

NOTICE TO PROFESSION

SOLICITORS' USE OF THE TITLE "SPECIAL COUNSEL"

For several years, it has been common for a law practice to describe some employed solicitors as "Special Counsel" or "special counsel".

There does not appear to be any established or uniform process by which an employed solicitor is accorded the title of "Special Counsel" or "special counsel", nor any identifiable or commonly applicable criteria governing the use of the titles.

Some concern has been expressed by members of the profession that use of the term "Special Counsel" to describe a legal practitioner conveys the notion that the person concerned possesses a high degree of experience and expertise as counsel or in one or more particular areas of legal practice. It signifies a differentiation, based on merit, between a person of that status and another employed solicitor within the legal practice and the profession generally.

There is a view that when the title is used in combination with nominated areas of law in which the person concerned practises, the expression is apt to convey that the person concerned is a specialist in those areas, both in terms of experience and expertise. The title attributes a distinct quality to the person as regards practising in the nominated areas. It conveys the notion that the person is deserving of special status as regards his or her capabilities, on account of experience and expertise, in those nominated areas of practice.

As the Legal Practice Board of Western Australia (**Board**) has some concerns regarding the use of "Special Counsel" or "special counsel", it has sought and received advice from Senior Counsel as to whether use by solicitors of either title breaches rule 45 of the *Legal Profession Conduct Rules 2010* (**Rules**) or section 18 of the *Australian Consumer Law* (**ACL**).

Advice from Senior Counsel

In summary, Senior Counsel has advised the Board:

- Whether use of the titles is misleading or deceptive or likely to mislead or deceive will depend upon the facts and circumstances applicable to the entire context in which the title was used with reference to a particular person, especially the level of experience and expertise of the person concerned. It is not possible to conclude that the use of either title itself is necessarily misleading or deceptive in all cases.

- There is proper ground for concern with the description of solicitors as “Special Counsel”, in circumstances where there is no definite and uniform system or criteria by which the designation is used.
- Long experience in a field of practice does not necessarily lead to the practitioner concerned gaining expertise in the area. Claims of expertise are difficult to justify, especially in circumstances where a practitioner’s work is not exposed to any or any significant objective scrutiny.
- If a law practice uses the titles without any proper assessment of the specific skills of a practitioner with respect to relevant practice areas, the use of the titles could well be misleading or deceptive in a given case, contrary to rule 45 and section 18 of the ACL. The use of the titles in advertising that promotes legal services would be conduct in trade or commerce.
- In the absence of an appropriate and objective system for use of the titles, it seems that there is obvious potential for widespread misleading use of the titles. Accordingly, it would be appropriate to amend the legislation to specifically prohibit the use of the titles absolutely or to prohibit them in the absence of some appropriate system, preferably involving distinct criteria for the selection of those to whom the designation is to be accorded an objective, independent scrutiny of the selection process.
- On balance, Senior Counsel has recommended prohibition, as permitting use of the titles with an appropriate selection system would only be satisfactory if the Board had supervision of the process. It would be a considerable undertaking to establish and maintain such a system.

Feedback from the profession

In the circumstances, the Board is seeking the views of the profession before making any possible recommendations to the Attorney-General regarding the amendment of the legal profession legislation prohibiting the use of the titles.

Accordingly, the profession is invited to make submissions to the Board with respect to this matter by Monday, 22 October 2018.

Any submission should be forwarded by email to general@lpbwa.com with “Use of the title Special Counsel” in the subject line.