

Queen's Counsel

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Background the government's review

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The Attorney-General, the Hon Margaret Wilson, has called for a review of the office of Queen's Counsel. The purposes of this paper are to outline something of the history of the office of Queen's Counsel in England and its extension to New Zealand; then to comment on its current role and the current appointment criteria and process. In so doing, we intend to submit that the office as presently constituted is effective and serves a useful purpose, and that no significant reform is needed.

History of the Office England

Queen's Counsel are barristers appointed by patent to be one of Her Majesty's counsel learned in the law. They do not constitute a separate order or degree of lawyers. But whilst utter barristers were called to the Bar by their inn of court, the Queen's Counsel were called by the Court within the Bar, a distinction which is, of course, inapplicable in New Zealand, where barristers are called to the Bar by the judges of the High Court. They were thus more than merely a professional rank, as their status was conferred by the Crown and recognised by the courts.

The Attorney-General, Solicitor-General, and King's Serjeants were King's Counsel in Ordinary. The first Queen's Counsel "Extraordinary" was Sir Francis Bacon, who was given a patent giving him precedence at the Bar in 1597, and formally styled King's Counsel in 1603 (WS Holdsworth, *History of English Law* (1938) vi 473-4; Patent Rolls, 2 Jac I p 12 m 15).

The obsolete rank of Serjeant-at-Law was formerly more senior, though it was overtaken formally in the 1670's, and professionally in the course of the late eighteenth century by the newer rank. The Attorney-General and Solicitor-General, had similarly succeeded the King's Serjeants as leaders of the Bar in Tudor times, though not technically senior until 1623 (except for the two senior King's Serjeants) and 1813 respectively (JH Baker, "The English Legal Profession 1450-1550" in Wilfred Prest (ed), *Lawyers in Early Modern Europe and America* (1981) 20). But the Queen's Counsel only emerged into eminence and integrity in the early 1830's, prior to when they were relatively few in number. It became the standard means of recognising that a barrister was a senior member of the profession, and the numbers multiplied accordingly (Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) 35). It became of greater professional importance to become a QC, and the serjeants gradually declined. The QCs inherited not merely the prestige of the serjeants, but enjoyed priority before the courts.

Queen's Counsel and serjeants were prohibited, at least from the mid-nineteenth century, from doing chamber work. They were briefed together with a junior barrister, and they had to have chambers in London (Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) 98-99). In Scotland, a separate roll of Queen's Counsel was created only in 1897, with the first appointed 1898. Formerly, the only QC appointed from the Scots Bar were the Law Officers, and the Dean of the Faculty of Advocates. Till 1920 in England and Wales they had to have a licence to appear in criminal cases for the defence. On appointment, QCs renounced the preparation of written pleadings and other chamber practices.

Queen's Counsel were traditionally selected from barristers, rather than from lawyers in general. This was because they were counsel appointed to conduct court work on behalf of the Crown. Although the limitations upon private employment was gradually relaxed, they continued to be selected from barristers, who had the sole right of audience to the higher courts. However, in 1994 solicitors of England and Wales were entitled to be admitted to the upper courts. Some 275 were so practising in 1995. In 1995 these solicitors alone became entitled to apply for appointment as Queen's Counsel. The first such was appointed March 1997 (On 27 March 1997, of the 68 new QCs announced, two were solicitors. These were Arthur Marriott (53), partner of the London office of the American law firm of Wilmer Cutler and Pickering, and Dr Lawrence Collins (55), a partner of the City law firm of Herbert Smith.).

New Zealand

First appointed June 1907, Queen's Counsel occupy in New Zealand a position in the nature of an office under the Crown, although the formal authority for the appointment of Queen's Counsel is regulation 3 of the Queen's Counsel Regulations 1987. Appointments are made by the Governor-General by Order-in-Council, on the recommendation of the Attorney-General with the concurrence of the Chief Justice. A fee is payable on appointment (Queen's Counsel Regulations 1987 cl 4, \$100, now \$270 by 1992/128). Till 1956 appointments were made under the general authority of the Letters Patent Constituting the Office of Governor-General, by letters patent. Since then they have been under the authority of the Law Practitioners Act 1955, and now 1982 (1955 s 15 (and later enactments)). Queen's Counsel receive a patent on appointment.

As soon as possible after the appointment, a new Queen's Counsel is called to the inner Bar, and reads the declaration of a Queen's Counsel. The following is the text of the declaration taken by Queen's Counsel:

I do hereby declare that well and truly I will serve the Queen as one of Her Counsel learned in the Law, and truly counsel the Queen in Her matters when I shall be called and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. I will duly in convenient time speed such matters as any person shall have to do in the law against the Queen as I may lawfully do without long delay, tracting, or tarrying the party of his lawful process in that to me belongeth. I will be attendant to the Queen's matters when I shall be called thereto.

This declaration preserves the identity of these senior counsel as “Her Majesty’s Counsel learned in the law”.

There is little evidence of why Queen's Counsel were only introduced in 1907, fifty years after Australia, and thirty years after the last Australian colony received them (Jeremy Finn, “A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915” [1995] NZLJ 95). However, it has been suggested that it was to improve the appointment of judges. Since Hoskings and Stringer in 1914, nearly half of the Bench have been King's or Queen's Counsel, including six of seven Chief Justices from Skerrett to the present. Not all welcomed the new office however, with opposition from both within and without the legal profession (Finn, Jeremy, “A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 96). This was motivated largely, it would seem, by suspicions that the new office would be monopolised by the larger centres.

Till the passage of s 3 of the Law Practitioners Amendment Act 1915, QCs could practice as solicitors also. The forced abandonment in 1915 of joint practise is the only instance where Parliament has intervened in an institution already operating as part of the prerogative, and it affected counsel already appointed (Jeremy Finn, “A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 97). In 1935 s 44 of the Law Practitioners Act Amendment Act made the prohibition on joint practise clearer. This development was designed to bring the status of Queen’s Counsel into conformity with contemporary British practice.

No practitioners from the independent Bar applied for silk until 1924 (although two solicitors-general took silk), apparently because successful barristers and solicitors believed the risk of abandoning practise as a solicitor to be too great. The term silk of course refers to the traditional use by senior counsel of silk gowns, in contrast to the gowns of junior barristers, which should be stuff, or woollen cloth. Today, both will be likely to be made of a synthetic material, though differences in cut and fabric are still apparent. From 1924 the English tradition, conspicuously not present at the inception of the appointment, of appointing those in practise as barristers sole, was adopted (Jeremy Finn, “A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 98). Since then the number of QCs have gradually increased, as has the number of members of the independent Bar.

Current role, appointment criteria and appointment process

Role

Although originally the QC was an extraordinary Crown officer- and their declaration retains this flavour- they have since the time of King William IV been largely seen as a mark of recognition for the leading counsel of the day. This was never purely an honorific distinction, however, as it imposed certain obligations, some of which were at times onerous. It is best seen as a professional distinction.

The Government of New South Wales has ceased to recommend the appointment of Queen's Counsel since 1993 ([1993] NZLJ 1. Legal Profession Reform Act 1993 (NSW)

§380). The motive for such a move may have been the republicanism of the then state government. The high level of fees paid to QC was also given as a factor, although there was little hard evidence that the incomes of QCs were higher than would be expected for counsel of their seniority. Certainly, there is no evidence that senior counsel has declined.

However, the need for some means of identifying senior counsel was felt to be necessary. As a consequence, the New South Wales Bar has invented the grade of Senior Counsel ("SC") to fill the gap left by the abandonment of the status of silk (Sydney Morning Herald, 14 October 1993, p 4). Such a need is also seen in other professions, where it is usually met by the use of grades of membership in professional bodies (Thus the seniority and experience of a professional arbitrator will be seen by their use of the style FArbINZ, less experienced by the style AArbINZ).

The appointment of Queen's Counsel has also been ended in Queensland, which now uses the style State Counsel (SC). Thus, the need for a style for senior counsel was recognised. Senior Counsel are also found in Belize.

In those Commonwealth countries which are now republics, the office of Queen's Counsel has generally been retained, though with a new style. Thus they became Senior Counsel in Guyana, Senior Advocate in India, State Counsel in South Africa, President's Counsel in Sri Lanka, Senior Counsel in Trinidad and Tobago.

It is clear that there are marked advantages to having a means by which senior members of the independent Bar may be identified. As a distinction conferred by the Crown, members of the general public, lawyers, and other interested parties can be confident that the recipient is a senior, experienced, and respected member of the Bar.

Appointment criteria

In 1907 the first 10 Queen's Counsel were appointed in New Zealand. By 1963 there were still only 9 practising in New Zealand, and 13 in 1968. They were to later increase in numbers as the independent Bar grew. Thus in 1978 there were 23 QC and another 84 barristers sole. Thus 21% of counsel were of the senior rank.

By 1992 there were 48 QC and another 219 barristers sole. The seniors now numbered 18%. In 1996 the numbers were 53 QC and another 396 barristers sole (12% senior). Discussion of the partial fusion of the legal profession between barristers and solicitors is beyond the scope of this paper. But, although generally anyone may practise as both barrister and solicitor in New Zealand, practice as a barrister sole is by no means uncommon. Indeed, the independent Bar continues to grow as the legal profession becomes more specialised.

The degree of fusion between counsel and solicitors varies throughout the Commonwealth, and indeed between jurisdictions within one country. But it is appropriate for QC to be selected solely from amongst counsel practising in the courts, for any alternative would render the style meaningless. The English option of allowing

solicitors with admission to the upper courts to become QCs is unnecessary in this country, since all lawyers are now admitted as both barrister and solicitor.

Those lawyers who choose the path of barristerial practice alone should receive recognition. Although in the early years of the office in New Zealand QCs practiced as solicitors also, that was at a time when the independent Bar was small, and few could afford to abandon practice as solicitors. The independent Bar is now significantly stronger, and the division between barristers sole and those barristers and solicitors who choose to practice as solicitors also is more marked. Senior solicitors may be identified by becoming partners of firms. There is only the office of QC to distinguish a senior barrister. Given the existence of a separate Bar, were the office to be extended to those practising as solicitors, the nature of the office would be radically changed. If there is envy amongst solicitors of the bestowal of the office upon barristers alone, let the solicitors be appeased by the creation of a new office. This could be confined to solicitors, and might be styled Queen's Solicitor.

Appointment process

The criteria for appointment of QC were never drawn together in a comprehensive way. Appointment is made only of the select few regarded as worthy of the prize awarded to the specially diligent, learned, upright and capable members of the Bar (Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476). In more recent years there have also been several one-off appointments of non-practising barrister, the first being Sir Kenneth Keith (See Sir Thomas Eichelbaum, "Appointment of Queen's Counsel" [1995] NZLJ 8, where Sir Kenneth Keith was appointed. Similar *honoris causa* appointments have also been made in the United Kingdom). More recently, the Clerk of the House of Representatives, David McGee, was appointed a QC.

The general requirements for appointment include eminent practice at the Bar, reasonably frequent engagement in important litigation, professional success dependent on scholarship, court experience and sound judgement, reputable private life, principal interest in the practice of law, and the spread of counsel at the Bars of the main centres. Application is made to the Solicitor-General, giving a history of experience at the Bar, and the particular reason for seeking to take silk.

Applications are sent to the Attorney-General and the Chief Justice. The latter seeks the views of the High Court and Court of Appeal judges, and indicates to the Attorney-General whether he or she supports the application. The Attorney-General consults as he or she thinks appropriate. Applicants are notified by the Solicitor-General, and the Attorney-General publishes a list of appointments (Jeremy Finn, "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915" [1995] NZLJ 95; memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476).

This is not an open process, in that selection is largely along lines similar to the selection of judges. Selection of QC's is however more transparent. The Memorandum of 1980 makes the criteria of selection quite clear (Memorandum of November 1980 from

the Chief Justice and Minister of Justice [1980] NZLJ 476). It is also unclear what alternative process could be adopted. Certainly, were the matter left entirely in the hands of the profession, as has happened in New South Wales, there could be public concern that the selection of new senior counsel was not made in an impartial manner. The selection process has also been criticised from time to time in England. On the 4th of April 1996 the appointment of 66 new QCs was announced. There had been 488 applicants, including 40 women and 14 from racial minorities. Of the new QCs, four were women, and one from a minority race. This was taken to imply discrimination of some kind, though the evidence for such a belief was inadequate (Times (London), 5 April 1996).

Conclusion

Appointment as a Queen's Counsel is not simply a matter of privilege, and Queen's Counsel are generally conscious that the conduct of their practice should reflect their responsibilities. The appointment of Queen's Counsel helps to provide incentives for those practising at the independent Bar, by providing an office to which court practitioners can aspire. Most within the legal profession would agree that the standing and standards of the profession would be diminished if the rank of Queen's Counsel were to be abolished or seriously (See Rt Hon Paul East, QC, "The Role of the Attorney-General" in Philip Joseph (ed), *Essays on the Constitution* (1995) 184-213).

The title of Queen's Counsel (as opposed to Senior Counsel or the like) should be retained as reflecting New Zealand's constitutional structure, the history of the institution in New Zealand, and its established reputation in New Zealand and abroad. There appears to be no groundswell of opposing opinion or compelling reason to change.