*The Appointment of Judges**

The Hon. Michael Lavarch
Attorney-General

There are few institutions more important to a healthy representative democracy than the courts. Important, because of the power courts hold; the power to determine rights between citizens and between citizens and the state; the power to uphold the rule of law.

The superior courts of course not only apply the law. They shape it and change it. That is the essence of the common law. Under our Constitution the High Court is not only the senior common law court; it is this nation's constitutional court. As such it is entrusted to determine issues of power between governments and the constitutional validity of statutes.

A discussion of making and unmaking courts invites a process of deconstruction; that is, breaking something up into its constituent parts in order to arrive at an understanding of it.

I wish to examine the making of a court, at least that part dealing with the appointment process of judges.

It is appropriate that the process of appointment should be examined. The courts, like most fundamental institutions within our society, have been subject to intense public scrutiny in recent times.

Public confidence in institutions, such as the Parliament, the churches, the professions, business and employee organisations, can no longer be taken for granted. For many reasons, unquestioning support of institutions is a thing of the past.

So it is with Australian courts and judges. This is not to say that the vast majority of Australians don't respect the judiciary nor believe that the courts operate fairly and independently from the state.

But, be it overall perceptions of inadequacy of the legal system or sensationalist media coverage given to some individual decisions, it cannot be denied that the courts are being viewed through more sceptical eyes.

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Public confidence in the judiciary inevitably goes hand in hand with the quality of our judges. In turn, the functions of a court are most effective if combined with full public confidence.

The process of appointment, I imagine, like much of the process of government, is poorly understood by the general public. How someone becomes a judge is not the subject of common conversation at the local pub. The current processes involve no more than *ad hoc* and informal consultations.

If equity could be said to vary depending on the size of the Chancellor's foot, then the selection process, for Commonwealth judges at least, can alter with each Attorney-General. A constant feature is consultation with the court involved, mostly with the Chief Justice. The profession will be consulted but the degree and the formality depends on each vacancy and the candidate or candidates under consideration. There is no recognised mechanism for consultation with the non-legal community, although again this varies from case to case.

One year ago I released my discussion paper entitled *Judicial Appointments - Procedure and Criteria*.

In the paper I identified three goals for reform of the appointments process:

- to make the selection process visible and comprehensive and thereby increase public confidence in the judiciary;
- to ensure that appointees were of the highest possible calibre; and
- to identify all suitable candidates and ensure no artificial barriers were stopping the consideration of women and members of other groups on the basis of merit.

The starting point is and must always remain merit. For the parties appearing before our courts the quality of the justice they receive is the only really important thing. It is also the only real measure which the community has for assessing the success of the appointments process. If any other factor were allowed to override merit in the selection process, then the foundation of the institution would be irretrievably compromised.

It is worth noting here that a number of the submissions received in response to the discussion paper made the point that the high quality of appointments shows that there is no need to change the appointments process. That is, we now have meritorious appointments. But what is 'merit'? How do we judge it? Where do we find it? Will we know it when we come across it? These are fundamental questions which the selection process must answer.

There are four ways to find candidates for the judiciary. They are not alternatives as such, and can be, and are often, combined.

First - Headhunting

In essence this is what we do now The criticism is that we do not do it thoroughly enough It can always be done better, and although it might not seem to advance us much beyond the current arrangements, a more professional and businesslike approach to headhunting would be a useful tool if used with other appropriate methods

Second - the Establishment of a Specialist Body

Essentially, such a body would gather names and short-list candidates I suppose it might be likened to a specialist judicial headhunting agency In fact, there are a range of options for such a body They include a formal judicial commission structure, an advisory committee or a series of bodies formed within particular interest groups, such as the Law Council, which might put forward their list of nominations

The Ontario Judicial Appointments Advisory Committee provides a practical example of how such a body could work

For each judicial vacancy, the Judicial Appointments Advisory Committee gives the Attorney-General a ranked list of at least two candidates it recommends, with brief supporting reasons This list is arrived at after advertising and interviews or, if time does not permit, from candidates interviewed within the preceding year

The Attorney-General must only put forward for appointment a candidate who has been recommended by the Committee However, the Attorney may reject the Committee's recommendations and ask it to provide a fresh list
This system seems to work quite well in Ontario and in June this year amendments were passed to the *Courts of Justice Act* to give the Committee a statutory basis

The Third Option is Advertising

This provides considerable scope for broadening the recruiting field by ensuring as many suitable people as possible are aware of the vacancy and have every opportunity to indicate an interest

Amongst recent changes to the judicial appointments process in Britain is the introduction of advertisements for judicial vacancies below the level of the High Court In late September this year advertisements inviting applications for appointment to the offices of Circuit Judge and District Judge began appearing in the British press Interested people are invited to phone or write for an application form and further information Selected people are then invited to attend an interview with a three member panel consisting of a senior serving judge, a lay person and a senior official of the Lord Chancellor's judicial appointments group

The applications and the interview process are not necessarily all the information which will be available to the Lord Chancellor. He or she can choose to supplement this information with further inquiries. For example, he has already indicated that he intends continuing consulting as appropriate with both the profession and the judiciary.

A Fourth Option is a Register of Expressions of Interest

This involves a register that can be consulted as vacancies arise.

Combined with advertising, this will considerably widen the pool of people whom the government knows are interested in judicial appointment. Both methods would also have clear advantages in encouraging participation in the system and they would provide ways in which those who might otherwise be overlooked can flag their interest.

Registers of expressions of interest have been, and are being, established for a number of statutory offices in my portfolio. The largest of these is for full-time and part-time members of the Administrative Appeals Tribunal. I have also established a register of expressions of interest in appointment as Judicial Registrars of the Industrial Relations Court. The existence of these registers has been advertised in the national press. From the numbers of names received they are proving to be popular and effective in broadening the pool of possible appointees.

Broadening the pool can only be a start, however.

For judicial appointment, as with any occupation, it is essential to carefully develop accurate and comprehensive selection criteria. Selection criteria are a useful way of explaining in clear terms just what is meant by merit when it comes to judicial appointment. They should clearly spell out the areas for inquiry in determining the suitability of candidates for judicial office. They will make the test of suitability known to the wider community and provide benchmarks for people with an interest in the process to satisfy themselves that standards are being upheld.

I should add that there needs to be some flexibility. Some variation in criteria may also be needed from jurisdiction to jurisdiction. The needs of the Family Court, for example, are different from those of the Industrial Relations Court. Selection criteria should not be vehicles for discrimination, either negative or positive. They should clearly state that a person's gender, race, origin or other status is not relevant to appointment.

On the other hand, it is not inconsistent with the concept of merit that the means of identifying possible appointees should encompass ways of ensuring qualified women and people of ethnic or indigenous backgrounds are not overlooked.

Much has been said about the value of a judiciary that reflects the community that it serves. This has at times been confused with the concept of a judiciary that represents sectional interests in that society. I want to make it clear that I believe that no judge should ever be appointed because that judge represents a section of society.

But merit doesn't mean everyone being a clone of existing judges. Excellence comes from a wide diversity of backgrounds and experiences. Under the Ontario model I mentioned earlier, the selection criteria do mention the desirability of reflecting the diversity of Ontario society in judicial appointments

It is also worth noting that, in November 1990, the Ontario Attorney-General advised the Committee, in accordance with the government's employment equity objectives, that, if possible, at least 50 per cent of the new judges appointed should be women. The Attorney also stressed the importance that the government attached to appointing judges from the native community and other under-represented minority groups. Of the 39 judges subsequently appointed, 18 were women. The Committee reported that they were able to achieve this, without in any way compromising the high standard of excellence for which it looked, in all whom it recommended for appointment.

The discussion paper I released a year ago gives some guide to the qualities an Australian judge might possess. The starting point, of course, should be legal skills. Knowledge of the law, professional ability, intellectual capacity and experience are all important whether they have been acquired as a barrister, a solicitor, a government lawyer or through work as a magistrate or tribunal member.

Personal qualities are also important. The discussion paper lists these as integrity, high moral character, sympathy, charity, patience, gender and cultural sensitivity and of course, simple good manners. The drawback in developing a more formal approach to appointments is that with the possible exception of good manners, these all involve highly subjective assessments

Another criterion that may be capable of more objective assessment is advocacy skills. This includes analytical and forensic ability, knowledge of court rules and procedures, ability to quickly grasp and deal with novel arguments, knowing when to keep arguing and when to keep quiet, and the ability to be forceful and assertive when required.

The paper notes somewhat wryly that very few commentators on the subject have singled out practicality and common sense. I would have thought these would be high on anyone's list of criteria for judicial appointments

Similarly, oral and written communications skills have to be considered. An incomprehensible judgment is little use to anyone. Also important are administrative skills and efficiency, given the sheer size of the workload faced by most courts

Finally, there is the capacity to uphold the rule of law and act in an independent manner Independence is, of course, absolutely essential The Chief Justice of the High Court, Sir Anthony Mason, put it this way:

> Judicial independence is not a privilege enjoyed by judges, although judges sometimes mistakenly encourage the notion by invoking the privilege as if it were their own. Judicial independence is a privilege of, and a protection for, the people It is a fundamental element in our democracy, all the more so now that the citizen's rights against the state are of greater value than his or her rights against other citizens

The point about all these criteria is that there is nothing that should automatically disqualify anyone from any branch of the legal profession. The necessary combination of legal and advocacy skills, independence, efficiency, personal qualities and practicality and common sense could be found throughout the profession

In addition to the discussion paper on judicial appointments, the processes have been considered by the Senate Standing Committee on Legal and Constitutional Affairs. In its report on May 30 of this year, the Committee made three recommendations relating to judicial appointment, covering selection criteria, an advisory committee on appointments and what amounts to an affirmative action policy for all jurisdictions. These recommendations are broadly similar to the proposals raised in the discussion paper and the Government is considering its response in that context

The reform of the selection process really takes us to the point of finding possible judges, from suitable backgrounds and with recognised skills. It does not tell us about the candidates' views on particular legal questions This is a sensitive issue and goes to the doctrine of judicial independence and the separation of powers. The question is to what extent, if any, is it legitimate for the executive and legislature to seek to know a potential judge's opinion on matters important to the development of the law. Clearly, this is an issue most relevant to the High Court

In recent times there have been calls for some form of parliamentary examination of the executive's nominee for appointment to the High Court; in essence, a confirmation hearing. The argument is advanced that the High Court has such influence on the development of the law, particularly on issues of the scope of federal power and the sovereign power of Parliament, that it is legitimate for parliament to know in advance the general philosophy of a High Court judge. This has not an issue that has been fully addressed by a parliamentary committee or law reform body. To institute such a change would be a major development in the history of judicial selection It is a question which I believe will not go without serious debate in the next few years.

The Prime Minister will be announcing the government's response to proposals for reform of the judicial appointment process in the forthcoming Justice Statement, which I now expect to be handed down early next year. The Prime Minister's central role in the reform process demonstrates how important the task of restoring confidence in our justice system is to the Government's social justice agenda.

Reform of the appointment process is of course only part of the solution. Better and continuing education of the judiciary and court staff, enhanced channels of communication, and an increased client service focus will all help the courts to meet the needs and expectations of the community. Those courts will also be closely linked with a range of external service providers who offer a variety of alternatives for people who prefer to try to resolve their difficulties outside the adversarial system. These alternative providers will be subject to a range of consumer protection measures so that people can seek their services with total confidence.

Consumers of court services and those of non-court providers will be an increasingly sophisticated and informed market. The opportunity to seek some way to resolve disputes should be available to everyone regardless of wealth. Court forms and statutory requirements will need to be easy to follow and to ask questions about, so there is real freedom of choice. Within the courts themselves, the range and sophistication of hearing alternatives and counselling opportunities should mean that fewer cases proceed to a hearing.

Parties will be able to approach the courts with a measure of confidence, knowing they will be helped to make a real contribution to resolving their own difficulties wherever possible. Part of that confidence will flow from the knowledge that the courts are being presided over by people they can relate to and they feel do understand and appreciate the experiences of everyday life which brought them to the door of the court.

That is what the government is working towards. The Australian Institute of Judicial Administration is making an important contribution to achieving that goal.