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Submission to Australian Law Reform Commission
Review of Judicial Impartiality

I take this opportunity to make the following submission in response to the ALRC's *Judicial Impartiality: Consultation Paper* in my capacity as the Executive Director of The Samuel Griffith Society.

In particular, the Society wishes to raise the following objections to Consultation Proposals 14 ('Transparent process for judicial appointments') and 15 ('Reporting on judicial diversity').

Competence should be the only criterion upon which judicial appointments are made

The only criterion upon which judicial appointments should be made in Australia is the capacity of the prospective appointee to perform the responsibilities of judicial office in a highly competent manner. In making judicial appointments, the government should be concerned with identifying suitable candidates who possess the requisite legal qualification, skills, experience and expertise. Judicial appointments should not be made on the basis of any other factors.

In particular, the increasing complexity of the range of duties performed by judges today demands a very specific skillset. Not only are prospective judicial appointees required to be thoroughly well-versed in the law, they are also now expected to play a highly active role in case management in order to ensure the ongoing efficiency of the court system.

The rigorous nature of the judge's role in today's courtroom is best suited to experienced legal practitioners with demonstrated, sustained practical experience and proven diligence.[1] The reality is that these practitioners, drawn predominantly from the Bar, are best-equipped and most likely to make a seamless transition to judicial office. The exigencies of modern litigation practices dictate that the requirement that prospective judicial appointees possess this high level of competence cannot be subordinated by political considerations, particularly in relation to innate characteristics such as gender and ethnicity.

Furthermore, the diverse requirements of the role of the judge in today's courts cannot easily be distilled into a terse list of job criteria upon which a public application process might be based.[2] Fundamentally, unlike many other vocations, the judicial function involves immense civic responsibility. This great responsibility warrants a far more comprehensive and holistic assessment of competence than traditional expression of interest processes allow.

The proper role of a judge is not comparable to that of a political representative

The proper role of the judge is to impartially administer justice according to the law. Judges are not public policymakers, nor ought they to be appointed with any reference to characteristics that might be desirable in legislators or political representatives.

While it may be true that there is a value in elected parliamentarians reflecting the diversity of the communities whom they serve, the same simply cannot be said of judges. Firstly, the judicature was never intended to become a quasi-legislature vested with political decision-making power. Instead, judges are called upon merely to interpret and apply the law as enacted by Parliament and in accordance with the Constitution. As such, the judiciary ought not to be subject to improper political interference or pressure.

Secondly, the courts are distinguished as a unique civic institution in that judicial decisionmakers are required to preside and render judgment objectively, impartially and dispassionately over complex and often politically contentious cases in which individuals' liberty and livelihoods may be at stake. Because the administration of justice demands that the parties to any legal dispute receive the benefit of sound application of the judicial method, judges cannot be guided by personal experience, identity politics or individual notions of 'social justice.'[3] Any appearance that a judge may have decided a matter on such a basis

[1] Justice Michael Kirby, 'Modes of appointment and training of judges — a common law perspective' (Speech, ICJ/CIJL and CAJ Seminar, 8 June 1999) 554.
[2] Chief Justice James Spigelman, 'Judicial Appointments and Judicial Independence' (Speech, Rule of Law Conference, 31 August 2007) 16-17; The Australasian Institute of Judicial Administration Incorporated, *Suggested Criteria for Judicial Appointments* (September 2015).
[3] Justice Michael Kirby (n 1) 541.

undermines the rule of law. Therefore, a judge's personal background should be wholly irrelevant to their exercise of the judicial function.

Consequently, any concern regarding a 'democratic deficit' or 'counter-majoritarian difficulty' with the proper exercise of judicial power by judges risks confusing the role of the judiciary with that of the political branches of government. Indeed, provided that the judiciary adheres to the constitutional separation of powers and the principle of parliamentary supremacy, no such issue need arise.

Instead, parliamentary elections are the appropriate means by which the community might seek to hold governments accountable for any perceived deficiencies in the law and its application. This is certainly what was envisaged by the framers of the Constitution when assigning the responsibility for the appointment of judges to the executive government under section 72. Doing so was not only in keeping with the principles of representative and responsible government, but also acts as a safeguard against the politicisation of the judiciary.

The current system of judicial appointments serves our system exceptionally well

The great strength of the current system of federal judicial appointments is that it allows for broad, yet discreet, consultation with a wide range of relevant stakeholders. This process of 'quiet consultation' ensures that the government can comprehensively consider the largest pool of potential candidates, while preserving the privacy and reputations of all involved.

This discretion ensures that suitable candidates are more able to participate, without risk of unnecessary personal or professional embarrassment. Any move to a public expression of interest process, such as that suggested by Consultation Proposal 14, would risk jeopardising the greatest strength of the existing appointments process.

Furthermore, the current system has also ensured that judicial appointments in Australia have remained overwhelmingly apolitical. In contrast, systems involving higher levels of public scrutiny of prospective judicial appointees, such as the United States, have become increasingly more politicised. As articulated by the Honourable Chief Justice Marilyn Warren AC:

> 'Transparency for the sake of satisfying modern pursuit of accessibility of process will make the process more open and public but political and, inevitably, controversial.'[4]

[4] Chief Justice Marilyn Warren, 'Judicial Appointments, Judicial Behaviour and Complaints Mechanisms' (Speech, National Judicial College of Australia Conference: Confidence in the Courts, 10 February 2007) 13-14.

Finally, the current system of appointments has already achieved a high degree of success in producing a judiciary that reflects the diversity of the Australian community – without the need for the adoption of formal affirmative action policies. For instance, women now make up 44 percent of judges on the Federal Circuit Court, 54 percent on the Family Court, 27 percent on the Federal Court, and 43 percent on the High Court. These figures do not suggest that there is a strong case for radical change, and there appears to be little evidence to suggest any inadequacy in the process of consultation currently conducted by the Attorney-General.

In contrast, experiments with reforms similar to those proposed by the ALRC in comparable jurisdictions have been met with mixed results. For instance, the adoption of a Judicial Appointments Committee in the United Kingdom appears to have produced very few measurable improvements in either the competency or diversity of the judiciary. To further illustrate the apparent inefficacy of these reforms, women make up only 17 percent of judges on the UK's Supreme Court, 21 percent on the Court of Appeal, and 28 percent of High Court judges.

Conclusion

The Samuel Griffith Society does not support the proposed reforms outlined in Consultation Proposals 14 and 15.

Instead, the Society believes that the current system of judicial appointments operates incredibly effectively and should be preserved. The Society believes that the only criterion upon which judicial appointments ought to be made is competence, and that there is insufficient evidence of a public perception that the judiciary is unbalanced or unable to perform its function. Indeed, as Consultation Paper JI3 acknowledges, 'applications for disqualification are rare' and very few succeed.

The Society makes no submission in respect of the 23 other consultation questions and proposals at this time.

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