

'It has been an honour to serve as the Queen's Judges'¹

Legal world's reaction to the Queen's death and impact of the demise of the Crown on the Courts and Legal Profession

By Daniel Yazdani



The Queen with her High Court judges at the opening of the newly renovated Rolls Building on 7 December 2011

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The death of Her Late Majesty Queen Elizabeth II on 8 September 2022 saw a seamless transition of temporal sovereignty from one monarch to another, reflecting the well-known legal maxim, 'the King never dies.' It also saw an unprecedented outpouring of tributes by the courts and legal profession in Australia, the other Realms and throughout the United Kingdom, reflecting a centuries-old connection between the judiciary and the Sovereign as the 'source of justice.'

Reaction of the legal world

On 9 September 2022, the High Court of Australia issued the following statement:

The Chief Justice, the Honourable Susan Kiefel AC, and the Justices of the Court express their sadness on the death of Her Majesty Queen Elizabeth II and extend their sincere condolences to Her Majesty's family. The court pays respect to Her Majesty's life of service, dedication and duty. Her Majesty's reign spanned over half of the time that the High Court has been in existence. She officially opened the new High

Court building in Canberra on 25 May 1980. Her Majesty embodied the legal traditions which have shaped and continue to shape our laws and the court. The court's flags will be lowered to half-mast.

At the commencement of the High Court's sittings in Canberra on 13 September 2022, it was solemnly proclaimed: 'The High Court of Australia is now in session. God save the King. Please be seated.'

The Hon A S Bell AC, Chief Justice of New South Wales, on behalf of the Supreme Court of NSW, noted 'with sadness the death of Her Majesty Queen Elizabeth II and extend[ed] its condolences to members of her family.' Individual courts in NSW paid their respects in various ways. The proclamation of 'God save the King' was formally read out at in at least one Supreme Court courtroom on 9 September 2022. It was also reported that on the same day one District Court judge announced that 'Her Majesty may have passed away but the Crown continues', and another District Court judge sitting in Parramatta called for one minute's silence as a mark of respect for our late Sovereign.²

The Hon Peter Quinlan, Chief Justice of Western Australia, acknowledged 'Her Majesty's decades of dedicated and untiring service to Australia and to the Commonwealth' as well as 'Her Majesty's unwavering commitment, as Queen of Australia, to the rule of law and to our nation's system of constitutional government.'³

The Hon J L B Allsop AO, Chief Justice of the Federal Court of Australia, announced that '[t]he court notes with great sadness the passing of Her Majesty Queen Elizabeth II and extends deepest condolences to the family of Her Majesty.' The Hon William Alstergren AO, Chief Justice of the Federal Circuit and Family Court of Australia, 'acknowledge[d] and express[ed] a deep sense of sadness following the news announcing the passing of Her Majesty', and stated that '[j]udicial office holders across the Commonwealth, and the wider community, will no doubt mark this day as a significant day in history.'

The President of the Australian Bar Association, Dr Matthew Collins AM, KC, similarly offered the ABA's condolences, praising the Westminster institutions and traditions that the late Queen embodied:

Her Majesty served the people of Australia, the United Kingdom and the Commonwealth with unfailing dignity, compassion, intelligence and grace over seven remarkable decades. Throughout that period, Australia has been very well served by, and owes much of its stability and prosperity to, the institutions and Westminster

traditions of which Her Majesty has been a vital and wise custodian. On this sad day, the legal profession joins in mourning the death of Her Majesty and in offering our best wishes to her successor, King Charles III.⁴

New Zealand's Chief Justice, the Rt Hon Dame Helen Winkelmann, stated the following:

When she acceded to the throne in 1952, New Zealand's Chief Justice, Sir Humphrey O'Leary, suggested that few would live to see the culmination of what he wished to be her 'long, calm and fruitful reign'. Both prediction and wish proved true, the Chief Justice said.

There have been seven Chief Justices of New Zealand during Queen Elizabeth II's reign. Much has changed in the landscape of the courts including the establishment of the Supreme Court, which replaced the Privy Council in London as the highest appellate court of New Zealand. But through all that time the Queen has continued to play an important if symbolic role in the administration of justice in New Zealand, as the figure in whose name justice is carried out.⁵

The courts of Newfoundland and Labrador:

Acknowledge[d], with regret, the passing of Her Majesty Queen Elizabeth II, Canada's longest reigning sovereign, on behalf of all Judges of the Court of Appeal, Supreme Court and Provincial Court of Newfoundland and Labrador. It has been an honour to serve as the Queen's Judges.⁶

The Provincial Court of British Columbia noted how 'Her Majesty's 70-year reign was distinguished by her dignified service to the Commonwealth, and in particular, to Canada. The Queen's unceasing sense of duty inspired generations of Canadians, and her wisdom and leadership will be deeply missed.'⁷

Similar statements were issued by the Courts of Alberta, New Brunswick, Saskatchewan and other Canadian courts,⁸ and in other Commonwealth Realms, such as The Bahamas.⁹

The Lord Chief Justice of England and Wales, the Rt Hon the Lord Burnett of Maldon, paid tribute to the late Queen's 'dedicated service ... as Sovereign to her people and country, to her Realms and to the Commonwealth ... an inspiration to judicial office holders as they fulfil their duties in the administration of justice', and that '[t]he Judiciary will continue to serve His Majesty King Charles III with the same commitment and pride as they did Her Late Majesty.'¹⁰ Following the death of Her Majesty, His Majesty's courts and tribunals across England and Wales observed a two-minute silence at the commencement of court sittings.¹¹

Similar tributes were paid by the Lord President of the Court of Session, the Rt Hon Lord Carloway, the Lady Chief Justice of Northern Ireland, the Rt Hon Dame Siobhan Keegan, and the President of the Supreme Court of the United Kingdom, the Rt Hon the Lord Reed of Allermuir.¹²



Why was there an outpouring of tributes by the courts?

The unprecedented number of tributes issued by courts throughout the Commonwealth was due to the symbolic and historic connection between the judiciary and the Sovereign, a connection which continues to this day.

Historically, the Sovereign was a key figure in the administration and enforcement of law and legal systems in England, and until the 15th century would personally preside in court with other judges.¹³ As such, he or she became known as the 'fount' or 'source' of justice. During the 19th century the Crown was 'explicitly seen as the ultimate source of justice, and its due administration, throughout England and the British Empire.'¹⁴ This was explained by Lord Westbury LC in 1861 as follows:

it was the first prerogative of the Crown, and a prerogative always assuredly to be preserved, that the Crown was the source of justice, and from the Crown proceeded the appointment of Judges to administer justice.¹⁵

This was also outwardly expressed in courts and on legal documents. A survey of plea rolls of the Court of Common Pleas during the 15th and 16th centuries illustrates the incorporation of Royal mottoes, derived from Biblical scripture, and heraldic badges and symbols to support the Sovereign's role as the 'upholder of justice.'¹⁶ This is today reflected in the display of the Royal Coat

of Arms in courts throughout Australia and the Commonwealth Realms.

Thus, the Sovereign is symbolically recognised as 'the 'source of justice', in that the courts are the sovereign's courts and dispense his or her justice throughout the realm.'¹⁷ This is personified in our courts in three distinct ways. First, prosecutions for indictable offences are commenced in the Monarch's name. Secondly, it explains the requirement of judges, upon their appointment, to swear not only the oath of allegiance, but to also take the judicial oath of office to 'well and truly serve our Sovereign Lord King Charles the Third' and to do right to all manner of people according to law. Thirdly, it is personified in the practice of bowing when in the presence of a judge in court. For it is not to the judge that one bows but rather to the armorial bearings which hang directly above the judge, which in turn symbolise 'the authority of the Crown as the source of justice.'¹⁸

Demise of the Crown and Courts

Historically, the demise of the Crown had serious legal consequences, not least being, *inter alia*, the discontinuance of court proceedings brought on or behalf of the Crown and the termination of the commissions of judges.¹⁹ These inconveniences were ameliorated by, first, s 21 of the Act 7 & 8 Will. III c. 27 (1695) and sub-s 1 and 5 of the Act 1 Anne c. 8 (1701), which provided that such commissions, writs and other legal processes shall continue

for six months following the demise of the Crown, and secondly, by s 1 of the Act 1 Geo. III c. 23 (1760), which provided that judges' commissions shall continue notwithstanding the demise. Various 'demise of the Crown' provisions have also been introduced throughout Australia (e.g., *Constitution Act* 1902 (NSW), s 49A and *Crown Proceedings Act* 1988 (NSW), s 8).

Notwithstanding the above, a number of practical and symbolic changes to court practice continue to take place following each demise. Queen's Counsel became King's Counsel immediately upon the Sovereign's demise and did not need to seek new letters patent. This was confirmed by the Australian Bar Association (and others, including the Bar Council of England and NZ Bar Association) the day after the Queen's death.

With respect to NSW, while the Crown's prerogative power to appoint Queen's Counsel was abrogated by the *Legal Profession Reform Act* 1993 (NSW), it did not affect the appointment of a person who was appointed as Queen's Counsel before the commencement of that Act.²⁰ As a result, the principle that existing Queen's Counsel automatically become King's Counsel applies to all Queen's Counsel appointed in NSW prior to the legislation coming into force.

The reason why no new letters patent are required is that legislation is in place which confirms that the holding of any office under the Crown is not affected by the Sovereign's demise. This is reflected by s 49A(1) of the *Constitution Act* 1902 (NSW) which, in



The Queen, along with the Duke of Edinburgh, Sir Garfield Barwick and Sir William Heseltine (far right), the then Private Secretary to the Queen, at the opening of the High Court building in Canberra on 26 May 1980

turn, derives from s 1(1) of the *Demise of the Crown Act 1901* (Imp). Although the office of King's Counsel is now simply one of status and precedence without any real connection with the Crown (unlike historically when counsel *were really* the King's counsel, being the assistants of the law officers of the Crown), the appointment is still referred to as an 'office' under the Crown as it is one formally made by the Sovereign by letters patent. In other words, by being appointed by letters patent, 'they were established and brought into ordinary.'²¹

Another significant change was with respect to criminal prosecutions, which must now be commenced in the name of the King (or *Rex*) instead of the Queen (or *Regina*). In NSW, the Director of Public Prosecutions, Sally Dowling SC, said that '[w]ith the passing of Her Majesty Queen Elizabeth II, sovereignty has passed to King Charles III. Indictments presented from today forward for arraignment should be in the name of His Majesty rather than Her Majesty to reflect this.'²²

It is interesting to note that in a recent High Court appeal, Kiefel CJ raised the question of whether the Commonwealth DPP would be changing the title of the proceedings following the demise of the Crown, with the following exchange taking place:

KIEFEL CJ: Mr Doyle, I think you have been put on notice that the court would appreciate some advice in relation to the position that the Commonwealth Director of Public Prosecutions is taking in relation to the title of the proceeding.

MR DOYLE: Yes, your Honour.

KIEFEL CJ: That is, not changing it from the Queen to the King. I would assume that the matter has been looked into and advice has been obtained.

MR DOYLE: Yes, your Honour, both those things have been done. It is the position of the Director that the source of authority to prosecute derives from section 9 of the *Director of Public Prosecutions Act 1983* (Cth), and that that provision confers on the Director the ability to prosecute in his own name, or in any other matter whatsoever. It has been the practice to bring proceedings in the name of the sovereign – this indictment was brought in the name of the Queen and the Director does not seek to have the name in the proceeding amended.

KIEFEL CJ: I see. I suppose section 11(2) of the *Constitution Act* (Vic) has been considered, and it has been determined that it has not been picked up by any Commonwealth provision?

MR DOYLE: The view has been taken, your Honour, that it would be picked up by section 80 of the *Judiciary Act*, but that that question does not arise because the common law authority of the sovereign to prosecute does not arise.

KIEFEL CJ: I see. I take it from what you say, then, that it is not – the view has not been based upon this being the appellate jurisdiction of the court?

MR DOYLE: No, more so, as I understand it, your Honour, that the authority to prosecute derives solely from that Commonwealth statute.²³

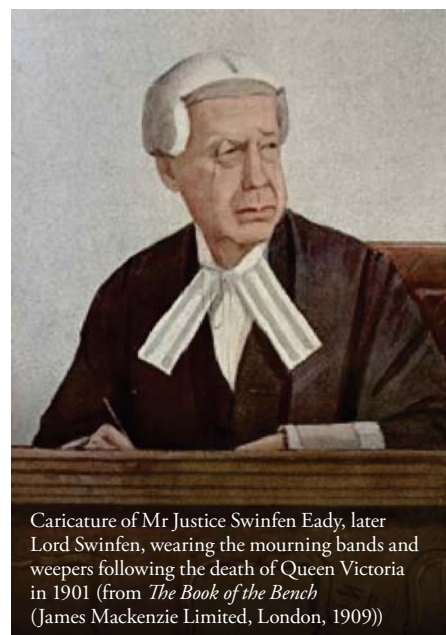
A symbolic change in court dress also takes effect following the Monarch's death. It is customary that, following the demise and during the period of official mourning, Judges and senior counsel wear mourning bands (which have a central pleat) and 'weepers', which are white linen coverings for the cuffs and sleeves of the court coat. The 'weepers' would allow a judge to use his or her sleeves to wipe his or her tears (hence, the use of the term 'weeper').²⁴ Junior barristers may also wear mourning bands, but not weepers.²⁵ Following the Queen's death the mourning bands and weepers were worn by at least one NSW Supreme Court judge, as well as by a number of silk and judges in England and Wales.

It is interesting to note, however, that the black gowns of the Bench and Bar are themselves emblems of mourning adopted after the demise of an earlier monarch. It is commonly thought that that monarch was either Queen Anne or her sister Queen Mary II, but that has been rejected as legal folklore insofar as it relates to the junior barristers' gown, for there is clear evidence that the stuff gown was adopted by the junior Bar in 1685, upon the death of their uncle, Charles II.²⁶ Following his death the whole royal court – which included the Bar – began wearing mourning dress. Nevertheless, it is fair to say that the Bench and Bar 'went into mourning at the death [of Charles II] and have remained so ever since!'²⁷

The Queen and the Rule of Law

Lastly, reference should be made to the late Queen's commitment to the rule of law. This is clearly reflected in two speeches Her Majesty made during her long reign.

The first concerns a speech delivered by the Queen on the opening of the new High Court building in Canberra on 26 May 1980, where Her Majesty paid tribute to both the High Court and the Australian judiciary generally. Part of that speech was as follows:



Caricature of Mr Justice Swinfen Eady, later Lord Swinfen, wearing the mourning bands and weepers following the death of Queen Victoria in 1901 (from *The Book of the Bench* (James Mackenzie Limited, London, 1909))



Photograph of mourning bands and weepers worn by the Hon Justice Kunc during the official period of mourning following the Queen's passing

... the High Court of Australia is at the pinnacle of the judicial system in Australia. It has a special place under the Australian Constitution, serving both as a final court of appeal on matters of general law and as arbiter on constitutional issues.

The court has a critical and sensitive role in the Federal compact that binds the Commonwealth of Australia, determining the law not only between citizen and citizen, and between citizen and executive Government, but also between the Governments that constitute the Commonwealth of Australia.

We should remember today Chief Justice Griffith and Justices Barton and O'Connor, who constituted the High Court of Australia in 1903, and with their successors defined the role of the court, in accordance with the Constitution, and established for it a fundamental place in the national life.



Kirsty Brimelow KC, Chair of the Criminal Bar Association of England and Wales, laying a wreath on 15 September 2022. Senior barristers, dressed in court mourning attire including weepers and mourning bands, processed from the Old Bailey to Gray's Inn Chapel to lay a wreath as a mark of condolence following the Queen's death

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I am pleased to pay tribute to the judiciary of Australia – including the judges present today and the justices of this court in particular – for the admirable way in which they discharge their onerous responsibilities.

The law of the land is a priceless inheritance and it secures the liberties which, as individuals and as a nation, we prize.

In times of social change and tensions in the world, great are the demands upon the courts and the challenges to them in reconciling competing interests and in accommodating traditional rules to new circumstances.

The High Court of Australia has earned great respect, both within Australia and beyond, and it is recognised as a court of the highest eminence among the courts of the nations.²⁸

Secondly, in a relatively unknown speech made at the opening of the Queen's Building extension to the Royal Courts of Justice on 10 October 1968 (but only made public during the Platinum Jubilee celebrations in June this year), the Queen spoke about the 'strong and peerless legal profession', and how the independence of the Bar 'is as much a safeguard to our liberties today as it has been in the past.' It is appropriate to end this note by quoting Her Late Majesty's speech in full:

The judiciary is one of the oldest and most honourable branches of the service of The Crown. It is also one of the most vital because, as the yearbooks tell us,

the law is the highest inheritance of the King, for both he and all his subjects are ruled by it. And if there were no law, there would be neither King, nor inheritance. That is as true today as it was five centuries ago.

The attachment of our people to law is the foundation of our constitution and of our civilisation. As the independent custodians of the law, the judges bear a direct and personal burden of responsibility, which makes their office a lonely and difficult one. We are fortunate that our judges are worthy inheritors of the great traditions of their predecessors. As our world becomes more complex, so the task of doing justice between man and man, and man and the State becomes more difficult and even more important.

Therefore, we must continue to be able to rely on the strong and peerless legal profession. The Bar's independence is as much a safeguard to our liberties today as it has been in the past. I welcome the completion of the new court building. I am glad, my Lord Chancellor, [Lord Gardiner] to grant your request that it be called the Queen's Building. I know that my judges, and all those who assist them so devotedly, will administer justice there in accordance with the finest traditions of their calling.²⁹

Vale Queen Elizabeth II.

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ENDNOTES

- * Barrister, 13th Floor St James Hall.
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- 'Vale – Queen Elizabeth II' (Public Notice, Supreme Court of Western Australia, 9 September 2022).
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- Emily Pennink, 'Courts fall silent as mark of respect for the Queen' (PA Media/Yahoo, 9 September 2022) <https://uk.news.yahoo.com/courts-fall-silent-mark-respect-091504567.html>.
- 'Her Majesty Queen Elizabeth II' (News, Scottish Judiciary, 8 September 2022); 'Death of Her Majesty The Queen' (Press Release, Northern Ireland Judicial Communications Office, 8 September 2022); 'Statement from Lord Reed on the death of HM The Queen' (News, Supreme Court of the United Kingdom, 8 September 2022).
- The last occasion in which a Sovereign is recorded as presiding in the Court of King's Bench was in 1465: A Harding, *A Social History of English Law* (Pelican Books, Sheffield, 1966) 168.
- Re Estate Polykarpu* (2016) 16 ASTLR 400; [2016] NSWSC 409 at [164] (per Lindsay J.).
- United Kingdom, Parliamentary Debates, House of Lords, 25 July 1861, vol 164, col 1463. See also the observations of Bayley B in *Summers v Moseley* (1834) 2 Cr & M 477, 486; (1834) 149 ER 849, 852, in the context of the court's power in relation to a subpoena duces tecum: 'Has not the king for the benefit of the subject a power to require a third party to do that which is essentially requisite for the purposes of justice. The course of justice would be most defective if there were not such a power inherent in the crown as the source of justice.'
- Elizabeth A Danbury & Kathleen L Scott, 'The Plea Rolls of the Court of Common Pleas: An unused source for the art and history of Later Medieval England, 1422-1509' (2015) 95 *The Antiquaries Journal* 157, 159, 174.
- Vernon Bogdanor, *The Monarchy and the Constitution* (Clarendon Press, 1995) 43–44.
- Lincoln v Daniels* [1962] 1 QB 237, 245 (per Devlin LJ), later Lord Devlin). It is important to note, however, that '[t]hese formalisms [i.e., any actual authority of the Crown] ... have little substantive content in the modern world' and are purely symbolic in nature. Bogdanor, *ibid*, 66.
- W Percy Pain, 'The Demise of the Crown' (1901) 26 *Law Magazine and Review: A Quarterly Review of Jurisprudence* 309; 'The Demise of the Crown' (1952) 25 *The Australian Law Journal* 633.
- See s 300(2) of the *Legal Profession Act 1987* (NSW), now reflected in s 160(2) of the *Legal Profession Uniform Law Application Act 2014* (NSW).
- W S Holdsworth, 'Rise of the Order of King's Counsel and Its Effects on the Legal Profession' (1920) 36 *Law Quarterly Review* 212, 214.
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- F N Newark, 'Judicial Robes' (1944-1946) 6 *Northern Ireland Legal Quarterly* 206, 212–213.
- D Yazdani, *The Habit of a Judge: A History of Court Dress in England & Wales, and Australia* (Talbot Publishing, 2019) 122.
- For a history of the development of the junior barristers' gown see Yazdani *ibid*, 112–120.
- 'The Demise of the Crown' (1936) 9 *The Australian Law Journal* 353, 354.
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