THE 2012 JOHN BRAY ORATION

*The Hon John Doyle AC QC**

CHOOSING OUR JUDGES

Sometimes criticism of judicial decisions leads to proposals to change the method of selecting and appointing judges and magistrates. Sometimes proposals for change are prompted by other factors.

The arguments for change usually reflect familiar themes. Some are concerned mainly with process. The appointment process should be written down, made public and should be open to public scrutiny. A variant on this process argument is an argument that the role of the elected government should be reduced or eliminated, and that the power to appoint should be given to a commission or committee, independent of the government. Other arguments reflect a wish to change the composition of courts. When you think about it, this must be with a view to changing the decisions reached. This, however, is rarely spelt out.

As we all know, the judiciary is largely male. This is changing rapidly. The number of women appointed to the bench is increasing steadily. Some people want the composition of the judiciary to reflect the composition of South Australia's population. They are rarely specific about how far they would go in that direction. Do they mean a bench that reflects the gender balance in the community? Do they want different ethnic groupings reflected in the bench? Do they want judges from rural areas as well as from urban areas? One could go on and on. The short answer to this is that it is impossible to insist on reflecting the composition of our population, if suitability for judicial office is to remain the primary criterion for appointment.

Another argument used is that judges should be more in touch with the community. What this often means is that the judge should agree with the speaker or writer. Some people want to influence how judges decide cases. They think that judicial attitudes are too much influenced by the professional background of members of the judiciary. So they want to change the composition of the bench with a view to changing the attitudes of the judiciary, and the decisions that the judiciary make.

The effect on our judiciary and its decisions of changing the method of selection is one of the great unknowns. Advocates of changing the selection methods sometimes assume that this will change the decisions that the court makes. No-one really knows. However, putting this to one side, it is worthwhile considering whether our method of selecting judicial officers could be improved.

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Sometimes the debate about choosing judges results in suggestions that judges and magistrates should be elected. The argument runs along these lines: We are a democracy, judges are public officials, and therefore they should be elected. Judges should be accountable, and so the people should be able to remove them. Elections would make the judiciary more representative. The need to get elected, and the risk of not being re-elected, would make the judiciary more responsive to public opinion. Judges are elected in America, so why not here?

Elections are said to achieve democratic legitimacy, accountability, a representative bench and a responsive bench. People who promote electing judges and magistrates think that it will achieve in one hit all of the changes that they want. They draw on the American experience because America is the only democracy, so far as I am aware, that elects its judges. Before dealing with these arguments, it might be helpful if I outline how we appoint judges and magistrates in South Australia.

Throughout Australia judges and magistrates are usually appointed by the Governor, acting on the recommendation of Cabinet or of the Attorney-General. So, the real decision is made by Cabinet or by the Attorney-General. Although the formal decision is made by the Governor, the Governor has no choice but to accept the advice of the Minister or of Cabinet.

How does Cabinet make its decision? The process is usually for the Attorney-General to make a recommendation to Cabinet. The extent to which the Cabinet involves itself in the decision will vary from place to place.

How does the Attorney-General arrive at a recommendation? There is some flexibility in this. I believe that throughout Australia the practice is fairly uniform. In South Australia the Attorney-General usually consults with the Chief Justice and, if the appointment is to a court other than the Supreme Court, with the judicial head of that Court. The Attorney consults with the President of the Law Society and the President of the Bar Association. I understand that the Attorney may consult with the Shadow Attorney-General, with the Solicitor-General, the Crown Solicitor and the Director of Public Prosecutions. Then the Attorney-General is at liberty to consult with other people. I assume that these would include fellow ministers and selected people within the community.

The process is not a public one. However, a wide range of views will be obtained.

The privacy of the process is said to be important. Some people would not comment frankly on particular people under consideration if they knew that their opinions might become public. It could be unfair to a person being considered for a judicial appointment if adverse comments about that person were to become public. I recognise the concerns of those who object to the privacy of the process but there is something to be said for it.

I emphasise that the judicial head of the relevant court does not have the final say. By convention the Attorney-General consults with them, but need do no more than consult. The expectation is that competence and personal integrity are the most important

criteria. If two candidates were in these respects equal, it is legitimate for the Attorney to make a choice on the basis of, for example, gender or background. The process has worked well, even though it is informal and not controlled by law, and not conducted in the public gaze. At no stage is a list of possible appointees published.

There have been suggestions for change.

One is that a statutory commission should be established with the power to make appointments. It might include senior judicial representatives, the Attorney-General, and representatives of the public. Another occasional suggestion is that such a commission be established to draw up a list of persons, with the government still making the choice, but being obliged to choose a person from the list, or, as an alternative, to give reasons if a person not on the list is chosen.

My opinion is that each of these proposals is a reasonable one, but I am not sure that either of them would amount to a significant improvement over the existing system. For what it is worth, I favour the second one of these. I believe that the government has a legitimate role in the appointment of the judiciary, and giving the government a role adds a democratic element to the process.

I return to the question of elections. What is the position in America? In America Federal judges — judges appointed by the United States government — are selected by the executive as occurs here. My belief is that the process is more openly political and more public than it is here. Political factors, and the attitudes of candidates, are canvassed much more openly than is the case in Australia. This probably reflects, in part, the fact that the role of judges in interpreting constitutional rights gives them a greater influence on political decision making.

A distinctive feature of the United States process is the process of confirmation hearings before a Senate committee. At these hearings candidates are questioned about their approach to issues, and their past can be raked over, as has happened on more than one occasion. Not all candidates survive. It seems clear that the process is not a pleasant one for those who have to go through it.

It is only at the state level that judges are elected in America. Articles that I have read state that judicial elections have been used in America since the middle of the nineteenth century. In 39 states, some or all judges are elected.[1] About 80 per cent of all state judges face election at some point in their career.[2] I put it this way because in some states you have to go through an election to be appointed at all, in other states you can be appointed to the bench but have to go through an election to secure a further term.[3] The importance of elected judges emerges from the fact that apparently over 90 per cent of all court business in America occurs in state trial courts.[4]

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1 Justice Margaret H Marshall, 'Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law' (2002) 24 *Sydney Law Review* 455, 464.

2 Ibid.

3 Ibid.

4 Ibid.

The Chief Justice of Wisconsin, Shirley Abrahamson, is an elected judge. She supports judicial elections. This is what she said, having stood successfully at three elections, each of which she said was hotly contested:

> The last campaign involved such lofty issues as the appropriateness of my sponsoring a staff aerobic class in the courtroom after hours, my decision to hang a portrait of the first woman to be admitted to the Wisconsin Supreme Court bar, and the removal of computer games from justices' computers. I was also the target of television ads challenging my votes in specific cases involving a school locker search, a *Terry* stop, and the sexual predator law. More than $1 million was raised by both candidates, and the election set a record for Wisconsin judicial campaign spending. The most fun thing about the race was winning it.[5]

You may be interested to know that in America the election of judges is opposed by many, including organisations representing the legal profession, and by many Federal judges and organisations associated with the Federal judiciary.

Chief Justice Abrahamson put several arguments in support of electing judges, which I will mention briefly. First, she makes the point that there is no perfect system for selecting judges. Every system has its strengths and weaknesses.[6] I agree. She says that the elective system can be an educational experience for both the judges and the electorate.[7] I must say I doubt that, but I am not really in a position to differ. She makes the point that in a democracy, an unelected judge cannot justify overturning legislation adopted by a democratically elected legislature.[8] I firmly disagree with this proposition. She says that no study has proved that elected judges perform poorly compared with appointed judges.[9] She says that elections are not a threat to judicial independence, as long as judges are true to their judicial oath.[10]

Chief Justice Abrahamson, Roy Schotland[11] and James Sample[12] make some valid points. The first point is that in an elective system much more information is out in the open than is the case in an appointed system.[13] Both systems (that is, our system and the American system) are said to be partly politicised, but one of them, the

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5 Shirley S Abrahamson (Chief Justice), 'The Ballot and the Bench' (2001) 76 *New York University Law Review* 973, 975.

6 Ibid 976.

7 Ibid 977.

8 Ibid 979.

9 Ibid.

10 Ibid 984.

11 Roy A Schotland, 'New Challenges to States Judicial Selection' (2007) 95 *Georgetown Law Journal* 1077.

12 James J Sample, 'Court Reform Enters the Post Caperton Era' (2010) 58 *Drake Law Review* 782.

13 Abrahamson, above n 5, 993–94.

elective system is open about it.[14] Another point made is that in an elected system greater diversity can be attained because people who would otherwise be on the outer and unlikely to be considered, can run for election and obtain the position that they would otherwise never obtain.[15]

I am opposed to the election of judges. It may work satisfactorily in America, although as I will tell you shortly, things are happening in America that cause supporters of elections to have some doubts. But even if it can work satisfactorily, I do not believe we could graft the election of judges onto our system. We need to remember that in America the election of judges occurs in a society in which many officials, whom we would appoint, are elected to office, and there is now a long tradition of judicial elections.

This is why I think elections are inappropriate.

A judge is appointed on the basis of the judge's professional skills, personal integrity and independence of mind. I am not confident that a process of election would result in appointments being made on the basis that these are the decisive criteria. In an election other factors are likely to play a greater part. Factors that might become relevant are the ability to raise campaign funds, being more photogenic and handling the media better. No doubt you can think of other things that would be relevant to an election. Also, imagine the outcry if it was said that we should elect people to fill senior surgical positions in the public hospitals. Our tradition is that professional positions are filled by appointment.

Next, there is the question of whether the best people would be willing to stand for election. I suggest that a number would not.

A particular point I make is the importance of the independence of the judiciary. Experience suggests that if there are elections, a candidate for judicial officer will have made promises or indicated attitudes to campaign supporters or to voters, and will have been helped financially and in other ways. Is there not a danger that successful candidates will come to the bench owing obligations to particular interest groups? This would be unsatisfactory in my opinion. Also, would not candidates be seen as representing particular interest groups, at least on particular issues raised in an election campaign? That would be unsatisfactory. Judicial independence would be compromised.

Imagine that you had the misfortune to appear before a judge who was elected on a platform of being tougher on crime, and who is shortly to face re-election. The circumstances look rather suspicious, and you are pleading not guilty. Would you be confident that such a judge would try your case and sentence you, uninfluenced by the fact that, with an election looming, an acquittal might be seized on by the judge's opponents as indicating that the judge is 'soft on crime'?

14 Schotland, above n 11, 1086.

15 Ibid 1090.

In the paper to which I referred, Chief Justice Marshall of Massachusetts acknowledges that there are some recent developments that cause concern. She says that since the late 1980s judicial elections, which had previously been low key, have become 'dog fights of a high order'.[16] This is because various interest groups have realised the significance of the judiciary in relation to the interests that they promote. They have begun to support and oppose particular judges standing for election by reference to their attitude on the issue that concerns them. Groups she mentions are trial lawyers, pro-business groups, pro-abortion and pro-life organisations. She says that in 2000, in the five States with the most hotly contested judicial elections, almost $35m was raised by the candidates. To me, as to her, that is a troubling fact.[17]

The most recent figures I have are in Schotland's article. He says that in 2004 there were 49 judicial seats up for election, not counting retention elections. Candidates raised $46.8 million, and there was a further $12 million spent on television advertisements funded directly, and not by candidates. In nine of the 16 States where there were elections, new records were set for expenditure.[18] Television advertisements were used in all of the States. Chief Justice Marshall also says that 'pugnacious advertisements' by candidates are cheapening judicial office.[19] In his article Schotland gives some interesting examples. Each of them is a little dated, so perhaps things have improved.

First of all, in California in 1984 an advertisement boasted '[s]ent more criminals — rapists, murderers, felons — to prison than any other Judge in Contra Costa County history'.[20] Another from 1994 announced '[o]ver 90 per cent convicted criminals sentenced … prison commitment rate is more than twice the State average'.[21] Finally, Chief Justice Marshall mentions that in a recent case the United States Supreme Court held unconstitutional a common state statute, which prohibited candidates for judicial office from 'announcing his or her views on disputed legal or political issues'.[22] That means that candidates can now be driven to indicate their views on issues likely to come before them. They can no longer say that the law forbids them to do so. To me it is most undesirable for that to happen. First of all, it can give rise to a serious concern about the issue of independence. If I am elected with the backing of a pro-life lobby, having stated that I am strongly opposed to abortion, what happens if a person comes before me charged with an offence of that kind?

All judges have opinions, and often they are opinions about issues that come before the court. By and large people accept that judges can put their personal opinions and attitudes to one side, and judge a case fairly. But if a judge has made a public

16 Marshall, above n 1, 465.

17 Ibid 465.

18 Schotland, above n 12, 1080.

19 Marshall, above n 1, 465.

20 Schotland, above n 11, 1099.

21 Ibid.

22 Marshall, above n 1, 466.

commitment in the process of getting elected, it is too much to think that people will accept that the judge will not be influenced by that commitment. Of its very nature, it is a commitment relating to how the judge will perform the judicial office.

Chief Justice Abrahamson also acknowledges some causes for concern. The first of these is a public perception that judges are influenced by campaign contributions. As she rightly says, on a matter like this perception is as important as reality.[23] If voters think that donors are calling the judicial tune, confidence in the judiciary must be undermined.

Second, she remarks that judicial elections have become very expensive. Candidates are putting their own money into their elections.[24] She makes the telling point that a position on the bench might become limited to the wealthy, if the cost of elections reaches the point at which only the wealthy can afford to compete.[25] That would be a disastrous outcome from a method of appointment based on the theory of democracy. Costs might close off a judicial career except to those who are wealthy or who can attract significant financial support. How can this be said to promote diversity? If anything, it narrows the pool of candidates.

So you can see that electing judges, while at first blush it might seem attractive, raises a number of problems.

Where do we go from here?

My opinion is that in Australia the only realistic possibility for change is the establishment of a committee or a commission that has the power to select a list of candidates from which the government must make its choice. I doubt whether any Australian government would go further than that. The composition of a selection committee or commission, and the vesting of the power of appointments would be contentious. The debate about who chooses judges would simply shift from debate about the government making the choice, to debate about a committee making the choice. There would not be any net gain.

I am confident that, over time, we will see an increasing number of women on the bench. The gender balance is changing, and will do so whatever method of appointment we choose. I am also confident that the background of the judiciary is changing, reflecting the change in the intake in our universities and law schools.

I can assure you that the judiciary is a diverse group of people. Our backgrounds vary greatly. We are not mainly 'silver spooners'. The attitudes of the judiciary on social issues are very mixed. However, it is inevitable that we reflect our professional background. That should not be seen as a bad thing. I want my doctor's approach to treating me to reflect his professional background. Unfortunately, in some quarters

23 Abrahamson, above n 5, 995.

24 Ibid.

25 Ibid.

there is an impression that judges are all elderly men who are deeply conservative in their approach, except when they make an adventurous decision of the kind the High Court sometimes makes, and then the problem is that they are not conservative enough. We cannot win.

Time will tell, but for these reasons I suggest that if you want to elect a judge, go to America to live.