

Chief Justice, Attorney-General, Shadow Attorney-General, Justices and, most importantly this evening, new silks.

The toast that I will propose this evening is to your appointment of silk and the achievement of, and the aspiration for, excellence. To explain why I do so, and what is meant by that aspiration, I want to say something about the origins and context of the aspiration for excellence in the law.

Sir Victor Windeyer once said that identification of the origins of a doctrine or practice depends upon "how far you wish to go back and how much certainty you demand in the connecting links". In the early Empire, the Emperor awarded to a jurist the *ius respondendi*, which Pomponius described as a right to speak with the authority of the emperor which was given "in order to enhance the authority of the law". Roman legal history only ever revealed the name of one man who was awarded this title. His name was Massurius Sabinus, a man described as being "already of advanced years" when he was granted the title. I hope that my colleagues will forgive me for mentioning that his "advanced" age was 50 years old.

Almost from its inception, English law followed suit with Edward I's serjeants at law appointed with exclusive rights in Common Pleas. Some of you might look back hopefully to that era of a true monopoly and the period from the fourteenth century when only serjeants could be appointed as judges of the Common Pleas and King's Bench. I am personally grateful that that restriction ultimately disappeared.

There are, however, two core aspects of the recognition of excellence afforded to the serjeants that remain today. The first was that, like the Roman jurists, they were a source of the law. Sometimes a legal scholar will puzzle over an early report that contains a result that is so obviously wrong even by the standards of the time but which takes decades to be overruled. One reason for this delay was that the law is much more than the decisions that are found in the books. During the time of the serjeants, English law was discussed at the benches in the Inns of Court. Some decisions, known to be obviously wrong, were simply never relied upon. Everyone knew that they could be disregarded; it wasn't even necessary to record it. As Pollock and Maitland remarked, to many reporters, "the opinion of the serjeants' seem[ed] as weighty as any judgment"¹. The same can be, and should be, true today. With the gigantic

¹ Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (1911), vol 1 at 217.

weight of electronic precedent for almost every imaginable proposition, a fine counsel may sometimes find and cite an authority in her or his favour that is plainly wrong only to acknowledge that she or he places no reliance on that authority.

The second aspect of excellence that the serjeants embodied was moral and ethical leadership. Sir John Baker described Serjeants as men, and they always were men at that time, who were "sworn to serve the public... and in return for their monopoly of audience accepted a concomitant duty to represent all clients wishing to retain them, however unpopular or indigent they might be"². Although the "cab rank" rule came to be generally applicable to all barristers, the serjeants were the leaders of the profession who set these standards for these and other moral and ethical duties.

The extinction of the serjeants and the process of the emergence of modern-day King's and Queen's Counsel is also a tale about the recognition of excellence. The first appointment as a King's or Queen's Counsel was Sir Francis Bacon. His consolation after missing appointment as attorney

² Baker, *Collected Papers on English Legal History* (2013), vol 1 at 115.

general, to which his rival Sir Edward Coke was appointed, and then solicitor general, which Sir Edward Coke vacated, was appointment as the first "King's Counsel extraordinary". The appointment was made to "ensure that a newly risen star should not use his talents against the crown"³. I will come back shortly to the importance of the description of him as "newly risen".

The rise of Queen's Counsel after Sir Francis Bacon caused the serjeants to have "outlived their usefulness as a separate order". The rank of Queen's Counsel became the desired recognition of excellence. But like the serjeants, and the Roman jurists, the rank of Queen's Counsel or King's Counsel remained, and remains, one that is concerned with excellence. It embodies excellence in learning and excellence in moral leadership.

Putting to one side the excellence that comes from learning in the law, the ethical and moral leadership that is recognised by your appointments as Queen's Counsel and Senior Counsel involves a number of key factors. One of them is public service. Public service is most obviously and clearly seen in work done pro bono publico. Peter Singer once suggested that a committed

³ Baker, *Collected Papers on English Legal History* (2013), vol 1 at 125.

utilitarian should set an ethical goal of giving a percentage, such as 10%, of her or his income to charity. A variant upon that might be an ethical goal to spend 10% of time working pro bono. But of course, public service is not merely pro bono work. All of the work you perform as counsel, is a form of public service.

Another matter involved in moral leadership is judgment. “Judgment” is extremely important. It embodies many aspects of integrity and discernment. Knowing when to speak and when to keep quiet. Knowing what to concede and what to contest. Knowing the difference between what is right and what will advance your client’s case. From where I have sat in the Supreme Court of Western Australia, the Federal Court, and the High Court, it is clear to me that the appointment of Queen's Counsel and Senior Counsel serves as highly focused and accurate recognition of excellence in learning in the law and each of the aspects of moral and ethical leadership.

There is only one area in which Australia has departed, in theory but not in practice, from the historical traditions in the appointment of silk. As an appointments process that is ultimately concerned with excellence in the learning and the moral and ethical leadership in law, the vast branch of the

profession practising in the courts should be, and is, dominant. But what about the other, non-practising branches of the law? The *ius respondendi* was only ever held by Roman jurists, great writers about the law. Sir Francis Bacon, the first appointment as King's or Queen's Counsel, was a brilliant writer and legal mind who had his first known appearance in court in the year of his appointment, 1594. And in the United Kingdom, since the late 19th century, the Ministry of Justice has appointed Queens Counsel (*Honoris Causa*) for, and I quote, “those lawyers and legal academics that have made a major contribution to the law of England and Wales outside practice in the courts, which has not been recognised through other forms of honours”. Their ranks include legal historians such as Sir John Baker and the late Brian Simpson and Toby Milsom; legal philosophers such as Ronald Dworkin and Tony Honore, public law academics such as Paul Craig and John Bell; private law academics such as Adrian Briggs, Andrew Burrows, and Sarah Worthington; legal commentators such as Joshua Rozenberg, and clinical legal educators such as Sara Chandler.

I say that Australia has only departed from this historical tradition in theory but not in practice because some Australian jurisdictions make these appointments exceptionally, despite a usual criteria of excellence in practice in court. Two

outstanding examples during my time in Western Australia were the appointment of a Parliamentary Draftsperson and the appointment of a senior academic who had held the position as legal advisor to the Attorney General for decades. The practice of law in the courts is, and will likely always be, a central focus in the appointment of silk, but the occasional and exceptional recognition of Queen's Counsel from outside those who practise in court reinforces the fundamental bases for the appointment of silk that we celebrate this evening: those fundamental bases are excellence in learning and excellence in moral leadership. And so, the toast that I propose this evening is to "the achievement and the aspiration for excellence".