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## The end of the silk road? The metamorphosis of Queen's Counsel into Senior Counsel in New Zealand

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### Introduction

The Lawyers and Conveyancers Act was passed by the New Zealand House of Representatives in March 2006.<sup>1</sup> It became law after the Governor-General assented to it in the name of The Queen.<sup>2</sup> The Act, which replaces the Law Practitioners Act 1982, implements many significant changes, particularly with respect to the district law societies,<sup>3</sup> and the duties and obligations of barristers, solicitors and conveyancers. It is expected that the Act will come into force over a period of some 18 months.<sup>4</sup> But one particular reform has fairly rapid effect,<sup>5</sup> and is worthy of detailed consideration in light of its Commonwealth-wide parallels, and the broader considerations which it highlights.

Until the passage of the Lawyers and Conveyancers Act 2006 senior barristers<sup>6</sup> in New Zealand were, as in the majority of realms of The Queen,<sup>7</sup> eligible for appointment by the Governor-General as Queen's Counsel. In this country the office has now undergone a radical reform. As in the recent reforms in the United Kingdom,<sup>8</sup> new candidates for appointment as Queen's Counsel may now include solicitors in partnerships.<sup>9</sup> But, in an equally if not more controversial move,<sup>10</sup> the office has also been renamed Senior Counsel.

We will consider some of the background to the reform, the two principal changes the Act has made to the former office of Queen's Counsel (renaming and eligibility), and look briefly at the possible future of the new office of Senior Counsel in New Zealand, and the lessons the changes may offer elsewhere in the Commonwealth.

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<sup>1</sup> The Third Reading was on 14 March 2006.

<sup>2</sup> The Royal Assent was signified by Dame Silvia Cartwright 20 March 2006.

<sup>3</sup> Membership of district law societies will become voluntary.

<sup>4</sup> s 2:

This Act comes into force on a date to be appointed by the Governor-General by Order in Council; and 1 or more orders may be made appointing different dates for different provisions.

<sup>5</sup> The current round of appointment, announced 8 February 2006, is expected to be the last, with appointments announced 15 May 2006; Press Release from the Attorney-General (David Parker), "Appointment round for Queen's Counsel", 8 February 2006.

<sup>6</sup> The New Zealand legal professional is divided into barristers and solicitors, although it is largely fused, as the great majority of practitioners are admitted as both barristers and solicitors and the majority have practising certificates as both. However, there is a separate Bar, whose members (whether barristers or QC), have a practising certificate as a "barrister sole".

<sup>7</sup> These are 16 of 53 member states of the Commonwealth.

<sup>8</sup> See <<http://www.qcapplications.org.uk/>> (viewed 29 March 2006).

<sup>9</sup> s 118(2). Though in New Zealand practise lawyers who are admitted as barristers and solicitors (as almost all are) may be in partnership, those holding a practising certificate as a barrister sole may not.

<sup>10</sup> This is because of its apparently political motivation.

## Background to the reform

In 2002 the New Zealand Cabinet decided in principle to change the title of Queen's Counsel to Senior Counsel ("SC").<sup>11</sup> The broader context in which this decision was placed was the long-awaited Lawyers and Conveyancers Bill, which was due to replace the Law Practitioners Act 1982.<sup>12</sup> It was intended that this new law would make a number of changes to the legal profession, with respect to its governance, and the roles and responsibilities of its members. Due to the range of reforms proposed, and the complexity of the draft Bill, the specific question of the future of Queen's Counsel were not subject to particular public focus, though it did attract critical comment from within the legal profession.<sup>13</sup>

The Lawyers and Conveyancers Bill 2003 was introduced into the House of Representatives on 24 June 2003 by the Minister of Justice, Hon Phil Goff, MP.<sup>14</sup> The Minister, in describing the Bill, said that the classes of people eligible to be appointed to the position of Queen's Counsel would be expanded to include all litigators, not simply those at the separate Bar. Solicitors could now be appointed senior counsel, and there would also be greater transparency in the appointment process. Both of these changes would bring the office into line with current arrangements in the United Kingdom for QCs. But it was also proposed to rename the office "Senior Counsel". No reason was given for renaming the office, other than to observe that this had been the trend recently in Australia. It might be argued that the name wasn't important, but if that were so, then it might be asked why was it to be changed? A more significant – political – motivation (than simply following a trend) might have lain at the heart of this proposal.

In those Commonwealth countries which are now republics an office equivalent to the office of Queen's Counsel has generally been retained on transition from a constitutional monarchy. Thus Queen's Counsel became Senior Counsel in Guyana,<sup>15</sup> Singapore,<sup>16</sup> and Trinidad and Tobago.<sup>17</sup> Some other styles have been preferred elsewhere. Senior counsel are known as Senior Advocate in India,<sup>18</sup> as Senior Consultus (commonly called Senior Counsel<sup>19</sup>) in South Africa,<sup>20</sup> and as President's Counsel in Sri Lanka.<sup>21</sup> Some of these appointments are made by the bench (usually the Chief Justice), and some by the executive. However, most countries of which Elizabeth II is Queen retain senior advocates styled "Queen's Counsel", and these are

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<sup>11</sup> Crown Law Office, *Briefing Paper for the Attorney-General* (August 2002) 6.

<sup>12</sup> This was itself an updating of the Law Practitioners Act 1955. The regulation of the profession can be dated to 1841 (Supreme Court Ordinance Sess 9 No 3); vol 448 NZPD 4465-68 (3 November 1982) per Hon J.K. McLay, MP, Minister of Justice.

<sup>13</sup> Unlike in England and Wales there was no significant solicitors' lobby for an extension of eligibility.

<sup>14</sup> The Bill's subsequent passage was entrusted to Hon Mark Burton, MP, his successor (in 2005) as Minister of Justice.

<sup>15</sup> Introduced in 1970 when the country became a republic.

<sup>16</sup> Independent as a republic 1965, Senior Counsel were only appointed from 1997; s 30 of the Legal Profession Act.

<sup>17</sup> A republic 1976.

<sup>18</sup> A republic 1950; designated as Senior Advocates by the Supreme Court of India or by any High Court; Advocates Act 1961.

<sup>19</sup> South African Senior Counsel are also still commonly known as "silks".

<sup>20</sup> They are commonly also called "silks".

<sup>21</sup> A republic 1972. Appointed under the Constitution of Sri Lanka, s 33 (cc), inserted by the Eighth Amendment to the Constitution Sec. 2. (1984).

normally appointed by the Governor-General on the advice of the Attorney-General or other law officer of the Crown.

The Governments of a number of Australian states have indeed ceased to recommend the appointment of Queen's Counsel since the 1990s. The motivation for such moves was sometimes the republicanism of the then state Governments<sup>22</sup> – though the high level of fees paid to QCs was also given as a factor,<sup>23</sup> though the mere renaming of the office would be unlikely to have a significant impact on fees. Certainly, there is little evidence that the fees charged by Senior Counsel are any less than those of Queen's Counsel. In the late 1980s concerns were also voiced respecting perceived political favouritism in appointments. Additionally, some state governments began to question why they were making appointments in the first place, given that other professions did not have equivalent offices.

Only rarely was the limitation to the appointment to barristers a significant issue, perhaps because in some Australian states (as in New Zealand) there was a partial fusion of the profession, and the tendency has been for this fusion to develop.<sup>24</sup> Since then, several of the states have switched to the appointment of "Senior Counsel," usually by the Chief Justice or the Bar Association, ending the direct involvement by the executive.

The Government of New South Wales has ceased to recommend the appointment of Queen's Counsel since 1993.<sup>25</sup> However, the need for some means of identifying senior advocates was felt, by the profession itself, to be necessary. As a consequence, the New South Wales Bar created the grade of Senior Counsel ("SC") to fill the gap left by the abandonment of the official appointment of silks.<sup>26</sup> Such a need for the recognition of senior standing is also seen in other professions, where it is usually met by the use of grades of membership in professional bodies.<sup>27</sup> Since these senior advocates are appointed by the Bar Association rather than by the state government, it was difficult for them to continue to be styled "Queen's Counsel" – even had this been desired – and the style "Senior Counsel" was adopted. This example has been followed to a number of other Australian states. The appointment of Queen's Counsel has ended in Queensland, which now uses the style State Counsel ("SC"). The Victorian Queen's Counsel have been renamed Senior Counsel,<sup>28</sup> as have those in Tasmania.<sup>29</sup>

Elsewhere in the Commonwealth realms Senior Counsel are also to be found, as in Belize. In the move from Queen's Counsel to Senior Counsel (or whatever the new

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<sup>22</sup> As noted by The Society of Legal Scholars; *Response to Consultation Paper CP08/03: Constitutional Reform: The future of Queen's Counsel* (The Society of Legal Scholars, Southampton, 2003) para 2.2. See also the Response to the Consultation Paper "In the Public Interest" (Department for Constitutional Affairs, London, 2003).

<sup>23</sup> [1993] NZLJ 1; Sydney Morning Herald, 14 October 1993, p 4.

<sup>24</sup> In Canada, like New Zealand, most provinces have a unified profession of barrister and solicitor, and the issue was even less important.

<sup>25</sup> [1993] NZLJ 1. Legal Profession Reform Act 1993 (NSW) §380.

<sup>26</sup> Sydney Morning Herald, 14 October 1993, p 4. The term silk of course refers to the traditional use by senior advocates 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. The dress of the new Senior Counsel has yet to be announced, but however they dress they could well become increasingly unlike the "silks" of the old style.

<sup>27</sup> 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.

<sup>28</sup> New South Wales Bar Brief (no 71, March 2000) p 2.

<sup>29</sup> Practice Direction, Supreme Court of Tasmania, No. 4 of 2005 1 February 2005.

term might be) the need for a style for senior advocates was recognised, but in a changing political context. The eligibility criteria were not usually altered – and the appointments process only occasionally. But the style itself changed to reflect changing political perceptions; specifically a move to distance the office from the Crown.

In some cases these politically-inspired changes of nomenclature were of course necessary. In Hong Kong Queen’s Counsel were renamed Senior Counsel after the resumption of Chinese sovereignty in 1997, but this was understandable, given that the new masters of Hong Kong were the People’s Republic of China and the Communist Party of China.<sup>30</sup> Similarly republics inevitably abandoned the style of Queen’s Counsel. But the retention of the style is regarded as the norm, even if its eligibility criteria and appointment procedures are altered. When the appointment of Queen’s Counsel was reviewed by the Canadian province of Manitoba, there was no question of the style “Queen’s Counsel” being abolished if the appointment remained in state control.<sup>31</sup>

Political considerations seem to have influenced the proposed change in this country, as it has in Australia. The expansion of the eligibility criteria to include all litigators, as well as barristers, and the expected more transparent appointment process, are in effect bringing the office into conformity with current practice in the United Kingdom – where reforms in which concerns over the monopoly of the more clearly distinct Bar, and over the appointments process, played a larger part than they did in New Zealand.

We will now examine the proposal of 2003, and the reform as eventually enacted in 2006.

### **Details of the proposal and its enacted form**

There was particular concern at the wording of clause 106(1) of the Bill when it was introduced into Parliament. This clause provided that:

As from the commencement of this section, –

- a. no person may be appointed as a Queen’s Counsel or King’s Counsel in New Zealand; and
- b. the prerogative right or power of the Crown to appoint persons a Queen’s Counsel or King’s Counsel for New Zealand ceases to have effect as part of the law of New Zealand.

The office was not being renamed so much as banned! – notwithstanding that current QCs would be allowed to keep their titles if they wished to do so.<sup>32</sup> This appeared almost as though it were a determined effort to remove Queen’s Counsel “root and branch”; ending the silk road, upon which junior barristers had trod for generations, towards the career goal of appointment as a Queen’s Counsel and then

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<sup>30</sup> Now governed by the Legal Services Legislation (Miscellaneous Amendments) Act 1996 s 8.

<sup>31</sup> *The Appointment of Queen’s Counsel: A Discussion Paper* (Manitoba Justice, 2000).

<sup>32</sup> s 118(3).

perhaps a judgeship.<sup>33</sup> It appeared also to be a conscious arrangement to prevent future Governments from reviving the appointment without amending legislation, thereby preventing its easy revival.

Criticism of the comparatively extreme nature of the reform (in its manner if not its effect) prevailed however, and the Justice and Electoral Select Committee substituted a less draconian provision during the select committee stage of the parliamentary process. The royal prerogative, which would have been abolished as part of the reform (in a constitutionally dubious provision, which helped raise suspicions of political influences at work) – making the new Senior Counsel purely creations of statute – was preserved.

But the suspicion remained that the office was being renamed, at least in part, for political reasons, especially since the other aspects of the reform (greater transparency – yet to be apparent, and depending upon administrative arrangements not yet announced; and the extension of eligibility to solicitors) went no further than in England and Wales,<sup>34</sup> and indeed were less significant for reasons to be seen shortly. The mere suspicion of this type of motivation for the reform of the legal profession is worrying, as the profession should be – and seen to be – non-political, and not to reflect ephemeral political fashion.

The Bill as reported back to Parliament by the select committee, and as eventually enacted, contained less radical provisions, though the Queen's Counsel were still to be renamed. Section 118 of the Act is the key provision in this regard:

118 Office of Queen's Counsel to be known as Senior Counsel

(1) As from the commencement of this section, the office previously known in New Zealand as Queen's Counsel is to be known in New Zealand as Senior Counsel.<sup>35</sup>

The constitutionally outrageous clause 106(1) has gone. Instead the Act provides that:

118 (6) Nothing in this section or section 119 abrogates the power of the Crown to revoke, under the Royal prerogative, the appointment of any person who was appointed as a Queen's Counsel for New Zealand before the commencement of this section.<sup>36</sup>

and:

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<sup>33</sup> The development of a career-structure for the judiciary, in which senior barristers (whether or not Queen's Counsel), serve as part-time recorders before appointment to junior judicial office (perhaps as a circuit judge), and then eventual elevation to the High Court and perhaps beyond, is more highly developed in England and Wales than in New Zealand. However, there have been signs in recent years that New Zealand, despite its much simpler judicial structure, is heading in a similar direction.

<sup>34</sup> And indeed is arguably much less far-reaching, both because the appointment process remains in the hands of the Attorney-General (unlike in the United Kingdom), and also because the division between barristers and solicitors is less well developed in New Zealand and it is not uncommon for a litigation partner in a law firm to become a barrister sole one year and apply for, and receive appointment as, Queen's Counsel within several years.

<sup>35</sup> This is not yet in force; s 2.

<sup>36</sup> s 118(6).

## 119 Power to make regulations in relation to Senior Counsel and Queen's Counsel

(1) The Governor-General may, by Order in Council, make regulations prescribing---

(a) the process by which candidates may be recommended to the Governor-General for appointment, by letters patent, under the Royal prerogative as Senior Counsel:<sup>37</sup>

...

(5) The powers conferred by this section do not derogate from the power to appoint, under the Royal prerogative, persons to the office previously known as Queen's Counsel and to designate the persons appointed to that office as Senior Counsel.<sup>38</sup>

This is much milder and less offensive, indeed much less radical than the reforms to date in the United Kingdom. In effect the office of Queen's Counsel in New Zealand is now simply to be renamed, and will remain a Crown appointment under the royal prerogative. As before, current QCs would be allowed to keep their titles if they wished to do so; indeed there is a presumption that they would do so, although they are permitted to use the new style if they wish.<sup>39</sup> The extension of eligibility to barristers and solicitors<sup>40</sup> would be a matter more of administrative practice than the reflection of a significant legal reform of the office, since in many cases litigation partners of law firms (barristers and solicitors) had joined the independent Bar very shortly before appointment as Queen's Counsel. It may however have longer-term implications for the independent Bar.

The technical distinctions as to whether this is a new office, or merely renamed,<sup>41</sup> and whether it is appointed under the royal prerogative or exclusively under the authority of the Act,<sup>42</sup> are important, but would scarcely attract public notice. A less radical reform than that proposed saw emphasis upon evolution rather than revolution. More cautious counsels prevailed, and this is rather more of a re-branding rather than the "root and branch" abolition originally proposed.

But no more Queen's Counsel will be appointed,<sup>43</sup> and New Zealand will instead have what could be described as the unimaginatively (and ambiguously) named "Senior Counsel". However valid the extension of eligibility to lawyers in partnership might have been, the rationale for the renaming appeared inadequate; indeed, with the reform being less radical than its equivalent in the United Kingdom, the explanation for the renaming is even less satisfactory, until we remember the underlying reasons

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<sup>37</sup> s 119(1)(a).

<sup>38</sup> s 119(5).

<sup>39</sup> ss 118(3), (4) and (5).

<sup>40</sup> Legal practitioners are almost always admitted as barristers and solicitors, and have a right of audience in all the courts, although a small number practise exclusively as advocates appropriate practising licences.

<sup>41</sup> The latter would appear to be the correct interpretation.

<sup>42</sup> The former appears to be the position, because of the effect of the ss 118 and 119; s 118(6), 119(1)(a) and 119(5).

<sup>43</sup> Once the requisite part of the Act comes into force; ss 118(1), 2.

for the abandonment of the style of Queen's Counsel in many Australian states in the 1990.<sup>44</sup>

But even with respect to the question of eligibility the picture was not as clear in this country as it might at first glance appear to be. Queen's Counsel here were not exactly the same as those in the United Kingdom. The history of the legal profession in New Zealand, relatively short as it is,<sup>45</sup> led to certain important distinctions. One of these was the degree to which the distinction between barrister and solicitor was blurred. In the new arrangements the role of Senior Counsel remains unchanged from that of Queen's Counsel, and counsel are still appointed by the Governor-General. Although appointment is now to be open to those other than barristers sole,<sup>46</sup> as we shall see this was formerly (albeit briefly) the position in New Zealand, where the divide between barrister and solicitor was early partly broken down.

### **Queen's Counsel as advocates**

In this country Queen's Counsel are barristers appointed by patent to be one of Her Majesty's counsel learned in the law. As in England 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. But they are more than merely a professional rank, as their status is conferred by the Crown and recognised by the courts, as the senior rank of advocates.

Queen's Counsel were traditionally selected from barristers (and advocates<sup>47</sup>), rather than from lawyers (such as proctors, attorneys and solicitors<sup>48</sup>) in general. This was because they were, at least initially, counsel appointed to conduct court work on behalf of the Crown.

Although the limitations upon private employment were gradually relaxed, they continued to be selected from barristers, who had the sole right of audience to the higher courts.<sup>49</sup> However, from 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.<sup>50</sup> From 2005 appointments were removed from ministerial control – a profound change yet the title remained unchanged, as they were

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<sup>44</sup> It is probably no coincidence that this period also saw the campaign for a referendum on a republic, which was held in 1999 and resulted in a majority voting for the retention of the monarchy.

<sup>45</sup> See Auckland District Law Society, *History of the New Zealand Legal Profession* (1980).

<sup>46</sup> The term for a barrister and solicitor who is in receipt of a practising certificate solely as a barrister, and who is required to comply with the distinct rules attached to barristers, including a prohibition on partnership, and the requirement for client referral.

<sup>47</sup> The practitioners in the ecclesiastical and admiralty courts.

<sup>48</sup> The attorneys were the common lawyers, who practised in the Courts of King's Bench and Common Pleas. The solicitors were the practitioners in the Court of Chancery. The proctors, who were licensed by the Archbishop of Canterbury, were found in the ecclesiastical and admiralty courts. As civil lawyers, they were found in the Court of Chivalry also.

<sup>49</sup> *Broughton v Prince* (1590) 3 Leonard 237; 74 ER 656.

<sup>50</sup> 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.

still “Her Majesty’s Counsel learned in the law”.<sup>51</sup> They still remain advocates, appointed by the Crown, as in New Zealand.

### **The arrival of Queen’s Counsel in New Zealand**

There is little evidence of why Queen’s Counsel were introduced only in 1907, fifty years after Australia, and thirty years after the last Australian colony received them.<sup>52</sup> However, it has been suggested that it was to improve the system for the appointment of judges. Since Hoskings and Stringer in 1914, nearly half of the Bench have been King’s or Queen’s Counsel, including seven of eight Chief Justices from Skerrett to the present.<sup>53</sup> Not all initially welcomed the new office however, with opposition from both within and without the legal profession.<sup>54</sup> This was motivated largely, it would seem, by suspicions that the new office would be monopolised by the larger centres.

Queen’s Counsel occupied 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 until now has been regulation 3 of the Queen’s Counsel Regulations 1987.<sup>55</sup> Appointments were 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 was payable on appointment.<sup>56</sup> Till 1956 appointments were made under the general authority of the Letters Patent Constituting the Office of Governor-General,<sup>57</sup> by letters patent. After then they were under the specific regulation of the Law Practitioners Act 1955, and later that of 1982,<sup>58</sup> but as an exercise of the royal prerogative. The new Senior Counsel will be similarly regulated and appointed.

As soon as possible after their appointment, a new Queen’s Counsel was called to the inner Bar, and read 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.

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<sup>51</sup> See <<http://www.qcapplications.org.uk/>> (viewed 30 March 2006).

<sup>52</sup> Jeremy Finn, “A Novel Institution: The First Years of King’s Counsel in New Zealand 1907-1915” [1995] NZLJ 95.

<sup>53</sup> Major-General the Rt Hon Sir Harold Barrowclough, Chief Justice 1953-1966, was not a Queen’s Counsel.

<sup>54</sup> Jeremy Finn, “A Novel Institution: The First Years of King’s Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 96.

<sup>55</sup> The Lawyers and Conveyancers Act 2006 appears to preserve the nature of Senior Counsel as appointments under the royal prerogative; the combined effect of ss 118 and 119; s 118(6), 119(1)(a) and 119(5).

<sup>56</sup> Queen’s Counsel Regulations 1987 cl 4, \$100, now \$270 by 1992/128. This remains modest compared with the fees now charged for applications for appointment in England and Wales.

<sup>57</sup> Letters Patent Constituting the Office of Governor-General of New Zealand, 11 May 1917.

<sup>58</sup> 1955 s 15 (and later enactments).



This declaration preserved the identity of these senior advocates as “Her Majesty’s Counsel learned in the law”, even though the obligation to serve the Crown exclusively was no longer extant. But it helped to differentiate Queen’s Counsel from other senior advocates, and QC continued to be called upon from time to time to assume public appointments or commissions. The wording of the declaration of Senior Counsel has yet to be revealed, but it will be an important test of the continuity of the new office with the old. Some measure of continuity will be necessary to justify the retention of appointment by the executive.

### **The QC in a “fused” legal profession**

In New Zealand there was already a tradition of mixed appointments, albeit not a recent one. When Queen’s Counsel first arrived in New Zealand they were of the hybrid nature, since the legal profession was partially fused due to the exigencies of colonial life in the earlier part of the nineteenth century,<sup>59</sup> and only later developed into what has been seen as the classic British model.<sup>60</sup>

The arrival of Queen’s Counsel in New Zealand raised some concerns about the equitability of geographic distribution, fuelled by provincial rivalry. Concerns that they would be dominated by advocates were muted, perhaps because they were seen to be senior court practitioners, and not in competition with solicitors. However, until the passage of s 3 of the Law Practitioners Amendment Act 1915, QCs could practice as solicitors also, and were therefore not exclusively advocates, as in England. 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 royal prerogative, and it affected Queen’s Counsel already appointed.<sup>61</sup>

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. All were barristers and solicitors, though after 1915 compelled to relinquish practice as solicitors on appointment.

From 1924 the English tradition, conspicuously not present at the inception of the appointment, of appointing those in practise as barristers sole, was adopted.<sup>62</sup> Since then the number of QCs have gradually increased, as has the number of members of the independent Bar.

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 then contemporary British practice. Ironically the Lawyers and Conveyancers Act 2006, in reflecting latter changes in the United Kingdom, has brought New Zealand practice back to where it was before 1915, and goes some way to countering what has hitherto been a growing trend towards a stronger independent Bar. Whether this signal is desirable or not remains to be seen,

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<sup>59</sup> In 1862 C.W. Richmond observed that there was no such animal in New Zealand as a barrister who practised exclusively as such; Michael Cullen, *Lawfully Occupied: the Centennial History of the Otago District Law Society* (Otago District Law Society, Dunedin, 1979) 22.

<sup>60</sup> See Lord Cooke of Thorndon (ed), *Portrait of a Profession* (Reed, Wellington, 1969).

<sup>61</sup> Jeremy Finn, “A Novel Institution: The First Years of King’s Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 97.

<sup>62</sup> Jeremy Finn, “A Novel Institution: The First Years of King’s Counsel in New Zealand 1907-1915” [1995] NZLJ 95, 98.

but the new silks will be unlike their predecessors in that their exclusive role of leaders of the independent Bar will be weakened.

### **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 there were 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 advocates were of the senior rank, but there were comparative few advocates as a percentage of the legal profession.<sup>63</sup>

This was to change in the 1980s. 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), reflecting an increasingly large Bar, and a greater number of younger practitioners. Discussion of the partial fusion of the legal profession between barristers and solicitors is beyond the scope of this article.<sup>64</sup> 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 advocates and solicitors varies throughout the Commonwealth, and indeed between jurisdictions within one country.<sup>65</sup> But it was appropriate for QC to be selected solely from amongst advocates practising in the courts, for any alternative would render the style "counsel" meaningless. The English option of allowing solicitors with admission to the upper courts to become QCs was unnecessary in this country, since all lawyers in New Zealand are now admitted as both barrister and solicitor.<sup>66</sup>

It could be argued that those lawyers who choose the path of advocacy should alone receive recognition, due to the history and nature of the appointment of Queen's Counsel. 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 potential clients) by becoming partners of firms. There is only the office of QC to distinguish a senior barrister. Given the existence of a separate Bar, extending eligibility to include those practising as litigation solicitors within partnerships could radically change the nature of the office, as it may well do in England, as it has done in Canada.

Indeed, its consequences could reach further. At the present time many of the leading barristers sole have been litigation partners, who have left their firms, relinquished their practising certificates as barristers and solicitors, and commenced practice as barristers sole. Such men and women would not now need to leave their firms to become Senior Counsel. As a consequence the independent Bar may suffer a significant diminution in senior membership.

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<sup>63</sup> The figures are from the applicable New Zealand Law Society *Barristers and Solicitors Directory*.

<sup>64</sup> See *Barrott v Barrott* [1964] NZLR 988.

<sup>65</sup> See for instance, J R Forbes, *The Divided Legal Profession in Australia: history, rationalisation and rationale* (Law Book Co, Sydney, 1979).

<sup>66</sup> Lawyers and Conveyancers Act 2006, cf Law Practitioners Act 1982.

If there was envy amongst barristers and solicitors of the bestowal of the office upon barristers sole, it might have been preferable for the solicitors be appeased by the creation of a new office. This could be confined to solicitors (and barristers and solicitors), and might be styled Queen's Solicitor.<sup>67</sup> Only time will tell what the effect will be.

### **Appointment process**

The criteria for appointment of QC in New Zealand were never drawn together in a comprehensive way. Appointment was made only of the select few regarded as worthy of the prize awarded to those who were seen as specially diligent, learned, upright and capable members of the Bar.<sup>68</sup> In more recent years there were also several one-off appointments of non-practising barristers, the first being Sir Kenneth Keith.<sup>69</sup> More recently, the Clerk of the House of Representatives, David McGee, and full-time university academic Professor John Burrows were appointed QCs.<sup>70</sup>

The general requirements for appointment included eminent practice at the Bar, reasonably frequent engagement in important litigation, professional success dependent on scholarship, court experience and sound judgement, reputable private life, and the spread of counsel at the Bars of the main centres. Application was made to the Solicitor-General, giving a history of experience at the Bar, and the particular reason for seeking to take silk. The process for Senior Counsel is likely to be similar, if not identical – subject to the significant extension of eligibility.

Applications were sent to the Attorney-General and the Chief Justice. The latter sought the views of the High Court and Court of Appeal judges, and indicated to the Attorney-General whether he or she supported the application. The Attorney-General consulted as he or she thought appropriate. Successful applicants were notified by the Solicitor-General, and the Attorney-General published a list of appointments.<sup>71</sup>

This was not an open process, in that selection was largely along lines similar to the traditional method for the selection of judges. The Memorandum of 1980 (now found in Practice Note of 12 August 1991) made the criteria of selection quite clear.<sup>72</sup> 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 advocates was not made in an impartial manner. The selection process has also been criticised from time to time in England. As an example, on 4 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 by some observers to imply discrimination of some kind, though the evidence for such a belief was not forthcoming.<sup>73</sup> The appointment process in

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<sup>67</sup> As was proposed in a submission to the Response to the Consultation Paper "In the Public Interest" (Department for Constitutional Affairs, London, 2003) para 250.

<sup>68</sup> Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476.

<sup>69</sup> 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.

<sup>70</sup> Mr McGee in 2000 and Professor Burrows in 2005; Attorney-General Michael Cullen, Media Statement, "Appointment of Queen's Counsel", 20 July 2005.

<sup>71</sup> 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.

<sup>72</sup> Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476.

<sup>73</sup> Times (London), 5 April 1996.

England and Wales has now been made more transparent, and a similar process may occur in New Zealand – though doubtless will still attract critical comments from time-to-time.

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 advocates 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 – and pre-eminently a distinction for advocates. The extension of the eligibility to include barristers and solicitors in partnership seems scarcely necessary in a jurisdiction where movement from this status to barrister sole is easy and readily done. The consequences for the independent Bar, and to the legal profession as a whole, could be serious.

### **The style Queen's Counsel**

The renaming also is serious. Since Queen's Counsel have considerable public prominence as the leaders of the Bar, public confidence in the appointment is vital. In light of this there is the concern that the office of Queen's Counsel has been renamed for what are apparently primarily political reasons. Since the office indicates a high degree of professional standing, and is used by the general public as a warranty of forensic experience and ability, there should be no change to the office or the appointment process which might undermine public confidence in it.

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 by the Crown helps to maintain the standing of the office – provided that the system is shown to be non-political. It is not sufficient that it is non-political; it must be seen to be so.

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Whilst the abolition of a formal distinction for senior advocates might have been justified, on the grounds that solicitors, and non-legal professions, do not have equivalent distinctions from the Crown, the renaming of the office for apparently political reasons is a matter of concern. This is particularly so at a time when the relationship between the judiciary and the executive is especially sensitive.<sup>74</sup> It is true that Queen's Counsel were appointed as counsel for the Crown, and indeed retain some vestiges of this connection. But the Crown represents a non-partisan, permanent, part of our Constitution. It is untainted by political dogma or bias.<sup>75</sup> Queen's Counsel have not been associated in New Zealand with party politics as Queen's Counsel – though they have at times elsewhere.<sup>76</sup>

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<sup>74</sup> See Noel Cox, "Criticism of Judges by Politicians: Some reflections from New Zealand" (2004) 13(3) The Commonwealth Lawyer 28-33.

<sup>75</sup> See Noel Cox, "The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen" (2002) 2(2) Oxford University Commonwealth Law Journal 237-255.

<sup>76</sup> As in Canada in the nineteenth century, and occasionally more recently.

It might be argued that the title isn't important, but if that were so, then why is it being changed? It could be another attempt to remove a symbol – and an important and highly visible one – associated with the Crown – or simply a symbol of the British heritage of New Zealand. It is to be regretted that the title Queen's Counsel was not retained, as it reflected New Zealand's constitutional structure, the history of the institution in New Zealand, and its established reputation in New Zealand and abroad.

The letters "QC" is a well-known and understood brand of excellence; "SC" could be much less respected, and internationally less well known, as the experience of several Australian states has been said to have shown. "Senior Counsel" is at best unimaginative, at worst unnecessarily ambiguous. Most importantly, this change in name is apparently politically-motivated.<sup>77</sup>

One cannot tell what the future will bring. But renaming Queen's Counsel could harm the reputation of the office, since the motivation for renaming potentially taints the office as political. The ambiguous replacement title of Senior Counsel could lead to confusion and lack of understanding – and therefore in the decline of its usefulness. The extension of eligibility in a fused profession could also seriously harm the evolving nascent independent Bar.

### **Conclusion**

Appointment as a Queen's Counsel was not simply a matter of privilege, and Queen's Counsel were generally conscious that the conduct of their practice should reflect their responsibilities. The appointment of Queen's Counsel helped 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 were agreed that the standing and standards of the profession would be diminished if the rank of Queen's Counsel were to be abolished or seriously changed.<sup>78</sup> Renaming, and the extension of eligibility may have this effect.

The title of Queen's Counsel (as opposed to Senior Counsel or the like) should have been retained. It not only reflected the constitutional heritage of the country, but it also conveyed a message of independence – ironically enough perhaps given the origins of QCs<sup>79</sup> – and benchmarking. Renaming suggests a political agenda, which can only be harmful to the legal profession. It is dangerous for the profession to be seen as being in any way under Government political control, or in receipt of appointments as reward for political services, or inducement for favours to follow.

Whether this is the "end of the silk road" remains to be seen. The traditional career progression of junior barrister to Queen's Counsel survives in a modified form; but whether the loss of the traditional terminology, as well as the opening up of appointments to barristers and solicitors in partnership, will seriously weaken the institution remains to be seen. Perhaps the greatest cause for concern was that the reform was brought about in the face of opposition from the legal profession, and did

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<sup>77</sup> Some members of the present Government are republicans.

<sup>78</sup> See Rt Hon Paul East, QC, "The Role of the Attorney-General" in Philip Joseph (ed), *Essays on the Constitution* (Brookers, Wellington, 1995) 184-213.

<sup>79</sup> By the twentieth century Queen's Counsel were regarded as exclusively the mark of senior advocates, whatever their attitude to the Government of the day might have been. The fact that the appointment was made by the Crown – like judges – reinforced this.

not seem to take due account of the symbolic importance of the name of the office,<sup>80</sup> and of the consequences for the legal profession as a whole.

The lessons for the Commonwealth as a whole may be seen to be these. It is desirable to avoid tampering with such appointments without the benefit of careful consideration of the broader issues, including reputation, and the flow-on effects of change. It is necessary to avoid overlooking the external impression of neutrality, competence and status, and not concentrate exclusively on the profession's attitude, or a government-inspired desire to introduce business models or other extraneous concepts.

Nothing should be done – at least not without careful and mature consideration – which has the effect, or may have the effect, of weakening the independence of the Bar (real or perceived). The independent Bar is a major safeguard of the judicial system and ultimately of the constitution.

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<sup>80</sup> Or perhaps, indeed, this was why it was changed.