
The Selection of Judges for Commonwealth Courts*

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This is a subject of constitutional significance. I address it from that viewpoint. Nothing I say refers to any particular judge or group of judges.

The process for appointing judges is unstructured and the criteria for making appointments are not defined. To quote a discussion paper issued in 1993 by the Attorney-General's Department—

Little is known publicly about the appointment process and no established internal rules for selecting judges have been developed. The appointment process has varied according to the personal preferences of individual Attorneys-General.¹

If we are to review the process of selecting judges, we should understand why we appoint judges and the functions which they are appointed to perform. Then we can consider the qualities of the women and men who should fill the judicial offices of the Commonwealth and the best means of selecting them.

Donald Horne said that the first of the civic values which most Australians would share is maintenance of the rule of law. It protects peace, order and progress. It is the

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¹ *Judicial Appointments—Procedure and Criteria*, sometimes known as 'the Lavarch Paper', after the Attorney General of the time.

basic underpinning of a free society. It is a value which is never questioned and, in the political arena, it is sometimes invoked to justify particular measures. But what is meant by 'the rule of law'? It means that the state, by its institutions, gives effect to the legal rights and duties, powers and immunities which affect relationships between people and with government. Implementing the rule of law requires a definition of those rights and duties, powers and immunities and a coercive mechanism to give effect to the law in particular circumstances.

In a democratic society, it is the function of the judiciary, separated from the political branches of government, to define the legal rights and duties, powers and immunities to which effect is given. In the familiar words of Chief Justice Marshall in *Marbury v Madison*,² 'It is emphatically the province and duty of the judicial department to say what the law is.' In a democracy which respects the separation of powers, the courts are the responsible institution to enforce the law as defined in concrete situations. In totalitarian societies, on the other hand, the legislature might retain the power to interpret its laws; the repositories of state executive power are authorized to enforce the law as they see it without judicial supervision and the judiciary is directed to decide cases in accordance with state policy. Experience elsewhere and our own history have shown that that kind of self-regulation is incompatible with the rule of law. The rule of law means that the law as defined by independent and impartial courts is applied by the judiciary or under judicial supervision.

We should be clear about how judges implement the rule of law. The rule *of* law is not the same as rule *by* law. It may be that Nazi Germany was ruled by law, many of Hitler's heinous policies being implemented by courts which applied laws framed in accordance with the prevailing ideology. The rule of law, on the other hand, seeks to do justice according to law. The judge is not a juridical robot. He or she may have to make value judgments in which common sense and an appreciation of community standards play a part: was the defendant negligent? Was the conduct dishonest? What is in the best interests of a child? What is the appropriate sentence to impose? Sometimes, particularly in the higher courts, a judgment has to be made on more technical or complicated issues: do the facts attract one rule of law or another? What is the meaning of an ambiguous statute? Should an earlier precedent be distinguished in the present circumstances? How should I exercise my discretion? A judge's active participation in the process is an integral element in, an essential characteristic of, the rule of law. In a secure democracy, public confidence in the judiciary is critical to the rule of law. That is, confidence in the selection of the best judges available and confidence in their competent and impartial application of the law. Both the public and the existing judiciary have a vital interest in the process and the outcome of selecting judges.

What do judges do to maintain the rule of law and what are the qualities that are needed to do it? First, the duty of defining the law applicable to particular circumstances means that judges must be legally competent. The law is a complex discipline and the complexity of contemporary society is reflected in the complexity of the law, whether the law is found in statute, regulation or case law. To avoid the wastefulness, if not the scandal, of useless litigation, the judges need to be well versed in the law, especially the law to be applied in their particular court. And they need to

² (1803) 5 US (1 Cranch) 137, 177.

have the ability to apply the law to the proceedings as they unfold before them. They must have an ability to listen but also to control effectively the conduct of the litigation. Litigants and the public purse cannot afford the judge who does not have the knowledge or experience to distinguish between material that is relevant and helpful and material that is irrelevant and time wasting. Such a judge, lacking the ability that gives authority, is not only inefficient in the conduct of the litigation; the emerging judgment is likely to be woolly, confusing or just plain wrong. An analytical ability is required to determine the relevance of facts and to define with the necessary precision the applicable rule of law. Then, after hearing whatever the parties may have to say, the judge alone must reason to a conclusion and to articulate those reasons in judgment. These elements of judging must be performed carefully and that often takes time. So an inclination to industry is needed.

As judgments resolve contests and as the reasons for judgment are sometimes contested by those whose interests are apt to be affected, a judge must have and exhibit a resolute strength of mind. When Sir Frank Kitto gave advice to his colleagues, he wrote:

Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all.³

The judges of different courts do not need the same set of legal skills possessed to the same degree. The different jurisdictions vested in the several courts call for different sets of skills and any process for the selection of judges must allow for the recognition of those differences. The nature of the workloads of courts also differ: some judges find that their docket is filled by cases of boring similarity; others find a more varied diet requiring continual attention to new issues. In some courts, the major questions for determination are questions of fact; in others, the major questions are questions of law. A practical and sophisticated understanding of what a candidate for judicial appointment to a particular court will be called upon to do is desirable in the appointing authority.

There are qualities of character and disposition to be desired in all judges. The supreme judicial virtue is impartiality⁴. Both partiality and the appearance of partiality are incompatible with the proper exercise of judicial authority. The one poisons the stream of justice at its source; the other dries it up. Lord Devlin commented that—

The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.⁵

³ *Why Write Judgments?* Delivered 1973, published in (1992) 66, *Australian Law Journal*, 787, 790.

⁴ 'Judges and Lawmakers', (1976) 39 *Modern Law Review* 1 at 4.

⁵ *Ibid.*

To be, and to appear to be, entirely impartial in the resolution of a dispute, a judge must be independent of external influences. That has been recognised since the Act of Settlement three centuries ago which provided for security of judicial tenure and undiminished remuneration during a judge's tenure of office. An American Bar Association Commission's *Report on Separation of Powers and Judicial Independence* noted that 'Judicial independence is not an end in itself but is a means to promote impartial decision-making and to preserve the supreme law of the land.' Chief Justice Lamer of Canada acknowledges⁶ that the fundamental purpose of judicial independence is the maintenance of the rule of law but, he observes—

There is an unfortunate tendency on the part of some to characterise judicial independence as a principle that enures primarily if not exclusively to the benefit of the judiciary itself. While it would be disingenuous to deny that the judiciary benefits from security of tenure and financial security, it must be emphasised that the primary beneficiary of the principle of judicial independence is society as a whole.

The process for selecting judges should not impair the safeguards on judicial independence. An aspirant to judicial office and, even more, an aspirant to judicial promotion, should have no incentive to speak or act in any way that might advance the aspiration except by the resolutely professional discharge of his or her professional duties. In other words, the ideal process is one where the only relevant consideration is whether the candidate has, and has demonstrated, the professional ability and the independence and impartiality of mind that is required for the performance of the judicial duties in question.

A judge must be not only able, but willing—once the judicial gown is donned—to shed any predilections that might affect either the conduct of the litigation or the judgment to be delivered. And a judge must remember that judicial impartiality or the appearance of judicial impartiality can be affected by inappropriate conduct or associations even outside professional life. The very authority of the court depends upon the demonstrated impartiality of its judges as well as on their competence.

Criticisms of the present process

Now if men and women with these capacities are the judges whom we would wish to see appointed to our courts, how well suited is the present process of selection to discover and to appoint them? In this country we adopted without much reflection the process which, over the years, had been adopted in England for the appointment of judges. We entrusted judicial appointments to the uncontrolled and unreviewable discretion of the executive government. True it is that, in general, the power has been wisely exercised and Australia has been privileged to have judges who, with very few exceptions, have been competent judges possessed of the judicial virtues I have mentioned. The respectful aura with which the judiciary has been traditionally surrounded encouraged the public to expect and governments overall to satisfy the expectation, that judges would be appointed 'on merit'. But in reality, there have

⁶ 'The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective' by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 4.

always been exceptions. And, recently, there has been an increase in the number of anecdotal reports of unmeritorious appointments.

The time has passed when it is possible to have any confidence in the system to discover and evaluate the abilities and the character of prospective appointees to Commonwealth courts. In earlier times, when the only Commonwealth courts were the High Court, the Bankruptcy Court and the Industrial Court, when the Attorney General of the day was an experienced and distinguished senior legal practitioner and when the judiciary was drawn from a Bar much smaller than it is today, it was possible for the Attorney perhaps to know personally and certainly to ascertain and to form adequately an appreciation of the relative merits of possible appointees. That is no longer the case. Certainly an Attorney, government minister or an Attorney General's department can take soundings from their friends and acquaintances as well as canvassing the views of serving judges, Bar Associations and Law Societies. However, a professionally inexperienced Attorney, or an Attorney's ministerial colleague or a government department is unlikely to have an appreciation of the actual functioning of the particular court or to be able to examine critically the respective merits of all possible appointees. The number of Commonwealth Judges has increased greatly in the last thirty years and candidates for judicial appointment can now be drawn from fields other than the practising Bar. The jurisdiction of the Commonwealth courts has expanded into new fields of law.

Commonwealth appointments are no longer restricted to the High Court or to what are known as the superior Commonwealth courts—the Federal Court⁷ and the Family Court. In 1999, the Commonwealth Magistrates' Court was created⁸ with a jurisdiction that is both extensive and important. Appointments to that Court are likely to attract less attention than appointments to the higher Commonwealth courts even though appointees will be exercising the judicial power of the Commonwealth in diverse areas including family law, bankruptcy, migration and industrial matters—issues which affect the vital interests of individuals.

It is impossible for the executive government to form a view of the comparative suitability of candidates for judicial appointment without extensive and relevant consultation and informed advice. That should be structured. The public interest is not served by appointments made upon advice, at least some of which may come from secret sources.

The need for a better method of selection

Thirty years ago, Sir Garfield Barwick, then Chief Justice of Australia, saw the problem clearly, even though there were fewer judges on only three courts to be selected from a smaller pool of possible appointees. In the first State of the Judicature Address he said:

In my view, the time has arrived in the development of this community and of its institutions when the privilege of the Executive Government in this

⁷ Also the Industrial Relations Court, the jurisdiction of which is now vested in the Federal Court: see *Workplace Relations and Other Legislation Amendment Act 1996*—Schedule 16.

⁸ *Federal Magistrates Act 1999*.

area should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may inhere in the appointment of a judge. Yet I think that long term considerations in the administration of justice call for some binding restraint of the exercise of this privilege. I make bold to suggest that, in all the systems of Australia where appointments to judicial office may be made by Executive Government, there should be what is known in some systems as a judicial commission—but the nomenclature is unimportant—a body saddled with the responsibility of advising the Executive Government of the names of persons who, by reason of their training, knowledge, experience, character and disposition, are suitable for appointment to a particular office under consideration. Such a body should have amongst its personnel judges, practising lawyers, academic lawyers and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees. Such a body is more likely to have an adequate knowledge of the qualities of possible appointees than any Minister of State is likely to have.⁹

I respectfully agree with Sir Garfield and the reasons he advances for the creation of a judicial commission to advise Government on the appointment of judges. Similarly, in the United Kingdom, the Lord Chancellor (Lord Falconer), in a paper issued by the Department for Constitutional Affairs, wrote:

... in a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence.¹⁰

In 1995, in his book *A Radical Tory*, Sir Garfield Barwick pointed out the real risk of the present system in politicising judicial appointments:

Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation, or at least an expected affinity in judgment to the philosophies of the party, form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it, even to the point of choosing the appointee merely to resolve a possible threat to the leadership.¹¹

When experience of judicial work in a particular court is limited and there is an inability to form an adequate opinion about the comparative merits of particular candidates, there is a greater likelihood of favouring those with political or personal connections, irrespective of their experience or ability. In 1999, Justice Bruce McPherson, then chairman of the Judicial Conference of Australia, contended that—

⁹ (1977) 51 *Australian Law Journal* at p. 494.

¹⁰ *Constitutional reform: a new way of appointing judges*, July 2003.

¹¹ G. Barwick, *A Radical Tory*, Federation Press, Sydney, 1995, p. 230.

There is growing evidence that the power of making judicial appointments is coming to be regarded by governments ... as a form of patronage and a source of influence that can be used to serve their short-term political interests.¹²

The Hon. Geoffrey Davies, speaking with the experience of a State Solicitor General, leading advocate, and sometime Judge of the Queensland Court of Appeal, notes that the traditional practice of consultation about judicial appointments with a view to appointing the most suitable candidate has changed. 'This is what has changed', he said:

Attorneys do not always consult with those professionally able to assess the professional qualities of candidates. When they do, they do not always disclose the names of possible appointees whom they have in mind. And they do not always accept the advice of professionals that a person they have in mind is not professionally qualified for the specific judicial position.¹³

He observes 'an increased politicisation of judicial appointments' because 'politicians appear to have come to believe that there are only two kinds of judges; those who are on their side and those who are on the other side.' If there be any doubt about the accuracy of this observation, the recent statement of the present Commonwealth Attorney must have dispelled it. The Hon Philip Ruddock, M.P., with insouciant disregard of recent history, is reported to have said that '[t]he most noticeable feature of the current approach for appointing judges is its accountability.'¹⁴ He praises the existing practice in order to counter any proposal for a judicial commission—a proposal which, in the Attorney's eyes, 'is the [judicial] activists' last frontier: they see that the numbers of "conscious judicial innovators" is drying up, so want more of a say in picking future judges.'

Those comments may come as a surprise to the bipartisan members of the Senate Standing Committee on Legal and Constitutional Affairs in 1994 who, noting the 'element of mystery' attending judicial selection made these recommendations:

- that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment;
- that the Attorney-General for the Commonwealth should establish a committee which would advise him or her on prospective appointees to the Commonwealth judiciary. That committee should include

¹² 'Judicial Appointments and Education: Response from the Judicial Council of Australia' (1999) 73(7) *Law Institute Journal* 23, 25 as cited by R. Davis and G. Williams in 'Appointments Process: Gender and the Bench of the High Court of Australia' (2003) *Melbourne University Law Review*, 32.

¹³ The Hon. G.L. Davies 'Why we should have a judicial appointments commission'—a paper delivered to the Australian Bar Association Forum on Judicial Appointments, Sydney, 27 October 2006.

¹⁴ 'System protects us from judicial rule', *Australian*, 17 July 2007, p. 14.

representatives of the judiciary, the legal profession and the non-legal community; and

- that the Attorney-General for the Commonwealth should urge the Attorney-Generals of the States and Territories to establish a similar advisory committee in their respective jurisdictions.¹⁵

As Geoffrey Davies observed, things have changed. We have heard that recently prospective judicial appointees have been interviewed by the Attorney General. We do not have access to any record of these interviews but are left to speculate on what may have transpired. Public questioning of a nominee, as in the United States, may be unacceptable but secret private questioning of potential appointees is a denial of transparency in the process, especially in light of Sir Garfield Barwick's warning about political criteria in the making of appointments. We saw the ambition to exercise raw political power when Mr Tim Fischer called for a 'Capital-C Conservative' to be appointed to the High Court. What a disservice was thus done to the High Court. Politics becomes the dominant consideration in judicial appointments when governments seek to wrest court judgments to their own purposes or when patronage is to be conferred on friends or the party faithful. It is high time that politics, which need not be taken out of consideration entirely, is subordinated to the requirements of merit, competently assessed. Unless that is achieved, the reputation and authority of appointees will be questioned and public confidence in the impartiality of the judiciary will be diminished.

There is a further justification for reviewing the present method of selecting judges for Commonwealth courts. Apart from the exercise of a court's jurisdiction, some judges are called on to exercise non-judicial functions, especially under modern legislation which often enlists judges as *personae designatae* to perform what are essentially executive functions. The most traditional of these functions is probably the issue of search warrants in aid of criminal prosecutions or warrants for the arrest of persons accused of arrestable offences. The exercise of these powers is governed by well-established law and is subject to judicial review. In more recent times, however, judicial *personae designatae* have been enlisted to exercise novel executive powers. We are now familiar with the Administrative Appeals Tribunal where the powers, albeit executive in nature, are exercised in a judicial manner and are subject on appeal to judicial control. The AAT case load relates, in the main, to an entitlement or disentitlement to a right or privilege available under a statute (licences and pensions, for example) or to the assessment of statutory imposts (customs duties and taxes, for example). These powers do not generally infringe or override the rights and immunities protected by the common law. With the passage of anti-terrorism legislation, however, the *persona designata* arrangements have been significantly extended.

Judicial officers, serving or retired, are now enlisted to issue warrants for detention and questioning, to make orders extending the periods of detention or questioning and to preside at and supervise the conduct of questioning sessions. Moreover, these powers are not now reposed in all members of a Court or Tribunal—they are

¹⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, Canberra, May 1994, p. xvi.

conferred only on those judicial officers selected by the Attorney General or by regulation.¹⁶ Judicial control of the exercise of these powers is difficult, if not impossible, to invoke even though the involvement of judicial officers is intended to give an assurance of balance in the circumstances of each case. This gives a new relevance to the question of the appointment of judges. The Attorney General is the minister charged with the administration of the anti-terrorism laws, having power to authorize applications for warrants to the judicial *personae designatae*. He has the authority to select the judges on whom ‘anti-terrorism powers’ are conferred. Does not this arrangement open the way to the appointment of at least some judges who might favour too readily the exercise of the anti-terrorism powers, at the expense of personal liberty? The arrangement appears to saddle an Attorney with at least a reasonable suspicion of conflict of interest. It tends against continuing to allow an Attorney General a non-transparent, non-accountable role in selecting judges.

Overseas practices

Australia is one of the few nations whose national government has repelled a proposal for more transparency in the process of selecting judges. The United Kingdom Parliament enacted the Constitutional Reform Act in 2005 which set up a Judicial Appointments Commission. The Act addresses the two aspects of judicial selection that affect transparency and objectivity: the constitution of the authority to make a selection and the criteria to be used in the process.

The Act provides a mechanism for selecting a candidate for appointment to judicial office. Selection Commissions are created to select a President, Deputy President or a member of the Supreme Court (the reconstituted Appeals Committee of the House of Lords). Their selection is advised to the Lord Chancellor who notifies the Prime Minister who must recommend the person selected to Her Majesty for appointment. Selection Committees are prescribed for each of the other senior judicial offices and the Judicial Appointments Commission is authorized to prescribe a selection procedure for puisne judges of the High Court and other prescribed office holders. Once the Commission has selected an appointee to a given office, the Lord Chancellor has only a limited power to reject or to require reconsideration of the selection. Ultimately the Lord Chancellor must accept a person who has been selected, but the selection may subsequently be disregarded if the person selected declines appointment or is unavailable or fails a health test.

The Act provides¹⁷ that selection of judges is to be ‘solely on merit’ and the Commission must be satisfied that the appointee ‘is of good character’ but, subject to these requirements, the Commission ‘must have regard to the need to encourage diversity’ of candidates.¹⁸ Of course, those are rather broad criteria. Much depends on

¹⁶ *Australian Security Intelligence Organization Act 1979*, Division 3. I addressed this topic in an after dinner address to the University of New South Wales Symposium on Terror and the Law on 4 July 2007.

¹⁷ Section 63.

¹⁸ Section 64. In May 2006, the Lord Chancellor, the Lord Chief Justice and the Chair of the Judicial Appointments Commission published a ‘Judicial Diversity Strategy’ designed to fulfil the statutory directory.

what is included in the notion of ‘merit’¹⁹ and what blemishes are consistent with the retention of ‘good character’.

The Commission has developed five ‘core qualities and abilities’ which are required for judicial office. They are:

- Intellectual capacity
- Personal qualities
- An ability to understand and to deal fairly
- Authority and communication skills
- Efficiency.

Each of these is a heading which embraces particular qualities. For example, ‘intellectual capacity’ includes:

- High level of expertise in a chosen area or profession
- Ability quickly to absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

In Canada, although the Government retains a discretion in the appointment of judges, an Advisory Committee on Judicial Appointments has been established in each province and territory.²⁰ The Committees assess candidates on the basis of three categories—‘recommended’, ‘highly recommended’ or ‘unable to recommend’ for appointment. One of the tasks of such an Advisory Committee is to give a measure of objectivity to the concept of merit and that has been done by prescribing criteria for appointment.²¹ The Office of the Commissioner for Federal Judicial Affairs reports that:

Independent judicial advisory committees constitute the heart of the appointments process. The committees are responsible for assessing the qualifications for appointment of the lawyers who apply. There is at least one committee in each province and territory; because of their larger population, Ontario has three regionally based committees and Quebec has two. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner.²²

The South African Constitution provides that the President appoints the Chief Justice, Deputy Chief Justice, President and Vice President of the Supreme Court of Appeal

¹⁹ Justice Mary Gaudron is reported as saying that merit ‘can have no legitimacy if patronage or “the Old Mates Act” applies’: ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court’ [2003] *Melbourne University Law Review*, 32 fn 88.

²⁰ The Canadian experience is reviewed by C.N. Kendall in ‘Appointing Judges: Australian Judicial Reform Proposals in light of Recent North American Experience’ (1997) 9 *Bond Law Review*, 175.

²¹ See, for example, the Canadian Federal criteria at <http://www.fja.gc.ca/fja-cmf/ja-am/assessment-eng.html> and the criteria of the Ontario Judicial Appointments Advisory Committee http://www.ontariocourts.on.ca/judicial_appointments/policies.pdf

²² <http://www.fja.gc.ca/fja-cmf/ja-am/com/mem-eng.html>

after consulting the Judicial Service Commission. In the case of the Chief Justice and Deputy Chief Justice he also consults the leaders of parties represented in the National Assembly. Other judges of the Constitutional Court are appointed after consulting the Chief Justice and leaders of parties represented in the National Assembly ‘in accordance with the following procedure’:

- a. The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- b. The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- c. The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

In New Zealand, the Attorney General retains the responsibility of advising on the appointment of judges. The Ministry of Justice website on judicial appointments, however, advises that:

Although judicial appointments are made by the Executive, it is a strong constitutional convention in New Zealand that, in deciding who is to be appointed, the Attorney-General acts independently of party political considerations. Judges are appointed according to their qualifications, personal qualities, and relevant experience.²³

I do not understand that that convention applies to the Executive of the Commonwealth. In 2004, the Ministry of Justice issued a discussion paper in which it reiterated the qualities which are looked for in making a judicial appointment. They are grouped under four headings:

- Legal Ability
- Qualities of character
- Personal technical skills
- Reflection of society

These headings are expanded into criteria for appointment. The criteria and the procedures followed in making an appointment are set out on a Ministry of Justice website²⁴ and were issued in booklet form in 2003.

In Israel Judges are appointed by the President on the nomination of a Judges’ Nominations Committee, consisting of:

²³ <http://www.courtsofnz.govt.nz/about/judges/appointments.html>

²⁴ Published on the Ministry website:

<http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html>

- three judges (the President of the Supreme Court and two Supreme Court justices)
- two members of the Knesset (Israel's Parliament)
- two Ministers (one of them being the Minister of Justice, who chairs the Committee)
- two representatives of the Israel Bar Association.

Vacancies are advertised, candidates are interviewed by a sub-committee and a decision on appointment is taken by secret ballot.

The systems in vogue in the United States are well known but, as neither direct election (which is incompatible with s72 of the Constitution) nor public examination of a candidate by a Senate Judiciary Committee seems to be attractive to most Australians,²⁵ I do not comment on the arguments for or against them.

Possible models for Australia

The experience of other jurisdictions is informative. Most common law countries have been conscious of the need to make the appointment of judges more structured and objective in order to achieve three principal objectives: building and maintaining public confidence in the judiciary; removing political influences that might impair the selection of the most qualified candidates judged on merit; and, subject to the necessity of appointing candidates on merit, expanding the categories from which judges have hitherto been appointed. I should not have thought that an improvement in the process to achieve these objectives would be undesirable in Australia. The principal disadvantage in the eyes of some would be the elimination of political patronage, a price that none of the main political parties has thus far been willing to pay. But there is little integrity in paying lip service to the rule of law while we cloak in secrecy both the criteria and the procedure for appointing the judges to whom the task of enforcing the rule of law is entrusted.

Of course, any reform of the present practice must conform with s 72(i) of the Constitution. It provides that '[t]he Justices of the High Court and of the other courts created by the Parliament ... [s]hall be appointed by the Governor-General in Council.' This provision precludes any system which would allow any authority other than the executive government the power to make a federal judicial appointment. However, academic opinion seems to favour the view that s 72(i) merely identifies the appointing authority and that a law prescribing a process of nomination by a Judicial Appointments Commission would be valid.²⁶ Certainly no constitutional doubt has

²⁵ The Lavarch Paper, op. cit., p. 21 comments that '[t]here has been little support for the federal Parliament to be involved with an inquiry into the merits of judicial appointment.'

²⁶ This was the view expressed by Professor Winterton in *Parliament, the Executive and the Governor General: a Constitutional Analysis*. Melbourne University Press, 1983, pp. 100–101; by Professor Zines' Opinion to the Australian Constitutional Convention Judicature Sub-Committee, *Proceedings of the Constitutional Convention*. Brisbane, 1985, vol. 2, p. 35. Dr James A. Thomson in *Australian Constitutional Perspectives* (ed. H.P. Lee and George Winterton, Law Book Company, Sydney, 1992, pp. 251, 268–269) canvasses the different views. If the source of power to make judicial appointments were s 61, as Mr Ruddock believes (fn 14), there would be less doubt about the validity of a law providing for the appointment of persons nominated by a Judicial Appointments Commission.

attended the enactment of sections 7²⁷ and 8²⁸ of the *High Court of Australia Act 1979* which govern the appointment of High Court Justices.

Assuming the validity of a law which would regulate the process of appointing federal Judges, the proposals of the Senate Committee earlier cited may be taken as a starting point.

First, ‘that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment.’ This has been done in the United Kingdom, Canada and New Zealand; it can be done here. Criteria have two advantages: they provide a public assurance of the quality of judicial appointments and they focus attention of referees and members of any selecting authority on qualities that are relevant to the selection they are to make. As in England, the development of the criteria should be the function of a Judicial Appointments Commission. The criteria relating to legal ability would reflect the jurisdiction of the respective courts. This is of particular significance in the selection of Justices of the High Court. Although popular comment and governmental interest might emphasise the legal ability of a candidate in public law, a large proportion of the High Court’s work is in private law—not least in dealing with the burden of special leave applications. This part of the Court’s work attracts little attention but Justices with broad experience are needed to assist in the massive and varied case load.

Next, the Senate Committee recommended ‘that the Attorney-General for the Commonwealth should establish a committee which would advise him or her on prospective appointees to the Commonwealth judiciary’ and ‘[t]hat committee should include representatives of the judiciary, the legal profession and the non-legal community.’ A Judicial Appointments Commission would give structure to the process of selection and, with satisfactory drafting of the legislation, would restrain Executive Governments from the making of unmeritorious appointments for political or personal reasons. Differently constituted selection committees of the Commission would be needed for each of the Commonwealth Courts, reflecting their respective jurisdictions and administrations.

The third recommendation ‘[t]hat that the Attorney-General for the Commonwealth should urge the Attorney-Generals of the States and Territories to establish a similar advisory committee in their respective jurisdictions’ lies outside the scope of this paper, though the considerations which warrant a Commonwealth commission would have much force in the States.

While preference for different models of a Judicial Appointments Commission will vary,²⁹ one model could be based on the general framework of the United Kingdom Act with the necessary adaptations and some variations. In 2006, two distinguished academic lawyers—Professors Simon Evans and John Williams—presented a well-

²⁷ Section 7 requires prior consultation with the Attorneys General of the states.

²⁸ Section 8 prescribes the professional status required of an appointee.

²⁹ See Rachel Davis and George Williams, ‘Appointments Process: Gender and the Bench of the High Court of Australia’ [2003] *Melbourne University Law Review*, 32.

researched paper to the Judicial Conference of Australia.³⁰ The authors proposed a Judicial Appointments Commission based on the English model but with some variations. I agree with the basis of their proposals, but I would prefer a model with different variations from the English template. I suggest —

1. While the United Kingdom Act provides that the Chief Justice of a court should preside on a selection committee for her or his Court, a Chief Justice of a Commonwealth Court might find the relationship with an incoming judge more difficult if the Chief has participated in the selection process—especially if it became known that the appointee was not the candidate favoured by the Chief Justice. I should prefer to allow the Chief Justice to appoint a nominee to the selection committee if she or he so chooses.

A Selection Committee for the High Court might be composed of—

- (a) The Chief Justice or her/his nominee
- (b) The Attorney-General of the Commonwealth or her/his nominee
- (c) The President of the Australian Bar Association or her/his nominee
- (d) The President of the Law Council of Australia or her/his nominee
- (e) 2 non-legal members appointed by Government who are familiar with the work of the Court
- (f) A person of distinction chosen jointly by the Chief Justice and the Attorney-General.

It should be mandatory for the Selection Committee to consult the Attorneys-General of the States and Territories, each of whom should be entitled to submit one or two names which the Selection Committee would be bound to consider in settling the list of nominees for submission to Government.

A Selection Committee for a Court other than the High Court should be differently composed. As each of the Judges of those Courts is based in a State or Territory and discharges a majority of her/his duties in that State or Territory, it would be preferable to include the local rather than the National Presidents of the professional bodies in the Selection Committees.

2. The United Kingdom Act strips the Prime Minister and the Lord Chancellor of any ultimate power to decline to accept a selection. In Australian conditions, and with an eye to the provisions of s 72(i), it is preferable to leave the ultimate choice to the Executive Government but not without some restraint designed to ensure that merit is the prime consideration. The Selection Committee should submit a list of, say, three names from which the Government is invited to make the appointment. If the Government wishes to consider another person who is not listed, the Attorney-General should refer the name of that person to the

³⁰ *Appointing Australian Judges: A New Model*, JCA Colloquium, 7–9 October 2006. The authors' model was preceded by a review of the existing literature and an informative description of overseas models.

Committee with a request to reconsider the list. The Committee would then either include the name in a new list of three or inform the Attorney in writing why the listed names are preferred. If Government nevertheless proposes to appoint the person who is not listed, the Attorney-General should inform the Committee in writing of the Government's reasons for appointing outside the list. This is not a coercive sanction but it provides a sufficient incentive not to appoint an unlisted candidate for dubious reasons.

3. As appointments to the High Court are usually made from the ranks of serving judges, it would be invidious to publish communications between the Selection Committee and the Attorney-General about the relative merits of candidates. The same view could be taken about appointments to other Courts but for less cogent reasons.

Conclusion

Governments no longer have the means of making an informed judgment about the comparative merits of possible judicial appointees. A more structured and informed process is needed—a process which allows for the views of an informed public to be taken into account and which yields appointments measurable against stated criteria. The efficiency of the courts is enhanced by the appointment of the most competent and impartial judges available to serve. Thus public confidence in the courts is maintained and the rule of law protected.



Question — Thank you very much for that address. I found it quite inspiring and very thought-provoking. It brought to mind the recent Thomas case and I wonder if you would comment on that where the findings of the various judges appeared to reflect more their attitude to the Terror Laws than any other aspect.

Gerard Brennan — The brief answer is no, but I should explain. It has been a great privilege for me to serve as a member of the High Court. I do not think that it is any function of a retired member of a court to comment on the work of her or his successors and for that reason, if for no other, I would not comment on the judgements in the Thomas case. There's another reason. Apart from the media reports, I haven't read them, and that will take a little time, perhaps when I'm finished re-reading *Gone with the Wind*. The case is obviously an important one. The only comment that I would make is not in relation to that case but with regard to the problem that we have with the Anti-terrorism Laws and that is the problem, not in that case, but in other cases, of the difficulty of ensuring judicial review of decisions, which are obviously of importance to the safety of the community but which are of no less importance to the liberty which we are trying to defend.

Question — You have mentioned the public confidence and public assurance almost 23 times so far—the importance of appointment in that context. My question is, given the changing world, particularly towards terrorism and the perception of security by the general public, how do you think the balance should be met in terms of executing

the law and maintaining the public confidence, because if any perception of not following the law in terms of detriment to the public is going to come back to the judiciary again if they get wrong. So how do you balance that?

Gerard Brennan — I've been very happy to come and speak today on the question of the process for selecting judges. I've pointed out one aspect of the developing law with regard to anti-terrorism in that context. The question of how to balance the security of a people against their civil liberties is I think a question of enormous importance. It's one which I must say that I would not here wish to enter upon and it's not because it's not important. It is of vital importance in my view, but it does need a particular enquiry into the specific provisions that have been enacted. The difficulties of their operation have a significance, both for the security of the country, the ability to provide any possible system of safeguard, and the availability of judicial review. In other words, I think the problem is a complex one and I wouldn't wish to give, as it were, a broad, sweeping, off the cuff, over the top, view about that.

Question — My first question is almost petty: what actually are those permissions for leave, which you mentioned? The second question is: you've spoken several times about the loss of confidence in the legal system. May I naively ask what that implies and what the effects of that are?

Gerard Brennan — The cases which come to the High Court of Australia are cases which these days, for the most part, reach there by a process known as special leave. This is a filtering process. It is intended to ensure that only those cases go on appeal to the High Court which raise matters of general importance, either to the community or the legal system. Now there are many applications for special leave for which the applicants always contend that those criteria are fulfilled. They are I think, running at something of the order (and I may be wrong about the figures), of about 600 a year at the moment. Now that's an exponential increase from the number that there were when I was a member of the court. The difficulty in dealing with special leave applications, many of them being made by persons who are not legally represented, is that, although there may be very thick papers, and much of it could be described as dross, every now and again you find a pearl somewhere in there and you can't be sure that there isn't a pearl somewhere in 600 by umpteen pages of material. These pages of material are dealt with in the first place by an analysis that is done by some of the Chief Justice's officers, but ultimately the pages are looked at by each of the judges. Now I don't mean each judge does 600. More likely it would be that they would be divided into groups of two or three, so that they are split up, but you don't get just one judge dealing with a case. You would get a number of judges looking at the papers, as it were a dossier.

Sometimes when the question is finely balanced as to whether they should be granted special leave, the matters are then listed for hearing before a full court in open session. Now the burden of dealing with this paperwork is just crippling and nobody sees it, apart from the registry staff and the associates I suppose. Some of them are here today, and no doubt they are all burdened by the fact that their judges are trying to deal with this mass of paper. To appoint a judge because he or she happens to have a high profile in relation to some matter of public importance, neglecting the question of whether they have a general experience which allows them to deal with this mass

of materials that comes through special leave would be a miscarriage. So that's what the leave situation is. I'm sorry, I'm getting Alzheimer's: what's the second question?

Question — The second one was that you referred several times to a loss of confidence in the courts. What does it mean?

Gerard Brennan — Lets take, if you can remember back this far, the Communist Party Dissolution case. I know that's been in the media lately, but I'm not using it for that purpose. Now that was a case in which political opinion was obviously very clearly divided, indeed there was a political campaign on the question of a passage of that legislation. Ultimately the High Court by a majority held that the legislation was *ultra vires*, against the Constitution; invalid. Certainly there was disappointment in some quarters about the decision of the High Court in that case. I don't think there was any doubt at all about the validity of the reasoning in that case. The Court's judgement was accepted. It was accepted generally as being a judgment which the court applying the rule of law was entitled to make and correctly made. Or if you like take the Bank Nationalisation case. Again a matter of political controversy, and once again both in the High Court and then (as the law then provided) in the Privy Council, again the decision of the courts was accepted as being the appropriate decision.

I'm not sure that cases of controversy today, for example the Thomas case, are as happily or as readily accepted as they once were. Somehow or other there seems to be a thought: 'Oh well, maybe they're just doing some other sort of job, they're not really applying the law.' I can only say that after a lifetime of experience in the courts, I've got no doubt that the judges are applying the law. They are applying it by applying the judicial method of reasoning and that is what is so critical to the appointment of judges. You have to have people, who are experienced in the law, not only technicians who know the various statutes and cases and so forth, but who understand the principles that underlie the various rules.

Especially in the High Court that's essential, where you're dealing now with the highest court for Australia. It wasn't so until, what was it 1986, when the last ties were cut with the Privy Council, but now the High Court has that responsibility of ensuring that the law is applicable for Australia. When there is any lack of confidence in the quality of the judges who are going to be appointed, you then make the decisions of those judges much more open to controversy. It was Alexander Hamilton in 1788 writing in *The Federalist*, who pointed out that the judicial branch of government, is the least dangerous. It hasn't got the power of the sword. It hasn't got the power of the purse. It's got only the power of judgment. Unless the reasonings of the Court are accepted generally by the public, it doesn't have a powerbase. So you need to have judges who can express these values in a not only coherent, but convincing, way and if you have that then you have public confidence. Without it you are without any powerbase at all and that is dangerous for the rule of law.

Question — I'd like to ask a question about the rule of law. What happens if the government of the day brings in laws to abolish the rule of law and substitute the divine right of the kings in determining justice as it should be? I'm thinking particularly of laws that enable somebody on the government's behalf to kidnap a three or four year old girl and put her in an electrified cage and leave her there until her parents agree to sign over their rights to refugee status in Australia under refugee

conventions. The government leaves them there until they cave in under the stress of seeing their daughter become catatonic, and they have no redress legally, because the High Court has decided that that law is perfectly legal. That's one position. The other position is if you do take an activist position and intervene on behalf of justice, not on behalf of the law, in administering the law of the Commonwealth, that opens the door for the Fiji and Thai type situations, where the military decide that it knows better than the legislators. So do you have any opinion on resolving that dilemma, between being allowed to override idiotic legislators, and opening the door for other people to follow suit. Do you think that would be a dangerous precedent or a welcome precedent in regards to justice?

Gerard Brennan — I can only say I hope that poor little girl doesn't get dandruff. I think the question, if I might say so, is malposed and it is malposed for this reason. The question that will always be before the High Court is whether the particular piece of legislation is within the Commonwealth's legislative power or not. That's where it starts and that's where it finishes. It's all very well speaking about activism as though it gives the judges some discretion about all these things; that they are chargers on white horses who are going off into the wild blue yonder—that is not so. The whole nature of the judicial process is that while it is not always hide-bound to follow the exact words of an earlier precedent, for example, it is bound so far as statute is concerned and so far as the Constitution is concerned, to follow the language of the legislature. The question of whether a law is within the legislative power is resolved according to a legal method. That is, as they say, constrained by precedent, by the methodology of judicial reasoning, which is logical, and sometimes by analogy, if there's no direct proposition to govern it. You don't have these wild swings of discretion that are so often times said to be the judicial process. So that if the legislation is within power it's within power. If it's not within power it's invalid. The notion that somehow or other there are great big opportunities for judges to do justice otherwise in according to what the law is, is mistaken. The law has to provide some leeway for justice in particular areas where leeway is appropriate, but in terms of whether or not a piece of legislation is within the constitutional power, that's a matter which is governed strictly by the legal considerations. That may not, I suppose, be very convincing to somebody who hasn't done it, but I can only say that having been party to some judgments which were said to be activist; having taken part in those judgements by the reading of cases or the reading of statutes or the reading of the Constitution and thinking of the background at which those statutes or Constitution were enacted, and applying the logical method of reasoning, which is so much at the heart of judicial process, I just can't understand the notion of activism if it isn't the notion that somehow or other you look to see whether or not just results will follow. That doesn't mean that you can depart from the law—you can't.

I'm sorry if that's not convincing, but that's the best I can do.

Question — Before coming to the question I want to ask, can I just say in relation to the last two questions that I think one of the finest and the most scholarly judgements in recent times, is clearly the judgement of the Chief Justice in the Mabo decision and it is unfortunate that so many who don't like the outcome have responded by denigrating the Court, rather than by analysing the reasoning. My question goes to your comments about a more structured process, and in particular for the development of criteria. I think I understood you to say that the sort of committees involved in the

structured process would be responsible for the development of the criteria, and it is with that proposition that I have a reservation and my reservation is this. You will know that for some years I was involved in advising governments on appointments, and that was many years ago when there were very few women on the Court and judges used to say to me: 'Appointments should only be made on merit and not a gender basis.' Some years later when a number of women had been appointed, a number of those same judges came to me and said they were wrong. They said the appointment of women had changed the culture of the Court and by that I understood them to mean, amongst other things, that it enabled the Court better to apply the social values of the community. Now the appointment of women was done by decision of the executive, and I wonder whether a committee of the kind that I think you have recommended would be as attuned to those sorts of needs as an executive might be. For that reason I wonder whether there shouldn't be a larger role for the executive in relation to the criteria for appointment.

Gerard Brennan — Thank you for a number of your comments. This I think is the reason why under our provision of Section 72 (1) it is desirable to leave the ultimate selection to the executive government, because there is an area of discretion here, which need not be political, or not in any party political sense, but can be in a wider sense designed to achieve a desirable result in the constitution of the judicial body. But as to the suitability of a judicial commission to develop the criteria, I think the English experience is instructive. Recently the Lord Chancellor, the Lord Chief Justice, and the President of the Judicial Commission in England have produced a paper on diversity. It was their work which was designed to achieve greater diversity in the constitution of the British judiciary.

If you have a committee which contains not only lawyers but indeed perhaps a majority of lay people who are interested in the legal process and have some knowledge about it, I think you'd probably have the prospect of an input that will ensure that you aren't, as it were, going to produce judicial clones in the next generation. I can't think of a better method than having (a) those who are knowledgeable in relation to the work of the courts, and (b) those who have an interest in the work of the courts, as the people to create the criteria that are needed, and indeed, provided the statute directs a requirement of consideration of diversity, developing even the criteria for consideration of those elements.