Issues Paper on the Public Interest and the office of Queen's Counsel [1]

1. The designation of Queen's Counsel and Senior Counsel publicly identifies barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice[2].

2. On 15 April 2014, 158 Victorian Senior Counsel appointed as such since 2000 transitioned to the office of Queen's Counsel by appointment by the Governor-in-Council of Victoria.

3. On 16 April 2014, the New South Wales Bar Association received a "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" (**The April 2014 Report**).

4. On 2 May 2014, in an article published in *The Australian* entitled *'Imperial' QC open to review, says the ALP's Martin Pakula*[3] Victorian Shadow Attorney-General criticised the Victorian Government decision to reinstate the office of Queen's Counsel, and is reported as saying: "*At the very least — the very least — the Victorian Bar Council ought to give as much consideration to the important matters of public interest and independence of the Bar as their NSW colleagues did.*"

5. What is the *public interest* referred to by Mr Pakula? The concept of *public interest* has been described as something that is of serious concern or benefit to the public, not merely of individual interest. It has been held that public interest does not mean of interest to the public, but in the interest of the public. The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered. The concept can be applied to a multitude of situations and circumstances. Public interest considerations (such as the administration of justice and the independence of the Bar) may also be simultaneously evoked in favour and against a particular matter. It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. The public interest relates to matters of common concern or relevance to all members of the public, or a substantial section of the public. A matter of particular interest or benefit to an individual or small group of people may nevertheless be a matter of general public interest.

6. Over more recent years there has been a significant lessening of the risks to the practice of a successful applicant for silk, and thus to his or her ability to make a living, than hitherto. In

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1 Generated by a member of the Victorian Bar for discussion within chambers

2 http://www.qldbar.asn.au/index.php/instructing-a-barrister2/about-barristers/queen-s-counsel

3 http://www.theaustralian.com.au/business/legal-affairs/imperial-qc-open-to-review-says-the-alps-martin-pakula/story-e6frg97x-1226902593367, THE AUSTRALIAN MAY 02, 2014

earlier times, Queens Counsel could not appear without a junior (the two counsel rule) and the junior was to charge two-thirds of the fee of the senior (the two-thirds rule). Taking silk meant a major change in the style of practice and the effective level of fees charged. The two-thirds rule broke down first. The two counsel rule was removed later, although it continued to have force through custom and practice. It is, of course, to be expected that many cases – or advices – will require two or more counsel and the appointment of silk should still indicate those capable of being leading counsel in such cases. The practice that silk would not draft pleadings and affidavits and would rarely become involved in interlocutory applications has waned. The net result is that silk can continue to do a junior's work charging junior's fees if he or she fails to attract work as leading counsel. Thus, there is little financial risk involved in making an application. The increasing ratio of publicly funded positions, particularly in criminal law, has the same effect.

7. There has been for many decades at least a very different method of appointing silks in the 3 largest Eastern States.

Queensland

8. In Queensland, Queen's Counsel were originally appointed by the Governor-in-Council upon advice from the Chief Justice of Queensland. In 1994, the Association established its own equivalent rank of Senior Counsel (S.C.). Barristers were appointed by the Chief Justice after an exhaustive process of consultation with members of the profession and the judiciary. In 2013, The Hon Jarrod Bleijie MP, Attorney-General and Minister for Justice, in consultation with the Association, re-instated the position of Queen's Counsel. Those barristers who had been appointed as Senior Counsel from 1994, were given the opportunity to change their title from S.C. to QC. From 2013, no further Senior Counsel will be appointed. All appointments will be as Queen's Counsel.[4]

9. At a meeting of the Bar Council in May of each year the Queen's Counsel Consultation Group (QCCG) shall be appointed. The QCCG shall consist of: the President, the Vice-President, and six Queen's Counsel or Senior Counsel nominated by the President, and approved by the Council, not more than one of whom may be a member of the Council, and comprising to the extent that Council considers it practicable, one silk practising in each of the jurisdictions of Planning and Environment, Commercial and Equity, Common Law and Personal Injury, Family Law, Administrative Law and Criminal Law.[5]

10. By no later than 30 September, the QCCG shall provide the President with a list of those applicants who are considered by it to satisfy sufficient of the Criteria for Appointment to be suitable for consideration for appointment.

11. On the first working day after receipt of the list from the QCCG the President shall provide the Chief Justice with:
    (a) A list of all applicants (together with their applications)

[4] http://www.qldbar.asn.au/index.php/instructing-a-barrister2/about-barristers/queen-s-counsel

[5] http://www.qldbar.asn.au/images/pdf/Queen's%20Counsel%20Appointment%20and%20Consultation%20Process.pdf

(b) The list provided by the QCCG .

12. Upon receipt of that information the Chief Justice shall consider:
    (a) whether any additional Queen's Counsel in and for the State of Queensland should be recommended by the Chief Justice for appointment as Queen's Counsel in that year, and
    (b) if any such recommendations are to be made, who should be recommended for appointment as Queen's Counsel.

    In doing so the Chief Justice consults specified categories of judges and then notifies the Attorney General and the President of the list of names selected by the Chief Justice who are then appointed as Queens Counsel by the Governor in Council on the recommendation of the Attorney General.

Victoria

13. The system in Victoria is that appointment as Senior Counsel in Victoria is governed by rules 14.08-14.10 of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008. 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. 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.

14. 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.

15. Unlike the Queensland QC model, the Victorian system in place enables Senior Counsel to elect to apply to the Attorney-General for recommendation to the Governor-in-Council for appointment as Queen's Counsel. Under the Queensland system new silks have no option but to accept an appointment as Queen's Counsel.

16. The Victorian appointment is effected by the issue of Letters Patent by the Governor in Council on the recommendation of the Attorney-General, however, the 2014 appointments specifically refer to section 87E(b) of the *Constitution Act* 1975 (Vic) and were made by the Governor in Council on the recommendation of the Premier.

17. Under the Victorian system a QC may revert to SC. This has in fact happened in the past.

18. The Victorian Attorney-General has reported that 156 Victorian SCs were appointed as QCs out of 177 eligible SCs. This represented a conversion rate 88%.

New South Wales

19. The NSW Bar has always had a very different approach to the selection and appointment of silk.
20. Prior to 1993 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 NSW the making of 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. It is noted that the Chief Justice of New South Wales has never appointed or recommended silk in New South Wales.

21. 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 Queens 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, although it has happened.

22. The SC system in NSW is now covered by the Senior Counsel Protocol as at 16 May 2013.[6] The appointment is made by the President of the Association. A markedly different system makes no effective consultation with the Chief Justice which merely sees the President informing the Chief Justice of New South Wales of the Selection Committee's final selection and seeks the views of the Chief Justice on those proposed appointees. The President will not appoint any applicant included in the Selection Committee's final selection whose appointment the Chief Justice opposes.

23. The NSW appointment system has been attacked publically on a number of occasions which more recently involved the NSW Bar retaining the Hon Roger Gyles AO QC to review its system of appointment and make certain changes. However, none of those changes has delivered an impartial non-Association appointment process. This may be seen as a point of weakness in the silk system in NSW compared with the impartiality of appointment in Queensland and Victoria.

Victorian Announced Positions on the Public Interest for a reversion to QC

24. The Victorian public interest reported by Vic AG in para 2.27 reports the Victorian Attorney-General reasons for working with the Victorian Bar Council on the reforms as asserting 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.

25. The April 2014 Report correctly identified para 2.28 the Chairman of the Victorian Bar Council had consistently advocated [7]:

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6 http://www.nswbar.asn.au/docs/webdocs/silk_protocol_2013.pdf

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

(a) That whereas previously in Victoria 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.

Is impartiality in the appointment process in the public interest?

26. It is argued that impartiality of appointment of silk is a paramount consideration. The designation of silk (Queen's Counsel or Senior Counsel) provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

27. Perhaps with NSW Bar continuing with appointments made by their Association only that that lack of impartiality in appointment does not really permit the appointments to be considered as being the same as those States involving the Chief Justice leading to the appointment of Queen's Counsel.

28. The NSW Bar has referred out to a select committee for consideration *"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?"*

29. The select committee of the NSW Bar consisted of a retired Supreme Court judge, 5 Senior Counsel and 1 junior counsel. Interestingly, the April 2014 Report states that 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.

30. The April 2014 Report concluded by the barest of margins: 4 No; 3 yes. The 3 yes were in favour of a convention based upon the current Victorian system[8].

31. The April 2014 Report wrongly states that the role of the Chief Justice of Victoria in the appointment process was broadly analogous to the role of the President of the NSW Bar.[9] It is not for the manner of consultation by a Chief Justice with consultants is quite a different form of enquiry than one from a barrister President.

[8] Paragraph 3.1
[9] Paragraph 2.7

32. A glaring defect in the April 2014 report is the No Foreign jurisdictions section and its failure to draw a distinction between fused practice jurisdictions and the those with independent Bars: Hong Kong is the still likely to be viewed as the only independent Bar in Asia and this is set out in para 2.30. Singapore has never had an independent Bar and SCs appointed in that jurisdiction are solicitor partners in lawyers firms. How the NSW Bar could not draw this apparent distinction to analysis is appalling and calls into doubt the rationality of the majority finding. It fails to uphold the benefit of the existence of the independent Bar. On this point alone the majority view should be consigned to oblivion for failing to uphold the traditions and importance of independence and the Bar. It is better seen to be a political diatribe of supporting the NSW Bar appointment system without analysing where this system fits within the importance of an independent Bar.

33. The April 2014 report gives only cursory recognition to the present and continuing confusion caused in the "market place" by the use of solicitors (as they once were called) of the term Senior Counsel (especially in USA firms now operating in Australia and other similar terms such as Senior Legal Counsel and Special Counsel. There was once a time where the use of the term Counsel only referred to advocates. How that has changed over recent years is no doubt due to the globalisation of the law. The apparent confusion in the use of such terms is recognized in para 3.20 and with Linked In example footnote 24 but no criticism flows from this in the Majority report. This is a glaring deficiency when compared to whether there is a public interest in the public being able to identify with a Queen's Counsel brand.

34. Although it notes there ought be uniformity of NSW with Victoria and Queensland and that this should be encouraged in Para 3.23 it fails to support this. It otherwise states that uniformity in title of membership in the Inner Bar throughout Australia is consistent with that policy of uniformity throughout the profession generally. Yet, the Majority then rejects the benefits of this to the public. This seems to fail the public interest test.

35. As a matter of anecdotal analysis it notes the public's preference for the title of QC over the use of SC and this is mentioned in para 3.28. Yet it rejects this apparent evidence without further discussion.

36. The No case proceeds upon the basis of the expected interference of the Executive in NSW in the appointment process. It overlooks the Victorian convention. It proceeds on the basis that the Rum Rebellion will never cease in NSW and always be subject to improper influence. It is suggested that it does not have to do so. See the Victorian system as a prime exemplar.

37. The majority notes 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 years ago. The degree of confusion experienced to date is likely to increase over time as solicitors[10] and in-house lawyers [11] increasingly adopt similar

[10] 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 . A similar search for 3000 produced slightly less but considerable in number.

titles such as "special counsel", "senior counsel", "senior counsel - legal", "senior legal counsel" and "general counsel". 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. [3.28]

38. The No case then proceeds to involve itself with how the old system in NSW appointed QCs between the President and the AG. It then decides the distinguishing feature of SC was the removal of the Executive. It then fearfully cites in para 4.8 that a change to QC will result in handing back to the Executive a discretion to accept appointments or add to them which would be a retrograde step.

39. In para 4.9 it asserts the public interest is best served by their present system as it is transparent and independent system for appointment. This is nothing more than a self-serving statement. It is strongly suggested here that the NSW system is flawed and deeply so. It strangely proceeds upon the basis that there would be political interference open in the future – it does not address the Victorian system nor the recommendations of the minority on the report. Para 4.9 is a nonsense.

40. Para 4.10 appears to denigrate the Victorian System as it decides that the Executive would be rubber stamping. The majority NSW Bar does not state anywhere in its report why the President should be the one responsible for the announcing of SCs – or why the system in Victoria could not be transplanted in NSW.

41. There has been much criticism of the NSW system over many years as is well documented such as the preference for chambers appointments and patronage which led to a review of its system which really did not amount to any real change. Perhaps as a Melbournian we can note that the priorities of the Rum Rebellion live long and strong in Sydney. Why do they not subject themselves to independent analysis in the appointment system? This is never explored it is just accepted as a truism although this denigrates from the assertion that the NSW Bar system is independent. Independent of whom?

42. Para 4.12 is disingenuous as it once more proceeds upon the basis that the old NSW system of QC appointment would be reintroduced. Rather it attacks the title as an anachronistic and retrograde step. The question that is not asked is whether there is a benefit to the public in the use of the title QC as opposed to SC? That answer is can easily be answered yes as it is historically understood as meaning that such a person is one of the best advocates

43. Para 4.14 once more proceeds to assert that as other Asian countries have SCs the title is understood without the NSW Bar ensuring that the importance of an independent Bar is pre-eminent in its considerations. That is it is not comparing apples with apples other than in

[11] 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 - IDM, 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". It is noted that several of the US firms in Melbourne advertise their own internal lawyers as Senior Counsel. This would seem to be a breach of the Legal Profession Act 2004.

Hong Kong, and there it is a different variant of apple to the one we are used to in Australia, UK, NZ and Canada.

44. Para 4.15 takes into account political statements of the NSW Shadow AG against the change. This is not a prudent exercise in the determination of the public interest. It actually denigrates from the Majority report to condescend to the politics of the State rather than concentrating on the public interest.

45. Para 4.17 supports itself by stating there is no public interest involved in changing from SC to QC as there is no probative evidence. The public interest is not likely one to be the subject of probative evidence but rather to the analysis of thought and principle. In any event the Majority conducted no objective public sampling to ascertain whether there was probative evidence that could be ascertained. This was a disingenuous assertion belittling of the report.

Observation

46. There is now a strong argument that because the NSW Bar appointment system is so different to that of Victoria and Queensland, both of which rely solely upon an independent Chief Justice to make the appointments of silks, that there should be a different designation of NSW counsel as SCs so as to not confuse consumers with QCs who are appointed after a truly independent appointment process.

Conclusion

47. The public understand what a QC is – it means Queen's Counsel. The public does not understand what SC means. It could mean Special Counsel, Senior Legal Counsel, Senior Counsel or even a recipient of the Star of Courage.

48. The public is entitled to know that the leading advocates have been appointed based upon merit as assessed by the Court – not by those they know within their chambers.

49. Until such time as the NSW Bar has an independent system for the appointment of silk which would entitle those members as recognition as QCs they are correct in maintaining the system of SCs. They are not the same as QCs.

50. The Attorneys General of Victoria and Queensland should be encouraged to be involved in the appointments of QCs as part of the public interest in access to the public courts of their States.

51. NSW should be encouraged to abandon its system and follow the example of Victoria as soon as possible.

52. Comment?