



From The Honorary Secretary  
Professor Nick Wikeley, M.A. (Cantab.), Barrister, John Wilson Chair in Law  
Faculty of Law, University of Southampton, Highfield, Southampton SO17 1BJ  
Tel: 023 8059 3416; Fax: 023 8059 3024; e-mail: [njw@soton.ac.uk](mailto:njw@soton.ac.uk)

## **RESPONSE TO CONSULTATION PAPER CP08/03**

### **CONSTITUTIONAL REFORM: THE FUTURE OF QUEEN'S COUNSEL**

#### **Introduction**

The Society of Legal Scholars (SLS), formerly the Society of Public Teachers of Law (SPTL), is the foremost learned society for legal academics and jurists. Its purpose is the advancement of legal education and scholarship in the United Kingdom and Ireland. The Society was founded in 1908 and currently has over 2,300 members worldwide. Our membership includes practicing Queen's Counsel and a number of very distinguished honorary Queen's Counsel. The Society therefore has direct interest in the future of the rank of Queen's Counsel. This response was drafted on behalf of the Society by Mr Richard Edwards, Senior Lecturer in the Faculty of Law at the University of the West of England. It was debated and approved at the meeting of the Society's Executive Committee at the Institute of Advanced Legal Studies on 7 November 2003.

#### **1 General Position of the SLS**

- 1.1 The Society is of the view that there should continue to be a status of senior counsel, known as Queen's Counsel, subject to some necessary reforms. We believe that there is still an important public interest to be served by the rank of QC in marking out in a fair manner those individuals who on an objective basis demonstrate excellence in the legal profession. Nevertheless, in the Society's view the rank of Queen's Counsel should serve as mark of distinction indicating excellence and expertise in the legal profession as a whole and not simply amongst members of the Bar. Our position is set forth in greater detail below.

#### **2 Title of Senior Counsel in England and Wales**

- 2.1 After consideration the Society is of the opinion that the title and status of Queen's Counsel (or King's Counsel where appropriate) should be retained. At the outset there is the issue of whether the title and style of senior counsel should be changed. In other common law jurisdictions where historically Queen's Counsel have been appointed this rank has been replaced by a similar office styled differently. For example, Senior Counsel (Singapore, Hong Kong, Australia, Ireland and Trinidad and Tobago), President's Counsel (Sri Lanka) and State Counsel (South Africa). Most Australian states have now followed the lead of New South Wales and adopted the rank of Senior Counsel when their respective governments have ceased to exercise the prerogative power to appoint Queen's Counsel. New Zealand will change the rank of

Queen's Counsel to Senior Counsel when the Legal Profession Bill becomes law, although appointments will continue to be made by the Governor-General.

- 2.2 In our view the changes in these jurisdictions to the rank of Queen's Counsel were driven either by a change to the nature of the legal order or to republican sentiment which is absent from England and Wales. By contrast, the rank of Queen's Counsel enjoys a long history in England and Wales, and as a consequence has widespread national and international recognition and a justified reputation as an indication of excellence.
- 2.3 We therefore believe that the case for re-styling the rank as Senior Counsel is weak especially when set against the manifest advantages retaining the title of Queen's Counsel. Moreover, there are other more important reforms to the rank of Queen's Counsel which the Society believes are of more tangible benefit than mere cosmetic changes.

### **3 Appointment Process**

- 3.1 We do not believe that the public interest would suffer if the government was not directly responsible for appointments to the rank of QC. Other professional bodies award similar ranks of professional standing and competence without the involvement of the state. Nevertheless the Society believes that the rank of Queen's Counsel should be retained, with appointments being formally made by Her Majesty. In light of this there will be a continuing need for government involvement in the appointments process. We propose that there should be an appointment committee, the Queen's Counsel Appointments Board (QCAB), which would be chaired by the Attorney General for England and Wales. The Board would be a separate, free standing committee and would not share its membership with the proposed judicial appointments commission.
- 3.2 The Society is strongly of the view that the Board should be chaired by a minister of the Crown with legal experience. As there is no guarantee that future Secretaries of State for Constitutional Affairs will be legally qualified we do not think that the holder of that office would be suitable. By appointing the Attorney General to be ex officio the chairman of the Board accountability for its decisions to Parliament would be ensured. Further, we would also envisage that the Attorney General would act in the public interest while chairing the Board. This would reduce any conflict of interest between the government and legal profession.
- 3.3 In addition to the Attorney General the membership of the Board should include a Lord Justice of Appeal, a Justice of the High Court, a Circuit Judge, two members recommended by the Bar Council, two members recommended by the Law Society and two members recommended by the legal learned societies to represent the staff of the law schools of England and Wales. All members of the Board would hold their offices as such for a non renewable period of three years and would be remunerated from public funds for their work.
- 3.4 We would envisage that there would continue to be an annual round of appointments following a public invitation for applications. Successful candidates would be appointed by Her Majesty by written instrument under

the authority of the Act of Parliament. Feedback should be automatically provided to unsuccessful candidates without further application.

- 3.5 There is a doubt in the minds of many lawyers that appointments to the rank of Queen's Counsel have historically discriminated against women and ethnic minority candidates. We believe that as a statutory body the Board should not only be bound by the anti-discrimination legislation but also be placed under a duty to ensure equality of opportunity when considering appointments. Moreover, the Society does not believe that the use of the automatic consultees can any longer be justified. The use of such people arguably sends a discouraging message to women, solicitors and minority ethnic applicants who are less likely to be known to the automatic consultees. The Society is of the opinion that reliance should instead be placed on a list consultees provided by the applicant. The Society cannot see what is wrong in principle with the applicant indicating to the Board to individuals best able to comment on their legal abilities.

#### **4 Eligibility for Appointment**

- 4.1 We believe that the follow should be eligible for appointment to the rank of Queen's Counsel where appropriate:
- (a) Practising members of the Bar of England and Wales with at least ten years call;
  - (b) Members of the Law Society of England and Wales who have held and exercised higher audience rights for at least five years; and,
  - (c) Those members of the academic staff of an institution of higher education who are in the opinion of the Board are distinguished jurists. (Such individuals would ordinarily be appointed as honorary Queen's Counsel.)

#### **5 Appointment Criteria**

- 5.1 With respect to the criteria for appointment the Society is of the opinion that the criteria for appointment place too much emphasis on advocacy. At the moment the criteria undoubtedly favour certain members of the Bar. In some areas of practice litigation is rare and thus appearance in court but such people are rare. Moreover, solicitors are placed at a heavy disadvantage.
- 5.2 Arguably different appointment criteria should be adopted by the Board for the appointment of different members of the branches of the profession as Queen's Counsel. The criteria which indicate excellence amongst members of the Bar are not necessarily applicable to Solicitor-Advocates or to jurists. The Society would like to see separate lists of criteria for barristers, solicitors and jurists. Further consultation may therefore be necessary.

#### **6 Number of Appointments**

- 6.1 The Society believes that as appointments should be merit based there should be no annual limit on appointments. Those who meet the criteria should be appointed.

## **7 Honorary Appointments**

- 7.1 The considerable contribution of academic lawyers continues to be greatly under recognised by the other branches of the legal profession. The appointment of leading members of the Society as honorary Queen's Counsel was therefore a most welcome if somewhat belated recognition of the importance of jurists. Indeed, the evident benefit of such appointments has now been recognised in other parts of the common law world. For example, honorary senior counsel are now appointed in both New Zealand and Hong Kong.
- 7.2 The Society is strongly of the view that such appointments must continue. For the Society the appointment of jurists as honorary Queen's Counsel represents significant public recognition of the outstanding contribution made by legal scholars to the on-going vitality of English law.
- 7.3 We are disappointed that hostility has been expressed by some members of the Bar to the practice of appointing honorary Queen's Counsel. In our view the appointment of the leading jurists to the rank of Queen's Counsel can only serve to enhance its prestige, and does not in any way diminish it.
- 7.4 The Society would welcome the continuation of the appointment of eminent jurists to the rank of Queen's Counsel (Honoris Causa) whether or not they have been called to the Bar of England and Wales. However, we see no reason in principle why academics with a practice at the Bar should not be considered for the full rank of Queen's Counsel on the basis of their contribution to scholarship and their record as practitioners.

## **8 Removal of Status**

- 8.1 In principle an appointment as Queen's Counsel should continue for the lifetime of the recipient. However, Her Majesty should be vested with the power to remove the status on the recommendation of the Board.
- 8.2 The Board should only be able to recommend to Her Majesty that the rank be removed from a holder where an individual is debarred or struck off the Roll. The Society also envisages that the rank might be withdrawn in a case where the holder was guilty of serious professional misconduct. In those circumstances in order to protect professional independence the Board would only be able to act on the receipt of a written request from either the Law Society or the Bar Council.

## **9 Re-Appraisal**

- 9.1 The Society cannot see any significant benefit in a system of re-appraisal. There is currently no system of re-appraisal. Any such system would be needlessly bureaucratic and would be of marginal benefit to the public interest.

## **10 Privileges**

- 10.1 Queen's Counsel should continue to enjoy their formal privileges.

## **11 Existing Appointments**

- 11.1 Existing holders of the rank should continue to enjoy that status unaffected by any changes which the Department for Constitutional Affairs might wish to implement.

## **12 Legal Framework**

- 12.1 We believe that the necessary changes and reforms to the rank of Queen's Counsel must be effected by primary legislation.
- 12.2 That Act must abrogate the prerogative power of the Crown to make appointments to the rank of Queen's Counsel.
- 12.3 The Act must also end the constitutional convention that those members of the House of Commons who are also members of the Bar can automatically become Queen's Counsel.

**7 November 2003**