A review of the Senior Counsel Protocol

By the Hon Roger Gyles AO QC

I have reviewed the New South Wales Bar Association Protocol for the Appointment of Senior Counsel and the related administrative arrangements at the request of the Bar Association. Having done so, I recommend as follows:

- That a distinguished person, who is not a practising barrister, be added to the Selection Committee with a non-deliberative role.
- That the form of application for appointment as senior counsel should be reviewed and framed to refer to the actual performance and practice of the applicant in a manner capable of being verified and assessed. This recommendation should be implemented forthwith.
- That the process of consultation and assessment be altered so as to be more closely tailored to the particular application than now.
- That the form of paragraph 7 of the protocol be reconsidered.

I have also drawn attention to some issues requiring further consideration.

Background

The present system was introduced after the then New South Wales Government ended the system of appointment of queens counsel by the Executive Council on the recommendation of the attorney general after appointments were made in 1992. The New South Wales Bar Association then developed a system for the selection and appointment of barristers to be designated as senior counsel by the president of the association. The principles governing that process are set out in the Senior Counsel Protocol which was last revised on 2 July 2008. That protocol is available on the website of the New South Wales Bar Association.

The silks ceremony in the High Court of Australia, 1 February 2010. Photo: courtesy of ID Photographics.

The change in system is not as great in practice as might appear. For many years, it had been the practice of successive attorneys general to seek the recommendation of the president of the New South Wales Bar Association as to those to be appointed as queens counsel. The president consulted widely before making the recommendation. It was rare for the attorney general to depart from the list recommended by the president. It has been a very long time since any attorney general has had sufficient personal and current knowledge of the bar to make the selection.

However, the relatively smaller number of applicants, coupled with the smaller bar and somewhat less specialisation, meant that the president in those days was likely to have a closer knowledge of the capacity of the applicants than is the case now, and was able to target consultations more closely to the particular applicants than has been the case in recent years. The increasing size of the bar, the proliferation of courts and tribunals, increasing interstate and international work and greater specialisation have complicated the identification of appropriate candidates.

The process is also complicated by the increase in the sheer number of applicants. Last year, 120 barristers applied. That reflects, in part, the significant lessening of the risks to the practice of a successful applicant for silk, and thus to his or her ability to make a living, than hitherto. In earlier times, queens counsel could not appear without a junior (the two counsel rule) and the junior was to charge two-thirds of the fee of the senior (the two-thirds rule). Taking silk meant a major change in the style of practice and the effective level of fees charged. The two-thirds rule broke down first. The two counsel rule was removed later, although it continued to have force through custom and practice. It

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is, of course, to be expected that many cases – or advices – will require two or more counsel and the appointment of silk should still indicate those capable of being leading counsel in such cases. The practice that senior counsel would not draft pleadings and affidavits and would rarely become involved in interlocutory applications has waned. The net result is that senior counsel can continue to do a junior's work charging junior's fees if he or she fails to attract work as leading counsel. Thus, there is little financial risk involved in making an application. The increasing ratio of publicly funded positions, particularly in criminal law, has the same effect.

As governments around Australia followed the New South Wales example, other states and territories developed their own response – all have retained a system of appointment of senior counsel, administered somewhat differently.

There has been public criticism of the system from time to time – usually by or on behalf of unsuccessful applicants. The protocol has been revised from time to time. The Honourable Trevor Morling QC undertook a review of the protocol and reported in March 1999. The public criticism of the system, both here and in Victoria (in relation to the somewhat different system applying there), has become greater over recent years. There has been media interest in the issue.

Present system

It is worth setting out some key aspects of the protocol. The purpose of the appointment is set out in paragraph 2 of the protocol:

> The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

Paragraph 4 provides that:

> Appointment as Senior Counsel should be restricted to practising advocates, with acknowledgment of the importance of the work performed by way of giving advice as well as appearances in courts and other tribunals.

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The essential criteria for appointment are identified (in paragraph 6) as learning, skill, integrity and honesty, independence, disinterestedness, diligence and experience.

Paragraph 7 is somewhat controversial, providing:

> Senior counsel will have demonstrated leadership in:
>
> - developing a diverse community of the bar; or
> - making a significant contribution to Australian society as a barrister.

The protocol provides for a Selection Committee (paragraph 9) which in turn chooses a Consultation Group (paragraph 11). The Selection Committee can summarily reject an application (paragraph 16) but must seek comments on all remaining applicants from the Consultation Group (paragraph 17) and from the Judicial Consultation Group (paragraph 18). The Selection Committee may consult with other persons (paragraph 19) and consult again with any of the persons from whom comments have been received (paragraph 20). The committee then makes final selection (paragraph 21). The chief justice of New South Wales has a veto (paragraphs 22 and 23).

A copy of the Cover Sheet for Senior Counsel Application 2009 which is to be attached to an application together with a Guide to Practical Aspects of the Appointment of Silk in New South Wales promulgated by the president in July 2009 are available on the New South Wales Bar Association website, and can be regarded as incorporated by reference in this report. These documents flesh out the relatively general provisions of the protocol.

In 2008 127 barristers applied and 645 judges and other members of the profession were consulted as part of the consultation group and the judicial consultation group. Fourteen applications were successful.

In 2009 there were 120 applicants, 648 persons consulted and 18 applications were successful.

There has been a rise in the ratio of senior counsel to junior counsel in recent years – from 11.3 per cent in 1990 to 15.2 per cent now.

Review procedure

At the time of engagement I was provided with documents relevant to the current procedure, the Morling

review, protocols from interstate and the United Kingdom, and a number of communications from members of the bar over the last couple of years which were critical of the process, together with some responses on the part of the association.

On 9 December 2009 the president notified members of the bar that this review was to take place and called for expressions of views by the first week of February 2010. It was later made clear that submissions could be sent directly to me. Time for submissions was extended, and I received some as late as early April. Overall, 50 submissions were received from members of the bar, including a submission from a former chairman of the Victorian Bar, some of which incorporated the views of others or represented the views of a section of the bar. As might be expected, most of those submissions offered criticisms of the present system with varying degrees of severity. Some were from disappointed former applicants, but many were not. Most of the submissions, including those from disappointed applicants, were well thought out, well presented and constructive in suggesting improvements or alternatives. I also received a number of solicited and unsolicited comments in the course of discussions with members of the judiciary and the profession, including solicitors. Further material was received from interstate and the United Kingdom.

The president of the association briefed me as to the detail of the handling of the applications in 2009. I spoke with a number of those who had been members of the Selection Committee recently. I consulted senior judges in all of the courts – state and federal – exercising jurisdiction in the state. I also consulted the president of the Law Society of New South Wales. I have taken into account my own experience over the years as a barrister and judge in observing the outcome of the process, as an office bearer of the New South Wales Bar Association and as a regular consultee thereafter.

Most members of the profession have not responded. Even though that may partly spring from apathy (and in some cases a concern not to be identified as a trouble maker), it must be taken to reflect a reasonable degree of satisfaction with the present system. I will not endeavour to summarise all of the issues canvassed and views expressed. They were many and varied, and some were directly in conflict with others. I shall identify the issues which I regard as significant and discuss them in the light of the material gathered without attempting to summarise or deal with all that has been said in relation to them.

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Should the appointment be abandoned?

A small number of persons were in favour of abandoning the appointment of senior counsel. A small number favoured reversion to the system of appointment of queens counsel or at least the use of the title queens counsel (citing the recent New Zealand experience). One respondent proposed replacing the present system with a form of specialist accreditation. Cogent arguments were advanced in favour of each proposition. However, my review is about the method of appointment of senior counsel rather than whether there should be such appointments. Whilst such questions will, no doubt, remain live, I do not sense a significant groundswell in favour of radical change at the moment, particularly as the system continues interstate and overseas – and has relatively recently been introduced in Singapore.

Are the criteria right?

The statement of the purpose of the appointment of senior counsel and the essential criteria stated in the protocol are basic to the system. There has been some criticism of the detail of this part of the protocol. That is inevitable. If the protocol were being re-written, there would no doubt be a range of legitimate views about the drafting. In my opinion, a strong enough case for change has not been made out in general. This part of the protocol differs to some extent from the matching provisions in the protocols of other states and territories.

It would be better to have a uniform approach, particularly because of the arrangements for mutual recognition between states and territories and the move to a national profession. That goal should be pursued. I would not suggest any change to the New South Wales protocol in the meantime on that account.

The basic principle enunciated in the protocol is peer group identification of those with individual merit and integrity for the benefit of the public in choosing

counsel – principally solicitors and their clients. That justification for the system has not been widely questioned.

A suggested alternative is to appoint all who apply after a lengthy minimum of years in practice who demonstrate a viable practice and integrity. That would be a radical departure from a long tradition in New South Wales, and is likely to confuse potential clients. It should only be considered if the present system breaks down.

Two issues of principle are raised about the essential criteria. The first is that there is no proper, perhaps any, recognition of barristers who practise in the field of mediation. The second is that there is a tension between the criteria in paragraph 7 and the balance of the criteria and, in particular, the statement of the purpose of appointment. I will return to discuss those two difficult subjects later.

General method of appointment

The president of the association makes the appointment on the advice of the Selection Committee. An alternative which is current in some states is appointment by the chief justice of the state. The chief justice has never appointed or recommended silk in New South Wales, by contrast with some other states. It might be thought that appointment by the chief justice would quell controversy, particularly about partiality and bias. This has not proved to be the case, as events in Victoria over recent years have demonstrated. The chief justice would not have sufficient personal experience of the applicants to make the choice, but would have to depend upon a process of consultation. It would be surprising if the chief justice of New South Wales would be willing to undertake a task not hitherto undertaken in circumstances likely to involve the Court in controversy. This is a New South Wales Bar Association scheme – albeit taking over the historical role of the attorney general – and, as such, it is appropriate that the appointment be by the president of that Association. I do not detect any pressure for a change in the appointing authority. As things stand at the moment, I see no basis for the kind of bureaucratic structure erected in the United Kingdom, nor for widening the potential appointees beyond practising barristers as occurs there.

The selection system

The principal complaints about the present system are that it is biased in favour of commercial practices and certain floors of barristers with a preponderance of members with commercial practices, and a corresponding bias against common law and criminal practice, particularly those who practise at trial in the District Court, and against members of regional Bars and women. The system is said to work in favour of members of the Bar Council and those politically active in Bar affairs and to have elements of a popularity contest based on reputation, rather than selection on merit. The system is said to lack transparency with no meaningful feedback to unsuccessful applicants. There is claimed to be a bias in favour of those having a floor connection with members of the Selection Committee.

However, the general opinion amongst those I consulted, confirmed by many of the submissions, even those critical of the present system, is that, by and large, those appointed senior counsel are 'within the range' of those that ought be appointed and have the necessary qualities. There are problems in the criminal area to which I shall return and there was

one recent appointment in a specialist area which is regarded as an aberration. The criticism, rather, is that candidates more worthy or at least as worthy as those selected are not chosen.

It is difficult to assess the claims of bias on any objective basis. I refer later to claimed bias in favour of those connected with the selectors. The reality is that different areas of practice have different demands for the services of leading counsel and different qualities are required for appointment. The most obvious example is the difference in years of experience prior to appointment between commercial silk and common law silk. Commercial silk have been appointed with fewer years of experience than common law silk for as long as I can remember. That is because court-craft gained from years of experience at trial is considered by briefing solicitors to be relatively more important for a common law silk than for a commercial silk.

I was not presented with any evidence that applications by women have been less successful than might have been expected on a systematic basis, indeed the evidence is to the contrary. The proportion of women applicants who succeed is far higher than that of men, in recent years. However, overall, the proportion of women silk to juniors is significantly less than that for men. That is not surprising in view of demographics – the age and experience profile of women would be younger than men and the rates should steadily improve as time goes on and the proportion of women in the eligible group becomes higher. The problem is exacerbated by the tendency to appoint women silk to the bench as soon as possible. I return to this topic later.

Photo: ID Photographics

There have been relatively few appointments from regional Bars. That has always been so and reflects the kind of work available at those Bars and the more limited practices that develop. This leads to more limited exposure of those practitioners to the judiciary and profession at large. The decline in substantial common law cases heard in regional centres over recent years has probably increased the difficulties.

A common criticism of the present system is that it measures reputation rather than performance. A related criticism is that the process of consultation is superficial and comparative rather than focussed upon the practice of the individual applicant. I shall deal with these issues as the discussion proceeds.

Selection Committee

The main issues concerning the Selection Committee are whether members of the Bar Council should be members of the committee, and whether the committee should include (or be comprised of) persons who are not practising barristers. I do not think it is practical to do anything about the complaint that the selectors chosen have not been sufficiently representative and are too narrowly based upon the commercial chambers located in Phillip Street. If a selection of members of the committee is to be made, it should be made by the president of the bar who bears responsibility for the appointments. It is neither practical nor desirable to endeavour to prescribe categories which should be represented on the panel. Even if it were practical, there would have to be an expanded number of selectors. This would increase the chance of compromise and horse trading inevitable in any committee system. This should be avoided as it would inevitably lead to appointments being made that are not appropriate. The risk of that happening which exists under the present committee system would be magnified if there were a quasi representative selection panel. Having said that, a prudent president would take into account the diversity of practice at the bar in choosing members of the Selection Committee.

No doubt a selection panel could be envisaged which is composed entirely of, or had a majority of, members who were not practising barristers, but who could have knowledge and experience of a relevant kind. That group could then consult with those able to assist in relation to the candidates. That model was no doubt worthy of consideration when the system was established, and may still be. However, in my opinion, the criticisms of the present system are not sufficient to warrant a wholesale

change from peer assessment to that model.

No committee of an appropriate size will have sufficient knowledge of candidates to act on its own experience. Consultation, and the assessment of the results of the consultation, must be a critical feature of the system. However, the current knowledge and experience of the practising members of the Selection Committee is an important part of the process. That very knowledge and experience may involve the possibility of actual or unconscious bias playing a part. Some statistical evidence was presented said to bear that out, which has not been refuted as such on the part of the association. Having spoken to some Selection Committee members, I have no doubt about the diligence and sense of responsibility with which the task is approached. In my view, the combination of experience, knowledge and responsibility inherent in peer group selection clearly outweighs the risk of bias. Provided that the committee is sensibly chosen and that there is a reasonable turnover of membership each year, the possible effect of bias should be minor. It is suggested that selectors should not participate in relation to members of their own chambers. I do not agree that there should be such a rule. The essence of peer review is knowledge of candidates – the closer the better. The choice of chambers connection is arbitrary. A selector may have closer relationships with other applicants than with floor members. Indeed, by no means all floor relationships are unduly friendly. Such a mandatory requirement is impractical in a peer review system. However, I can imagine circumstances where it would be appropriate for a selector to refrain from contribution in relation to a particular candidate. On the other hand, confidence in the system would be enhanced by having a distinguished person other than a practising barrister as a non-deliberative member of the committee, and I so recommend. That person should be charged with observing the process to monitor integrity.

The present consultation process was widely criticised. The obtaining of yes, no or not yet responses from so many consultees about so many applicants on the one form does have the appearance of superficiality, particularly where a number of criteria need to be satisfied.

I was surprised by the number of respondents who were against any Bar Council member being a member of the Selection Committee. However, that was far from a majority view, even amongst the relatively small proportion of barristers who did respond. I do not think that a sufficient case has been made for that change.

Consultation and assessment

The present consultation process was widely criticised. The obtaining of yes, no or not yet responses from so many consultees about so many applicants on the one form does have the appearance of superficiality, particularly where a number of criteria need to be satisfied. The consultees are only given a list of names with the address of chambers and broad statement of areas of practice for each applicant. The applicant is able to provide more relevant information, but that does not form part of the wide consultation process. That concern is somewhat alleviated by the present requirement that a respondent should not answer except on the basis of experience of an applicant within the last 3 years, except in special circumstances. There is also much misunderstanding as to the use that is made of the results of consultation. Analysis of the results does provide much useful information in a time and cost-effective way. The selectors can, and do, take account of the identity and position of those who have contributed in relation to a particular applicant and can, and do, personally discuss an applicant with a consultee if the occasion arises. The analysis of the results of the survey is a starting point rather than an end point. The committee can, and does, make its own enquiries. The process is by no means as mechanical as is thought by many. Nonetheless, responses to the questionnaire are likely to be impressionistic and influenced by reputation; not that the repute and standing of an applicant is irrelevant. By and large, lack of 'ticks' or the presence of negatives are a significant factor in the decision-making. The lack of reasons makes meaningful feedback difficult.

A sense of perspective needs to be retained. A thorough individual examination of 127 candidates is a major exercise. Current experience is that consultations result in the identification of a small number of candidates – usually less than 10 – who receive close to universal support. There is a large group who clearly do not

command sufficient support. This leaves a group of varying size, but perhaps 20 or 30, about whom there are mixed messages. Whatever system is chosen, there needs to be a judgment call as to those who do and do not survive closer scrutiny. Whatever system is chosen, a number of those who are rejected will be aggrieved when they compare themselves with those who succeed.

One solution would be to limit appointment to those receiving close to universal approval in a relevant field of practice. That would enhance the standing of the office and, over time, would probably reduce the number of applications. That approach would no doubt be attacked as elitist and protectionist. Neither argument holds sway with me. Any merit-based appointment can be described as elitist. The number of senior counsel seems to have proportionally increased over recent years, and there is an increasing proportion of senior counsel who do not practise as leaders of the bar as envisaged by the protocol. I have not heard any suggestion that there is a dearth of available senior counsel, particularly as appropriate counsel can be obtained from interstate in the event of a particular shortage developing. However, some candidates of real merit might be overlooked in a more restrictive approach. Whilst there may be a case for setting the bar for selection higher than it has been over recent years, the difficult task of assessment of those in the grey area would still need to be done, even if the grey area might be smaller in size.

The present consultation procedure is probably the most efficient way of conducting a 'yes', 'no' or 'not yet' system. It is a useful filtering process but in my opinion is no longer suitable as a major component of decision-making.

I agree with the predominant view of respondents that assessment of an application should be more closely aligned to the actual practice and performance of the applicant. The applicant should demonstrate the case for appointment based upon his or her actual practice and performance and that case should be scrutinised by the selectors. I note that both the United Kingdom and Queensland bars have moved in that direction with the applications requiring a good deal of detail. I do not favour moving as far down that track as the United Kingdom. The required detail there is extensive and complex. Indeed, a business of coaching candidates has developed. This may be explained by the size, diversity and geographical spread of the United Kingdom Bar. I recommend that this change be instituted this year, whether or not other recommendations are accepted. Even if the present system is retained, the Selection Committee would be much better informed about the applicants than they are at present.

A number of respondents have made suggestions as to the required information and the methods of assessing it, and some have urged that there be an interview with the candidate. Before descending to that kind of detail, it is necessary to consider the ramifications of the general approach. It can be taken that the consultation group for a particular applicant would be closely tailored and may involve opponents, barristers and solicitors with whom the applicant has worked, and judges or tribunal members before whom the applicant has appeared.

A threshold question is whether the bar has the resources to institute such a system. It would be more resource-demanding than the present system. It would require more staff administration than at present if the task of the Selection Committee is to be kept within reasonable bounds. Dealing with 120-odd applications would be daunting indeed. However, the number of applicants would probably drop when the need to have a fully justified application with chapter and verse as to the extent of the applicant's practice to be given and investigated is appreciated. It is also both feasible and appropriate that a substantial fee be charged to all applicants in order to fund the necessary resources. If that has the effect of deterring some fringe applicants, so be it.

In that system the focus would be more closely upon the qualities of the candidate as such rather than the current system which, to an extent, can be seen as a kind of contest between candidates. As there is no support for a quota of senior counsel, it does not matter whether in the result, few or many are chosen in a particular year. It would also enable more useful feedback to unsuccessful candidates.

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The present system of consultation could be used as a filter for identifying those candidates about whom detailed consideration is appropriate this year as an interim measure while the consultation and assessment process is developed and the place of the present survey assessed. Since the system has been set up, and the results are capable of helpful analysis, its use should not necessarily immediately be discarded. If that is not done, there should be an initial cull of those whose applications simply do not measure up to the required standard on any reasonable view prior to more intensive consideration of applications.

I thus recommend that approval in principle be given to requiring that an application for appointment as senior counsel be framed to refer to the actual performance and practice of the applicant in a manner capable of being verified and assessed. I recommend that the process of consultation and assessment be altered so as to be more closely tailored to the particular application than now. If that recommendation is accepted, there is a good deal of detailed work to be done. One issue will be the tension between genuine consultation on the one hand and transparency to the candidates on the other. Many respondents may be reluctant to give frank opinions if they are to be disclosed to applicants. A number of the respondents have made detailed suggestions worthy of consideration which can be extracted, if appropriate. Two particular suggestions are worthy of mention.

The first is that there should be no annual lodging of applications by a fixed date with one announcement of results for the year. Applications could be made at any time and dealt with individually or in smaller groups. That would emphasise the individual assessment of applications and would alter the competitive nature of the present process. That would be likely to reduce the sense of grievance felt by those rejected and reduce the occasion for external interest in the league table of results presently announced. That is the approach in the United Kingdom. Consideration of its introduction should only take place if the recommended principles were adopted and the necessary processes established.

I confess to being troubled by the notion that social opinions or social activism should be regarded as necessary for the appointment as senior counsel.

The second, and more radical, proposal is that assessment of an application be made over a period – one suggestion was two years – during which the practice and performance of the applicant could be monitored. This should be kept in mind as the system develops.

Some contentious issues

Protocol paragraph 7

Some have pointed to the tension between the criteria in paragraph 7, which has little, if anything, to do with performance as a barrister, and the other criteria, which are merit-based, and argue that paragraph 7 ought be removed. Some say that the criteria leads to self-promotion, particularly in relation to election to the Bar Council, with a view to being advantaged in the appointment of senior counsel. It is said to be uncertain in meaning and an example of misplaced political correctness. On the other hand, others argue that the criteria are appropriate but that only lip service has been paid to them.

The content of the two limbs of paragraph 7 is somewhat nebulous. On any view, it is difficult to justify paragraph 7 as a mandatory requirement ranking equally with the qualities set out in paragraph 6. It has certainly not been applied as such in practice. I confess to being troubled by the notion that social opinions or social activism should be regarded as necessary for the appointment as senior counsel. I can understand that leadership in social areas might be regarded as a plus, but it is hardly an essential criterion. I recommend that the form of paragraph 7 of the protocol be reconsidered.

Some of the submissions on this point complained that no real progress has been made in advancing those who are relatively disadvantaged, particularly women and others who have not been able to carry on full-time practice without interruption. Paragraph 7, as framed, has little apparent connection with that issue. Be that as it may, equal opportunity and anti-discrimination is a difficult topic in the field of merit selection – by no means limited to the appointment of senior counsel. It may be accepted that a disadvantaged person of exceptional ability might not develop the largest of junior practices or the widest reputation, but nonetheless be quite capable of handling a substantial case as leading counsel. In addition to women, this could be said of those who have worked overseas

or interstate, those who have been locked in a long case or are members of regional Bars, and so may not have the recognition they deserve among the consultees. I hope that a fully justified application by such a person, properly and fairly scrutinised and assessed, would recognise that capability. In that way, I would expect that such meritorious cases would have a greater chance of success if the approach I have recommended were instituted than at present. However, I do not think that it is appropriate that a candidate who has not demonstrated the necessary capability, whether because of some disadvantage or not, should be given silk in the hope that the necessary capability will develop. Appointment along those lines is likely to bring the system into disrepute.

I said earlier that I detect no bias against women in the process for the selection of senior counsel – rather the contrary. That is not to say that there is no disadvantage to women (and other sections of society) in relation to practice at the bar generally. That issue is beyond the scope of the review.

Mediation

The protocol is framed on the assumption that representing a client as an advocate before courts and tribunals is the core function of senior counsel. That has been the general understanding over time and is likely to accord with the perception of judges, solicitors and the public.

As such, the present criteria do not sit easily with an application by a barrister who specialises in mediation. It is argued in some comprehensive submissions that as mediation is a recognised field of practice at the bar, excellence in that field should be capable of recognition as much as excellence in other legitimate fields of practice at the bar.

I have some knowledge about mediation as practised in New South Wales but I am not confident that I have a sufficient grasp of what is entailed in a barrister's practice specialising in mediation to express an opinion on the issue. The barristers whom I have come across in mediation are involved because they do, or will, represent the client in actual or prospective litigation or arbitration over the dispute being mediated, not because they are experts in mediation. Barristers, of course, act as mediators – as do members of other professions and occupations. I suspect that a barrister would be chosen rather than another professional because of presumed knowledge of the law rather than other qualities. No doubt some people are better mediators than others. However, that skill does not (or may not) reflect the eminence of the person in his or her substantive field.

Mediation has burgeoned in recent years and mores are no doubt developing. The question as to whether skill or eminence as a mediation practitioner should be recognised by the appointment as senior counsel is a policy question which ought to be the subject of separate consideration.

Criminal Practice

There is considerable disquiet about the appointment of silk in the criminal arena. Some judges are unhappy with the standards of advocacy of some appointed as senior counsel; some members of the private profession perceive a bias in favour of the public profession; some members of the public profession are unhappy with the choice of candidates as appointment follows from the bureaucratic allocation of work – particularly between trial and appeal; and those practising at trial complain of a lack of recognition. These problems in part result from changes in criminal practice at the bar in recent times. Solving them is beyond the scope of this review, but they need to be addressed with input from those in that field.