

**“Judicial Appointments - Diversity, Transparency and Quality”**  
**Seminar held by NSW Young Lawyers and the Women Lawyers Association of**  
**NSW, 13 October 2005**

**Speech presented by Her Honour Judge Gay Murrell SC**

My fellow lawyers,

I welcome this opportunity to publicly discuss judicial appointment, a topic which is of considerable private concern to many judges.

However, for those of you who have pressing domestic or professional commitments, you can go home or back to work right now. You already know the problems with our "system" of judicial appointments - the "system" is shrouded in mystery. It has resulted in a bench which does not reflect the diversity of our community. It is not of uniformly excellent quality. You already know what we need -- a transparent system which results in a diverse bench of quality -- diversity, transparency and quality.

Recently, the Chief Judge of the District Court observed that our system of judicial appointments was deficient by international standards. He said:

"it is a system of appointment which is open to abuse and corruption through patronage of friends or political allies, and it is a system which does nothing to address the need for excellence in appointments" (1).

**What is the current system?**

If by "system" we mean an orderly plan or process, then the answer is -- there is no system.

In NSW, there is no statutory requirement that the Attorney-General consult with anyone. The only statutory requirement for appointment to the District or Supreme Court is that the appointee be a legal practitioner of at least seven years' standing. I think that, for an appointment to the District or Supreme Court, the Attorney usually consults the head of the relevant jurisdiction (and any lawyers with whom he is having a barbecue dinner) and then recommends a lawyer of at least seven years' standing to Cabinet. However, I don't know that. Perhaps the Attorney's personal assistant cuts the names of all lawyers of seven years standing from the law almanac and a name is then selected from a hat.

And if I as a judge and you as lawyers do not understand the appointment process, how can the public have confidence in the process?

The same situation prevails in the federal sphere. The only statutory requirement relates to the appointment of High Court judges. There, the Commonwealth Attorney-General must consult with the State Attorneys-General before an appointment is made.

We live in an age when the authority of our institutions is frequently questioned and occasionally attacked. And, in the absence of a transparent appointment process which

is designed to deliver a highly qualified and representative bench, why wouldn't judicial authority be questioned? After all, judges occupy powerful and privileged positions but are not accountable to the community, the legislature or the executive. We are only accountable to other judges on appeal. We are not elected and it is very difficult to remove us from office. Yet, as judges, we are able to imprison people, interfere with family relationships and make decisions which have enormous commercial ramifications.

### **Why Diversity?**

Susan Crennan's appointment to the High Court was universally applauded.

Commonwealth Attorney-General Philip Ruddock said that the sole criterion for her appointment was "merit".

That's reassuring. But what did he mean by "merit"?

He has said that "merit" means:

"legal excellence, a capacity for industry and a temperament suited to the performance of the judicial function" (2).

Mr Ruddock denied that gender was a factor in Crennan's choice, maintaining that Cabinet simply nominated "the best person for the job" (3).

However, most of us believe that Crennan's appointment was particularly meritorious *because* of her gender. I am confident that more than 50% of the population is of that view. Most women agree with Justice McHugh that "women lawyers will bring a different approach to legal problems" (4). Women want to see women at all levels of power. They want to know that their perspective is being represented.

Mr Ruddock, don't be afraid of political correctness. Your new portfolio offers the opportunity to heal community division, to nurture diversity and to value change -- in short, embrace your female side! You are doing very well, Mr Ruddock. In NSW, since May 2001, there have been 14 appointments to the District Court, the largest trial court in the country, and not one of them a woman!

More seriously, the argument for diversity is *not* an argument for political correctness. It is an argument for representation on the bench. It is an argument that a representative bench will reinforce public confidence in the judicial system.

In parliamentary elections, we vote for candidates whom we feel will understand and represent us. Women have confidence in institutions in which women hold positions of authority. Indigenous Australians are vastly overrepresented in the criminal jurisdiction and feel alienated from a judiciary that sometimes seems to come from another planet. If only because we need to promote public confidence in the judicial system, a policy of diversity should be actively pursued. However, it will need to be a policy which does not compromise on the quality of incumbents.

### **What qualities should we seek in our judges?**

The Law Council of Australia Policy on the Process of Judicial Appointments (5)

identifies recommended attributes. Those attributes fall into three categories -- legal knowledge and experience, professional qualities, and personal qualities.

As far as legal knowledge and experience is concerned, the Policy states:

"2. It is desirable that successful candidates have court or litigation experience."

Currently, almost all judges appointed to the District Court or at a higher level are drawn from the bar. The bar provides a thorough education in litigation practice and procedure and courtroom manners. Practice at the bar also nurtures the professional qualities identified by the LCA -- including sound judgement, decisiveness and a willingness to work hard. Practice at the bar fosters an attitude of professional independence.

Some judges drawn from outside the bar have had difficulty adjusting to the judicial role. If judges are to be drawn from other sources, then there must be a much greater investment in judicial education -- both a financial investment in education courses *and* an investment of current judicial resources through on-the-job mentoring and training. Absent a much greater investment in judicial education, it is not only desirable, it is essential that judicial candidates have extensive court experience. It is probably desirable that most be drawn from the senior bar.

That is not to say that most barristers make good judges. Far from it. Many barristers lack the personal qualities required of a good judge -- qualities such as courtesy, patience, open-mindedness and awareness of contemporary social issues. Practice at the bar may broaden the perspective of some barristers, but others remain intellectually arrogant, needlessly competitive products of a narrow upbringing.

We cannot expect that such a person will readily transmogrify into an intellectually modest, endlessly courteous and compassionate judge with the patience to hear from a slightly mad self-represented litigant, if necessary for weeks on end, and then dispassionately deliver the right decision.

Consequently, as things stand, judicial deficiency more often lies in the area of personal qualities rather than professional skills and qualities. Predictably, as one looks up the judicial pyramid one sees greater professional skill. I sometimes think that, as one looks down the judicial pyramid, one sees greater personal quality. It is hard to fault the modesty, patience and good humour of most magistrates and -- I venture to suggest -- many District Court judges.

### **How should we select judges?**

No one advocates the popular election of judges. The law and order auction which accompanies parliamentary elections is nightmare enough. The popular election of judges would result in a judiciary which was beholden to its electorate.

Nor is there support for the parliamentary ratification of candidates. To an Australian observer, the United States Senate confirmation hearings are a political circus. Candidates are questioned about the very matters which they may later have to decide.

In Australia, it is unlikely that quality candidates would be prepared to undergo election or confirmation. Selection by either process would result in lower quality judges who

were neither independent nor impartial. We do not want judges who cultivate popularity, but judges who are prepared to withstand unpopularity.

The minimum reform which should be undertaken is implementation of the LCA Policy. That policy recommends that each jurisdiction adopt a publicly available judicial appointments protocol which sets out the legal knowledge and experience, professional qualities and personal qualities required for office. Under the protocol, before appointing any judge the relevant Attorney-General would consult specified officeholders (as well as anyone else whom he or she chose to consult). In NSW, the Attorney would consult the Chief Justice of the Supreme Court, the head of the relevant jurisdiction, the President of the Bar Association and the President of the Law Society. The Attorney might advertise for expressions of interest, but candidates would not be limited to those who responded to the advertisement.

The Commonwealth Attorney-General does not support the LCA's protocol. He doubts that the consultation requirement would increase transparency. He considers that, currently, he consults in an appropriate way (2). Why am I not surprised? I doubt that any Attorney will gladly embrace a system which curtails his or her unfettered discretion.

The LCA's protocol is analogous to the process for selection of senior counsel, in which a protocol states the requirements for selection, there is a call for applications and extensive consultation with appropriate officeholders. Prior to the introduction of the senior counsel protocol, the appointment of senior counsel was -- rightly -- criticised for nepotism. Transparency of process has resulted in the appointment of more uniformly excellent candidates. However, the protocol does not promote greater diversity of senior counsel. This year, only one of 17 successful candidates was a woman.

In NSW and federally, there is a call for expressions of interest in the position of magistrate. At the federal level, there is a formal interview process. In NSW, there is no formal interview, but the head of jurisdiction may conduct an informal interview. Undoubtedly, recent appointees to the federal magistracy and to the Local Court have been of excellent calibre. In part, this may be because a call for expressions of interest enables the identification of a wider pool of qualified candidates who are interested in an appointment.

If there is to be a change in the appointment process, the principal alternative to the LCA's recommendation is appointment through an independent body. In England and Wales, there is a proposal that all appointments be made through a Judicial Appointments Commission, comprising 5 judicial members, 2 professional legal members, 6 lay members, one tribunal member and one lay justice. The JAC would recommend a candidate for each vacancy. The Minister could reject a candidate and ask the JAC to reconsider but could not substitute his or her own candidate. Such a system already operates in Scotland (6).

In New South Wales, the Judicial Commission is an independent body which could play an important role in the appointment process.

## **Conclusion**

Adoption of the LCA's protocol or a process of appointment through an independent body such as the Judicial Commission would promote both transparency of process and

quality of appointments.

However, neither reform would result in a more diverse bench.

How can we achieve a more diverse bench? It is partly a question of political will, but the answer is not that easy.

It is time that these issues were debated publicly. In fact, it is past time. And the most challenging part of the debate will be that which relates to diversity.

1. Justice Blanch AM, "Judicial Visit to China", Judicial Officers' Bulletin, April 2005, Vol 17, No 3.
2. Guest lecture, Sydney University, 2 May 2005, [www.ag.gov.au/agd](http://www.ag.gov.au/agd).
3. Courier Mail, 21 September 2005, page 5.
4. [www.smh.com.au/news](http://www.smh.com.au/news) on 18 August 2005.
5. 16 March 2002.
6. There is a full discussion of these proposals and of current appointment processes throughout Australia in Justice Ronald Sackville, "Judicial Appointments: A Discussion Paper" (2005) 14 JJA 117.