

CONFERRAL AND USE OF THE TITLE
“SENIOR COUNSEL”
IN WESTERN AUSTRALIA

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Introduction

- 1 I support and advocate abolition of the title “Senior Counsel” for lawyers.
- 2 I recommend that the Law Society and the Bar Association work together to formulate a long term strategy to effect abolition of a system of preferment that calls some lawyers, but not other senior lawyers, “Senior Counsel”. When abolition occurs it should have retrospective effect.
- 3 In an article in the February 2007 edition of *Brief*, the magazine of the Law Society of Western Australia the Hon Justice John McKechnie, then a Judge of the Supreme Court of Western Australia, argued for abolition of the position of Senior Counsel or to take courts and judges from the selection process. For more than seven years that call has gone mostly unheeded despite subsequent reviews of the system, attempts by the Law Society of Western Australia (which represents most of Western Australia’s more than 4,000 lawyers) to have reform effected, unsurprising opposition from some of the appointed Senior Counsel in this State (who comprise a minority of lawyers – less than 40), and opposition by some judges.
- 4 I seek to re-introduce for debate the notions advocated by Justice McKechnie as well as refer to other issues. The authors, proponents and beneficiaries of these systems, and opponents of reform, should justify their retention and relevance to a modern legal system, and particularly where relevant their failure to conform with principles that are now widespread and that govern data collection, retention and use of information, access to information, and review of decisions. If the end purpose is to identify and mark some, to the exclusion of others, as possessors of superior expertise the current system in Western Australia lacks a number of safeguards to ensure that the outcomes of the process are accurate and fair.

- 5 This paper also discusses developments in some States where forces to revert to the archaic title of “Queens Counsel” have emerged (usually driven by cohorts of Queens’ Counsel and appointed Senior Counsel) and in some States have succeeded.
- 6 If necessary Parliament should enact legislation to create a statutory prohibition against systems of preferment. Section 90 of the *Legal Profession Act 1994* (NSW) provides a useful precedent.

Benefits for the system of justice

- 7 In my view there is no demonstrated empirical proof that a system of calling some senior barristers “Senior Counsel” is necessary for a system of justice. If these systems are to continue their value must be justified by evidence. In my view they are the product of history and, absent empirical proof, assumptions and dogma. You either believe they have value or you don’t. You either accept that appointed “Senior Counsel” are the “best” or you don’t.
- 8 It might be correct that barristers who bear the title “Senior Counsel” assist the proper functioning of the system of justice. But so too do many more other talented lawyers.
- 9 Currently in Western Australia there are many lawyers, who have not been given an officially sanctioned title “Senior Counsel”, who are able to and do provide services to the public, the legal profession and the courts that are at least the equal of those offered by appointed Senior Counsel. In some cases, in their fields, they are in fact more senior to and able to provide a better quality of service than an appointed Senior Counsel. In Western Australia the number of talented, skilled and highly experienced barristers who are not called “Senior Counsel” seems to be increasing. This fact should be recognised by the profession and the judiciary. It diminishes the argument in favour of retention.
- 10 The public, the profession and the judiciary will benefit from express recognition that there are experienced and skilled lawyers who, in their fields, can provide services that are not inferior to those provided by appointed Senior Counsel. Potential benefits might

be increased competition, increased choice for solicitors and the public, improved decision making in allocating briefs according to experience and expertise rather than title, and improved and more efficiently provided advice and advocacy services.

- 11 Systems of calling some lawyers “Senior Counsel” are not necessary for a system of justice to function well. For three decades no such system has existed in Canada’s largest Province, Ontario. In 1985 the system for appointing Queen’s Counsel in Ontario was abolished. It was not replaced. Nor do these systems exist in the United States of America.
- 12 The current Western Australian system was created in 2001 after the system for appointing Queen’s Counsel was abolished by the State Government of the time. The 2001 system was based on, but was a local modification of, the abolished Queen’s Counsel system. A new face was given to what was essentially the continuation of an archaic system of a bygone era and, with some re-adjusting, the result was a process that appears to be unique and idiosyncratic to our State. Since 2001 other jurisdictions have moved on and implemented reforms. Western Australia has not.
- 13 Systems for appointing Queen’s Counsel originated in England. They underwent major reforms in 2005 after a period of boycott by the Law Society, independent reviews, and a time when the risk of abolition was very real. The reforms followed an agreement between the Law Society and the Bar.
- 14 Like reforms have not occurred in Western Australia even though, in 2010, the system in this State came under criticism from the Law Society and there was potential for a boycott to occur. What happened is discussed in this paper and includes the justifications that were given by the opponents of reform.

Advocating for change since 2001

- 15 This paper is based on documents I have collected over many years. Based on my own views and experience, and the views expressed to me by others, I believe that many see a need for change.
- 16 One view, including my own, is that the only satisfactory system is no system and with retrospective removal of titles. My reasons include that:
- 16.1 These systems are historical anachronisms and there is no doubt they are not needed;
- 16.2 In the current age, sometimes called the Information Age, much relevant information about lawyers is readily accessible using the Internet making an inscrutable kitemark less relevant than it might have been in a bygone time;
- 16.3 In recent decades there has been increasing specialisation in the legal profession which also makes a kitemark less relevant unless expressly tied to an area of identified expertise;
- 16.4 Contrary to its apparent purpose a kitemark has the capacity to mislead the lazy or those who do not thoroughly explore relevant material when selecting a barrister based on expertise;
- 16.5 Members of the legal profession are very intelligent, well-educated and competent, and they do not need a kitemark imposed by an external system in order to make intelligent and correct choices;
- 16.6 There is no rational reason why a system that is external to the representative body of the legal profession, and particularly a system administered by judges, should have a monopoly over the term "Senior Counsel";
- 16.7 There is no one system that will satisfy everyone. The fact that there are so many variants in my view indicates that there should be none because if there was a satisfactory system everyone would replicate it;

- 16.8 Every system that confers an external advantage on some lawyers who are working in a market place creates a corresponding disadvantage on their competitors who have not been so advantaged. The statistics on appointments in Western Australia, that are discussed later in this paper, seem to make this issue more significant in our State than elsewhere. It is nevertheless an issue that is important and relevant elsewhere;
- 16.9 For each benefit these systems might provide to the judiciary, profession and public there are more potential or possible detriments including:
- 16.9.1 inaccuracy and unfairness to unsuccessful applicants;
 - 16.9.2 anti-competitive outcomes;
 - 16.9.3 reduced choice and higher costs;
 - 16.9.4 failure to meet the expectations and needs of the public and the legal profession;
 - 16.9.5 potential to encourage ingratiating or “gun shy” behaviour by lawyers who are not, but want to be, called Senior Counsel;
 - 16.9.6 enmity between senior barristers who are appointed Senior Counsel and those who are not;
 - 16.9.7 diminished relations between Bar and Bench and between barristers;
 - 16.9.8 potential for perceptions to emerge of systemic subjectivity, influence of personal and professional associations, interest group bias, systemic process bias, experiential bias, and appearance of preferential treatment by the judiciary;
 - 16.9.9 reduced attraction of working as a barrister long term;
 - 16.9.10 the potential for a weaker or reduced independent Bar; and
 - 16.9.11 the risk for some of mental health issues;

- 16.10 There will be benefits to the judiciary, the profession and the public that will flow from abolition.
- 17 Views that have been expressed to me include that there is a number of barristers in Western Australia who are senior counsel in fact but have not been officially called Senior Counsel. If the system is one based on facts and objectivity there should not be a difference, and no-one would have any perception that there is any difference, between those who are senior counsel in fact and those who are called Senior Counsel. As will be seen there are numbers that look anomalous.
- 18 There should be more competition among senior barristers and more trust conceded to the legal profession to make intelligent choices. There should not be a favoured and protected species of Senior Counsel who have an officially sanctioned competitive advantage over other senior barristers. The intelligence of others should be trusted just as a parent should not wrap a child in cotton wool for fear that some unspecified harmful threat might appear.
- 19 In 2001 I advocated for a different system which, if implemented, would have amounted to a substantially reformed system. It was not a system of decision making by judges or Chief Justice. Since then my view has firmed that we must have reform. I have formed the view that abolition is the best and fairest solution.
- 20 If a system for conferring a special title on some lawyers and not others is to continue it must be, and accepted by all to be, based on the application of criteria that are as factual as possible and established by evidence to which clear implementation guidelines apply. Decision making must be by independent panel. The main focus on the enquiry must be a balanced and objective evaluation of evidence of a lawyer's body of work in cases and in legal presentations and writing over many years. It might also include proof of mentoring. There must be widespread acceptance that there are express safeguards built into the system that ensure accuracy and fairness in decision making, including

documentation of the decision making process, access to documentation, public accountability and a review mechanism.

- 21 I do not believe that these goals can be achieved in a manner that will satisfy everyone but I believe that it is possible to create a system that is vastly better than what we have in Western Australia.
- 22 Widespread discussion and debate are important and necessary.

History and commentary on Queen's/Senior Counsel in Western Australia

1996 review by the Hon Justice David Malcolm AC

- 23 From 1900 Queen's Counsel were appointed in Western Australia, under an Order in Council dated 19 September 1900, on the recommendation of the Chief Justice to the Governor in Council: The Hon Justice David Malcolm AC "Appointment of Queen's Counsel" *Brief*, August 1996. Executive Government is accountable to Parliament.
- 24 The Order in Council was amended in 1936 to permit the Governor to act on his own initiative in appointing a person as King's Counsel who was a senior law officer of the Crown: *Ibid*.
- 25 On a number of occasions since 1959, and as recently as 2013, the bodies that represent the legal profession in Western Australia have considered the issue of appointment of lawyers who were not barristers. In England the issue was resolved about 10 years ago in favour of the Law Society. Since 2005 there has not been a requirement for an appointee to practice as an independent barrister.
- 26 The possibility of eminent practitioners who did not practise at the Bar being appointed Queen's Counsel arose in 1959 and was subsequently rejected by existing Queen's Counsel and the Chief Justice. In 1970 the Law Society resolved that recommendations for appointment should be made without any condition that the appointee should refrain from continuing to act as a solicitor. The Chief Justice, Sir Laurence Jackson, rejected that suggestion. A Queen's Counsel was required to be available as counsel without that

availability being impinged on by being drawn into permanent “interest” situations and there was a risk that the patent might primarily be used as an advertisement that the “Silk” was a distinguished solicitor: *Ibid.*

- 27 In 1978 the Law Society adopted a resolution that appointments of Queen’s Counsel should be made from the profession at large on the basis of merit and not restricted to those practising or undertaking to practise solely as barristers. The Chief Justice, Sir Francis Burt, responded that appointments should be confined to those who displayed eminence in the field of advocacy and practised exclusively or virtually exclusively as counsel.
- 28 In the early 1980s both the Bar Association and the Law Society in Western Australia rejected a proposal from a resolution of the 1981 State Conference of the Liberal Party that appointments of Queen’s Counsel be made by a panel of Crown Advisers. The Law Society submitted that the Chief Justice was uniquely qualified to assess any applicant on the merits and to bring an informed, independent and impartial mind to bear in a manner consistent with his oath of office which required him to act “without fear or favour, affection or ill-will”.
- 29 The Law Society’s submission was made to a committee chaired by Mr Gresley Clarkson QC (**Clarkson Committee**) that was established to enquire into the future of the legal profession in Western Australia. The Clarkson Committee recommended by a majority that criteria to be applied in the appointment of Queen’s Counsel were:
- 29.1 Eminence in the law, in either litigious or advisory work which included non-litigious advisory work;
- 29.2 Availability and freedom in mode of practising by practising either as a barrister at the Bar or within a partnership;
- 29.3 In the case of an appointee who intended to remain or become a member of a partnership, he was required to establish by proven briefs his availability to

persons who were not members or clients of the partnership and to undertake that while a member of the partnership he would practice only in the style of a barrister.

- 30 The minority recommended that eligibility should be restricted to barristers at the voluntary or independent Bar. The minority recommendation was supported by the Bar Association.
- 31 The Clarkson Committee recommended that a person interested in applying for appointment make an application to the Chief Justice and recommended consultation by the Chief Justice with the president of the Law Society and the president of the Bar Association jointly, and other persons he considered appropriate concerning the merits of the applicants.
- 32 A more comprehensive summary of the relevant aspects of the Clarkson Report is set out in 2013 report of the Law Society of Western Australia *The Appointment of Senior Counsel in Western Australia*. That report also discusses a report by a review committee of the Law Society in 1996.
- 33 In March 1991 the Attorney General, the Hon Joseph Berinson QC, announced that he had decided to adopt the majority recommendations of the Clarkson Report in relation to criteria and that appointments would be made only on the recommendation of the Chief Justice.
- 34 Chief Justice Malcolm applied the recommendations of the Clarkson Report and consulted with the presidents of the Law Society and Bar Association jointly, and with the Solicitor General, various Judges and such other persons as he considered appropriate.
- 35 In 1996 Chief Justice Malcolm recommended to the Attorney General the appointment of a representative committee to review the criteria and procedure for appointment and make such recommendations, if any, for changes they thought necessary. He also

suggested that the committee be asked to consider whether there should be any and, if so, what form of recognition of practitioners who had achieved eminence as solicitors, as distinct from barristers, and if so, the criteria for such recognition, the title or office that should be conferred and the process of application, recommendation and appointment that should be adopted.

Proposed regulation by Order

36 In 1999 the then Attorney General, the Hon Mr Peter Foss QC, provided the Bar Association with a proposed *Queen's Counsel (Procedure for Appointment) Order 1999*.

37 A motion dated 26 May 1999, by Mr Christopher Zelestis QC, was circulated proposing that the Bar Association oppose the proposed order, that Bar Council be authorised to take any proceedings to challenge the validity of the proposed order, and that any change to the system for appointment of Queen's Counsel be appointment of Senior Counsel by the Chief Justice by reference to the criteria and processes of consultation that presently applied to the appointment of Queen's Counsel.

38 The Attorney General's proposal did not proceed.

2001 WA Bar committee

39 In early 2001 a new State Government was elected and it appeared that it might cease the practice of appointing Queen's Counsel. Bar Council requested that (the then) Mr Wayne Martin QC (now the Hon Wayne Martin AC, Chief Justice of Western Australia) convene a committee (**Martin committee**) for the purpose of seeking submissions and suggestions from the membership of the Association generally and reporting back to Bar Council as to the appropriate mechanisms and procedures. Other members of the committee were Mr Andrew Stavrianou (now his Honour Judge Stavrianou) and Mr Christopher Edmonds (now SC).

- 40 The convenor circulated a memorandum to members dated 16 February 2001 requesting submissions. A number of written submissions were received, oral conferrals occurred with a number of barristers, and the committee compiled a dossier of information.
- 41 I took advantage of the opportunity to make a submission to the committee and set out my views in a memorandum dated 25 February 2001. I recommended that the old system be completely abandoned and be replaced with a system that had pre-determined criteria that were as objective as possible, was open to public scrutiny, did not leave the decision making process in the hands of any one individual, and did not permit any individual Judge or member of the Bar to have private influence.
- 42 In my 2001 submissions I suggested that the system of decision making by an individual be replaced by a committee that consisted only of members of the Bar and senior briefing solicitors and that it should not be limited to Queen's Counsel and there should be a system of election and rotation of officers. I suggested that any consultation should be directed at obtaining rational and representative comment rather than comment based on opinion or based on limited experience of an individual, rumour or supposition. It should be directed at finding direct and reliable evidence, from personal experience, of the seniority, skill and experience of the individual. It should only be given weight if it was backed up by objective evidence. The process should also guarantee that selections did not come from circles of favour and there could be no secret influence. Nor should expressions of opinion be acted on that were not objectively verified or verifiable or capable of challenge to correct error. Reasons should be given to justify appointment or non-appointment and it may also be appropriate for the decision, following reasons for decision, to be open to review by some mechanism.
- 43 I strongly recommended against endorsing or replicating the old system.
- 44 The Martin committee was aware that the Chief Justice, the Hon Justice David Malcolm AC, had made recommendations to the previous government about appointment of

Queen's Counsel that were not implemented before the change of government. That fact induced the committee to produce recommendations "which will enable the timely appointment of those persons under the new procedure". By memorandum dated 1 March 2001 the committee reported to Bar Council.

45 The Martin committee made a number of recommendations.

46 *Appointor* – The committee's view was that it was "beyond doubt that the appropriate person to exercise the power [of appointment] is, in this State, the Chief Justice". The later materials in this paper, in my view, provide strong support for the conclusion that this is not "beyond doubt". On the contrary I contend that it is not appropriate for any judge, or committee of judges, to confer an official title of "Senior Counsel" on some lawyers in preference to others.

47 The Martin committee's report said that there was a convention among Chief Justices that a person who is appointed Senior Counsel under a procedure where the Chief Justice did not have the right to determine the identity of that person would not be recognised in other jurisdictions.

48 The committee did not refer to, and hence did not discuss, s38O of the *Legal Profession Act* of New South Wales that prohibited judicial officers in that State from conducting a scheme for the recognition of seniority or status among legal practitioners.

49 *Consultation process* – The committee recommended no change to the existing process of consultation. The committee considered that there were three disadvantages to a consultative committee procedure:

49.1 Discussion in a committee was "likely to inhibit the candour with which views are expressed as to the suitability of individual applicants and the protection of the confidentiality of those discussions". No empirical support was provided for that expressed view;

- 49.2 With the committee comprising representatives of interest groups there would be a danger that representatives would feel obliged to champion the cause of applicants from the group that they represented or to protect the interests of that group. That danger was acknowledged to exist with the current system but was claimed by the committee to be diminished by “the informality of discussion and the current emphasis placed upon consultation with the judiciary”. No empirical support was provided for the views expressed;
- 49.3 There was a risk that a committee comprised of persons other than the judiciary would be influenced by a risk of lobbying. Again, no empirical support was given for that view.
- 50 *Criteria for appointment* – The committee did not recommend any change to the criteria for appointment. They considered that:
- 50.1 Debate about criteria was likely to resuscitate the view that senior practitioners in any area of practice ought to be considered for appointment; and
- 50.2 Dissatisfaction about particular appointments in the past were more likely attributable to differences in views about the application of criteria rather than to the enunciation of the criteria;
- 50.3 Some suggested criteria (by some of the submissions) were matters that did not bear upon skills and capacities as a practitioner or were specific instances of matters that would be taken into account under the criteria of eminence, independence and availability;
- 51 The committee did not address the question of implementation guidelines and the importance of objectivity in the criteria and proof by evidence.
- 52 *Transparency* – The committee did not support any proposal for greater transparency. The justification provided was that confidentiality of applicants should be respected, disclosure of adverse comments and provision of reasons would inhibit candour to the

detriment of the consultation process and may encourage litigious challenge to that process and even collateral proceedings. The committee said that a review mechanism was not appropriate where the decision making was by the Chief Justice.

53 The committee did not give empirical justification to support its views concerning the issue of transparency. These views appear incompatible with basic ideas of fairness to applicants, and the importance of having mechanisms that ensure accurate and fair decision making and provide means of enabling an applicant to know that error has occurred and recourse to correct it. The committee did not make any reference to developments since 1901 in laws of privacy, freedom of information, and administrative review that are directed at ensuring that information about an individual that is collected stored and applied in decision making is accurate, stored data can be corrected, that decision making processes are accurate and fair, and that error can be corrected.

54 The committee said that a Chief Justice would “conduct appropriate inquiries from appropriate sources so as to obtain reliable and objective information about an applicant” and that this was “preferable to a more formalised structure”. There was implicit recognition that there should be “appropriate inquiries from appropriate sources to obtain reliable and objective information”.

55 The committee recommended:

55.1 Revocation of the Order in Council of 1901 (said by the committee to have been published in 1900);

55.2 Amendment of the *Legal Practitioners Act*;

55.3 Convening a general meeting to consider a policy in terms set out in the report.

56 According to the committee a motion in similar terms was to be put to a meeting of the council of the Law Society on 12 March 2001.

57 The practical effect of the recommendations of the Martin committee’s report was to replicate the old system of appointment of Queen’s Counsel but make the Chief Justice

the appointor and change the appellation and post-nominal to “Senior Counsel” and “SC”.

Appointment by Chief Justice

58 On 12 March 2001 the Council of the Law Society, whose then president was Mr Kenneth Martin QC, passed a resolution in terms that were identical to those set out in the Martin committee’s report.

59 Subsequently, by notice dated 14 March 2001, the then Mr Martin QC and Mr Christopher Zelestis QC gave notice of a motion to be moved at the next general meeting of the Bar Association (then understood to be on 28 March 2001) in terms that mirrored those set out in the Martin committee’s report.

60 On 21 March 2001 Bar Council resolved to adopt the committee’s report.

61 At a general meeting of the Bar Association on 28 March 2001 the motion by the then Mr Martin QC and Mr Zelestis QC was put. The vote was evenly divided and the motion was lost.

62 By July 2001 the State Government had indicated to the president of the Bar Association that it would repeal the Order in Council and take no part in the process for appointment of Senior Counsel.

63 By memorandum to members dated 3 July 2001 the president of the Bar Association advised that on 19 June 2001 Council of the Bar Association resolved to support the implementation of a system in terms of the Martin committee’s report and recommendations. The memorandum attached, and requested members to complete and return, a questionnaire. The questionnaire was directed at gauging the degree of support among members for the position adopted by Bar Council.

64 72 members of the Bar Association responded. 57 supported the proposal and 15 were opposed. I voted against the proposal.

- 65 Subsequently the then Mr Martin QC and Mr Zelestis QC drafted a protocol that they forwarded to the then Chief Justice, the Hon Justice Malcolm AC, for consideration. The draft protocol was reviewed and a draft practice direction was established.
- 66 By letter dated 31 July 2001 the then Chief Justice sent a copy of the draft Practice Direction to the president of the Bar Association. He also sent a copy to the president of the Law Society. He suggested there be a meeting of the presidents of the Bar Association and the Law Society to which the Solicitor General could be invited.
- 67 Practice Direction 2 of 2001 was published on 24 September 2001. It was to take effect when the Order in Council, that had been published in the *Government Gazette* dated 19 September 1900, was revoked and notice to that effect was published in the *Government Gazette*.
- 68 The original Practice Direction provided that the Judges and Masters of the Supreme Court had resolved that the appointment to the office of Senior Counsel shall be by the Chief Justice of Western Australia on behalf of the Court.
- 69 The rationale for appointment of Senior Counsel was then given as:
- 69.1 It is in the interests of the administration of justice in Western Australia and therefore in the public interest that an office of Senior Counsel be established to which a legal practitioner satisfying the criteria for appointment may be appointed; and
- 69.2 The establishment of the office of Senior Counsel will further the administration of justice in Western Australia by recognising those counsel who are of outstanding ability and who are dedicated to the pursuit of justice.
- 70 The Practice Direction stated that the interests of the administration of justice will only be served if appointees are, and are recognised as, persons of conspicuous ability.
- 71 The four principal criteria for appointment were stated to be:
- 71.1 Eminence in the practice of law, especially in advocacy;

- 71.2 Unquestioned integrity;
 - 71.3 Availability; and
 - 71.4 Independence.
- 72 The Practice Direction set out further detail of the requirements of eminence, integrity, availability and independence. The detailed attributes of the eminence criteria were said to be likely reflected in the appointee having a substantial and high quality practice, largely based on demanding cases.
- 73 Applicants were required to provide “details of their qualifications, experience, and practice relevant to suitability for appointment”. It did not otherwise set out what objective evidence would be required to be submitted to satisfy these criteria.
- 74 The Practice Direction identified the persons with whom the Chief Justice would consult concerning prospective appointments. The persons to be consulted included:
- 74.1 The president or other representative of the Law Society of Western Australia;
 - 74.2 The president or other representative of the Bar Association;
 - 74.3 Representatives of existing Senior Counsel (including Queen’s Counsel); and
 - 74.4 Such other person or representative as the Chief Justice considered appropriate.
- 75 The consultations were to be confidential and conducted in such manner as the Chief Justice considered appropriate. The Chief Justice was permitted, in an appropriate case, to inform an applicant of the nature of a specific allegation of misconduct or of other disqualifying circumstance which had arisen and to invite the applicant to respond. The Chief Justice was not required to provide an applicant with a right to be heard on any negative commentary.
- 76 After the consultation the Chief Justice was to prepare a list of possible appointees and consult with the Judges and Masters of the Supreme Court under a guiding principle that no person was to be appointed Senior Counsel without the support of the Supreme Court of Western Australia.

- 77 The Practice Direction did not include any provision governing how the views of particular consultees were to be weighted in comparison with others or to ensure that only objective evidence would be given weight and that evaluations would be balanced.
- 78 Appointments were to be made under the hand of the Chief Justice and announced in December.
- 79 Queen’s Counsel or Senior Counsel appointed in another Australian jurisdiction which recognised the status of Senior Counsel appointed in Western Australia were accorded the status of Senior Counsel in Western Australia when practising in that State.
- 80 The Chief Justice was empowered to revoke an appointment after providing counsel concerned with a prior opportunity to show cause why his or her appointment or recognition should not be revoked.
- 81 The Practice Direction did not impose any requirement on a Judge or Master of the Supreme Court to read and evaluate material supplied by an applicant and any objective evidence collected by a Chief Justice in the consultation process before deciding whether to give or withhold “support” for an applicant.
- 82 Since 2001 the Practice Direction has been amended at least twice. A consultative committee of Judges was introduced after the Hon Wayne Martin AC (**Chief Justice Martin**) was appointed Chief Justice in 2006. A reference to leadership has been added.
- 83 The relevant Practice Direction is now Practice Direction 10.3 of the Consolidated Practice Directions of the Supreme Court.
- 84 The Practice Direction says that the office of Senior Counsel is continued by the Practice Direction. It says that the office furthers the administration of justice in Western Australia by recognising those counsel who are of outstanding ability and who are dedicated to the pursuit of justice.

- 85 Apart from an individual making an application by 31 August of a particular year the Practice Direction permits the Chief Justice to invite applications from appropriate individuals.
- 86 The Practice Direction states that the Judges and Masters of the Supreme Court resolve to create a committee with whom the Chief Justice would consult and to whom the Chief Justice will provide for its comment the list of applicants, their applications and any comments received in the process of consultation.
- 87 The committee includes, among others, the senior Judge of the Federal Court resident in Western Australia or his or her nominee. The Practice Direction permits Judges of other courts to consult confidentially with Judges of their courts.
- 88 The Practice Direction requires that where a specific allegation adverse to an applicant is made in the course of the process of consultation or deliberations of the committee, the applicant will be given the opportunity to respond to the allegation, either in writing or, at the invitation of the Chief Justice, personally. Where a general question of suitability arises the committee will ensure that it has sufficient information to make a judgement on the application, but will not necessarily put that question to the applicant for his or her comment.
- 89 After taking into account the recommendations of the committee the Chief Justice will decide which applicants will be appointed to the office of Senior Counsel, and will advise each applicant in writing of the outcome of their application.
- 90 The Chief Justice will not normally provide written reasons for declining to appoint an applicant but the Chief Justice may, of his or her own volition, or at the request of the committee, initiate a meeting with any unsuccessful applicant for the purpose of discussing the application and the reasons for its refusal. An unsuccessful applicant may request a meeting.

2007 commentary by the Hon Justice McKechnie

- 91 In an article in the February 2007 edition of *Brief* the Hon Justice McKechnie argued for abolition of the position of Senior Counsel or to take courts and judges from the selection process.
- 92 His Honour made the following points:
- 92.1 He challenged the assumptions that the office was necessary and that the courts should be involved in some way in selecting those deemed worthy of appointment;
- 92.2 The appointment had financial consequences, usually beneficial, but not always so, and it was no business of the court to anoint some practitioners, however eminent and learned, with the ability to charge greater fees because of the magical post-nominal SC;
- 92.3 The annual appointment of Senior Counsel was becoming controversial with occasional threats that a Chief Justice might be sued;
- 92.4 The selection process is opaque and there is a fundamental difficulty of lack of transparency to be contrasted with the other business of the court that was conducted in the open and followed by publication of written reasons;
- 92.5 There were very many highly competent practitioners of integrity who exhibited the same qualities as the select few;
- 92.6 The Law Societies and Bar Associations are quite capable of acknowledging members of the profession who are deemed suitable for special recognition;
- 92.7 There were eminent and learned solicitors who contributed much to the profession and the community but there was no way under the present system that they were able to be recognised;
- 92.8 The administration of justice would not falter if there were no further appointments;

92.9 Appointment as Senior Counsel was not required as a precondition of appointment as a judge;

92.10 Continuing a flawed system was not justified by the argument that unless all past appointments were revoked there will be a continuing unfair advantage in favour of those whose positions are entrenched;

92.11 The perceived problem of visiting Senior Counsel from other jurisdictions can be overcome by withdrawal of recognition of the title within Western Australia;

92.12 The law was capable of dealing with external changes that affected contractual arrangements (for example, contracts that provided for a Queen's Counsel or a Queen's Counsel's opinion).

93 His Honour suggested that it is perhaps time to consign "this colonial remnant to the dustbin of history".

WA Bar Association protocol

94 In July 2010, on behalf of a number of senior barristers, I made a submission to the President of the WA Bar Association concerning "Senior Counsel". Subsequently, the Bar Association adopted a protocol to assist the President to meaningfully participate in the consultation process under Practice Direction 10.3 of the Consolidated Practice Directions of the Supreme Court.

2010 Review by Law Society ad hoc committee

95 In August 2010 the Law Society of Western Australia adopted, on an interim basis, a protocol to assist the president or his or her nominee to meaningfully participate in the consultation process under Practice Direction 10.3 of the Consolidated Practice Directions of the Supreme Court. At that meeting the Council resolved to establish an ad hoc committee to consider whether it would continue to support and be involved in the consultation process. None of the members of the ad hoc committee was an appointed Senior Counsel. The members were Mr Konrad de Kerloy (later President of the Law

Society), Mr Michael Feutrill, Mr John Fiocco, Ms Linda Kenyon, Ms Elizabeth Needham, and Ms Jenny Thornton. Two members, Mr Feutrill and Ms Needham, were barristers. Mr Feutrill later resigned from the committee.

96 The ad hoc committee sought the views of persons and organisations connected with the appointment process and by report dated 13 December 2011 reported to the Council of the Law Society.

97 The ad hoc committee concluded that the appointment process was flawed for these reasons:

97.1 The widely held opinion within the profession, but not amongst judges who responded to the committee, was that the selection process is opaque;

97.2 The width, rigour or fairness of the consultation within the courts or organisations are not specified by the Practice Direction and are left very much to chance, hope and the expectation that the Chief Justice's secret soundings will "get it right" and the process does not ensure rigour, transparency or fairness;

97.3 There is a lack of formal structure to the consultation process;

97.4 In England the system for appointing Queen's Counsel has been completely reformed;

97.5 The process of appointment should focus on assessment based only on those persons who have personally seen or dealt with the applicant;

97.6 The decision to appoint ultimately is at the sole discretion of the Chief Justice;

97.7 It was not clear whether the Chief Justice or the Supreme Court have power to confer titles on legal practitioners, a Chief Justice may be exposed to litigation, judicial involvement was not consistent with the independence of the judiciary, because it involved them in matters that were essentially private concerns of the legal profession;

- 97.8 There were limited numbers of Senior Counsel in areas of practice that were identified by the committee;
- 97.9 A system based on the discretion of the Chief Justice, or equivalent, was viewed by the Bar Council of the United Kingdom as clearly inappropriate in England and Wales where it is imperative the system of appointment is regarded as open and transparent;
- 97.10 The Committee (of judges) that made recommendations to the Chief Justice is unrepresentative of the legal profession and necessarily privy only to advocacy and written submissions of advocates who appear before them and not to many other aspects that make a lawyer excellent such as negotiation skills, written advice, advice in conference, availability, timeliness, commerciality and common sense;
- 97.11 Outstanding legal advisers provide advice and negotiation skills that are more relevant to the client's choice of lawyer than the lawyer's advocacy skills;
- 97.12 An independent profession should select its own top professionals;
- 97.13 The criteria for appointment did not include capacity to lead the profession and a demonstrated commitment to equality of opportunity and fair and unbiased treatment of fellow practitioners irrespective of gender, race, sexual orientation or religion and availability to advise members of the profession on matters of ethics and practice;
- 97.14 The criteria discriminated against lawyers who were not barristers or counsel holding statutory offices;
- 97.15 In England and Wales the status of Queen's Counsel is now open to all advocates whether barristers or solicitors.
- 98 The ad hoc committee recommended that:

- 98.1 The Law Society continue to support the appointment of Senior Counsel provided the perceived flaws in the system were addressed by appropriate reform;
- 98.2 The Law Society should seek to have both the criteria and procedure for appointment reformed including bringing the appointment process under the control of a committee that included representatives of the judiciary and the legal profession and restricting the role of the Chief Justice to a power of veto only;
- 98.3 The Law Society should not participate in the consultation process whilst it remains flawed.
- 99 On 3 February 2012 the Law Society published the report of the ad hoc committee and invited its members to review the report and send comments to the Law Society.
- 100 Within days a committee, chaired by Mr Christopher Zelestis QC (**Zelestis committee**), was set up by the Council of the Western Australian Bar Association to prepare a submission on the Law Society's ad hoc committee's report. According to the submission of the Zelestis committee (entitled "Submission of the Western Australian Bar Association in Response to the Law Society Senior Counsel Ad Hoc Committee Report):
- 100.1 The members of the committee were Mr Zelestis QC, Mr Craig Colvin SC, Mr Marco Tedeschi, Ms Katrina Banks-Smith (now SC) and Mr Steven Wong;
- 100.2 One member (who was not identified by name) participated in the drafting of a protocol in 2001 that was substantially adopted by the then Chief Justice as the basis for implementation of the new Senior Counsel system and which continues to represent the foundation of the current Practice Direction.
- 101 By memorandum dated 7 February 2012 to the president of the Bar Association I asked that Bar Council refer the issues to the broader Bar membership, to be debated in an open and thoughtful way, before the Association finalised a formal response to the Law Society's ad hoc committee's report. A general meeting of members was called and held

on 22 February 2012. It was a meeting to discuss issues. No resolution was put or passed.

102 On 29 February 2012 the president of the Bar Association distributed to members a copy of the submission of the Zelestis committee, as the Bar Association's response to the report of the Law Society's ad hoc committee.

103 The Zelestis committee's response was a critique of the report of the Law Society's ad hoc committee. It was not a report on systems for appointment of Senior Counsel including rationale and objectives of appointment, appointment processes including features that ensure fairness and accuracy, merits and demerits of alternatives and systems and features, and a range of options for the future.

104 The Zelestis committee's submission commented on what it said was the purpose of Senior Counsel:

104.1 The submission identified the primary duties of an advocate as an officer of the court;

104.2 The special position of barristers who worked in a collegiate environment, who appeared regularly in court where their commitment to their duties was tested and scrutinised on a regular basis, and who were committed to independence by acting on instructions from and receiving payment from other lawyers, not employing other lawyers, and applying a "cab rank" rule;

104.3 The appointment of Senior Counsel recognises leadership in upholding ethical duties as officers of the court and cannot be achieved without adopting a mode of practice that is independent and without being generally available to accept instructions;

104.4 Senior Counsel provide guidance to all members of the profession on how properly to perform their duties as officers of the court;

- 104.5 It is to be expected that most Senior Counsel will be practising solely as barristers when appointed;
- 104.6 The report of the ad hoc committee of the Law Society began from the “false premise” that the purpose of appointment is to recognise a “hollow” notion of leadership in the profession or an area of practice. It was “hollow” because it excludes the essential ingredient of independence;
- 104.7 The appointment encouraged a commitment to upholding all of the duties of an officer of the court;
- 104.8 The courts depend upon a system for appointing leaders who have demonstrated a consistent ability to uphold those duties, as well as excellence in the practice of the law;
- 104.9 The object of the appointment is to identify persons who are of outstanding ability and who are dedicated to the pursuit of justice;
- 104.10A system of the kind suggested by the report of the Law Society’s ad hoc committee was squarely aimed at private interests.
- 105 According to the Zelestis committee’s submission it was wrong to assert that there was no formal structure to the consultation process under the present system because:
- 105.1 Written applications were invited;
- 105.2 The Chief Justice consults with various parties;
- 105.3 Applications were then considered by a judicial committee which took into account the results of the consultation process and the benefit of further consultations by committee members themselves;
- 105.4 If a specific matter is raised in the consultation process that is adverse to an applicant then details are required by the Chief Justice and the applicant is given an opportunity to respond before a decision is made;

105.5 The Chief Justice communicates the outcome to the applicant and unsuccessful applicants are offered an opportunity to confer with the Chief Justice to be informed of the reasons for that position.

106 The Zelestis committee submission criticised as “sweeping and unjustified” the Law Society committee’s contention that the present system is “opaque” and does not ensure “rigour, transparency or fairness” and said:

106.1 Those who were consulted are expected to frankly express views about candidates;

106.2 The Chief Justice has access to the experience and assessment of members of the judiciary and senior practitioners who are best placed to observe the qualities of candidates for appointment;

106.3 It is not necessary for the Practice Direction to state the obvious fact that the most reliable views communicated to the Chief Justice will be those that are demonstrably the result of personal experience and assessment, wide enquiry, objective analysis and detailed explanation;

106.4 The process of assessment is focused on the views of persons who have had personal experience of the candidate;

106.5 Where a person consulted puts forward a particular event or matter as a specific reason tending against appointment of a particular applicant, the Chief Justice insists that sufficient details be made available so as to enable the Chief Justice to communicate the matter to the applicant for comment.

107 The Zelestis committee submission also criticised the assertion that the system was discriminatory (that is in favour of barristers and against lawyers who were not barristers) because:

107.1 There was no restriction or barrier for a lawyer to adopt a mode of practice of a barrister;

- 107.2 The previous 20 years had seen changes in the practice of the law by Australian solicitors that were characterised by an increasing focus by law firms on conducting operations as commercial enterprises that cultivated the closest possible relationships with clients;
- 107.3 Removing the criterion of independence would denude the appointment of its purpose;
- 107.4 Changes in England and Wales had been “controversial” that had “reduced” the appointment as Queen’s Counsel to one based upon excellence in written and oral advocacy and the process for appointment is “bureaucratic”.
- 108 The Zelestis committee submission rejected the criticism of the role of the Chief Justice and the judiciary generally in the appointment process and said that:
- 108.1 The ad hoc committee’s report overlooks the fundamental power of the Supreme Court to regulate practitioners in the public interest and said that the supporting authorities were thoroughly examined when the system for appointment of Senior Counsel was originally established and there was undoubted inherent power to support the present system;
- 108.2 The prospect of controversy in litigation is not sufficiently significant;
- 108.3 The process of consultation is not confined to the views of the judiciary and provides information on practitioners whose work does not bring them to the courts with any frequency;
- 108.4 The ad hoc committee’s view about the role of the Chief Justice fails to understand the purpose of the appointment which was not general recognition of eminence or that a practitioner was a “leader” but rather it reflects the court’s need in the administration of justice to identify those practitioners whose eminence and experience demonstrates both a commitment to, and an understanding of, ethical duties as an officer of the court;

108.5 The process of consultation should be broad and should facilitate frank discussion but be administered in the interests of justice and not in the interests of the profession.

109 The Zelestis committee submission rejected the proposed removal of requirements of independence and in support of that rejection said:

109.1 The threshold question is whether the system is intended primarily to serve the interests of the public or the self-interest of appointees;

109.2 The system must be one that can be relied upon by the judiciary, the profession and the public;

109.3 The administration of justice is advanced by the identification of outstanding counsel who are dedicated to the pursuit of justice and as worthy examples of high standards of professional work and conduct to which other practitioners should aspire and represent an encouragement to the profession and the public to utilise the services of those practitioners, especially in more complex matters to the benefit of the judiciary and the public;

109.4 The selection criteria for a system should be designed to identify the most outstanding and appropriate practitioners and not simply to expand the pull of appointees or serve private interests. The report of the ad hoc committee “effectively disregarded” the fundamental significance of the public interest in the administration of justice and dealt with the criteria of availability and independence in a “cursory manner”;

109.5 The report “consigns the independence criteria into irrelevance”;

109.6 It is in the public interest that appointees have the maximum possible availability to prospective clients and that criterion is more readily satisfied in the case of barristers rather than solicitors.

110 The Zelestis committee submission contended in summary that:

110.1 The current system is open and transparent;

110.2 The proposed change to criteria for appointment would undermine the purpose of appointment;

110.3 The existing criteria do not discriminate;

110.4 It was “fundamentally inconsistent” with the nature of the appointment of Senior Counsel for the process to be under the control of a committee that includes professional representatives because it must be under the control of those best able to make judgments as to the suitability for appointment having regard to the purpose of the appointment;

110.5 A committee would be “vulnerable to lobbying”, there was no explanation as to how proposed members would be qualified to make the judgements essential to the appointment process, and the committee did not explain how judges would be selected to participate;

110.6 There was no element of “secret soundings” under the existing process;

110.7 The appointments made by the Chief Justice reflect the consensus views of the committee of judicial leaders;

110.8 The report was relatively “superficial in its analysis”;

110.9 A proper and genuine attempt to review the present system would have proceeded from a full and accurate understanding of the elements and operation of that system. It was not the role of the response in the submission to carry out that review. Rather, the purpose was to evaluate the ad hoc committee’s report;

110.10 The Western Australian Bar Association had an interest in maintaining the system.

2013 Law Society of Western Australia report

111 In 2013 the Law Society of Western Australia issued a detailed report called *The Appointment of Senior Counsel in Western Australia*. The report was prepared by the Executive of the Law Society and approved subject to minor amendments at the November 2013 meeting of the Council of the Law Society. None of the Executive of the Law Society was an appointed Senior Counsel. The President, Mr Craig Slater, is a barrister. The Senior Vice President (President in 2014) was Mr Konrad de Kerloy and the Vice President (President in 2015) was Mr Matthew Keogh.

112 The Law Society's recommendations were:

112.1 The Society continue to support the retention of Senior Counsel in Western Australia;

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

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

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

112.5 The Society recommend to the Chief Justice of Western Australia that paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to

address the criteria in paragraph 4 and to provide at least three referees in their application;

112.6 The Society amend its Protocol for the Appointment of Senior Counsel to include a member of the Young Lawyers Committee who is also a member of the Law Society Council;

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

113 The Chief Justice requested the WA Bar to respond to recommendations 2 to 5 and 7 of the Law Society's report.

114 At the request of the president of the Bar Mr Peter Quinlan SC, a sub-committee comprising Mr Steven Davies SC and Mr Matthew Howard SC prepared a response to the Law Society's report. Their report was adopted by a majority resolution of Bar Council. I was a member of Bar Council at the time and I opposed it. I disagreed with elements of the Zelestis committee's submission upon which the sub-committee's report was based. The sub-committee's report was not submitted to members of the WA Bar before it was adopted by Bar Council.

115 The sub-committee's report was based on the submission of the Zelestis committee and did not support a single recommendation made by the Law Society.

116 By letter to the Law Society dated 25 June 2013 the Chief Justice, the Hon Justice Wayne Martin AC, advised that he had concluded that it would be desirable to add a sentence in the Practice Direction about demonstrated leadership within the profession. He did not propose to make any changes or take action on any other recommendation.

117 In the April 2015 edition of *Brief* Chief Justice Martin provided his view, as an insider, as to how the process of appointing Senior Counsel worked and "perhaps to dispel any myths or false assumptions". He made these points:

- 117.1 He performs roles and functions as the delegate of the Judges of the Supreme Court;
- 117.2 The appointment process is governed by a protocol in the Consolidated Practice Directions of the Supreme Court;
- 117.3 The protocol was adopted by resolution of the Judges and Master of the Supreme Court and can only be changed with their concurrence;
- 117.4 All members of the Court have the opportunity to participate in the appointment process;
- 117.5 His task is not to decide who should or should not be appointed but to oversee and coordinate an extensive process of consultation and consideration that facilitates the development of consensus;
- 117.6 His focus is on process and maintenance of appropriate standards generally and his views on individual applicants have a very limited part to play in the process;
- 117.7 Applicants are invited to apply for appointment in writing by 31 August each year;
- 117.8 Applicants are encouraged to provide a resume including details of qualifications, experience and practice. They are not required to nominate referees because of the extensive nature of the consultation process but may do so;
- 117.9 After the closing date copies of all applications are sent to six Judges who serve with the Chief Justice on a committee that makes recommendations on appointment and to nine nominated office holders who are to be consulted and which include representatives of various bodies within the legal profession;
- 117.10A list of applicants is provided to each Judge and to the Master of the Supreme Court and copies of any and all applications are made available to them upon request;

117.11 The Judges and Master of the Supreme Court provide their views directly to the Chief Justice orally or in writing;

117.12 The Chief Justice meets with the eight nominated representatives other than the Chief Magistrate and generally discusses each and every application;

117.13 The process is undertaken on a confidential basis, although members of the committee are able to consult with others within their organisation or court on a confidential basis;

117.14 The process is in confidence in order to avoid embarrassment to unsuccessful candidates and to enhance the candour of the consultation process;

117.15 On occasions a consultee or member of the committee might express a view adverse to a particular applicant. If that derives from a particular incident or occasion procedural fairness requires the applicant be given notice of the assertion and an opportunity to respond. This has been necessary on very few occasions;

117.16 A more common situation is where an adverse view is expressed about one or other of the specified criteria for appointment at a level of relative generality. The task of the Chief Justice then is to ascertain whether the view is idiosyncratic or personal to the commentator and to ensure that the committee has a sufficiently broad base of information to arrive at its own considered view;

117.17 The consultation process takes place over a period of about two months and after it is completed the Chief Justice provides a written report for each committee member setting out the commentary received from each person consulted about each applicant. The Chief Justice does not express any views of his own within that report. The consultation process and preparation of the report to the committee is estimated to take about a week of the Chief Justice's time;

117.18 Following the circulation of the report the Chief Justice meets with the six other Judges who serve on the consultative committee. They generally serve as

representatives or delegates of the courts they represent and report to the meeting the general views of that court rather than their personal view;

117.19 The purpose of the meeting is to place each applicant in one of four categories.

They are:

117.19.1 Those who are to be appointed;

117.19.2 Those not to be appointed but to be encouraged to reapply;

117.19.3 Those not to be appointed;

117.19.4 Those not to be appointed and from whom a further application is not encouraged.

117.20 Often each application is discussed generally before endeavouring to place the application into one or other of the categories in a context of discussions about applications generally;

117.21 The Chief Justice chairs the meeting and encourages discussion aimed at forming a consensus on the merits of each application;

117.22 It is seldom necessary, if ever, to take a vote although the Chief Justice seeks a view from each committee member about each applicant;

117.23 Often it is unnecessary for the Chief Justice to express a view in relation to individual applicants;

117.24 Since the committee was created in 2006 the Chief Justice has consistently adopted what he calls “the precautionary principle”. He describes this as “unless there is a significant consensus in favour of the appointment of an applicant, that person will not be appointed. The “precautionary principle” has been adopted, according to Chief Justice Martin, because of the potential harm which could be caused by an unworthy appointment, as a result of clients assuming that the appointee has the requisite expertise to justify appointment;

117.25 The protocol confers the power of appointment on the Chief Justice and theoretically the Chief Justice could act otherwise than in accordance with the recommendations of the committee. That outcome is theoretical and so improbable as to be unthinkable;

117.26 During the nine years that the Chief Justice has facilitated the process each and every decision with respect to appointment or refusal has been made on the basis of the consensus of views expressed at the committee meeting informed by the prior consultation. In practice the decisions are made by the committee and formed by extensive consultation;

117.27 There is no quota on appointments;

117.28 The committee will take into account the perceived need for appointments in a particular field of practice but has consistently taken the view that a perceived need does not justify reduction in standards;

117.29 The protocol contemplates the requirement of an undertaking that an applicant will only practice in a particular field but the committee has not favoured solicitation of undertakings because as one application put "if you don't trust me to accept briefs which I can adequately discharge, you should not appoint me";

117.30 The committee takes a similar approach to gender issues as it does with specialised fields;

117.31 Sometimes the committee will require further information before making a decision about a particular applicant;

117.32 When applications have been decided letters are prepared generally corresponding to the four categories and they are delivered to each applicant as simultaneously as possible in late November or early December;

117.33 The Chief Justice telephones each successful applicant to convey his congratulations and a small ceremony is held early the following year in which a

certificate of appointment is presented in the presence of the applicant's immediate family and Judges of the court;

117.34 The letters set by the Chief Justice do not provide reasons and neither the court nor the committee favours the provision of written reasons in respect of each applicant for a number of reasons;

117.35 The protocol provides that any unsuccessful applicant may call upon the Chief Justice to discuss his or her application and it is not uncommon for that opportunity to be taken up;

117.36 During the meetings the Chief Justice reports candidly on the outcome of the consultation process and the general tenor of the relevant deliberations at the committee meeting without identifying the source of any particular view;

117.37 Sometimes the committee will ask the Chief Justice to initiate a meeting with an unsuccessful applicant. This is usually for the purpose of enabling an aspect of concern to be conveyed so that the applicant might address that concern and improve prospects of appointment in the future;

117.38 Any process that selects some and rejects others for advancement will inevitably generate dissatisfaction and, sometimes, controversy;

117.39 Informed debate with respect to the process of appointment of Senior Counsel is to be encouraged.

118 Chief Justice Martin expressed the hope that the insight he provided into how the process worked from an insider's perspective would provide more information on the topic for the profession and the community.

119 This history in Western Australia now needs to be compared or contrasted with what has happened (or is happening) in other jurisdictions and, perhaps most importantly, in England and Wales. The jurisdiction that gave birth to the first Queen's Counsel system has moved on. Western Australia has not.

England and Wales

120 In 1992 the system of appointment of Queen's Counsel in England and Wales was described by the then Chairman of the Bar, Gareth Williams QC (later Lord Williams of Mostyn, the Attorney General), as "based on the Franz Kafka school of business management": David Pannick QC (later Baron Pannick) "Why there should be no place for the Silk's purse" *The Times*, 10 April 2001.

121 On 28 September 1999 the Guardian reported that:

The Law Society is boycotting the system of "secret soundings" for choosing judges and QCs, in protest at what it sees as an outdated and discriminatory "old boys' network".

The professional body for the 80,000 solicitors in England and Wales told the Lord Chancellor Lord Irvine yesterday it would no longer take part in the confidential system whereby leading legal figures are sounded out on candidates' suitability.

The society also called yesterday for an immediate end to the soundings system, the abolition of QCs, and an independent judicial appointments commission to take over the Lord Chancellor's role in choosing judges.

Robert Sayer, the society's president, said: "The system we have for appointing judges is more appropriate to the 19th century than the 21st. It discriminates against solicitors, who form 90% of the legal profession. It also discriminates against many barristers. "A key weakness is its heavy reliance on secret soundings, a system which has all the elements of an old boys' network. The system is entirely inconsistent with open and objective recruitment practices and out of step with the Nolan principles on public appointments".

122 In 2001, in his article in the Times, Baron Pannick suggested that if a higher rank was to be retained the Bar itself should decide the relevant criteria and procedures, organising an appointments panel consisting of eminent lawyers and distinguished non-lawyers, and that the rank of Queen's Counsel would be replaced by that of Senior Counsel. However he considered that if the legal system were being created today the rank of Queen's Counsel (and presumably Senior Counsel) would have no place. He anticipated that it was unlikely to survive the Century.

123 In Baron Pannick's view there were substantial disadvantages in maintaining the status of Queen's Counsel. There were many junior barristers who were at least as skilled as

leading counsel. There were many Queen's Counsel who were not very good. The market was the best mechanism for identifying the best lawyers and for rewarding them with the most interesting or most lucrative cases. In other professions, especially skilful practitioners were recognised by their performance and reputation and not by a general and permanent mark of excellence. There was also a human cost for barristers who made applications and failed. Self-confidence would be dented but many rejected each year were excellent lawyers. Those who were successful might not be briefed by solicitors and clients until they had established a successful reputation, and some never did, losing the lucrative practice they enjoyed as juniors.

124 In 2001 in England and Wales Queen's Counsel were appointed annually by the Queen on the advice of the Lord Chancellor. Before October 2005 the Lord Chancellor was a member of Cabinet, responsible for the functioning independence of the Courts, and also a judicial officer. After October 2005 the Lord Chancellor was a member of Cabinet only. The current incumbent is not a lawyer.

125 The appointment process in 2001 entailed extensive consultation. The Lord Chancellor was assisted by the Lord Chancellor's Department.

126 In 2001, in a report to the Lord Chancellor on judicial appointments and Queen's Counsel selection, Sir Leonard Peach suggested a number of improvements to the Queen's Counsel selection process.

127 Sir Leonard's terms of reference had been to report to the Lord Chancellor on the operation of the appointments procedures in relation to all judicial appointments and Queen's Counsel and in particular to advise on:

127.1 The appropriateness and effectiveness of the criteria and the procedures for selecting the best candidates;

127.2 The extent to which candidates are assessed objectively against the criteria for appointment;

127.3 The existence of safeguards in the procedures against discrimination on the grounds of race or gender; and

127.4 To make recommendations as appropriate to the Lord Chancellor for development in the judicial appointments and Queen's Counsel selection procedures.

128 Sir Leonard recommended that:

128.1 Assessment for the rank of Queen's Counsel be conducted against the professional requirements of that title and not be confused with potential for the judiciary;

128.2 The consultation assessment form be restructured to improve quality and facilitate interpretation of written assessments provided and to enable it to be used more effectively by all consultees;

128.3 The question relating to the applicant's suitability should be mandatory and should require a response that related to the criteria.

129 In 2001, in a report *Competition in Professions*, the Office of Fair Trading considered the position of Queen's Counsel in England and Wales. It questioned the involvement of government in conferring a title that had a marked impact on fee level and the information value to consumers of a title that offered no information about the barrister's specialism and offered no guarantee that a barrister's level of competence was sustained over time.

130 The Office of Fair Trading raised these concerns about the Queen's Counsel system:

130.1 The need for a quality mark was difficult to understand when the services of barristers were purchased by solicitors who were specialists;

130.2 The conditions for a quality mark to be of value were that it must be awarded according to clear criteria and in a transparent way that had particular regard to the experience of purchasers and that must be capable of being lost as well as won with continued holding being continued on high quality performance;

130.3 Whether there was an unofficial quota;

130.4 Distortion of competition.

131 One of the concerns of the Office of Fair Trading was whether it was appropriate for the Crown to confer a title on selected practitioners within a profession which enhanced their earning power and competitive position relative to others.

132 The government issued a consultation paper in which it sought views on issues raised by the Office of Fair Trading. Most of the responses were from lawyers rather than users of legal services. Although there was no clear majority in favour of a particular way forward there was a strong body of opinion supporting significant change. Many respondents doubted whether State involvement was appropriate. The indication from customers suggested the rank of Queen's Counsel in the legal services market did not produce a useful kitemark in practice and the market might work more effectively if it were removed.

133 In 2003 a Consultation Paper by the United Kingdom's Department for Constitutional Affairs, *Constitutional Reform – The Future of Queen's Counsel* pointed out that the appointments were made by the Queen and the Queen acted only on the advice of the Ministers who were accountable to Parliament.

134 The 2003 Consultation Paper considered differences between work undertaken by Queen's Counsel and other barristers. There were three suggested differences:

134.1 Cases that were legally or factually complex, or of significance, or where the law is not clear may need specialist expertise;

134.2 In some areas of the law Queen's Counsel appeared in court more often than junior counsel;

134.3 In cases where there was a large amount of material to be managed a Queen's Counsel may be chosen to lead a team of advocates. One response suggested that lawyers in America worked the same way with a leader and team support.

135 The responses from the judiciary included that:

135.1 QCs are most likely to be involved in cases of special difficulty or complexity or those subject to particular public or particular interest and the courts could not function effectively without the support of advocates performing their role properly and honestly and that role is honed in those cases;

135.2 The Queen's Counsel system played a useful part in identifying future candidates for appointment as senior full time judges.

136 The consultation paper discussed the options of an independent panel or judges to make recommendations for appointment.

137 The paper considered whether the rank of Queen's Counsel should continue. Points that were submitted in favour by barristers and solicitors were:

137.1 It provided a body of advocates who are identified as leaders of their profession and gave a clear mark of distinction as an advocate;

137.2 The mark was internationally recognised and was a very substantial source of foreign earnings by attracting commercial litigation to the United Kingdom;

137.3 It assisted solicitors in selecting the quality of legal assistance their client needed and to instruct with confidence advocates with whom they had little or no experience;

137.4 It enhanced competition from the pool of Queen's Counsel;

137.5 It promoted and maintained expertise which was important to the court system;
and

137.6 It provided a career structure for barristers.

138 Comments that did not favour maintaining the rank were that:

138.1 The market in legal advocacy was highly developed and solicitors did not need a broad and undifferentiated quality mark to decide who to instruct. There were

better ways of assessing qualities of competence, reputation and previous experience than the Queen's Counsel mark;

138.2 The rank was not a reliable guarantee of quality or, in an increasingly specialist market, expertise;

138.3 The rank restricted competition and did not allow market forces freely to determine allocation of resources. For example, it reduced choice by discouraging the use of highly competent junior counsel;

138.4 The division of barristers into only two ranks did not constitute a sufficient career structure;

138.5 The focus on oral advocacy in court put at a disadvantage a barrister whose work was mainly on paper or directed to achieving resolution out of court;

138.6 The designation was essentially a public honour accorded to a private group and there was no logical reason why such an honour or its equivalent might not be given to outstanding doctors, dentists or accountants;

138.7 The designation was a mark of patronage that was inappropriate in the modern age.

139 According to the paper the last two comments in the preceding paragraph were those of the Law Society. For those reasons the Law Society had not participated in the automatic consultation process for appointments since 2000.

140 Another comment against the system was that in some cases a distortion of the market occurred where work was diverted from very good barristers who had not successfully applied and the purchaser simply wanted a Queen's Counsel for the sake of having a Queen's Counsel even though the other barrister, of equal seniority, would do the job as well or better.

141 The consultation paper concluded that while a quality mark may have some benefits the current system may:

- 141.1 Directly or indirectly distort competition in relation to the provision of advocacy services; or
 - 141.2 Not be the most effective in meeting the modern needs of users of legal services, in particular by giving a disproportionate weight to resolving disputes by litigation in open court.
- 142 The government's provisional view was that retention of the rank in its current form can only be justified if:
- 142.1 It serves a helpful purpose for users of legal services;
 - 142.2 Any benefits clearly outweigh any problems, and in particular the extent to which it may distort competition in the market for legal services and its possible effect on fees; and
 - 142.3 Its possible benefits cannot be provided in other ways free of such disadvantages.
- 143 The report identified disadvantages to users of maintaining the system and advantages in its abolition:
- 143.1 The responses did not produce many concrete examples of the rank being used as an effective guide when selecting an advocate;
 - 143.2 What was relevant to an instructing solicitor was the individual advocate's experience and skill;
 - 143.3 Solicitors frequently found the right junior counsel as better value than a Queen's Counsel;
 - 143.4 The rank drove up legal costs unjustifiably;
 - 143.5 There was a perception Queen's Counsel were instructed in circumstances where their skills were not really needed but, for example, because it might be thought judges would pay more attention to a QC's argument or the other party had instructed a QC;

143.6 Such perceptions could have the effect of tilting the market in favour of Queen's Counsel and against experienced juniors;

143.7 Abolition could lead to more effective reliance on information about individual advocates and their skills so that consumers would pay only the price reflecting the real value of the service they were buying rather than paying for a badge or brand;

143.8 Abolition could reduce costs by increasing competition.

144 There were criticisms of the focus on advocacy:

144.1 Many barristers who were specialists of the very highest ability carried out advice on paper and in conference or through negotiation rather than in the open court;

144.2 In substantial commercial litigation it was usual for solicitors to bring in leading counsel only at a comparatively late stage of the case and much of the preparation was done by solicitors or junior counsel only, and much negotiation and most or all of important advocacy work in preliminary hearings was handled by senior solicitors;

144.3 There was much greater, and court managed, emphasis on seeking settlement at an early stage and increasing use of alternative forms of dispute resolution such as mediation.

145 As to an alternative system:

145.1 The government's view was that on competition grounds it would obviously be necessary for a replacement scheme to be administered on transparent and objective grounds, and for any restrictions to be based on qualitative, rather than quantitative, factors;

145.2 Respondents suggested a number of elements were key to a quality mark scheme such as:

145.2.1 Rigorous selection process (possibly including examination and/or interview);

145.2.2 An appeal system for unsuccessful candidates; and

145.2.3 A quality mark that was of more practical use to consumers, perhaps through the identification of an individual's area of expertise (eg. "QC (Family)"); and

145.2.4 Regular reappraisal or reaccreditation.

146 The Law Society subsequently announced an agreement for a new scheme for appointing Queen's Counsel in England and Wales that was based on an agreed competency framework and aimed at providing a more transparent, open, and fairer way to make appointments: *Report by the Research Working Group on the Legal Services Market in Scotland 2006*. The process was approved by Lord Falconer and the initial competition (as it is called) took place in 2005-06: www.barcouncil.org.uk *Judicial Appointments and Silk*.

147 The Competency Framework sets out the detailed requirements for the competencies and provides examples. The competencies are understanding and using the law, written and oral advocacy, working with others, diversity and integrity.

148 The scheme has a selection panel. It is not a panel of judges or a judge. The selection panel has a website www.qcappointments.org that provides information for applicants. According to the panel website, the agreement on the process recorded that combined with the competency framework it serves the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts and provides identification of the very best advocates rigorously and objectively and promotes fairness, excellence and diversity.

149 The process is overseen and directed by the selection panel supported by a secretariat. The panel and secretariat are independent of the Bar, the Law Society and the

Government. The panel is made up of a senior judge, senior lawyers (including barristers and solicitors) and distinguished lay (but not legally qualified) people.

- 150 An applicant may be a barrister or a solicitor. The application form is online and it appears that it is submitted online. Word limits are imposed.
- 151 The process is based on evidence. Applicants that appear to demonstrate the competency sufficiently are invited to interview. Unsuccessful applicants receive personal feedback on their application. The list of recommended candidates is passed to the Lord Chancellor.
- 152 The application form invites the applicant to provide evidence of most important recent cases, narrative description of practice, self-assessment of demonstration of each of the competencies in those cases, and names of assessors the panel can approach who have seen the applicant in action in the cases. The assessors are in three categories – (1) judge or arbitrator, (2) practitioner, and (3) professional client, client or client proxy. There are guidelines for selection of assessors and disclosure of relationships. There are no automatic consultations.
- 153 Guidelines are provided on what to include in the narrative description of practice and what not to include. Matters that are not to be included include references in legal directories or elsewhere and any reference to sitting as an arbitrator or in a judicial capacity, and details of earnings.
- 154 The panel looks for evidence of an applicant's demonstration of the competencies in cases of substance, complexity, or particular difficulty or sensitivity in relation to the law courts of England and Wales or in international courts or tribunals in respect of law applicable in United Kingdom.
- 155 Applications are assessed on competencies and character issues are not taken into account by the panel unless a sub-panel has previously determined that they are sufficiently serious. Where an integrity concern is raised by a judge it must be fully

particularised. Any concern about integrity will be put to the applicant who then has an opportunity to provide an explanation to the panel.

156 The panel requires the applicant's assessment of how the applicant demonstrates the competencies and requests evidence for this. In general it will only consider examples drawn from professional life. Specific instances are required and not generalities. This is in connection with the competency of written or oral advocacy.

157 Assessments are received on the basis that they are confidential to the assessor, the panel, the secretariat and, if appropriate, the complaints committee.

158 An application is required to be accompanied by a fee.

159 Assessors are provided with written guidelines. The guidelines make clear that expressions of views must be supported by evidence and the bare comments, even of "excellent", are of limited value to the panel. Assessors are asked to give evidence on each competency if possible. Assessors are not asked to comment on the integrity of an applicant other than to answer a question "Do you have any evidence that the applicant is NOT honest and straight forward in his/her professional dealings with the Court and all parties?"

160 Assessors are told that the panel bases its decisions on first hand evidence relating to each applicant. The assessor is therefore asked to give an assessment based solely on his or her experience of the applicant in the applicant's professional life. If the assessor has consulted others then this must be stated in the assessor's completed form.

161 A concern by an assessor amounting to an allegation of professional misconduct is not taken into account by the panel unless, with the consent of the assessor (if necessary) it has been put to the applicant who will be given the opportunity to provide the panel with an explanation.

162 There is provision for an applicant to make a complaint after the outcome of the competition has been announced. There is a facility on the panel's website to provide feedback.

163 The system is fact and evidence based with clear implementation guidelines and the decision making is by an independent body. It does not include compulsory consultation, does not permit vague negative or positive commentary to be received or acted on, and there is no criterion of "support" from a court as a condition of appointment.

164 In my view it is vastly superior to the system that has been in place in Western Australia since 2001.

Canada

165 On 10 December 1985 the Premier of the Canadian province of Ontario, the Hon Mr David Peterson, announced to the Legislative Assembly that the government intended to abolish the designation of Queen's Counsel and revoke all existing provincial Queen's Counsel appointments in Ontario. Mr Peterson said there had been public and professional criticism for many years about the practice of cabinet granting letters patent of Queen's Counsel to lawyers in Ontario. He quoted from an address by Justice Sydney Robins of the Ontario Court of Appeal in 1974 that "the whole system of awarding QC's is, in my view, misleading to the public and unfair to the legal profession".

166 Mr Peterson provided a number of reasons to justify abolition:

166.1 In England the appointment was based exclusively upon proven excellence as a court room advocate and based on merit but in Ontario the practice of previous governments had been that any lawyer of good standing may be appointed and excellence in advocacy was not a prerequisite;

166.2 The designation in Ontario misled the public. He quoted from the speech given by Justice Robins in 1974 to the effect that all too often the profession is left with

the conclusion that the honour is granted more on the basis of who one knows rather than what one knows;

166.3 The system had become unfair to practising lawyers because it may be considered a mark of demerit not to have the appointment at a certain stage of one's career and may even subject the lawyer to a competitive disadvantage among his peers for reasons wholly unconnected with his abilities in the law. Clients may attach unwarranted prestige to the designation. Lawyers were pressured by the system to engage in an unseemly lobbying effort with other lawyers, influential citizens and politicians to secure the Queen's Counsel appointment;

166.4 The Queen's Counsel designation was an appointment that stood alone as an honour bestowed by government on the legal profession at a time when no similar honours were granted to any members of any other profession;

166.5 The Queen's Counsel in Ontario had been used by previous governments as a form of political patronage.

167 The Premier stated that the government looked forward to working with representatives of the Bench and Bar to see if they can return to the method of appointing Queen's Counsel to its merit based English roots of excellence in advocacy before the courts:
Hansard 10 December 1985.

168 A number of provinces retained systems that took different forms. There does not appear to be a single province that has made the Chief Justice, or a panel of judges, the appointor.

169 The Canadian Government discontinued federal appointments in 1993: Mireau *Queen's Counsel Appointments*, *Slaw* 3 January 2012. The Government reintroduced appointments in 2013 by appointing (on the recommendation of the Minister for Justice with the assistance of Department of Justice advisory panel) seven government lawyers

as Queen's Counsel for their "exemplary service within the public service": Press release dated 11 December 2013.

Australian States

170 Between 1993 and 2008 each Australian State and Territory replaced the title of QC with that of SC. The changes made were New South Wales 1993, Queensland 1994, Australian Capital Territory 1995, Victoria 2000, Western Australia 2001, Tasmania 2005, Northern Territory 2007 and South Australia 2008: Stuart Wood "The Economic Case for Reinstating QCs" *Quadrant* 1 May 2013.

171 The 2013 report of the Law Society of Western Australia reviewed processes for appointment in other Australian States and Territories. At that time appointments were by the President of the Bar Association in New South Wales (a Bar protocol) and the Australian Capital Territory (Bar rules). The Chief Justice was empowered to appoint in Tasmania (Practice Direction), the Northern Territory (Rules of the Court), and South Australia (Practice Direction). In Queensland appointments were by the Chief Justice apparently under a protocol of the Bar. In Victoria the appointments were by the Chief Justice but in 2011 the Chief Justice told the Victorian Bar Council that she would no longer have the time to devote to the process and would return it to the Bar.

172 There have been developments since 2013. Among Australian jurisdictions there is no consistent pattern in the methodologies for calling some and not other lawyers "Senior Counsel". Systems have been changing.

New South Wales

173 Queen's Counsel were last appointed in New South Wales by the Governor in Council in 1992: Geoff Lindsay *Personalia* (1994) 68 ALJ 469, 470. It had been the practice for the president of the Bar Association after appropriate consultation to recommend certain practitioners to the Attorney General who in turn made nominations to the Executive Council: Lindsay.

174 A news release issued on 3 December 1992 by the Premier of New South Wales, the Hon John Fahey, stated that:

174.1 The issue of Letters Patent was an anachronism that would serve no purpose;

174.2 The Government should not be asked to mark out particular lawyers for special treatment. It did not happen with accountants or other professionals and why should it happen with barristers;

174.3 The Premier did not believe Letters Patent were needed or that the Government should be involved in such a process:

Daniel Klineberg "The Great Silk Debate" *Bar News (NSW)*, 17 April 2014.

175 In 1993 the Hon Justice Kirby, then president of the New South Wales Court of Appeal, did not support abolition of the title of Queen's Counsel. In addition he supported the role of the executive government: Lindsay.

176 In August 1993 the New South Wales Bar Council approved a protocol for appointment of Senior Counsel. The selection was to be by the president of the Bar Association after compulsory consultation with judges and discretionary consultation with legal practitioners, subject to a veto by the Chief Justice of the Supreme Court of New South Wales: Lindsay.

177 The first Senior Counsel were appointed in 1993 and appeared before the New South Wales Court of Appeal in December of that year. In a speech that congratulated the appointees Chief Justice the Hon Justice Murray Gleeson stated that in other States of Australia the practical power of recommending persons for appointment rested with the Chief Justice of the State and when Senior Counsel from New South Wales came to seek the same recognition in other States the Chief Justices of those States will want to be assured that no one will be appointed Senior Counsel who would not previously have been appointed Queen's Counsel. The existence of the power of veto in the Chief Justice will contribute to that assurance: Lindsay.

178 Amendments were made to the *Legal Profession Act 1987* (NSW). They included the introduction of s38O that removed the prerogative right or power of the Crown to appoint persons as Queen's Counsel and prohibited executive or judicial officers of the State from conducting a scheme for the recognition or assignment of seniority or status among legal practitioners. The substance of s38O was repeated in s90 of the *Legal Profession Act 1994* (NSW).

Victoria

179 In Victoria the Chief Justice, the Hon Marilyn Warren AC, was persuaded to continue appointments.

180 In 2013 in an editorial in the Australian Journal of Administrative Law Dr Damien Cremean criticised the Victorian appointment system: (2013) 20 AJ Admin L 57. He said that it seemed to fail all basic administrative law principles, did not seem to be grounded in any enabling provision of the *Supreme Court Act 1986* (Vic), and any outside observer would say the system was deeply flawed:

180.1 He said "The system for silk in Victoria seems to fail every administrative law test: a vague discretion, exercised by only one person, on unspecified criteria, without appeal, without interview, by recourse to people's untested views, without reasons being formally required to be given, and without appeal. This is no better than hopeless as an administrative law exercise in fair and upfront dealing. Why the profession continues to limp along with it as the Victorian Bar seems to do – is anybody's guess";

180.2 He suggested none of the States and Territories was an outstanding example of openness and straightforwardness;

180.3 He said that the Chief Justice (whoever it may be) should not be regulating the market of who can charge the higher fees of a silk in a competitive world where

market forces should be doing their job without intervention or assistance, and this was not a judge's role;

180.4 Alternatively, he favoured abolition.

181 In 2014 the Chief Justice of Victoria appointed Senior Counsel under a protocol that was set out in a document called "The Appointment of Senior Counsel in Victoria; Summary of the Process for 2014". She was aided by a Preliminary Evaluation Committee composed of the Chairman and Vice-Chairman of the Bar Council, a retired superior court Judge, four Senior Counsel, and two solicitors. The Committee's purpose was to provide a list of applicants considered by the Committee as suitable for consideration for appointment. This was not a committee of judges. The Chief Justice then consulted with such persons as she considered appropriate and with heads of jurisdiction identified by the applicant as an area of substantial practice. This document included criteria expressed in very general language. The Preliminary Evaluation Committee was not representative of the broader legal profession – with solicitors under-represented and no apparent representation by senior barristers who were not called "Senior Counsel", unless the Chairman and Vice-Chairman of the Bar Council fell into the latter category.

Return to Queen's Counsel

182 In 2013 in Queensland and 2014 in Victoria the status of Queen's Counsel was reintroduced. The issue of returning to the title of Queen's Counsel in New South Wales is controversial: see Greg Barnes "The Empire Strikes Back" *Lawyers Weekly* 20 February 2014; cf Jeffrey Philips SC "God Save The Queen's Counsel" *Lawyers Weekly* 10 March 2014.

183 A reason given for the change in both Queensland and Victoria was the importance of recognition outside the State concerned. The Attorney General and Minister for Justice for Queensland, the Hon Jarrod Bleijie, announced that it was "important that Queensland Silks are competitive internationally, particularly in Singapore and Hong

Kong where the use of QC is preferred”: media release “Queen’s Counsels return to Queensland”, 12 December 2012. This rationale has nothing to do with administration of justice. It is squarely aimed at and serves private interests.

184 According to the then Attorney General in Victoria, the Hon Robert Clark, “the option to be appointed as QCs will help Victorian barristers to ensure full recognition of their experience, skills and expertise both within the Asia-Pacific region and within Australia”: Dept of Justice and Regulation of Victoria web site.

185 In 2015, at the request of the current Victorian Attorney-General to undertake a comprehensive review of the designation of Queen’s Counsel, the Victorian Bar appointed the Hon Murray Kellam AO, a former judge of the Supreme Court of Victoria and the Court of Appeal, to prepare a report responding to the Attorney-General’s request. Mr Kellam is currently seeking submissions.

186 In 2014 the New South Wales Bar Association requested comment from its members on the desirability of reinstating the term Queen’s Counsel in New South Wales. A committee, of one Queen’s Counsel, five Senior Counsel and one other barrister who was neither QC nor SC, prepared a report dated 16 April 2014 “Report to the NSW Bar Council on the suitability of approaching the Attorney General for support for establishment of a system for appointment of Queen’s Counsel” (Priestley report).

187 The proponents of reintroduction of Queen’s Counsel in New South Wales argued that:

187.1 There was a public interest in ensuring that the competition between barristers in Australian jurisdictions is free and not artificially constrained. There was perceived to be an artificial competitive disadvantage through the opportunistic and inconsistent exploitation of the historical and popular resonance of the QC post-nominal;

187.2 With reduced competition comes the risk of reduced quality;

- 187.3 There was potential commercial disadvantage that individual barristers may face vis a vis interstate QC peers;
- 187.4 The QC/SC alternative post-nominals are confusing and not fully understood by consumers of legal services;
- 187.5 There were practitioners who can hold the titles of QC and SC at the same time. For example, until 2001 in Western Australia there was a convention that an Interstate SC would automatically be recognised as a Western Australian QC after appearing in that State and there were therefore New South Wales SCs who were also QCs in and for the State of Western Australia;
- 187.6 Desirability of uniformity in a National Legal Profession in the context of mobility of the Bar;
- 187.7 Promoting New South Wales as the centre for legal excellence nationally and internationally.
- 188 The opponents of change argued:
- 188.1 Questions of commercial benefit and status were secondary to the unique role that barristers play in the administration of justice;
- 188.2 The system for appointment of Queen's Counsel in New South Wales before the introduction of Senior Counsel was different from that in other Australian States in that the appointments were made on the nomination of the Attorney General who by convention was advised by the president of the Bar Association;
- 188.3 s90 of the *Legal Profession Act 2004* (NSW) prohibits both the appointment of Queen's Counsel and the Executive from conducting any scheme for the recognition or assignment of recognition of status amongst legal practitioners in New South Wales;
- 188.4 The present system serves the public interest by providing a transparent and independent system for appointment and it was set up with a view to ensuring it

was immune from political interference and only the best counsel are selected for appointment;

188.5 No public interest was served by adding a title to the rank of Senior Counsel and the imprimatur of the Crown would be an anachronistic and retrograde step given that independent regulation of selection by the profession itself has been in place for 21 years;

188.6 There was no concrete empirical (as opposed to anecdotal) evidence available to support the arguments in favour of change;

188.7 There was no indication that other Bars in Australia were considering reinstating the title of Queen's Counsel;

188.8 Any change to the existing system could be reversed in the event of political climate change;

188.9 It had been reported that the Attorney General did not support, and the Shadow Attorney General will not support, reversion to Queen's Counsel.

189 The majority of the committee that prepared the Priestley Report was of the view that it was not suitable for the Bar Association to approach the Attorney General to seek support for reinstatement of Queen's Counsel.

190 A little over 12 months later that view had not maintained ascendancy. In May 2015 the Bar Association resolved to form a working party to establish a protocol that will give Senior Counsel in the State the choice to be a Queen's Counsel or a Senior Counsel: Samantha Woodhill *Australian Lawyer* 15 May 2015.

191 There are opponents of change in New South Wales. Mr Dan O'Gorman was reported as saying "We are no more counsel of the Queen than pigs fly. The history of the title of Queen's Counsel is as the title implies – you are elevated to that status because you were one of Her Majesty's counsel. That has long gone" *Australian Financial Review* 22 May 2015 33. I interpolate, has not the need for Senior Counsel "long gone"?

192 The *Australian Financial Review* article also reported that the New South Wales Attorney-General had made it clear that she would need to be convinced that any change would improve the administration of justice in her State.

193 The article contains statistics on numbers of appointed Senior Counsel in Queensland, Victoria and New South Wales:

	Total SC and QC	Senior Counsel	Queen's Counsel
Queensland	108	4	104
Victoria	298	39	259
NSW	372	322	50

Comments on April 2015 article by Chief Justice Martin

194 In my view a number of elements of the process described by Chief Justice Martin in his article in the April 2015 edition of *Brief* are problematic.

Myths or false assumptions

195 The article assumes that there may be “myths or false assumptions” about the appointment process.

196 This raises questions of whether and why there are any myths or false assumptions, and what is fact and what is fiction. It appears to indicate that a problem that I identified in 2001 – namely, that the discarded Queen’s Counsel system was susceptible to rumour and strong rumours about the process – has persisted since that time.

197 There are many candidates for “myths or false assumptions” about the process that I could articulate. The reviews in other jurisdictions have dealt with some perceptions and facts. Whether an asserted proposition is true or not requires its articulation and investigation. The secrecy that surrounds implementation of the process in Western Australia does not make this an easy task. This is a reason for insisting on change that gives a higher level of transparency.

The consultative committee of Judges and who makes the decisions

198 The article describes the roles and functions that the Chief Justice performs under the process as those of a delegate of the Judges of the Supreme Court. It says that his task is not to decide who should or should not be appointed but to oversee the process of consultation and consideration. The article says that in practice the decisions are made by a committee of six judges and the Chief Justice.

199 The Practice Direction does not permit the Chief Justice to devolve decision making to a committee of Judges. It provides that after taking into account the recommendation of the committee the Chief Justice shall decide which applicants will be appointed to the office of Senior Counsel, and will advise each applicant in writing of the outcome of their application.

200 The Practice Direction provides that appointment to the office of Senior Counsel shall be by the Chief Justice on behalf of the Court. It does not authorise decision making and appointment by the consultative committee of Judges, or by a committee that includes judges who are not judges of the Supreme Court. The decision and the appointment shall be by the Chief Justice on behalf of the Supreme Court.

201 There are features in the process that do not sit well together or do not fit together at all. First, the Practice Direction does not authorise appointment by judges who are not judges of the Supreme Court. Under the Practice Direction three of the judges on the consultative committee are not judges of the Supreme Court. In addition, one is the President of the State Administrative Tribunal.

202 Secondly, it is not obvious how under a Practice Direction of the Supreme Court the Senior Judge of the Federal Court resident in Perth, the Chief Judge of the Family Court and the Chief Judge of the District Court could participate in decision making process of the Supreme Court or make a decision that is valid.

Time spent

203 The article says that the amount of time spent each year on the process by the Chief Justice equates to about one week.

204 If one week means 40 hours of working time and if each application is given equal treatment and time then (based on past numbers of applications) the amount of time spent on assessing an application may have been in the range of 2 to 3.5 hours per application. If a week means 60 hours then that range would increase to about 3 to 5 hours per application.

205 A process that results in a decision that can have a life changing effect for an applicant might warrant more time than a range of 2 to 5 hours per applicant. In that window of time a Chief Justice would have to complete all of these tasks:

205.1 Receive, read and consider the application;

205.2 Match the received material against the appointment criteria;

205.3 Distribute them to those required or permitted to be consulted;

205.4 Complete a consultation with each of the eight nominated representatives;

205.5 Consult with up to seventeen Judges of the Supreme Court;

205.6 Review material obtained and prepare a written report about the applicant and the results of the consultations;

205.7 Distribute the report to the Judges' consultative committee; and

205.8 Attend and chair a meeting of the Judges' consultative committee at which each application would be discussed and decisions made, not only about whether the material satisfied the criteria under the Practice Direction, but also as to which of four letters should be sent to the applicant.

206 Overall a week is a significant time constraint and a significant time burden. In 2011 the Chief Justice of the Supreme Court of Victoria gave the burden of the time required to process applications as one of the reasons to end her role in the process.

207 It is not immediately obvious why, where the effective decision making is made by the Judges' committee, the numerous consultation activities need to be undertaken by a Chief Justice. These tasks would be better undertaken by someone else, leaving a Chief Justice more time to discharge the responsibilities of administering the Supreme Court and hearing and deciding cases.

Confidentiality

208 The article says that the process is in confidence in order to avoid embarrassment to unsuccessful candidates and to enhance the candour of the consultation process.

209 This assumes unsuccessful candidates might be embarrassed. Unsuccessful candidates might not be embarrassed. They might want increased transparency. They might wish to express discontent and the reasons for it and have this reviewed outside a secretive process. Results of the process being in confidence might include that unsuccessful applicants are denied a voice concerning their experiences with the process and/or that the process is shielded from criticism or scrutiny.

210 The asserted need for "candour" feeds into the next issue of procedural fairness. It is not even-handed, and in my view it is systemically unfair, for a system to (1) protect from disclosure a source of negativity of a generalised nature but (2) not protect the recipient applicant with precautions by applying a principle that excludes non-specific material and/or by conferring a right to be heard before a decision is made.

Procedural fairness

211 The article says that on occasions a consultee or member of the committee might express a view that is adverse to a particular applicant. If that derives from a particular incident or occasion procedural fairness requires the applicant be given notice of the assertion and an opportunity to respond. This has been necessary on very few occasions.

212 The article also says a more common situation is where an adverse view is expressed about one or other of the specified criteria for appointment at a level of relative

generality. The task of the Chief Justice then is to ascertain whether the view is idiosyncratic or personal to the commentator and to ensure that the committee has a sufficiently broad base of information to arrive at its own considered view.

213 According to the article an unsuccessful applicant may meet with Chief Justice Martin to discuss the application. At that meeting he reports “candidly on the general tenor of the relevant deliberations at the committee meeting without of course identifying the source of any particular view”.

214 In my view there would be a lack of procedural fairness in the second of the categories of negativity, if an adverse view is expressed about an applicant at a level of relative generality and it is then acted on as an exclusionary factor without prior notice to the applicant. There are two problems.

215 The first is that criticisms should be fact and evidence based and must necessarily be specific and factual or they should not be given any weight. The generality of negative sentiment that is permitted in our system quite rightly is not permitted in the English system. It should not be permitted in Western Australia.

216 The second is that what may be in effect an aspect of complaint or criticism of an applicant should be known to an applicant before and not after a decision has been made, if it is viewed as sufficient to justify refusal. The applicant, and not merely others in the consultation process, may have a rational and convincing response to an expression of an adverse view.

217 The negative view might not be accurate or fair, or a balanced and representative description of the candidate’s qualities. It might distract attention, in a time poor environment, from what a balanced review of a portfolio of work in decided cases says about an applicant. It might be counterbalanced by positive evidence in the same area of generality.

218 Applicants should be protected against non-specific generalised negativity. They should not be rejected by any form of negative labelling, irrespective of whether the expression of a “view” is seen not to be idiosyncratic. If it is not specific it should be rejected and given no weight. A negative “view” particularly if it is a sweeping generalisation or label, once expressed, can promulgate and establish itself and affect judgement about a person even though on a rational analysis it is not borne out by fair and balanced evaluation of evidence. If it is specific, and it is evidence, procedural fairness requires that it is relayed to an applicant before a decision is made.

219 Requirements for comments to be specific and factual and for prior disclosure of material negative comment are missing safeguards.

Decision making founded on a collection of “views”

220 The process seeks “views” in order to arrive at a “consensus” (a “collection of views” system). These seem to be directed to determining whether an applicant is “worthy” or should be rejected outright, or by the application of the “precautionary principle” (see below), as “unworthy” of appointment.

221 It might reasonably be expected that the task of the Judges’ committee should be to compare evidence provided by applicants against specified criteria to see whether, on the evidence, the specified criteria are satisfied. If the expression of “views” that leads to consensus is something other than each member of the committee, including the Chief Justice, matching evidence supplied by an applicant against criteria and forming a conclusion then this should be articulated and justified. Matching should be done before the report of the Chief Justice’s consultations is considered. What is not clear is how these reports are then fairly weighed against a fair evaluation of material supplied by an applicant.

222 There is lack of clarity on what qualifies as a “view” that will be given weight. There are no written guidelines on how different views are to be weighted. For example is the

view of the Law Society to be given greater weight than that of representatives of appointed Senior Counsel. What weightings are given to the Law Society, the Bar, and so on?

223 Appointed Senior Counsel are numerically over-represented in their opportunities to comment within the process. Senior barristers who have not been appointed Senior Counsel have no recognition as a separate and relevant interest group.

224 The notion that there must be a consensus of “views” in favour of the appointment suggests that the process, ultimately, is subjective (or has a strong subjective element) rather than an application of factual criteria to evidence and proven facts. The conclusion that the process is subjective is given weight by the reference in the article to deciding whether an applicant is “worthy” and by the vagueness of the appointment criteria.

225 The English system imposes constraints and guidelines on what is permissible as a comment by a consultee. The Western Australian process does not have this safeguard. It does not have clearly articulated factual criteria that amount to a test of level of skill. It lacks documented guidelines that insist on and seek objective and verifiable evidence that shows that a particular applicant has a high level of skill in a particular area of the law.

226 For example an applicant could be (but is not) required to provide evidence of a long history of advising in cases, appearing and succeeding in trials and appeals, achievements to develop legal techniques, evidence from instructing solicitors and clients on quality of advice and pleadings and their relationship to results in cases, mentoring lawyers, and authorship of legal papers and texts. Further, although references can be provided there is no requirement to follow them up.

227 I would describe the alternative approach as one that examines a portfolio of work rather than considers a collection of “views”. The English system is a form of “portfolio of

work” system. An objective evaluation of a portfolio of work does not require its repetition many times over by representatives of various interest groups who then consult with a Chief Justice.

228 Wide consultation could still occur to ensure that any clear disqualifying factor, such as multiple provable instances of bullying younger lawyers, is known and can be investigated. I have in mind what Daniel Kahneman would call a “leg breaker”. Kahneman won the Nobel Prize for Economics in 2002 was the author of the 2011 work on the psychology of human judgment and decision making, *Thinking, Fast and Slow*.

229 However disqualifying factors should be clearly articulated. I expect the categories would be few in number and they should be brought to an applicant’s attention before and not after a decision was made.

230 The lack of a requirement for relevant references, and that they be followed up, is a missing safeguard. Senior instructing solicitors can provide a more reliable and balanced view of an applicant but they do not have input in the consultation process. In addition to what is seen by a judge they see and can comment on the quality of initial advice, quality of advice on evidence and management of the case (or cases), value of outcomes based on that advice, case preparation, efficiency and cost effectiveness of work. Senior instructing solicitors also see and remember the chains of trial outcomes through appeals and can compare and contrast those outcomes with the advice and preparation work provided by the barrister. The current “collection of views” system does not take advantage of this obvious and highly relevant resource.

231 Appointed Senior Counsel are expected to be mentors. However they are not required to prove that they have been mentors in the past or that they have the necessary skills. If an applicant has been a successful mentor then the applicant should be able to find a referee who will verify and outline the mentoring that was provided to the referee. The “collection of views” process does not require or follow up proof of mentoring.

Four letters

232 There are aspects of the process described in the article that do not appear to find expression in the Practice Direction. They include the four types of letters sent to applicants and the “precautionary principle”.

233 Three categories of letters are sent to unsuccessful applicants:

233.1 Those not to be appointed but to be encouraged to reapply;

233.2 Those not to be appointed;

233.3 Those not to be appointed and from whom a further application is not encouraged.

234 There is no provision in the Practice Direction for three or four different categories of letters. There should only be two – one, the application has been successful, and two, the application was not successful.

235 The three letters that have been used for unsuccessful applicants appear to bind future decision making and create a risk, if not the fact, of pre-judgment in the event that an unsuccessful candidate were to apply again. The potential for a senior talented unsuccessful barrister to be disadvantaged by pre-judgement has an associated paradox that a less experienced barrister, applying for the first time, might have better prospects of success.

236 In England, each year an application will be considered afresh. There is no institutional pre-judgment of an applicant. This is another missing safeguard.

“Precautionary principle”

237 The article says that since the committee was created in 2006 Chief Justice Martin has consistently adopted what he calls “the precautionary principle”. He describes this as “unless there is a significant consensus in favour of the appointment of an applicant, that person will not be appointed” allied with the notion that there is “potential [for] harm which could be caused by an unworthy appointment, as a result of clients assuming that the appointee has the requisite expertise to justify appointment”.

238 There are problems with this. The first, as stated above, is that as formulated in the article it is not part of the Practice Direction. If it has in fact been applied to render an application in the past unsuccessful then the applicant may have had a legitimate basis for seeking administrative law review, if such could be available. Given the lack of a requirement for reasons for decision there may be a number of applicants who do not even know that this “principle” has caused their application to be rejected.

239 Secondly, whether it has a foundation in the field of psychology and decision making or is an idiosyncratic Western Australian notion is unknown. What is the source of this asserted “precautionary principle” and what field of learning justifies it?

240 Thirdly, the notion that the numerous senior barristers at the Bar in Western Australia, who are experienced and talented but not called Senior Counsel, may cause “harm” because they are “unworthy of appointment” should be rejected outright by all of the judiciary and the legal profession of this State. It has no demonstrated empirical foundation.

241 Fourthly, it is highly improbable that any client has ever matched the criteria for appointment against the kitemark “Senior Counsel” so as to be misled or harmed if an “unworthy” individual were given the title.

242 In other areas of risk and decision making an idea of precautionary principle has apparent critics. Daniel Kahneman appears to be a critic. In *Thinking, Fast and Slow* he said:

“The intense aversion to trading increased risk for some other advantage plays out on a grand scale in the laws and regulations governing risk. This trend is especially strong in Europe, where the precautionary principle, which prohibits any action that might cause harm, is a widely accepted doctrine. In the regulatory context, the precautionary principle imposes the entire burden of proving safety on anyone who undertakes actions that might harm people or the environment. Multiple international bodies have specified that the absence of scientific evidence of potential damage is not sufficient justification for taking risks. As the jurist Carl Sunstein points out, the precautionary principle is costly, and when interpreted strictly it can be paralyzing. He mentions an impressive list of innovations that would not have passed the test, including “airplanes, air conditioning, antibiotics, automobiles, chlorine, the measles vaccine, open-heart surgery, radio, refrigeration, smallpox vaccine, and X-rays.” The strong version of

the precautionary principle is obviously untenable. But *enhanced loss aversion* is embedded in a strong and widely shared moral intuition; it originates in System 1 [the thinking fast system]. The dilemma between intensely loss-averse moral attitudes and efficient risk management does not have a simple and compelling solution [p. 351, italics in original].”

243 Carl Sunstein was a critic of what he understood to be the precautionary principle in legal systems: *Beyond the Precautionary Principle* 2003 Chicago Unbound, University of Chicago Law School, Public Law and Legal Theory Working Papers. The abstract from that article provides:

“The precautionary principle has been highly influential in legal systems all over the world. In its strongest and most distinctive forms, the principle imposes a burden of proof on those who create potential risks, and it requires regulation of activities even if it cannot be shown that those activities are likely to produce significant harms. Taken in this strong form, the precautionary principle should be rejected, not because it leads in bad directions, but because it leads in no directions at all. The principle is literally paralysing - forbidding inaction, stringent regulation, and everything in between. The reason is that in the relevant cases, every step, including inaction, creates a risk to health, the environment, or both. This point raises a further puzzle. Why is the precautionary principle widely seen to offer real guidance? The answer lies in identifiable cognitive mechanisms emphasized by behavioural economists. In many cases, loss aversion plays a large role, accompanied by a false belief that nature is benign. Sometimes the availability heuristic is at work. Probability neglect plays a role as well. Most often, those who use the precautionary principle fall victim to what might be called “system neglect,” which involves a failure to attend to the systemic effects of regulation. Examples are given from numerous areas, involving arsenic regulation, global warming and the Kyoto Protocol, nuclear power, pharmaceutical regulation, cloning, pesticide regulation, and genetic modification of food. The salutary moral and political goals of the precautionary principle should be promoted through other, more effective methods.”

244 Whether some sort of “precautionary principle” should be apply, what it means and how and why it applies, should be debated. It is not a conception that appears in any of the literature I have reviewed about systems for appointing Senior Counsel. I looks like a uniquely Western Australian phenomenon in the context of lawyer selection. A system that is based on objective examination of a portfolio of work, rather than a “consensus of views” might obviate the perceived need to have applied it.

245 This issue needs to be considered in the context of the statistics on applications and appointments over the past 9 years. Is the application of a “precautionary principle” the

explanation for the comparatively low numbers of appointments of Senior Counsel in Western Australia since 2006?

“Worthy”

246 The Practice Direction says nothing about whether an applicant is “worthy” or otherwise. Either the specified criteria apply on the material collected or they do not. There are many senior barristers who have not been appointed by the system who are undoubtedly worthy barristers who have great expertise. Any suggestion to the contrary must be unequivocally rejected by the judiciary and legal profession of Western Australia.

“Requisite expertise”

247 The criteria under the Practice Direction however do not identify any standard for “requisite expertise”. The criteria are eminence in the practice of law, especially in advocacy, integrity, availability, and independence. The category of eminence includes intellectual capacity, knowledge of the law and legal method and demonstrated commitment to the provision of the highest level of service and pursuit of excellence. No objective benchmarks are set. The word “eminence” connotes subjectivity. It represents notions of status or impression in the mind of the beholder. The categories of integrity, availability and independence are not categories of expertise. Nor are they categories that set benchmarks of skill.

248 The criteria in the Practice Direction are vague. Expertise may underlie the notions that they express but they are not themselves criteria of expertise. Further, it is not obvious how the process that is undertaken – which seeks “views” but lacks formal objective benchmarks, evidentiary standards and assessment guidelines – ultimately is a factual assessment of expertise or skill.

Accountability

249 The process lacks a mechanism of accountability.

250 In the current world, where there are extensive rules for access to data and data correction, privacy and data protection, and administrative law review, accountability in decision making is unquestioned. Rights or legitimate expectations of individuals are protected by access to and correction of data, requirement for reasons for decision, and mechanism and grounds for review. These safeguards are not provided by the process for appointing Senior Counsel in Western Australia.

251 The article by Chief Justice Martin says that reports on applicants are prepared and provided to members of the consultative committee of Judges. The fact that reports about applications are prepared and provided to the consultative committee of judges makes independent inspection or audit of them, and the material supplied by applicants, a practical and purposeful possibility for the future. Inspection and audit are potential accountability and transparency safeguards. An obvious one is written reasons.

Changing the system

252 The article says that the protocol was adopted by resolution of the Judges and Master of the Supreme Court and can only be changed with their concurrence. One avenue for change to be effected is to secure that concurrence.

253 Revocation of the Practice Direction by the Judges of the Supreme Court is not the only avenue for reform. The current system can be changed without their consent. A relevant amendment could be made to the *Supreme Court Act 1935* or the *Legal Profession Act 2008*. Section 90 of the *Legal Profession Act 1994* (NSW) may serve as an initial guide. In addition a legislative amendment could be effected to restrict, if not otherwise controlled by existing legislation or regulations, the issue and promulgation of practice directions by the judges of the Supreme Court to matters of practice and procedure in that court.

Legal basis for 2001 system

254 The 2010 Law Society ad hoc committee questioned whether it was clear that the Chief Justice or the Supreme Court had power to confer titles on legal practitioners. The response of the Zelestis committee was that the Supreme Court had fundamental power to regulate practitioners in the public interest and that supporting authorities were thoroughly examined when the system for appointment of Senior Counsel was originally established and there was undoubted inherent power to support the present system. The Zelestis committee did not elaborate on the statement that there was undoubted inherent power. They did not contend that the Supreme Court has any express statutory power.

255 It is not at all obvious that the Supreme Court has any inherent power. There was no history before 2001 of a Chief Justice, in the exercise of asserted inherent power of the Court, conferring the title “Senior Counsel” on some lawyers and not others. The appointments of Queen’s Counsel were made by the executive government, albeit in this State, on the advice of the Chief Justice. Executive government was not bound by the views of a Chief Justice.

256 There is no obvious express power in the *Supreme Court Act 1935* or the *Legal Profession Act 2008* to support Practice Direction 10.3. However the title of Senior Counsel is recognised in the *Legal Profession Act*. Section 14 applies to a number of specified names, titles and descriptions and states that the regulations may specify the kind of persons who are entitled, and the circumstances in which they are entitled, to take or use a name, title or description to which the section applied. One of the listed names, titles or descriptions is “Senior Counsel”. The Legal Practice Board includes self-nominated Queen’s Counsel and Senior Counsel whose principal place of practice is Western Australia.

257 By regulation 5 of the *Legal Profession Regulations 2009* the kinds of persons who are entitled to use the name, title or description of Senior Counsel are Australian lawyers

with the status of Senior Counsel as recognised by the High Court or a Supreme Court of any jurisdiction. There is no suggestion that “Senior Counsel” from other jurisdictions are or are to be viewed as less than equal in Western Australia or as having been appointed under less stringent standards or application of standards. Nor is this regulation compatible with the notion that standards for appointment are higher than in other States or are to be more rigorously implemented in Western Australia.

Successful and unsuccessful appointments since 2006 – the numbers

258 In his first year in office, 2006, Chief Justice Martin made no appointments of Senior Counsel.

259 Although written reasons for decision for appointment or non-appointment have not been given by a Chief Justice in the past a number of media releases have been issued after 2006 and they contain important information. In November 2007 and between November 2009 and November 2014 each year a media officer of the Supreme Court issued a media announcement by Chief Justice Martin of the successful appointments for the relevant year.

260 On 4 December 2008, the then President of the Western Australian Bar Association, Mr Craig Colvin SC, issued a press release about the appointment that year of two individuals as Senior Counsel. The media release did not provide any details about the successful applicants but stated that 15 applications had been received.

261 Each media statement issued from the Supreme Court stated that:

“Appointment of Senior Counsel is based on eminence in the practice of law, especially in advocacy, unquestioned integrity, availability and independence. A Committee advises the Chief Justice on applications for appointment. The Committee, chaired by Chief Justice Martin, comprises the President of the Court of Appeal, the Senior Judge of the Supreme Court, the President of the State Administrative Tribunal, the Senior Judge of the Federal Court resident in Perth, the Chief Judge of the Family Court and the Chief Judge of the District Court”.

262 Each media statement from the Supreme Court also stated the number of applications received, identified the successful appointees, and summarised information about each of

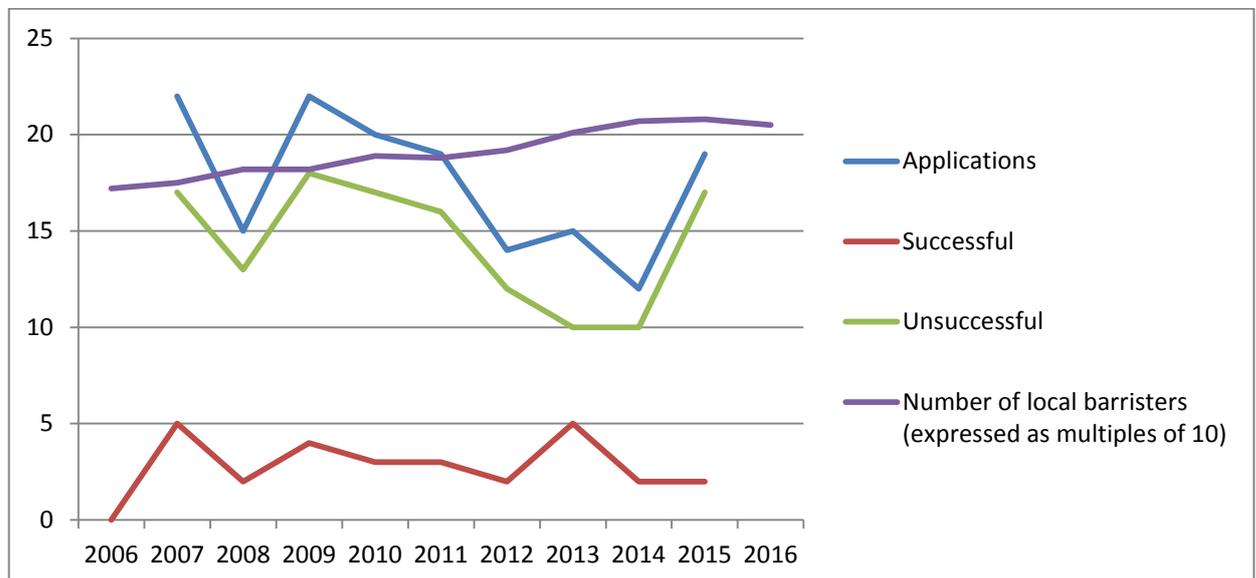
them. The information about successful candidates has not been a detailed and reasoned summary of why they, as opposed to unsuccessful candidates, satisfied the appointment criteria.

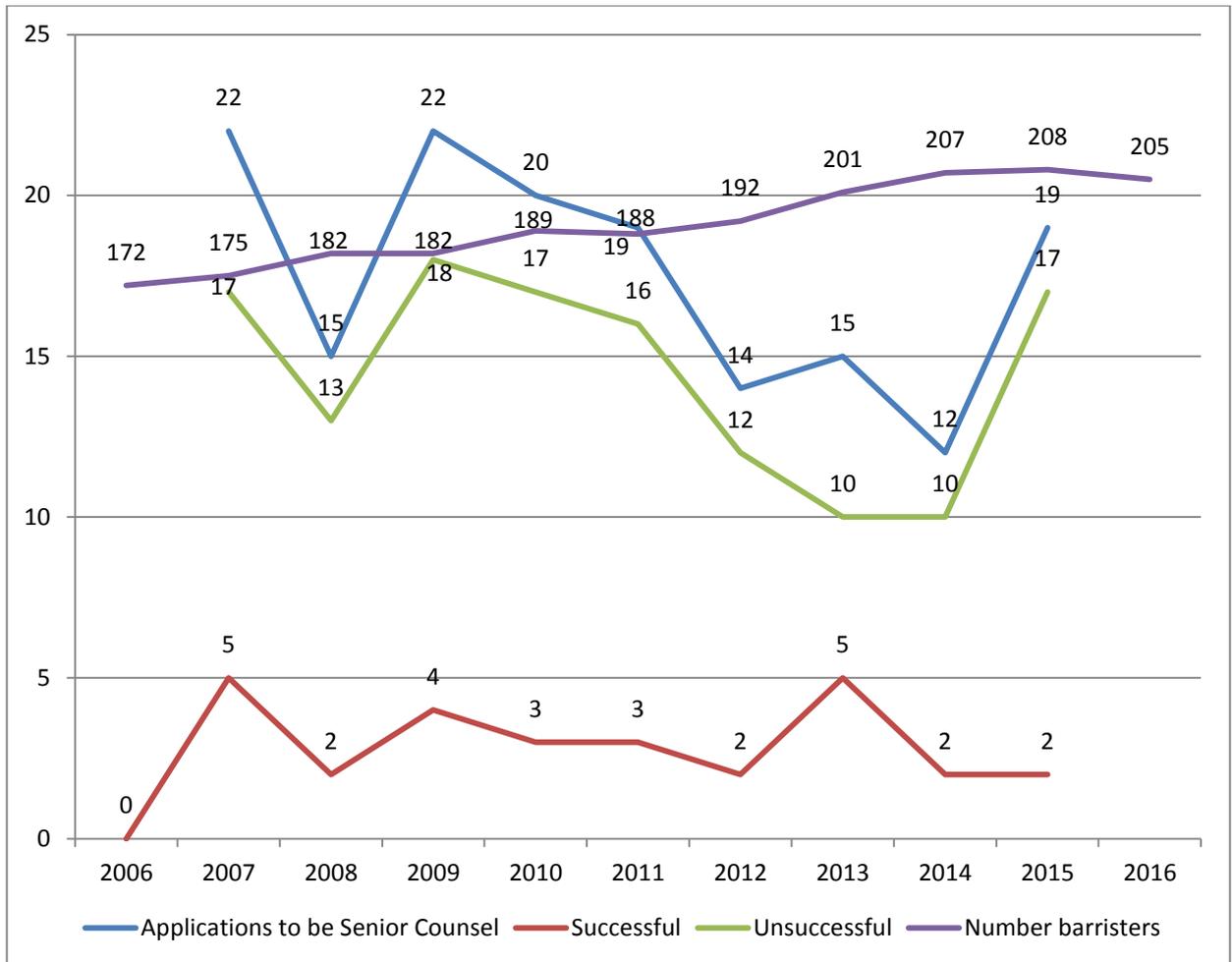
263 The number of unsuccessful applications since 2006 can be calculated.

264 The number of applications and results are displayed in the following table and graph.

Year	Number of applications	Percentage change from previous year	Successful	Unsuccessful
2006	Not known to author	Not known to author	0	All
2007	22	Not defined	5	17 (77%)
2008	15	↓ 32%	2	13 (87%)
2009	22	↑ 47%	4	18 (82%)
2010	20	↓ 9%	3	17 (85%)
2011	19	↓ 5%	3	16 (84%)
2012	14	↓ 26%	2	12 (86%)
2013	15	↑ 7%	5	10 (67%)
2014	12	↓ 20%	2	10 (83%)
2015	19	↑ 58%	2	17 (89%)

265 These figures reflect trends over 8 to 9 years of modestly increasing numbers of local barristers, steeply decreasing numbers of applications for Senior Counsel, and steady and small numbers of successful applications:

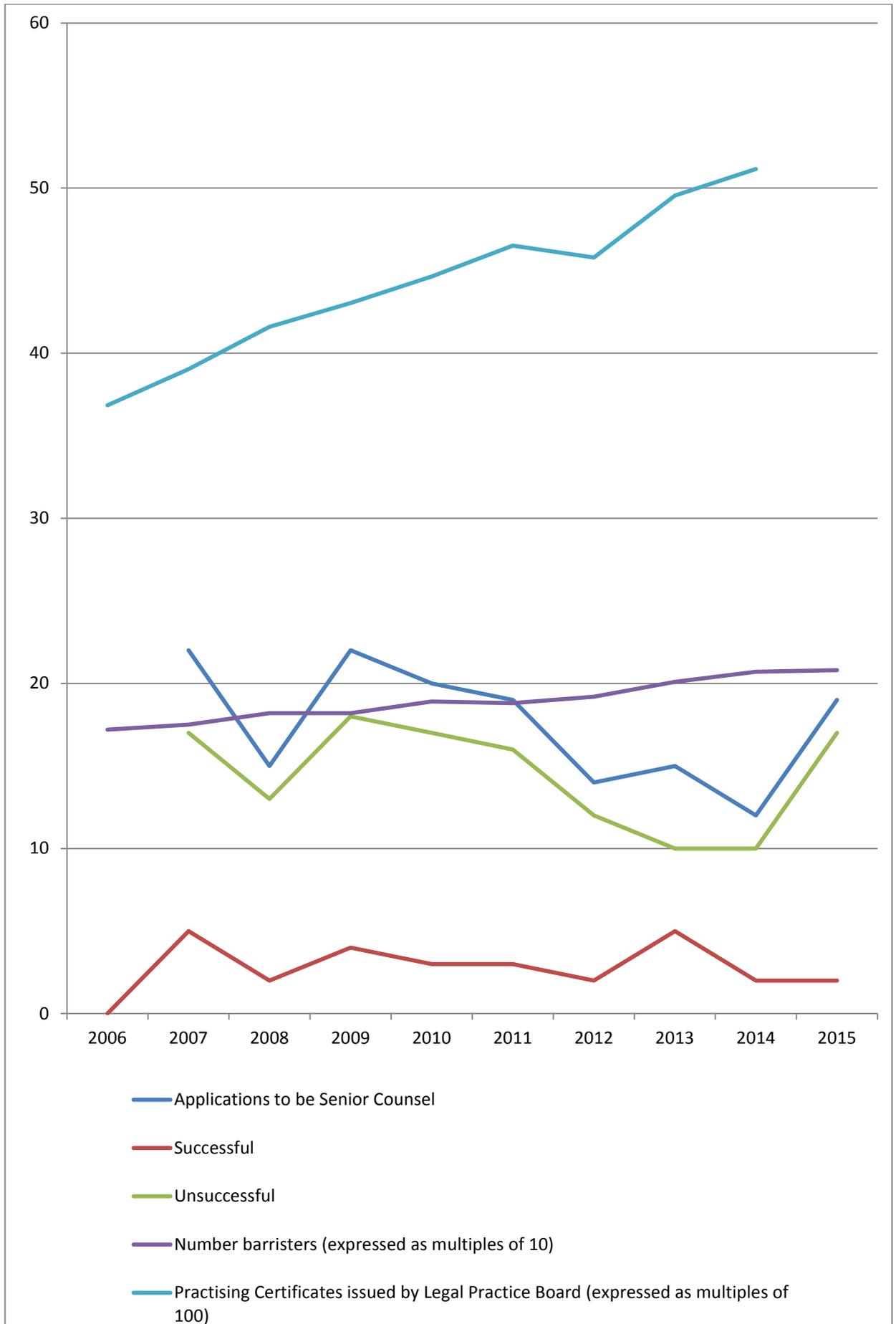


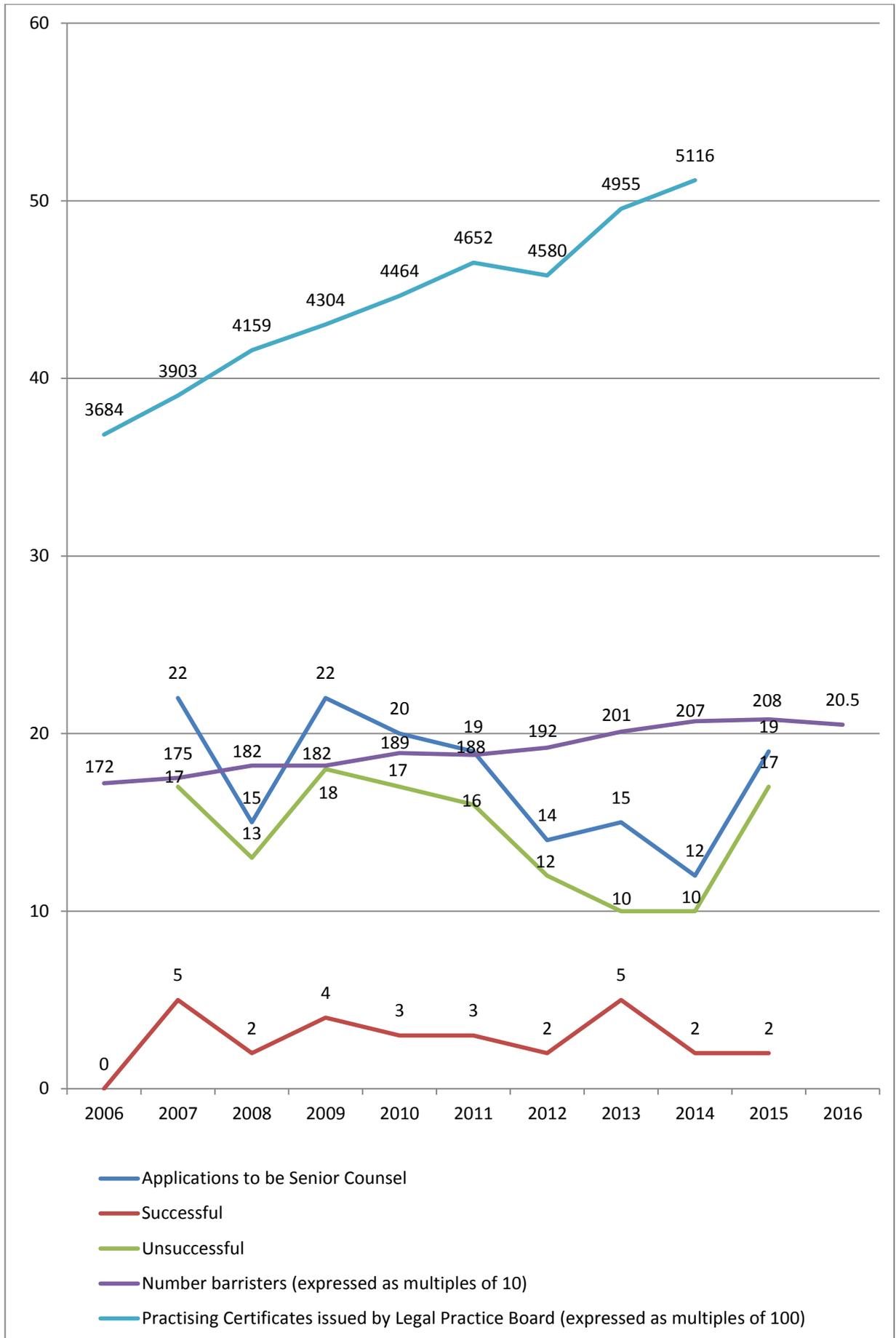


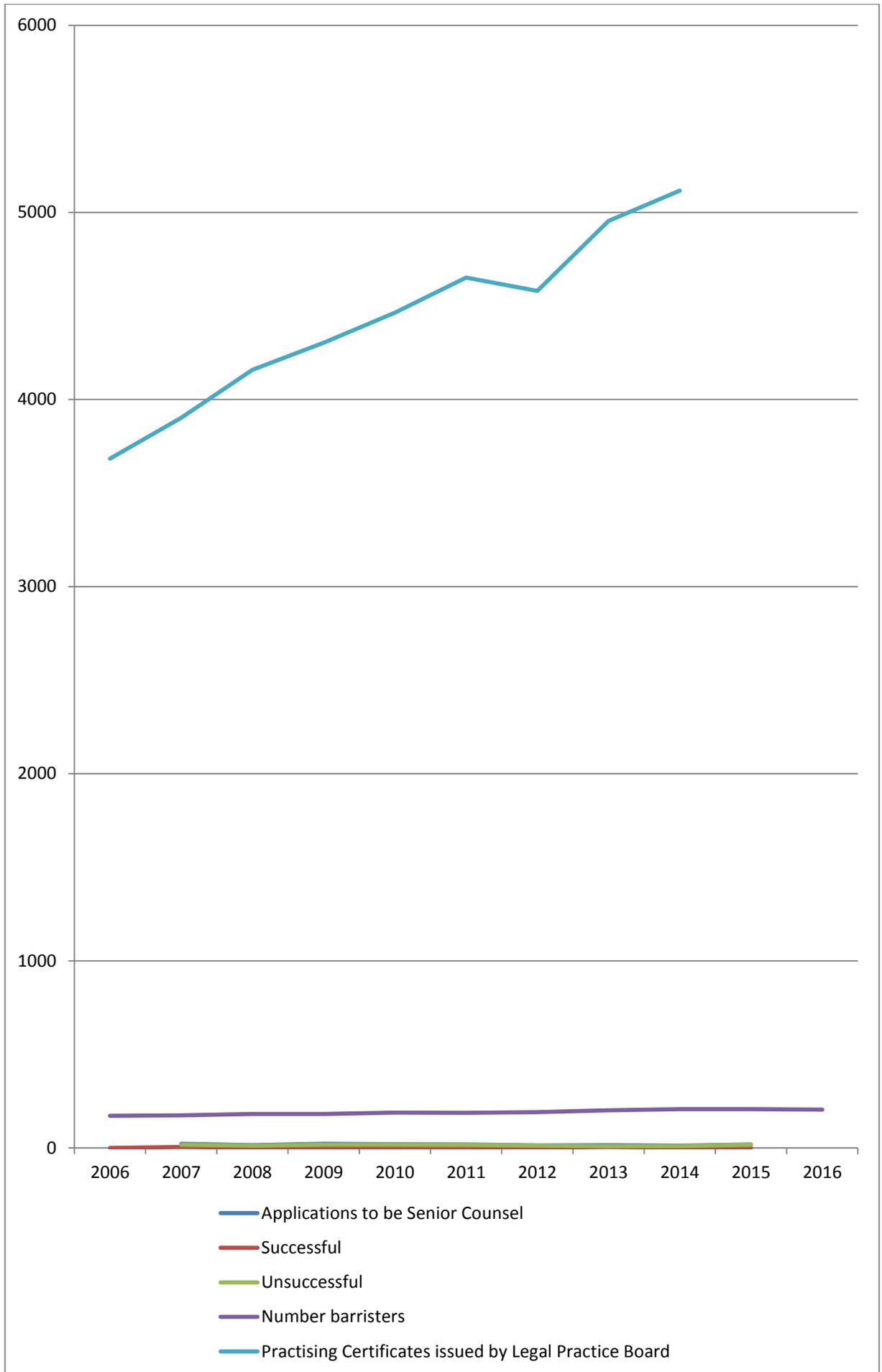
266 Barristers make up a small proportion of lawyers overall in Western Australia. The charts that follow show how comparatively insignificant they are numerically. Individuals who have applied to be called “Senior Counsel” are small in number (in comparison with the overall size of the legal profession) and the numbers are decreasing. The number of successful applicants for the title “Senior Counsel” is extremely small.

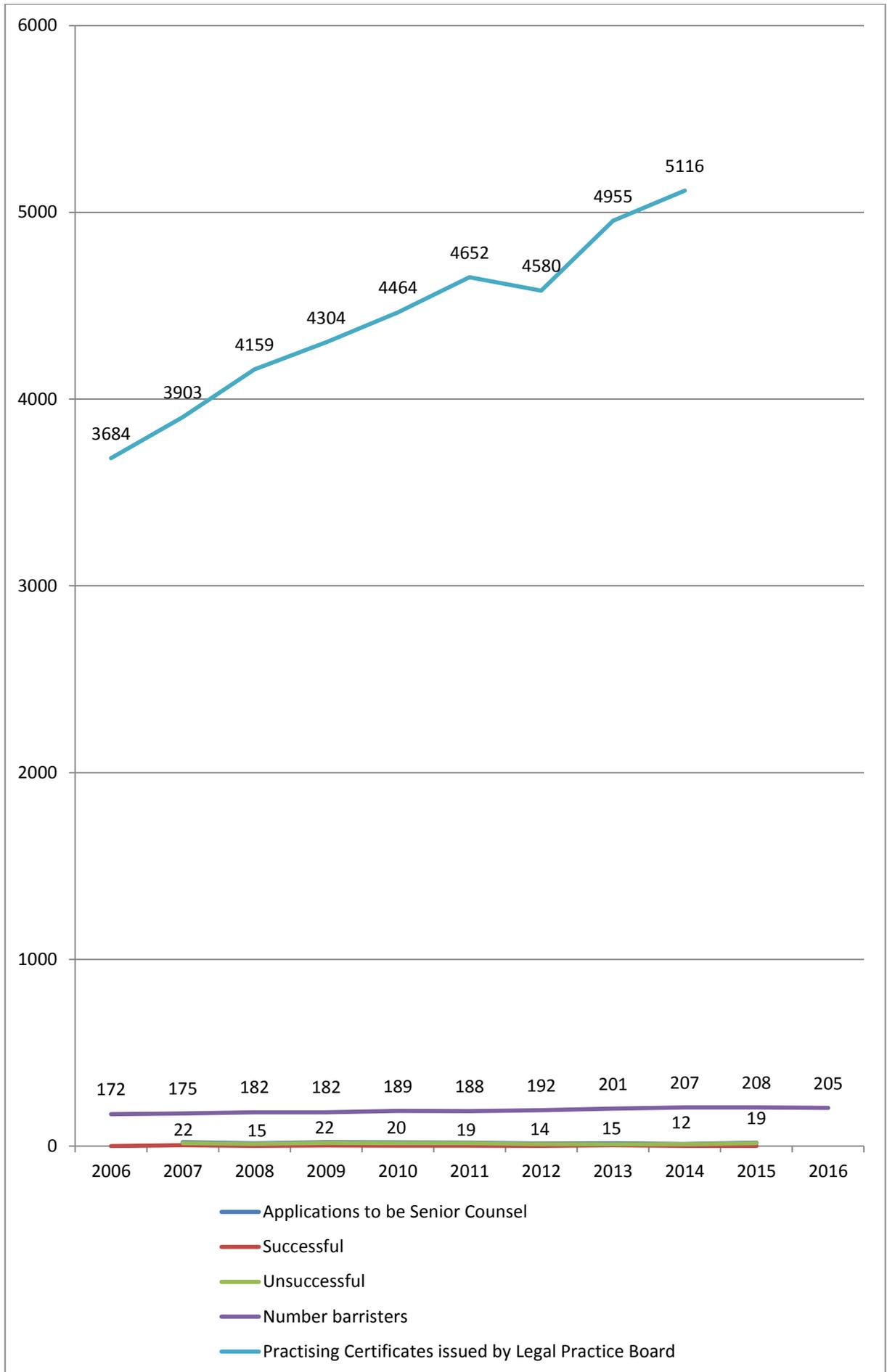
267 Over the past 8 or so years the rate of change of the number of legal practitioners in Western Australia has significantly exceeded the rate of growth of the number of barristers. When shown in absolute numbers the rate of growth of the Bar has been barely discernible.

268 On a trend basis, there does not appear to be any rate of change in the numbers of “Senior Counsel” appointed from year to year despite the growth of the legal profession and the modest growth in the size of the Bar.









Some comparative statistics

269 I have referred to the comparatively small number of successful applications for Senior Counsel in Western Australia, and the apparent trend after 2006 of decreasing numbers of applications.

270 There are data that suggest that in Western Australia the proportion of barristers with the title “Senior Counsel” (including Queen’s Counsel appointed before 2001) is substantially less than in the most populous Australian States of New South Wales and Victoria. There is no public recognition of, or explanation for, this difference which might be viewed as an anomaly.

271 In April 2014 there were 2,189 practising barristers at the New South Wales Bar: *Report to the NSW Bar Council on the suitability of approaching the Attorney General for support for the establishment of a system for the appointment of Queen’s Counsel*, 16 April 2014, LJ Priestley and others. In 2015 24,777 lawyers worked in private, corporate and government sectors in New South Wales: Urbis Keys Young *The Solicitors of New South Wales in 2015*, p41. There were 2,266 barristers at the New South Wales Bar. 375 were Senior Counsel; that is, 1.5% of practising lawyers and 17% of barristers: www.nswbar.asn.au/the-bar-association/statistics.

272 In 2014 there were 1,948 barristers in Victoria and 231 (12%) were Senior Counsel: *The Victorian Bar Inc. Membership Statistics*, July 2014. As at 30 November 2014 the total number of registered practitioners in Victoria was 18,516: www.lsb.vic.gov.au/lawyer-search/-statistics/. The number of Senior Counsel was about 1.3% of the number of registered practitioners.

273 The web site of the Western Australian Bar Association indicates that there are about 200 barristers and 34 (about 17%) are Senior Counsel. Senior Counsel account for about 0.8% of the legal profession in Western Australia.

274 In October 2011 the number of practising solicitors in New South Wales, Victoria and Western Australia were 24,543, 16,407, and 4,038 respectively. The legal professions of New South Wales and Victoria were 6 and 4 times the size of the profession in Western Australia respectively. Assuming this proportion has continued to 2014 the number of Senior Counsel available for each 1,000 practising solicitors was 15 for New South Wales, 14 for Victoria and 8.5 for Western Australia.

275 If the proportions of appointed Senior Counsel to lawyers that exist in New South Wales and Victoria were applied in Western Australia there would be about 58 Senior Counsel in Western Australia. In order to have parity of proportions between these States, under the 2001 system in Western Australia 24 more appointments would have been required. There would be an increase from 0.8% to 1.5% of the legal profession. When expressed numerically, if those in the range are the “best” in the profession, what realistic difference could there be between the top 0.8% and the next 0.7%? Should that decision be left to the intelligence of the market?

Some propositions to consider

276 What follows in this section are propositions that, in my view, ought to be subjected to informed and rational debate or inquiry.

277 Systems that call some but not all senior barristers (or senior lawyers) “Senior Counsel” lack demonstrated empirical justification. Their features differ from jurisdiction to jurisdiction, suggesting there is no ideal formula or process. The systems might be founded more on historical development, assumptions and dogma than evidence. Analogues from other professions are lacking.

278 They also display elements of lack of balance:

278.1 In Australia appointed Senior Counsel comprise a minority of lawyers. However in Western Australia they have a voice in the secretive appointment systems and their views have been prominent in reviews of systems. Their influence is

arguably greatly out of proportion to the weight and value of their numbers. Senior barristers who have applied unsuccessfully to be acknowledged as “Senior Counsel” do not appear to have had a mechanism to give their interests any voice, or any voice of significance;

278.2 Appointment systems, such as the system in Western Australia, protect the comments of consultees (including barristers who have successfully been called “Senior Counsel”) and the decision makers from the application of privacy law and administrative law principles. One rationale is a need to protect “candour”. The systems do not provide an equal measure of protection for unsuccessful applicant barristers against comments that may be inaccurate, unfair, unbalanced or unrepresentative. If there is any feedback on negative comment on an individual (with exceptions in cases of particular reported incidents) it is provided after, and not before, a decision has been made. Absent are basic fairness and accuracy safeguards that lawyers and the community may now expect as standard requirements in other areas of public decision making;

278.3 Barristers who successfully navigate these systems receive formal and public acknowledgement through conferral of a title. A large number of talented and experienced senior skilled barristers, who have not successfully navigated the path, do not receive any formal appreciation and acknowledgement of their value to the workings of systems of justice, to the profession and to the public. This cannot be justified on a ground that they are “unworthy” or lack “requisite skill”;

278.4 The value of appointed Senior Counsel to systems of justice is a reason espoused by some to justify maintaining these appointment processes. Senior skilled and experienced barristers, as well as solicitors, contribute greatly to the workings of systems of justice. That value should also be acknowledged. Justice will not fail if Senior Counsel were no more.

- 279 Reverting from the term “Senior Counsel” back to the archaic “Queen’s Counsel” will be irrelevant to most lawyers. The comparative disadvantages to unlabelled skilled and experienced barristers will remain.
- 280 Basic economic theory says that lesser numbers of appointed Senior Counsel in a context of fixed demand for the services, may (if not, will) result in adjustment upwards of fees for services to the advantage of those on the advantageous supply side. It will result in less competition, and less choice and potentially higher costs for the legal profession and consumers of legal services.
- 281 Issues that may require empirical study are whether and to what extent appointed Senior Counsel charge at a higher rate than non-appointed peers, how soon after appointment increases occur in the fee rates quoted by new appointees, and whether there is any evidence of anticompetitive behaviour among appointed Senior Counsel to maintain higher fee levels.
- 282 A Chief Justice, or committee of judges, should not make decisions that confer a status title on some lawyers over others and that have the potential to produce anti-competitive outcomes. For every advantage of status that is bestowed by a judge or judges there will be a corresponding disadvantage bestowed on potential competitors.
- 283 In Western Australia the number of barristers who have been called Senior Counsel by the system that has been in place since 2001 appears disproportionately low in comparison with numbers in other States. This kind of outcome exacerbates comparative competitive disadvantage and the problem of reduced choices and higher fees for the profession and the public. There is a paradox that the unrecognised senior barristers must work harder on their skills and quality of work to try to be competitive. They may be competing with Senior Counsel from their own State and with Senior Counsel from other States.

284 Numbers of applications for appointment appear to have shown a decreasing trend. What is the explanation for this?

285 In my view there is a significant number of outstanding senior lawyers at the bar in Western Australia who are not called Senior Counsel. They are not lesser lawyers (and not less “worthy”) than appointed Senior Counsel. This apparent anomaly has been recognised and asserted to me by a number of senior solicitors over a number of years. I do not accept that it can be explained by notions of elitism, or by assertions that the selection process in Western Australia is more rigorous than elsewhere or that some barristers are less “suitable” or “worthy” or lacking skill.

286 If these systems are to survive standards should be the same across the country and applicants should not be prejudiced by their selection of home State. If the sparse legal framework in Western Australia suggests anything it is that Senior Counsel are to be treated in Western Australia as equals irrespective of State of origin and appointment.

287 Also, there are many talented and highly skilled lawyers who are not at the independent bar. Why are they not able to call themselves “Senior Counsel” if factually that is so? Why does, and why should, a Practice Direction of the Supreme Court have a monopoly on conferring the right to use that term? The much vaunted justifications of independence and availability apply to barristers but have nothing to do with words selected for a title.

288 What must be examined are the criteria for appointment, the extent to which they are factual and concrete, how they can be established by evidence, what evidence should be submitted, how and by whom the evidence will be evaluated, procedural fairness in cases of negative comments, the rationale for confidentiality (and particularly, who and what is being protected), whether and why there is rational value in a wide consultation if the process is fact and evidence based, provision of written reasons, and review to correct unfairness or error.

289 Australian States, and Western Australia in particular, have not kept pace with the reforms that have occurred in England and Wales. In Ontario Canada the solution adopted many decades ago was abolition.

The future

290 Options for the future in Western Australia might be:

290.1 Independent review;

290.2 Joint review by Law Society and Bar Association (by a group that reflects in a representative way the composition of the profession);

290.3 Change the 2001 system in identified areas – they might include all or some of selection criteria, decision maker(s), guidelines for the decision maker(s), guidelines for consultees (or assessors), guidelines for applicants, reasons for decision, review mechanism, and accountability (including independent inspection or audit, or review);

290.4 Change the 2001 system to appointment by independent panel;

290.5 Abolish the 2001 system with retrospective or prospective effect;

290.6 Replace the 2001 system with a system of appointment of Queen's Counsel by the Executive;

290.7 Do nothing – agree with the opponents of reform and preserve and continue the 2001 system.

My recommendation

291 In Western Australia the Law Society and the Bar Association should have a long term strategy to effect abolition of a system of preferment of some lawyers over others. When it occurs it should be with retrospective effect.

292 While it continues, or if abolition is not preferred, the system should be substantially reformed following the example of England and Wales. Western Australia should have a system that is superior to systems that have been abolished or reformed and appropriate

to a modern legal profession and judicial system. This would entail appointment by independent panel and guidelines and safeguards of the kind that have been implemented in England and Wales; but tailored and streamlined to suit Western Australian conditions. The focus must be on facts based on supporting evidence and by reference to a portfolio of work that demonstrates legal experience, skill and advocacy in many trials and appeals over many years.

293 Fourteen years ago I advocated that we should not endorse or replicate the old system of appointing Queen's Counsel. That view did not prevail then and it has not yet prevailed. The abandoned system has continued in a modified form and with a change of title and a consultative committee of judges added. My hope is that the profession and the judiciary will choose to effect change and we will not wait another fourteen years (adopting the words of the Hon Justice McKechnie) before we consign "this colonial remnant to the dustbin of history".

Geoffrey Hancy

30 June 2015

** Figures in tables updated in December 2015*