

REGULATORY IMPACT STATEMENT – Review of Senior Counsel

EXECUTIVE SUMMARY

The Lawyers and Conveyancers Act 2006 renamed the office of Queen's Counsel, "Senior Counsel" and extended eligibility for appointment to litigation specialists practising in firms. A selection panel was also established to provide advice to the Attorney-General on proposed appointments.

The accompanying Cabinet paper proposes to restore the title of Queen's Counsel and limit eligibility to barristers sole. Other lawyers may be appointed from time to time in recognition of exceptional contributions to the law. In addition, the selection process will be simplified by removing the requirement for a selection panel but providing for consultation with the New Zealand Law Society and the NZ Bar Association.

These changes are considered to better recognise the reciprocal relationship of obligations and privileges between Queen's Counsel and the Crown and the need to maintain the independence and objectivity of Queen's Counsel.

The changes will be effected by amendments to the Lawyers and Conveyancers Act 2006 and the associated regulations.

ADEQUACY STATEMENT

Crown Law has reviewed this Regulatory Impact Statement and considers it to be adequate according to the adequacy criteria.

STATUS QUO AND PROBLEM

The Lawyers and Conveyancers Act 2006 provides for the retention of the office of Queen's Counsel with the following changes:

1. The office was renamed "Senior Counsel" (existing Queen's Counsel could retain their title);

2. Eligibility was extended to include litigation specialists practising in firms; and
3. Changes were made to the appointment process, including the establishment of a selection panel (comprising the Solicitor-General, two members of the NZ Law Society and two members of the NZ Bar Association) to advise the Attorney-General on candidates for appointment as Senior Counsel.

This represented a change from the previous system when the title was Queen's Counsel and the rank was generally only available to barristers sole.

At the time, the legal profession was divided on the desirability of the change of title and the extension of eligibility to all lawyers.

One of the issues is that the change of title to Senior Counsel overlooked the historical link between Queen's Counsel and the Crown. This link establishes a reciprocal relationship between the Crown and Queen's Counsel, as seen in the expectation that Queen's Counsel will from time to time take instructions to act on behalf of the Crown. It also provides the Government with a pool from which to draw both judicial appointees and independent specialist legal advice.

In addition, the extension of eligibility to litigators in law firms failed to provide due recognition to the importance attributed to the independence of the office. Queen's Counsel must not only be but also be perceived to be objective and independent. This includes a consequential independence from clients and the ability to act unconstrained by previous advice from others in a firm.

Finally, the current requirement for the appointment of a selection panel is unnecessarily rigid.

OBJECTIVES

The objectives of the reform are:

1. Make changes which appropriately reflect the nature and purpose of the rank. In particular, the reciprocal relationship between Queen's Counsel and the Crown;
2. Maintain and protect the independence and objectivity of the office of Queen's Counsel; and
3. Preserve the transparency of the appointment process whilst also allowing the Attorney-General sufficient flexibility in the manner in which consultation with specified organisations occurs.

ALTERNATIVE OPTIONS

Status Quo

Maintaining the status quo does not address the problems identified with the current legislation.

Providing for Senior Counsel and Queen's Counsel

An alternative proposal of returning to the rank of Queen's Counsel for barristers sole and retaining the rank of Senior Counsel for other lawyers was considered and rejected. It would establish a two tiered system which is not considered warranted in a small country.

PREFERRED OPTION

COSTS

Lawyers in firms will not be able to apply for appointment to Queen's Counsel although they may become eligible in recognition of excellence in legal practice. This is an opportunity cost rather than a direct or quantifiable cost.

It may provide an unfair marketing advantage to a small pool of barristers sole. However, it is equally arguable that the confinement of the rank to barristers sole would allow such barristers to compete with the marketing machine of a large firm with a team of litigators.

BENEFITS

Government:

The qualities which have marked the rank of Queen's Counsel will be preserved meaning that Government will continue to have the confidence in the rank to appoint Queen's Counsel, from time to time, to assist with work such as Ministerial inquiries where a degree of independence from the executive is thought desirable.

Legal profession:

The reform will strengthen the separate bar which in turn will increase the ability of small law firms to access high quality counsel for complex litigation.

Business:

The reciprocal nature of the relationship between Queen's Counsel and the Crown will be more readily understood. Preserving the independence of Queen's Counsel means that businesses can have confidence when seeking their services.

Society

The special characteristics of independence, objectivity and excellence in advocacy which are the mark of Queen's Counsel will, once again, be more readily identifiable. The title of Queen's Counsel, as opposed to Senior Counsel, is publicly recognised and understood

IMPLEMENTATION AND REVIEW

Primary legislation and amendments to regulations are required to implement the proposal. There are no specific plans to review the changes made by the proposed legislation.

CONSULTATION

Stakeholder Consultation

The Attorney-General has consulted the New Zealand Law Society, New Zealand Bar Association and the Chief Justice.

Government Departments/Agencies

Ministry of Justice has been consulted. The Department of Prime Minister and Cabinet was informed.