



**The Law Society
of New South Wales**

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Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2601

By email: <https://senate.aph.gov.au/submissions>

Dear Mr Hallahan

Re: Senate Inquiry into Australia's Judicial System and the Role of Judges

The Law Society of NSW is grateful for the opportunity to comment on the Inquiry into Australia's Judicial System and the Role of Judges.

The Criminal Law Committee and the Litigation Law and Practice Committee Committees of the Law Society of NSW have considered the terms of reference of the Inquiry and have provided brief comments.

I enclose the comments made by the Committees for your consideration.

Yours sincerely

Joseph Catanzariti
President



The Law Society of
New South Wales is a
constituent body of the
Law Council
of Australia



Senate Legal and Constitutional Affairs Committee

Inquiry into Australia's Judicial System and the Role of Judges

Comments by the Criminal Law Committee and Litigation Law and Practice Committee of the Law Society of NSW

The Law Society of NSW has an approved policy for selection of the Judiciary, applicable both to the Commonwealth and NSW. Merit as the fundamental criterion for appointment is emphasised. The qualities which constitute merit in this context are: legal skills and personal qualities. The Policy defines the legal skills and personal qualities in detail. Emphasis is also given to gender balance when considering appointments. A copy of the Policy is attached for your information.

The Law Society supports the continued existence of an informal process, but believes that it must wider and on a more structured basis which should include the Law Society and the Bar Association. The creation of an official selection body is opposed for the reason that many eminently suitable persons would be reluctant to go through a public process of selection.

Importantly, it is stressed that the undue prominence given to selecting the judiciary from the Bar should be changed. The skills and qualities of the other branches of the legal profession have been undervalued and this imbalance must be rectified. Solicitors and academic lawyers must be included in the selection process.

There has been no determination by the Council of the Law Society on the method of termination of judicial appointment, but the present position that contained in section 72 of the Australian Constitution would be the acceptable position to ensure the independence of the judiciary.

The NSW Judicial Commission has provided a suitable complaints handling system for the judiciary. A similar system federally would be desirable and the Law Society provided a submission supporting the creation of a Federal Judicial Commission in July 2003. Whether such a Commission is ultra vires Chapter Three of the Australian Constitution is a debateable issue.

In New South Wales there are protocols on how to deal with complaints about timeliness. These protocols provide timelines for judicial decisions and these generally are three months from the conclusion of the hearing. Any decision outstanding over the three month period would be considered outside the guidelines and a process for dealing with delays has been provided. This system has operated reasonably well in NSW.

Law Society of New South Wales

Selection Process for the Judiciary

Policy Document

(Adopted by Council at its meetings on 26 March 1997 and, as amended, on 19 June 2008)

The Australian Judiciary, both State and Federal, has maintained the highest traditions of independence and fearlessness. Any new selection process must ensure that these fundamentals are not diluted. Independence implies freedom from sectional, political and other affiliations.

One of the frequent criticisms levelled at the judiciary is that it is "unrepresentative" of the community. The Law Society believes that the fundamental criterion for selection must be merit and merit alone. The best candidate must be chosen no matter who he or she is and where he or she is from. No other consideration should be allowed to interfere with this paramount criterion if the Australian judiciary is to continue to maintain its eminence.

The following represents the Law Society's position on the selection of judges, State and Federal.

CRITERIA FOR SELECTION

Merit

Merit is the fundamental criterion and the only means of ensuring that the best candidate is selected. Gender, political leanings or any other consideration should not influence selections.

The qualities which constitute merit include particularly:-

- legal skills;
- personal qualities

The principles of equal opportunity should be borne in mind when selecting between two candidates who are in all respects of equal merit, e.g. if the candidates are of different gender, the female candidate should be chosen.

Legal Skills

Legal skills required include:

- thorough knowledge of the law and long experience in the practice of law;
- oral and written skills;
- thorough understanding of the rule of law, the role of the courts and our system of government;

- ability to digest large quantities of information and identify the legal issues arising from them;
- thorough knowledge of the law of evidence and procedure;
- litigation experience, including advocacy experience, though the latter should not be given primacy.

Personal Qualities

Personal qualities required include:-

- integrity;
- independence;
- impartiality;
- self-discipline;
- capability to uphold the rule of law and act independently;
- organisational and management skills;
- ability to reach verdict and judgment in a timely manner;
- ability to discharge his/her duties with courtesy.

The Selection Process

At the present time most judicial appointments come from a single branch of the legal profession, the Bar. Traditionally, advocacy skills have been regarded as singularly the most important attribute in judicial appointment. The Law Society believes it is merely one of a range of skills and should not be given undue prominence. The selection process must cover all lawyers, barristers, solicitors and academic lawyers, providing they have the requisite qualifications. The skills and qualities of the other branches of the legal profession have been undervalued in the appointment of judges and this imbalance should be corrected. The sole criterion is merit; the best candidate for the position, irrespective of whether the candidate is a barrister, solicitor or academic lawyer, should be appointed.

The Law Society supports the continued existence of an informal selection process. However, it believes that the consultation must be wider and on a more formal basis and must include consultation with the NSW Bar Association and the Law Society of NSW. The establishment of an official body or committee for the selection of judges is not supported. Many eminently suitable candidates would be reluctant to go through a public process of selection. However, there can be no objection to calling for expressions of interest on a confidential basis.

For example, where an appointment to the High Court of Australia is to be made, apart from the statutory obligation to consult with the States' Attorneys General, there should be wider consultation with the judiciary, leaders of the legal profession and former Chief Justices.
