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## AUCKLAND DISTRICT LAW SOCIETY INCORPORATED

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### PUBLIC ISSUES COMMITTEE

## THE EFFECT OF THE LAWYERS AND CONVEYANCERS ACT ON THE INDEPENDENT BAR

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23 April 2009

#### Public Issues Committee

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**Public Issues Committee  
Auckland District Law Society  
Discussion Paper**

**THE EFFECT OF THE LAWYERS AND CONVEYANCERS ACT ON THE  
INDEPENDENT BAR - OVERVIEW**

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The Lawyers and Conveyancers Act 2006 has had certain implications for the independent bar, lawyers who practice solely as barristers (or courtroom lawyers). As noted in our previous paper, “The Changing Legal Profession”, there has recently been some discussion as to whether the continued division of the New Zealand legal profession into barristers and solicitors ought to be maintained. It has further been suggested that legal practitioners should all be styled lawyers, the distinction between barristers and solicitors being now largely – or so it is argued – irrelevant. The Lawyers and Conveyancers Act 2006, in its name and in the use of the term “lawyer” in preference to barrister and solicitor, suggests that this perception is being acted upon in legislation. Recent developments have, however, both strengthened and weakened the independence of the independent bar, and this has implications for the operation of the legal profession, and thus for the public.

On 3<sup>rd</sup> October 2008 the appointment of the first of the new senior counsel (replacing Queen’s Counsel) was announced. Aside from the change in name, the major alteration was the extension of eligibility to include lawyers working in partnerships. Thus litigation partners of solicitors’ firms are now eligible for appointment. Significantly, only two of the seven new appointments were from the independent bar, Rt Hon Sir Geoffrey Palmer and Jan McCartney. If this is to become a pattern there are serious implications for the independent bar, for whom appointment as QC was seen as a significant career step; and by those outside the bar as a warranty of expertise and experience.

The New Zealand Law Society practising certificate application form also presumes that there is a single fused profession, and thus undervalues the members of the independent bar.

At the same time there is now a requirement (in an admittedly interim process) for new barristers to have had six months legal experience. This is a long-overdue step, and fills a serious and embarrassing gap. It will do much to strengthen the bar.

A strong independent bar is needed for a strong bench. Judges are generally recruited from senior litigators – whether in partnership or barristers sole. The latter are however important as they are both independent and also specialists in their fields, and should form the bedrock of the bench. The Lawyers and Conveyancers Act, and the attitude it reflects, could weaken the independent bar, with unforeseen implications in the future of the bar and bench. The advent of the requirement for new barristers to be experienced is a contrary development, and one which is welcome. The division between barristers and solicitors may seem esoteric, but it is nonetheless an important one.

**Public Issues Committee  
Auckland District Law Society  
Discussion Paper**

**THE EFFECT OF THE LAWYERS AND CONVEYANCERS ACT ON THE  
INDEPENDENT BAR**

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## **Introduction**

The Lawyers and Conveyancers Act 2006 has had certain implications for the independent bar, lawyers who practise solely as barristers (or courtroom lawyers). As noted in our previous paper, “The Changing Legal Profession”,<sup>1</sup> there has recently been some discussion as to whether the continued division of the New Zealand legal profession into barristers and solicitors ought to be maintained. It has further been suggested that legal practitioners should all be styled lawyers, the distinction between barristers and solicitors being now largely – or so it is argued – irrelevant.<sup>2</sup> The Lawyers and Conveyancers Act 2006, in its name and in the use of the term “lawyer” in preference to barrister and solicitor, suggests that this perception is being acted upon in legislation. Recent developments have, however, both strengthened and weakened the independence of the independent bar, and this has implications for the operation of the legal profession, and thus for the public.

On 3<sup>rd</sup> October 2008 the appointment of the first of the new senior counsel (replacing Queen’s Counsel) was announced. Aside from the change in name, the major alteration was the extension of eligibility to include lawyers working in partnerships. Thus litigation partners of solicitors’ firms are now eligible for appointment. Significantly, only two of the seven new appointments were from the independent bar, Rt Hon Sir Geoffrey Palmer and Jan McCartney. If this is to become a pattern there are serious implications for the independent bar, for whom appointment as QC was seen as a significant career step; and by those outside the bar as a warranty of expertise and experience.

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<sup>1</sup> (7<sup>th</sup> May 2008) Public Issues Committee of the Auckland District Law Society occasional paper <<http://www.adls.org.nz/filedownload?id=82e017ab-003c-4de6-825a-a8516a8122e3>> 1-11.

<sup>2</sup> Ted Faleauto, Northern Law News 19<sup>th</sup> April 1996 p 4; Law Talk 453, 15<sup>th</sup> April 1996, p 3; Colin Amery, Law Talk 455, 13<sup>th</sup> May 1996 p 2; Robert McKee, Northern Law News 14<sup>th</sup> June 1996 p 6; Law Talk 459, 8<sup>th</sup> July 1996 p 2; C.M. Ruane, Law Talk 455, 13<sup>th</sup> May 1996 p 2.

At the same time there is now a requirement (in an admittedly interim process) for new barristers to have had six months legal experience.<sup>3</sup> This is a long-overdue step, and fills a serious and embarrassing gap. It will do much to strengthen the bar.

A strong independent bar is needed for a strong bench. Judges are generally recruited from senior litigators – whether in partnership or barristers sole. The latter are however important as they are both independent and also specialists in their fields, and should form the bedrock of the bench. The Lawyers and Conveyancers Act, and the attitude it reflects, could weaken the independent bar, with unforeseen implications in the future of the bar and bench. The advent of the requirement for new barristers to be experienced is a contrary development, and one which is welcome. The division between barristers and solicitors may seem esoteric, but it is nonetheless an important one.

### **The legal professions(s)**

Legal professions may be categorised as divided between functions. In the classic English form this was between barristers and solicitors. However, this pure distinction, between the counsel who represent clients in court, and those lawyers who act directly for clients, is far from universal. Dual practise, where lawyers may act as barrister or solicitors at their choice, is rather commoner.<sup>4</sup> In this situation a lawyer who chooses to undertake court or opinion work, and minimise his or her contact with clients, may be called a barrister sole, to distinguish them from barristers and solicitors.<sup>5</sup> Some professions have been amalgamated,<sup>6</sup> but perhaps the only truly fused professions are those where lawyers use only one style, and there is no functional or legal division of the profession between court and office work.

Whilst the great majority of New Zealand legal practitioners are both barristers and solicitors,<sup>7</sup> if they are acting as a barrister they are only entitled to the (remaining) privileges of that calling if they are not also purporting to act also as a solicitor,<sup>8</sup>

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<sup>3</sup> New Zealand Law Society, “Starting Practise as a Barrister” (26<sup>th</sup> September 2008), under s 30(1)(a) of the Act and R.12 of the Lawyers and Conveyancers Act (Lawyers: Practise Rules) Regulations 2008 the Council of the Law Society must be satisfied that a lawyer wishing to practise on his or her own account as a barrister sole is a suitable person to do so, having regard to, *inter alia*, the lawyer’s legal experience.

<sup>4</sup> See the Annual Reports of the New Zealand Law Society.

<sup>5</sup> FORBES, J.R. (1979). *The Divided Legal Profession in Australia: history, rationalisation and rationale* (Sydney, Law Book Co).

<sup>6</sup> For New Zealand as a fused profession see *Barrott v Barrott* [1964] NZLR 988.

<sup>7</sup> “Barrister” includes a barrister and solicitor practising as a barrister, whether or not he or she is also a solicitor; Law Practitioners Act 1982, s 2. For the role of a barrister see *Ziems v Prothonotary of Supreme Court of New South Wales* (1957) 97 CLR 279, 298; 64 ALR 620 (HCA).

<sup>8</sup> Privileges include immunity from civil arrest, whilst going to, remaining at, and returning from court; *Meekins v Smith* (1791) 1 Hy Bl 636; *Childerston v Barrett* (1809) 11 East 439; *Pitt v Coombs* (1834) 3 Nev & MKB 212; *Newton v Harland* (1839) 8 Scott 70; *Anon* (1839) 9 LJCP 176. There is also privilege in judicial proceedings for defamatory statement: *Rawlinson v Oliver* [1995] 3 NZLR 62 (CA);

whether or not they may have a practising certificate as a solicitor also.<sup>9</sup> No person holding a practising certificate as a barrister and solicitor shall hold himself or herself out as practising as a barrister sole.<sup>10</sup>

There is manifestly a distinction between their two types of work. Indeed, in recent decades the greatest increase in legal personnel has been among the specialist counsel. But not every jurisdiction retains this distinction. Two questions might profitably be asked. Firstly, how did this division occur; and secondly, how do other jurisdictions organise their legal professions. A tentative answer might then be attempted to the question of whether this division should continue.

### **Introduction of the legal profession into New Zealand**

The arrival of the legal profession in New Zealand occurred at a time when the profession in England was undergoing great change, especially the move towards higher educational standards for admission (Birks (1960) pp 176-80). In England regular Law Society lectures were commenced in 1836 and in that same year an examination in written form was instituted for attorneys at common law. Solicitors in equity followed suit in 1837. In both cases the Law Society appointed the examiners (Birks (1960) pp 176-80).

Richard Davies Hanson, an English solicitor, is recorded as being the first qualified lawyer to set foot in New Zealand, arriving at Port Nicholson on 3<sup>rd</sup> January 1840 as Land Purchase Officer to the New Zealand Company. He became the first Crown Prosecutor (Foden (1936), Cooke (1969) p 24). Even before the first Supreme Court Ordinance was enacted regulating the admission of lawyers in New Zealand, attempts were made to prevent unqualified men from practising law here.

Although the first admission did not occur until January 1842,<sup>11</sup> the first formal measure to regulate the admission to practise was the Supreme Court Ordinance passed on 22<sup>nd</sup> December 1841. This was closely modelled on the Charters of Justice of older colonies, such as New South Wales before 1834, Newfoundland, and parts of the West Indies. The Supreme Court was empowered to enrol as barristers and as solicitors those who had been admitted as such in the United Kingdom.<sup>12</sup> This meant, of course, as counsel<sup>13</sup> or solicitors.<sup>14</sup> Scottish practitioners<sup>15</sup> were only accorded

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*Munster v Lamb* (1883) 11 QBD 588 (CA); *Brook v Montague* (1605) Cro Jac 90; Defamation Act 1992, s 14(1).

<sup>9</sup> Rights of audience are accorded all barristers and solicitors, and barristers (s 43 (4)), though those practitioners who are admitted as solicitors only have rights of audience in the lower courts only; *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA); *Mihaka v Police* [1981] 1 NZLR 54.

<sup>10</sup> Rule 11.02 of the Rules of Professional Conduct for Barristers and Solicitors (1998) (5<sup>th</sup> ed, Wellington, New Zealand Law Society).

<sup>11</sup> The first name on the roll being that of William Swainson, admitted 31<sup>st</sup> January 1842; COOKE, R. (Ed) (1969). *Portrait of a Profession* (Wellington, Reed) 142.

<sup>12</sup> s 13.

<sup>13</sup> Advocates of the ecclesiastical (including probate and divorce causes) and admiralty courts, barristers in the Court of Chancery and the common law courts

equality by the Scotch Law Practitioners Act 1856,<sup>16</sup> primarily because Scots Law is based to a large extent on the Roman Law, rather than the common law.

This first Ordinance was however disallowed by the Crown on the advice of the Colonial Office on 4<sup>th</sup> December 1843 as it excluded from admission those barristers who were educated in the New Zealand or in other colonies.

The second Ordinance, passed 13<sup>th</sup> January 1844 repeated substantially the provisions of the first regarding qualifications, but also included those barristers who might qualify under any New Zealand prescription for admission, and solicitors who had “established themselves in the exercise of their profession” on or before 27<sup>th</sup> December 1841. In fact, the numbers involved were extremely small.

Both Ordinances maintained the distinction between barristers and solicitors, although in practise a man who had qualified as one might seek recognition in New Zealand as the other. The distinction was not allowed to interfere with the growth and improvement of the profession, at a time when legally qualified men were few.

The Supreme Court Ordinances of 1841 and 1844, and an Amendment Ordinance in 1848 expressly permitted barristers to act as solicitors, and solicitors as barristers, in each case for a period of five years after the commencement of the enactment, unless the Court should order to the contrary.

The Supreme Court Rules Ordinance 1856<sup>17</sup> replaced the Supreme Court Rules Ordinance 1844, without however providing for new rules of admission. The Law Practitioners Act 1861<sup>18</sup> repealed all earlier statutes governing admission.<sup>19</sup> It was very complex, and reflected the diverse background of lawyers, and the desire to maintain the division of the profession. The sections providing for the Judges to make rules dividing the two branches and requiring every barrister and solicitor to select which branch they would follow were clearly written as transitional provisions.<sup>20</sup>

Within six months of the making of rules for separation every practitioner was to elect in which branch they would practise.<sup>21</sup> In the event no such rules were ever made (Greenaway (1989) p 22). The Act also regularised legal training in New Zealand,<sup>22</sup>

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except that of King’s Bench, serjeants at law in the Court of King’s Bench, and, in Ireland, the barristers of the Society of King’s Inn.

<sup>14</sup> Attorneys in the common law courts, solicitors in the Court of Chancery, proctors in the ecclesiastical and admiralty courts, and, in Ireland, the solicitors.

<sup>15</sup> The advocates, and the law agents, solicitors, and Writers to the Signet, known only since 1933 as solicitors.

<sup>16</sup> 19 & 20 Vict no 33.

<sup>17</sup> Under the authority of the Supreme Court Procedure Act 1856 (19 & 20 Vict no 15).

<sup>18</sup> 24 & 25 Vict no 11.

<sup>19</sup> s 3, and the First Schedule.

<sup>20</sup> ss 59-60.

<sup>21</sup> s 60.

<sup>22</sup> ss 5, 16.

created examinations,<sup>23</sup> provided for articles,<sup>24</sup> and gave the judges control of the profession.<sup>25</sup>

Although from the eighteen-forties barristers could act as solicitors, and solicitors as barristers, there never was in New Zealand a conscious fusion of the two branches of the legal profession. The right of barristers and solicitors to practise each other's profession was intended as a temporary measure, made necessary by the shortage of qualified lawyers in the colony.<sup>26</sup>

In 1862 Justice Richmond observed that there was no such animal in New Zealand as a barrister who practised exclusively as such (Cullen (1979) p 22). The dual practise of barristers and solicitors had obvious advantages, no less to practitioners than clients, when the country was not yet sufficiently densely populated to support an entirely separate Bar (Cooke (1969) p 140).

Had the provisions of the Law Practitioners Acts 1854<sup>27</sup> and 1858,<sup>28</sup> and the Supreme Court Rules 1846 been perpetuated, with the right of reciprocal qualification, fusion could have become reality (Cooke (1969) p 139). As it was, New Zealand developed a profession that was theoretically made up of distinctive branches, but allowed for the *combined* or dual practise of its members. Members might practise as one or the other as they chose. The relatively small group of practitioners who were barristers sole remained members of the New Zealand Law Society, but voluntary associations of barristers have been created.<sup>29</sup>

Today, to obtain entry into the legal profession in New Zealand candidates must pass the degree of bachelor of laws in one of the five university law schools, pass a professional legal studies course run by the Institute of Professional Legal Studies, and apply to the High Court for admission as a barrister and solicitor of the High Court.<sup>30</sup>

Since 1982 admission has been both as barrister and solicitor, admission as one or the other having ended. Most of those admitted to the profession in New Zealand practise as both barrister and solicitor. The continued division of the profession derives from the practise in Britain, but is nonetheless a functional one.

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<sup>23</sup> s 6-9.

<sup>24</sup> s 16(3)-(7).

<sup>25</sup> s 6 (examination of candidates for the bar), s 8 (judges may make rules), s 25 (admission of solicitors), s 35 (power of Court to strike off), s 37 (taxation of bills of costs by registrars).

<sup>26</sup> In the United States of America there was not so much a fusion of the professions, as the absence of a separate bar.

<sup>27</sup> 17 & 18 Vict no 8.

<sup>28</sup> 21 & 22 Vict no 23.

<sup>29</sup> Such as the Criminal Bar Association of New Zealand, and the New Zealand Bar Association.

<sup>30</sup> Law Practitioners Act 1982; Law Practitioners Admission Rules 1987 (SR 1987/223).

An increasing number of lawyers practise as barristers sole, and Justice Richmond's words are no longer a true description of the state of the profession. In 1989 the figures were 3.2%, 1993- 6.2%, 1996- 9% barristers sole. On 30<sup>th</sup> November 1998 in Auckland there were 410 barristers sole, 28 Queen's Counsel, of 3,162 total practitioners, 13.8% counsel (*Law Directory 1989, Law Directory 1998*). In 2006 there were a total of 14,999 practising lawyers throughout New Zealand, of whom 1,511 were barristers sole (including QCs) – 10% of the total profession.

Whilst the nature of the New Zealand barrister may be somewhat dissimilar to that of the English barrister, to whom the option of a relatively easy conversion. The new legal aid scheme may drive out of the profession those barristers who have sought to practise as barristers sole because they have not been successful in obtaining employment as solicitors. The profession is in flux, as indeed it is in many countries, with the growth of large partnerships. Yet at the same time specialisation is increasing, including specialist litigation lawyers.

There is not an effectively fused legal profession in New Zealand. This is because the rights and duties of barristers and of solicitors are still distinct. Thus solicitors generally maintain trust accounts, but not barristers sole. Solicitors must have three years experience before they are permitted to practise on their own account or as partners. Barristers, who are expected to have little or no direct contact with their clients, may commence professional practise without having had any experience.

## Counsel

By looking at the origins of barristers and solicitors in England we can see why there is a divided profession, and gain some insight into the reasons why the division has survived.<sup>31</sup>

Barristers, also called counsel,<sup>32</sup> or collectively, as the bar, traditionally have been said to undertake court work. They gave assistance in court, by reciting the count or pleading and engaging in any argument which arose.<sup>33</sup> They were originally the lawyers of the common law and equity courts, members of the Inns of Court. The barristers succeeded the advocates the ecclesiastical and admiralty courts after that order declined<sup>34</sup>.

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<sup>31</sup> There was a division of the English legal profession for as long as there has been a profession; BAKER, J. (1969). "Counsellors and Barristers: an historical Study", Cambridge Law Journal, 205.

<sup>32</sup> Counsellor, or Counsellor-at-Law, is an obsolete term for barrister, but may still be occasionally found in Ireland.

<sup>33</sup> BAKER, J. (1979). *An Introduction to English Legal History* (London, Butterworths) 134, 135.

<sup>34</sup> *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] WLR 440, 449 per Lord Goddard. The advocates also practised in the Court of Requests, the Council in the North at York, and the Council in the Marches in Wales), and were admitted by the Dean of the Arches.

The advocates were admitted to all the courts by statute in 1857,<sup>35</sup> and barristers, attorneys, serjeants and solicitors were admitted to the admiralty courts by statute in 1859.<sup>36</sup> It was settled in practise after 1858 that barristers were entitled to practise in the ecclesiastical courts. On the basis of the doctrine *ex necessitate rei* as explained *In the matter of the Serjeants at Law*,<sup>37</sup> barristers would be allowed to practise in the Court of Common Pleas if all the serjeants were dead. A similar application of the doctrine was given in the Court of Chivalry in 1954.<sup>38</sup>

The distinction between barristers and solicitors as court lawyers and office lawyers respectively is not the essential distinction. It is really based on the court structure. But this distinction between several types of practitioner does underpin the whole profession.

Queen's Counsel are (or were, in New Zealand and most Australian jurisdictions) barristers appointed by letters patent to be one of Her Majesty's counsel learned in the law. They do not constitute a separate order of lawyers. Whilst other barristers were called to the Bar by their inn, the Queen's Counsel were called by the Court within the Bar.

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 (Holdsworth (1938) vol 6 pp 473-4).<sup>39</sup>

The obsolete rank of Serjeant-at-Law was formerly more senior, though it was overtaken in the 1670 formally, and professionally in the course of the late eighteenth century, as had the Attorney-General and Solicitor-General, who succeeded the King's Serjeants as leaders of the Bar in Tudor times, though not technically senior until 1623<sup>40</sup> and 1813 (Baker (1981) p 20). But the Queen's Counsel only emerged into eminence and integrity in the early 1830s, prior to when they were relatively few. It became the standard means of recognising that a barrister was a senior member of the profession, and the numbers multiplied accordingly (Duman (1983) p 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 later enjoyed priority before the courts.

They 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. This requirement appears first in the nineteenth century, and

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<sup>35</sup> Court of Probate Act 1857 (20 & 21 Vict c 77) (UK) s 40.

<sup>36</sup> An Act to enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to practise in the High Court of Admiralty (22 & 23 Vict c 6) (UK).

<sup>37</sup> (1840) 4 Bing (NC) 235, 239 per Tindal CJ, approving *Parton v Genny* (1462) YB 2 Edw IV Trin f 2 p 14 per Littleton J.

<sup>38</sup> *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] WLR 440, 449 per Lord Goddard.

<sup>39</sup> Patent Rolls, 2 Jac I p 12 m 15.

<sup>40</sup> Except for the two senior King's Serjeants.

gradually hardened into a rule of professional conduct, since abolished (Cooke (1976), Johnston (1977), Cock (1978), *Annual Statement 1935* p 6). The rule was abolished by the Bar Council with effect from 1 October 1977 (*Annual Statement 1977-78* pp 42-5).

In England, Queen's Counsel also had to have chambers in London (Duman (1983) pp 98-9). Until 1920 they had to have a licence to appear in criminal cases for the defence (*Annual Statement 1920* p 6). 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.

In 1994 solicitors of England and Wales were entitled to be admitted to the upper courts. Some 275 were so practising in 1995.<sup>41</sup> On 4<sup>th</sup> April 1996 the appointment of 66 new QCs was announced. There were also 6 QC *Honoris Causa*. 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.<sup>42</sup> In 1995 solicitors who had obtained audience in the superior courts were entitled to apply for appointment as Queen's Counsel. The first such were appointed March 1997. These were Arthur Marriott, partner of the London office of the American law firm of Wilmer Cutler and Pickering, and Dr Lawrence Collins, partner of the City law firm of Herbert Smith.<sup>43</sup>

Queen's Counsel are essentially the same as elsewhere in the Commonwealth, even though in some countries they include lawyers from partnership and in others they must be members of the independent bar. They are appointed from practising counsel, so solicitors are not appointed. Nor are they generally from members of the academic community. There is the expectation that once appointed, a QC will undertake predominantly court practise until retirement or elevation to the bench.

First appointed June 1907, 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 was regulation 3 of the Queen's Counsel Regulations 1987.<sup>44</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.<sup>45</sup> A fee was payable on appointment.<sup>46</sup> Until 1956 appointments were made under the general authority of the Letters Patent Constituting the Office of Governor-General, by letters patent.<sup>47</sup> Since then they have been under the authority of the Law Practitioners Act 1955, and later of 1982.<sup>48</sup> Queen's Counsel received a patent on appointment.

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<sup>41</sup> The Times (London), 5<sup>th</sup> April 1996.

<sup>42</sup> The Times (London), 5<sup>th</sup> April 1996.

<sup>43</sup> The Times (London), 5<sup>th</sup> April 1996.

<sup>44</sup> SR 1987/332.

<sup>45</sup> Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476.

<sup>46</sup> Queen's Counsel Regulations 1987 cl 4, \$100, now \$270 by 1992/128.

<sup>47</sup> Law Practitioners Act 1931.

<sup>48</sup> 1955 s 15 (and later enactments).

As soon as possible after the appointment, a new Queen's Counsel was called to the inner Bar, and read the declaration of a Queen's Counsel.<sup>49</sup>

There is little evidence of why Queen's Counsel were only introduced to New Zealand in 1907, fifty years after Australia, and thirty years after the last Australian colony received them (Finn (1995)). 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 seven of eight 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 (1995) p 96). This was motivated largely, it would seem, by suspicions that the new office would be monopolised by the larger centres.<sup>50</sup>

Until 1915 QC could practise as solicitors also.<sup>51</sup> 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 (Finn (1995) p 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 practise.

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.<sup>52</sup> From 1924 the English tradition, conspicuously not present at the inception of the appointment, of appointing only those in practise as barristers sole, was adopted (Finn (1995) p 98). Since then the number of QCs have gradually increased, as has the number of members of the independent Bar.<sup>53</sup> The extension of eligibility to lawyers in partnership in the 2006 Act was not as significant reform as was suggested at the time.

Although originally the QC was an extraordinary Crown officer – and their declaration retains this flavour – they had 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.<sup>54</sup>

The Government of New South Wales has ceased to recommend the appointment of Queen's Counsel since 1993.<sup>55</sup> 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

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<sup>49</sup> Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476.

<sup>50</sup> FINN, J. (1995). "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915", New Zealand Law Journal, 95.

<sup>51</sup> s 3 Law Practitioners Amendment Act 1915.

<sup>52</sup> FINN, J. (1995) "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915", New Zealand Law Journal, 95.

<sup>53</sup> *Law Directory 1989, Law Directory 1998*.

<sup>54</sup> As is seen by its replacement in some jurisdictions by senior counsel appointed by the Chief Justice or Law Society/Bar Association.

<sup>55</sup> [1993] NZLJ 1. Legal Profession Reform Act 1993 (NSW) §380.

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.

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.<sup>56</sup> Such a need is also seen in other professions, where it is usually met by the use of grades of membership in professional bodies.<sup>57</sup>

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. New Zealand has now followed this example.

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, and 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.

In 1907 the first 10 Queen’s Counsel were appointed in New Zealand.<sup>58</sup> By 1963 there were still only 9 practising in New Zealand,<sup>59</sup> and 13 in 1968.<sup>60</sup> They were to later increase in numbers as the independent Bar grew. Thus in 1978 there were 23 QC and another 84 barristers sole.<sup>61</sup> Thus 21% of counsel were of the senior rank.

By 1992 there were 48 QC and another 219 barristers sole.<sup>62</sup> The seniors now numbered 18%. In 1996 the numbers were 53 QC and another 396 barristers sole<sup>63</sup> (12% senior).

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.<sup>64</sup>

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<sup>56</sup> Sydney Morning Herald, 14<sup>th</sup> October 1993, p 4. “Senior Counsel Protocol” as at 12<sup>th</sup> July 2001.

<sup>57</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>58</sup> FINN, J. (1995). “A Novel Institution: The First Years of King’s Counsel in New Zealand 1907-1915”, New Zealand Law Journal, 95.

<sup>59</sup> *Law Directory* 1963.

<sup>60</sup> *Law Directory* 1968.

<sup>61</sup> *Law Directory* 1978.

<sup>62</sup> *Law Directory* 1992.

<sup>63</sup> *Law Directory* 1996.

<sup>64</sup> 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 the Rt Hon Sir Kenneth Keith.<sup>65</sup> More recently, the Clerk of the House of Representatives, David McGee, was appointed a QC.

The general requirements for appointment included eminent practise 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 practise of law, 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.<sup>66</sup>

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. Applicants were notified by the Solicitor-General, and the Attorney-General published a list of appointments.<sup>67</sup>

This was not an open process, in that selection was largely along lines similar to the selection of judges. Selection of QC's was however more transparent than that for judges. The Memorandum of 1980 made the criteria of selection quite clear.<sup>68</sup> 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 was also criticised from time to time in England,<sup>69</sup> and has since been reformed.

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 practise should reflect their responsibilities.<sup>70</sup> 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.<sup>71</sup> 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 altered.<sup>72</sup>

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<sup>65</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>66</sup> EICHELBAUM, SIR THOMAS (1995). "Appointment of Queen's Counsel, New Zealand Law Journal", 8.

<sup>67</sup> FINN, J. (1995). "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915", New Zealand Law Journal, 95; memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476.

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

<sup>69</sup> The Times (London), 5<sup>th</sup> April 1996.

<sup>70</sup> EAST, P. (1995). "The Role of the Attorney-General", in: P. Joseph (ed), *Essays on the Constitution* (Wellington, Brooker's) 184-213.

<sup>71</sup> Compare "Senior Counsel Protocol" as at 12<sup>th</sup> July 2001 (New South Wales).

<sup>72</sup> See EAST, P. (1995). "The Role of the Attorney-General", in: P. Joseph (ed), *Essays on the Constitution* (Wellington, Brooker's) 184-213.

The title of Queen's Counsel (as opposed to Senior Counsel or the like) should perhaps have been 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.<sup>73</sup>

Queen's Counsel are not a separate branch of the legal profession. But they are, or (in those jurisdictions which have abolished them) were a distinct professional status. As such they are an office which reinforces the distinction between barristers and solicitors, though this distinction is in decline. In particular, the appointment of solicitors to the office has done much to reduce professional jealousies in England. The office once contributed to the perceived division of the legal profession; in several instances (as in Canada and more recently in England) it may have helped to emphasize professional links rather than divisions.

The court branch of the legal profession was long regarded as the senior, or more prestigious. Barristers (with solicitors) are now the sole survivors of a range of professions derived from the disparate courts. Barristers not under court control and supervision in same way that attorneys (and the later solicitors) were. They were more inclined to self-regulation. The Queen's Counsel survived as a separate grade, but were under threat, perhaps in part because its function and purpose was not clear.

### **Chambers lawyers**

The chambers lawyers are now reduced to but one rank, that of the solicitor. Their professional status and importance has grown, often at the expense of the barristers-though where the division between barristers and solicitors remains strong they often retain important professional monopolies of appointment.

The distinction between those lawyers who conduct trials and those who deal with paperwork and interview clients was never more than artificial, but it does represent a real distinction. As in many fields of human endeavour, the tendency over time has been for the legal profession to be simplified. Though the single unified profession, as found in the United States of America, may not be the commonest form, it represents a logical evolution. Logical, in that having one person provide the complete range of legal services was convenient in a colonial environment. In today's more complex environment the emphasis is more on the specialist. Thus, the existence of a litigation specialist would be logical.

The division between barristers and solicitors survives in many common law jurisdictions, though it is perhaps less rigid than at the height of the nineteenth century. The professional privileges of the barrister have been attacked. But the need for them remains.

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<sup>73</sup> COX, N. & SPILLER, P. (2000). "Queen's Counsel", New Zealand Law Journal, 371.

In the New Zealand context the increase in the numbers of barristers may be seen as partly a reflection of the flexibility of barristerial practise compared with solicitors practise,<sup>74</sup> and as a reflection of the increasing diversification of legal practise.

## Conclusion

The Lawyers and Conveyancers Act 2006 has had certain implications for the independent bar, lawyers who practise solely as barristers (or courtroom lawyers). Recent developments have, however, both strengthened and weakened the independence of the independent bar, and this has implications for the operation of the legal profession, and thus for the public.

Aside from the change in name, the major alteration to the office of Queen's Counsel (now called, rather obscurely, Senior Counsel) was the extension of eligibility to include lawyers working in partnerships. Significantly, only two of the seven new appointments were from the independent bar. If this is to be a precedent there are serious implications for the independent bar, for whom appointment as QC was seen as a significant career step; and by those outside the bar as a warranty of expertise and experience.

The New Zealand Law Society practising certificate application form also presumes that there is a single fused profession, and thus undervalues the members of the independent bar.

At the same time the requirement for new barristers to have had six months legal experience is a welcome and long-overdue step, and will do much to strengthen the bar.

A strong independent bar is needed for a strong bench. Judges are generally recruited from senior litigators – whether in partnership or barristers sole. The latter are however important as they are both independent and also specialists in their fields, and should form the bedrock of the bench. The Lawyers and Conveyancers Act, and the attitude it reflects, could weaken the independent bar, with unforeseen implications in the future of the bar and bench. The advent of the requirement for new barristers to be experienced is a contrary development, and one which is welcome. The division between barristers and solicitors may seem esoteric, but it is nonetheless a real one, and this has important implications for the operation of the legal profession.

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<sup>74</sup> There is no need for a trust account, and formerly no need for a period of post-admission experience, enable and encourage recent graduates to set themselves in business as barristers, see note 3 above.

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