DOES THE SYSTEM OF APPOINTING AUSTRALIAN HIGH COURT JUDGES NEED REFORM?

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Abstract

This paper sets out ways in which the work of the High Court is political and argues that the method by which appointments to it are made needs to be re-examined to reflect this understanding of the Court. To this end the issues of selection criteria and the process of appointment are considered, noting how each is relevant to the need for public confidence in the High Court. In Australia the question of criteria has traditionally been dealt with by assuming that merit, which has remained undefined, is the sole consideration. The paper recommends that criteria for appointment be developed to include both professional and personal skills and suggests what these should be. The paper also proposes that Australia introduce a Consultative Commission to assist the appointment process.

The need for public confidence in the work of the High Court is addressed by suggesting that appointments to it fairly represent society. These changes are the result of the modern conception of the High Court as a dynamic law-making institution.

Contents

Introduction 1

Part I - The High Court 1

Part II - Criteria and Process for Appointment 9

Australian Appointments Procedure 9

Criteria for Selection 10

The Appointment Process 18

A - Election to the High Court 19

B - Endorsement by the Legislature 20

C - Nominating Commission 21

D - Consultative Committee 23

E - Advertisement 25

F - Nomination 25

G - Convention 26

Part III - Recommendations 26

The Appendix - Comparison of systems of appointing judges to final courts of review 29

Bibliography 31
**The Introduction**

The appointment of judges to any final court of review involves two related issues. By what criteria are the judges chosen and what procedure is used to select them? The debates about these issues largely turn on the perception of the work of the court in question - in this case the Australian High Court. This paper argues that the perception of the work of the High Court has changed over time. Further, as a result of the changed nature of the High Court’s work (or as a result of the explicit statement of the High Court’s work that was previously left a mystery?), the appointments issue must be debated recognising that the Court cannot be characterised as a purely ‘legal’ rather than ‘political’ institution.¹

At the outset the paper notes the limitations of legal scholarship on the appointments issue and then briefly traces the development of the changing perception of the work of the High Court. This approach demonstrates that the High Court is not completely separate from political matters and that its decisions require judges to make value choices. As a result of understanding that the work of the High Court is at least partly political, the second part of the paper considers the issues of selection criteria and appointment process, analysing the options for each in turn and noting how each contributes to the issue of confidence in the judiciary. This is in many ways an artificial approach to the issue of appointments to the High Court as quite obviously criteria will impact on process and vice versa. However, to separate the discussion of criteria and process is attractive because it ensures that criteria for selection are debated and not merely addressed as an adjunct to the appointments process. In part three the paper concludes with recommendations for the reform of the appointment of judges to the High Court of Australia.

**Part I - The High Court**

Shielded by its cloak of legalism, the Court has been able to perform a high profile but delicate political function without being embroiled in political controversy. (Galligan 1987: 252)

¹In this paper where reference is made to the appointments issue it is a reference to both criteria for selection and process of appointment.
Legal scholarship usually addresses the issue of appointments in terms of the process outlined in the Constitution (Lumb 1986, Howard, 1985, Lane 1979, Howard & Saunders 1979, Ziness 1977). Where the literature has noted judicial appointments, it has usually characterised the debates anecdotally by linking the Government of the day to its appointments, but not through any analysis of the criteria or the appointments process (McQueen 1987, Coper 1987, McMillan et al 1983, Gardner 1980, Blackshield 1977, Sawer 1967). With the exception of Cooney's analysis of the need for more women on the Bench and Shestreet's call for a fair reflection of society, the literature deals with the 'legal' nature of the institution of the Court by positioning the work of the Court on the basis of the doctrine of the separation of powers and the independence of the High Court (Cooney 1993, Shestreet 1987).

In consequence legal academic scholarship is not concerned with characterising the judicial role beyond one of independence, except where remarks are made about particular appointments. This analysis obscures the fact that appointments have always been based on more than the sole criterion of merit (Solomon 1992, Galligan 1987, Coper 1987, McMillan et al 1983, Sawer 1963). Further, this characterisation of the appointments issue does not address the question of public confidence in the High Court and whether the Court ought somehow to reflect society. Using independence as the primary focus of scholarship produces work that does not consider other arguments about the possible role and function of judges and how these might impact on judicial selection.

The assumptions about the purely legal work of the Court, whether explicit or implicit, are also present in the papers produced by the legal profession on this issue. Both the Australian Bar Council and the Law Council of Australia maintain that the independence of the Bench is fundamental (Australian Bar Association 1993, Law Council of Australia 1993, Meagher 1993, Virtue 1986, Gleeson 1979). In consequence they argue that judicial appointments must be concerned only with the legal skills, independence and the personal qualities of the lawyer. In 1993 the Australian Bar Association mentioned a requirement that judges might need to be able to demonstrate an ability to understand community values and be prepared to apply them (Australian Bar Association 1993: 5). This suggestion will be taken up in the discussion of appropriate criteria for judicial appointments.

Similarly, two former Chief Justices of the High Court, Barwick and Gibbs, analyse the appointment of members to the Bench on this basis (Gibbs 1987, Barwick 1977). What is interesting is that, although the current Chief Justice, Mason, staunchly advocates the independence of the judiciary, his conclusions differ in some respects from those of his predecessors (Mason 1994 and 1992). He suggests that the Bench does not have to be exclusively drawn from the independent bar and that 'a more representative judiciary may assist in maintaining public confidence in the administration of justice', providing this is done 'without any diminution of the quality of judicial performance' (Mason 1994: 10). By including a reference to public confidence in the Court Chief Justice Mason is implicitly positioning the Court within a wider context than that of a merely legal institution whose work is the concern only of lawyers. This challenges the purely legal approaches to the appointment issue and suggests the need to extend them.

This is not to say that we should abandon the notion of judicial independence. It is fundamental. What needs to be challenged in the writing on the appointment issue is its preoccupation with the Court as a legal institution. If the debate is put in a more realistic legal and political light, it will illuminate where arguments are flawed in their assumptions. For example, the Attorney-General's discussion paper released in 1993, Judicial Appointments - procedure and criteria (The Attorney-General's Paper), not only deals with the issue of how to appoint the best people for the job; it considers the role of the Court. This exhorts those considering the appointment issue to ask what is the job of the High Court in Australia in the 1990s and into the future. By suggesting that the Court might need fairly to reflect society the discussion paper argues, in effect, that the Court might need to reflect the composition of society.

Before turning to the question whether the High Court is political, it is worth noting that some legal scholarship has addressed possible changes to the appointment process. In Australia George Winterton, for instance, although applying traditional formulations of the role of the Court, suggests alternative consultative structures for vetting prospective
candidates (Winterton 1987: 211). Sir Garfield Barwick, while Chief Justice of the High Court, advocated a Nominating Commission (Barwick 1977). However, neither of these suggestions addresses the notion that the perception of the High Court may be changing and that this might impact on analysis of the appointment issue.

The Court has traditionally been seen as a legal institution; one that applies the law without reference to social or community attitudes. This was partly premised on the doctrine of separation of powers and the independence of the Court this enshrined. Separating out the post-appointment significance of judicial independence from its relevance to appointments was often ignored with the result that current practice is justified on the basis that it actually fosters the independence of the judiciary (Law Council of Australia 1993). Further, the commitment to legal positivism propounded by Chief Justices Dixon, Barwick and Gibbs reinforced the characterisation of the Court as a purely legal institution removed from politics and government. Many commentators have noted that this view of the Court underestates or ignores its potential political impact.

There is no simple description of whether or to what extent the High Court is a political institution. The very idea of a 'political institution' means different things to different people. In short, political here means pertaining to the State or its affairs and involves making decisions with policy implications, perhaps of wide public interest. Coper usefully identifies four areas in which the question arises. They are: 'appointment to the court; the behaviour of the judges; the nature and impact of the court's work and the reasoning underlying and justifying the court's decisions' (Coper 1987: 154). Focusing as it does on the criteria and selection process of appointments to the High Court, this paper will not enter the debate about whether previous appointments have been 'political', except to the extent that it raises a relevant issue about criteria for selection. However, it is necessary to consider briefly the nature and impact of the Court's work and its reasons for decisions to understand fully that the High Court is perceived today as more than a purely legal institution.

In Australian Federalism in The Courts, Geoffrey Sawer outlined the impact of the decisions of the Court within a political context (Sawer 1967). In his previous work, Australian Federal Politics and Law, he noted the appointments to the High Court and incisively chronicled their stamp on judgments (Sawer 1963). However, these issues were not taken up seriously until recently.

Brian Galligan's Politics of the High Court published in 1987 altered the traditional conception of the High Court. Galligan argues that the High Court was in 1903 and remains an institution that benefits from political analysis. He argues persuasively that, as the third arm of government -

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2 Former Chief Justice Dixon delivered a speech, 'Concerning Judicial Method', at Yale on 19 September 1955 in which he outlined the necessity for judges to be committed to strict and complete legalism (Dixon 1965). Dixon noted the risks of abandoning positivism in these terms - 'For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk.' (Dixon 1965: 165).

3 Judicial independence is clearly protected by instituting tenure for appointees, guaranteed salaries and autonomous administration of the Court. Arguably it is less of an issue for High Court judges who can only be removed from office by a request to the Governor-General from both Houses of Parliament on the grounds of 'proved misbehaviour or incapacity' (Constitution s. 72 (ii)). Further, the High Court is responsible for its own budget and administrative arrangements since the introduction of the High Court of Australia Act 1979 (Cth.) s. 17.

4 Former Chief Justice Dixon provides a helpful explanation of positivism - 'But it is a safe generalisation that courts proceed upon the basis that the conclusion of a judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired [...].' (Dixon 1965: 158).

5 It is crucial to bear in mind the distinction between politicisation of the Bench and political implications of the work of the High Court. They are often confused. The former refers to appointments made to have a partisan view on the Bench. The latter accurately notes that the Court was and will continue to have a political role in as much as its decisions directly impact on government policies and politics.

6 Jeffrey Goldsworthy takes issue with the definition of legalism adopted by Galligan. He maintains that Galligan defines legalism to include literalism (confined by the word of the text) and conceptualism (legal form rather than practical substance) and fails to include those aspects of legalism which refer to a purposive reading of any text. As a result Goldsworthy believes that Galligan has artificially constructed the debate between legalism and interpretivism. Goldsworthy suggests that there is little difference between sensible legalism and interpretivism and renews the argument that High Court judges use either literalism or conceptualism as a cloak or shield to protect their decisions from allegations of being political (Goldsworthy, 1989 and 1998a). It is beyond the scope of this paper to enter the debate on definitions of common sense legalism and interpretivism. However, there is no doubt that Galligan's work has demonstrated that judges have, on occasion, used their discretion in relation to issues of policy significance. Whether this is called common sense legalism or interpretivism is not the issue. The real significance of the book is that it publicised the nature of the High Court's work and subjected it to political
which judicially reviews decisions of the other arms of Federal Government and of all arms of state governments, and also adjudicates on disputes between governments - the Court has always had a political impact. David Solomon's *The Political Impact of the High Court*, analyses the decisions of the High Court and convincingly argues that they have political ramifications (Solomon 1992). The publication of these studies requires the appointments issue to be analysed in light of the 'political' nature of the Court that has been identified.  

More recently, the High Court has provided a further reason why it is necessary to view it as an institution of government which has political repercussions. The High Court implied a right to freedom of communication about government and political affairs in 1992 (*Australian Capital Television Pty Ltd and Others v The Commonwealth of Australia* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1). Traditionally the lack of a Bill of Rights in Australia has meant that arguments about the political nature of the High Court's work have been overshadowed by the fact that it rarely sits on cases where civil liberties are argued in terms of implied Constitutional rights. This is no longer the case. Some might point out correctly that the Court has sat, in the past, on cases where personal freedoms have been debated. For instance the Communist Party Case of 1951 is an example of a case with substantial political consequences (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1, Galligan 1988: 203). However, that case turned largely on the limits of legislative and executive power, rather than a preparedness to concede constitutional guarantees of civil rights. Arguably the political advertising decisions indicate a willingness to construct, at common law, a system of rights tantamount to those entitlements located in a Bill of Rights. This means the work of the Court has become more intrinsically political. 

Many recent decisions demonstrate the role the Court plays in making law and the relevance, to their work, of the judges' social and political perceptions. The decision of the High Court in *Mabo v The State of Queensland* [No. 2] demonstrates that it is, on occasion, a function of the High Court to make law (Kirby 1994: 19-27, Mason 1986, Sturgess and Chubb 1988, *Mabo v The State of Queensland* [No. 2] (1992) 175 CLR 1). The different approaches of the various judges demonstrates that part of the law-making process requires striking a balance between the actual text and its purpose or spirit. There is no value-free mechanical procedure for doing so.’ (Goldsworthy 1989: 28). There are numerous other judgments that illustrate the point that the Court must, as a part of its work, make value choices in areas with high public profile.

There is an increasing community awareness of the need for judges to make social and political judgments as a part of their decision-making. This flows from their preparedness to state openly that this is a part of judicial decision-making (Mason 1994a and 1986, Kirby 1983). Unfortunately this paper cannot fully explore the issue of increased public awareness of the High Court and the work it does. Nonetheless, without doubt the advent of the mass media has increased the public debate that historically existed of the High Court, its functions and appointments to it, especially when there is a perception that talking to the media assists the community to understand the work of the Court (Mason 1994a). Ten years ago no member of the High Court would be interviewed by *The Sydney Morning Herald*. When they were approached they all maintained that 'judges should be removed from personal publicity, and, generally heard only in their court work’ (Thomson, 1984). In the past two years Chief Justice Mason has been interviewed by the ABC for *The Law Report*, commented on radio about the attacks on the Court after the decision in the Mabo case and held an interview with *The Sun Herald* newspaper.

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8 For example, McKinney v The Queen (1991) 171 CLR 468 and Dietrich v The Queen (1992) 177 CLR 292. In both cases the Court, in determining the issues, had to make value choices. In McKinney the Court decided that uncorroborated signed confessions made to the police ought only be placed before a jury after warning of the dangers of convicting on that evidence alone. In the Dietrich case a majority of the Court held that where a trial cannot be fair because of the absence of representation for the accused (through no fault of their own) the trial should be adjourned, postponed or stayed until representation is available. A hearing in the absence of representation may result in any conviction obtained being quashed on appeal. 

9 The exception to this cautious approach to the press was Sir Garfield Barwick's address to the National Press Club in 1976. Other High Court judges were not impressed by this openness (Marr 1980: 284 - 288).
(Mason 1994a, McDonnell 1994). Mason has also made statements to the profession about the role of the courts, the High Court and appointments to it both at conferences and through the *Australian Lawyer*, a publication circulated widely among lawyers (Mason 1994 and 1992, Virtue 1993). In addition the comments made to the profession were picked up by the press and reported widely.\(^{10}\)

Since 1984 it has been necessary for litigants to seek special leave from the High Court before an appeal proceeds before it. This requires that a matter be of public importance before an appeal can proceed. The Federal Court now hears a lot of the original jurisdiction and appellate cases that previously occupied the High Court lists. There is an argument that as a result of this change, the Court's work has altered and it now sits only on cases concerned with particularly significant points of law. It is beyond the parameters of this paper to analyse the decisions of the Court to see if they are now more significant. But even without the benefit of such research it is reasonable to suggest that the profile of the Court has been lifted as a result of it consistently sitting on important high profile cases.

Moreover, with the total abolition of appeals to the Privy Council in 1986, the High Court, as final arbiter in all Australian cases, attracts more attention as an institution. Again the full impact of this change is beyond the scope of this paper. But the Court is now properly perceived as a true final court of appeal for Australia.

In these circumstances it is not sufficient simply to state that the current system works and does not need changing (Law Council of Australia 1993, Gibbs 1994). Retaining the status quo does not do anything to meet the increasingly articulate argument that the process is shrouded in secrecy and premised on less than perfect information. Further, issues of public confidence in the judiciary are not met by this approach. With the advent of considerable analysis of the High Court as a political institution, it is imperative to position the appointment debate more widely and analyse it from the modern conception of the Court as a dynamic law-making institution whose decisions not only have policy and political implications, but are also made by judges whose values and social perceptions form a part of the decisions the Court makes (Mason 1986). In short, this paper does not suggest that the appointments issue needs to be debated with a view to improving outcomes - quality of appointments. Many have commented on the generally high quality of Australian High Court Judges (Galligan 1988: 202). As will be seen, this paper approaches the issue in terms of a need for a more open and accountable system of appointments, both in terms of the criteria and the process.

**Part II - Criteria and Process for Appointments**

(i) **Australian Appointments Procedure**

The judicial whisper goes around and someone ends up miraculously on the bench [...] Because there is all this mystique, as if it is somehow by magic that it happens, there is a perception - that may or may not be right in some cases - that it depends on who you know; that it is not based on any objective criteria; and that we do not know what we are trying to achieve when we appoint people.

Justice Sally Brown, Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, 1994.

Section 72 (i) of the Constitution provides that the Governor-General in Council appoints Australian High Court judges. Convention requires that this appointment be made on the recommendation of the Attorney-General. Since 1979 the Attorney-General has consulted with the States prior to making any appointment (*High Court of Australia Act* 1979 (Cth), s. 6). The nominee of the Attorney-General is taken to the Cabinet for approval before the Governor-General endorses the appointment. A candidate must have at least five year's experience as a barrister and solicitor and retire at seventy years of age (*High Court of Australia Act*, s. 7 and *Commonwealth Constitution*, s. 72). In short, it is a process that takes place behind closed doors, requiring only that the States be consulted. As a matter of practice the judiciary and some members of the profession may also be consulted, but this is completely informal (Gibbs 1987).
The current system is not public and relies heavily on existing networks in the legal establishment and within the Governments of the States to bring candidates to the attention of the Attorney-General. The informality of the networks is a major cause for concern. There is a risk that networks can be conservative and closed to some members of the profession who are relative latecomers to legal circles. The relatively smaller number of women at the bar demonstrates that certain groups, simply because of their limited numbers, may not be a part of informal networks. Likewise, any groups similarly less well represented at the bar may not form part of existing networks. Continuing with the example of women, given that the prevailing networks are male, and there is always at least an element of homo-sociability in these networks, there is no way of stating that the issue of informal and perhaps exclusive networks can be ignored. There is no basis upon which the allegation and perception of closed and conservative networks can be rebutted.

Further, the current system publicly assumes merit as the sole criterion for appointment without defining what is meant by the term. Are judges only appointed to the High Court for their legal skills? Are personal qualities relevant in making appointments? Does the public have a right to know on what basis appointments are made? Until recently these valid issues have been largely ignored. For example, The Final Report of the Constitutional Commission 1988 did not consider criteria for appointment to the High Court.

(ii) Criteria for Selection

At least spare us old mates — An appointment, particularly to the High Court, is not necessarily a time for off-loading mates owed a favour or bowing to state chauvinisms.


There are several issues that arise when attempting to ascertain the appropriate criteria for selecting Australian High Court judges. At the outset there is the problem of whether the judiciary should be representative of society or fairly reflect society or be entirely independent of both these claims. After this is discussed, the definition of merit will be analysed to determine what criteria should be met by judicial appointees. Some argue barristers are the only branch of the legal profession sufficiently independent for judicial appointment and that politicians and solicitors, lacking appropriate experience of independence, ought not be considered for appointment to the High Court. These contentions will be analysed within the context of what criteria should be required for appointment of a High Court judge.

The word 'representative' means 'standing or acting for another or others', as in a representative to the parliament (*Macquarie Dictionary*). Australia's system of governance is a delicately mixed system of checks and balances, one of which is that the High Court be truly independent. The traditional understanding of the High Court's role has been that it stands at the pinnacle of an independent judicial system, free to adjudicate on cases involving the other arms of government and to apply the law as it finds it to exist. The loyalty required of the High Court is toward the rule of law, not to any person or group. Even if the work of the High Court is becoming more political, its members should not be accountable to any section of the community. This intrinsic check on the representative arm of the Government, the Parliament, would be compromised if interest groups were to have representation on the Bench. Thus, representatives of certain groups will not assist the Court to perform its function within our current system of government.

However, fair reflection of society does not mean that an appointee is the delegate of a group, but, rather, when 'an appointment is made that regard be had to the composition of the court so as to determine whether a particular appointment will enhance the breadth of experience on it' (Cooney 1993: 22).

With the recent political advertising cases and statements by members of the Court that the social and political perceptions of judges can be relevant to its decisions, whether High Court appointments ought fairly to reflect...
society is once again legitimately on the agenda. In addition, there are valid calls for increasing the public confidence in our judiciary. In 1993 there were allegations in the press about the lack of understanding by members of the judiciary, although not of the High Court in particular.\textsuperscript{12}

To meet the complaint that judges are not sufficiently informed about broad social issues, various groups have claimed the High Court would be improved by fairly reflecting women, indigenous people and persons from non-English speaking backgrounds on the Bench (Department of the Attorney-General 1993). Essentially the question is, given the Court makes value judgments as a part of its decisions, has gone so far as to imply rights in the Constitution and there is a need for public confidence, do appointments need to reflect society?

The issues of representative appointments and public confidence are often confused. This is compounded by the misconception of ‘fair reflection of society’ to be the same as a ‘representative’ requirement. Representation must be rejected for the reasons already given. However, the notion of fair reflection of society assists with issues of confidence and meeting the need to have some basis for implications about social perceptions. Such implications are increasingly demanded of the Court, as recent experience and ensuing public debate has made plain. Mason states that judges are not removed from society (Mason 1994a). This paper is not arguing that they are. It is suggesting that, where possible, the Bench should reflect society in an attempt to foster greater confidence.\textsuperscript{13} This is not to be done in any way that compromises the skills required of those appointed.

\textsuperscript{12} The Senate Standing Committee of Legal and Constitutional Affairs Report, Gender Bias and the Judiciary (The Senate Report), provides an excellent summary of the incidents that put gender and judges on the agenda.

\textsuperscript{13} Mason suggests that confidence in the judiciary may be assisted by a greater understanding of its role, particularly that of the High Court, which has never been grasped (Mason 1994a). Other responses include the issue of confidence in the legal system. It is beyond the scope of this paper to analyse the coherent and persuasive arguments that the law itself needs to evolve to meet the changed conceptions of legal justice - moving beyond the patriarchal history of the law. Excellent work revealing entrenched biases in the law has been done in Australia by Morgan and Graycar in The Hidden Gender of the Law. The Senate Report also restates the position that the present system of law holds the potential to be biased against women and, therefore, also other groups (May 1994). Finally, part of the solution to this articulated concern with the judiciary is met by appropriate education (Mason 1994a, The Senate Report 1994, Mahoney 1993, Cooney 1993, The Attorney-General's Paper 1993, Australian Bar Association 1993, Law Council of Australia 1993, Morgan and Graycar 1990). Clearly this has to be designed not to compromise judicial independence. Mahoney has done this in Canada by focusing on contextualising the experiences of women and other minorities so that the law can take this into account (Mahoney 1993, Cooney 1993).
The Law Council of Australia proposes that criteria for appointment fall into two categories - legal qualities and personal qualities (1993: 10), while the Australian Bar Association identifies the need for a sense of independence, technical strengths and personal qualities (1993: 6). Both the Law Society and the Bar Association define legal skills similarly. The Law Society definition is more succinct and entails 'knowledge of the law, knowledge of evidence and procedure (the processes) and the ability to marshal and utilise those skills in an effective manner' (1993: 11). These are clearly sensible requirements. Further, they are criteria about which there is consensus and to establish whether a potential High Court judge meets these criteria would not be too difficult.

The personal qualities required of a High Court judge clearly include integrity (Gibbs 1987 & 1994, Law Council of Australia 1993, Australian Bar Association 1993). There is no point in having an independent judiciary unless it is operating with integrity. The Law Council of Australia also suggests that impartiality, wisdom and understanding, and self-discipline are relevant criteria. The Australian Bar Association makes mention of practicality and common sense, a well-developed sense of the role of the courts and the law, and an appreciation of community standards and a preparedness to apply them (Australian Bar Association 1993: 5 - 6). This final point has also been expressed as a 'breadth of vision', which is characterised as a requirement most particularly desired in High Court judges (Submission by Cowan and Ryan to Report from the Select Committee of the NSW Legislative Assembly on the Appointment of Judges to the High Court of Australia 1975, Australian Bar Association 1993). As all its proponents identify, this criterion is not about prioritising other criteria also essential to a High Court appointment - professional and other personal characteristics - it is about considering the ability of a possible appointee to understand the community.

The requirements of a breadth of vision and a fair reflection of society will be characterised as problematic by some. The requirement to consider the constitution of the Court before making the decision who to appoint has arguably occurred in the past. Each party analyses its appointments with a view to appointing a person who has at least some sympathy for the policies of the Government of the day (Sawer 1963, McMillan et al 1983, Galligan 1987, Coper 1987). The fact that governments hold the power of selection ensures that the subjective assessment of the possible appointments is shared between the major parties (McMillan et al). All that needs to be added to this is a sensitivity to the composition of the Court and how it reflects social make-up.

How to establish whether a person meets the criterion of a breadth of vision is difficult. The criterion 'breadth of vision' is ultimately subjective. What is required is a full understanding of the social issues of the day, or an open-mindedness or preparedness to listen to those who have such an understanding. This can be adduced by systematic scrutiny of a person's curriculum vitae (rather than anecdotal evidence from peers) and possibly interview. There is a need to look for the comments a person has made about the views of others and this can be done by reading what has been written by possible appointees, talking to his/her peers (rather than receiving reports informally), or noting any particular interests. This issue arises again in relation to a Consultative Committee or Nominating Commission considered in the next part of the paper.

It is necessary to address the assumption that only barristers can be sufficiently independent for appointment as judges because it is only they who have the requisite degree of independence (for example, Editorial 1987, New South Wales Bar Association in The Times on Sunday 1987). Earlier, the paper mentioned the importance of personal independence - what use is a supine barrister? It is also central to perceptions of the Court that its members not be tainted by perceived ongoing connections with other groups. Part of the reason why independence is attributed to barristers is that in Australia the legal profession is not fused in practice, and therefore there is a popular perception that barristers are not influenced by any commitment to clients. In New South Wales and Queensland the bar is actually independent from the rest of the profession. In all other states barristers have developed independent professional associations, although lawyers are admitted to practice as barristers and solicitors. The reality is that barristers in Australia primarily act as advocates and are not located in solicitors' offices with any formal

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14 Galligan argues that the Labor Party has been in a position of relative disadvantage over the appointments of High Court judges. Labor has only appointed eight of the thirty-four judges of the High Court (Galligan 1987: 189). However, three of those appointments have been made in the last ten years.
connection with clients or other legal professionals. This is quite different from the arrangements in Canada and the United States of America where the legal profession is fused. Perhaps the more telling reason is that barristers are used to operating free from influence and therefore have developed a practice of personal and professional independence.

None of these arguments is particularly persuasive of the exclusive prerogative of barristers to claim sufficient independence. Further, because of the difficulty in attracting people to be judges generally, \(^{15}\) and since the necessity of experience as a barrister to be a good judge has been challenged by the successful appointment of non-barristers to the Bench, it seems that this debate should be laid to rest. \(^{16}\)

On the basis that independence from influence is one of the identified criteria for selection, the test ought to be what has the person done in the past that might compromise or enhance independence? Reformulating the approach in this manner does not automatically exclude non-barristers. Academics, for instance, are arguably as independent of external claims and pressures as barristers. Obviously they are even more independent in some respects because they are not a part of the legal profession’s establishment.

The case for solicitors being eligible for the Bench is more difficult. They do have extensive links with particular groups such as partners of large law firms and employers. Further, if a High Court judge is going to disqualify him/herself due to a past association, a full court cannot sit. Traditionally all members of the High Court have sat in significant constitutional matters and this appears an appropriate practice so long as court lists and costs permit. Thus, if there is any group that face a priori difficulties in the appointment to the High Court it is solicitors, and for these reasons there must be reservations about appointing such persons. But, as suggested, this problem is very much a function of the High Court

\(^{15}\) There are currently two Federal Court vacancies existing in Western Australia for which no one can be found (Evidence of Mr Fleming to The Senate Committee on Legal and Constitutional Affairs, 1994). Further, The Senate Report referred to an occasion when ten people were approved by the Federal Cabinet as acceptable judicial appointments and all those people refused the office (1994: 81).

\(^{16}\) For example, Mr Justice Tugwell was appointed to the Supreme Court of Victoria in 1987 having worked as a solicitor for the twenty-five years prior to his appointment. Although there was a furore at the time, the issue is no longer alive (Editorial 1987, Pengilley 1987).

only having seven judges and usually wishing to sit as an entire group on significant cases. It is not a problem of solicitors lacking the skills (Pengilley 1987). Further, the potential for conflicts may be overstated. Former politicians have sat on cases involving the governments of which they were part, and Solicitors-General have coped with the transition from specialist government adviser to judge.

There is also argument about whether politicians can be sufficiently free from influence to be High Court judges. The case against their appointment is based on their exposure and involvement in a partisan manner with the political process, and therefore an allegation of lack of independence which might be either real or apparent. Part of the problem with former politicians being appointed to the High Court is that the public sees this as compromising the independence of the institution. In contrast there are others who argue that Australia has a history of successfully placing appropriately qualified politicians on the High Court and that their experience of the process of government has been useful to the Court (McMillan et al 1983). In all ten lawyer politicians have been appointed to the High Court, although only two of these, Barwick and Murphy, were appointed in the last fifty years (Galligan 1987: 201). \(^{17}\) If this issue is to be resolved on a matter of principle, then any politician being considered for the High Court should be assessed on the appropriate criteria, not disqualified on the basis of past political experience.

One question remains - are there any criteria specifically required of Chief Justices that have not been addressed previously? If, as we have seen earlier, High Court judges are going to talk to the press in an effort to assist with the community’s understanding of the institution, it may be the case that appointments to the position of Chief Justice should be made with this in mind. However, this publicity role does not necessarily have to be performed by the Chief Justice. It might be timely for the Court’s Chief Registrar to fill this role or for the appointment of a community liaison officer. If it is to be filled by the Chief Justice then effective communication skills are an additional necessary criterion. There is an obvious preference

\(^{17}\) The first five judges appointed to the High Court were all previously politicians. They were Griffith, Barton and O’Connor, appointed in 1903, and Isaacs and Higgins appointed in 1905. Since then Evatt (1930), McTiernan (1930), Latham (1935), Barwick (1964) and Murphy (1975) are the only politicians who have been appointed to the Court.
for the Chief Justice to be a leader of the Court intellectually and to have strong organisational skills.\textsuperscript{18}

There is a core set of legal skills required, about which Government and the profession agrees. Generally the core personal qualities of a judge are also the subject of agreement. Further, there are persuasive reasons for two additional criteria - fair reflection of society, where that it possible, and a breadth of vision in the individual appointee - these being required due to the political nature of some of the work of the High Court.

Finally, the criteria for appointment to the High Court must be transparent. It would greatly assist the public’s confidence in the High Court to understand the basis of appointments. A practical suggestion is to see the criteria used to select High Court appointments recorded in some meaningful way - either by statute or by protocol. This consideration leads us to an examination of the process by which appointments are made.

(iii) - The Appointment Process

There is great diversity in the methods used by different countries for the appointment of judges to their final courts of review. Those of most relevance to Australia are Canada, the United States of America, India and Malaysia. This is both because each of these nations is a federation with a written constitution and one which has inherited the common law system of its British colonists. The Appendix below highlights the differences in approach to appointments from these countries and also includes Switzerland to give an insight into the range of options available. It is interesting to note that neither Malaysia, Canada nor India have abandoned Government appointment of their judges to their final courts of review.

The methods of appointment that will be considered below are:

- Election of judges to the High Court;

Ratification of Government nominees by some part of the legislature;
- Nominating Commissions; and
- Consultative Committees.

These options are chosen because together they cover the field for the major possible changes. They are also methods of appointment used by countries that, with the exception of Switzerland, arguably have some similarities to legal arrangements within Australia. In addition, the issue of advertisement and introducing an official to whom names can be suggested will be considered. Further, the practice of appointing the second most senior justice of the High Court to the position of Chief Justice, if the appointment to that position is to come from the Bench, will be addressed.

(iii) A - Election to the High Court

There are arguments that a system of public elections produces a more transparent nomination process and results in a judiciary more likely to represent components of society. However, this has to be weighed against the politicisation not only of the process but also of the criteria for selection (Winterton 1987: 193). As Winterton points out, election is hardly likely to judge the contenders on their merits, meaning the relevant criteria (ibid). This would be the case unless there were preconditions for standing; for example, if someone were to approve a list of possible judges according to the established criteria and then elections were held.

A less radical version of the election option is to have the judges elected by the peoples’ representatives - the Parliament. This is the method by which the Swiss elect their judges for their final court of review.\textsuperscript{19} This method of appointment would result in the debating of appointments in Parliament and therefore losing candidates as a result of the publicity this method would attract. It would also minimise the chance of having candidates selected on the basis of established criteria. The politicisation of

\textsuperscript{18} The High Court of Australia Act 1979 (Cth) gives the administrative decision making power of the Court to all members of the High Court, so it is not technically essential for the Chief Justice to be the most able administrator.

\textsuperscript{19} However the Swiss Federal Tribunal or final court of review does not determine the validity of federal legislation. This is left to the people to resolve by way of referendum in the event of a request to do so by more than 35,000 voters of more than eight of the fifteen cantons (Siegenthaler 1982).
the issue is as likely to occur if parliament is called to vote as it is in a
more general election, particularly in Australia where there is a strong
adversarial tradition between the political parties in Parliament. There are
arguments about the extent to which the Senate should be able to
influence the selection of High Court judges. This matter will be more
duly discussed in relation to the proposed introduction of a Consultative
Commission.

In any event election of judges is not a realistic option in Australia because
it would require constitutional amendment (Katz submission to the Select
Committee of the NSW Legislative Assembly on the Appointment of
High Court Judges, 1976). Further, no commentator has seriously
advocated the option in Australia and many have spoken out against it
(Associate-General’s Discussion Paper 1994; Australian Bar Association

(iii) B - Endorsement by the Legislature

An alternative to elections of judges is to have their appointments ratified
by either House of Parliament or a Committee of Parliament. Given the
requirement to consult with the States prior to any appointment, it seems
to duplicate this process to require consultation with the Senate. This view
is open to the rejoinder that the Senate is really the house of review, and
not representative of the States at all, and ought not to be removed from
the process. The risks of endorsement by the House of Representatives are
much the same as putting the issue before the Parliament for election. As
a result the best option within this category would be to have a bipartisan
Committee of both Houses. The issue is, does political and possibly
partisan review of the Government’s nominee qualitatively improve the
current practice?

An endorsement committee would enable the vetting of candidates by
both major (or perhaps more) parties. If they also had the power to inquire
about the nominee’s suitability for the position it would also facilitate
greater scrutiny of the candidate. However, as has been demonstrated in
America, it is very hard to contain the questions. This criticism can be

partly overcome either by establishing a protocol or describing the nature
and scope of the hearing in the constitutional amendment that would be
required to establish the procedure. Scrutiny of personal integrity is
relevant. However, it is doubtful that the Parliament is the most
appropriate forum for this type of inquiry.

Some commentators have recommended that Australia adopt the
endorsement committee option (Russell 1994). It is put on the basis that
Australia ought to recognise the increasing political role of the Court and
trust elected representatives both to publicise the appointment process and
to enable closer scrutiny. It remains a moot point whether this would
assist in providing quality scrutiny of possible High Court appointments. It
is also clear that the process could be made accountable through other
evoting procedures. As with the elections suggestion, there is the problem
that a constitutional amendment would be required unless the reviewing
committee was given no effective power.

(iii) C - Nominating Commission

Sir Garfield Barwick, while Chief Justice of the High Court, made the first
call in Australia for the introduction of a Nominating Commission
(Barwick 1977). He argued that leaving appointments completely in the
hands of the Government left open the risk of ‘political’ appointments.
The irony of this point being made by a previous Attorney-General who
was subsequently appointed to the Bench is obvious. Other benefits that
Barwick perceived were that the Commission would not need to be
comprised entirely of lawyers and would not be likely to be seen as
partisan, and that this might also result in appointments from a wider
group.

A Nominating Commission could include legal and lay members who
would propose candidates to the Attorney-General. This method of

that the Supreme Court of the United States of America is now an institution that has to
meet the ‘political correctness’ requirements of the Senate. He maintains that this
happened over time without the people of America becoming aware of the altered
direction and methodology of the Supreme Court. He alleges this has changed the Court’s
role from one of commitment to justice before the law to left-liberal notions of a particular
(and partisan?) judiciary. His analysis ignores the argument that his position is, itself, a
partisan view.

21 In an interview by the author with Peter Russell, Professor of Political Science of the
University of Toronto.

20 The appointment of Supreme Court judges in the United States of America is a part of
the political process and, in consequence, the process adopted is justifiably different,
although not without its critics. Robert Bork in his book The Tempting of America argues

appointment is alleged to depoliticise the appointment process. It was introduced in Canada for provincial High Courts and reports confirm that it has had the effect of depoliticising the process (Russell 1994). However, prior to that, the Canadian appointment process was notoriously political as a result of an historical trend that developed very early in the life of the courts (Russell 1987, Ziegler 1987, Snell and Vaughan 1985). The method of appointments to the Canadian Supreme Court has not been changed.  

The Australian Bar Association correctly notes that this arrangement would result in an abrogation of the Federal Government’s responsibility, as elected representatives, to appoint High Court judges (Australian Bar Association 1993). It does not seem appropriate for the Government to abandon the power to determine who should be appointed, even in part, to an unelected body. What if the Government’s preferred appointee, who met all the established criteria, was not included on the list from the Nominating Commission? If the answer is that the Government would be able to appoint that person anyway there seems little point in having a Nominating Commission. If the Government has abrogated the power to appoint any person not on the Nominating Commission’s list it has, in effect, lost its power to appoint. This is unnecessary given that this paper does not accept that criticisms of the current appointment process, on the ground that it is unacceptably politicised, are valid.

Further, Justice Michael Kirby has suggested that the introduction of a Nominating Commission could ‘deprive our judiciary of the light and shade that tend to come from the present system’ (Kirby 1983: 22). In short, this argument suggests that a Nominating Commission, especially one comprised exclusively of judges, might produce more institutional appointments and the creativity of Government appointments might be lost.

For these reasons a Nominating Commission does not seem to meet the identified weaknesses in the current system of High Court appointments and is not recommended.

(iii) D - Consultative Committee
Consultation by the Attorney-General prior to any appointment can take several forms. It can remain informal, as it is currently, or it can be institutionalised to include specific groups which address identified issues. A Consultative Committee, for want of a better title, could be empowered to advise on candidates selected by the Attorney-General. However, its powers could be more extensive and there could be a requirement that the Attorney-General explain to Parliament any selection made that did not coincide with the recommendations of the Committee. The discussion below assumes an advisory, but not binding, role for the Committee. If the role of the Committee were to be expanded, the question arises whether the Government would be bound by its recommendations. If the Government is bound a constitutional amendment would be required as, in effect, the Attorney-General’s selection would be confined by the Committee.

This system provides a great deal more information about prospective candidates than one can realistically expect the Office of the Attorney-General to muster under the current system. Further, contributions would ideally be received from a range of people and thus there would be much greater reason for the public to have confidence that the system of appointing High Court judges is not controlled by the informal networks mentioned earlier. This Committee would aim fairly to reflect society by including among its members women, indigenous people, non-lawyers and people from non-English speaking backgrounds. Those appointed to the Committee would not be representatives in the strict sense of the word - not elected. True representation can only really be effected by people electing a delegate and this procedure would seem to be both excessively time-consuming and expensive and largely met by the appointments currently being made by an elected representative - the Attorney-General. This suggestion ensures that there is full discussion of the relative strengths of candidates thereby increasing the information available to the Attorney-General and the public confidence in the appointments process.

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22 The Canadian Governor-General, on the advice of the Attorney-General, who usually has informal consultation with the Provinces, still appoints Supreme Court judges (Mehony 1994 in Evidence to the Senate Committee; Russell 1993, Blaustein 1992, Ziegler 1987). Both the Attorney-General’s Discussion Paper and The Senate Report have incorrectly stated that the proposed Meech Lake Amendments to the Canadian Constitution were enacted. They were not. There is a requirement that Quebec have at least three representatives on the Supreme Court, but this is located in the Supreme Court Act of Canada and not the Constitution.
Criticisms of this suggestion have usually focused on the fact that by creating a relatively powerless advisory body the system is not greatly improved. Further, the system might not remain confidential and, therefore, it will do greater harm than good. This latter reservation can perhaps be overcome by requiring the strictest confidence and making all documents subject to privacy legislation, in the same way that cabinet documents are currently protected. It is also quite practicable to keep this Committee to a small number of people - perhaps eight?

The Chief Justice, two academics (legal or not), one representative of the Australian Bar Association, one representative of the Law Council of Australia, one representative of labour and two lay people might be appointed. There must be a fair reflection of society on the Committee as a whole, including representatives of women, indigenous Australians and those from a non-English speaking background. This composition of the Committee ought to make it well-rounded.

It is necessary to consider the issue of the States having a consultative role in the selection of High Court judges. The change to include consultation with the States was introduced by section 6 of the High Court of Australia Act 1979 (Cth). There is an argument that suggests the States ought not to be any more successful in a claim to representation than other interest groups such as women or indigenous people. To date this issue has been avoided by not giving the States anything other than a consultative role. For example, calls to be allowed to take it in turns to appoint High Court judges were not implemented (N.S.W. Parliament Select Committee of the Legislative Assembly upon the Appointments of Judges to the High Court of Australia 1975). Given the absolute rejection of a representative judiciary, the introduction of a consultative role for the States in the appointment of High Court judges was appropriate. Providing other equally legitimate calls for consultation are met, it is not problematic to retain some form of state consultation. State consultation should either remain as it is now or the number of members of the Committee could be increased by one to include a State representative. The States might have to take it in turns to sit on the Committee or make a joint selection. It would not be practicable to include all State representatives on the Committee because it would then become cumbersome.

This paper recommends that the Consultative Committee be established to report on those people the Attorney-General considers for appointment and also on any name put forward (see below). It is necessary to consider how the Committee might go about its work. The Committee should not hold public hearings. In large part this is because to require it to do so replicates the parliamentary hearing scenario already rejected. In addition to private discussions, the Committee should be able to interview and seek the opinions of third parties about possible appointments, paying careful attention that privacy and rights to Natural Justice are not compromised. This Committee should report to the Attorney-General, but at this stage a report to Parliament seems to risk the scrutiny of the possible candidates to potentially unhelpful political debate.

(iii) E - Advertisement
On occasion there have been calls for the introduction of advertising judicial positions. This certainly challenges the intractability of relying on informal networks. However, the argument that it also makes it harder for the Government to approach an individual and persuade them to consider High Court appointment is very persuasive (Mason 1994). Advertisement is not recommended for positions on the High Court as a result of the advantages of informal and confidential approaches to possible appointees. However, this should not be taken as a rejection of advertising judicial positions generally.

(iii) F - Nomination
If there is an individual to whom recommendations for appointment as a High Court judge can be put forward, this would enable suggestions to be made by any person. This practice was introduced in Canada in 1974 (Ziegel 1987). It allegedly had the effect of bringing more names to the attention of the Government. However, its effectiveness over time has varied (Ziegel 1987: 11). The change, if introduced, should also require all the names suggested be referred to the Consultative Committee for consideration. This is taking the most useful part of the Nominating Commission proposal, being people brought to the Government's attention, without requiring either the formality of a Nominating...
Commission nor the debates about the power such a Commission should have.

(iii) G - Convention
Historically the second most senior judge has been appointed to the position of Chief Justice if the appointment to that position came from the Court. Chief Justices Duffy, Dixon, Gibbs and Mason were all the next most senior judge to the Chief Justice and appointed to that position on the retirement of the incumbent. Some argue that this practice is a convention. There have certainly been no exceptions to it to date. The reason advanced in favour of such a convention is that 'It prevents ill-informed and mischievous people falsely suggesting that any Justice might be tempted to accommodate the wishes of the Executive Government in the hope of achieving "a promotion"' (Morris 1994). This approach seems in the interests of the independence of the Court. The appointment of the Chief Justice should be either the next most senior judge on the Bench or should come from outside the Court.

Part III - Recommendations

At the outset, this paper identified that the role of the High Court had shifted or, at least, been articulated to include the notion that it is a powerful institution, the decisions of which reflect social and political perceptions of its members. If the High Court judges are going to imply Constitutional civil liberties and make value choices about matters of public controversy, then it seems imperative that the Australian community have confidence in the judges making these decisions. Further, the current system is a closed process based on informal networks which operate without a definition or general understanding of merit or the appropriate criteria for appointment. This state of affairs means we have a system of appointment of Australian High Court judges that is in need of reform; not radical change, but sufficient change to overcome the identified weaknesses. As mentioned previously, this is not because of a history of poor appointments to the High Court, but because of a growing need for confidence in the way in which those appointments are to be made in the future.

To this end I would make the following recommendations:-

Criteria for appointment of High Court judges:

The first criterion for the appointment of a High Court judge should be that they have the requisite legal skills. This means that any appointee must have the ability to run court proceedings, understand the rules of evidence, analyse and debate points of law of extraordinary complexity and produce written work of an exceptionally high standard. Further, the appointee must have appropriate personal skills, including: integrity, compassion, patience, and an ability to communicate very clearly. High Court appointees need specifically to understand the position of the Court within our system of government and have breadth of vision. Appointments should be made with the composition of the Court in mind and in the hope of creating a fair reflection of society.

Criteria should be recorded in a protocol and reviewed periodically, with the benefit of experience of their application.

Process for appointing High Court judges:

A Consultative Committee should be established to consider the names of those people whom the Attorney-General wishes to appoint to a position on the High Court. This Committee should comprise eight members. The members should be selected as follows:

- The Chief Justice of the High Court of Australia;
- One representative of the Australian Bar Association;
- One representative of the Law Council of Australia;
- Two academics who need not be legal academics (for instance, a political scientist or sociologist might be helpful in this context);
- One representative of labour;
- Two lay people; and, possibly,
- One representative of the states.

The Committee should include at least three women, and an indigenous Australian and a person from a non-English speaking background within the categories outlined.
The Appendix
Comparison of systems of appointing judges to final courts of review

<table>
<thead>
<tr>
<th>Country</th>
<th>Australia</th>
<th>Canada</th>
<th>India</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unitary/Federation</td>
<td>Federation</td>
<td>Federation</td>
<td>Federation</td>
</tr>
<tr>
<td>Constitution/not</td>
<td>Written - 1901</td>
<td>Written - 1867</td>
<td>Written - 1949</td>
</tr>
<tr>
<td>Bill of Rights/not</td>
<td>No</td>
<td>Yes - 1982</td>
<td>Yes</td>
</tr>
<tr>
<td>Appointment procedure</td>
<td>By the Governor-General in Council after consultation with the States.</td>
<td>By the Governor-General in Council upon receipt of the Minister of Justice’s nominee. Quebec must have at least three representatives on the Court and any representative must be drawn from a list submitted by the Quebec administration. Other provinces can submit names.</td>
<td>President appoints after consultation with such judges of the Supreme Court or High Courts as wished.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Malaysia</th>
<th>Switzerland</th>
<th>United States of America</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unitary/Federation</td>
<td>Federation</td>
<td>Federation</td>
<td>Federation</td>
</tr>
<tr>
<td>Constitution/not</td>
<td>Written - 1957</td>
<td>Written - 1874</td>
<td>Written - 1789</td>
</tr>
<tr>
<td>Bill of Rights/not</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Criteria: Aged less than 70 years and more than five years experience as a barrister and solicitor. Experience required: 5 years as a judge or 10 years as an advocate or an eminent jurist.
Bibliography


Coper, M., 1987, Encounters with the Australian Constitution, CCH Australia Ltd., North Ryde.


Department of the Attorney-General, 1993, Judicial Appointments - procedure and criteria, September.


Fricke, G., 1986, Judges of the High Court, Hutchinson, Melbourne.

Galligan, B., 1987, Politics of the High Court, University of Queensland Press, St. Lucia, Queensland.


Kirby, M., 1994, Keynote Address presented at the Mabo and Native Titles Seminar, Macquarie University, Minerals and Energy Economics Centre, Sydney.


Meadows, R., 1992, 'A Flare-up Over the High Court' *Australian Law News*, November, p. 3.


Senate Standing Committee on Legal and Constitutional Affairs, 1994, *Gender Bias and The Judiciary*, AGPS.


