INTEGRITY IN PUBLIC SECTOR RECRUITMENT

March 1993

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INDEPENDENT COMMISSION AGAINST CORRUPTION

The Hon Max Willis, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon K R Rozzoli, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Gentlemen

In accordance with s74 of the Independent Commission Against Corruption Act 1988, the Commission hereby furnishes to each of you its third Report on the investigation into the resignation of Dr Terry Metherell from the Legislative Assembly and his appointment to a public service position. It deals with questions of policy and administration: specifically the second and third of the terms of reference given by both Houses of the Parliament to this Commission on 28 April 1992.

The first two Reports, which dealt with the first term of reference, were furnished on 19 June 1992 and 1 September 1992.

The Commission recommends pursuant to s78(2) of the Independent Commission Against Corruption Act 1988 that this report be made public forthwith.

Yours faithfully

Ian Temby QC
Commissioner

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CONTENTS

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PREFACE

This is the third Report arising from a reference to the Commission by both Houses of the New South Wales Parliament. Appendix 1 contains the terms of reference.

The first Report dealt with the facts and circumstances arising out of the resignation of Dr Terry Metherell from the Parliament and his subsequent appointment to a senior public service position, and whether any corrupt conduct had occurred.

The second Report dealt with legal proceedings that followed the first Report and raised issues arising from those proceedings concerning the ICAC Act and desirable changes to it.

This Report addresses the second and third terms of reference namely possible changes in applicable law and in methods of work, practices and procedures.

The Commission has examined the current laws and practices of public sector recruitment in New South Wales to consider whether change is needed. Commission staff consulted widely with senior public sector managers. A discussion paper was published in October 1992 and submissions called for. Twenty-four submissions were received in response and a hearing was held on 18 December 1992. Several who had made submissions and some others gave evidence at that hearing. One further submission was later received. The Commission is grateful for the public and institutional input. The range of views expressed has been useful to the Commission in its understanding of the strengths and weaknesses of present systems.

Each of the present categories of public sector recruitment have been considered and assessed for resistance to corrupt practices. Particular problems that may arise when politicians seek public sector jobs have been considered.

The Report considers the changing nature of public sector recruitment and what general principles and practices may be necessary to achieve merit appointment. It is clear that in a relatively regulated system of public sector recruitment, great care must still be taken to ensure that there are sufficient checks, balances and accountabilities to prevent corrupt conduct. In specified areas the present system is not sufficiently corruption resistant.

The recommendations propose a universal requirement for merit selection and emphasise that there must be proper and appropriate processes to achieve it in each category of public sector employment. In general, discretions to bypass or dispense with advertising and proper process must be conferred and exercised most cautiously. Finally the Report concludes that in reality no process controlled by Government can presently give a job to a former Member of Parliament without a significant risk of controversy and public disquiet. An eminent and independent standing panel of review should therefore consider such instances after recommendation but before appointment, with the power to effectively vet the recruitment process that has occurred.

The recommendations are collated below.

A number of the submissions received made specific allegations of corrupt conduct (not involving the Metherell protagonists) and those submissions were not formally tendered at the hearing. They are not referred to in this Report, as to do so would be unfair to the named persons. The submissions that were tendered at the hearing and the one subsequent submission are listed in Appendix 2 to this Report.

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Given the nature of this Report, it contains no findings against individuals or recommendations for the consideration of criminal or other proceedings.

The term corruption is used in this Report as it is defined in the ICAC Act.

All Commission Reports are available free of charge.

Recommendations

1. There should be a statutory requirement for all public sector jobs at every level to be filled on the basis of merit, i.e. the best person for the job.

2. There should be a statutory requirement for every public sector job (other than temporary jobs) at every level to be the subject of a public advertisement, and to be filled following a merit selection process.

3. Chief Executive Officer appointments should be made by the Governor on the recommendation of Cabinet following a merit determined recommendation to the Minister.

4. When making SES appointments, the CEO who appoints should be enabled but not required to consult with the Minister.

5. There should be a statutory ban upon Ministerial involvement in the making of appointments to non-executive positions.

6. Advertising and the convening of panels to make recommendations should be encouraged for temporary public sector jobs and secondments and transfers. These should be statutory requirements if the job is to be filled for a period in excess of six months, but an extension or extensions up to six months should be permitted.

7. The Minister should have the right to appoint Ministerial staff, on the basis of merit principles, with tenure no more extensive than the Minister's own.

8. Consideration should be given to enacting legislation similar to the Commonwealth Members of Parliament (Staff) Act 1984.

9. An independent committee of eminent persons should be established pursuant to statute to scrutinise the process followed for the filling of each public sector job where one of the applicants was a Member of Parliament within the preceding period of two years.

10. Appointments to membership of boards, trusts and statutory authorities should be by the Minister or by Cabinet. Merit selection principles should apply. Personal and professional qualities, spread of talents and representative considerations may properly be relevant in the selection process.

11. Where CE0s are responsible to a board or trust they should be appointed by that board or trust on merit criteria, with Cabinet retaining a right of veto, and this to be reflected in the governing legislation of such bodies.

12. Government should accept and state that all judicial appointments will be made on the basis of merit, i.e. the best person available for the job, and that the process followed be documented and published. Expressions of interest should be sought periodically to ensure that worthy applicants are not overlooked.

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CHAPTER 1 HISTORY AND BACKGROUND

Introduction

The circumstances surrounding Dr Metherell's resignation from Parliament and appointment to a public service position, from which he later resigned, have now been extensively traversed. It serves no purpose to recount them again. The Parliament has called on the Commission to examine the need for change to any laws and practices arising from those facts and circumstances. The central issue for the Commission is the vulnerability or resistance to corrupt influences of the current system of public sector recruitment in New South Wales. The Commission has examined all categories of State public sector employment in these respects.

In this process the Commission consulted widely with senior public sector managers and others. A discussion paper was published in October 1992 and submissions invited. Some of those consulted, and a number of submissions received, alleged actual corrupt recruitment or stated that there were areas of potential corrupt recruitment permitted by the present system.

Philosophies and rules are not immutable. This Report and the recommendations in it are made in the context of New South Wales in 1993. Historically, and in other parts of the world even today, practices our society may reject, like purchase of office, patronage and nepotism, are accepted as reflecting social norms.

Approaches to recruitment also vary significantly among developed Western nations. For example in the United States most civil service appointments are subject to merit selection, but the President has the constitutional right to make some 2,700 appointments of higher level officials, "with the advice and consent of the Senate", which can veto appointments, but not substitute another appointee. A recent study has indicated that this approach has had mixed success in preventing improper practices in appointments.

English Heritage

From early times in England appointment to positions in the bureaucracy was entirely determined by patronage. As the power of Parliament grew and the power of the Crown waned, the proportion of public appointments made by the Parliament increased, but patronage persisted substantially until the Northcote-Trevelyan reforms subsequent to 1854. Those reforms incorporated some features of the Chinese and continental European services; competitive entry and promotion by merit. By the third quarter of the nineteenth century, entry to the English civil service followed competitive recruitment, and promotion was by merit.

Public administration in New South Wales commenced with autocratic control by a Governor, appointed from England, who had the power of recruitment in New South Wales subject to the Colonial Office:

> Upon the death or suspension of any civil officer of the Government you are at liberty to appoint any proper person for the execution of the duties of such office until His Majesty's pleasure be known (Lord Sydney to Governor Phillip, 28 April 1787, Historical Records of New South Wales, 1, b83)

1842 saw a Legislative Council in New South Wales possessed of limited powers. Heads of departments were still appointed by the Governor. In 1855 the Constitution of New South Wales was proclaimed and a rudimentary Legislative Assembly and Legislative

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Council were subsequently formed. Section 37 of the New South Wales Constitution vested the appointment of all public officers in the Governor upon the advice of the Executive Council. The NSW Public Service was thus born; it numbered 1,077. By 1894 it had grown to 32,722. It had expanded without real co-ordination and was riddled with patronage (or worse).

This State, This Century

After some largely unsuccessful attempts at reform, a Royal Commission of Inquiry was convened in 1894 and made a series of recommendations to reform the service. A Public Service Commission was established with central responsibility for recruitment, grading, salaries and practices. The Public Service Act under which it was formed provided by regulation 71:

> As the career of an officer in the public service will depend entirely upon his personal conduct and the manner in which his duties are performed, he is prohibited from seeking the interest of influential persons in order to obtain promotion, removal, or other advantage. Any infringement of this rule will be severely dealt with.

This attempted abolition of patronage was accompanied by competitive admission and promotion by merit although until recently merit was seen to involve - indeed almost be equated with - seniority This system in varying forms continued throughout most of this century. During this time the notion grew of a career public service which impartially provided objective loyal advice and administration to any elected Government. Employment from outside the public service above the base grade was rare.

In 1974 the Act was amended to establish a form of merit as the central criterion for promotion and from 1978 senior jobs were publicly advertised. There followed the substantial devolution of senior public sector recruitment in New South Wales. The power of the Public Service Board was reduced gradually and, with the advent of the Greiner Government in 1988, the Board was abolished. Radical changes were introduced, senior executives were all placed on contract, and the culture of the public service was sought to be changed to a rigorous performance-based system. Emphasis was placed upon modem private sector management attitudes and techniques.

Such central responsibility as remained for development of personnel policy passed predominantly to the Premier's Department. Chief Executive Officers were appointed by Cabinet or the relevant Minister, and the CEO made all recommendations for senior executive and non-executive positions. The Senior Executive Service was established. No appeal or legal challenge was permitted to senior and chief executive appointments. Merit was the stated principle in relation to all senior appointments and non-executive positions. Guidelines were promulgated by the Premier's Department.

The trend in Australia has been towards a culture of merit, and this is now clearly embraced. Two methods of merit recruitment are commonly contrasted in Australia. They are:

a. rigidly controlled processes with checks, balances and appeals, presided over by an independent central authority; and

b. managerial discretion, with performance goals and accountability.

In the last ten years the emphasis in New South Wales has shifted towards the second. The latter system reflects a new managerial philosophy and ideology.

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The new less regulated approach raises the issue of the degree to which politicians ought be involved in recruitment, due to their constitutional position.

Suggested Principles

What follows has been distilled from submissions received by the Commission, observation, experience, and some reference to contemporary writing.

The public wants an equitable, efficient system of public sector recruitment which produces good quality public servants.

Some detect a tension between equity and modem conceptions of efficiency, as noted by Halligan and Power in "Political Management in the 1990's" (1992) at p252:

> The principles of merit and equity, on the other hand, required a different kind of support and protection, for they tended to be subordinated whenever they were co-located in an agency also responsible for the furtherance of the principles of effectiveness and efficiency...

The dissonance can be resolved by factoring equity into the agency's goals, so there is no conflict between equity and efficiency.

Effective mandatory accountabilities must be built into the system, their nature must be plain, and they must be enforceable, otherwise, the public will not be confident that a system is equitable and efficient.

The system must be transparent so that the public can see that the above principles are being satisfied. Further, transparency provides performance of processes. This principle was demonstrated by the federal Ombudsman, judicial review and freedom of information, legislation which opened up administrative processes and decision making to scrutiny and review and of which Wilenski said in "Public Power and Public Administration" at p188):

> .... they have led to better decisions being made and to increased protection of the basic rights of individuals vis-a-vis Government. In addition, as a result of various forms of external review, many procedures have been modified and improved.

What is "Merit"?

The simplest formulation of "merit" is that it requires the appointment of the best person available to any given job. Section 26 of the Public Sector Management Act 1988 requires the selection of the applicant with the greatest merit having regard to:

a. the nature of the duties of the position; and

b. the abilities, qualifications, experience, standard of work performance and personal qualities of those persons that are relevant to the performance of those duties.

In ordinary language a person who is "qualified" for a particular job can be described as a "meritorious applicant". To decide that that person is the best available for the job is to answer a different question. A proper application of the "best" principle will prevent the corrupt appointment of persons for reasons unrelated to merit. The application of the "qualified" principle will not necessarily achieve that.

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Approaches to Securing Merit Recruitment

Historically society has sought to achieve a corruption-free system of recruitment in several ways. In times of promotion by seniority, that principle - if effectively enforced - could eradicate corrupt recruitment above the base grade because there was one easily checkable criterion for appointment, the promotion of the most senior person available. An independent Public Service Board, statutorily isolated from political input, with independent appeals for all, and strictly prescribed criteria and procedures, was the method adopted to achieve integrity in many places for quite some time. Its power, independence and checks and balances were said by some to be very effective.

The modern New South Wales approach to recruitment encompasses ideas of managerial autonomy and accountability, and devolution of recruitment authority. Because it is relatively new its effectiveness in achieving integrity is largely unexamined

Making the managers of the process plainly accountable for its proper conduct will give them an interest in the success of the process. The quality of appointees will reflect the performance of those who managed the appointments. Accountability will engender responsibility.

Responsibility can be imposed by legislation which either provides general principles or specific procedures, or by guideline, directive or code of conduct. Which of these approaches is chosen will affect the degree of discretion and flexibility that managers possess. At a minimum, however, the principles or processes to be applied, and who must apply them, must be clear, and there must be a responsibility with some form of sanction applied to the person in charge of the process.

The question of effectiveness is germane to whether principles, processes and responsibility ought be imposed by statute or administrative guideline. Statute imposes a legal obligation the breach of which will have legal consequences, as the statute prescribes. Obligations imposed by Ministerial or other directives depend for their effectiveness upon the will of the director to maintain and enforce them. This may vary from person to person and may be affected by political circumstances. Codes of conduct have no legal force and the consequences of breaching them is often quite unclear; sanctions are often not prescribed, or enforceable. This is particularly so in the case of Ministers who are constitutionally immune from administrative dismissal from Parliament or suspension without pay. Where responsibility is dependent upon discretion, effectiveness can be reduced if enforcement does not occur. This may give rise to public cynicism.

Another issue which requires consideration is whether there ought be appeal and review mechanisms. Such mechanisms may deter those tempted to act corruptly, and can provide a means to correct decisions made in error or corruptly. The need is less if the community is satisfied that the original recruitment process has sufficient checks, balances and consequent propriety to render an appeal mechanism unnecessary. The benefit of appeal and review must be weighed against the extra cost, time and uncertainty involved. In new South Wales appeals are only available relative to the internal appointment of public servants below SES level.

A system which does not involve clear criteria and process will permit corrupt behaviour and reduce the likelihood of optimum outcomes. Similarly, a system will be rendered vulnerable to corruption where there is an unreviewable discretionary ability to bypass significant aspects of process and criteria. The discretionary exception, unless itself plainly regulated and prescribed, provides the opportunity for the potentially corrupt to bypass an otherwise proper process. Some discretions are of course important to enable flexible and effective management, and thus a balance needs to be struck with care.

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CHAPTER 2 PUBLIC SECTOR APPOINTMENTS

Introduction

This chapter deals in detail with public service appointments. However the recommendations are more broadly expressed. They speak of public sector appointments generally, because the principles upon which they are based have general application.

There are three categories of full-time public servants. Chief Executive Officers (CE0s), the Senior Executive Service (SES) and other (non-executive) public servants form the central core of public sector employees in New South Wales. All three categories are regulated, to differing degrees, by the Public Sector Management Act.

All submissions that the Commission has received agreed that the inviolable principle of merit - the best person for the job - should apply to recruitment in these three categories.

The possibility of corruption in recruitment processes is real. The possibility of the corrupt involvement of politicians cannot be ignored. The most recent Australian inquiry to focus on corruption, and the involvement of politicians in the process of general public sector recruitment, was the Fitzgerald Inquiry in Queensland. In his report dated 3 July 1989 the Chairman of that inquiry - the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct - expressed strong views on the topic of that involvement and the need for propriety in recruitment. At p131 he said:

> Cabinet Ministers should not be concerned with public service appointments, promotions, transfers and discipline, other than those of Chief Executives, to which special considerations apply A Minister's legitimate concern with personnel is to see that honest and efficient policies and systems are designed and fairly implemented.
>
> The more important the office, the more imperative that appointments be made with scrupulous propriety. There will obviously be diversity and competing claims among those who are eligible for employment, but it would wrong for those who know politicians and senior bureaucrats to be preferred, while a pool of talent is ignored or disqualified for no good reason.
>
> Inappropriate appointments, particularly to important positions, are very disruptive of public administration, and increase the exposure of the decision making process to the risk of improper influences.
>
> Detailed decisions on personnel should be left to suitable people to whom authority has been delegated, and that authority should be exercised impartially and openly.

Non-Executive Public Officers

The recruitment of non-executive public officers is controlled by Part 2 Division 4 of the Public Sector Management Act 1988 and the regulations pursuant to it. The Act provides that such officers are to be appointed by the Governor on the recommendation of the department head (CEO). The first two sub-sections of s26 of the Act provide:

1. A Department Head shall, for the purpose of determining the merit of the persons eligible for appointment to a vacant position under this section, have regard to:

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a. the nature of the duties of the position; and

b. the abilities, qualifications, experience, standard of work performance and personal qualities of those persons that are relevant to the performance of those duties.

2. In deciding to make a recommendation for the appointment of a person to a vacant position which has been advertised in accordance with this Act:

a. the appropriate Department Head may only select a person who has duly applied for appointment to the vacant position; and

b. the appropriate Department Head must, from among the applicants eligible for appointment to the vacant position, select the applicant who has, in the opinion of the Department Head, the greatest merit.

The Public Sector Management (General) Regulations provide by clause 11 that unless the department head otherwise determines a selection committee shall be established to assess the merit of applicants to a vacant position, and:

3. A selection committee shall, as far as practicable

a. consist of at least 3 persons; and

b. include at least one person who does not hold a position in the department in which the vacant position exists; and

c. be constituted so as to ensure the fairest consideration of all applicants.

4. A selection committee shall, as far as practicable, deal with each applicant in a similar fashion, but the committee is not required to grant an interview to all applicants.

5. Nothing in this clause requires a department head to adopt any recommendation made by a selection committee in relation to the filling of a vacancy.

Currently a CEO could bypass most standard procedural requirements.

A number of different selection methods would satisfy the essential requirements of proper process. The current methods include selection panels, entrance examinations and practical tests, all of which are acceptable forms of merit selection provided that they are consistently and properly applied. It should be compulsory for such merit selection processes to be applied in accordance with the qualifications needed to perform the job. While the chosen merit selection procedure is being pursued, the temporary appointment and secondment provisions should be adequate to cover emergency staffing requirements.

Section 31 of the Act requires all vacancies to be advertised, but allows this requirement to be waived by the CEO "if the Minister so approves". Where not advertised, vacancies can only be filled by existing officers from the same administrative unit. Even the general statutory rule is only for advertisement of the vacancy in the public service notices and in such other publication (if any) as the CEO determines. The public service notices tend not to be widely read by those who are not public sector employees. The general rule should require advertisement in a public newspaper of general circulation.

The requirement to advertise publicly is important from the viewpoint of each of equity, transparency and efficiency. Except in situations where some aspect of security necessitates secrecy, there should be no discretion to waive advertising. With the Act in

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its current form it is legally possible for a person to be appointed to a public service position which is not advertised and without a merit selection procedure. Apart from the consideration that it would be difficult to achieve a merit selection in the circumstances where no one else knew enough about the job even to apply for it, if merit selection were achieved the community could not be confident that it had been.

The discretion to waive advertising ought therefore be removed in all cases except where secrecy is demanded by security considerations. For example one could not have a secret inquiry into a matter of state security, if advertisements for the officers to staff it were placed in public newspapers.

The Commission is aware that an immediate move to public advertising of aft non-executive positions could create dislocation and short-term cost disadvantages. However, such a practice is highly desirable and if unable to be rapidly implemented should be introduced on a staged basis.

The current practice of creation of eligibility lists for non-executive positions, following a proper merit selection process, is a sensible and efficient method of filling vacancies, particularly where vacancies might occur frequently. The practice needs to be properly managed to avoid degrading the recruitment process.

The selection process should be completed and the eligibility list created, to await vacancies, rather than leaving applications unprocessed until a specific vacancy or need arises. This requires the job description to be reasonably well defined, and the process from advertising to selection or creation of eligibility list to be completed within a reasonable time. Delay might allow abuse or corruption of the process.

Eligibility lists should only remain operative for a pre-specified period, such as six months from the application's closing date. However in certain circumstances such as very short eligibility lists, the fist should remain operative for a shorter period. Eligibility lists should only be permitted when public advertising has occurred.

The legislation is silent as to whether the Minister can direct or advise the department head concerning non-executive public officer appointments. This is unsatisfactory from all points of view: Minister, department head and the public. The degree to which Ministers ought or ought not play a part needs to be plain, so that all know their duty.

The desirable process is an impartial and transparent merit selection, producing a recommendation made to the CEO who decides. In such a process it is difficult to see what legitimate role a Minister would have beyond matters of general nature such as emphasising particular skills needed by the department. Non-executive public servants in departments have little contact with the Minister. Fitzgerald and others hold the strong view that there should be no Ministerial involvement in appointments at this level. No convincing reason has been given to the Commission as to why there should be such involvement. Any such involvement will have the potential to appear corrupt or at least partial. There is the obvious danger that a CEO or panel members may be unduly influenced by Ministerial intervention. This ought not be permitted.

Senior Executive Service

Appointments to the Senior Executive Service are made pursuant to the Public Sector Management Act by the Governor on the recommendation of the CEO. The appointment of SES officers is controlled by Part 2 Division 3 of the Public Sector Management Act. Section 15 provides that the merit and advertising provisions relating to non-executive officers also apply to appointments to senior executive positions. Accordingly there is a statutory requirement for the appointment of the applicant with the greatest merit, who must apply for the position.

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There is no statutory requirement for any particular process to be followed. By section 42J judicial review by the courts is excluded. Neither internal nor external appointments are subject to any form of appeal. As in the case of non-executive appointments, the requirement for advertising may be waived.

The Premier's Department has published guidelines concerning SES appointments. The guidelines state that any appointment process must have credibility and integrity and plainly apply the merit principle. They also advise the preparation of a selection report to ensure accountability. These guidelines do not have binding force. They are administrative directions; policy that the CEO concerned ought ordinarily to follow. If followed they ill undoubtedly ensure a high degree of integrity. It is not clear what form enforcement could take. Disciplinary action might be taken against a CEO, but that is improbable. Nothing of the sort could be contemplated if the relevant Minister breached the guidelines.

Perhaps more so than in the case of non-executive officers, it is important that any process of recruitment concerning these important and senior positions be open and accountable. There seems little reason why there should be a discretion to waive the requirement to advertise, except for security reasons where secrecy is essential. However, the ability to supplement the advertising process with "head-hunting" to encourage people to apply for the job, should be permitted.

While the provisions regarding eligibility lists for non-executive positions can be applied to SES positions, the more specialised and significant nature of the SES requires more stringent safeguards to be applied to the public advertising which precedes such lists. The advertisements would need to have highly specific job descriptions or proper merit selection would not be achievable.

What role if any should the Minister play in SES appointments? Some SES officers will have significant contact with the Minister. It has been contended that the Minister should therefore have input into appointments to ensure those appointed are people the Minister can trust and work with. Some argue vehemently against this, on the basis that at the SES level the principles of a dispassionate public service equally loyal to all ought remain, and that accordingly the Minister should have no input.

In South Australia section 39 of the Government Management and Employment Act 1985 prohibits the Minister from giving any direction to the CEO concerning a particular appointment. The present Northern Territory Draft Bill does the same. Such provisions do not prevent consultation, but leave that to the CEO. This approach allows the CEO to take into account any special knowledge or input that the Minister may have where there may be a need for compatibility between the Minister and the SES officer to be appointed, but makes the relative responsibilities clear.

Submissions to the Commission suggest that most CE0s presently consult with their Minister concerning SES appointments and that this system works well in ensuring good relations between the Minister and the CEO, and as a final check on the proposed appointee.

Chief Executive Officers

These appointments are made by the Governor pursuant to Part 2 Division 2 of the Public Sector Management Act. There are no legislative provisions relating to criteria or process. There is no right of appeal against an appointment and section 42J of the Act excludes judicial review by the industrial tribunals and courts. By convention the Minister makes the recommendation to the Governor.

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There are administrative guidelines. On 11 August 1992 the Premier issued procedures for the appointment and termination of Chief Executive Officers and full-time statutory appointees. The text is reproduced in Appendix 3 to this report. The memorandum summarises the procedures in the following terms:

1. Chief Executive and certain other appointments which a Minister may approve, or which he/she recommends to the Governor in Council will continue to be submitted to Cabinet for approval, prior to the appointment being made. A listing of all those positions is provided.

2. The processes of advertising, interviewing and selecting are to be based on independent advice to assist in arriving at an appropriate collective decision of Cabinet on the choice of the best candidate.

3. The responsible Minister will oversee the procedures, and the Premier's Department will perform a co-ordinating role where the appointee is the Chief Executive Officer.

4. The Director General, Premier's Department will be responsible for ensuring that questions of remuneration packages and severance payments are appropriately determined in each case.

5. Ministers are to consult the Premier, or Director General, Premier's Department prior to taking action in each individual case of chief executive placement or the remuneration/severance payment for all Chief Executive Officers and full-time statutory appointees.

The accompanying procedures require that new positions and vacancies are to be advertised "except in very exceptional circumstances which are to be explained in the Cabinet Minutes". There is no discussion of what "exceptional circumstances" are. The procedures advise that as a general rule each advisory selection panel is to include a woman, representation from outside the department/authority, and one person from the private sector. The panel then reports to the Minister. A Cabinet Minute is then to be provided detailing the applicants and conclusions of the panel plus other particulars. The Cabinet then makes the selection.

If these procedures are followed, corrupt appointments should be avoided. The process is however not generally weft known. If merit is to apply without exception then that principle should be enshrined in statute so that it cannot be dispensed with or avoided. For an effective merit selection to occur, positions will need to be advertised except where secrecy due to security demands otherwise.

It is contended by some that there ought be "flexibility" in relation to the more senior appointments. It is argued that in certain circumstances speed and/or confidentiality mean that advertising and panels are inappropriate. Given the existence of the power to employ people temporarily or second them for a period, there win rarely be an occasion where a CEO needs to be appointed permanently without a delay of-say-a month. Effective management ought to be able to achieve advertising, a panel, and interviews within a month or six weeks. Ensuring confidentiality in positions that may require it is purely a matter of effective management. For example, applications could be made directly to the chairperson of a particular panel who may then share the information only with the other few panel members.

The reality is that to dispense with any advertising, merit criteria, and the requirement for a panel, is a prescription for abuse. Uncontrolled discretions may work well when conscientious people are in charge, but they provide opportunities for abuse to the less well motivated.

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At this very senior level, it must be recognised, some may not apply and risk rejection. On occasions, for this and other reasons, to get the best an element of executive search is appropriate. The solution is to retain advertising and an open process but allow the final merit arbiter to approach and appoint someone other than those who initially responded to the advertisement, if it is clear after a proper merit assessment that that person is the best for the job.

Most academic works dealing with the topic and most submissions made to the Commission agree that it is appropriate for the Minister to have significant input into the process whereby a CEO responsible to them is appointed. It is appropriate to recognise that the Minister must work closely with CE0s and must therefore have a significant input into who is recruited.

Secondments, Temporary Appointments and Transfers

A secondment is an administrative process whereby with the agreement of both departments an officer is effectively lent by one department to another. There is no formal process, criteria or other regulation of this method of staff movement.

Secondments can fulfil a myriad of functions. They allow the quick and economical short notice covering of staff absences or temporary staffing needs. Secondments are also used for training purposes, or to provide another department with valuable skills which may be required for a short time or a particular purpose.

The mix of benefits sought to be achieved by secondments, and the short term purposes for which they may be used, render it inappropriate that full formal selection processes be applied. These would prevent secondments from being used where they are of most benefit.

Nonetheless the Metherell matter itself and a significant amount of anecdotal evidence submitted to the Commission in this matter suggest that secondment may occasionally be used to bypass normal merit selection procedures. The aim must be to retain the flexibility but prevent the abuse. Imposing a time limit on secondments which have occurred without a proper merit selection process would at least prevent the practice from being used to give a de facto permanent job by bypassing the normal process. Secondments would of course still be feasible for longer periods of time, which may be appropriate in the case of a particular project, but such secondments would need to involve a merit selection process to ensure that the best person for the job is appointed.

Temporary appointments are regulated by the Public Sector Management Act. The department head may appoint an existing public sector officer to a position temporarily if that position is vacant or the holder of such a position is suspended from duty, sick or absent. Section 34 of the Public Sector Management Act provides that the officer may not continue in the position for more than six months except with the approval of the Industrial Authority having regard to "the exigencies of the public service". These do not appear to be defined by the Act. There are no criteria or processes prescribed by the Act.

The department head may also employ any person pursuant to section 38, whether existing officer or not, if of the opinion that it is necessary to do so. The only criterion is that the person must have "appropriate qualifications to carry out work in the department". The person may be employed for successive four month periods in this way. For the period to exceed 12 months the approval of the Industrial Authority is required. The statute therefore provides no requirement for merit selection or any particular process.

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These provisions are no doubt also valuable to satisfy short term, finite or emergency staffing needs as well as to provide career development opportunities. Due to the nature of these needs, the requirement for the application of full merit selection processes would be inappropriate. But, as in the case of secondments, the provision should not be used to give a de facto permanent job, evading the merit selection criteria and processes that would normally apply. A time limit is the simplest and most easily checked method of preventing this.

The Commission suggests a six month period as a suitable period but recognises that short extensions beyond that period may be necessary to complete work assignments, and efficiency would suffer if a full selection process was necessary for such short extensions. Therefore the Commission is of the view that an extension or extensions up to a further six months should be permitted before a full selection process is required. The Commission suggests such extensions should be approved in writing by an officer at higher level than the officer who made the original appointment decision.

Transfers between departments occur by administrative arrangement with the approval of the department heads concerned. There is a statutory requirement that the process must be "in the interest of the public service" and that the person is "qualified". No merit selection criteria or processes are provided.

Transfers can be used to give a permanent job. Whilst transfers normally occur without promotion, the qualifications for jobs within the public sector on the same level vary widely. The person qualified for a particular job may not be the best person to do another job. However the community will want the best person possible to fill the second job. There seems no reason therefore why merit selection criteria and processes should not apply Without them, merit is only partially ensured by the criteria of "qualified" and "in the interest of the public service".

Other considerations apply to staff redeployment. The Commission recognises that in the case of certain types of positions, a department may employ a number of staff filling the same essential function. Redeployment of such staff within the department, either as part of a career development process or to replace staff who leave or to address changed organisational needs, should be permitted without the need for advertising outside the department or a merit selection process. To prevent abuse of the process the redeployment should not involve any change to job specification or grading.

Recommendations

1. There should be a statutory requirement for all public sector jobs at every level to be filled on the basis of merit, i.e. the best person for the job.

2. There should be a statutory requirement for every public sector job (other than temporary jobs) at every level to be the subject of a public advertisement, and to be filled following a merit selection process.

3. Chief Executive Officer appointments should be made by the Governor on the recommendation of Cabinet following a merit determined recommendation to the Minister.

4. When making SES appointments, the CEO who appoints should be enabled but not required to consult with the Minister.

5. There should be a statutory ban upon Ministerial involvement in the making of appointments to non-executive positions.

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6. Advertising and the convening of panels to make recommendations should be encouraged for temporary public sector jobs and secondments and transfers. These should be statutory requirements if the job is to be filled for a period in excess of six months, but an extension or extensions up to six months should be permitted.

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CHAPTER 3 MINISTERIAL STAFF

Recent History

Before 1972 Ministers generally had only small personal staffs predominantly consisting of seconded public servants who performed largely administrative functions. The interface between the Minister and his or her department was largely through the CEO of the department. During the first World War Australian Prime Ministers commenced employing press secretaries who assisted with the more political aspects of the office. Their numbers remained few and it was not until the election of the Whitlam Government just over 20 years ago that the situation substantially changed.

Long out of office, the new Federal Government believed for a number of reasons it would need extra assistance in implementing its extensive policy agenda. By November 1975 Ministerial staff had risen from 155 to 219, only half of whom were seconded from the public service. In 1973 Prime Minister Whitlam took the opportunity of the Garran Oration to assess the phenomenon and to state that:

> With the present need to develop and maintain new policy initiatives involving people outside the Department and the authorities with it, we have found a need to provide Ministers with greater help on the policy side. I have no hesitation in saying that the help Ministers have obtained from their offices has relieved departments of involvement in party-political matters and has given Ministers support as they have forged ahead in their own particular fields...

Despite criticism of the trend whilst in Opposition, and some early cutbacks, the Fraser Government soon expanded Ministerial staff numbers to the previous level. By 1977 the concept of Ministerial staff in this new expanded role had bipartisan support. In that year Prime Minister Fraser said, when he delivered the Garran Oration:

> The Ministerial staff provide an important support to the Minister in his carrying out of those functions which can not be delegated to departments without handing over responsibilities which must be his alone. The Ministerial staff have become an important increment to the resources available to the elected Government in carrying out the tasks for which it was elected.

The suggested benefits of Ministerial staff are various. They can bring a new perspective and dimension to the policy advice that the Minister would otherwise be only receiving from the Department. They can carry out the more overtly political duties in the Minister's office, and the tension that can occur if a Minister attempts to impose these on non-political members of his or her department is avoided. These factors mean that Ministerial personal staff are more political and closely associated with the Minister than any other category of public sector employee. By convention they are employed only as long as the Minister holds the portfolio, and the new Minister will invariably select his or her own personal staff afresh.

There is no doubt that Ministerial staff play a very important role in the modem political and administrative process. They can play a central role in policy formation, can act as a filter, conduit or liaison between the Minister's office and the department, and can perform any manner of role that the Minister decides is appropriate.

Many submissions to the Commission and some academic literature suggest that the appointment of Ministerial personal staff should be at the Minister's discretion. Two main reasons are suggested, namely:

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a. that they are temporary political positions; and/or

b. that the political and personal nature of the job is such that qualifications for it involve such a high degree of trust, compatibility and appropriate political ideology that it would be too difficult for anyone apart from the Minister to assess such personal and political attributes in a candidate.

The vast majority of opinion is therefore that the Minister ought be able to appoint such persons at his or her discretion.

The view is not held universally. For example in 1983 the Hawke Government created a Ministerial Staff Advisory Panel to introduce a degree of process and vetting concerning the appointment of Ministerial personal staff.

Whilst almost all concede the need for the Minister to make his or her own appointments in this area, there nonetheless exists a real question whether some degree of formal merit or qualification requirement is appropriate. Whilst the public may recognise and accept the political nature of the position, the salaries of such officers are paid from public money, and the public would wish to ensure that such appointments are in the public interest.

Statutory Provisions

Ministerial personal staff are employed pursuant to the temporary appointment and temporary employment provisions of the Public Sector Management Act, sections 33 and 38. They are also entitled to a redundancy payment in lieu of notice if they are made redundant. Because the employment and appointment is pursuant to the general provisions of the Public Sector Management Act, certain restrictions apply. For example section 34 provides that employment of a Ministerial stager for longer than six months requires the approval of the Industrial Authority. Similar restrictions apply to temporary employees under section 38.

Further, both sections 33 and 38 effectively give the power of appointment of Ministerial staff to the departmental head. It is inappropriate for a department head to control who the Minister may employ on his or her personal staff There are other incongruities, The Public Sector Management Act was not enacted with Ministerial personal staff in mind, and it shows.

In 1984 the Commonwealth recognised the need to provide for the recruitment and employment of Ministerial personal staff with legislation attuned to the unique nature of the position. In introducing the Members of Parliament (Staff) Act 1984, Mr Dawkins (the then Minister assisting the Prime Minister for Public Service Matters) said (Hansard 30 May 1984 page 244l):

> ... a new mechanism is being proposed under the Members of Parliament (Staff) Act which, quite unambiguously, provides Ministers with the ability either to make appointments to their staff or to have people assist in other projects. Those appointments will naturally take into account the consistency of views of those to be appointed and the Ministers themselves...
>
> There is a need for Ministers and Governments to be able to make these kinds of appointments but they ought to be quite separate from any appointments to the public service. They should be quite visible and clearly linked with the needs of a particular Minister and their tenure should be specified to be limited. In this sense the tenure of these Ministerial consultants will be restricted to the term of office of the Minister making the

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> appointment and that ought to be made perfectly clear. Any question of transfer to the public service would be in respect of the normal principles applying to appointment to the public service.
>
> Appointment as a Ministerial consultant does not get a person an entree into the career public service. If a person has been a member of the career public service and becomes a consultant, of course that person can return. That is only proper. That is the way in which the arrangements currently operate. However, people who have been selected in ways other than through merit selection will not be admitted into the public service unless at some stage they go through that merit selection. These are two separate issues. One issue is the possibility for lateral recruitment to the career public service, which will continue to be strenuously based on the merit principle which will be reinforced and so on, and the second is the new procedure for the appointment of consultants. The appointment of consultants is not new; the mechanism will be new and vastly improved.

That Act provided that the Prime Minister may determine that a Senator or Member ought be empowered to employ staff It provides that the Prime Minister may empower the Senator and Member to directly employ their staff in accordance with arrangements approved by the Prime Minister, and makes plain the nature of the employment is for the duration of the Minister's, Senator's or Member's term, and provides for certain rights relating to tenure and loss of office.

This approach has much to commend it. It avoids the incongruities of trying to force artificially the Ministerial office into an Act concerned with the general employment of public servants, and formalises the nature of the office in an appropriate way.

A clear statement of the rights, obligations, tenure and termination provisions to be applied to Ministerial staff would clarify the present situation. As earlier discussed such an Act should vest the recruitment responsibility solely with the Minister but provide that the Minister should apply the merit principle to it. The duty of all parties would be clear to them, and apparent to the public. Ministerial staff should not be eligible for career public service appointments, including temporary appointments, unless such appointment follows a full merit selection process.

Recommendations

7. The Minister should have the right to appoint Ministerial staff, on the basis of merit principles, with tenure no more extensive than the Minister's own.

8. Consideration should be given to enacting legislation similar to the Commonwealth Members of Parliament (Staff) Act 1984.

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CHAPTER 4 APPOINTMENTS OF POLITICIANS

A Problem Area

Notwithstanding the advances in recruitment integrity which would be achieved by the reforms advocated in this report, appointments of former Members of Parliament are likely to remain controversial. This will be particularly so in cases where it is perceived that Government may have an improper interest in the appointment.

The public has a level of cynicism about politicians and their actions, particularly when those actions seem to result in a collateral advantage. It is likely that controversy will persist in the case of the recruitment of a former Member of Parliament despite advertising, merit selection, and panels, due to the public's perception that any process controlled by Government can be "stacked" if the stakes are high enough.

Possible Solutions

Several possible solutions have been suggested. The reality is that any selection process involving a former Member of Parliament the ultimate responsibly for which lies with a Minister or Cabinet, is in danger of not having the confidence of the public, particularly where a political advantage is gained by the appointment. The most extreme suggestion put to the Commission was for a complete ban on any subsequent public sector employment of a politician. Most would view such a rule as unfair and discriminatory. Many former Members of Parliament would be able to contribute a great deal to the public sector given the opportunity It would neither be in their interests, nor the interests of the community, to prevent that from occurring.

Another suggestion is that there be a moratorium on the employment of a former Member of Parliament for a specified period subsequent to their retirement from politics. Such a provision would render it less likely that any improper deal would be adhered to, and hence render it less likely that any improper deal would be made. This approach also assumes that the passage of time will lessen the possibility of improper appointment by way of influence or favouritism. Whilst time may lessen a former Member's influence and lessen the friendship or political allegiance that may occasion patronage, it is certainly not a measurable process about which generalisations can be made. A moratorium might substantially lessen the likelihood of corrupt deals to resign in exchange for a promise of appointment, but it would not substantially lessen the possibility of patronage or favouritism.

The moratorium approach has however been adopted in the local government context. Section 95(2) of the Local Government Act provides that a person who has held office in a council shall not be eligible to be appointed to any position in the pay of that council until six months have elapsed from his ceasing to hold such office. The provision remains in Part V of the new Local Government Bill 1992. It must be recognised that local government has special characteristics which distinguishes it from State Government. Councillors work in closer proximity to the staff, may have a more general and intimate knowledge of the activities of the council, and may be in a significantly greater position to exert inappropriate influence if they immediately take a job on their own council. They may also be in a better position to organise such a job for themselves.

A third suggestion is that there be independent supervision of recruitment in any case where a former Member is a candidate. It should not be restricted to cases where the Member is the recommended appointee. It is equally possible for the former Member to be wrongly or corruptly denied a position as it is possible for a former Member to be

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corruptly given one. An appointment may even be denied in the current climate, because the appointing body or person wishes to avoid political controversy.

The independent scrutiny solution is the only one of those suggested which is truly equitable. A politician is neither disentitled nor advantaged, has an equal chance with all others, and the community is not denied the opportunity of securing the services of the best candidate, if the best candidate be the former Member, and the community can be satisfied as to process.

There are essentially two alternative suggestions. The State already possesses a tribunal experienced in hearing appeals and disputes concerning appointment and promotion. The Government and Related Employees Appeals Tribunal (GREAT) performs this function in relation to the internal appointment of non-executive public sector officers. Each Chairperson of the tribunal is a permanent appointee and accordingly isolated from employment related government pressure. Any review of an appointment process involving a former Member would be of such importance that the Senior Chairperson would need to preside.

The alternative was proposed in a submission by the Premier's Department, namely an external committee of review made up of eminent persons in the community. In its initial submission to the Commission it proposed that such a committee would scrutinise any selection process which led to the recommendation of any former politician for appointment to any publicly funded position or office in the State public sector including statutory authorities, the judiciary and government boards. In a subsequent submission the Department proposed that such a committee would scrutinise the selection process and satisfy itself of the extent to which the process met the required standards of qualification, merit and general propriety, and report that to the Premier.

The subsequent submission posited that whilst the process would be clearly applicable to the recruitment for positions in departments and authorities of both former Members and Members of Minister's personal stags, the application of the process to judicial and board appointments was problematic. It argued that an independent committee of eminent persons would be seen to be more impartial than an existing government instrumentality such as GREAT.

This proposal would seem potentially the most independent, equitable and transparent method of scrutiny and check available. To be independent, equitable and effective in operation the committee would need to satisfy a number of criteria:

a. The committee would need to be demonstrably both eminent and non partisan. The members would need to be eminent and independent so as to not be beholden to Government for any form of current favour or future appointment. Alternatively they should be existing office holders who possess independence and permanence.

b. The committee would need to be a standing body so that it could not be suggested that it has been "stacked" for any particular appointment. Whilst the panel would only convene when necessary, members would need to be appointed for a fixed non-renewable period of substantial length, say five years. To ensure that a panel of at least three is available in a timely fashion, the panel should have say five members with a Chairperson possessing a duty to convene.

c. The committee would need to have a statutory identity. This is necessary so that it is unable to be disbanded or unilaterally altered by the administrative act of Government. This will prevent capricious executive interference, alteration or threat.

d. The members of the committee, if not eminent senior non-Government citizens, should be office holders in the nature of:

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- the Senior Chairperson of GREAT
- the SES Grievance Meditator
- Commonwealth Merit Protection Review Agency head
- a judicial office holder of some seniority

e. The committee should scrutinise the process immediately after the recommendation is made and before the appointment of any given individual to determine whether proper, open, fair selection processes have occurred in accordance with the appropriate legislation and guidelines, and that bona fide application of merit principles has occurred. The committee ought be empowered to declare void any recommendation which has not followed the letter or the spirit of the required merit selection process, and require the process to be undertaken again. Such a provision is necessary to ensure the effectiveness of the review.

f. The committee would have jurisdiction where a Member of Parliament applied for a public sector job within two years of leaving Parliament. The Commission considers that a two year period would generally be sufficient to allay most public concern that an improper appointment might occur.

g. The committee should be empowered to report to the Parliament in the public interest.

The Commission suggests that this review process should apply when former Members of any Australian Parliaments, not just the New South Wales Parliament, are considered for jobs in the New South Wales public sector.

Recommendation

9. An independent committee of eminent persons should be established pursuant to statute to scrutinise the process followed for the filling of each public sector job where one of the applicants was a Member of Parliament within the preceding period of two years.

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CHAPTER 5 BOARDS, TRUSTS AND STATUTORY AUTHORITIES

In New South Wales there is a number of bodies each established or controlled predominantly by its own statute. Where those bodies are expressed to be subject to the Public Sector Management Act then the statutory provisions providing for CEO, SES, and non-executive public officers will regulate their appointment. The comments and recommendations in Chapter 2 will be applicable.

CEO Appointments

Several authorities and bodies are empowered to recruit by their own statute. In many cases no particular requirements are prescribed as to process or criteria. Where the body is headed by a full-time chief executive the position will normally be included in the Chief Executive Officer schedules to the Public Sector Management Act. If it is not, and no provision is made for process or criteria in the regulating statute, then CEO recruitment will be usually the responsibility of the Minister. The relationship being similar, the same merit criteria and process ought apply as in the case of an ordinary CEO.

Some authorities and bodies are run by a board or trust to whom a CEO is responsible. In these cases, the argument for appointment by the Minister or Cabinet (on the grounds of essential trust and compatibility for working closely together) does not apply with the same force. The primary relationship of responsibility is between the CEO and the board. In these circumstances there seems little reason why the board should not make the appointment themselves. These CEO appointments should be by the same process as earlier outlined for CE0s of departments and the various legislation should reflect that.

Membership

The members of boards and trusts which head statutory authorities or other bodies are generally responsible to a Minister. Appointments may be fulltime or part-time. Even when part-time, these positions may be of great responsibility and importance to the community, and may be substantially remunerated. At present these persons are generally appointed by the Governor on the relevant Minister's recommendation.

Boards and trusts also exist independently of statutory authorities (for example the Offenders Review Board) and members are similarly appointed by the Governor on the Minister's recommendation. In many cases there is no statutory requirement for merit selection or for any particular process or criteria to be adopted.

In the case of full-time statutory appointees the Premier's Memorandum number 92- of 11 August 1992 applicable to Chief Executive Officers is also applicable to fulltime statutory appointees: see Appendix 3. This Memorandum directs the application of merit selection and processes of advertising, interviewing and independent advice to achieve it. As discussed in the context of CE0s, the Memorandum will be substantially effective in preventing corruption, if followed. It does not have the force of legislation, as earlier discussed.

By Memorandum 92-29 dated 14 September 1992 the Premier directed that any proposed appointment or re-appointment of part-time members of boards, commissions and significant non-statutory standing committees where part-time members are in receipt of remuneration is to be brought to Cabinet's attention before appointments are

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made with details of the name and summary of qualifications for appointment of each person, the remuneration payable, and the term of the proposed appointment. No criteria are prescribed. Further, the Memorandum does not specify what review process Cabinet will undertake concerning proposed appointments.

The principles discussed in Chapter 1 ought require the merit selection of persons to fill such part-time positions. It is less easy to specify what process is necessary to guard against corrupt recruitment practices. There are a wide range of entities, performing functions differing in nature and purpose, to which persons may be appointed. Some may require the application of advertising and selection panel processes more rigorously than others, depending on their functions.

The provisions should not preclude the right to head-hunt in addition to the process of receiving applications. It is sufficient for legislation to provide for the application of the general principle of merit together with a requirement that appropriate processes be applied.

The Premier's Department has prepared a draft report on are view of the roles, responsibilities and accountabilities of non-executive directors and part time members of public sector boards and committees. This draft report proposes that CE0s should be appointed on the recommendation of and report to the board if it is a "governing" board with the Minister and Cabinet retaining a right of veto, but appointed by the Minister subject to Cabinet approval if it is an advisory board or a committee providing policy advice to the Minister.

The draft report states that merit should form the basis of appointments in this area, with candidates being assessed against pre-determined criteria directly related to the functions of the board. It suggests the use of a selection committee to provide names for consideration as non-executive directors in appropriate circumstances, and widespread "trawling" by way of executive search and other recruitment services to provide names for board and committee membership. These principles and processes are appropriate.

Recommendations

10. Appointments to membership of boards, trusts and statutory, authorities should be by the Minister or by Cabinet. Merit selection principles should apply. Personal and professional qualities, spread of talents and representative considerations may properly be relevant in the selection process.

11. Where CE0s are responsible to a board or trust they should be appointed by that board or trust on merit criteria, with Cabinet retaining a right of veto, and this to be reflected in the governing legislation of such bodies.

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CHAPTER 6 THE JUDICIARY

Present Situation

Judges and Magistrates in New South Wales are appointed by the Governor. Their appointment is further regulated by the various statutes governing the respective courts in which they sit. Each of the statutes provides that the Governor may appoint any person who is qualified. Qualifications are provided in each statute.

The qualification prescribed for appointment to the Magistracy is that the applicant must be a lawyer. The qualification for appointment to the District Court is to be a lawyer of a prescribed number of years standing. The qualification for appointment to the Supreme Court is to be either an existing Judge in another jurisdiction or a lawyer of a prescribed number of years standing.

None of these Acts prescribe any other criteria, or any processes. By convention a recommendation for judicial appointment is made to the Governor by the Attorney General. The Premier has recently directed that judicial appointments require Cabinet approval

It is reasonably well known that at present the appointment of Magistrates is by a process whereby potential vacancies are advertised and merit assessment occurs by way of an eminent independent panel who make recommendations to the Attorney General.

Less is publicly known about the appointment of Judges. Most of the public probably share the view of Mr K T Fennell, Deputy Auditor General, as expressed in his submission to the Commission: "the processes behind the appointment of Judges have always been somewhat esoteric." In its submission to the Commission the Premier's Department describes the present process thus:

> The Attorney General consults with the New South Wales Bar, the Law Society, the Head of Jurisdiction in the court where the appointment is to be made, and with the Minister for Justice...
>
> ... Members of the Judiciary are selected from among appropriately qualified lawyers with an established track record and a degree of recognition among their peers...
>
> Governments have traditionally included judicial appointments among the categories of appointments requiring Cabinet approval before formal appointment.

What is here described is not generally known. Whilst there has been little controversy concerning judicial recruitment in recent years, there is no published process. Should controversy occur the public would not be able to compare what did happen against what should happen.

Discussion

Principle requires that judicial appointments be made on merit.

Some suggest that the nature of the Office of Judge and the qualifications for it are such that there will always be only a small group of well known applicants, and accordingly processes such as advertising and panels are not necessary. Traditionally appointments to the District and Supreme Court have been made from the Bar. In some Australian

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jurisdictions appointments of eminent litigation solicitors and academics are now being made. Potential appointees from these relatively new areas of judicial recruitment may not be as weft known to the Attorney as the Bar.

This makes an informal head-hunting approach by the Attorney an increasingly large job if the Attorney is to realistically find the best available person willing to take the job. Periodically calling for expressions of interest would substantially enhance this aspect of the Attorney's task.

There is no reason of principle why the community would not want the same degree of merit and accountability in the recruitment of the judiciary as for senior members of the public sector.

The community ought to know the process for appointing judicial officers and it win then be in a better position to consider whether the processes are appropriate to guard against corrupt recruitment or whether there needs to be some formalisation or change of them. That process ought to commence by publishing the present system.

Recommendation

12. Government should accept and state that all judicial appointments will be made on the basis of merit, i.e. the best person available for the job, and that the process followed be documented and published. Expressions of interest should be sought periodically to ensure that worthy applicants are not overlooked.

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APPENDIX 1

28 April 1992

PARLIAMENT HOUSE.
SYDNEY. N.S.W. 2000

Mr I. Temby, Q.C.,
Commissioner,
Independent Commission
Against Corruption,
GPO Box 500,
SYDNEY NSW 2001.

Dear Mr Temby,

We desire to inform you that the Legislative Council and the Legislative Assembly have both this day agreed to the following resolution:

"That this House requests the Independent Commission Against Corruption:

To investigate the facts and circumstances relating to the resignation of Dr Terry Metherell from the Parliament of New South Wales, and the appointment of Dr Metherell to a position in the Senior Executive Service or Public Service of New South Wales, with a view to determining:

(a) whether any corrupt conduct has occurred, is occurring or is about to occur; and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct; and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

In particular, the Commission is to consider whether it is desirable to proscribe or regulate the appointment of persons who have ceased to be Members of Parliament to positions in the public sector."

Yours faithfully,

John D. Evans,
Clerk of the Parliaments.

Russell D. Grove,
Clerk of the Legislative Assembly.

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APPENDIX 2

Submissions Tendered	Exhibit Number	Attendance
Mr R G Humphry Director-General Premier's Department Submission dated 4/12/92	Exhibit P/1	Mr H C Eagleton
Mr J L Lynn GREAT Submission dated 4/12/92	Exhibit P/2	
NSW Public Service Professional Officers Association Submission dated 24/11/92	Exhibit P/3	
Mr K T Fennel Deputy Auditor-General Submission dated 13/11/92	Exhibit P/4	
Mr K P Baxter Secretary Department of Premier and Cabinet – Victoria Submission dated 11/12/92	Exhibit P/5	
Mr Windross General Manager TAB Submission dated 17/11/92	Exhibit P/6	
Professor G McCarry	Exhibit P/7	
Dr H K Colebatch Submission dated 15/12/92	Exhibit P/8	Dr H K Colebatch
Mr S R Beevor Submission dated 28/4/92	Exhibit P/9	Mr S R Beevor
Mr J M McCurrich Motor Accidents Authority Submission dated 8/12/92	Exhibit P/10	
Royal Institute of Public Administration Australia Submission dated 25/11/92	Exhibit P/11	Ms R Henderson
Mr H Jones Submission dated 27/11/92	Exhibit P/12	
Mr K B Campbell Submission dated 1/12/92	Exhibit P/13	
Mr C Nightingale	Exhibit P/14	

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Submission dated 27/11/92

Mr B R Rhodes — Exhibit P/15
Submission dated 23/11/92

Miss F L Rode — Exhibit P/16
Submission undated

Mr Scott-Irving — Exhibit P/17
Submission dated 24/11/92

Mr D Wilcock — Exhibit P/18
Submission dated 23/11/92

Mr E Dowling — Exhibit P/19
Submission dated 17/8/92

Mr J Kinross MP did not provide a written submission but attended and gave evidence

Supplementary Submission

Mr R G Humphry
Director-General
Premier's Department
Supplementary submission dated 22/1/93

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APPENDIX 3

Premier of New South Wales
Australia

MEMORANDUM NO. 92-22

(Memorandum to all Ministers)

APPOINTMENTS AND TERMINATIONS OF CHIEF EXECUTIVE OFFICERS AND FULL-TIME STATUTORY APPOINTEES

A review was recently undertaken into the requirements applying to the appointment of Chief Executive Officers and Full-Time Statutory Appointees. The revised requirements are set out on the attachment to this Memorandum.

The major change is that a number of positions which perform deputy or other assistant roles to Chief Executive Officers no longer need be submitted to Cabinet. This means that in future these positions will be treated in the same way as deputies and other senior executives in public service departments which have never been matters for Cabinet consideration.

The revised procedures still incorporate the following principles:-

1. Chief Executive and certain other appointments which a Minister may approve, or which he/she recommends to the Governor-in-Council will continue to be submitted to Cabinet for approval, prior to the appointment being made. A listing of all those positions is provided.

2. The processes of advertising, interviewing and selecting are to be based on independent advice to assist in arriving at an appropriate collective decision of Cabinet on the choice of the best candidate.

3. The responsible Minister will oversee the procedures, and the Premier's Department will perform a co-ordinating role where the appointee is the Chief Executive Officer.

4. The Director-General, Premier's Department will be responsible for ensuring that questions of remuneration packages and severance payments are appropriately determined in each case.

5. Ministers are to consult the Premier, or Director-General, Premier's Department prior to taking action in each individual case of Chief Executive placement or the remuneration/severance payment for all Chief Executive Officers and full time Statutory appointees.

John Fahey, MP
Premier.

Date: 11th August, 1992.
Branch: Director-General's Unit
Contact Officer: Les Quinnell (02) 228 5982

8th floor, State Office Block, Macquarie Street, Sydney 2000. Telephone: (02) 228 5555, Telex: AA 121269, Facsimile: (02) 231 1110, Telegraphic Address: MANIPRETE

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PROCEDURES FOR APPOINTMENT AND TERMINATION OF CHIEF EXECUTIVE OFFICERS AND FULL-TIME STATUTORY APPOINTMENTS

The following procedures are to apply in respect of the recruitment, appointment and termination of Chief Executive Officers and full-time Statutory appointees (nominated in the attached schedule).

1. Chief Executive Officers and the nominated full-time Statutory appointments which a Minister may approve, or which he/she recommends to the Governor-in-Council, will continue to be submitted to Cabinet for approval, prior to the appointment being made.

2. New positions and vacancies are to be advertised in the press, except in very exceptional circumstances which are to be explained in the Cabinet Minutes.

3. Unless there are compelling reasons, advertising action should be initiated:

   - as soon as possible after an incumbent's resignation or departure is known,
   - at least three months before an incumbent's term of office expires, in those cases where the Minister or the incumbent has decided in terms of Clauses 4 & 5 of the standard CEO's Contract of Employment not to renew the appointment for a further term.

   or consent obtained from the Premier to fill the position as an exception without advertising. Ministers will be responsible for arranging the advertising and are to consult the Director-General, Premier's Department, on the wording and placement of advertisements.

4. In performing a co-ordinating role for Chief Executive Officer positions, the Premier's Department Director-General will assist the responsible Minister by reviewing the selection criteria and advising on the composition of the advisory selection panel, including choice of a Convenor.

5. As a general rule each advisory selection panel is to include a woman, representation from outside the Department/Authority and one person from the private sector.

6. The deliberations of the panel dealing with Chief Executive Officer positions should be conveyed by the Convenor of the panel in a written report to the responsible Minister. It is anticipated the panel may furnish a short list of suitable candidates for the Minister's consideration and recommendation for Cabinet's consideration.

7. Cabinet's formal approval must be obtained by the responsible Minister prior to any appointment being made by a Minister or the Governor-in-Council. (See Section 11 for details).

8. Where a Minister favours a CEO's re-appointment for a further term, the Minister should obtain Cabinet's formal endorsement prior to discussing reappointment with the incumbent (in terms with Clauses 4 & 5 of the standard Contract of Employment). If the Minister and the incumbent agree to re-appointment for a further term, a further reference to Cabinet is not necessary in these cases.

Attachment to Memorandum No. 92-22

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9. Where the appointment needs to be submitted to the Governor-in-Council, no announcement of the appointment is to be made until the approval of the Governor-in-Council is obtained.

10. Unless there are special circumstances, eg sudden resignation or departure from office, recommendations are to be submitted to Cabinet one month in advance of the date on which an office is to be vacated, in order that there is adequate time to consider the proposed appointment.

11. Cabinet Minutes are to include:

- details of the qualifications and experience required in the position;
- the particulars of those persons placed on a short list for interview and the conclusions of the advisory selection panel;
- a separate statement attached to the Minute giving full details of the recommended appointee, including qualifications and experience;
- an attachment containing a full list of all applicants, their qualifications and employment details, etc;
- the total remuneration payable for the appointment/position.
- in the case of boards or commissions comprising more than one member, reference should be made to any special area for which the appointee is to be responsible. In such cases, an indication should be given of ways in which the proposed appointee's qualifications and experience complement that of the other members and meet the requirements of his/her appointment.

12. Persons proposed to be appointed or re-appointed to Chief Executive Officer or full-time Statutory positions need not undergo a medical examination prior to appointment unless desired by the Minister or if it is required for superannuation entitlement which is automatically available on appointment. Any examination is to be arranged by the responsible Minister. Where a medical is to be arranged, reference to that fact should be included in the Cabinet Minute and the certificate should accompany the Executive Council Minute.

13. Now that the Public Sector Management Act has been amended to no longer require retirement at a specified age, appointments can be made based entirely on merit. The age of the recommended person is not a relevant factor in the decision making process.

TERMINATIONS:

Where a Minister decides that it is desirable to remove a Chief Executive Officer or the holder of one of the nominated full-time statutory positions from his/her position, the circumstances are to be brought to the attention of the Premier before any action is initiated. Following consultation with the Minister, the Director-General of the Premier's Department will arrange for any appropriate action regarding public sector re-deployment or compensation to be initiated.

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