Stop pretending

By Duncan Graham

A fresh group of barristers was recently made silk. They are the first appointees since the senior counsel protocol was reviewed by Roger Gyles QC and amended in accordance with his recommendations. Doubtless, the new process of selection is more rigorous and time-consuming. Keith Mason QC, the 'non-practising barrister' observer on the Senior Counsel Selection Committee, said the process was 'exhaustive'. In greeting the new silk, Chief Justice Spigelman described the system as being 'much more rigorous' than the 'considerably less transparent' process of old.

Although revamped and much improved, the system remains fundamentally unfair. The reason for this is simple: while many of the criteria are verifiable, the most critical factor is what colleagues and judges think of an applicant. That can never be anything but a subjective opinion and prone to palpable or subconscious bias. Gyles QC conceded that it was difficult to assess claims of bias on any objective basis. The system will always be unfair until selection is based exclusively on objective, verifiable criteria. In a branch of a profession which champions the principles of natural justice, it is puzzling why selection of 'outstanding' practitioners rests on the say-so of peers rather than on the satisfaction of objective, provable factors.

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The quest for objectivity is worthwhile. Its attainment is not illusory. Gyles QC received submissions on the need for verifiable criteria.[1] His recommendations went some way to that end. For instance, he suggested that the form of application should be reviewed and amended to ensure that the application was made in 'a manner capable of being verified and assessed.' This recommendation was adopted. It enabled the selection committee to check some of an applicant's assertions, but it did not make the selection itself based on verifiable factors. The real issue is ensuring that the selection is carried out in 'a manner capable of being verified and assessed' and not just the form of application. That issue has not been addressed.

Senior counsel are meant to be those who display an ability to provide exceptional service as advocates and legal advisers in the administration of justice.[2] The overarching criterion is therefore excellence. The current process apparently selects candidates who are 'in the range'.[3] Near enough is not good enough. Excellence should be capable of proof and not something seen in the eye of the beholder.

At present, there is a positive onus on an applicant to demonstrate that he or she has satisfied to a high degree the essential criteria of learning, skill, integrity and honesty, independence, disinterestedness, diligence and experience.[4] An applicant must also prove leadership in developing the diverse community of the bar, or in making a significant contribution to Australian society as a barrister.[5] The only proof applicants can offer is a statement of how long they have been a barrister, what qualifications they hold, and what experience they have had (hearings, important cases). They can also

demonstrate how they have served the Bar Association. That is as far as objective criteria go. Their suitability is then polled, and further culling occurs after members of the selection committee talk to unidentified persons about the applicant. Both the poll and the discussions are purely subjective. Those surveyed may answer 'yes' or 'no' or 'not yet'. It is impossible for any selection committee member to test the objectivity of the opinions they receive from the poll or orally. They have no idea whether a 'yes' or 'no' response is valid or infected by undisclosed bias. They do not know how any of those polled assess the criteria for silk. Trust is not enough.

Put simply, an applicant may satisfy objective criteria and yet the application may be rejected on the basis that an unidentified third person has told a member of the Senior Counsel Selection Committee that the applicant is not skilful, diligent, independent, disinterested or honest enough. I am not sure how some of these intangible factors can be assessed fairly. I do not know how someone can tell a barrister is not independent or disinterested when many only accept briefs for insurers or on a speculative basis (and, hence, must always have a conflict of interest with a client). Criticisms levelled at a barrister may be very serious. In an adversarial system, there must always be a risk of personality clashes, animosity, professional jealousy, etc. There may be a dislike of the applicant's personality, or a desire to protect one's own practice. Of course, there may be many valid reasons why a third person may have a negative opinion about an applicant (e.g. lack of trustworthiness). But it is impossible for a committee member to ascertain where the truth lies, particularly if the survey shows polarisation of views. There is a real risk of unwitting discrimination against applicants with mental illness (an unknown explanation for personality clashes beyond the 'bad hair day' referred to by Mason QC) or based on an applicant's sexuality. The Senior Counsel Selection Committee may have no knowledge of a particular applicant and thus must rely on the views of third persons. No professional organisation would tolerate a system which permits an unidentified third person to criticise, defame or misrepresent the qualities of an applicant and for this to pass as a proper basis for identifying excellence. It is no more than a glorified job application where referees are rung up for their feedback on a particular applicant.

To think that those consulted will provide uniformly fair and appropriate appraisals of applicants is to live in a world where a frog could turn into a prince if kissed. It is time to stop pretending that this consultation process is anything other than subjective and often unfair, particularly when there is no right of review or a right to receive reasons or to know what has been said and by whom. In addition, stop pretending this is a system that recognises real expertise. The vast majority (or even all of those) consulted approach their task intending to be fair. But it is basic to the human condition that subjective factors may influence the advice given to the committee. The cases on bias teach us this much at least.

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Having identified the problem, it is difficult to gain any momentum for change within the Bar. Most criticisms of the system are from rejects[6] and dismissed by many as 'sour grapes'. Those already senior counsel are unlikely to be interested in change. Others are fearful of criticising the process on the basis that it will cruel prospects in the future. This is hardly a satisfactory environment in which to have proper debate on the system. The apathy of which Gyles QC referred to in his report is also understandable. I doubt it reflects satisfaction with the system, other than from those who have already passed through it.

If there is to be debate about the system, then the first question is to ascertain whether silk are relevant to contemporary practice.

For the appointment of silk to be relevant, the position must satisfy some valid public interest or need. Barristers provide professional legal services and assist in the proper administration of justice. Consumers of barristers' services are solicitors and, either directly or indirectly, members of the public. This means that it is necessary to view the system from the perspective of the consumer of legal services rather than internally from peer perspective within the bar.

of acknowledging expertise and excellence and of communicating that fact to consumers. I do not think it is. The reason is that members of the public, and probably the majority of solicitors, have no idea how senior counsel are selected. They cannot identify (particularly after the event) whether valid, relevant criteria have been satisfied so as to ensure the best counsel are selected. The letters 'SC' tell a consumer nothing about the qualifications, training or experience of the particular barrister.

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How do clients or solicitors view the position of senior counsel? In simple terms, senior counsel are held out to, and perceived by, consumers as experienced experts in particular fields of practice or as experienced and more skilled general advocates. They are held out to consumers to be the best in their fields. The question is whether the present system is the best way

Gyles QC vaguely referred to the public's need for silk in his report when he said:

> 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.

The purpose is therefore to help consumers in 'choosing counsel'. It is unclear what this means. Is the public served by silk selected by peers through the present system? There can be little doubt that there is a need for consumers to access acknowledged experts in particular fields of practice. Consumers also are likely to have a need to access the very best and the most experienced advocates in a particular field or generally. The fact that senior counsel are able to charge higher fees and lead other counsel is proof that some type of specialist system is not only tolerated, but desired, by consumers.

If there is a need for a system giving acknowledgement to expertise and experience, then it must be a system that can be trusted by consumers of barristers' services to result in the appointment of the right people. This can only exist if the selection of barristers with additional expertise and experience is based upon objective, tangible and verifiable factors.

What are verifiable, objective factors? This needs to be reviewed and debated. They could include the following:

- number of years of practice (say, a minimum of 15 years);
- number of years of practice in a particular area of law (say, a minimum of five to 10 years);
- a log demonstrating a prescribed minimum number of first instance trials as junior counsel and as sole counsel in various jurisdictions;

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- a log demonstrating a prescribed minimum number of contested interlocutory arguments;
- a log demonstrating a prescribed minimum number of appeals as junior counsel and as sole counsel;
- evidence of number of briefs per annum (taking into account the applicant's area);
- qualifications – including qualifications additional to a law degree in specialist areas;
- no history of professional complaints; and
- no convictions.

The current requirement for a log of the previous 12 months' work is a step in the right direction, but is far too short. Keith Mason QC's 'insider' comments about the lack of trial experience ignores the changing landscape of commercial and common law litigation. The majority of cases settle at mediation. Many barristers ran a significant number of cases earlier in their practices before alternative dispute resolution became mandatory. To suggest such an applicant lacks trial experience based on the last 12 months is not only unreal, but unfair. There is also a tension between the ethical obligation of barristers to try and resolve matters and the demand for trial experience. To obtain greater exposure to the judiciary, barristers would need to run cases that could be settled, contrary to the barristers' rules. Anyone with passing knowledge of contemporary practice must know that, for many, it largely involves advice work, mediations and arbitrations.

At present, a barrister is only able to hold himself or herself out as a specialist if he or she has both relevant expertise *and* experience or is a specialist under a scheme conducted by the Bar Association.[7] No specialist scheme exists other than that for the appointment of silk. It is not enough to hold yourself out as a specialist to say you have been practising in an area for a certain number of years unless you also have relevant expertise. What expertise is required? There is no guidance. Does it mean a law degree or does it mean a law degree and, for example, a Master in Taxation to be a specialist taxation barrister, or a law degree and a medical degree to be a specialist in medical negligence? It is unclear and unsatisfactory. Are silk the only barristers allowed legally to hold themselves out as specialists? If they are, then the system is flawed in relation to the recognition of specialist practitioners.

Gyles QC's terms of reference did not include whether the system of silk selection should be abolished or whether some other type of system should be introduced in its place or in combination with it. That inquiry should occur. At the very least, there should be a further review of the process to ensure decisions are made in 'a manner capable of being verified and assessed'.

Endnotes

1. Such as from this writer.
2. Paragraph 5 of the Senior Counsel Protocol.
3. Gyles QC report.
4. Paragraph 6 of the Protocol.
5. Paragraph 7 of the Protocol.
6. Like me.
7. Section 86 *Legal Profession Act* 2004.

Editor's note

The article 'Stop pretending' was prepared for publication during the 'caretaker period' immediately before the new Bar Council was elected.

In these circumstances the outgoing president of the time, Tom Bathurst QC, did not believe it appropriate to make a detailed comment on matters raised in the article. However, Bathurst did say that whilst there are inevitably difficulties in relying on subjective appraisal of applicants for appointment as senior counsel, the alternative suggested by Mr Graham would seem to substitute a mechanical procedure that may raise more problems than it might solve.

Mr Graham's comments, along with the comments of any other person who believes the silk process could be approved, will be considered by the new Bar Council as part of the annual review of the protocol, which will take place early in 2011. Members are encouraged to express their views to the Bar Council.