The Institution of Senior Counsel

Those appointed Senior Counsel in and for the State of Victoria join a tradition which traces its roots back to the reign of Elizabeth 1, who in 1597 bestowed on Sir Francis Bacon the title "*Queen's Counsel Extraordinary*" (without letters patent) giving him precedence at the Bar over the Serjeants[1]. In 1604 James I granted Bacon a patent of appointment. James I appointed another King's Counsel, Charles I appointed nine and Charles II appointed thirty-one[2]. The creation of the office of King's Counsel facilitated the development of the common law through the provision of representation of the very highest order in both the King's courts and in the Court of Common Pleas as the reach of those courts extended throughout England and Wales.

There was a presumption that when in court King's Counsel were engaged for the Crown, so they were accorded rights of pre-audience and in 1670 professional precedence over the Serjeants[3]. This was the beginning of the rise of the office of King's Counsel as the most able lawyers called upon to lead the growing profession sought silk rather than the coif[4]. In appointing an average of nine King's Counsel a year William IV institutionalized the office. Following William IV's death in 1837, the recognition of the most able barristers as leaders of their profession by appointment as Queen's Counsel was confirmed by Queen Victoria, who elevated approximately 12 barristers per year to that rank. This growth in the numbers of Queen's Counsel ended the rule that only Serjeants be appointed judges of the Court of Common Pleas.

Appreciation of the origins of the office of Senior counsel and its essential role in the development of the common law upon which our Australian democracy is built, serves to remind all those who presently hold "*silk*" (and all those who would aspire to do so) of both the privilege and the responsibility which that office imposes.

From inception of the office, appointment as King's or Queen's Counsel was not to be lightly sought and not to be lightly made. Appointment as Queen's Counsel provided a public identification of advocacy skills, legal experience, learning and personal qualities sufficient to justify the appropriately high expectations of the Monarch, the judiciary, the

[1] Who traced their history back to 1300, having been brought into existence as a body by Henry II
[2] Baker "An Introduction to English Legal History" 4th ed OUP 2007 at 164 to 165
[3] In 1670 King Charles II sitting in the Privy Council determined that serjeants did not take professional precedence over King's Counsel
[4] The traditional attire of the serjeant-at-law being robe and fur cloak (later adapted into the robe worn by judges)

serjeants, benchers and barristers and the public. From the outset all appointed King's Counsel and later Queen's Counsel shared with the judiciary the onerous task of advancing the administration of justice itself and in turn the rule of law. The contribution of the office of Queen's Counsel to the achievement of a stable and independent legal system is inestimable.

The tradition continues to this day as is to be seen in the following passage from the report produced for the Bar of England and Wales by a committee chaired by Sir Sidney Kentridge in response to a report of the Office of Fair Trading:

"*7.7 As well as representing an honour, the rank of QC is a good indication, even if not a guarantee, to a client with an important and difficult case that an advocate who practises in the relevant field of law can be trusted to handle such a case…. The rank of QC is an internationally recognised quality mark which plays an important role in ensuring the competitiveness of English advocates in litigation outside the UK and in international arbitrations. Its value is also recognised in the well known "QC clause" in many insurance policies…*

7.8 The value of the QC system is not limited to the information that it provides to purchasers. It also plays a role in the maintenance of standards. Not all of the qualities required of an outstanding advocate have a market value…professional qualities such as integrity and independence, courtesy and brevity are not necessarily valued by clients…such attributes are rightly included in the criteria for the appointment of QCs…"

History reveals that those appointed Queen's Counsel have always been recognized by their peers as leaders of the profession prior to their elevation. The attributes required of Senior Counsel have remained consistent over the years since 1597. First and foremost they must be learned in the law. That is the foundation for their craft. And they must have the necessary skills of advocacy which can advance their client's case as fully as possible within the parameters of fact and law pertaining. This demands in turn that their minds be of sufficient clarity that they can readily analyse those elements. In addition there is need for application and stamina. The personal qualities of integrity and honesty are so obvious they are to be assumed. Taken together it is to be hoped that these qualities will produce the most vital of attributes, good judgment.

Save for the learning in the law, the attributes we look for in Senior Counsel are the very same attributes we hope to find throughout the boardrooms of Australia, within the Colleges of Surgeons, and in each of our many legislatures, just to mention a few. Doubtless they are

also the very qualities possessed by those who are judged worthy recipients of an Australian honour or award whereby outstanding service to the nation is recognized[5].

Few people outside the profession are likely to have any interest in the selection process. They are dependent upon the profession to pursue the highest standards and trust that it will not hold out as able to do so, those not of the ability to conduct difficult and important cases. This places a great responsibility on the profession to ensure that the selection process is directed to the pursuit of excellence in professional endeavour.

That pursuit of a standard of excellence has been safeguarded in Victoria by the office of the Chief Justice of the Supreme Court assuming responsibility for the appointment of Senior Counsel in and for the State of Victoria. In assuming this responsibility upon the Government's renunciation in 2004, the Chief Justice has ensured that the public of Victoria has not been subjected to the vicissitudes of influence and pressure which can beset well intentioned but politically susceptible committee systems.

In making appointments the Chief Justice is assisted by the Judges of the Court and of course is guided by the profession through a broad consultation process. In addition the Chief Justice routinely confers with the Chief Justice of the Federal Court, the Chief Justice of the Family Court, and the Chief Judge of the County Court. The Chief Justice has the benefit of each applicant identifying the Judges which that applicant considers will support her or his application. But ultimately the responsibility for appointment is that of the office of the Chief Justice as it has been for more than one hundred years. If the government were to resume responsibility for the appointment of Senior Counsel, then convention dictates that it would, as it has in the past, act upon the recommendation of the Chief Justice.

As always there will be imponderables, that is because excellence is being pursued. Sometimes aspirants will be required to wait longer than they think is fair, others will have to wait for those ahead of them, some will be left as junior counsel so that there are able advocates of that rank available to the public.

Demands for "transparency" in the process whereby in each year those to be appointed Senior Counsel are determined, are as misleading and untenable as they are unwarranted. There can be no rational suggestion that the process involved in the Chief Justice's determination of who is to be appointed is not well known to the profession, and particularly well known to those who make application.

Where people put themselves forward for appointment they are inviting assessment. And if we are to pursue excellence those assessments might be blunt and they may be adverse, but

[5] Introduced by the Australian Government on 14 February 1975

that does not render them any the less worthwhile. If they are irrationally adverse they will lack influence. If they are consistent with others then they can be accepted as rational and whilst not welcomed by the applicant are required by a process and an institution which rests upon the pursuit of excellence.

The contention that careers are made by appointment, cannot withstand close analysis. The concept that those not regularly conducting difficult and important cases before they are appointed will, upon appointment, immediately commence to do so and at the same time be able to charge higher fees simply because they have been elevated is not the reality.

At the Bar, as happens wherever any organized group of persons unite to pursue similar aims and aspirations, leaders emerge. This is our experience right from our earliest memories of the schoolyard. It happens in corporations, it happens within unions, it happens within community organizations and in sporting clubs. Do we demand revelation of every step taken in the appointment of the captain of the Australian Test team or the Wallabies? And would the shareholders of our public companies be better served by insistence that no person could be appointed CEO unless they had satisfied criteria requiring them to have conducted so much community service etc, and otherwise subjected themselves to a process where the views of any board member upon a particular candidate could be published far and wide? The expectation in each of these instances is that excellence be pursued and that candidates be adjudged according to a standard of excellence.

Those who demand change to the present system of appointment of Senior Counsel have chosen to close their eyes to the fact that those called upon to lead do so, not by earning a "rubber stamp" of approval, but in consequence of the regard and respect in which they are held by the members of the judiciary before whom they regularly appear.

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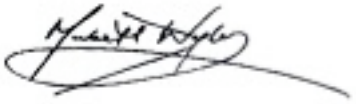

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