

APPENDIX 6

LAW SOCIETY OF NEW SOUTH WALES – EXTRACT FROM SUBMISSION 7

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.

