

New Zealand Law Society

To: The Chair and Members
Justice and Electoral Select Committee
Parliament Buildings
Wellington

Submissions on Lawyers and Conveyancers Amendment Bill

Part 1 - Amendments relating to Queen's Counsel

1 Policy Issues

- 1.1 Sections 118 and 119 of the Lawyers and Conveyancers Act 2006 (the Act) created the Senior Counsel title in substitution for Queen's Counsel and extended eligibility for appointment to barristers and solicitors. This was despite the nature of our submissions (which were relatively neutral) and the submissions of the New Zealand Bar Association (which were strongly opposed to change). It seemed apparent to us that these changes were in large part policy-based and not in response to any pressing call for change.
- 1.2 The Lawyers and Conveyancers Amendment Bill (the Bill) includes provisions for the title Senior Counsel to revert to Queen's Counsel and standard eligibility to be restricted to barristers sole. As with the previous changes in the Act, these provisions appear to be policy-based.
- 1.3 Many lawyers will be expecting us to take a firm stance on these latest policy shifts but we are in no better position with the Bill than we were with the Act. Opinion amongst lawyers is simply too divided for us to advance any single view likely to meet favour with a significant majority of lawyers. Even within the ranks of various groupings of lawyers, where a degree of unanimity might usually be expected (including large firms and members of the separate bar) there are still quite strongly held opposing positions.
- 1.4 Some say Queen's Counsel are an essential and integral part of the separate bar.
- 1.5 Others simply do not accept the implication that only lawyers who practise at the separate bar can be truly independent. They say that independence is the hallmark of every lawyer and that they are backed by the ethical rules which apply to all lawyers, eg:

"A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients."

And

"The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client."

- 1.6 There are also those who express themselves in blunt terms, eg that the rank is an ancient honorific, anachronistically bestowed by the State after faulty selection.

2 **Excellence and leadership**

- 2.1 Over many years of debate about the rank of Queen's Counsel, one of the issues on which we have received repeated expressions of concern has been the inconsistent quality of appointments, the lack of clarity in the appointments criteria, and the lack of transparency in the process.

- 2.2 We take no exception to the substituted section 119 under which the various matters relating to appointments continue to be left to regulations. We take no exception, either, to the fact that these regulations may, as with the current situation, authorise the Chief Justice and the Attorney-General to issue guidelines in relation to requisite qualifications and experience, as well as the process by which candidates may be recommended for appointment. All we are saying in these submissions is that for public and professional acceptance of the worth of preserving the rank, determined efforts need to be applied to these issues. The objective must be the appointment of only the best people, distinguished by their outstanding all-round qualities of excellence, integrity, judgement and leadership.

- 2.3 Notwithstanding the divisions of opinion referred to in our comments on policy in paragraph 1 of these submissions, lawyers can be expected to be largely at one on this matter of excellence and leadership and will expect us to have appropriate input into any necessary recasting of the existing regulations and guidelines.

3 **Royal prerogative power to appoint**

- 3.1 We very much support the preservation of the Governor-General's power under the Royal prerogative to appoint other lawyers as Queen's Counsel from time to time in recognition of their contributions to the law.

- 3.2 The objective referred to in paragraph 2.2 above, ie the appointment of only the best people, distinguished by their outstanding all-round qualities of excellence, integrity, judgement and leadership, should be applied with equal determination to appointments of those from outside the standard eligibility.

- 3.3 The Royal prerogative to appoint other than in the standard manner has been exercised very rarely indeed in the past. If standard eligibility is restricted to members of the separate bar, there must be a case for more frequent exercise of this prerogative.

4 **Complexity**

- 4.1 If enacted in its present form, Part 1 of the Bill would lead to the existence of three classes (and several subclasses) of Queen's Counsel/Senior Counsel appointed in the standard manner, together with a measure of complexity concerning the titles available for use and the ability of existing Queen's Counsel/Senior Counsel to practise other than at the separate bar.

- 4.2 On our reading of the Bill, if enacted in its present form, there will be the following categories and sub-categories of Queen's Counsel/Senior Counsel:

a **Queen's Counsel appointed before 1 August 2008**

These would be free:

- i to continue describing themselves as Queen's Counsel or to change their description to Senior Counsel
- ii to practise in partnership or at the separate bar (provided that they practised other than at the separate bar at any time between 31 July 2008 and the commencement date of Part 1 ("Commencement Date")).

Those who have not made the above elections before the Commencement Date will be required under the new regime to continue describing themselves as Queen's Counsel and to remain at the separate bar.

Any who have changed their description to Senior Counsel and/or ceased to practise at the separate bar will be able to continue with that description or position. (We recognise that there may in fact be none in this category).

b **Senior Counsel appointed after 31 July 2008 and prior to the Commencement Date**

These may choose:

- i to describe themselves as Queen's Counsel or as Senior Counsel

- ii to practise either as barristers sole or otherwise.

Accordingly, there will be four possible sub-categories of Senior Counsel:

- Those who describe themselves as Queen's Counsel and practise other than at the separate bar.
- Those who describe themselves as Queen's Counsel and practise at the separate bar.
- Those who describe themselves as Senior Counsel and practise other than at the separate bar.
- Those who describe themselves as Senior Counsel and practise at the separate bar.

c **Queen's Counsel appointed in the standard manner after the Commencement Date**

These must describe themselves as Queen's Counsel and must practise at the separate bar. If they cease to practise at the separate bar, they would lose the rank of Queen's Counsel.

- 4.3 There would appear to be nothing to prevent those in categories a and b of paragraph 4.2 who practised other than at the separate bar at any time after 31 July 2008 and before the Commencement Date from moving at will between the separate bar and other forms of practice.

5 **Simplification and clarity**

- 5.1 The position could be considerably simplified with resulting improvement in clarity in the following manner:

- a From the Commencement Date, all past appointees (whether as Queen's Counsel or Senior Counsel) are to be known as Queen's Counsel. This should not present a difficulty for Senior Counsel.
- b Those appointed after the Commencement Date under the standard system must practise solely at the separate bar. (This accords with the approach taken in the Bill.)
- c Those entitled to practise other than at the separate bar who at any time after the Commencement Date chose to practise at the separate bar are not permitted subsequently to reverse that election.

- 5.2 If this greater simplicity and clarity were thought desirable, some amendment to the Bill would be required but that could be effected fairly readily. We would be willing to assist.

Part 2 - Miscellaneous amendments

6 Dates

- 6.1 We are not sure why the indicative date (1 April 2010) in clause 118C(5) is shown as three months before the indicative Commencement Date. We do not believe the legislation should contain any element of retrospectivity.

7 Clauses 7 and 8 - Qualifying trusts

- 7.1 These clauses would permit non-voting shares in an incorporated law or conveyancing firm to be held by a qualifying trust. Since the Act came into force, we have received many inquiries from lawyers expressing concern about this issue. These amendments will be warmly welcomed, along with the additional efficiency and flexibility which will result.

8 Clause 9 - Extension of power of attorney

- 8.1 Clause 9(1) would extend the operation of a power of attorney required by section 44 of the Act to include any period during which the donor is an undischarged bankrupt.
- 8.2 We sought this amendment and we support it. It is an important client protection mechanism and it is very much in the interests of the clients of a practitioner who becomes bankrupt. It is likely to be of benefit in easing a practice through to ultimate disposal by the official assignee.
- 8.3 Clause 9(2) would require practitioners to give extended powers of attorney within three months after the date on which clause 9 comes into force. Once the Bill is enacted, we will advise lawyers who are in sole practice of this requirement.

9 Clause 10 - Applications to the Legal Complaints Review Officer

- 9.1 This provision would amend the commencement time from which the 30-working day period for lodging an application for review with the Legal Complaints Review Officer runs, to one day after the determination, requirement or order ('Determination') is served on the applicant for review.
- 9.2 We have no difficulty with the principle underlying this provision. However, the change would highlight and exacerbate the unsatisfactory nature of the current provisions relating to service of Determinations.
- 9.3 The requirements of s158 of the Act (taken in conjunction with ss193 and 194) necessitate written notice of a Determination being given not only to the complainant and the lawyer of whom the

complaint was made, but also to each related person or entity of that lawyer.

9.4 A 'related person or entity' is defined in s6 of the Act to include:

- a any person who practises in partnership with the lawyer concerned;
- b any person who employs the lawyer concerned;
- c any person who is a director or shareholder of an incorporated law firm in which the lawyer concerned practises.

9.5 This would appear to render it necessary to give notice of a Determination to:

- a every partner in a law firm in which the lawyer concerned is a partner or an employee;
- b every director and shareholder (including non-voting and non-lawyer shareholders) of an incorporated law firm in which the lawyer concerned practises.

9.6 This is manifestly unsatisfactory, particularly in the case of a large law firm or an incorporated law firm with numerous shareholders including non-lawyer shareholders.

9.7 The position would be made even more unsatisfactory by the enactment of the proposed clause 10(1) of the Bill which would result in an indefinite period in which an application for review could be made by a related person who could show that notice of the Determination had not been served on him or her. Clearly, this would not be in the public interest.

9.8 Accordingly, it is submitted that s158 of the Act needs to be amended to provide that:

- a in the case of a partnership, service on a partner (other than the lawyer concerned) constitutes service on all partners;
- b in the case of an incorporated law firm, service on a director of the firm (other than the lawyer concerned) constitutes service on the firm and all the directors and voting shareholders;
- c there should be no requirement to serve notice of a Determination on non-voting shareholders of an incorporated law firm.

9.9 These amendments need to take effect not later than the time when clause 10 of the Bill comes into force, in order to prevent the potential for unsatisfactory situations to arise.

- 9.10 While the above comments are directed to law firms, s198 of the Act extends to conveyancing practitioners as well, so that the amendments should relate to both lawyers and conveyancing practitioners.
- 9.11 We have some difficulty with clause 10(2). The effect of paragraph (a) is by no means clear and in any event we consider that this paragraph is unnecessary. The paragraph should be omitted with the relevant subclause then reading along the following lines:
Section 198(b) of the principal Act (as substituted by subsection (1)) applies only to applications for review under section 193 of the principal Act that are made after the commencement of this section.
- 9.12 Alternatively, and perhaps more desirably, the subclause could be modified so that it applies only to applications for the review of a determination, requirement, order or direction of a Standards Committee made after the commencement of the substituted section 198(b).

We wish to be heard in support of these submissions.



Jonathan Temm

President

1 December 2010