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'The selection of judges and their continuing judicial development'

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Introduction

Two bedrock imperatives for the healthy maintenance of a nation's judiciary are, first, the appointment of judicial officers of appropriate qualification, experience and quality; and second, ensuring the maintenance of that judicial quality, as by a vibrant programme of continuing judicial development.

I wish to speak today of some recent Australian experience in both those areas. As to the former, there is in Australia evident growing public interest in the process of appointment in particular. As to the latter, there has here been increasing judicial and governmental interest in the co-ordination and development of continuing judicial development programs.

The appointment process

The Australian Federation comprises six States and two federal Territories. At the peak of the Australian judiciary is the seven-member High Court of Australia. Each of the six States and two Territories has a Supreme Court, and in four cases, a permanent Court of Appeal division within that Supreme Court. All States have a magistracy, and in all bar one, an intermediate District or County Court. At the Commonwealth level, the Federal Court of Australia exists conterminously with the State Supreme Courts, together with the Family Court of Australia and the Federal Magistrates Court.

The nation's judges are, by and large, appointed by the same process, that is, by the Commonwealth Governor-General in Council or the State Governor in Council. That body acts on the nomination of the relevant Attorney-General following a process of consultation with a range of people. They will usually include the Chief Justice of the relevant

jurisdiction and the presidents of the professional law associations. Generally speaking, the appointment of a Chief Justice would be preceded by a resolution of Cabinet, that is, the Prime Minister or Premier and senior Ministers of State.

As to consultation, with one exception that is a matter of custom. The exception concerns appointments to the High Court, where s 6 of the *High Court of Australia Act* 1979 obliges the Commonwealth Attorney-General to consult State Attorneys-General before making an appointment.

There are, in Australia, more than 950 serving judicial officers.

The functioning of the Australian judiciary is enhanced by the complementary functioning of the legal profession, particularly the Bar. The Bar, like the courts, is characterised by unflinching independence.

Over recent years, Bar Council queries over the appropriateness of a handful of judicial appointments have sparked a wider debate, whether the process of appointing judges should not, in my country, be rendered more transparent and accountable.

Also, public interest in the identity of judges appears to have increased, at least so far as that may be reflected through media coverage. There is intense interest in those judges comprising the High Court of Australia especially. That is explained both by its being at the apex of the Australian judiciary, and by the critical public importance of all of the decisions that court makes. A good example is its well-known and sometimes controversial decision on indigenous native land title, *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

Of course, decisions of great importance are daily made by all courts. That also attracts persistent public scrutiny, most markedly in the area of sentencing for criminal offending. As the Australian media has ever more robustly analysed the work of the courts of law, the

focus has tended to shift from the courts as institutions, to those who constitute them, and thereby inevitably, to the process of the selection and appointment of judges.

In broad terms, the interest expressed by Bar Councils has dwelt on securing greater transparency and accountability in the appointment process, thereby enhancing the assurance that only those best qualified for appointment are indeed appointed – and the perception that is so. The publicly expressed interest, as through the media, has probably dwelt more upon two other questions: first, whether the process of appointment sufficiently shields courts from the possibility of politically motivated appointments; and second, increasing diversity in the composition of the courts, particularly as to the proportionate representation of women. Impetus in the latter respect was fed by some inappropriate observations made by male judges in the course of trials in the early 1990's of men charged with sexual offences against women.

As to the representation of women on Australian courts, it is I believe generally accepted that courts should not be constituted with a view to presenting any particular point of view. To proceed otherwise would plainly be destructive of the goals of independence and objectivity. It will nevertheless enhance public confidence in the courts, and thereby perceptions of their public acceptability, if, while respecting the abiding primacy of merit, the gender composition of courts can be brought more approximately into line with that of the general community.

In this debate, possible resort to an appointments commission has been mooted. The United Kingdom Judicial Appointments Commission, established by the *Constitutional Reform Act* 2005 (UK), has been raised as a model. It is one of a number of comparable commissions in various jurisdictions, including Ireland, Scotland, Northern Ireland, Canada, South Africa, Israel, France, Germany, Italy, the Netherlands, Portugal and Spain.

The UK Commission comprises fifteen commissioners drawn from the judiciary, the legal profession, tribunals, the lay magistracy and the public. The commissioners recommend a

candidate for appointment by the Lord Chancellor. If the Lord Chancellor rejects the recommended candidate, the Lord Chancellor must state reasons for that rejection.

A question raised in Australia has concerned the composition of such a Commission. If, say, its members are appointed by the government of the day, will there not remain a residual perception that the process may be subject to political influence?

Another expedient being adopted in some Australian jurisdictions, notably Victoria and Tasmania, is to invite, by means of public advertisement, applications from persons interested in appointment, or at least their expressions of interest. This is arguably problematic in a drive for improvement, for as observed by Chief Justice Gleeson, "if an appointment process required choice between competing applicants, then, to be truly transparent, it would be necessary to reveal the identity of the applicants" ("State of the Judicature" address referred to below).

A view not infrequently expressed in Australia is that a government would be most unlikely willingly to surrender the power to appoint judges as it presently exists, or to suffer any dilution of that power. That is because it offers powerful opportunity for a government potentially to set its mark upon the courts of law, not by any infusion of political influence, but through the appointment of persons who are considered like-minded – in terms, for example, of social philosophy. There is no doubt that such considerations can impact heavily on many of the judgments contemporary courts are called upon to make. That is especially so when there is a broad discretion to be exercised.

I presently think that a government subject to criticism would more likely turn its attention from the accountability of the appointments process, to the accountability of those appointed, as by establishing mechanisms for the receipt and treatment of complaints against members of the judiciary, and by ensuring that judicial officers submit to regular and comprehensive programs of continuing judicial development. The New South Wales Judicial Commission is a body which effectively addresses both those issues.

That said, the experience in the United Kingdom is instructive. It is telling insofar as that executive government, for decades or centuries considered deeply traditional in this respect, in fact surrendered absolute power in this area, and thereby rendered the appointments system much more transparent and publicly accountable.

Those who support retention of the present Australian system may argue that accountability is ultimately achieved through the power of the electorate to register its dissatisfaction at the ballot box. But considering the wide range of issues often confronting the electorate, many of which will feature vastly more prominently than the issue of the composition of the courts of law, any effective registering of dissatisfaction electorally seems remote.

I expect this debate will persist in Australian jurisdictions, as public interest in the work of the courts grows, and as interested persons consider increasingly what qualities should typify a person suitable for appointment to the bench.

What are those qualities? The term 'merit' is often used, and sometimes misused, in this context.

One thing which may reliably be said is that the range of qualities expected of a contemporary appointee is probably much wider than it was, say, two or three decades ago. Then the focus was rather more confined to legal learning, professional experience and a wide and reputable experience of life.

In 1993, the Commonwealth Attorney-General's Department in Australia published a discussion paper entitled 'Judicial Appointments: Procedures and Criteria'. That paper listed the following, broadly cast, criteria for judicial appointment:

> "Legal skills; personal qualities (for example, integrity, high moral character, sympathy, patience, even temper, gender and cultural sensitivity, good manners); advocacy skills (noting that this term "encompasses a variety of skills, some of which are highly relevant to judicial work and some of which might be counterproductive to

> judicial performance"); fair reflection of society by the judiciary; practicality and common sense; vision; oral and written communication skills; capability to uphold the rule of law and act in an independent manner; administrative skills; and efficiency." (Appointing Judges in an Age of Judicial Power: ed. K Malleson and P Russell, UTP, 2006, p. 132).

While that list never drew any higher official imprimatur, its breadth, including for example resort to such abstract conception as 'vision', would on one view accord an appointing authority very considerable licence in travelling beyond the rather more limited archetypal 'good judge'. I expect the debate which will persist in Australia, will embrace not only the nature of the appointment process, but extend as well to the image and capacity of an appropriate appointee, just as the judicial role is apparently evolving, along with society.

I hope what I have said this morning may spark some discussion of situations in the other jurisdictions represented in this room.

In countries served by career judiciaries, comparisons will not be particularly easy. In Japan, for example, I understand high appointment is dependent on a rigorous examination process and proven experience, with independent selection by the Legal Training and Research Institute subject to supervision of the Chief Justice of the Supreme Court of Japan; and that appointment to lower courts is subject to nomination by a non-partisan commission.

Somewhat similarly, appointments in Pakistan, Thailand and the Philippines are made from national career systems; with judges drawn in Bangladesh, Nepal, Singapore and Indonesia from a career judiciary within the country's general civil service system (supra, pp 360-361).

In Pakistan, the Chief Justice's recommendation of superior court appointments is considered binding. From what I read (supra, p. 386), the appointment of judges in Russia is increasingly subject to recommendations from a judicial qualification commission. It may be our colleagues from the Peoples Republic of China will speak of the process of

judicial appointment in mainland China and here in the Hong Kong Special Administrative Region.

On the other side of the world, we see in Canada intense interest in the selection of judges, especially to the Canadian Supreme Court, noting its jurisdiction under the 1982 Charter of Rights and that capacity to influence public policy. In recent New Zealand history, the establishment of a completely new court, the Supreme Court, in substitution as it were for the Judicial Committee of the Privy Council as applicable to New Zealand, allowed the then serving government to stock a court entirely, a mission fulfilled, I venture to say, with a minimum of controversy and a plainly admirable outcome.

I believe all our home countries share this common feature: they eschew the popular election of judges. The contrast is with the United States of America, where 39 states elect their judges. In the United States, judicial election campaigns have come to be characterized by exorbitant campaign funding, the clamorous intrusion of special interest groups, negative campaigning and bitter rhetoric (cf. R Caulfield: "Judicial Elections: Today's Trends and Tomorrow's Forecast", The Judges' Journal vol 46 no 1 pp 6-11). It is hard not to discern, there, a consequent threat to judicial independence and the stable maintenance of the rule of law; a threat, certainly, to confident perceptions of those critical stipulations. Whatever the current debate on the transparency and accountability of our processes, we at least are assured a rather more conservatively stable base.

My own feeling is that in my country, substantial change in the manner of appointing judges is quite some way off. For those who fear a possible politicisation of the judiciary, there may be an ultimate source of comfort, and that is the natural integrity of a person otherwise fitted for judicial appointment, which one hopes would quell any temptation to stray from the strict administration of justice according to law. History reminds us of the dismay of governments who note the unforeseen stance taken by judges expected to come down in a particular way, something Lord Bingham of Cornhill once interestingly described as 'the great judicial virtue of inconsistency'.

Continuing judicial development

I turn now to the question of continuing judicial development. I move into this area with some trepidation in the presence of our distinguished observer, the Chief Justice of Canada, who is chair of the Board of Governors of the National Judicial Institute of Canada. That Institute has since the year 1988 run a very successful and sophisticated program of continuing judicial development for the Canadian judiciary. So, as is well known, does the Judicial Studies Board in the United Kingdom.

In an address given in Toronto in September 2006 ("The Judging of Diversity – the Diversity of Judging", Commonwealth Magistrates' and Judges' Association Conference), Chief Justice McLachlin spoke of the institutional dimension of judicial education. She identified two goals.

> "First, judicial education should sustain an ethic of independence from political powers, and provide judges with the courage and resources to exercise the authority that is theirs under the rule of law. It should provide them with a clear sense of their distinctive role as guardians of the rule of law and impartial and objective decision makers, wielding an authority that is difference from that of other branches of government. And, for this reason, judicial education should be under the control of the judiciary, and funded independently.
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> Second, judicial education should instil an ethic of cultural neutrality. Courts should be neutral places, visible symbols of peaceful interaction. Courts should be places where the dignity of each human being is respected and enforced, regardless of race, gender or creed. Courts should represent a common space, where one can encounter difference without risk of losing his or her distinctive identity. For courts to play this symbolic role, each judge must learn how best to embrace diversity. For this reason, judicial education itself should be attuned to social diversity, and the judiciary itself should be broadly reflective of the community's diversity."

In his "State of the Judicature" address on 25 March this year to the 35th Legal Convention in Sydney, Chief Justice Gleeson noted, as an important development over the last three decades in Australia, "the recognition, by the judiciary, the legal profession, and by

governments, of the importance of judicial formation and continuing education". Chief Justice Gleeson continued as follows:

> "For most of the 20th century, it was assumed that practical experience and advocacy provided all the training that was needed for judicial office, and Judges and Magistrates, once appointed, were left to their own devices to keep up with changes in the law and with any other professional needs. In effect, governments relied on the Bar to train Judges and relied on Judges, once appointed, to maintain their own professional competence…it required a cultural change for people to accept that judicial formation and continuing education ought to be regarded as part of the job. It required a similar cultural change for governments to accept that a properly funded judicial system must provide for this need."

His Honour observed that "Australian courts now have well established, formal, programmes of training and continuing education for Judges and Magistrates. In funding, we still lag behind some comparable jurisdictions such as Canada, but good progress has been made."

In Australia, the Institute of Judicial Administration has for a quarter of a century offered education and training programs designed to promote excellence in the administration of justice throughout Australia and its surrounding region, mainly through research, educational events, working with courts, tribunals, governments and agencies to influence policy and organisational development, and by disseminating information about the administration of justice (Annual Report to 30 June 2006, p. 1).

Notwithstanding the very effective work of the AIJA, the early 1990's saw calls for the establishment of a body to provide judicial education for the whole of the Australian judiciary. In the year 2000, the Australian Law Reform Commission expressly recommended the establishment of an Australian Judicial College, to be governed by the judges, and responsible for orientation courses for newly appointed judges and continuing judicial development for existing judges.

In the result, in May 2002, the National Judicial College of Australia was established as an independent entity. Its financial resources come mainly from the Commonwealth and

State and Territory governments. Its council reports annually to the Council of Chief Justices, and to the Standing Committee of Attorneys-General.

At the launch of the college in August that year, the inaugural chairman of its council, Chief Justice John Doyle from South Australia, referred to "a qualitative aspect to the administration of justice which calls for judicial officers to have a real enthusiasm for their work, a strong belief in the importance of justice, and a commitment to the administration of justice in the fullest sense of the word". He suggested that in the long term, judges may suffer 'burn out', and added these observations:

> "In the past it was assumed that, somehow or other, in the course of a judicial career, a judge or magistrate would receive the stimulus for self-improvement, and the refreshment and reinvigoration that we know we need. We now know that this assumption is too optimistic. There is a real need for organised programs of professional development. The judiciary, as a profession, has come to understand this, as have the other professions."

Over the last year, the National Judicial College of Australia has presented programs in most Australian States and Territories. 270 judicial officers have attended them. The college's approach has been to offer the programs for comparatively small groups, say no more than 20 to 30 persons, being persons from different courts and jurisdictions, who will usefully share their knowledge and experience. The sessions are not concerned with the law, but with judicial skills, such as communication.

In April this year, the College provided, in Hobart, Tasmania, a two day program on judicial leadership, for Chief Justices, Chief Judges and Chief Magistrates from throughout Australia and New Zealand. (This Conference of our own is a uniquely high level endeavour of similar orientation.)

Other National Judicial College of Australia programs have covered sentencing, judgment writing, children in the courts, issues of social awareness, and the engendering of public confidence. Also, the college co-hosts a national judicial orientation program annually, covering such topics as judicial conduct and ethics, the assessment of the credibility of witnesses, the use of technology, psychological and physical health, judgment writing,

court craft, the interpreting of evidence, litigants in person, sentencing and alternative dispute resolution. That seminar fosters interaction between novice and established judges, the latter leading sessions highly interactive in character.

The college has also developed a 'national standard for judicial professional development', a statement of policy as to the amount of time judicial officers should commit to their professional development, and the time courts should make available for that purpose. The standard is at least five days each calendar year. The Council of Chief Justices has endorsed that policy statement. The college presents the standard as "a benchmark for encouraging Australian governments to make an appropriate commitment to professional development for Australia's judiciary … (and) to encourage heads of jurisdiction to enable each judicial officer to be released from ordinary duties for the required amount of time each year". (NJC Annual Report 2005-6 p. 12). In other words, judges should be allowed this time out of sitting commitments, and governments should meet the cost of their participation in the relevant programme.

Judicial exchanges can be useful, of course, in stimulating or reviving flagging judicial psyches. Also, there is the prospect of rejuvenation through contact with our colleagues in other jurisdictions, whether based similarly to our own, or quite differently: common law/civil law; adversarial/inquisitorial; career judiciary/judiciary predominantly sourced from the bar. I am sure my court is not alone in regularly hosting visits by judges from other jurisdictions. Likewise, Australian judges deeply appreciate the opportunity to spend time with their counterparts from other, especially quite different, jurisdictions. These experiences foster what is known cliché-ically as lateral thinking.

I mention finally a judicial feature of our Australian federation, the Council of Chief Justices. This body has existed in some form or other for almost 50 years. In its current form, it comprises the Chief Justice of the High Court of Australia as Chairman, together with the Chief Justice of New Zealand, and the Chief Justices of all State and Territory Courts and the Federal and Family Courts (of Australia). For the last 13 years, the Council has met twice a year, rotating about the capital cities. It operates on a consensual basis,

and has demonstrated a considerable capacity for desirable influence over government and the judiciary in relation to issues such as judicial independence, judicial ethics and judicial development. In addition, it has led a thrust towards harmonization of aspects of procedure among the disparate jurisdictions represented within it.

I imagine that judges in all jurisdictions represented at the Conference are by some positive means or other attentive to the need for their own continuing professional development. Especially as the law itself becomes ever more complex, as the nature of the cases before courts becomes more demanding of the attention of the judges, as public scrutiny of the work of the courts intensifies, the need for judges to keep abreast of their professional responsibilities, assumes great importance.

Primarily, of course, this goes to judicial self esteem, and ensuring satisfaction in the way we carry out these greatly significant responsibilities.

But importantly beyond that, it is a matter of upholding the institution we serve. Our public would understandably lack confidence in the work of courts stocked by judges not abreast of the law and contemporary judicial method.

As Chief Justices, we are in the position of acknowledging these stipulations, and securing as best we may, the resources, in time and other forms, necessary to ensure that we and our colleagues have the opportunity to follow these productive paths.

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