The Sydney Morning Herald

The silk cut

From Richard Ackland

September 27, 2002

Any moment soon the NSW Bar Association will announce the 20 or so names that are to be gilded with silk, or otherwise appointed to the honour roll of Senior Counsel.
They will be drawn from the list of 137 who put their names forward to be gonged with the post-nominals "SC".

Drinks will be served in the Bar Association common room, speeches will be made and photos snapped. For the delirious 20 or so it means the prospect of being able to charge higher fees for the same old service, up to one-third higher.

Given the process has a direct affect on keeping the price of advocacy or legal advice high, it is bewildering that the process still is shrouded in arcanery and mystery.

Of the 137 who consider themselves worthy enough this year as many as 12 are actually women. Last year of the 20 selected SCs, none were officially women.

The selection is supposed to be a "mark of excellence", but there is no guarantee of that. Everyone at the Bar knows of silk who are far from excellent, while there are plenty who are never called who are. Even if someone is brilliant at the moment of appointment, there is no safeguard that the same brilliance will be in tact 10 or 12 years down the track.

The old regime of Queens Counsel whereby the government of the day sprinkled holy water over the selection process was abolished by the Fahey government in 1993. The rationale was that the State should not be involved in sanctioning a system of preferment over which it had no real say.

The Bar, as in most other States, then came up with its self-anointed system of Senior Counsel, or "nylons", but the mechanism for appointment is no less opaque.

A list of the applicants is distributed each year by the Bar to another secret list of worthies, including judges, senior members of the Bar Association, heads of chambers, the Law Society and other spiritual organisations.

Those who are invited to vet the list are provided with some helpful prompts by the Bar Association. Next to each name it says: Yes/No/Not Yet/Not Known. If someone falls outside that range of reaction then the candidate would be in trouble. Presumably the scrutineers circle one, or more, of these possible responses and maybe offer an insightful personal comment.

Who then sifts and makes the final choice is not something the Bar announces. As a general rule it is harder for those who specialise in family law or crime or workers compensation and are outsider the magic square mile of the CBD to receive the final call. Phillip Street-Martin Place commercial, equity and common law types predominate among silk/nylons. And as for women or non Anglo-Celts, they are still relatively rare contenders.

The Bar successfully fended off attack from the competition regulator about the old silk cartel. In 1994 the Trade Practices Commission (the predecessor to the Australian Consumer and Competition Commission) said that silk was really a way of conferring market power on a few advocates which enabled them to charge more and thereby leverage up the fees of all barristers.

The fact that the percentage of senior to junior barristers stays really constant at 10 per cent suggests that there is an unofficial quota system in force to prop up the market.

The TPC recommended the abolition of rules which "continue the demarcation between senior barristers and juniors…" The Legal Professional Advisory Council in 1998 thought that the system did breach the Trade Practices Act, but it wasn't quite sure.

In England some challenging ideas are being bandied about by the Lord Chancellor, one of which is that QCs should be stripped of their rank if they fail to provide "value for money". Following a report by the Office of Fair Trading which "harpooned" the English Bar, Lord Irvine of Lairg has set up an inquiry into the advocacy business.

Someone called the Commissioner for Judicial Appointments, Sir Colin Campbell, is also reporting on the selection process for British silk. He has been critical of the "secret soundings" system of selection ? the nods and winks regime. It is open to bias and encourages judgments about people to be based on hearsay. Comments like "not normal QC mould" are a real worry.

Just spare a thought for the 125 or so souls who will be rejected from the most recent NSW list of contenders. They will have little to no idea why they have been blackballed or whether it is worth their while ever to apply again. Just the sort of device to keep chaps on their toes.