NEW SILKS CEREMONY

HIGH COURT OF AUSTRALIA

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A TOAST TO THE NEW SILKS

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HIGH COURT OF AUSTRALIA

Today is the first occasion upon which you have worn your new silken robes in the High Court. Thoreau, the nineteenth century American naturalist and philosopher warned, "mistrust any new enterprise that requires new clothes". Those in ancient Rome who were awarded triumphs were also provided with "prompters" (slaves) who whispered in their ears as their processions passed the Forum, remember you are mortal. The lesson from these, is, I suppose, that it is as well to remember that fallibility is not incompatible with the status of Senior Counsel.

Tonight will, I hope remain with you all as a memorable occasion. It is for me a particular pleasure to propose this toast of the evening to the new silks. I would like to think that in spirit I remain one of you.

Most of you probably know, but it would no doubt surprise those who criticise the institution of silk, that the Order originated from a perceived need to break down monopolies and enhance competition in professional practice, and for appointment to the Benches of England.

It is almost certain that the Order dates from 1604 when Sir Francis Bacon was appointed King's Counsel Extraordinary. It soon however lost its special character as Counsel to the Monarch exclusively and became a patent of precedence.

The patent which each of you has today is not a Grand Patent issued by Her Majesty the Queen of Australia. Your entitlements differ because various, not entirely uniform rules, now exist in the different jurisdictions with respect to enrolment as silk. Nevertheless, the effect is the same - you are recognised by a formal and substantial process as being the senior members of the practising profession of advocates. Recognition is conferred only after a process of application and assessment, involving consultation at least, with those most harsh of critics, your peers.

It is interesting to reflect a little more upon the evolution of the order. The gradual ascendancy of silk meant the beginning of the end for what had been the oldest, most powerful, most senior and probably least competitive limb of the legal profession - the Serjeants-at-law. Theirs was an ancient order; so ancient that its origins are shrouded in ambiguity, and the mystery, privilege, secrecy and mistrust that tend to be associated with such ambiguity. The appointment of silks led ultimately to the loss of the Serjeants' exclusive rights of appearance in the Court of Common Pleas and their longstanding monopoly over appointments to the Bench.

Not surprisingly, the Serjeants-at-law bitterly resented this intrusion upon their patch. In his book, "The Order of the Coif", Serjeant Pulling lamented the growing influence of the intruders. He described matters relating to silk in a sow's ear kind of way: of potential silks who contrived their appointments, of the institution being an " *anomaly* ", of the "batches" of appointments made and of the "multitudinous and indiscriminate creation of Queens Counsel". He alleged that a "very gross injustice" had been inflicted on the Serjeants by the "contrivance" of silk.

Perhaps some enterprising contemporary opponent of the institution might like to send a copy of the Serjeant's work to some of the persistent media critics of the institution.

Now I want to ask you to hypothesise. Regard this as your final test for admission to the Order of Silk. Assume that the order of silk had not emerged in 1600: but in 2000. The Serjeants still hold monopolies on practice. Judicial appointments are made only from their ranks. They are powerful, well-connected and privileged. They live principally in Double Bay, Toorak and Ascot and own internet companies. Along comes a bright Attorney-General. She proposes far-reaching reforms. No

more Serjeants will ever be appointed. All monopoly rights will be withdrawn. Their restrictive trade practices are at an end, she announces. In their place, an egalitarian institution is hereby established. Appointments to it will be made only on merit after extensive consultation and consideration. Only the best will be eligible. The appointees will form a group of people recognised as possessing greater skill and experience than other members of the Bar. Any practitioner can apply and is entitled to have his or her application carefully examined and assessed. A designation will be adopted after the appointee's name to indicate to the public and profession alike that this person has highly developed skills and extensive experience.

The reaction? Professors Hilmer and Fels rejoice openly. A press release is issued. "At last there is an end to the long reign of the Serjeants over the Courts and their practices. In their place is established a competitive, modern, anti-monopolistic and efficient instrument of reform of the legal profession".

It is only to be expected that the institution of Silk would not escape in this country the all-pervading suspicion that any apparent form of elitism or recognition, however deserved, tends to attract. The truth is that the Bar, and the Silks, as its most eminent and senior practitioners, are engaged in a uniquely competitive activity. I am unaware of any substantial legal barriers to the practice of advocacy by any qualified and admitted lawyer if she or he wishes. The most important work that is done by barristers is done in public. It is done not only in an abstract way, but also in a direct and immediate way, in actual, sometimes, fierce competition with other barristers. No one is compelled to brief senior counsel. Everyone is entitled to stipulate the fee that he or she is prepared to pay, just as counsel is free to say that he or she will not accept that fee. All of this sounds much more like a free market place than the market place in which a number of the critics of the Bar and of the institution of silk operate.

It is, in my personal opinion, entirely appropriate that there should be a senior rank of counsel. And I think it is difficult to find compelling arguments against it. The judiciary, public servants, the defence forces, academe, financial institutions and all other public institutions rank their members, not just for symbolic reasons but also for good, practical ones. Indeed, even the media rank journalists. The fact that barristers are sole practitioners is itself an important factor in ensuring independence and competitiveness.

Perhaps the profession needs to do more to dispel the ignorance which exists among even those who should know better about the way in which the bar and its senior members practise.

One might ask whether the authors of the report on the implications arising from the Hilmer proposals made by the Industry Commission had ever visited a set of barristers' chambers. If they had they might not have written that the Bars should be encouraged (by implication, compelled) to incorporate or form partnerships in order to obtain the advantage and cost savings of shared chambers, staff, library and electronic facilities[1].

The legal profession today, in each of its various branches seems to be but grist to the critics' mill. The adversarial system and all who sail in her are under attack. Those who do the attacking might do well to look at the situation which exists in those countries in which an inquisitorial system operates. There is in France widespread disillusionment with the Inquisitorial system and the way in which such a system may represent a threat to judicial independence. In France and Italy examining Judges are coming under attack for abusing a system that assumes guilt before charges are brought. There have been at least as many blunders by the judicial inquisitors as there have been by the police forces in the common law countries. The new French Justice Minister is struggling to reform the justice system and has gone so far as to make an admission of a kind that is not always popular and rarely made in France, that the British Common Law system may have some advantages. The Supreme Court of Japan, in its official handbook takes pride in the adoption, by the 1946 Constitution of that country, of the adversarial system and the rules against the reception of hearsay evidence[2]. All of you here tonight of course have an important role to play in continuing to refine and improve the adversarial system.

It used to be said in England that one, perhaps the most important criterion for a grant of silk was whether, he - it was always he in those days - would make a respectable County Court Judge if he failed as a Silk. Then there were real risks in taking silk of a kind that you do not have to face, because no silk could appear without a junior, and his - again it was almost invariably his - fee could

not be less than two thirds of the leader's. There were, in consequence, not a few, who brought successful careers as juniors to a sudden and unhappy end by an unprudent successful application for silk.

There are among you only five women. Tonight is not the occasion to debate whether that number should be regarded as a reasonably sufficient number in all of the circumstances. But on any view, that you are at last here and that your numbers are increasing, show that we have moved a distance from some of he discriminatory practices of the past. The first woman law student in France, Mlle Chauvin initially applied for admission to the French Bar in 1892. It was not until 1900, after repeated applications and the personal intervention of such statesmen as Poincare and Viviani that she was able finally to obtain admission to practice. By 1914 only a dozen women were practising in France.

The position had been no better in the common law countries. Miss Lavinia Goodell applied to the Wisconsin Supreme Court for admission in December 1875. She was able to produce a certificate that she had been examined in open court, that she was a resident of the state, that she was a person of good moral character and that she possessed sufficient legal knowledge and ability to justify admission as an attorney and councillor at law. Ryan CJ, speaking for the Court, after discussing the statutes, which, despite their generally "gender neutral" language, he held to be completely against her, said this[3]:

> "So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, it emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice".

The last thing that I would wish to do on this night for congratulations is to harangue you about the way in which you should prepare your outlines of arguments and addresses to the Court. However, I could perhaps leave you with one piece of advice to be distilled from a criticism by Carolyn Chute that appeared in the *New York Times* , of the works the celebrated American author William Faulkner. The critic wrote, "he uses a lot if big words, and his sentences are from here back to the airport".

As I recollect, this ceremony was resurrected in 1996 after a lapse of some years. That there should be a presentation of commissions in Canberra was originally the idea of an Australian Bar Association. It is a pity that, for a time it fell into disuse. It was an important and wholly worthy initiative. That we are here together tonight is an indication of the national nature of the profession and of the interdependence of the courts and the Bar upon each other. I wish you well in the future. I look forward to seeing you all in Court, and I take pleasure in proposing the toast to you, the new

silks.

Sources

Pulling, *Order of the Coif* (1884)

Holdsworth, *A History of English Law* , (1945) Vols V, (1937) VI and (1938) XII

Robertson, *An Experience of Women: Pattern and Change in Nineteenth-Century Europe* (1982)

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1 Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments* (1995) at 113.

2 Supreme Court of Japan, *Justice in Japan* at 13, 14.

3 (1875) 39 Wisc. 232 at 244-246.