

**SUBMISSION IN RESPONSE TO  
NSW ATTORNEY GENERAL'S DEPARTMENT  
DISCUSSION PAPER ON THE SELECTION CRITERIA  
FOR JUDICIAL APPOINTMENTS**

**29 May 2008**

**Response to**

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The Women Lawyers' Association of New South Wales (WLA NSW) thanks the NSW Attorney General's Department for inviting us to respond to the NSW Attorney General's Department Discussion Paper on Selection Criteria for Judicial Appointments.

## **The Women Lawyers' Association Of New South Wales<sup>1</sup>**

WLA NSW is the peak representative body of women lawyers in New South Wales (NSW). Our membership is diverse and includes: members of the judiciary; barristers; solicitors; academics; students; retired lawyers; lawyers on maternity leave; and lawyers working for government bodies, corporations, large and small city and country firms, community legal centres, law reform agencies, and policy agencies.

Since our establishment in 1952, WLA NSW has been active in advocating for and promoting law and policy reform, frequently making submissions on antidiscrimination law, industrial equity, criminal law, women's health, legal aid, child care, and gender bias in the legal profession.

WLA NSW is in a unique position to comment on the issue of judicial appointments in NSW. Issues that impact on the advancement of women in the legal profession in NSW, such as judicial appointments, are a significant reason for the very existence of our organisation. We are a unique professional legal organisation, because apart from standing for diversity in the legal profession, we are the only professional legal organisation in NSW that represents as broad a cross section of the legal profession as we do.

The weight of our experience informs our response to the NSW Attorney General's Department Discussion Paper on Selection Criteria for Judicial Appointments (Discussion Paper).

### **Introduction**

WLA NSW understands that the Discussion Paper focuses on the selection criteria for judicial appointments rather than procedures for judicial appointments. However, we note that the Introduction to the Discussion Paper mentions new procedures that have been introduced for Local Court and District Court appointments in NSW, and particularly mentions the independent panel that makes recommendations on judicial appointments to the NSW Attorney General.

We support the views expressed by the federal Attorney General when he announced that he would be consulting our national representative body,

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<sup>1</sup> For more information about the Women Lawyers' Association of New South Wales, please visit our website – <http://www.womenlawyersnsw.org.au>.

Australian Women Lawyers (AWL),<sup>2</sup> in his speech to the Bar Association of Queensland Annual Conference on 17 February 2008, when he said:

Selecting candidates for appointment is an enormous responsibility. And it is one that I believe cannot be discharged without broader consultation and greater transparency ...

The mystery surrounding the current judicial appointments process and controversy over past appointments has two negative consequences.

Firstly, it can tarnish or detract from the honour of being appointed to judicial office.

Secondly, at a broader level it can diminish public confidence in the courts and the justice system.<sup>3</sup>

We also support widely accepted and long standing arguments for diversity in the judicial appointments. In brief, when it comes to the appointment of women lawyers in particular, these arguments include:

- To facilitate public confidence in the judiciary;<sup>4</sup>
- To ensure that courts are representative of the societies that they serve,<sup>5</sup> and representative of the make up of the legal profession;<sup>6</sup>
- To reflect our society's commitment to equality;<sup>7</sup>
- To best use available human resources;<sup>8</sup>
- To bring new perspectives and rout clichéd stereotypes.<sup>9</sup>

We agree that “women lawyers will bring a different approach to legal problems,”<sup>10</sup> and observe that there are results of studies in the United States indicating that:

Judges on diverse panels were more likely to debate a wider range of considerations in reaching their judgments than were judges of homogenous panels. Diversity was also more likely to move the decision in the direction of what the law requires. It is not just that

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<sup>2</sup> The Honourable Robert McClelland MP, speech for “Judicial Appointments Forum”, Bar Association of Queensland Annual Conference, 17 February 2008, at para 43.

<sup>3</sup> Above, at para 14-19.

<sup>4</sup> Her Honour Judge Gay Murrell SC, of the District Court of New South Wales, “Judicial Appointments – Diversity, Transparency and Quality”, speech for Judicial Appointments seminar held by NSW Young Lawyers and the Women Lawyers’ Association of New South Wales, 13 October 2005; Caroline Kirton, Immediate Past President of Australian Women Lawyers, “Has the System Failed Women?” speech for Australian Bar Association, Judicial Appointments Forum, 27 October 2006, at 4.

<sup>5</sup> The Right Honourable Beverley McLachlin PC, Chief Justice of Canada, “Why We Need Women Judges”, speech for International Association of Women Judges 8<sup>th</sup> Biennial Conference, 3-7 May 2006; Her Honour Judge Gay Murrell SC, of the District Court of New South Wales, above.

<sup>6</sup> Caroline Kirton, Immediate Past President of Australian Women Lawyers, above, n 4, at 5.

<sup>7</sup> The Right Honourable Beverley McLachlin PC, Chief Justice of Canada, above, n 5.

<sup>8</sup> The Right Honourable Beverley McLachlin PC, Chief Justice of Canada, above, n 5.

<sup>9</sup> The Right Honourable Beverley McLachlin PC, Chief Justice of Canada, above, n 5; Caroline Kirton, Immediate Past President of Australian Women Lawyers, above, n 4, at 5-6.

<sup>10</sup> The Honourable Justice Michael McHugh AC, Guest Lecture, Sydney University, 2 May 2005; Her Honour Judge Gay Murrell SC, of the District Court of New South Wales, above, n 4.

people from different backgrounds inevitably bring with them their different experience to the process of deciding hard cases; their presence and their actions also affect what their colleagues say and do.<sup>11</sup>

WLA NSW is consulted in relation to federal appointments through its national representative body, AWL. This process involves the AWL President forwarding a list of candidates who AWL considers appropriate for particular appointments to the federal Attorney General. The AWL President relies on the recommendations of AWL's State and Territory women lawyers association Constitutional Bodies in formulating the list forwarded to the federal Attorney General.

WLA NSW is not currently consulted in relation to judicial appointments in NSW, but our sister women lawyers associations in Western Australia and the Australian Capital Territory are consulted at a state and territory level. WLA NSW was the first women lawyers association in Australia. We have been heavily involved historically, and on an on-going basis, in encouraging diversity across the legal profession.

In our submission, in addition to relying on the backgrounds of the individual representatives on the independent panel making recommendations for judicial appointments to the NSW Attorney General, diversity in judicial appointments would be enhanced by a process of consultation with WLA NSW. We urge the NSW Attorney General and his Department to consider introducing such a consultation process.

We note that the manner of consultation with women lawyers associations that are consulted about judicial appointments varies. We are strongly of the view that it is important that any method of consultation adopted complements the rest of the judicial appoints process as a whole. We would be open to discussing this issue further with the NSW Attorney General and his Department.

### **Selection Criteria for Judicial Appointments**

WLA NSW agrees that the list of Professional Qualities proposed in the Discussion Paper is appropriate.

In relation to the list of potential Personal Qualities provided in the Discussion Paper, we make the following two recommendations.

#### ***(1) That “disability” and “sexuality” be added to Item 6***

We note that awareness of disability and sexuality issues form part of the criteria for judicial appointments in Victoria, and support a similar approach in NSW.

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<sup>11</sup> The Right Honourable Baroness Brenda Hale of Richmond House of Lords, United Kingdom, “The Appointment and Removal of Judges: Independence and Diversity,” speech for International Association of Women Judges 8<sup>th</sup> Biennial Conference, 3-7 May 2006, at 2.

In our submission it is important for judicial officers to be educated in relation to, and aware of, issues that affect people with a disability appearing before the courts. This includes people with a mental illness, people with an intellectual disability and people with a physical disability. Awareness of disability issues is particularly important for judicial officers who are required to apply the terms of legislation such as the *Mental Health (Criminal Procedure) Act* 1990 (NSW), and section 275A of the *Criminal Procedure Act* 1986 (NSW) and section 41 of the *Evidence Act* 1995 (Cth) in relation to improper questioning of vulnerable witnesses. Awareness of disability issues is also essential for judicial officers who are required to communicate with people with a mental illness and people with an intellectual disability in an effective manner.

It is our further submission that given the diversity of sexual preferences among the contemporary communities in which the courts in NSW operate, it is also important for judicial officers to act with a sensitivity to, and awareness of sexuality issues.

In our view, requiring judicial officers to have an awareness of disability and sexuality issues will go a significant way in ensuring that decisions made in NSW courts are of the best quality possible, and allowing courts in NSW to:

- Facilitate public confidence in the judiciary;<sup>12</sup>
- Reflect our society's commitment to equality;<sup>13</sup>
- Best use available human resources;<sup>14</sup>
- Bring new perspectives and rout clichéd stereotypes.<sup>15</sup>

It is our contention that an awareness of disability and sexuality issues is required for judicial officers to competently demonstrate the majority of the Professional Qualities proposed in the Discussion Paper.

**(2) That “Awareness of contemporary social issues”<sup>16</sup> be added as Item 7**

It is the experience of WLA NSW that members of the community in NSW are often of the perception that members of the judiciary are distanced from contemporary social issues.

WLA NSW notes that “social awareness, including gender and cultural awareness” is one of the Personal Qualities listed in the Law Council of Australia’s policy on the “Process of Judicial Appointments”. We observe that an awareness of contemporary social issues other than racial, gender, disability, sexuality and cultural issues, is essential in the exercise of the doctrine of judicial

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<sup>12</sup> Above, at 2.

<sup>13</sup> Above, at 2.

<sup>14</sup> Above, at 2.

<sup>15</sup> Above, at 2.

<sup>16</sup> Her Honour Judge Gay Murrell SC, of the District Court of New South Wales, above, n 4.

notice by judicial officers.<sup>17</sup> For this reason, it is our view that judicial officers cannot adequately discharge their professional responsibilities without having an awareness of contemporary social issues.

In our submission requiring judicial officers to have an awareness of contemporary social issues other than racial, gender, disability, sexuality and cultural issues, will ensure that decisions made in NSW courts are of the best quality possible, and allow the courts in NSW to:

- Facilitate public confidence in the judiciary;<sup>18</sup>
- Ensure that courts are representative of the societies that they serve;<sup>19</sup>
- Reflect our society's commitment to equality;<sup>20</sup>
- Best use available human resources;<sup>21</sup>
- Bring new perspectives and rout clichéd stereotypes.<sup>22</sup>

We would argue that an awareness of contemporary social issues is required for judicial officers to competently demonstrate the majority of the Professional Qualities proposed in the Discussion Paper.

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<sup>17</sup> *Holland v Jones* [1917] HCA26; *Crown Glass Aluminium P/L v Ibrahim* [2005] NSWCA 195 (30 June 2005).

<sup>18</sup> Above, at 2.

<sup>19</sup> Above, at 2.

<sup>20</sup> Above, at 2.

<sup>21</sup> Above, at 2.

<sup>22</sup> Above, at 2.