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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

KIRBY P
SHELLER JA
CRIPPS JA

MONDAY 14 DECEMBER 1992

ANNOUNCEMENT OF THE APPOINTMENT OF QUEEN'S COUNSEL

STATEMENT BY THE PRESIDENT

(After welcoming individually the new Queen's Counsel who announced
their commissions)

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KIRBY P: Sadly, gentlemen (and there are no ladies at the table today) I missed the ceremony in the Banco Court on Thursday last when you were welcomed by the Supreme Court sitting in an extraordinary session in banc.

It is perhaps a symbol of my life that I was already committed that morning to open a computer security conference. That obligation, in turn, arose out of a function which I had as chairman of an OECD expert group on data security. This led to a decision of the Council of the OECD last month to recommend to the various member countries certain principles of data security which it is hoped will influence local law. I was telling local organisations of this development. That is why I was not in the Banco Court on your notable occasion.

I have heard, and read in the media, that the Chief Justice's remarks on that occasion were regarded by some as a little Delphic, even uncharacteristically so. Let me therefore say directly what I would wish to say to you on an occasion such as this.

It has been said that counsel at the table before this Court today will be the last persons appointed as her Majesty's Counsel in this State. That statement arises out of an announcement by the Premier (the Hon John Fahey MP) that the Government would be making no such recommendations for appointments next year.

I hope that the Executive Government of the State will reconsider that decision, if such it be. The Premier is a thoughtful and intelligent man. He is himself a member of the legal profession. I would hope that he would reflect again upon the decision. It was announced on the very day on which I, and other judges, received a discussion paper issued by the Attorney-General which raised, amongst others, a question for our comment as to whether the office of Queen's Counsel should be abolished. If the Government, Parliament and people are still interested in receiving the opinions of the judges on that matter, such opinions will in due course be expressed. It was, to say the least, a little surprising that, on the very day of receipt of the consultation paper, a decision was unilaterally announced. At the least, it is undesirable that such a decision should be made unilaterally for this State only. It disadvantages those counsel who have a natural expectation that they would move through the profession to the rank which the new appointees before us have now attained.

There is no doubt that an increased demand will arise for Australian legal services in Asia and elsewhere in the years ahead. The appointment to the rank of Queen's Counsel is an important and professionally valuable step in the life of a barrister. Appointment

to a new rank, differently styled and differently chosen, of senior counsel would not carry the same respect, at least until it earned it. That would take time.

There is also no doubt that there would always remain in the legal profession a position of senior advocate. In many of the countries of the Commonwealth which are now republics there are appointments of senior counsel, so styled (SC). In Sri Lanka, counsel appointed to the Inner Bar are appointed as President's Counsel (PC). In Nigeria, senior counsel are appointed as Senior Advocates of Nigeria (SAN). There is therefore little doubt that, in time, some such ranking would emerge from the profession in this State if the rank of Queen's Counsel were abolished.

What, then, will we have achieved by the abolition of the appointment of Queen's Counsel? We will have removed the Queen's name from the warrant by which the leaders of the Bar are appointed. And we will have removed the rôle of the Executive Government in the appointment of those leaders.

So far as the removal of the Queen is concerned, it seems to me that, whilst we remain a constitutional monarchy, that ought not to happen. Behind the rank of Queen's Counsel lie four centuries of the service of distinguished leaders of our profession. Such a ranking should not be set aside, at least without careful consultation with the judges, the profession, and the community. Certainly, in my respectful opinion, it should not be a decision made by an unexpected announcement on an afternoon when, as I understand it, the Attorney-General of the State was outside the State and on the very day that a consultation paper, including a question on the very issue, was distributed to the judges and to others.

So far as the involvement of the New South Wales Executive Council in the appointment is concerned, I have to say that, although

views differ, I unequivocally support that involvement. First, it has tended to leaven the appointments which would otherwise come from within the profession alone. The profession's choices of its leaders may not necessarily always be the best cross-section of those who should be appointed to lead the legal profession at the Bar. In my view, it is useful to have the leavening which arises from the involvement of the Executive Government. For my own part, I would dissent from the notion that judges, or even the Chief Justice - any Chief Justice - should effectively have such appointments to himself or themselves. For myself, I think it is important that we should have more academics, government lawyers, parliamentary counsel, more women and others, in the senior ranking of the profession. That is much more likely to happen, as it seems to me, if the rank of Queen's Counsel is appointed with an involvement of the Executive Government of the day than if it is left to the profession alone.

Secondly, to those who say the Executive Government should step out of this appointment it ought perhaps to be said that they have not reflected enough on the rôle which the Inner Bar plays in the work of fashioning and developing the law. At least they do so in this courtroom - and in the other appellate courts. The Executive Government plays a part in such appointments because, in a real sense, the leaders of the Inner Bar are co-workers with the judges in fashioning the principles of the common law and in the interpretation of the Acts of Parliament and other legislation. That is why they have a special rank and why they hold a public office. They are, as Justice Brennan once said, ministers of justice, with the judges, in fashioning and developing our law.

I feel I am entitled to make these remarks which, of course, are simply my personal views. I can do so because I do not think it can be said of me that I am an opponent of reform of the legal

profession. I am a supporter of such reform. But I do not believe that the abolition of the rank of Queen's Counsel is a useful reform. I do not believe that it attacks either of the twin causes of legitimate concern of the Government and the community, about the delivery of legal services, which are costs and delay. I do not believe that the decision was made in a well thought out way. Such a decision, affecting a tradition of four centuries, should certainly be made very carefully. Things so long settled may sometimes have good reasons to support them. Particularly where, as announced, it affects only New South Wales: the State which is the most important in terms of the quantity, variety and significance of litigation, the announcement seems to inflict an unnecessary wound on the legal profession of the Premier's own State. We will be bound by legislation to recognise Queen's Counsel of other States of Australia. The beneficial creation of a truly national legal profession will be set back.

My hope is that wiser thoughts will ultimately prevail. When the time comes around next November for the consideration of further applications, which I hope will go forward in the usual way, I trust that the Executive Government will think twice about the decision. And that we will see before us this time next year, or a little earlier, the appointees who come forward with their famous commission to announce their appointment to the Court and, through the Court, to the community.

I once again congratulate you all and send you forth to your work. I trust that there is no history in this ceremony - merely the continuation of a great tradition, at once of service and leadership, to which you are but the latest heirs.