
The restoration of QC and the opportunity for choice

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SOME HISTORICAL CONTEXT

Organisations, whether they are churches, sports or social clubs, armed forces, professional associations, political parties, trade unions, and countries, have symbols or insignia which reflect what and who they are and which provide instant recognition. Such symbols might be a flag, a uniform, a coat of arms, club colours, livery, a badge, a title, an office, or whatever it is that denotes the body or tribe and/or its members. Often to attack or suppress an organisation, a nemesis might seek to damage, remove or ban the organisation's symbols or insignia. History is replete with the victor's zealous removal of the banners and standards of the vanquished.

However, in the long, drawn out cold war in Australia regarding our system of government, the republicans and their fellow travelers have been determined to damage, remove, or ban the symbols and standards of our constitutional monarchy without achieving a democratic victory. You all know what I am talking about, for example, the attack upon our flag, the abolition of imperial honours, the deletion of the word "Royal" before the names of organisations, and the removal of symbols of the Crown from our public buildings. Yet, as we also all know, a victory for the republicans is looking more unlikely as it grapples with its own contradictions and as it recedes up its own fundament.

During these past few decades such pre-emptive strikes against the symbols of our constitutional monarchy and history have even extended to the legal profession and in particular to barristers who are members of the Inner Bar. The Australian legal profession, because of its origins and the common law, derives its style and usages from the United Kingdom and the Crown.

Up until the end of 1992 members of the Inner Bar, commonly referred to as silks on account of the fabric of their court robes, were in New South Wales (NSW) and elsewhere called Queen's Counsel or "QC".

The ancient office of Queen's Counsel dates back to Elizabethan times. As noted by my Victorian colleague Stuart Wood QC:

The office of QC dates back to the late sixteenth century, when Sir Francis Bacon was appointed by Elizabeth I. The primary significance of the appointment was that the Queen's (or King's) Counsels constituted a group of barristers recognized by the sovereign as being of special eminence. When the legal profession was established in the Australian colonies, the usage and practices of the profession in England were taken up. The title serves to signify that the barrister has obtained a level of experience, learning, seniority and standing within the profession as an advocate who merits recognition.¹

The office of Queen's Counsel was struck down by a decision of the then Premier of New South Wales, John Fahey. In November 1992, it was announced that his government would no longer make recommendations for the appointment of Queen's Counsel. The Bar and the legal profession were ambushed by this change. The announcement was a surprise, not only to the New South Wales Bar but to others who had been asked to comment upon a legal profession Issues Paper, included in which was whether the office of Queen's Counsel should be abolished.

The last time Queen's Counsel were appointed in NSW by the Governor-in-Council was therefore in 1992. The history of this change is well set out in the "Personalalia" column of the *Australian Law*

¹ Wood S, "The Economic Case for Reinstating QCs", *Quadrant* (May 2013).



Journal, edited by Geoff Lindsay.² The article contains the speeches of welcome made to the last crop of Queen's Counsel appointed in this State in 1992, after which the system of appointment of Senior Counsel or "SC" had been taken over by the Bar Association of New South Wales.

The then Chief Justice Murray Gleeson's address traced the historical role of the appointment of Queen's Counsel by the Crown. However, he was circumspect in what he said about the change. However, in his address to the new Queen's Counsel a few days later, the then President of the Court of Appeal, Justice Michael Kirby was not so delphic, *inter alia*, he said,

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

There is no doubt that an increased demand will arise for Australian legal services in Asia and elsewhere in the years ahead. The appointment to the rank of Queen's Counsel is an important and professionally valuable step in the life of a barrister. Appointment to a new rank, differently styled and differently chosen, of senior counsel would not carry the same respect, at least until it earned it. That would take time.³

The timing of the John Fahey's announcement in November 1992 perhaps was his expressing support for the then question of whether Australia ought to become a republic. However, the overwhelming "NO" result of the 1999 referendum should have resolved such matters for some time. I believe that whilst this country remains a constitutional monarchy, the 1992 change from the QC post-nominal was petty, undemocratic and unnecessary. One of the first Queen's Counsel appointed in NSW was John Hubert Plunkett who came from Ireland and was a Roman Catholic at a time when members of that faith were perceived to be mistreated by the Protestant ascendancy. It is a shame if John Fahey's misplaced antipodean Fenianism was a pretext to the decline of this ancient office.

Unfortunately, other States of Australia and New Zealand followed the course set by the Fahey Government by refusing to sanction the appointment of Queen's Counsel. The various States and New Zealand then adopted the classification of Senior Counsel, although existing Queen's Counsel were permitted to retain the office of QC and its post-nominals. I note that I know of no example in NSW of any Queen's Counsel who swapped his QC for an SC. Included in that group were such avowed republicans as Gough Whitlam QC, Neville Wran QC, Peter Collins QC, and Jeff Shaw QC.

THE CURRENT SITUATION

What has happened since 1993 is that in the public mind and in the minds of the media there are two tiers or ranks of senior counsel: those who still retain the rank of Queen's Counsel; and those appointed as Senior Counsel. The *Sydney Morning Herald* journalist and Justinian editor Richard Ackland has continually quipped about the issue by referring to QCs as silks and SCs as rayons.

The two species of senior counsel at times are confused by the public, including sophisticated litigants. From personal experience, and from anecdotal evidence from my colleagues, many Senior Counsel's are introduced to clients in the following fashion:

Here is your barrister. He is an SC, but really is a QC.

More confusing, if not misleading, is the comparatively new usage, in some law firms, of an employee classification called "Special Counsel".

² Lindsay G, "Personalialia" (1994) 68 ALJ 469 at 470.

³ Lindsay, n 2 at 472-473.



Despite the widespread change to Senior Counsel and the expectation that those remaining Queen's Counsel would dwindle with the ravages of time, the ersatz title Senior Counsel has never taken root to replace the four centuries old brand of Queen's Counsel.

However, recently the change to Senior Counsel has started to be wound back. In June 2009, the government of New Zealand restored the title of Queen's Counsel. The New Zealand Attorney-General Christopher Finlayson gave reasons for its restoration, including that:

The title Queen's Counsel is instantly recognised as providing a certain standard of legal advice both among the New Zealand public and internationally.⁴

There is a strong economic argument for the restoration of Queen's Counsel. A promising young Sydney barrister, Andrew Martin, and I set this economic case out in an article in *Lawyers Weekly* earlier this year:

The practice of law is often referred to as a noble calling but is still a business. The brand of a business is a valuable and carefully guarded asset. The marketing of the brand is of enormous importance. The value of the brand recognition that the office QC has would be incalculable.

The United Kingdom had a debate about getting rid of Queen's Counsels during the time of Tony Blair's New Labour. The decision was ultimately made to retain the QC, albeit with a different appointment process. As Lord Falconer of Thoroton (then Lord Chancellor) told the House of Lords at the time:

We felt it was wrong to abolish the rank of QC when there was considerable evidence that it benefited the market – in particular, so far as concerned the international business that came to London in relation to legal services.

The theory was that internationally, companies would source QCs from the UK, and then there was a flow-on economic effect to the law firms that engaged them.

The importance of such brand recognition for the QC title is not just for the supply by barristers of their services but also when considering the contemporary competition between legal firms across Europe and the Asia Pacific for the Asian legal dollar. QCs are also internationally recognised in the former British colonies of Hong Kong, Malaysia, and Singapore.⁵

More recently and locally, the Commonwealth, and the States of Queensland and Victoria have restored the appointment of Queen's Counsel. Even proponents of Senior Counsel have recanted. Writing in the *Canberra Times*, former Australian Capital Territory Attorney-General Gary Humphries wrote that in 1995 he introduced legislation to cease future appointment of members of the local Bar "to be one of Her Majesty's Counsel for the Territory", that is Queen's Counsel. He wrote that:

At the time, the nation was in the grip of competition-policy fever, where anything regarded as impeding the proper operation of the marketplace was being swept aside.

The appointment by State and federal governments of leading barristers to be Queen's Counsel was considered by bodies like the (then) Trade Practices Commission to be anti-competitive, in that "official government endorsement of the status of a limited class of professional service providers cannot be justified in the public interest". The title itself had to be phased out (and replaced with "Senior Counsel", or SC) along with a government role in appointments, because the reference to the Queen was thought to imply a continuing government endorsement of that particular barrister's expertise, such that he or she would gain some market advantage over other members of the bar.⁶

However, experience has proved to Humphries that the loss of the office of Queen's Counsel has placed senior barristers, who would otherwise merit the office, at a competitive disadvantage. He goes on to say:

The theory behind the bill was sound. The pillars of the free market were upheld. But with the benefit of hindsight, the whole exercise was a mistake and, frankly, should now be reversed.

The irony here is that the abolition of QCs has made certain barristers *less* competitive. Specifically, it's made them less competitive in a globalised legal market where many of their competitors still use the rank, and gain market share precisely because they do.

⁴ Finlayson C, *Government to Restore Queen's Counsel*, Media Release (17 June 2009).

⁵ Phillips J and Martin A, "God Save the Queen's Counsel", *Lawyers Weekly* (10 March 2014).

⁶ Humphries G, "Scales of Marketplace Balance in Favour of Queen's Counsels" *The Canberra Times* (7 November 2014).



The dominance of the English legal system as the setting for international dispute resolution, carrying as it does a tradition of rigour and impartiality, has consolidated in the 21st century. In the stellar economies of Asia, particularly, there is a growing role for an independent judicial system to sit above the deal-making and corruption of much of the marketplace.⁷

He also notes that:

Significantly, barristers themselves have voted with their feet for a return to the old title. In Queensland and Victoria, where the senior profession has been given the choice of whether to remain SCs or become QCs, the vote for tradition has become a stampede. In Victoria, 156 out of 177 SCs chose to become QCs, and in Queensland 70 out of 74 made the switch.

I have little doubt this is less a yearning for an imperial relic than recognition that the title carries real cachet with the users of legal services here and in the region. The failure to reintroduce the rank in NSW has left that state's barristers not only behind in Asia but behind QCs in Victoria and Queensland.⁸

THE WAY FORWARD

These events have not gone unnoticed by the Bar in NSW. The Bar Council elected in 2013 appointed a committee earlier this year to investigate whether such a change back to Queen's Counsel was warranted. The committee called for submissions and received hundreds of responses, which ran two to one in favour of a return to Queen's Counsel. The committee considered the submissions but voted four to three against restoration as not being within the "public interest". An overwhelming majority of the Bar Council supported the committee's recommendation and voted for the status quo.

This action by the Bar Council was not well received amongst a large part of the Bar Association membership, some of whom decided to challenge the incumbent Bar Council at its 2014 election. A group of candidates standing on a platform of restoring the title of QC, and providing a choice between Queen's Counsel and Senior Counsel were well supported. There were 110 candidates for 21 positions. Of those five silks who received the highest number of votes, three are firmly in support of the restoration of QC and choice. Those three are one of this State's most successful Crown Prosecutors, Margaret Cunneen SC, former Commonwealth Solicitor-General, David Bennett QC, and I can happily report, dear little me. The group that stood for choice between Queen's Counsel and Senior Counsel has a majority on the new Council and together with other known supporters have a clear majority to push a policy of choice forward. The blinkered and narrow view of the ancien regime was repudiated by the membership.

It is passing strange that every time a choice is presented to the Australian people about our system of government or its symbols, whether it be the 1999 referendum or the barristers of New Zealand, Queensland and Victoria (and now in NSW), they vote overwhelmingly to retain our well known system and symbols. All of which is in stark contrast to the bien pensant elites who would change our system incrementally, undemocratically, and who refuse to provide a hallmark of a free society, that is choice for those who may have an alternative opinion.

Once the Bar has formulated a proposal to go to the State government after the March 2015 election, it will then be in the hands of the newly elected government, like in New Zealand, Queensland, Victoria, and the Commonwealth, to wind back one of the Fahey Government's silliest decisions. Notwithstanding the embarrassment caused by a forgotten bottle of 1959 Grange Hermitage and a brown envelope of cash handed over on the front seat of a Bentley in Newcastle, one can reasonably expect the return of a Liberal/National Party Government. I would therefore ask you all here to contact your local State Member of Parliament and if you are a member of a political party your representative. You should urge them to support the restoration of Queen's Counsel, to restore the symbols of our system of government, for the benefit of the NSW economy and in the public interest.

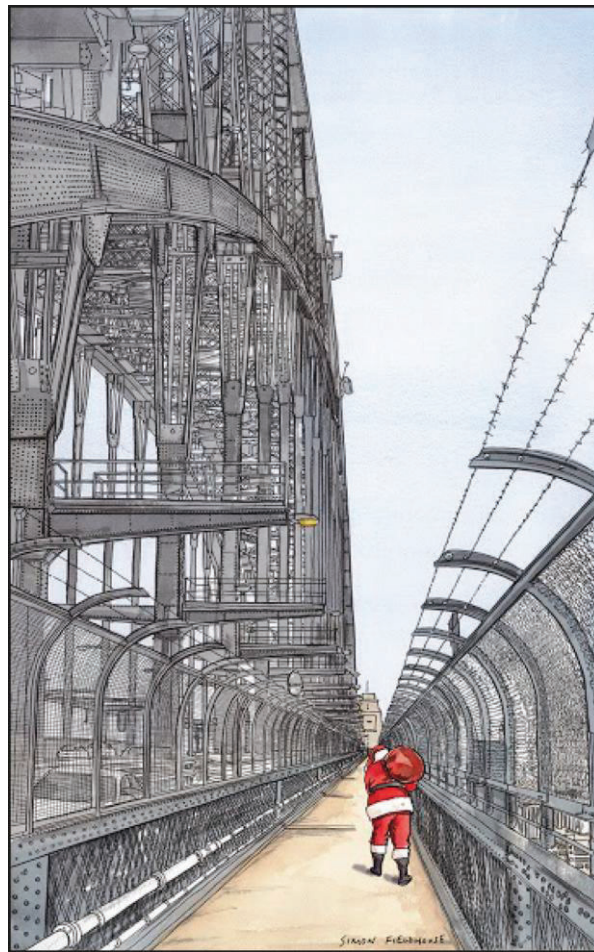
⁷ Humphries, n 6.

⁸ Humphries, n 6.





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