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# The Law Council Of Australia Policy 2001 On The Process Of Judicial Appointments: Any Good News For Future *Female* Judicial Appointees?

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## Introduction

The simple answer to this question is there is *some* good news for future *female* judicial appointees (or appointees of non-dominant background), but this good news comes with many caveats. The highlighting of *some* serves to indicate at the outset that the good news is limited. The emphasis on *female* is to illustrate that the argument of this article is not just about extension of the judicial franchise to more women, but also to those persons who do not fit the dominant norms for judicial office. Indeed the aim of much feminist scholarship is not just to examine issues relating to women's inequality and law, but to demonstrate the reality of unequal treatment within the legal system for many "others"<sup>1</sup> or groups who are non-dominant in the system, eg the poor, the queer, the Indigenous.

It is the purpose of this article to examine the strengths of a new Law Council of Australia (LCA) Policy<sup>2</sup> on judicial appointments as well as its flaws and shortcomings. Some recommendations will be made regarding its prospective implementation by State and federal Attorneys-General. This is likely to be on the political agenda in 2001 and

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<sup>1</sup> This term has been used by many academic writers, including Margaret Thornton, whose work is referred to extensively in this article, in particular *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press 1996.

<sup>2</sup> The Policy was released on 28 January, 2001. It is available on the LCA website at <[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)>. The LCA website indicates that at a meeting on 30 June 2001 it was decided to make certain amendments to this policy. Details of these amendments had not been released at the time this article went to publication. Valuable feedback on the new policy was obtained from participants, who included many leading feminist legal academics, at the Feminist Legal Academics Workshop 2001 (*supra* \*).

beyond as the issue of criteria for judicial office and 'merit' entered the public arena in the past few years and particularly so in 2000<sup>3</sup> after a decade of debate in academic, political and other circles.<sup>4</sup>

At face value, the LCA Policy does extend the judicial franchise well beyond those who have been 'traditionally anointed' (ie senior male commercial barristers)<sup>5</sup> in the past – but the question must be asked: does it extend it far enough? The policy demonstrates that change on judicial appointments has finally occurred within the legal profession. However, it has taken 80 years to achieve this change in the goalposts – women in most States having gained the right to practise law in the early 1920's. Questions must still be asked – will the policy lead speedily to a more representative Australian judiciary or is it going to require another 80 years of evolution before this is a reality? Are more aggressive affirmative action policies necessary? Is a principle of 'parity', which requires quotas based on eg sex, or ethnic background, needed?

The answer to all these questions will depend on how, if and when each State and federal Attorney-General implements this new Policy (or something similar emanating from other sources, eg State Law Reform Commissions). Sensitively developed and implemented, there is the prospect of a more 'inclusive' and representative judiciary with a 21<sup>st</sup> century understanding of equality before the law; conservatively implemented, there is the prospect of 'more of the same' – what some have termed a "cloned judiciary".<sup>6</sup> Thus, it is the manner of implementation that is crucial. However, it is a golden opportunity, because it is a chance to change the goal-posts with the mandate of LCA policy. It stands to reason that *change* which occurs with some degree of acceptance from 'insiders' (legal professionals) and does not involve the disruption and negative perceptions of affirmative action policies and even more so quotas, is more likely to be long-lasting and effective.<sup>7</sup>

### The LCA Policy

The LCA Policy sets out explicitly a process for developing a protocol for judicial appointments at both State and Federal level (with the exception of appointments to the High Court). The Policy provides a model for developing this protocol. There are two attachments incorporated in the Policy: attachment A listing the *attributes of candidates for judicial office*, and attachment B listing the *office holders to be consulted* prior to

<sup>3</sup> See for instance 'Forget Judge's Gender: Gibbs', *The Weekend Australian*, February 12-13 2000; J Scutt, 'No merit to endemic sexism in the legal system', *The Australian*, 19 July 2000 at 13.

<sup>4</sup> See in particular: Attorney-General Michael Lavarch, Discussion Paper: 'Judicial Appointments-Procedure and Criteria' September 1993; Justice Tasmania, Discussion Paper: 'Judicial Appointments in Tasmania' August 1999 and references to Australian academic literature discussed in this paper.

<sup>5</sup> To the best of my knowledge, research is not available that has compiled comprehensive information on background of judicial appointees (for example information including areas of practice, ethnic background or sexual orientation). However it seems well accepted in legal circles that until the last few years, many appointments to superior courts were of senior male commercial barristers.

<sup>6</sup> Baroness Helena Kennedy described the process of appointment in one's own mould as "cloning", as reported in C McGlynn, (1998) *New Law Journal* 597 at 598.

<sup>7</sup> This was the view expressed by almost all authors ('major players' of legal system reform) in H Stacy and M Lavarch, *Beyond the Adversarial System*, Federation Press 1999. It has been beyond the scope of this article to examine the substantial body of literature relating to the impact of the implementation of affirmative action policies.

actual appointment. The Policy encourages State and Federal Attorneys-General to publish their own judicial appointment protocols, drawing on (but not restricted to) the model set out in the Policy. The attributes of candidates for judicial office cover three areas – legal knowledge and experience, professional qualities, and personal qualities. In requiring qualities beyond traditional requirements of legal knowledge and experience, it is believed the pool of ‘eligible candidates’ is potentially widened. This could be good news for future possible appointees of ‘non-dominant’ background, but a careful examination of the attributes for judicial office set out in the Policy is required, as discussed below.

### Reasons for the Policy

Issues of ‘fitness’ for judicial office came to the forefront in Queensland in late 1998, when the newly elected Labor government began actively appointing women to the bench.<sup>8</sup> The merit of appointees was raised in the local press.<sup>9</sup> The Queensland Bar Association in particular criticised a very broadly well-qualified woman appointee on the basis she did not meet the traditional criteria.<sup>10</sup> The issue came to a head in February 2000, when former Chief Justice of the High Court of Australia, Sir Harry Gibbs, a Queenslander himself, said at an opening of the Queensland Supreme Court Library Rare Books Room:

A more recent heresy is that the Bench should be representative and that the sex of the aspirant or perhaps his or her ethnic origin should be a more important consideration than merit.<sup>11</sup>

This was seen to be an endorsement at the highest level of criticisms that had been circulating within the legal profession in Queensland, particularly the Bar. These criticisms were that women and other appointees of non-traditional background were only being appointed because of their sex or ethnic origin; their appointment could not have had anything to do with their capabilities. Indeed one Supreme Court judge publicly drew attention to the eminence of the source and said the remarks should be treated seriously for that reason: “When a man of Sir Harry’s stature has something to say it should not be ignored or brushed aside”.<sup>12</sup>

<sup>8</sup> In June 1998, prior to the Beattie Labor government coming to power, there was one female Supreme Court Justice out of 23 justices – in January 2001, there were 7 women out of 24 Justices, including Justice Margaret McMurdo who was appointed President of the Court of Appeal. In June 1998, there were 3 female District Court Judges out of 35 judges – in January 2001, there were 6 female District court judges out of 35, including Judge Patricia Wolfe, who was elevated to Chief Judge. In June 1998, there were 6 female magistrates out of a total of 62 – in January 2001, there were 15 out of 75 female magistrates, including Dianne Fingleton who was appointed as Chief Stipendiary Magistrate. Another female magistrate was subsequently appointed in 2001.

<sup>9</sup> See ‘Lawyers Attack Woman’s Appointment to Top Court’, *Courier Mail*, 5 September 1998; ‘Activist Judiciary Warning’, *Courier Mail*, February 12 2000.

<sup>10</sup> I have previously written about this. See B Hamilton, ‘Criteria for Judicial Appointment and “Merit”’ (1999) 15 *Queensland University of Technology Law Journal* 10.

<sup>11</sup> Oration by Sir Harry Gibbs 11 February 2000 at <http://www.courts.qld.gov.au/sc&dc/speeches/gibbs110200.htm>.

<sup>12</sup> Shepherdson J as quoted in ‘Judge backs Gibbs’ remarks, *Courier Mail*, March 11 2000.

Material from the LCA makes clear that, while the need to adopt a new, updated policy of judicial appointment was recognised in 1999, the immediate impetus for the Policy was the controversy emanating from Sir Harry Gibbs' remarks and the comments of other leading lawyers in the public arena.<sup>13</sup> Justice Mary Gaudron, the only female justice of the High Court, also focussed attention on the issue from a different perspective:

The way in which debate turns to "merit" when but only when a woman is considered for a particular position or office is not only insulting, it is clear evidence of a belief that women are inferior and ought to be treated as such.<sup>14</sup>

The previous decade had seen substantial literature and reports on the issue,<sup>15</sup> and had seen other overseas jurisdictions address and move on the same issue,<sup>16</sup> but ultimately it seems it was the stridency of remarks (offensive to the ears of the public of 2000, yet emanating from respected and influential judicial figures), that captured public's distaste in a way that forced the LCA to reevaluate its policy.

### **The Immediate Benefits**

The LCA Policy will be welcomed throughout Australia but particularly so in Queensland, where according to one female judge, appointees shudder every time a new woman appointment is made,<sup>17</sup> as they revisit the debate over their 'merit' as appointees.<sup>18</sup> The definition of 'merit' embodied in the attributes of judicial office in the Policy envisages merit in much wider terms, than has previously been the case. Thus the LCA criteria will make it easier for broadly qualified woman lawyers (and other lawyers from non-traditional backgrounds) to be appointed without the criticism that has previously dogged many such appointments.

In particular, the LCA Policy makes clear that judicial appointments can be made from a pool much wider than the traditionally favoured ie 'meritorious' (senior male commercial barristers, who have reached the status of Senior Counsel). This implicit, but unexpressed criterion, which has applied in the superior (principally Supreme) courts, has disenfranchised women as judicial appointees. This is because comparatively few women even today seek and maintain a bar practice. In 2001 in

<sup>13</sup> 'Message from the President' *Australian Lawyer* September 2000; 'Law Council Moves to Deliver More Transparency to Judicial Appointments' *Australian Lawyer* February 2001.

<sup>14</sup> Justice Mary Gaudron, High Court of Australia, Speech to launch 'Corporate Women, Children, Careers and Workplace Culture: The Integration of flexible work practices into the legal and finance professions', NSW Parliament House, Sydney, NSW 14 July 2000. This speech achieved wide coverage in the press, see for instance 'Gaudron enlivens the equality debate', *The Australian*, 17 July 2000.

<sup>15</sup> *Supra* n 4.

<sup>16</sup> Judicial appointment processes from overseas jurisdictions are comprehensively canvassed in Justice Tasmania, Discussion Paper: 'Judicial Appointments- Procedure and Criteria' August 1999 <<http://www.justice.tas.gov.au/legpol/judicial.htm>> and in Dr M White QC, 'Judicial Appointments: Including the role of the Attorney-General' (2000) 20 *Aust Bar Review* 115.

<sup>17</sup> Queensland District Court Judge Helen O'Sullivan, in her role as Chair of the session 'Judiciary, the Courts and Change' at the F-Law Workshop 2001 (*supra* \*) expressed this view to the audience.

<sup>18</sup> The issue of the 'merit' of female judicial appointees raged in the Queensland press for quite a time, see notes 9, 10, 11 and 12.

Queensland only 8% of the practising Bar are women; the figure in Victoria around 20%; other States fit somewhere between.<sup>19</sup> This is despite women having been 50% of law graduates for at least 10 years.<sup>20</sup>

The reasons for the low level of female participation at the Bar have been canvassed at length elsewhere. In particular, Hunter and McKelvie's report on Equality of Opportunity at the Victorian Bar<sup>21</sup> identified many gendered impediments to women seeking the path of the bar and remaining there, including: demanding and irregular working hours inimical to family responsibilities (apparently it is even "difficult for male barristers to find (and keep) partners prepared to be barristers'wives")<sup>22</sup>, lack of support systems on which male barristers usually relied, briefing practices controlled by senior male solicitors, lack of orientation to 'courtroom behavior' (the outward forms, as well as the subtle norms that govern), but in particular the 'culture' of the bar. The report highlights an intensely masculine culture involving: high levels of criticism of female barristers, exclusion of females from social networks, lunching rituals at male clubs, issues of sexuality being used to undermine women's credibility, and in particular, 'no dobbling' in respect of gender biased treatment or practices. Naturally many women fail to thrive in or even seek such a climate.<sup>23</sup>

### Strengths of the Policy

An initial strength of the Policy results from the authoritativeness of its source, which makes it likely to be consulted and implemented in some form. It was issued by the Law Council of Australia, the peak body representing the legal profession in Australia (both solicitors and barristers) after an in-depth consultative process within the profession through the LCA's committees. Many embrace the view that change which occurs with some mandate from 'insiders' (legal professionals) will be more easily embraced by the legal profession; change that is 'accepted' is not likely to be undermined.<sup>24</sup> It will be interesting to observe, should the policy be sensitively implemented in Queensland, whether the authoritativeness of the source will give legitimacy to non-traditional appointments; a legitimacy which was denied many of the appointments of former Attorney-General Matt Foley during 1998-2000. Appropriately implemented, I believe those who would criticise non-traditional appointees will at least be far more careful in phrasing their public utterances.

A second positive is that it does not purport to set out a blue-print model for all States; rather it is a statement, which may be developed, added to or implemented in individual ways by State and federal Attorneys-General. It applies to all jurisdictions and levels of judicial office in Australia, with the exception of the High Court. In effect, State and

<sup>19</sup> Enquiries of the Qld Bar Association revealed this figure in January 2001; enquiries of the Victorian Bar Association revealed this figure in March 2001. Enquiries of Bar Associations in the other States revealed figures between the Queensland and Victorian figures. In NSW as of January 2001, 12.6% of those holding NSW Bar Association practising certificates were women. However, not all barristers are members of the relevant Bar Associations.

<sup>20</sup> Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 Part II (1994) at para 9.1.

<sup>21</sup> R Hunter and H McKelvie, 'Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council' (1998) Victorian Bar Council, Melbourne.

<sup>22</sup> *Ibid* at xi.

<sup>23</sup> See M Neave, 'Women at the Victorian Bar – Reform or Rejection' (1999)12 *AFLJ* 121.

<sup>24</sup> *Supra* n 7.

federal Attorneys-General can develop their own judicial appointment protocols. Nevertheless, regardless of how far they depart from the LCA model, their protocols will justify and legitimise individual processes of appointment, because the policy provides leeway for the personalisation of protocols.

Its third strength is it that it encourages each State and federal Attorney-General to publish a Judicial Appointment Protocol, thus making the process demonstrably more open and transparent. In most States, even to have a written statement about the process of judicial appointments, apart from a formal process or advisory committee, is in itself novel.<sup>25</sup> The existence of a written protocol certainly must inspire greater confidence in the process and go some way to countering criticisms of cronyism or ‘jobs for the boys’ or ‘jobs for the girls’. David Pannick’s comments about any formal committee process of appointment apply equally to a written protocol, setting out the process of appointment, “...it could hardly fail to improve on the unarticulated criteria, acts of God, and secret processes of nature which currently govern judicial appointments”.<sup>26</sup>

### The Policy and ‘Merit’

At the outset the Policy makes clear that merit is the overarching principle. “In addition to any statutory criteria for eligibility for appointment, the sole criterion for judicial appointment should be merit”.<sup>27</sup> Clearly there are sound reasons for this – “Judicial Legitimacy” requires a merit principle.<sup>28</sup> It is frequently linked to the rule of law. Dr Michael White QC alludes to the rule of law at the commencement of his article on “Judicial Appointments” and continues: “The quality of the persons appointed to hold judicial office is, therefore, a foundation stone for a democratic structure and civil liberties and freedoms”.<sup>29</sup> Later he notes that merit has been linked to the observance of human rights obligations, in particular the International Covenant on Civil and Political Rights provision that “everyone is entitled to a fair and public hearing by a competent...tribunal”.<sup>30</sup>

There is, however, an intrinsic problem with merit. Merit can lie in the eye of the beholder<sup>31</sup> and has not served women and ‘other’ contenders for judicial office in the past, as the debate in Queensland in recent years has shown. The Queensland Bar Association in past years blatantly took a stance on female judicial appointments, evincing a highly gendered view of merit (discussed above).<sup>32</sup> Margaret Thornton has argued persuasively that merit has a mystique, malleability and subjectivity that can be used to “justify, to criticise, or to constrain, any policy proposals”.<sup>33</sup>

<sup>25</sup> Only Tasmania has produced a formal discussion paper on the process of appointments, *supra* n 16. Enquiries of the Queensland Attorney-General’s Department revealed no policy document about the process of judicial appointments.

<sup>26</sup> G Drewry, ‘Judicial Appointments’ (1998) *Public Law Comment* 1 at 7.

<sup>27</sup> Law Council of Australia Policy on Judicial Appointments at 1.

<sup>28</sup> See CJ M Gleeson, ‘Judicial Legitimacy’, ABA Conference, New York, 2 June 2000 referred to in McMurdo J (President, Qld Court of Appeal), opening address to Feminist Legal Academic Workshop 2001, 15 February 2001 (see \* above) at 3-4.

<sup>29</sup> Dr M White QC, ‘Judicial Appointments: Including the role of the Attorney-General’ (2000) 20 *Aust Bar Review* 115.

<sup>30</sup> Article 14.1 ICCPR; Dr M White QC, *Ibid* at 138.

<sup>31</sup> See McMurdo J, *supra* n 28 at 3.

<sup>32</sup> *Supra* n 10.

<sup>33</sup> M Thornton, ‘Affirmative Action, Merit and the Liberal State’ (1985) 2 *Australian Journal of Law and Society* 28 at 29.

Margaret Thornton explains that concepts like merit are not value neutral and the result has been “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>34</sup> Similarly Brian Martin points out that “...the evaluation of merit is shot through with the biases of those in positions of power as well as biases in the very definition of merit in a system which imposes unequal life opportunities”.<sup>35</sup>

This was clearly seen in the debate about merit in Queensland. The Queensland Bar Association and other judges, who saw the Attorney’s appointments as fundamentally sexist, appeared to have seen merit only in appointments of senior (preferably Senior Counsel) barristers - presumably on the basis of the traditional view that well-honed legal (principally commercial) and advocacy skills are the touch-stone for judicial office. Judged against this standard, the Attorney-General’s appointments lacked merit. However those who criticised appeared to lack awareness that their definition of merit was biased in reflecting and continuing the existing power order (favouring their own) – thus their definition lacked its own intrinsic merit. Martin makes this point: “The usual definition of merit.... may *seem* (emphasis added) fair, and be applied fairly within its own terms, while being entirely compatible with the continuance of structural inequalities such as male dominance”.<sup>36</sup> Jocelyne Scutt, leading Australian feminist lawyer, cut to the quick regarding the failings of ‘merit’ in relation to female judicial appointments in the *Australian* newspaper last year – women can’t win either way, as successful contenders or otherwise:

What is merit? Don’t ask Alice. When it comes to judicial appointments, ask the March Hare. Women are rarely appointed to the judiciary... because women are not good enough. Lacking the magic quality, merit, women do not rate. For the relatively few appointed, merit is not the criterion. Rather, it is affirmative action.<sup>37</sup>

## **Establishment of a Judicial Appointment Protocol**

### ***Who should appoint the judges?***

The LCA Policy affirms the traditional view that judicial appointment remain a function of the Executive Government, who *should* formally *consult* top legal office bearers, ie Chief Justice of the Supreme Court, Chief Justice of the Court to which the appointment is made, President of the Bar Association, President of the Law Society and *may* consult other persons. There is no concept of a formal advisory body or independent commission.

In the United Kingdom in the past few years, there has been a substantial call to divest judicial appointments from the Law Chancellor and place the responsibility with a judicial appointments commission, with substantial layperson membership.<sup>38</sup> This

<sup>34</sup> M Thornton, ‘The Fictive Feminine’ in *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press (1996) at 35.

<sup>35</sup> B Martin, ‘Merit and Power’ (1987) 22 *Aust Journal of Social Issues* 436 at 437.

<sup>36</sup> *Ibid.*

<sup>37</sup> J Scutt, ‘No merit to endemic sexism in legal system’, *The Australian*, 19 July 2000 at 13.

<sup>38</sup> K Malleon, ‘Ending elitism in judicial appointments’ (August 2000) *Legal Action* 6; See C McGlynn, ‘Appointing Women Judges’ (1998) 148 *New Law Journal* 597; J Hayes, ‘Appointment by invitation’ (1997) 147 *New Law Journal* 520.

movement is reflective of the same call there has been in Australia for more openness and transparency in the appointment process and for a process that creates greater opportunity for selection of persons outside the bar elite.<sup>39</sup>

Scotland has recently moved strongly in this direction - appointments have been in effect wrested from the hands of the Law Advocate ending a centuries old tradition. In future, Scotland's judges will be selected by an independent appointments board headed by a non-lawyer with equal proportions of lay and legal members, though the formal power of appointment remains with the Scottish Executive.<sup>40</sup> In other jurisdictions, the process of appointment is carried out largely by advisory committees (with differing degrees of persuasiveness or compulsion to follow their recommendations), again with ultimate power of appointment resting with the Executive.<sup>41</sup> The main difference in debate about models centres not on whether the body is a commission or advisory committee, but whether it should be primarily comprised of laypersons or of lawyers.<sup>42</sup>

In Australia many argue for and are strongly committed to ensuring the check of democracy (ensured by maintaining a popularly elected Attorney-General as appointer of judges) upon a judiciary, which otherwise fiercely maintains its independence from popular opinion or government influence, through (virtually) life tenure provisions and only exceptional grounds for dismissal.<sup>43</sup> Nevertheless a judicial appointments commission or advisory body could take a strongly democratic form as in Scotland and Canada. In Scotland, the Commission is appointed by the Executive after advertisement; the chair is a lay person and there are five legal and five lay representatives. Judicial officers are chosen by the Commission after advertisement, application and interviews with candidates. The Commission then provides a preferred candidate and short list of candidates in order of preference to the Minister. This is similar to the model operating in each Canadian province, but the preponderance of lay members is even stronger: six non-lawyers to one judge and two practising lawyers. Applicants submit a full written application to the advisory committee, who ranks each application as "highly favourable", "favourable" and "not favourable". Attorneys-General have voluntarily agreed to restrict themselves to the first two categories.

Dr Michael White QC, in a recent article examining models for judicial appointment in other jurisdictions beyond Australia, recommends that either appointments occur through a Commission (with nominal lay person membership) or the Attorney-General be constrained by appointing from the list of recommended nominees of a small committee of "judicial persons".<sup>44</sup> This fails to take account of the fact that the most important feature of a modern process designed to ensure a 'non-cloning' judiciary is that the Attorney-General be advised by or consult formally with a group much more representative of ordinary Australians, and certainly not just by a group of 'insiders'

<sup>39</sup> See A Murray and F Maher, 'Judging the Judges' (1998) 23 *Alt L J* 185.

<sup>40</sup> B McCain, 'New System for selecting judges: Generations of secrecy to end with independent appointments board headed by a non-lawyer' *The Herald* (Glasgow, Scotland) 15 March 2001 at 8.

<sup>41</sup> New Zealand and Canada have adopted models along these lines.

<sup>42</sup> Justice Tasmania, Discussion Paper: 'Judicial Appointments in Tasmania' August 1999, <<http://www.justice.tas.gov.au/legpol/judicial.htm>> at 13.

<sup>43</sup> LJ King, 'The Attorney-General, Politics and the Judiciary' (2000) 29 *Univ of West Aust Law Review* 155 at 175; McMurdo J *supra* n 28.

<sup>44</sup> Dr M White, *supra* n 29 at 159-160.



(legal professionals) for the reasons discussed below. If the process involves an independent Commission, it is the composition of members that is the major issue.

***Who needs to be consulted in developing the Protocol?***

Section 3 of the Policy states that the Attorney-General for the jurisdiction should, *in consultation with the legal profession* (emphasis added), establish and make publicly available a Judicial Appointment Protocol, which outlines the judicial appointment process in that jurisdiction. The emphasis on consultation with the legal profession points to a flaw discussed above and further in this article; it is essential that the criteria of judicial office in the 21<sup>st</sup> century ensure the appointment of judicial officers who have the confidence of the many persons and groups currently disenfranchised from the legal system.

A glance through newspapers every week reveals stories of alienation of recurring groups, for instance - women, the poor, children, gay and lesbian people, indigenous people, non-English speaking people. Selection criteria must ensure that the courts are staffed with those who have a 21<sup>st</sup> century understanding of equality before the law, ie an understanding of the structural and other factors that lead to unequal treatment of such groups, as well as individual persons. This is unlikely to happen if a new process is designed in consultation only with the existing power holders, ie members of the legal profession. Daniel Goleman comments succinctly on the inability of those who are 'enfranchised' to understand the position of those who are not:

It is a paradox of our time that those with power are too comfortable to notice the pain of those who suffer, and those who suffer have no power. To break out of this trap requires.....the courage to speak truth to power.<sup>45</sup>

Thus it is imperative that the consultation process involved in developing a new Judicial Protocol include contributions from a wide spectrum of society; at the very least from community legal services and community organisations. It should also involve the participation of individuals, who have the courage 'to speak truth to power', although this is a hard ask from persons who may lack many of the resources so prized by the system itself – financial security, education, articulateness, confidence, as well as familiarity and knowledge of the norms of the system. Comments I made, when reviewing *Beyond the Adversarial System*, a book which collected together insights of 'major players' of legal system reform, are apposite here. I pointed out that the book, mirroring the legal system reform agenda itself, was principally a collection of offerings from the elite and required a greater representation from a grass-roots level for a balanced approach:

There is a concern that reform of the legal system may reflect the same problems that have occurred in the past in the development of the law. The law grew up in the eye of the white Anglo-Celtic male, because its almost exclusive actors were white, Anglo-Celtic males. Reform of the legal system must be broadly inclusive.<sup>46</sup>

<sup>45</sup> D Goleman, *Vital Lies, Simple Truths: the Psychology of Self-Deception*, Bloomsbury 1997 at 13.

<sup>46</sup> B Hamilton, Book review: 'Beyond the Adversarial System', (1999) 15 *Queensland University of Technology Law Journal* 218 at 222.

I further pointed out, that in my opinion, the most interesting contribution was of indigenous author, Colleen Starkis, who wrote in an Aboriginal way based on oral tradition used to reach group consensus, from her perspective as a Darkinong woman and from the perspective of the group, with whom she collaborated. It is to be noted that of all the authors in this text, Starkis found the legal system most in need of radical change. She painted a picture of total disenfranchisement of Indigenous Australians from the legal system; this was in stark contrast to other authors, such as former LCA President Bret Walker, who saw the legal system as a level playing-field for the enjoyment of rights before a neutral umpire.<sup>47</sup>

The views of persons and groups, such as Starkis and her collaborators, need to find their way into any attempt to formulate a new process for selection of judges for the 21<sup>st</sup> century. A recognition of this need permeated the governments' views in both Scotland and Canada, when they set up their 'judicial appointments' bodies with a majority of lay members – the view being the judiciary must serve the whole community and be seen to understand the whole community. The Scottish Executive state the function of legally qualified members is to testify as to the legal ability of candidates, "while lay members could assess qualities such as the candidate's understanding of people and society and ability to communicate well with the huge variety of people who pass through a court".<sup>48</sup>

Thus, as we stand at the threshold of a new judicial appointments policy, it is vitally important who is entrusted with the task of developing the new Protocol. It is a chance to embrace change (with an authoritative underpinning), and enshrine a policy, which will see the courts staffed by more persons who can hear the voices of ordinary Australians.

The agenda for change will be inevitably controlled by the government of the day. This frequently means resultant law reform is a 'baggage of compromises'- any government has to deal with many and differing agendas and is to some degree controlled by powerful and conflicting interest groups, whom it represents and who all have a stake in the reform outcome. We may have to accept the imperfect imperatives of law reform, but it is essential that the 'stakeholders' in the process of developing a new protocol include groups representative of ordinary Australians, as well as legal professionals, academics and government. This is not mandated by the LCA Policy, which confines the Attorney-Generals' consultations in relation to the protocol to the legal profession, although Attorneys-General are urged, but not required, to consult widely in relation to actual appointments. To follow the LCA Policy and confine the consultation process so narrowly in the development of protocols is likely to continue the "self-perpetuating oligarchy".<sup>49</sup>

### **Judicial Appointment Protocol and Selection Criteria**

Once a judicial appointment protocol has been developed, which establishes a *system* more likely to result in a 'inclusive' judiciary, the criteria of merit to be embodied in the

<sup>47</sup> B Walker, 'Judicial Time Limits and the Adversarial System' in *Beyond the Adversarial System*, Federation Press 1999 at 89.

<sup>48</sup> B McCain, *supra* n 40.

<sup>49</sup> Judge Rosemary Balmford, 'Gender Equality in Courts and Tribunals' (Spring 1995) 94 *Victorian Bar News* 34.

protocol need to be established. Margaret Thornton addresses the importance of the relevant criteria when she says, "...the determination of what criteria are relevant at the threshold ensures that a particular value system is encompassed in that construct".<sup>50</sup> "It is doubtful that we will ever get to a position where the more subjective elements [of merit] will be eliminated",<sup>51</sup> but it is clearly high time the criteria for judicial office attempt to reflect something other than the male Anglo-Celtic value system. The traditional criteria for judicial office, which generally focus on skills related to process and argument, do not serve most Australians well in the 21<sup>st</sup> century. Criteria favouring persons with courtroom experience reinforces negative traits of an adversarial system, which is itself under scrutiny and subject to many proposals for reform. As I have argued before:

...if courts today are to reflect a 21<sup>st</sup> century understanding of equality before the law, one crucial aspect is the selection of judges. This selection needs to be based on far more than legal and advocacy skills... Today selection based on those skills is not sufficient to ensure courts are staffed with judicial officers able to recognize and meet the imperatives of legal system reform. Nor is it sufficient to ensure the many persons who currently feel disenfranchised from the legal system truly 'have a voice' and 'will be heard.' For until they do, equality before the law exists in theory, not in practice.<sup>52</sup>

Thus new criteria for judicial office need to reflect a broadly based value system. All recent models and proposals for reform of the judicial appointment process, whether Australian or overseas, adopt criteria that extend well beyond the traditional legal and advocacy skills into the realm of personal qualities, and in that respect to a greater or lesser degree attempt to incorporate a more broadly based value system.<sup>53</sup>

### **The Law Council of Australia Selection Criteria<sup>54</sup>**

The Policy sets out a recommended list of 'Attributes of Candidates for Judicial Office' as attachment B. Attributes are divided into three categories:

- Legal Knowledge and Experience
- Professional Qualities
- Personal Qualities

The attributes appear to be modelled very closely on the United Kingdom published selection criteria, which broadly adopts the above categories. The proposed Tasmanian model requires very similar qualities as well.

<sup>50</sup> *Supra* n 33 at 30, quoting G Ezorsky, 'Hiring Women Faculty' (1978) 7 *Philosophy and Public Affairs* 82.

<sup>51</sup> C Burton, *Redefining Merit*, Affirmative Action Agency Monograph no. 2, AGPS Canberra 1988.

<sup>52</sup> B Hamilton, *supra* n 10 at 17.

<sup>53</sup> Selection criteria utilised in a wide range of jurisdictions are canvassed in Justice Tasmania, Discussion Paper: 'Judicial Appointments in Tasmania' August 1999.

<sup>54</sup> I gained valuable feedback on the gender considerations relating to these criteria from presenting the Policy and seeking the opinion of participants at the Feminist Legal Academics Workshop 2001 (*supra* \*).

## Legal Knowledge and Experience

The heading legal knowledge and experience defines “necessary” and “desirable” experience. Court or litigation experience is not required as a necessary, rather it is specified as desirable. This makes it clear that there can be no concept that only barristers are entitled to appointment. However it is *necessary* that the successful candidate “will have obtained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in *professional practice* (emphasis added)”. The United Kingdom has a similar requirement. This would appear to require appointments from practising barristers and solicitors. In contrast, Tasmanian and New Zealand criteria require *demonstrated overall excellence in a legal occupation*, which is clearly preferable if the goal is to achieve a more inclusive judiciary.

The goalposts will have hardly changed at all if those appointable are only practising barristers and solicitors; academic lawyers, government lawyers, community service lawyers or members of legal tribunals equally have a claim to appointment and may bring a critical dimension to law, in that they may be more aware of imperatives for reform, than those steeped in the system as their livelihood. In particular the NZ criteria appear to recognise the importance of awareness of the critical dimension. Under the heading legal ability, it is pointed out: “At an appellate level, legal ability includes the capacity to discern general principles of law and in doing so weigh competing policies and values”.

## Professional Qualities

The following qualities are specified as “desirable”:

- *Intellectual and analytical argument*
- *Sound judgement*
- *Decisiveness* and the ability to discharge judicial duties promptly
- Written and verbal communication skills
- *Authority* – the ability to command respect and to promote the expeditious disposition of business, while permitting cases to be presented fully and fairly
- *Capacity and willingness for sustained hard work*
- Management skills, including case management skills
- Familiarity with, and ability to use, modern information technology or the capacity to attain the same
- Willingness to participate in ongoing judicial education

The first five attributes are also found in the Tasmanian model. The highlighted characteristics above could be seen as gendered requirements (and thus disadvantaging non-dominant groups equally), drawing on ‘male’ concepts. Nevertheless, many women who have entered the profession (and particularly attained senior positions) may see these concepts as neutral, because they involve the norms of the profession, are extolled as neutral, and they may have endeavoured to exhibit or develop these qualities themselves.<sup>55</sup>

<sup>55</sup> M Thornton, ‘Authority and Corporeality: Women in Law’ (1998) 7 *Feminist Legal Studies* 147 at 152-153.

Margaret Thornton and others have pointed out that women have not been seen as bearers of “authority”, because the attributes of authority have been defined in masculinist terms; authority is frequently equated with command, which itself is redolent of militarism and sovereignty.<sup>56</sup> Authority is also associated with powerful speech. Kathleen Jones points out: “[W]e define the masculine mode of self-assured, self-assertive, unqualified declarativeness as the model of authoritative speech”.<sup>57</sup> On the other hand female speech (generally) may be considered to lack authority and credibility in the public sphere. Research has demonstrated that men and women use, and are expected to use, different modes of speech<sup>58</sup> and that “qualities more likely to be used by, and socially appropriate, for females are associated with powerless speech and lessened credibility”.<sup>59</sup> As Kathleen Jones says: “...the ‘female’ voice of would-be authority may speak in compassionate tones inaudible to listeners attuned to harsher commands”.<sup>60</sup>

The subjectivity and value-laden perceptions of terms similar to those listed in the LCA criteria have been the subject of adverse comment in the UK. Clare McGlynn notes that Kamlesh Bahl, chairwoman of the UK Equal Opportunity Commission, has noted:

The great danger in an area such as the judiciary,...is that it has always been seen as a male area of work, so perceptions of what makes a good judge – and what constitutes “authority” and “decisiveness” – are also likely to be male.<sup>61</sup>

McGlynn continues:

In particular, it is often thought that “authority” is something women lack. Authority is an elusive concept, dependent more on what others think than one’s own qualities.<sup>62</sup>

Intellectual and analytical argument, sound judgement, and decisiveness can be subjected to similar analysis – these qualities resonate with the voices of reason and dominance, so often attributed to the male sex within the legal profession – women’s (frequently) different reasoning patterns and quiet assertiveness are sublimated within these categories as defective. “Capacity and willingness for hard work” is also problematic in a gender sense, because women’s employment patterns, particularly within the legal profession (with periods devoted to child raising and part-time work resulting from family responsibilities) may be regarded as counter-indicative of this trait. There may be arguments similarly that women more frequently (than men) seek ‘balance’ between their work and external lives and believe their work productivity is enhanced by such balance; “capacity and willingness for hard work” may be assessed

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<sup>56</sup> *Ibid* at 154. See also M Thornton, *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press 1996, see particularly at 31, 35, 109 and 111.

<sup>57</sup> K Jones, *Compassionate Authority: Democracy and the Representation of Women*, Routledge 1993 at 119, quoted in M Thornton, *ibid*.

<sup>58</sup> K Mack, ‘Challenging Assumptions about Credibility’ *Proctor* May 2001 16 at 18. K Mack, ‘Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process’ (1993) 4 *Criminal Law Forum* 327 at 330-331.

<sup>59</sup> *Ibid*.

<sup>60</sup> K Jones, *supra* n 57 at 118.

<sup>61</sup> C McGlynn, ‘Appointing Women Judges’ (1998) *New Law Journal* 597 at 597-598.

<sup>62</sup> *Ibid* at 598.

against a standard generated by those prepared (or needing) to work a ten-hour day or more, which appears the norm in legal practice.

The NZ list of professional qualities, titled “Personal technical skills”, has I believe quite a different flavour, which while canvassing similar territory, avoids the above perceptions. “Personal technical skills” are described as follows:

There are certain personal skills that are important, including skills of effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and to maintain charge and control of a court.

### ***Personal Qualities***

The LCA Policy lists as “desirable” the following qualities:

- Integrity, good character, and reputation
- Fairness
- Independence and impartiality
- Maturity and sound temperament
- Courtesy and humanity
- Social awareness including gender and cultural awareness

While it is pleasing that the policy identifies qualities that draw on insight and humanity, in particular the last two listed qualities, this list is nevertheless subject to the same criticisms noted above – they are subjective and value-laden criteria, dependent more on what others think than a person’s inherent qualities. McClynn notes this of the requirement of “standing” in the UK, which is similar to the LCA’s “good character and reputation”:

“Standing” is another very subjective notion that is prone to interpretation on stereotypical grounds, and again relies more on the views of others, rather than the abilities of the individual. Standing also equates to being known in the profession, something which is much easier on the whole for men who have greater access to contacts and networks.<sup>63</sup>

It is suggested that some important personal qualities are missing in this list. In particular, if the goal in the 21<sup>st</sup> century is a judiciary more aware and sensitive to the needs of ordinary Australians and the diversity of modern Australian society, criteria which draw on this need to be represented, for instance:

- Willingness to understand the viewpoints of others
- A history of involvement in community organizations or activities
- Willingness to educate oneself beyond one’s own boundaries

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<sup>63</sup> *Ibid.*

Again the problem with such qualities is they are highly subjective and need to be framed in a manner that will allow the candidate to be tested in relation to them in an objective way.

### ***Conclusion on the LCA criteria***

Feminist scholarship has demonstrated the tenacity of the myth of objectivity, rationality and neutrality in law until comparatively recently. The reality was (and largely still is) that the law looked directly into the eye of the ‘reasonable man’, while at the same time asserting its objectivity. In contrast, law’s subjectivity was (and still is) specifically instanced by legal doctrine, procedural rules and judicial statements categorising women as unreliable witnesses.<sup>64</sup> It is believed there will be a similar strong belief held by both male and female legal professionals that the LCA criteria are value neutral and could not be seen to advantage either gender or ‘others’. Rosemary Hunter and Helen McKelvie’s research relating to female barristers in Victoria indicates many female barristers deny the gender oppression created by an intensely masculine culture at the bar, whilst at the same time giving clear instances of it.<sup>65</sup> The same phenomenon has been written about in the US; both those responsible for discrimination and its victims deny its existence.<sup>66</sup> Both structural reasons – the need to conform to succeed within the profession – and psychological explanations – the reluctance of ‘victims’ to identify as such – have been given as explanations.

It would serve potential appointees of non-dominant background better to follow critical comment in the UK in relation to the subjectivity of similar criteria and “replace ... vague and virtually meaningless criteria ... and come up with criteria directly related to the skills actually required, which can be tested with some semblance of objectivity”.<sup>67</sup> While the LCA criteria clearly represent an improvement on the traditional implicit criteria, which focus on courtroom skills, these criteria could still result in a ‘cloned’ judiciary for the reasons addressed above.

### **Matching the candidate to the criteria**

The most important task of the appointment process ultimately is matching the candidate to the criteria, and in this respect the LCA Policy does not deliver in a way that follows the path of other jurisdictions and that is therefore likely to lead to the possibility of real change in the judiciary. The LCA Policy is sadly lacking in a proper process to match the candidates with the criteria in two respects. One is that the consultation process relating to appointments is ‘cloned’; the second is that there is no

<sup>64</sup> See M Thornton, *supra* n 55 at 155.

<sup>65</sup> This follows from the research undertaken by Hunter and McKelvie for the Victorian Bar Council, *supra* n 21. I have also had the benefit of reading two as yet unpublished papers on this topic: R Hunter and H McKelvie, ‘Talking up Equality: Women Barristers and the Denial of Discrimination’ and R Hunter, ‘Women Barristers and Gender Difference’ (forthcoming in U Schultz and G Shaw (eds), *Women in the Legal Profession: A Challenge to Law and Lawyers*, Hart Publishing Oxford 2002). Both these papers draw on the research for the Victorian Bar Council.

<sup>66</sup> D Rhode, ‘The “No-Problem” Problem: Feminist Challenges and Cultural Change’ (1991) 100 *Yale Law Journal* 1731 at 1773.

<sup>67</sup> G Bindman, ‘Appointing Judges without Discrimination’ (1991) 141 *New Law Journal* 1692 at 1695.

open and transparent process, which can ensure all relevant aspirants are considered in the selection process.

In respect of the first issue, the Policy says the Attorney-General *should* consult:

- Current Chief Justice of the Supreme Court
- Current Chief Justice (or equivalent) of the Court to which the appointment is made
- President of the Bar Association
- President of the Law Society

The Policy then says the Attorney-General *may* consult:

- Such other persons as the Attorney-General thinks fit eg office holders or organizations, such as appropriate women lawyers' organizations.

The weight given to prominent members of the legal profession (*should* versus *may* and it is not clear if the A-G may consult community *non-legal* organisations) in the LCA Policy is probably reflective of the International Bar Association (IBA) stance. In the IBA 'Code of Minimum Standards of Judicial Independence' it is stated that promotions of judges must be vested in a body with a majority of members of the judiciary and legal profession.<sup>68</sup> It is natural that 'insiders' (Bar Association members) ultimately want to keep the process 'in-house'. However it is vitally important there be an equality, if not preponderance, of lay opinions on the suitability of candidates, if a judiciary with the qualities suggested in this article is sought. It was this thinking which motivated Canadian and recent Scottish reforms, as expressed by the Scottish Justice Minister:

It is right that the judicial appointments board will be headed up by a lay person. The judiciary serves the whole community. They must understand and be seen to understand that whole community.<sup>69</sup>

In respect of the second issue, the LCA Policy does not follow most other recent models of Judicial Appointment (UK, NZ, Canada), which require judicial positions to be advertised, written applications addressing the criteria submitted, checking the applicant's credentials, and formal interview by an advisory body or commission. The Policy says the Attorney-General *may consider*:

- Advertising for "expressions of interest" for a particular judicial appointment.

This is not sufficient to ensure the best matching process of candidate to criteria can occur – a formal process of advertisement, application, interview, checking and consultation is necessary for this. If establishing broader criteria for judicial office is to be truly effective in producing long-lasting change in the judiciary, then there is a need for all relevant candidates to have a chance to be 'heard'. In particular, there may be many lawyers 'out there' who understand the need for broad criteria, are in sympathy

<sup>68</sup> D R Meagher QC, 'Appointment of Judges' (1993) 2 *Journal of Judicial Administration* p 190 at 201.

<sup>69</sup> B McCain, *supra* n 40.



with them, and in particular have a disposition to educate themselves beyond their own boundaries, who would be unlikely to be considered even by ‘insiders’.

## Conclusion

Any form of change within the legal profession is difficult. The history of women’s struggle for acceptance as equals within the profession is a testament to that. Sensitive implementation of the LCA Policy brings with it the possibility of a real shift in the goalposts and thus long-lasting change in the nature and composition of the judiciary. I realize that there is a tension between my arguments on the nature of desirable change and who needs to drive this change. On the one hand, there is my essential argument that a judicial appointment protocol must involve and reflect the views of ordinary Australians in order to ensure a ‘non-cloned’ judiciary. On the other hand, I believe the protocol needs some form of ‘insider’ support, otherwise it will be undermined. For these reasons, I have argued the LCA Policy satisfies both needs – it emanates from the peak body of the legal profession, but it acknowledges State and Federal Attorneys-General should develop their own protocols, drawing on, but not restricted to the model suggested by the Policy.

Thus, there is a chance to learn from the mistakes of other jurisdictions and from the growing body of critical literature of similar processes. State and federal Attorneys-General can use this knowledge to develop protocols – protocols that will result in a more representative and inclusive judiciary with a 21<sup>st</sup> century understanding of equality before the law. In itself, the flow-on from a more diverse composition of the Bench (in terms of women, ‘others’, and lawyers from more diverse fields of legal endeavour) should be greater sensitivity to the needs of a broader spectrum of society. One reason alone for enhanced judicial sensitivity is if judicial common rooms reflect a greater ‘melting-pot’ of ideas and background experiences, this should increase the understanding of all members of the court. The strength of a well-developed protocol is that it will do this without a form of affirmative action – without seeking to make the bench deliberately representative, which raises the hackles of many within the profession.

Many women and other community groups see a need for stronger affirmative action or even quotas (eg 50% of the bench to be women, indigenous people to be proportionately represented), as numbers of women (and ‘others’) are so comparatively small on the Bench, after eighty years in the profession, and after at least ten years of graduating in equal numbers with men from law school. The price is the negative perception that persons appointed under such policies have not been appointed on merit. The merit issue, as has been seen particularly with the Queensland experience of recent years, has often been misused as a detrimental catch-cry. Jocelynne Scutt pin-points this: “What is merit? Don’t ask Alice. When it comes to judicial appointments, ask the March Hare....Lacking the magic quality, merit, women do not rate”.<sup>70</sup> The debate about “merit” of female appointees may not happen so publicly again, but the same sentiments will traverse bar and judicial common rooms and law offices, unless the issue is tackled head-on. I see the answer in a well-developed protocol which changes the goal-posts.

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<sup>70</sup> *Supra* n 37.

Such a protocol will not compromise appointment on ‘merit’. Rather it will embody a more inclusive and transparent concept of merit, even though it is accepted that ‘merit’ is inevitably subjective. This should in turn lead to a more representative judiciary and arguably, a judiciary who can also ‘hear’ the voices of those who have struggled in the past to be ‘heard’ within the legal system, without the negative impact likely to flow from more aggressive policies. The challenge for State and federal Attorneys-General is how they implement the LCA Policy (in developing their own judicial appointment protocols) – the gauntlet has been thrown down!