From the President

APPOINTMENT OF SILK

The appointment of silk has always caused controversy. The extraordinarily large number of applicants in the last few years has increased that controversy. The formalities concerning the appointment of silk are well-known and readily accessible. As part of that process the President of the Association calls upon the Attorney-General in order to communicate to him the list of applicants for silk and tenders the advice to the Attorney, if required, both as to the number of silk to be appointed and as to the qualifications of the applicants for appointment.

It may be helpful to those considering applying for silk if I outline the procedures I adopted and the principles I applied in tendering my advice last year. I was largely guided in this by advice from my predecessor, and I know that he in turn had been guided by previous experience.

In considering the number of silk to be appointed I took into account "wastage" of silk during the preceding twelve months, the requirements of various jurisdictions gleaned from the discussions to which I will later refer, discussions with the Barristers' Clerks' Association, and my assessment of the number of qualified applicants.

I called upon or consulted with the following to discuss the list of applicants - the Chief Justice of New South Wales, the Chief Judge of the Federal Court, the President of the New South Wales Court of Appeal, the Chief Judge at Common Law, the Chief Judge in Equity, the Judge in charge of the Commercial List, the senior Sydney Judge of the Sydney Registry of the Family Court, the Chief Judge of the Industrial Commission, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, various individual Judges whose opinions I value, each silk on the Bar Council, and various other silks including former Presidents. If, after this process, I was in doubt about any praticular candidate, I consulted one or more referees.

The inclusion of referees in the application was an experiment which I introduced last year, adopted from the procedures applying in Victoria. I had hoped that it would assist in limiting the number of applications, as well as providing a source of information. It did not limit the number of applications, and I found that if I knew an applicant's area of practice the process of consultation which I have described is perfectly adequate. I therefore do not propose to continue the experiment.

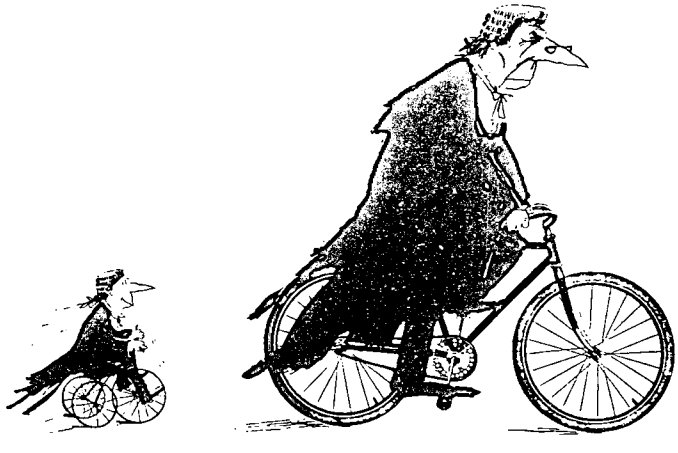
The objective is to identify those applicants regarded by the profession as having the requisite degree of professional eminence and standing in their field of practice coupled with integrity and good fame and character. My experience last year, and what I know of the previous couple of years, shows that the consultation process will identify a relatively small number of candidates - say half a dozen - who are at the top of virtually everybody's list.

Upon one view, appointments should be restricted to this group. If this standard were consistently applied the Senior Bar would undoubtedly be stronger and of more even quality. It would also lead to more work being done by senior juniors, often leading other counsel. Both of these effects would be beneficial. It would, however, place great demands upon the services of the Senior Bar, and it would make it difficult to properly service the demands of solicitors and their clients. One by-product of this would be a pressure for undue increases in fees charged by silk. Each President and each Attorney will no doubt have their own views to where to draw the line.

There is then a group of perhaps twenty who receive a substantial number of votes and whose claims thus have to be seriously weighed. Support for the balance is plainly not sufficient to warrant appointment.

The choice between those "within the range" is difficult. The bar is increasingly becoming specialised, and the work of the barrister may be centred upon a particular jurisdiction. Increasingly, it is the requirement of particular jurisdictions which must be served rather than any global market. This gives rise to some misundertanding. Last year, for example, some well qualified candidates from the commercial bar and the personal injuries bar were not appointed. There is a tendency to compare that group with some who were appointed whose practice lies in other jurisdictions and thus criticise the selection process. That, in my view, is not the correct comparison. The unsuccessful candidates should be compared not with successful candidates from other fields of practice, but with his or her direct peers. If there is a shortage of silk in a particular field opportunities may come more quickly than in other fields.

There are a number of factors to take into account in making the choice. Assuming roughly equivalent merit, their seniority and experience, service to the Bar, and versatility are amongst them. Some jurisdictions will only carry a small number of silk regardless of the qualifications of those practising in the jurisdiction. One of the most difficult judgments is to weigh up the claims of the more junior 'high flyer' against those of the experienced campaigner. Another is to judge the relevance of experience before admission to the Bar.



Simon Fieldhouse.

There is a particular problem in making judgments about those who practise on the commercial equity side. If a barrister is taken up by one or two large firms he or she can develop a very large practice and a substantital reputation simply based upon chamber work and appearances as junior Counsel to leading Counsel. In my view, this is not a sufficient qualification for silk. To be entitled to silk an applicant must show the ability to handle substantial cases on his or her feet over a period of time.

There is also a particular problem at the moment concerning Counsel specialising in personal injuries work. Because of the doubt over that work at the time of consideration of applications last year, it was my view that no person practising in that jurisdiction should be appointed unless he or she had substantial experience in other jurisdictions. I have the same general view this year, although there may be a place for some personal injuries specialists.

In the small specialist jurisdictions I do not believe that appointment to silk is warranted simply because a barrister has one of the largest practices in that jurisdiction. Silk should in general be reserved for those who can competently handle work flowing from the jurisdiction, including appellate work.

I hope that this outline will assist in removing some of the mystique and misconceptions which surround the appointment of silk.

If I may give one last bit of advice. A candidate's chances are not improved by provision of references from others or personal representations or lobbying. If a person truly has the professional eminence requisite for appointment to silk, the consultation process which does take place will not ensure he or she is not overlooked. □

Bar Notes

Bar Association opposes retrospectivity

The Federal Government is proposing to amend the **Telecommunications (Interception) Act** by including s.64 which states:

"Dealing in connection with existing proceeding
64.(1) A person may:

(a) for a purpose connected with a proceeding begun before the commencement of this Part, or for 2 or more such purposes, and for no other purpose, communicate to another person, make use of, or make a record of or
(b) give in evidence in such a proceeding; information:
(c) obtained by intercepting a communication before that commencement, whether or not in contravention of subsection 7(1); or
(d) obtained, before that commencement, by virtue of a warrant issued under section 11 or 11A or Part IV.

(2) For the purposes of this section, a proceeding by way of a prosecution of a person on indictment for an offence shall be deemed to have begun before the commencement of this Part if a proceeding with a view to the committal of the person for trial for the offence began before that commencement.

(3) For the purposes of this section, a proceeding by way of an appeal from, or otherwise arising out of, another proceeding shall be deemed to have begun before the commencement of this Part if the proceeding began, or by virtue of another application or applications of this section is deemed to have begun, before that comencement'.

On 27 May 1987 R.V. Gyles Q.C. on behalf of the Bar Association wrote to the Attorney-General, Lionel Bowen, about this proposal and informed him the Association was totally opposed to retrospective legislation of any kind, particularly that which would affect the liberty of the subject. He urged the Attorney-General to reconsider the proposed amendment. □