AUSTRALIAN BAR ASSOCIATION

JUDICIAL APPOINTMENTS FORUM

THE JUDICIAL APPOINTMENTS PROCESS IN AUSTRALIA: TOWARDS INDEPENDENCE AND ACCOUNTABILITY

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The views expressed in this paper are those of Justice Sackville, not those of the Federal Court or of the Judicial Conference of Australia

AN ATTITUDINAL OXYMORON

The expression 'naïve cynicism' would seem to be an oxymoron: a contradiction in terms. Yet that expression describes accurately enough the attitude of most Australians towards governments and governmental institutions.

The collective cynicism is starkly demonstrated by the low standing of parliamentarians in Australia and the community's enthusiasm for attributing malign motives to any politician making a significant public utterance on a policy issue. The depths of the collective cynicism are regularly plumbed by the almost universal derision that greets an increase in the salaries or perquisites of politicians or the periodic 'revelations' in the press of the cost of international travel by Ministers or other elected officials.

Communal naïvety is most evident in the pervasive belief, only too well understood by politicians, that there must be simple answers available to solve complex problems such as crime, indigenous disadvantage, neglected infrastructure, ethnic and religious conflict and global warming. Relatively few people are prepared to acknowledge that some problems are intractable and that the reluctance of successive governments to propose and implement long term solutions to difficult societal problems is closely linked to the apparent reluctance of voters to accept that substantial short and medium term pain may be required to achieve long term benefits. Curiously enough, communal naïvety about the political process co-exists with collective cynicism about the very same process and its practitioners.

Much the same naïve cynicism pervades public attitudes to the judiciary and to the court system. Judicial officers, particularly those involved in sentencing, are widely seen as hopelessly out of touch with community standards and removed from the problems of everyday life. The courts are perceived as encased by outmoded technicalities and procedural rules that are deliberately designed to conceal the truth rather than to expose it. The cost and complexity of litigation are thought to serve the interests of the lawyers' cabal, the members of which will one day themselves become judges and magistrates and thus perpetuate the self-serving character of the system. Any increase

in judicial salaries or benefits, or revelations of the cost of travel by judicial officers, however modest, is greeted with the same levels of derision as the cost of peregrinations by politicians. The very occasional scandal of a judicial officer who is incompetent or who commits criminal acts only serves to confirm in the public mind the wisdom of maintaining a cynical attitude towards the judicial system.

Yet alongside the cynicism, community attitudes towards the legal system demonstrate considerable naïvety. Much of this naïvety, like that directed to the political process, has its source in the comforting belief that there must be simple answers even to the most intractable problems. Why is it that the courts cannot substantially reduce, if not eliminate, serious crime by handing down more severe penalties? Why do courts take so long to resolve disputes that anyone with common sense could decide in a few weeks? Why are the courts not truly representative of the community they are meant to serve? Why do they not reflect the popular will in the decisions they make? Why are judges not accountable to the people?

The current debate about the appointments process for judicial officers is hardly at the top of the political agenda. Nonetheless, aspects of the debate reflect the paradoxes inherent in the naïve cynicism that often characterises attitudes in Australia towards public institutions.

There are, for example, cynics who say that no Attorney-General, Prime Minister or Premier will ever relinquish even a modicum of the unfettered power to determine who becomes a judge or magistrate, regardless of the strength of the arguments in favour of change. The most cynical observers attribute this reluctance to the strong desire, which presumably beats deep in the heart of every First Law Officer, to remould the courts in his or her ideological image. A more subtle form of cynicism condemns the idea of a judicial appointments commission, which figures prominently in reform proposals, on the ground that the government of the day will simply fashion the commission in its own image. The present Commonwealth Attorney-General, for example, has said that he is not in favour of such a commission partly because:

> *'...you just move the debate from who is being appointed to the bench to who is*

being appointed to the appointments commission'.

On the other hand, proponents of an appointments process independent of government influence sometimes naïvely see a judicial appointments commission as a panacea for the somewhat battered reputation of the judiciary. For them, removing judicial appointments from the political process is the means by which an apparently out of touch, male-dominated judiciary can be transformed into a more modern, balanced, diverse and accountable group of judges and magistrates. A more traditional, perhaps semi-colonial form of naïvety regards the argument in favour of an independent appointments process as unanswerable because the United Kingdom Parliament has legislated for the establishment of a Judicial Appointments Commission. If it is good enough for the mother country, it is good enough for Australia.

Naïvety is by no means the exclusive province of proponents of change. Those who contend, and genuinely believe, that the present system has produced a judiciary of the highest possible quality are guilty of a Panglossian view of the judicial world. Similarly, those who argue, and genuinely believe, that the present opaque system of unfettered executive discretion holds governments truly accountable for the quality of their judicial appointments show little understanding of the practical limits of accountability on such a (politically) peripheral issue.

Key Issues

The parameters of the debate about the judicial appointments process have now been well defined. A closely reasoned paper recently presented to the 2006 Colloquium of the Judicial Conference of Australia puts the case for the adoption in Australia of a process modelled on that recently established for England and Wales, but modified to take account of circumstances in Australia.

Given that the battle lines have been drawn, it may be useful to address some key issues relevant to the policy-making process that have emerged from the debate. I do so from the perspective of a strong supporter of the establishment of an independent judicial appointments commission, the role of which would be to make recommendations to

government (but not decisions) concerning the appointment of individual candidates to judicial vacancies.

A Many-Sided Coin

In a typically insightful address to the 2003 Colloquium of the Judicial Conference of Australia, the Chief Justice of Australia points to the disparity between the level of interest in the appointments process for judicial officers and in judicial education. He expresses no view as to whether changes to the appointments process are desirable, but he acknowledges that the 'pressure to widen the gene pool' is, on balance, a good thing. The Chief Justice emphasises, however, that there is a very close relationship between the appointments process and judicial education. He observes that, in the past, professional experience as an advocate has been regarded as the primary qualification for judicial office. In consequence, governments have been relieved from the necessity to train professional judges in such areas as the rules of evidence and procedure and the management of a courtroom. The Chief Justice does not argue for the retention of the Bar's historic monopoly of the more senior judicial positions. His point is different:

> *'It is that, historically, the monopoly has been protected by the lack of proper arrangements for judicial training and development. Real change, as distinct from window-dressing, in the one area, requires real progress in the other'.*

The Chief Justice's contention that there is a close link between judicial appointments and judicial education is undeniable, but the point can be taken further. The appointments process is also closely related to the system for dealing with complaints against judicial officers. If the 'gene pool' is to be widened and greater transparency introduced into the appointments process, the argument for an independent and transparent complaints system becomes even stronger. Moreover, if one consequence of a new appointments procedure is that judicial officers have a more diverse background, the standards of conduct expected of judicial officers may have to change in certain respects. It will not only be necessary for governments to make more resources available for continuing judicial education, but judicial officers themselves will have to accept greater responsibility for enhancing their skills and updating their legal knowledge.

Similarly, there is an inter-connection between judicial appointments procedures and court governance. If judicial officers are not necessarily expected to be capable of dealing with all matters within their court's jurisdiction immediately upon appointment, the head of jurisdiction may have to exercise more stringent control over the allocation of work within the court. The exercise of such control might be difficult to reconcile with the notion that each judicial officer must enjoy full independence in the exercise of his or her decision-making responsibilities, not only from external sources but from his or her colleagues and head of jurisdiction. But it may be one price of procedures designed, in part, to ensure a judiciary appointed from a wider gene pool.

The links between the appointments process and other aspects of the judicial system have been recognised by the reform process in other countries. In the United Kingdom, for example, the *Constitutional Reform Act 2005* has not merely changed the appointments process, but has reformed disciplinary procedures, important aspects of court governance and indeed the very structure of the judicial system itself. In New Zealand, recent proposals for change have addressed a wide spectrum of policy issues affecting the judicial system, in the context of the abolition of appeals to the Privy Council and the creation of the Supreme Court of New Zealand.

It is, however, one thing to acknowledge that the appointments process cannot be divorced from such questions as judicial education, complaints procedures and court governance. It is another to suggest, as some may be tempted to, that nothing should be done about reforming appointments procedures until all related issues concerning the judicial system have been addressed and resolved. This would be a recipe for permanent inaction. Moreover, the establishment of a more transparent and rigorous appointments process is likely to generate pressure for worthwhile reforms elsewhere within the judicial system.

The Quality of Judicial Appointments

Supporters of the existing system of largely unfettered executive discretion in relation to

judicial appointments often argue that it has produced satisfactory outcomes. In short, why change a system that:

> *'has served us well [and] has provided Australia with an internationally renowned and respected judiciary.'*

There are a number of answers to this argument. First, the current system has largely neglected a pool of talent that, if appropriately tapped, would enhance the standing and performance of the judiciary. Under a system of unfettered executive decision-making, attention is necessarily focussed on those whose abilities can readily be observed by, or whose credentials, real or apparent, come to the attention of the Attorney-General or his or her colleagues or close political advisers. There is little incentive to encourage interest from those whose background is perhaps less orthodox or whose availability is not widely known, but who nonetheless may have much to contribute as judges or magistrates.

Secondly, it is simply not the case that all judicial appointments in Australia have been made on 'merit', however that elusive term is defined. As Dr Evans and Professor Williams say:

> *'It is a notorious fact that judicial officers have been appointed whose character and intellectual and legal capacities have been doubted and whose appointments have been identified as instances of political patronage.'*

While this observation is an historical one, it is very difficult to suggest that all appointments in recent times have been made exclusively on merit, or from the best available candidates. It is clear enough that some have not. Moreover, there have been cases where outstanding lawyers, willing to accept appointment to a court for which they are eminently well-suited by reason of practical experience, professional achievements and demonstrated scholarship, have been passed over in favour of others less qualified. Given the opaqueness of the current process, it is not possible to ascertain with certainty the reason for the refusal to appoint, but the strong likelihood is that the motivation is usually provided by the perception, which may or may not have substance, that the outstanding candidate is not ideologically sound.

I do not suggest that all those who have not been appointed exclusively on merit will necessarily be unable to perform their judicial work at a satisfactory standard. People appointed to offices for which they seem not to be especially qualified sometimes perform well by dint of hard work and a willingness to learn. My comments are directed to the assertion that the current system produces appointments based solely on merit and, by implication, that it achieves the best outcome the community is entitled to expect. It does not.

Thirdly, the defenders of the existing system overlook the fact that the appointments process itself affects the perceived quality and the community of the judiciary. Almost every serious analysis of the virtues and deficiencies of the judicial system refers to the importance of maintaining public confidence in the system. An appointments process that is neither transparent nor fair is hardly likely to maximise public confidence. Moreover, if a judge or magistrate proves unequal to the onerous task of exercising judicial power because of deficiencies in the selection process leading to his or her appointment, it is the reputation of the court concerned and of the judiciary as a whole that suffers. By the time the inadequacy of the appointee becomes manifest the 'accountable' government or Attorney-General may well have become part of the inexorable march of history.

The Significance of Forensic Experience

The debate about the judicial appointments process in Australia has attracted some unlikely bedfellows. Some Bar associations, or at least sections of those associations, find themselves aligned with the more fervent supporters of a more diverse judiciary. Both see the present system as having produced unacceptable results. Both see the solution in a more independent selection process. Yet the professional organisations frequently consider that the problem is the appointment of too many judicial officers who lack the requisite prior forensic experience. By contrast, their temporary bedfellows consider that the problem is that the current system, by favouring barristers as the primary source of appointment to the superior courts, perpetuates a male-dominated, conservative, largely monolithic judiciary. Both diagnoses cannot be right.

The debate has been confused by an insistence in some quarters that only barristers, or professional advocates, are equipped to become trial judges. (There seems to be a more general, although not universal, willingness to accept that extensive forensic experience may not always be necessary for appointment as an appellate judge.) A distinguished former Judge of the Queensland Court of Appeal points out that an important part of the work of trial judges is deciding difficult questions of evidence, procedure and law, often on the spot. He argues that:

> *'[a]ssuming the necessary intellectual capacity and legal knowledge, the only satisfactory way … of acquiring [these skills] is by having to practise [them] over a sustained period.'*

This argument downplays, if not overlooks, the undoubted fact that many judicial officers with little or no forensic experience prior to appointment have proved to be excellent judges at both trial and appellate levels. The experience in a number of courts is that academic lawyers, legal practitioners with little or no background in advocacy can make outstanding judges, provided that they have the requisite knowledge of the law, excellent intellectual qualities, a capacity to write clearly and (perhaps most important of all) an ability to recognise the limits of their own competence. It is equally a fact that some successful barristers, notwithstanding their forensic experience, do not necessarily perform well, or even satisfactorily, as judges. The skills required of a trial judge are not exclusively those of the successful barrister. Indeed, all appointees, whatever their background, need to be able to recognise the limits of their own competence.

The insistence that prior forensic experience is an essential prerequisite for a trial judge also overlooks the role of judicial education programs and the support of experienced colleagues in ensuring that a newly appointed judge satisfactorily discharges his or her responsibilities. Despite Chief Justice Gleeson's misgivings, even those who have never participated in a jury trial as an advocate can conduct criminal jury trials competently and efficiently. The combination of judicial education, collegiate support and a gradual introduction to trial work, reduces to acceptable levels the risk of a capable, but forensically inexperienced newly appointed judge being inflicted unfairly

on hapless litigants. That risk, which in one form or another is potentially present with all appointees, must be weighed against the substantial advantages of broadening the pool of qualified candidates for judicial office.

One of the advantages of an independent appointments body is that it can systematically encourage qualified lawyers from outside the ranks of professional advocates to seek appointment to the bench at an appropriate level. Whether this approach is described as 'outreach' or as 'widening the range of applicants', an independent body, supported by skilled staff and by uniform advertising, interview and selection procedures, is very much better placed to undertake the task than the necessarily haphazard, non-transparent efforts of an Attorney-General and his or her Department or personal staff.

There is a consequential benefit. An Attorney-General who seeks to widen the 'gene pool', for example by systematically appointing more women to the bench within a relatively short period, exposes the appointees to the criticism that they have not genuinely been appointed on merit. This phenomenon has been apparent recently in more than one Australian jurisdiction. Very often the criticism will be utterly baseless. Yet because the appointment has not been made in a transparent manner by an independent body responsible for selecting on merit, a truly meritorious appointee may be tarred unfairly with the 'token appointment' brush. This cannot be to the advantage of either the judicial officer or the court concerned.

The Concept of Merit

There is no special difficulty in identifying the criteria that should be taken into account in determining the 'merit' of candidates competing for judicial appointment. The criteria published by the Lord Chancellor in 2004 are fairly typical:

'
- *legal knowledge and experience;*
- *intellectual and analytical ability;*
- *sound judgment;*
- *decisiveness;*
- *communication and listening skills;*

- *authority and case management skills;*
- *integrity and independence;*
- *fairness and impartiality;*
- *understanding of people and society;*
- *maturity and sound temperament;*
- *courtesy; and*
- *commitment, conscientiousness and diligence.'*

The more difficult question is how the criteria are to be applied to candidates with different kinds of experience and different attributes (or drawbacks). The reference to 'legal knowledge and experience' in the Lord Chancellor's list, for example, tends to disguise the difficulty of the weight that should be given to forensic experience when assessed against other forms of legal experience.

The Lord Chancellor's list makes no express reference to the desirability of having a more diverse judiciary, although there has been much discussion in the United Kingdom about the desirability of such an outcome. There is undoubtedly some tension between the principle that judicial appointments should be made exclusively on merit and the proposition that that the appointing or recommending body should actively seek greater diversity.

The issue is addressed, although perhaps not entirely resolved by the *Constitutional Reform Act 2005*. It provides that the Judicial Appointments Commission must select 'solely on merit' but does not define 'merit', apparently leaving that task to the Commission itself. The Commission is required also to 'have regard to the need to encourage diversity in the range of persons **available for selection for appointments**'. However, the latter requirement is subject to the paramountcy of merit and, in any event, does not oblige the Commission to have regard to the need for diversity when actually selecting candidates for particular judicial offices.

There are some who contend that the principle of appointment solely on merit simply

cannot be reconciled with a desire to increase diversity in the judiciary. On that view, the conflict can be resolved only by explicitly relaxing the standards so as to permit, as a transitional measure, the appointment of a wider range of judges and magistrates. In particular, standards should be 'compromised' to allow female candidates with less forensic experience than their male counterparts to be appointed to the bench.

No doubt forensic experience is generally an advantage for appointment as a trial judge although, for reasons that have been explained, such experience is not a **necessary** prerequisite for appointment as a trial judge, depending on the candidate's other qualities. But that does not mean that the choice is as stark as has been suggested. The criteria formulated by the Lord Chancellor, for example, allow a range of skills and attributes to be taken into account in selecting candidates for judicial office. The relative importance of the various skills and attributes may depend on such factors as the nature of the judicial office, the kind of work the appointee is likely to be allocated and the support facilities available once the appointee is on the bench.

In a competition for appointment to judicial office it may be, for example, that a particular female candidate has substantially less forensic experience than the best qualified male candidate. But she may have demonstrated excellence as a courtroom advocate, albeit for a limited time, and may also have, for example, superior communication and writing skills. In addition she may have specialised knowledge of an area of law of particular significance to the court concerned. In these circumstances there would be no 'compromise' involved in regarding the female candidate as superior on merit. Indeed the same principles apply to male candidates who, for one reason or another, have limited forensic experience.

A Question of Principle

It is important to appreciate that the current debate about the judicial appointments process has not been generated simply by concern about the quality of recent appointments. Nor is it simply a response to the apparent trend away from regarding the Bar as the virtually exclusive recruitment barracks for appointment to office in the

superior courts. Public discussion of these issues long predates recent controversies.

The discussion paper prepared in 2004 under the auspices of the Judicial Conference of Australia, for example, was not prompted by any specific concern about the quality of appointments. As the paper records, it was prepared largely because different views had been expressed within the Executive of the Judicial Conference as to the utility and appropriateness of advertising judicial vacancies and the associated practice, adopted in some jurisdictions, of interviewing candidates for judicial office.

The discussion paper identifies a number of 'potential advantages' flowing from the creation of an independent commission having responsibility either for making appointments to judicial office or at least for making recommendations to government concerning such appointments. The advantages are identified as follows:

'
- *greater transparency in the appointments process;*
- *greater public confidence in the appointments process, which will be seen as less susceptible to political influences and more likely to produce appointments on genuine merit;*
- *encouragement to a wider range of candidates to seek appointment, thereby increasing the diversity of judiciary, but without sacrificing merit as a guiding principle; and*
- *greater scrutiny of candidates to eliminate those who may be unsuited to the judicial role.*'

These advantages flow from an independent appointments process regardless of any ephemeral controversy concerning particular appointments to the bench.

In considering the question of principle, it is important to bear in mind that a great deal has changed over the period of time in which the current arrangements have been in effect. In 1903, the year the High Court commenced its work, there were three federally appointed Judges. In October 2006, there were 133 judges or magistrates holding office in the federal courts, all three of which have been created within the last thirty

years.

The numbers of Judges holding office in the Supreme and District Courts (or equivalents) of each State have also increased exponentially. The comparative figures are shown in the following chart.

	Number of Judges 1903	Number of Tenured Judges 2006
New South Wales		
Supreme Court	7	48
District Court	7	72
Victoria		
Supreme Court	6	34
County Court	5	59
Queensland		
Supreme Court	4	24
District Court	4	36
South Australia		
Supreme Court	3	13
District Court	0	19
Western Australia		
Supreme Court	3	20
District Court	0	27
Tasmania		
Supreme Court	3	6
Australian Capital Territory		
Supreme Court	0	4
Northern Territory		
Supreme Court	0	6
TOTALS	39	368

The increase in the size of each of these courts reflects the growth in the population and the vastly greater volume of litigation, both civil and criminal, over the past 103 years. The sheer increase in judicial numbers necessarily means that very many more judicial appointments are now made each year than in the early years of the twentieth century. Other factors have also influenced the rate at which judicial appointments are made, such as the creation of new courts, the professionalisation of the magistracy and the introduction of compulsory retirement ages for judges and magistrates.

The consequence of these developments is that in the three years from 1 July 2003 to 30 June 2006, the Commonwealth appointed 35 federal Judges and magistrates. A further 13, ten of whom were federal magistrates, were appointed in the four months from July to October 2006. New South Wales appointed 39 judicial officers during the same

three year period and nine in the four months after 30 June 2006. The comparable figures for Victoria were 31 and 12, respectively. Thus the larger Australian jurisdictions now make a significant number of appointments to the judiciary each year.

A further factor to bear in mind is that the process of change in relation to judicial appointments in Australia has already begun. In the United Kingdom, the creation of the Judicial Appointments Commission marked the culmination of a period of significant change and experimentation in the judicial appointments process. As Sir Thomas Legg remarked when commenting on what were then proposed changes to the making of judicial appointments in England and Wales, the system:

> *'has been continuously developed and improved ever since it began [in the late 1970s]…and that process is still going on. The reforms now proposed should be seen as part of that evolution.'*

Similarly process of judicial appointments in Australia has changed significantly in recent times. Appointments are now commonly made to vacant judicial positions after the vacancies have been advertised and applications or expressions of interest sought. Candidates are often interviewed and their qualifications and suitability for appointment assessed by reference to published criteria. It is true that theses changes have occurred for the most part (although not entirely) at the level of magistrates courts, but they have also been applied from time to time to more senior judicial appointments. There is no compelling reason why they cannot be applied more generally to the selection process for vacancies in the superior courts. There are therefore fewer practical barriers than there once were to the implementation of changes that should be made for sound reasons of principle.

A Recommending or Appointing Body?

One of the striking features of the Judicial Appointments Commission for England and Wales is that it is more than a recommending body. Although the final selection of judges is formally made by the Lord Chancellor, his or her options are severely limited by statute. The Lord Chancellor can reject the initial selection of the Commission or ask for it to be reconsidered, but ultimately the Commission's selection must be accepted.

The effect of this elaborate procedure is to transfer the last vestiges of power to make judicial appointments from the Executive to an independent statutory body.

In determining whether this model is appropriate for Australia, as Dr Evans and Professor Williams in substance propose, it is necessary to take into account significant differences between the judicial system of England and Wales, on the one hand, and Australia, on the other. It is often assumed that because of our common legal heritage the two systems are substantially the same. They are not.

First, the Commonwealth *Constitution* entrenches (or has been interpreted as entrenching) a clear separation between judicial and non-judicial power. The United Kingdom has no equivalent to Ch III of the *Constitution* which, among other things, prevents federal courts from exercising non-judicial power (unless incidental to judicial power) and prohibits federal judges from discharging functions incompatible with the exercise of federal judicial power. The *Constitutional Reform Act 2005* requires the Lord Chancellor and all other Ministers of the Crown to 'uphold the continued independence of the judiciary'. But it does not incorporate a constitutional principle of separation of judicial and non-judicial powers. The absence of a rigid separation of powers may have contributed to the fact, not always fully appreciated in Australia, that the Judicial Appointments Commission is responsible for the appointment of both judicial officers and members of tribunals. Indeed the appointment of tribunal members is numerically more significant than the appointment of judges.

Secondly, courts in the United Kingdom have not asserted or exercised the power to declare legislation invalid, although in more recent times the courts have assessed legislation against human rights norms. In Australia, by contrast, the power of judicial review of legislation has always been regarded as an essential component of the judicial power of the Commonwealth. The High Court's role as constitutional arbiter has contributed to a process which has not infrequently produced High Court Judges selected, at least in part, on the basis of political considerations, rather than exclusively on 'legal merit'. As I have noted, this pattern has spilled over to other courts, in the

sense that political factors, such as the perceived ideological leanings of the candidate, have influenced selections from time to time, often by disqualifying an otherwise well qualified candidate from appointment to a particular court.

By contrast, the United Kingdom has no discernible tradition of political appointments to the courts. This may have made it relatively easy for the United Kingdom Government to relinquish a power that it had chosen never to exercise in an ideological manner. Certainly the Lord Chancellor responsible for the reforms was unequivocal about the virtues of an independent appointments system. In his Foreword to the *Consultation Paper* which paved the way for the new system, Lord Falconer of Thoroton said this:

> *'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.'*

Notwithstanding the force of these comments, it is difficult to imagine an Australian Attorney-General wholeheartedly embracing the same sentiments.

Thirdly, a system of judicial apprenticeship, incorporating on-the-job training, is well entrenched in England and Wales. In practice, appointment as a part-time ('fee paid') judge and satisfactory performance in that position is a prerequisite to appointment to a permanent ('salaried') position. A candidate for permanent judicial office therefore must usually have had experience, for example, as a Deputy High Court Judge, Recorder or Deputy District Judge before being considered for appointment. Ordinarily, these fee paid positions involve service for 15 to 30 days per annum, usually for a minimum of two years, before appointment to a permanent position will be considered. In consequence, those conducting the selection process for permanent appointments are able to take into account, among other things, the candidate's performance as a part-time judge as assessed by his or her referees.

In Australia, the *Constitution* does not permit the appointment of acting or limited term

judges to federal courts. In the past, some Australian States have appointed acting judges, with a view to assessing their suitability for a termed judicial position. However, there is now considerable resistance to that practice, exemplified by the controversy in Victoria about the Government's announced intention to appoint more acting judges and the more limited use of acting judges in New South Wales than in earlier times. It follows that in Australia, unlike England and Wales, most candidates for appointment to judicial office will not have had prior judicial experience. This, if anything, makes the appointments process even more important in Australia than in the United Kingdom.

Fourthly, the judiciary in England and Wales is larger than the Australian judiciary, although the number of permanent (tenured) judges is not very much greater. In Australia, as at October 2006, 957 permanent judges and magistrates served on Commonwealth, State and Territory courts. Of these, 484 were judges and 473 were magistrates. In England and Wales, at about the same time, there were 1,364 permanent judges, of whom 161 were High Court or more senior Judges; 641 were Circuit Judges; 423 were District Judges; and 139 were District Judges (Magistrates' Court). However, the serving judiciary also included 1,361 Recorders, 755 Deputy District Judges and 148 Deputy District Judges (Magistrates' Court), all of whom were fee paid. Thus the larger number of judicial officers in England and Wales when compared with Australia is primarily accounted for by the very large number of fee paid judges in England and Wales holding office at any given time.

Fifthly, in the United Kingdom, the national Government makes all judicial appointments. In Australia, nine different Governments make appointments to 'their' courts. Consequently, the Judicial Appointments Commission for England and Wales will be responsible for making many more judicial appointments than any single Australian jurisdiction, although most will be to fee paid rather than permanent positions.

These differences do not necessarily make the English reforms inapplicable to

Australian circumstances. The historical pattern of appointments suggests, however, that it may be difficult to persuade Australian governments, of whatever political complexion, of the virtues of yielding virtually all powers in relation to individual judicial appointments.

Leaving aside pragmatic considerations, there is much to be said as a matter of principle for a system that seeks both to strengthen political accountability for judicial appointments and to introduce an independent body into the process. This can be done by establishing an independent commission that **recommends** the appointment of candidates to judicial office, but does not **appoint** particular candidates (whether directly or as the result of an elaborate process such as that adopted in England and Wales). On this approach, the Attorney-General or government of the day would have the option of rejecting a particular recommendation. However, if that course was followed, it would be necessary for the Attorney-General to explain publicly why the Government had chosen to reject the recommendations.

The establishment of a commission with only recommendatory functions would recognise that there may be circumstances in which an Attorney-General has valid reasons for not wishing to appoint from a recommended short list or, alternatively, wishes to appoint a particular person from outside any existing list. Legitimate reasons could include the need to add a judge with particular expertise to a court or to take advantage of a 'window of opportunity' to appoint a candidate whom the commission did not know was available for appointment when it prepared its recommended short list. They could also include the need for geographic balance in a particular court. A less legitimate reason, but one for which the Attorney-General might nonetheless be prepared to accept political responsibility in the face of a contrary recommendation, is that he or she simply prefers a person with different qualifications, experience or, perhaps, views.

It is possible to strike a balance between the virtues of an independent appointment process and leaving ultimate responsibility (and thus accountability) for judicial

appointments with the elected government. That balance can most effectively be struck by conferring upon the commission the functions of inviting applications from qualified candidates, assessing the merit of those who apply and recommending either a particular candidate or a short list of no more than (say) three or five candidates suitable for appointment. If the Government, through the Attorney-General, decides not to accept the recommendation, it should have the option of inviting the commission to reconsider, provided it gives reasons for rejecting the recommendation. If the Government, following the reconsiderations, still wishes to select a candidate other than the recommended person or persons, it should be free to do so. However, the Attorney-General would be required to table in Parliament a statement of reasons for selecting a candidate not supported by the commission. In this way, both political accountability for the decision and the transparency and integrity of the appointments process will be enhanced.

The Composition of the Commission

There is no single 'correct' formula for the composition of an advisory judicial appointments commission. The issues, albeit in the context of an appointing body, have been well-canvassed elsewhere. It is enough for present purposes to make five points.

First, the danger of a government undercutting the independence of the commission can be avoided by ensuring that a majority of members are appointed *ex officio*, or on the nomination of specified office holders. In the case of judicial members or representatives of professional bodies, there would seem to be little difficulty in this regard. Some lay members, too, might be nominated by particular office holders or after a prescribed process of consultation has taken place.

Secondly, the judicial and legal members of the commission should be responsible for assessing and ranking the legal qualifications, experience and ability of candidates for judicial appointments. But, generally speaking, the commission as a whole should be responsible for making recommendations concerning particular vacancies and should do so after taking into account all relevant criteria for appointment.

Thirdly, if each jurisdiction is to establish its own commission (as distinct from a national judicial commission) membership should be relatively small. There is no pressing need for judges and practising lawyers to account for a majority of the commission. On the contrary, a legal majority may create the risk that recommendations for appointment will too closely reflect the current composition of the judiciary in that jurisdiction. Moreover, community confidence in the appointments process is likely to be enhanced if non-lawyers are at least equally represented on the commission.

Fourthly, the composition of the commission should be such as to allow for some flexibility in the procedures followed in relation to appointments to different courts in the judicial hierarchy. Depending on the workload, despite what has been said earlier, it may not be necessary, for example, to involve all members of the commission in recommending appointments to each court in the particular jurisdiction.

Fifthly, the composition of the commission may have to be modified to some extent to reflect the particular circumstances of each jurisdiction that chooses to follow the path suggested in this paper. The recommending body in the less populous jurisdictions, for example, might have fewer members than those in the larger States or the Commonwealth body. If, as Dr Evans and Professor Williams perhaps optimistically suggest, a national body is created with a remit that potentially covers all courts in the country, it may be appropriate for it to have a variable membership. This would allow representatives from each jurisdiction participate in the selection of recommended candidates for appointment in that jurisdiction.

Conclusion

The most compelling arguments in favour of an independent process for the appointment of judicial officers in Australia is one of principle. The process should be more transparent; involve the application of appropriate criteria of merit to all candidates for appointment to particular courts; and encourage a wider range of suitably qualified candidates for appointment. The arguments for a reformed system therefore do not

depend on the validity of criticism directed at recent judicial appointments. Nonetheless, it is naïve to believe that the quality of the judiciary in every Australian jurisdiction is as high as the community is entitled to expect.

The drawbacks of the current process, which involves virtually unfettered executive discretion, are not offset by true political accountability. The opaqueness of the process prevents meaningful challenges to the inevitable assertion by the Attorney-General of the day that the best, or at least a superior, candidate has been selected. The process certainly does little to encourage a systematic widening of the gene pool of qualified candidates. The recently adopted English model relies on a body independent of the executive, in effect, to make judicial appointments. While this has attractions, there are advantages in seeking to combine the virtues of a more independent appointments process with greater accountability on the part of the elected officials ultimately responsible for making judicial appointments.

The most suitable model for Australia would see the creation of an independent commission responsible for making recommendations to government for appointment to vacant judicial offices. The commission's membership should be equally divided between legal and lay members, although the former would assess and rank the **legal** qualifications, experience and ability of candidates. All commission members, however, should participate in making the final recommendations.

The functions of the commission should include inviting applications from qualified candidates, assessing the merit of those who apply and recommending, say, a short list of three candidates suitable for appointment. The Government would have the option of inviting the commission to reconsider and, ultimately, to make its own appointment notwithstanding the commission's recommendation. If the Government decides to take this course, the Attorney-General should be required table a statement in Parliament giving reasons for selecting a candidate not supported by the commission.

As with all recommendations for reform of the judicial system, there is room for debate

about details of the proposed appointments regime. It is, however, time that Australian jurisdictions advanced beyond a system that incorporates neither transparency nor genuine political accountability.