



# RESEARCH NOTE

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## Appointments to the High Court: the Process

The processes for selecting High Court judges have been the subject of some debate over the years. In *Judges of the High Court*, Graham Fricke said that the 'processes of appointment (are) relatively mysterious.' Justice Michael Kirby, in the 1983 Boyer Lectures, stated that the 'procedures taken leading to judicial appointment tend to be clouded in secrecy and mystery.' Similarly, the Attorney-General, Michael Lavarch, is reported in the *Australian* (28 September 1993) as saying that 'judges should not be appointed in an atmosphere of intrigue and conjecture.' Dr Colin Howard, writing in the *Australian* (24 October 1994), said that appointments to the High Court are made in secret and 'the first and last the public knows about it is when an appointment is announced.' Indeed, Justice Kirby argues:

A bookmaker's ticket, based on gossip around counsels' chambers, is the most the community presently receives as a pre-appointment discussion of judicial qualities and likely judicial attitudes.

This issue has again come to the fore pending the forthcoming retirement of the Chief Justice of the High Court, Sir Anthony Mason, on 20 April 1995. For example, Associate Professor Geoff Lindell of Melbourne University has stated (*Australian*, 11 March 1995) that 'the more the court

deals with basic rights and values on which the community might be divided, the more pressure there will be for more scrutiny of nominees to the bench.'

### The Constitution

The Constitution says little about the selection and appointment of members of the High Court. It does, however, provide that:

- the High Court shall consist of a Chief Justice
- there shall be at least two other Justices (the High Court currently consists of the Chief Justice and six Justices)
- appointments are made by the Governor-General in Council
- appointees must be less than seventy years of age.

### The Selection Process

Section 6 of the *High Court of Australia Act 1979* (the Act) requires the Commonwealth Attorney-General to consult with the Attorneys-General of the States before an appointment to the High Court is made.

The Commonwealth Attorney-General is obliged merely to consult; he or she may appoint someone not nominated by the States.

Section 7 of the Act provides that in order to be appointed a Justice of the High Court, a candidate must have served as a Judge of a court created by Parliament or of a Court created by a State or Ter-

- ensure no artificial barriers prevent the consideration of

ritory or must have been enrolled as a barrister or solicitor for a period of not less than five years.

### Suggestions for Reform

A variety of reform proposals have been put forward. For example, the Leader of the National Party, Mr Tim Fisher, is reported (*The Age*, 16 November 1994) as supporting some form of Parliamentary confirmation hearing.

Given the role of the High Court in determining the limits between Commonwealth and State power, it has been suggested that the States should have a greater role in appointments to the Court, including alternating appointments between the Commonwealth and the States. In its report, the *Australian Judicial System* (1987), the Advisory Committee to the Constitutional Committee rejected this approach, arguing that appointments should remain with the Commonwealth following consultation with the States.

In his 1993 discussion paper, *Judicial Appointments*, the Attorney-General, Michael Lavarch, said that the aim of the judicial appointment process should be to:

- make the selection process visible, and hence increase public confidence in the judiciary
- ensure the best possible appointees  
women and members of other groups on the basis of merit.

### **The Current High Court**

	<b>Appointed</b>	<b>Appointed By</b>	<b>Must Retire By</b>
Mason CJ	1972 (CJ: 1987)	Coalition	20 April 1995
Brennan J	1981	Coalition	1998
Deane J	1982	Coalition	2001
Dawson J	1982	Coalition	2003
Toohey J	1987	Labor	2000
Gaudron J	1987	Labor	2013
McHugh J	1989	Labor	2005

Following community disquiet over comments made by a member of the South Australian Supreme Court, the Senate Legal and Constitutional Affairs Committee, in May 1994, recommended amongst other things that:

- selection criteria be established and made public to assist in evaluating suitable candidates
- the Commonwealth Attorney-General establish a committee, including judicial, legal and community representatives, to advise on prospective appointees to Commonwealth courts.

In his address to the National Conference of the Australian Institute of Judicial Administration late last year, Mr Lavarch noted the importance of broadening the pool of potential appoint-

ees, as well as the need to carefully develop selection criteria.

Mr Lavarch suggested four methods by which candidates for the judiciary may be found: headhunting; establishment of a specialist body; advertising; and the maintenance of a register of expressions of interest. These methods are not mutually exclusive.

#### ***Headhunting***

Mr Lavarch considered the current system akin to headhunting. He considered this a useful tool if used with other appropriate methods.

#### ***Advertising***

This would ensure suitable candidates are aware of vacancies and allow them to nominate an interest in appointment.

#### ***Register of Expressions of Interest***

A register of expressions of interest would widen the pool of likely candidates the Government knows are interested in appointment.

### ***Establishment of a Specialist Body***

The establishment of a Judicial Appointments Committee has been raised quite frequently. For example, in 1977, Sir Garfield Barwick suggested the utilisation of such an advisory body. A Judicial Appointments Committee could take a range of forms. The Committee could advertise vacancies and interview possible candidates. Justice Michael Kirby has said that the establishment of a Judicial Commission would be unfortunate in that it would institutionalise orthodoxy and would be 'quite the wrong way to procure a Bench more reflective of the diversity of our country'.

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*Views expressed in this Research Note are those of the author and do not necessarily reflect those of the Parliamentary Research Service and are not to be attributed to the Department of the Parliamentary Library. Research Notes provide concise analytical briefings on issues of interest to Senators and Members. As such they may not canvass all of the key issues.*

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