Silk selection is a smooth process

By Ian Harrison SC

Every year in October the newly appointed senior counsel are presented with their scrolls by the chief justice of New South Wales. The ceremony is simple but the occasion is always well attended and has a significance which transcends the evening itself. Those who are successful applicants for silk are unlikely to pause to reflect upon, or to question, the process which led to their appointment. The same cannot be said for the far greater number of applicants who are unsuccessful and who in varying degrees have to come to terms with often very significant feelings of disappointment and rejection or being left to speculate about why they should have missed out. In my opinion, it is unsatisfactory for anyone whose application for silk is unsuccessful to have to speculate about anything. My purpose is to attempt to clarify how the process works, how the silks protocol is applied, to offer some transparency where confusion often exists and to give some possible guidance for those who wish to apply in the future.

The present system for the appointment of senior counsel has been in operation now for twelve years. In 1993 ten senior counsel were appointed. In the years since then the numbers have varied but, on average, have been in the order of approximately twenty three senior counsel appointments per year. The numbers appointed in each year are themselves no guide to prospective applicants and say nothing about the likely appointments in the following year. The process is not burdened with a quota which either has to be achieved or cannot be exceeded. Applicants who attain an appropriate level of support are appointed without regard to what will then become the number of appointments in that year. If the system were to operate in any other way it would do so unfairly and unpredictably.

The silks protocol provides for the distribution of the names of all applicants for silk in any particular year to a consultation group. The protocol specifies who should be on the list of consultants in categories which, in broad terms, include judges, senior and junior counsel and solicitors. The list changes from year to year although requiring in some categories the retention of a specified proportion of those who were consulted in the preceding year. In 2003 the number of those consulted was approximately 500. That number was reduced in 2004 to approximately 250. This was done for a number of reasons, not the least of which was to ease the administrative burden created within the offices of the Bar Association by such a potentially large number of responses. The literal application of the protocol would require no more than approximately 120 consultants in any one year.

The Senior Counsel Selection Committee is made up of five senior counsel or queen's counsel including the president, the senior vice-president and three others. Attempts are made generally to include women and men from the major areas of practice. The combinations obviously vary from year to year and historically the make up of the committee has included new members each year.

As is well known, those who are consulted for their opinions are asked to proffer, in the case of any one applicant, a response from a list of four categories being 'Yes', 'No', 'Not yet' or 'Not known'. In previous years a column for comments was also included. I decided this year to discard the comments column. I did this for the reason that the inclination of anybody to write negative or positive comments about a particular applicant universally corresponded to a 'No' or 'Yes' response in that case. The strength of some comments had the potential to inflame or seduce in a way which could add undue weight to the value of the opinion of any person consulted.

I have spoken to a large number of those who applied for silk in 2004 and who were unsuccessful. I invited such meetings and, contrary to popular belief, they were generally pleasant and informative. There were some exceptions, but that is not a matter for adverse comment. The general misconceptions about why an applicant may have been unsuccessful seem to be the following.

First, many unsuccessful applicants feel that they could not have been known by sufficient people on the consultation group and therefore could not have been given exposure to enough people genuinely able to comment upon their application. This view is often associated with the misconception that a successful application requires the attainment by any particular applicant of a specified minimum number of favourable responses in order to succeed. This is wrong. For example, for applicants whose principal area or areas of practice lie in narrow or less well-known disciplines, it is often the case that the total number of responses received will have been small. What is stressed in such cases is the ratio of supporters to detractors. An applicant who receives a very low total turnout in responses of any colour will nonetheless be favourably considered if the proportion of responses for outweighs those against by a reasonable margin. The wisdom that informs this approach is obvious enough. Even though an applicant may be not widely known, those who do know her or him, and who are able to express views, thereby give a reliable indication of suitability or otherwise.

Secondly, some applicants have suggested that, for one reason or another, respondents from the consultation group are expressing opinions either against her or him out of spite or malice or in circumstances where they should have declined to do so because they had absolutely no knowledge of the applicant at all. From my experience, this view, although potentially comforting to unsuccessful applicants, is ill-founded. If it were present it would operate, for example, to favour applicants who generally were regarded as not ready or

not qualified for silk in that year or vice versa. This would have the anomalous effect of both including in and excluding from the list of successful applicants those who should not have been included or excluded as the case may be. Whilst it is true that comment is made each year upon who was successful and who wasn't successful, the list of silks generally receives widespread acceptance. Certainly the list in 2004 appears to have been received in this way. Moreover, this view of how some judges and members of both branches of the profession would treat the important task of responding contradicts the responsible way in which members of the consultation group appear year after year to perform their task.

Thirdly, many unsuccessful applicants 'know' from canvassing those who they discover have been consulted that they should have received more support than their unsuccessful application appears to indicate. In my experience, no unsuccessful applicant should ever assume that what she or he is told by anybody who was consulted is always accurate. Responses from the consultation group are not anonymous and are known to the selection committee in every year. These responses are destroyed once the statistics are compiled as the maintenance of confidentiality and the anonymity of respondents is essential to the continued good operation of the system.

Fourthly, many unsuccessful applicants have no proper understanding of the strength of opinion against them. Many unsuccessful applicants maintain a belief that a power of veto exists, or that they are the victim of some real or imagined long-festering or recent enmity created as the result of a victory over a member of the inner bar who happens to be on the consultation group or the successful prosecution of an appeal from the decision of a trial judge who has also been consulted. Sometimes these applicants are very surprised to learn that the ratio of responses in their favour to responses against them has been as high as 1:4 or 1:7 or more. Whatever subjective material the silks selection committee can call upon to advance the interests of an otherwise apparently worthy candidate for silk, responses in numbers from the consultation group in ratios of that order effectively obliterate any prospect of the committee's deliberations producing a favourable outcome.

This, in my opinion, is the singular strength of the present system. Whereas prior to 1993 the bases upon which queen's counsel were appointed were shrouded in mystery, or at least not measurable by reference to a set of criteria which were published and widely available, the present system operates within a known framework. It has to be assumed that responses for and against candidates are given with a knowledge of the protocol, what it requires and how it applies. The system would degenerate into a morass of subjective preference if considerable weight were not given to the expressed views of the consultation group. To the eternal credit of almost every unsuccessful applicant who came to speak to me about their application this year, those who were told that they were, in effect, soundly rejected by those who responded, were more satisfied to know the harsh truth than to have been given no real indication of why they had failed.

In my experience, many unsuccessful applicants lack insight about their own abilities, the impression they leave with opposing counsel or the regard in which they are held by judges before whom they appear. One applicant one year 'understood' that all judges in that person's area of practice had supported the application. In fact, the complete opposite was true. The view we all have of ourselves often stands in the way of an acceptance of such revelations. Information of this sort, however, can often form the building blocks of a successful application in years to come.

The decision made in 1993 to replace the appointment of queen's counsel by a process effectively owned and controlled by the Bar Association was courageous at the time. Those with the foresight to have conceived it have, in my opinion, been vindicated. All of us have, from time to time, harboured fears that the system was afflicted with frailties and weaknesses that produced favourable and unfavourable results which often were misunderstood and could not be justified. My close association with the operation of the system over the last three years at least has confirmed my view that it operates fairly and has inherent strengths which far outweigh any weaknesses which may exist. It is sometimes argued that too many silks, measured as a proportion or percentage of the total number of members of the Bar at any time, devalues the currency. There is some force in this argument. However, if appointment is to be upon the basis of merit it cannot be constrained by considerations which are not related to merit. Continually unsuccessful applicants will serve their cause best by mollifying their outrage at the 'unfairness' of the silks selection process and by coming to terms with the fact that a significant majority of judges, senior and junior barristers and solicitors who are asked whether they were appropriate candidates for silk simply said no. It is a mistake to assume that unsuccessful candidates, who some people feel passionately have been passed over year after year on inexplicable grounds and for un-stated reasons, are in truth the victims of an unfair system. As harsh as it seems, and as harsh as it is in fact, unsuccessful applicants for silk should not necessarily feel that they have been the victim of discrimination or prejudice or that they are a statistical casualty.

Finally, my experience with past members of the selection committees on which I have served is that they have all come to the task with some trepidation, but have left it with a sense of confidence in the way it works. One senior counsel described membership of the selection committee as the most satisfying contribution that that person had been able to make to the Bar Association. I have never received a negative comment. If the process can be improved then it should be. I am not persuaded that a better system has yet been identified.