

Review of the office of Queen's Counsel in Victoria

The Hon. Murray Kellam AO

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Introduction and overview

1. In January 2015, the Attorney-General for the State of Victoria, the Hon. Martin Pakula MP, requested the Victorian Bar to undertake a review of the office and designation of “Queen’s Counsel” in this State. Subsequently the President of the Victorian Bar Council, James Peters QC, asked me to undertake the review on behalf of the Victorian Bar, which I agreed to do.
2. The current system for appointment of Queen’s Counsel in Victoria (the “**Current System**”) involves three aspects:
 - (a) The selection and appointment of “Senior Counsel” by the Chief Justice of the Supreme Court of Victoria.
 - (b) Senior Counsel being given the option of applying to the Attorney-General to be recommended for appointment as “Queen’s Counsel” by the Governor-in-Council, or to continue using the title “Senior Counsel”.
 - (c) The Attorney-General recommending for appointment as Queen’s Counsel those persons selected as Senior Counsel by the Chief Justice who have applied to the Attorney-General seeking appointment as Queen’s Counsel.
3. The results and conclusions of my review are set out in this report. In summary, and for the reasons set out in further detail below, I conclude that the public interest is best served by the Current System being retained without change.
4. The balance of this report proceeds as follows. First, an overview of the background to this report is provided. This includes the circumstances leading to the Attorney-General’s request for a review of the system, and the broad consultation process which has since been undertaken. Secondly, a brief history of the office and appointment of Queen’s Counsel in Victoria is provided. Thirdly, the position of other Australian States

and Territories, as well as overseas countries, is presented. Fourthly, considerations relevant to whether the Current System should or should not be retained, including public interest aspects of the system, are identified and discussed. Finally, some concluding remarks are provided.

Review of the office of Queen’s Counsel

5. In 2000, the Victorian Government announced that it intended henceforth to change the name of the office of ‘Queen’s Counsel’ to ‘Senior Counsel’. The first appointments of Senior Counsel under this system were made on 28 November 2000¹.
6. In February 2014, at the request of the Victorian Bar, the then Attorney-General, the Honourable Robert Clark MP, agreed that Victorian barristers appointed Senior Counsel by the Chief Justice from 2014 would have the option to apply to be appointed as Queen’s Counsel. A media release of the Victorian Bar dated 3 February 2014 stated:

“We recognise that the title of QC is a well understood brand, particularly in some jurisdictions and areas of practice, and the choice will now be up to individuals and made possible by the Attorney General agreeing to the legal process which requires the involvement of the Government of the day”.

7. On 17 April 2014, 156 Senior Counsel were appointed as Queen’s Counsel in Victoria. Of those Senior Counsel eligible to apply for appointment as Queen’s Counsel, 89% did so. This was the first appointment of Queen’s Counsel in Victoria in 14 years.
8. On 22 January 2015, the Attorney-General, the Honourable Martin Pakula MP, announced that barristers appointed Senior Counsel in November 2014 would have the choice to be appointed as Queen’s Counsel. A media release from the Premier of Victoria, the Honourable Daniel Andrews MP, dated 22 January 2015, attributes the following quotes to the Attorney-General:

“The Senior Counsel designation has been in use in Australia for just over twenty years and is now recognised here and overseas as a mark of professional distinction for legal advocates, and the full equivalent of Queen’s Counsel.

Following the reintroduction of Queen’s Counsel in Victoria last year, many of the existing Senior Counsel took the opportunity to change their designation.

¹ Victorian Bar News, No, 115, Summer 2000, p 31.

I have determined that the most recent group of Senior Counsel appointees should likewise have the opportunity to be appointed as Queen's Counsel².

As Attorney-General, I have asked the Victorian Bar to undertake a comprehensive review of the reintroduction of Queen's Counsel, including broad-ranging consultation with its members, the legal profession as a whole, and the wider community. This type of review was recently undertaken by the NSW Bar, which ultimately decided not to seek the reintroduction of Queen's Counsel in NSW.

I am mindful that constantly changing the government's position on QCs has the potential to damage an important legal institution. I look forward to receiving advice from the Bar that takes into account the views of as many of its members as possible, and considers the perspective of the whole community".

9. I am not aware of there being any comprehensive review or public consultation process undertaken in relation to the decision of the Government in 2000 to change the name of the office of "Queen's Counsel" to that of "Senior Counsel", or in relation to the decision of the Government in 2014 to reinstate the office of Queen's Counsel³. Although all appointments subsequent to the decision of the Government in 2000 until 2014 were as Senior Counsel, those who had previous to 2000 been appointed Queen's Counsel had the opportunity to change to Senior Counsel. At that time there were 166 Queens Counsel. Three of those chose to change to Senior Counsel in 2000.
10. The Attorney-General has now requested the Victorian Bar to undertake a comprehensive review of the designation of Queen's Counsel⁴. I understand the terms of the review to be directed to considerations relevant to whether the Current System should or should not be retained, including consideration of any public interest in

² In consequence, 17 of the 18 appointees as Senior Counsel in 2014 subsequently made application for appointment as Queen's Counsel.

³ The Attorney-General did, in each case, consult the Chairman of the Victorian Bar Council before making these decisions. See my further comments in this regard in paragraph 14, below.

⁴ Letter to Mr James Peters QC, Chairman of the Victorian Bar (as he was then known) from the Attorney-General, the Honourable Martin Pakula MP, dated 21 January 2015.

aspects of the system. On 8 May 2015, I agreed to conduct that review and prepare a report responding to the Attorney-General's request.

11. On 15 May 2015, the Victorian Bar called for submissions from any interested parties in relation to the issue of the designation of Queen's Counsel by 29 May 2015⁵. That date was later extended to 5 June 2015.
12. Sixty-three responses were received from a range of interested parties. Of that number, twenty-three submissions were received which supported change of the Current System to the designation of Senior Counsel only. All but three of such submissions were made by members of the Bar, two of them being Queen's Counsel, and fourteen of whom are Senior Counsel. Two submissions from four members of the Bar argued that there should be no appointments of either Senior or Queen's Counsel on the basis that the "office of silk does not meet modern demands"⁶. One other submission from a non-lawyer who is head of a mediation body argued that the appropriate appointment should be that of "Special Counsel"⁷. Five responses did not state a view one way or the other. The balance of submissions, which were from a broad range of people including members of the Bar, supported the retention of the Current System. In addition, the Executive of the Victorian Bar made a submission supporting the retention of the Current System.

⁵ This request was published on the website of the Victorian Bar and in the Victorian Bar publication, "In Brief" Issue #720. This request was republished in subsequent editions of "In Brief". In addition, 50 letters were sent to persons representing organisations who were thought to be interested in this issue, inviting those persons to make a submission.

⁶ Whilst I am appreciative of the submissions made in this regard I do not consider that consideration of the abolition of "the office of silk" altogether is within the terms of reference for this enquiry, nor is that substantial step the basis upon which submissions were sought, and thus the issue is not addressed by others who made submissions.

⁷ It appears that that submission contained a misunderstanding as to what the post nominal SC stands for and is thus an example of how the use of SC has caused confusion amongst some.

13. My review has involved a consideration of each of the above submissions, together with additional material that pertains to this issue, as referred to in this report.
14. It is appropriate to observe that a number of submissions from current Senior Counsel of the Victorian Bar criticised the process by which it was decided by the Bar Council to approach the Victorian Government to request reinstatement of the office of Queen's Counsel in 2013/2014. Although I appreciate those parties taking the time to write to me and express those views, I do not consider that the terms of the review requested by the Attorney-General invite me to examine the process by which the office of Queen's Counsel was reinstated in Victoria in 2014 or for that matter the process by which the decision to change the name of the office in 2000 was undertaken. A review of that nature would require consideration by me of the actions of previous Governments and, in my view, is beyond the terms of the review requested, as described in paragraph 10, above. Furthermore, for better or for worse, those decisions have been made and people have been appointed and acted as Senior Counsel or Queen's Counsel in consequence of those decisions. As the Attorney-General very fairly observed in his letter to the President of the Bar dated 21 January 2015, he had decided that the "... option to apply to be appointed as Queen's Counsel should be available to the most recent Senior Counsel appointments, because of the expectation that was created when the Queen's Counsel designation was restored in 2014 and which existed at the time of their appointment as Senior Counsel".
15. A further issue that was raised by a number of such submissions was the contention that the junior bar did not have an adequate opportunity to have input into the decision made in 2014. I have not examined that issue but I note that in response to the request for submissions to be made to this review, 19 members of the junior bar responded.

History of the office of Queen’s Counsel

16. The office of Queen’s Counsel in Victoria is conferred by the granting of letters patent by the Governor-in-Counsel.
17. The history of the office of Queen’s Counsel dates back to 1604, when James I granted Francis Bacon the office of “one of our Counsel learned in the law”, with “place and precedence in our courts or elsewhere and preaudience”⁸. Holdsworth opines that it is probable that at least one other patent was granted by James I⁹. His son, Charles I, then appointed nine King’s Counsel, followed by Charles II who appointed thirty-one.
18. By the nineteenth century, nearly all barristers with high aspiration sought the distinction of the “silk gown” – in preference to the “coif” of the serjeants at law – having regard to the rights of precedence and preaudience afforded to such barristers. Queen’s (or King’s) counsel rose to prominence as officers of the law, ranking only behind the Attorney-General and Solicitor-General¹⁰.
19. The first Queen’s Counsel of the Victorian Bar were appointed in 1863. The Attorney-General of the day stated the terms upon which it was proposed that distinction would in the future be conferred¹¹:

“But if Queen’s Counsel are to be introduced here I think that care must be taken that the office shall exist in reality as well as in name; and that the conditions which are understood to be attached to the office, and which may in some cases be felt to be onerous, shall be accepted together with that title of distinction. A silk gown is, I believe always given at home on the understanding that it is to be retained for life, or given up only under special

⁸ The patent is printed in Sainty *English Law Officers* p 294 and Holdsworth *History of English Law*, vol 6, pp. 472 to 478 (footnotes). See also J H Baker *An Introduction to English Legal History* 4th edn (Butterworths LexisNexis 2002) p 165.

⁹ Holdsworth *History of English Law*, vol 6, p 474.

¹⁰ In part, as a consequence of these developments, the order of serjeants at law died out in the late nineteenth century: J H Baker *An Introduction to English Legal History* 4th edn (Butterworths LexisNexis 2002) pp 159, 165.

¹¹ Arthur Dean *A Multitude of Counsellors A History of the Bar of Victoria* (F. W. Cheshire Publishing, 1968) (*Dean*), p 259, 260. This correspondence has also been attributed to Chief Justice Stawell.

and unforeseen circumstances. A Queen's Counsel, moreover, is forbidden by the professional usage to practise in inferior courts, to draw pleadings and generally to undertake business which commonly falls to the share of the junior member of the profession. I am aware that their Honours, the judges of the Supreme Court, concur in the opinion that these and all other obligations attached to the office of Queen's Counsel in England and Ireland ought to be observed and enforced in Victoria".

20. The next appointment of Queen's Counsel in Victoria was in 1871. The first Victorian female Queen's Counsel was appointed in 1965.
21. Some of this State's most well-known jurists, including Sir Owen Dixon, Sir Wilfred Fullagar, and Sir Keith Aickin, all practised as Queen's (or King's) Counsel prior to their judicial appointments. In more recent times, a number of prominent female barristers, including Joan Rosanove QC, the Hon. Susan Crennan AC, and the current Chief Justice of the Supreme Court, the Hon. Marilyn Warren AC, also practised as Queen's Counsel at the Victorian Bar. As at December 2014, there were 264 silks in practice at the Victorian Bar¹². Approximately 85% (225) of those silks are Queen's Counsel.
22. Over the passage of time, the connection between Queen's Counsel as officers of the Crown who, without licence, could not appear against the Crown (for example, in defending criminal proceedings) has been lost entirely. Now, the title of Queen's Counsel remains a mark of legal excellence, but without exclusive or superior rights to perform work on behalf of the Crown.
23. The first rules governing the practice of the profession of a barrister at the Victorian Bar, including a statement of professional usage covering the practice of Queen's Counsel, were adopted in 1884¹³. The statement of professional usage as to the practice

¹² Victorian Bar, Membership statistics as at December 2014, available at: <http://www.vicbar.com.au/about-us/about-the-victorian-bar/bar-statistics>.

¹³ The principal provisions are set out in *Dean* at p 90.

of Queen’s Counsel was confirmed by the Bar Committee in 1901¹⁴. It has been recognised since then that the Bar Council may define the rules of conduct for practice by Queen’s Counsel, subject to the powers of the Courts to regulate the conduct of proceedings before them¹⁵.

24. The rights and obligations of Queen’s Counsel continue to derive from regulations and from professional usage. By reason of these rights and obligations, the title Queen’s Counsel has become one of honour and status¹⁶. However, the rank is not purely honorific or merely reflective of seniority; it confers real responsibility.

History of the appointment of silk in Victoria

25. It is worth reviewing the history of the procedure for the appointment of silk in Victoria, as that procedure is distinct from both that which was practised prior to 1993 and that which is currently practised in New South Wales.
26. From 1857 to 1984, the procedure for the appointment of silk in Victoria was governed by prerogative regulations made by the Governor-in-Council. The first of such regulations were published by the Governor-in-Council on 10 August 1863 (as made on 7 December 1857), including the following¹⁷:

“[1] Except in the case of barristers who shall have held the office of Attorney-General or Solicitor-General no barrister shall be appointed Her Majesty’s Counsel except on the recommendation of the Chief Justice to the Governor-in-Council”.

¹⁴ *Dean* at p 261.

¹⁵ *Some Marginal Notes About Queen’s Counsel*, J.D. Merralls, *Victorian Bar News*, No, 89, Winter 1994, p 51.

¹⁶ *Dean* at p 262.

¹⁷ See *Dean* at p 260.

27. The 1857 regulations remained in force without amendment until 17 January 1950. In 1970 a set of regulations entitled *Regulations Governing the Appointment of her Majesty's Counsel* (No 97 dated 21 October, 1970) was made by the Governor-in-Council. The relevant part of those regulations provided:
- “1. No barrister, other than a barrister who holds or has held the office of Attorney-General, shall be appointed to be one of Her Majesty's Counsel except on the recommendation of the Attorney-General to the Governor in Council made on the nomination of the Chief Justice of Victoria”.
28. The 1970 regulations were replaced by a set of regulations entitled the *Appointment of Her Majesty's Counsel Regulations 1978*¹⁸, which contained an identical regulation to that cited above. The 1978 regulations were amended by Regulation 261 of 1979, but in a manner that is not relevant for present purposes.
29. The 1978 regulations were “sunsetting” by the *Subordinate Legislation (Revocation) Act 1984*, which provided that every statutory rule should by virtue of that Act be revoked on 31 July 1984. No new regulations were made to replace the 1978 regulations, but the procedure prescribed by them was still followed.
30. Following the decision of the Government of the day to change the name of the office of “Queen's Counsel” to “Senior Counsel” in 2000, Senior Counsel continued to be appointed by the Governor-in-Council, on the recommendation of the Attorney-General, who, in turn, acted upon the advice of the Chief Justice of the Supreme Court of Victoria.
31. The appointment of Senior Counsel was an appointment to a public office under section 88 of the *Constitution Act 1975* (Vic). A General Order published by the Government on 5 December 2002 provided that the Attorney-General would have responsibility for

¹⁸ No. 34 of 1978.

s 88 of the *Constitution Act 1975* (Vic), "...so far as it relates to the appointment of Senior Counsel, Crown Counsel and Crown Counsel (Advisings)".

32. On 28 May 2003, the Attorney-General, the Honourable Rob Hulls MP, wrote to the Chairman of the Bar Council, asking for comments on the continued involvement of the Attorney-General in the appointment of Senior Counsel. In that letter, he referred to the "undesirable perception of direct political involvement in a profession which is, and must be seen to be, independent". In subsequent discussions it emerged that the Attorney-General did not wish to continue to play a part in the appointment of Senior Counsel.
33. On 4 August 2004, the Chief Justice of the Supreme Court advised the Chairman of the Bar Council that she was prepared to accept the responsibility of appointing Senior Counsel on the basis of such consultation and advice as she considered appropriate and necessary in the circumstances.
34. The *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* were amended on 28 October 2004 to introduce order 14 "Part 2 – Senior Counsel"¹⁹. Order 14 rules 13 to 15 provided that a person who was admitted to practise in Victoria and who was, and for many years had been, regularly practising exclusively or mainly as counsel, whether in Victoria or elsewhere within Australia, may apply in writing to the Chief Justice for appointment as Senior Counsel. Rule 14.15 provided that appointment as Senior Counsel shall be by the Chief Justice, under the seal of the Court.
35. On 30 July 2008, the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* replaced the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*. The 2008

¹⁹ *Supreme Court (Chapter II Amendment No. 6) Rules 2004* (Sr No 133 of 2004), reg 5.

rules similarly provide that appointment as Senior Counsel shall be by the Chief Justice, under the seal of the Court²⁰. These rules remain in force today.

36. A pilot system for the appointment of Senior Counsel was introduced by the Victorian Bar in June 2012. The Chief Justice remained centrally involved as the appointer of Senior Counsel. However, the Chief Justice was assisted by a preliminary evaluation of applications undertaken by an advisory committee. That pilot system has now been permanently adopted for the appointment of silk in Victoria.
37. The reintroduction of Queen’s Counsel did not change these arrangements. No legislative amendments were necessary to effect the reintroduction of the designation of Queen’s Counsel. Appointments of Senior Counsel continued to be made by the Chief Justice under the seal of the Court. However, Victorian barristers who have been appointed Senior Counsel may apply for appointment as Queen’s Counsel.
38. Information made available to Senior Counsel in 2014 stated:

“Senior Counsel who wish to be appointed as Queen’s Counsel should complete and forward the attached application letter to the Attorney-General. The Attorney-General will then recommend qualified applicants for appointment by the Governor in Council”.
39. The application form for appointment as Queen’s Counsel is addressed to the Attorney-General and requires an applicant:
 - (a) to certify his/her appointment as Senior Counsel;
 - (b) to consent to the Department of Justice checking that the applicant is currently on the roll of Senior Counsel maintained by the Prothonotary of the Supreme Court; and

²⁰ *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008*, rr 14.8 to 14.10.

- (c) to undertake if appointed Queen's Counsel not to use the designation Senior Counsel from the date of his/her appointment.
40. The appointment to the office of Queen's Counsel is effected by the issue of letters patent by the Governor-in-Council on the recommendation of the Attorney-General, although this is, by convention, no more than a formal act that is required because of the rule that the Governor in such matters acts only on the advice of the Executive Council²¹.
41. Accordingly, in Victoria, the selection of silk is, and has always been, made by the Chief Justice of the Supreme Court of Victoria.

²¹ *Constitution Act 1975 (Vic)*, section 87E.

Comparison with other jurisdictions

42. The title conferred on the office of silk differs in detail from jurisdiction to jurisdiction.
43. Of the Australian jurisdictions, Victoria and Queensland appoint Queen's Counsel. The New South Wales Bar Association has recently resolved to approach the New South Wales Attorney-General to reinstate the appointment of Queen's Counsel in that State. On the other hand, Senior Counsel are appointed in Western Australia, Tasmania, South Australia and the Australian Capital Territory and the Northern Territory.
44. It is worth reviewing in more detail the position adopted in Queensland and New South Wales.

Queensland

45. In Queensland, Queen's Counsel were originally appointed by the Governor-in-Council upon advice from the Chief Justice. The title of 'Queen's Counsel' was abolished in 1994 and, until 2013, Senior Counsel were appointed by the Chief Justice of Queensland after a process of consultation with members of the profession and the judiciary.
46. In 2013, Attorney-General and Minister for Justice, the Hon Jarrod Bleijie MP, in consultation with the Queensland Bar Association, re-instated the position of Queen's Counsel²². Future appointments in that State will be to the office of Queen's Counsel. Barristers who had been appointed as Senior Counsel from 1994 were invited to apply to change their title from Senior Counsel to Queen's Counsel²³. This is reported to have

²² Queensland Government Gazette Vol 363 no 6.

²³ Ibid cl 6.

resulted in 70 of 74 Senior Counsel in Queensland converting to the rank of Queen's Counsel.

New South Wales

47. New South Wales abolished the office of Queen's Counsel in 1993. Since 1993, appointments of Senior Counsel are made by the President of the New South Wales Bar Association after a process of consultation with members of the profession and the judiciary. The role of the President of the New South Wales Bar Association in this process is broadly analogous to the role of the Chief Justice in the appointment of Senior Counsel in Victoria.
48. On 15 May 2015, the New South Wales Bar Association is reported to have resolved to lobby the State government to reintroduce Queen's Counsel²⁴. The New South Wales Bar Council is said to support a uniform system of titles and styles for barristers across the country and that all New South Wales barristers who are appointed silks should be allowed to elect to "use the title Queen's Counsel ... or King's Counsel as the case may be". The New South Wales Attorney-General is reported to be "willing to consider" this idea.
49. This resolution of the New South Wales Bar Council differs with the majority view expressed in the '*Report to the NSW Bar Council on the Suitability of Approaching the Attorney General for Support for the Establishment of a System for the Appointment of Queen's Counsel*' (the **Priestley Report**) dated 16 April 2014.
50. The Priestley Report arose out of a request by the New South Wales Bar Council for comments from its members on the desirability of reinstating the use of the term

²⁴ *Sydney Morning Herald*, May 15 2015, "Bar renews push to reintroduce Queen's Counsel title in NSW".

“Queen’s Counsel” in New South Wales, with a view to approaching the New South Wales Attorney-General to seek support for the establishment of a system for the appointment of Queen’s Counsel. The New South Wales Bar Association established a committee to examine responses received and report to the Bar Council on that issue. The Priestley Report is the work of that committee. A majority of the committee were of the view that it was not suitable for the New South Wales Bar Association to approach the Attorney-General. The minority were of the view that it was suitable for an approach to be made to the Attorney-General.

51. The system for the appointment of Queen’s Counsel in New South Wales in place prior to 1993 was different from that in Victoria and in all other Australian States. In New South Wales the Attorney-General was responsible for selecting candidates for silk. In this capacity, the New South Wales Attorney-General was, by convention, advised by the President of the New South Wales Bar Association. The Priestley Report describes the role of the New South Wales Attorney-General in the appointment of Queen’s Counsel prior to 1993 as follows (citations omitted)²⁵:

“The system for the appointment of Queen’s Counsel in NSW in place prior to the introduction of the appointment of Senior Counsel was different from that in all other Australian States. In other States, such appointments were made by the Executive Council on the recommendation of the Chief Justice, but in NSW the making of nominations rested with the Attorney General who by convention, was advised by the President of the Bar Association. The Attorney General was at liberty to accept or reject the recommendation and to add to that list. This was regarded as an important power of the Attorney General”.

52. The Priestley Report describes the removal of the involvement of the Executive Government as “the distinguishing feature of the process for the appointment of Senior Counsel in NSW”²⁶. A key concern expressed in relation to reinstating the use of the

²⁵ Priestley Report at pars 4.5

²⁶ Priestley Report at par 4.6.

term ‘Queen’s Counsel’ in the Priestley Report is the public interest against reintroduction of a political element in the appointment process²⁷:

“Should the Bar Council decide to approach the Attorney General, the basis of such an approach would have to be that referred to in paragraphs 1.1 and 2.1 above. This could result in handing back to the Executive a discretion to accept appointments or add to them, which would be a retrograde step.

The present system serves the public interest by providing a transparent and independent system for appointment. The public interest would not be served by the dismantling of that system in favour of one that reintroduced a political element into the appointment process. Indeed, the current system is set up with a view to ensuring that it is immune from political interference and that only the best counsel are selected for appointment. It is anachronistic to return to a system that entrusts and endows the Executive with power to select those entitled to be recognised as the most eminent members of the profession”.

53. The Priestley Report was also concerned that introduction of a system akin to the current Victorian system (whereby Senior Counsel have the option to be appointed Queen’s Counsel upon application) would involve a departure from the historic New South Wales system²⁸. Further, legislative amendment would be required to repeal or amend section 90 of the *Legal Profession Act 2004* (NSW)²⁹.
54. The above considerations do not pertain in Victoria. In particular, a distinction may be drawn between the selection of successful applicants and their appointment as Senior Counsel. In Victoria, as described above, the selection of Queen’s Counsel is made by the Chief Justice of the Supreme Court of Victoria. The appointment is by the Governor-in-Council on the recommendation of the Attorney-General. The Attorney-General has never been involved in the selection of Queen’s Counsel or Senior Counsel in Victoria. The Attorney-General, by convention, has a formal role only in the

²⁷ Priestley Report at pars 4.2 and 4.10, citation from pars 4.8 and 4.9.

²⁸ Priestley Report at par 4.10.

²⁹ Priestley Report at par 2.8. *Legal Profession Act 2004* (NSW), section 90 confirms that any prerogative right or power of the Crown to appoint persons as Queen’s Counsel or to grant letters patent of precedence to counsel remains abrogated and executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners.

appointment of Queen's Counsel in Victoria. That formal role is not indicative of any substantive involvement in that process.

Other jurisdictions based on English common law

55. The appointment of Queen's Counsel has also been a matter of considerable debate in England. A Constitutional Paper was issued by the Department for Constitutional Affairs in July 2003. That paper discussed arguments for and against the continuation of the rank of Queen's Counsel and the continuing role of the State in the appointment of silk. That paper was lengthy and detailed and sought responses from the public. A very great number of responses were received. Following this process, the Government announced the continued appointment of Queen's Counsel in 2004.
56. New Zealand reinstated the appointment of Queen's Counsel in 2013. The office of Senior Counsel, which had been created in 2008 to replace Queen's Counsel, was disestablished at that time. Appointments to Queens Counsel are made by the Governor-General on the recommendation of the Attorney-General with the concurrence of the Chief Justice of New Zealand.
57. Singapore and Hong Kong appoint Senior Counsel. In Hong Kong, this has only been the case since the transfer of sovereignty over Hong Kong to the People's Republic of China in 1997. Queen's Counsel appointed in Hong Kong before the transfer of sovereignty have been renamed Senior Counsel. However, I am aware of the fact that a number of senior Hong Kong advocates who have been called to the UK Bar designate themselves as "QC, SC"³⁰ and that numerous UK barristers practice in Hong Kong as Queens Counsel. Indeed a number of London based barristers chambers advertise the fact that some QC members are admitted to practise in Hong Kong. Malaysia has no

³⁰ See for example www.parksidechambers.com.hk and www.chenghuansc.com.

system for the appointment of Queen's Counsel or Senior Counsel. India, Pakistan and Sri Lanka do not appoint Queen's Counsel or Senior Counsel, but do have *sui generis* systems for the appointment of senior advocates in their respective legal professions.

58. There appears be no similar mark of distinction or quality comparable to Queen's Counsel or Senior Counsel in the legal profession in the United States which in general has no similar system of independent advocates forming a Bar as in the UK and Australia.
59. In Canada the title of Queens Counsel continues to be used in the majority of provinces and in the Federal sphere.

The Public Interest - Consideration of issues

60. In this section, the reasons in favour of retaining the Current System, and the reasons in support of returning to the previous system (in which only “Senior Counsel” appointments were available) are considered. The factors identified have been derived from submissions received during the consultation process in preparing this report, as well as other reports and opinion pieces addressing the issue.
61. The Attorney-General’s request for a review to be conducted in relation to Queen’s Counsel in Victoria also sought the identification and evaluation of any “public interest” considerations. In other words, whether any considerations have a public interest component in the sense of being to the benefit of society and its members generally, as distinct from the interest of individuals³¹. These aspects are also referred to in the course of the following discussion.

Economic considerations

62. A primary reason advanced in favour of retaining the office of Queen’s Counsel is the economic advantage that accrues to Victoria from its use. These advantages, it is argued, have a public interest component in addition to benefits which may flow to individual barristers. The submission of the Victorian Bar Executive argues that the title Queen’s Counsel is a nationally and internationally recognised designation of significant value which is immediately recognised by the profession locally and is readily distinguished from the widely used generic terms Senior Counsel and Special Counsel used in the broader profession.

³¹ See *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 75 per Kaye, Fullagar and Ormiston JJ; *McKinnon v Secretary, Dept of Treasury* (2005) 145 FCR 70 at 75-6 (FFC).

63. The economic case in which is argued in favour of retaining the Current System has three limbs. First, that Asia is a rapidly expanding market for legal services – and arbitration work in particular – and that for Victorian barristers to export their services and compete for work in this market (particularly against English QC’s), these barristers should be given every reasonable advantage possible. This includes being entitled to practice as a QC. Secondly, that Victoria is in the process of positioning itself as a location of choice for international arbitration work (particularly in the Asian region). In so doing, it is competing with Hong Kong, Singapore, as well as other Australian States (most particularly, New South Wales). The international and domestic recognition of the designation “Queen’s Counsel” or “QC” – in contrast to that of “Senior Counsel” or “SC” – is said to best advance the prospect of Victoria enhancing its reputation as a centre of legal excellence, and attracting to and retaining international arbitration work in this State. Finally, in the competition for domestic work, the designation of “Queen’s Counsel” may provide advantages for Victorian barristers vis-à-vis their counterparts in other States known as “Senior Counsel” (as in New South Wales), or at least not disadvantage Victorian barristers as compared to barristers in other States or Territories where the office of “Queen’s Counsel” has been or may be reinstated (such as Queensland).
64. Underpinning each of these considerations is the idea that the designation “Queen’s Counsel” is an entrenched and well understood indicator of excellence in the provision of legal services. In other words, it is a mark of distinction afforded to members of counsel identified as persons with special skills able to manage cases of particular complexity, size, or importance (or a combination of all three). It is also said to be a mark which clients and solicitors are able to recognise and understand instantly.

65. The explanation for these observations appears to lie in the long-history of the office of Queen’s Counsel; the reputation and standing of well-known advocates who have practised as Queen’s Counsel; the spread of the English legal system and its traditions throughout the world during the eighteenth and nineteenth centuries (to countries including Australia, Canada, New Zealand, Hong Kong, and Singapore); and the association of the English legal system with the growth of international commerce.
66. The well-known and instantly recognisable attributes of Queen’s Counsel are contrasted with “Senior Counsel” – a title without the same history, prestige, and degree of international (or domestic) recognition.
67. As a matter of fact and substance – at least in Victoria – Queen’s Counsel do not possess any different or superior skills to those of “Senior Counsel”. The selection process is the same (involving appointment by the Chief Justice of the Supreme Court), save that those who wish to apply for letters patent may do so, and no further or independent assessment is required before the Attorney-General makes a recommendation to the Governor-in-Council.
68. The economic considerations said to favour retaining the Current System are, therefore, based on a market *perception* of the position of Queen’s Counsel compared to that of Senior Counsel. Although it is contended in a number of submissions put before me by those opposed to the Current System, that the perception is not well-placed or justified, the fact is that the perception clearly exists³².

³² Submissions received from solicitors and external users of legal services indicated that the perception exists. Some submissions received from barristers (who favour a return to appointment of Senior Counsel only) suggest that the perception either does not exist or has no substantive effect on a client’s briefing decision. No submissions were received from solicitors or other users of barristers’ services which supported this view.

69. To provide just one example from the submissions received during the consultation process, a corporate tax partner of a large international accounting firm reported that, in his experience:
- (a) clients from Asia, the US, UK, and Europe insist on briefing QCs for large and complex matters because they recognise the title and understand the value and skill underpinning it;
 - (b) clients regard the designation SC as inferior to QC;
 - (c) the title QC is thought to provide clients with a competitive advantage; and
 - (d) the views of his clients about the relative standing of QCs and SCs have not changed even though it has been a number of years since the introduction of “Senior Counsel” in Australia.
70. Turning to the first of the economic considerations referred to at the outset of this section, there is evidence that Asia is a large and growing market for legal services, with Hong Kong and Singapore becoming major forums for transnational litigation and arbitration. This is reflected in the increasing presence of international law firms in the region (eg. Baker & McKenzie, Jones Day, Clifford Chance and Freshfield Bruckhaus Deringer), and Australia’s large national practices merging or joining other firms with exposure to Asia (eg. Herbert Smith Freehills, King & Wood Mallesons, Ashurst, Norton Rose Fulbright, and Allens Linklaters).
71. It is not only solicitors establishing a presence in Asia. There is no doubt that the English Bar is capitalising on the growing Asia-Pacific market for legal services more effectively than the Australian Bars. At the time of the consideration of the future of Queen’s Counsel in the UK in late 2003 the English Commercial Bar Association argued that the status of QC “performs a significant role in the international provision

of UK legal services. It is one of the badges of English law internationally”. As such, any replacement or substitute (such as Senior Counsel) would have to “start from scratch with no international recognition and no assurance of success”. A number of sets of London-based chambers, including Essex Court Chambers, One Essex Court, 20 Essex Street, and 39 Essex St Chambers, have all opened offices in Singapore to exploit the growth of international arbitration work now conducted in that country.

72. The growth of international arbitration work in the region is also reflected in statistics published by the Singapore International Arbitration Centre (which has a membership of more than 15,000 companies, chambers of commerce and industry associations). In 2003, the SIAC conducted 64 arbitrations. By 2013, that had increased to 259³³. And of those 259 arbitrations, more than half had no connection with Singapore³⁴.
73. There is an opportunity for the export of legal services from Victoria to these markets. This has been referred to in submissions received, including one from a partner of a large forensic accounting firm with offices in Singapore, who said:

“Through our office in Singapore and my history of living and working in Singapore I have undertaken, and continue to undertake, a range of forensic engagements based in or related to Singapore and regularly give expert evidence in Singapore courts and arbitrations in the region. My team and I have noticed a marked increase in the use of arbitrations. ...

Through my regular visits to, and discussions with lawyers in Singapore, both at “on-shore” and “off-shore” firms, as well as attendees at various arbitration related conferences, I have frequently discussed the issue of foreign counsel, whether from England, Australia or elsewhere, being used in arbitrations in Singapore and the region. On a number of occasions it has been mentioned to me, by leading arbitration/litigation practitioners, that it is difficult to persuade clients, particularly local clients, of the need to engage a Senior Counsel (‘SC’) from another jurisdiction, as SCs are available within the Singapore local firms (and from my experience, the best SCs there are world class in intellect and advocacy). Therefore it is easier to persuade a client of the need for a Queen’s Counsel (‘QC’), as such a commodity is not available in the Singapore market... Therefore the ability to use the term QC rather than SC would

³³ <http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics>

³⁴ <http://www.siac.org.sg/faqs>

provide some market advantage over only being able to use the term SC when seeking this sort of work in the region. This is particularly relevant when the main source of external counsel used in arbitrations in the region is from England, who already have the title QC”.

74. This submission went on to record a warning, however, that the use of QC rather than SC would not provide instant access to the Asian markets, but that it would make it easier “for lawyers engaging international counsel to consider, on more equal footing, counsel from Australia compared with counsel from England”.
75. Another submission by the Chair of the Asia Practice section of the Commercial Bar Association of Victoria (which section comprises of “members who have diverse cultural background, principally identifying their cultural and ethnic heritage from Malaysia, Singapore, Hong Kong, Taiwan, China, Vietnam, India and Sri Lanka”) supported retention of the designation of Queen’s Counsel on several grounds. It was submitted that “Asian clients (individuals or corporations) involved in significant litigation matters in Victoria have always asked for a ‘QC’ rather than ‘SC’. Rightly or wrongly, there is a perception by local and overseas Asian clients that the rank of ‘QC’ is better. This is possibly because ‘SC’ as a rank is not necessarily understood to be of equal rank to ‘QC’”. The submission further argues that “the rank of ‘QC’ is well known amongst the legal profession and commercial sector in Asian countries like Malaysia, Singapore, Hong Kong, India and Sri Lanka as former members of the British Commonwealth”.
76. The office of Queen’s Counsel has been recognised in England as providing a potential competitive edge in securing international arbitration work. A committee of the Bar of England & Wales chaired by Sir Sidney Kentridge observed that: “the rank of QC is an internationally recognised quality mark which plays an important role in ensuring the competitiveness of English advocates in litigation outside the UK and in international

arbitrations”³⁵. Similarly, the English Commercial Bar Association has previously stated that “the QC system is in the public interest, adds value and diversity to our legal system, and performs a significant role in the international provision of legal services. It is one of the badges of English law internationally”³⁶.

77. The second aspect of the economic case concerns the growth of arbitrations as a means of resolving disputes, and the opportunity for Victoria to attract work in this field.
78. In a paper presented by the Hon. Justice Clyde Croft, a judge of the Supreme Court with expertise in the field of arbitration, his Honour stated³⁷:

Commercial arbitration continues its global growth – with very significant increases in the number of disputes initiated, as well as in the monetary sums in dispute. This strong trend can be partially attributed to developing and rapidly industrialising economies, particularly those in Asia, and the consequent increase in business opportunities and ensuing disputes.

79. The growth of international arbitration work is also reflected in the results of a survey conducted by Queen Mary College in 2013, which recorded that more than 50% of in-house counsel stated that arbitration was their preferred form of resolving international disputes³⁸.
80. The opportunities presented by international arbitration work have been reflected in recent speeches given by the Chief Justice of the High Court of Australia, Robert French

³⁵ Cited in the article “The institute of silk in 2003” *Advocate* (April 2003) p 10 [5] (<http://www.sabar.co.za/law-journals/2003/april/2003-april-vol016-no1-pp10-12.pdf>)

³⁶ Constitutional Reform – Building on Strength (The response of the Commercial Bar Association) <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supremecourt/responses/sc033.pdf>).

³⁷ The Future of International Arbitration in Australia – a Victorian Supreme Court Perspective (2011): <http://assets.justice.vic.gov.au//supreme/resources/3c0b4d9a-b575-4a59-be4e-906c4c3b9ec7/the+future+of+international+arbitration+in+australia+a+victorian+supreme+court+perspective+june+2011.pdf>

³⁸ International Arbitration Survey (2013) *Corporate choices in International Arbitration* p 6: <http://www.arbitrationonline.org/research/2013/index.html>

AC³⁹, and the Chief Justice of the Supreme Court of Victoria, the Hon Marilyn Warren AC⁴⁰. Justice Clyde Croft has also written on the topic⁴¹.

81. There is a public interest in attracting domestic and international arbitration work to Victoria, with the attendant economic benefits which accrue to non-legal sectors involved in the provision of services to those attending and participating in such arbitrations. In light of the high regard in which Queen’s Counsel is held both domestically and overseas – particularly by comparison with that of Senior Counsel – the presence of Queen’s Counsel in Victoria (to become involved in arbitration work as arbitrators and/or counsel appearing) has the capacity to assist in promoting Victoria as a seat for domestic and international arbitration work in the future⁴².
82. It is true, as pointed out in a number of submissions made by those supporting change to the Current System that the majority of Victorian silks do not engage in international arbitration work. I accept that these issues are not as relevant to those in other areas of practice. However, that is not to say that the views of those who do not practice in such areas of law should prevail over the views of others who are working to advance the

³⁹ <http://www.lawyersweekly.com.au/wig-chamber/news/16576-chief-justice-optimistic-of-australia-as-arbitration-hub>

⁴⁰ The Hon Marilyn Warren “Australia – A vital commercial hub in the Asia Pacific region: Victoria – a commercial hub” (25 February 2015): <http://www.supremecourt.vic.gov.au/home/contact+us/speeches/australia+a+vital+commercial+hub+in+the+asia+pacific+region+victoria+a+commercial+hub>

See also “Australia as a Safe and Neutral Arbitration Seat” (VSC) [2012] *Vic J Schol* 13 (<http://www.austlii.edu.au/au/journals/VicJSchol/2012/13.html>);

The Victorian Supreme Court’s Perspective on Arbitration 4 December 2009 <http://assets.justice.vic.gov.au/supreme/resources/11180a12-275b-47c7-bc83-f3988228f4db/remarks+at+the+international+commercial+arbitration+conference+december+2009.pdf>

⁴¹ Eg. “International Arbitration and the Australian Courts” 10 August 2011; “The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective” 20 May 2011: <http://www.supremecourt.vic.gov.au/home/contact+us/speeches/speeches+--+justice+croft>

⁴² This involves an evaluative judgement. It is acknowledged that the extent or nature to which the Queen’s Counsel designation may assist is difficult, if not impossible to quantify with any precision.

prospects of the State of Victoria becoming an international centre of excellence for dispute resolution.

83. A third economic consideration relevant to the use of “Queen’s Counsel” is the competition for legal services within Australia. As referred to earlier in this report, Victoria and Queensland are the only Australian States in which barristers are able to apply to the State Attorney-General for a recommendation to be given to the Governor-in-Council for letters patent to be granted (to Senior Counsel). Most relevantly, in an increasingly national market for legal services, it is noteworthy that New South Wales barristers are not afforded this opportunity. The desirability of being entitled to practice using the title “Queen’s Counsel” is apparent from the number of barristers in Victoria and Queensland who, having been appointed as Senior Counsel and given the choice of moving of Queen’s Counsel, have taken up the opportunity. It is also apparent from the fact that the New South Wales Bar, despite the majority recommendation of the recent Priestley Report (against returning to a system of appointing Queen’s Counsel), is again reviewing its position⁴³.
84. It is in the context of this third consideration that Victorian barristers who practice in fields outside of commercial law may also stand to benefit. In appropriate cases, clients may wish to retain interstate counsel from Victoria practising in areas such as common law (particularly those involved in large-scale class actions), family law, crime, or general appellate work.
85. In view of the fact that many senior counsel appear with a member of junior counsel, increased work for Victorian silks may also lead to more work and exposure to new and interesting areas of law for the junior bar (including international arbitrations).

⁴³ <http://www.lawyersweekly.com.au/news/16533-bar-council-backs-qc-push>

Public understanding of what is meant by the term Senior Counsel

86. A further reason in support of the Current System that appears in a number of submissions is the potential for or existence of confusion with respect to the title “Senior Counsel”. This confusion appears to stem from three sources.
87. First, the title “Senior Counsel” or “SC” is used by some corporations in describing levels of in-house counsel, and some law firms use the designation “Special Counsel” to describe senior solicitors⁴⁴. With respect to “Special Counsel”, a partner of a major national law firm in his submission to this review stated:
- “There is often trouble distinguishing between in-house solicitors/barristers – particularly those who call themselves Special or Senior Counsel and a Senior Counsel (SC) external barristers. It is often awkward for me to explain to clients what a Senior Counsel is, and how this differs from an in-house Special Counsel”.
88. Secondly, the title “Senior Counsel” is less well-known than Queen’s Counsel. This is said to require explanation to clients who do not have a developed understanding of the market for legal services in Victoria (or Australia), particularly international clients. Some submissions received have referred to clients even having misunderstood “Senior Counsel” as referring to the age or experience of a practitioner, not necessarily his or her standing in the profession.
89. Thirdly, confusion may arise from the fact that the titles of Senior Counsel and Queen’s Counsel co-exist and do not refer to barristers of higher or different standing (as between themselves). In Victoria at least, the existence of or potential for such confusion has diminished because the overwhelming number of barristers previously known as Senior Counsel have chosen to and now use the title Queen’s Counsel. It is

⁴⁴ See, for example, this job description at Mastercard: https://mastercard.wd1.myworkdayjobs.com/en-US/CorporateCareers/job/Rozelle-Australia-Pinpoint/Senior-Counsel_R-22860-1?codes=INDEED. Parks Victoria was represented recently by in-house counsel referred to as “Senior Legal Counsel” in a matter before VCAT: *Save Our Seat Inc v Mornington Peninsula SC* [2014] VCAT 1494.

true of course that this potential source of confusion will not be eliminated entirely under the Current System (where the option exists between remaining a Senior Counsel or becoming a Queen’s Counsel, and some barristers choose to remain as Senior Counsel).

90. It is not in the public interest for confusion to exist about the meaning and use of designations such as “Senior Counsel”. It is desirable that consumers of legal services understand clearly who is an advocate who has attained the rank of Senior Counsel by reason of appointment by the Chief Justice, and who is a legal practitioner who has adopted the title of Senior Counsel or Special Counsel for other reasons.
91. It has been pointed out in some submissions (which support a return to the system of appointing only Senior Counsel) that, over time, the title of Senior Counsel has and will become more widely known and understood in the market for legal services, particularly as the number of Queen’s Counsel declines. There is force in this argument, and I recognise that a number of well-known and highly regarded barristers in Victoria, New South Wales and elsewhere are known as Senior Counsel. However that is less so now following the introduction of the Current System in Victoria. An immediate return to the appointment of only Senior Counsel would still see Queen’s Counsel and Senior Counsel co-existing as barristers in Victoria for at least another thirty years.
92. There is a public interest in not adding to the presently existing confusion about the roles and titles of Queen’s Counsel and Senior Counsel, by again changing the system (this time to abolish the rank of Queen’s Counsel). Such a move would create incoherence. As the Attorney-General said in his press release of 22 January 2015, “I am mindful that constantly changing the government’s position on QC’s has the potential to damage an important legal institution”. That statement recognises the potential to harm the perception of Victoria as a centre for legal services and

detrimentally impact the export of Victorian legal services internationally. Put another way, it is difficult to articulate any public interest to be served by dispensing with the Current System. Although submissions made to me asserted that the public interest would be served by so doing and in particular because “a single term to denote senior counsel is to be preferred,” the fact remains that irrespective of what decision is made by the Attorney-General, there will (unless some arbitrary and retrospective step was capable of being taken) remain a two tiered method of identifying the leading members of the Bar in Victoria for the foreseeable future.

Queen’s Counsel as an anachronism⁴⁵

93. A strong theme in the submissions in opposition the Current System (which advocate a change to appointment of Senior Counsel only) is that the office or title of Queen’s Counsel does not reflect a modern, pluralist society like Victoria (or Australia). It is argued that it is an undesirable anachronism, particularly considering the loosening of historical ties between Australia and England, and the possibility of Australia becoming a republic in the future. One of the submissions received put it in these terms:

“The title of Queen’s Counsel is an anachronism in contemporary Australia. This was recognised by its progressive abolition throughout Australia in the late 20th and early 21st centuries. Its recent reintroduction in Queensland is both anomalous and retrograde and should now be reversed”.

94. The reality is, however, that the designation of Queen’s Counsel has only a remote connection with Australia’s monarch, and that the community understands the title to be only a mark of legal excellence attributed to barristers of high-standing and ability. In this sense, it is not unlike other historic designations used in common parlance, such as a “Rhodes Scholar” – which invokes the image of young Australians studying at

⁴⁵ Defined by the Shorter Oxford Dictionary as “something or someone out of harmony with the time”.

Oxford University, not Cecil Rhodes and his activities in Southern Africa. Our democracy is a product of its history. Many institutions have terms and practices which reflect that history. For example our adoption of the Westminster system leaves our parliamentary process redolent of language, processes and practices which some may regard as anachronistic and others as traditional and important to the institution. In my view the relevant question is whether such a process or practice has a useful public purpose, irrespective of whether it is the subject of language that may be in the eyes of some, an anachronism.

95. A number of submissions were received by persons identifying themselves as “republicans”, but who nonetheless supported retaining the office of Queen’s Counsel in Victoria. The persons making these submissions rightly regarded the two issues as separate and distinct.
96. A strength of the Current System is that it does have the advantage of least providing people with an option, without forcing the views of one group onto the other. In the balancing of the competing interests, I consider that as a favourable outcome, even if it comes at the expense of complete uniformity.

Relevance for country and small law firms

97. Some submissions received from practitioners who have worked in country firms or small firms in Melbourne have suggested that the ability of these firms (and their clients) to brief QCs, with the long standing recognition and status that designation carries, assists them to take on the “big end of town” and to “level the playing field”.
98. While there may be for certain clients and solicitors a perception that briefing a QC (rather than an SC) provides a psychological advantage in litigation, the primary source of benefit for those clients and solicitors is being able to call on the services and

expertise provided by the Victorian Bar generally. It is the substance of the advice and assistance provided by barristers that enables small firms and clients to take on “the big end of town”, not whether the barrister is a Senior Counsel or Queen’s Counsel. Accordingly, I do not accord substantial weight to this consideration and I observe that over recent years a number of SC’s have engaged in substantial circuit work.

Gender issues

99. A possible unintended result of abolishing future appointments of Queen’s Counsel in 2000 in Victoria was to further entrench any pre-existing bias in the practice of briefing male barristers compared to female barristers. As at 30 June 2000, there were 158 male Queen’s Counsel and 8 female Queen’s Counsel⁴⁶. As at 30 June 2013, there were 220 male Queen’s Counsel or Senior Counsel and 25 female Queen’s Counsel or Senior Counsel⁴⁷. I observe that of the current 29 female members of the Victorian Bar who hold silk, all but five are designated as Queen’s Counsel. Only two of the present number of female silks were appointed as Queen’s Counsel prior to 28 November 2000, which means that the clear majority of female silks considered it to be in their interests to apply for appointment as Queen’s Counsel subsequent to February 2014.
100. A change in the Current System (by reverting to the appointment of only Senior Counsel in Victoria) may arguably reintroduce this bias into the briefing selection process. And it has the possibility of doing so in circumstances where the proportion of women barristers being appointed Senior Counsel in future years is likely to increase having regard to the relative number of women now joining the Bar. The public interest would not be best served if this were to occur.

⁴⁶ Victorian Bar Inc, Annual Report, 30 June 2000.

⁴⁷ Annual Report of the Victorian Bar Incorporated for the year ended 30 June 2013

The selection process

101. The convention in Victoria, which is retained under the Current System, is that the Attorney-General only recommends to the Governor-in-Council persons to be nominated as Queen's Counsel if they have already been appointed as Senior Counsel by the Chief Justice of the Supreme Court of Victoria. This approach has a number of advantages, including the fact that Senior Counsel are chosen following a rigorous selection process undertaken each year by the Chief Justice. That process relieves the Attorney-General from having to perform a similar consumer protection function; it provides the Government with confidence in the appropriateness of the persons applying for letters patent; and it insulates Government from criticism that might be made in relation to the appointment of Queen's Counsel.
102. It follows that the primary concern addressed in the Priestley Report does not apply to the process of selecting and nominating Queen's Counsel in Victoria.

The case for choice

103. The Executive of the Victorian Bar submitted to the review that it:

“Is the firm position of the Victorian Bar that choice is important and should be maintained. We therefore support the current process whereby the Chief Justice appoints Senior Counsel, and thereafter, as an optional step a barrister so appointed be given the choice of also seeking appointment as Queens Counsel by a grant of letters patent.”

104. The majority of submissions made in favour of maintaining the Current System support that position. On the other hand as two opponents of the Current System submitted, it is desirable that there be a single, uniform designation for all practitioners who take silk, rather than individual choice. I have considerable sympathy with that viewpoint but in reality it has not been the case since 2000 and, irrespective of what decision is made now, is likely not to be the case in the foreseeable future. Taking that matter into

account, it appears to me that the Current System, which accords a choice, does permit those who are opposed to the grant of letters patent as Queen's Counsel to not make application thereto. Although seventeen of the 18 silks appointed in 2014 chose to make such an application, it may well be that, if the arguments advanced by those who oppose continuation of the Current System are perceived to have weight, the exercise of such choice in favour of the title of Senior Counsel will over time become the preferred choice.

Conclusion

105. As, stated above, and on balance, I conclude that the advantages of retaining the Current System outweigh the advantages of engaging in further and more confusing change at the present time. In coming to this conclusion I observe that the majority of submissions, both those in favour of maintaining the Current System, and those in favour of retaining the office of Senior Counsel only, were well reasoned and thoughtful. It is clear to me that thoughtful and reasonable people do have honestly held contrary opinions about the matters in issue. Members of the Bar for whom I have considerable respect have expressed opinions and maintained arguments which are completely opposed, but have done so with civility and reasonableness and in accordance with standards of conduct which are one of the hallmarks of the Victorian Bar. The conclusion I have reached at this time is based upon my consideration of what I see as the relevant evidence pertaining at this time to the principal issue, that is, should the Current System be retained? Taking into account the clear importance of the matter to members of the Bar and the community, and the damage that may be done to the institution by yet another change, I have concluded that no substantive change should be made to the Current System.
106. Finally, I would like to express my appreciation to Kate Beattie and Michael Rush of Counsel who provided considerable assistance to me in undertaking research in the course of this review, as well as to Laura Astasiadis who assisted in the collation of submissions for me.

19 July 2015.

The Hon. Murray Kellam AO