

# Restoring Faith in Justice

Promoting Transparency in Judicial Appointments in NSW



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### Executive Summary

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**Sir Garfield Barwick, A Radical Tory, Federation Press, Sydney 1995 p.230**

*“Attorneys General 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”*

**The Hon. Geoffrey Davies AO, former Qld Judge of Appeal, “Why we should have a judicial appointments Commission”—Australian Bar Association Forum on Judicial Appointments, Sydney, 27 October 2006**

In recent years as the law and order debate has raged, attention has often focussed on individual judges and magistrates and whether their decisions, particularly on sentencing and bail, reflect community attitudes and expectations.

The general public are mystified as to how judges and magistrates are appointed, compared with senior public servants and executives in private industry whose jobs are regularly advertised in the press and now on the Internet. There is widespread suspicion that many appointments to judicial positions are based on political views and prejudices. Some go as far as to suggest that many appointments are based on cronyism sometimes described as ‘jobs for the boys.’

There is no doubt that some prominent appointments have had the appearance of cronyism, particularly to the superior Courts, such as the High Court of Australia. This suspicion has been confirmed by comments made by various people ‘in the know’, such as former Commonwealth Attorney General, Senator Gareth Evans.

A consequence of the highlighting of criticism of judges and magistrates together with the increase of public scrutiny of the criminal justice system has seen the community lose confidence in the ability of the NSW legal system to dispense justice.

This discussion paper seeks to address these issues and suggest solutions that introduce transparency and accountability into the appointment process that, if successfully implemented, could restore public faith in the legal system.

This paper examines the current system of appointments and the systems used in other jurisdictions, particularly overseas. It concludes that the current system needs overhauling because it is government controlled and leads to political appointments and patronage; that it is opaque and impossible to determine the process of selection and appointment; that there is a perceived lack of consultation among relevant stakeholders; and that there is a perceived lack of depth in the pool from which judicial talent is drawn.

The paper recommends the establishment of a Judicial Appointments Commission to ensure a fairer and more transparent appointments process, while safeguarding against excessive politicisation of the Courts. It sets out reasons why such a system would provide a marked improvement in the selection process and help to restore public confidence in the justice system.

# Restoring Faith in Justice

## Promoting Transparency in Judicial Appointments in NSW

### Introduction

A fundamental tenet of the Australian system of government is the doctrine of the separation of powers, where the power of the government is vested separately in the executive, the legislature, and the judiciary. This separation is a hallmark of our constitutions and provides a vital protection for individuals in the face of unrestrained power. For this system to perform efficiently, however, all branches of government must work to ensure they are representative and independent, and acting in the best interests of the community.

There has been significant community concern recently over the manner in which persons are appointed to the New South Wales judiciary. Accusations of “jobs for the boys”, and political favouritism, in the arena of judicial appointments, have clouded public perceptions of the New South Wales judiciary. With the current process of judicial appointment clouded in secrecy, such community concerns are hardly surprising. With the level of community disquiet regarding judicial decision-making, it is important that there is a transparent process in place surrounding judicial appointments, which enjoys broad community support and engenders community faith.

### Background

It is important to note that concerns over judicial appointments are not new. Brazen political appointments were conceded by then Federal Shadow Attorney-General Gareth Evans who stated in 1981:

“[T]here is no point at all in the government of the day being coy or hypocritical about the appointment of judges. It should not relinquish the power of appointment to anyone else, and should use such opportunities to appoint to the Bench men-and women who are known to be in general sympathy with its own aims and perspectives.”<sup>1</sup>

One such appointment was that of the former Federal Attorney-General, Lionel Murphy QC. Gareth Evans’ approach represents what a lot of the community believe is occurring with judicial appointments in our states, a system that puts political sympathies above merit, and challenges the independence of the judiciary. Similarly, there has been considerable public concern in Victoria over the appointment of a significant number of Labor-affiliated persons to the judiciary in 2007<sup>2</sup> and similar concern has been expressed with respect to Labor appointments in New South Wales<sup>3</sup>.

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<sup>1</sup> Evans, G. *The Politics of Justice: An Agenda for Reform*, Victorian Fabian Pamphlet, Melbourne, 1981.

<sup>2</sup> For more information, view Whinnet, E. [Rob Hulls makes his mark on Courts](http://www.news.com.au/heraldsun/story/0,21985,22403490-2862,00.html). Herald Sun. September 12 2007 accessible at <http://www.news.com.au/heraldsun/story/0,21985,22403490-2862,00.html>

<sup>3</sup> Merritt, C. *Ex-PM’s brother lands plum law job*, The Australian, October 18 2007

From time to time the media highlight the performances of judges who are perceived to be erratic in their decision-making. The Sunday Telegraph reported that one former Workers Compensation Court Judge, who, like many of his former colleagues, was appointed a District Court Judge after the Workers Compensation Court was abolished, had more than 75% of appeals against his rulings in criminal cases upheld by superior courts<sup>4</sup>.

There have been other controversial appointments in New South Wales in recent years. Before the recent enactment of the *Local Court Bill 2007*, which sets eligibility for appointment as a magistrate, as either being a serving or former Australian judicial officer, or an Australian legal practitioner of at least 5 years standing, there was no period specified for eligibility, as long as a person was admitted as a legal practitioner in Australia. This allowed former Attorney General, Bob Debus, to appoint as a magistrate, a woman with a law qualification who had only been admitted as a legal practitioner for 6 months. Another well-known and controversial magistrate was allowed to resume duties after a long break and has continued to attract public criticism. As such, there has been a growing demand for a new approach which would ensure that Attorneys-General are aware of all suitable and willing candidates, and raise public confidence that candidates are assessed against consistent appropriate criteria.

### **The current system**

The power to appoint a person to a judicial office is found in s.47 of the *Constitution Act (1902) (NSW)* and realised in the laws of the respective courts of NSW<sup>5</sup>, which allows for the appointment of officers by the Governor. A person is qualified for appointment if the person holds judicial office or is an Australian lawyer of at least 7 years standing (Supreme and District Courts) or 5 years (Local Court). Removal of a person from judicial office is regulated by ss.52-56 of the same Act.

The law or process for appointing a magistrate, judge or justice is not written down in any rules, there is no formal process that must be adhered to; it is essentially an unwritten function of the Executive Government empowered by the State Constitution, what Lane described as an “untrammelled executive act”<sup>6</sup>. It should, however, be noted that the system is largely the same in most countries, “in most jurisdictions where judges are appointed by the Executive, no clear standardised procedures exist beyond statutory requirements of professional qualifications”<sup>7</sup>.

It is generally accepted that the process is steered by the Attorney General and his/her department with informal consultation amongst people with requisite knowledge in the area. Following this process a recommendation (in senior positions) would be forwarded to cabinet for approval and then that recommendation would be made to the Governor, who then appoints the person as a judicial officer. It is difficult to describe the process with any certainty because there is no written

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<sup>4</sup> Mercer, N. *A law unto himself*, Sunday Telegraph (August 24, 2006)

<sup>5</sup> *Supreme Court Act 1970 s.26, District Court Act 1973 s.13, Local Courts Act 1982 s.12*

<sup>6</sup> Lane, P H. *Constitutional Aspects of Judicial Independence*, Published in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) Judicial Commission of New South Wales.

<sup>7</sup> Skordaki, E. *Judicial Appointments: An international review of existing models*, Law Society, London, 1991, p. 12.

procedure that is followed, and no doubt the level of involvement by the Cabinet and Attorney General would differ from case to case.

For instance, the recommendation of appointments to the Supreme Court and District Court are often made to the Attorney General, by the Chief Justice of the Supreme Court or the Chief Judge of the District Court. While the Bar Association, the Law Society and Chiefs of divisions of the Court and other judges are sometimes consulted, political influence is still considered to be a major factor in determining appointments.

Magistrates' positions are advertised and applicants interviewed, but the Attorney General makes the formal decision. Recently, the Attorney General advertised for expressions of interest in appointments as a District Court Judge. It is not known whether recent appointments were made as a result of going through a selection process. There is no requirement for the Attorney General to accept the recommendations of any person or committee.

The system of judicial appointments that applies in other Australian States bears little difference to the New South Wales' system. The appointment and removal of judicial officers is authorised by the States' Supreme Court or Constitution Act and it is, much like in New South Wales, the Governor who officially appoints Judicial Officers on the recommendation of the Executive of the day.<sup>8</sup>

Victoria is the only state in the Commonwealth that has made any movement towards a more transparent system of judicial appointments, but most of the changes are token and achieve little in terms of real transparency. Victoria passed the *Courts Legislation (Judicial Appointments) Act 2004*, which broadened the criteria that needs to be met before a magistrate or judge is qualified for appointment, but in effect the legislation differs little from the New South Wales provisions.

Expressions of interest for judicial and tribunal appointments are sought in Victoria and advertised on the Courts and Tribunals website. Victoria, unlike any other state, actually sets out a criterion of attributes for successful judicial appointments, which states that:

“Judicial appointees possess personal qualities such as integrity, fairness, maturity, sound temperament and commitment to public service.

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<sup>8</sup> Victorian judicial officers are appointed under the *Constitution Act 1975* (Vic) s 75 and s 77(1) deals with the conditions of their removal; Queensland judicial appointments are authorised by the *Supreme Court of Queensland Act 1991* (Qld) s 12, s 33, s 195 (dismissal); Western Australia is authorised by the *Supreme Court Act 1935* (WA) s 7 (1), and removal is authorised by the provisions of The *Supreme Court Act* s 9 (1) or the *Constitution Act 1889* (WA), ss 54 and 55; Appointments in South Australia are authorised by *Constitution Act 1934* (SA) s 74, s 74 and s 75 deal with removal from judicial office; Tasmanian appointments are authorised by the *Supreme Court Act 1887* (Tas) s 5, and removal is subject to the *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1; The Northern Territory appoints Judges under the authority of the *Supreme Court Act 1979* (NT) s 32 (1) and their removal is controlled by s 40 (1); and the Australian Capital Territory appoints Judicial Officers under the authority of *Supreme Court Act 1933* (ACT) s 4 (1) and there is no provision for the removal or for tenure under those provisions.

Successful appointees are also aware of and sensitive to issues of gender, sexuality, disability and cultural and linguistic difference.”<sup>9</sup>

Although the Victorian system establishes criteria, the Attorney General and Executive are not bound by these guidelines, nor is there an independent body to ensure that these criteria are complied with. The Victorian Attorney General also has scope to appoint people who do not submit an expression of interest as their departmental site discloses in stating, “Candidates who have not submitted an expression of interest will not be excluded from appointment and extensive consultation will continue to occur as each judicial appointment is made.”<sup>10</sup>

This system has remained largely unchanged throughout the history of New South Wales and Australia, despite examples of reform internationally. It must be stressed that the public has no access to any record of interviews and as such are left to speculate on what may have transpired in the selection process. Public questioning of a nominee, as in the US, may be unacceptable, but secret private questioning of potential appointments is a denial of transparency in the process<sup>11</sup>.

### **Criticisms of the current model**

The current model of judicial appointments has come under criticism since at least the late 1970s, with numerous reports calling for an overhaul of the current model.

Criticisms of the present model generally fall into several categories:

1. It is government controlled, and as such leads to political appointments and patronage.
2. The appointment process, “carried on as it is deep within the secret labyrinths of the executive government” is opaque, it being impossible to determine the process by which a choice is made, or the reasons creating a culture of unaccountability.
3. Perceived lack of consultation amongst various stakeholders.
4. Perceived lack of depth in the pool from which judicial talent is drawn.

For some time now it has been claimed “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 preference of individual attorneys-general”<sup>12</sup>.

Former High Court Chief Justice Sir Garfield Barwick argued,

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<sup>9</sup> Expressions of Interest for Judicial Appointments, <http://www.courts.vic.gov.au/CA256EBD007FC352/page/Court+and+Tribunal+Appointments-Judicial+Appointments?OpenDocument&1=45-Court+and+Tribunal+Appointments~&2=45-Judicial+Appointments~&3=~>.

<sup>10</sup> Expressions of Interest for Judicial Appointments, *ibid*.

<sup>11</sup> Brennan, G. *The Selection of Judges for Commonwealth Courts*. Speech delivered Canberra 10 August 2007

<sup>12</sup> Lavarch, M. *The Appointment of Judges* in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 153, 153

“the time has arrived in the development of this community and of its institutions when the privilege of the Executive Government in this area should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may interfere 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...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, practicing lawyers, academic lawyers, and indeed laymen likely to be knowledgeable in the achievements of possible appointees. Such a body is likely to have a more adequate knowledge of the qualities of possible appointment than any minister of state is likely to have”<sup>13</sup>

Sir Garfield added to these comments two decades later, stating that,

“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”<sup>14</sup>.

The Judicial Council of Australia has stated,

“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”<sup>15</sup>

A former Queensland Judge of Appeal recently told an ABA Forum on Judicial appointments that,

“Attorney’s General 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”<sup>16</sup>

In the United Kingdom, during the implementation of reforms to the judicial appointment system, the Lord Chancellor (Lord Falconer) stated,

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<sup>13</sup> Barwick, G. *State of the Judicature* (1977) 51 ALJ at 494

<sup>14</sup> Barwick, G. *A Radical Tory*. Federation Press, Sydney 1995 p230

<sup>15</sup> *Judicial Appointments and Education: response from the Judicial Council of Australia* (1999) 73(7) Law Institute Journal 23 at 25

<sup>16</sup> Davies, G. *Why we should have a judicial appointments commission*, Australian Bar Association Forum on Judicial Appointments. Sydney, October 27 2006



“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 the Government. It must be transparent. It must be accountable, and it must inspire public confidence”<sup>17</sup>

The current Chief Justice of the High Court of Australia has recently expressed doubts about whether those who currently have the power to make appointments would willingly relinquish it. He also referred to criticisms of the new British approach made by Lord Bingham, a prominent member of the Judicial Committee of the House of Lords.<sup>18</sup>

## **Models of judicial appointment**

### **Career judiciary**

In most civil law systems, individuals train for a career either as a lawyer or as a judge. The bench is regarded as another arm of the bureaucracy where promotion through the ranks is determined on the basis of technical ability and seniority. Australia, as with all common law jurisdictions, does not have a ‘career judiciary’, and accordingly, such a model is inappropriate for serious consideration in the Australian context. It must be noted, however, that the UK has moved in this direction to reflect the government’s aim of promoting diversity through more flexible career paths. The system that now exists within the UK has an accepted path of appointment and promotion.

### **Popular election**

Popular election of judges occurs in 35 US states, although not at the federal level, and in no other common or civil law jurisdiction. Depending upon the details of the nomination process, it has been argued that popular election of the judiciary might lift the veil of secrecy currently surrounding selection, and could result in a judiciary more closely reflecting the gender and ethnic composition of the community. Proponents of such a model also argue that since judges are periodically required to submit themselves to the electorate, it ensures accountability. It is also argued that as judges make law, they therefore should be selected or chosen by the people who will be subject to, or affected by, these laws. However, political considerations would probably play an even larger role than at present. Similarly, it is also argued that this system does not consider any formal qualifications, and significantly enhances the politics of the court, citing how in some US states judges must not only participate in a party campaign, but must be almost constantly active in party politics, most commonly being elected to their position under a party’s banner. This model has little or no support in Australia.

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<sup>17</sup> Lord Falconer, C.L. *Constitutional Reform: A new way of appointing judges*, July 2003

<sup>18</sup> Pelly, M. *Gleeson calls for court time limits*, The Australian, February 1, 2008

### **Legislative ratification**

In the United States, Federal Judges are appointed by the President with the consent of the Senate. This model is unique to the United States, although was briefly considered in Canada in the late 1970s. Such a process has a number of distinct advantages over the secret, largely non-accountable nature of the current Australian method of Executive appointment. Senate ratifications are conducted in public, the nominees' professional and personal record is examined closely by a select committee, and the Executive is effectively made publicly accountable for their choice. Conversely, it is argued that politics would intrude into the judicial appointment process to an even greater extent than at present because "there would doubtless be a greater disposition to enquire into the philosophies of aspirants to the bench". Secondly, by the time you reach the point of ratifying or rejecting a single nomination, the seeking is over, and the single nominee will be confirmed unless something abominable can be charged against them. As a system, such ratification provides only for the avoidance of downright poor nominations, it does not provide for positively seeking out the best available nominees in the first place

As the Government effectively controls the Lower House in our system of responsible government, it would be appropriate for any such models in Australia to be vetted by the Upper House, as in the US model. However, unlike the US Senate, our upper houses are primarily a party political body, although such problems could technically be overcome.

Due to the belief that formal legislative ratification would cause unnecessary politicisation of the judiciary, this model has little support within Australia.

### **Formalised consultation**

It is a matter of logic that 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. As such, there is little dissent to the principle that the Executive should consult widely prior to making any judicial appointments. Critics of the current model state that this should be structured, as the public interest is not served by the current system of appointments, at least some of which may come from secret sources. As such, it has been raised that a requirement for such consultation be codified in statute, and that the Executive be obliged to consult specific bodies or persons prior to recommending a judicial appointment.

Formalising consultation represents an advance over the current system, however it is argued that it fails to overcome the central problems with the system of exclusive Executive appointment: the lack of effective criteria and the problems inherent in secret soundings by an unrepresentative group in the executive. Whilst policy may set out criteria for judicial appointments, it is questionable whether they would be applied consistently or appropriately, let alone in a transparent manner, under a formalised system of consultations. Moreover, this model, dependant as it still is upon secret soundings, would be unlikely to avoid current problems like patronage or unconscious self-selection. Detractors of this model state that merely increasing or formalising the scope of consultation is insufficient, and more transparent process is necessary to ensure equal opportunity in appointments for qualified candidates.

## India

In India, the President appoints all judges after consultation with different functionaries. In the case of a difference of opinion between the Chief Justice and the President, the opinion of the Chief Justice shall prevail, and no judge should be appointed without the concurrence of the Chief Justice, who, in turn, should consult the next two senior judges.

### **Judicial appointment commissions**

There has been significant support recently for the concept of a judicial appointments commission – an independent body, which would either recommend a list of judicial candidates, from whom a choice could be made, or which might even be accorded the right to choose the appointee itself. Such a body would be comprised of judges, practising lawyers, academic lawyers and laymen likely to be knowledgeable in the field. Advantages of such a model are said to include:

1. A more publicly visible process.
2. Enhancement of the position of the judiciary as an independent arm of government.
3. A stronger guarantee of scrutiny of possible candidates and the fields from which they may be selected.
4. Greater protection for the public against political or capricious appointments.
5. Consistency with international practices and standards.

Opponents of the judicial commission model have stated that a commission substantially representative of those already involved in the selection process would be likely to produce a list of candidates little different from those currently considered. It has also been claimed that such commissions provide the government with an arms length body that may still reflect their political biases and sympathies. A decline in the confidentiality of the process may have adverse consequences for the financial situation of possible appointees, and simply formalising the existing process may prove less costly and cumbersome.

Other strands of opposition have focused on the apprehension that the bench and the bar would effectively control such commissions. In the 1983 Boyer lecture, Justice Kirby opposed the creation of Judicial Commissions by stating that *“I hope nothing will come of it. It has all the hallmarks of an institutional arrangement that could deprive our judiciary of the light and shade that tend to come from the present system. In our judges we need a mixture of the traditionalist and the reformist. Institutionalising orthodoxy, or worse still, judges choosing Judges, is quite the wrong way to procure a bench more reflective of the diversity of our country”*.

More recently, criticism of judicial commissions has come from the conservative side of politics, yet along similar lines. Greg Craven, the current Vice-Chancellor of the Australian Catholic University and one of Australia's leading black letter law academics has suggested, *“I detect in such proposals the same strand of legal empire-building that underlies much of progressivist theory. Thus, nothing would suit progressivist lawyers better than to wrest from the executive government the task of constructing the nation's courts. Once this principle was firmly established, it would*

*be possible to fully implement a judicial structure which reflected the role of lawyers as a directive liberal aristocracy*<sup>19</sup>.

These comments would seem to more aptly apply to appointments to the appellate courts, notably the High Court, rather than Courts of first instance. These lower courts impose sentences and grant bail, the two main areas of controversy.

## **Case Studies**

### The United Kingdom

The United Kingdom moved to a system of appointments following formal consultation with a Judicial Appointments Commission (JAC). This process followed the introduction of the *Constitutional Reform Act 2005*, and the commission was established on the 3<sup>rd</sup> of April 2006.

This system of judicial appointments establishes an independent non-departmental public body to select judicial office holders. The process seeks to select candidates for judicial office on the basis of merit, through fair and open competition from the widest range of eligible candidates. Once Her Majesty's Courts Service advises the JAC that there is a vacancy in the judiciary, the JAC then advertises widely for the position in the national press, legal publications, the professional press and online. After applications are received the JAC conducts a process of assessment. From this stage a shortlist is prepared and candidates are interviewed and the panel makes an assessment of the candidates and compiles a report with their recommendations. These candidates are then recommended for appointment to the Lord Chancellor. The Lord Chancellor has the power to reject the recommendations for appointment, but must do so in writing with reasons.

This system has the virtue of flushing out candidates who wish to be appointed as judges, who may be able and practical lawyers, but lack political influence.

Introduction of the system in the United Kingdom has been met with a mixed response concerning the effectiveness of the JAC. Most of the criticism is confined to the shortage of judges being experienced, with 21 vacancies in the Queen's Bench and Chancery Divisions being advertised for fulfilment in October. Criticism has also centred on the operation of the bureaucracy of the Commission.<sup>20</sup> However, some information seems to be directly related to the stringency of the criteria that the JAC follows.

As difficulties emerging from the UK model show, it is imperative to give proper consideration to the criteria that will be applied for the appointment of magistrates and judges if New South Wales is to adopt a similar system.

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<sup>19</sup> Craven, G. *Reforming the High Court*. Speech presented to the Samuel Griffith Society Conference, Adelaide, 7-9 June 2007

<sup>20</sup> <http://www.judicialappointments.gov.uk/current/1327.htm>

### New Zealand

In 1998 New Zealand established a Judicial Appointments Unit to publicise all judicial vacancies (except the Court of Appeal) and receive applications, which are then kept on a register. Expressions of interest must be submitted, but an individual can also be nominated.

Lower courts in New Zealand assess applications and referees as well as using an interview panel. Following this process short lists are then submitted to the Attorney General.

A recent review of the process was commissioned in September 2002 by Sir Geoffrey Palmer, a former Prime Minister and Attorney General of New Zealand, who concluded that there needed to be a *“properly designed and resourced method of managing the appointments process”*<sup>21</sup>. This was to be achieved by a consolidated process managed by a new bureaucratic structure in the Judicial Appointments and Liaison Office.

### United States

Some states in the USA have moved from a model of direct election to what are known as ‘Missouri plans’ or ‘merit selection’. Based on the commission plan adopted in Missouri in 1940, which comprised lawyers, laypersons and a judge, these models establish commissions to select candidates for appointment by the state executive. Usually judges appointed are still required to stand in ‘retention elections’ after a short period on the bench. There is no set model for these commissions, but the American Judicature Society, who promotes the adoption of merit commissions, advocates the following model:

“Merit selection is a system whereby the state sets up a bipartisan nominating commission, including members of the legal community as well as citizens. When a vacancy occurs on the court, applicants submit their applications to this nominating commission. The commission then reviews the applications, conducts interviews with the applicants, and assesses the qualifications of each. The commission creates a list of names of those they feel are most qualified for the job (this list usually contains 3-8 names depending upon the state). This list is given to the governor, who chooses one of the people on the list and appoints that person to a judgeship. After serving, the judge is then regularly placed on the ballot for a “retention election” and citizens get to decide whether or not they will retain their seat on the bench.”<sup>22</sup>

Advocates of merit selection in the United States point to more qualified candidates and limiting interference by political parties in the judiciary as benefits of the system. This of course comes from a background where political campaigning for the judiciary is a common practice. Most opposition in the United States towards merit plans being established comes from quarters advocating the direct public election of judges, and criticises merit plans on the basis that the system of appointment is political and denies the rights of individuals to elect their judiciary. Such criticisms

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<sup>21</sup> Sir Palmer, G. *Memorandum: Judicial Administration Issues* (2002) 14

<sup>22</sup> What is Merit Selection? American Judicature Society, [http://www.ajs.org/selection/sel\\_faqs.asp](http://www.ajs.org/selection/sel_faqs.asp)

would be unlikely if a merit selection process was introduced in the Australian context.

### Canada

In 1988 Canada moved from a system of executive appointment, similar to that which exists in New South Wales, and moved to a commission system. The intention behind this move was to depoliticise the process and increase transparency in judicial appointments.

The Canadian system employs an advisory committee where interested applicants submit a personal history form outlining their interest in appointment. If a candidate isn't already a judge then they are assessed by the relevant judicial appointments advisory committee. If they are already a judge then the file cases they have decided are reviewed and commented upon. The committee's decisions are only advisory, and are not binding. In this system the Minister for Justice is still at liberty to make his/her own consultations. The committee in each province is comprised of 7 members, which includes a nominee of the provincial or territorial law and bar society; a nominated judge, a nominee of the provincial government and three nominees of the federal Minister of Justice. These are all chosen by the Federal Minister for Justice from a short list provided by the bodies. Members are appointed for two years, with a one year extension possible.

Candidates are assessed against established criteria, with consideration being given to diversity in appointments. The process is not purely insular, though, seeking consultation from the legal and non-legal community. Following this process the Federal Minister of Justice is given a rating of the candidate and the ultimate decision to recommend an appointment to Cabinet remains with the Minister. Rachel Davis and George Williams have noted that, "as a result, the role of the committees in practice is to identify inappropriate candidates rather than the most suitable appointment."<sup>23</sup> In 1996 the Canadian Government sought to rectify this problem by only appointing "recommended" candidates, but they have no obligation to do so.

### South Africa

The South African Constitution provides that the President appoints the Chief Justice, Deputy Chief Justice, President and Vice-President of the Supreme Court after consulting the Judicial Service Commission.

In the case of the Chief Justice and Deputy Chief Justice the President 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:

1. The JSA must prepare a list of nominees, with 3 names more than the number of appointments to be made and submit the list to the President.

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<sup>23</sup> Davis, R. and Williams, G. *Reform of the judicial appointments process: gender and the bench of the High Court of Australia*, [2003] MULR 32

2. The President may make appointments from the list, and must advise the JSA, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
3. The JSA must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list, if acceptable.

### Israel

Judges are appointed by the President, on the nomination of a Judges' Nominations Committee, consisting of:

- Three judges (President of the Supreme Court and two Supreme Court justices).
- Two members of the Knesset.
- 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 way forward in New South Wales**

Most common law countries have become conscious in recent decades of the desirability of making 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 based on merit.
- Expanding the categories and the pools from which judges have hitherto been appointed.

It is argued that Judicial Commissions are the optimum solution in ensuring a fair and transparent process, whilst safeguarding against excessive politicisation of the Court. Assessments of judicial appointments commissions have been positive in describing how they changed the judicial selection process. Whilst there is, as yet, no definitive empirical evidence on whether such commissions have increased the quality of judicial appointments, it is significant that they have been perceived as having this effect. This should increase public confidence. A review of the research in the US context concluded that the key difference between elections and a merit commission system is their impact on public confidence

The evidence from the US, Canada and South Africa all indicates that public confidence in commissions is generally very high, and that they are widely perceived as being a superior method of appointment. Commissions are commonly regarded as fairer than elections or exclusive executive appointment, and where they are used the appointments process appears to attract less criticism. The extent of support for the use of commissions is best evidenced by the fact that no Country, State or

Province, which has changed its appointment system in recent years has adopted any other method, and none which has adopted a commission has abandoned it<sup>24</sup>.

Support for judicial appointments among various stakeholders is generally quite high. The Australian Law Reform Commission<sup>25</sup>, senior members of the Judiciary<sup>26</sup>, Academics<sup>27</sup> and the Law Institute of Victoria<sup>28</sup>. Similarly, both Federal and Tasmanian Governments<sup>29</sup> and a Report commissioned by the NSW Attorney-General's Department<sup>30</sup> have argued in favour of such a model.

### **The composition and structure of a judicial appointments commission in NSW**

In determining the nature of the model of judicial commissions, several questions must first be resolved. These include the constitution of the authority to make a selection, the criteria to be used in the process, who should convene and take primary responsibility for the commission, tenure and remuneration.

The prime question regarding judicial commissions is whether the ultimate power to appoint should rest with the commission, or with the Executive. There remains a powerful democratic argument against such a transfer of power by Parliament from the executive to a non-elected body. The doctrine of responsible government supports the power of appointment resting with the executive, which is required to answer to Parliament and to the Australian people with respect to its exercise. In light of such considerations it is preferable to leave the ultimate choice to the Executive, but not without some restraint designed to ensure that merit is the prime consideration. A model to ensure such transparency and responsibility would be where the commission submit a list of three names from which the Executive is invited to make the appointment. If the Executive wishes to consider another person who is not listed, the Attorney General should refer the name of that person to the 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 General in writing why the listed names are preferred. If the government nevertheless proposes to appoint the person who is not listed, the Attorney General should inform the committee in writing of the Executive's reasons for such an action, and these reasons should be made publicly available.

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<sup>24</sup> Malleon, K. *The New Judiciary: The Effects of Expansion and Activism* (1999) p151

<sup>25</sup> Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Part 2, Report No 69 (1994) recommendation 9.5

<sup>26</sup> Barwick, Op cit. See also *Selection and Induction of Judicial Officers* in Michael O'Connell (ed), *Justice Delivery: Meeting New Challenges — Conference Proceedings: 17th Annual Conference of the Australian Institute of Judicial Administration: A Collection of Papers* (2000) 150 p 164–5 and Justice McPherson (as Chairman, Judicial Council of Australia)\_

<sup>27</sup> Winterton, G. *The appointment of Federal judges in Australia* (1986), 16 University of Melbourne Law Review 185, pp209-10

<sup>28</sup> Gawler, M., *Who Is to Judge?* (2000) 74(4) Law Institute Journal 3

<sup>29</sup> See former Commonwealth AG, Michael Lavarch, *The Appointment of Judges in Australian Institute of Judicial Administration* (ed), *Courts in a Representative Democracy* (1995) 153, and former Tasmanian AG, Peter Patmore, Department of Justice and Industrial Relations, Tasmania, *Judicial Appointments in Tasmania: Discussion Paper* (1999) <http://www.justice.tas.gov.au/legpoll/judicial.htm>.

<sup>30</sup> Attorney-General's Department and Department for Women, New South Wales, *Report of the Committee to Implement the Recommendations of the Report into Gender Bias and the Law: Women Working in the Legal Profession* (1996).



There are numerous criteria that have been proposed and implemented internationally. In the United Kingdom Justices are appointed “solely on merit”, with the Commission satisfied that they are “of good character”. The Commission also “must have regard to the need to encourage diversity”. Five key characteristics in assessing potential appointees are their intellectual capacity, personal qualities, ability to understand and deal fairly, efficiency and authority and communication skills.

Professor Williams, in arguing for a domestic model, has proposed the following qualities:

- Legal skills (including knowledge of the law, professional ability, intellectual capacity and experience).
- Professional qualities (such as advocacy skills, communication skills, analytical and forensic ability, knowledge of the rules of evidence and court practice).
- Personal qualities (such as integrity, high moral character, sympathy, charity, patience etc).
- Diversity (and a fair reflection of society).

The next question in determining the nature of any proposed Judicial Commission model is its establishment and composition. A Commission could be established by legislation or as an administrative body, whose members could be appointed by the Attorney General. Another model where the members of the Commission are chosen by a separate recommending body. In examining the composition, appointees could be selected as individuals or as representatives of stakeholder bodies, and a Commission could comprise judges, legal practitioners, academics, community representatives, members of government committees, retired judges, retired politicians, serving politicians and even lay-persons. One aspect that ought to be examined is the ratio of lawyers to non-lawyers.

Regarding tenure and remuneration, Commission members could be paid or the positions could be honorary. It must be noted that appointments occur relatively infrequently, and as such, tenure may be an important factor.

The final question on the makeup of the Commission is who should convene and take primary responsibility for its work. Options include the Attorney General, the Chief Justice, and the Director-General of the Attorney General’s Department.

## **Conclusion**

It is undeniable that the current system of judicial appointments is problematic at best. Appointments remain shrouded in secrecy, with no clear criteria, undermining public confidence in the judiciary. A judicial appointments commission addresses all these problems, without subjecting the judicial branch to unnecessary politicisation. Similarly, it does not interfere with the discretion of the Attorney General to appoint anyone to judicial office, whilst still providing advice and assistance in finding suitable candidates. The prevailing reason for the appointment of such a commission is that it has the ability to restore public confidence in judicial appointments and the state of the judiciary in New South Wales. As such it is certain that the time has come for New South Wales to establish an advisory judicial commission.

**Greg Smith SC MP**