

Taking the Silk Route - Designating KCs or Senior Advocates

1. In the Commonwealth Caribbean there are four discussions going on in relation to the appointment of silk. They relate to:
 - a. the process by which silk is awarded;
 - b. the name of the designation;
 - c. the criteria for appointment, in particular, whether appointments should be limited to advocates; and
 - d. whether to abolish such designations.

The Process

2. The most contentious issue by far relates to the process by which persons are appointed. The process is very different throughout the region with varying degrees of formality, but they seem to all have three things in common:
 - a. interested persons must submit an application;
 - b. there is some amount of consultation with members of the legal profession; and
 - c. appointments are ultimately made by the Head of State acting on the advice of the Prime Minister/Governor.
3. I will comment briefly on how appointments are effected in 5 jurisdictions - Jamaica, The Bahamas, the Eastern Caribbean, Barbados and Trinidad and Tobago.

Jamaica

4. In 1997 after extensive discussions between the Government and the Bar, a process was agreed and gazetted. A committee was established comprising seven persons - the Chief Justice (who chairs the committee), the President of the Court of Appeal, The Attorney General, the Chairman of the General Legal Council, the President of the Jamaican Bar Association, the President of the Advocate's Association and a Representative of the King's Counsel Group.
5. By October 31 each year persons who wish to be considered must submit written applications to the Governor General through the Chief Justice. The committee considers the applications and makes recommendations to the Governor General for appointment. The Governor General then acts on the advice of the Prime Minister.
6. There is an understanding that Prime Ministers will advise the Governor General to appoint the persons the committee recommends. They have expressly reserved the right to appoint other persons by virtue of office and traditionally, Attorneys General, Solicitors General and Directors of Public Prosecutions are automatically appointed.
7. The general view in the profession is that this process has worked well but there are two concerns. The first is that while all recommended persons have ultimately been appointed, there have been two or three occasions where appointments have been delayed for almost a year without any credible explanation.
8. The second and perhaps more important concern is that an Attorney General has recently expressed the view that this agreement is not

binding on the Prime Minister and the current Prime Minister could choose to ignore it.

9. You will no doubt hear more about this.

The Commonwealth of the Bahamas

10. The Bahamas appears to be the only jurisdiction in the region where the process is set out in a Statute. The Legal Profession Act provides that Attorneys may apply to the Attorney General for appointment, and after consultation with the Chief Justice, the President of the Bar Association and such other persons as the Attorney General sees fit, the Attorney General may recommend appointments to the Prime Minister. The Prime Minister will then advise the Governor General who to appoint.
11. It does not appear that there is any formal consultation and persons have been appointed without applying.

The Eastern Caribbean

12. The Organisation of Eastern Caribbean States (a group of nine territories - Antigua, Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and The Grenadines and the British Overseas Territories of Anguilla, The BVI and Monserrat) probably have the most detailed and robust regime. There are published appointment protocols which contain a great deal of detail in relation to the process, criteria, and other factors. There are guidance notes for applicants, assessment forms and application forms.
13. The Chief Justice of the OECS appoints a Silk Advisory Committee which consists of five members, a judge of the Supreme Court, a judge of the

Court of Appeal, a representative of the OECS Bar Association, a senior barrister and a lay person who has held a senior position in the public service or the private sector.

14. This appears to be the only jurisdiction in which there is a fee for applying and a further fee if one is appointed.
15. The protocols also include provisions that allow applicants to request that a member of the Silk Advisory Committee recuse themselves and is a power to revoke appointments.
16. The committee makes recommendations to the Chief Justice who can choose to follow them or not. The Chief Justice will send any recommendations to the Governor General or Governor of the relevant territory but it appears that that person will only act on the advice or approval of the relevant Prime Minister.

Barbados

17. A few months after Barbados transitioned to Republican status, the Chief Justice sent a notice to the profession setting out a new procedure for the appointment of Senior Counsel. In summary - (1) interested persons must submit applications to the Chief Justice (2) the Chief Justice will consult with other judges and the Bar Association and then convene a meeting of a committee comprising the Chief Justice, the Attorney General and a Former Attorney General, and (3) the committee will make recommendations to the Prime Minister who will advise the President on the appointments to be made.

Trinidad and Tobago

18. As is often the case in our region, the position in Trinidad and Tobago is the most interesting. The last documented statement of procedure appears to be a notice gazetted by the then Attorney General which merely indicated that Attorneys-at-Law who wish to be considered for appointment as Senior Counsel should submit an application in the prescribed form to the Attorney General and Minister of Legal Affairs.
19. The notice did not indicate how the Attorney General would treat with applications, but appointments have been made by the President acting on the advice of the Prime Minister after some amount of informal consultation.
20. There has been ongoing dissatisfaction in the profession about this process, and a few years ago the Law Association appointed a committee to consider whether such appointments should be abolished and if not, to make recommendations as to the procedure and criteria to be applied. That committee issued a report in 2015 which questioned the constitutionality of the present process given the importance to the administration of justice of an independent bar, and made various recommendations.
21. Most important may have been that the President would appoint Senior Counsel acting solely on the recommendation of an independent panel and they recommended a panel similar to the committee which presently operates in Jamaica.
22. The committee made other interesting recommendations, such as that there should be two categories of Senior Counsel one for leading

advocates and the other “SC (hc)” or Senior Counsel Honoris Causa for excellence outside the courtroom.

23. Unfortunately, while there was general agreement that there should be an independent panel the members of the Law Association have not been able to agree on the details. The position has therefore remained unchanged.
24. However, the matter has now been brought to a head, as yesterday a constitutional claim was filed in Trinidad and Tobago’s High Court challenging the constitutionality of the process and specifically the role of the political directorate in deciding who should be appointed to the rank of senior counsel.
25. Counsel throughout the region and perhaps elsewhere will watch the progress of this case with interest.

The Name

26. The three republics in the region (Guyana, Trinidad and Tobago and Barbados) use the designation “senior counsel” but all other territories use King’s Counsel (formerly Queen’s Counsel). Barbados, the most recent Republic appears to be in somewhat of a transitional stage. Some previous appointees have started using Senior Counsel, but most continue to use Queen’s or King’s Counsel. There have been no new appointments since Republican status, but any appointees are likely to be designated Senior Counsel.
27. Many members of the Bar in Jamaica (including many King’s Counsel) feel strongly that we should change the designation to Senior Counsel. One unfortunate consequence of maintaining the current designation is

that some eminently qualified and deserving persons have chosen not to apply because of it.

28. However, there is also a discussion about Jamaica becoming a republic and it seems unlikely that there will be any change to the designation until there is a change to the country's status.

The Criteria - Inclusion of non-Advocates

29. This discussion has also been going on throughout the region for decades and in some territories a few persons have been appointed as silk for eminence on a field other than advocacy. However, it appears that the overwhelming majority are of view is that the award of silk should continue to be for leaders of the bar who are also Advocates.

Should there be any Distinction?

30. Finally, there is a question as to whether any distinction at all should be maintained. As I observed earlier, the committee appointed by the Trinidad and Tobago Law Association was asked to consider this question and they recommended that the practice should be abolished unless the process is significantly reformed. It was clear however, that the committee's preference was that appointments should be retained and reformed.
31. That appears to be the view of most members of the profession in the Commonwealth Caribbean and is one that I strongly share. The OECS protocol observes that **“the designation as Queen's Counsel of a practitioner is intended to serve the public's interest by providing public identification of a practitioner whose standing and achievements justifies expectations on the part of**

those who may need their services as well as on the part of the judiciary that they can provide outstanding services as practitioners and advisors to the good of the administration of justice.” The protocol goes on to state that appointments are designed to provide a goal for junior counsel.

32. The committee appointed by the Trinidad and Tobago Law Association made a similar observation in stating that the role of Senior Counsel in the administration of justice is essentially one of standard setting for members of the profession.
33. In my view, these two objectives fully justify maintaining appointments of silk. It must surely be of benefit to the public and prospective clients to know who are the persons that their peers and the judiciary consider to be the best at their craft.
34. It is also important for young counsel to know who are the persons who are deemed to be leaders of the bar by reason of the quality of their advocacy, their integrity, their contribution to the profession and other relevant criteria.
35. However, it goes without saying that the process by which appointments are made must be transparent, robust and effective. And while I make no comment on the pending constitutional claim in Trinidad and Tobago, in my view it would be best if the political directorate did not decide.