ISSUES PAPER

THE OFFICE OF QUEEN'S COUNSEL IN NSW

BACKGROUND

The office of Queen's Counsel (or King's Counsel) was instituted in NSW in the nineteenth century. In 1835 the Supreme Court authorised W C Wentworth to wear a silk gown as a "patent of precedence".[1] The first verified appointment in NSW of Queen's Counsel was John Hubert Plunkett in 1856.[2] Appointments as QC (or KC) in NSW continued up until and including 1992.[3]

From 1956 the system involved individual applications to the Bar Council, which would provide the Attorney General with its view of the suitability of applicants. In doing so, the President was required to consult with those Bar Councillors who were not members of the inner bar and Councillors of not less than ten years' standing at the bar.[4] Subsequently the range of people consulted by the President was expanded to include a wide range of members of the bar and the judiciary.[5]

Although the President's recommendations were ordinarily accepted by the Attorney, this was not always so. From time to time the Attorney General would add certain members of the Executive Government, such as Crown Prosecutors or Public Defenders, to the list before it was submitted to the Executive Council.[6] There were other instances in various jurisdictions of individuals who were not recommended by the Bar Council being added to the list[7], and of Attorneys General refusing to appoint individuals contained in the recommended list.[8] The Attorney General would then recommend the list of applicants to the Governor-in-Council for appointment.[9]

1993 Legal Profession Reforms

In November 1992, the then Attorney, the Hon John Hannaford MLC, released an Issues Paper entitled "The Structure and Regulation of the Legal Profession". The Paper was issued in the wake of some controversy regarding the appointment of non-barrister Attorneys General as

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[1] J M Bennett (ed), A History of the New South Wales Bar, Law Book Company 1969, p236

[2] J M Bennett, letter published in (1994) 68 *ALJ* at 477

[3] J M Bennett (ed), A History of the New South Wales Bar, Law Book Company 1969, p236 , p237

[4] Ibid, p 241

[5] Ruth McColl "Appointment of Senior Counsel", (1994) 68 *ALJ* 471

[6] Gleeson CJ, address to 1992 Queen's Counsel, Banco Court, 10 December 1992. Published in (1994) 68 ALJ 471-2.

[7] In NSW, then Attorneys the Hon Frank Walker MP and the Hon Peter Collins MP in effect appointed themselves Queen's Counsel in 1982 and 1991 respectively. Neither were barristers at the time. There are similar instances in other jurisdictions, including the appointment of the Hon Shane Stone MLA as a QC in the Northern Territory in 1997.

[8] For example, the non-appointment of Jon Tippett in 2000 by the then Northern Territory Chief Minister and Attorney General the Hon Denis Burke MLA.

[9] J M Bennett (ed), A History of the New South Wales Bar, Law Book Company 1969, p241

Queen's Counsel over the preceding decade, and the NSW Law Reform Commission's Report "Legal Profession: General Regulation and Structure".[10] The Law Reform Commission report had recommended that the office of Queen's Counsel should be opened up to solicitors, academics and non-practising barristers. Attorney General Hannaford's Issues Paper specifically raised the prospect of legislation to extend the Government's powers so as to be able to appoint "outstanding practising solicitors" and "eminent non-practising barristers or solicitors" as silk.[11] In the alternative, the Issues Paper also questioned whether the Government should be involved in bestowing the title at all.[12] The Paper raised the following specific questions:

Should the title of Queen's Counsel be retained? If so, should the range of persons appointed be extended to lawyers other than practising barristers?[13]

Shortly thereafter, the Premier, the Hon John Fahey MP, announced that the Government would no longer make recommendations for the appointment of Senior Counsel.

The last appointments of NSW Queen's Counsel were made by the Governor-in-Council in late 1992.

In October 1993 the NSW Government introduced the Legal Profession Reform Bill 1993. The Bill included a specific provision, proposed section 38O, which expressly removed the role of Government in the appointment of senior counsel.

Attorney General Hannaford's Second Reading Speech, delivered on 16 September 1993, relevantly stated:

New section 38O abolishes the prerogative of the Crown to appoint Queen's Counsel and provides that executive and judicial officers have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners…..It will not prevent the legal profession establishing its own schemes for recognition of status or expertise.

In his speech in reply in the Legislative Council on 28 October 1993, he went on to say:

The Government does not believe that it is appropriate or relevant in today's society to maintain a system of patronage for selected lawyers. Of course, the bar is at liberty to introduce its own scheme of senior counsel, and I understand that it intends to do so. This is an appropriate means of establishing a peer recognition system.

The Bill, including proposed s38O, passed both Houses of NSW Parliament and received Royal Assent on 29 November 1993.

In the period leading up to the introduction of the Bill, the Bar Council, in consultation with the Attorney General, developed an alternative system for the recognition of eminent counsel.

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[10] *First Report On the Legal Profession: General Regulation And Structure*, NSW Law Reform Commission Report 31, 1982.
[11] Attorney General's Department, "Issues Paper: The Structure and Regulation of the Legal Profession", November 1992, p33.
[12] Ibid, p33.
[13] Ibid, p34.

A Committee chaired by Sackar QC, also comprising Nicholas QC, B W Walker and A J Meagher (as they then were), reported to Bar Council in February 1993.

The Committee recommended a replacement system for the appointment of Senior Counsel, and the substance of its recommendation was adopted. Subsequently the Bar Council approved a protocol for the appointment of Senior Counsel in August 1993.[14]

The system for the appointment of Senior Counsel, with various refinements, continues until the present day.

DEVELOPMENTS IN OTHER JURISDICTIONS

Following the establishment of the system of Senior Counsel in NSW, the other Australian jurisdictions followed suit over the next two decades.

Queensland introduced a system of Senior Counsel appointments in 1994, the ACT in 1995, Victoria in 2000, WA in 2001, Tasmania in 2005, the Northern Territory in 2007, and finally, South Australia in 2008. The Commonwealth replaced QC with SC in 2010.

The majority of these jurisdictions established systems whereby Senior Counsel appointments were ultimately made by the Chief Justice. Only NSW and the ACT adopted a process independent from the Courts whereby appointments are made by the President on the recommendation of an independent Selection Committee.

Up until late 2012, a system for the appointment of Senior Counsel applied in every Australian jurisdiction.

At a national level, the Australian Bar Association resolved to work towards a national uniform system for the appointment of senior counsel. The New South Wales Bar Association's Strategic Plan, endorsed by Bar Council on 11 October 1992 provides that one of the Association's three principal objectives in achieving a national legal profession is "To achieve a national, uniform system for the recognition of senior counsel". The Bar Council has also resolved that, recognising it is a long term project, the NSW Bar should press the Australian Bar Association to push for a national scheme of silk selection – and the common use of the title 'Senior Counsel'.[15]

However, since that time, significant changes have been announced in two states.

A. Queensland On 12 December 2012 the Hon Jarrod Bleijie, MP, the Queensland Attorney General and Minister for Justice, announced the reintroduction of a system for the appointment of Queen's Counsel in that state. All new appointments would be given the title "Queen's Counsel", and current Senior Counsel would be entitled to have their title amended to QC if they so wished.[16]

[14] Ruth McColl "Appointment of Senior Counsel" (1994) 68 *ALJ* 473-4
[15] Bar Council minutes, 21 March 2013.
[16] The Hon Jarrod Bleijie Media Release "Queen's Counsels return to Queensland", 12 December 2012.

The system came into force in 2013.

Under the Queensland system for the appointment of silk, appointments are initially recommended to the President by a specialist Bar Association panel ("the Queen's Counsel Consultation Group"), and then in turn recommended to the Chief Justice. The Chief Justice is to provide the Attorney General with a list of barristers recommended for appointment as Queen's Counsel, which is then taken to the Governor-in-Council.

Under the previous system for the appointment of Senior Counsel in Queensland, appointments were made by the Chief Justice after receiving recommendations from the President of the Queensland Bar Association.

B. Victoria

On 3 February this year, the Victorian Attorney General the Hon Robert Clark MP announced that Victorian Senior Counsel will in future have the option to be appointed as Queen's Counsel upon application.[17]

The proposed Victorian system will not change the current arrangements under which barristers are appointed as Senior Counsel by the Chief Justice with the support of an advisory committee.

However, existing and future SCs who wish to be appointed as Queen's Counsel will be recommended to the Governor for appointment upon application. Existing and future Senior Counsel who wish to continue to be known as SCs will be able to do so.

Unlike the Queensland model, the Victorian proposal simply enables Senior Counsel to elect to apply to the Governor-in-Council for recognition as Queen's Counsel. Under the new Queensland system new silks have no option but to accept an appointment as Queen's Counsel.[18]

ARGUMENTS FOR RE-INSTATEMENT OF QUEEN'S COUNSEL

Proponents of the reversion to the use of the title "Queen's Counsel" argue that the use of the title brings practical benefits.

Both the Queensland and Victorian Attorneys General have argued that:

- The QC title is more widely recognised and understood as a mark of professional distinction at the Bar[19];
- That the move will provide greater clarity amongst the general public[20];

[17] The Hon Robert Clark MP Media Release "Victoria to give senior barristers option to become QCs", 3 February 2014.
[18] Bar Association of Queensland, Queen's Counsel Appointment and Consultation process", As approved by the Queensland Bar Council 15 July 2013.
[19] The Hon Jason Bleijie MP Media release "QCs restored in Queensland", 7 June 2013.
[20] Ibid.

- That the use of the term provides a commercial advantage, principally in relation to the Asian legal services market (particularly in Singapore and Hong Kong) where the use of QC is preferred[21] ;
- That overseas barristers who hold the title of Queen's Counsel are often regarded by non-lawyer clients as being more senior than Senior Counsel[22];
- That use of the term will avoid confusion of Senior Counsel with other titles such as "Special Counsel" and "The Star of Courage"[23].

At this stage there is no available empirical data available to either support or refute these arguments.

Short of directly consulting with practitioners and others directly involved in the Asian legal services market, it is difficult to reach any precise conclusions as to whether the title "Queen's Counsel" carries greater weight in those jurisdictions. What can be said with certainty is that that the title "Senior Counsel" is used for those silks appointed in Singapore (since 1989), Hong Kong (since 1979) and India (since 1961).

Rather than embark on some speculative consultation process to establish the truth or otherwise of these arguments, the Bar Council wishes to deal with the QC/SC issue promptly and definitively.

THE CURRENT NSW LEGISLATIVE POSITION

Section 90 of the *Legal Profession Act 2004* (NSW) is entitled "Prohibition of official schemes for recognition of seniority or status". It is in precisely the same terms as section 38O of the 1993 Act and provides as follows.

(1) Any prerogative right or power of the Crown to appoint persons as Queen's Counsel or to grant letters patent of precedence to counsel remains abrogated.

(2) Nothing in this section affects the appointment of a person who was appointed as Queen's Counsel before the commencement of this section.

(3) Nothing in this section abrogates any prerogative right or power of the Crown to revoke such an appointment.

(4) No law or practice prevents a person who was Queen's Counsel immediately before the commencement of this section from continuing to be Queen's Counsel while a barrister or solicitor.

(5) Executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners.

(6) Nothing in subsection (5) prevents the publication of a list of legal practitioners in the order of the dates of their admission, or a list of barristers or solicitors in the order of the dates of their becoming barristers or solicitors, or a list of Queen's Counsel in their order of seniority.

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[21] Ibid; The Hon Jason Bleijie MP Media Release "Queens Counsels Return to Queensland", 12 December 2012.
[22] The Hon Robert Clark MP Media Release, op cit.
[23] The Hon Jason Bleijie MP Media release "QCs restored in Queensland", 7 June 2013.

(7) In this section:

executive or judicial officers *includes the Governor, Ministers of the Crown, Parliamentary Secretaries, statutory office holders, persons employed in the Public Service or by the State, an authority of the State or another public employer, and also includes judicial office holders or persons acting under the direction of the Chief Justice of New South Wales or other judicial office holder.*

Queen's Counsel *means one of Her Majesty's Counsel learned in the law for the State of New South Wales and extends to King's Counsel where appropriate.*

It seems clear that section 90, in particular subsections (1) and (5) above, would not only prohibit a scheme of appointment for Queen's Counsel along the lines of the Queensland model, but also the kind of optional scheme for appointment on the approval of the Governor-in-Council proposed in Victoria.

Accordingly, should the Bar Council wish to pursue a scheme for the appointment of Queen's Counsel, section 90 of the *Legal Profession Act* would have to be repealed or substantially amended. In these circumstances, the Bar Council would need to seek the support of the Attorney General, the Minister administering the Act, for such a change, which would then require the approval of State Cabinet, and ultimately the majority support of both Houses of State Parliament.

<u>QUESTION:</u> Should the New South Wales Bar Association approach the Attorney General to seek support for the establishment of a system for the appointment of Queen's Counsel following appointment as Senior Counsel under the existing Silk Selection Protocol?