Saturday, 13th November, 1999

Speech by the Hon. K. Trevor Griffin, MLC

Attorney General, Minister for Justice,

Minister for Consumer Affairs

Panel Discussion, Judicial Conference, Melbourne

I welcome the opportunity to participate in this forum. While the correspondence with Mrs Wade, the former Victorian Attorney-General, is not the only topic of discussion today, it has raised some important issues to stimulate debate.

Interestingly, I note that at last years colloquium Mr Gotterson QC referred to an apparent reluctance of Attorneys-General to come forward and disclose what actually happens with judicial appointments. Maybe they had never been asked. Here we are some twelve months later with a panel of Attorneys dealing with that very issue, although I've never thought that the process was secret or that Attorneys-General were unwilling to talk about it.

Judicial appointment

There are 38 Judges in South Australia including the Chief Justice of the Supreme Court and the Chief Judge of the District Court, five Masters and 36 magistrates.

Since I became Attorney-General in late 1993, I have been involved in the appointment of many judges and magistrates including the current Chief Justice, Chief Judge and Chief Magistrate. I take this responsibility very seriously and I am very conscious of the importance of nominating people with appropriate skills which equip them to perform judicial duties and other duties associated with the office.

Beyond the statutory requirements of a minimum period of practice set out in the *Supreme Court Act*, the *District Court Act* and the *Magistrates Act*, there are no formal prerequisites for appointment to the position of a judge or magistrate. In South Australia we have a fused profession, although a number of practitioners choose to practise at the separate Bar. Appointees are not restricted to only those practising at the Bar. Recent appointments have included barristers, solicitors and government lawyers with experience including criminal, civil, industrial and family practice.

Judges are appointed by the Governor in Executive Council on the recommendation of the Cabinet and on the advice of the Attorney-General.

It has always been my policy to consult with the Presidents of both the Law Society and the Bar Association, the relevant Judicial Head, the representative of the Leader of the Opposition (usually the Shadow Attorney-General) and others whose judgment I respect. Generally, that consultation takes the form of a discussion, working through a list of names of persons who may be suitable and inviting the other person both to comment on the list and add others. Experience and qualities as well as any impediments may be raised with me but not by me, because I am interested in hearing other people's views rather than divulging mine. Discussion with the relevant Judicial Head is more frank than with others.

Various qualities are identified - experience as a lawyer, particularly Court experience; standing in the community; manner and communication skill; capacity to make a decision and not to prevaricate and delay; likely ability to be fair but firm, as well as courteous, are among them.

This consultation had not occurred, at least with me when I was Shadow Attorney-General from 1982-1993.

I then take a note to Cabinet advising of my intention to approach the nominee to discuss possible appointment. After that is agreed, then contact is made with the potential nominee by me. Subject to the nominee's acceptance of the position, the matter returns to Cabinet for formal approval and recommendation to the Governor in Executive Council for appointment. The relevant Judicial Head will be informed of the formal decision after it has been made by Cabinet, but before the formal appointment in Executive Council. The decision is kept very close to my chest and frequently the legal profession, which has run a 'book' on the outcome, gets the choice wrong.

Magistrates are appointed by the Governor upon the recommendation of the Attorney-General. A recommendation for the appointment of a magistrate cannot be made by the Attorney-General unless the Chief Justice has been consulted in relation to the proposed appointment. When a vacancy occurs in the magistracy, expressions of interest are now sought by advertisement, from suitably qualified legal practitioners. This ensures that a wide range of persons, frequently not known personally to me, may be considered. For example, only recently, at my request, the Chief Magistrate chaired a panel on which I was represented, which conducted an interview process to assist in selection of an appropriate person. The recommendation was made to me, I was satisfied with it, and the recommendation was then taken by me to Cabinet. When endorsed by Cabinet, it was presented to the Governor in Council for the formal appointment.

Some criticise systems similar to that adopted in South Australia because of a so-called lack of transparency, secrecy, possible politicisation and lack of assessment against specified criteria. As will be discussed today, there are other ways by which judges can be appointed. However, on considering the alternatives I am not persuaded that the current system in South Australia is in need of reform.

We could adopt an election system as is adopted in some States of America, and, I should say, it is a system favoured by some lay Members of Parliament. This would certainly create a different environment in the judicial system - one I hasten to add, to which I am opposed. Such a system brings with it a greater risk of partisan politicisation than that presently employed, and a "populist" approach to justice.

Another option is the system adopted for the appointment of judges to the US Federal Courts. We have probably all seen reports highlighting the appearance of the President's nominee for the US Supreme Court before the Senate for confirmation. On occasions, matters of little relevance to the exercise of judicial duties are raised or questions are put to the nominee about their position on certain social issues to assist in assessment of whether they will adopt a conservative or radical approach. Such an approach raises serious questions and must surely result in some suitable candidates shying away from appointment because of an uneasiness with the potentially intrusive and public nature of the process.

The establishment of a Judicial Commission to advise on appointments has been adopted in several jurisdictions and has received some support in Australia. Most recently, the Tasmanian Attorney-General has released a Discussion paper on the issue. The paper looks at the determination of criteria in conjunction with a Judicial Commission.

While some even suggest a more rigorous and independent appointment process through a Judicial Commission, this raises very serious questions about the accountability of such a Commission for any decision taken. I am not convinced of the need for a Judicial Commission of any type, or for predetermining criteria. I think the setting of criteria will be a most difficult, if not impossible, task. Obviously the criteria would need to reflect the nature of the appointment. For example, increasingly the heads of jurisdiction will need managerial skills and experience as they are more directly responsible for management and administrative issues. And the establishment of specialist courts and the involvement of courts in such options as diversion programmes for defendants must surely influence the pool of likely eligible candidates.

As previously indicated, I am still to be convinced that there is a serious flaw in the current system. If there is, then surely this calls into question all current appointments.

Another issue raised in the correspondence with Mrs Wade is the issue of a broadly based and representative judiciary. I agree that it is not beneficial to have all judges fitting the one mould. I think it is incumbent on us as Attorneys-General to consider all potential appointees on their merits. However, I do not take this to mean that the judiciary should be representative in the sense that they are seen to represent a particular group. Rather, while obviously acting in accordance with the law, the judiciary should reflect community standards and values as they exist throughout Australia.

In fact, I think this is a very important issue facing the judiciary. The independence of the judiciary could be threatened if judges lose the support of the community because of examples of inappropriate behaviour or the expression of attitudes and views which simply do not bear any relationship to contemporary social realities in Australian society.

Issues such as the adoption of codes of conduct, upgraded courses for continuing judicial education combined with the development of more effective methods of peer review for judges and magistrates are all important issues for ongoing consideration and action. The big challenge here, on occasions, is how to ensure that judges and magistrates participate in programmes to improve their judging ability. There is no means, other than peer pressure and, ultimately, address of both Houses of Parliament, to deal with judicial 'under-performance' or inability and that latter course in most instances is much too harsh.

A further criticism from time to time has been a failure to appoint female judges. I believe that this will be redressed - if somewhat too slowly for some. I can assure you that in South Australia, potential female candidates are considered on equal terms with their male counterparts and I believe that recent appointments reflect this. However, to a certain extent, this will be resolved when the legal profession promotes women practitioners on merit and more women practitioners actively engage in advocacy work.

The correspondence with Mrs Wade also touches on the appropriateness or otherwise of temporary appointments. In South Australia, there is an ability to make acting appointments to judicial positions for periods up to twelve months. However, this is not used as a trial period to assess suitability. Nor has it been used as a mechanism to provide judicial training before permanent appointment.

South Australian legislation also provides for limited appointments in some situations. For example, in the Youth Court, a person cannot be a member of the Court's principal judiciary for a term exceeding five years, or a series of terms exceeding five years in aggregate. unless that person is one of the first members of the Court's judiciary, in which case the proclamation designating that person as a member of the Court's principal judiciary may provide for a term of up to 10 years or for a series of terms over a period not exceeding 10 years. However, in answer to any possible allegations regarding a possible infringement of judicial independence, on the expiration of the term, the member retains his or her position in the judiciary in another jurisdiction.

In South Australia, the issue of judicial independence was also raised in relation to the appointment of the Coroner for one term of ten years. The Coroner now also holds office as a stipendiary magistrate, not because a fixed term was seen to be in breach of any concept of judicial independence, but rather because of some pre-existing commitments.

In addition, the *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* allows for a pool of judicial officers to be appointed on an annual basis to provide extra support to the courts. On the face of it those appointments may be seen to be in conflict with the wider aspects of judicial independence, but the matter has been handled sensitively and appropriately by the Courts and I am confident that justice has been served without interfering with real or perceived judicial independence.

These are all important issues. They all relate ultimately to issues of independence **and** accountability. Both go hand in hand. They are not, I suggest, issues which relate to appointment processes. I don't

believe we should be spending much time focussing on the processes - no government will give up the right it has had for hundreds of years to make judicial appointments. The focus has to be on the quality of the communication between us and the level of co-operation which will ensure justice is delivered and a high level of quality service is provided to the community.