

**CHIEF JUSTICE'S TASK FORCE ON GENDER BIAS IN WESTERN
AUSTRALIA**

SUB COMMITTEE ON THE APPOINTMENT OF THE JUDICIARY

RECOMMENDATIONS

1. That a Judicial Appointments Commission be established by legislation to which nominations or applications for judicial and magisterial positions are made.
2. That the Commission 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 some community representatives who are aware of gender bias issues.
3. That the Commission be required to consult widely to obtain comments on prospective judges and magistrates. Consultation should be sought with the following:
 - (a) Women Lawyers Association;
 - (b) Law Society;
 - (c) the Bar;
 - (d) head of jurisdiction;
 - (e) Solicitor General;
 - (f) community representatives.
4. That the Governor in Council be required by legislation to choose judges and magistrates from candidates recommended to the Attorney-General by the Commission.
5. That priority be given to appointments of women to the judiciary and magistracy and urgent priority be given to the appointment of women judges to the Supreme Court and the Family Court of Western Australia.
6. That selection of women for judicial appointment include legally qualified women in the following categories:
 - (a) practitioners;
 - (b) women in academic positions;

- (c) women already appointed as tribunal members, registrars, magistrates and District Court judges.
7. That a target be set seeking a certain number of women to be appointed as judges and magistrates within a certain time.
 8. Where a man and a woman are considered equally qualified preference be given to the woman until there is a significant representation of women on the bench.
 9. That there be a set of criteria to be considered in the appointment of judges and magistrates to include not only relevant legal skills but also personal qualities and experience - either within or outside practice of law which will be relevant for those positions (including experience in dealing with human relationships e.g. raising children, community involvement, academia);
 10. That part-time judicial and magisterial positions be available, together with -
 - (a) flexible working hours or holidays; and
 - (b) flexible and appropriate pro-rata arrangements relating to the non-contributory pension.
 11. That judges and magistrates upon appointment be immediately provided with educational materials in relation to their functions including materials relating to the avoidance of gender bias.
 12. That a program be established for current and prospective judges and magistrates to receive continuing education in gender issues.
 13. That education of lawyers in gender bias should be -
 - (a) included in the professional conduct rules; and
 - (b) a compulsory prerequisite to admission/practice certificates.

CHIEF JUSTICE'S TASK FORCE ON GENDER BIAS IN WESTERN AUSTRALIA

SUB COMMITTEE ON THE APPOINTMENT OF THE JUDICIARY

14. As Professor Kathleen E. Mahoney stated in a lecture at the Supreme Court of Western Australia on 14 August 1992 in a talk entitled "Gender Bias in Judicial Decisions"

"Gender bias falls in the systemic category. For the most part, it is a form of subtle but potent discrimination. To begin to deal with it, one must realise that every decision maker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of gender and race-based values, experiences and assumptions that are thoroughly embedded, some of which adversely impact and discriminate against women. To the extent that judges labour under certain biased attitudes, myths and misconceptions about women and men, the law itself can be said to be characterised by gender bias.

Gender bias takes many forms. One form is behaviour or decision-making by participants in the justice system which is based on, or reveals reliance on, stereotypical attitudes about the nature and roles of men and women or of their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations. Gender bias can also arise out of myths and misconceptions about the social and economic realities encountered by both sexes. It exists when issues are viewed only from the male perspective, when problems of women are trivialised or oversimplified, when women are not taken seriously or given the same credibility as men. Gender bias is reflected not only in actions of individuals, but also in cultural traditions and in institutional practices.

Gender fairness requires empathy and understanding of the life experiences gender creates."

15. It is a myth to declaim that the legal system and the judiciary are bias free, impartial and objective.

16. This was recognised by Lord Justice Scrutton in "The Work of the Commercial Courts"⁴ regarding the social and economic biases which we all, including judges, carry around with us. It is now accepted that a further piece of "bias-baggage" is that arising from gender.

17. Women's life experiences are different from those of men, women's perceptions of life are different from those of men, women speak about their lives in different ways from men.

18. But men make the laws, men administer the laws, men adjudicate the laws and men decide what law will be studied and how and who will practise law and how. No one is impartial, but problems arise and have arisen because those in positions of power do not understand or acknowledge that lack of impartiality and therefore do nothing to overcome it.

⁴ (1921) 1 Cambridge L.J. 6, 8

19. In "The Politics of the Judiciary"⁵ Professor J. Griffith stated that for a judge to be completely impartial he or she would have to be like a political, economic and social eunuch and have no interests in the world outside the Court - an impartiality incapable of realisation.

20. Judge Rosalie Abella, chair of the Ontario Law Reform Commission states in her article "The Dynamic Nature of Equality"⁶ that every decision maker who walks into a Court room to hear a case is armed not only with the relevant legal texts but with a set of values, experiences and assumptions that are thoroughly embedded.

21. Researchers in the U.S.A. have found that while male judges have largely succeeded in their conscious efforts to free themselves from stereotypical thought with respect to colour, they have tended to adhere to traditional values and beliefs about "natures" of men and women and their proper roles in society⁷. They have found overwhelming evidence that gender based myths, biases and stereotypes are deeply embedded in the attitudes of many male judges as well as in the law itself. They have concluded that particularly in areas of tort law, criminal law and family law, gender difference has been a significant factor in judicial decision making especially when gender issues arise, when "non-feminist" men were least likely to decide in favour of women, and women judges committed to a feminist perspective were most likely to decide in favour of women.

22. The Honourable Madame Justice Bertha Wilson of the Supreme Court of Canada believes that "a distinctly male perspective is clearly discernible" in some areas of law and has resulted in legal principles that are not fundamentally sound.⁸ The judicial acceptance of traditional stereotypes concerning women has had an impact on many areas of law not least on areas of family law, criminal law, tort law and human rights law.

Why Should More Women Be Appointed To The Judiciary?

23. Sean Cooney in his paper "Gender and Judicial Selection. Should there be more women on the Courts"⁹ presents two categories of argument. The first is that a judiciary which reflects to some degree the variety in our society will enhance public confidence in the Courts and is more likely to ensure balanced approaches to the judicial function. This is what Professor S. Shetreet calls a "fair reflection".¹⁰ The judiciary should be seen to be impartial and the

⁵ (1977) Manchester University Press

⁶ R. Abella "The Dynamic Nature of Equality" in S. martin and K. Mahoney (eds) "Equality and Judicial Neutrality" (1987) Carswell page 3 - 9, 8

⁷ J. Johnston and C. Knapp "Sex Discrimination by Law: a Study in Judicial Perspective, (1976) 46 N.Y.U.L. Rev. 675

⁸ "Will Women Judges Really Make a Difference?" Honourable Madame Justice Bertha Wilson. The Fourth Annual Barbara Betcherman Memorial Lecture, 28 Osgoode Hall L.J. 507

⁹ Melbourne University Law Review Vol 19(1) June 1993 p.20

¹⁰ "Who Will Judge. Reflections on the Judicial Process and Standards of Judicial Selection", (1977) 61 ALJ 776

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. The present composition of the courts does not fairly reflect gender differences in society. This is not an argument for proportional representation but relates to the need for the public to have a perception of a fair judiciary.

24. The expectation is that the mere presence of women on the bench will make a difference. As Suzanne Sherry, Associate Law Professor at the University of Minnesota says, the mere fact that women are judges serves an educative function and helps to shatter stereotypes about the role of women in society which are held by male judges and lawyers as well as by litigants, jurors and witnesses.¹¹

25. It is appropriate to ensure that Judges are drawn from as broad a base as possible to ensure that diverse groups within society do not consider that their views are being ignored in the decision making. The consequences of such attitudes may be reduced respect for the judiciary and a curtailing of judicial discretion and independence. As Judge Gladys Kessler, former President of the National Association of Women Judges in the United States says (as quoted by Madame Justice Bertha Wilson)¹² -

"But the ultimate justification for deliberately seeking judges of both sexes and all colours and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged."

26. The committee suggests that the greater participation of women within the judiciary is an appropriate and effective way to improve the legal environment for women. At the moment the image of a Judge is overwhelmingly male. For those women who appear as counsel, to appear before a woman judge is to be normal, to have shared experiences and a shared reality. It reduces the risk of sexist comments and inappropriate attempts at humour which many women counsel in this state have experienced.¹³ The view advocated is that the appointment of more women could help overcome the discrimination experienced by women lawyers, could help break down stereotypes about the role of women in society, and could increase public confidence in the Courts as capable of understanding the needs of both women and men.

27. The second category of argument for an increase of women on the bench is related to the law reform aspect and eliminating gender bias. Research shows that men and women have different perceptions of human relationships and of society and that these different perceptions have an influence on judicial decision making in general. Carol Gilligan's research in this area¹⁴ - is referred to by both Justice Bertha Wilson and Sean Cooney with approval. There is considerable support for the view that women speak from the bench with a different voice and

11 "The gender of Judges" (1986) for Law and Inequality 159, 160.

12 Op. Cit. n.5

13 Also experienced in other jurisdictions. See Law Society of British Columbia Gender Bias Committee quoted at footnote 91 in Australian Law Reform Commission Discussion Paper 54, July 1993.

14 In a Different Voice: Psychological Theory and Women's Development (1982)

that a greater number of women judges may lead to a less confrontational and less adversarial style of litigation.

28. In addition to the view that women have a different perspective and "voice" from men, a further concern relates to the law itself and the belief that it is predicated on a dominant, male view of the world. This has led to those areas of life which traditionally most affect women (child care, health, marriage) being relegated to a "domestic" or "private" domain into which the law tries not to enter - thus resulting in disadvantages for women. Secondly, the insistence on "equality" before the law has always been referred to a male idea of equality so that women's experiences in relation to matters such as sexual violence are overlooked.

29. Women are more likely to be aware of these perspectives than men and to take them into account in their approach to judicial decision making. "It is unlikely that the unconscious assumptions in legal reasoning and the evaluation of evidence will be corrected unless there is a significant proportion of women judges on the courts. Male judges, in general, do not have the background experience necessary to recognise the male-centredness of law in its subtle and not so subtle forms".¹⁵ The committee is not advocating that female views be substituted for male views, but that it is important to have the influence of both views and ensure that all judges are aware of both views.

THE SUPREME, DISTRICT & FAMILY COURTS

The Current Criteria for Appointment - and why there are so few women Judges

30. The Current Profile:

SUPREME COURT OF WESTERN AUSTRALIA

	Men	Women	Total
Judges	15	0	15
Masters	3	0	3
Principal Registrar	1	0	1
Registrar	2	1	3

¹⁵ Cooney Op. Cit. n.6

DISTRICT COURT OF WESTERN AUSTRALIA

	Men	Women	Total
Judges	17	2	19
Principal Registrar	1	0	1
Registrar	1	1	2
Deputy Registrar	2	0	2

FAMILY COURT OF WESTERN AUSTRALIA

	Men	Women	Total
Judges	5	0	5
Magistrates	4	3	7

31. Women are clearly under-represented in each of these Courts in comparison with their number in the general community and in the legal profession. This is even more pronounced in the Family Court which has no women judges and yet where women also make up 50% of the litigants. W.A. is the only State with no women judges in the Family Court after 18 years.

32. Women are better represented in the magistracy and tribunals than in the superior courts.

33. Women are now well represented in the law schools but the surveys done to date have indicated that women do not stay in the profession in the same way as men and that their career paths differ significantly from those of men, due partly to child bearing and child rearing and to a lack of advancement within legal firms and government.

34. In the committee's view attention must be given to considering ways to ensure that women are better represented in the judiciary and other tribunals.

35. The section of this report dealing with career paths identifies the many obstacles which exist for women tending to prevent them from advancing through the recognised and prevailing career paths in law.

36. There is currently little in the formal requirements for appointment of judges which requires any consideration of factors other than the length of admission to practice. In the Supreme and Districts Courts appointees must be persons who have been barristers or solicitors of the Court of not less than 8 years' standing and practice. (Supreme Court Act Section 8, District Court Act Section 10).

37. The Family Court is slightly different (Family Law Act Section 9). A person may be appointed a Family Court Judge if that person has been a judge of a Federal Court, a State Court or a barrister or solicitor of not less than 8 years' standing **and, in any case, by reason of training, experience, and personality, (that person) is a suitable person to deal with matters of Family Law.** There are clearly numerous women as well as men who satisfy these criteria.

Current Selection Process

38. Formally, Judges are appointed by the Cabinet on the recommendation of the Attorney General. The Attorney may place a number of nominations before Cabinet and by convention Cabinet may only approve a person put forward by the Attorney General.
39. The initial impetus for the appointment of a judge is generally the occurrence of a vacancy in the jurisdiction or an approach to the Attorney from the head of a jurisdiction indicating a need for more judges.
40. The Attorney must decide whether or not a judge is required.
41. In practice, there is no formal procedure and there are no rules for the selection of suitable candidates but a number informal steps may be taken.
42. For example, the Attorney often consults with the Solicitor General who may be requested to find appropriate nominees. Alternatively, the Chief Justice may nominate candidates. The practice will vary depending on who the incumbents of the various positions are - and they are mostly men.
43. The practice is to consult with a number of people including the head of the relevant jurisdiction, the Chief Justice and the presidents of the Law Society and the Bar Association. If several candidates are identified comments may be sought from the above group of people on each candidate and the Attorney will then take one or more names to Cabinet.
44. The Attorney is not limited to referring only to the people mentioned above and may refer more broadly and for example include retired judges or senior professional members working in the relevant jurisdiction. However there are no guidelines or formal requirements for identifying potential nominees, or assessing their suitability. Essentially, all identification of candidates and appointments is done on an informal basis and may be funnelled through one person. It is impossible to set out the steps for appointment because there are no formal steps - they will vary depending on who fills the relevant positions at the time.
45. Because of the selection process and the terms of appointment women will be less likely than men to be appointed to the judiciary and magistracy.
46. The Federal Attorney General's Discussion Paper on Judicial Appointments of September 1993 (the Attorney's paper) starts with the proposition that the present process leads to the appointment of a judiciary which is unrepresentative of society. In particular, the selection process fails to identify suitable women and persons of different ethnic backgrounds as candidates for judicial appointment. The Attorney's paper states "the fact that men of Anglo Saxon or Celtic background hold nearly 90% of all Federal judicial offices indicates some bias in the selection process".
47. The Attorney's paper suggests that there should be a review of the selection process but that any process should ensure that the appointees are of the highest possible calibre, that potential candidates come from a broader field and that the selection process be visible and comprehensive thereby increasing public confidence in the judiciary. The committee endorses this view.

48. However, merely asserting that appointments should be made on "merit" does not identify the criteria by which "merit" is to be assessed. In the Attorney's paper a number of criteria are suggested although no attempt is made to rank them. What is clear is that the assessment of merit should not be by a solely male standard.

49. The criteria suggested are as follows:

1. Legal Skills

While legal skills are fundamental to the judiciary no consideration is given as to how these skills should be assessed or whether there is bias in the assessment of those skills. Studies in other jurisdictions suggest that precisely the same task is differently evaluated depending on whether it is performed by a man or a woman (for example the same paper read to different audiences by men and women is likely to be assessed overall as more scholarly when read by a man). There are also anecdotal examples of women lawyers being thought of by their male colleagues as younger and less experienced than they actually are. Because the manner of assessment of legal skills is unformulated and bias in such assessments is inevitable there must be a broader consultation within the selection process.

2. Personal Qualities

Personal qualities required include integrity, high moral character, sympathy, charity, patience, even temper, gender awareness, good manners and cultural sensitivity. The fact that these are all subjective qualities highlights the importance of the role of those who are consulted in the selection process.

3. Advocacy Skills

The criterion of advocacy skills has been broken down into a number of components some of which may be more important to a candidate for the judiciary than others. In Western Australia there have been a number of notable appointments of well respected judges who have not previously specialised in advocacy. Where formerly a person would not be appointed to the judiciary unless the person practised at the bar and took silk this has not been an essential criterion for the appointment of judges in Western Australia for some years, although it is still the most commonly perceived road to appointment.

Nevertheless there are aspects of advocacy skills which may be important for potential candidates such as analytical abilities, oral communication skills, and an understanding of the way in which cases are framed and their impact on the consumers of the legal system.

In Western Australia the advantage of a fused profession is that it produces a substantial pool of people with significant experience in relevant areas.

Training once the appointment is made could overcome any lack of experience.

4. Practicality and Common Sense, Vision, Capability to Uphold the Rule of Law and Act in an Independent Manner, Administrative Skills, Efficiency ["Life Skills"]

The life skills listed above have been identified by various members of the Australian judiciary and the authors of the Attorney's paper as desirable qualities of appointees to the judiciary. The qualities which are universally perceived to be required extend beyond voluminous legal knowledge, e.g. D. R. Meagher QC in his paper "Appointment of Judges"¹⁶ argues that independence from the executive is the most important characteristic of a judge.

Clearly many of these qualities, especially in the areas of personal qualities and life skills, are obtainable and are obtained by lawyers outside the practice of law. Many women having borne and raised families and having been involved with local organisations associated with schools, churches and sport acquire enormous skill, and expertise in these areas. Those who possess these qualities and who have acquired them in ways other than the traditional male career patterns should be actively and positively sought for judicial positions.

50. Assessing merit is not an objective process. Clare Burton¹⁷ surmises from her research that

"Men and women tend to rate men's work more highly than women's . . . When the participants [in research interviews] are asked to explain the causes of successful performances of men and women, they attribute the male's performance to ability and the female's to the greater effort put into the task".

51. There is an adverse effect on women's careers from stereotyping. Practising law has traditionally been seen as "men's work", so traits associated with men are considered appropriate for high status positions. These "masculine" qualities include independence, detachment, objectivity, dominance, self confidence and ambition. Women are perceived to be emotional, quiet, yielding, and compassionate.¹⁸ Women fall into the double bind - if a woman is "too feminine" she will not succeed because feminine traits are not typically correlated with success, and if she is "too masculine" she will not succeed because she will be perceived as engaging in deviant behaviour unbecoming to her gender.

52. Women are disadvantaged in their "career advancement" because child bearing and child rearing have a greater impact on them than on men. Women are more likely than men to have interrupted their legal practice, and to be working part-time, and are less likely to be partners in large law firms. Notwithstanding the increase in the number of women in the practice of law, there has been no change in the proportion of women who are partners - so simply an increase of women in practice will not of itself result in an increase in women judges. This is the case because the constraints of their families may prevent highly competent women lawyers

16 "Appointment of Judges", Journal of Judicial Administration, February 1993

17 "Redefining Merit" (1988)

18 Radford, M.F. "Sex Stereotyping and the Promotion of Women to Positions of Power" (1990) 41 Hastings Law Journal 471 - quoted by Cooney Op. Cit. n.6

from entering the higher ranks of the profession from where judges are chosen and also, even when a women is in the "pool" of eligible candidates, the assumptions set out above act against her and the qualities she may have acquired in a non-male career pattern are not regarded positively.

The Proposed Selection Process

53. Little is publicly known about the current selection procedure for the appointment of judges. There should be a rational and more public process of selection than is presently the case.

54. A number of different approaches to the selection procedure have been identified by Professor George Winterton.¹⁹ They are the popular election of Judges, legislative ratification of judicial appointments, establishing a commission to recommend suitable appointees to the Attorney General and the present method of appointment by the Commonwealth Attorney General (which is broadly similar to the practice followed in Western Australia).

55. The committee sees no merit in the popular election process as adopted in the U.S.A., and believes that legislative ratification raises difficulties in relation to judicial independence. D. R. Meagher in his paper referred to earlier²⁰ strongly criticises the current method of appointment on the basis of executive influence and interference in the judicial process. He refers to the International Bar Association's Code of Minimum Standards of Judicial Independence envisaging a judicial appointments commission comprising a majority of judges and lawyers but with representation of the executive, making the appointments. Meagher does not address the issue of bias or partiality and assumes that it is possible to achieve impartiality. However, extrapolating from his favoured model and using the example of the Ontario Judicial Appointments Advisory Committee, such a commission could include persons who are neither judges nor lawyers and consist of at least 50% women.

56. Having more women involved will enhance the public perception of the equity of the appointment process and will correct a long standing imbalance. Having more women involved will enhance the process itself, because generally women are more personally aware of gender bias.

57. As set out in the Attorney's paper - such a commission could recommend nominees and the Attorney would have to choose an appointee from those nominees.

58. The Attorney's paper sets out a list of those who might be consulted by such a commission and recommends that those people or organisations should include the following:

1. the Chief Judge of the Court to which the appointment is to be made;
2. other Judges of the Court to which the appointment is to be made;
3. the Chief Justice of the Supreme Court;

¹⁹ "Appointment of Federal Judges in Australia", 16 Melbourne University Law Review, 192.

²⁰ Op. Cit. n.13

4. relevant professional organisations including the Law Society and Bar Association, Women Lawyers' Association, Family Law Practitioners' Association, Criminal Lawyers' Association, etc.
5. leading academic lawyers;
6. certain lay persons with an understanding of the functions of the judiciary;
7. representatives of the community interests.

59. The Attorney General should have the benefit of considering all nominations produced by this process of consultation although the Attorney should not be restricted from taking further appropriate advice in relation to respective qualities of those who are nominated and their suitability for appointment to the position.

60. However a formal consultative procedure requiring the Attorney General to consider all nominations and not to go beyond those nominations is appropriate.

61. However, it is clear that it is not sufficient simply to assume that as the number of eligible women lawyers increases, so will the number of women judges. As set out above, other factors than simply "eligibility" have significant bearing on such appointments. Simple anti-discrimination legislation is ineffective because women don't even get to the point of being considered.

62. It is therefore necessary to consider what further steps should be taken to increase the number of women appointed to the bench. There are a number of possible models²¹ - including a quota model, (i.e. a number of places being set aside for women), a preference model (requiring a women's gender to be considered more favourably than a man's in the appointment process) and a self-examination model (examining whether the number of women being appointed reflects the number of eligible women). This latter model does not address the immediate problem of a current significant gender imbalance in the judiciary. However, with the setting of notional targets to be achieved within a certain time the effectiveness of changes in the method of appointment could be monitored, and if necessary, changed. A final model mentioned by Cooney is the "outreach model" whereby judicial nominees are sought from a broader section of legal practice where there are more women such as community groups, public sector, corporate lawyers and academia. It may also include considering the appointment of judges from the ranks of other jurisdictions such as the magistracy.

²¹ see Cooney's paper Op. Cit. n.6

THE MAGISTRACY

The Current Profile

63. The current profile of the magistracy is set out below.

FAMILY COURT OF WESTERN AUSTRALIA

	Men	Women	Total
Magistrates	4	3	7

COURT OF PETTY SESSIONS/LOCAL COURT

	Men	Women	Total
Stipendiary Magistrates	32	4	36

CHILDREN'S COURT

	Men	Women	Total
Full-time Magistrates	2	2	4
Casual Magistrates	2	1	3

The Current Criteria for Appointment

64. Section 4(2) of the Stipendiary Magistrates Act provides that a barrister or solicitor of the Supreme Court or of certain other Courts may be appointed a Stipendiary Magistrate, as may someone who has passed the prescribed examinations and fulfils other requirements as "may be prescribed". The prescribed examinations referred to currently comprise the following subjects:

- Law of Torts
- Law of Contract
- Evidence
- Real and Personal Property
- Criminal Law
- Practice and Procedure
- Legal Interpretation

65. For many years lay Magistrates were used in the Children's Court of Western Australia however Section 10(2) of the Children's Court Act provides that no further appointments of non-legally qualified Magistrates shall be made.

Current Selection Process

66. Positions for the appointment of Stipendiary Magistrates are advertised in the newspapers. Applications are sought from those who are interested in the position and once nominations have been received, a selection panel is created to interview applicants. The selection panel consists of the Chief Stipendiary Magistrate (in the case of selection of a Stipendiary Magistrate) or the President of the Children's Court (if it is a Children's Court appointment), the Attorney General or nominee (formerly The Under Secretary for Law) and a District Court Judge or the Solicitor General.

67. In addition to interviewing the applicants informal enquiries may be made of contemporaries, colleagues and other people who may have knowledge of the applicant before the decision is made by the panel.

Recommended Criteria for Appointment

68. As with the superior Courts, the criteria for selection of Magistrates should be clearly identified and should be the same as for the judiciary including legal qualifications. The nature of the work of Magistrates requires that they have similar qualifications to those of the judiciary.

The Proposed Selection Process

69. The committee endorses the current process of seeking nominations as it enables any person with the required qualifications to apply. The committee endorses the process whereby all nominations are considered by the selection panel but the "selection panel" should be formally created and include a similar range of members as for the judiciary with respect to gender and qualifications.

BOARDS & TRIBUNALS

Current Profile

70. Schedule I sets out the current profile of many boards and tribunals in Western Australia.

Current Criteria for Appointment

71. The criteria for appointment to these bodies is significantly different from those of the judiciary and magistracy. Currently it would appear that save for certain professional qualifications there are few, if any, other criteria required for appointment.

Current Selection Process

72. The selection process for the tribunals varies although many of them have members nominated by the appropriate Minister and others from the particular profession or interest group involved. There appears to be no identifiable selection process in many instances. This lack of objective criteria for appointment is strongly criticised by Meagher in his paper but for reasons other than gender bias. However, his criticism is also valid on that basis.

Recommended Criteria for Appointment

73. The committee has not considered in detail the criteria which should apply to the appointment of these various bodies. Sometimes the requirement for professional or sectional representatives on the board or tribunal has the capacity to make the selection process and criteria for appointment very different from that for the appointment of the judiciary.

74. Nevertheless in their function as adjudicative tribunals, disciplinary and regulatory bodies, many of the criteria and procedures for selection and appointment relevant to the judiciary should be applied here.

75. The committee recommends that advertising be carried out for membership in addition to consultation with the appropriate professional bodies. In most cases the appointment is made by a Minister and ratified by Cabinet and it is recommended that a formal procedure should be created whereby all nominations received are forwarded to the Minister with appropriate comments from relevant professional bodies or others associated with the tribunal. There should also be certain objective criteria included such as the number of women and the type of experience which is relevant.

JUSTICES OF THE PEACE

76. As at 17 February 1994 there were 3,027 Justices of the Peace for the State of Western Australia of whom 2,571 are male and 456 are female. No statistics are currently maintained regarding the numbers of Aboriginal Justices however, there are several Aboriginal appointees, some of whom deal with matters within their own communities under the Aboriginal Communities Act, and others who sit in Courts of Petty Session.

77. The President of the Royal Association of Justices, Mrs Laurel Wareham J.P., is the third female President, her predecessors being Mrs Dianne Annear (1992 - 1993) and Mrs Dorothy Dettman (1971 - 1980). Three of the twelve Councillors of the Royal Association of Justices are female.

78. The first female Justice of the Peace was appointed in 1925, nine years after Parliament had ruled that women should not be appointed to the office. Women Justices were used extensively in the Summary Relief and Children's Courts sitting with Stipendiary Magistrates in an era when all Magistrates were male, and efforts were made to constitute a Bench that comprised both genders.

79. Justices of the Peace are appointed on the understanding that they will undertake a training course conducted by the Ministry of Justice which courses may be personally attended or completed by correspondence. The training course focuses on a relatively small area of law relating mainly to practice and procedure in Courts of Petty Sessions. Justices receive no training in areas of contract, property or criminal law or the law of torts.

80. Female Justices of the Peace currently perform the same work as male Justices, including sitting regularly on the Bench but there is still a large preponderance of men being appointed.

81. For similar reasons as set out in the area of judicial appointments, it is essential that a larger proportion of Justices of the Peace be women, and although the committee has not

considered this in detail, clearly the procedure needs to be formalised and some identification made as to the target number of women to be appointed as Justices of the Peace in the immediate future.

TERMS & CONDITIONS OF EMPLOYMENT

82. In considering the issue of gender bias in the appointment of the judiciary and magistracy it is necessary to consider the impact which the terms and conditions of employment may have upon the appeal of such an appointment to women.

83. As has already been noted, child bearing and child rearing have a major impact upon the professional career of women and it is clear that many women lawyers find it attractive to work in part time capacities or for limited periods of time to accommodate family commitments.

84. The requirement for full time availability and, with respect to the magistracy, the requirement of country service, have a greater impact on women than men. It is very difficult for married women to apply for appointment. Even when they do, it has been the experience of applicants that they are questioned at length about their domestic arrangements and possibly discounted for appointment on the basis of the solely male selection panel's view about what is an appropriate way for women to work and arrange their domestic lives. While it is necessary to service country courts it may be possible for more appointments of Magistrates to be made to metropolitan courts with financial or other incentives offered for service in country courts.

85. A more flexible approach to working hours - for example permanent part time work, a greater number of holidays and non-standard working hours - may be attractive to many potential applicants and nominees and would reduce the likely restrictive impact on women.

86. There has been a dramatic increase in the number of women magistrates appointed in the eastern states of Australia. Many of these have come from the ranks of experienced solicitors and barristers. Anecdotal comments indicate that this has had the effect of raising the standard of the magistracy.

87. In an article published in "Judges and Judging", Toronto 1990 called "Inside the Canadian Judicial System", Peter McCormick and Ian Greene state "most jurisdictions in Canada have created positions for Judges who have either reached mandatory retirement age or chosen early retirement but wish to continue judging on a part time basis. These semi-retired Judges are known as 'supernumerary Judges' and account for about 6% of Canada's Judges.

88. Consideration must be given to the appointment of part time judges and magistrates and the utilisation of more flexible working arrangements in those positions. The Children's Court of Western Australia for example currently has 1 permanent part time Magistrate and 3 casual Magistrates.

89. Besides providing a useful avenue of training, this system enables the performance of part-time appointees to be assessed, with potential for a full-time appointment to a higher jurisdiction in due course, as has occurred in the case of two District Court Judges, two Stipendiary Magistrates and one Family Court Registrar. Even temperament, and the

capability to assess both sides of a case fairly, are pre-requisites for good judges, and may sometimes be lacking in good advocates who may not be objective in their efforts to produce the most favourable results for their clients.

90. The concept of assessment of judicial suitability on previous performance resulting in elevation to a higher jurisdiction is not new. Some current judges of the Supreme Court of Western Australia were previously judges of the District Court. In South Australia Justice Margaret Nyland was recently elevated from the District to the Supreme Court. In Victoria and the Northern Territory women magistrates have been elevated respectively to the Family Court and the Supreme Court.

CONCLUSIONS

91. The committee concludes that:

- (a) the current "merit" tests do not ensure objective assessments 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 the 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 - as recommended by the Honourable Madame Justice Bertha Wilson in her paper "Will Women Judges Really make a Difference", Osgoode Hall Law School, York University, 8 February 1990; and
- (f) there needs to be a period of affirmative action in the appointments to the bench in order to address the issues raised in this submission.

SCHEDULE I

PROFILE OF BOARDS & TRIBUNALS IN WESTERN AUSTRALIA

Chiropractors Board

No. of Members: 5
No. of Females: Nil

Mode of Appointment: A legal practitioner nominated by the Attorney General, two chiropractors nominated by the profession (who conduct an election for the purpose as a matter of choice) and two members nominated by the Minister for Health.

Dental Board

No. of Members: 7 (currently 6, one to be appointed soon)
No. of Females: 1

Mode of Appointment: One ministerial representative, one lawyer nominated by The Legal Practice Board, Dean of the Dental School and four dentists appointed by the Minister. Protocol for appointment of the dentists is that the Australian Dental Association makes nominations which the Minister considers.

Equal Opportunity Tribunal

No. of Members: 3
No. of Females: to be advised

Mode of Appointment: Ministerial appointments, one of whom must be a legal practitioner.

Guardianship Board

No. of Members: 10
No. of Females: 4 (currently, 5th to be appointed soon)

Mode of Appointment: Expressions of interest are invited. Applicants interviewed by a panel (which includes Deputy Chairperson of Board, Principal Registrar of Supreme Court, one person with an expertise in mental illness, one member from Ministry of Justice). Appointment made by Minister.

Land Valuation Tribunal

No. of Members: 3
No. of Females: 1
No. of Deputy Members: 3
No. of Females: 1

Mode of Appointment: Ministerial appointment having regard to certain professional or occupational criteria.

Medical Board

No. of Members: 9
No. of Females: 2

Mode of Appointment: Two members are ex officio by reason of public service appointments and the balance are appointed by the Minister. Protocol has been for the Minister to act on the advice of the AMA, although that is not always followed. There is no statutory requirement that the Minister should so act.

Occupational Therapists Board

No. of Members: 6
No. of Females: 6

Mode of Appointment: One member is a Health Department nominee. Another is a medical practitioner nominated by the Minister. Another person is nominated by Curtin University. Three occupational therapists are appointed by the Minister from a panel of names proposed by the relevant professional association.

Optometrists Board

No. of Members: 8
No. of Females: 2

Mode of Appointment: Two optometrists nominated by the Minister, three elected by the profession directly, one from the University of WA, one ophthalmologist nominated by the AMA and another person appointed by the Minister (nearly always a legal practitioner).

Physiotherapists Board

No. of Members: 5
No. of Females: 5

Mode of Appointment: One person is appointed by virtue of public service office and the balance by ministerial appointment. Protocol has been for the Minister to act on the advice of the professional association, although this is not a statutory requirement.

Podiatrists Board

No. of Members: 6
No. of Females: 2

Mode of Appointment: One is a ministerial representative, another is a medical practitioner nominated by the Minister, another is a person nominated by Curtin University, and three are podiatrists recommended by the professional association and appointed by the Minister.

Psychologists Board

No. of Members: 5
No. of Females: 3
No. of Deputy Members: 5 (currently 4)
No. of Female Deputies: 1

Mode of Appointment: There is a member and deputy in each category: one academic appointed by the Minister, two psychologists (appointed by the Minister from names submitted by the Psychologists Society following elections), one lawyer appointed by the Minister (nominated by the Law Society), and one psychiatrist nominated by the Royal College.

Real Estate & Business Agents Supervisory Board

No. of Members: 5
No. of Females: 1

Mode of Appointment: Chair appointed by Minister, two by REIWA, two are either accountants or solicitors.

Racing Penalties Appeals Tribunal

No. of Members: 8
No. of Females: 1

Mode of Appointment: By Minister. Members to be qualified as or entitled to be appointed as a Magistrate.

Settlement Agents Supervisory Board

No. of Members: 5 normally but only 3 at present (going through changes)
No. of Females: Nil

Mode of Appointment: Chair person by Minister, two elected by REIWA, two either accountants or solicitors.

Town Planning Appeal Tribunal

No. of Members: 3
No. of Females: 1
No. of Deputy Members: 3
No. of Female Deputies: 1

Mode of Appointment: Ministerial appointment having regard to certain professional or occupational criteria. The most recent appointment, who chairs the Tribunal, is female.

WA Industrial Relations Commission

No. of Members: 8, including the President and all Commissioners
No. of Females: 1

Mode of Appointment: By Minister. Protocol Cabinet decision.