THE APPOINTMENT OF JUDGES

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The time I have this morning is quite brief. I propose not to follow the rather classical treatment of this subject found in the good number of writings on it. To do so would see me presenting a descriptive outline of topics such as statutory eligibility for appointment, statutory mode of appointment, and criteria for appointment. I assume that you are sufficiently familiar with them.

Some of you may have been involved in the process of selection of one or more judges. You may have done so as a Chief Justice, a Judge of Appeal or a Senior Judge. Or your involvement may have been - as mine has, as President of a Bar Association. Where you have participated, it will have been as a person with whom an Attorney-General has consulted prior to making an appointment. My experience with consultation has led me to some views about it. I shall mention them later.

But first, some observations of a general kind. In Australia, judges - often very eminent ones - have written about the appointment of judges; so have academics; and, occasionally, practising lawyers. But it is not a subject which serving Attorneys-General choose. In 1993, a discussion paper on procedure and criteria for judicial appointments was released by Commonwealth Attorney-General, Michael Lavarch. It, however, is clearly the work of departmental officers and not that of Mr Lavarch himself. Even former Attorneys-General leave the subject alone. Only Sir Garfield Barwick appears to have written on it - but briefly - in recent years. That was in 1977, a long time after his years as Commonwealth Attorney-General. It is a pity that this is so. It would be very useful to hear, if only from one Attorney-General, about the store that is placed on an Attorney's own knowledge of possible candidates, about consultation and how it is undertaken and the results of it absorbed, and about criteria for appointment and how they are ranked. Why so little has been written is a matter for conjecture. Perhaps, it is because these are all attributes of a valued privilege of executive government - a privilege that embodies the element of patronage which may inhere in the appointment of a judge. One can understand the reluctance of a government to forego patronage or to see it curtailed. Maybe there is an apprehension that the more an Attorney-General discloses about what actually happens in the process, the more it is open to close public scrutiny, and that with scrutiny comes the possibility of legislative provision for compulsory, independent, external involvement in the process, one way or other.

Whatever the reason, I suggest that we may glean in the apparent reticence of Attorneys-General to write candidly upon the subject, a strong desire on the part of executive government of all political colours for the maintenance of the current constitutional arrangements whereby judges are appointed by the Governor-General in Council or a Governor in Council. Given this, substitution of these arrangements by any one of a number of alternative systems, for example, by election, or by appointment by an independent body, or by a system of career judges, is not even remotely foreseeable. There is little practical purpose in discussing those alternatives today. Of course, in the Commonwealth sphere, amendment of the Constitution by referendum would be necessary to achieve appointment other than by the Governor General in Council, adding a further substantial hurdle.

My second observation follows on from this. Sir Anthony Mason recently described appointment by the Governor-General in Council in this way:-

> "In practice, that means an appointment by Cabinet, generally on the recommendation of the Attorney-General."

He went on to note that "the appointment of State judges follows a similar pattern, a Cabinet

decision pending the formal appointment by the Governor in Council".

This description expresses the general understanding of what happens in practice. But, it seems that it is not the invariable practice. In most jurisdictions, Executive Council may be sufficiently constituted by the Vice Regal representative, or deputy, and two Cabinet ministers. That leaves open the possibility of judicial appointment by an Executive Council without any prior consideration by Cabinet. That procedure might seem to you to be a surprising departure from the practice described by Sir Anthony Mason.

The individual's view of whether there should be such a departure or not would be influenced to a significant degree by the view taken of the quality of the appointments made. But one's views should also be influenced by other considerations - the likelihood that other Cabinet ministers will be less well informed than the Attorney-General about the relative credentials of candidates and, more alarming, the possibility that an outstandingly credentialed candidate nominated by the Attorney-General might be rejected in favour of a candidate with inferior credentials for political reasons quite unassociated with the candidate's suitability for office. It may be noted, too, that the departure is towards the practice that operates in the United Kingdom whereby senior judicial appointments are made by the Queen on the recommendation of the Lord Chancellor.

Notwithstanding the individual views we may take on this, there is no doubt that whether Cabinet is involved or not is, in the end, a matter for Cabinet itself. From a political perspective, this is probably as it should be because, in the public's eye, the quality of judicial appointments is seen to reflect more upon the Government of the day than upon the Attorney-General of the day.

The third general observation is about criteria for appointment - or, more specifically, about one criterion for appointment on which widely differing views have emerged. It is commonly called "fair reflection of society". Professor Shimon Shetreet elevates this criterion to high prominence. He describes why he does so in the following passage from a paper he presented in 1986:-

> "An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, idealogically, socially, culturally and the like. This is based on a doctrinal ground, which has been suggested, namely, the principle of fair reflection. This doctrinal approach may be supported by additional arguments. The judiciary is a branch of the government, not merely a dispute resolution institution. As such, it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection."

This criterion was advocated in a somewhat modified way in the Lavarch discussion paper in this statement:-

> "It is a reasonable aim of an appointment process, and consistent with merit principles, that the process can seek to ensure that all sections of society (particularly women, aboriginal and Torres Strait islanders, and members of different ethnic groups) are not unfairly under-represented in the judiciary."

The practising profession has doubted the validity of this criterion or, if not that, has relegated

its role to a much lower level. In a comment on the discussion paper, Chief Justice David Malcolm said this:-

> "That the composition of the judiciary should reflect the composition of society should not be a criterion relevant to the appointment of a judge."

Earlier, Sir Harry Gibbs had rejected it on the ground that judges are there to do justice to all manner of people and not to be representatives of particular groups. Sir Anthony Mason treats it with reserve, commenting:-

> "... It would be a serious mistake to concentrate on the goal of fair representation to the detriment of seeking candidates with a high order of professional skill. Such an approach would compromise both the pursuit of efficiency and public confidence in the courts."

The attitude of the Law Council of Australia, of which the Bar Associations and Law Societies are constituent members, is that it disagrees with the suggested criterion of "fair reflection of society". It does not regard that "factor" as a basis upon which a potential appointee may or may not be determined to be meritorious. The Law Council's position is this:-

> "While interest-group representation is opposed, that is not to say that judges ought not to fairly reflect society in the general sense of having cultural sensitivity, gender sensitivity, wisdom in a broad sense, and an understanding of the community's aspirations and objectives. That is a critical part of being a good judge. But achievement of those objectives does not justify or require interest-group representation."

I myself support the Law Council's approach as the correct one, but now is not the occasion to preach. The observation I wish to make is that the divergence of views on this criterion - or suggested criterion as many regard it - has serious implications for the consultative process. Where a consulting Attorney and those consulted from the profession - judges or lawyers in practice - rank it with substantially different levels of importance, then the value of the process itself is diminished. The likelihood of coincidence of individuals in the various lists of suitable candidates is much reduced and, consequently, the likelihood of an appointment that will be widely applauded is also reduced.

Speaking of consultation brings me to my own experiences of it. I have lost track of the number of judicial appointments for which I have been consulted - but there have been many of them - for courts at all levels in both the Federal and State systems. The consultations have been with three different Attorneys - one Commonwealth, and two State. Naturally, these consultations are always held on a confidential basis. I cannot tell you what was said but I can tell you about style - strictly anonymously, of course! One Attorney would consult by inviting me to submit names of suitable candidates for consideration. That I would do on the understanding that I would put forward names only of those whom I knew would be prepared to accept. This would avoid the indignity of the rejection of offers made by the Attorney. If there was any verbal consultation with me at all, it was brief. On the other hand, another Attorney clearly preferred that there be no communication with potential nominees prior to consultation to gauge their attitudes. So much so that one would be asked to go to an interview with the Attorney not knowing what it

was about and having to think of suitable names on the spot. Once, I was asked if I would consult over a car phone without any prior notice. I declined. In an interview consultation, one Attorney would make extensive notes of what one had to say about candidates in an exercise book. Another would show little interest in what one would say whenever it was not what he wanted to hear.

Queenslanders amongst you are probably playing: Spot the Attorney. But the issue is not merely a local one. 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 will 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. I favour some formalisation of the process to allow the individual consulted adequate time to prepare and submit a written list of eligible candidates and to provide for supplementary verbal consultation as may be necessary. Some assurance, too, that the information given will be taken into account is needed. The development of a protocol on consultation should be seriously considered by the Standing Committee of Attorneys-General. Organisations such as the Judicial Conference, the Australian Institute of Judicial Administration and the Law Council would wish to make submissions on its content.

I admit that what I am suggesting is mere improvement of the prevailing system. It stands in contrast to a far more bold approach that some would advocate. In 1977, Sir Garfield Barwick suggested "that in all systems of Australia where appointments to judicial office may be made by Executive Government, there should be a judicial commission - a body saddled with the responsibility of advising the Executive Government of the names of persons who are suitable for appointment to the particular office under consideration". It might seem to you a little strange that Sir Garfield should make this proposal - after all, he, as Attorney, would have had a very good knowledge of the senior members of the practising profession. As an individual, he was forthright in his opinions. But, quite probably, he had others in mind and not himself. He advanced his proposal because, in his view, "the time (had) arrived in the development of this community and of its institutions when the privilege of the Executive Government in this area should at best be curtailed". Why Sir Garfield thought that the time had then arrived may have been because of his widely known hostility to the appointment to the High Court of Lionel Murphy some two years earlier in 1975.

Whatever the reason, the idea has not taken root in Australia. Overseas, it has been adopted fairly recently, but only to a limited extent. There are advisory appointment bodies in New Zealand and in several of the Canadian Provinces. But they advise only in respect of appointments to courts at the District or County Court level, and not to the superior courts. From all accounts, they perform well. If that continues, then possibly their roles may be extended to superior courts. I am not aware of any plans for that.

All judicial offices are important ones. However, the professional and community interest in an appointment is heightened when it is to a superior court. The appointment then comes in for more detailed and, often, more critical scrutiny. At this level, appointments need to be made on the best informed basis possible. That being so, it can be respectably argued that if there is to be an advisory body at all, then it should advise on these appointments. Why except appointments to the superior courts? Isn't there an element of skirting the issue in excepting them? I acknowledge that my reservations about advisory bodies are to some extent based on a concern that if introduced here, they would merely reflect the overseas model. If that were so, they would not be giving advice on appointments where advice could most valuably be given.

No one here will disagree with the principle of appointment on merit. There is general agreement, too, on the criteria to be applied in assessing the relative merit of candidates. I have

already referred to one factor on which there is disagreement. Those on which there is agreement are sometimes given brief treatment by commentators because they are thought to be self-evident. I have noticed a recent discussion of them by Sir Geoffrey Palmer, a distinguished academic-lawyer and former New Zealand Attorney-General. He has compiled a list of qualities, relying on his own experience and a very useful set of evaluative criteria listed in the *Handbook for Judicial Nominating Commissions* published by the American Judicature Society. His comments on the qualities impressed me as both practical and refreshing. Here are just a few of them.

> "*Knowledge of the Law and Professional Skills:* These are essential qualities. They must be carefully and rigorously assessed. They are a necessary condition for appointment but not themselves a sufficient one. Sometimes people who are too learned in the law may not be suitable - they may be too pedantic, or not able to see the wood for the trees.
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> *Industry:* Judges have to work hard. Lazy Judges are no use. The bench is not a place of refuge from hard work. Some practitioners may regard it that way and this tendency needs to be guarded against. Lawyers suffering from burnout should not be made judges. People who are dilatory practitioners will be slow judges.
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> *Impartiality:* Judges need to be objective and detached. A person with a strong and rigid set of beliefs passionately held will not be the right sort of person. Judges need to be open-minded.
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> *Communication Skills:* High levels of facility with both oral and written expression are essential. Judges must be good writers, concise and lucid. Judgments must be capable of being understood by ordinary people. Logical, tight, relevant judgments must be produced in timely fashion."

Well, for those of you who are judges, it must be exhilerating to realize that at least one person at one time thought that you fitted the bill! One last point - and it's a serious one! How is it possible to predict how candidates will turn out? Reputation is one thing, but it is no assurance against someone being bad tempered, too interventionist, too pompous, or too slow with judgments. A system which allows individuals to trial as judges has much to commend it. The appointment in the United Kingdom of Deputy High Court Judges and Deputy District Judges is an example. A period of three months full time on the Bench - but no less - can, in my observation, provide a useful guide to the long term. By contrast, acting part-time appointments do not! This year, a number of barristers were appointed to act as District Court Judges here for three months on a full time basis. Because of my involvement with their selection, I took a personal interest in their performance. Avoiding any detail, I can say that this was sufficient to gain impressions on whether a person was suitable for permanent appointment, whether a permanent appointment now would be premature, or whether a permanent appointment should not be made.

Ladies and Gentlemen,

On that note, may I thank you for your time and wish you all a loquacious colloquium.

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