

# The Great Silk Debate

By Daniel Klineberg

Since the commencement of law term, debate over the appointment of queen's counsel has become extremely topical. On 3 February 2014, it was announced that Victorian senior counsel could apply to change their designation from SC to QC. A similar announcement had previously been made in Queensland. Later in February, Bar Council requested comment from members of the New South Wales Bar Association on the desirability of reinstating the use of the term queen's counsel in NSW and it circulated an issues paper on various aspects of the debate. Subsequently, in March Attorney General George Brandis QC announced that the Commonwealth intended to appoint new silks as queen's counsel and would give all existing Commonwealth senior counsel the option of changing their post-nominal to QC.

Bar Council has now established a committee to examine the responses received from members and to report on the suitability of the association seeking support from the NSW attorney general for a system to appoint individuals as queen's counsel, following their appointment as an SC under the existing 'Silk Selection Protocol'. The committee was asked to report by 17 April 2014. This article is intended to bring to the fore in an impartial manner some of the key issues relevant to the debate.

## December 1992: the 'last' NSW QCs

A useful place to begin is a ceremonial sitting of the Court of Appeal held on 14 December 1992. The bench comprised Kirby P, Sheller JA and Cripps JA. On that occasion, Kirby P addressed the then new queen's counsel. Gleeson CJ had welcomed the newly appointed QCs the previous week on 10 December 1992 at a sitting of the Supreme Court in banc. Kirby P stated that he had missed the previous week's ceremony because his Honour already was committed on that day to opening a computer security conference. The addresses of the chief justice and of the president are published in (1994) 68 ALJ at 471-473.

Kirby P noted that as a result of the recent announcement by the Fahey government, the counsel at the bar table would be 'the last persons appointed as her Majesty's counsel in this state'. His Honour proceeded then to comment on certain

aspects of the appointment debate, which remain central to the current discussion. The three key themes of his Honour's remarks were as follows. First, his Honour said that there was:

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.

This reflects the argument, which sometimes is put, that silks appointed as QC rather than SC are more likely to be recognised as eminent counsel, particularly in Asia. This is referred to below.

Interestingly, in this context, Kirby P referred to 'many of the countries of the Commonwealth which are now republics' in which there are senior counsel, as so styled, and his Honour referred also to Sri Lanka, where there are 'President's Counsel' and to Nigeria where senior counsel are 'Senior Advocates of Nigeria'. His Honour noted, that therefore, there was little doubt that in time 'some such ranking would emerge from the profession' if the rank of queen's counsel were abolished.

Secondly, his Honour commented as to the removal of the queen from the appointment title. His Honour's view was that whilst Australia remained a constitutional monarchy, 'that ought not to happen'. This aspect of the debate, which is discussed briefly below, remains a divisive issue. Kirby P continued that 'four centuries of service of distinguished leaders of our profession' lay behind the queen's counsel rank and that such a ranking 'should not be set aside, at least without careful consultation with the judges, the profession, and the community'. In this context, his Honour noted earlier that the announcement by the New South Wales Government had occurred on the same day that his Honour (and other judges) had received a discussion paper issued by the attorney general, which raised for comment whether the office of queen's counsel should be abolished.

Thirdly, in relation to the involvement of the Executive in the appointment of queens's counsel, Kirby P said that 'I unequivocally support that involvement'. This

was for two reasons. First, his Honour considered that it has 'tended to leaven the appointments which would otherwise come from within the profession alone'. Secondly, his Honour said that the Executive 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 ... legislation'. That is why they 'have a special rank and why they hold a public office'.

This issue, namely the involvement of the Executive in the appointment of QCs, remains one of the key issues in the current debate. It is discussed below.

It may be noted that Kirby P's view was that 'I hope that the Executive government of the state will reconsider that decision'. His Honour said that he felt able to make these remarks, which were his personal views, because he did not think it could be said that his Honour was 'an opponent of reform of the legal profession'. His Honour said he was a supporter of reform, but that the abolition of queen's counsel was not a useful reform. In contrast, his Honour said that the reform did not address the key legitimate concerns of the government and the community, namely costs and delay.

The announcement by the Fahey government that no further queen's counsel would be appointed in NSW was made on 3 December 1992. The premier's news release states that issuing of Letters Patent was 'an anachronism' which would 'serve no purpose' and 'I don't believe we really need them'. The news release continued that:

It's the only profession in which the Government is asked to endorse the decisions of the administration of that profession. The Government should not be asked to mark out particular lawyers for special treatment. That doesn't happen with accountants or other professionals – why should it happen with barristers?

I don't believe the Government should be involved in such a process. It simply emphasises how out of date we are.

This news release puts into context the third of the issues of Kirby P identified above which his Honour stated in his remarks a little under two weeks' later, on 14 December 1992. It is, perhaps, the most important topic of substance in the current debate.

### Involvement of the Executive

A history of the involvement of the Executive in the appointment of QCs was summarised by the chief justice in his remarks to the new silks on 10 December 1992. His Honour concluded his remarks by stating that although the proposed removal of the Executive in the appointment process 'is of great interest, and may give rise to differing opinions' his Honour continued that 'I do not intend on this occasion to express any view on the matter'.

A point sought to be emphasised by those against the reintroduction of queen's counsel is that there is no reason why the Executive should be involved in the appointment process of silks, just as the Executive is not involved in the appointment of senior members of any other profession. For example, the government is not involved in the appointment of individuals to be fellows of the various medical colleges.

It may be noted that Bar Council's consultation process is considering the establishment of a system for the appointment of an individual as QC but, relevantly, only following that person's appointment as SC under the Senior Counsel Protocol. It appears, therefore, that the current consultation being undertaken by Bar Council does not propose that there should be a reversion to the pre-3 December 1992 position where the attorney general had the ability to recommend to the governor such appointments as he or she considered appropriate.

In saying that, the attorney general could recommend such appointments as he or she considered appropriate, it may be accepted that the attorney general received the recommendations of the president of the Bar Association who himself or herself undertook a consultation process. Nevertheless as Gleeson CJ noted in his remarks to the new queen's counsel on 10 December 1992:

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.

The NSW pre-3 December 1992 position appears, however, to be the new position in Queensland

following the change, initially announced by the Queensland attorney-general's media release on 12 December 2012, that new silks in Queensland would be appointed queen's counsel and existing senior counsel could elect to be commissioned as queen's counsel. The 'Appointment and Consultation Process' as approved by the Council of the Bar Association of Queensland on 15 July 2013 sets out the process for the appointment of queen's counsel. It provides that the Queen's Counsel Consultation Group, which considers applications, shall provide the president with a list of applicants who are considered to satisfy the 'criteria for appointment'. The chief justice is able to consider whether any additional persons should be recommended (after consultation with various other judges). The chief justice, then, is to write to the attorney-general listing those recommended by the chief justice for appointment. The appointment and consultation process is, however, silent as to what factors the attorney-general may consider or take into account in making recommendations for appointment to the governor.

This is to be distinguished from the position in Victoria where the chief justice will continue to appoint silks as senior counsel, with the support of an advisory committee, under the current application and selection process. However, the newly appointed senior counsel may apply to be recommended to the governor for appointment as queen's counsel. The queen's counsel proposed question being considered currently by Bar Council appears to envisage a process similar to the Victorian model.

Nevertheless, as is noted in the Victorian Bar media release dated 3 February 2014, the application for Letters Patent by silks appointed senior counsel is 'by an invitation of the Attorney General'. Thus, even if there is not the same involvement of the Attorney-General in the Victorian process as was the case in NSW before 1993, and as appears to be the case in the newly-instigated process in Queensland, there is, nevertheless, the involvement of the Attorney-General and, hence, the Executive, at least insofar as the issuing of Letters Patent for the appointment of queen's counsel by the governor requires the governor to act on the advice of the Attorney-General.

The issue was stated by one member of the junior

bar to *Bar News* (regrettably anonymously, perhaps) as 'if the profession wants to organise its own system of prefects, that's fine but the government should have no part in it'.

A more traditional summary of the position was set out in a letter dated 10 December 1992 from Sir Garfield Barwick to John Coombs QC, the then President of the Bar Association. Sir Garfield wrote, as 'an antideluvian [sic] member of the Bar' in relation to the recently-announced proposal that there would be no new queen's counsel appointed in NSW. It is worth setting out the text of Sir Garfield's letter in full:

May an antideluvian member of the Bar offer the Council a suggestion about the Premier's intention to abandon the commissioning of Queens' Counsel.

I recall my endeavours to persuade Reg Downing when Attorney General to allow the Bar to participate in the selection of candidates for silk. I have always disliked that choice being made by the Executive.

My suggestion is that you accept the Premier's move. To do so will end the intrusion of the Attorney General into this aspect of the life of the Bar. Of course, one result is that the letter 'Q' drops out of the nomenclature. But we are regularly spoken of as senior counsel. The letter 'S' replacing the 'Q' ought not to matter. But of course, the issue of a commission will no longer take place.

But the Bar can take sole charge of the choice of senior counsel, make its own rules to govern the grant of the senior rank and negotiate with the judiciary its acceptance of the Council's choice and its recognition of the rank and precedence of senior counsel.

One final suggestion. In laying down the Bar's own rules for the selection of Senior Counsel, there would be room to limit the grant to experienced and outstanding advocates. Specialising in a branch of the law without experience and reputation as an advocate ought not to be a sufficient qualification. The two counsel rule can be better defended if the leader being a general advocate needs the assistance of a specialist to aid him through the intricacies of some particular branch of the law.

A critical issue to be considered in connection with the potential for Executive involvement in the appointment of queen's counsel in NSW is section 90 of the *Legal Profession Act 2004* ('LPA 2004').

### Section 90 of the LPA 2004

A hurdle to be overcome in achieving the appointment of queen's counsel in NSW is section 90 of the LPA 2004. That section, which is entitled 'Prohibition of official schemes for recognition of seniority or status', provides as follows:

- (1) Any prerogative right or power of the Crown to appoint persons as Queen's Counsel or to grant letters patent of precedence to counsel remains abrogated.
- (2) Nothing in this section affects the appointment of a person who was appointed as Queen's Counsel before the commencement of this section.
- (3) Nothing in this section abrogates any prerogative right or power of the Crown to revoke such an appointment.
- (4) No law or practice prevents a person who was Queen's Counsel immediately before the commencement of this section from continuing to be Queen's Counsel while a barrister or solicitor.
- (5) Executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners.
- (6) Nothing in subsection (5) prevents the publication of a list of legal practitioners in the order of the dates of their admission, or a list of barristers or solicitors in the order of the dates of their becoming barristers or solicitors, or a list of Queen's Counsel in their order of seniority.
- (7) In this section:

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

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

That section reflects section 380 of the *Legal Profession Act 1987* ('LPA 1987'), which was introduced into the LPA 1987 in due course following the 3 December 1992 announcement, save that section 380(1) provided that any prerogative right or power of the Crown to appoint persons as queen's

counsel or to grant letters patent of precedence to counsel 'is abrogated', rather than 'remains abrogated'.

The effect is that section 90 acts as a bar to the appointment of further queen's counsel in NSW. Is legislative change possible? It may be stated that quite apart from any other considerations which may arise, any attempt to repeal section 90 is likely to face difficulty. The recent media release from the shadow attorney general, Paul Lynch, states that the NSW state opposition 'will not support legislative change to allow senior barristers in the state to be appointed as a 'QC''. Mr Lynch commented that NSW has no role in the appointment of senior counsel and he does not support the government 'reclaiming a role in the appointment' process.

It is unclear if there will be enough willpower, particularly in the lead-up to the NSW state election in 2015, for the government to seek to amend section 90 in light of the stated position of the opposition on any proposed legislative change.

### Overseas markets

It is stated often in the context of seeking to reintroduce queen's counsel that the title has a prestige in overseas markets, particularly in Asia, that the senior counsel title simply does not have. Thus, for example, the Queensland attorney-general's media release dated 12 December 2012 concerning the reintroduction of queen's counsel stated that:

It is important that Queensland silks are competitive internationally particularly in Singapore and Hong Kong where the use of QCs is preferred.

Asian countries employ QCs from as far as the United Kingdom and this change will give Queensland leverage over other Australian states competing for a share of this market.

The same sentiment was repeated in the attorney-general's subsequent media release on 7 June 2013. Similarly, the Victorian attorney-general's media release on 3 February 2014 stated that:

Allowing senior Victorian barristers the option to be appointed as QCs will help Victorian barristers to ensure full recognition of their experience, skills and expertise both within the Asia-Pacific region and within Australia ...

At present, barristers from the UK or other jurisdictions

who have the title QC are often regarded by non-lawyer clients as being more senior than Victorian SCs, and many senior Victorian barristers consider this has placed them at a competitive disadvantage.

In an article published in *Lawyers Weekly* dated 10 March 2014, Jeffrey Phillips SC and Andrew Martin argued to the same effect and stated that 'QCs are also internationally recognised in the former British colonies of Hong Kong, Malaysia, and Singapore'. The authors referred to comments from Dr Patrick Lau, managing director and head of the Mergers and Acquisitions Department for CCB International, who is quoted as saying that 'My experience is that certain sectors of Asians view royal connections favourably' and 'In my view, I would think QC sounds better to Asians than SC'.

Against these arguments is the fact that queen's counsel are not appointed in Singapore, Malaysia or Hong Kong or China. It is difficult to assess the validity of any assertions that suggest that Australian senior counsel are at a disadvantage in working in such jurisdictions particularly in circumstances where the locally-appointed silks are themselves senior counsel and, therefore, presumably the title is both recognised and understood.

Bruce McClintock SC, who is quoted in an article in the *Sydney Morning Herald* on 12 March 2014 in relation to the issue of potential reinstatement of queen's counsel in NSW, spoke to *Bar News*. In his view, an Australian silk will be briefed in Asia or in Australia or elsewhere because of their reputation and not because of whether they are a queen's counsel as opposed to a senior counsel. McClintock said that due to historical connections as between the United Kingdom on the one hand and certain Asian countries on the other such as Hong Kong, a London silk may have an advantage over an Australian silk. However, in McClintock's view, that advantage arises because of the history of London silks doing work in Asia. That is, any advantage which exists in favour of a London silk over an Australian silk arises irrespective of whether the Australian silk is a senior counsel or a queen's counsel.

### Confusion

Proponents of reinstating of queen's counsel point out that some solicitors now use titles such as 'Special Counsel' which, when considered with the title of senior counsel, may cause confusion to the public. This was noted in the media releases of the Queensland attorney-general of 7 June 2013 and of the Victorian attorney-general of 3 February 2014. That may be so. However, presumably the solicitors who brief barristers are aware of the difference between their colleagues and senior counsel.

The Queensland Attorney-General's media release of 7 June 2013 went further. The Attorney said that the 're-introduction of QCs will also help to clear up confusion because a number of other titles are abbreviated to SC, including Special Counsel and the Star of Courage'. *Bar News* is not aware that the public is generally aware of the Star of Courage at all or that a member of the public will be confused about whether a person to whom they are speaking and who has such post-nominals is a person who shows conspicuous courage in circumstances of great peril or is a senior barrister.

What may be accepted, however, is that there are two factors which can lead to misunderstanding, if not to confusion, to the public. They are related factors.

The first concerns NSW. There is no uniformity within NSW as to the position of silks. Sections 38O(2) and (4) of the LPA 1987 (now sections 90(2) and (4) of the LPA 2004) preserved the position of queen's counsel appointed prior to the enactment of section 38O. Although it appears that, following the introduction of section 38O, there may have been discussions about whether existing queen's counsel should have the right to instead choose to use the title of senior counsel, *Bar News* has not identified any queen's counsel who elected to give up their title as queen's counsel in favour of senior counsel.

Thus, the legislation sowed the seed for confusion at least insofar as from after 1993, there was, and remains, both queen's counsel and senior counsel practising as silks in NSW. Indeed, from 1993 and for many years, the number of practising silks who were

senior counsel were a minority compared with the number of practicing silks who were queen's counsel.

Thus, the public's ability to appreciate fully the position and title of senior counsel from after 1993 was not assisted by the fact that, notwithstanding the legislative change, there remained practising silks who were queen's counsel. As recently as November 2012, when his term ended, the then president of the Bar Association was Bernard Coles QC.

The second issue is related to the first. There is no uniformity within Australia as a whole concerning the title for silks. In fact, following the changes to reintroduce the position of queen's counsel in Queensland, Victoria and the Commonwealth there is now considerable variation Australia-wide as to the position of senior counsel versus queen's counsel.

The changes have effected additional intra-state variations. For example, the position in Victoria is that it is optional for senior counsel, as appointed pursuant to the established senior counsel appointment process, to apply to the attorney-general for Letters Patent. Thus, although it appears that a significant majority of senior counsel have sought Letters Patent, not all have done so. A post to the 'News & Resources' page of the Victorian Bar webpage (<http://www.vicbar.com.au/news-resources/news-resources>) on 28 February 2014 stated that:

Over 85% of the Bar's SCs who are eligible have applied for letters patent to change their title to QC. If any eligible people still wish to apply, please forward your application and we will see if the Attorney will receive them in the next week. Otherwise, the next opportunity will fall in November when the new Silks are announced.

I remind everyone that 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.

It is unclear what perception the Victorian public will have of those senior counsel who elect not to apply for Letters Patent. In contrast, in Queensland from 2013 all appointments are of queen's counsel and it appears that the significant majority of existing senior counsel have elected to be issued with Letters Patent.

A suggestion put to *Bar News* was that it may be that any confusion of the public would be diminished if there was some national appointment body not of senior counsel, which should remain the purview of the states, but of queen's counsel. The profession within each jurisdiction would continue to make arrangements for the recognition of senior barristers who would be appointed as senior counsel. Following this, the state bar associations, or some other national association, would pass a resolution to petition the governor-general to issue Letters Patent creating the new senior counsel as queen's counsel (for those who wished to be so created). The governor-general would then act on this advice in a similar way as he or she acts on the advice of the Council of the Order of Australia in making appointments to the Order.

Such a suggestion raises various additional issues which it is unnecessary to explore in this article. Needless to say, it is likely that any Australia-wide development will be complicated to implement.

#### QCs appointed in other states

It may be noted that the LPA 2004 recognises silks appointed as queen's counsel in other states. Section 16(2) of the LPA 2004 provides that the 'regulations may specify the kind of persons who are entitled, and the circumstances in which they are entitled, to take or use a name, title or description to which this section applies'. By virtue of section 16(1), the section applies to the following 'names, titles and descriptions':

lawyer, legal practitioner, barrister, solicitor, attorney, counsel, queen's counsel, King's Counsel, Her Majesty's Counsel, His Majesty's Counsel, senior counsel

Section 8(1) of the *Legal Profession Regulation 2005* contains a table in which, for the purposes of section 16(2) of the 2004 Act, the 'kinds of persons specified in the third column of the table to this subclause are persons who are entitled, in the circumstances specified opposite in the fourth column, to take or use a name, title or description specified opposite in the second column'. The table which is set out, includes the following:

First column	Second column	Third column	Fourth column
Item No	Name, title or description	Kinds of persons who are entitled to take or use name, title or description	Circumstances in which the persons are entitled to take or use name, title or description
11	Senior Counsel or SC	Australian lawyer	when the Australian lawyer currently holds the status of Senior Counsel, as recognised by the High Court or a Supreme Court of any jurisdiction
12	Queen's Counsel or QC, or King's Counsel or KC, or Her Majesty's Counsel, or His Majesty's Counsel	Australian lawyer	when the Australian lawyer currently holds the appropriate status, as conferred by the Crown in any capacity or as recognised by the High Court or a Supreme Court of any jurisdiction

Thus, it appears that a person appointed as a queen's counsel in Victoria could use that title in New South Wales.

Before the recognition of interstate practitioners, it was not uncommon for NSW counsel to seek admission in states other than NSW (and in addition to the Commonwealth). Thus, for example, there are senior counsel appointed as such in NSW who sought and obtained admission in Western Australia as a queen's counsel before the change occurred in that state from queen's counsel to senior counsel. However, given the current state recognition of interstate practitioners, there is likely to be limited need for NSW barristers to seek admission in other states.

If a NSW barrister were to seek admission in, say, Victoria or Queensland, with the intention then of using in NSW the queen's counsel title subsequently obtained, it would appear that the barrister would have to apply in the ordinary way in those jurisdictions. It may be that an inability to identify a practice in such a jurisdiction which would warrant the barrister's appointment as a silk in that jurisdiction would result in an unsuccessful application. The reality appears to be that it is likely not to be common for NSW based barristers to apply for and to obtain silk in a jurisdiction which appoints queen's counsel either directly (such as Queensland) or on application (such as Victoria).

#### Queen's counsel not king's counsel

In the context of the suggestion that queen's counsel has a cachet which senior counsel does not, one fact that is sometimes overlooked is that since the accession to the throne of Queen Elizabeth II on 6 February 1952, there has been only queen's counsel and no king's counsel appointed. No one under 62 years of age will have had any dealings with a KC. The number of dealings by persons over 62 with king's counsel is, on any view, likely to be limited and, obviously, to have occurred before 6 February 1952.

The point to highlight is that if QC has a prestige which SC does not, it may be that a large part of that comes from the fact that, for over 60 years, there has been only queen's counsel. However, Queen Elizabeth II will not live forever. Upon her death, queen's counsel will become king's counsel (although see below in this regard). The appointment of a person as a KC is unlikely to have the same perception or prestige as QC for the simple reason that there has not been a king's counsel during the lifetime of most people; the expression simply will likely appear unfamiliar.

Thus, members of the public might associate the expression 'queen's counsel' as meaning an eminent barrister without knowing precisely (or at all) that it means a silk with Letters Patent from the current monarch. It remains to be seen whether the public will connect the same association of pre-eminence with the expression 'king's counsel'.

In the context of the change in monarch, it is not immediately apparent what the effect of section 90 of the LPA 2004 will be on the current NSW-appointed QCs. Historically, the appointment by the monarch of an individual, by Letters Patent, as one of the monarch's counsel was personal in character to the monarch. Thus, upon the death of the monarch, there would need to be issued new Letters Patent from the new monarch for the existing silks. This may be seen when examining volume [1901] AC. There is a 'Memorandum' at the commencement of the volume which notes as follows:

On Tuesday, January 22, 1901, it pleased Almighty God to take to His mercy our late Sovereign Lady Queen Victoria of blessed memory.

[There is then a record of the re-swearing of the judicial oath of allegiance to King Edward VII.]

Feb. 15. The King was pleased by several Letters Patent under the Great Seal to appoint and declare—

That the persons who were appointed by Her late Majesty to be of Her Majesty's Counsel learned in the law should be of His present Majesty's Counsel learned in the law, with all such precedence, power, and authority as were originally granted to them.

Thus, upon the issue of the 'several Letters Patent', the former queen's counsel became king's counsel. After 1901, the position changed. *Bar News* has not located the complete documentary chain however it appears that there was no need for new Letters Patent to be issued upon the death of King George VI in 1952 for the then existing KCs to become QCs upon the accession of Queen Elizabeth II.

It is not clear what will occur to the title of NSW queen's counsel upon the death of Queen Elizabeth II. If the position had remained as it was in 1901 when King Edward VII was required to issue new Letters Patent, section 90 would appear to have the effect that such Letters Patent would not be effective in NSW. However, as it appears that the reissuing of Letters Patent no longer is required for the appointment of an individual as one of the monarch's counsel to continue upon the death of the monarch, it may be that section 90 will have no effect to the position of NSW queen's counsel upon the death of Queen Elizabeth II.

### Monarchy and republic Influences

In an article in the *Sydney Morning Herald* article on 12 March 2014, McClintock described the moves to reintroduce queen's counsel as 'ridiculous', 'disingenuous' and 'dishonest'. He asked, rhetorically, in what sense are QCs counsel of, or to, Queen Elizabeth II? McClintock continued that the changes were 'disingenuous and mask a reactionary political agenda'. The same article quotes the Commonwealth attorney-general criticising the New South Wales Bar as 'a bastion of Keating-era republican sentiment'. Thus, it is difficult to separate the issues concerning the reintroduction of queen's counsel discussed above from the broader debate involving the monarchy within Australia. That latter issue is not the subject of this article.

What may be noted, however, returning to the comments from Kirby P referred to above, is that his Honour was of the view that whilst Australia remained a constitutional monarchy the monarch should not be removed from the appointment process of silks. Nevertheless, the change envisaged in December 1992 occurred and, since then, there have been no appointments of QCs in NSW. Thus, assuming one accepted the view expressed by Kirby P, given that the change occurred, the proposed reintroduction of the monarch into the appointment process of silks may be seen by some to be demonstrative in whole or in part of monarchical tendencies.

### Conclusions

*Bar News* looks forward with interest to Bar Council's assessment of the consultation process concerning the proposal to establish a system for the appointment of queen's counsel following the appointment of senior counsel under the existing Senior Counsel Protocol.