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Judicial Selection and Training: TwoSides Of The One Coin

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There is a remarkable contrast between the level of interest taken by governments, politicians, commentators, and the members of the public, in two topics.

The first is the policy and process adopted by governments when they appoint judges. This is an interesting subject, on which many people hold strong opinions. Some complain of the lack of gender, ethnic, geographical, or other forms of diversity in the judiciary. Some criticise the present system as inequitable, giving unfair preference to a small group. Some see it as inefficient, failing to make the best use of all available talent. The issue has political significance. Proposals to change methods of judicial appointment appeal to voters. In a number of Australian States, judicial vacancies are now advertised, and expressions of interest solicited. It may be only a matter of time before it becomes necessary for people who want to be considered for appointment, even to some of the highest judicial offices, to appear before selection panels to display their professional and ideological credentials. Perhaps this will only mean that governments will take as much care in appointing members of the selection panels as they now take in appointing judges. The capacity to control or influence the selection of judges is regarded, on all sides of politics, as an important aspect of governmental power. It would be surprising to see it given away. However, governments like to be seen to be progressive, even if there is no general agreement as to what kind of change constitutes progress.

The second topic is that of judicial education: training newly appointed judges and magistrates, and providing for their continuing professional development. There are absolutely no votes in this subject. It is without electoral sex appeal. It is a topic of interest and concern to some members of the judiciary, a handful of lawyers and law teachers, and practically nobody else. With a few honourable exceptions, politicians and government officials ignore it completely. It rarely engages the attention of the media.

The reason why the contrast is remarkable is that, in truth, the two topics are closely related. But the relationship seems to have escaped attention. People who propose changes in the method by which judges are selected, without having any knowledge or ideas about their training or professional development, are beating the air. Whether or not any specific change in methods of judicial appointment is worthwhile may be contestable. It is not my purpose to argue about that. One thing, however, is clear. Significant and long-term (as distinct from cosmetic) change is impossible without progress in developing facilities for judicial education.

One of the main differences between the administration of justice in common law and civil law countries is in the background, training and appointment of judges. In countries with a civil law tradition,

being a magistrate or judge is a career upon which lawyers ordinarily embark at the beginning at their professional lives, and in which they remain until the end. Young lawyers are trained to be judges, and they progress upon a career path within the judiciary. Judges rarely sit alone: they sit in panels, which often include some who, by our standards, are remarkably youthful. (A recently published Code of Conduct for Chinese judges admonishes them to keep their judicial uniforms clean and tidy). Judicial promotion is not the exception; it is the rule. Often, this is a career path shared with prosecutors, but that matter, although important for another reason, is presently irrelevant. In such countries, lawyers who intend to enter the practising profession undergo a different system of training, and, although in some places there are moves to recruit more judges from within the profession, practitioners rarely take up judicial office.

The common law tradition is different. In England, and in other jurisdictions with a divided legal profession, there has always been a close association between Bench and Bar. With occasional exceptions, most judges, especially members of the senior judiciary, are appointed, usually in middle age, from the ranks of experienced barristers. In the past, professional experience has been regarded as the primary qualification for judicial appointment. Not all successful barristers wanted to be judges, but, among those who did, professional eminence was regarded as a good practical guide to suitability for judicial office. It has never been thought to be infallible. No one ever professed to believe that all good barristers would make good judges. And there were some outstanding judges who had not been particularly successful at the Bar. But it was seen as the best way of identifying prospective judicial talent.

The common law system of judicial recruitment has advantages and disadvantages. One major advantage is its contribution to a spirit of judicial independence. Judges have never regarded themselves as public servants. People who have made a career as independent advocates, functioning without employers or even partners, find it easy, and natural, following judicial appointment, to maintain their independence of the executive government. It should not be assumed that governments are always unequivocally pleased by that independence; but it is a fundamental constitutional value in our society. It is taken for granted. One reason for that is the professional background from which judges are chosen. The status and independence of the judiciary in common law countries owes a good deal to the fact that judges have historically been appointed from within the legal profession, and that many successful lawyers have regarded it as a privilege to be offered judicial office, even if that involved a large drop in income. Another practical advantage of the system, from the point of view of governments, was that it made it unnecessary to spend money on training newly appointed judges. Most people appointed to judicial office had spent a substantial part of a professional lifetime appearing regularly as advocates in courts. They were familiar with the rules of procedure and evidence, and the trial and appeal processes. They understood the ways of litigants and advocates. It was assumed that their professional experience equipped them to take on the task of judging without any need for formal instruction. This relieved governments of the need to pay for their training and continuing education. A further benefit is that common law countries make do with far fewer judges than civil law countries. Our trial judges sit alone and in civil cases this is usually without a jury. Civil law judges, even at first instance, sit in groups of three or five. When I last checked the numbers, France had eight times as many judges per head of population as Australia. The extent to which governments in common law countries save money by using the Bar as the principal source of judicial training and recruitment has never been acknowledged.

One of the disadvantages of the common law system, which has attracted increasing attention in recent years, flows from the fact that judges reflect the characteristics of the group from which they are drawn. That group is somewhat homogenous, in both the Latin and the Greek senses.

When I entered practice in New South Wales in 1963, most judges had previously been barristers. They were all male. Few solicitors, or law teachers, would have contemplated the possibility of, or wanted, judicial appointment. It was unlikely that they would be familiar with the rules of procedure or evidence, and most would not have had any experience of litigation. If such a person had been appointed, then he or she would have been offered no form of instruction to overcome that practical difficulty. That was a major impediment to the appointment of solicitors or law teachers as judges. It was both a cause and an effect of the Bar's practical monopoly on judicial appointments. It is impossible to understand that monopoly without relating it to the absence of arrangements for judicial training and development.

When I was Chief Justice of the Supreme Court of New South Wales, I sat mainly in the Court of Appeal and the Court of Criminal Appeal. However, I also made a point of sitting at first instance in most areas of the Court's work, including civil and criminal jury trials. This was possible only because I had appeared, as a barrister, in cases of that kind. I would not have attempted it without that experience. Criminal jury trials form a routine part of the work of most of Australia's judges. Conducting such a trial can be like walking on egg shells. The trial judge cannot adjourn to consult a textbook every time a point of procedure or evidence arises, and a wrong ruling might result in a mistrial. It must be extraordinarily difficult for a person who has not had substantial experience in advocacy, or been given the benefit of appropriate training and instruction, to take up work of that kind. Trial judges, of course, are equipped with Bench Books and similar aids, but these are usually prepared on the assumption that the reader already has a fund of knowledge based on practical experience. It would be impossible to take even the most outstanding new graduate from law school, and send him or her off on circuit to conduct criminal trials equipped only with a Bench Book and a store of self confidence. I hesitate to think of what some of the trial lawyers I know would do to a person like that.

I am not seeking to advocate the retention of the Bar's absolute monopoly on judicial appointment. My point is different; and one that has largely been ignored by people who profess to be interested in breaking down that monopoly. It is that, historically, the monopoly has been protected by the lack of proper arrangements for judicial training and development. Real change, as distinct from window-dressing, in the one area, requires real progress in the other.

The point is reinforced by considering what goes on in those common law jurisdictions where, historically, the Bar has not dominated judicial appointments. In North America, there has never been a divided profession, and the tradition of specialisation in advocacy by a distinct and separate group of practitioners does not exist. Both in the United States, and in Canada, there is a long history of appointment of law teachers to judicial office. In many of the state jurisdictions in the United States, judges are elected. Many of the candidates for election are not experienced trial lawyers. However, it has long been recognised in North America that, if people are to be appointed to the Bench without practical experience in advocacy in trial or appeal courts, they need training as judges. No matter how learned and intelligent a lawyer might be, if he or she is appointed a trial judge without experience in the conduct of litigation, then the task of managing a civil or criminal trial, especially a complex trial, is extremely difficult. Consequently, in both the United States and Canada, Institutes of Judicial Education, well-funded and providing formal programmes of orientation and on-going training and development, are an established part of the judicial system. Governments in Australia, in the past, have avoided that issue by relying on the Bar to train their prospective judges. This has saved them trouble and expense. If governments want to reduce that reliance, then they need to find an alternative way to train judges. Until they do that, experienced barristers will always have a huge advantage in any selection process that is seriously based upon merit. 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.

Until relatively recently, magistrates were part of the public service. They were recruited from within the public service. Most had obtained their qualifications by working as officers in the Courts of Petty Sessions. That was a form of practical training. Nowadays, magistrates have achieved structural independence from the executive government, and most are appointed from outside the public service; principally from the practising profession. Many of them are people who have previously been solicitors, rather than professional advocates. Appointing, as magistrates, people who have not had in-service training, raises the same issue. Recruitment and training are two sides of the one coin.

In England, and in Australia, many people say they want to see judges appointed from a wider pool. Although the Bar is less male-dominated than it was 40 years ago, the numbers of women who reach the top of the profession are still relatively modest compared with the numbers of women who enter law school. The fact is that, although the position is gradually improving, women are still under-represented in the senior ranks of the Bar. Other forms of lack of diversity also attract criticism. Governments now recognise that there are solicitors who, given the opportunity, would make good judges. The same applies to law teachers. There is understandable pressure to widen the gene pool.

On balance, this is a good thing. Provided it is done properly, widening the range of persons from whom judges and magistrates are recruited will increase the vitality and strength of the judiciary. But it cannot be done successfully unless attention is paid to the reason why, for so long, so much preference has been given to practising barristers.

In recent years, a good deal of effort has gone into the production of lists of qualities that ought to be possessed by candidates for judicial appointment. I do not wish to under-estimate the importance of some of the qualities that appear on those lists, but it is necessary to keep in mind that there are certain basic skills that are also required. They may not be sufficient to make a good judge; but they are necessary. These include, for example, an ability to write reasons for judgment. That skill is not taught at law school, and is not required of the majority of practising lawyers, or law teachers. Advocates, in the ordinary course of their practice, become familiar with what is involved in the preparation of reasons for judgment. Their arguments are largely directed towards encouraging judges to write reasons in a particular way, and they are constantly required to scrutinise reasons for judgment in order to advise upon the prospects of success of an appeal, or in order to conduct an appeal. This skill can be taught, as well as acquired by experience. But it cannot be ignored.

This is something we can learn from civil law jurisdictions, and from North American common law jurisdictions, where there has never been the intimate relationship between bench and bar with which we are familiar. We are learning; but the message has still not reached a wide audience.

There are additional reasons why judicial training and development should be a subject of wider concern.

The increasing specialisation of legal practice means that old assumptions about the breadth of the experience of professional advocates are no longer valid. How many modern barristers, before being appointed to a trial court of general jurisdiction, or an appellate tribunal that hears appeals from such a court, will have appeared in anything like the full range of matters that come before the court? Many barristers find, upon judicial appointment, that much of the work they are required to do is outside their range of experience. How many barristers appointed to the Federal Court have ever been involved in a refugee case? A specialist in revenue law might never have handled an intellectual property dispute. A specialist in personal injury cases at the bar, appointed to the Common Law Division of the Supreme Court of New South Wales, will be listed routinely to sit on major criminal trials, perhaps without recent criminal trial experience. And such a barrister is unlikely to have any familiarity with bail applications.

Furthermore, litigation is increasing in complexity. The range of cases that come before courts is as wide as the range of disputes that can arise between citizens, or between citizens and governments. Modern judges are required to deal with complex and technical issues that can leave them at the mercy of experts. One of the questions to be addressed by judicial educators is whether judges, or at least judges who sit in particular jurisdictions, should receive specialist training to equip them better to assess evidence, including expert evidence. This is not the occasion to go into that question; but I raise it to indicate that the context in which judges operate is changing in ways that call for an educational response. One of the challenges facing the judiciary is to identify those changes, and design the appropriate response.

There has been educational response from the Australian judiciary over the last 15 years, but it has attracted little interest on the part of governments or the legal profession, and virtually no public attention.

In England, the Judicial Studies Board was established in 1979. It provides a formal and comprehensive programme of induction and professional development for judges. In New South Wales, the Judicial Commission was established in 1986. One of its principal functions is to provide judicial orientation and training for magistrates and judges of all courts in New South Wales. In recent years, in conjunction with the Australian Institute of Judicial Administration, it has conducted an orientation programme for newly appointed judges from all Australian jurisdictions. Judges from overseas have attended those courses. In an article in 1993, Professor Sallmann described the Judicial Commission of New South Wales as "(the) Rolls Royce of judicial education bodies in Australia". Over the years since its establishment, the range of services it has provided to judges and magistrates has expanded greatly. In co-operation with the Education Committees of all the New South Wales courts it conducts impressive programmes, and these will, no doubt, continue to expand and develop. But how much of its work is known outside the judiciary?

In 2002, the Judicial College of Victoria was established.

Australia now has a National Judicial College, established in 2002. It seems that it has not yet achieved the critical mass necessary for its acceptance and success. There is a small budget of $380,000 per annum compared to the budget of the Judicial Commission of New South Wales of $4.2M. It is supported by the Commonwealth Government, and a number of state governments, but not by some other

state governments.

Courts in all Australian jurisdictions have now developed their own programmes of judicial development. The progress that has been made in this area is a notable, even if largely unrecognised, achievement. But there is a great deal of scope for further development. The orientation courses that are provided are a major improvement on the past; but there is enormous potential for their expansion. And, although the Australian judiciary has embraced the idea of continuing professional development, the range of topics that could usefully be addressed could be expanded well beyond those that are now covered. Within the judiciary there are educators with experience and imagination who, given the necessary support and encouragement, could devise more ambitious and comprehensive training schemes, to meet the needs of the Australian judiciary into the twenty-first century. Consider the challenges that are ahead of us. Legislation will expand at an even greater rate, and become increasingly complex and technical. Advocates will become more and more specialised, and judges will be required to match their expertise. Expert witnesses, whose evidence judges will be required to evaluate, will assume an increasingly important role, and the mastering of complex litigation will require judicial skills of a higher order.

Experience in Australia, and in the United Kingdom and North America, has shown that programmes of judicial training and continuing professional development will only be successful under certain conditions. Notwithstanding the enthusiasm of some for sending judicial officers off for re-education along the lines of the Cultural Revolution, with a view to instilling in them ideologically sound habits of thought, the unromantic truth is that it is more important to ensure that new judges and magistrates know the rules of procedure and evidence, and how to write a judgment. And needs for continuing education are largely shaped by the requirements of the particular court to which a person is appointed. Judicial officers, once appointed, cannot be compelled to learn anything. Evaluating their educational needs is itself a skilled task, as that of the growing class of judicial educators in common law countries, including Australia. Serving and retired judges are major contributors to work in judicial training institutes. They represent a valuable resource upon which governments are able to draw. Judges respond much better where programmes are designed with substantial input from experienced colleagues and former colleagues. At the same time, professional teachers themselves bring a specialist skill to judicial training. The most successful institutes are those which best combine the contributions of judges and professional educators.

It is important that the judiciary should accept that continuing education is part of the job. Judges value their independence, and are quick to react against any form of pedagogical influence. They are well aware that there are those who would treat professional development as an opportunity for indoctrination. Much depends upon maintaining their confidence. That requires that institutes of judicial training share the independence of the judiciary. Obtaining financial support from governments for bodies that are independent of government control, or even influence, is not easy. In fact, it is one of the most difficult arts of practical politics. But it is a challenge the judiciary must accept. To do that, we need to inform governments, and the public, about the issues and about what is at stake.

The acceptance of the need for judicial education in Australia is growing, but it has a long way to go. There was some early resistance within the judiciary but that, I believe, has disappeared. Some judges were concerned that programmes of judicial training would be used for inappropriate proselytisation; a concern that was heightened by pressure from some sections of the community for programmes to cultivate in judges attitudes reflecting the prevailing enthusiasm of the day.

What is missing however, amongst governments, the profession, the public, and even some members of the judiciary, is an appreciation of the connection between judicial training and development, on the one hand, and changes in policies and practices concerning judicial appointment.

Outside the ranks of experienced advocates the sort of people that governments might want to appoint to judicial office would be very reluctant to accept such appointment unless proper arrangements are made to equip them to perform the task. Even among experienced advocates, these days, such arrangements are necessary, but they are doubly necessary in the case of others. The success of any programme that has its object widening of the pool from which judges are drawn depends upon the existence of adequate facilities for judicial training and continuing professional development.

Let me return to the matter of the National Judicial College. It has the potential to become a major force in the Australian judiciary of the twenty-first century. I emphasise that it is national, not federal. There is a good reason for this.

In the United States, the federal judiciary has a long history which separates it from the state judiciaries. Federal judges are appointed, not elected; and they hold office for life. In many states, judges are elected. The process of election can involve campaigns by supporters and opponents of candidates. It is completely foreign to our method of judicial appointment. The federal judiciary is large, and supported by an enormous administrative apparatus. Federal judges deal with criminal, as well as civil, cases. Within the federal judiciary there is a highly developed appellate structure. Federal and state judges have their own, separate, training and educational arrangements.

In Australia, until the mid-1970's, the federal judiciary was very small. The exercise of federal jurisdiction was largely entrusted to state judges. Apart from the High Court, and a small number of specialist courts (principally in the areas of industrial law and bankruptcy) there were no federal judges. At that time, our Constitution also required that all federal judges be appointed for life. That, I am sure, is one reason why there were so few of them. With the amendment of that Constitutional provision, and the creation of the Federal Court and the Family Court, the federal judiciary expanded. But, even today, the States of New South Wales, Victoria and Queensland appoint more judges than the Commonwealth Government.

In Australia, movement between the federal and state judiciaries is common. Five of the present members of the High Court were formerly members of State Courts of Appeal. A number of judges of the Federal Court were formerly judges of State Supreme Courts. One of the members of the New South Wales Court of Appeal came to that Court from the Federal Court. Moreover, because of a difference in ages of compulsory retirement, an acting appointment to the Supreme Court of New South Wales is now a standard method of easing the passing of Federal Court judges who happen to live in that State.

Furthermore, there is a movement between State judiciaries. One of the present members of the Court of Appeal of New South Wales came to that Court from the Supreme Court of Western Australia.

In a recent case, the New South Wales Court of Appeal was constituted by the Chief Justice of Western Australia, and Judges of Appeal from Victoria and Queensland. In the last 10 years there have been a series of exchanges between the Supreme Court of New South Wales and the Northern Territory. I hope that, over time, this valuable form of cross-fertilisation will increase.

Federal and State judges mix regularly in professional associations, such as the Judicial Conference of Australia. In all parts of Australia, they come from virtually identical professional backgrounds. In the States other than New South Wales and Victoria, the numbers of federal judges are relatively small, and, inevitably, they associate as much with their State colleagues as with other federal judges.

As a result, the Australian judiciary is much more cohesive than that of the United States. This should be a source of strength, if we make proper use of it. The annual conference of judges from the Federal Court and the State and Territory Supreme Courts has, for many years, been a national force for the continuing legal education of judges. This Judicial Conference is an offspring of that annual meeting. Although we are a federal nation, we have a national spirit in our judiciary. We should foster that, and take advantage of the benefits it has to offer.

The National Judicial College provides one such an opportunity. Its governing body is representative of federal and state jurisdictions. Its Chairman is a State Chief Justice. It has the support of the federal government and the federal judiciary. It has the support and active cooperation of the Judicial Commission of New South Wales. Its establishment was fostered by the Council of Chief Justices of Australia and New Zealand, and the Australian Institute of Judicial Administration. It ought to be able to draw on the experience and talents of judges and judicial educators through the Commonwealth; and it ought to be in a position to service all judiciaries in the Commonwealth. Additionally, it ought to be in a position to represent Australia in the increasingly significant developments in judicial training that are taking place internationally.

I have no difficulty understanding the desire of governments to look for judicial talent beyond the group of experienced barristers who have, in the past, held a virtual monopoly on judicial appointment. But governments, and the public, need to face up to the fact that the narrow group from which judges were previously appointed brought certain advantages, including significant cost advantages. Governments did not need to provide them with formal training in order to equip them with the basic skills necessary to perform the judicial task. But, for reasons I have ready given, the assumption that experienced barristers require no judicial training can no longer safely be made. The days when governments could act on the basis that, unlike their counterparts in civil law jurisdictions, judges required no training or continuing professional development, are gone. The trend towards increasing recruitment of judicial officers from outside the ranks of experienced advocates is not the only reason why that is so, but it makes the need for appropriate systems of judicial education more obvious and more urgent.

The time has come for the matter of judicial training and continuing legal education to be taken up by all governments that appoint judges and magistrates as an issue of lively interest. It is up to judges to raise the level of public interest in that subject. The Judicial Conference has a key role to play.

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