LJ Priestley QC
Frederick Jordan Chambers
53 Martin Place
SYDNEY NSW 2000

16 April 2014

Mr Phillip Boulten SC
President
New South Wales Bar Association
Selborne Chambers
174 Phillip Street
Sydney NSW 2000

Dear President,

Report to the New South Wales Bar Council on the Suitability of Approaching the Attorney General for Support for the Establishment of a System for the Appointment of Queen's Counsel

Attached is a Report for the consideration of Bar Council from the QC/SC Committee.

As outlined in the Report, the Committee has set out arguments in support of the "yes" case and those in support of the "no" case. The majority were of the view that it was not suitable for the New South Wales Bar Association to approach the Attorney General. The minority were of the view that it was suitable for an approach to be made to the Attorney General.

In the circumstances, the Committee was of the view that it is not appropriate to make a recommendation about the suitability of approaching the Attorney General. The Committee commends the report to the Bar Council.

Yours sincerely

The Hon L J Priestley QC
Chair

REPORT TO THE NSW BAR COUNCIL ON THE SUITABILITY OF APPROACHING THE ATTORNEY GENERAL FOR SUPPORT FOR THE ESTABLISHMENT OF A SYSTEM FOR THE APPOINTMENT OF QUEEN'S COUNSEL

Wednesday

16 April 2014

Committee Members

L.J. Priestley QC (Chair)
Noel Hutley SC
Campbell Bridge SC
Arthur Moses SC
Anthony Lo Surdo SC
Elizabeth Cheeseman SC
Victoria Brigden

Report on Suitability of Approaching the Attorney General for Support for the Establishment of a System for the Appointment of Queen's Counsel

1. INTRODUCTION

1.1 On 24 February 2014, the Bar Council requested comment from members on the desirability of reinstating the use of the term "Queen's Counsel" in NSW. Specifically, the views of members were sought on the following question:

> *"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?"*

1.2 On 14 March 2014 the Bar Association established a Committee "to examine the responses received and report to Bar Council on the suitability of the Bar Association approaching the Attorney-General to seek support for the establishment of a system for the appointment of individuals as Queen's Counsel following their appointment as 'Senior Counsel' under the existing Silk Selection Protocol".

1.3 The task of the Committee therefore was to examine the responses and then report on the suitability of approaching the Attorney-General to seek support defined in the above question.

1.4 The Committee comprised L J Priestley QC (Chair), Noel Hutley SC, Campbell Bridge SC, Arthur Moses SC, Anthony Lo Surdo SC, Elizabeth Cheeseman SC and Victoria Brigden, and was asked to report to Bar Council by 17 April 2014.

1.5 Comments were due to be provided by 17 March 2014 and while the majority of responses were received by this date comments received after this date were also provided to the Committee for consideration.

1.6 At the time of finalisation of this report there were 2868 members of the Bar Association. Of that number, 2189 are practising barristers (class A1 members), 34

are members who previously held a NSW barristers' practising certificate as at the early 2000s but who no longer do (class A2 members), 150 are interstate barristers (class B1 members), 464 are class B2 members consisting of retired barristers, members of the judiciary, solicitors and academics, and 31 are class B3 members (employees of the NSW Bar Association and clerks). Speaking for 308 members (including 38 clerks), 216 responses, had been received. The responses favouring an approach to the Attorney General outnumber those opposing an approach by approximately two to one.

1.7 As the Committee was divided as to how the question put should be answered, it concluded that its report should set out the consideration of all the arguments for and against making the proposed approach, which it has done in separate sections of the report below. The eventual conclusion of the Committee is set out in paragraph 5.1 below. This will return to the Bar Council the responsibility of deciding what in its view is the better course to follow. The intention of the Committee was that its report would provide the Bar Council with a useful summary of all the matters relevant to the making of its decision.

1.8 It is significant to note that the suggestion that a republican or monarchist stance should inform the issue of whether or not the suggested approach to the Attorney General should be made was disclaimed by members of the New South Wales Bar Association on both sides of the debate.

2. THE PROPOSED APPROACH BY THE NSW BAR

2.1 The Committee was unanimously of the view that if the Bar Council decides that an approach should be made by the Bar Association to the NSW Government, such an approach should have the following features:

(a) The model should maintain the Bar's exclusive function of determining, by reference to the criteria in the Silk Selection Protocol, those candidates whose standing and achievements justify recognition as Senior Counsel; and

(b) The model would be on the express basis that a necessary precondition for an individual to apply to be appointed as Queen's Counsel would be to have attained the rank of Senior Counsel in NSW.[1]

2.2 It follows from the Committee's view that it considers that:

(a) The approach would be based upon seeking to preserve and protect the Bar's exclusive function of determining, by reference to the Bar's Silk Selection Protocol, those candidates whose standing and achievements justify recognition as Senior Counsel;

(b) The approach would be based upon seeking agreement with the Executive that appointment to the rank of Senior Counsel by the Bar will be a necessary precondition for any individual to obtain a grant of letters patent for a commission as Queen's Counsel; and

(c) The decision as to whether to seek from the Executive a commission as Queen's Counsel would be at the election of each individual Senior Counsel.

2.3 Such a system would be significantly more robust in terms of transparency and less likely to result in Executive intervention than the system of appointment of QCs that was in place in NSW prior to 1993.

2.4 A relevant matter for consideration is the form that any such system takes, whether by protocol, understanding, convention or legislative provision. Some members of the Committee thought that a legislative constraint upon the Executive from adding to, or detracting from, the list of senior counsel presented to it by the Bar was necessary. Other members did not agree and were of the view that a system

[1] The Committee notes that the question posed by the Bar Association does not suggest that the Bar is considering an approach to the Attorney General which would advocate a return to the system of appointment of QCs that was in place in NSW before 1993.

depending upon a convention, similar to that adopted in Victoria, would be acceptable.[2]

2.5 The form of any protocol, understanding, convention or legislative provision that might be agreed with the Executive as to whether and, if so, on what basis the Executive may decline to grant letters patent to those Senior Counsel who elect to apply for a commission as a Queen's Counsel would be a matter for consultation between the Bar and the Executive.

2.6 It is likely that the form of any such protocol, understanding, convention or legislative provision agreed in NSW may be influenced by what has been agreed in those states that have recently reinstated the office of Queen's Counsel, namely Queensland and Victoria.

2.7 In both Queensland and Victoria, prior to the reintroduction of Queen's Counsel, the role of the Chief Justice in the appointment of Senior Counsel was broadly analogous to the role of the President of the NSW Bar. The appointment model in each of Queensland, Victoria and New South Wales was based on selection of candidates following the application of a published State-based Senior Counsel protocol. The reinstatement of the office of Queen's Counsel has resulted in the following arrangements being put in place in Queensland and in Victoria.

2.8 Unlike in Victoria and Queensland, in order to introduce a scheme for the appointment of Queen's Counsel in New South Wales, legislative amendment would be required[3].

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[2] The following observations made by the Hon Roger Gyles AO QC in the 2010 review of the Senior Counsel protocol undertaken at the request of the New South Wales Bar Association are worthy of note: *"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 Queen's 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."*

[3] That is, the repeal or amendment of s90 *Legal Profession Act 2004* (NSW).

Queensland

2.9 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.[4]

2.10 In Queensland, the new arrangements were settled in consultation with the Chief Justice and the Bar Association of Queensland.[5] From May 2013, all new silks in Queensland are designated as Queen's Counsel. The Bar Association of Queensland remains entitled to determine the process for the appointment of Queen's Counsel so far as that process precedes the recommendation of the Chief Justice to the Attorney-General (referred to below).[6]

2.11 The new arrangements include a requirement that:

> *"The Attorney-General will cause an Executive Council minute to be prepared for consideration by the Governor recommending the issuing of letters patent to each of the applicants whom the Chief Justice recommends and only those applicants.*[7]*"*

2.12 Existing Queensland Senior Counsel were invited to apply for appointment as Queen's Counsel on the basis that seniority would be preserved in accordance with each individual's original appointment as Senior Counsel.[8]

2.13 Provision is also made for members of the judiciary (including retired members) to elect to apply to change from SC to QC.

2.14 The application process provided for:

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[4] The Hon Jarrod Bleijie Media Release "Queen's Counsels return to Queensland", 12 December 2012.
[5] Queensland Government Gazette Vol 363 no 6, cl.3.
[6] Ibid.
[7] Ibid cl.5.
[8] Ibid cl.6-10.

(a) The President of the Bar Council to provide a list of all such applicants to the Chief Justice;

(b) The Chief Justice to then provide a list of existing Senior Counsel who are recommended by the Chief Justice for appointment to Queen's Counsel;

(c) The Attorney-General then submits an Executive Council minute to be prepared *"for consideration by the Governor to give effect to the recommendation of the Chief Justice."*[9]

2.15 The above process resulted in 70 of 74 Senior Counsel in Queensland applying for and being granted appointment as Queen's Counsel.[10]

Victoria

2.16 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.[11]

2.17 In Victoria, the new arrangements which were settled in consultation with the Chief Justice and the Victorian Bar Council[12], were described in broadly similar terms:

> *"...existing and future SCs who wish to be appointed as Queen's Counsel will be recommended to the Governor for appointment upon application."*

2.18 There does not appear to have been any public notice of the process gazetted in Victoria.

2.19 The new Victorian system does not change the current arrangements under which barristers are appointed as Senior Counsel by the Chief Justice with the support of an Advisory Committee.

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[9] Ibid cl.7-10.
[10] Alex Boxall, *Australian Financial Review*, 14 June 2013, quoting Queensland Attorney-General Jarrod Bleijie.
[11] The Hon Robert Clark MP Media Release "Victoria to give senior barristers option to become QCs", 3 February 2014.
[12] Victorian Bar President's announcement of 3 February 2014 and Press Release by Victorian Attorney-General , 3 February 2014.

2.20 Appointment as Senior Counsel in Victoria is governed by rules 14.08-14.10 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008.*[13] Under the Rules, applications for appointment are made in writing to the Chief Justice. Appointments are made by the Chief Justice under the seal of the Court.

2.21 Existing and future Victorian Senior Counsel 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.

2.22 Unlike the Queensland model, the Victorian proposal simply enables Senior Counsel to elect to apply to the Governor-in-Council for appointment as Queen's Counsel. Under the new Queensland system new silks have no option but to accept an appointment as Queen's Counsel.[14]

2.23 No legislative amendments were necessary to effect the new system for the appointment of Queen's Counsel which has been established in Victoria.

> *"The 'Queen's Counsel Application for Appointment: Information for Applicants' published in Victoria provides for a bi-annual opportunity for 'Victorian barristers who have been appointed Senior Counsel under the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 or pursuant to Letters Patent to apply for appointment as Queen's Counsel.'"*[15]

2.24 The appointment is effected by the issue of Letters Patent by the Governor in Council on the recommendation of the Attorney-General. It is stated in the information published for applicants that:

> *"Senior Counsel who wish to be appointed as Queen's Counsel should complete and forward the attached application letter to the Attorney-General. The Attorney-General will then recommend qualified applicants for appointment by the Governor in Council."*

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[13] Rule 14.08 of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic) provides *inter alia* that a person who is admitted to the legal profession in Victoria and who is practising exclusively or mainly as counsel, whether in Victoria or elsewhere within Australia may apply to the Chief Justice to be appointed Senior Counsel in and for the State of Victoria.

[14] Bar Association of Queensland, "*Queen's Counsel Appointment and Consultation Process*", as approved by the Queensland Bar Council 15 July 2013.

[15] Queen's Counsel Application for Appointment: Information for Applicants.

and:

> *"Appointment as Queen's Counsel does not affect an applicant's status as Senior Counsel, and applicants will remain on the roll of Senior Counsel maintained by the Prothonotary of the Supreme Court. The applicant's precedence will remain unchanged.*
>
> *If at any point in the future an appointee as Queen's Counsel wishes to revert to the Senior Counsel designation, the appointee will need to write to the Attorney-General requesting to relinquish the Letters Patent."*

2.25 The Victorian application form for appointment as Queen's Counsel is addressed to the Attorney-General and requires an applicant:

(a) To certify his/her appointment as Senior Counsel;

(b) To consent to the Department of Justice checking that the applicant is currently on the roll of Senior Counsel maintained by the Prothonotary of the Supreme Court; and

(c) To undertake if appointed Queen's Counsel not to use the designation Senior Counsel from the date of his/her appointment.

2.26 It has been reported that by the expiration of the first of the bi-annual windows of opportunity for existing Victorian SCs to apply to be appointed as QCs applications had been made by 88% of all existing Victorian SCs, ie 156 of 177 SCs.[16] It is expected that of the remaining existing Victorian SCs a further number may choose to apply at the next opportunity to do so which will arise in around November 2014.

2.27 Public statements made by the Victorian Attorney-General as to his reasons for working with the Victorian Bar Council on the reforms assert the public interest in strengthening the standing of the Victorian Bar and enhancing the opportunity for the Victorian legal profession to provide services competitively both within Australia and overseas.[17]

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16 Nicola Berkovic, *The Australian,* 14 March 2014.

17 Nicola Berkovic, *The Australian,* 14 March 2014.

2.28 A notable feature of the manner in which this issue has been handled by the Victorian Bar is that the Chairman of the Victorian Bar Council has consistently advocated:

(a) That whereas previously QCs had been entitled to choose to adopt the title, SC, a barrister appointed as an SC did not have that option;

(b) That the invitation by the Attorney-General allows individual members a choice;

(c) That the freedom of choice being introduced recognises that the title of QC is a well understood brand, particularly in some jurisdictions and areas of practice and the choice will now be up to individuals and made possible by the Attorney General agreeing to the legal process which requires the involvement of the Government of the day;

(d) The decision to change to QC or to retain the SC title is a personal one and that the Bar respects every individual's choice. [18]

Foreign Jurisdictions

2.29 A significant number of submissions addressed the issue of Senior Counsel in Asian jurisdictions which are seen as attractive to Australian barristers particularly Singapore and Hong Kong. Accordingly, the Committee undertook some research into the current systems of recognition and appointment of Senior Counsel in the Bars that operate in the following Asian jurisdictions. The primary focus of consideration has been directed to the systems in place in Hong Kong and Singapore, however it is significant to note that Queen's Counsel are not appointed in India, Pakistan, Malaysia or Sri Lanka.[19]

[18] Victorian Bar website messages from Chairman dated 7, 21 and 28 February 2014: http://www.vicbar.com.au/news-resources/from-the-chairman

[19] In other jurisdictions, India has a system of appointment of Senior Advocates. The highest level of advocate in Pakistan is a Senior Advocate of the Supreme Court. Malaysia does not have any system for the appointment of Senior Counsel. In Sri Lanka eminent lawyers equal to the rank of Queen's

2.30 In Hong Kong the rank of Queen's Counsel was granted when it was a crown colony and British dependent territory. Practising barristers were appointed as Queen's Counsel in recognition of their professional eminence by Crown Patent on the advice of the Chief Justice. Since Hong Kong severed ties with the United Kingdom in 1997, barristers have instead been appointed as Senior Counsel. The appointments are made by the Chief Justice of the Supreme Court of Hong Kong, in practice with the input of the Hong Kong Bar Association. Those Queen's Counsel appointed before the change have been renamed as Senior Counsel.

2.31 In Singapore since 1989, the Senior Counsel Selection Committee of the Singapore Academy of Law, evaluates applications and appoints individuals as Senior Counsel. Chaired by the Chief Justice of Singapore, the Selection Committee also comprises the Attorney General and three judges of appeal.

2.32 Thus in both Singapore and Hong Kong individuals are appointed as Senior Counsel not Queen's Counsel.

3. THE YES CASE

3.1 Three members of the Committee supported the "yes" case. They were of the view that there are significant public interests that would be served by approaching the Attorney General to adopt a model for the reintroduction of Queen's Counsel that incorporates the three features set out in paragraph 2.2. The reasons for making an approach to the Attorney General on the basis of a model along the lines of that proposed above are set out below. The members of the Committee who favoured the approach to the Attorney General were of the view that a convention of the variety that exists in Victoria would be acceptable.

Protecting and Improving the Quality of the Legal Services Provided by the Bar

3.2 There is a strong public interest in promoting and enhancing the quality of the legal services offered by barristers in all Australian jurisdictions through the promotion of unfettered and direct competition across state and international boundaries. Ensuring

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Counsel in the United Kingdom hold the office of President's Counsel which is conferred by the Sri Lankan President. There appears to be no equivalent office in Brunei.

that the quality of the Bar is not dampened or diluted by the introduction of an artificial competitive disadvantage[20] through the opportunistic and inconsistent exploitation of the historical and popular resonance of the QC post nominal is important.

3.3 Protecting against the potential dilution of genuine competition at the Bar in a nationally and increasingly internationally mobile legal services market protects and improves the quality of the legal services provided by the Bar. The role that barristers play in the administration of justice and the duties that barristers owe to the court and to their clients are such that there is a real public interest in ensuring that competition between barristers in Australian jurisdictions is free and not artificially constrained.

3.4 The proliferation in the use of conflicting and confusing QC/SC nomenclature within and between Australian jurisdictions threatens to operate so as to distort competition within and between Australian jurisdictions and internationally. With reduced competition comes the risk of reduction in quality. The effect of incoherence in the designation of QC/SCs within and between Australian jurisdictions will in the long term threaten to impact both the courts and the public as users of legal services if quality suffers as a result of competitive disadvantage.

3.5 Based on members' responses there are also real and significant concerns about the potential commercial disadvantage that individual barristers in many practice areas may face vis a vis their interstate QC peers. It is clear that the apprehension of commercial disadvantage is closely related to those practice areas in which there is or is likely to be interstate and or international mobility of practice or where choice of barrister is more likely to be driven by clients who are not necessarily repeat litigators, eg in family law, personal injury or crime. The responses of some members support this proposition.

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[20] The term *"competitive disadvantage"* is used to focus on the public interest against suppressing competition within the bar between and across the states. Comments received by members that oppose the Association making an approach to introduce a system for appointment of QCs tended to focus on the private interests of individuals in not being disadvantaged *vis a vis* their interstate counterparts. Private interests of this nature are described as *"commercial disadvantage"* in this report. The use of the two terms seeks to recognise and differentiate between the public and private interests that are necessarily both involved.

Constraining freedom of choice of barristers

3.6 Concerns were expressed by members supporting the approach to the effect that where there is a diversity of opinion as to whether one should be able to become a QC or remain an SC, it is preferable that members of the Bar have an opportunity to pursue the course which each member considers in his or her best interest. That militates in favour of an approach to the Attorney General.

The current QC/SC alternative post nominals are confusing or not fully understood by consumers of legal services

3.7 A further point of public interest arising from comments received, in terms of promoting the quality of the Bar through open competition, is the desirability of fostering an informed and discerning consumer base for legal services. Enhancing the public's understanding of the legal services market by promoting the consistent use between States of the QC/SC nomenclature would further this interest and promote the making of informed choices by the consumers of legal services.

3.8 The term QC has historical roots both nationally and internationally. A number of submissions suggested that there was a widespread appreciation of the title "Queen's Counsel" that does not exist in respect of the title "Senior Counsel". Some submissions provided anecdotal evidence suggesting that there are two areas of potential confusion. The first is the reported mistaken perception of some that QC designates a barrister of better quality or more experience than an SC. The second is the suggestion that the title "SC" is misunderstood or conflated with the job titles of "Special Counsel" or "Senior Counsel" that are used by solicitors.

3.9 Comments received from members recounted direct personal experience of clients and members of the public evincing and acting on a mistaken belief that QCs were superior to SCs. Examples of the type of direct personal experience recounted in the comments received by members included the following:

(a) A client requiring a QC and not a SC to be briefed for the stated reason that the post nominal QC denotes higher rank/quality:

(b) (b) A client's insistence on retention of counsel to advise or appear with the express stipulation that only those with the title QC would be considered notwithstanding provision of an explanation of the title of SC in both domestic and international contexts;

(c) Direct experience of a public perception that QC is a rank that is distinct from and superior to SC;

(d) Direct experience that consumers of legal services believed that there was a tiered scheme of recognition with QC ranking above SC – in effect constituting two ascending tiers of silk;

(e) Public perception that QC is a rank that is distinct from and superior to SC;

(f) Recounted experience of users of legal services in international markets understanding the rank of QC but not recognising/ understanding the rank of SC;

3.10 As a consequence of the changes in Queensland and Victoria, there is a concern that the opportunities for such occurrences are likely to increase.

Uncertainty arising out of the use of different post nominals

3.11 Prior to the recent implementation of changes in Victoria and Queensland, all Australian States had moved to the exclusive conferral of the title of "Senior Counsel", which leads to the use of the letters "SC". The use of the title "QC" had therefore become increasingly rare. However, that trend has now been reversed. On the basis of the current approaches adopted by Queensland and Victoria the use of a consistent post nominal for silk in Australian jurisdictions is no longer achievable. It is in that context that the present question for the approach to be taken by NSW arises for consideration.

3.12 The recent changes in the entitlement to use the designation Queen's Counsel will expand the range of ways in which the titles of QC and SC will co-exist in Australian jurisdictions.

3.13 It is necessary to note that it has long been the practice in NSW to recognise as Queen's Counsel those barristers who were appointed Queen's Counsel in other States. Originally, interstate Queen's Counsel were recognised as QCs in NSW in the context where silks in NSW also bore the title of QC. The practice of recognising interstate QCs as QCs in NSW continued after the office of QC had been abolished in NSW and is still the practice today. A barrister recognised by the High Court or by a Supreme Court of any jurisdiction as holding the status of Queen's Counsel, is able to use that title in NSW.[21]

3.14 Unless the opportunity to become a QC is afforded to existing and future NSW SCs who currently are not also QCs, those SCs will be exposed to the risk that the proliferation of QCs, both as a result of recent developments in Queensland and Victoria, together with possible usage of the title of QC by persons who have that opportunity for reasons which are explained below, will suffer professional disadvantage. That professional disadvantage is likely to result from:

(a) The misguided perceptions referred to in paragraph 3.9; and

(b) The increasing confusion in the market as to whether QCs and SCs are truly comparable.

3.15 The persons who will be able to compete in the legal marketplace using the title QC will consist of the following classes of practitioners:

(a) NSW QCs appointed prior to the abolition of the office in NSW;

(b) Interstate QCs recognised as such in NSW prior to NSW introducing the title of SC;

(c) Interstate QCs who were appointed in other States after 1993 (when NSW had abolished the office of QC but the barrister's home State had not) and who practice in NSW using the post nominal QC;

[21] The use of the titles Queen's Counsel and QC is specifically addressed in s16 *Legal Profession Act 2004* (NSW) and clause 8 Legal Profession Regulation 2005 (NSW).

(d) Silks who practice either in Queensland or Victoria and NSW and who were appointed SC in their home State (say Queensland for example) and who have since converted to QC and now use QC in NSW;

(e) Silks who practice either in Queensland or Victoria and NSW and who have taken silk recently and been appointed as QC under the new Queensland or Victorian regimes and who are now entitled to use QC in NSW;[22]

3.16 Practitioners can hold titles of QC and SC at the same time. For example, there was until 2001 in Western Australia a convention that an interstate SC would automatically be recognised as a Western Australian QC after appearing in that State. There are therefore NSW SCs (appointed after 1993) who are also QCs in and for the State of Western Australia, and there would appear to be no impediment to such silks shifting between the two titles at will under the present arrangements.

3.17 Under the new systems put in place interstate there does not appear to be any potential for such a NSW SC to be recognised as a QC in Queensland or Victoria and then commence usage of the title in NSW. Indeed, the stated advantage of enabling Queensland and Victorian silk to compete domestically would suggest that it would be counter-productive for either State to adopt a process of appointing NSW SCs as QCs. What may be argued to be a competitive disadvantage imposed by the Queensland and Victorian bars on the NSW Bar would be undermined if such an avenue was available. When considering the competitive disadvantage imposed on NSW by the new regimes in Queensland and Victoria it is noteworthy that as presently framed there does not appear to be any capacity for NSW SCs to be appointed as QCs under either regime. The position at Commonwealth level is unclear but traditionally Commonwealth silk appointments have been restricted to a very narrow class of counsel. It is the group of NSW SCs (present and future) that have no capacity to apply to be appointed as QC who will bear the brunt of any competitive disadvantage that manifests in the domestic and international legal markets.

[22] Commonwealth QCs may also fall into this category, but the numbers are very small.

Use of the post nominal "SC" by non-barristers

3.18 Many of the comments received were to effect that both the users of legal services, particularly in-house counsel and clients, and more generally the public remain confused about the position of Senior Counsel despite it having been introduced some 20 years ago.

3.19 Similar observations were made in both Queensland and Victoria as part of the justification for the new systems instituted in both those States.

3.20 The degree of confusion experienced to date is likely to increase over time as solicitors[23] and in-house lawyers[24] increasingly adopt similar titles such as "special counsel", "senior counsel", "senior counsel – legal", "senior legal counsel" and "general counsel".

3.21 Some members recounted the experience of clients being confused as to the role of silk designated as SC in the context where the solicitor used the title Special Counsel. No QCs who provided comments recounted similar confusion as to the role of the QC and any solicitor designated Special Counsel.

Promotion of National Uniformity in the Legal Profession

3.22 The desirability of uniformity in a national legal profession has long been recognised and is increasingly important in the context of the mobility of the Bar in providing services across all States of Australia. This is demonstrated by the following:

(a) Mutual recognition arrangements;

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[23] The ubiquity of usage is revealed by the following. A search of LinkedIn members with the Job title "special counsel" in the industries of law practice or legal services operating within a 160km range of postcode 2000 results in almost 400 hits.

[24] For example, Linked In listings suggest that each of the following corporates uses the title "senior counsel" to describe their internal solicitors employed in NSW - IBM, Oracle, American Express, Leighton Holdings, GE Mining, CBA, AMP. This list is not exhaustive. A great many more corporations use variants of the job title senior counsel such as "senior counsel – legal" or "senior legal counsel".

(b) The national scheme of uniform regulation expected to commence on 1 July 2014 – on 5 December 2013, the Intergovernmental Agreement on a Legal Profession Uniform Framework was signed by Victorian Attorney-General Robert Clark, and NSW Attorney General Greg Smith SC. At the time the Victorian Bar Chairman released a statement which included the observation that *"uniformity of laws, policies and regulations that govern the profession across the two states will serve the interests of clients, as well as making our profession more competitive internationally"*[25]; and

(c) There is a commitment in the Bar's strategic plan to national uniformity.[26]

3.23 Uniformity in title of membership in the Inner Bar throughout Australia is consistent with that policy of uniformity throughout the profession generally.

3.24 It obviates the perceived risk of the development, or exacerbation, of misconceived distinctions between members of the Inner Bar who are QCs and members who are SCs.

Promoting NSW as a centre for legal excellence nationally and internationally and promoting the export of NSW legal services internationally

3.25 At the time that NSW abolished the office of Queen's Counsel in 1993, the solicitors and barristers of NSW primarily serviced clients within its borders.

3.26 Since that time, it has become commonplace for members of the bar to appear in both State and Federal Courts across the country. There is also a growing incidence of members of the Bar appearing in arbitrations seated in Singapore, Indonesia, Hong Kong and elsewhere.

3.27 A significant number of members supporting the approach have expressed the view that the better world-wide view of the title Queen's Counsel provides an advantage in remaining competitive both on a domestic and international stage. There were

[25] Vic Bar Media Release distributed 6 December 2013.
[26] http://www.nswbar.asn.au/cpdattachs/Strategic%20Plan,%2011%20October%202012.pdf

contrary views expressed by a number of practitioners as to whether the designation QC provides an advantage in international commercial arbitration and litigation.

3.28 There were accounts in the submissions of some members dealing with international situations in which clients were said to have expressed preferences for a QC over an SC.

Approach to the Attorney General is consistent with the objects of the New South Wales Bar Association

3.29 There are significant policy reasons for exploring ways of removing or at least striving to minimise the risk of consumer confusion, competitive and commercial disadvantages arising from differences in the title of silk within and across NSW and other Australian jurisdictions.

3.30 If one accepts the existence of those policy justifications, an approach to the Attorney General would be consistent with each of the following objects of the New South Wales Bar Association[27]:

(a) to promote the administration of justice;

(b) to promote, maintain and improve the interests and standards of Local Practising Barristers;

(c) to make recommendations with respect to legislation, law reform, Rules of Court and the business and procedure of Courts;

(d) to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community;

(e) generally to do all such things as may in the opinion of the Bar Council be of benefit to Local Practising Barristers.

[27] Constitution of the New South Wales Bar Association, clause 3 – Statement of Objects, in particular clauses 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.5, 3.1.8 and 3.1.19.

3.31 These arguments justify an approach to the Attorney General.

4. THE NO CASE

4.1 Four members of the Committee support the no case. They are of the view that such an approach is not justified in the public interest. [28]

The Public Interest

4.2 Barristers in New South Wales are officers of the Supreme Court who owe their paramount duty to the administration of justice.[29] Given the unique role that barristers play in the administration of justice in New South Wales, questions of commercial benefit and status must be regarded as secondary in the present debate.

4.3 The first question is whether the return to a scheme for the appointment of Queen's Counsel in NSW will return to one which involves the Executive Government in the process of appointment and whether there is any public interest in doing so.

4.4 The current system for the selection and appointment of Senior Counsel was introduced in 1993, following consideration by the Bar Council of the public interest to be served by a system for designating eminent Counsel.[30] The public interest in the case of advocates was seen to focus specifically upon "the fundamental social and political importance of an energetic administration of justice and insistence on the rule of law".[31] The question is therefore whether the public interest is served in reverting to a system for the appointment of Queen's Counsel in some form.

4.5 The system for the appointment of Queen's Counsel in NSW in place prior to the introduction of the appointment of Senior Counsel was different from that in all other Australian States. In other States, such appointments were made by the Executive Council on the recommendation of the Chief Justice, but in NSW the making of

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[28] New South Wales Bar Association, Issues Paper, "The Office of Queen's Counsel in NSW, p.6.
[29] *Legal Profession Act 2004* (NSW), s.33 and New South Wales Barristers' Rules 4, 5 and 6.
[30] Bar Council Committee Paper on how the custom of the Crown appointing Queen's Counsel might be replaced, cited in Bar News 1993 Edition 9, "Learned in the Law" – The Transition from Queen's Counsel to Senior Counsel, by Ruth McColl, p. 13.
[31] Ibid., p. 13.

nominations rested with the Attorney General who by convention, was advised by the President of the Bar Association. The Attorney General was at liberty to accept or reject the recommendation and to add to that list which was regarded as an important power of the Attorney-General.[32]

4.6 In other words, the distinguishing feature of the process for the appointment of Senior Counsel in NSW is the removal of the Executive Government from the process. Indeed, s.90 of the *Legal Profession Act 2004* (NSW) prohibits both the appointment of Queen's Counsel and the Executive from conducting any scheme for the recognition or assignment of recognition of status amongst legal practitioners in New South Wales.

4.7 It has been reported that the NSW Attorney General, the Hon Greg Smith SC MP, does not support the reintroduction of Queen's Counsel in NSW.[33] The NSW Shadow Attorney General and Minister for Justice, Mr Paul Lynch MP, has also stated that the Opposition will not support any reversion to the appointment of Queen's Counsel on the basis that he does not see any role for the involvement of the Executive in any such appointments.[34]

4.8 Should the Bar Council decide to approach the Attorney General, the basis of such approach would have to be that referred to in paragraphs 1.1 and 2.1 above. This could result in handing back to the Executive a discretion to accept appointments or add to them, which would be a retrograde step.

4.9 The present system serves the public interest by providing a transparent and independent system for appointment. The public interest would not be served by the dismantling of that system in favour of one that reintroduced a political element into the appointment process. Indeed, the current system is set up with a view to ensuring that it is immune from political interference and that only the best counsel are

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[32] Address of Chief Justice Gleeson delivered on 10 December 1992 at the bowing ceremony for Queen's Counsel appointed that day, cited in in Bar News 1993 Edition 9, "Learned in the Law" – The Transition from Queen's Counsel to Senior Counsel, by her Honour Justice McColl, p. 10-11.

[33] Michael Pelly, "Calling a silk by any other name suggests some are blinded by cash and cachet", The Australian, 21 March 2014.

[34] Media Release, Mr Paul Lynch MP, Shadow Attorney General and Shadow Minister for Justice released on 26 March 2014.

selected for appointment. It is anachronistic to return to a system that entrusts and endows the Executive with power to select those entitled to be recognised as the most eminent members of the profession.

4.10 The alternative is a system akin to the newly introduced Victorian system, whereby existing SCs and future appointees have the option to also be appointed Queen's Counsel by the Governor upon application.[35] Such a system would require the support of the Government and Opposition and require the Executive in effect to "rubber stamp" Senior Counsel appointments as Queen's Counsel, a departure from the historic NSW system. Unless there is a legislative constraint such as to render the Executive a rubber stamp, any convention might be overturned. Those members of the Committee opposed to the proposed approach were concerned that if there was not a legislative amendment that required the Executive to appoint, and only appoint, those members of the NSW Bar that the New South Wales Bar Association had selected according to its Senior Counsel protocol, all one could rely upon is a convention of the Victorian and Queensland variety.

4.11 In any event, a Victorian style system would create two strands of Senior Counsel. If the argument that the title QC is more recognised and understood as a mark of professional distinction at the Bar is valid, then such a two tiered system would do nothing to quell such perceptions but rather perpetuate them.

4.12 Furthermore, the question remains as to how would a return to such a two-tiered system be in the public interest? A system which merely rubber stamps the appointment of Senior Counsel as Queen's Counsel adds nothing to the position or to the appointment process. It simply adds a title. A title that adds the Queen's name but which is no longer connected with the historic process by which the title of Queen's Counsel was awarded, that is, Executive involvement. There can be no public interest served in merely adding a title to the rank of Senior Counsel. It was considered that it would also be anachronistic and a retrograde step to return to a system that rewards those recognised as the leading members of the profession with the imprimatur of the Crown in circumstances where the independent regulation of selection by the profession itself has been in place for 21 years.

[35] New South Wales Bar Association , Issues Paper, "The Office of Queen's Counsel in NSW, p.5.

Other Arguments

4.13 Judging by the responses received, the main arguments in favour of the reintroduction of Queens Counsel seemed to be (in summary):

(a) The title QC is more recognised and understood as a mark of professional distinction at the Bar;

(b) The move will provide greater clarity amongst the general public;

(c) The title will prevent competitive disadvantage principally in the Asian market (particularly Singapore and Hong Kong);

(d) Overseas barristers using the title QC are often regarded by clients as more senior than Senior Counsel; and

(e) The title will avoid confusion between Senior Counsel and other titles such as Special Counsel.

(f) The perceived marketing advantage in other international legal markets, particularly in Canada and the United States where the pre-eminence of the title is also perceived;

(g) The position is no longer uniform in Australia and for NSW to be out of step will now place NSW barristers at a competitive disadvantage;

(h) The public remains confused about the position of Senior Counsel despite it having with been introduced over 20 years ago. It is argued that the degree of confusion will only increase over time as solicitors increasingly adopt similar titles such as "special counsel' or "general counsel".

4.14 In response to all these arguments, there is simply no concrete empirical (as opposed to anecdotal) evidence available to support them. In particular, there is no empirical evidence available as to the suggested competitive disadvantage by Senior Counsel in the Asian and international markets. As referred to in paragraphs 2.29 to 2.32

above, a number of the Asian jurisdictions in which it is said that QCs have a competitive advantage do not themselves have QCs: see for example Hong Kong, Singapore, Malaysia, Brunei, Pakistan and India. In any event, NSW SCs practising in international markets are a small minority of the NSW Bar and the question is whether the system needs to be changed to accommodate the commercial interests of this small group. Even if the Bar Council determines that an approach to the Attorney General should be made, there is no indication that other Bars in Australia (such as those in Western Australia, South Australia, Tasmania and the Territories) are themselves considering reinstating the title of Queen's Counsel in their respective jurisdictions.

4.15 Further in relation to arguments concerning public perceptions about the role and rank of QCs as opposed to SCs, the current system has been in place for 21 years. If there is any confusion about the role and rank of Senior Counsel then it is necessary to allow further time for the system to become embedded in the public mind rather than simply return to the previous system which does not have bipartisan support. As can be seen from the attitude of the Shadow Attorney General, any change to the existing system could be reversed in the event of political climate-change thereby resulting in further fragmentation. This would be to the detriment of junior members of the Bar (yet to be appointed Senior Counsel) who would suffer the same alleged commercial disadvantage as is said to presently exist for Senior Counsel.

4.16 Those on the Committee opposed to the making of the approach felt that the fact that Queensland and Victorian have reintroduced QCs is not a sufficient argument for the making of the proposed approach. If there is no public interest to be served in reintroducing the title, then to reintroduce it in NSW just because these States have done so would be erroneous and misconceived. Any argument that it would give interstate QCs an advantage is conjecture. There are other reasons why NSW SC's are preferred, such as superior skill and knowledge, locality, recognition by instructing solicitors and knowledge of Courts and the recognition by Judges in NSW who are eligible to participate in the silk selection process.

4.17 There are simply no reasons based on probative evidence or the public interest that support the reintroduction of QCs. NSW should retain the current system and

continue to lead the way on this issue. Although there was a degree of anecdotal material relied upon by members on both sides of the debate in their submissions, it was not sufficient to support either contention (that there be a change, or that the problem in respect of recognition of SCs as compared with QCs did not exist). Therefore, those on the Committee opposed to the proposed approach felt that there was no justification in the public interest that the Bar should alter the existing system in NSW which ensures the quality of appointment of Senior Counsel.

An approach to the Attorney General is not consistent with the objects of the New South Wales Bar Association

4.18 In light of the above conclusion of those members of the Committee opposed to the making of the approach to the Attorney General that such an approach was not justified in the public interest, the following objects of the New South Wales Bar Association are served by maintaining the status quo and declining to make the proposed approach to the Attorney-General:

(a) to promote the administration of justice;

(b) to promote, maintain and improve the interests and standards of Local Practising Barristers;

(c) to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community; and

(d) generally to do all such things as may in the opinion of the Bar Council be of benefit to Local Practising Barristers.

5. THE VIEW OF THE COMMITTEE

5.1 We have set out above arguments in support of the "yes" case and those in support of the "no" case. The majority were of a view that it was not suitable for the New South Wales Bar Association to approach the Attorney General. The minority were of the view that it was suitable for an approach to be made to the Attorney General.

In the circumstances, it is not appropriate to make a recommendation and the Committee commends its report to the Bar Council.