APPOINTMENT OF FEDERAL JUDGES IN AUSTRALIA

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[*This article examines the present procedure for selecting federal (including High Court) judges, notes its deficiencies, and considers possible reforms. While ruling out popular election of judges and legislative review of judicial appointments, the author argues that the Commonwealth Attorney-General should consult widely before recommending judicial appointments to Cabinet, and proposes the establishment of a Judicial Nominating Commission (or Commissions), comprising judges, academic and practising lawyers and non-lawyers, to recommend suitable candidates for judicial appointment. The appointment of federal judges should remain in the hands of the Commonwealth government, which would be obliged to state its reasons publicly if the person appointed was not recommended by the Commission. The author argues that the proposed reforms would overcome deficiencies in the present system, and promote adventurous and meritorious judicial appointments.*]

1. *CURRENT PROCEDURES*

The Commonwealth Constitution s. 72(i) vests the power to appoint justices of the High Court of Australia and other federal judges in the Governor-General in Council. A constitutional amendment would, therefore, be necessary if the power were to be conferred upon some other body.

The Commonwealth Parliament has regulated this constitutionally conferred power to some extent, by specifying certain minimum qualifications for justices of the High Court and the two federal courts — the Federal Court of Australia and the Family Court of Australia — and by requiring the States to be consulted before High Court vacancies are filled. The constitutional validity of these statutory qualifications (enacted under s. 51(xxxix)) upon the power conferred by s. 72(i) has never been questioned.

These statutory provisions specify that

(a) High Court justices and federal judges must have been State or federal judges, or legal practitioners for at least five years;[1]

(b) Family Court judges must 'by reason of training, experience and personality' be 'suitable person[s] to deal with matters of family law';[2] and

(c) the Commonwealth Attorney-General must consult the State Attorneys-General before a vacancy on the High Court is filled.[3]

Relatively little is known regarding the procedure by which federal judges, including High Court justices, are appointed. What is known is that the actual decision to appoint a particular person is made by the Cabinet on the recommendation of the Attorney-General (except, presumably, when he is the appointee), and that the Prime Minister is also likely to take a close interest in High Court appointments, especially to the office of Chief Justice.

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1 High Court of Australia Act 1979 (Cth) s. 7; Federal Court of Australia Act 1976 (Cth) s. 6(2); Family Law Act 1975 (Cth) s. 22(2)(a).

2 Family Law Act 1975 (Cth) s. 22(2)(b).

3 High Court of Australia Act 1979 (Cth) s. 6.

But little is known about the process whereby the Attorney-General decides upon the proposed appointee. It is not known whether departmental guidelines exist, or whether there is even a widely followed procedure. The Commonwealth Attorney-General would, of course, usually consult his departmental and personal advisers who presumably keep some sort of 'file' on potential appointees to the three federal courts.[4] Beyond that, the practice of Attorneys-General no doubt varies quite widely with each occupant of the office. As Sir Harry Gibbs remarked recently, although not specifically of the Commonwealth Attorney-General,

> In Australia it is of course common for an Attorney-General to consult a Chief Justice or other members of the profession with regard to a prospective appointment. There is, however, no settled practice of that kind. Sometimes an appointment may be made without any consultation. At other times the advice given by those consulted may be ignored.[5]

Other commentators paint a similar picture. Some years ago, Justice Gordon Samuels of the New South Wales Court of Appeal noted that

> The procedure is nowhere formalized; but generally there is consultation between the attorney general and the chief justice or chief judge of the court in which a vacancy is to be filled, and the attorney general makes a recommendation to his cabinet colleagues.[6]

The Canadian Bar Association's Special Committee on the Method of Appointment of Judges noted, in its August 1985 report, that, while the New South Wales Attorney-General usually consulted the chairman of the State's bar association before nominating judges, his Victorian counterpart did not, much to the bar's chagrin.[7]

The most complete account of the Australian judicial appointment process appears in an unpublished paper by Professor Duncan Chappell, formerly of the Australian Law Reform Commission, in which he reported the results of a series of interviews he and Peter Cashman conducted with past and present Attorneys-General in all jurisdictions except Western Australia and the Northern Territory between January and May 1981. He reached the following conclusions:

1. '[N]o . . . government possessed formal written procedures for selecting and appointing judges although one Attorney General, upon discovering this documentary lacuna . . . prepared a quite detailed memorandum for the benefit of his Cabinet colleagues . . . [on] his understanding of the appropriate procedures . . . . Informal information about the selection and appointment process appeared, most typically, to be retained among a select group of senior public servants in the [Attorney-General's departments].'
2. '[T]he pivotal role of the Attorney General in the appointment of judges in each Australian jurisdiction was confirmed although . . . variations occurred in the methods by which each Attorney selected [judges]. Each interviewee acknowledged that during his . . . term of office he was responsible for bringing forward to his . . . Cabinet the names of persons believed to be suitable for judicial appointment. Each Attorney indicated that a single name, rather than a list of names, was submitted by him . . . thus leaving Cabinet with the opportunity to ratify or reject [his] choice . . . . The rationale for this practice was said to be the constitutional convention that persons being considered for appointment to judicial office should not be put into a competitive position before a political body for this would impinge upon . . . the independence of the judiciary . . . . [I]t was only on extremely rare occasions that a Cabinet challenged a name put forward by an Attorney General, and that a particular nomination was withdrawn following such a challenge.'

4 Virtue, B., 'Choosing federal judges — is there need for a new approach?' (1986) 21 *Australian Law News* No.11, 7.

5 Sir Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 7, 11.

6 Justice Gordon Samuels, 'Judicial Competency: How it can be Maintained', *The Blackstone Bicentennial* (1980) 481, 486.

7 *The Appointment of Judges in Canada* (1985) 24. The Committee consulted the Vice-president of the Law Council of Australia (*ibid.* 2).

3. '[W]hen appointing a chief justice each of the Attorneys General indicated that somewhat different considerations applied and that the Premier, or the Prime Minister, . . . became directly involved in the selection process and usually jointly with the Attorney General advanced a name to Cabinet . . . . The involvement of [chief ministers] in [the appointment of chief justices] was said to depend upon the importance and political sensitivity of the duties attached to [the chief justiceship] including acting, in some Australian jurisdictions, [as Lieutenant-Governor]. Substantial controversy was said to have surrounded some appointments to the position of chief justice in a number of jurisdictions.[8] Heated discussions and disagreement were said to have occurred among Cabinet members about certain candidates resulting, on occasions, in a name being withdrawn from consideration, for the position of chief justice.'
4. '[T]he consultative process adopted by Attorneys General when identifying suitable candidates for judicial office differed substantially both within and between Australian jurisdictions. Two variables which appeared to affect this process were the size of the jurisdiction, and the nature of the legal experience possessed by an individual Attorney General making a selection. In smaller jurisdictions, like Tasmania and South Australia, . . . most of the potential candidates . . . were usually known to the Attorney General. Thus the choice . . . [did not require] extensive consultation . . . with legal, parliamentary or other advisors. In larger jurisdictions, however, like Victoria and New South Wales, the Attorney General was unlikely to have acquired an intimate knowledge of all of the prospective . . . appointees, making him more reliant upon other sources of information and advice.' This is exacerbated when the Attorney-General is not a lawyer. '[I]n practice, the nature of the advice sought by all Attorneys General interviewed . . . was marked by few patterns or procedures. Some . . . appeared to rely almost exclusively upon their personal knowledge of potential candidates . . . . Others, principally in larger jurisdictions, undertook a series of "informal soundings" from a range of people including the Chief Justices or Chief Judges of the court to which an appointment was to be made, members of bar councils or law societies, parliamentary colleagues, Cabinet colleagues, law officers of the Crown and personal friends. Even within jurisdictions the consultative practice changed from Attorney to Attorney . . . .'
5. Since advice from judges and recommendations from the Chief Justice play an important role in the appointment of Queen's Counsel (recommended to Cabinet by the Attorney-General), and judges are frequently appointed from the ranks of Queen's Counsel, serving judges can influence the appointment of their future colleagues in this way.
6. Although a minority of jurisdictions required potential judges to obtain a medical certificate of good health after Cabinet approval but before appointment by the Governor in Council, in no jurisdiction was a search made of police records.
7. '[A] broader range of consultation occurred in the case of the appointment of [federal judges].' The High Court of Australia Act 1979 s. 6 requires the State Attorneys-General to be consulted, and 'recent experience . . . with the appointment of a new Chief Justice of the High Court [in 1981] suggests that this consultative process can have a significant influence on the choice made by the Federal Attorney General, and Federal Cabinet.[9] In regard to other Federal judicial appointments, like those made to the Federal Court, it appeared to be the practice for the Federal Attorney General, as a matter of courtesy . . . to seek advice from his State or Territorial counterparts concerning the suitability for office of a particular candidate.'[10]

As already noted, the only consultation which the Commonwealth Attorney-General is obliged to undertake is that specified by the High Court of Australia Act 1979 s. 6, namely consultation with State Attorneys-General over appointments to the High Court. The Attorney-General has not, to the writer's knowledge, released details of the consultation process, but the Australian Constitutional Convention's Judicature Sub-committee was no doubt reliably informed in reporting that

[8] See, *e.g.*, Cribb, M., 'Political Chronicle — Queensland' (1982) 28 *Australian Journal of Politics and History* 97, 424-5; Monaghan, D. and Whitton, E., 'The Curious Story of Queensland's Top Judges', *Sydney Morning Herald* (Sydney), 29 June 1985.

[9] Duncan Chappell suggests that State opposition was a factor in the appointment of Sir Harry Gibbs, rather than R. J. Ellicott Q.C. (reputedly favoured by Prime Minister Fraser and Barwick C.J.), to the chief justiceship of the High Court in February 1981: *op. cit.* n. 8, 20 n. 17. Brian Galligan believes that the opposition of five States was instrumental in barring Ellicott's appointment: 'Ellicott's prospects for the chief justiceship might well have weathered the storms of Labor's opposition had it not been for additional strong opposition from the non-Labor states.': *Politics of the High Court. A Study of the Judicial Branch of Government in Australia* (1987) 198.

[10] Chappell, D., 'Judicial Responsibility: A Review of the Selection Process for Australian Judges', *Australian National Report for the Eleventh International Congress of Comparative Law* (1982) 6-12.

> the procedure for consultation pursuant to s. 6 that has been adopted to date [May 1985] for the appointment of Justices has involved the Attorney-General of the Commonwealth writing to the Attorneys-General of the States asking them to suggest those whom they wish to have considered for appointment. The names put forward by the State Attorneys have been considered by the Commonwealth Attorney in making his proposals to the Cabinet. In some cases there has been additional consultation by telephone.[11]

Even if the States' reported success in securing the appointment as Chief Justice of Sir Harry Gibbs, rather than R. J. Ellicott Q.C.,[12] be put to one side, the statistics comparing appointments before and after the implementation of s. 6's procedure are undeniably suggestive: three of the six appointments since the new procedure came into effect have been State Solicitors-General (Sir Ronald Wilson in May 1979, Sir Daryl Dawson in July 1982, and Mary Gaudron in February 1987), while not one of the thirty-one previous appointees (including Piddington J.), was appointed from a comparable State office. Nevertheless, a majority on the Constitutional Convention's Judicature Sub-committee considered the present consultative procedures under s. 6 to be inadequate, and sought 'greater State involvement'.[13]

2. *IS THE PRESENT METHOD OF APPOINTMENT ADEQUATE?*

Any consideration of possible changes to the present method of appointing federal judges must, of course, derive from an assessment of the adequacy or deficiencies of the current appointment process, including both its results and its procedures. Studies in several countries have, for example, recommended the establishment of an advisory committee to participate in the appointment process (by submitting a list of suitable candidates to the government), and have based their recommendations upon specific defects identified in the current method of judicial appointment in that jurisdiction. In Canada, it was primarily political patronage;[14] in England, the unnecessarily limited pool from which an increasing number of appointments must be made.[15]

Most commentators agree that, assessed in terms of legal competence, the *results* of the present method of appointing federal judges are very favourable. Political appointments (in the sense that a judge is appointed because of his or her political opinions, to satisfy political party pressures, or to derive electoral advantage[16]) have been rare in recent years[17] and, in any event, might be expected to play a larger role in appointments to the High Court (especially on account of its jurisdiction over constitutional disputes) than to the lower federal courts.

[11] Australian Constitutional Convention, Judicature Sub-committee, *Second Report to Standing Committee* (May 1985), para. 3.3. (This report appears in *Proceedings of the Australian Constitutional Convention* (1985) vol. II.

[12] See *supra* n. 10.

[13] *Supra* n. 11 at para. 3.5.

[14] See the report of the C.B.A. Special Committee on the Method of Appointment of Judges, *op. cit.* n. 7, esp. chs 6 and 7; Ziegel, J. S., 'Federal Judicial Appointments in Canada: The Time is Ripe for Change' (1987) 37 *University of Toronto Law Journal* 1, 6-9.

[15] See Justice, Sub-committee of Standing Committee on Civil Justice, *The Judiciary* (1972) paras 12, 43.

[16] With respect, Justice Samuels' definition of political appointments — 'where the appointee has sat as a member of the legislature, or has been an unsuccessful candidate for election in a party political interest, or has held office in a party machine; and presumably has been appointed by his own party' (*op. cit.* n. 6, 492 n. 16) — may be rather too wide.

[17] *Ibid.* 486; Virtue, *op. cit.* n. 4, 8.

Although it may no longer enjoy (especially in the United States) quite the prestige it enjoyed in the hey-day of Sir Owen Dixon's presidency during the 1950s, the High Court is still regarded very highly by most knowledgeable observers. Indeed, the courts of other Commonwealth countries appear to refer to its decisions more frequently now than they did even in Dixon's hey-day. A decade ago two highly-qualified observers were very satisfied with the High Court's competence:

> Any proposals that the Federal Cabinet's autonomy in making appointments should be fettered must be based ultimately on the conviction that Cabinet can not be trusted to make proper appointments. The validity of that assumption is best tested by looking at the record on appointments which have been made thus far in the Commonwealth's history. We believe that this shows that all federal Governments have exercised their power in this field with a great sense of responsibility. It is simply not true that appointments have stressed unduly political affiliations or convictions, or that incompetent people have been appointed. In the history of the High Court, a number of its members have earned universal recognition as great judges. In general, the quality of the High Court is very high; it is one of the most respected appellate tribunals in the common law world.
>
> We are convinced that no justification exists at present for any change in the method of appointing Justices of the High Court, and that the probable effect of any change would be to lower the quality and standing of that Court.[18]

Other commentators have, however, been more critical of the standard of judicial appointments. Without mentioning any specific courts, Sir Harry Gibbs has remarked that 'all parties, when in office, on occasion do take politics into account in making judicial appointments'.[19] He noted that, although not frequent, political appointments occur 'often enough to cause some concern';[20] specifically that 'some appointments are made of persons who have not achieved the highest standard of professional ability and experience.'[21] Sir Harry appears especially to have had the Family Court in mind, for he caused quite a furore in August 1985 in asserting that 'the creation of [the Family] Court has made it difficult to maintain the highest standards in the making of judicial appointments.'[22] The obvious implication is that some Family Court judges fall short of the appropriate level of competence, a charge rejected by several commentators, including Justice Elizabeth Evatt, Chief Judge of the Family Court,[23] Justice Michael Kirby, President of the New South Wales Court of Appeal,[24] and the Family Law Section of the Law Council of Australia.[25]

The procedural aspects of the present appointment process have also been justifiably criticized, principally on the ground that they involve excessive secrecy and inadequate and unpredictable consultation by Attorneys-General

18 Cowen, Z. and Ryan, K. W., Submission on 'Appointment of Justices of the High Court of Australia' (18 April 1975), Parliament of New South Wales, *Report from the Select Committee of the Legislative Assembly upon the Appointment of Judges to the High Court of Australia* (1975) 33, para. 9.

19 'The State of the Australian Judicature' (1985) 59 *Australian Law Journal* 522, 527.

20 *Ibid.*

21 Gibbs, *op. cit.* n. 5, 9.

22 *Op. cit.* n. 19, 522.

23 Solomon, D., 'Evatt Conterpunches Gibbs', *Australian Financial Review* (Sydney) 7 August 1985.

24 Slee, J., 'Kirby Joins in defence of Family Court', *Sydney Morning Herald* (Sydney) 12 August 1985.

25 Solomon, D., 'Lawyers defend creation of Family Law Court', *Australian Financial Review* (Sydney) 8 August 1985.

who are not obliged to consult anyone (except the State Attorneys-General pursuant to the High Court of Australia Act) and, of course, are free in any event to ignore whatever advice they receive. Murray Gleeson Q.C. of the New South Wales Bar, for example, has argued that

> It is a defect in our system of appointing judges that there are no clearer and more widely-known procedures of consultation and inquiry in relation to judicial appointments . . . . Of course [the Attorney-General] should be free to make use of whatever sources of information he has, but there is much to be said for the view that he should be obliged, at least by convention, to go to certain obvious sources even if he ultimately rejects their views.[26]

It is significant that this view should be shared by the Attorneys-General themselves, for Duncan Chappell reported that in his 1981 survey several Attorneys-General 'admitted they were troubled by the "public invisibility" of the process and the reliance placed upon what one described as "hit or miss" methods of selecting suitable candidates.'[27] The Canadian Bar Association's Special Committee on the Method of Appointment of Judges criticized the Canadian federal judicial appointment procedures on similar grounds: excessive secrecy, inadequate consultation, insufficient information and, of course, the intrusion of political considerations.[28]

A more controversial criticism of the results of the present method of judicial appointment is that Australian benches lack 'balance', in that virtually all appointees are white male barristers, usually of Anglo-Celtic origin. The strongest critic of the Australian judiciary on this ground has undoubtedly been the late Justice Lionel Murphy, who is reported to have told Sydney University law students in October 1975 that

> The system of selecting judges is very very poor. You eliminate the academics entirely as though they are not to have anything to do with courts.
>
> Of the practising members of the profession 90% are eliminated because they are solicitors. Another 90% are eliminated from the remaining 10% because they are only junior barristers — no matter how old they are.
>
> So you are left with 1% and that is a very small number of people to turn to. I trust there will be a departure from this system of selection when the Family Law Court goes into action.[29]

Five years later, and much more controversially, he advocated a different sort of 'balance' — social, ideological, sexual, and ethnic 'balance'.

> In Australia, no attempt is made to achieve any balance. With rare exceptions, appointments are made of persons who can fairly be regarded as conservative or ultra conservative . . . . A proper balance throughout our legal system is overdue. This includes the appointment . . . of women as well as men judges and court officers; of those whose families are not from the British Isles as well as those who do originate from the British Isles.[30]

These concerns have been echoed by several commentators,[31] including Justice Michael Kirby who remarked, in his Boyer Lectures of 1983, that

26 Gleeson, A. M., 'Judging the Judges' (1979) 53 *Australian Law Journal* 338, 339.

27 *Supra* n. 8, 14-15.

28 *Supra* n. 7, esp. ch. 5.

29 *Sydney Morning Herald* (Sydney) 21 October 1975. Accord Transcript of National Press Club Address (cited *infra* n. 30, p. 190) 7, 22.

30 Department of the Parliamentary Library, Current Information Service, Transcript of Address to the National Press Club, Canberra, 22 May 1980, 6-7; quoted in [1980] *Reform* 77.

31 See, *e.g.* Chappell, *op. cit.* n. 8, 16; Basten, J., 'Judicial accountability: a proposal for a Judicial Commission' (1980) 52 *Australian Quarterly* 468, 475; Justice Richardson, 'Judges as Lawmakers in the 1990s' (1986) 12 *Monash University Law Review* 35, 43; Campbell, C. M., 'Judicial Selection and Judicial Impartiality' [1973] *Juridical Review* 254.

> Judges judge the community in all its diversity. There must be qualities of mind and character first. But it should be possible, within such requirements to re-mould the third branch of Government, gradually and patiently, to reflect the Australian community's variety. I do not envisage exact proportionality of minority groups. But I do look for an end to the judicial stereotype and more balance and variety in the selection of Australia's Judges.[32]

However, these observations have not passed unchallenged, Sir Harry Gibbs in particular condemning them as 'heresy'.[33] Alluding specifically to Justice Kirby's remarks, Sir Harry warned that

> It is not the function of a judge to represent any section of society, or to advance or defend any particular set of values. Indeed a judge who acted in that way would be acting in violation of the judicial oath. The essential qualities required of a judge are integrity and independence . . . . The integrity and independence of the judiciary would be likely to be compromised if it became respectable to regard such matters as political or social values, or ideological commitment as the criteria of judicial appointments. And if judges were to be chosen for their racial origin, their sex or their social background, rather than for their learning, experience and moral character, a decline would almost certainly occur in the efficiency of the Bench.[34]

With respect, Sir Harry's criticism of Justice Kirby's comments amounts, to some extent, to an attack on a straw man because Justice Kirby did not advocate the appointment of women and non-Britons as 'representatives' of those community groups. He appears merely to have expressed the hope that in time the judiciary would more accurately 'reflect the Australian community's variety'.[35]

It is, moreover, important to distinguish between the appointment, on the one hand, of distinguished solicitors and academic lawyers as such and, on the other, the appointment of women and members of minority racial, ethnic and religious groups as such. The former can clearly be justified on the ground that they are legal experts whose appointment would bring to the bench valuable legal skills different from those possessed by most barristers. (It is interesting to note, in this regard, that the late Justice Mahon of the New Zealand Supreme Court argued that judges should *not* be consulted in relation to judicial appointments because they would be familiar mainly with the forensic skills of potential appointees, whereas the principal attribute required by judges is *judgment*, and 'Forensic skills may not always predicate the existence of that quality.'[36]) Accordingly, a strong case can be made for the appointment of academic lawyers[37] and solicitors, especially to appellate courts. Indeed, during his term as Attorney-General (1977-1983), Senator Durack appointed an academic lawyer, a government lawyer, and several solicitors to the Family Court,[38] and early in his term Senator Evans appointed a government lawyer to the Federal Court.

On the other hand, the quality of being a woman or member of a particular racial or ethnic group has no bearing on the qualities of temperament and personal character, and the intelligence and professional skill required to perform the judicial function well. Experience of human nature suggests, of course, that a

32 Justice Michael Kirby, *The Judges* (1983) 17-8.

33 *Supra* n. 5, 9.

34 Sir Harry Gibbs, Address to the Victorian Young Lawyers (December 1983), (1984) 2 *Lawyer* No. 1, 14, 15-6.

35 See *supra*, text accompanying n. 32.

36 'Judicial Appointment and Promotion' [1974] *New Zealand Law Journal* 257, 257-8.

37 See, *e.g.*, Current Topics, 'The System of Selecting Judges' (1976) 50 *Australian Law Journal* 107; Justice Sub-committee, *op. cit.* n. 15, paras 21-8.

38 Sexton, M. and Maher, L. W., *The Legal Mystique* (1982) 17-8; Basten, *op. cit.* n. 31, 475.

judge's personal characteristics, such as sex, age, and social and educational background are likely to have some effect upon his or her opinions and performance of the judicial function.[39] Hence, in theory, those factors ought, perhaps, not to be completely irrelevant in making judicial appointments. But it is impossible to determine what rôle (if indeed any) such factors do play, and variations among individuals are so great as to belie any reliable causal link between particular character traits and such personal characteristics as sex, race, class, *etc*.

Moreover, the judiciary's level of professional competence would be imperilled were such personal characteristics, rather than individual merit, to play a significant rôle in the appointment process. Hence, they should largely be ignored in the judicial selection process. Murray Gleeson was essentially correct in arguing that

> The sex, religion or social background of a person are irrelevant to that person's qualifications for judicial office. It would be quite wrong if those responsible for judicial appointments were to set about appointing 'token' judges of particular social, religious or biological characteristics simply in order to make the judiciary appear more 'representative' of the community.[40]

In sum, informed commentary on the Australian federal judiciary suggests that it enjoys a well-deserved reputation for professional competence — in many cases, excellence. But the appointment process has not been immune from criticism, relating both to its procedure and its results. As to the latter, political appointments do occur occasionally, and governments should more readily appoint solicitors and academic lawyers to the federal courts, including the High Court. More controversially, some commentators argue that the bench should more accurately reflect the sexual and ethnic composition of the Australian community and that governments should, accordingly, appoint more women and members of ethnic minorities who have attained the appropriate high level of competence for judicial appointment.

The present judicial appointment process is also procedurally flawed by being too secret, and by not ensuring that the Attorney-General will consult the appropriate persons and groups before recommending appointments to Cabinet.

3. *ALTERNATIVE METHODS OF APPOINTMENT*

Like other common law countries, Australia does not have a 'career judiciary', so the appropriate models for its judicial selection process are those of other common law countries, such as the United Kingdom, the United States, Canada and New Zealand. The experience of these countries, including various proposals for reform of their methods of judicial appointment, suggests that only four possible methods of judicial appointment need be considered and that, of these, the first is not really worthy of serious consideration. The four methods are

[39] *Cf.* Lord Justice Scrutton, 'The Work of the Commercial Courts' (1921) 1 *Cambridge Law Journal* 6, 8: 'It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.' One should not underestimate the education people (including judges) derive from working with colleagues whose interests and backgrounds differ from their own.

[40] *Supra* n. 26, 340-1.

- Popular election of judges
- Legislative ratification of judicial appointments
- Retaining the present method of appointment but requiring the Attorney-General to consult various persons or bodies
- Establishing a commission to recommend suitable appointees to the Attorney-General.

A. *Popular election*

Popular election of judges occurs in about thirty-five States of the United States,[41] but not at the federal level in that country, and in no other common law jurisdiction. Such a selection method might alleviate some of the defects of the present system, but would be likely to exacerbate others. Depending upon the details of the nomination process, it might lift the veil of secrecy currently surrounding judicial selection, and could result in a judiciary more closely reflecting the sexual and ethnic composition of the community. But political considerations would probably play an even larger rôle than at present and, above all, the general public is unlikely to be an able judge of intellect, professional competence, or even integrity and judicial temperament.

Hence, this method of selection (even if combined with executive appointment pursuant to the recommendation of a judicial commission along the lines of the Missouri Court Plan in the United States) has little support in Australia.[42] Moreover, apart from its questionable merit, it can confidently be predicted that the prospects of successfully amending the Constitution to take the appointment of federal judges out of the hands of the executive, where it presently lies, are minimal indeed.

B. *Legislative ratification*

United States federal (including Supreme Court) judges are appointed by the President 'by and with the advice and consent of the Senate.'[43] The President's nomination is considered by the Senate Judiciary Committee (before which nominees nowadays usually appear) whose recommendation the full Senate almost invariably accepts. The process appears to many observers to have some distinct advantages over the secret, largely non-accountable nature of the current Australian method of executive appointment: the Judiciary Committee hearings and Senate debates are conducted in public, the nominee's professional and

[41] For a brief recent comment on a system, the details of which seem to be ever-changing, see the report of the Canadian Bar Association Special Committee on the Method of Appointment of Judges, *op. cit.* n. 7, 22-3. A useful tabular summary of the current American State judicial appointment procedures can be found in *The Book of the States, 1986-87 Edition* (1986) vol. xxvi, 161-3 (Table 4.4).

[42] See, *e.g.*, Basten, *op. cit.* n. 31, 476-7 (although election of judges was proposed by the New South Wales branch of the Australian Legal Workers Group, John Basten did not favour it); Chappell, *op. cit.* n. 8, 14: 'The support for an elective process for judges in Australia would appear to be minimal. Not one of the Attorneys General interviewed favoured such a process . . .'. The New Zealand Royal Commission on the Courts also rejected an elective judiciary: *Report* (1978) para. 656, as did Vice-Chancellor Sir Robert Megarry: 'The Anatomy of Judicial Appointment: Change But Not Decay' (1985) 19 *University of British Columbia Law Review* 113, 115-6. For a contrary view, see Pannick, D., 'Election of the Judiciary' (1979) 129 *New Law Journal* 1064 (arguing for popular election of the Law Lords and, perhaps, the Lord Chief Justice and Master of the Rolls).

[43] United States Constitution art. II § 2(2).

personal record are examined closely, and the President is effectively made publicly accountable for his choice, which is by no means automatically accepted. Of the 142 Supreme Court nominations since 1789, the Senate has rejected 28, almost 20%, although only five since 1894.[44] Even George Washington was not immune; his nominee for Chief Justice (John Rutledge) was rejected by the Senate in 1795.

Hence, it is hardly surprising that legislative ratification has always attracted some would-be reformers of the judicial appointment process. Since, under our system of responsible government, the government effectively controls the House of Representatives, were such an innovation to be adopted here, the appropriate legislative forum would clearly be the Senate, as the American model itself suggests. The Senate's Standing Committee on Constitutional and Legal Affairs would be the obvious candidate to fulfil the rôle performed by the Senate Judiciary Committee in the United States.

Legislative ratification of judicial appointments is unique to the United States (at least among the principal common law jurisdictions), but the idea did enjoy a temporary efflorescence in Canada in the late 1970s. Although ultimately not included in the constitutional amendments adopted as part of its 'patriation package' in 1982,[45] earlier reform proposals provided for ratification of Supreme Court appointments by a reformed Upper House of the Canadian Parliament. The proposal had two main objectives: to open the appointment procedure to public scrutiny, thereby hopefully reducing the likelihood of political appointments and, more important (since, after all, Senate ratification was not to apply to all federal judicial appointees, but only to judges of the Supreme Court of Canada), to ensure provincial influence in the process whereby judges were appointed to the tribunal ultimately responsible for determining the balance of power between the central and provincial authorities, and for authoritatively interpreting the new constitutional Charter of Rights and Freedoms.

The proposal was embodied in the Trudeau Government's Constitutional Amendment Bill 1978 (Bill C-60), introduced into the Canadian House of Commons in June 1978. That Bill included a complicated provision designed to ensure that a nomination for appointment to the Supreme Court of Canada was endorsed by both the Attorney-General of Canada and the Attorney-General of the nominee's Province (or, in the event of a failure to agree, by a nominating council)[46] and, additionally, required the appointment to be approved by the House of the Federation[47] (the reformed Upper House of the Canadian Parliament, comprising a specific number of members from each Province, half to be

[44] See Abraham, H. J., *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2nd ed. 1985) 39. The figures in the text take into account the two successful and one unsuccessful nominations since Abraham wrote: Chief Justice Rehnquist and Justice Scalia, both appointed in 1986, and Judge Robert Bork, rejected in October 1987. For a table of Supreme Court nominations, 1789-1984, see Tribe, L.W., *God Save this Honorable Court* (1985) 142-51.

[45] See the Canada Act 1982 (U.K.).

[46] Clause 106, summarized in Australian Constitutional Convention, Judicature Sub-committee, *op. cit.* n. 11, App. D, pp. 39-40.

[47] Clause 107. But clauses 106 and 107 did not apply to the appointment of the Chief Justice if he was already on the Court: clause 108.

chosen by the Canadian House of Commons, and half by the relevant provincial legislative assembly).[48]

A detailed examination of the Canadian proposal for Senate ratification of Supreme Court appointments would be inappropriate here, but it is noteworthy that it had quite wide support in Canada at the time. It was, for example, adopted by two prestigious committees of inquiry, the Canadian Bar Association's Committee on the Constitution and the Task Force on Canadian Unity (the 'Pepin-Robarts Commission'), both of which reported within a year of the Bill's introduction into Parliament. Both bodies proposed that the federal government retain its exclusive power to nominate Canadian Supreme Court judges,[49] and both suggested that their appointment require ratification by a committee of the reformed Upper House (to comprise members appointed by the provincial governments).[50] The Canadian Bar Association Committee suggested that the committee sit *in camera*.

Academic reaction to these proposals was mixed. Some commentators endorsed the concept of Upper House ratification of Supreme Court appointments[51] — indeed some still do[52] — but others appreciated its dangers, which had not really been addressed adequately by its proponents. One obvious risk, judging from American experience, is that politics would intrude into the judicial appointment process to an even greater extent than at present because 'there would doubtless be a greater disposition to enquire into the "philosophies" of aspirants to the Bench'.[53] Another telling criticism was made by a commentator who compared Upper House ratification adversely with one of its chief alternatives (although the two methods could be combined), an official nominating commission.

> Everyone agrees that . . . 'We should seek for the court . . . the best and most sensitive judicial minds the nation has to offer'. But, by the time you reach the point of ratifying or rejecting a single nomination, the 'seeking' . . . is over, and the single nominee will be confirmed unless something really bad can be marked up against him. *As a system, such ratification provides only for the avoidance of downright poor nominations; it does not provide for positively seeking out the best available nominees in the first place.*[54]

Indeed the history of the legislative ratification proposal provides a dramatic illustration of how rapidly ideas, even constitutional ideas, come into, and go out of, fashion. Within a year of its proposal by the Canadian government, it had

[48] Clauses 62 and 63. Two territorial representatives were also to be appointed by the Governor General in Council.

[49] But the Task Force suggested that the federal Attorney-General consult his provincial counterparts: The Task Force on Canadian Unity, *A Future Together, Observations and Recommendations* (1979) 101, 130 (para. 59 (iii)).

[50] *Ibid.*; Canadian Bar Association, Committee on the Constitution, *Towards a new Canada* (1978) 55, 60.

[51] See, *e.g.*, Weiler, P. C., 'Confederation Discontents and Constitutional Reform: The Case of the Second Chamber' (1979) 29 *University of Toronto Law Journal* 253, 268 n. 30; MacPherson, J. C., 'The Potential Implications of Constitutional Reform for the Supreme Court of Canada'; Beck, S. M. and Bernier, I. (eds), *Canada and the New Constitution. The Unfinished Agenda* (1983) vol. I, 161, 184, 209.

[52] See, *e.g.*, Hogg, P. W., *Constitutional Law of Canada* (2nd ed. 1985) 186 n. 128.

[53] McConnell, W. H., 'The House of the Federation: A Critical Evaluation' (1979) 57 *Canadian Bar Review* 513, 526.

[54] Lederman, W. R., 'Current Proposals for Reform of the Supreme Court of Canada' (1979) 57 *Canadian Bar Review* 687, 698. Emphasis added.

been adopted by two distinguished independent committees of inquiry. Yet, when the government decided not to implement it, its decline in popularity seems to have been precipitous, largely due, no doubt, to the government's failure to reform the Senate, a *sine qua non* in all the proposals for Upper House ratification of Supreme Court appointments. Thus, when another Canadian Bar Association committee studied the judicial appointment process just seven years after the government's original proposal, it reported minimal support for the idea.

> [T]here was overwhelming criticism of the proposal that Parliament review candidates' qualifications, on the grounds that the process might become too politicized and deter good prospects from allowing their names to be put forward for consideration. Very few of those interviewed supported the idea.[55]

Is Senate ratification of judicial appointments worthy of serious consideration in Australia? Previous opinion (what little there is) has generally been unfavourable, largely because the Australian Senate does not act as a 'States' House', but divides along party lines, with the result that it would act neither as a protector of State interests in judicial (especially High Court) appointments, nor as an independent reviewer of a potential appointee's merits.[56] However, one commentator, now a Family Court judge, saw merit in the idea, although he was concerned as to the practicalities of its implementation.

> Whilst I see great merit in allowing nominations for judicial appointments to be 'tabled' as it were, and publicly debated . . . I doubt whether the Australian Senate is a proper body for that purpose. Unlike the United States Senate it is primarily a party political body and the merits and demerits of an appointee would quickly be lost in the political debate. There are no conservative Democrats to side with the Republicans, or liberal Republicans to side with the Democrats. There would indeed be the danger that judicial appointments would come to lie in the hands of independent Senators or minority parties. This problem could, of course, be overcome by requiring confirmation of two-thirds of the Senators present and voting, which would ensure that any successful candidate should have bi-partisan support.[57]

It is submitted that there is, in fact, something to be said on either side of this question. On the positive side, if primary (or even sole) responsibility for vetting judicial appointments fell upon the Senate Standing Committee on Constitutional and Legal Affairs, as it probably would, that committee might behave responsibly and with relative freedom from partisanship, as it often has in the past. These tendencies might be encouraged, and potential appointees protected, if it met *in camera*, as was proposed by the Canadian Bar Association Committee on the Constitution.[58] (This would apply especially to unsuccessful candidates, and thus might encourage the committee to apply rigorous standards, relatively unconcerned by the injury rejection would inflict upon a nominee's reputation.) Moreover, the committee could ensure that the views of State Attorneys-General, communicated to the Commonwealth Attorney-General pursuant to s. 6 of the High Court of Australia Act, were really taken into account. This was, indeed, the justification the Task Force on Canadian Unity gave for advocating

[55] Canadian Bar Association Special Committee on the Method of Appointment of Judges, *op. cit.* n. 7, 49.

[56] See Cowen and Ryan, *op. cit.* n. 18, pp. 31-2 (para. 4). The Constitutional Commission's Advisory Committee on the Australian Judicial System favoured neither legislative appointment nor ratification of the appointment of federal judges: *Report* (22 May 1987), para. 5.11.

[57] Nygh, P. E., 'Submission to the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia', *Report*, *op. cit.* n. 18, 55.

[58] *Supra* n. 50 at 55, 60.

ratification of Canadian Supreme Court appointments by a committee of the Upper House.[59]

On the other hand, as with any proposal to introduce foreign constitutional notions or institutions, it is very difficult to predict how Senate ratification of judicial appointments would operate in an alien environment. We can be certain that migration would affect it, so that, to a greater or lesser extent, its operation would change in the different constitutional, political and cultural environment of Australia.[60]

Australia's constitutional tradition perceives the judiciary in less politicized terms than America's, partly due, no doubt, to the absence of a constitutional Bill of Rights. (The absence of an elective judiciary at the State level must also be a significant factor.) The United States Senate Judiciary Committee rigorously examines the constitutional and political 'philosophy' of judicial (especially Supreme Court) nominees (unless they are Senators, or former Senators), although opinion, even among Senators, is divided as to whether or not this is appropriate.[61] Judging from the Senate's behaviour, it seems quite widely accepted that it is, despite the fact that a leading constitutional scholar recently thought it necessary to remind the Senate to that effect.[62] The factors which caused the Senate to reject almost 20% of Supreme Court nominations demonstrate the degree to which political considerations have motivated the Senate. (While it is, of course, important to remember that only five Supreme Court nominations have been rejected this century, rejection statistics alone do not reveal the full picture. Although ultimately confirmed, for example, the recent nomination of William Rehnquist to be Chief Justice (1986) demonstrated the extent to which a nominee's constitutional and political views can become a matter of partisan political debate in the Senate — and the nation. This occurred to an even greater extent, of course, in the case of the unsuccessful nomination of Judge Robert Bork in 1987.)

[59] See *supra* n. 49 at 101.

[60] *Cf.* Winterton, G., *Monarchy to Republic: Australian Republican Government* (1986) 101-2.

[61] Although there is a wide spectrum of opinion on this question, it falls, generally, into two categories: those who would confine the Senate to examination of the nominee's intellectual capacity, temperament, character, and commitment to the Constitution (admittedly, a somewhat open-ended criterion), and those who, in effect, believe that Senators can properly vote to reject a nominee whose constitutional views differ substantially from their own (although it is rarely expressed quite so bluntly). For views in the first category, see, *e.g.*, Senator Joseph Biden, quoted in Tribe, *op. cit.* n. 44, 93, and in Robinson, J. H., 'Envisioning the New Court' (Book Review) (1986) 48 *Review of Politics* 463, 465 (but Senator Biden appears to have adopted a different approach to the nomination of Judge Bork to the Supreme Court in July 1987); Senator Orrin Hatch, 'Save the Court from What?' (Book Review) (1986) 99 *Harvard Law Review* 1347, 1355-6; Friedman, R. D., 'Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations' (Book Review) (1986) 95 *Yale Law Journal* 1283, 1318-20 (Senators should reject nominees only if their views are 'repugnant', 'abhorrent', 'beyond the realm of rational political discourse'). For views in the second category, see, *e.g.*, Tribe, *op. cit.* esp. at 86 ff.; Rees, G., 'Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution' (1983) 17 *Georgia Law Review* 913; Editorial, 'Judge Bork, the Senate and Politics', *New York Times*, 2 July 1987; Wicker, T., 'Judging Robert Bork', *New York Times*, 2 July 1987; Schwartz, H., 'The Senate's Right to Reject Nominees', *New York Times*, 3 July 1987. For an intermediate view, see Black, C. L., Jnr, 'A Note on Senatorial Consideration of Supreme Court Nominees' (1970) 79 *Yale Law Journal* 657 (Senators should reject a nominee whose 'views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court'). See generally Senator Paul Simon, 'The Senate's role in judicial appointments' (1986) 70 *Judicature* 55.

[62] See Tribe, *op. cit.* n. 44, *passim*.

> Just why were the twenty-seven rejected either outright or simply were not acted on by the Senate? Among the more prominent reasons have been: (1) opposition to the nominating President, not necessarily the nominee; (2) the nominee's involvement with a visible or contentious issue of public policy or, simply, opposition to the nominee's perceived political or sociopolitical philosophy (i.e., 'politics'); (3) opposition to the record of the incumbent Court which, rightly or wrongly, the nominee had presumably supported; (4) Senatorial courtesy (closely linked to the consultative nominating process); (5) a nominee's perceived 'political unreliability' on the part of the party in power; (6) the evident lack of qualification or limited ability of the nominee; and (7) concerted, sustained opposition by interest or pressure groups. Usually several of these reasons — not one alone — figure in the rejection of a nominee.[63]

Whether or not factors such as these are considered relevant to judicial selection in the United States, it is submitted that most of them would not be considered relevant here, and ought not to be. Yet it is possible that Senate review of judicial appointments could operate similarly were it to be introduced here. Politicization of the review process might be less were a Senate committee to be given the final word, so that its report did not require consideration by the full Senate, as was, indeed, proposed by both the Canadian Bar Association Committee on the Constitution and the Task Force on Canadian Unity.[64] But, once again, the record of the United States committee does not augur particularly well.

In sum, Senate review of federal judicial appointments, at least at the High Court level, would be worthy of consideration only if the present appointment process were not to be reformed in any other way. A constitutional amendment would be desirable to implement it, although a requirement that the Senate approve proposed appointees could probably be imposed by federal legislation enacted under s. 51(xxxix). However, Senate review of federal judicial appointments may well be the sort of constitutional amendment which would pass, since it would restrict the government's power of patronage, and would be seen as protecting the interests of the States because it gave power to the Senate. For these reasons, if no other, no Commonwealth government would be likely to introduce a proposed amendment to that effect.

In conclusion, it is submitted that Senate review is not the most desirable reform of the present method of judicial selection because, although it would, admittedly, open the appointment process to public scrutiny, it would not, in itself, rectify the two perceived defects of the present system: it would neither reduce the likelihood of political appointments (American experience suggests, in fact, that it might increase it), nor would it necessarily promote the appointment of more academic lawyers and solicitors, or foster a better sexual and ethnic 'balance' on the federal courts (if the latter consideration be thought appropriate). Ultimately, its greatest defect, however, is that a Senate veto is merely *negative*, a shield to keep undesirable appointees off the bench, whereas *positive* measures are required to remedy the defects of the present system.[65]

C. *Guaranteed consultation*

As noted above, in varying degrees Commonwealth Attorneys-General consult various persons and bodies before proposing a particular judicial appointment to Cabinet. The only obligatory consultation is that required by s. 6 of the High Court of Australia Act 1979 (Cth), namely that the State Attorneys-General must

63 Abraham, *op. cit.* n. 44, 39-40.
64 See *supra*, text accompanying n. 50.
65 See Lederman, quoted *supra*, text accompanying n. 54.

be consulted before a High Court appointment is made. But, of course, the Attorney-General is not bound to follow any advice received.

The principle that the Commonwealth Attorney-General ought to consult widely before recommending a judicial appointment to Cabinet would probably enjoy unanimous support, and few (there are some[66]) would deny that the judiciary, or at least the chief justice of the relevant court, and professional organizations, such as bar associations and law societies, ought to be consulted as a matter of course.[67] Although Attorney-General Peter Durack was prepared to commit himself to consult the State Attorneys-General before recommending a High Court appointment to cabinet, and entrenched this requirement in law,[68] Attorneys-General may be reluctant to commit themselves to wider consultation, even though, as already mentioned, they are free to ignore any advice proffered — although cabinet may, of course, require it to be revealed to them. The Law Council of Australia recently urged the Commonwealth Attorney-General to consult representatives of the legal profession before appointing federal judges because the appointees should enjoy the profession's confidence and respect, but the Attorney-General declined to commit himself to consult the Law Council as a matter of course.[69]

The question whether the Attorney-General should be obliged to consult specific bodies or persons prior to recommending a judicial appointment to cabinet involves two issues.

1. Whom should the Attorney-General consult? and
2. Should the Attorney be *obliged* to consult them, either by law or as a matter of 'convention'?

Logically, the first step in considering which bodies or persons the Attorney-General ought to consult before selecting a judge is to note the qualities necessary for competent performance of judicial office. The short answer usually given is 'merit', the relevant elements of which were summarized recently by the British Lord Chancellor.

> No considerations of party politics, sex, religion, or race must enter into my calculations and they do not. Personality, integrity, professional ability, experience, standing and capacity are the only criteria, coupled of course with the requirement that the candidate must be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability.[70]

A Canadian Minister of Justice has emphasized the human qualities of judicial office.

> I tend to look first at a lawyer's human qualities — things like sympathy, generosity and charity. An even temperament and an ability to listen, integrity and an impeccable personal life are important qualities for a judge to have. But of course, legal ability and experience are also very important. I rate ability above experience and try to match both to a willingness to work and a desire to do a job well.[71]

66 See *infra*, text accompanying nn. 81 and 82.

67 See, *e.g.*, Constitutional Commission, Australian Judicial System Advisory Committee, *Report*, *op. cit.* n. 56, para. 5.23; Gleeson, *op. cit.* n. 26, 341.

68 The High Court of Australia Act 1979 (Cth) s. 6.

69 See Virtue, *op. cit.* n. 4, 7.

70 Lord Hailsham, 'Appointment to Silk and the Judiciary' (1985) 82 *Law Society Gazette* 2335.

71 Lang, O., 'Judicial Appointments' (1974) 8 *Law Society of Upper Canada Gazette* 121, 125. The C.B.A. Special Committee on the Method of Appointment of Judges suggested the following as 'essential qualities' for judicial appointment: high moral character; human qualities: sympathy, generosity, charity, patience; experience in the law; intellectual and judgmental ability; and good health and good work habits: *op. cit.* n. 7, 69-70 (para. 24).

While a more humane view of judicial qualities may be more appropriate for a judge of a lower court, especially the Family Court, whose judges are by statute required 'by reason of training, experience and personality [to be] suitable person[s] to deal with matters of family law',[72] it is submitted that intellectual criteria ought to predominate in selecting judges for the High Court.[73]

The Attorney-General should, accordingly, consult those best able to assess a prospective judge's intellectual capacity, legal competence, integrity, humanity, and temperament.

1. *Judges*

Commentators, including a former Chief Justice of the High Court, have reported that the Attorney-General commonly consults the chief judge of the court to which an appointment is to be made,[74] a practice followed also in New Zealand,[75] Canada,[76] and England.[77] Indeed, in New Zealand the Chief Justice plays an exceptionally prominent role in the appointment of Supreme Court judges: after consulting his colleagues, he submits a short list of three or four names to the Attorney-General, discusses their respective merits, makes a recommendation (which the Attorney-General is free to reject), and, finally, he (or the Solicitor-General) approaches the person chosen by the Attorney-General to ascertain his willingness to serve. This last task usually falls upon the Chief Justice because he is best able to give the proposed appointee detailed information concerning his prospective office.[78]

International opinion also appears to believe that judicial influence in the appointment and promotion of judges is essential for the maintenance of judicial independence. Thus, the *International Bar Association Code of Minimum Standards of Judicial Independence* provides

> 3. (a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are *vested in a judicial body, in which members of judiciary and the legal profession form a majority.*
> (b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.[79]

[72] Family Law Act 1975 (Cth) s. 22 (2)(b).

[73] *Cf.* Angus, W. H., 'Comment, Linden, A. M. (ed.), *The Canadian Judiciary* (1976) 52, 54. Senator Gareth Evans proposed six criteria for appointment of High Court justices: 'intellectual capacity', 'intellectual creativity', 'intellectual integrity', an 'understanding of the real political world', 'personal integrity', and 'a capacity to inspire general respect and confidence': Evans, G., 'The Politics of Justice', (1981) No. 33 *Victorian Fabian Society Pamphlet* 15-6.

[74] See Gibbs, quoted *supra*, text accompanying n. 5; Samuels, quoted *supra*, text accompanying n. 6; Chappell, quoted *supra*, text accompanying n. 8 (para. 4).

[75] See Canadian Bar Association Special Committee on the Method of Appointment of Judges, *op. cit.* n. 7, 25-6; Gibbs, *op. cit.* n. 5, 8.

[76] see C.B.A. Special Committee, *op. cit.* n. 7, 11.

[77] *Ibid.* 17-8; Hailsham, *op. cit.* n. 70, 2336; Sir Robert Megarry, 'Seventy-five Years On: Is the Judiciary What It Was?', Hoath, D. C. (ed.), *75 Years of Law at Sheffield 1909-1984: The Edward Bramley and Jubilee Lectures, 1984* (1985) 1, 10-1.

[78] See Gibbs, *op. cit.* n. 5, 8.

[79] Adopted by the 19th IBA Biennial Conference, New Delhi, 22 October 1982, reprinted Shetreet, S. and Deschênes, J.(eds), *Judicial Independence: The Contemporary Debate* (1985) 388. Emphasis added.

A similar view was also proposed for adoption (ultimately without success) by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders:

> Where judges are appointed (i.e. not elected), appointments shall be made either by the judiciary or by the executive and/or the legislature, *preferably in consultation with members of the judiciary or by a body in which members of the judiciary participate.*[80]

Surprisingly, perhaps, there have been dissenting voices. Duncan Chappell reported that one State Attorney-General thought it inappropriate to consult serving judges about their potential colleagues,[81] and it will be recalled that the late Justice Mahon of the New Zealand Supreme Court held a similar view, arguing that, although judges could comment knowledgeably on an advocate's *forensic* skills, they were unable to evaluate his or her *judicial* skills.[82]

While Justice Mahon is undoubtedly correct in distinguishing between the skills required by an advocate and those needed by a judge — which suggests that access to judicial office should not be exclusively via the bar — it is respectfully submitted that he overstates his case. Judges will surely be in a good position to judge attributes besides forensic ability, such as intelligence, familiarity with legal principle, temperament, and humanity. Information on these and other qualities will be valuable to the Attorney-General and his staff, although they would do well to bear Justice Mahon's distinction in mind when evaluating it.

It is, accordingly, submitted that the Attorney-General ought to consult members of the judiciary, especially the chief judge of the court to which, and the Chief Justice of the State from which, the proposed appointment is to be made, seeking both the names of suitable appointees and comments on those the Attorney already has in mind.

2. *The Legal Profession*

Because of its knowledge of the qualities of prospective candidates for judicial office, 'the legal profession' clearly ought to be consulted before a judicial appointment is made. But this can be somewhat more complicated than consulting the judiciary through the relevant chief judge, because it is not always clear exactly whom the Attorney-General should consult. In Australia, for example, Sir Harry Gibbs has noted that 'members of the profession' are commonly consulted,[83] and others have reported that in some States the chairman of the State bar association is regularly consulted.[84] Similarly, in England the Lord Chancellor and his staff consult 'senior members of the profession',[85] while in New

[80] Draft Guidelines (Varenna, 1984) para. 19(a), reprinted (1985) 11 *Commonwealth Law Bulletin* 976, 979. Emphasis added. This provision was not, ultimately, included in the 'Basic Principles on the Independence of the Judiciary' adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 1985), and by the U.N. General Assembly. See 'The Milan Principles', (1986) No. 37 *Review of the International Commission of Jurists* 62-4.

[81] See Chappell, *op. cit.* n. 8, 10.

[82] See *supra* text accompanying n. 36.

[83] See *supra* text accompanying n. 5.

[84] See *supra* text accompanying nn. 7 and 8 (para. 4).

[85] See Hailsham, *op. cit.* n. 70, 2336.

Zealand the presidents of the national and district law societies are consulted.[86]

It is submitted that it is useful to distinguish, on functional grounds, between two types of consultation.

1. Consultation to ascertain the names of suitable appointees, and
2. Consultation to ascertain professional opinion upon specific individuals being considered for judicial office.

Although the Attorney-General may, of course, consult whom he pleases, in seeking advice of the first type he ought at least to seek the opinion of all bodies which represent substantial elements of the profession in the relevant jurisdiction, including the State and national bar associations and law societies and, possibly, also more 'marginal' groups, although not necessarily those affiliated with any political party. (On the other hand, there would certainly be no harm in hearing what such groups had to say, since the Attorney-General is under no obligation to follow any advice received and, in general, the more information he receives, the better.) Of course, if professional bodies expect to be consulted and to have their advice taken seriously, they must institute proper procedures to ensure that they are in a position to offer *informed* advice.

At least as important is informed advice as to the suitability and relative merits of prospective appointees. If the Attorney-General consulted only the leaders of the professional associations or the proposed appointee's close colleagues, there is a risk that he or she may receive unreliable advice based upon the perceptions of only one or two people regarding the candidate's reputation, or upon their prejudices. To avoid these dangers, both the American and the Canadian Bar Associations have established special committees to investigate and grade prospective judicial appointees:[87] the American Bar Association Standing Committee on Federal Judiciary and the Canadian Bar Association National Committee on the Judiciary.

This is not the place for a detailed study of the working of these committees. For present purposes, some brief comments should suffice to explain the functions of the committees and their methods of operation.[88]

Both committees merely respond to requests from the government (and, in the United States, from the Senate Judiciary Committee) to report on proposed appointees; neither committee proposes candidates. Both committees enjoy a high degree of success, in the sense that very few nominees graded 'not qualified' secure appointment in the United States, and virtually none in Canada.[89]

[86] See C.B.A. Special Committee, *op. cit.* n. 7, 25; Royal Commission, *Report*, *op. cit.* n. 42, para. 118.

[87] The A.B.A. committee grades Supreme Court nominees as 'well qualified', 'not opposed' or 'not qualified', and nominees to the lower federal courts as 'exceptionally well qualified', 'well qualified', 'qualified' or 'not qualified'. The C.B.A. committee's grades are 'highly qualified', 'qualified' or 'not qualified'.

[88] For details on these committees, see American Bar Association, *Standing Committee on Federal Judiciary: What it is and How it Works* (1983); Slotnick, E. E., 'The ABA Standing Committee on Federal Judiciary: a contemporary assessment' (Parts 1 and 2) (1983) 66 *Judicature* 349, 385; C.B.A. Special Committee, *op. cit.* n. 7, ch. 4.

[89] Professor William Angus had serious qualms regarding the C.B.A. committee's effective veto, which 'approaches a *de facto* sub-delegation of [the Minister of Justice's] authority to a non-public body': see Angus, *op. cit.* n. 73 at 53-4. But it is 'not uncommon' for the Minister of Justice to challenge a negative assessment, and 'occasionally' he secures its reversal. See Ratushny, E., 'Judicial Appointments: The Lang Legacy', Linden, A. M. (ed.), *The Canadian Judiciary* (1976) 31, 40. Since 1967 only one judge has been appointed without having been submitted for consideration

The American committee, which has operated since 1946, has 14 members, representing all federal judicial circuits. Although most members of the committee participate in investigations of proposed Supreme Court justices, only the circuit representative investigates lower court nominees. In Canada, where the committee was established in 1967 and has 23 members, most of the investigation appears to be organized by the chairman, who seeks the advice of members in the appropriate jurisdiction. (It should be noted that the Canadian federal government, unlike its Australian counterpart, appoints the judges of the higher provincial courts, as well as those of the Supreme Court of Canada, the Federal Court of Canada, the higher territorial courts, and the Tax Court.)

The Canadian committee appears to have been modelled on the American in most respects, but the American committee's investigation seems to be much more thorough than the Canadian's, especially in regard to appointments to the Supreme Court of the United States. (Indeed, the Canadian committee has not investigated recent Supreme Court appointees because they have all been appointed from lower courts and are, thus, exempt under its rules from the committee's scrutiny. The American committee has no such gap in its investigative net.) The American Bar Association committee describes its scrutiny of proposed nominees to the lower federal courts as follows:

> The circuit member examines the available legal writing of the prospective nominee and conducts a large number of confidential interviews with judges, lawyers, law professors and others who are in a position to evaluate the prospective nominee's competence, integrity and temperament. The circuit member interviews a representative sample of the profession in the community, including attorneys from different sized offices, attorneys who practice in different fields of law, law professors and deans, judges of different courts, government attorneys, legal services and public interest attorneys, women attorneys and attorneys who are members of various minority groups. Spokespersons of professional organizations including those representing women and minorities are also contacted. In addition, representatives of groups involved in the selection or evaluation of prospective nominees for the federal judiciary are interviewed.[90]

Its investigation is even more thorough in regard to Supreme Court nominees, and includes a review of the nominee's legal writings 'to weigh professional competence, not to assess . . . ideology' by a panel of academic lawyers and another panel of practitioners.[91]

Although their rôles are well accepted, and their governments (and the United States Senate Judiciary Committee) treat their reports with respect, both committees have recently been criticized. The American Bar Association committee has come under fire from both sides of the political spectrum: from conservatives for alleged prejudice against 'judicial candidates who do not subscribe to the liberal doctrines of judicial activism',[92] and from others for favouring 'traditional candidates'[93] and for alleged prejudice against blacks.[94] Its procedures have also been

by the C.B.A. committee — Justice Pinard, appointed to the Federal Court in June 1984: see McConnell, W. H., 'Recent Developments in Canadian Law: Constitutional Law' (1986) 18 *Ottawa Law Review* 721, 741-2.

[90] American Bar Association, *Standing Committee on Federal Judiciary: What it is and How it Works* (1980) 6.

[91] See *ibid.* 9. The committee reports that it 'does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity': *ibid.* 4.

[92] See Popeo, D. J. and Kamenar, P. D., 'Behind Closed Doors: How the ABA Vetoes Judicial Nominations' (1986) 2 *Benchmark* No. 1, 11.

[93] See Slotnick, *op. cit.* n. 88, 393.

[94] See *ibid.* 354, quoting 'the head of the predominantly black National Bar Association'.

attacked as a denial of due process,[95] a charge which could also be levelled, perhaps with greater justification, against the Canadian Bar Association committee, which works under excessive constraints of time, and appears to rely heavily on hearsay.[96]

It is, nevertheless, submitted that Australian professional associations should also establish specialist committees if they are to offer informed advice on the merits of prospective judges.[97] But they ought to take care to avoid some of the procedural deficiencies for which the American and Canadian committees have been justifiably criticized. The American Bar Association committee's perusal of a candidate's legal writings, including judgments where applicable, is certainly worth emulating.

Finally, it should be noted that, as with judicial consultation, international opinion believes consultation of the legal profession to be necessary to protect the independence of the judiciary. This opinion is held by the International Bar Association, whose *Code of Minimum Standards of Judicial Independence* was quoted above,[98] and by the Human Rights Standing Committee of Lawasia, which adopted the following principle at its Tokyo meeting of July 1982:

> [T]he appointment of a Judicial Services Commission, or the adoption of a procedure of consultation with the organized associations of lawyers should be adopted as a means of safeguarding the proper appointment of judges.
>
> Where a Judicial Services Commission is adopted for these purposes, it should be representative of the higher judiciary, and of all concerned in the administration of justice, to an extent that will ensure that its independence and integrity are safeguarded, and are seen to be safeguarded.[99]

3. *Others*

The Attorney-General should, of course, consult informed opinion wherever located. Apart from his departmental advisers and the Solicitor-General,[1] academic lawyers could offer useful advice, especially regarding High Court appointments, both as to the range of persons who ought to be considered for appointment and, as they do in the United States, on the merits of the writings, including judgments, of particular individuals. Duncan Chappell reported that State and territorial Attorneys-General were usually consulted over appointments to the lower federal courts, and this seems appropriate.[2]

4. *Should consultation be obligatory?*

It is submitted that the Attorney-General ought to consult at least the judiciary and the legal profession before recommending a judicial appointment to Cabinet.

95 See Popeo and Kamenar, *op. cit.* n. 92, 13.

96 See C.B.A. Special Committee, *op. cit.* n. 7, 32-4. For other criticisms, and rejection of them, see Ratushny, *op. cit.* n. 89, 39-40.

97 But see Professors Cowen and Ryan (*op. cit.* n. 18, pp. 32-3, para. 6A), who do not favour adoption of the C.B.A. National Committee on the Judiciary model for High Court appointments. They believe such a formal consultative procedure to be unnecessary and possibly 'harmful', because 'the very existence of such a body would lead to pressure by interested persons or groups to be represented on it as a means of influencing High Court appointments'. That accusation has been levelled at the A.B.A. committee.

98 *Supra* text accompanying n. 79.

99 Principle 10(d), reprinted *Judicial Independence: The Contemporary Debate*, *op. cit.* n. 79, 441, 443.

1 As also occurs in New Zealand: see *Report*, *op. cit.* n. 42, para. 118.

2 See *supra*, text accompanying n. 8 (para. 7). However, the Constitutional Commission's Advisory Committee on the Australian Judicial System '[did] not think there is a need for the Commonwealth to consult with the States in relation to the appointment of judges to federal courts other than the High Court': *Report*, *op. cit.* n. 56, para. 5.28.

But, in view of the difficulty in framing general rules suitable for all appointments, the obligation to consult should not be imposed by legislation, but should, instead, merely be a practice invariably followed, perhaps with the formal status of a 'convention'.

D. *A nominating commission*

Many common law jurisdictions either employ an independent judicial nominating commission or are considering doing so. The idea also has proponents in Australia, including Sir Garfield Barwick, former Chief Justice of the High Court. In his 1977 address on 'The State of the Australian Judicature', Sir Garfield argued that

> the time has arrived in the development of this community and of its institutions when the privilege of the Executive Government [to select the judiciary] . . . should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may inhere in the appointment of a judge. Yet I think that long term considerations in the administration of justice call for some binding restraint of the exercise of this privilege. I make bold to suggest that, in all the systems of Australia where appointments to judicial office may be made by Executive Government, there should be what is known in some systems as a judicial commission — but the nomenclature is unimportant — a body saddled with the responsibility of advising the Executive Government of the names of persons who, by reason of their training, knowledge, experience, character and disposition, are suitable for appointment to a particular office under consideration. Such a body should have amongst its personnel judges, practising lawyers, academic lawyers and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees. Such a body is more likely to have an adequate knowledge of the qualities of possible appointees than any Minister of State is likely to have.[3]

Sir Garfield declined to express a preference as to whether the proposed body should actually choose the judges, or whether it should merely submit a short list of names to the government, which would be obliged either to choose someone on that list or, if it went beyond it, explain publicly why it was necessary to do so. But he repeated, with emphasis, that

> the time is here when some restraint should be placed upon and accepted by the Executive Government in its choice of judicial appointees.[4]

Various forms of judicial nominating commission operate in the 35 or so American States which have adopted the 'Missouri plan',[5] and in six Canadian Provinces and two territories.[6] In its August 1985 report, the Canadian Bar Association Special Committee on the Method of Appointment of Judges concluded that there had been a 'marked improvement' in the quality of judicial appointees in those Canadian jurisdictions which had established judicial councils,[7] and that appointments on political grounds had thereby been eliminated.[8] The committee reported that those familiar with the workings of the councils agreed that

[3] Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 494.

[4] *Ibid.*

[5] See Baar, C., 'Judicial Appointments and the Quality of Adjudication: the American Experience in a Canadian Perspective' (1986) 20 *La Revue Juridique Thémis* 1, 3-16; C.B.A. Special Committee, *op. cit.* n. 7, 22-3.

[6] The Provinces are Alberta, British Columbia, Newfoundland, Ontario, Quebec and Saskatchewan. See *ibid.* 13-4, 68-9, Russell, P. H., *The Judiciary in Canada: The Third Branch of Government* (1987), 127-30.

[7] C.B.A. Special Committee, *op. cit.* n. 7, 48. Accord *ibid.* 58 ('improved markedly'), 66 ('improved greatly').

[8] See *ibid.* 37, 59.

> the dates of their establishment marked watersheds in the relative competence of the provincial judiciary and in the ability of provincial courts to do their work effectively.[9]

The committee, accordingly, proposed that all Canadian governments should establish such councils to recommend suitable judicial appointees to the appropriate government.[10] The C.B.A. Special Committee believed that the establishment of such advisory councils would greatly improve the quality of the judiciary because the councils' wide access to information would enable them to seek out the best candidates, rather than simply vet names submitted by the government,[11] and that appointment on the ground of political patronage would, thus, be eliminated. As had already occurred in the case of most provincial councils, governments would be obliged, at least *de facto*, to choose from among those recommended by the council, although the council could be requested to suggest further names.[12] The C.B.A. Special Committee also noted that Attorneys-General might indeed welcome the protection such advisory councils would provide them against 'the sometimes intolerable pressure from political allies of prospective judges lobbying for appointments of political favourites'.[13]

The employment of some form of judicial nominating commission has been endorsed by several Canadian commentators, including a former Chief Justice of Canada (in a speech delivered a month after Sir Garfield Barwick's),[14] but the proposal reportedly lacks political support.[15]

The idea has also received support in New Zealand and the United Kingdom. The 1978 New Zealand Royal Commission on the Courts recommended the introduction of such a commission to ensure that the present tradition of non-political judicial appointments continues,[16] and an Advisory Appointments Committee to advise the Lord Chancellor on judicial appointments was advocated by

9 *Ibid.* 15.

10 *Ibid.* 66-9. The committee's report was adopted by the C.B.A. Council in February 1986, and by the Canadian Association of Law Teachers in May 1986: see Canadian Association of Law Teachers (C.A.L.T.), Special Committee on Judicial Appointments, *1986 Report*, in *Judicial Selection in Canada: Discussion Papers and Reports* (Prepared for the C.A.L.T. Special Committee on the Appointment of Judges, February 1987), 240, 246, 270.

11 See *ibid.* 46, 58.

12 See *ibid.* 13-4, 67 (para. 14).

13 See *ibid.* 39.

14 See Lederman, *op. cit.* n. 54, 699-700; Chief Justice Bora Laskin, quoted in Lederman, 699; Russell, P. H., Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations' (1984) 17 *Canadian Journal of Political Science* 227, 241; Baar, *op. cit.* n. 5, 18-9; Ziegel, *op. cit.* n. 14, 14-9. Professor Lederman (whose proposal Professor Russell endorsed) envisaged a commission consisting almost entirely of federal and provincial politicians, government and opposition, including among them both lawyers and non-lawyers. A two-thirds majority vote would be needed to place a name on the short list. For a convenient tabular summary of fifteen proposals (from 1956 to 1983) to reform the Supreme Court of Canada, see MacKay, A. W. and Bauman, R. W., 'The Supreme Court of Canada: Reform Implications for an Emerging National Institution', Beckton, C. F. and MacKay, A. W. (eds), *The Courts and the Charter* (1985) 37, 97-106 (Appendix A).

15 Hogg, *op. cit.* n. 52, 186 note 127; Russell, *op. cit.* n. 14, 241; Ziegel, *op. cit.* n. 14, p. 188 at 22-4. The 'Meech Lake Accord' of June 1987 between the Canadian Prime Minister and the ten provincial premiers has largely foreclosed the employment of a nominating commission for appointments to the Supreme Court of Canada. The proposed ss 101A-101C of the Constitution Act 1867 would entrench a Supreme Court of nine judges, at least three of whom must have been admitted to the Quebec bar. Judges would continue to be appointed by the Canadian government but, except when a member of the Supreme Court is elevated to the Chief Justiceship, that government *must* select a person nominated by a provincial government 'and who is acceptable to the [Canadian government]'.

16 See *Report*, *op. cit.* n. 42, paras 657-65.

a Justice sub-committee in England in 1972.[17] Recent reports suggest that the proposal has increasing support at the English bar.[18]

Sir Garfield Barwick is not alone in advocating such a body in Australia either. The concept of a judicial nominating commission has some adherents, but apparently not many.[19] Most recently, support has come from the Law Council of Australia, whose Federal Courts Committee argued, in September 1986, that there was

> an *urgent need* for the establishment of an independent body of the sort suggested by Sir Garfield Barwick to endeavour to protect the Federal judiciary against being the target of political controversy.[20]

Moreover, various forms of joint Commonwealth-State judicial nominating commission have been recommended in Australia from time to time, as they have in Canada.[21] In the mid-1970s, for example, before the present State-consultation procedure[22] had been implemented, a committee of the New South Wales Legislative Assembly recommended that the Commonwealth government should be obliged to consider the advice of a High Court Appointments Commission (actually the Standing Committee of Attorneys-General) before filling High Court vacancies.[23]

A more ambitious scheme was envisaged by Attorney-General Robert Ellicott in his comments upon Sir Garfield Barwick's 1977 address. He advocated a unified Australian judicial system and, in that context, suggested that the judges of all Australian superior courts, including the High Court, should be *appointed* by an independent Commonwealth-State commission comprising 'judges, lawyers, nominees of government and suitable laymen'.[24]

The preponderance of Australian commentary, however, appears opposed to a judicial nominating commission.[25] In commenting upon Sir Garfield's address, the editor of the *Australian Law Journal* reported that reaction to the proposal had been 'far from enthusiastic', and predicted that it was 'hardly likely to get off the ground' because no government 'would be prepared to forgo so important a prerogative as the right to make judicial appointments in an entirely independent manner'.[26] This pessimistic assessment was corroborated four years later by Duncan Chappell's report that most Attorneys-General interviewed did not support the introduction of such a body.[27]

Opposition to a judicial nominating commission is frequently grounded on

17 See *supra* n. 15, p. 188, para. 43.

18 See Gibb, F., 'Who will judge the judges to be?' *Times* 16 April 1986; Gibb, *infra* n. 38. See also Campbell, *op. cit.* n. 31, 278-9, recommending such a committee for Scotland.

19 One proponent is John Basten, *op. cit.* n. 31, 477, 481.

20 Law Council of Australia, Courts (Federal) Committee, *Appointment of Federal Judges* (September 1986) para. 2 (unpublished). Emphasis added.

21 See *supra* n. 14, p. 206.

22 See the High Court of Australia Act 1979 (Cth) s. 6.

23 See *Report*, *op. cit.* n. 18, p. 189, paras 39-46.

24 Ellicott, R. J., 'Comment on paper by Chief Justice' (1977) 2 *Commonwealth Record* 885, 886.

25 This is reflected in the recommendation (against such a body) by the Australian Judicial System Advisory Committee of the Constitutional Commission: *Report*, *op. cit.* n. 56, para. 5.21.

26 Current Topics, 'The Nineteenth Australian Legal Convention, Sydney, 3rd to 9th July, 1977' (1977) 51 *Australian Law Journal* 501, 506.

27 Chappell, *op. cit.* n. 8, p. 187, 15. For a New Zealand opponent, see Mahon, *op. cit.* n. 36, 257-8.

apprehension that the bench and the bar would effectively control such commissions, leading to excessively 'conservative', 'orthodox', and 'unimaginative' appointments.[28] Justice Michael Kirby, for instance, took this view in his 1983 Boyer Lectures.

> The call for the establishment of . . . a Judicial Commission has been made in Britain, New Zealand and Canada. So far, nothing has come of it and I hope nothing will. It has all the hallmarks of an institutional arrangement that could deprive our judiciary of the light and shade that tend to come from the present system. In our judges we need a mixture of the traditionalist and the reformist. Institutionalising orthodoxy, or worse still Judges choosing Judges, is quite the wrong way to procure a Bench more reflective of the diversity of our country. Fortunately, I do not see politicians of any political persuasion surrendering to the temptations of a Judicial Appointments Commission.[29]

Similarly, Professor James Crawford has argued that

> The danger of an 'independent' Commission is that it would produce 'safe', uncontroversial appointments, and that it would tend to limit the range of candidates. Domination of such a commission by judges and senior professionals would tend to self-perpetuation, whereas, in courts as in government, changes of course from time to time are desirable.[30]

It has, for example, been suggested that a judicial nominating commission would rule out an 'affirmative action' policy in judicial appointments,[31] and it probably would greatly reduce the likelihood of active politicians being appointed to the bench, even if otherwise well qualified. This would be a retrogressive development in the opinion of those who argue that practical experience of government is desirable in High Court judges.[32] *A fortiori* for those, like Senator Gareth Evans, who believe that governments not only do, but *should*, appoint judges 'who are known to be in general sympathy with its own aims and perspectives'.[33]

Less significant objections have also been raised against the nominating commission proposal, including a likely decline in the confidentiality of the selection process,[34] and the argument that the commission 'would be subjected to considerable pressures from within or without to take into account factors other than fitness for office'[35] — 'behind the scenes wire-pulling and name-juggling' in the colourful language of the *Australian Law Journal*.[36] This, supposedly, would lead to 'compromises which would result in the inclusion of persons of inferior quality and the exclusion of outstanding persons.'[37] Lord Scarman expressed the same sentiment well a decade ago: 'Judicial appointments are not suitable work for a committee, where compromise is a virtue and mediocrity would be a likely consequence.'[38]

28 See *e.g.* Chappell, *op. cit.* n. 8, 15.
29 *Op. cit.* n. 32, 22-3 (references omitted). *Cf.* Gleeson, *op. cit.* n. 26, 341.
30 Crawford, J., *Australian Courts of Law* (1982) 53.
31 See Chappell, *op. cit.* n. 8, 16-7.
32 See *e.g.*, Blackshield, T., 'Political judges have a right to sit' *Age* (Melbourne), 12 August 1986; Nygh, *op. cit.* n. 57, 56; Aitkin, D., Submission on 'The Appointment of Judges to the High Court of Australia' (16 April 1975), in *Report*, *op. cit.* n. 18, 30, para. 2; Evans, *op. cit.* n. 73, 15-6.
33 *Ibid.* 13. Senator Evans makes clear that he is referring to 'general values' which 'need have nothing whatever to do with known party membership or party loyalties.': *ibid.* 14-5.
34 Current Topics, *op. cit.* n. 26, 506.
35 Cowen and Ryan, *op. cit.* n. 18, p. 33, para. 8.
36 Current Topics, *op. cit.* n. 26, 506.
37 Cowen and Ryan, *op. cit.* n. 18, p. 33, para. 8.
38 'Foreword', in Shetreet, S., *Judges on Trial. A Study of the Appointment and Accountability of the English Judiciary* (1976) xiv. But *cf.* Gibb, F., 'Scarman criticizes "old boy network" selection of judges', *Times* 8 October 1987.

However, with all respect, although these objections undoubtedly have weight, they need not be determinative because, as is argued below, they can be overcome by designing the commission's composition and functions carefully, with these concerns in mind.

In fact, the principal hurdle likely to face proponents of a judicial nominating commission is the argument that it is unnecessary because the present Australian appointment system has produced a judiciary of high standard. But this argument is not persuasive because the judicial commission proposal could only enhance the quality of the judiciary, and could not diminish it. In particular, employment of such a commission would serve to reassure the public that merit is the sole criterion for judicial selection, and should alleviate the concerns of knowledgeable observers, like Sir Harry Gibbs, who maintain that inferior appointments do occasionally occur.[39]

Accordingly, it is submitted that the Commonwealth government ought to establish a judicial nominating commission for appointments to the federal courts, including the High Court. The federal judicial appointment system ought to have the following features.

1. The power to appoint federal judges should remain in the Commonwealth government. This is not merely for the practical reason that a constitutional amendment would be necessary to vest it in someone else,[40] but on the ground of principle, namely that, because the appointment of judges is an exercise of public power, it must be performed by those accountable therefor to Parliament and the people.[41] As James Crawford has noted, 'The character and quality of the judiciary is no less a matter of public concern that the character and quality of the laws it administers.'[42]

2. Although the Commonwealth Parliament would probably have power under s. 51(xxxix) of the Constitution to confine the government's choice to someone on the commission's short list of approved candidates,[43] it is submitted that the procedures should allow governments greater flexibility. The commission's function should be to prepare a short list of suitable candidates (perhaps up to four for each position on the lower federal courts, and six to eight for each High Court vacancy) after hearing submissions and advice from a wide range of sources, including, if he wishes, the Commonwealth Attorney-General, the judiciary, the legal profession, and State Attorneys-General. The Commonwealth Attorney-General should be entitled to request the commission to present further names if he is not satisfied with those submitted, but the commission should

39 See *supra* p. 189.

40 See Zines, L., *The High Court and the Constitution* (2nd ed. 1987) 236.

41 See Chappell, *op. cit.* n. 8, p. 187, 14; Cowen and Ryan, *op. cit.* n. 18, p. 33, para. 7. See also Constitutional Commission, Australian Judicial System Advisory Committee, *Report*, *op. cit.* n. 56, paras 4.24, 5.11 and 5.32. But see *contra* MacKay and Bauman, *op. cit.* n. 14, 80, 84 (proposing that the appointment power be transferred from the Canadian government to an Appointing Council).

42 Crawford, *supra* n. 30, p. 208, 53.

43 See Winterton, G., *Parliament, the Executive and the Governor-General* (1983) 100-1; Zines, L., Opinion on Integrated Courts Scheme (23 August 1984), in Australian Constitutional Convention, Judicature Sub-committee, *Report to Standing Committee on an Integrated System of Courts* (October 1984), Appendix, 27, 33-5. (This report appears in *Proceedings of the Australian Constitutional Convention* (Brisbane, 1985) vol. II.) But see Cowen and Ryan, *op. cit.* n. 18, p. 189 at p. 31, para. 2. *Cf.* Angus, *op. cit.* n. 73, 53; C.A.L.T., Special Committee on Judicial Appointments, *Recommendations . . . 1985*, in *Judicial Selection in Canada*, *op. cit.* n. 10, 209.

probably be entitled to refuse to do so if it believes that its standards would be compromised if it complied.

The Commonwealth government should, in any event, be free ultimately to choose whomever it wishes but, if it appoints someone not recommended by the commission, it should be obliged to explain publicly why it was necessary to do so. The experience of the Canadian provincial judicial councils suggests that, in practice, Attorneys-General will choose from among those approved by the commission, even if not legally obliged to do so.[44] As one Canadian scholar has remarked, the government 'would have a lot of explaining to do if it failed to appoint one of the persons . . . recommended'.[45]

3. The constitution of the commission is critical and if great care is taken, both in determining its constitution and later in selecting its members, many of the concerns voiced by critics of the nominating commission proposal can be overcome.

It is submitted that the body should be established by legislation, enacted under s. 51(xxxix) of the Constitution, and that its members should be appointed by the Commonwealth government.[46] There is fairly wide agreement among the proponents of nominating commissions as to who should serve thereon. Thus, there is virtual unanimity in including judges, sometimes the chief judge of the relevant court, and practising lawyers, and most proponents would include some lay members.[47] It is often suggested that the lawyers should be nominees of their professional associations,[48] but it is submitted that the appointment of such nominees would be a serious mistake. It is vitally important that all members be appointed in their individual capacity, so that they represent nothing but the public interest. With all respect to Sir Zelman Cowen and Justice Ryan, who thought otherwise, it *is* possible

> to imagine a body entrusted with the task of drawing up a panel of High Court nominees which could be so constituted as to avoid suggestions that it or its members were representative of certain partisan interests.[49]

It is submitted that the commission's members should include judges, barristers, solicitors, academic lawyers, and one or two non-lawyers familiar with the work of the relevant court. The inclusion of lay members is recommended not 'to meet fashionable demand',[50] as a New Zealand Secretary for Justice suggested, but on its merits, on two grounds. First, because one does not need to be a lawyer to assess the personal qualities required by a judge — intellectual capacity, integrity, humanity, sympathy, patience, *etc.* — and these attributes may even be clearer to a non-lawyer able to assess them free from preconceptions based

44 See C.B.A. Special Committee, *op. cit.* n. 7, p. 186, 13-4.

45 Lederman, *op. cit.* n. 54, 700.

46 *Cf.* Basten, *op. cit.* n. 31, 481-2, who tends to a contrary view with which this writer, with respect, disagrees.

47 See *e.g.* C.B.A. Special Committee, *op. cit.* n. 7, p. 186, 66-7, para. 12; CALT, *Recommendations*, *op. cit.* n. 43, 206, 211-3, 216; Justice Sub-committee, *op. cit.* n. 15, p. 188, para. 43; Basten, *op. cit.* n. 31, 482. The New Zealand Royal Commission tended to the opposite view: *Report*, *op. cit.* n. 42, p. 193, para. 662.

48 See *e.g.* C.B.A. Special Committee, CALT Special Committee, Justice Sub-committee, and Basten, all cited *supra* n. 47, p. 210; New Zealand Royal Commission on the Courts, *Report*, *op. cit.* n. 42, p. 193, para. 661.

49 Cowen and Ryan, *op. cit.* n. 18, p. 33 para. 7.

50 See New Zealand Royal Commission, *Report*, *op. cit.* n. 42, para. 662.

upon professional reputation.[51] Secondly, participation of lay persons in the judicial selection process would be an important symbol of the wider public interest in the composition of the bench, which is not of concern exclusively to lawyers, but greatly affects, and therefore must concern, the general public.[52]

Because no member of the commission should be appointed in a representative or 'nominee' capacity, the State Attorneys-General should not be members of the commission but should, of course, be free to offer it advice. The legal professional associations should be in a similar position and, as the Canadian Bar Association's Special Committee recognized, the establishment of an official, but independent, judicial nominating commission would render a professional assessment committee like those of the A.B.A. and C.B.A. unnecessary.[53]

4. This is not the place for a detailed examination of the operation of the proposed commission, but certain machinery questions would, of course, need to be considered. Obvious questions of this kind include:

- Should there be a separate commission for each federal court, including the High Court? (There probably should be.)
- Should the membership of the comm ons for the two lower federal courts have a fixed core but include differe members depending upon the State from which the judge is to be chosen? (Probably not.)
- What provision should be made regarding disqualification of commission members for judicial appointment? Should they be disqualified only from the court on whose commission they sit?, and should the disqualification extend beyond their term of membership? If so, for how long?

But discussion of these, and similar, questions would be premature at this stage.

4. *CONCLUSION*

Federal judges, including justices of the High Court, ought to continue to be appointed by the Commonwealth government, but it should be required to take into account the recommendations of a judicial nominating commission appointed by it, and to state its reasons publicly if it declines to choose one of the commission's recommended candidates. The members of the commission should include highly respected judges, legal practitioners, academic lawyers, and non-lawyers familiar with the workings of the judiciary, all appointed in their individual capacity, and not as representatives or nominees of any group.

It is submitted that a commission constituted in this way need not exhibit the defects alleged by critics of the proposal. Since it would not be selecting the one appointee, but would merely produce a short list of suitable candidates, the final selection remaining in the hands of the government, apprehension that compromise among the commission's members would produce mediocre appointees appears to be unwarranted.

[51] This is especially true of the criterion for appointment specified in the Family Law Act 1975 (Cth) s. 22(2)(b), noted *supra*, text accompanying n. 2, p. 185.
[52] Accord Basten, *op. cit.* n. 31, 482.
[53] See C.B.A. Special Committee, *op. cit.* n. 7, 68 para. 20.

Moreover, far from producing 'orthodox' and 'unimaginative' appointments, it is submitted that the exact opposite is more likely to occur. The record of Australian judicial appointments, especially when compared with those in the United States and Canada, suggests that faith in the present system producing 'adventurous' appointments is misplaced. But a commission comprising well-educated members with independent views, representing nothing but their perceptions of the public interest, could well provide governments with the support they apparently need to be courageous enough to make unorthodox appointments.