"Learned in the Law" - The Transition from Queen's Counsel to Senior Counsel

Between November 1992 and November 1993 the New South Wales Bar developed its own system of recognising eminent counsel from among its junior ranks to be acknowledged as worthy of appointment to the Inner Bar following the demise of the system whereby the Governor, on the advice of the Executive Council, appointed Queen's Counsel in and for the State of New South Wales. This change was brought about by the decision of the New South Wales Government in late 1992 that the Executive Council would no longer participate in a system of appointment Queen's Counsel. In this article Ruth McColl *traces the steps which led to the evolution of the new system.*

"Greetings -

We, confiding in your knowledge, experience, prudence, ability and integrity do, with the advice of the Executive Council of our Colony of New South Wales by these presents nominate, constitute and appoint you the said John Fletcher Hargrave to be one of Our Counsel learned in the law for Our said Colony for and during Our pleasure to take rank precedence and preaudience in all Our Courts of Justice next after Alfred James Peter Leetwyche Esquire and you are to discharge the trust hereby reposed in you with a due respect to all Our rights and prerogatives and the good of Our Subjects according to law - "

By the above words the Governor in Chief of New South Wales, Sir John Young, appointed John Fletcher Hargrave Queen's Counsel in and for the Colony of New South Wales in 1863[1] one of the earliest members of the Inner Bar in New South Wales.

In his work on the History of the New South Wales Bar which Mr Bennett edited for the New South Wales Bar Association, he set out (in Chapter 3) the history of the Inner Bar in New South Wales. As he points out, while in 1835 "W C Wentworth was authorised by the Supreme Court to wear a silk gown as a 'patent of precedent'", it appears most certain that the first barrister admitted to the Inner Bar was John Bayley Darvall who was so admitted in 1853.[2] John Hubert Plunkett (see cover) was appointed to the Inner Bar on 15 May 1856.[3]

Historically, the Governor-in-Council exercised the Crown's prerogative in the appointment and control of the Inner Bar.[4] However, by 1956 the Attorney-General "indicated that he would be pleased to accept assistance from the Council of the Bar Association as to the suitability of applicants for silk".[5] The Council adopted (inter alia) a rule which required the President of the Council, upon becoming aware of an application for appointment to the Inner Bar, to:

> "... after consultation with the Councillors who are not members of the Inner Bar and Councillors who are of not less than 10 years' standing at the Bar, tender to the Attorney-General all available information as to the professional qualities and eminence of such applicant."[6]

By the time of the decision by the Government in November 1992 that the Executive Council would no longer participate in the appointment of Queen's Counsel, the latter rule had been further modified so that the range of people who the President of the Council consulted included not only Councillors but a wide variety of members of the Bar and Judges of the Federal Court, the Family Court, the Supreme and District Courts in New South Wales as well as the Magistrates sitting in the Local Courts.

In November 1992 the Honourable J P Hannaford MLC, Attorney-General in and for the State of New South Wales, distributed an Issues Paper on The Structure and Regulation of the Legal Profession. One of the issues raised by that Paper (at p 34) was:

> "Should the title of Queen's Counsel be retained? If so, should the range of person (sic) appointed be extended to lawyers other than practising barristers."

Almost contemporaneously with the distribution of the Issues Paper the Premier, the Honourable John Fahey MP, announced that the Government would no longer make recommendations for the appointment of Queen's Counsel.

This announcement came as a surprise to the New South Wales Bar, particularly bearing in mind the fact that, having regard to the Issues Paper, the issue raised and set out above was still regarded as ripe for discussion.

The Governor-in-Council did appoint Queen's Counsel in 1992. They were:

RATTRAY Peter (Victoria)
KELLAM Murray Byron (Victoria)
MIDDLETON John Eric (Victoria)
BARR Graham Russell (NSW)
SEMMLER Peter Clement Bronner (NSW)
BASTEN John (NSW)
SLATER Anthony Hugh (NSW)
STEELE John Joseph (NSW)
HASTINGS Peter Selby (NSW)
BARRY Christopher Thomas (NSW)
ROBB Stephen David (NSW)
SLATTERY Michael John (NSW)
CATTERNS David Kenneth (NSW)
LITTLEMORE Stuart Meredith (NSW)
JACOBSON Peter Michael (NSW)

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1 JM Bennett, BA, LL M, *A History of the New South Wales Bar*, The Law Book Company Limited, 1969 at pp. 237 and facing p.241.
2. *Ibid* at 236-237.
3. *Ibid* at 237.
4. *Ibid* at 239-240.
5. *Ibid* at 241.
6. *Ibid* at 241.

These appointments were the last such to be made by the Governor-in-Council in the State of New South Wales.

On 10 December 1992 the 1992 Queen's Counsel attended to make their bows before the Supreme Court of New South Wales sitting in banc. Members of the New South Wales Bar filled almost every seat in the Banco Court and many stood in the aisles while others were unable to fit into the packed Court.

Chief Justice Gleeson delivered the following address:

"The Court has assembled in banc to receive your announcements of appointment to the rank of Queen's Counsel.

The office which you hold has been described by the Privy Council as an office under the Crown which is "a mark and recognition by the Sovereign of the professional eminence of counsel upon whom it is conferred"[1]. You have attained that rank in your capacity as barristers of the Supreme Court of New South Wales.

Your appointment has been accompanied by a number of assertions, not all of them entirely consistent, as to the future of the office. Your presence this morning demonstrates that rumours of your abolition are exaggerated. A more circumspect statement was issued by the Council of Australian Governments in Perth last Monday. That statement said that most Heads of Government endorsed a proposal to remove the role of Executive Government in the appointment of Queen's Counsel, but that four governments have not concluded their consideration of the matter.

This is an appropriate occasion to consider how the Executive Government came to have a role in the appointment of Queen's Counsel. The answer lies in an understanding of constitutional and legal history, of the governmental role of the courts, and of the relationship between the courts and the barristers and solicitors who are officers of those courts. This Court was established by royal prerogative, not by an Act of Parliament. The term "court" itself, which originally meant the Sovereign's palace, and has as an extended meaning the place where justice is administered, is eloquent on the subject of the association between the Sovereign and the administration of justice.[2]

The emergence of an organised legal profession in England was a process that was intimately connected with the courts and the persons to whom the courts granted rights of audience.

In medieval times literacy was largely confined to the clergy, and clerics acted in the administration of civil justice. The first organised body of lay practitioners was the order of serjeants-at-law established at about the time of King Edward I. The Church forbade clerics to appear as advocates in the secular courts and there then emerged a class of lay advocates.[3] The Court of Common Pleas was for a substantial period the dominant court in England, and the serjeants-at-law had an exclusive right of audience in that court. As the practice of appointing ecclesiastics and public officials to the bench was abandoned, the judges themselves were recruited from the ranks of serjeants.[4]

Another class of professional lay advocates, with a right of audience in the Court of Kings Bench and the Exchequer, later grew up. These advocates, called barristers, were organised in Inns of Court. They came to be divided into inner barristers and outer barristers. By the end of the sixteenth century there had been established a practice of the appointment by the Sovereign, by letters patent, of King's Counsel from amongst the ranks of barristers. The first King's Counsel was Francis Bacon.[5] Inner barristers are to this day heard in England from within the bar of the court.

King's Counsel were originally appointed to assist, where necessary and when called upon to do so, the Attorney General and Solicitor General, the first and second law officers of the Crown. In addition, up until the early part of this century they required a dispensation to appear against the Crown.[6] Subject to those matters, the primary significance of the office was that they constituted a group of barristers recognised by the Sovereign as being of special eminence.

In 1670, during the reign of King Charles II, the Privy Council declared that King's Counsel took precedence over the serjeants-at-law.[7] This decision resulted in the gradual decline of the order of serjeants. It is of some interest to reflect that it was this assertion of the Sovereign's prerogative, giving precedence to King's Counsel appointed by the Executive Government, which led to their dominance in the profession and to their ascendancy over the serjeants, who were appointed by the judiciary. Would it not be curious if the wheel is about to turn full circle? Perhaps one of your number will in future years become part of legal folklore in the same manner as Serjeant Sullivan, often regarded as the last survivor of that order.[8] Perhaps it will be the aptly named Mr Barr QC.

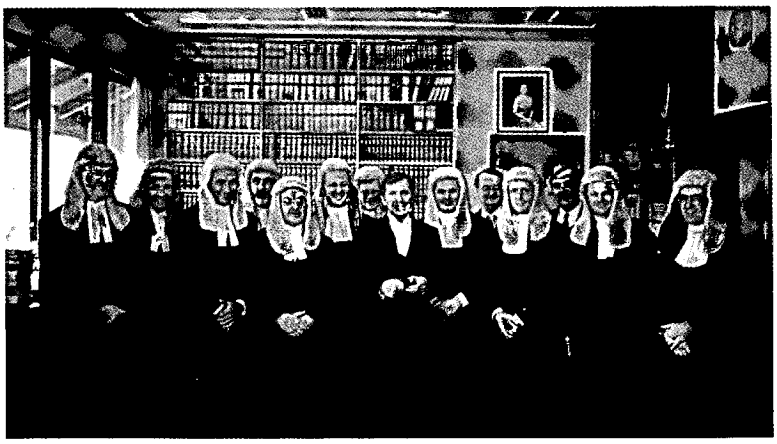
When the legal profession was established in the various Australian colonies the usage and practices of the profession in England and Ireland were taken up. A member of the Inner Temple who visited Sydney in the 1850s wrote: "The Sydney Bar is highly respectable in character and is certainly the most numerous and perhaps, taken as a whole, the best Bar out of England".[9] The Governor-in-Council appointed King's Counsel following the English and Irish tradition.

Over the years there developed a variance between the practice in New South Wales and that in other States in relation to the selection of appointees. The appointments were, of course, everywhere made by the Executive Council, but in New South Wales the function of making the nominations

1. *AG for Canada v AG for Ontario* [1898] AC 247 at 252 per Lord Watson.
2. Jacob, *Law Dictionary*, quoted in *Halsbury's Laws of England*, 4th ed., vol. 10, para 701.
3. W J V Windeyer, *Legal History*, 2nd ed., p139
4. Windeyer, op cit, p140.
5. *Halsbury's Laws of England*, 4th ed., vol 3(1) para 359.
6. Halsbury, op cit, para 433.
7. Halsbury, op cit, para 359.
8. He was, in truth, not a member of the English order, but was the last survivor of the King's Serjeants in Ireland. (Baker, An Introduction to English Legal History, p182.)
9. Quoted in J M Bennett, *A History of the New South Wales Bar*, p77.

rests with the Attorney General who, by convention, is advised by the President of the Bar Association. The President of the Bar Association, after engaging in appropriate consultation, recommends certain practitioners. The recommendation may or may not be accepted by the Attorney General. Ordinarily it is, but this has not always been so. Frequently, in years past, the Attorney General has added to the list certain officers of the Executive Government, such as Crown Prosecutors or Public Defenders. This was regarded as an important power reposed in the Attorney General. In other States it has been the Chief Justice who is the effective source of nominations to the Executive Council.

The announcement that in New South Wales it is proposed to remove the role of Executive Government in the appointment of senior counsel is of great interest, and may give rise to differing opinions. I do not intend on this occasion to express any view on the matter, although I would observe that there is a body of opinion that the removal or restriction of the role of the Executive Government in relation to other matters concerning the administration of justice is also a subject that is ripe for consideration.



The last Queen's Counsel for New South Wales - 1992 Queen's Counsel with the President of the Court of Appeal, his Honour Mr Justice Kirby A.C., C.M.G., Mr Justice Sheller and Mr Justice Cripps . (L to R) S M Littlemeore Q.C., D K Catterns Q.C., P C B Semmler Q.C., G R Barr Q.C., J J Steele Q.C., A H Slater Q.C., J Basten Q.C., Mr Justice Kirby, S D Robb Q.C., Mr Justice Sheller, P S Hastings Q.C., C T Barry Q.C. and P M Jacobson Q.C.

Whether this is an historic occasion only time will tell. For each of you individually, however, it must be an occasion for pride and satisfaction. You carry a mark and recognition of professional eminence which has a long and distinguished history. The judges of the Court congratulate you and wish you well."

The President of the Court of Appeal, Mr Justice Kirby, was unable to be present during the ceremony on 10 December 1992. On 14 December 1992 the new Queen's Counsel made their bows before the Court of Appeal presided over by the President, who sat with Mr Justice Sheller and Mr Justice Cripps. The President made the following statement:

"Sadly, gentlemen (and there are no ladies at the table today) I missed the ceremony in the Banco Court on Thursday last when you were welcomed by the Supreme Court sitting in an extraordinary session in banc.

It is perhaps a symbol of my life that I was already committed that morning to open a computer security conference. That obligation, in turn, arose out of a function which I had as chairman of an OECD expert group on data security. This led to a decision of the Council of the OECD last month to recommend to the various member countries certain principles of data security which it is hoped will influence local law. I was telling local organisations of this development. That is why I was not in the Banco Court on your notable occasion.

I have heard, and read in the media, that the Chief Justice's remarks on that occasion were regarded by some as a little Delphic, even uncharacteristically so. Let me therefore say directly what I would wish to say to you on an occasion such as this.

It has been said that counsel at the table before this Court today will be the last persons appointed as Her Majesty's Counsel in this State. That statement arises out of an announcement by the Premier (the Hon John Fahey MP) that the Government would be making no such recommendations for appointments next year.

I hope that the Executive Government of the State will reconsider that decision, if such it be. The Premier is a thoughtful and intelligent man. He is himself a member of the legal profession. I would hope that he would reflect again upon the decision. It was announced on the very day on which I, and other judges, received a discussion paper issued by the Attorney-General which raised, amongst others, a question for our comment as to whether the office of Queen's Counsel should be abolished. If the Government, Parliament and people are still interested in receiving the opinions of the judges on that matter, such opinions will in due course be expressed. It was, to say the least, a little surprising that, on the very day of receipt of the consultation paper, a decision was unilaterally announced. At the least, it is undesirable that such a decision should be made unilaterally for this State only. It disadvantages those counsel who have a natural expectation that they would move through the profession to the rank which the new appointees before us have now attained.

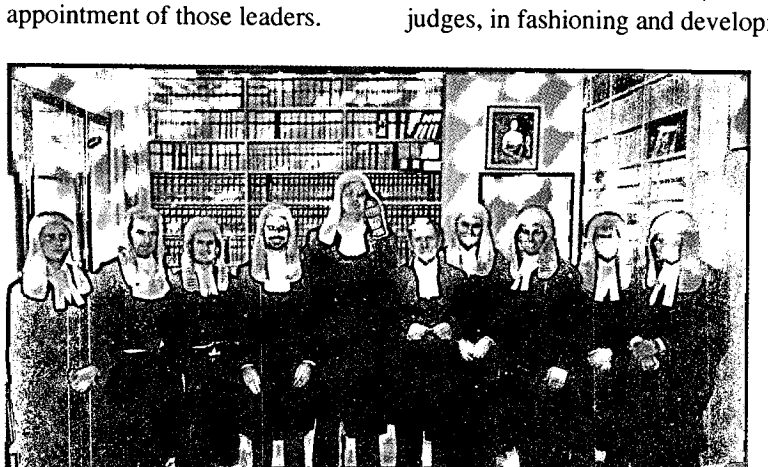
There is no doubt that an increased demand will arise for Australian legal services in Asia and elsewhere in the years ahead. The appointment to the rank of Queen's Counsel is an important and professionally valuable step in the life of a barrister. Appointment to a new rank, differently styled and differently chosen, of senior counsel would not carry the same respect, at least until it earned it. That would take time.

There is also no doubt that there would always remain in the legal profession a position of senior advocate. In many of the countries of the Commonwealth which are now republics there are appointments of senior counsel, so styled (SC). In Sri

Lanka, counsel appointed to the Inner Bar are appointed as President's Counsel (PC). In Nigeria, senior counsel are appointed as Senior Advocates of Nigeria (SAN). There is therefore little doubt that, in time, some such ranking would emerge from the profession in this State if the rank of Queen's Counsel were abolished.

What, then, will we have achieved by the abolition of the appointment of Queen's Counsel? We will have removed the Queen's name from the warrant by which the leaders of the Bar are appointed. And we will have removed the role of the Executive Government in the appointment of those leaders.

So far as the removal of the Queen is concerned, it seems to me that, whilst we remain a constitutional monarchy, that ought not to happen. Behind the rank of Queen's Counsel lie four centuries of service of distinguished leaders of our profession. Such a ranking should not be set aside, at least without careful consultation with the judges, the profession, and the community. Certainly, in my respectful opinion, it should not be a decision made by an unexpected announcement on an afternoon when, as I understand it, the Attorney-General of the State was outside the State and on the very day that a consultation paper, including a question on the very issue, was distributed to the judges and to others.



The first Senior Counsel for New South Wales - 1993 Senior Counsel with the President of the Court of Appeal, his Honour Mr Justice Kirby A.C., C.M.G. (L to R) B W Walker S.C., M J Sweeney S.C., A S Morrison S.C., P W Taylor S.C., J C Kelly S.C., Mr Justice Kirby, S D Rares S.C., C Steirn S.C., J N Gallagher S.C., G A Flick, S.C. (J S Hilton S.C. was unable to be present).

So far as the involvement of the New South Wales Executive Council in the appointment is concerned, I have to say that, although views differ, I unequivocally support that involvement. First, it has tended to leaven the appointments which would otherwise come from within the profession alone. The profession's choices of its leaders may not necessarily always be the best cross-section of those who should be appointed to lead the legal profession at the Bar. In my view, it is useful to have the leavening which arises from the involvement of the Executive Government. For my own part, I would dissent from the notion that judges, or even the Chief Justice - any Chief Justice - should effectively have such appointments to himself or themselves. For myself, I think it is important that we should have more academics, government lawyers, parliamentary counsel, more women and others, in the senior ranking of the profession. That is much more likely to happen, as it seems to me, if the rank of Queen's Counsel is appointed with an involvement of the Executive Government of the day than if it is left to the profession alone.

Secondly, to those who say the Executive Government should step out of this appointment it ought perhaps to be said that they have not reflected enough on the role which the Inner Bar plays in the work of fashioning and developing the law. At least they do so in this courtroom - and in the other appellate courts. The Executive Government plays a part in such appointments because, in a real sense, the leaders of the Inner Bar are co-workers with the judges in fashioning the principles of the common law and in the interpretation of the Acts of Parliament and other legislation. That is why they have a special rank and why they hold a public office. They are, as Justice Brennan once said, ministers of justice, with the judges, in fashioning and developing our law.

I feel I am entitled to make these remarks which, of course, are simply my personal views. I can do so because I do not think it can be said of me that I am an opponent of reform of the legal profession. I am a supporter of such reform. But I do not believe that the abolition of the rank of Queen's Counsel is a useful reform. I do not believe that it attacks either of the twin causes of legitimate concern of the Government and the community, about the delivery of legal services, which are costs and delay. I do not believe that the decision was made in a well thought out way. Such a decision, affecting a tradition of four centuries, should certainly be made very carefully. Things so long settled may sometimes have good reasons to support them. Particularly where, as announced, it affects only New South Wales: the State which is the most important in terms of the quantity, variety and significance of litigation, the announcement seems to inflict an unnecessary wound on the legal profession of the Premier's own State. We will be bound by legislation to recognise Queen's Counsel of other States of Australia. The beneficial creation of a truly national legal profession will be set back.

My hope is that wiser thoughts will ultimately prevail. When the time comes around next November for the consideration of further applications, which I hope will go forward in the usual way, I trust that the Executive Government will think twice about the decision. And that we will see before us this time next year, or a little earlier, the appointees who come forward with their famous commission to announce their appointment to the Court and, through the Court, to the community.

I once again congratulate you all and send you forth to your work. I trust that there is no history in this ceremony - merely the continuation of a great tradition, at once of service

and leadership, to which you are but the latest heirs."

The President's hope that the Government would reconsider its decision was shared by the Bar. However, following the public announcements made in late 1992, which appeared to commit the Executive Council to not again recommending to the Governor that anyone be appointed as Queen's Counsel, the Bar Council consulted the Attorney-General as to the way forward. He informed the Bar Council on 28 January 1993 that he would support the profession devising a replacement for the previous system as long as the replacement did not involve the Executive Government in any way.

The Bar Council then appointed a committee chaired by Sackar QC, and consisting of him, Nicholas QC, BW Walker and AJ Meagher to consider the question of how the custom of the Crown appointing Queen's Counsel might be replaced. That Committee reported to the Bar Council on 12 February 1993. A portion of its paper is set out below.

" Replacement of the Rank of Queen's Counsel in New South Wales after 1992

Justification for the designation of eminent counsel as such, formerly as Queen's Counsel and in the future by some new description, should provide some guidance as to the ideals which a replacement system should embody, and also some guidance as to the means by which it should operate.

The Bar is not the only group where designation of eminence has been accorded, over and above the certification of the basic qualifications to practise or work. Many professions and occupations mark eminence or degrees of responsibility by explicit designations of rank or quality. In some of them, the executive government continues to make the appointments - eg the armed forces and the public service. Designations of eminence are also accorded within professions and occupations which do not directly serve the Crown - eg academics, medical practitioners, the merchant marine and certificatedd tradesmen and machine operators. The common effect of these rankings is to identify persons, both within the group and to the public, who have achieved and are regarded likely to be able to continue a certain higher standard or greater experience in the area of work in question. The rank of Queen's Counsel was not the result of a quaint anomaly whereby only barristers could attain official designation of eminence. A replacement rank for eminent counsel would equally be merely one of many examples where eminence at work is recognised by explicit designation.

This is not the time or place to argue that designation by the Crown of eminent counsel as Queen's Counsel appropriately recognised the integral role of advocates in the administration of justice, and their place as officers of the Court, and thereby in a sense part of one of the arms of government. Arguments in this vein justify retention of the role of the Executive Council, but we are reporting on the basis that its role will not be restored.

However, the fact that all advocates are, by statute, officers of the Court, and that their role is integral to the administration of justice, leads to consideration of the public interest which may be served by a system for designating eminent counsel. The public interest to which we refer goes beyond the ordinary (albeit important) public interest which is served by information being available concerning the merits of anybody who offers his or her services in any profession or occupation to the public. In the case of advocates, the public interest is specifically focussed on the fundamental social and political importance of an energetic administration of justice and insistence on the rule of law.

The public interest in a healthy and vigorous system of justice, under the rule of law, places a premium on certain qualities apart from the necessary technical skills and linguistic ability.

First, and particularly in a common law system where case-law continues to govern many areas of disputation, and continues to assist in the application of statute law, it is in the public interest that advocates are learned, not merely in the academic sense but also in their practical knowledge and deployment of principle and authorities, in day-to-day forensic contests. The law cannot be developed or refined as well as it should be in a sophisticated society without advocates, at their best, having much more than a modicum of such learning.

Second, advocates should act with integrity and honesty. They represent contestants in an arena where, however artificially, the truth is the ultimate goal in fact finding. The requirements of impartiality and fairness in an acceptable system of justice necessitate mutual trust between contesting lawyers that there will be no illegitimate concealment, sharp dealing or knowing misrepresentation. Sufficient integrity is required to prevent resort to means which may assure victory by misleading or tricking the Court.

Third, the profession of advocacy, unlike many other professions or occupations, imposes on its practitioners a duty over and above the duties of loyalty to and diligence for one's own client. One sense in which advocates must be independent is in the observance of that paramount duty, usually expressed to be owed to the Court, but obviously being a duty to serve a higher public interest than merely the representation of a client's individual cause. As the High Court has observed, that paramount duty can require an advocate to act contrary to the express instructions of his or her client. The public interest served by this duty to the Court has been expressed as a duty to assist in the advancement of the administration of efficient justice.

It is to be hoped that the possession of these qualities to an acceptable degree is not the sole preserve of Queen's Counsel or whatever designation replaces that rank. It is self-evident from explanation of those qualities that they should represent the ideals of all counsel, however junior. It is equally obvious that many juniors display these qualities to a commendable extent. No-one could suggest that some magical transformation strengthens these qualities in persons who have attained the rank of Queen's Counsel. For a start, the former custom and any replacement system should aim to designate eminent counsel only if those qualities are already

sufficiently displayed by them as juniors.

The real distinction between juniors and silk, which should be preserved in a replacement system, is experience. It has a double aspect. First, it is undeniable that experience is necessary for the development, testing and improvement of each of the qualities discussed above - even integrity, which must survive actual temptations. Second, the experience of others participating with counsel in the administration of justice and observing individual counsel at work supplies the essential quality of substantiated reputation without which a system for designating eminent counsel would lack a proper foundation.

The prime justification for a system of designating eminent counsel is, therefore, to mark the acceptance by qualified observers that an individual has developed and displayed these necessary qualities to an extent which renders him or her eminent as an advocate.

The public marking of eminent counsel provides clear information to those interested to know - principally prospective clients and instructing solicitors - concerning the identity of those regarded as such by the serious opinions of well qualified observers. It stands in contrast against self-promotion by way of individual advertisement. It should be as close as possible to an objective assessment, in the sense of an assessment which draws from a pool of individual opinions rather than merely reflecting the advocate's own opinion or hopes. As a badge of eminence, the designation of eminent counsel also serves a subsidiary purpose of readily distinguishing those counsel who will restrict themselves to certain forms of advice and advocacy work, or to cases of more than usual difficulty or consequence.

We consider that an important secondary justification, or alternatively a highly beneficial consequence, of a system for designating eminent counsel is that it provides an overt and institutional standard to be emulated. It is important that the ambition which probably characterises virtually all advocates should not be dominated by financial calculation. The approval by one's peers and betters signified by the rank of Queen's Counsel or some replacement designation provides a powerful incentive to achieve and maintain high standards. The frankly idealistic ethos which should be the explicit basis of a system for designating eminent counsel is also a significant spur to encourage a concern for the values of justice over the desire for personal wealth. "

The Committee recommended a replacement system for the appointment of Senior Counsel. The paper was considered by the Bar Council and the substance of its recommendation adopted.

On 26 August 1993 the Bar Council approved a Protocol for the appointment of Senior Counsel. One of the recommendations of the Committee was that "whatever procedures are adopted should be made known formally in a document available to anyone". This was done and the Protocol was circulated to the New South Wales Bar. The Protocol provides:

A.

The principles governing the selection and appointment of those to be designated as Senior Counsel by the President of the Bar Association are as follows:-

1. The designation as Senior Counsel of certain practising barristers by the President of the Bar Association, in accordance with the following principles and under the following system, is intended to serve the public interest.
2. The designation of Senior Counsel provides a public marking 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 service as advocates and advisers, to the good of the administration of justice.
3. As an accolade awarded on the basis of the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.
4. Appointment as Senior Counsel should be restricted to practising barristers, with acknowledgement of the importance of the work performed by way of giving advice as well as appearances in courts or other tribunals.
5. The qualities required to a high degree before appointment as Senior Counsel are skill and learning, integrity and honesty, independence, diligence, and experience.
   (a) Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
   (b) Senior Counsel must be skilled in the presentation and testing of litigants' cases so as to enhance the likelihood of just outcomes in adversary proceedings.
   (c) Senior Counsel must be worthy of complete and implicit trust by the judiciary and their colleagues, at all times, so as to advance the open, fair and efficient administration of justice.
   (d) Senior Counsel must be committed to the discharge of counsel's paramount duty to the Court, that is the administration of justice, especially in cases where that duty may conflict with clients' interests.
   (e) Senior Counsel who are in private practice must honour the letter and spirit of the cab-rank rules.
   (f) Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of their clients' interests.
   (g) Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.
   (h) In order for the foregoing qualities to have been properly developed and tested, it is expected that applicants for appointment as Senior Counsel should have practised for a considerable time.

6. The system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose sufficient achievement of the foregoing qualities displays and promises their ability to provide exceptional service as advocates and advisers in the administration of justice.

B.

The system for the selection and appointment of those to be designated as Senior Counsel is to be conducted as follows:

1. All steps towards selection of appointees are to be conducted by the President of the New South Wales Bar Association.
2. The Bar Council, as such, is to have no role in any of the steps towards selection of appointees. Individual members of the Bar Council may be consulted, as individuals, in accordance with the following procedures.
3. The Bar Council is to ensure that the President is provided with all administrative, clerical and other assistance reasonably necessary for the discharge of his or her responsibilities for the selection and appointment of Senior Counsel.
4. Each year, and before applications for appointment are received, the President shall, by invitation, choose at least 20 Senior Counsel, at most 5 junior counsel (if any), and at least 5 solicitors specialising and experienced in the conduct of litigation, for the purpose of mandatory consultation with the profession for the selection of appointees.
5. On or after 1 August, applications may be made in writing to the President by junior counsel who are members of the Association with full practising certificates and who wish to be considered for appointment as Senior Counsel.
6. No application will be considered for appointment which is received later than 31 August (or the first working day thereafter if it is not a working day), except in cases of accident or other special circumstances, in the discretion of the President.
7. The President must seek comments on all applicants from each of the persons chosen for the purpose of mandatory consultation with the profession, to the extent to which those members of the profession are able to provide comments.
8. The President may, but only after taking into account all comments received, determine that any application which the President is satisfied does not warrant further consideration should be rejected, in a preliminary selection.
9. The President must seek comments on each applicant whose application has not been rejected in the preliminary selection from the following members of the judiciary, namely:-
   (a) the Chief Justice of New South Wales;
   (b) the President of the Court of Appeal;
   (c) the Chief Judge of each Division of the Supreme Court;
   (d) the Chief Judge or most senior member of at least one of any other courts or tribunals of New South Wales in which the President considers the applicant to have practised to a substantial extent;
   (e) the Chief Justice of the Federal Court of Australia;
   (f) The Chief Justice of the Family Court of Australia and at least one other Judge of the Family Court in which the President considers the applicant to have practised to a substantial extent;
   (g) at least 2 other Judges of Appeal or Judges in any Division of the Supreme Court in which the President considers the applicant to have practised to a substantial extent; and
   (h) at least 2 other Judges or members of at least one of any of the courts or tribunals of the Commonwealth in which the President considers the applicant to have practised to a substantial extent.
10. The President may, in his or her discretion, consult with as many other legal practitioners or members of the judiciary as he or she considers may be of assistance in consideration of the applications, apart from the persons from whom comments must be sought, with respect to all or any of the applications.
11. The President may, in his or her discretion, consult with any of the persons from whom comments have already been received, for the purposes of further discussion, clarification or other assistance in the President's consideration of the applications.
12. The President shall, but only after taking into account all comments received, make his or her final selection of the proposed appointees.
13. The President shall inform the Chief Justice of New South Wales of the President's final selection and seek the views of the Chief Justice on those proposed appointees.
14. The President shall not appoint any applicant included in the President's final selection whose appointment the Chief Justice opposes.
15. The process of selection must be completed so as to permit public announcements of the successful applications on the first Friday in November, when the President shall publish the names of the successful applicants for appointment as Senior Counsel for that year, in order of intended seniority.

C.

Conditions of appointment as Senior Counsel include the following:-

1. Subject to the approval of the Chief Justice of New South Wales, and subject to the requirements and permission of particular courts, tribunals and other jurisdictions, appointees as Senior Counsel shall wear the court dress worn by Queen's Counsel.

2. Appointees as Senior Counsel shall be entitled to described themselves as "Senior Counsel".

3. Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they remain practising barristers in private practice or retained under statute by the Crown, or during temporary appointments in a legal capacity to a court, tribunal or statutory body, or in retirement from legal practice, or while they are members of the judiciary or Members of Parliament. The President may revoke the appointment of Senior Counsel for breach of this undertaking."

On 22 November 1993 the President of the Bar Association announced the appointment of Senior Counsel each of whose appointment was effective from 1 December 1993. They were:

1. Richard Ross TRACEY (Victoria)
2. Peter Richard DUTNEY (Queensland)
3. John Victor KAUFMAN (Victoria)
4. Margaret Anne WILSON (Queensland)
5. Henry JOLSON (Victoria)
6. Anthony John MORRIS (Queensland)
7. Hugh Barron FRASER (Queensland)
8. Thomas Andrew GRAY (South Australia)
9. Shane Edward HERBERT (Queensland)
10. Ross Campbell MACAW (Victoria)
11. Richard John STANLEY (Victoria)
12. Michael John SWEENEY
13. Geoffrey Alan FLICK
14. Andrew Stewart MORRISON
15. Jeffrey Steven HILTON
16. Clive STEIRN
17. John Charles KELLY
18. Peter William TAYLOR
19. Bret William WALKER
20. John Neil GALLAGHER
21. Steven David RARES

It has been confirmed that all the courts in New South Wales will recognise the title of Senior Counsel. The title will also be recognised by the High Court and the Federal Court of Australia. The Chief Justices of the Supreme Courts of all other States and Territories will recognise the title of Senior Counsel from New South Wales for the purposes of appointing Queen's Counsel in their jurisdictions in the same way as they hitherto from New South Wales recognised the title of Queen's Counsel.

On 1 December 1993 the new Senior Counsel who practice substantially in New South Wales were presented with their Scrolls of Appointment by Chief Justice Gleeson in a short ceremony in the Bar Association Common Room.

On 3 December 1993 those Senior Counsel made their bows before the Court of Appeal presided over by Chief Justice Gleeson. On that occasion his Honour made the following speech:

"On my own behalf, and on behalf of all the Judges of the Court, I congratulate you all on your appointment as Senior Counsel, and thank you for your courtesy in attending this morning to make a formal announcement of that appointment in the manner that has been customary when barristers have been appointed Queen's Counsel.

It is the policy of the Government of New South Wales, a policy that has been confirmed by recent legislation, to discontinue the ancient practice according to which the Executive Government has appointed barristers to the rank of Queen's Counsel. It is, of course, quite wrong to say that the office of Queen's Counsel has been abolished. There are many persons in this State, including approximately 200 practising barristers, who hold the rank of Queen's Counsel, and in the ordinary course of things it might be expected that there will still be practising Queen's Counsel in New South Wales in 30 years' time. The office has not been abolished. What has been decided is that no more people will be appointed to it.

The response of the New South Wales Bar was predictable, and was undoubtedly foreseen by the Government. As in other countries where, for one reason or another, the practice of appointing barristers as Queen's Counsel was abandoned, that office has been replaced by the office of Senior Counsel. The expression "senior counsel" has, for a long time by custom, in New South Wales and elsewhere, been used as a description of Queen's Counsel. Such persons have commonly been referred to as senior counsel, all other barristers being referred to as junior counsel. The post-nominals SC are used in a number of countries in place of the post-nominals QC or KC, and the rank of senior counsel is one which enjoys international recognition. The New South Wales Bar has now established its own procedure for the appointment of eminent barristers as Senior Counsel. There is a protocol governing such appointment. Appointments are made by the President of the New South Wales Bar Association after obligatory consultation with a range of people, including judges and legal practitioners. The Chief Justice of New South Wales has the power to veto any appointment. I am delighted to say that it did not even cross my mind as a serious possibility that I should exercise such a power in any of your cases. I would hope that the occasion for the exercise of the power will never arise. It may be expected that its mere existence would operate as a restraining influence in the unlikely event that such influence was necessary. It is, however, of some significance, because in other States of Australia the practical power of recommending persons for appointment as Queen's Counsel rests with the Chief Justice of the State. Naturally, when Senior Counsel from New South Wales come to seek in other States the same recognition as was, in the past, accorded to Queen's Counsel from New South Wales, the Chief Justices of those other States will want to be assured that no-one will be appointed Senior Counsel who would not previously have been appointed Queen's Counsel. The existence of the power of veto in the Chief Justice of this State will contribute to that assurance.

It would be inappropriate for me on this occasion to comment on the merit of the political decision to make no more appointments to the rank of Queen's Counsel. The Government has made its decision, and it has been endorsed by Parliament. The profession, in turn, has made its response. The decision of the Executive Government to withdraw from this field will be regarded by some lawyers as surprising, but not unwelcome. The surrender of power by the Executive Government occurs only rarely, and when it does, it is not necessarily an occasion for regret. Oddly enough, in this instance it has taken place at the same time as various moves in the opposite direction.

The truth is that there is currently a great deal of confusion as to what people expect of the legal profession. There is fundamental uncertainty as to what professions are, and ought to be. In the case of the legal profession people within the profession and outside it seem to want, at one and the same time, regulation and de-regulation, commercialism and professionalism, free competition and price control. Some people want lawyers to become more like merchant bankers; others want them to become more like social workers. Some people want legal costs to be governed by fee scales or benchmarks; others want the Trade Practices Act to apply. There are even some who seem to think it is possible to have both, although a closer acquaintance with the Trade Practices Act should disabuse them of that idea. It seems to be overlooked that, in the world of free and unrestricted price competition, provided they obey the law people may charge whatever the traffic will bear. That is a world which some lawyers will find very congenial.

However, in relation to the appointment of Senior Counsel at least, the Government has chosen de-regulation, and although many regret that choice, it has some advantages.

Under the protocol which governs the appointment of Senior Counsel, the members of the legal profession and the public may be assured of the professional eminence of all appointees. They may be assured of your eminence.

You are all to be congratulated. Your appointments have resulted from the profession's recognition of your learning, skill and ability. As the first persons appointed to the rank of Senior Counsel in the history of New South Wales, you are entitled to take great pride in your achievement.

I wish you every success in your professional future."

The appointment of Senior Counsel was, in all respects, made in precisely the same way as the appointment of Queen's Counsel, save that no member of the Government played any part in it.

The Scroll of Appointment handed to the Senior Counsel by the Chief Justice recited:

"Greeting:

I, John Sebastian Coombs QC, being the President of the New South Wales Bar Association having confidence in your knowledge, experience, prudence, ability and integrity, do hereby nominate, constitute and appoint you the said (name of barrister) to be Senior Counsel learned in the law for the State of New South Wales, to take rank precedence and preaudience in all the State's Courts of Justice next after (name of barrister) one of our Senior Counsel for the State aforesaid, and you are to discharge the Trust hereby reposed in you with a due respect to the law and usages of the State and for the benefit of the citizens of the said State according to the law, this appointment to take effect from the first day of December ..."

The tradition continues. ❑