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Appointing Judges: Australian Judicial Reform Proposals in Light of Recent North American Experience

Abstract
[extract] Some eight years later, it would appear that similar calls for reexamination and change [to those in Canada] are being heard throughout Australia. At the High Court level, some have argued that more consultation between the states and the Commonwealth is required. More generally, some have argued that the actual selection procedures for judges throughout Australia should be less secretive and subject to public scrutiny. Still others have argued that appointments should do more to reflect the diverse nature of the Australian population and that once appointed, judges should undertake judicial training to ensure that they understand and are sensitive to this diversity.

The purpose of this paper is to summarise the main findings of my 1990 Ontario Law Reform Commission research and to determine what reform recommendations and findings, if any, are applicable and useful within the present Australian debate on judicial reform.

Keywords
judicial reform, Canada, United States, Australia, judicial appointment

Cover Page Footnote
Much of the comparative work on this topic was undertaken in 1990 for the Ontario Law Reform Commission. That early work would not have been completed without the thorough research and work completed by Ian Peach of the Attorney General's Office, Toronto and without the assistance and guidance of Professor John D Whyte, then Dean of Law at Queen's University in Kingston, Ontario. I thank and credit both for introducing me to this most interesting of topics. I would also like to thank Lisa Riche, Student at Law, for her excellent research assistance and for summarizing the judicial reform proposals being discussed and considered in Australia. Thank you also to Jeremy Curthoys for encouraging me to again undertake research on this topic.

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APPOINTING JUDGES: AUSTRALIAN JUDICIAL REFORM PROPOSALS IN LIGHT OF RECENT NORTH AMERICAN EXPERIENCE

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Introduction: A Judiciary In Need of Reform?

In 1990, the Ontario government asked the Ontario Law Reform Commission, chaired by Judge Rosalie Abella, to investigate and report on the need for reform in the process by which judges are appointed in Canada.[1] The impetus for this review lay in large part in proposed, but ultimately rejected, amendments to the Canadian constitution which would have allowed greater provincial participation in the selection of judges to the Canadian Supreme Court.[2] The review also took place within the context of much publicised comments by one of Canada's more popular and respected Supreme Court judges, Bertha Wilson, that the Canadian judiciary was not representative of the diversity of the Canadian population and, as such, not capable of being truly impartial and effective.[3] As part of this review, I was asked to examine and report on the various judicial reform proposals advanced in Canada since the late 1960's, with particular attention being given to those submissions calling for changes to the appointment process and improvement of the quality of individual judges.[4]

Some eight years later, it would appear that similar calls for re-examination and change are being heard throughout Australia. At the High

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* BA (Hons), LLB (Queen' s), LLM (Michigan). Much of the comparative work on this topic was undertaken in 1990 for the Ontario Law Reform Commission. That early work would not have been completed without the thorough research and work completed by Ian Peach of the Attorney General's Office, Toronto and without the assistance and guidance of Professor John D Whyte, then Dean of Law at Queen's University in Kingston, Ontario. I thank and credit both for introducing me to this most interesting of topics. I would also like to thank Lisa Riche, Student at Law, for her excellent research assistance and for summarizing the judicial reform proposals being discussed and considered in Australia. Thank you also to Jeremy Curthoys for encouraging me to again undertake research on this topic.

1 The final report of the Commission is found in Ontario Law Reform Commission *Appointing Judges: Philosophy, Politics and Practice* (1991).

2 See specifically s. 101 of the *1987 Constitutional Accord* (The Meech Lake Accord) (Canada). See generally on this point Bliss M, 'A Wild Constitutional Leap in the Dark,' *The Toronto Star*, June 30, 1987 at A21

3 The full text of her Honour's comments can be found in Madame Justice Bertha Wilson, 'Will Women Judges Really Make A Difference?' (1990) 28 Osgoode Hall LJ 507.

4 See Kendall C, 'Criticism and Reform: A Survey of Canadian Literature on the Appointment of Judges' in *Appointing Judges*, above n 1 at 211-230.

Court level, some have argued that more consultation between the states and the Commonwealth is required.[5] More generally, some have argued that the actual selection procedures for judges throughout Australia should be less secretive and subject to public scrutiny.[6] Still others have argued that appointments should do more to reflect the diverse nature of the Australian population and that once appointed, judges should undertake judicial training to ensure that they understand and are sensitive to this diversity.[7]

The purpose of this paper is to summarise the main findings of my 1990 Ontario Law Reform Commission research and to determine what reform recommendations and findings, if any, are applicable and useful within the present Australian debate on judicial reform. It is not my purpose to offer any final recommendations. Rather, I offer only a brief survey of reform options in the hope that they are of some assistance in the event that the Australian government ultimately decides to effect change.[8]

If one aims to understand present proposals for judicial reform, it is necessary to examine briefly some of the recognised or perceived problems inherent in the Australian judicial appointment system as it now functions. This will assist in understanding the present need for reform.

One of the more recent and now most frequently articulated criticisms of the actual appointment of judges is directed at the politicisation of judicial appointments. Although the degree of politicisation is by no means consistent across Australia, recent comments by Deputy Prime Minister Tim Fisher that the present government will aim to appoint 'capital C conservatives' to replace retirees from the High Court have done little to appease the concerns of a public wary of political interference in the judicial branch's exercise of its independence.[9] Indeed the present government's apparent indication that ideological leaning, rather than merit or professional reputation, will be the criterion upon which future appointments to the High Court will be made, has been the subject of

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5 See, for example, calls by former Queensland Premier Robert Borbidge for greater state participation in the appointment of High Court judges as noted in Williams J, 'The Court of Many Colours', *The Australian*, March 4 1997 at 13.

6 See, for example, Solomon D, 'The Courts and Accountability: Choosing Judges' (1995) 9(2) Legislative Studies 39.

7 Tongue S, 'The Courts as Interpreters of Community Values' (1995) 9(2) Legislative Studies 45; Cooney S, 'Gender and Judicial Selection: Should There Be More Women On The Courts?' (1993) 19 Melbourne University Law Review 21; McKelvie H, 'Gender Bias: It's Time to Educate' (1993) 18 Alternative Law Journal 137; Hall K, 'Unconscious Bias in the Judicial System' (October 1993) Australian Lawyer 34; Purvis R, 'Judiciary and Accountability: the Appointment of Judges' (1994) 26 Australian Journal of Forensic Sciences 56.

8 An excellent overview of the situation of nations not canvassed in this paper is found in Skordaki E, *Judicial Appointments: An International Review of Existing Models*, The Law Society (1991). See also Shetreet S, 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 Australian Law Journal 766.

9 See Lane B, 'A-G Tells Judges to Cool Down, Speak Up', The Australian 7 January 1998 at 5. An excellent analysis of the possible implications of this ideological commitment is provided by Justice Michael Kirby in '*Attacks on Judges – A Universal Phenomenon*' as presented at the American Bar Association Winter Leadership Meeting, Maui, Hawaii, 5 January 1998. The full text of his Honour's speech can be found at http://www.hcourt.gov.au/maui.html.

intense public criticism, with former Chief Justice Brennan seemingly agreeing with Sir Ninian Stephen's claim that that the judicial function 'is only capable of proper functioning if judges are made immune both from the influence and certainly from the control of the government of the day.'[10] As Brennan CJ himself argued:

> Treating Courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable.[11]

The experience of other nations would seem to indicate that the concerns expressed by the former Chief Justice and some of his former colleagues are justified. Indeed, one of the problems with any overt politicisation of the bench is that it can ultimately lead to the appointment of candidates for whom professional or intellectual distinctions have not been the prime criteria for selection. This, in turn, can lead to the perception that those appointed are less than qualified and may ultimately result in strong, non-partisan candidates expressing a reluctance to accept appointments for fear of being immediately discredited as mere political tokens.

Another criticism frequently voiced is that the selection and appointment procedure is too secretive. Indeed, very little is known about the procedure by which judges are appointed in Australia.[12] For many, this is troublesome because it ensures that the public has little knowledge of the method by which judges are chosen and consequently has no say as to the type of candidates it believes are necessary. With respect to the appointment of High Court judges, for example, the Australian Constitution specifies no specific qualification for the position of High Court justice. The *Judiciary Act* 1903 (Cth) requires only that justices must be or have been Supreme Court judges, or legal practitioners, qualified to practice before either the High Court or a State Supreme Court, of at least five years standing.[13] The current mode of appointment to the High Court, in conforming with s 72 of the Australian Constitution, is by the Governor-General in Council.[14] The only Cabinet consultation required under statute is with State Attorneys-General[15] and it is unknown what level of

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10 Sir Ninian Stephen, quoted in the (1989) 24(9) Australian Law News, as cited in Skordaki, above n 8 at 10.

11 Former Chief Justice Gerard Brennan, 'The State Of The Judicature' in *Opening Of 30th Australian Legal Convention*, Melbourne, 19 September 1997 at http://www.hcourt.gov.au/judicat.htm. See also Fife-Yeomans J, 'Judges Tell MP's to Stop Meddling,' *The Australian*, April 14, 1997 at 1; Lane B, 'Brennan Backs Judges Against MP's,' *The Australian*, April 15, 1997 at 3 and Lane B, 'High Court on Trial,' *The Australian*, March 22-23, 1997 at 22.

12 Winterton G, 'Appointment of Federal Judges in Australia' (1987) 16 Melbourne University Law Review 185.

13 McQueen R, 'The High Court of Australia: Institution or Organisation?' (Autumn, 1987) The Australian Quarterly 43 at 48.

14 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Cunningham H (ed), *Fragile Bastion: Judicial Independence In The Nineties And Beyond*, Judicial Commission of New South Wales (1997) at 11.

15 See section 6 of the *High Court of Australia Act* 1979 (Cth).

consultation with the State Attorneys-General actually occurs or is in fact required. Indeed, it has been suggested that it may amount to no more than the Commonwealth Attorney requesting the State Attorneys to nominate an individual for appointment to the Court, with little or no obligation on the part of the Commonwealth to accept the nomination.[16] There is also the further possibility that any advice given may ultimately be ignored.[17]

Historically, the lack of appointments to the High Court from States other than New South Wales, Victoria and Queensland has long attracted adverse comment, with some asserting that a less centralist interpretation of the Constitution might have prevailed in recent years if the other smaller States had been represented on the Court.[18] In response, some, like Sir Anthony Mason, have canvassed the idea of according the States a more formalized and public role in the appointment of Justices of the High Court.[19]

One final criticism that must be addressed is that which alleges that the judiciary is not reflective of the community at large because there is a serious under-representation of both women and social minorities. It has been argued, for example, that there are inherent biases in the system based on assumptions about the 'type' of people that should be appointed to the bench. High Court judges are predominantly: male; former leading members of the Bar; appointed to the Court in their fifties; and graduates of private schools. The fact that men of Anglo-Saxon or Celtic background form the majority of High Court appointments suggests to many that there exists an inherent bias in the selection process, or at the very least that the current selection process fails to identify females and persons of varied ethnic backgrounds who may constitute candidates suitable for judicial appointment.[20] For many, the system will continue to fail the public in so far as glaring gender and social inequity remains unchecked, for as Chief Justice David Malcolm of the Western Australia Supreme Court concludes:

> The Judiciary should be seen to be impartial and the procedure for appointment of judges should be bound to reflect in its appointments the composition of society in general, whether it be in relation to gender, ethnic background, language or religion.[21]

Sir Anthony Mason adverts to the judiciary's position as an important branch of government, noting that its exercise of public power

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16 Sir Anthony Mason, in Cunningham, above n 14 at 12.

17 Gibbs H, 'The Appointment and Removal of Judges' (1987) 17 Federal Law Review, 141 at 144.

18 *Report of the Select Committee of the New South Wales Legislative Assembly* (1975) paragraph 10, as cited in Sir Anthony Mason, in Cunningham, above n 14 at 16.

19 Sir Anthony Mason, in Cunningham, above n 14 at 15-16. See also the comments made by former Queensland Premier Robert Borbidge on the need for more state involvement in the appointment of High Court judges, as noted in Williams J, 'The Court of Many Colours', *The Australian*, March 4, 1997 at 13.

20 Attorney-General Michael Lavarch, Discussion Paper: 'Judicial Appointments - Procedure and Criteria' (September 1993) at 3.

21 Chief Justice David Malcolm, *Report of Chief Justice's Task Force on Gender Bias* (1994) at 89-90.

impacts upon the rights of individuals and upon crucial decision making by government and other organizations.[22] Similarly, Professor Shetreet, advocating representation on the High Court of those individuals whose rights are affected, asserts that 'the judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society'.[23] Yet another writer notes that:

> it is imperative to approach the appointment debate not merely in terms of judicial independence, but also to include the notion of the High 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.[24]

For many, the unrepresentative composition of the High Court and most other courts throughout Australia can be attributed to the veil of secrecy surrounding appointments and the lack of identified criteria for appointment to the courts and appointment procedures which involve no public participation or scrutiny.[25] Sir Anthony Mason, acknowledging the inadequacy of present executive appointment of judges 'by an unknown and ill-defined process which involves no more than private, confidential consultation,'[26] notes that criticisms of judges are inevitable while the Executive Government makes judicial appointments without the public having knowledge of how candidates are chosen and appointments made.[27]

Reform Options: The North American Experience

In 1993, then Attorney General for Australia, Michael Lavarch, presented a discussion paper on the topic of judicial appointments. Entitled *Judicial Appointment: Procedure and Criteria* (the *Attorney General's Discussion Paper*), the paper canvassed a number of reform options for the appointment of judges in Australia. Amongst these were the following:

(1) Popular election of judges;

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22 Sir Anthony Mason, in Cunningham, above n 14 at 12-13. Sir Anthony is referring to the High Court's tendency in recent years to imply individual rights and personal freedoms within the Commonwealth Constitution, particularly in *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. An excellent article on the mutation in legal/political culture towards greater judicial realism and the increasing role of the discretionary power of judges on issues of major public importance is found in Brian Galligan and Peter Russel, 'The Politicisation of the Judiciary in Australia and Canada' (Winter 1995) Australian Quarterly 85. See also the Hon Mr Justice P N Bhagwatti, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (October 1992) Commonwealth Law Bulletin 1262 and Gordan M, 'Howard Rejects Law-Maker Role for High Court', *The Australian*, February 25, 1997 at 4.

23 Shetreet S, 'Who Will Judge: Reflections on the Judicial Process and Standards of Judicial Selection' (1987) 61 Australian Law Journal at 776.

24 Nicholson P, 'Appointing High Court Judges: Need for Reform?' (1996) 68(3) Australian Quarterly 69 at 75.

25 Sir Anthony Mason, *'The Appointment and Removal of Judges'*, in Cunningham, above n 14 at 2.

26 Ibid. at 13.

27 Virtue B, 'Choosing Federal Judges -- Is There Need for a New Approach?' (December 1996) *Australian Law News* 7 at 9.

(2) Legislative ratification of judicial appointments;

(3) Establishing a commission to recommend suitable appointees to the Attorney-General; and

(4) Retaining the present method of appointment but requiring the Attorney-General to consult various persons or bodies.[28]

Before deciding whether any of these proposals provides a sufficient response to some of the expressed inadequacies of the present system, it is helpful to first analyse the ways in which some of the procedures outlined by the Attorney-General are in fact used in other jurisdictions to determine if they can or should be applied in Australia. This in turn will assist us in determining which of the proposed options is preferable and workable in this country.

The standard Australian system of executive appointment of practising lawyers has two major competitors, in the form of an elected judiciary, common in the majority of U.S. state systems, and the career judiciary, common in all civil law countries. Under the career judiciary, an individual is trained either for the Bar or the Bench, with the Bench being treated as another bureaucracy. It is doubtful whether Australia could adopt this system. In other countries where this option has been analyzed, the judiciary itself has expressed concern that the importance of promotion for a career judge may interfere with his or her independence, as he or she may perceive promotion as dependent on the decisions reached in particular cases.[29] As well, in Australia, the legal profession is not divided into different branches upon which one could create a career judiciary.

A second possibility, although again not likely to be deemed appropriate in Australia, is that which calls for the election of Judges. There is considerable experience in other jurisdictions with both partisan and non-partisan elections. The first type of election, the partisan election, consists of a nomination process through party conventions or primaries followed by popular election. This is presently used in eighteen states in the U.S.[30] One consequence of this system is that the judges elected tend to be more on the liberal side of non-unanimous decisions. This is probably due to the fact that Democrats are more likely to be elected judges.[31]

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28 Lavarch, above n 20 at 21. The *Discussion Paper* relies to some degree on an article by Winterton G, 'Appointment of Federal Judges in Australia' (1987) 16 Melbourne University Law Review 192. See also Michael Lavarch's summary and further explanation of his Report in (1994) 2(6) Australian Law Librarian 331. The Report is also analyzed in detail by Solomon D, 'The Courts and Accountability' (1995) 9(2) Legislative Studies 39.

29 See specifically Ziegel J, 'Federal Judicial Appointments in Canada: The Time is Ripe for Change' (1987) 31 U Toronto LJ 1 at 4.

30 Snider L, 'The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution' (1985-86) 14 Fordham Urb LJ 353 at 366.

31 Nagel S, '*Comparing Elected and Appointed Judicial Systems*' Beverley Hills: Sage, 1973 at 9.

There are a number of problems with an elected judiciary. Morally, the objection most frequently articulated is, as stated by Jeremy Webber, that the '[e]lection [of judges], it is believed, is incompatible with their role as a bulwark against majoritarian excesses, concerned more with protecting individual interests than with pursuing communal goals.'[32] It is also alleged that elections are generally seen as demeaning to the candidates and therefore less likely to attract the best qualified members of the Bar.[33] A further complaint is that few voters participate in judicial elections. American studies have found, however, that this is only the case when judicial elections are run separately from general elections; even though the turnout may be low when the two elections are separated, the voter demographics tend to be representative of a cross section of the populace as a whole, while the participants in general elections have been found to differ substantially from the general populace.[34] It should be noted that most of these systems are partisan in nature and this has unacceptable side effects including strong partisan voting on the bench, expensive electoral campaigns which allow only the very wealthy to run and increased political divisiveness on the bench.

Non-partisan elections seem to be an improvement over the partisan process. In a non-partisan election someone wishing to be a candidate circulates a petition and if he or she gets a certain amount of support, his or her name is placed on the election ballot, without a party designation. This system is presently used in 20 American states. While it tends to eliminate the dangers of partisanship in judicial decision-making, it nonetheless cannot overcome the complaints about the impropriety of a judge campaigning to gain the greatest popular vote, in a legal system in which judges purport to be protectors of individual rights against majoritarian excesses.

The leading reform to the elected system is the introduction of a nominating commission designed to make professional merit the prime consideration in selecting persons for an election ballot. This is commonly referred to as the 'Missouri Plan' after the state which first introduced it. Under this system, a nominating commission creates a short list of highly qualified candidates for the appointing power, be it the executive or the legislature, to appoint from and, after a period on the Bench, the appointee is required to gain the approval of the voting public by way of a 'retention election'. This system may well embody the ideal combination of professional assessment, executive appointment and public participation. But it has also been suggested that the retention election serves only a cosmetic purpose because of its low voter turnout, lack of serious threat to

32 Webber J, 'Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon Mr Justice Burger' (1984) 29 McGill LJ 369 at 389.
33 Nagel, above n 31 at 4.
34 Ibid. at 17-19.

the candidate of his defeat, and the lack of information on which the voter can base her decision.[35]

A more controversial method of selecting judges is legislative confirmation of executive nominations, such as occurs in the US Senate with respect to Presidential nominees to the US Supreme Court and other federal courts. Various forms of the confirmation process are also used in eighteen states. At a very basic level, the process has some advantages. Specifically, it exposes the appointment process to public scrutiny and educates the public on the nature of the court's work. This might now be considered an important factor now that the High Court in particular has taken an active role in reviewing the relationship between government and the individual rights of the citizen. Having said this, it would appear that the system's disadvantages far outweigh any positives it offers. This became particularly clear during the confirmation hearings of both Robert Bork and Clarence Thomas, in which it was clear that the techniques of political campaigning soon found themselves applied to the process of judicial confirmation.[36] Another quite significant drawback of this system is that as the real problem is seeking out the best qualified persons to nominate, the process of Senate confirmation does nothing to improve the appointment system at the initial stages of selection.[37]

The final and most promising appointment system seems to be that which combines both the recommendations of a nomination commission and executive appointment. Under this system a nominating commission recruits, screens, and recommends a 'short list' of candidates for judgeship (usually three to five) from which the appointee, normally a member of the executive, must appoint one. This system, or a hybrid of it, is presently used in 35 American states and the Canadian provinces of British Columbia, Ontario and Quebec.[38] As well, in 1977, U.S. President Carter adopted a plan to create United States Circuit Judge Nominating Commissions; 'citizen panels' empowered to select federal Appeal Court judges. The panels were made up of citizens chosen by the President, and membership was not limited to lawyers. They were activated when a vacancy arose and were required to present a list of five candidates to the President within sixty days. One of these five would then be chosen by the President to be presented to the Senate for confirmation.[39]

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35 Wierzbicki J, 'Selecting Michigan's Supreme Court Judges: Enough of Partisan, Non-Partisan Elections' (1984) Det CL Rev 731 at 732.

36 Reske H, 'Did Bork Say Too Much?', (1987) 73 ABAJ 74 at 75 and Carter S, 'The Confirmation Press' (1988) 101 Harvard LR 1185. On this point see the comments of the Hon Madame Justice L'Heureux Dube of the Canadian Supreme Court, 'Nomination of Supreme Court Judges' (1991) Manitoba Law Journal 600.

37 Makin K, 'Patronage Cited in 50% of Tory Judicial Appointments', *The Toronto Globe and Mail*, June 3, 1989 at A1.

38 Baar C, 'Judicial Appointments and the Quality of Adjudication: the American Experience in Canadian Perspective', (1986) 20 Themis 1 at 3.

39 Ibid.

The standard U.S. state nominating commission is of the same basic configuration but of less *ad hoc* composition. In all states employing the commission system the commissioners serve a fixed term of between two and six years. Their composition generally maintains a close balance between lay people and lawyers. The power to appoint the members is dispersed among the executive, bar associations, and other interested groups.[40] In sixteen states no judge sits on the commission, while in thirteen states one does, in four states two do, and in two states there is a variable judicial content between zero and two. As well, some states have mandatory bipartisanship rules.[41]

British Columbia was the first Canadian province to establish a strong role for a judicial nominating commission. In that province, the *Provincial Court Act*, 1985 stipulates that the Cabinet must make appointments from persons recommended by the BC Judicial Council.[42] The Council also has the primary responsibility for collecting names and establishing a bank of suitable candidates for the provincial judiciary, though they do approve more names than there are vacancies, thus allowing some Ministerial discretion in the appointment process.[43] Nevertheless, this system does achieve the key goal of guaranteeing the personal qualities and professional ability of potential judges.

Quebec also uses a nominating committee system, which is activated as soon as a vacancy arises. The Quebec committee consists of the chief judge of the court in which the position is to be filled, a lawyer, and a non-lawyer appointed by the government. A positive feature of the Quebec system is that the judicial vacancies are advertised in the newspapers of the provincial Bar to ensure that, 'any lawyer meeting the requirements (can) let his availability be known in an apolitical manner.'[44]

Arguably, the most innovative appointment process (certainly one which is unprecedented) is the system adopted by Ontario in December, 1988. Announced by Attorney-General Ian Scott in that year, the province began a three-year trial in which nine people, six of whom are not lawyers, sit on the province's Judicial Appointments Advisory Committee and recommend candidates for the provincial bench. With the idea of improving the quality of the provincial court bench and having it reflect Ontario's demographics, Mr. Scott created the committee to draw up criteria for judicial appointments and recommend candidates. In its first year, the committee included a clergyman, a female hospital administrator and a businessman. The committee's duty is to interview applicants for provincial court judges, and create a list in order of priority for each

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40 Ibid. at 6.
41 Ibid. at 7.
42 Russel P, *The Judiciary in Canada: The Third Branch of Government*, McGraw Hill Ryerson (1987) at 118.
43 Ibid. at 128.
44 Ibid. at 129.

vacancy. The list is then submitted to the Attorney-General for approval. Prior to 1995, the Attorney-General had turned down only one candidate whom the committee ranked highest for a job. In that case, the candidate was refused because he was not bilingual, and the Sault Ste. Marie area required a bilingual judge.[45] Since the election of the Conservative government, however, the Attorney-General has made it somewhat of a habit to quite publicly reject the Committee's recommendations - thereby again politicising the entire judicial selection procedure and quite deliberately defeating the entire purpose of the judicial selection committee. Despite this, the committee continues with its mandate and continues to receive the support of both opposition parties, at least one of whom is quite likely to form the next government.

The Ontario committee advertises through news media for candidates, who are interviewed rigorously on developments in the law, on their community involvement, and on their personal attitudes to sensitive issues. Each candidate must supply four references and the list that is eventually sent by the committee to the Attorney-General goes beyond ranking, including detailed comments on each candidate's strengths and weaknesses.[46] A highly positive characteristic of the present committee is that it makes an effort to provide representation to those individuals who have traditionally been excluded because of race or gender. (Whether or not subsequent committees will in fact do so remains to be seen and figures are not yet available on the present committee's overall success in this regard. In any event, these figures, once they are available, may not provide the best indication of the potential for progressive reform in this area given the present government's refusal to accept the committee's recommendations).

The judicial nominating committee system does not solve all the problems associated with political appointment. American experience suggests that politics continues to play a significant role in appointments, in that individual commissioners still tend to favour candidates from particular parties. Nevertheless, this system does appear to provide the best opportunity for finding the most qualified candidates and, if the commission is balanced carefully, the political preferences of those individuals comprising the commission are minimized. Clearly, initiatives will also have to be taken to address the gender/racial imbalance on the bench. If this too can be addressed then the nominating commission system may well prove to be the most efficient appointment system for achieving the various goals encouraged by supporters of judicial reform. As Jacob Ziegel explains:

> It has great attractions. It largely depoliticizes the selection process but still leaves a role for the government to play. It gives major constituencies an input to the selection process and, so far as

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45 Makin K, 'Ontario Makes Merit Key to Judicial Posts' *The Globe and Mail*, February 22, 1990 at A13.

46 Ibid.

> appointments by the federal government to the provincial superior courts are concerned, ensures that provincial needs and concerns are fully taken into account. This would remove a major source of recent friction. Even more important, provincial precedents involving the establishment of judicial advisory committees or councils, particularly those in British Columbia and Quebec, show that judicial nominating councils for federal judges could work successfully and make a significant difference to the overall quality of federal appointments.[47]

The idea that nominating commissions should exist has long held support in Canada. Perhaps the earliest advocate of this type of appointment system was Professor W.R. Lederman of the Faculty of Law, Queen's University, who developed the idea throughout the 1970's. Lederman recognized that the responsibility for appointing, and the power to appoint judges should remain with the federal Cabinet as it must eventually answer to Parliament and, ultimately, to the public for the quality of appointments made. But Professor Lederman felt that nominating commissions could improve the quality of those appointments and, when applied to appointments to the Supreme Court of Canada, simultaneously give the provinces an effective role in the selection of judges.[48] They could, in his view, best achieve the goal of merit based selection by providing shortlists of the best qualified candidates from which the appointing authority would be obliged, either in law or practice, to appoint a suitable individual.[49] Lederman envisioned the commissions as standing federal-provincial bodies with effective secretariats and full rules of procedure and with members composed almost entirely of federal MP's and members of provincial legislatures drawn from both the government and opposition benches. They would also include lay persons and lawyers. A two-thirds majority would be sufficient to put a candidate's name on the short list, which would be composed of two or three names in total. Finally, the committee would operate on a confidential basis to protect the reputations of those investigated.[50]

Reform Options For Australia

As already noted, in Australia the Attorney-General's 1993 *Discussion Paper* on judicial reform canvassed in some detail many of the procedures and techniques outlined above. Recall specifically that the *Discussion Paper* outlined four possible options for judicial reform in Australia:

(1) Popular election of judges;

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47 Ziegel, above n 29 at 2.
48 Lederman WR, 'Thoughts on Reform of the Supreme Court of Canada' in *Continuing Constitutional Dilemmas*, Butterworths (1981) at 207.
49 Ibid. at 224.
50 Ibid.

(2) Legislative ratification of judicial appointments;

(3) Establishing a commission to recommend suitable appointees to the Attorney-General; and

(4) Retaining the present method of appointment but requiring the Attorney-General to consult various persons or bodies.[51]

A brief comparison of these options with the techniques presently employed or suggested in other nations reveals a number of problems with many of these reform strategies, but also offers some promise for effective change.

Popular Election of Judges

Popular election of judges in Australia would require an amendment to the Australian Constitution. Given the rather cumbersome procedures for constitutional amendment provided for in section 128 of the Australian Constitution, and considering that constitutional amendment has not in the past been often or easily forthcoming, this option is likely to be unfeasible.[52] In addition, it has been noted that electing judges may compromise their independence because they would need to campaign for office and would be subject to removal at the whim of a disgruntled public. Further criticism centres upon the concern that popular elections, while allowing popular candidates to claim victory, might not necessarily result in the election of an individual who is qualified or indeed competent.[53] Experience with elected officials in the United States would seem to support some of these concerns.

Legislative Ratification of Judicial Appointments

The possibility of the *Senate Standing Committee on Legal and Constitutional Affairs* exercising a vetting role over candidates for judicial appointment has also been raised as an option. Whether or not this will prove effective, however, remains questionable.[54] As noted by Lavarch, it is clear that the option of Senate review will not necessarily remedy some of the more patent defects evident in the current judicial selection system. Indeed, such a model would neither reduce the likelihood of political appointments nor promote the appointment of more solicitors or academic lawyers. Neither would it promote a better gender and ethnic balance in the Courts. More importantly, the Senate power of veto would act purely as a

51 Lavarch, above n 20 at 21. These and other options are also examined and critiqued in Nicholson, above n 24; Winterton, above n 12, and Solomon, above n 28.

52 Constitutional amendment requires the assent of a majority of voters in a majority of States and a majority overall. Only eight federal referenda have been successful since Federation in 1901.

53 Sir Anthony Mason in Cunningham, above n 14 at 13.

54 A critique of this reform option is offered by Nicholson, above n 24 at 81.

barrier against undesirable appointees, when what is required is positive action to cure the defects of the current selection system.[55]

This model has also been criticized on the basis that it would require the rather public interrogation of High Court candidates on issues that may or may not come before the Court. In Australia, there has, at least until late, been an accepted tradition of government abstaining from seeking the views of candidates for judicial appointment on issues that might face the court, or regarding such matters as Commonwealth/State conflicts. It is unlikely the Australian public would accept any institutionalized alteration of this tradition.[56] Again, recent US experience would seem to suggest that an amended appointment process along these lines is unacceptable, or at least less preferred.

Establishing a Commission to Recommend Appointees to the Attorney-General

This option involves creating an appointments commission to advise the Governor-General or the Attorney-General on suitable candidates for judicial appointment. Commissions in other common law countries either decide on who should be appointed; make recommendations as to appointment; or provide a shortlist of candidates which the Executive may not ignore, or ignore only when providing a public explanation for doing so.[57]

As outlined in the Attorney-General's 1993 *Discussion Paper*, the advantages of an appointments or advisory commission are as follows:

1. the commission and its activities are visible, lending a much-needed climate of openness to the current cloistered system;

2. public confidence in the manner and quality of judicial appointees is enhanced as the establishment of such a commission fosters judicial independence;

3. there is stronger scrutiny of judicial candidates and the backgrounds from which they are selected, particularly if the commission provides public reports about the selection process;

4. the commission protects the public against political or arbitrary appointments; and

55 Lavarch, above n 20 at 21-22.
56 Sir Anthony Mason in Cunningham, above n 14 at 14-15.
57 Skordaki, above n 8.

5. the use of such a commission is consistent with international practices and standards.[58]

As again outlined in the *Discussion Paper*, one of the possible disadvantages of a commission-type procedure would appear to be that recommendations as to potential appointees may not provide the Attorney-General with a wider choice if the commission is substantially comprised of persons already involved in the selection process.[59] In England, the Report of the British Section of the International Commission of Jurists (hereinafter 'JUSTICE') in examining this concern, suggested a commission model comprising 13 members of whom 7 would be lay members.[60]

This last point then brings us to what is perhaps the most contentious element in any commission-type model - that is, its composition. Sir Anthony Mason has suggested that if a commission were to be established, then its membership should not exceed nine members, with at least five of the nine consisting of judges and practicing lawyers. Sir Anthony suggests as possible members, two judges, a nominee of the relevant Law Council or Society, a nominee of the Council of Law Deans, one or two representatives from government and two lay persons who should be selected having regard to their capacity to represent the community.[61]

The West Australian Gender Bias Taskforce Progress Report (1997), in supporting the formation of a Judicial Appointments Commission, suggests that it consist of at least 50% women, 2 of whom should be the President of the Women Lawyers' Association and the President of the Women's Advisory Council, and community representatives with an awareness of gender bias issues.[62]

In England, the JUSTICE report suggests that a commission should consist of thirteen members, seven of whom should be lay persons. It also suggests that the Chair be a lawyer or judge. An administrator is also proposed, who would be a non-lawyer. Six professionally qualified persons would sit on the Commission, ideally comprised of three solicitors and three barristers and no more than two of the six lawyers would be judges. JUSTICE emphasizes the importance of a strong lay element on a commission. It argues that these members should not be viewed as mere community tokens, but should be expected to contribute substantially to the commission's work. To ensure that this is the case, JUSTICE recommends that all lay members have previous experience with respect to selection,

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58 Lavarch, above n 20 at 22-23. See also Virtue, above n 27 who outlines similar calls for a judicial commission-type model by former Chief Justice of Australia Sir Garfield Barwick. The advantages of a commission system are also analyzed by Nicholson, above n 24 and Winterton, above n 8.

59 Lavarch, above n 20 at 23.

60 JUSTICE, *The Judiciary in England and Wales*, Justice (1992) at 28.

61 Sir Anthony Mason in Cunningham, above n 14 at 17-18.

62 *Gender Bias Taskforce Report Progress Report*, Women's Policy Development Office and Ministry of Justice, (1997). http://www.wa.gov.au/wpdo/genintro.html. (Appendix, recommendations 26 and 27).

training, performance assessment and change management. JUSTICE also proposes that in the interest of promoting a more diverse bench, it is crucial that women and social minorities have effective representation on a commission. Finally, JUSTICE emphasizes that it is imperative to the successful operation of a Commission that it be independent of the executive and the judiciary. It is suggested that any commission be created by statute and that the Lord Chancellor choose members, after a rigorous selection process. Members would be appointed for a term of four years, with the possibility of a three year extension.[63]

The Attorney-General's *Discussion Paper* outlines the constitution of commissions established or recommended in other countries, some of which have been the focus of much of this paper, as follows:

1. In Ontario, the Judicial Appointments Advisory Committee has six lay members, one judge and two practising lawyers;

2. Israel has a committee, with three Supreme Court judges (who are elected by other judges, one of whom is President of the Court), two lawyers elected by the Bar Association, two members of the Parliament elected by the Parliament and two government Ministers, one of whom, the Minister for Justice, chairs the Committee;

3. The *Report of the New Zealand Royal Commission on the Courts* (1978) recommended the establishment of a Judicial Commission. It was suggested that the Chief Justice would chair the Commission. The other membership would be comprised of a Supreme Court Judge, the Chief District Court Judge, the Solicitor-General, the Secretary for Justice and two members nominated by the New Zealand Law Society and appointed by the Governor-General.

4. The Law Society of Great Britain, in the Discussion Paper *Judicial Appointments*, recommended that an advisory commission should consist of four groups, none of which should be dominant. The groups would be: serving members of the judiciary; legal academics and members of the two branches of the legal profession; lay persons with expertise in recruitment and training at senior levels; and lay persons who would represent the community as a whole.[64]

Consultation Less Formalized than a Judicial Appointments Commission.

The Attorney-General's *Discussion Paper* suggests one further option for reform; ie, a process of consultation more formalized than the

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63 JUSTICE, above n 60 at 28.

64 Lavarch, above n 20 at 24-25. See also Skordaki, above n 8. Apart from Canada and the United States, New Zealand has been most vocal in its support for a commission type system. See, eg, Harris B, 'Appointments to the Bench: The Role of a Judicial Services Commission' (1993) 15 Adel LR 191 and Hon Paul East, 'A Judicial Commission' (June 1995) New Zealand Law Journal 189.

present process, but less formalized than the establishment of a judicial appointments commission. Specifically, the paper suggests that the present minimalist consultation process, requiring consultation only with State Attorneys-General about High Court appointments, be broadened. Such consultation models could range from adding a much needed degree of visibility to the current arrangements, to establishing a formal consultative group whose duties would include providing advice on judicial appointments. The paper also suggests that pertinent considerations under such a model would be: who should be consulted, and the degree of consultation with the States.[65]

The paper suggests consultation with the following persons to seek nominations of possible appointees:

1. The Chief Justice of the court of which the appointment is to be made;

2. Judges of other courts and retired judges;

3. Professional organizations like the Law Council of Australia and the Law Societies and Bar Associations;
4. Academic lawyers;

5. Politicians, both serving and retired;

6. Members of the Standing Committee of Attorneys-General;

7. Lay persons who understand the judicial function, the workings of the Court, or who would have some knowledge of possible appointees' achievements;

8. Legal practitioners who may not be representatives of professional organizations;

9. Community representatives;

10. Aboriginal and Torres Strait Islander and ethnic representatives; and

11. Media representatives.[66]

It is further suggested that appointees be chosen either as individuals or representatives of interest groups.[67] Sir Anthony Mason suggests that there is an advantage in limiting the number of persons who are required to be consulted, in the interests of preserving confidentiality, which is crucial

65 Lavarch, above n 20 at 27.
66 Ibid. See also Nicholson, above n 24 at 45.
67 Lavarch, above n 20 at 26-27.

to the success of the consultative process, for in the absence of confidentiality there is scant prospect of obtaining a candid opinion. Sir Anthony also considers it essential that professional and academic bodies be vigilant as to identifying suitable appointees who are willing to accept appointment to the High Court. He argues that this may assist in the identification of suitable appointees who are not barristers. He further suggests that it might be constructive for those persons interested in being appointed to express their interest to the Attorney-General or his/her department.[68]

Legal academic Pip Nicholson suggests that a consultative committee should be established to consider nominees whom the Attorney-General wishes to appoint to the High Court. He believes that the committee should be comprised of between eight and ten members, of which one member only would be a judge, the Chief Justice of the High Court. He further favours the inclusion of a political scientist or sociologist on the committee, as well as a number of both men and women, non-indigenous and indigenous Australians and persons from both English and non-English speaking backgrounds. Like Sir Anthony Mason, he is also in favour of an Attorney-General employee being identified as someone to whom a person can put forward a nominee to be considered by the committee when a High Court vacancy arises.[69]

Regardless of whether one adopts a commission style procedure or mere consultative procedure it is clear that consultation with the States is considered desirable in light of the disproportionate number of High Court judges who are selected from the New South Wales and Victorian Bars. The NSW Select Committee of the Legislative Assembly Report on the Appointment of Judges to the High Court recommended that an advisory commission on High Court appointments be comprised of the members of the Standing Committee of Attorneys-General.[70] The options for consultation with the States on High Court appointments are to:

1. Retain the current minimal level of consultation required by section 6 of the *High Court of Australia Act*; or

2. Provide for consultation with the States and Territories by including State and Territory Attorneys-General on an advisory commission or consultative body.[71]

What is clear from the above and from a review of procedures adopted or proposed in other nations is that there is considerable support for a process of appointment that is more inclusive, less secretive, more open. It is clear that many of the reforms canvassed in this paper can, if adopted,

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68 Sir Anthony Mason in Cunningham, above. n 14 at 21.
69 Nicholson, above n 24 at 85.
70 Lavarch, above n 20 at 28.
71 Ibid at 27-28.

improve both recruiting and screening of candidates for judicial appointment. Nominations could be sought from a wider variety of sources than in the past. A nominating commission, for example, could be more thorough in assessing the qualifications of candidates than the assistant to the Minister of Justice is presently able to be. Furthermore, the inclusion of non-lawyers would add popular legitimacy to the process and might strengthen the body's capacity for assessing the personal, non-legal qualifications of the candidates.

Composition: Who Should Be Appointed?

As this paper has made clear, the majority of reform proposals advanced in other nations and indeed even in our own tends only to address the appointment process or the structure of those bodies designed to appoint. Very few tend to address the important issue of the type of values we expect or want in these appointees. While expanding the composition and diversity of the people who ultimately appoint will go far in improving the representative nature of the judicial system it is also clear that in order to ensure that this representation is as complete and as effective as possible, we also need to address those qualities and elements of professionalism we wish to see reflected in Australian judges so that any new system of appointment takes these into account when reviewing nominees.

To assist us in this regard, it is again useful to briefly look to overseas experience. In the United States, for example, Connecticut's Judicial Evaluation Program has suggested one set of criteria for just such a review. It has divided professional qualifications into three categories: demeanour, legal ability and judicial management skills.[72] The first criterion includes temperament, patience, attentiveness, and a lack of bias; under the second, knowledge and understanding of the law, completeness of his or her decisions, correctness of his or her jury charges, analytical ability, and effectiveness in settlement negotiations are required; finally, under the third heading is included an ability to act decisively in incidents that might threaten a fair trial, the ability to keep proceedings moving and orderly, skill in assisting parties in reaching agreements, and the capacity to explain trial procedures to a jury when necessary.[73] While some of these criteria could apply only to the evaluation of sitting judges, some of them would be relevant in evaluating the qualifications of any potential nominee to judicial office.

The Canadian Bar Association (CBA) in its 1985 Annual Report also recommended a number of criteria which it felt should be addressed before appointing an individual to the Bench. Recommendation 24 of the Report, for example, states:

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72 Sponzo M, 'Independence v Accountability: Connecticut's Judicial Evaluation Program' (1987) 26 Judges' Journal 12 at 14.

73 Ibid.

Criteria for Appointment

24. After discussing the basic qualifications and character requirements for judicial appointment with a large number of knowledgeable people that are, or have been, involved in appointing judges in Canada, the committee recommends the following list of essential qualities for men and women being considered for judicial appointment:

High moral character
Human qualities: sympathy, generosity, charity, patience
Experience in the law
Intellectual and judgmental ability
Good health and good work habits
Bilingualism, if required by the nature of the post.

In the present climate of public opinion about judicial appointments, and because of the appearance of political influence, it is inappropriate for cabinet ministers to be appointed directly to the bench. However, it would be unfair to exclude ex-ministers from consideration indefinitely. The committee therefore recommends that no such candidate be considered for appointment for at least two years after resigning from cabinet.[74]

The CBA Report also recommended the creation of a national centre for judicial training and education for both federal and provincial judges. While these are worthwhile recommendations, it is probably also wise to examine other factors, including an appointee's judicial philosophy, or his or her ability to avoid becoming involved in controversies outside the requirements of his or her office. With respect to the latter, perhaps it is time we recognized, as does Jeremy Webber, that there is scope for judicial action outside pure adjudication which does not undermine the judges' impartiality from politics. Webber suggests that a judge cannot be considered to be abusing his or her authority when fundamental matters, such as the administration of justice, have become questions for debate in such a way that the very nature of the judicial office itself justifies, or possibly requires, comment on the part of a judge.[75] Others have made similar suggestions by stating that it is simply inaccurate to suggest that if a judge interferes in political decision making he or she is committing an act which is as threatening to constitutional stability as when a politician interferes in judicial decision-making.[76]

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74 *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada*, The Canadian Bar Foundation (1985) at 69.
75 Webber, above, n 32 at 399.
76 Felsky M, 'The Berger Affair and the Independence of the Judiciary' (1984) 42 U Toronto Fac L Rev 118 at 121.

In Australia, the Attorney-General's *Discussion Paper on Judicial Appointments*[77] and the West Australian *Chief Justice's Taskforce on Gender Bias*[78] are equally in agreement that all judicial appointments should be made on merit. It is important to note, however, that 'merit doesn't mean everyone being a clone of existing judges'[79] and the Taskforce has noted that care should be taken to ensure that the standard agreed upon does not simply ensure the continued exclusion of those historically denied a role. In other words, in assessing merit, we must not view it as something devoid of any social context.[80]

The Attorney-General's *Discussion Paper* comments on the difficulty of assessing merit, whilst providing a list of criteria relevant to the selection of judges. The initial criteria suggested by the *Discussion Paper* outline what might broadly be referred to as preferable legal skills: knowledge of the law, professional ability, intellectual capacity and experience, to name but a few. Persons believed to posses such skills are barristers, solicitors, senior legal academics, government lawyers and lawyers already serving as magistrates or tribunal members.[81] The *Chief Justice's Taskforce* expresses concern as to the possible occurrence of bias in the assessment of legal skills, highlighting that studies in other jurisdictions have revealed that the same task is differently evaluated depending on whether a man or a woman carries it out. It notes, for example, anecdotal evidence of women lawyers being considered by their male colleagues as younger and less experienced than they are. The *Taskforce* concludes that in light of the likelihood of the occurrence of bias in the assessment of legal skills, it is imperative that there be a wider consultation within the selection process.[82]

Personal qualities deemed necessary, or at least desirable, in a judge by both the Attorney-General's *Discussion Paper*[83] and the *Chief Justice's Taskforce*[84] include integrity, high moral character, sympathy, charity, patience, even temper, gender awareness and cultural sensitivity, and good manners.[85] Again, both reports acknowledge that these qualities are subjective and emphasize the importance of the role of the persons evaluating these criteria. Sir Anthony Mason adds to this list qualities such as industry, impartiality, and a strong sense of fairness and willingness to listen to and understand the views of others. He also suggests as a desirable, although not essential, quality 'an ability to communicate to the legal community and the public about the law and the work of the courts.'[86]

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77 Lavarch, above n 20 at 5.
78 *Report of the Chief Justice's Taskforce*, above n 21 .
79 Lavarch M, 'The Appointment of Judges' (1994) 2(6) Australian Law Librarian 331 at 335.
80 On this point, see Thornton M, 'Affirmative Action, Merit and the Liberal State' (1985) 2(2) Australian Journal of Law and Society 82.
81 Lavarch, above n 20 at 5.
82 *Chief Justice's Taskforce*, above n 21 at 94.
83 Lavarch, above n 20 at 5
84 *Chief Justice's Taskforce*, above n 21 at 94.
85 See also Solomon, above n 28 at 43.
86 Sir Anthony Mason, in Cunningham, above n 14 at 10.

The Attorney-General's *Discussion Paper* considers advocacy skills to be a further criterion relevant to the selection of judges. 'Advocacy skills', according to the *Discussion Paper* can be broken down into a number of skills, among the more important of which are oral communication skills, forensic ability, knowledge of the rules of evidence and court practice and procedure, analytical abilities, and the ability to appreciate and contextualise novel arguments.[87] The *Chief Justice's Taskforce*, highlighting the importance of a judicial appreciation of law in context, adds to such desirable skills 'an understanding of the way in which cases are framed and their impact on the consumers of the legal system.'[88]

The Attorney-General's *Discussion Paper* enumerates a number of 'life skills' which it deems desirable qualities for all judicial appointees: practicality and common sense, vision, an ability to uphold the Rule of Law and act in an independent manner, strong administrative skills, efficiency, and political experience of judicial candidates. Professor Nygh is particularly supportive of the eligibility of politicians for appointment to the High Court:

> A constitutional court is a political court and exercises political functions. As such, as the experience of the United States and West Germany has shown, the participation by persons with political experience in the work of the court is invaluable and, in my opinion, essential…What a constitutional court requires is both legal knowledge and statesmanship.[89]

The *Chief Justice's Taskforce* adds to this list, endorsing Meagher's opinion, that independence from the executive is a crucial characteristic for any judge.[90]

The Attorney-General's *Discussion Paper* suggests that whilst appointments from the Bar to the High Court should continue to be made, appointments from other branches of the legal profession should also be considered.[91] The paper explores the commonly held assumption that advocacy skills, considered to be skills crucial to be a successful barrister, are also those needed to be a successful judge. It emphasises that advocacy skills are not the exclusive preserve of advocates, asserting that such skills are acquired by, and are as relevant to, the work of solicitors, academic lawyers and government lawyers. The British JUSTICE report asserts that the quality of justice can be improved through a more diverse bench. The report emphasises that an academic lawyer would be as suited to the judicial

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87 Lavarch, above n 20 at 6.

88 *Chief Justice's Taskforce*, above n 21 at 94.

89 Nygh PE, *Report from the Select Committee of the NSW Legislative Assembly upon the Appointment of Judges to the High Court of Australia* (1975) at 56, cited in Lavarch, above n 20 at 11.

90 D.R. Meagher QC, 'Appointment of Judges', Journal of Judicial Administration, February 1993, cited in the *Chief Justice's Taskforce*, above n 21 at 95.

91 Lavarch, above n 20 at 16.

role as would a barrister, given that her work would involve an independence of mind.[92]

The Attorney-General's *Discussion Paper* also calls for more active judicial training and asks that we not merely rely on previous litigation experience as the only criterion for judicial expertise.[93] It appears that this is particularly important in so far as ensuring social awareness and sensitivity is concerned. While some judges are in favour of judicial training, their willingness to undergo such training extends only to training courses that they would formulate and oversee. For example, former Chief Justice Brennan, whilst welcoming the idea of 'social context education', perceives it to be crucial that the ultimate control of the design of these programmes remain with the Judiciary. The former Chief Justice is equally opposed to input either from the Executive Government or non-governmental interest groups in judicial training programmes. He deems it:

> inappropriate to permit non-governmental interest groups to control the design of judicial educational programmes touching their own special interests, especially when those interest groups are likely to appear in litigation or to stimulate litigation to promote their agenda.[94]

While there is something to be said for avoiding interest group manipulation, one must also acknowledge that the current appointment process has created a court that continues to be predominantly comprised of white, male ex-barristers and this is cause for concern in a country as culturally diverse and committed to gender equality as Australia. Concern must also be had regarding the possibility that the views expressed by such a homogenous body may not be as impartial as one might expect. Indeed, this has led at least one judicial taskforce to call for the immediate implementation of gender awareness and affirmative action programmes across Australia in an attempt to combat what it sees as systemic judicial inequalities on the basis of gender and race.[95]

With respect to gender bias, perhaps Madame Justice Wilson of the Canadian Supreme Court best sums up the need to appoint more women to the bench when she writes:

> Taking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective... In some other areas of the law, however, a distinctly male perspective is clearly discernible. It has

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92 JUSTICE, above n 60 at 17. See also Pengilley W, 'Solicitors on the Bench: Questioning Traditional Criteria for Judicial Appointments' (1987) Law Society Journal, 34 at 36-37, on the suitability of solicitors, academics and those from other backgrounds for judicial appointment.

93 Lavarch, above n 20 at 17-19.

94 Former Chief Justice Gerard Brennan, 'The State Of The Judicature', Opening Of 30th Australian Legal Convention, Melbourne, 19 September 1997. http://www.hcourt.gov.au/judicat.htm.

95 *Chief Justice's Taskforce*, above. n 21.

> resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself.[96]

In addition to appointing more women to the bench as but one means of eradicating systemic gender biases and prejudices, Madame Justice Wilson, like many other judges and academics, encourages the approach adopted in the United States to counteract gender bias through nation-wide educational programs for judges and the creation of judicial task forces to investigate sexism on the bench. She also endorses the Canadian Judicial Council's initiative to include gender issues in its summer seminars for judges. She recognizes, however, that this is only the first step. Her Honour further advises that one way to eliminate sexism in the court system is to appoint more women judges and more courteous and sensitive male judges. Although she does not offer any conclusions as to how we should go about getting more women and racial minorities on the Bench, she does make clear the urgency to rectify an unsuitable situation. Perhaps we can implement some of the recommendations of the West Australian *Chief Justice's Task Force on Gender Bias* which concludes that:

a) the current 'merit' tests do not ensure objective assessment of a person's ability. Assumptions about gender in the concept of merit need to be removed. There is no 'perfect judge' and competence is a composite quality. The present selection criteria have not and will not lead to an increase in the appointment of women judges or magistrates, despite an increase in the number of women lawyers;

b) there should be clearer criteria governing the appointment of the judiciary, magistracy and members of tribunals;

c) there should be a formal and known selection procedure designed to ensure broader consultation where standard criteria for selection are set and published and the identity of the selectors and process of selection is public;

d) there should be consideration given to more flexible working arrangements in the judiciary and magistracy;

e) there needs to be urgent and continuing education of Judges and members of the legal profession in the area of gender bias;

f) there needs to be a period of affirmative action in appointments to the bench in order to address the issues raised in this submission.[97]

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96 Madame Justice Wilson, above n 3 at 515. See also Graycar and Morgan, *'The Hidden Gender of Law'* (Annandale NSW: Federation Press, 1990) at 412-431 and the many authors noted therein on the varied perspectives that the appointment of women to the judiciary can bring to bear.

97 *Chief Justice's Taskforce*, above n 21 at 102.

While we might want to examine the option of implementing some of the recommendations outlined above, it is clear that there are no easy answers. What we can say, however, as again stated by Madame Justice Wilson, is that:

> Whether the criticism of the justice system comes to us through Royal Commissions, through the media or just through our own personal friends, we cannot escape the conclusion that in some respects our existing system of justice has been found wanting. And the time to do something about it is now.[98]

Conclusion

It is likely that debates centering on the judicial role will continue to be heard throughout Australia. For many, the present appointment process for state and federal judges is unacceptable, whether it be because the process is too secretive, under inclusive or too centralised. Whether or not reform will in fact occur remains to be seen. Should calls for change be taken seriously, however, other nations provide us with a plethora of reform options, some of which may do much to ensure that our own judiciary is as fair, representative and accountable as is possible. By examining the reform proposals presently being articulated in Australia and by contrasting them with those structures already in place or suggested in other nations, it is clear that the rationale and enthusiasm for change now evident throughout the country can, if we choose to acknowledge it, result in a judicial system which is indeed representative of all Australians.

98 Madame Justice Wilson, above n 3 at 22.