Silk – the current institution

By Jeremy Gormly SC

Senior Counsel or 'silk,' have in one form or another been around as an appointed rank for centuries. Before 'Senior Counsel', they were known as Queens Counsel or Kings Counsel. Prior to that, there was a rank of barristers known as Sergeant. As a rank, Sergeants lost ground to the growing use of an appointed group of counsel that grew from a Crown rank known as Queens Counsel as they became available to the public. It was a part of the ongoing natural evolution of a rank of appointed senior counsel.

The demand for a rank of senior counsel has been consistent and longstanding. It comes from the public and from those who brief counsel. It comes from government institutions who seek certainty, authority and auditability. It is adopted and used by the media to make a point and to categorise responses to issues and to litigants. It is relied upon by the judiciary both in practice and in judgment. It is utilised by the commercial community in dispute clauses in which the opinion of a silk determines an issue. It imposes upon silk obligations upon which others rely. It is not merely an obligation of legal excellence (which exists in abundance across the Bar), but a willingness to be publicly used on matters of law consistent with the authority expected of silk – or suffer what may be very publicly exposed 'wrongness'.

There seems little doubt that appointment as silk, with the certification or endorsement that goes with it, is a form of public information not dissimilar to other familiar forms of certification. Specialists in medicine, elevation to partnership or to a board and the grant of a degree, provide similar public information. Silk is a public certification too, but its qualifications are acquired in the field and are assessed as a result of work exposed in the public arena over time. A judgement can and is made by those who see the work done often over a prolonged period. The assessment process for silk has always had to take that form.

There have been contentious periods in the history of silk. There have been past issues over the use of juniors (the 'two-counsel rule' and the 'two-thirds rule', which are referred to below – both now abolished). There have been issues over access to silk and about gender levels among silk. There have been issues about whether silk should or should not have the imprimatur of the attorney-general or the executive or the chief justice of a jurisdiction. In 1993 in NSW there was an issue about the post nominal 'SC'. It linked Australian jurisdictions with international jurisdictions which also used 'SC' for senior counsel. Some thought it might be confused with an important award in the grant of the governor general which also had a post nominal 'SC' There have been issues about whether senior counsel should be reserved for practising advocates or for lawyers generally, whether it can include barristers who practise extensively as mediators or whether, as in some Canadian jurisdictions, it should be an award that comes with seniority. These are all reasonable issues that arise over time and have been resolved by making changes.

The institutions of senior counsel in all states of Australia are currently settling down after a series of adjustments made over the last 20 years. The settling process is not over yet. Outstanding issues concern modern demands for transparency of appointment.

PAST ADJUSTMENTS OF SILK

The two-thirds rule, which required that the fee payable to a junior briefed with a silk be two thirds that of the silk, was abolished long ago. That was a substantial change at the time. The two-thirds rule had been an accepted fee system but it attracted disapproval because it was a structure that caused fees to be paid that were not commensurate with the work done by a junior. The two-thirds rule may have been part of the rank at the time, but was not part of the function of silk. Ironically though, the paper-driven nature of modern litigation and its procedural demands has meant that a junior's total fees in a case are often greater than those of the leader who has perhaps been brought in at a later stage of the litigation or who has had no role in the interlocutory phases of an action.

The two-counsel rule was also abolished long ago. It used to require silk to be accompanied in a matter by another barrister, usually a junior. Prior to the modern structured readers programs, it was often a tool for the education of new barristers, but it was an expense to clients where two counsel were not needed. In modern practice, the demands of a case where a decision is made to use silk usually involve the use of two counsel anyway, but it is no longer compulsory. Currently, using two or sometimes more barristers additional to the silk, including another silk, may sometimes be necessary. The use of a solicitor advocate or no second counsel at all is now not only permissible depending on the jurisdiction, but expected where that may be appropriate. The modern practice for the use of silk is to follow the demands of the case rather than the demands of the rank.

The change from the title and mode of appointment from Queens Counsel to Senior Counsel proved less significant than it seemed when the government of the day made a sudden announcement in 1992 that it would no longer take part in the process. There have been other small changes over time as well, as silk has moved with professional and community development.

CURRENT ISSUES OF CONTENTION

The current issue of contention (especially in NSW) relates to the selection process. In previous systems of selection in NSW and at smaller Bars, a president or a Bar Council would advise an attorney-general, or in some jurisdictions the chief justice, of appropriate candidates. The current system in NSW responds to the size of the Bar – neither the president nor the council can know every candidate personally. The NSW protocol for selection of senior counsel presently uses wide consultation, the inclusion of selectors not on the Bar Council and a highly respected and well-informed former senior judge. The criteria are generally public and in NSW are available on the Bar Association website. They are periodically revisited by the Bar Council and seem a reasonable basis for selection.

A question has arisen in NSW as to what selection information should be provided to candidates after the selection. Those consulted did so in confidence. The question was decided last year by Yates J in the Federal Court (*Smallbone v New South Wales Bar Association* [2011] FCA 1145 6 October 2011) in favour of disclosure that did not breach the confidentiality or privacy of the commentators.

The selection process sharply raises the tension between a closed system as used to occur and a transparent one. >>

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Candidates would understandably prefer that their candidature was not public, but it does become known. The price of transparency of course is exposure. Silk is usually an exposed and public role, so one might expect that transparency is the price of the application, but the issues reported by candidates who are not selected, leaving aside their disappointment, do seem to require attention.

Debate continues about the current system of consultation before selection. Some say the wide consultation looks like a 'vote' and does not provide sufficient information of use to a selection committee. Others argue that a better system would involve a more thorough body of material being provided by the applicant. At present in NSW there is a mix of wide consultation and some supply of information.

The selection process will no doubt continue to evolve to meet these issues as it has in the past.

THE LEGITIMACY OF THE RANK

It is legitimate to question whether a system of silk has social utility, but there is no sign of silk going away. Scrutiny shows a high level of social utility and demand. There seems to be a need for a publicly specified group of people who are in effect certified to the world at large as capable of doing what is demanded of silk. The interest taken in the appointment of silk seems undiminished. Litigation solicitors seem to hold the view that the rank has functional utility and attest to the demand of clients of all needs for silk, in certain cases. Litigants seem to know and understand when their case would benefit from silk. If they don't, their solicitors or existing barristers in the case know, and advise them either for or against the use of silk.

Critics of the institution usually make the mistake of thinking that silk are good barristers who are allowed to charge more; or that silk is an award like a medal. And it is true that silk come in all shapes and sizes. There are baby silk, corporations silk, criminal trial silk, common law silk, opinion silk, equity silk, commercial silk, appellate silk and many other kinds. Some are courteous and scholarly. Some are calm and some are irritable. Others are natural pugilists. They are as various as any group of people.

One criticism of the rank that cannot be made concerns its availability. Silk are available in criminal cases, refugee, social security, personal injury, public interest and generally in cases where it is needed. The idea that the higher cost of silk makes silk unavailable is simply untrue. Competition, interest, the cab-rank rule, curiosity, professional obligation and spec briefing all tend to make the means of a client a rare obstacle to the use of silk. It is hard to measure, but people without means are numerically probably greater users of silk than corporations and people with means. The willingness of silk to do legal aid work and to work in public office such as public defenders, in the offices of the DPP, for government solicitors and in Crown advocate roles also means that silk are available in the public service.

Silk as a rank is of a type understood in most occupations; of senior officers in the armed services; partners in law firms; of directors in corporations; of senior officers in the public sector. The ranking involves expectations and different work. The function of the persons in those offices precedes the entitlements that the rank may bring. It is the same in all fields. The Bar is no different. The appointment and the rank of silk attract attention because the life of any barrister, silk or not, is a semi-public life conducted in a public arena of dispute. None of those features, however, attract as much attention as the work they do and the way they do it.

THE WORKING METHOD OF SILK

Experienced litigation solicitors, the Bar generally, institutional litigants and those who often work with silk are aware that the value of silk lies in its working method. It is a working method that is generally not available to the busy barrister in usual practice. It is in understanding and using this difference in working method (and its higher cost), that the best use can be made of silk. It is also in this area of practical working function that the utility of the institution emerges.

This is a brave topic to address because the work methods of a silk can vary from area to area, case to case, but more especially from silk to silk. Furthermore, the nature of work at the Bar has altered so much over the past two decades, and there are ongoing re-adjustments of its work the full ramifications of which are as yet unknown. These changes include:

- the increase in written advocacy required in litigation;
- the more confined but more critical role of orality in litigation (the last chance to engage directly with the bench);
- the reduction of time spent in court but the increase in the length of cases;
- an as yet unclarified pushing back of the known boundaries of the freedom to litigate as a party chooses, and the independence of lawyers in favour of a much higher degree of judicial case management, issue formulation and control of lawyers (including punitive control) – the ramifications of these changes for the judiciary are also still being worked through;
- the impact of alternative dispute resolution in its various forms;
- the massively increased focus on provision of judicial reasons rather than on an outcome; and
- the increasing gap between exposure of the legal system (and particularly the judiciary) to scrutiny on the one

hand, and the resources it can have on the other.
One could add the increased size of the profession, increased specialisation and the increased remoteness of the Bar from each other and from the Bench – often not having met or even heard of one another as they engage in a case in a system that has always relied upon mutual trust.
Still, despite these emerging re-adjustments, there are a number of working characteristics that are common for most silk. Reasonable minds will differ about the list set out below, but most solicitors, barristers and silk are likely to agree on the following:

1. Silk will usually be required to work with a team rather than solo, which is the usual intense demand of life at the Bar; allocation of work and issues among a team may mean that a silk is aiming at areas of exposure of argument or evidence in particular ways.
2. Silk can devote unfractured time to a case, not usually required in most cases and largely unavailable to the busy junior.
3. Silk are accustomed to providing opinions or oral work in the glare of publicity and under the expectation of high levels of scrutiny.
4. Silk will exercise judgement calls of a type that, in each silk's past, will have survived professional, judicial, appellate and often public scrutiny— important requirements in the selection of silk in most jurisdictions.
5. Silk usually have a demonstrated history of managing the volume and pressures of high-scale or documentary litigation. The need to manage complexity and high volumes of material is a feature of the work of most people in the legal system, but speedily managing, shortening and simplifying complex and bulky material in a public arena is a common reason for using the work methods of silk.
6. Silk are expected to (and usually do) meet the pressures imposed by the demands of a case, a client and a court.

Some of these six characteristics necessarily cross over. Most speak for themselves. All mean that taking silk involves risk-taking. It also involves a change of role, and often an effective end to long, satisfying professional relationships with instructing solicitors. These characteristics are just as true of silk in public office (such as DPP Crowns, Public Defenders, Crown Advocate and Solicitor General), as they are of those at the private Bar. These are characteristics, I suggest, of the working functions of a silk, rather than the result of individuality.

The application of experience and expertise with unfractured time in an organised team approach is a method of work that is generally unavailable to the busy barrister upon whom the demands of practice can be enormous, various and performed in isolation. It is a common joke between silk and juniors that the junior might 'pop in' while the silk is at work on their case; the junior being too busy to be there all the time. It is a recognised reflection of the difference in the working method expected of a silk.

It is an inevitable and necessary consequence of the silk system that silk accumulate a history of, and an expertise in, dealing with large, difficult and complex cases. So long as silk remain accessible to those who need a service of the type that they offer, there is a benefit in having a group of such advocates publicly known and identified.

The hourly rate for a silk may be higher, but there are efficiencies in the utilisation of the experience and expertise in a team. The six characteristics listed above help to work out what a silk will need to best meet the demands of a case. Of the six characteristics listed above, those dealing with 'expectations' warrant some additional comment before examining how best to use the services of a silk.

EXPECTATIONS OF SILK

There is an expectation, when silk is briefed, that a case has a feature that justifies its presentation in a particular way. It may just be that the case is large, but usually there is some issue either factual but more likely legal, that demands particular attention. Whatever the reason for briefing silk, the user would need to be aware that the silk will be expected by the court, the client, the opponent, the media if watching and others to produce work that meets the full demands of the case, whatever that might be. Life at the Bar is very public and highly competitive. The silk's goal, however, will be to meet the demands of the point or >>

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the case to a degree appropriate to the case. That can be demanding.

Similarly, in opinion work, excellence in such work is common at the Bar. The silk, by reason of knowledge, experience in court and in chambers, and by reason of the time or expertise spent on the opinion, is expected to produce an outcome of authority. 'Authority' in this sense is used to mean an outcome which can be relied upon to be as close as reasonably possible to the outcome that a court with the same evidence would be likely to produce.

THE SELECTION OF A SILK

What will cause the selection of a silk may mean applying different criteria from the selection of the barristers with whom a briefing solicitor may ordinarily work. Silk are therefore more likely to be chosen for a particular purpose. That seems to be a good way to select a silk.

A silk who is a scholarly appellate lawyer may or may not be a good choice before jury. A good first instance silk may not be as useful on some types of appeal. A good commercial silk may not be a good choice for a criminal matter, and *vice versa*. None of this is rigidly true. Breadth of experience is still a feature of the Bar. Word of reliable mouth, law reports and seeing the silk at work are good methods of selection. Asking the silk for their view is often the best guide. If a matter is outside their fields they will say so and can suggest another silk. I do that. All silk I know do it. No one can comfortably appear in all jurisdictions any more. The hail of legislation, the range of tribunals, the expertise of judges, procedural differences and the size of the law make it almost impossible in modern practice.

EFFECTIVE BRIEFING OF SILK

There are some solid, useful principles that apply to briefing a silk. The following principles may be a useful guide:

1. It is poor economy to dispense with existing counsel or not use second counsel once a silk has been briefed. The economics of a matter may make two counsel a problem, but a second counsel is generally of real value in a silk team. The nature of the matter or the silk selected may make it unnecessary, but most silk say that a junior provides a sounding board, knowledge of the matter and some opportunity to spread the workload at an hourly rate cheaper than that of the silk. Of these matters, it is the first in my experience (sounding board) that is of most value. I have had instructing solicitors who have, in effect, stood in as a junior. It has, in those cases, generally worked. However, my experience is that solicitors, however expert and knowledgeable, do not have the time to be junior as well as solicitor. There is no substitute for the work of another barrister. However much that may sound like convenient pleading, I stand by it. All silk will attest to the value of a junior in almost any case.
2. After the brief has been delivered, it becomes necessary to work out and provide what will be needed to respond to the brief and it is at that point that the working relationship becomes a personal one in which the team commences to function as a unit devoted to the task set by the brief as the matter develops. Most silk consult. Most will allocate or work in a team arrangement. Not all silk do that well or willingly. Perhaps they make up for that in other ways but, generally, team operation is a feature of the working method of silk. Responding to the team demand of a case extracts the best use of a silk. That may include agreeing on the definition of the work required of the silk and indeed the whole team, whatever that might be.
3. Deal with fees up front. Silks fees are not low, but the real problem is that time and fees can accumulate on a matter reasonably quickly. If fees limits are not dealt with promptly, they will be unknown to the silk. You will get a fees disclosure but that is what the silk would charge if not informed of any limit you wish to apply. Silk will not be embarrassed by the question and may raise the question anyway, but you should check if it is likely to be an issue.

The effective use of silk involves only three things:

1. Communication with the silk about what the silk is being asked to do (including as to outcome, timing and fees);
2. Determining whether the silk is able to do that task (timing, fees, expertise); and
3. Providing the silk (usually through a team arrangement), with the material and people needed to do that task.

THE FUTURE OF SILK

Silk as an institution is here to stay. It may have its critics, but the demand for its use and working methods is much greater than any opposition to it. Opposition to silk as an institution is usually focused not on cost as such but upon an argument that appointment as silk only gives a warrant to charge higher fees. That argument ignores the fact that silk need not be briefed. If it is not a rank of merit and utility, then there is abundant expertise at the Bar in all fields. If it is a rank of merit and utility, then the combination of its work methods, its expertise and the certification it provides are available in cases that call for its use.

I do believe that the institution of silk is currently missing a form of structure that would be of benefit to the community and the legal system. There are a number of factors that suggest the need for a national college

of senior counsel. The first is the emerging concept of a national profession through joint commonwealth-state development. The second is the increased size of the legal system which, while not matching growth in other areas of public utility, is nevertheless sufficient to require effective lines of communications among all its branches. Thirdly, a national body – especially if it were non-statutory and not vested with the type of powers held by the state legal professional bodies – could explore matters such as better and more transparent methods of silk selection and service of the public interest to assist the various Bars. Finally, the profession one way or another is becoming national in its work in any event; that is a development that perhaps would be well reflected in a national body of senior counsel. Such a body would be quite separate from that of the professional bodies and the current professional national bodies. Its role might be:

1. To ensure that the institution of silk remains responsive to the needs of the community and the courts;
2. To ensure that the institution nationally remains open, including selection, and operates consistently with its charters and protocols; and
3. To provide an additional voice for the legal system on issues of legal significance.

The idea of a national profession, achieved by commonwealth-state agreement, produced scepticism when it first emerged, but it has been developing with surprising pace and detail. The increasingly national nature of the legal profession's work may itself become the main agent of change towards an organised national profession, rather than being driven there by legislation.

CONCLUSION

Whether or not a national institute or college of senior counsel emerges, silk is useful, accessible and in demand. All institutions (and silk, in a broad sense, is an institution), require scrutiny for utility, especially those in public service. All institutions are subject to the conflicting pressures of being both stable and having to adjust. Silk has a history of both.

Those who attack silk on the grounds of cost are not looking closely enough. It is like complaining that one type of building tool costs more than another; you may use both in building, but they do different jobs. And people who mistake silk for an award are like a newlywed who cannot see past the wedding day.

While silk provides a service, it will exist in one form or another. If it fails to adjust to community demand, it will die. It seems to be alive and well, in demand and adapting as required. ■

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