

The Myth of Legal Merit

By Leighton McDonald

Justice Mary Gaudron, the first and only female to sit on the High Court of Australia, is to be replaced by a man. The institution charged with the ultimate authority for the application, interpretation and development of Australian law is, again, to be staffed exclusively by men.

The Howard Government has defended the appointment of Justice Dyson Heydon as the 'best person for the job', his appointment being determined principally on the basis of 'legal ability and merit'.

But the notion of legal merit is not a useful one in this context. Law is not an exact science that involves neat syllogisms. Any first year law student struggling to understand legal argument and reasoning knows this. Judgments can, of course, be made about a lawyer's aptitude for their craft; but these judgments are contestable and cannot be a sure guide as to who will make a good judge. Despite the Government's rhetorical references to legal ability, nobody has yet explained the criteria by which its existence can be objectively ascertained.

The simple reality is that there is a sizeable pool of talented and sufficiently well qualified lawyers who could all make distinctive and valuable contributions to the work of the Court (many of whom have not taken silk at the Sydney bar). Many of these lawyers also happen to be women. The notion that there exists a 'best person for a job' on the High Court is embarrassingly naïve or deliberately misleading. If, as many have suggested, Justice Heydon is clearly the best man for the job, we can, with just cause, wonder why he was not appointed to the Court in 1998 in preference to Justice Callinan--at that time both men were practising barristers. Might it be that other considerations were at play? Perhaps it was thought that with the imminent retirement of the only Justice from Queensland (Brennan CJ) another Queenslanders should be appointed to the Court. Perhaps the Howard Government considered even broader political issues. If so, it should be more honest and open about them.

Few cases that are litigated in the High Court are capable of easy resolution; eminent judges and lawyers regularly disagree with one another about what should be done. This does not mean that when a controversial case makes it to the High Court everything is up for grabs. However, it is clear that doctrinal mastery and 'legal ability' cannot resolve such cases. As such, it is both inevitable and legitimate for a government to consider things such as a person's wisdom, compassion, ability to think creatively, their life experiences, their likely judicial philosophy and, indeed, their political proclivities prior to appointing them to a court such as the High Court. What is not legitimate is to hide all of this behind the myth of 'legal merit'.

Given the nature of appellate judging, the panoply of issues the High Court deals with, and the multiplicity of characteristics that we should legitimately look for in our judges, an all male Court sends a clear and unacceptable message about the sort of contributions which women are capable of making to the legal profession and Australian society. This message cannot be avoided by glib references to 'merit'.

Since Justice Gaudron was appointed in 1987 successive Labor and Liberal governments have had the opportunity to make seven new appointments. (Though she was not appointed to the position of Chief Justice by the Howard Government, Justice Gaudron retires, not only with a richly deserved reputation as an outstanding judge, but also as the longest serving judge currently on the High Court.) As such, maintaining the status quo of one female High Court Justice should not have elicited any special praise. But by again failing to appoint a woman, out of the truly impressive range of potential candidates, this government deserves to be strongly criticised.

The current formal process for the selection of High Court judges is clearly misfiring. The issue is of considerable importance and deserves to be the subject of an ongoing debate.