Judging the Judges

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Improving the procedures for judicial appointments to the High Court — the Australian Democrats' model.

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The High Court of Australia is the nation's highest court. High Court decisions affect the lives of all Australians. Accordingly, the procedures for the appointment of judges to the High Court are of significance. Public confidence in the court and its pronouncements depends on a perception of its judges as the most meritorious and independent individuals. Such perception depends on appointment procedures that are open and depoliticised. New procedures are necessary to abate the apparent decline in confidence in the court, evidenced by public reaction to recent High Court decisions including the *Wik* judgment.

Current appointment procedures

High Court of Australia

Existing procedures for the appointment of judges to the High Court are of concern. They are archaic and clouded in secrecy. The legal requirements are minimal, discretionary, and inadequate.

In s.72, the Commonwealth Constitution sets out only two requirements for the appointment of High Court judges:

- appointments must be made by the Governor-General in Council; and
- appointees must be less than 70 years old.

The *High Court of Australia Act 1979* (Cth) sets out two further requirements in ss.6 and 7:

- the Commonwealth Attorney-General must consult with the Attorneys-General of the States before an appointment is made; and
- a candidate must have served as a judge of a court or must have been admitted as a barrister or solicitor for not less than five years.

In practice, limited, informal consultation takes place and the Prime Minister and Cabinet, who advise the Governor-General, make the decision on the Attorney-General's recommendation. The State Attorneys-General may not have nominated the candidate appointed.

The Commonwealth executive government therefore enjoys a wide discretion in the appointment of judges to the nation's highest court, exercising, in effect, monopoly control. The public must *trust* that the Attorney-General consults widely to determine the most eminent and capable candidate. The current federal Attorney-General concedes that assessing a candidate's suitability is a personal judgment and that the existing appointment system depends on his having the connections and the background to carry out the selection. The current system relies heavily on existing networks in the legal establishment. The informality of the networks is cause for concern. The consequence of the existing system is a history of predominantly senior, white, male, eastern States barristers on the High Court bench, and negative public perceptions. Is merit really always the basis of such appointments? Or are the appointments political — made to serve the ends of the incumbent executive government?

The Australian Democrats' primary concerns with the current system of High Court appointments are:

- *breach of the separation of powers doctrine.* Judicial appointments by an unchecked executive involve executive intervention in the judicial branch and breach the separation of powers doctrine.
- *politicisation of appointments.* This was most clearly evidenced by the Deputy Prime Minister's recent call for the appointment of 'Capital 'C' Conservative judges'.
- *secrecy.* Details about candidates and the qualities required of them are typically not revealed.
- *lack of external scrutiny of appointments.*

Other courts

Appointments to other Federal and State courts are made using procedures comparable to those of the High Court.

Alternative procedures for appointment

A greater role for the States

State leaders have expressed the view that the States should have greater influence over appointments to the High Court.[1] Their suggestions range from increased control through a formalised consultation process, to a majority veto over Commonwealth selections. They include each State in turn nominating alternative nominees, and appointment by a committee comprised of the Federal and State Attorneys-General. Proponents point to the degree of regional involvement in the appointment of judges in the United States, Germany, the Russian Federation, Malaysia and Canada. However, these views have been rejected by the Prime Minister and the Federal Attorney-General. The Attorney-General characterised the High Court as a national court, performing national functions, and accordingly, the responsibility of the national government. He regarded greater State participation, particularly any form of veto power, as likely to politicise the appointment process.

Yet since the High Court's new Chief Justice took his position on the bench this May, five of the Court's seven justices are from New South Wales. This raises the question whether High Court appointees should represent, or at least reflect to a reasonable degree, the various States of the federation. The principle of judicial independence dictates that judges be loyal to the rule of law and not to any person or group. Members of the High Court cannot be representatives of, or accountable to, any section of the community. However, it can be argued that appointments should ensure the balanced composition of the judiciary, as far as is sensible, geographically, ideologically, socially, and culturally. 'The judiciary is a branch of the government, not merely a dispute resolution institution. As such, it cannot be composed in total disregard of the society.'[2] A 'fair reflection principle' flows from the requirement that the judiciary be and be seen to be independent.[3] The Australian Democrats' view is that some greater diversity of State background among High Court judges, which state participation in the appointment process might promote, could improve the bench, at least in the public mind.

A greater role for parliament

Proposals concerning parliamentary involvement in the appointment process range from greater legislative influence and supervision to a veto power over executive decisions. Judicial appointments to the United States Supreme Court, and in European nations including Germany, Switzerland and Italy, are subject to parliamentary supervision. However, parliamentary participation would produce political debate that is unlikely to increase public confidence in the federal judiciary. The Houses of Parliament are divided along party lines and might not be independent scrutineers of a candidate's qualities. The Attorney-General has rejected a role for Parliament. He noted that US Senate confirmation hearings conducted in respect of nominations to the Supreme Court are highly politicised. Nominees are subject to wide-ranging inquisition that may deter some qualified candidates from allowing themselves to be nominated. They are expected to give answers, in the abstract, to questions that might arise later for consideration on the bench in a factual context. In contrast, Canadian commentators regard it as appropriate to interrogate judges before they are appointed. Rigorous questioning of candidates' views about the theory and practice of constitutional law, in particular, is advocated because 'it puts justice and the values on which the [Canadian Charter of Rights and Freedoms] is based at risk when the commitment of those nominated to the Court is ambiguous and clouded in doubt.'[4]

The Democrats' view is that the need for the three arms of Australian government to be independent precludes a greater role for Parliament in High Court appointments. Parliamentary appointment raises concerns analogous to those raised by executive appointment.

A greater role for the public

Proposals about public participation in the appointment of judges to the High Court include:

- consultation;
- confirmation of candidates at a referendum; and
- popular election of judges by a majority of Australians.

Judicial appointment procedures in the United States are often cited as the model. Such proposals have also been opposed by the Attorney-General. In particular, the popular election of judges was rejected for its potential to be very expensive and time-consuming. Further, it would be very difficult for the community to make an appropriate decision on who should be appointed. Although those elected would have popular appeal they might not have the qualities required to fulfil judicial functions to the appropriate standard, and the selection process would be politicised. The Australian Democrats do not support the American system of electing judges: 'all of the campaign hoopla that goes with it is not something that sits comfortably with the Australian political system.'[5]

Recent proposals for reform

Attorney-General Daryl Williams — 1997

Addressing the Monash University Law School Foundation on 'Judicial Independence and the High Court' in May 1997, the Attorney-General rejected major reform to the existing procedures for appointment to the High Court. He proposed two minor changes to the system:

- greater transparency by explaining to the public the nature of the selection process; and
- more extensive consultation by the Commonwealth Attorney-General.

Mr Williams perceived the major flaw in the existing system was that consultation was inconsistent, often perfunctory. His view was that more radical reform was unnecessary if the consultation process was broadened and standardised. He proposed that the Commonwealth Attorney-General would advise the State and Territory Attorneys-General of an impending vacancy on the High Court bench, and invite them to consult widely, identify worthy candidates, and provide a list of nominees. The Commonwealth Attorney-General would then further consult a wide group of informed people, including:

- members of the High Court, Federal Court and Family Court;
- ex-judges;
- leaders of the legal profession; and
- Ministers and other parliamentarians, including the Leader of the Opposition, shadow Ministers and non-government parliamentarians.

On the basis of State nominations and his consultations, the Attorney-General would advise Cabinet of the best person for the job, and an appointment would be made.

However, there is no intention to give Mr Williams' proposals statutory force. The Commonwealth Attorney-General has no obligation to comply with the requirements for greater transparency and more extensive consultation. The Democrats' concerns regarding the existing system of High Court appointments are not addressed by the minimal reforms proposed by Mr Williams.

Supreme and District Courts (Appointment of Judges) Amendment Bill (SA) — 1994

The Australian Democrat Sandra Kanck introduced this Bill into the South Australian Legislative Council in September 1994. It took the lead in Australia in setting up a community-based committee to assist in the selection of judges to State Supreme and District Courts. The Bill was defeated on its second reading in November 1994 but is nonetheless worthy of consideration.

The Bill proposes the establishment of a Judges Selection Committee, composed of 14 legal and community representatives. The Committee is invested with four main functions:

- to *establish and maintain a register* of people who wish to be considered for appointment as a judge;
- to *advertise* for applicants to the Register;
- to *select three candidates* for a vacancy; and
- to *report* to the Governor about the people selected, and the methods by which that selection took place.

The South Australian Bill makes further provision for a Register of interested people, the advertisement of positions and the publication of the specific selection criteria to be considered by the Judges Selection Committee. The provisions for registration and the advertising of vacancies mirror recent developments in the procedures for appointing lower court judges in Great Britain.

Senate Legal and Constitutional Affairs Committee — 1994

In its May 1994 report on 'Gender Bias and the Judiciary' the Senate Standing Committee on Legal and Constitutional Affairs made various proposals for reform to the existing procedures for appointment to the High Court. In particular, that 'the Commonwealth Attorney-General should establish a committee that would advise him or her on prospective appointees to the High Court'. The committee was to include representatives of the judiciary, both current and retired, lawyers, representatives from legal professional and legal aid organisations, academics and lay people. As a matter of policy, its membership was to be diverse. The Committee regarded this as the best way to ensure that consultation was formalised and lay views were put forward.

Former Attorney-General Michael Lavarch — 1993

In a 1993 discussion paper about judicial appointments the then Commonwealth Attorney-General Michael Lavarch rejected the popular election of judges and any legislative ratification of judicial appointments. However, he gave detailed consideration to both retaining the present method of appointment but requiring the Attorney-General to consult various people or bodies, and establishing a commission to recommend suitable appointees to the Attorney-General. His proposals for consultation do not vary significantly from those made more recently by Attorney-General Williams, and like Mr Williams' proposals, do not remedy the principal defects of the existing system. In contrast to Mr Williams, Mr Lavarch recognised that an appointments commission to 'advise the Governor-General and Attorney-General on suitable candidates for judicial office' would have several advantages, including:

- visibility;
- enhancement of the position of the judiciary as an independent arm of government by increasing public confidence in the manner and quality of appointments;
- a stronger guarantee of scrutiny of possible candidates and the fields from which they may be selected;
- a measure of protection for the public against political or capricious appointments; and
- consistency with international practices and standards.

It is the Australian Democrats' view that any disadvantages of an appointment commission, which Mr Lavarch also considered, are avoided by carefully addressing the composition of the commission. In particular, questions to be considered include:

- who should be on the commission;
- what is the desirable ratio of lawyers to non-lawyers; and
- who should convene and take responsibility for the work of the commission.

Australian Democrats' model for appointment of High Court judges

The Australian Democrats believe that a modified version of the South Australian reform proposals, having regard to the unique features of appointments to the High Court, must be implemented for full public confidence in the court to revive. Three principles underlie the Democrats' model:

- transparency and openness in appointments procedures;
- merit as the fundamental selection criterion; and
- an absence of obstacles for women and members of other minority groups.

Ultimately, the appointment process must be depoliticised. This will be achieved by implementing the Democrats' two-pronged model.

The two-pronged model

The first prong of the Democrats' model is the creation of a *Judicial Appointments Committee.* The second prong is the *publication of selection criteria in a Protocol periodically reviewed by the Committee.* The two-pronged model for judicial appointments can operate with reference to State Supreme Court and Federal Court judges as well as High Court judges.

As to the first prong, as early as 1977 in Australia, Chief Justice Barwick in his inaugural 'State of the Judicature' address recommended the creation of a judicial commission to advise the executive of people suitable for appointment to the High Court. The Chief Justice saw the role of such a body as inevitably curtailing executive privilege and restoring balance to the Australian political system. Chief Justice Gleeson, who recently took his place on the High Court bench, expressed the same view in 1979, as have several commentators since.[6] Their proposals mirror those of the South Australian *Supreme and District Courts (Appointment of Judges) Amendment Bill*, the Senate Legal and Constitutional Affairs Committee, and former Attorney-General Lavarch. The International Bar Association supports the creation of independent judicial bodies to appoint appellate judges. Judicial Advisory Committees, or analogous bodies, operate in various jurisdictions, including Israel, Zimbabwe, Namibia, 35 American States, and six Canadian provinces and two territories. The Australian Democrats' model draws together the strengths of commentators' proposals, and of committees working elsewhere.

The Judicial Appointments Committee should be composed of at least seven members, including:

- the Commonwealth Attorney-General;
- one member of the Australian Bar Association;
- one member of the Law Council of Australia;
- one academic (specialising in constitutional law);
- one community member; and
- two State representatives.

Although not so diverse as that of the South Australian Bill's proposed Committee, the composition of the Democrats' Judicial Appointments Committee ensures a role for both legally trained people, and lay people, and is not too large to be unworkable. With a membership of around seven, maintaining confidentiality during the early stages of the Committee's work, before recommendations are made and the reasons made public, would not be difficult.

The Judicial Appointments Committee would assume the role currently played by the Commonwealth Attorney-General in appointments to the High Court. Accordingly, its first function is to consult widely with interested and informed parties about people suitable for appointment. Consultation is necessary to the extent Attorney-General Williams proposed in his May address to undertake in future High Court appointments. The consultation is to occur in conjunction with the advertisement of positions and receipt of nominations.

Next, the Committee is to play a part in selecting appointees. A Committee might nominate the one person best qualified for the job, or might forward a short-list of candidates to the Governor-General in Council. Further, its nomination or nominations might be recommendatory only, or binding on the Governor-General in Council, such that a person outside those nominated by the Committee cannot be appointed, or cannot be appointed without a public explanation. To invest the Committee with power to select a single candidate who must be appointed is to give the power of appointment to a body besides the Governor-General in Council and would require constitutional amendment. However, constitutional lawyers have concluded that to confine the Governor-General in Council's choice to three or four candidates nominated by a Judicial Appointments Committee would require no such amendment, particularly if there is ultimate freedom to appoint any person, provided a public explanation is given for failing to appoint a nominee of the Committee. The Democrats' view is that the Committee should be empowered to select a short-list of potential appointees outside of which the Governor-General in Council cannot go. The Democrats' proposal avoids the complexities of constitutional amendment and addresses issues of democracy. The appointment of judges is an exercise of public power and should ultimately, although not exclusively, be performed by those accountable to Parliament and the people.

As to the second prong, generally, *merit* must be the basic principle governing selections for appointments to the High Court. However, merit, without definition, is a subjective and amorphous concept. The qualifications and skills that constitute merit must be identified and made available for public scrutiny. The selection criteria must emphasise the importance of an independent judiciary with integrity, and that equal opportunity principles prevail. Various commentators judicially trained and otherwise, have formulated lists of the qualities expected of candidates for appointment to the judiciary, and in particular, the High Court.[7] A High Court judge must have legal skills of the highest order, as well as various personal qualities.

The legal skills required of a High Court judge include:

- a thorough knowledge of the law;
- long experience in the practice of the law;
- the respect of colleagues;
- oral and written skills;
- intellectual capacity;
- thorough understanding of the rule of law, the role of the High Court and Australia's system of government;
- analytical ability;
- ability to digest large quantities of information and identify the legal issues arising from them;
- ability to quickly master complex material and novel arguments;
- ability to make reasoned judgments;
- thorough knowledge of the laws of evidence and procedure; and
- litigation experience, including advocacy experience.

The personal qualities required of a High Court judge include:

- independence;
- integrity;
- industry;
- impartiality;
- self-discipline;
- morality and a sense of ethics;
- practicality and common sense;
- assertiveness, where necessary;

- personality, including fairness, sympathy, charity, generosity, compassion, patience, even-temperedness, willingness to listen and to understand the viewpoints of others, and gender and cultural sensitivity;
- organisational and management skills;
- ability to reach a verdict and judgment in a timely manner;
- a willingness to participate in professional training;
- a sense of public service;
- a history of involvement in community organisations or activities; and
- breadth of vision.

Some commentators also regard the fair reflection of society as a criterion in the appointment of High Court judges.[8] The Australian Democrats support this view. A personal quality of judges related to the fair reflection principle is experience and understanding of life in general. That is, social perceptiveness should be regarded as a relevant criterion in the quest for a more balanced High Court bench.

According to the Democrats' model, the Judicial Appointments Committee is responsible for drafting the selection criteria for appointment of High Court judges. The Committee must then record the criteria in a protocol that it should periodically review and update. The protocol would be available for public scrutiny.

Chief Justice Malcolm of the Western Australian Supreme Court agrees that the public should be informed about the criteria considered relevant in making a judicial appointment. The Law Council of Australia has also stated that it would 'advocate that a protocol — though not enforceable by law — might be adopted by the present, and future, federal Attorneys-General, formalising the selection criteria for merit of judicial appointees. This would serve a useful purpose in further clarifying the qualities required of federal judicial appointments.'

Necessary legislative amendment

The Australian Democrats' view is that the reformed model for High Court appointments must be given statutory force. The Democrats propose amendment to the *High Court of Australia Act.* In particular, s.6 should be amended to provide for the establishment, constitution and functions of the Judicial Appointments Committee. Further, s.7 should be amended by adding to the qualifications requirement a reference to the Protocol of criteria to be drafted by the Committee. General recognition of the principles of equal opportunity, independence and integrity might also be statutorily entrenched.

According to the Democrats' model, no constitutional amendment is required. The proposed reforms lie on top of the existing constitutional requirements. Constitutional amendment must comply with the rigorous elements of s.128 of the Constitution.

Alternatively, the federal Parliament probably has power under s.51(xxxix) of the Constitution to draft new legislation establishing the Judicial Appointments Committee, defining its members, describing its functions, and confining the Attorney-General's choice to someone on the Committee's short list of approved candidates. The South Australian *Supreme and District Courts (Appointment of Judges) Amendment Bill* provides a valuable model.

Conclusion

The existing system for appointment of judges to the High Court of Australia needs to be reformed. In the words of Chief Justice Barwick, '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.'[9] The Australian public should no longer be left in the dark about how candidates are identified and compared and appointments made. Nor should it have to *trust* that public interest and not political concerns motivate the Commonwealth Attorney-General when selecting appointees. The Australian Democrats' proposed model for appointment of judges to the High Court would:

- provide transparency;
- reduce the potential for political appointments;
- promote a judiciary that fairly reflects the diversity of Australian society;
- safeguard the independence of the judiciary; and
- improve accountability.

Only in these circumstances will public confidence in the nation's highest and most influential court fully revive.

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