

# *Judicial Appointment*\*

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I was asked to address this topic from a ‘feminist’ viewpoint, so these remarks will focus on the appointment of women to the judiciary.

As I was asked to be brief, and the idea of my contribution, I gather, is to stimulate discussion, I shall commence with the fundamental points I wish to make:

- 1 Judicial appointment should be on merit – a concept which should be defined.
- 2 Judicial appointment should be non-discriminatory.
- 3 Judicial appointment should reflect the diversity of the community in order to ensure that the diversity of the community’s values, beliefs and experience are brought to bear in the legal process.
- 4 The concept of a ‘representative’ judiciary is too easily misunderstood; judges should not represent, or be seen to represent, any sectional interest.
- 5 Neither gender, race or religion should be a criterion for judicial appointment.

Having said that,

- 6 In order for women to be appointed to the bench there needs to be a pool of meritorious candidates.
- 7 The pool of such candidates exists and is ever-increasing.
- 8 It is essential that the legal profession encourage the enlargement of that pool by adopting and implementing equal briefing practices.
- 9 There is a high percentage of women on the bench in New South Wales.
- 10 The appointment of women to the bench, of necessity, depletes the pool of candidates.
- 11 It should not be assumed that every woman who might be regarded as a suitable candidate for judicial appointment will accept that position if offered.

\* Remarks made at ‘Constitutional Fundamentals and Judicial Power’ Conference, University of Sydney Law School, 27 November 2004. They have not been revised.

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The high representation of women in the legal profession is well known. The legitimate complaint is that this has not translated into high representation at senior levels. But that cannot be said of the bench. If I take a simple statistic, in May 2002 women accounted for 20.9 per cent of the Australian judiciary.<sup>1</sup> I suspect the percentage is somewhat higher today. If you apply that statistic to New South Wales, it compares very favourably with the fact that the percentage of women at the Bar, the traditional source of candidates for judicial appointment, has long hovered around 13 per cent. And, of course, the appointment of those women has concomitantly reduced the percentage of women in the senior ranks of the legal profession. It is a vicious cycle.

That does not mean that I am complacent about the numbers of women in the senior ranks of the Bar. They are clearly inadequate and should be improved. In this respect I think I can do little better than repeat what I said at my swearing-in.

The numbers of any minority at the Bar will only increase in a climate that recognises and accepts diversity. All members of the legal community play a vital role in addressing unequal participation in the profession. It is the leaders of the profession who act as critical change agents to demonstrate their rejection of factors which limit participation, whether by women, the indigenous community or, indeed, any minority. Some factors may be relatively easily changed, for example, by the provision of adequate funding to redress economic inequality. Yet experience tells that comprehension does not speedily turn into action. Leaders of the profession must drive the process of change from the top. Equally, those who must give practical effect to the changing face of the legal profession, whether in employment or in briefing practices, also act as real forces of change. And those who are given the opportunity to participate must grasp it and make the most of it.

Let me return to my first proposition that judicial appointment should be on merit. As Professor Margaret Thornton has said, 'merit has a mystique, malleability and subjectivity that can be used to justify, criticise or constrain any policy'.<sup>2</sup> Thus she explains that concepts like 'merit' are not value-neutral, and the result has been that 'the "best person" to occupy a position of authority has tended to be unproblematically defined in masculinist terms, which reflect the values of the public sphere'.<sup>3</sup>

The recognition that merit comes differently packaged appears a relatively comprehensible concept. I suspect it is a proposition more readily comprehended by those who make the judicial appointments than by those who are responsible for the briefing of women. There are many organisations which adopted, or

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1 Rachel Davis & George Williams, 'A Century of Appointments But Only One Woman' (2003) 28 *Alternative Law Journal* 54 at 58 n 40.

2 Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law and Society* 28 at 29.

3 Margaret Thornton, 'The Fictive Feminine', in Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) at 35. See also Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1 *QUT Law & Justice Journal* 223.

professed to adopt, equitable briefing practices long ago, yet time and again they appear only to brief male barristers.

The typical bar table is all male, while the instructing solicitors sitting behind them are all women. Unless those responsible for briefing practices change their attitudes to briefing in substance, rather than as an exercise in window dressing, the pool of senior judicial candidates will continue to grow at a dismal rate.

Finally let me address my second proposition: it is undesirable to treat gender, race or religion as a criterion for judicial appointment. Treating such matters as criteria for judicial appointment reflects a naïve assumption that a judge of a particular gender, race or religion will determine controversies by reference to gender, race or religion based beliefs. This assumption is best characterised as involving 'crude stereotyping and gross caricatures'.<sup>4</sup>

As McHugh J said in his recent speech, 'Women Justices for the High Court',

Commentators often treat as axiomatic that the mere presence of a woman on the bench will somehow change the dynamic and thinking of a court. Able women judges do not accept this. Justice Claire L'Heureux-Dubé has cautioned that '[i]t is not enough to simply appoint more women and minorities to the bench. What we need', she said, 'is a change in attitudes, not simply a change in chromosomes'. The aspiration of the good judge is not merely to appreciate gender difference but, as her Honour put it, 'what we must seek is to develop an increased sensitivity on the part of all judges to the diverse human experiences which are presented to courts on a daily basis'.<sup>5</sup>

And his Honour also observed:

[S]ocial scientists and lawyers who have researched whether female judges in particular US courts have brought a different approach to their task based on their gender have failed to verify the difference hypothesis. The results of their research have been inconclusive. By and large, they have failed to discern any substantial difference in approach between male and female judges that is attributable to their different genders.

Although there was early opposition to the notion of a diverse judiciary, largely, I suspect, because of the way the concept was packaged, I believe many have now come to accept that a judiciary which does not reflect the diversity of society at large, will lose the confidence of the public upon which its authority ultimately rests.

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4 Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676 at 686.

5 Speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004: <[http://www.hcourt.gov.au/publications\\_05.html](http://www.hcourt.gov.au/publications_05.html) - MichaelMcHugh>.

