

# **Senior Counsel: Recognition, Review, Requirements, Responsibilities and Renewal**

## **Speech on the occasion of the 2011 new Senior Counsel announcing their appointment to the Land and Environment Court of NSW**

**by**

**The Hon. Justice Brian J Preston  
Chief Judge**

**21 October 2011**

### **Recognition**

I, on behalf of the Court and personally, congratulate each of you on the honour and privilege of your appointment as senior counsel in New South Wales.

The appointment of senior counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of persons needing the services of a barrister and on the part of the judiciary and public, that they will provide outstanding service as advocates and advisers, to the good of the administration of justice in this State.

Your appointment is a recognition by your peers of your high standing and a personal accolade and reward.

### **Review**

The rank of Senior Counsel has an ancient lineage, dating back over 400 years. The forerunners were serjeants-at-law, an order established in the time of Edward I.<sup>1</sup> The word “serjeant” simply meant “servant”.<sup>2</sup> During the Middle Ages, certain of the serjeants, called king’s serjeants, were appointed to appear on behalf of the king and to advise the king.<sup>3</sup> However, by Tudor times, in the sixteenth century, it had become the practice for the legal work to be done by the law officers of the Crown, being the king’s attorney-general and solicitor-general.<sup>4</sup> The attorney-general, solicitor-general and king’s serjeants together constituted the king’s counsel in ordinary in England.<sup>5</sup>

By the last part of the sixteenth century, the increase in the legal business in which the Crown was concerned meant that the king’s attorney-general and solicitor-general could not by themselves do all the work their office imposed upon them.<sup>6</sup> As a result, counsel were appointed by letters patent to give advice and assistance to the law officers of the Crown.

---

<sup>1</sup> W J V Windeyer, *Lectures on Legal History* (Law Book Co, 2<sup>nd</sup> ed, 1949) 154.

<sup>2</sup> *Ibid* 155.

<sup>3</sup> *Ibid* 157.

<sup>4</sup> *Ibid* 157; J H Baker, “The English Legal Profession, 1450-1550” in W Prest (ed), *Lawyers in Early Modern Europe and America* (Croom Holm, 1981) 20.

<sup>5</sup> J H Baker, *An Introduction to English Legal History*, (Butterworths, 3<sup>rd</sup> ed, 1990) 188.

<sup>6</sup> W S Holdsworth, *A History of English Law* (Methuen, 2<sup>nd</sup> ed, 1937), vol 6, 472.

The first king's counsel "extraordinary" to be granted the office of king's counsel by patent was Sir Francis Bacon. He had been called within the bar in 1594 as Queen Elizabeth I's "learned counsel extraordinary, without patent or fee". Bacon was constantly employed by Elizabeth in legal work.<sup>7</sup> In 1603, James I's warrant renewed Bacon's appointment as one of the "learned counsel extraordinary" to the king.<sup>8</sup> However, in 1604, James I granted Bacon by patent the office of "one of our counsel learned in the law", with "place and precedence in our courts or elsewhere and pre-audience" and a fee of £40.00 per annum.<sup>9</sup> Bacon thereby managed to get the office of king's counsel "established and brought into ordinary".<sup>10</sup>

Only one other king's counsel was appointed by patent by James I, but Charles I appointed nine and Charles II appointed 31.<sup>11</sup> The effect of these patents upon the position of king's counsel was that, instead of being informally appointed by the law officers of the Crown as before, they were appointed directly by the Crown by letters patent. King's counsel therefore became an established order in the legal profession, comparable to that of the serjeants-at-law who were appointed by royal writ.<sup>12</sup>

Although they became an established order in the legal profession, the nature of the duties of king's counsel was, at first, not affected. They were appointed to give assistance and advice to the law officers of the Crown. Hence, in Charles II's reign, they were consulted in capital cases and in cases of state. In James II's reign, they were expected to give a favourable opinion as to the legality of the proposed exercise of the dispensing power.<sup>13</sup> King's counsel were supernumerary law officers who, in return for a small salary, held permanent retainers which prevented them from appearing against the Crown. Until 1920, it was necessary for king's counsel to obtain a licence to appear for the defendant in a criminal case.<sup>14</sup>

The new rank of king's counsel contributed to the gradual obsolescence of the formerly more senior serjeant-at-law. The king's attorney-general and solicitor-general had similarly succeeded the king's serjeants as leaders of the Bar in Tudor times, although they did not technically become senior until 1623 when the attorney-general and solicitor-general were given, by royal warrant, precedence over all but the two most senior king's serjeants<sup>15</sup> and then 1813 when, by another royal warrant, they were given precedence over the entire Bar.<sup>16</sup> In 1670, King Charles II delivered his decision in the Privy Council that serjeants no longer took professional precedence of the new officers of king's counsel.<sup>17</sup> Thereafter, the most junior king's counsel preceded even the most senior serjeant (not being a king's serjeant).

---

<sup>7</sup> Ibid 473.

<sup>8</sup> Ibid.

<sup>9</sup> J H Baker, above n 5, 188; Holdsworth, above n 6, 473-474.

<sup>10</sup> Holdsworth, above n 6, 474.

<sup>11</sup> Baker, above n 5, 188.

<sup>12</sup> Holdsworth, above n 6, 474-475.

<sup>13</sup> Holdsworth, above n 6, 475.

<sup>14</sup> Holdsworth, above n 6, 475; Baker above n 5, 188.

<sup>15</sup> Who were known thereafter as the king's first (or prime) and second serjeants: Baker, above n 5, 188.

<sup>16</sup> Baker, above n 4, p 20 fn 15; Baker, above n 5, 188.

<sup>17</sup> Baker, above n 5, 189.

During the eighteenth century, king's counsel ceased really to be assistants of the attorney-general and solicitor-general. The position of king's counsel became simply one of rank and precedence superior to ordinary counsel with a right of preaudience.<sup>18</sup> Nevertheless, these privileges of rank and precedence and the right of preaudience were highly valuable to the recipient and by the nineteenth century nearly all barristers with high aspirations chose the silk gown of king's counsel in preference to the coif of a serjeant. This contributed to the decline and ultimate extinction of serjeants-at-law.<sup>19</sup>

King's counsel emerged into eminence in the early 1830s, during the reign of King William IV. Appointment as king's counsel became the standard means of recognising that a barrister was a senior and leading member of the legal profession. The numbers of king's counsel increased accordingly.<sup>20</sup>

The earliest English law list, published in 1775, listed 165 members of the Bar, of whom 14 were king's counsel, a proportion of about 8.5%. After the 1830s, the proportion of king's counsel increased. By the last quarter of the nineteenth century, approximately one practising barrister in six in England was a queen's counsel, a proportion of 16.6%.<sup>21</sup> Today in NSW, the same proportion exists, notwithstanding the growth in the number of barristers. In 2011, 2150 barristers hold NSW practising certificates, of whom 358 are queen's counsel or senior counsel, a proportion of 16.7%.<sup>22</sup>

In 1993, NSW replaced the title of Queen's Counsel, and appointment by letters patent, with the title of Senior Counsel, and appointment by the President of NSW Bar Association. Although there have been changes to the tradition of queen's counsel, the significance of the office has not diminished. The values it embodies remain just as important in the twenty-first century as at any time in its history.<sup>23</sup>

## Requirements

The appointment of senior counsel provides a clear and public identification of those barristers whose legal knowledge, experience and skills, and personal qualities, mark them out as being the best within the legal profession. The requirements of being highly learned in the law, skilled as an advocate and diligent, having practical legal experience acquired over a considerable period, and having the highest

---

<sup>18</sup> Holdsworth, above n 6, 476; Windeyer, above n 1, 157.

<sup>19</sup> Baker, above n 5, 188-189. The order of serjeants-at-law finally came to an end in 1877: Windeyer, above n 1, 156.

<sup>20</sup> D Duman, "The English and Colonial Bars in the Nineteenth Century" (Croom Helm, 1983) 35.

<sup>21</sup> Duman, above n 17, 98.

<sup>22</sup> The New South Wales Bar Association, <http://www.nswbar.asn.au/>

<sup>23</sup> Justice M H McHugh AC, "Speech to Welcome 2005 New Silks", The Great Hall, High Court of Australia, Canberra, 31 January 2005 at 1  
[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj\\_31jan05.html](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_31jan05.html)

standards of integrity, honesty and independence continue to distinguish senior counsel as leaders in the legal profession.

## **Responsibilities**

However with the status and respect for the designation of Senior Counsel comes responsibilities. There is the responsibility to maintain the distinguished tradition and expectation of both service and leadership which have been central to the institution for over four hundred years.<sup>24</sup> There is the responsibility to uphold the high standards expected of senior counsel in all advocacy and advice work.

An advocate, as an officer of the court, is central in assisting in the administration of justice according to law and upholding the rule of law. Judges place a significant level of trust in the advocates appearing before them. It is vital to our justice system that judges are able, without question, to hold the utmost confidence in the integrity and character of each advocate appearing before the court. As such, each advocate carries a significant burden. This burden is greater for those advocates who achieve the rank of Senior Counsel; they are expected to lead by example and to discharge these responsibilities to the fullest extent possible.<sup>25</sup>

There is also a responsibility to give hard advice to clients, advice that they might prefer not to hear, as to the prospects of success of cases and of particular issues in cases. It involves being discriminating as an advocate in the points to run and those to discard. Clients are more likely to accept such advice and such advocacy decisions by senior counsel because of their high standing and competence. The judiciary certainly rely on senior counsel to have given such advice and made such advocacy decisions.

## **Renewal**

As senior counsel your work is likely to alter in nature, difficulty and intensity. The learning, experience and skills that have been recognised by your appointment as senior counsel will be increasingly called upon, not only in the fields of law that you may have practised as a junior barrister, but in all fields. Diversification and renewal of your practice is a desirable outcome, not only for your own professional satisfaction but also for those who need to call on your services and for the judiciary.

This Court would invite and would welcome each of you to extend the benefit of your learning, experience and skills by appearing in matters before this Court.

The Land and Environment Court is a unique court with a diverse, complex and important jurisdiction. It is a superior court of record. It was the first specialised, environmental, superior court in the world. It has been used as a model and has been studied all around the world. Its judgments have been cited throughout the Commonwealth and overseas.

---

<sup>24</sup> Ibid 2.

<sup>25</sup> Ibid.

The jurisdiction includes criminal law, administrative law, equitable remedies, valuation and compulsory acquisition law, an extensive merits review function, and a mining jurisdiction. The matters often raise difficult legal, evidentiary and policy questions. The jurisdiction provides ample scope and opportunity for senior counsel. Both litigants and the Court benefit from the appearance of senior counsel in these matters.

Each of the judges of the Court look forward to your appearing in the Court. I and the rest of the judges of the Court wish you every success in your career and service to the law.

The Court is adjourned.