

## CRITIQUE AND COMMENT

### REFORM OF THE JUDICIAL APPOINTMENTS PROCESS: GENDER AND THE BENCH OF THE HIGH COURT OF AUSTRALIA

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*[The judges of the High Court of Australia are appointed by the federal executive on the basis of 'merit' after an informal and secret consultation process. This system is anachronistic when compared with the judicial appointments procedures and ongoing reforms in other common law jurisdictions, and when considered against the minimum level of scrutiny and accountability now expected of senior appointments to other public institutions. It is also inconsistent with the role of the High Court in determining the law, including matters of public policy, for the nation as a whole. One consequence of the current system, including its reliance on the subjective concept of 'merit', is that, of the 44 appointments to the Court, only one has been a woman. The appointments process should be reformed to provide for the selection of High Court judges by the executive based upon known criteria after the preparation of a short list by a judicial appointments commission. Without this, the current executive appointments system threatens to undermine public confidence in the Court and the administration of justice.]*

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## I INTRODUCTION

This year marks the centenary of the High Court of Australia. At its first sitting on 6 October 1903, the Court took up a position at the apex of the Australian judiciary. This role as part of the third branch of government has always been inherently political (in the broad, rather than partisan, sense of the term).<sup>1</sup> While the Court exercises its functions independently of the legislative and executive branches, the political, social and economic consequences of its decisions are obvious. Moreover, decision-making by the Court often involves difficult choices of policy and judgment. While such choices arise out of essentially legal questions, the need to make them inevitably leads to debate about the capacity of the judges to make such decisions and the legitimacy of their doing so.

As an institution exercising public authority within Australian society, the High Court necessarily generates an expectation of accountability. Of course, unlike other public institutions, a central characteristic of the Court, and of the judiciary more broadly, is its independence.<sup>2</sup> However, as Chief Justice Murray Gleeson has observed: ‘The independence and impartiality of the judiciary are not private rights of judges; *they are rights of citizens*.’<sup>3</sup> Ultimately, judicial legitimacy (and power) rests on public confidence in the courts, in the judges themselves, and in their decisions. The centrality of such confidence to a functioning democratic system has been emphasised at all levels of the judiciary,

<sup>1</sup> See, eg, Geoffrey Sawer, *Australian Federalism in the Courts* (1967); Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987); Brian Galligan, ‘Realistic “Realism” and the High Court’s Political Role’ (1989) 18 *Federal Law Review* 40; Michael Coper, *Encounters with the Australian Constitution* (1987) ch 3; David Solomon, *The Political High Court: How the High Court Shapes Politics* (1999).

<sup>2</sup> This may be understood as the freedom of a judge from improper pressure to hear and decide cases in anything other than an impartial manner: Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 1, 34–5. This formulation is also the one adopted by Kate Malleson in the United Kingdom context as ‘individual’ judicial independence or ‘party impartiality’: Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (1999) ch 3.

<sup>3</sup> Chief Justice Murray Gleeson, ‘Public Confidence in the Judiciary’ (2002) 76 *Australian Law Journal* 558, 562 (emphasis added).

including at the most senior by the current Chief Justice of the High Court,<sup>4</sup> and by its former Chief Justices.<sup>5</sup> As Sir Gerard Brennan, for example, has said:

The judiciary, the least dangerous branch of government, has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people ... have confidence in the exercise of the power of judgment.<sup>6</sup>

Where courts enjoy such confidence, it is the strongest protection against incursions into their independence.

Public confidence in the High Court is dependent upon its judges; and, in their selection, the Court is dependent upon the executive. The appointment of High Court judges by the government of the day is significant, not only in terms of the outcomes of that process (that is, the judges actually chosen), but also with respect to the appropriateness of the *process* of appointment itself. As to the former, the strong and longstanding reputation of the Court in the common law world is well-known. In this article we examine the latter issue — the process of exclusive executive appointment. We do so with the benefit of recent reforms in other comparable common law jurisdictions, particularly those made in the United Kingdom, where it is proposed that a Judicial Appointments Commission be established for appointments to all levels of the judiciary.<sup>7</sup>

The focus of our argument is the question of gender. This might suggest an examination of the outcomes of the appointments process. Certainly, the appointment of only one woman out of 44 judges over the first century of the High Court is a ground for serious concern (and, indeed, gender is only one aspect of a broader question of diversity on the bench of the Court). However, we are not arguing that unmeritorious candidates have been appointed by the executive, but rather that the current system *prevents* meritorious candidates with different backgrounds or characteristics from being adequately considered by the Attorney-General or Cabinet, and that this has the potential to undermine public confidence in the Court. The reform proposal set out in this article seeks to ensure that, rather than relying solely on the malleable concept of ‘merit’, the executive appointments process articulates the relevant criteria, included in which should be the concept of diversity, and operates in a sufficiently transparent and procedurally fair manner to ensure that public confidence in the Court is maintained. While we argue for reform of the method of appointment, we reject the idea that there should be prescriptive rules or a quota as to who should be chosen to sit on the Court, such as a minimum number of men or women. ‘Merit’ must remain the overriding standard, but it should not remain undefined.

In Part II of this article, we set out the existing (but very limited) explicit criteria and the current process for the appointment of High Court judges. In Part

<sup>4</sup> Ibid.

<sup>5</sup> See, eg, Mason, ‘The Appointment and Removal of Judges’, above n 2, 7–8; Sir Gerard Brennan, quoted in Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 6–7.

<sup>6</sup> Sir Gerard Brennan, quoted in Campbell and Lee, above n 5, 6–7.

<sup>7</sup> Department for Constitutional Affairs, United Kingdom, *Constitutional Reform: A New Way of Appointing Judges*, CP 10/03 (2003) (‘*Constitutional Reform*’).

III we contextualise the lack of women on the High Court bench through their absence more generally from the institution, and suggest that the reasons for this reside partly in the current system of appointment and partly in structural inequalities within the legal profession itself. While reform of the appointments process will not solve these issues on its own, it will at least ensure that they are not compounded in judicial selection.

We therefore highlight in Part IV two of the principal problems with the current system, namely that it is based upon (i) the making of purely subjective assessments of potential candidates by the Attorney-General with reference to an unreviewable and unarticulated set of criteria; and (ii) a closed process of decision-making, which relies on informal networks and is not subject to any public scrutiny or involvement. We argue that these problems should be addressed through, respectively, the development of specific criteria for judicial appointments (discussed in Part V) and the creation of a formalised appointments procedure for the High Court (discussed in Parts VI and VII). We outline the scope and pace of change with respect to judicial appointments processes in other comparative jurisdictions and conclude that Australia is severely out of step.

Of course, the federal government also appoints judges to other federal courts,<sup>8</sup> as well as to Commonwealth tribunals, and there is similar need for reform of the appointments processes at state and territory level.<sup>9</sup> While many of the considerations outlined in this article are also applicable to other courts, we focus principally on the method of appointment to the country's highest court in light of its pre-eminent position in the political and judicial hierarchy.

In setting out a new process of selecting High Court judges, we are primarily concerned with the need for appropriate accountability on the part of the executive in exercising its power of appointment. The Court's role as a political institution demands that the criteria seen as relevant to appointment be articulated by the government and that the appointments process itself be formalised and made more transparent. The current system is anachronistic when compared with the judicial appointments procedures and ongoing reforms in other common law jurisdictions, and when considered against the minimum level of scrutiny and accountability now expected of senior appointments in other major public institutions, in academia and in the professions. Indeed, as the most senior legal institution in Australia, it is vital that the procedure for appointment to the Court should not only be fair but be *seen* to be fair.

<sup>8</sup> Appointments to the Federal and Family Courts are similarly made by the Governor-General: *Federal Court of Australia Act 1976* (Cth) s 6(1)(a); *Family Law Act 1975* (Cth) s 22(1)(a).

<sup>9</sup> The problems with the High Court process are reflected in the appointments processes at state and territory level according to a 1981 study by Duncan Chappell and Peter Cashman, reported in George Winterton, 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review* 185, 186–7, and in the more recent overview given by Chief Justice David Malcolm, 'The Appointment of Judges' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 159, 162–3.

## II THE CURRENT EXECUTIVE APPOINTMENTS PROCESS

### A *The Law*

The only provision in the *Australian Constitution* relating to the process of appointment to the High Court is s 72(i), which states that justices of the Court '[s]hall be appointed by the Governor-General in Council'. In practice, this means that the Governor-General makes the appointment acting on the advice of the government of the day. Other than prohibiting the appointment of judges who have reached the retirement age of 70 years,<sup>10</sup> the *Constitution* makes no mention of qualifications or background, and contains no other procedural requirements. It does not even require that an appointee be qualified as a lawyer.

The *High Court of Australia Act 1979* (Cth) is slightly more prescriptive. Section 7 requires that an appointee be a judge of a federal or state court, or have been enrolled as a legal practitioner in Australia for not less than five years. Section 6 states that, before making an appointment, the 'Attorney-General shall ... consult with the Attorneys-General of the States' (no mention is made of the Attorneys-General of the Territories). However, the extent and form of consultation is not specified and it is unclear whether this process has any real effect on the appointment made by the federal government.

### B *In Practice*

According to former federal Attorney-General Daryl Williams, appointees to the High Court are chosen on 'the essential criterion' of merit,<sup>11</sup> a basic policy that has been confirmed by the current Attorney-General, Philip Ruddock.<sup>12</sup> As for more specific criteria: 'It is enough to say that outstanding professional skills and personal qualities, such as integrity and industry, are required, together with a proper appreciation of the role of the Court.'<sup>13</sup> Currently, the Attorney-General consults with both the state and territory Attorneys-General prior to an appointment being made to the High Court.<sup>14</sup> With respect to federal appointments generally, the Attorney-General also holds confidential consultations, or 'informal discussions', with various individuals, including 'the Chief Justice (or equivalent) of the relevant court', 'legal professional bodies such as the Law Council and the Bar Association or Law Society' of the relevant state or territory, 'serving and former judges, the Attorney-General's ministerial and parliamentary colleagues, [and] appropriate community groups'.<sup>15</sup> In the case of the

<sup>10</sup> *Australian Constitution* s 72, which states: 'The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.'

<sup>11</sup> 'High Court Appointment', *Sky News*, 17 December 2002.

<sup>12</sup> Letter from Philip Ruddock to Rachel Davis and George Williams, 17 November 2003.

<sup>13</sup> Daryl Williams, 'Judicial Independence and the High Court' (1998) 27 *Western Australian Law Review* 140, 149.

<sup>14</sup> Ruddock, above n 12; Simon Evans, 'Appointment of Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 19, 21.

<sup>15</sup> Ruddock, above n 12.

appointment of a Chief Justice, the Prime Minister may play a particularly influential role.<sup>16</sup> On the other hand, there is ‘no formal consultation with the Opposition parties’.<sup>17</sup>

It does not appear that those ‘consulted’ are requested to assess candidates against specific criteria, but are instead simply asked for their personal opinion or ‘impression’.<sup>18</sup> According to Sir Harry Gibbs, the extent to which the views of those consulted are actually taken into account varies, as does the extent of consultations.<sup>19</sup> As former federal Attorney-General Michael Lavarch has said: ‘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’.<sup>20</sup>

After ‘consulting’, the Attorney-General informs Cabinet of his or her recommendation — or recommendations, in the case of more than one vacancy. At the time of the most recent appointment made to the High Court in February 2003, the Attorney-General also conducted private interviews with candidates but did not indicate what questions were put to candidates, or how this information was used in the selection process.<sup>21</sup>

Cabinet then considers the Attorney-General’s recommendation and may accept it or may decide on an entirely different person.<sup>22</sup> It is unclear what information, other than the candidate’s name, Cabinet has before it when it makes its decision. However, the limited evidence available of instances where an Attorney-General’s preferred candidate has not been accepted by Cabinet demonstrates that the choice has been influenced by considerations as diverse as the potential appointee’s ‘politics, state of origin, friendships, and the views of sitting Justices’.<sup>23</sup>

<sup>16</sup> See Winterton, ‘Appointment of Federal Judges in Australia’, above n 9, 185.

<sup>17</sup> Evans, above n 14, 21.

<sup>18</sup> R W Gotterson QC, having been consulted as President of the Queensland Bar Association with respect to appointments at both state and federal level, has commented:

I have spoken to others who have been consulted — not only in Queensland but in other states as well. My experience is generally similar to theirs. Individual Attorneys, it seems, decide how they will consult. Sometimes the same Attorney may consult in different ways. There is no consistency of approach to it. The result, I think, is that consulting is not as effective as it could be. For one thing, those consulted do not have a clear picture of what information they may, or are to, provide and how and when they may, or are to, provide it. ... Some assurance, too, that the information given will be taken into account is needed.

R W Gotterson, ‘The Appointment of Judges’ (Speech presented at the Third Annual Colloquium of the Judicial Conference of Australia, Surfers Paradise, 6–8 November 1998) <<http://www.jca.asn.au/GottersonPaper.html>>.

<sup>19</sup> Sir Harry Gibbs, ‘The Appointment of Judges’ (1987) 61 *Australian Law Journal* 7, 11.

<sup>20</sup> Michael Lavarch, ‘The Appointment of Judges’ in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 153, 153.

<sup>21</sup> Chris Merritt, ‘Court Row as Williams Vets Judges’, *The Australian Financial Review* (Sydney), 11 December 2002, 1. See also Chris Merritt, ‘Change Sets a Precedent’, *The Australian Financial Review* (Sydney), 19 December 2002, 6; Sir Anthony Mason, ‘The Centenary of the High Court of Australia’ (2002) 5 *Constitutional Law and Policy Review* 41, 44.

<sup>22</sup> See Troy Simpson, ‘Appointments that Might Have Been’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 23.

<sup>23</sup> *Ibid.*

The Attorney-General, after securing the agreement of the nominee chosen by Cabinet, ‘formally recommends’ the appointment to the Governor-General.<sup>24</sup> In practice, then, the Governor-General in Council has no active involvement in the process and the decision is entirely in the hands of a small group in the executive. The lack of established criteria (beyond the vague notion of ‘merit’), and of an entrenched process of public consultation, means that appointments to the High Court have been accurately described as being ‘the gift’ of the executive government.<sup>25</sup>

On the other hand, by clearly linking the executive to the process of judicial selection, the current system enables the executive to be held accountable pursuant to the conventions of representative and responsible government.<sup>26</sup> In addition, the central (and exclusive) role of the executive can produce its own level of diversity in judicial selection, for example, in the way in which governments of all political persuasions consider the extent to which potential candidates reflect their preferred judicial outlook and approach. The existing process may therefore lead to the appointment of judges who might otherwise not be selected under a more formalised process, whereby the power of appointment would be constrained politically, if not legally, by the involvement of some other body of unrepresentative ‘officials’. Moreover, the judicial approach of appointees has been known to change over time following their appointment to the bench, thereby creating a further dynamic in the current system.

While we recognise the strength of such arguments in favour of the current system, we believe that the serious problems inherent in the existing appointments process require its substantial reform. We also argue (in Part VII below) that some of the potential dangers in moving to a more formalised system of appointments can be prevented through the appropriate design of such a system.

### *C Limitations on the Power to Appoint?*

Other than the scant law on the technical qualifications of an appointee, there are effectively no formal limitations under the current appointment system on who may be chosen to sit on the High Court. There is therefore no real safety net against inappropriate appointments (with the exception of the formal, elaborate — and never successfully invoked — powers of removal for proved misconduct or incapacity).<sup>27</sup>

<sup>24</sup> Williams, ‘Judicial Independence and the High Court’, above n 13, 145.

<sup>25</sup> The expression has been used by Tony Blackshield, ‘The Appointment and Removal of Federal Judges’ in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 400, 426; Justice Michael Kirby, *The Judges* (1983) 20; Evans, above n 14, 21.

<sup>26</sup> On this advantage of the current system, see Greg Craven, ‘Reforming the High Court’ in The Samuel Griffith Society, *Upholding the Australian Constitution: Proceedings of the Seventh Conference of the Samuel Griffith Society* (1996) vol 7, 21, 58–9; Justice Michael Kirby, ‘Modes of Appointment and Training of Judges — A Common Law Perspective’ (2000) 26 *Commonwealth Law Bulletin* 540, 542–5; Justice Michael Kirby, ‘What Is It Really Like to Be a Justice of the High Court of Australia? A Conversation between Law Students and Justice Kirby’ (1997) 19 *Sydney Law Review* 514, 523–4.

<sup>27</sup> *Australian Constitution* s 72(ii) provides that a Justice of the High Court ‘shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament

Justice Peter Young of the Supreme Court of New South Wales contends that, while an Attorney-General is not under a ‘*duty* to recommend only the most suitable appointee’ for a judicial position, he or she ‘has a role under the unwritten constitution that requires independence from political or other influence when performing certain duties’ including, in particular, recommending judicial appointments to Cabinet.<sup>28</sup> But former Attorney-General Daryl Williams takes a different view even of this limitation: ‘the perception that the attorney-general exercises important functions independently of politics and in the public interest is either erroneous or at least eroded’.<sup>29</sup> Moreover, according to Williams, Australian Attorneys-General ‘are elected members of Parliament, answerable to their party colleagues, Parliament and the electorate. They are not, and cannot be, independent of political imperatives.’<sup>30</sup>

Justice Young outlines the various options, and their likelihood of success, in the case of an inappropriate appointment. In his view, the relevant court could hardly decline to swear in the appointee after being explicitly directed to do the opposite by a Commission of the Governor-in-Council. A federal court might intervene in the case of an improper appointment to a state Supreme Court (on the basis that the appointment might impair the integrity of, and public confidence in, the court according to the principle established in *Kable v Director of Public Prosecutions (NSW)*),<sup>31</sup> but this is probably ‘politically unrealistic’.<sup>32</sup> In these circumstances, Justice Young concludes that the public must simply put their faith in the appointee:

A thinking lawyer who believes that he is being offered an appointment otherwise than on merit may well decline because he knows that the Bar may make his judicial life unbearable. Often, however, appointees do not realise their inadequacies.<sup>33</sup>

### III WOMEN AND THE HIGH COURT

Despite the role of the High Court in determining the law on behalf of the nation across a full spectrum of social and political issues, it has remained a remarkably homogenous institution. Of those people appointed to the Court, ‘[m]ost Justices have come directly from the Bar or the judiciary. None has been a full-time academic ... [and] there has yet to be an appointment not of Anglo-Celtic background’.<sup>34</sup> There has also been only one openly gay Justice.<sup>35</sup> This

in the same session, praying for such removal on the ground of proved misbehaviour or incapacity’.

<sup>28</sup> Justice Peter Young, ‘Current Issues’ (1998) 72 *Australian Law Journal* 825, 832 (emphasis added).

<sup>29</sup> Daryl Williams, ‘Who Speaks for the Courts?’ in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 183, 192.

<sup>30</sup> Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 261.

<sup>31</sup> (1996) 189 CLR 51, 98–9 (Toohey J), 103–4 (Gaudron J), 114–16 (McHugh J).

<sup>32</sup> Young, ‘Current Issues’, above n 28, 833.

<sup>33</sup> *Ibid.*

<sup>34</sup> Francesca Dominello and Eddy Neumann, ‘Background of Justices’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 48, 48.

general lack of diversity also holds true in regard to gender. It does so not only with respect to the judges of the Court, but also in regard to the lawyers who speak before it.

#### A A Woman on the Bench

Over the last century, there have been 44 appointments to the High Court. Only one has been a woman. Justice Mary Gaudron was appointed in 1987 and since her retirement in February 2003 there is no longer a woman judge<sup>36</sup> on the Court. Australia is unusual among its common law counterparts in having an all male bench on its highest court.<sup>37</sup> Both the Supreme Court of Canada and the Supreme Court of Singapore include three women (out of nine and 13 judges respectively), with Ireland, the United States and New Zealand each claiming two (out of nine, nine and eight members of their highest courts respectively). Both the Chief Justice of Canada and the Chief Justice of New Zealand are female (McLachlin CJ and Elias CJ respectively). While the highest court in the UK, the House of Lords, had up until this year never had a female judge appointed to it, the UK was exceptional in this respect, and the subject had been a matter of significant public debate.<sup>38</sup> The historic appointment in October this year of Dame Brenda Hale to the House of Lords, effective January 2004, further highlights Australia's unique position.

The High Court reflects other Australian courts in this respect. In 1994, the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs concluded in its report entitled *Gender Bias and the Judiciary* that Australian judges 'are overwhelmingly male, former leaders of the Bar, appointed in their early fifties, and products of the non-government education system.'<sup>39</sup> Moreover, 'men of Anglo-Saxon or Celtic background hold nearly 90% of all federal judicial offices'.<sup>40</sup> The Standing Committee concluded that this was 'not, of itself, a reflection on those currently occupying judicial office. However, it does suggest that there are competent candidates who possess the requisite qualities for judicial office who are being overlooked.'<sup>41</sup> Nearly a decade later, some progress has been made in increasing the number of women on the bench, with women now comprising around 20 per cent of the judiciary.<sup>42</sup> However, when

<sup>35</sup> Kristen Walker, 'Sexual Preference' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 622, 624.

<sup>36</sup> Regina Graycar has highlighted the danger in using the description 'woman judge' of simply reinforcing the underlying male norm: Regina Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *University of British Columbia Law Review* 1, 2-4. However, for the purposes of this article, it is necessary to distinguish between female and male judges.

<sup>37</sup> See generally Rachel Davis and George Williams, 'A Century of Appointments but Only One Woman' (2003) 28 *Alternative Law Journal* 54.

<sup>38</sup> See, eg, Clare Dyer, 'Where are the Women?', *The Guardian* (London), 8 July 2003, 16.

<sup>39</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (1994) [5.47] ('*Gender Bias and the Judiciary*').

<sup>40</sup> Attorney-General's Department, Commonwealth, *Judicial Appointments — Procedure and Criteria* (1993) 3 ('*Lavarch Paper*').

<sup>41</sup> *Gender Bias and the Judiciary*, above n 39, [5.81].

<sup>42</sup> Women accounted for 20.9 per cent of the judiciary as at 30 May 2002: see Davis and Williams, above n 37, 56.

the senior judiciary alone is considered, women account for approximately 14 per cent of judges,<sup>43</sup> and when the bench of the highest court is considered, women are simply absent. Of course, the lack of women in the senior judiciary reflects their absence in the upper echelons of the profession more generally, and particularly among the senior bar which, according to the current Chief Justice, remains 'somewhat homogenous'.<sup>44</sup>

### B Women in 'Speaking Parts'

Women are largely absent from the ranks of the lawyers who appear and speak before the High Court (as compared to those lawyers who appear before the Court as non-speaking 'juniors'). In two speeches, four years apart, Justice Michael Kirby of the High Court compared the number of women speaking in argument before the Court and found that it was static.<sup>45</sup> In 1996 and the first half of 1997, only six female barristers had 'speaking parts' in appeals heard by the Court, with only two in substantive appeals (as opposed to special leave applications).<sup>46</sup> Again, over the second half of 2000 and the first half of 2001, only six women were heard in argument before the Court.<sup>47</sup> Justice Kirby estimated this proportion as about two to three per cent of the total number of counsel appearing before the Court.<sup>48</sup> These figures reflect the proportion of women currently at the senior bar. For example, in 2002, women comprised 37 per cent of all practising solicitors in New South Wales.<sup>49</sup> Yet, as at February 2003, only 13.5 per cent of all barristers holding New South Wales practising

<sup>43</sup> Women accounted for 14.6 per cent of all superior federal (High Court, Federal and Family Court) and superior state and territory (Supreme Court and Court of Appeal) court judges as at 27 March 2003: Davis and Williams, above n 37, 56. This can be compared with the strong representation of women among appointments to the magistracy. However, the equivalent figure for the appointment of judges in New South Wales by the Labor government between 1995 and April 2003 was 21.3 per cent: Chris Merritt and Katherine Towers, 'Hearsay', *The Australian Financial Review* (Sydney), 2 May 2003, 65. The disproportionate representation of women in lower judicial ranks is an international phenomenon, as identified by a comparative analysis by the International Bar Association ('IBA') in 1998: Kate Malleson, 'Prospects for Parity: The Position of Women in the Judiciary in England and Wales' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 175, 177. Interestingly, the IBA study also found that the higher the status of the judiciary in a country, the lower the proportion of female appointments: at 177.

<sup>44</sup> Chief Justice Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591, 592.

<sup>45</sup> The speeches are substantially reproduced in: Justice Michael Kirby, 'Women Lawyers — Making a Difference' (1998) 10 *Australian Feminist Law Journal* 125, esp 129–34; Justice Michael Kirby, 'Women in the Law — What Next?' (2002) 16 *Australian Feminist Law Journal* 148.

<sup>46</sup> Kirby, 'Women Lawyers', above n 45, 130.

<sup>47</sup> Kirby, 'Women in the Law', above n 45, 148.

<sup>48</sup> This problem is not confined to the High Court. The new Chief Justice of the Supreme Court of Victoria, Marilyn Warren, has recently stated that the number of women appearing in cases before the Supreme Court has declined since 1998: Katherine Towers, 'Women Must "Stand Up and Be Counted"', *The Australian Financial Review* (Sydney), 11 July 2003, 52. See generally Jason Silverii, 'Keeping Gender on the Agenda' (2003) 77(7) *Law Institute Journal* 16.

<sup>49</sup> Law Society of New South Wales, *After Ada: A New Precedent for Women in Law* (2002) 7.

certificates were women,<sup>50</sup> and only nine out of 295 (or approximately three per cent) of the senior bar were female.<sup>51</sup>

### C Women Associates

The proportion of women on the High Court bench and of those speaking before it can be contrasted with the figures relating to judges' associates (that is, those generally recent graduates who commonly work for a Justice for a year, providing legal research and other assistance). According to a study of High Court associates over 1993–2000, approximately 47 per cent of associates were female.<sup>52</sup>

This contrast between counsel and associates in the High Court reflects the prevalence of women at the entry level and the lower echelons of the legal profession, and their under-representation in its upper tiers.<sup>53</sup> Despite several decades of growing representation of women among law graduates and new entrants into the profession (including more than a decade of equal representation among both groups),<sup>54</sup> this has not translated into seniority. Women comprised over 10 per cent of the profession at the start of the 1980s, rising to over 25 per cent by the beginning of the 1990s,<sup>55</sup> and since then increasing to over 35 per cent of practising solicitors in some jurisdictions.<sup>56</sup> Yet there has been little or no change in the proportion of women appearing before the High Court in 'speaking parts'. While women practitioners began appearing (albeit usually as junior counsel) before the High Court in statistically significant numbers in the 1970s,<sup>57</sup> this figure has hardly improved over three decades. In its 2001 report on the challenges facing the profession, the Law Council of Australia concluded that the assumption that, 'given time, the number of women entering at the bottom of the profession would be reflected in senior ranks has not material-

<sup>50</sup> Nationally, in the financial year 1998–99, women constituted approximately 29 per cent of barristers and solicitors working in solicitor practices, but only 11 per cent of barristers working in barrister practices: Australian Bureau of Statistics, *Legal Services Industry: Australia*, ABS Catalogue No 8667.0 (2000) 8, 20.

<sup>51</sup> New South Wales Bar Association, *Statistics Update* (2003) <[http://www.nswbar.asn.au/Public/About%20us/stats\\_240203.pdf](http://www.nswbar.asn.au/Public/About%20us/stats_240203.pdf)>. These New South Wales statistics are reflected in surveys and reports conducted in other States and Territories over the past decade: see the list of reports in Law Council of Australia, *2010: A Discussion Paper — Challenges for the Legal Profession* (2001) 132 ('*2010: A Discussion Paper*').

<sup>52</sup> Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25 *Alternative Law Journal* 295, 297. See also the table of associates in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 36–7.

<sup>53</sup> *2010: A Discussion Paper*, above n 51, 132.

<sup>54</sup> *Ibid.*

<sup>55</sup> Rosemary Hunter, 'Women in the Legal Profession: The Australian Profile' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 87, 92.

<sup>56</sup> Law Society of New South Wales, above n 49, 7.

<sup>57</sup> Prior to the 1970s, women had appeared in 'no more than two dozen reported cases': Margaret Thornton, 'Women Practitioners' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 722, 722.

ised.<sup>58</sup> Yet the inevitability of the ‘trickle-up’ effect, as it is often called, remains a persistent assumption.<sup>59</sup>

In practice, and as numerous reports and studies have concluded, there are many and varied reasons for women’s continued under-representation at senior levels of the profession.<sup>60</sup> However, in our view, the current system of judicial appointments by the executive is in fact structured in a way that disadvantages women and, indeed, any candidate from a background different to that of the norm. Reforming the judicial appointments process in the relatively modest way we outline in the following sections will obviously not, on its own, solve the underlying structural problems in the profession (and in society more generally) that impede women and individuals from other under-represented groups from becoming judges. However, it will at least ensure that, in this area, these problems are not compounded.

#### IV THE RHETORIC OF ‘MERIT’

##### A ‘Merit’: *The Myth of a Neutral Standard*

By common consensus, ‘merit’ should be the fundamental criterion for appointment to the High Court. The *Oxford Dictionary* defines merit as the ‘quality of deserving well; excellence, worth’, reflecting its derivation from the Latin for ‘price’ or ‘value’.<sup>61</sup> But while merit should incontrovertibly be the starting point when making judicial appointments, it is of minimal help as the sole criterion for appointment and may in fact mask (conscious or unconscious) bias in decision-making.

‘Merit’, without more, cannot be a neutral standard. It has what Margaret Thornton calls an ‘essential subjectivity’ to it.<sup>62</sup> Thornton’s review of the legislative and political uses of ‘merit’ reveals that the lack of an explicit definition of what constitutes it is ‘an omission characteristic of almost every formal application of the merit principle.’<sup>63</sup> As Clare Burton has outlined in the public employment sector, this definitional space allows each decision-maker to

<sup>58</sup> 2010: *A Discussion Paper*, above n 51, 132. The report also noted that ‘[w]omen leave the profession in disproportionate numbers’ and ‘do so for various reasons, but these cannot be attributed solely or predominantly to family responsibilities’: at 132. For the United States context, see Deborah Rhode, *The Unfinished Agenda: Women and the Legal Profession* (2001) 14.

<sup>59</sup> It is what Deborah Rhode has analysed in the United States as the “no problem” problem’: Deborah Rhode, ‘The “No Problem” Problem: Feminist Challenges and Cultural Change’ (1991) 100 *Yale Law Journal* 1731.

<sup>60</sup> See generally Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996). For a very recent collection of studies, see Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003). For studies of the structural impediments confronting those from backgrounds generally different to that of the ‘benchmark man’, see Philip Thomas (ed), *Discriminating Lawyers* (2000).

<sup>61</sup> George Turner (ed), *The Australian Concise Oxford Dictionary of Current English* (7<sup>th</sup> ed, 1987) 677.

<sup>62</sup> Margaret Thornton, ‘Affirmative Action, Merit and the Liberal State’ (1985) 2(2) *Australian Journal of Law and Society* 28, 33. For an illustration of this, see Barbara Hamilton’s discussion of the Queensland Bar Association’s 1998 objection to the appointment of Justice Roslyn Atkinson to the bench of the Queensland Supreme Court: Barbara Hamilton, ‘Criteria for Judicial Appointment and “Merit”’ (1999) 15 *Queensland University of Technology Law Review* 10, 12.

<sup>63</sup> Thornton, ‘Affirmative Action’, above n 62, 36.

construct her or his own notion of what characteristics or experience will be considered ‘meritorious’.<sup>64</sup> Thus, ‘merit-in-practice’ allows for the possibility of ‘idiosyncratic and arbitrary means of assessing individual abilities and personal qualities.’<sup>65</sup>

As Thornton and other feminist analyses of the ‘public sphere’ have demonstrated, the emphasis on ‘merit’ as the only articulated criterion for appointment to public positions or roles has meant that the ‘best person’ to occupy a position of authority has tended to be unproblematically defined in masculinist terms that reflect the values of the ‘public sphere’, making it ‘virtually impossible for women and differentiated others’<sup>66</sup> (including men who do not fit within the particular conception of masculinity adopted)<sup>67</sup> to satisfy the norm.<sup>68</sup> According to Thornton, relying on ‘merit’ alone

assumes that all the *relevant characteristics* of a person may be considered in the construction of merit. It is clear, however, that the determination of what criteria are relevant at the threshold ensures that a particular value system is encompassed in that construct, and allows biased decisions to be rationalised more easily.<sup>69</sup>

The criteria for appointment to public office generally adopted under the rubric of merit tend to reflect attributes and concerns stereotypically seen as ‘male’ (such as ‘detachment’, ‘authority’ and ‘confidence’)<sup>70</sup> and require women, in Justice Gaudron’s expression, to become ‘honorary men’.<sup>71</sup> In a form of ‘double bind’, if women do demonstrate the requisite characteristics, they are often derided as inappropriately ‘masculine’ in their behaviour, and thus too assertive, too self-confident or too independent to suit the position.<sup>72</sup> This double bind is prevalent within the legal profession not only in Australia,<sup>73</sup> but also in jurisdictions such as the United States, Canada and the United Kingdom.<sup>74</sup> It remains a

<sup>64</sup> Clare Burton, *Redefining Merit* (1988). See also Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) ch 9.

<sup>65</sup> Thornton, ‘Affirmative Action’, above n 62, 33.

<sup>66</sup> Thornton, *Dissonance and Distrust*, above n 60, 35.

<sup>67</sup> On the legal and social construction of masculinities, see generally Richard Collier, ‘“Nutty Professors”, “Men in Suits” and “New Entrepreneurs”: Corporeality, Subjectivity and Change in the Law School and Legal Practice’ (1998) 7 *Social and Legal Studies* 27.

<sup>68</sup> Thornton, *Dissonance and Distrust*, above n 60, 35.

<sup>69</sup> Thornton, ‘Affirmative Action’, above n 62, 30 (emphasis in original).

<sup>70</sup> See, eg, Erika Rackley, ‘Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor’ (2002) 22 *Legal Studies* 602, 618–23.

<sup>71</sup> Justice Mary Gaudron, ‘Speech to Launch Australian Women Lawyers’ (1998) 72 *Australian Law Journal* 119, 122. See also Rackley, above n 70.

<sup>72</sup> Sean Cooney, ‘Gender and Judicial Selection: Should There Be More Women on the Courts?’ (1993) 19 *Melbourne University Law Review* 20, 33–4.

<sup>73</sup> See, eg, Thornton, *Dissonance and Distrust*, above n 60, chs 4–5, esp 106; Rosemary Hunter, ‘Women Barristers and Gender Difference’ in Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 103.

<sup>74</sup> For recent analyses, see Deborah Rhode, ‘Gender and the Profession: An American Perspective’ in Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 3, esp 10–12; Fiona Kay and Joan Brockman, ‘Barriers to Gender Equality in the Canadian Legal Establishment’ in Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 50; Clare McGlynn, *The Woman Lawyer: Making the Difference* (1998) chs 6–7. On the position confronting women lawyers in civil law jurisdictions, see generally Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) chs 15–26.

very real problem in Australia. As Justice Gaudron observed upon her retirement in early 2003, as a woman ‘you can still be refused silk in NSW on the basis that people have reported that you are too aggressive’.<sup>75</sup>

As Thornton observes, not only women but all ‘differentiated others’ are affected by the fact that they are distinguishable from the standard holder of senior public office (a white, middle-aged male):

All of these ‘others’ are represented as possessing ‘particular’ interests, emanating from their race, sexuality, and so on, that distinguish them from the norm, namely benchmark man. Otherness has been effectively constructed as though it were a personal peccadillo that compromises the claimed universality and neutrality of the public sphere.<sup>76</sup>

The automatic assumption that being ‘other’ (for example, a woman) and being appointed to high office is somehow not the same as being appointed on ‘merit’, is illustrated in the personal testimony of female judges.<sup>77</sup> Women judges may be expected to demonstrate their ‘neutrality’ and ‘rationality’ (and thus their merit for the purposes of the judicial role) beyond what is required of male judges.<sup>78</sup> Justice Claire L’Heureux-Dubé, formerly of the Canadian Supreme Court,<sup>79</sup> has recently argued that women judges remain ‘outsiders’ in Canada’s courts, ‘interlopers in a white, male-dominated judiciary’.<sup>80</sup> Justice L’Heureux-Dubé, in describing the ‘challenge of legitimacy’ faced by female and other ‘outsider’ judges, explains how women judges are required to prove that they do in fact merit their appointment (that is, that they are not merely token figures) and that they are not biased simply by virtue of their gender.<sup>81</sup>

In the Australian context, Graycar has argued that, ironically, the rhetoric of ‘merit’ is usually only relied upon when ‘there is some suggestion that factors like sex, or race, or even geography are also considered relevant: that is, the concept is used only when we talk of looking outside the traditional white male

<sup>75</sup> Justice Mary Gaudron, Speech delivered at the Australian Women Lawyers’ Reception, Sydney, 25 January 2003.

<sup>76</sup> Thornton, *Dissonance and Distrust*, above n 60, 25.

<sup>77</sup> For example, Justice Claire L’Heureux-Dubé, ‘Outsiders on the Bench: The Continuing Struggle for Equality’ (2001) 16 *Wisconsin Women’s Law Journal* 15; Dame Brenda Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ [2001] *Public Law* 489; ‘We Must Redress the Balance: An Interview with Her Honour Judge Toni Kennedy of the District Court’ (1994) 21(4) *Brief* 9; Barbara Hamilton, ‘The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?’ (2001) 1 *Queensland University of Technology Law and Justice Journal* 223, 226 (see fnn 17–18 and accompanying text, quoting Queensland District Court Judge Helen O’Sullivan).

<sup>78</sup> Thornton, *Dissonance and Distrust*, above n 60, 25, 297. See generally Graycar, ‘The Gender of Judgments’, above n 36.

<sup>79</sup> Which has had five female judges on its bench, three of whom are currently sitting.

<sup>80</sup> L’Heureux-Dubé, ‘Outsiders on the Bench’, above n 77, 21.

<sup>81</sup> *Ibid* 21–2. On the question of bias and impartiality, Justice L’Heureux-Dubé states at 27–8:

Impartiality does not mean the absence of knowledge or experience. ... The key issue is what types of experience are accepted and what are considered illegitimate. Society does not value the experience of the outsider: the woman, the member of a minority group. Our experiences are not considered legitimate. By their anatomy, their skin pigmentation, or their accent, these outsiders are brandished as biased, not to be trusted as judges and not to be accepted as members of the judicial community.

paradigm.<sup>82</sup> The extent to which the attributes of the majority of current judges are accepted as the norm is evident from, for example, a poll taken by the Australian Broadcasting Corporation on its website early this year when the issue of Justice Gaudron's successor was being considered. The poll asked participants, '[s]hould there be more women judges on the High Court?', and offered a choice of one of three answers: 'Yes', 'No', or 'Should Be Decided on Merit' (as if the first and last were incompatible alternatives).<sup>83</sup>

### B *Informal Networks and the Problem of Patronage*

While every appointment involves 'political' considerations to some extent, notable members of the judiciary have commented on the possibility of inappropriate considerations or even bias affecting the exclusively executive judicial appointments system currently operating in all Australian jurisdictions. Sir Harry Gibbs, a former Chief Justice of the High Court, speaking generally of the appointments process in Australia in 1987, stated that 'most governments in Australia, whatever their political complexion, do from time to time make appointments which fall short' of the appropriate standards.<sup>84</sup> In 1995, Sir Garfield Barwick, a former federal Attorney-General and Chief Justice of the High Court, made similar observations: 'Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee'.<sup>85</sup> More recently, in 1999, Justice Bruce McPherson of the Supreme Court of Queensland, as Chairman of the Judicial Conference of Australia, referred to the 'absolute and uncontrolled prerogative of the executive' to make appointments, and contended that: '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>86</sup>

Justice James Wood of the Supreme Court of New South Wales has argued that the present system

is unlikely to continue working as well as it did in the past, now that the ranks of practitioners have expanded, chambers have become dispersed, the number of law faculties has multiplied, and mega law firms with substantial international connections have emerged. It is no longer feasible to suppose that the

<sup>82</sup> Regina Graycar, 'The Merit of a Bigger Pond', *The Sydney Morning Herald* (Sydney), 19 December 2002, 17. See also Hale, above n 77, 493.

<sup>83</sup> Australian Broadcasting Corporation, *Public Record* (2003) <<http://www.abc.net.au/public/vote/total.htm>>. Out of 983 votes, 56 per cent voted 'Yes'; 4 per cent voted 'No'; and 40 per cent voted 'Should Be Decided on Merit'.

<sup>84</sup> Gibbs, 'The Appointment of Judges', above n 19, 9.

<sup>85</sup> Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) 230.

<sup>86</sup> Justice Bruce McPherson, 'Judicial Appointments and Education: Response from the JCA' (1999) 73(7) *Law Institute Journal* 23, 25.

Attorney-General of the day could claim to know personally all of those most suitable for appointment.<sup>87</sup>

Moreover, if there is no requirement for consultation, or only limited consultation is undertaken, this lack of personal knowledge may not be rectified before the Attorney-General proceeds to recommend an appointment. The same obviously applies, and with greater force, to the intervention of the Prime Minister and Cabinet in the process, as they are not even required to engage in consultation, yet hold the ultimate power to decide on the appointment. In addition, none of the politicians involved are bound to any specified criteria, other than to the inherently problematic one of ‘merit’. As Justice Gaudron has argued, ‘can have no legitimacy if patronage or “the Old Mates Act” also applies’.<sup>88</sup>

Whether or not inappropriate appointments are in fact made by a government, the secrecy of the decision-making process is inconsistent with even the most modest requirements of governmental accountability, and is certainly capable of giving rise to the *perception* that irrelevant factors may have been taken into account, or relevant ones omitted. It is vital, whether the appointee is a woman or a man, that a transparent process ensures that they cannot be subjected to any allegations of favouritism or, alternatively, tokenism. As Chief Justice David Malcolm of the Supreme Court of Western Australia has argued, the appointment of judges must ‘be, and be seen to be, directed to the appointment of judges of ability, independence and integrity’.<sup>89</sup>

In the United Kingdom, research by Kate Malleon and Fareda Banda into the factors affecting the decision to apply for judicial office and for silk illustrates the impact of patronage on the outcomes of the appointments process and, just as importantly, on perceptions of the process.<sup>90</sup> The United Kingdom procedure for all judicial posts up to and including the High Court relies on a system of publicly promulgated criteria and advertisements; submission of applications; consultations with respect to the applicants by the Lord Chancellor or his or her delegate with members of the profession (known as ‘secret soundings’); and then, on the basis of these consultations, compiling a short list of candidates and interviewing them for the position. The role of the ‘secret soundings’ in the process has been controversial and remains the main focus of criticisms of the United Kingdom system.<sup>91</sup>

According to Malleon, the findings demonstrate that while the system operating in the United Kingdom ‘ensures that those it appoints are chosen on merit, it does not necessarily guarantee that all those who are equally well-qualified

<sup>87</sup> Justice James Wood, ‘Selection and Induction of Judicial Officers’ in Michael O’Connell (ed), *Justice Delivery: Meeting New Challenges — Conference Proceedings: 17<sup>th</sup> Annual Conference of the Australian Institute of Judicial Administration: A Collection of Papers* (2000) 150, 158.

<sup>88</sup> Justice Mary Gaudron, ‘A Happy Coincidence of Self-Interest and the Public Interest: Equality of Opportunity for Women at the Victorian Bar’ (1999) 12 *Australian Feminist Law Journal* 117, 118.

<sup>89</sup> Malcolm, above n 9, 159.

<sup>90</sup> Kate Malleon and Fareda Banda, ‘Factors Affecting the Decision to Apply for Silk and Judicial Office’ (Research Series No 2/2000, Lord Chancellor’s Department, 2000).

<sup>91</sup> See Malleon, *The New Judiciary*, above n 2, 92–3.

have the same prospects of selection'.<sup>92</sup> The system requires what can be termed 'merit plus'.<sup>93</sup> The process of secret consultations means that being well qualified may not be sufficient as an individual candidate also needs to be well *known* among the group of judges and senior members of the profession whose personal opinions are sought. Yet fulfilling the additional criterion of 'being known' may be 'as much about good fortune, patronage and connections as merit', because the principal means of 'being known' are through court appearances and through informal networking associated with chambers.<sup>94</sup> This means that '[t]alented lawyers outside the "magic circle" of elite chambers' are disadvantaged by the process,<sup>95</sup> as are barristers with principally 'paper practices',<sup>96</sup> most solicitors, academics and (to a lesser extent) government lawyers. Also disadvantaged are many lawyers from minority backgrounds, and many women lawyers (particularly those with family responsibilities), given their under-representation at the senior bar.<sup>97</sup>

In addition, the empirically demonstrated problem of 'self-selection' is a real one in any process where the consultations and decision to appoint are made by a relatively closed and elite group of politicians and very senior members of the profession.<sup>98</sup> The operation of (often unconscious) self-selection, or what is sometimes called 'cloning',<sup>99</sup> in selection and assessment of candidates means that an individual may possess all the necessary criteria for appointment but be excluded from consideration because they lack other characteristics traditionally associated with incumbents. In the context of judicial appointments, this problem relates directly to the government's tradition of drawing appointees almost exclusively from the existing judiciary or from the Bar. As Malleeson puts it: 'Outsiders are inevitably at a disadvantage in a system which relies on the opinions of insiders.'<sup>100</sup> The problem is exacerbated in Australia where the key 'insider' positions in the appointments process, the federal Attorney-General and the Prime Minister, have never been held by a woman or person of non-Anglo-Saxon background.

#### V GIVING MEANING TO 'MERIT': THE NEED FOR CRITERIA

In 1993, then federal Attorney-General, Michael Lavarch, produced a discussion paper (*Lavarch Paper*) on the procedure and criteria for federal judicial appointments in Australia.<sup>101</sup> The paper suggested that any reform of the appointments process should aim to (i) 'ensure that appointees are of the highest

<sup>92</sup> Kate Malleeson, 'Creating a Reflective Judiciary: The Challenge Facing the Judicial Appointments Process' (Speech delivered to the Association of Women Barristers, London School of Economics, 10 July 2000) 4.

<sup>93</sup> *Ibid.* 5.

<sup>94</sup> Kate Malleeson, 'Another Nail in the Coffin?' (2002) 152 *New Law Journal* 1573, 1577.

<sup>95</sup> *Ibid.*

<sup>96</sup> Malleeson, 'Creating a Reflective Judiciary', above n 92, 7.

<sup>97</sup> Malleeson and Banda, above n 90, 25, 39.

<sup>98</sup> Cooney, 'Gender and Judicial Selection', above n 72, 34.

<sup>99</sup> Helena Kennedy, *Eve Was Framed: Women and British Justice* (1992) 267.

<sup>100</sup> Malleeson, *The New Judiciary*, above n 2, 93.

<sup>101</sup> *Lavarch Paper*, above n 40.

possible calibre'; (ii) 'identify a broader field of candidates for judicial office'; and (iii) 'make the selection process visible and comprehensive and thereby increase public confidence in the judiciary.'<sup>102</sup> The paper argued that the first step in any such process was to settle 'the criteria on which judicial selection should be made'.<sup>103</sup> These criteria could then be set out in legislation and be amended as necessary by Parliament.<sup>104</sup>

A 1999 discussion paper promulgated by Tasmanian Attorney-General, Peter Patmore ('*Patmore Paper*'), also recommended the establishment of criteria,<sup>105</sup> as did the Law Council of Australia's *Policy on the Process of Judicial Appointments* developed in 2000 and adopted in 2001.<sup>106</sup> The need for specific criteria in making judicial appointments has been echoed in several recent inquiries into gender and the Australian legal profession, including, at the national level, the 1994 Senate report on *Gender Bias and the Judiciary*<sup>107</sup> and the Australian Law Reform Commission's 1994 inquiry into women's equality before the law,<sup>108</sup> and at the state level, the 1998 report into women at the Victorian Bar<sup>109</sup> and the 1996 report by a New South Wales government Implementation Committee on redressing gender bias in the legal profession.<sup>110</sup>

Each of these papers and reports accepts that appointments to the bench must be based upon 'merit'.<sup>111</sup> However, several go further and give meaning to the concept through the development of criteria. Such criteria are usually formulated at a high level of abstraction,<sup>112</sup> which reflects the inherent difficulty in describing the process of judging and of identifying the diverse and complex range of skills required of a judge.<sup>113</sup> Nevertheless, criteria that capture and articulate, to

<sup>102</sup> Ibid 3–4.

<sup>103</sup> Ibid 5.

<sup>104</sup> Limited criteria already exist in the *High Court of Australia Act 1979* (Cth) s 7, the *Federal Court of Australia Act 1976* (Cth) s 6(2) and the *Family Law Act 1975* (Cth) s 22(2).

<sup>105</sup> Department of Justice and Industrial Relations, Tasmania, *Judicial Appointments in Tasmania: Discussion Paper* (1999) <<http://www.justice.tas.gov.au/legpol/judicial.htm>>.

<sup>106</sup> Law Council of Australia, *Policy on the Process of Judicial Appointments* (2002) <<http://www.lawcouncil.asn.au/policy/1957352833>> ('*LCA Policy*').

<sup>107</sup> *Gender Bias and the Judiciary*, above n 39, 91.

<sup>108</sup> Australian Law Reform Commission, *Equality before the Law: Women's Equality, Part 2*, Report No 69 (1994) recommendation 9.5 ('*Equality before the Law: Part 2*').

<sup>109</sup> Rosemary Hunter and Helen McKelvie, *Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council* (1998) 149.

<sup>110</sup> Implementation Committee, 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) 11 ('*Implementation Committee Report*'). See also Kim Gould, 'Enhancing Judicial Diversity — When Time Is Not on Your Side?' (1998) 2 *Flinders Journal of Law Reform* 215.

<sup>111</sup> The *LCA Policy*, for example, states that 'in addition to any statutory criteria for eligibility for appointment, the sole criterion for judicial appointment should be merit': *LCA Policy*, above n 106, 2.

<sup>112</sup> This is typically the case according to Malleson, *The New Judiciary*, above n 2, 95–6.

<sup>113</sup> Compare the more objective assessment of judicial skills and knowledge made possible in Germany (Annette Marfording, 'The Need for a Balanced Judiciary: The German Approach' (1997) 7 *Journal of Judicial Administration* 33, 35–6), Belgium (Martin Vranken, 'Judicial Appointments in Belgium and the Aftermath of the Dutroux Affair' (1999) 9 *Journal of Judicial Administration* 70) and other civil law systems through a system of common exams and supervised practical training periods. The United Kingdom has also piloted an Assessment Centre for

the best extent possible, the qualities sought in appointments are clearly preferable to no criteria at all (as is the case with appointments made solely on the basis of ‘merit’).

Specific criteria for appointment to judicial office have been proposed by the Law Council of Australia (although not for appointments to the High Court),<sup>114</sup> the *Patmore Paper* and the *Lavarch Paper*. Criteria for appointment to the bench already exist in the United Kingdom, New Zealand and Canada (as do criteria for the evaluation of proposed judicial appointments in the United States). The criteria for judicial appointment in such nations are commonly grouped into three main categories, which are also appropriate to the Australian context:

- legal knowledge and experience;<sup>115</sup>
- professional qualities; and
- personal qualities.

We would also propose that a fourth category, already found in some jurisdictions — and incorporated in the appointments policy of the United Kingdom — should be added, namely the need to achieve diversity in the judiciary. Finally, any criteria should be prefaced by a statement of equality of access to judicial office and non-discrimination in appointment.<sup>116</sup>

These four categories are examined below in order to illustrate how they might be applied in the Australian context and, in particular, in regard to appointments to the High Court. However, while we conclude that criteria under each of these four categories are a necessary part of a reformed judicial selection process, we are not attempting to specify the exact criteria that should be included. Obviously, the criteria need to be developed by government after consultation with the community, the legal profession, and present and former members of the judiciary.

potential District Court appointments in England and Wales to improve objectivity and impartiality in testing: *Constitutional Reform*, above n 7, 17.

<sup>114</sup> The *LCA Policy* states that it

applies to all jurisdictions and to all levels of judicial office in Australia, except for judges of the High Court of Australia. The High Court is in a unique position as the ultimate appellate court for Australia, and judicial appointments to the High Court are already subject to a statutory requirement for consultation prior to appointment (section 6 of the *High Court of Australia Act 1979*).

*LCA Policy*, above n 106, 1. However, that requirement is minimal and appointments to the High Court are currently not made against any recognised criteria. It is unclear why the criteria set out in the Policy (or at least a modified form of them) are not applicable to the High Court. In our view, the reasons for articulating criteria for appointment to lower courts apply even more strongly in the case of the High Court.

<sup>115</sup> The legal knowledge and experience required may vary according to the judicial post under consideration, while the criteria under the other categories are unlikely to vary greatly between positions.

<sup>116</sup> For example, along the lines of that found in the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (1995) cl 13, unanimously adopted by the Chief Justices of the courts of the LAWASIA region in 1995: reprinted in (1996) 70 *Australian Law Journal* 300. See also Marfording, above n 113, 34.

### A Legal Knowledge and Experience

The *LCA Policy* provides that a candidate must possess either a ‘sound knowledge and understanding’ of the relevant areas of law in the court to which they are being appointed or, ‘in the case of candidates with more specialised professional experience, the ability to acquire an effective working knowledge’ of them.<sup>117</sup> Experience as an advocate is often advanced as a central requirement for judicial work, and Chief Justice Gleeson has highlighted some of the justifications for the traditional focus on advocates as potential candidates for judicial appointment, including the spirit of independence which experience at the Bar may promote and the importance of the practical training gained by barristers in light of the historical lack of properly funded judicial education programs.<sup>118</sup> However, the Chief Justice has also pointed to the specialisation of the profession and the concomitant breaking down of the assumption that a barrister would automatically have gained a breadth of experience across a wide range of legal areas.<sup>119</sup> In addition, as Tony Blackshield has observed, the knowledge required of a trial judge can be very different to that required of a judge of the highest appellate court, where the skills learnt at the bar may not be as directly relevant.<sup>120</sup>

According to the criteria applied in New Zealand, ‘[m]ore important than where legal knowledge and experience in application is derived from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation’.<sup>121</sup> This can be contrasted with the more restrictive *LCA Policy* (which largely follows an old version of the criteria for appointment to the United Kingdom High Court), which states that: ‘It is necessary that successful candidates ... will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged *while in professional practice*’.<sup>122</sup> The Policy then states that ‘court or litigation experience’ is not required, but is ‘desirable’.<sup>123</sup>

The most recent version of the United Kingdom criteria for appointment to the High Court (for the 2003 competition) states that: ‘*All* successful candidates will have attained (a) [a] high level of understanding of the principles of law and jurisprudence and (b) [a] comprehensive knowledge of the rules of evidence and

<sup>117</sup> *LCA Policy*, above n 106, 4.

<sup>118</sup> Gleeson, ‘Judicial Selection and Training’, above n 44, 591–2. The development of the National Judicial College in 2002 is significant in this regard: see Chief Justice John Doyle, ‘The National Judicial College of Australia’ (2003) 14 *Public Law Review* 69.

<sup>119</sup> Gleeson, ‘Judicial Selection and Training’, above n 44, 594.

<sup>120</sup> Blackshield, ‘The Appointment and Removal of Federal Judges’, above n 25, 432–3.

<sup>121</sup> Ministry of Justice, New Zealand, *Judicial Appointments: Office of High Court Judge* (2003) <<http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html>>. Similarly, the Canadian guidelines state: ‘While courtroom experience is an asset, it is only one of many factors which may be considered in assessing a candidate’s suitability for the role of judge’: Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates — Assessment Criteria* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/assess\\_e.html](http://www.fja.gc.ca/jud_app/guide/assess_e.html)> (‘*Canada Assessment Criteria*’).

<sup>122</sup> *LCA Policy*, above n 106, 4 (emphasis added).

<sup>123</sup> *Ibid.*

of court practice and procedure'.<sup>124</sup> However, the criteria then go on to specify that: 'Practitioners will in addition have obtained ... (d) an outstanding level of professional achievement in the areas of law in which they have been in professional practice'.<sup>125</sup> The statutory criteria in the United Kingdom require only that a candidate (in the case of the High Court) have held a right of audience in relation to all proceedings in the court for 10 years — a right which is acquired at the time of admission to practice or the Bar.<sup>126</sup> Interestingly, the Canadian guidelines applying to federal judicial appointments emphasise that 'all legal experience', including that 'outside a mainstream legal practice' and 'area(s) of professional specialization' are relevant, even desirable, professional qualifications to be taken into consideration.<sup>127</sup> However, this must be read in the light of the basic statutory requirement for Canadian federal court judges to have been either at the Bar for 10 years or in another judicial position.<sup>128</sup>

In the United States, the criteria adopted by the American Bar Association ('ABA') in evaluating nominees to all federal courts, including the United States Supreme Court, focus on three requirements: integrity, professional competence and 'judicial temperament' (which is analogous to the 'personal qualities' category below).<sup>129</sup> With respect to the Supreme Court, the criteria state that 'exceptional professional qualifications' are required in light of the 'significance, range and complexity of issues considered by the Supreme Court, the importance of the underlying social problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket'.<sup>130</sup>

Neither the *LCA Policy* nor the United Kingdom or New Zealand criteria directly address the desirability of 'scholarly' qualities. With respect to professional competence, the ABA criteria state:

Recognising that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theatre of the courtroom), the Committee may place somewhat less emphasis on the importance of trial experience as a qualification for the appellate courts. On the other hand, although scholarly qualities are necessary

<sup>124</sup> Legal and Judicial Services Group, Department for Constitutional Affairs, United Kingdom, *High Court 2003 (Appointments to the Office of Justice of the High Court): Guide for Applicants* (2003) 6 <[www.dca.gov.uk/judicial/appointments/hcj03/hcj03appguide.pdf](http://www.dca.gov.uk/judicial/appointments/hcj03/hcj03appguide.pdf)> ('*High Court 2003: Guide for Applicants*').

<sup>125</sup> *Ibid.* Requirement (c) relates to experience derived from part-time judicial work.

<sup>126</sup> *Ibid.* 4; Department for Constitutional Affairs, United Kingdom, *Judicial Appointments in England and Wales* (2003) <[www.dca.gov.uk/judicial/appointments/jappinfr.htm](http://www.dca.gov.uk/judicial/appointments/jappinfr.htm)> ('*Judicial Appointments in England and Wales*'). Alternatively, two years experience as a District Court judge is also sufficient qualification.

<sup>127</sup> See *Canada Assessment Criteria*, above n 121; Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates — Assessments and Confidentiality* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/process4\\_e.html](http://www.fja.gc.ca/jud_app/guide/process4_e.html)> ('*Canada Assessments and Confidentiality*').

<sup>128</sup> *Judges Act*, RSC 1985, c J-1, s 3; *Federal Court Act*, RSC 1985, c F-7, s 5(5); *Tax Court of Canada Act*, RSC 1985, c T-2, s 4(3).

<sup>129</sup> Standing Committee on the Federal Judiciary, American Bar Association, *The ABA Standing Committee on Federal Judiciary: What It Is and How It Works* (2001) 3 <<http://www.abanet.org/scfedjud/background.pdf>> ('*ABA Standing Committee on Federal Judiciary*').

<sup>130</sup> *Ibid.* 9–10.

for the trial courts, the Committee believes that appellate court nominees should possess an especially high degree of scholarship and academic talent.<sup>131</sup>

This quality is assessed by the ABA through an examination of the candidate's legal writings by, in the case of Supreme Court nominees, teams of legal academics who are experts in the relevant fields (typically under the direction of a senior professor who reports the findings to the Committee) and teams of practising lawyers.<sup>132</sup> The nominee's writing is assessed for 'professional competence' and not 'ideology'.<sup>133</sup>

Additional issues arise in regard to appointment to appellate courts such as the High Court of Australia. According to the ABA: 'The ability to write lucidly and persuasively, to harmonise a body of law and to give guidance to the trial courts for future cases are considered in the evaluation of nominees for appellate courts'.<sup>134</sup> In the Australian context, Sir Anthony Mason has advocated similar criteria for selecting High Court judges, commenting that 'the High Court's principal preoccupation with constitutional and public law requires an understanding of government in the widest sense of that term and a greater capacity to formulate the general principles of law'.<sup>135</sup>

### B Professional Qualities

According to Chief Justice Gleeson:

There is plenty of room for argument about what constitutes merit in judicial selection. But, if it means nothing else, it must at least include the capacity to preside over adversarial litigation, conduct the proceedings with reasonable efficiency, and produce a well-reasoned judgment at the end.<sup>136</sup>

The *Lavarch Paper* noted that there has been an assumption that the skills required of a senior barrister are the same as those required of a competent judge.<sup>137</sup> However, it also recognised that while some advocacy skills are essential for judicial office (such as oral communication skills, and analytical and forensic ability), others are decidedly not and may indeed conflict with the judicial role of arbiter.<sup>138</sup> Moreover, it is not only barristers who possess advocacy skills; they are also required of solicitors, academic lawyers and government lawyers.<sup>139</sup> In addition, as the 2000 Australian Law Reform Commission report on the federal civil justice system noted, the move towards managerial judging in all Australian jurisdictions, and the general (and in many cases judicially initiated) reform of the adversarial process, has rendered new skills

<sup>131</sup> Ibid 4.

<sup>132</sup> ABA Standing Committee on Federal Judiciary, above n 129, 10.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 4.

<sup>135</sup> Mason, 'The Appointment and Removal of Judges', above n 2, 6.

<sup>136</sup> Gleeson, 'Judicial Selection and Training', above n 44, 593.

<sup>137</sup> *Lavarch Paper*, above n 40, 16.

<sup>138</sup> For example, the ability 'to maintain and advance an argument in the context of conflicting and equally valid counter-arguments': ibid 17.

<sup>139</sup> Ibid 18.

relevant to the judicial role.<sup>140</sup> Accordingly, the traditional skills of the vigorously *adversarial* lawyer may be less central to the judicial role now than in the past.

The first five professional skill requirements in the *LCA Policy* essentially follow the United Kingdom criteria, but without the elaboration found in the United Kingdom context. The current United Kingdom criteria require:<sup>141</sup>

- first, ‘*sound judgement*’, which is said to involve the appropriate exercise of discretion and the ability to consider conflicting arguments and reach a balanced conclusion;
- second, ‘*intellectual and analytical ability*’, which includes forensic ability and the application of the law to the facts (and, interestingly, ‘the ability to concentrate for long periods of time’);
- third, candidates require ‘*decisiveness*’, which is clarified as meaning the ability to ‘think, decide and act independently of others, and to rely on their own judgment’;
- fourth, ‘*communication skills*’, which importantly includes the ability to communicate effectively with ‘*all types of court user*’;
- and fifth, and somewhat problematically, ‘*authority and case management skills*’ (which the LCA formulation elaborates simply as ‘the ability to command respect’).<sup>142</sup>

Barbara Hamilton has argued that the potential for stereotyping and unconscious bias exists in relation to four of these five criteria (the exception being communication skills), despite their apparent neutrality deriving from their normative status within the legal profession.<sup>143</sup> Whether this is true of all of them, it is certainly true of the requirement of ‘authority’ which, as Clare McGlynn notes, is less about an individual’s qualities than about what others think of them: ‘if there is a court room full of individuals who consider that women should not be on the Bench but at home, the woman judge will not have much “authority”’.<sup>144</sup>

The *LCA Policy* goes on to include an additional four qualities, including a ‘capacity and willingness for sustained hard work’.<sup>145</sup> While it is obviously important that judges are industrious, Hamilton has drawn attention to the danger that ‘women’s employment patterns, particularly within the legal profession (with periods devoted to child-raising and part-time work resulting from family responsibilities) may be regarded as counter-indicative of this trait’, particularly if it is measured solely according to hours worked rather than the quality of work or the speed at which it is produced.<sup>146</sup> The *LCA Policy* could potentially

<sup>140</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.4].

<sup>141</sup> *High Court 2003: Guide for Applicants*, above n 124, 6–7.

<sup>142</sup> *LCA Policy*, above n 106, 4 (emphasis in original).

<sup>143</sup> Hamilton, ‘The Law Council of Australia Policy 2001’, above n 77, 234–6.

<sup>144</sup> McGlynn, above n 74, 181. See also Margaret Thornton, ‘Authority and Corporeality: The Conundrum for Women in Law’ (1998) 6 *Feminist Legal Studies* 147; Thornton, *Dissonance and Distrust*, above n 60, ch 6.

<sup>145</sup> *LCA Policy*, above n 106, 4.

<sup>146</sup> Hamilton, ‘The Law Council of Australia Policy 2001’, above n 77, 235–6.

disadvantage any person, male or female, who ‘interrupts’ his or her career for family reasons, an issue that has been highlighted as demanding attention more generally in the legal profession.<sup>147</sup>

The final three criteria in the *LCA Policy* are: ‘management skills, including case management skills’; ‘familiarity with, and ability to use, modern information technology or the capacity to attain the same’; and ‘willingness to participate in ongoing judicial education’.<sup>148</sup> With respect to the third, the important link between judicial appointment and education has been articulated by Chief Justice Gleeson. While recognising that widening the pool of candidates for judicial office would be desirable as it would ‘increase the vitality and strength of the judiciary’,<sup>149</sup> his Honour has emphasised that the success of any change in the method of appointing judges to reflect this aim would depend upon adequate judicial training and ongoing professional development programs.<sup>150</sup> According to the Chief Justice: ‘Significant and long-term (as distinct from cosmetic) change is impossible without progress in developing facilities for judicial education.’<sup>151</sup>

### C Personal Qualities

The *LCA Policy* states that the following attributes are desirable in judges:

- integrity, good character and reputation;
- fairness;
- independence and impartiality;
- maturity and sound temperament;
- courtesy and humanity; and
- social awareness, including gender and cultural awareness.<sup>152</sup>

Hamilton argues that the notion of ‘reputation’ in the first criterion is again inherently subjective, and dependent on ‘being known’ within the profession or within the narrow section of the profession consulted in the appointments process.<sup>153</sup> In the United Kingdom, where the equivalent requirement of ‘standing’ was subjected to sustained criticism, the criteria now state that ‘integrity’ encompasses ‘having the trust, confidence and respect of others’ — which is still problematic, as ‘others’ remains undefined.<sup>154</sup>

<sup>147</sup> See generally Hunter and McKelvie, above n 109, ch 5. McGlynn has rejected what she calls the ‘human capital rationale’ of undervaluing women’s work by assuming that women voluntarily invest less in their training or career by ‘choosing’ to have children and take time out from professional work: McGlynn, above n 74, 98–9.

<sup>148</sup> *LCA Policy*, above n 106, 4.

<sup>149</sup> Gleeson, ‘Judicial Selection and Training’, above n 44, 594.

<sup>150</sup> *Ibid* 597.

<sup>151</sup> *Ibid* 591. The Canadian guidelines emphasise the importance of judicial education and the role of the individual judge in ensuring that they continue their professional development while on the bench through such programs: Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates — Professional Development* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/considerations4\\_e.html](http://www.fja.gc.ca/jud_app/guide/considerations4_e.html)>.

<sup>152</sup> *LCA Policy*, above n 106, 4.

<sup>153</sup> Hamilton, ‘The Law Council of Australia Policy 2001’, above n 77, 236.

<sup>154</sup> *High Court 2003: Guide for Applicants*, above n 124, 7.

Hamilton suggests that the final two requirements in the *LCA Policy* are laudable because they reflect the fact that judges have shifted away from being merely a 'passive umpire' in court proceedings. According to Justice Bertha Wilson of the Supreme Court of Canada, a judge must understand and engage with the arguments and perspectives of the parties appearing before him or her before being able to 'step back' and engage in judgment.<sup>155</sup> As Malleeson observes,

broadly humanistic qualities ... are increasingly being included on appointment criteria around the world. In one respect these can be seen as personal values but they also underpin the principles upon which the administration of justice rests.<sup>156</sup>

In Canada, for example, 'tolerance', 'consideration for others' and 'humility' are listed as attributes required of federal judges.<sup>157</sup> The ABA criteria also refer, under the concept of 'judicial temperament', to 'compassion', 'open-mindedness, courtesy, patience' and 'commitment to equal justice under the law'.<sup>158</sup> Annette Marfording has outlined the concept of a 'personal evaluation interview' which forms a central part of the appointments system operating in the German state of Lower Saxony.<sup>159</sup> This assesses a candidate's judicial competency,<sup>160</sup> professional motivation<sup>161</sup> and 'social competency', the latter encompassing 'the candidate's social empathy, capability to negotiate and settle disputes, capacity to cooperate, ability to exercise power constructively, and willingness to adhere to one's convictions.'<sup>162</sup>

Sir Anthony Mason has referred to the fact that justice is 'no longer a cloistered virtue' and has emphasised 'a willingness to listen to and understand the viewpoint of others' as a vital judicial attribute.<sup>163</sup> The New Zealand guidelines require candidates to be

aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the com-

<sup>155</sup> Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507, 521.

<sup>156</sup> Malleeson, *The New Judiciary*, above n 2, 102. In Australia, a judge of the Family Court is currently required to be 'by reason of training, experience, and personality ... a suitable person to deal with matters of family law': *Family Law Act 1975* (Cth) s 22(2)(b).

<sup>157</sup> *Canada Assessment Criteria*, above n 127. In Ontario, the criteria include 'respect for the essential dignity of all persons regardless of their circumstances' and 'compassion and empathy': Judicial Appointments Advisory Committee, Ontario, *Policies and Process* (2002) <[http://www.ontariocourts.on.ca/judicial\\_appointments/policies.htm](http://www.ontariocourts.on.ca/judicial_appointments/policies.htm)> ('*Ontario Policies and Process*').

<sup>158</sup> *ABA Standing Committee on Federal Judiciary*, above n 129, 4-5.

<sup>159</sup> Marfording, above n 113, 36.

<sup>160</sup> Primarily determined by examination results and references: *ibid.*

<sup>161</sup> Which assesses the candidate's sense of justice and their diligence: *ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Mason, 'The Appointment and Removal of Judges', above n 2, 10. 'Breadth of vision' is sometimes advanced as a criterion but has been interpreted variously, ranging from 'a well-developed sense of the role of the courts and the law in our society' (*Lavarch Paper*, above n 40, 9), to 'a full understanding of the social issues of the day, or an open-mindedness or preparedness to listen to those who have such an understanding' (Pip Nicholson, 'Appointing High Court Judges: Need for Reform?' (1996) 68(3) *Australian Quarterly* 69, 79).

munity of which the Court is part and who clearly demonstrate their social awareness.<sup>164</sup>

Importantly, the Canadian guidelines include ‘awareness of racial and gender issues’ and ‘interpersonal skills — with peers and the general public’ within the required professional (as opposed to personal) qualities.<sup>165</sup>

Gender and cross-cultural awareness and interpersonal ability are of vital importance to the modern judicial role and are important personal characteristics at the time of appointment. They relate directly to the final criterion which we would propose.

#### D Diversity in the Judiciary

We would argue that in addition to articulating requirements related to legal experience, professional skills and personal qualities, a further criterion referring to the outcome of the appointment process is necessary — that is, the need to achieve diversity among the people who actually comprise the judiciary. Without such a specific requirement, there is a danger that the foregoing criteria could be applied in an overly orthodox manner, which would produce a judiciary lacking, in Justice Kirby’s phrase, the necessary ‘light and shade’.<sup>166</sup>

Unfortunately, the debate over this issue in Australia has been ‘sidetracked’<sup>167</sup> by confusion between diversity in the membership of the judiciary and the idea of partisan representation.<sup>168</sup> While the judiciary should reflect the make-up of the society from which its members are drawn, this should be distinguished from the idea that judges ought to ‘represent’ (or advocate) the interests of the gender or other group to which they are seen as belonging. A central feature of the judiciary is that it is independent of and unresponsive to political pressure. Clearly, the role of a judge of the High Court, as spelt out in the judicial oath, is to ‘do right to all manner of people according to law without fear or favour, affection or ill-will.’<sup>169</sup>

In the United Kingdom, there has been significant and quite sophisticated debate for several years over the importance of securing a more diverse judiciary and methods of achieving this. While diversity has not been built in as a formal criterion, it is a stated policy of the Lord Chancellor’s Department that ‘[t]he Lord Chancellor is keen to see a judiciary which reflects the diversity of the legal profession, which in turn should mirror our society’.<sup>170</sup> This policy is implemented not only through the promulgation of specific criteria and a process of advertising and interviewing for most judicial appointments (discussed in below

<sup>164</sup> Ministry of Justice, New Zealand, *Office of High Court Judge*, above n 121.

<sup>165</sup> *Canada Assessment Criteria*, above n 121.

<sup>166</sup> Kirby, *The Judges*, above n 25, 22.

<sup>167</sup> Wood, above n 87, 157.

<sup>168</sup> See, eg, Sir Harry Gibbs, ‘Oration Delivered at the Opening of the Supreme Court Library’s Rare Books Room’ (Speech presented at Supreme Court of Queensland, Brisbane, 11 February 2000) <<http://www.courts.qld.gov.au/publications/articles/speeches/gibbs110200.htm>>.

<sup>169</sup> *High Court of Australia Act 1979* (Cth) sch.

<sup>170</sup> Lord Chancellor’s Department, United Kingdom, *Judicial Appointments in England and Wales: Equality of Opportunity and Promoting Diversity* (2001) Department for Constitutional Affairs <[www.dca.gov.uk/judicial/judequal.htm](http://www.dca.gov.uk/judicial/judequal.htm)>.

Part VI), but also through specific initiatives carried out by the Lord Chancellor's Department. These include commissioning reports and funding research; publishing information booklets and annual reports on the application process (including statistics about the proportions of appointments from under-represented groups); holding information sessions to promote awareness of the process; and the development of innovative measures, such as 'work shadowing' of judges by interested applicants.<sup>171</sup> The Judicial Appointments Commission proposed for the United Kingdom would continue this policy and seek further ways of implementing it.<sup>172</sup>

Other jurisdictions explicitly recognise the need for diversity in the judiciary in their constitutional requirements for appointment, as is the case in Fiji<sup>173</sup> and South Africa.<sup>174</sup> In others, such as Ontario, this requirement is built into legislative or policy-based criteria for appointment.<sup>175</sup>

In Australia, the idea of increasing diversity while retaining appointment on the basis of merit was supported in the *Lavarch Paper*<sup>176</sup> and by the 1994 Senate report, *Gender Bias and the Judiciary*.<sup>177</sup> Several commentators have also proposed that the need for the judiciary to be reflective of society should be relevant where the candidates being considered are otherwise 'equally meritorious' (assuming that this could be determined). Those advocating this view include Sir Harry Gibbs,<sup>178</sup> Justice Jeff Shaw of the New South Wales Supreme Court (and former Attorney-General of that State)<sup>179</sup> and the New South Wales Implementation Committee.<sup>180</sup> More broadly, former Attorney-General Daryl Williams has recognised that the requirement of a balanced composition on the High Court need not 'negate or qualify' the principle that appointments should be made on merit; a candidate's professional skills and personal attributes 'must be considered in the context of ensuring that appointments to the Court maintain or enhance public confidence in the institution and the independence and impartiality of its members.'<sup>181</sup> As Sir Anthony Mason has pointed out:

<sup>171</sup> Ibid.

<sup>172</sup> *Constitutional Reform*, above n 7, 46.

<sup>173</sup> The *Fijian Constitution* s 134 states: 'The making of appointments to judicial office is governed by the principles, first, that judges should be of the highest quality and, secondly, that the composition of the judiciary should, as far as practicable, reflect the ethnic and gender balance of the community.'

<sup>174</sup> The *South African Constitution* s 174(2) states: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

<sup>175</sup> The criteria for appointing provincial judges states that: 'The judiciary of the Ontario Court of Justice should be reasonably representative of the population it serves. This requires overcoming the under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability': *Ontario Policies and Process*, above n 157.

<sup>176</sup> *Lavarch Paper*, above n 40, 6.

<sup>177</sup> *Gender Bias and the Judiciary*, above n 39, [5.81]–[5.82].

<sup>178</sup> Sir Harry Gibbs, 'The Appointment and Removal of Judges' (1987) 17 *Federal Law Review* 141, 145.

<sup>179</sup> Jeff Shaw, 'Judicial Appointments' (2000) 77 *Reform* 6, 88. Shaw states that where there is 'equality of merit, or even reasonable comparability of merit' then it is legitimate for an appointing Attorney-General to take the need for diversity in the judiciary into account.

<sup>180</sup> *Implementation Committee Report*, above n 110, 1.

<sup>181</sup> Williams, 'Judicial Independence and the High Court', above n 13, 149.

There is a risk ... that an unrepresentative judiciary may result in a loss of confidence in the system, all the more so when the judges are called upon to apply community standards as part and parcel of their daily work. Once that is acknowledged, as it must be, it is important that efforts be made to ensure that the judiciary is more representative than it is at the present time and that its composition is fairly balanced.<sup>182</sup>

Where a section of society feels that its perspectives and needs are not being adequately taken into account by the judiciary — due partly to the fact, as Simon Shetreet has argued, that the judiciary does not reflect their presence within society — this can result in a lessening in regard for, and confidence in, judicial decision-making.<sup>183</sup> For example, studies in New Zealand and the United Kingdom illustrate this in the case of women users of the court system. In New Zealand, women who have gone to court have been recorded as registering a much lower sense of confidence than that of men that they had been treated fairly.<sup>184</sup> In the United Kingdom, women who had never been to court evinced less confidence than men that if they went to court with a problem they would receive a fair hearing.<sup>185</sup> Such studies are reflected in the Australian context at the national level in, for example, the three volumes of findings of the Australian Law Reform Commission's 1994 inquiry into gender equality in the law, which outlined numerous areas in which women felt that they were treated unfairly by the legal system.<sup>186</sup>

The 'hidden gender of law'<sup>187</sup> has been exposed by a range of commentators.<sup>188</sup> While the 'different voice' which women may bring to the bench understandably remains controversial,<sup>189</sup> the presence of more women judges — and more judges from different racial, religious and other backgrounds to those

<sup>182</sup> Mason, 'The Appointment and Removal of Judges', above n 2, 7.

<sup>183</sup> Shimon Shetreet, 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 *Australian Law Journal* 766, 776–7. See also *Gender Bias and the Judiciary*, above n 39, [5.59]–[5.60]; Gibbs, 'The Appointment and Removal of Judges', above n 178, 145–6; Hale, 'Equality and the Judiciary', above n 77, 502–3.

<sup>184</sup> See Joanne Morris, 'Women's Experiences of the Justice System' (1997) 27 *Victoria University of Wellington Law Review* 649, 661–2.

<sup>185</sup> Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (1999) 229 (62 per cent of men agreed or strongly agreed that they would receive a fair hearing, compared with only 52 per cent of women). See also at 239–45 on common perspectives on members of the judiciary.

<sup>186</sup> Australian Law Reform Commission, *Equality before the Law: Women's Access to the Legal System*, Report No 67 (Interim) (1994); Australian Law Reform Commission, *Equality before the Law: Justice for Women, Part 1*, Report No 69 (1994); *Equality before the Law: Part 2*, above n 108. See also Department for Women, New South Wales, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996).

<sup>187</sup> The phrase used by Graycar and Morgan: Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed, 2002).

<sup>188</sup> The literature in Australia alone is significant, and includes studies ranging, for example, from deconstructions of the traditional 'public/private' dichotomy (see, eg, Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995)) to analyses of the sex (and other characteristics) of the 'legal person' or subject of law (see, eg, Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997)) to the way in which 'judicial knowledge' or 'commonsense' is acquired or constructed (see, eg, Graycar, 'The Gender of Judgments', above n 36, 14–21; Graycar and Morgan, above n 187, ch 4). See generally Graycar and Morgan, above n 187.

<sup>189</sup> See, eg, the range of articles in a symposium on this issue in (1993) 77(3) *Judicature* 1, 126–73.

of the majority — has the potential to bring about change in both the substantive law and in the profession generally, through the effect of diversity in combating pervasive stereotypes and other (often unconscious) assumptions.<sup>190</sup> With respect to the higher courts, as Blackshield has pointed out, it is in fact because of the perceived benefits of a wider range of experiences and perspectives that ‘appellate and constitutional tasks are assigned to collegiate benches. If all members of a bench share the same kind of background and outlook, the *very purpose* of a multi-judge bench may be defeated.’<sup>191</sup> We would agree with such arguments and, therefore, in our opinion, a fourth criterion emphasising diversity is crucial.

## VI MODELS OF JUDICIAL APPOINTMENT

In a thorough analysis in 1987 of possible models of judicial appointment, George Winterton concluded that while the results of the current executive method of appointment to the High Court, ‘assessed in terms of legal competence’, are ‘very favourable’,<sup>192</sup> the procedural aspects could be ‘justifiably criticized’.<sup>193</sup> In the years since Winterton’s analysis, the models for appointment, particularly judicial appointments commissions, have been developed and improved upon in a range of common law countries, in part because of a desire for a more professionalised and transparent selection process. This has also been reflected in Australia in the processes for appointment to the lower tiers of the judiciary, primarily at the level of the magistracy, with the use of advertising and interviews, but not at the more senior levels, including the High Court. Here we outline the principal models available but focus, for reasons outlined below, on variations to an executive appointments process.

### A *A Career Judiciary*

In most civil law systems, individuals train for a career either as a lawyer or as a judge, with the bench regarded as another arm of the bureaucracy where promotion through the ranks is determined on the basis of technical ability and seniority. The system now operating in England in fact reflects some of these characteristics in that there is an accepted path of appointment and promotion ‘from Assistant Recorder to Recorder to Circuit Judge, and from Deputy District Judge to District Judge, and in some instances upwards to the High Court’.<sup>194</sup> This reflects the United Kingdom government’s aim of promoting diversity in appointments through more flexible career paths, and career-based appointment appears likely to increase.<sup>195</sup> While Australia has many examples of judges being

<sup>190</sup> See Justice Claire L’Heureux-Dubé, ‘Making a Difference: The Pursuit of a Compassionate Justice’ (1997) 31 *University of British Columbia Law Review* 1.

<sup>191</sup> Blackshield, ‘The Appointment and Removal of Federal Judges’, above n 25, 435 (emphasis added).

<sup>192</sup> Winterton, above n 9, 188.

<sup>193</sup> *Ibid* 189.

<sup>194</sup> Wood, above n 87, 159.

<sup>195</sup> In his foreword to the United Kingdom consultation paper, Lord Falconer of Thoroton states that: ‘The Government does not believe that a career judiciary on the continental model would be appropriate for the common law system of England and Wales but they do believe that new

promoted from lower to higher courts (and more flexible career paths through the judiciary have been the subject of debate and discussion), there is no Australian tradition of promotion like that of the United Kingdom.

### B Election

Popular elections are currently employed in 21 states in the United States,<sup>196</sup> but not at the federal level or in any other common law jurisdiction.<sup>197</sup> We would argue that election is not a likely or feasible option for the Australian judiciary. Judicial elections can degenerate not only into blatantly political contests between partisan judges but, like political elections, into financial contests as well. As Winterton observes, election has not been a favoured model among Australian commentators and, in his (and our) view, ‘is not really worthy of serious consideration’ as a reform option.<sup>198</sup>

Election by the legislature instead of the public is an alternative model used to select the judges of the Federal and Constitutional Courts in Switzerland and Germany and in the European Court of Human Rights and the International Court of Justice.<sup>199</sup> However, in Australia, it is likely that this would raise similar problems as appointment by popular election given the traditionally adversarial relationship between the major political parties in the federal Parliament.<sup>200</sup>

### C Confirmation by the Legislature

Of the main common law jurisdictions, confirmation by the legislature is only found in the United States. Confirmation hearings operate for all United States courts at the federal level, including the Supreme Court. The President nominates candidates who then must be confirmed by the Senate (typically acting on the recommendation of the Senate Judiciary Committee).<sup>201</sup> As Winterton has summarised, a confirmation process has some advantages over

the secret, largely non-accountable nature of the current Australian method of executive appointment: the Judiciary Committee hearings and Senate debates are conducted in public, the nominee’s professional and personal record are ex-

career paths should be looked at to promote other opportunities and diversity in appointments’: *Constitutional Reform*, above n 7, 5.

<sup>196</sup> *Ibid* 77.

<sup>197</sup> Winterton, above n 9, 193.

<sup>198</sup> *Ibid* 192.

<sup>199</sup> Kate Malleson, ‘Selecting Judges in the Era of Devolution and Human Rights’ in Andrew Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (2003) 18.

<sup>200</sup> See Nicholson, above n 163, 81.

<sup>201</sup> The ABA had traditionally (since 1948) assumed the role of ranking proposed candidates before their nominations were made public and submitting these rankings to the Senate through the Judiciary Committee. However, in 2001 the Bush Administration announced that it would no longer submit names to the ABA before nomination. However, the ABA has continued its traditional role, albeit post-nomination, at the request of the Senate: *ABA Standing Committee on Federal Judiciary*, above n 129, 1.

amined closely, and the President is effectively made publicly accountable for his choice, which is by no means automatically accepted.<sup>202</sup>

The idea was also raised in Canada in the 1970s and has again become the subject of discussion there, with one former Supreme Court judge (G rard La Forest) publicly supporting the introduction of such a system.<sup>203</sup>

Confirmation by the federal Parliament for appointment to the High Court is unlikely to achieve significant support in Australia. The process would not be a guarantee against political appointments, as the United States has shown, with heated confirmation battles over the appointments of Robert Bork and Clarence Thomas to the Supreme Court, and could potentially increase the politicisation of the judiciary and partisanship in judicial selection. It is also difficult to see how the process could work in the Australian Parliament with its more rigid party system. It is unlikely that any Australian government would agree that the Senate, in which the balance of power is generally held by independents and minor parties, should be given authority to confirm appointments. On the other hand, if the power were granted to the House of Representatives, the process could be ineffectual since that House is likely to be controlled by the government proposing the candidate for the judicial office.

#### *D Appointment by the Executive on the Advice of a Judicial Appointments Commission*

Judicial appointments commissions have been adopted in many jurisdictions, including in some states of the United States, in Canada at the federal and provincial levels, and in Scotland, Ireland, South Africa, Israel and various European countries,<sup>204</sup> and are under consideration in the United Kingdom and New Zealand. A developing body of empirical research suggests that not only do commissions produce judges of equal quality to those nominated under purely executive appointments systems, but they have the potential to result in greater diversity of applicants and appointments. Most importantly, they contribute directly to public confidence in the judicial appointments process. Here, we review the systems currently operating in the United States, New Zealand, Canada (at the federal and provincial levels) and the United Kingdom (including the recent proposals for reform), and then briefly survey some of the principal research on the functioning of judicial appointments commissions.

##### *1 United States*

Partly to counter criticism of the direct election model, some states in the United States have established what are known as ‘Missouri plans’ or ‘merit plans’ setting up commissions to select candidates for appointment by the state executive. To date, commissions have been adopted in 34 states to nominate candidates for appointment by the executive for at least a portion of the relevant

<sup>202</sup> Winterton, above n 9, 193–4.

<sup>203</sup> Malleon, ‘Selecting Judges in the Era of Devolution and Human Rights’, above n 199, 17–18.

<sup>204</sup> *Constitutional Reform*, above n 7, 73–4.

judiciary.<sup>205</sup> Typically, the judges appointed are still required to stand in 'retention elections' after a short period on the bench. While there is no set model for such commissions, the American Judicature Society, which promotes the adoption of merit commissions, has identified as common features the inclusion of lay and legal professional members to recruit, receive applications, investigate and evaluate potential candidates, combined with the nomination to the appointing authority of a limited number of candidates.<sup>206</sup>

## 2 New Zealand

In 1998, a Judicial Appointments Unit was established within the New Zealand Ministry of Justice to publicise judicial vacancies and receive applications, which are then kept on a register.<sup>207</sup> All positions (with the exception of the Court of Appeal) are advertised.<sup>208</sup> Nominations are also used, but in both cases expressions of interest must be submitted by candidates.

In the case of the High Court of New Zealand, the Solicitor-General reviews the initial register and consults with ministers and judges and a range of legal organisations to determine whether there are any additional candidates who should be approached to submit an application. All candidates are then given a rating by the Chief Justice and President of the Court of Appeal,<sup>209</sup> and this list (the 'long list') is presented to the Attorney-General who selects a short list for consideration. The Solicitor-General then conducts further confidential inquiries with respect to the candidates on the short list, albeit among a much more limited range of individuals and organisations (primarily judges and members of the professional associations). The Solicitor-General also asks candidates to complete a questionnaire on their background and their willingness to be appointed, and may hold interviews. Finally, the Attorney-General selects a preferred candidate and recommends that person to Cabinet, which then decides upon the name of the appointee to be tendered to the Governor-General.

For other courts, an interview panel (comprised of one or two judges of the relevant court and a senior departmental officer) undertakes the role of the Solicitor-General in the High Court appointment process. However, the critical difference between this procedure and that applying to the High Court is that there are no 'secret soundings' at the stage of assessing the candidates' merits. The interview panel contacts the referees nominated by the candidate, before submitting the final short list to the Attorney-General, although the President of the Law Society is generally also consulted.<sup>210</sup>

In September 2002, the government commissioned a review of the judicial appointments process by Sir Geoffrey Palmer, a former Prime Minister and

<sup>205</sup> Ibid 75.

<sup>206</sup> See Malleon, *The New Judiciary*, above n 2, 130.

<sup>207</sup> Ministry of Justice, New Zealand, *Office of High Court Judge*, above n 121.

<sup>208</sup> Ibid.

<sup>209</sup> Either as being suitable for immediate appointment, suitable in two years time or falling into neither category: *ibid*.

<sup>210</sup> Ministry of Justice, New Zealand, *Judicial Appointments: Office of District Court Judge* (2003) <<http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/district-court-judge.html>>.

Attorney-General of New Zealand. In November 2002, Sir Geoffrey reported that:

On appointments, the functions of search, database management, short-listing, interview, referee checking, etc are fragmented, incoherent, poorly resourced and out of line with best practice in both the private and public sector. What is needed is a properly designed and resourced method of managing the appointments process.<sup>211</sup>

He recommended the establishment of a new Judicial Appointments and Liaison Office, which would consolidate the process of application and interview for all judicial offices, up to and including the Court of Appeal.<sup>212</sup> The government has established a working group to consider how the recommendations in the report might best be implemented.<sup>213</sup>

### 3 Canada

Canada has moved from a system of executive appointment similar to that in Australia to a commission system intended to depoliticise the process and increase transparency.

#### (a) The Federal Committee System

At the federal level, an advisory committee system for appointments to the provincial and territorial superior courts<sup>214</sup> and the Federal and Tax Courts of Canada (but not the Supreme Court) has been in place since 1988.<sup>215</sup> Potential candidates may submit an expression of interest and an outline of their personal history to the Commissioner for Federal Judicial Affairs. While the Commissioner also receives nominations, if the nominee is interested in the position when contacted, then they must also submit a personal history form. All candidates who are not already judges are then assessed by the relevant judicial appointments advisory committee. Judicial candidates are not ‘assessed’, but the committees review and comment upon their files. The federal Minister of Justice may also consult with ‘members of the judiciary and the bar, with his or her appropriate provincial or territorial counterparts, as well as with members of the public’.<sup>216</sup>

<sup>211</sup> Sir Geoffrey Palmer, *Memorandum: Judicial Administration Issues* (2002) 14 <[http://www.beehive.govt.nz/wilson/judical/judicial\\_administration\\_issues\\_report.pdf](http://www.beehive.govt.nz/wilson/judical/judicial_administration_issues_report.pdf)>.

<sup>212</sup> One of the principal reasons given for not recommending a completely separate ‘Commission’ was the ‘already over-fragmented’ justice sector in New Zealand, where there are currently three departments fulfilling the functions that the Attorney-General’s Department alone fills in Australia: *ibid*.

<sup>213</sup> Margaret Wilson, ‘Enhancing Judicial Independence’ (Press Release, 7 March 2003).

<sup>214</sup> Unlike in Australia, judges in many provincial courts in Canada are appointed by the federal government. The *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, App II, No 5 states: ‘The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.’

<sup>215</sup> The following outline is from Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/index\\_e.html](http://www.fja.gc.ca/jud_app/guide/index_e.html)>.

<sup>216</sup> Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates — Appointments* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/process7\\_e.html](http://www.fja.gc.ca/jud_app/guide/process7_e.html)>.

While the function of the judicial appointments committees is advisory, according to the Commissioner for Federal Judicial Affairs they constitute the ‘heart’ of the appointment system.<sup>217</sup> There is at least one committee in each province and territory, with each committee having seven members:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial bar association;
- a judge nominated by the Chief Justice of the province or territory;
- a nominee of the provincial or territorial Attorney-General or Minister of Justice; and
- three nominees of the federal Minister of Justice.<sup>218</sup>

In fact, the term ‘nominee’ is somewhat of a misnomer, as each ‘nominee’ is chosen by the federal Minister of Justice from a short list provided by the nominating body or individual. However, the federal Minister seeks to make the committees reflective of the jurisdiction, taking into account ‘geography, gender, language and multiculturalism’.<sup>219</sup> The members are appointed for two-year terms, with the possibility of one additional term.

The assessment of candidates involves the committee considering each candidate against the established criteria for appointment; giving ‘due consideration’ to diversity; and consulting widely within the legal and non-legal community about him or her.<sup>220</sup> The committee then provides the federal Minister of Justice with a rating of the candidate — ‘recommended’, ‘highly recommended’ or ‘unable to recommend’. The ultimate decision to recommend an appointment to Cabinet (which then advises the Governor-General) remains with the Minister, who may also undertake his or her own ‘informal’ consultations about the candidate after receiving the committee’s assessment.<sup>221</sup> As a result, the role of the committees in practice is to identify inappropriate candidates rather than the most suitable appointment. However, in 1996, the Canadian government agreed to only appoint candidates recommended by the committees (although they are under no statutory compulsion to do so).<sup>222</sup>

#### (b) Provincial Committees

Appointment commissions have been adopted in four of Canada’s 13 provinces and are being considered in the remainder.<sup>223</sup> The Ontario Judicial Appointments Advisory Committee (‘JAAC’) is typically regarded as the leading model. Established as a pilot program in 1989 and then confirmed in legislation in 1995, the JAAC consists of 13 members who serve for three year terms (with the possibility of a single renewal):

<sup>217</sup> Commissioner for Federal Judicial Affairs, Canada, *Federal Judicial Appointments Process: Guide for Candidates — Judicial Advisory Committees* (2003) <[http://www.fja.gc.ca/jud\\_app/guide/process3\\_e.html](http://www.fja.gc.ca/jud_app/guide/process3_e.html)>.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> *Canada Assessments and Confidentiality*, above n 127.

<sup>221</sup> *Ibid.*

<sup>222</sup> Malleon, *The New Judiciary*, above n 2, 131.

<sup>223</sup> *Constitutional Reform*, above n 7, 78.

- seven lay members appointed by the Attorney-General; and
- six members from the legal community appointed by the Chief Justice of the province, the provincial law society, bar association, and county and district legal professional associations.<sup>224</sup>

The legislation requires the Committee to reflect ‘the diversity of Ontario’s population, including gender, geography, racial and cultural minorities’.<sup>225</sup>

The JAAC has a detailed policy outlining its procedures, ranging from confidentiality to conflicts of interest, disqualification of candidates, and interviewing and file retention.<sup>226</sup> Under the JAAC process, judicial vacancies are advertised (and applications from under-represented groups encouraged), with candidates submitting a ‘Judicial Candidate Information Form’ addressing the relevant criteria and attaching details of referees. The JAAC then compiles a list of those who should proceed to the initial stage of reference checks and confidential inquiries, which are made of ‘the judiciary, court officials, lawyers, law associations [and] community and social service organisations’.<sup>227</sup> The Committee then agrees on a short list of candidates to be interviewed, following which a ranked list of at least two candidates (with reasons for the ranking) is given to the Attorney-General, who must make the appointment from that list.

#### 4 *United Kingdom*

Over the last decade and under the leadership of the past two Lord Chancellors, Lords Mackay and Irvine, a series of reforms to the United Kingdom judicial appointments system have been implemented with the aim of making the system more transparent and accountable.<sup>228</sup> These include the following measures, which now apply to all judicial offices up to and including the High Court: the establishment and promulgation of detailed selection criteria; the use of advertising for positions; the formalisation of a process of application, sifting and interviewing of short-listed candidates (involving an interview panel composed of a judicial and a lay member, and a member of the Lord Chancellor’s Department’s Judicial Appointments Group); the rating of each short-listed candidate against the publicised criteria; and the provision of feedback to unsuccessful candidates.<sup>229</sup>

The appointment system has continued, however, to be criticised for its heavy reliance on ‘secret soundings’ of senior members of the profession without candidates being informed either of the identities of those consulted or of what was said about them (see above Part IV(B)). In addition, at the Court of Appeal and House of Lords level, secret soundings and personal invitation remain the sole method of appointment.

<sup>224</sup> Judicial Appointments Advisory Committee, Ontario, *Where Do Judges Come From? The Process of Appointment of Ontario Provincial Judges* (2003) <[http://www.ontariocourts.on.ca/judicial\\_appointments/where.htm](http://www.ontariocourts.on.ca/judicial_appointments/where.htm)>.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ontario Policies and Process*, above n 157.

<sup>227</sup> *Ibid.*

<sup>228</sup> Most of these reforms are described, and the relevant documents accessible, on the Department for Constitutional Affairs website at <<http://www.dca.gov.uk>>.

<sup>229</sup> *Constitutional Reform*, above n 7, 63–5.

A report into the appointments process was commissioned in 1999 from Sir Leonard Peach,<sup>230</sup> and as a result of its recommendations, a Commission for Judicial Appointments was established in 2001 to act as a complaints and auditing body for the processes of appointment to judicial office and to silk. In 2002, in its first annual report, the Commission found examples of undue delay in the appointments process,<sup>231</sup> and an unsatisfactory calibre of comments from consultees, which in some cases were not based on adequate or current knowledge of candidates or were not related to the selection criteria.<sup>232</sup> The absence of a satisfactory audit trail meant that the Commission could not determine whether unsupported or irrelevant comments had in fact been disregarded,<sup>233</sup> as required by the Lord Chancellor's official policy.<sup>234</sup>

In July 2003, the newly created Department for Constitutional Affairs (which replaced the Lord Chancellor's Department) released a consultation paper entitled *Constitutional Reform: A New Way of Appointing Judges*.<sup>235</sup> The paper 'seeks views on the form and responsibilities of a new, independent Judicial Appointments Commission which will take responsibility for the selection of judges in England and Wales.'<sup>236</sup> An independent judicial appointments commission has already been established in Scotland and one will shortly come into operation in Northern Ireland under the terms of the devolution agreement.<sup>237</sup> In his foreword to the paper, Lord Falconer of Thoroton, the new Secretary of State for Constitutional Affairs and the Lord Chancellor (until the position is formally abolished), outlined the context of the proposal:

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 Government. It must be transparent. It must be accountable. And it must inspire public confidence. ... Of course the fundamental principle in appointing judges is and must remain selection on merit. However, the Government is committed to opening up the system of appointments, to attract suitably qualified candidates both from a wider range of social backgrounds and from a wider range of legal practice.<sup>238</sup>

The consultation paper outlines three different models for the proposed Judicial Appointments Commission:

- an *appointing* commission, which would make the appointments the Lord Chancellor is currently empowered to make personally and which would advise the Queen directly on appointments above that level;

<sup>230</sup> Sir Leonard Peach, *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (1999) <[www.dca.gov.uk/judicial/peach/indexfr.htm](http://www.dca.gov.uk/judicial/peach/indexfr.htm)>.

<sup>231</sup> Commission for Judicial Appointments, United Kingdom, *Annual Report 2002* (2002) 10–11.

<sup>232</sup> *Ibid.* 16.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Judicial Appointments in England and Wales*, above n 126.

<sup>235</sup> *Constitutional Reform*, above n 7.

<sup>236</sup> *Ibid.* 3.

<sup>237</sup> *Ibid.* 66, 69–70.

<sup>238</sup> *Ibid.* 3–4.

- a *recommending* commission, which would recommend to the minister whom he or she should appoint (or should recommend that the Queen appoint); or
- a *hybrid* commission, which would act as an appointing commission for junior appointments and as a recommending commission in relation to more senior appointments.<sup>239</sup>

The paper expresses an initial preference for a recommending commission with 15 members, combined with ‘severely circumscribed ministerial discretion’ to reject the Commission’s nominee and appoint another.<sup>240</sup> An additional consultation paper was released in July 2003 on the proposal to replace the House of Lords with a new Supreme Court of the United Kingdom.<sup>241</sup> That paper argued that the recommending commission model would be the most suitable one for appointments to the new Supreme Court.<sup>242</sup>

### 5 *Evaluating the Commission Model*

Assessments of judicial appointments commissions have been positive in describing how they have changed the judicial selection process. While there is as yet no definitive empirical evidence on whether such commissions have increased the quality of judicial appointments,<sup>243</sup> it is significant that they have been *perceived* as having had this effect. A review of the research in the United States context by Malia Reddick for the American Judicature Society concluded that the key difference between elections and a merit commission system is their impact on public confidence, and that for this reason alone, merit plans are preferable to judicial elections.<sup>244</sup> According to Malleeson, who in 1999 assessed the use of judicial appointments commissions against a range of criteria:<sup>245</sup>

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 either 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>246</sup>

In Ontario, there has also been a marked increase in the diversity of judicial appointments since the JAAC was established. With respect to gender, the

<sup>239</sup> Ibid 22–3. Note that the auditing and complaints function currently performed by the Commission for Judicial Appointments will either continue to be exercised by it (possibly reconstituted) or transferred to a separate body: at 38.

<sup>240</sup> Ibid 28.

<sup>241</sup> Department for Constitutional Affairs, United Kingdom, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03 (2003).

<sup>242</sup> Ibid 30.

<sup>243</sup> Malleeson, *The New Judiciary*, above n 2, 141–2. But compare Malia Reddick, ‘Merit Selection: A Review of the Social Scientific Literature’ (2002) 106 *Dickinson Law Review* 729, 743–4.

<sup>244</sup> Reddick, above n 243, 744 fn 110.

<sup>245</sup> Malleeson, *The New Judiciary*, above n 2, 140–51.

<sup>246</sup> Ibid 151.

number of women appointed rose dramatically, and between 1989–92 women comprised 41 per cent of new appointments.<sup>247</sup> This seems principally to flow from the JAAC's targeted encouragement of applications from under-represented groups.<sup>248</sup> At the federal level, the number of female applicants for appointments rose from 12 per cent to 26 per cent between 1989–94, following the introduction of the committee system.<sup>249</sup> In the United States context, Reddick found that the available evidence on the effect of merit commissions on the diversity of the bench is inconclusive.<sup>250</sup> However, as Reddick points out, criticism has been levelled at the composition of the commissions and a 1999 study, which examined the effects of gender and racial diversity among commission members on the diversity of applicants and nominees in eight states, found that there was in fact 'some evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees'.<sup>251</sup>

## VII A JUDICIAL APPOINTMENTS COMMISSION FOR AUSTRALIA

The idea of an Australian judicial appointments commission has not been universally accepted.<sup>252</sup> An alternative, more 'minimalist' model would be to retain the current system but to formalise the process of consultation. For example, the *LCA Policy* states that the power to appoint should remain with the executive and be at its 'discretion',<sup>253</sup> subject only to a requirement to consult with a limited subset of office holders, namely the Chief Justice of the relevant court and the presidents of the relevant bar association and law society.<sup>254</sup> The Policy also states that the Attorney-General may additionally consult whoever he or she thinks fit.<sup>255</sup> Those who have supported a minimalist model requiring a formalised system of consultation for High Court appointments include Sir Harry Gibbs<sup>256</sup> and Chief Justice Malcolm of Western Australia.<sup>257</sup>

The minimalist consultation model would continue the focus on a core element of the current appointments process, namely the link between judicial selection and executive choice and, as discussed above, would continue some of the advantages that have been identified in the current system.<sup>258</sup> However, in our view, the minimalist consultation model fails to overcome the central problems with the system of exclusive executive appointment: the lack of effective criteria

<sup>247</sup> Ibid 144.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid 143–4.

<sup>250</sup> Reddick, above n 243, 740–1.

<sup>251</sup> Ibid 731–2.

<sup>252</sup> The Constitutional Convention of 1973–85 considered any amendment of the *Constitution* unnecessary, while the Constitutional Commission of 1985–88 recommended against amendment: see Max Spry, 'Executive and High Court Appointments' in Geoff Lindell and Robert Bennett (eds), *Parliament: The Vision in Hindsight* (2001) 419, 444.

<sup>253</sup> *LCA Policy*, above n 106, 1.

<sup>254</sup> Ibid 5–6.

<sup>255</sup> Ibid 2.

<sup>256</sup> Gibbs, 'Opening of the Supreme Court Library's Rare Books Room', above n 168.

<sup>257</sup> Malcolm, above n 9, 163–4.

<sup>258</sup> See above Part II(B) on the advantages of the current system.

and the problems inherent in secret soundings by an unrepresentative group in the executive. While the *LCA Policy* sets out criteria for judicial appointments (see above Part V), it is questionable whether they would be applied consistently or appropriately (let alone in a transparent manner) under what would merely be a more formalised system of consultations. Moreover, this model, dependent as it still is upon secret soundings, would be unlikely to avoid current problems like patronage, or unconscious self-selection, which can act against female candidates and others from diverse backgrounds.

While other comparable nations have reformed their judicial selection processes, most have recognised that merely increasing or formalising the scope of consultation is insufficient. A more transparent process is necessary to ensure equal opportunity in appointments for all qualified candidates. Of the alternative appointment models set out in Part VI, we would argue that the judicial appointments commission is the most appropriate for Australia, including for the selection of High Court judges. It has worked well in comparative common law jurisdictions and is the preferred reform model in the United Kingdom for all levels of their judiciary. In our view, a judicial appointments commission should be a key participant in every appointment to the federal judiciary; and indeed similar commissions should also be established in the States and Territories.

The idea of a judicial appointments commission already has wide support in Australia. As early as 1977, Sir Garfield Barwick, then Chief Justice of the High Court, declared that ‘the time [had] arrived’ for the curtailment of the exclusive executive power of appointment through the creation of a judicial appointments commission.<sup>259</sup> The establishment of an appointments commission in some form has since been supported by several inquiries, such as the Senate report on *Gender Bias and the Judiciary*,<sup>260</sup> the Australian Law Reform Commission’s 1994 inquiry into gender equality in the law,<sup>261</sup> and the 1995 New South Wales *Implementation Committee Report*; by governments through the *Lavarch Paper* and the *Patmore Paper*; by judges such as Justice Wood;<sup>262</sup> and by various commentators, including Winterton.<sup>263</sup> It has also received qualified or conditional support from others such as Sir Anthony Mason<sup>264</sup> and Justice McPherson (as Chairman of the Judicial Council of Australia).<sup>265</sup> The Law Institute of

<sup>259</sup> Sir Garfield Barwick, ‘The State of the Australian Judicature’ (1977) 51 *Australian Law Journal* 480, 494. He reiterated this support in 1995: Spry, above n 252, 447.

<sup>260</sup> *Gender Bias and the Judiciary*, above n 39, recommendation 3.

<sup>261</sup> *Equality before the Law: Part 2*, above n 108, recommendation 9.3. See also Sue Tongue, ‘The Courts as Interpreters of Community Values’ (1995) 9(2) *Legislative Studies* 45, 50.

<sup>262</sup> Wood, above n 87, 164–5.

<sup>263</sup> See, eg. Winterton, above n 9, 209–11; Nicholson, above n 163, 85; John Basten, ‘Judicial Accountability: A Proposal for a Judicial Commission’ (1980) 52(4) *Australian Quarterly* 468; Alan Rose, ‘The Model Judiciary — Fitting in with Modern Government’ (1994) 4 *The Judicial Review* 323.

<sup>264</sup> Writing in 1997, Sir Anthony stated that if such a commission could be established, it would ‘serve a useful purpose’, but considered that there were ‘no present indications that governments are willing to establish such a body’: Mason, ‘The Appointment and Removal of Judges’, above n 2, 18. He therefore concluded that he favoured extending and formalising the current appointment system over no reform at all: at 21.

<sup>265</sup> In response to proposals in 1999 by Jan Wade, then Attorney-General of Victoria, that raised the issue of working towards a more diverse judiciary, Justice McPherson stated that while the Judicial Conference of Australia neither endorsed nor disavowed the establishment of an impar-

Victoria has also advocated the establishment of an advisory commission for judicial appointments in that State.<sup>266</sup>

An important initial question in the establishment of a commission is whether the body should (i) have the power to directly advise the Governor-General in Council itself; (ii) have the power to recommend a short list of candidates to the Attorney-General from which the government *must* choose before advising the Governor-General; or (iii) have the power to recommend a short list of candidates to the Attorney-General from which the government *may* choose or select another person entirely. In regard to the first option, as Sir Anthony Mason has stated, there is a 'powerful democratic argument' against such a transfer of power by Parliament from the executive to a non-elected body.<sup>267</sup> 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.<sup>268</sup>

In regard to the second option, Pip Nicholson has pointed out that if the Attorney-General were required (by statute) to choose from the commission's list then this would effectively abrogate the executive's power of choice, raising the same problems as the first option.<sup>269</sup> On the other hand, Leslie Zines argues that there are strong reasons for interpreting the appointment power granted to the Governor-General 'in the light of the general principle of parliamentary supremacy',<sup>270</sup> and Winterton has suggested that the Parliament may well have the power under s 51(xxxix) of the *Constitution* to confine the executive's decision to a candidate on the commission's short list.<sup>271</sup> Despite this, Winterton expressed support for a commission with an advisory role only,<sup>272</sup> as has Sir Anthony Mason.<sup>273</sup>

In our view, the same reasons for the rejection of the first option militate against the second option and tip the balance in favour of the third. The commission should recommend a list of names to the Attorney-General, but this should not limit the government's ultimate discretion as to who might be appointed. However, if the Attorney-General has the power to recommend a different name to Cabinet (or to request a further short list from the commission), this leaves open the possibility of an inappropriate appointment being made, in contradiction of the stated criteria and without adequate consideration. For this reason, where a government decides not to appoint from a commission short list, it should be required to indicate this in a statement to Parliament. Any decision to

tial 'Judicial Appointments Board' (either with the power to make appointments itself or sharing that power with the executive), it would be the 'minimum condition that ought, in the public interest, to be satisfied' before proposals to expand the pool of candidates for judicial office could be properly considered: McPherson, above n 86, 25; Jan Wade, 'Judicial Appointments and Education: The Attorney's Letter' (1999) 73(7) *Law Institute Journal* 21.

<sup>266</sup> See Michael Gawler, 'Who Is to Judge?' (2000) 74(4) *Law Institute Journal* 3.

<sup>267</sup> Mason, 'The Appointment and Removal of Judges', above n 2, 16.

<sup>268</sup> It has been argued that this first option may be constitutionally invalid: see James Thomson, 'Appointing Australian High Court Justices: Some Constitutional Conundrums' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 251, 266–9.

<sup>269</sup> Nicholson, above n 163, 82. See generally Basten, above n 263; Rose, above n 263, 337–8.

<sup>270</sup> Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 272.

<sup>271</sup> Winterton, above n 9, 209.

<sup>272</sup> *Ibid* 209–10.

<sup>273</sup> Mason, 'The Appointment and Removal of Judges', above n 2, 16–18.

appoint a non-shortlisted person must be transparent and the government must be held publicly accountable for its action, consistent with the doctrine of responsible government.<sup>274</sup> It may even be that over time, as has now occurred at the federal level in Canada, successive Attorneys-General voluntarily bind themselves to select from the commission's short list and that a convention to this effect will develop.

Other important issues that must be considered, and which are directly connected to the success of any appointments commission proposal, relate to the composition and appointment of members of the commission itself. The commission must not, in Justice Kirby's words, have the effect of merely '[i]nstitutionalising orthodoxy'.<sup>275</sup> Like the judiciary, the commission must include men and women from a range of backgrounds. If the commission simply reflects the individuals and organisations currently consulted by the Attorney-General, it would only replace an informal method of secret soundings of the legal establishment with a formal one. Sir Anthony Mason has suggested a nine member commission, with five lawyers (comprising two judges, two nominees from the profession and a nominee of the Council of Law Deans), two nominees of the government and two lay persons.<sup>276</sup> Sir Garfield Barwick has suggested that the body be composed of judges, practising lawyers, academic lawyers and lay members 'likely to be knowledgeable in the achievements of possible appointees'.<sup>277</sup> In our view, such a qualification on lay members is too restrictive and is likely to replicate some of the current problems relating to patronage. Instead, lay members should be chosen because of what they can bring to the process that is distinct from that brought by members of the profession, including the perspective of those who are most affected by the judicial process and those who may be effectively disenfranchised under the current legal system.<sup>278</sup> The inclusion of lay members is therefore not only symbolically important, in that it would build public confidence in the system. Lay members would also bring a vital non-lawyers' perspective to the assessment of the professional and, particularly, the personal qualities of applicants.<sup>279</sup>

The method by which the members of a judicial appointments commission are selected is thus crucial. They should be appointed in a way that ensures the commission is able to exercise an appropriate level of independence from executive interference in its decision-making. Hence, it would be inappropriate for the Attorney-General to have the sole power of appointment (and, in any

<sup>274</sup> See Winterton, above n 9, 210.

<sup>275</sup> Kirby, *The Judges*, above n 25, 22–3.

<sup>276</sup> Sir Anthony Mason suggests that the lay members 'should be selected having regard to their capacity to represent the community': Mason, 'The Appointment and Removal of Judges', above n 2, 17. Winterton, on the other hand, has argued that *every* member should be appointed in their individual capacity 'so that they represent nothing but the public interest': Winterton, above n 9, 210.

<sup>277</sup> Barwick, 'The State of the Australian Judicature', above n 259, 494.

<sup>278</sup> Hamilton, 'The Law Council of Australia Policy 2001', above n 77, 232. The perspective of indigenous Australians would be particularly important here: see Colleen Starkis, 'Civil Litigation: An Indigenous Perspective' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (1999) 21.

<sup>279</sup> See Winterton, above n 9, 210–11.

event, it would be unnecessary if the government is not bound to appoint a person from the commission short list). Appointment by the Attorney-General alone would potentially negate much of the benefit to be gained under a commission system and would merely diffuse the Attorney-General's responsibility among a group of non-elected individuals.

A possible alternative is the United Kingdom model,<sup>280</sup> in which it is proposed that the members of the commission would be chosen by a separate recommending body of four people, whose recommendations would be made to the Prime Minister, who would then make the formal recommendation for appointment to the Queen. The proposed recommending body would be chaired by the Permanent Secretary of the Department for Constitutional Affairs and might also include a senior judge, a senior figure entirely removed from the Department and the judiciary, and an Independent Assessor.<sup>281</sup> Of course, this is only one proposal, which clearly requires further debate.

An Australian judicial appointments commission could be activated for each appointment by a request from the Attorney-General to supply a short list of names (specified as a minimum of two). Potential candidates should be identified by the commission through wide consultation and from those who have registered an expression of interest with the commission.<sup>282</sup> Expressions of interest should be encouraged by the commission advertising in general and professional publications both at regular intervals and at the time of each appointment. Expressions of interest should be confidential, as should the deliberations of the commission and its short list and accompanying statement.

While the commission should consult in identifying potential candidates for appointment, it should not engage in informal 'secret soundings' to ascertain professional opinion on individual candidates. The latter approach lacks rigour as well as any accountability for the comments made. As the United Kingdom evidence has shown, secret soundings can prejudice the applications of women (and others) if they do not directly, and only, address the appointment criteria or if those consulted do not in fact know the candidate.<sup>283</sup> If the commission wishes to gain further information on candidates, it should be permitted to do so by seeking information and assessments, first from referees nominated by an applicant and then, if needed, from professional bodies and members of the profession, including judges, in the form of written statements addressing the appointment criteria. As Malleon has argued:

<sup>280</sup> *Constitutional Reform*, above n 7, 54–5.

<sup>281</sup> The Independent Assessor would be appointed according to the Commissioner for Public Appointments, *Code of Practice for Ministerial Appointments to Public Bodies* (2001) <<http://www.ocpa.gov.uk/pages/downloads/pdf/codeofpractice.pdf>>.

<sup>282</sup> In order to gain a wide pool of potential appointees, people need to be identified both through consultation and through registering expression of interest. The research by Malleon and Banda in the United Kingdom indicates that women under-apply for silk and for judicial positions relative to their numbers in the pool of potential applicants (Malleon and Banda, above n 90, 7). Generally, 'the lack of openness, the continuing role of patronage, the dominance of an elite group of chambers and the need to be "known" in order to be appointed were identified as weaknesses in the process and a deterrent to applications from under-represented groups': at 39.

<sup>283</sup> See Malleon, 'Prospects for Parity', above n 43, 183–4.

If we are serious about widening the recruitment pool in terms of background and promoting the appointment of judges with a wider range of skills then the consultation process must be removed or marginalised. This aspect of the system evolved at a time when the Bar and the Bench were both very small and when senior practitioners and judges were well known to each other and when the monopoly of the Bar over appointments to the higher judiciary was unchallenged. In that context it worked very well. For those in the inner elite, the system still works reasonably well ... However, as the legal profession and the judiciary have expanded in size the consultations process has become increasingly not just unfair but inefficient. The majority outside the magic circle are left struggling to demonstrate their qualities or compete on a level playing field.<sup>284</sup>

The commission should have the option of interviewing candidates, particularly so that a candidate can be presented with any adverse information and given the opportunity to rebut it. This is the procedure adopted by the ABA<sup>285</sup> and by most commissions in the United States,<sup>286</sup> and is an important aspect of ensuring procedural fairness. Whether or not the interviews should be held publicly, as now occurs very successfully under the South African appointments system,<sup>287</sup> is one of a range of issues which would need to be considered.

The commission would then determine the short list, which it would present to the Attorney-General along with an accompanying statement on each short-listed candidate, assessing them against the publicly promulgated selection criteria.

## VIII CONCLUSION: A NEW PROCESS FOR APPOINTING HIGH COURT JUDGES

We have sought to demonstrate how the current process of executive appointment of High Court judges is seriously inadequate. While the final say should remain with our elected representatives, the process should be reformed to ensure that meritorious candidates from diverse backgrounds are not overlooked

<sup>284</sup> Malleeson, 'Creating a Reflective Judiciary', above n 92, 9.

<sup>285</sup> *ABA Standing Committee on Federal Judiciary*, above n 129, 6–7.

<sup>286</sup> Malleeson, *The New Judiciary*, above n 2, 137.

<sup>287</sup> In South Africa, the Judicial Service Commission (established in 1994 under the *Interim Constitution*) has adopted public interviews for all candidates. While initially controversial, with the profession claiming that good candidates would not subject themselves to such a process, the process has proved itself to be very successful and generally very well regarded both by observers and those who have been interviewed with the appropriate balance of demanding but restrained questioning. The public interviews have also had the unexpected advantage of allowing judges to reveal certain information about themselves in a controlled environment. In 1999, Justice Edwin Cameron, an openly gay member of the South African High Court and a highly respected judge, informed the Commission that he had AIDS at his interview for a post on the Constitutional Court. His subsequent appointment undoubtedly reinforced the Judicial Service Commission's reputation for making non-discriminatory appointments on the grounds of merit alone.

Malleeson, 'Selecting Judges in the Era of Devolution and Human Rights', above n 199, 17.

Part of the reason for the success of these public interviews is that they are reasonably brief (45 minutes) and do not attempt to 'catch candidates off-guard'. Candidates are given advance notice of any controversial allegations, as the aim is to bring out the positive attributes of the candidate rather than aggressively highlight their negatives: Malleeson, *The New Judiciary*, above n 2, 138. See also Kate Malleeson, 'Assessing the Performance of the Judicial Service Commission' (1999) 116 *South African Law Journal* 36, 41.

because of structural problems such as the potential for patronage and the lack of appropriate selection criteria. A key element of the reform process should be the development of known criteria that give meaning and substance to the inherently subjective notion of ‘merit’. We have argued that criteria are needed under each of the following four broad categories:

- legal knowledge and experience;
- professional qualities;
- personal qualities; and
- diversity in the judiciary.

The specific criteria within each category should be determined after a consultation process initiated by government, including consultation with the community, the legal profession and current and former members of the judiciary.

These criteria should be applied by a new judicial appointments commission established for all federal judicial appointments. The commission should be designed according to what has proved to be effective in comparable common law jurisdictions. In our view, the central features of an Australian judicial appointments commission should be as follows:

- The commission must include men and women from diverse backgrounds, some of whom must be lay members, chosen by a process that ensures the commission has an appropriate level of independence from the executive;
- The commission should be activated for each federal judicial appointment by a request from the Attorney-General to supply a short list of names (specified as a minimum of two);
- Potential candidates should be identified by the commission through wide consultation and from those people who have registered an expression of interest with the commission (expressions of interest should be encouraged by advertisement, with under-represented groups encouraged to apply);
- If the commission wishes to gain further information on candidates, it should do so by seeking information and assessments first from referees nominated by an applicant, and only then from professional bodies and members of the profession, and always in the form of written statements made against the appointment criteria. The commission must not engage in ‘secret soundings’ with the profession to ascertain professional opinion on individual candidates;
- The commission should have the option of interviewing candidates;
- The commission should determine a short list of names for each judicial position along with an accompanying statement on each short-listed candidate based upon the application of the selection criteria;
- Expressions of interest in judicial appointment, the deliberations of the commission and its short list and accompanying statement must be confidential;
- The Attorney-General may request a further short list from the commission or the government may appoint a person not on a commission short list;
- Where a government appoints a person not on a commission short list, it must disclose this in a statement to Parliament.

Justices of the High Court should in the future be appointed by the executive with the benefit of advice from a judicial appointments commission applying known criteria. Without such reform, the current system of appointment threatens to undermine public confidence in the Court. An appointments system based solely on the subjective concept of ‘merit’ is inconsistent with the role of the Court in determining the law, including matters of public policy, for the nation as a whole. Under the current system, only one woman, and no judge from a non-Anglo-Saxon background, has been appointed to the Court during its first century. Our proposal for reform recognises, in the words of Justice Ruth McColl of the New South Wales Court of Appeal, ‘that merit comes differently packaged’ and that *all* meritorious candidates must be considered in order to produce a more diverse but equally well qualified High Court.<sup>288</sup> A more open and accountable appointments system can only increase public confidence in our judges and our legal system.

<sup>288</sup> Justice Ruth McColl, Speech delivered at the swearing in ceremony of the Hon Justice Ruth McColl, Supreme Court of New South Wales, 29 April 2003, [97] <[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/mccoll\\_030429](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/mccoll_030429)>.