

Silk appointments: the alternatives don't stack up

By Tom Bathurst QC



I am told by the editor that this column has to be brief as he has far more interesting things in *Bar News* than a report from me. However, there are a number of matters I would like to raise with you.

The state government is now well installed and I have already had the opportunity to meet the attorney general. I raised with him some of the matters which have been of concern to the bar particularly in the area of tort law reform and legal aid. The attorney, who of course was the deputy director of public prosecutions and is a long time member of the bar, was sympathetic to the matters which I raised and assured me that they would be given consideration. I have no doubt we will be able to have a cooperative relationship with him.

I would also take this opportunity to extend my congratulations to Alan Robertson SC on his appointment to the Federal Court, to Justice Sackar to his appointment to the New South Wales Supreme Court and to judges Woodburne

and Olsson on their appointment to the District Court.

The Bar Council also reconsidered the silk protocol in the light of last year's experience. Submissions were called for but very few were received. The principal area of concern was the lack of transparency. The council sympathised with this concern but took the view that the process of enquiry – particularly that initiated – would be rendered quite ineffective if persons who responded were required to publicly disclose their opinions. In those circumstances the council resolved that no amendment to the protocol could be satisfactorily devised to accommodate the problem.

The Bar Council also considered proposals to replace the scheme with a specialist accreditation scheme or to award silk simply

on a statistical basis of the number of appearances in various courts, or at an extreme purely based on seniority. The specialist accreditation proposal has two problems. The first, at a practical level, it is difficult to see who accredits the specialists and what the process of accreditation should be. For example, is it by way of exams, experience or by recommendation from other members of the profession? If it is the latter, the same problems as

appear with silk arise. Further, it ignores one fundamental premise that underpins the bar, that is, that we are advocates. It is true that there is a greater degree of specialisation at the present time. But the best quality barrister will have the ability to cross various jurisdictions and apply his or her mind to the problems which arise in each of them.

The other suggestion, to simply appoint having regard to the length of time and practice or the number of appearances in particular courts, would, in my opinion, demean the process. Silk is a mark of excellence not longevity, and it would be unfair to both the profession and the public generally if it was awarded on this basis.

I appreciate that a number of you will disagree with me, perhaps strongly. However, the only

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justification for the institution is that it is a recognition of excellence in the profession. If the process is so flawed so as not to be able to produce that result, then the only real alternative is abolition. In my opinion, the process is not so flawed.

That is not to say that the process is perfect. Far from it. However, I can assure all of you that the selection committee does the best it can to ensure each applicant is treated

fairly and appropriate enquiries made. I can also assure you that the committee's practice is to disregard intemperate comments and comments which appear to be based on personal likes or dislikes. These are not the criteria by which silk is awarded.

I also recognise that on occasions decisions not to grant people silk may seem to be finely balanced or wrong. However, the committee can only do the best it can based on the information it receives.

I should indicate that the committee this year will comprise persons in a variety of practices and in a variety of chambers. As with last year, I will be the only person on the committee from Wentworth or Selborne Chambers. The Honourable Keith Mason AO QC has very kindly agreed to serve again as the impartial observer.

I should also indicate that acting as a mediator will be regarded in appropriate cases as a basis for appointment as senior counsel. Further, those persons who have principally advice practices will be invited to give details of those persons to whom they customarily give advice, so that the opinions of such persons can be sought.

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The Bar Council also considered recently the issue of incorporation of barristers' practices. It had received senior counsel's advice on this issue and following consideration of the matter decided that it was not appropriate to take the matter further at this time.

The council has been active in areas outside the ones that I have referred to above. Comprehensive submissions have been provided to the Attorney General's Department in respect of its review of the Defamation Act and a response has been prepared to the Administrative Review Discussion Paper. The renovations to the Bar Association's premises have been completed and seem to be successful. The new *New South Wales Barristers' Rules* will be gazetted and will become the national model rules.

Once again, as I indicated before, if anyone has any gripes or any matter they particularly wish to raise with me, please do not hesitate to do so.