

JUST JUSTICE

"Perspectives" article for Courier-Mail

Chief Justice Paul de Jersey

01/03/00

Confronting everybody who seeks justice inside the Supreme Court is "Themis": female and ethnic blindfolded and timeless, like justice. Justice, being so preciously "every day", must not become banal like any old well-worn pair of shoes pressing on no particular corns which we may discard when ready.

The Attorney-General's public affirmation that merit is the relevant criterion for judicial appointment is reassuring. But because of continuing debate, it may be helpful to explore this further. What aggregation of qualities establishes "merit"?

Before thinking about that question we should consider the significance of the judiciary. The judges comprise the courts which maintain the rule of law so fundamental to our free and democratic society. The rule of law depends on common acceptance by all of the authority of the courts. As put by Sir Gerard Brennan, former Chief Justice of the High Court: "The rule of law in a free society can be maintained only if, in the event of dispute, it is accepted that curial judgments will prescribe the norm to which all parties will conform." Public confidence in the judgments of the courts in turn depends on the existence of a competent and respected judiciary.

I consider a meritorious appointee to high judicial office in this State will exhibit these qualities: integrity, professional eminence, high intellect and legal learning, experience in and knowledge of the way litigation is conducted, capacity to analyse and articulate facts and legal propositions clearly, capacity to write clearly and concisely and to deliver reasoned judgments without delay, and ability to deal with emotional people and situations in a calm and rational way.

These necessary qualities aggregate to the highest professionalism. The extent to which one person, as against other possible candidates, demonstrates those qualities, must be the sole criterion for appointment. That is what is meant by appointment on merit.

Under the law of Queensland, to qualify for appointment as a judge, a person must be a barrister or solicitor. Judges have generally been chosen from the ranks of the Bar. The reason is that barristers are continually placed in a position where they

must prove (or sometimes disprove) the existence of each of those qualities in a public way.

Barristers are required to write documents outlining their clients' cases and their factual and legal bases; they are required to examine and cross-examine witnesses in court, demonstrating their ability (or lack of it) to present the relevant, and only the relevant, facts to the court, and their ability (or lack of it) to deal with people under stress; they are required at the end of evidence to address the court on the factual and legal findings which the court should make, sometimes entirely orally but increasingly partly in writing and partly orally; and they are required to furnish opinions and oral advices to their clients on the legal consequences of given sets of facts. In all but the last of those, their performance is a public one critically scrutinized by their peer group (other barristers and solicitors) and judges before whom they appear. It is also scrutinized by the litigants and the news media. And in the writing of opinions, their approach is critically assessed by the solicitors to whom the opinion is given, often by other barristers who may be furnished with that opinion for comment or check opinion, and sometimes by judges before whom it may be tendered.

This is not to say that solicitors or legal academics should not be appointed as judges. Some such appointments have proved very effective. It is, however, more difficult to make an accurate advance assessment of the judicial potential of a solicitor or academic lawyer.

The legal profession and the Bar in particular are tendentiously portrayed as elitist. Citizens will nevertheless understand that these are forums in which persons without financial means or establishment backgrounds may nevertheless rightly achieve highly by dint of their own industry, intellect and talent. Success at the Bar comes from hard work and ability. Similarly the solicitors' branch of the profession is merit driven.

Certainly many successful barristers develop a connection with the so-called "big end of town". But that is inevitable: competent business people need the best legal advice and representation and seek it out. This must carry an implication of suitability for judicial office, not the converse.

The sharp focus of the most recent controversy is the appointment of women judges. While securing a court more reflective of the makeup of the community is, I believe, to be encouraged, that must not be done unless those appointed exhibit the above features. The goal is equal justice for all. While at 4 women judges of 24, the Supreme Court of Queensland currently has the highest representation of women of any State Supreme Court or the Federal Court, that is still obviously regrettably low. The court remains predominantly male. The reason for that is clear. Until recent times relatively few women pursued a career at the bar. Very few women obtained the professional experience and skills necessary for judicial

appointment. That landscape will hopefully change.