



briefing paper



NSW Parliamentary Library
Research Service

Judicial Appointments

Briefing Paper No 3/2012

by Lenny Roth

RELATED PUBLICATIONS

- *Judicial Accountability*, Background Paper No. 1/98

ISSN 1325-5142

ISBN 978-0-7313-1888-9

April 2012

© 2012

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

Judicial Appointments

by

Lenny Roth

NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

Gareth Griffith (BSc (Econ) (Hons), LLB (Hons), PhD),
Manager, Politics & Government/Law (02) 9230 2356

Lenny Roth (BCom, LLB),
Senior Research Officer, Law..... (02) 9230 2768

Lynsey Blayden (BA, LLB (Hons)),
Research Officer, Law (02) 9230 3085

Talina Drabsch (BA, LLB (Hons)),
Research Officer, Social Issues/Law..... (02) 9230 2484

Daniel Montoya (BEnvSc (Hons), PhD),
Research Officer, Environment/Planning (02) 9230 2003

Edwina Schneller (BSC, LLB)
Research Officer, Law.....(02) 9230 2484

Nathan Wales (BSc/BA, PhD)
Research Officer, Environment/Planning (02) 9230 2906

John Wilkinson (MA, PhD), Research Officer, Economics (02) 9230 2006

Should Members or their staff require further information about this publication please contact the author.

Information about Research Publications can be found on the Internet at:

<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/V3L1stRPSubject>

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

CONTENTS

Summary	i
1. Introduction	1
2. Key issues for judicial appointments	1
2.1 Judicial independence	1
2.2 Merit-based appointments	3
2.3 Gender and cultural diversity	4
2.4 Transparency and accountability	4
3. Models for judicial appointments	5
3.1 Overview	5
3.2 Models involving appointment by the Executive	5
3.3 Other appointment models.....	6
4. Judicial appointments in NSW	8
4.1 Statutory provisions	8
4.2 Selection process.....	8
4.3 Selection criteria	9
4.4 Acting judges	10
4.5 Judicial diversity.....	10
5. Appointments in other Australian jurisdictions	10
5.1 Commonwealth	10
5.2 Other Australian States.....	12
6. Comments by academics, judges and lawyers	15
6.1 Criticisms of the appointment process	15
6.2 Calls for an appointments commission	16
6.3 Alternative views and reform proposals	18

7. Recent papers and reports in Australia.....	20
7.1 NSW Coalition policy paper	20
7.2 Commonwealth Senate Committee report	21
7.3 Victorian Government discussion paper	22
8. Judicial appointments in the UK.....	24
8.1 The 2005 reforms.....	24
8.2 The Appointments Commissions	25
8.3 Comments on Commission's record	28
8.4 Proposals for further reforms	28
9. Judicial appointments in Canada	31
9.1 Federal and State responsibilities	31
9.2 Supreme Court of Canada	32
9.3 Federal courts and provincial superior courts	33
9.4 Provincial courts.....	34
10. Conclusion.....	35

SUMMARY

Key issues for judicial appointments

Key issues to consider in relation to judicial appointment processes include:

- Judicial independence;
- Merit-based appointments;
- Equality and diversity;
- Transparency and accountability.

Models for judicial selection

In most major common law countries judges are appointed by the Executive. However, the selection process varies across jurisdictions, and even within jurisdictions. In broad terms, the models include:

- Executive makes a selection after conducting a consultation process, which may be formal or informal;
- Executive makes a selection after receiving advice from an advisory panel convened by the Executive;
- Executive makes a selection after receiving recommendations from an independent appointments commission.

Most Australian jurisdictions (including NSW) apply the first two of these models. The third model has been adopted in the UK and, with qualifications, in Canada. Three other models that exist in the US are: Executive nomination and Legislature confirmation; election by the Legislature; and popular election. There is little, if any, support for adopting any of these US models in Australia.

Judicial appointments in NSW

Legislation provides for judges to be appointed by the Governor, acting upon the advice of the Executive Council. In practice, the Attorney-General makes recommendations to Cabinet, and then advises the Governor. Superior court appointments are made following consultation with the head of jurisdiction and legal professional bodies. There is a different selection process for District Court judges and Local Court magistrates (resulting, in part, from reforms in 2008). Vacancies for these positions are advertised, with calls for expressions of interest. In addition, selection panels provide advice to the Attorney-General. Selection criteria were published in 2008, and these are to be considered when selecting candidates for every judicial office. In terms of the gender balance, women comprise less than 20 percent of Supreme Court judges, around 25 percent of District Court judges, and about 40 percent of magistrates.

Appointments in other Australian jurisdictions

In all other Australian jurisdictions, appointments are also made by the Executive. In the case of High Court judges, appointments are made after a consultation process conducted by the Commonwealth Attorney-General. The process for appointments to other federal courts was revised in 2008, and includes consultation, advertising, and advisory panels. The judicial appointment process in other States appears very similar to NSW. It can be noted, however, that the Tasmanian Department of Justice has published a

Protocol for Judicial Appointments and that, in Tasmania, advertising and assessment panels are also used for Supreme Court appointments.

Comments by academics, lawyers and judges

For decades, the processes for appointing judges in Australia have been subject to criticism by a number of academics, lawyers and judges. Criticisms have been made about the lack of transparency in the appointments process, about patronage and political appointments, and regarding the limited gender and cultural diversity on the bench. A number of critics (including eminent judges) have called for the establishment of an independent judicial appointments commission (or commissions) in Australia. On the other hand, some eminent judges have opposed, or expressed doubts about, such a proposal, instead favouring a more formal consultation process. The NSW Law Society has also not supported the establishment of a commission.

Recent papers and reports in Australia

In March 2008, the NSW Coalition released a policy paper which recommended the establishment of a Judicial Appointments Commission. Following the State election 2011, the new Attorney-General, Greg Smith, said that the Government was still looking at this proposal. At the federal level, in 2009, a Senate Committee published a report on Australia's judicial system. The Committee was not persuaded that the cost of establishing an appointments commission was currently warranted. Most recently, in July 2010, the Victorian Government published a discussion paper on the judicial appointment process.

Judicial appointments in the UK

The Executive is responsible for making judicial appointments but, as a result of reforms enacted in 2005, its role in the selection process has been curtailed. A Judicial Appointments Commission (JAC) now recommends candidates for most judicial offices in England and Wales (Scotland and Northern Ireland have their own commissions). The JAC is comprised of members from the judiciary and the profession, as well as lay members. The Executive can only reject a recommendation from the JAC on certain grounds. The JAC has been criticised for delays, and also regarding the type and quality of appointments. The UK Government recently published a consultation paper, with proposals to address some issues with the process and to respond to an Advisory Panel's report on judicial diversity. A House of Lords Committee has also recently published a report, which supported the existing model but proposed some changes.

Judicial appointments in Canada

For appointments to the Supreme Court of Canada, the Executive identifies a list of qualified candidates and this list is reviewed by a selection panel comprised of five Members of Parliament. The panel provides an unranked list of six candidates to the Executive for its consideration. A different process applies for appointments to other federal courts and to provincial superior courts. The Commissioner for Federal Judicial Affairs administers part of this process on behalf of the Minister, and a key feature of the process is the role of Judicial Advisory Committees. These Committees are made up of eight representatives from the judiciary, the profession, the public, the government and the law enforcement community, and they provide the Minister with an assessment of candidates (except candidates that are judges).

1. INTRODUCTION

Judges play an extremely important role in our society. They adjudicate on disputes between private parties and between government and citizens, they preside over criminal trials and sentence those who have offended, they review executive action which is challenged as being unlawful, and they uphold the terms of the Constitution. It is crucial that the judiciary maintains high standards of competency, impartiality and fairness, and that the public has utmost confidence in the judiciary. The judicial appointments process is a vital mechanism for ensuring that these objectives are achieved.

In Australia, there have been longstanding concerns about the lack of transparency in the appointments process, about patronage and political appointments, and regarding the limited gender and cultural diversity on the bench. This debate has led to some reforms in NSW and in other Australian jurisdictions. However, these reforms have not gone as far as in some other countries, including the United Kingdom, which has established an independent Judicial Appointments Commission. In 2008, the NSW Coalition released a policy paper suggesting that NSW should also establish an Appointments Commission and following the 2011 State election, the NSW Attorney-General, Greg Smith, said that the Government was still looking at this proposal.

This paper outlines the present system of judicial appointments in NSW and other Australian jurisdictions. It also summarises the debate about the appointments process and looks at recent discussion papers and reports in NSW and other Australian jurisdictions. In addition, an overview is presented of the judicial appointments system in the UK, and of recent reviews of this system, one of which considered whether Parliament should have a greater role. Finally, the federal and provincial systems for appointing judges in Canada are outlined. First, however, this paper briefly discusses some key issues and presents a broad overview of appointment models.

2. KEY ISSUES FOR JUDICIAL APPOINTMENTS

A number of key issues need to be considered when assessing systems for making judicial appointments. These include:

- Judicial independence;
- Merit-based appointments;
- Equality and diversity;
- Transparency and accountability.¹

2.1 Judicial independence

Judicial independence is a fundamental aspect of our justice system. In a 2007

¹ UK Ministry of Justice, [The Governance of Britain: Judicial Appointments](#), Consultation Paper, October 2007, Ch 2. See also S Evans and J Williams, 'Appointing Australian Judges: A New Model (2008) 30(2) *Sydney Law Review* 295 at 297

consultation paper on judicial appointments, the UK Government stated:

Judicial independence is vitally important to the rule of law, and in particular to public confidence in judges as a means of upholding the law. This in turn brings social and economic benefits. It enables people to be assured that when their rights are infringed, or when others' duties need to be enforced, the appropriate action will be taken. It assures people that justice will be done when a criminal allegation is made.²

Judicial independence includes independence from the other branches of government. In respect to independence from the Executive, the paper stated that "it is essential that the public has confidence that judges will interpret the law impartially and, where appropriate, stand up for the rights of individuals irrespective of the wishes and interests of the State".³ The paper also referred to the importance of judges being independent from the Legislature, noting "it is in the interests of justice that the judiciary should be left free to decide cases, protected from political pressure to reach particular decisions in individual cases".⁴ The paper then commented:

One of the most important ways of securing judicial independence is to ensure that the appointments process does not result in politically biased judges, or judges who are, or feel, beholden to the appointing body or person, or to any individual or organisation. This in turn helps to ensure that the judges who are appointed are able to act independently, free from political or other improper pressure, in office.⁵

In a 2007 address on judicial independence, the former Chief Justice of the NSW Supreme Court, Jim Spigelman AC, observed:

The most significant single aspect of the institutional arrangements for judicial independence is the need to insulate, indeed to isolate, the exercise of judicial power from interference or pressure from the executive branch of government. To a substantial degree, this is simply a manifestation of the need to ensure impartiality. So far as I am aware, in all jurisdictions, the hydra-headed executive branch is the single most frequent litigant in the courts.⁶

In relation to judicial appointments, he noted:

Judges who are selected or promoted on the basis of how they are likely to decide, rather than on the basis of their professional expertise, may not disappoint the authorities who select and promote them.⁷

Writing in 2008 about the process for appointing judges in Australia, Simon

² UK Ministry of Justice, n1, para 2.4

³ UK Ministry of Justice, n1, para 2.6

⁴ UK Ministry of Justice, n1, paras 2.6-2.7

⁵ UK Ministry of Justice, n1, para 2.9

⁶ Hon J Spigelman AC, 'Judicial appointments and judicial independence' (2008) 17(3) *Journal of Judicial Administration* 139 at 141

⁷ Hon J Spigelman AC, n6, p142

Evans and John Williams commented that the principle of judicial independence did not "demand an absolute separation of all aspects of the judicial process from the political process".⁸ Indeed, Evans and Williams suggested that "it is perhaps not desirable that appointments be wholly independent from politics". According to Evans and Williams:

What an appointments model should seek to do is attenuate the direct influence of the political branch on the process and subject its involvement to greater transparency and accountability, while preserving all the existing constitutional arrangements for ensuring decisional independence.⁹

2.2 Merit-based appointments

It is generally accepted that judicial appointments must be made solely on the basis of merit. However, as noted by Evans and Williams, unless merit is broken down into its constituent elements, "the concept becomes almost wholly subjective, allowing each decision-maker to construct his or her own features which are significant".¹⁰ Evans and Williams commented:

The publication of disaggregated selection criteria provides for greater transparency by allowing candidates to be assessed against a common set of standards, so enabling 'a more realistic interpretation of what "merit" actually involves for a particular job. Disaggregating the components of merit also enables evaluation of the *values* that are implicit in the concept of merit. As argued by Justice Sackville, '[t]o the extent that publication of standards encourages public discussion and debate about the qualities required of judicial officers, this might be thought to promote greater public confidence in the judicial appointment process'.¹¹

Establishing selection criteria that reflect merit is one aspect; applying the criteria based on evidence is another. Evans and Williams stated:

Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitute merit. No other process is capable of providing reasonable assurance that the appointee is among the most qualified candidates for the position...

If the concept of merit is disaggregated and clearly articulated and applied on the basis of evidence, it is consistent with the best of existing practice in judicial appointments. Further, disaggregating the concept highlights the shortcomings of the existing processes that fail to identify worthy candidates beyond the range of the 'usual suspects'.¹²

⁸ Evans and Williams, n1, p299

⁹ Evans and Williams, n1, p300

¹⁰ S Roach Anleu and K Mack, quoted in Evans and Williams, n1, p297-298

¹¹ Evans and Williams, n1, p298

¹² Evans and Williams, n1, p299

2.3 Gender and cultural diversity

In a submission to a 2009 Senate inquiry into Australia's judicial system, the Gilbert and Tobin Centre of Public Law commented:

There are two specific arguments in favour of recognising diversity as a desirable factor in judicial appointments. First, a judiciary which is broadly representative of the make-up of the Australian community has been found to enhance public confidence in the courts and respect for their decisions. Second, the whole point of multi-member benches is to expose legal arguments to a number of decision-makers able to bring differing perspectives on the issues in question.¹³

While it may generally be accepted that judicial diversity is important, there has been some debate about how to promote diversity on the bench, and in particular, the issue of "whether an approach to selection that encourages diversity is consistent with selection based on merit".¹⁴ Another issue that may have a bearing on diversity is the extent to which consideration is given to appointing solicitors and academic lawyers in addition to barristers (which has been the traditional pool from which judges are drawn).

2.4 Transparency and accountability

Transparency in the judicial appointments process is significant for a number of reasons. The UK Government's 2007 consultation paper stated:

Confidentiality in relation to individual applicants must of course be respected, but the procedures for appointment should be as open and transparent as possible. This supports equality and diversity, by driving up public confidence in the justice system, encouraging applications from a more diverse range of individuals and improving the public perception of the judiciary. This in turn supports appointment on merit and quality, as well as confidence in the independence of the judiciary.¹⁵

Transparency applies to the selection criteria that are used and also to the selection process that is followed, including, if relevant, who is consulted as part of the selection process.¹⁶ In addition to transparency, it is important that the person or body who is responsible for appointing judges can be held accountable for the operation of the process and for individual appointments.¹⁷ One view is that the executive should have exclusive responsibility for judicial appointments because it is politically accountable for its decisions.¹⁸ However,

¹³ Gilbert and Tobin Centre of Public Law, [Submission to Senate Standing Committee on Legal and Constitutional Affairs](#), March 2009, p8

¹⁴ Senate Standing Committee on Legal and Constitutional Affairs, [Australia's Judicial System and the Role of Judges](#), December 2009, p20

¹⁵ UK Ministry of Justice, n1, para 2.19

¹⁶ See Evans and Williams, n1, p302-303

¹⁷ House of Lords Select Committee on the Constitution, [Judicial Appointments](#), 25th Report of Session 2010-2012, p11-12

¹⁸ Evans and Williams, n1, p302-303

Justice Ronald Sackville has argued that this does not work in practice:

... if a judicial appointee is not up to the job, it is his or her court that inevitably suffers the opprobrium...Political accountability may be present in theory, but in practice is largely illusory, since the effects of a sub-optimal appointment are usually not clear until the Attorney-General responsible has moved on or the Government has lost office.¹⁹

3. MODELS FOR JUDICIAL APPOINTMENTS

3.1 Overview

Professor Simon Shetreet has discussed two ways of classifying models of what he refers to as "judicial selection". He states:

Practices and procedures of judicial selection can be classified in accordance with the nature of the process. This classification is based on whether the selection is made by election, by appointment or by a mixed method. Judicial selection methods can also be classified in accordance with the organs of government that make the selections. These include the Executive, the Legislature...and the judiciary. One also has to keep in mind the distinction between the formal powers of judicial selection and the informal practices which actually take place in the course of the process of judicial selection. The formal powers may be vested in one organ, but in practice that organ only acts after hearing the recommendations of other organs, bodies or judges. Sometimes, the practice develops to such a level that the organ with the formal powers feels bound to exercise its powers of judicial selection only after the practice had been followed and sometimes only in accordance with [its] recommendations...²⁰

3.2 Models involving appointment by the Executive

In most major common law countries (including Australia, Canada, New Zealand, and the United Kingdom) judges are appointed by the Executive. However, the selection process varies across jurisdictions, and even within jurisdictions. In broad terms, the models (which are outlined in more detail in the following sections of this paper) include:

- Executive makes selection after consultation: In some jurisdictions, the Executive makes a selection after consulting with various persons. There may be either a formal or informal consultation process. In most Australian jurisdictions, the Executive generally conducts an informal consultation process when selecting candidates for superior courts (there are no statutory requirements or guidelines on who must be consulted).

¹⁹ Hon R Sackville, 'Three issues facing the Australian judiciary' (2008) 20(3) *Judicial Officer's Bulletin* 17 at 20

²⁰ S Shetreet, 'Who will judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61(12) *The Australian Law Journal* 766 at 766-67

- Executive makes selection after receiving advice from selection panel: The Executive may convene a selection panel to provide it with advice on appointments. In some Australian jurisdictions, the Executive has a policy of convening a selection panel to provide advice on the appointment of judges to certain courts. The panels vary in composition across the jurisdictions but it is common to include a senior judge, a nominee from the Attorney-General's Department, and another person. The Executive is free to ignore the panel's advice. In Canada, for vacancies on the Supreme Court, a selection panel comprised of five Members of Parliament (including three government members) reviews a long list of qualified candidates compiled by the Executive and provides a short list of six candidates to the Executive for its consideration.
- Executive makes selection after receiving recommendations from an appointments commission: In several countries (e.g. UK, Canada, South Africa, and several US States) permanent commissions or committees assess candidates for judicial positions, and make recommendations to the Executive. In the UK and Canada, these are comprised of members of the judiciary, the profession and lay members. The Executive is restricted to choosing a candidate from one of a number of candidates nominated by the commission (in contrast, in South Africa, the Executive is required to appoint those nominated by the commission²¹).

3.3 Other appointment models

There are a number of other models for appointing or selecting judges. Three other models, which exist in the United States, are:

- Executive nomination and Legislature confirmation: In United States, the responsibility for appointing federal judges is shared between the Executive and the Legislature. The US President makes nominations for these judicial vacancies, which then must be confirmed by a majority vote of the US Senate. The Senate undertakes scrutiny of judicial nominations, including conducting public hearings. The same model is used in a number of US States (e.g. New Jersey).
- Election by Legislature: In two States, judges are elected by a vote of the General Assembly. In Virginia, House and Senate Justice Committees assess judicial nominees and make recommendations to the General Assembly. In South Carolina, a Judicial Selection Commission submits three nominees to the General Assembly. The Commission has ten members: five are appointed by the Speaker, three by the Chairman of the Senate Judiciary Committee, and two are appointed by the President

²¹ Except for appointments to the Constitutional Court of South Africa. For a summary of the judicial appointment process in South Africa, see H Corder, 'Appointment, discipline and removal of judges in South Africa', Chapter 5 in H.P Lee, *Judiciaries in Comparative Perspective*, Cambridge University Press, 2011.

of the Senate (6 members must be appointed from the General Assembly and four must be from the general public).

- Election by citizens: In many States, judges are elected through popular election. In some States, judges are elected for a number of years and another election is then held. In other States, judges are appointed by the Executive for a number of years (typically, the Governor appoints a judge after receiving recommendations from a nominating commission) and after the expiry of the judge's term, voters decide (in a retention election) if the judge should remain in office.²²

There is little, if any, support for adopting any of these models in Australia. In 1987, George Winterton commented on the popular election model, which he noted, had not been adopted in any other common law country. He outlined the advantages and disadvantages of this method of judicial selection compared to the existing system in Australia:

Such a selection method might alleviate some of the defects of the present system, but it would be likely to exacerbate others. Depending upon the details of the nomination process, it might lift the veil of secrecy currently surrounding judicial selection, and could result in a judiciary more closely reflecting the [gender] and ethnic composition of the community. But political considerations would probably play an even larger role than at present and, above all, the general public are unlikely to be an able judge of intellect, professional competence, or even integrity and judicial temperament.²³

In the same article, Winterton discussed the option of legislative ratification of executive appointments as follows:

... although it would, admittedly, open the appointment process to public scrutiny, it would not, in itself, rectify the two defects of the present system: it would neither reduce the likelihood of political appointments (American experience suggests, in fact, that it might increase it), nor would it necessarily promote the appointment of more academic lawyers and solicitors, or foster a better [gender] and ethnic 'balance' on the federal courts...Ultimately, its greatest defect, however, is that a Senate veto is merely *negative*, a shield to keep undesirable appointees off the bench, whereas *positive* measures are required to remedy the defects of the present system.²⁴

²² This information on the US models was, in part, taken from M Tushnet, 'Judicial selection, removal and discipline in the United States', Chapter 7 in H.P Lee, *Judiciaries in Comparative Perspective*, Cambridge University Press, 2011.

²³ G Winterton, 'Appointment of Federal Judges in Australia', (1987) 16(2) *Melbourne University Law Review* 185 at 193

²⁴ G Winterton, n23, p198. See also Constitutional Commission, *Final Report of the Constitutional Commission*, Australian Government Publishing Service 1988, p398-399

4. JUDICIAL APPOINTMENTS IN NSW

4.1 Statutory provisions

The statutes governing the various courts in NSW provide for judges to be appointed by the Governor, acting upon the advice of the Executive Council.²⁵ In practice, the Attorney-General makes recommendations to Cabinet, and then advises the Governor. The relevant courts legislation also sets out the qualifications for office: a person is eligible to be appointed as a judge of the Supreme Court or District Court if the person is an Australian lawyer of at least 7 years standing (5 years standing in the case of appointments to the Local Court).²⁶ There are no statutory provisions (or formal guidelines) on the selection process for judges but the procedure has been described on the Department of Attorney General and Justice's *Lawlink* website.²⁷

4.2 Selection process

Superior courts and heads of jurisdiction: The *Lawlink* website provides the following brief description of the selection process for appointments to the Supreme Court, other superior courts (i.e. the Land and Environment Court and the Industrial Relations Commission), and heads of jurisdiction (e.g. Chief Justice of the Supreme Court):

The appointment of judges to the higher courts and the appointment of heads of jurisdiction continue to be made traditionally following consultation with the head of jurisdiction and relevant legal professional bodies.

District Court and Local Court: A different selection process applies to the appointment of District Court judges and Local Court magistrates. This process was established as a result of reforms instituted by the Attorney-General in 2008 (but note that magistrate vacancies had previously been advertised and, before 1999, selection panels were convened for magistrate positions²⁸). Now, vacancies for District Court judges and Local Court magistrates are advertised, with calls for expressions of interest (EOIs). Persons may also be nominated. As outlined below, selection panels assist the Attorney-General in making selections for District Court judges and Local Court magistrates:

A panel, comprising the relevant head of the jurisdiction, the Director General of the Attorney General's Department, a leading member of the legal profession and a prominent community member, is convened from time to time to review EOIs against the selection criteria.

²⁵ *Supreme Court Act 1970*, s 26; *District Court Act*, s 13; *Local Court Act 2007*, s 13

²⁶ *Supreme Court Act 1970*, s 26; *District Court Act*, s 13; *Local Court Act 2007*, s 13

²⁷ Department of Attorney General and Justice, *Careers for Judicial and Other Statutory Officers*, [[online](#)]

²⁸ See R Sackville 'Judicial appointments: A discussion paper', (2005) 14 *Journal of Judicial Administration* 117 at 122

The panel develops a short list of candidates for interview. Following interviews candidates are assessed as being highly suitable, suitable or unsuitable for judicial office - candidates are not otherwise ranked within these categories. A report is then provided to the Attorney General.

Given the high level of interest in appointment to judicial office and the occurrence of vacancies throughout the year, the panel may reconvene to conduct fresh interviews to assist in expanding the pool of applicants identified as being most suitable for judicial office.

The above process supplements the traditional selection process. The Attorney General may propose a nominee for appointment where this is felt necessary in appropriate cases.²⁹

4.3 Selection criteria

The Department explains that "the Attorney General has approved a list of personal and professional criteria, which will be considered in selecting candidates for every judicial office". The selection criteria were published for the first time in 2008, and are set out below:

Overriding principle

Appointments will be made on the basis of merit. Subject to this principle, including the relevant considerations listed below, there is a commitment to actively promoting diversity in the judiciary. Consideration will be given to all legal experience, including that outside mainstream legal practice.

Professional qualities

- Proficiency in the law and its underlying principles
- High level of professional expertise and ability in the area(s) of professional specialisation
- Applied experience (through the practice of law or other branches of legal practice)
- Intellectual and analytical ability
- Ability to discharge duties promptly
- Capacity to work under pressure
- Effective oral, written and interpersonal communication skills with peers and members of the public
- Ability to clearly explain procedure and decisions to all parties
- Effective management of workload
- Ability to maintain authority and inspire respect
- Willingness to participate in ongoing judicial education
- Ability to use, or willingness to learn modern information technology

Personal qualities

- Integrity
- Independence and impartiality
- Good character

²⁹ Department of Attorney General and Justice, n27

- Common sense and good judgement
- Courtesy and patience
- Social awareness.

4.4 Acting judges

The legislation governing the various courts provides for the appointment of acting judges, by commission for up to 12 months.³⁰ Guidelines have been published on these acting appointments. The guidelines state that "generally, only a former judicial officer will be appointed as an acting judicial officer". Retired judges and judges who are approaching retirement may submit expressions of interest to the relevant head of jurisdiction.

4.5 Judicial diversity

There does not appear to be any information collected on judicial diversity in NSW. In response to a question without notice in December 2010, the former Attorney-General, John Hatzistergos, reported on the gender balance in the NSW judiciary, stating that "around 25 per cent of the District Court bench are female and 40 per cent of the Local Court bench are female". Mr Hatzistergos also stated that, "sixteen per cent of judges and 38 per cent of magistrates appointed since 2007 have been women".³¹ In addition, he noted that the appointments came from a variety of backgrounds including solicitors and barristers, crown prosecutors, public defenders, and academia. The current list of NSW Supreme Court judges on the Supreme Court's website shows that only 10 of the 49 permanent judges are women (i.e. less than 20 per cent).³²

5. APPOINTMENTS IN OTHER AUSTRALIAN JURISDICTIONS

5.1 Commonwealth

Relevant provisions: The Commonwealth Constitution provides that Justices of the High Court and of other federal courts "shall be appointed by the Governor-General in Council".³³ In practice, the Attorney-General makes recommendations to the Cabinet, and the Attorney-General then advises the Governor-General. The legislation governing the High Court and the other federal courts set out the qualifications for office (e.g. persons are eligible for appointment to the High Court if they are a judge or a legal practitioner of five years standing).³⁴ The only statutory provision on the process for making judicial appointments is section 6 of the *High Court Act*, which requires the Commonwealth Attorney-General to consult with the Attorneys-General of the States before making an appointment to the High Court.

³⁰ See, for example, *Supreme Court Act 1970*, s 37

³¹ J Hatzistergos, *Hansard, Legislative Council*, 1 December 2010, p28643

³² See Supreme Court NSW, *Judicial Officer Contact Details*, [online]

³³ *Commonwealth Constitution*, s 72

³⁴ *High Court of Australia Act 1979*, s 7

High Court: An outline published by the Commonwealth Attorney-General's Department (in 2010) describes the process for appointing High Court Justices:

...the Attorney-General consults widely with interested bodies seeking nominations of suitable candidates. In addition to those bodies outlined earlier, the Attorney-General also writes to:

- State Attorneys-General
- Chief Justice of the High Court
- Justices of the High Court
- State and Territory Chief Justices

The Attorney-General then considers the field of highly suitable candidates and writes to the Prime Minister seeking his and/or Cabinet approval. If approved by the Cabinet, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process.³⁵

On 23 March 2012, the Commonwealth Attorney-General, Nicola Roxon, announced that she would "cast a wide net to start the search for two new High Court Justices" to replace Justice Gummow (who retires in October 2012) and Justice Heydon (who retires in February 2013).³⁶ The Attorney-General said that she encouraged "those from across the community to consider who they might want to nominate keeping in mind the need for a diverse range of professional speciality, cultural background, gender and residential location across applicants". Ms Roxon wrote to "State and Attorneys-General, law societies, universities, the opposition, legal services and the wider legal community, asking for [nominees]".

Other federal courts: The process for judicial appointments to other federal courts was revised in 2008 in order to ensure greater transparency, that appointments are based on merit, and that everyone who has the qualities for appointment is properly considered.³⁷ The process is described as follows:

When the decision has been made to make an appointment to a federal court, the Attorney-General consults widely, writing to interested bodies inviting nominations of suitable candidates. These bodies include, but are not limited to, the Chief Justices of the Family and Federal Courts, the Chief Federal Magistrate, the Law Council of Australia, the Australian Bar Association and their State and Territory counterparts.

At the same time, the Attorney-General's Department places public notices in national and local media seeking expressions of interest and nominations and publishes the appointment criteria on its website.

³⁵ Attorney-General's Department, [Judicial appointments: Ensuring a strong and independent judiciary through a transparent process](#), 2008, p3

³⁶ N Roxon, 'Wide net cast in search for two new High Court Justices'. [Media Release](#), 23 March 2012.

³⁷ Attorney-General's Department, n35, p1

The Attorney-General has established standing Advisory Panels to assist in assessing expressions of interest and nominations. The membership of the Advisory Panels includes the Head of the relevant court (or their nominated representative), a retired judge and a senior official from the Attorney-General's Department.

The Attorney-General writes to the Advisory Panel requesting that they consider all expressions of interest and nominations. The Advisory Panel may interview candidates it considers suitable for appointment. The Advisory Panel subsequently presents the Attorney-General with a report that lists those candidates that it has assessed as being highly suitable for appointment.

After considering the Advisory Panel's report, the Attorney-General writes to the Prime Minister seeking his and/or Cabinet approval. If approved by the Cabinet, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process.³⁸

5.2 Other Australian States

Overview: As in NSW, appointments in the other States are made by the Governor in Council. In practice, the appointee is selected by Cabinet on the recommendation of the Attorney-General. Like in NSW, no other State has statutory provisions to govern the selection process. Only Victoria and Tasmania have published an outline of the current selection process (see further below). The only published information on the selection process in other States is in a 2005 discussion paper prepared for the Judicial Conference of Australia.³⁹ On the basis of the available published information, the appointments process in all five States can be summarised briefly as follows:

- **Advertising:** In all other States, the Attorney-General advertises for expressions of interest for magistrate positions. In Victoria and Tasmania, the Attorney-General also calls for expressions of interest for judicial appointments to the higher courts.
- **Selection criteria:** In Victoria and Tasmania, the Attorney-Generals have published selection criteria for judicial appointments. In Queensland and Western Australia, advertisements for magistrate positions set out criteria which applicants are expected to address.
- **Advisory panels:** In Victoria, the Attorney-General convenes advisory panels to advise on the appointment of magistrates only. In Tasmania, the Attorney-General convenes an assessment panel in relation to Magistrate Court and Supreme Court appointments.

³⁸ Attorney-General's Department, n35, p2. Selection criteria for the appointment of Federal Court Judges has been published on the Attorney General's Department's [website](#)

³⁹ Justice R Sackville, n28

- ***Interviews:*** In all other States, interviews are conducted for magistrate positions. In Victoria, South Australia and Western Australia a panel is formed to conduct these interviews. None of the States have a formal interview process for judges of the higher courts.
- ***Consultation:*** In most other States, the Attorney-General consults with members of the judiciary and professional bodies. In Western Australia, the Solicitor-General undertakes the consultation process and makes a recommendation to the Attorney-General.

Victoria: The process for appointing judges in Victoria was outlined in a July 2010 discussion paper, which noted that:

The current Attorney-General, the Hon Rob Hulls MP, has introduced the following reforms to make the process of appointing judges and magistrates more transparent and to broaden the pool from which judicial officers are appointed:

- publishing selection criteria for all judicial positions
- advertising for expressions of interest from eligible candidates for all judicial positions
- conducting wider consultation before deciding on a preferred candidate, including with the judiciary, the Victorian Bar, the Law Institute of Victoria, Victoria Legal Aid, and the Victorian Government Solicitor.⁴⁰

The discussion paper outlined the selection process as follows:

In Victoria, the Attorney-General discusses with the head of jurisdiction the nature of the judicial vacancy, any particular skills and attributes which may be appropriate, and the present and future needs of the court. The Attorney-General assesses the suitability of candidates who have lodged an expression of interest and other people who have been identified as possible candidates. This assessment includes consideration of the contents of the expression of interest application (if any), feedback arising from consultations undertaken by the Attorney, and the results of probity checks. For appointments of judges and magistrates, the Attorney-General will have a face-to-face meeting with the proposed candidate before forming a concluded view about whether to recommend the person for appointment.

In addition, for appointments to the Magistrates' Court and VCAT, an advisory panel is convened to provide advice to the Attorney-General. Advisory panels are established as vacancies arise. They assess the expressions of interest for the position against the selection criteria, interview short-listed candidates, and contact referees nominated by the candidate. The panel then prepares a report for the Attorney-General with its assessment of candidates and a list of suitable candidates for appointment.

The Attorney-General may recommend for appointment any person who meets

⁴⁰ Department of Justice, [Reviewing the Judicial Appointments Process in Victoria](#), Discussion Paper, July 2010, p8. The Courts and Tribunals Victoria [website](#) has information on submitting an expression of interest (including the selection criteria).

the statutory requirements. Although the Attorney-General has not appointed people assessed as being unsuitable by an advisory panel, he is not bound by the panel's assessment.⁴¹

The paper noted that advisory panels for appointments to the Magistrate's Court are usually comprised of the Chief Magistrate, a senior public servant from the Department of Justice and a third person, such as another judicial officer or the CEO of the Judicial College of Victoria or the Sentencing Advisory Council.⁴²

Tasmania: The Tasmanian Department of Justice has published a *Protocol for Judicial Appointments* (formulated in 2002 and revised in 2009).⁴³ In summary:

- *Expressions of interest:* The Attorney-General advertises for expressions of interest in newspapers and on the Department's website. In addition, the Attorney-General may invite any suitably qualified persons to submit an expression of interest. The views of the Opposition Spokespersons and the various major bodies representing the interests of the legal profession will be confidentially sought on candidates who may be suitable for appointment and who should be encouraged to apply.
- *Assessment Panel:* An Assessment Panel is to be formed to assess the expressions of interest. In the case of a Supreme Court vacancy, the Panel is to be comprised of a representative of a professional legal body chosen by the Attorney-General, the Secretary of the Department of Justice or their nominee, and the Attorney-General's nominee. In the case of a Magistrate's Court vacancy, the Panel is to be made up of the Chief Magistrate or their nominee, the Secretary of the Department of Justice or their nominee, and the Attorney-General's nominee.
- *Assessments by Panel:* The Assessment Panel may make inquiries of referees and may seek the views of third parties as to the suitability of any person. Applicants will be assessed as suitable or not suitable for appointment. If more than five applicants have been assessed as suitable, the panel will indicate the five most suitable applicants. A statement of reasons will be provided for the recommended applicants. All assessments will then be provided to the Attorney-General.
- *Consultation by A-G:* After receiving the recommendations, the Attorney-General may consult with whoever he or she sees fit. Once the Attorney-General has identified a preferred candidate, the Secretary of the Department of Justice will contact the Executive Director of the Law Society and Chair of the Legal Profession Board and ask whether there is any reason why the appointment should not proceed. Following

⁴¹ Department of Justice, n40, p19

⁴² Department of Justice, n40, p22

⁴³ Department of Justice, [Protocol for Judicial Appointments](#), April 2009

consideration of the matter by Cabinet, the Attorney-General will recommend an appointment to the Governor-in-Council.

6. COMMENTS BY ACADEMICS, JUDGES AND LAWYERS

6.1 Criticisms of the appointment process

For decades, the processes for appointing judges in Australia have been subject to criticism by a number of academics, lawyers and judges. A number of critical comments over the years are outlined below. As can be seen from the previous section of this paper, these criticisms have prompted some reforms. However, some would argue that the reforms have not gone far enough.

In 1987, Professor George Winterton commented on the appointment process for federal judges in Australia in these terms:

The procedural aspects of the present appointment process have...been justifiably criticized, principally on the ground that they involve excessive secrecy and inadequate and unpredictable consultation by Attorneys-General who are not obliged to consult anyone (except the State Attorneys-General pursuant to the High Court of Australia Act) and, of course, are free in any event to ignore whatever advice they receive.

A more controversial criticism of the results of the present method of judicial appointment is that Australian benches lack 'balance', in that virtually all appointees are white male barristers, usually of Anglo-Celtic origin...⁴⁴

In 1999, Justice McPherson, then Chairman Secretary of the Judicial Conference of Australia, commented:

There is growing evidence that the power of making judicial appointments is coming to be regarded by governments in power as a form of patronage and a source of influence that can be used to serve their short-term political interests.

The whole process of making judicial appointments ought to be scrutinised and reviewed to ensure that it is less secretive or, as some would have it, more 'transparent'. In this, as in other areas, governments must be accountable for the way in which their powers are exercised.⁴⁵

Writing in 2003 about appointments to the High Court, Rachel Davis and Professor George Williams commented:

Whether or not inappropriate appointments are in fact made by a government, the secrecy of the decision-making process is inconsistent with even the most modest requirements of government accountability, and is certainly capable of giving rise to the *perception* that irrelevant factors may have been taken into

⁴⁴ G Winterton, 'Appointment of Federal Judges in Australia', (1987) 16(2) *Melbourne University Law Review* 185 at 190

⁴⁵ As quoted by P Young, 'Current Issues', (1999) 73(9) *Australian Law Journal* 609 at 611

account, or relevant ones omitted. It is vital, whether the appointee is a woman or a man, that a transparent process ensures that they cannot be subjected to any allegations of favouritism or, alternatively, tokenism.⁴⁶

Davis and Williams also referred to issues of self-selection and diversity:

In addition, the empirically demonstrated problem of self-selection is a real one in any process where the consultations and decision to appoint are made by a relatively closed and elite group of politicians and very senior members of the profession. The operation of (often unconscious) self-selection, or what is sometimes called 'cloning', in selection and assessment of candidates means that an individual may possess all the necessary criteria for appointment but be excluded from consideration because they lack other characteristics traditionally associated with incumbents. In the context of judicial appointments, this problem relates directly to the government's tradition of drawing appointees almost exclusively from the existing judiciary or from the Bar.⁴⁷

In a 2008 article, Justice Sackville summarised the calls for reform:

Supporters of change point to the need for a more transparent appointments process, the desirability of attracting a wider range of suitably qualified candidates for appointment, and the benefits of applying standard criteria uniformly to all candidates for judicial office. The supporters of change argue that a reformed appointments process will maintain public confidence in the independence, competence and integrity of the judiciary.⁴⁸

6.2 Calls for an appointments commission

Many critics of the judicial appointment process have called for the establishment of a judicial appointments commission. In their 2003 article, Davis and Williams commented:

The idea of a judicial appointments commission already has wide support in Australia. As early as 1977, Sir Garfield Barwick, then Chief Justice of the High Court, declared that 'the time [had] arrived' for the curtailment of the exclusive executive power of appointment through the creation of a judicial appointments commission. The establishment of an appointments commission in some form has since been supported by several inquiries, such as the Senate report on *Gender Bias and the Judiciary*, the Australian Law Reform Commission's 1994 inquiry into gender equality and the law, and the 1995 New South Wales *Implementation Committee Report*; by governments through the [Commonwealth Attorney General's 1993 discussion paper] and the [Tasmanian Attorney-General's 1999 discussion paper], by judges such as Justice Wood, and by various commentators, including [Professor] Winterton. It has also received qualified or conditional support from others such as Sir Anthony Mason and

⁴⁶ R Davis and G Williams, 'Reform of the judicial appointment process: gender and the bench of the High Court of Australia', (2003) 27 *Melbourne University Law Review* 819 at 834

⁴⁷ R Davis and G Williams, n46, p835

⁴⁸ Hon R Sackville, 'Three issues facing the Australian judiciary' (2008) 20(3) *Judicial Officers Bulletin* 17 at 19

Justice McPherson (as Chairman of the Judicial Council of Australia). The Law Institute of Victoria has also advocated the establishment of an advisory commission for judicial appointments in that State.⁴⁹

With respect to the Commonwealth Attorney-General's 1993 discussion paper, in fact the paper only mentioned an advisory appointments commission as one of the options for reform; an alternative option was to establish a more formalised consultation process.⁵⁰ As well as referring to support for the concept, Davis and Williams noted that the proposal for an appointments commission "has not been universally accepted".⁵¹

Davis and Williams proposed the establishment of a new judicial appointments commission for federal judicial appointments. They said that a commission should be "designed according to what has proved effective in comparable common law jurisdictions". In terms of the composition of a commission, Davis and Williams said that it "should include men and women from diverse backgrounds some of whom must be lay members, chosen by a process that ensures the commission has an appropriate level of independence from the executive". In terms of the process, some key features included:

- Potential candidates should be identified by the commission through wide consultation and from those people who have registered an expression of interest with the commission (expressions of interest should be encouraged by advertisement, with under-represented groups encouraged to apply);
- If the commission wishes to gain further information on candidates, it should do so by seeking information and assessments first from referees nominated by an applicant, and only then from professional bodies and members of the profession, and always in the form of written statements made against the appointment criteria. The commission must not engage in 'secret soundings' with the profession to ascertain professional opinion on individual candidates;
- The commission should have the option of interviewing candidates;
- The commission should determine a short list of names for each judicial position along with an accompanying statement on each short-listed candidate based upon the application of the selection criteria;
- Expressions of interest in judicial appointment, the deliberations of the commission and its short list and accompanying statement must be confidential;
- The Attorney-General may request a further short list from the commission or the government may appoint a person not on a commission short list;
- Where a government appoints a person not on a commission short list, it must disclose this in a statement to Parliament.⁵²

In a 2008 article (based on a 2006 paper), Associate Professor Simon Evans and Professor John Williams also proposed setting up a judicial appointments

⁴⁹ R Davis and G Williams, n46, p857-858

⁵⁰ M Lavarch, *Judicial Appointments: Procedure and Criteria*, Discussion Paper, September 1993

⁵¹ R Davis and G Williams, n46, p856

⁵² R Davis and G Williams, n46, p862-863

commission, or separate federal and State judicial commissions (they noted that, in NSW, the functions of an appointments commission could be conferred on the Judicial Commission of NSW).⁵³ Evans and Williams stated that, while the model that they propose "is informed by the English experience it is not a carbon copy of it".⁵⁴ The details of their proposal will not be outlined here except to note that the final stage of the selection process would proceed as follows: the commission would recommend a short list of three names to the Attorney-General; and the Attorney-General must then choose one of the three candidates or ask the commission to reconsider its recommendation.⁵⁵

In 2007, the former Chief Justice of the High Court, Sir Gerard Brennan, also expressed support for the creation of a judicial appointments commission.⁵⁶ Referring to the Evans and Williams proposal, Brennan said "I agree with the basis of their proposals, but I would prefer a model with different variations of the English template". He proposed a slightly different composition for the commission (which he referred to as the "Selection Committee"). He agreed that the Committee should submit a list of three names to the Government, and the Government could ask the Committee to reconsider the list. However, in his proposal, the Government could appoint a person who was not listed as long as it informed the Committee of its reasons in writing.

6.3 Alternative views and reform proposals

In his 1983 Boyer Lectures, Justice Kirby noted that Chief Justice Garfield Barwick had proposed the establishment of a commission which would advise the Executive on judicial appointments and he commented:

The call for the establishment of such a Judicial Commission has been made in Britain, New Zealand and Canada. So far, nothing has come of it and I hope nothing will. It has all the hallmarks of an institutional arrangement that could deprive our judiciary of the light and shade that tend to come from the present system. In our Judges we need a mixture of traditionalist and reformist. Institutionalising orthodoxy, or worse still Judges choosing Judges, is quite the wrong way to procure a bench more reflective of the diversity of our country. Fortunately, I do not see politicians of any political persuasion surrendering to the temptations of a Judicial Appointments Commission.⁵⁷

In 2009, at the end of his judicial career, Justice Kirby suggested that the appointment process for High Court vacancies could be changed by, for example, allowing practitioners and judges to indicate their willingness to be considered for appointment.⁵⁸ However, Justice Kirby again indicated that he

⁵³ S Evans and J Williams, 'Appointing Australian Judges: A New Model (2008) 30(2) *Sydney Law Review* 295 at 311,322

⁵⁴ S Evans and J Williams, n53, p311

⁵⁵ S Evans and J Williams, n53, p321

⁵⁶ G Brennan AC KBE, [*The selection of judges for Commonwealth Courts*](#), Papers on Parliament No. 48, Australian Parliament, January 2008

⁵⁷ M Kirby, *The Judges*, ABC, 1983, p22-23

⁵⁸ Hon M Kirby AC CMG 'The High Court of Australia: Perspectives from the Brink' (2009) 21(2)

did not support the idea of selections being made by a commission:

...I would oppose any move to assign a final or semi-final appointment veto to current or retired judges or lawyers, however distinguished. It is part of the genius of our Constitution that a democratic element is introduced into judicial appointments, especially at the level of the High Court, by the fact that, under the Constitution, the appointments are made by elected politicians. Effectively assigning the appointment process to so-called "experts", to retired or serving judges and to other lawyers would not, in my view, be a desirable development. Obviously the highest courts make decisions that are affected by the values and judicial philosophies' of their members. In my opinion, well-informed elected politicians are much more likely to make wise decisions on the appointment of judges than a cohort of lawyers.⁵⁹

In a speech in 2000, the former High Court Chief Justice, Sir Harry Gibbs said:

Sir Garfield Barwick suggested that the power of appointment should be given to a judicial commission. There are objections to that course; the members of a commission can be chosen to secure the desired result, and a commission may adopt a bureaucratic approach to selection. A commission might think itself bound to conduct inquisitions of the prospective candidates, emulating, even if weakly, the United States Senate.⁶⁰

Sir Harry Gibbs went on to say:

It is difficult to suggest any workable alternative to appointments by the government. However, society would benefit if the process of making judicial appointments were required to be more transparent. One way in which that could be done would be for the law to provide that the Attorney-General should consult, say, the Chief Justice, the President of the Bar Association, and the President of the Law Society, and that the Attorney-General should, at the time of making an appointment, reveal the recommendations that had been made. The Attorney-General would not be obliged to appoint any of the candidates who were recommended but if he or she departed from the recommendations, it would be necessary to account to the public for the departure...⁶¹

In a 2007 address, the then Chief Justice of the NSW Supreme Court, Jim Spigelman, expressed doubts about involving a committee in the judicial appointments process. He said:

It is possible to attain a reasonably broad consensus about the persons who are appropriate appointees. However, there are very few, if any, occasions on which a single person will stand out as the obviously best appointment. In my opinion, no mechanism is necessarily better than any other in balancing and assessing the wide range of attainments to which I have referred. Success necessarily depends on the background and character of whoever must formulate the

Judicial Officer's Bulletin 11 at 12

⁵⁹ M Kirby, n58, p12

⁶⁰ Sir H Gibbs, [Oration Delivered at the Opening of the Supreme Court Library's Rare Books Room at the Supreme Court of Queensland](#), 11 February 2000

⁶¹ H Gibbs, 2000, n60

judgment, recognising that it is a judgment on which reasonable people will differ. I do, however, wish to express my scepticism that it is a task capable of being performed by a committee.⁶²

The NSW Law Society has developed a policy on *The Selection Process for the Judiciary* (adopted in 1997 and amended in 2008), which states:

The Law Society supports the continued existence of an informal selection process. However, it believes that the consultation must be wider and on a more formal basis and must include consultation with the NSW Bar Association and the Law Society of NSW. The establishment of an official body or committee for the selection of judges is not supported. Many eminently suitable candidates would be reluctant to go through a public process of selection. However, there can be no objection to calling for expressions of interest on a confidential basis.⁶³

7. RECENT PAPERS AND REPORTS IN AUSTRALIA

7.1 NSW Coalition policy paper

In March 2008, the NSW Liberals and Nationals released a policy paper entitled *Restoring the Faith in Justice: Promoting transparency in judicial appointments in NSW*. As stated in the Executive Summary, the paper:

...concludes that the current system needs overhauling because it's government controlled and leads to political appointments and patronage; that it's opaque and impossible to determine the process of selection and appointment; that there is a perceived lack of consultation among relevant stakeholders; and that there is a perceived lack of depth in the pool from which judicial talent is drawn.

The paper recommends the establishment of a Judicial Appointments Commission to ensure a fairer and more transparent appointments process, while safeguarding against excessive politicisation of the Courts. It sets out reasons why such a system would provide a marked improvement in the selection process and help to restore public confidence in the justice system.⁶⁴

The paper did not outline all of the details of the proposed Commission (e.g. how it would be comprised). It stated that the ultimate choice of candidates should be left to the Executive "but not without some restraint designed to ensure that merit is the prime consideration". The paper proposed that:

...the commission [would] submit a list of three names from which the Executive is invited to make the appointment. If the Executive wishes to consider another person who is not listed, the Attorney-General should refer the name of that person to the committee with a request to reconsider the list. The committee

⁶² Hon J Spigelman AC, 'Judicial appointments and judicial independence' (2008) 17(3) *Journal of Judicial Administration* 139 at 143

⁶³ See Senate Standing Committee on Legal and Constitutional Affairs, [Australia's Judicial System and the Role of Judges](#), December 2009, p123

⁶⁴ NSW Liberals and Nationals, *Restoring the Faith in Justice: Promoting transparency in judicial appointments in NSW*, 2008, p2

would then either include the name in a new list of three or inform the Attorney-General in writing why the listed names are preferred. If the government nevertheless proposes to appoint the person who is not listed, the Attorney-General should inform the committee in writing of the Executive's reasons for such action, and these reasons should be made publicly available.⁶⁵

Following the election of the Coalition to government in 2011, the Attorney-General, Greg Smith, was asked about this proposal in an interview for the May 2011 Law Society Journal. Mr Smith reportedly said that:

... a Judicial Appointments Commission [is] something we are still looking (sic)

However, we have not pushed the proposal because shortly after circulation of the discussion paper, John Hatzistergos, the previous Attorney-General, introduced a system of advertising District and Local Court positions and establishing selection panels which recommend suitable persons.

While appointments to the Supreme Court seemed to have proceeded satisfactorily, there had been concerns that some appointments to lower courts lacked transparency.⁶⁶

7.2 Commonwealth Senate Committee report

In December 2009, the Senate Legal and Constitutional Affairs References Committee published a report on Australia's judicial system.⁶⁷ In relation to judicial appointments, the Committee's two recommendations were:

- When the appointment of a federal judicial officer is announced the Attorney-General should make public the number of nominations and applications received for each vacancy. If the government or department prepared a short list of candidates for any appointment, the number of people on this list should also be made public.
- The process for appointments to the High Court should be principled and transparent. The Attorney-General should adopt a process that includes advertising vacancies widely and should confirm that selection is based on merit and should detail the selection criteria that constitute merit for appointment to the High Court.⁶⁸

The Committee also discussed the issue of diversity of the judiciary and the relationship between diversity and merit. The Committee considered that "an approach consistent with the United Kingdom *Constitution Reform Act 2005*,

⁶⁵ NSW Liberals and Nationals, n64, p15

⁶⁶ A Susskind, 'Freed from opposition, the new AG Greg Smith has BIG PLANS', (May 2011) *Law Society Journal* 14 at 15

⁶⁷ Senate Legal and Constitutional Affairs References Committee, [Australia's Judicial System and the Role of Judges](#), December 2009.

⁶⁸ Senate Committee report, n67, Recommendations 3-4

which emphasises merit and promotes diversity, is worthy of consideration".⁶⁹

The report noted that a small number of submissions argued strongly for the establishment of an independent Judicial Advisory Commission. However, the Committee was "not persuaded that the cost of establishing a separate [commission] is currently warranted".⁷⁰ On the other hand, the Committee said that this was "an issue that deserved to be monitored".

The Government's response to the report accepted both of the above recommendations in part.⁷¹ With respect to the first of these recommendations, the Government stated that it would make public the number of applications and nominations received for a judicial vacancy. With respect to the second recommendation, the Government said that advertising for High Court vacancies would achieve little in addition to the current consultation process.

7.3 Victorian Government discussion paper

In July 2010, the Victorian Government published a discussion paper seeking community views on the appointment process for appointing judges including:

- the skills, attributes and qualities required of a modern judicial officer
- strategies for attracting and identifying suitable candidates who reflect the diversity of the community
- the best process for assessing and appointing candidates
- whether candidates for judicial office should be required to have a health assessment before being appointed.⁷²

With respect to the process for assessing and appointing candidates, the discussion paper examined three options: (1) retaining the current system, (2) reforming the advisory panel system, and (3) establishing an independent judicial appointments commission. The discussion paper did not ultimately indicate which option the Government preferred. The pros and cons of Option 1 (retain the current system) were as follows:

The current system has resulted in high quality judicial appointments. Reforms made by the Attorney-General have also increased the transparency of the process, especially as a result of the publication of selection criteria for judicial office and the ability of any person to submit an expression of interest.

Further, an Attorney with a commitment to attracting and appointing a diverse judiciary may have more success achieving this aim than approaches which require consensus to be reached by a number of people.

⁶⁹ Senate Committee report, n67, p23

⁷⁰ Senate Committee report, n67, p29

⁷¹ Australian Government, [The Senate Legal and Constitutional Affairs References Committee Report on Australia's Judicial System and the Role of Judges - Government Response](#), October 2010, p2-3

⁷² Department of Justice Victoria, [Reviewing the judicial appointments process in Victoria](#), Discussion Paper, July 2010

Arguments can also be made in support of the current use of advisory panels only for appointments to the Magistrates' Court and VCAT. These appointments involve consideration of candidates from a large pool, often lawyers in private practice whose record is not as readily available. Advisory panels enable large numbers of candidates to be screened in a streamlined process while retaining the Attorney-General's unfettered decision-making power. In contrast, candidates for appointment to the Supreme Court and the County Court are usually experienced in their particular legal field and have a profile which facilitates an assessment of their suitability for judicial office...

Compared to other options, the current approach is also low cost. Advisory panels are created on an *ad hoc* basis as judicial vacancies arise and do not require the infrastructure and other costs of a permanent body or commission.⁷³

The advantages and disadvantages of the second option (establishing advisory panels for all judicial appointments in Victoria) were stated as follows:

The key advantage of extending advisory panels to the Supreme and County Courts is that it creates a formal assessment process outside the Attorney's office, which utilises the knowledge, expertise and judgment of panel members. The Attorney's decision may be better informed as a result of the panel's recommendations and may produce appointments from a broader range of backgrounds. A more transparent process may also encourage applications from a broader range of people who might otherwise believe they do not have the profile to be considered.

Some candidates for judicial vacancies on higher courts may be reluctant to be part of a formal assessment process, especially if it requires a formal interview. There is also a concern about the appropriateness of interviewing serving judges who are being considered for elevation to a higher court, or a higher office in the same court.

However, in a number of Australian jurisdictions it is already the case that candidates for appointment to higher courts are required to be part of a selection process which may involve an interview. The Commonwealth's view is that the selection panel can decide whether interviews are conducted for appointments to the Federal Court and the Family Court. Retired Justice Ronald Sackville has said that "there is no compelling reason" why changes introduced for magistrates courts, such as interviews of candidates, "cannot be applied more generally to the selection process for vacancies in the superior courts".⁷⁴

The advantages and disadvantages of Option 3 (an independent appointments commission) were outlined in these terms:

The key advantage of a commission is that it would be a permanent body with staff who have the time and skills to develop and apply comprehensive selection processes. Like its counterparts in other jurisdictions, a commission would decide how it shortlists candidates, when it conducts interviews and whether it requires

⁷³ Department of Justice, n72, p20-21

⁷⁴ Department of Justice, n72, p21

candidates to participate in other selection exercises such as role-plays. Further, a more independent and transparent approach may also give confidence to potential applicants that their application will be considered on its merits.

However, some commentators have questioned the benefits of appointment bodies and point to deficiencies in the performance of the Judicial Appointments Commission in England and Wales. The main criticisms are that the appointment process “is overly bureaucratic and the whole appointments process is unreasonably intrusive as well as taking too long.”

Another criticism of the Commission in England and Wales discussed above is that it has not achieved one of its mandated aims of increasing the diversity of the judiciary and that some people who have the skills and experience for judicial office are not being appointed.

Finally, concerns have been expressed that transferring the decision from an individual to a group of people “may result in the selection of mediocre compromise candidates” and may not result in the appointment of the best candidates.⁷⁵

There was a change in government in November 2010 and the new Government has not implemented any reforms to date.

8. JUDICIAL APPOINTMENTS IN THE UK

8.1 The 2005 reforms

In 2003, the UK Government released a consultation paper which outlined its intention to change the system for judicial appointments, primarily by establishing a new and independent Judicial Appointments Commission. The consultation paper stated the case for reform as follows:

...the fundamental problem with the current system is that a Government minister, the Lord Chancellor, has sole responsibility for the appointments process and for making or recommending those appointments. However well this has worked in practice, this system no longer commands public confidence, and is increasingly hard to reconcile with the demands of the Human Rights Act.

In the same way, the central role he has played in the selection of judges has taken up much of the time of successive Lord Chancellors. This has inevitably diverted their attention from the core business of administering the justice system, and in particular running the courts.

The time has now come for a radical change to the judicial appointments system to enable it to meet the needs and expectations of the public in the 21st century. Any system which is introduced must, in addition to ensuring quality, also guarantee judicial independence. A Commission will provide a guarantee of judicial independence, will make the system for appointing judges more open and more transparent, and will work to make our judiciary more reflective of the

⁷⁵ Department of Justice, n72, p21-22

society it serves. A Commission will also free the Department to focus on its core responsibilities.⁷⁶

The Lord Chancellor noted that "there is already such an independent commission in place for selecting judges in Scotland and one forms part of the agreed settlement in Northern Ireland". The Judicial Appointments Board for Scotland was set up by in 2002. The Northern Ireland Judicial Appointments Commission commenced work in June 2005.

Reforms to the judicial appointment process were enacted in the *Constitutional Reform Act 2005*. The new selection process encompasses two selection commissions: one for the UK Supreme Court (the Selection Commission for the Supreme Court) and one for other judges in England and Wales (the Judicial Appointments Commission).⁷⁷ Appointments are still made by the Executive but its role in the selection process has been curtailed.

8.2 The Appointments Commissions

Supreme Court Selection Commission: The Supreme Court Selection Commission is a small ad hoc body, convened by the Lord Chancellor only when a vacancy arises. As outlined in the *Constitutional Reform Act* (Schedule 8 to the Act), the Commission is to consist of the following members:

- the President of the Supreme Court (the Chair);
- the Deputy President of the Supreme Court; and
- one member from the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission.

The selection process is determined by each Selection Commission but the Act sets out some requirements including that "selection must be on merit", and that the Commission must consult the "senior judges", the Lord Chancellor, the First Ministers of Scotland and Wales, and the Secretary of State for Northern Ireland (s 27). The Commission must submit a report to the Lord Chancellor which must state who has been selected and who was consulted (s 28).

The Lord Chancellor is then required to consult with the same persons as the Commission (s 28). If the Lord Chancellor is content with the recommendation made by the Commission, he forwards the person's name to the Prime Minister who, in turn, sends the recommendation to the Queen. The Lord Chancellor can reject a recommendation of the Commission but only on the grounds that the person "is not suitable for the office concerned" (s 30). The Commission is then not permitted to re-select that candidate. The Lord Chancellor can also require

⁷⁶ Department for Constitutional Affairs, [Constitutional Reform: A New Way of Appointing Judges](#), Consultation Paper, July 2003, p17-18

⁷⁷ K Maleson, 'Appointment, discipline and removal of judges: fundamental reforms in the United Kingdom, Ch 6 in H. P Lee (ed), *Judiciaries in Comparative Perspective*, Cambridge University Press, 2011, p120

the Commission to reconsider a selection but only if (s 30):

- (a) there is not enough evidence that the person is suitable for the office concerned,
- (b) there is evidence that the person is not the best candidate on merit, or
- (c) there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom.

The Lord Chancellor must give the commission reasons in writing for rejecting or requiring reconsideration of a selection.⁷⁸

The Judicial Appointments Commission: The Judicial Appointments Commission (JAC) was established in April 2006. The JAC, which is a permanent body and has a substantial secretariat, is responsible for recommending candidates for most judicial offices in England and Wales outside the Supreme Court (but not magistrates).

The JAC is comprised of 15 commissioners (Schedule 12). The Chairperson must be a lay member and of the 14 other commissioners:

- 5 must be judicial members
- 2 must be professional members (1 barrister and 1 solicitor)
- 5 must be lay members
- 1 must be a tribunal member
- 1 must be a lay justice member

Three of the judicial members are to be chosen by the Judges' Council. The remaining 12 commissioners are to be appointed on the recommendation of a panel convened by the Lord Chancellor which comprises:

- A person selected by the Lord Chancellor with the agreement of the Lord Chief Justice (the Chair of the Panel);
- The Lord Chief Justice or his nominee;
- A person nominated by the Chair of the Panel;
- The Chairperson of the Commission.

The JAC is to determine its own selection process but the Act sets out some requirements including that:

- Selection must be solely on merit;
- The person selected must be of good character
- The JAC must have regard to the need to encourage diversity in the range of persons available for judicial selection (s 63, 64).

⁷⁸ The UK Supreme Court has published an [overview](#) of the selection process.

In summary, the JAC's selection process involves the following stages:⁷⁹

- *Advertising and applications:* The JAC advertises all selection exercises on its website and in the media. It tailors the application form for each selection exercise and prepares an information pack. On receiving the applications, the JAC checks that the candidate meets the entry requirements and makes an assessment of good character.
- *Shortlisting:* Shortlisting of candidates is either undertaken on the basis of written evidence (including the candidate's self-assessment and references) or on the basis of tests which are designed to assess the candidate's ability to perform in a judicial role. Depending on the method used, referees are approached either before the paper sift, or after the qualifying test. Candidates are requested to nominate a number of referees and the JAC also approaches referees it nominates itself.
- *Selection day:* Shortlisted candidates are invited to a selection day, which may consist of a panel interview, interview and role play, interview and presentation or interview and situational questioning (which focuses on what a candidate would do in a hypothetical situation).
- *Panel report:* Panel members assess all the information about a candidate and agree which candidates best meet the required qualities. The Panel Chair then completes a report providing an overall panel assessment. This forms part of the information presented to the JAC.
- *Statutory consultation:* The JAC must, as part of the selection process, consult the Chief Justice and another person who has held the judicial post, or has relevant experience of the post, about those candidates the JAC is minded to select. The JAC will consider the responses.
- *Selection decisions:* The JAC considers all the information gathered about the candidates to make its final selections. When reporting its final selections to the Lord Chancellor, the JAC must say what the consultees' comments were and whether it followed them or not, and give reasons.

If the Lord Chancellor accepts the recommendation, he will make this recommendation to the Queen. As with Supreme Court appointments, the Lord Chancellor can only reject a recommendation of the JAC on the grounds that the person is not suitable for the office concerned (e.g. s 91). The JAC is not permitted to re-select a candidate who has been rejected. The Lord Chancellor can also require the JAC to reconsider a selection but only if (s 91):

- (a) there is not enough evidence that the person is suitable for the office concerned,
- (b) there is evidence that the person is not the best candidate on merit.

⁷⁹ Adapted from information on the Judicial Appointment Commission's [website](#)

The Lord Chancellor must give the commission reasons in writing for rejecting or requiring reconsideration of a selection (s 91).

Appointments Ombudsman: As part of the 2005 reforms, the Government also established a Judicial Appointments and Conduct Ombudsman to investigate complaints about the judicial appointments process and about the handling of matters involving the conduct or disciplining of judges.⁸⁰ The Ombudsman is independent of the executive and the judiciary.

8.3 Comments on Commission's record

In a 2011 publication, Kate Malleson commented on the JAC's record to date.⁸¹ She noted that in the first three years, all the names which the JAC put forward to the Lord Chancellor were approved. However, in 2010, the commission recommended a person (Sir Nicholas Wall) for the post of President of the Family Division, which the Lord Chancellor referred back to the JAC. The JAC subsequently resubmitted his name and he was appointed. No information was made public as to the reasons for this, which led to speculation by the press that the Lord Chancellor had sought to block the appointment due to critical comments that the candidate had made publicly about the resourcing of the Family Courts. Another area of criticism, particularly in the early years, concerned delays in processing applications. Malleson added that:

...more substantive and ongoing concerns of the new system have been expressed about the type and quality of the appointments made. On the one hand, it has been argued the greater emphasis on interview skills and competencies has sometimes excluded highly talented applicants who would have been appointed under the old system. On the other hand, there is evidence that, despite changes to the process, there has been little real increase in the background and make-up of those selected.⁸²

8.4 Proposals for further reforms

In 2007, the UK Government published a green paper on constitutional reforms and an associated consultation paper on judicial appointments.⁸³ In March 2008, the Government published a white paper proposing constitutional reforms.⁸⁴ In relation to judicial appointments, the white paper proposed various changes, including: removing the Lord Chancellor's discretion to reject, or ask the JAC to reconsider, a JAC selection for a judicial office below the High Court; and removing the Prime Minister's role in the process for appointing senior

⁸⁰ Department of Justice, *Judicial Appointments and Conduct Ombudsman*, [[Online](#)]

⁸¹ K Malleson, n77, p124-126

⁸² K Malleson, n77, p125

⁸³ Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, July 2007; and Ministry of Justice, *The Governance of Britain: Judicial Appointments*, Consultation Paper, October 2007.

⁸⁴ Ministry of Justice, *Governance of Britain – Constitutional Renewal*, March 2008

judges.⁸⁵ Neither of these proposals was ultimately implemented.

In February 2010, the Advisory Panel on Judicial Diversity (established by the Lord Chancellor in April 2009) published its report, which made 53 recommendations to improve the diversity of the judiciary.⁸⁶ One of the key recommendations was that "there should be a fundamental shift of approach from a focus on individual appointments to the concept of a judicial career". This approach requires action across a number of areas including:

- ensuring that lawyers from all backgrounds recognise early on in their career that becoming a judge could be a possibility for them;
- more effort by the legal professions to promote diversity at all levels and to support applications from talented candidates from all backgrounds.
- better information on the career paths available. These career paths must promote opportunities across the courts and tribunals as one judiciary.
- providing a variety of means for potential applicants for judicial office to understand what the role involves and to gain practical experience and build confidence.
- open and transparent selection processes that promote diversity and recognise potential, not just at the entry points to the judiciary but also for progression within it to the most senior levels.⁸⁷

In August 2010, the new Lord Chancellor Kenneth Clarke stated his commitment in principle to supporting the delivery of the Advisory Panel's recommendations, and in May 2011, the UK Coalition Government published a progress report on the implementation of these recommendations.⁸⁸

In November 2011, the Government published a [consultation paper](#) on both judicial appointments and judicial diversity. The paper stated:

The changes brought about through the [Constitutional Reform Act 2005] delivered progress in many areas particularly in respect of transparency and openness. However, the Ministry of Justice, JAC, judiciary and HM [Courts and Tribunals Service] have identified a number of issues which continue to attract criticism and should be addressed. These include the balance between the executive, judicial and independent roles and accountabilities in the appointment processes, the speed with which the diversity of the judiciary is changing, the degree of transparency surrounding some senior appointments, and the length of time and amount of money it can cost to make a selection.⁸⁹

⁸⁵ Ministry of Justice, n84, Part 1, p30-36

⁸⁶ J Neuberger, [Report of the Advisory Panel on Judicial Diversity](#), 2010

⁸⁷ J Neuberger, n86, p19

⁸⁸ UK Government, [Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'](#), May 2011

⁸⁹ Ministry of Justice, [Appointments and Diversity: Judiciary for the 21st Century](#), Consultation Paper, November 2011, p5

In relation to the balance between the roles in the appointment process, the issues raised in the consultation paper included:

- whether the Lord Chancellor should transfer his decision-making role to the Lord Chief Justice in relation to appointments to the Courts and Tribunals below the level of Court of Appeal or High Court;
- whether...the Lord Chancellor should have more meaningful involvement in appointments for the most senior judiciary in England and Wales (Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lords Justices of Appeal) as well as appointments for the President of the UK Supreme Court;
- the role of the Prime Minister in judicial appointments;
- the composition and balance of independent responsibilities on selection panels;⁹⁰

The Government noted that it would consider consultation responses along with the findings of the House of Lords Constitution Committee, which was in the process of carrying out an inquiry into the judicial appointments process.

In March 2012, the House of Lords Constitution Committee published its report on judicial appointments. The Committee supported the existing appointments model but recommended some limited changes to the process including:

- UK Supreme Court selection commissions should be increased in size, with greater lay representation.
- The President and Deputy President of the Supreme Court should not sit on the selection commissions formed to choose their successors.
- The Lord Chancellor's power to reject or request reconsideration of nominations from the JAC for appointments below the level of the High Court should be transferred to the Lord Chief Justice.⁹¹

The Committee was opposed to giving Parliament a greater involvement in the judicial appointment process, concluding:

We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions. In the United Kingdom, judges' legitimacy depends on their independent status and appointment on merit, not on any democratic mandate.

We agree that post-appointment hearings of senior judges would serve no useful purpose. There may be an exception in the case of the Lord Chief Justice and the President of the Supreme Court who undertake leadership roles for which they can properly be held to account.

Parliamentarians, acting in that capacity, should not sit on selection panels for judicial appointments. There is no useful role that parliamentarians could play

⁹⁰ Ministry of Justice, n89, p6

⁹¹ House of Lords Select Committee on the Constitution, [Judicial Appointments](#), 25th Report of Session 2010-2012, Executive Summary

that could not be played by lay members on selection panels. It would not be possible to choose one or two parliamentarians without recourse to political considerations and in so doing it would be difficult to maintain the appearance of an independent judicial appointments process.⁹²

The Committee made a number of recommendations to increase judicial diversity. One of these was that the recommendations of the Advisory Panel on Judicial Diversity should be implemented more rapidly. In addition:

- All selection panels should themselves be gender and, wherever possible, ethnically diverse.
- All those involved in the appointments process must be required to undertake diversity training.
- The duty on the JAC, contained in s 64 of the CRA, to encourage diversity in the range of persons available for selection for appointments should be extended to the Lord Chancellor and the Lord Chief Justice.
- The “tipping provision” contained in s 159 of the Equality Act 2010 should be used as part of the appointments process.
- If there has been no significant increase in the numbers of women and BAME judicial appointments in five years’ time, the Government should consider setting non-mandatory targets for the JAC to follow.
- There needs to be an increased commitment to flexible working and the taking of career breaks within the judiciary. The Senior Courts Act 1981 should be amended to allow part-time appointments to be made at High Court level and above.
- There needs to be a greater commitment on the part of the Government, the judiciary and the legal professions to encourage applications for judicial posts from lawyers other than barristers. Being a good barrister is not necessarily the same thing as being a good judge.⁹³

9. JUDICIAL APPOINTMENTS IN CANADA

9.1 Federal and State responsibilities

Under Canada's Constitution, the Federal Government has the power to appoint judges to federal courts (which includes the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court).⁹⁴ The Federal Government also has the power to appoint judges to the superior courts in the provinces, which includes the provincial courts of appeal as well as the trial courts of general jurisdiction. The Federal Government's power to make these judicial appointments is vested in the Governor-General, who acts on the advice of the Cabinet. Provincial governments only have the power to appoint judges to the lowest level of courts (generally known as "provincial courts").

⁹² House of Lords Select Committee, n91, p61-62

⁹³ House of Lords Select Committee, n91, Executive Summary

⁹⁴ Supreme Court of Canada, *The Canadian Judicial System*, [\[online\]](#)

9.2 Supreme Court of Canada

As Martin Friedland explains, the process for appointing judges for the Supreme Court of Canada changed in 2006:

Up until very recently, the selection of judges for the Supreme Court was made by federal Cabinet without any formal involvement of Parliament or an outside Committee. In 2006, Marshall Rothstein of the Federal Court of Appeal was selected by Prime Minister Harper to fill [a] Supreme Court of Canada vacancy... Harper selected Rothstein in 2006 from a list of three names sent to the Minister of Justice by a committee made up of parliamentarians, lawyers and others. The list of three had emerged from a list of six names sent to the committee by the former Liberal government. There was then a hearing before a parliamentary committee in which Justice Rothstein was gently questioned. Unlike an American confirmation hearing, the committee did not vote on the issue.⁹⁵

A similar selection process was proposed in 2008 with the announcement of the retirement of a Supreme Court judge. However, this time, it was proposed that the committee would be entirely comprised of five parliamentarians: two from the government and one from each of the opposition parties. As it turned out, the committee did not function effectively, and Prime Minister Harper made an appointment outside this new process.⁹⁶ In May 2011, Prime Minister Harper outlined the selection process for two upcoming Supreme Court vacancies:

- To identify a pool of qualified candidates for appointment to the Supreme Court of Canada, the Minister of Justice and Attorney General will consult with the Ontario Attorney General, as well as leading members of the legal community. Members of the public are invited to submit their input with respect to qualified candidates who merit consideration.
- The list of qualified candidates will be reviewed by a selection panel composed of five Members of Parliament – including three Members from the Government Caucus and one Member from each of the recognized Opposition Caucuses, as selected by their respective leaders – to review the list of qualified candidates.
- The Supreme Court Selection Panel [as referred to above] will be responsible to assess the candidates and provide an unranked short list of six qualified candidates to the Prime Minister of Canada and the Minister of Justice for their consideration.
- The two selected nominees will appear at a public hearing of an ad hoc parliamentary committee to answer questions of Members of Parliament. This is a process that was first established for the appointment of the Honourable Mr. Justice Marshall E. Rothstein in 2006.⁹⁷

⁹⁵ M Friedland, 'Appointment, discipline and removal of judges in Canada', Ch 3 in H. P Lee (ed), *Judiciaries in Comparative Perspective*, Cambridge University Press, 2011 p57

⁹⁶ M Friedland, n95, p57

⁹⁷ Prime Minister Harper, 'Statement by the Prime Minister of Canada on the upcoming retirement of two Supreme Court judges', [Media Release](#), 13 May 2011

9.3 Federal courts and provincial superior courts

A different process applies to the appointment of judges to other federal courts and to provincial superior courts. The Commissioner for Federal Judicial Affairs is responsible for the administration of the appointments process on behalf of the Minister of Justice.⁹⁸ A key feature of the selection process is the role of Judicial Advisory Committees (JACs), which assess the qualifications for appointment of lawyers who apply for judicial positions. There is at least one JAC in each province. Candidates are assessed by the JAC established for the judicial district of their practice, or by the JAC judged most appropriate by the Commissioner. Each JAC consists of eight members including:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice of the province or by the senior judge of the territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice;
- a nominee of the law enforcement community; and
- 3 nominees of the federal Minister of Justice representing the general public.⁹⁹

The selection process is outlined in a guide published by the Commissioner for Federal Judicial Affairs.¹⁰⁰ In summary:

- *Applications and nominations:* Qualified lawyers and persons holding provincial or territorial judicial office who wish to be considered for appointment must apply to the Commissioner for Federal Judicial Affairs. In addition, members of the legal community and other interested persons can nominate persons they consider qualified for the office.
- *Statutory qualifications for appointment:* If a candidate meets the threshold constitutional and statutory qualifications for appointment (e.g. 10 years at the bar), the Executive Director, Judicial Appointments will forward the candidate's file to a JAC for assessment (in the case of lawyers who apply) or for comment (in the case of judges who apply).
- *Judicial Advisory Committee:* JACs assess the qualifications for appointment of lawyers who apply. The JAC undertakes extensive consultations in both the legal and non-legal community in respect of each applicant. The JACs are asked to assess candidates on the basis of two categories: "recommended" or "unable to recommend" for

⁹⁸ Office of the Commissioner for Federal Judicial Affairs, *Process for Federal Judicial Appointments*, [\[online\]](#)

⁹⁹ Office of the Commissioner for Federal Judicial Affairs, n98

¹⁰⁰ Office of the Commissioner for Federal Judicial Affairs, n98. See also House of Commons Canada, [Preserving independence in the judicial appointments system](#), Report of the Standing Committee on Justice and Human Rights, 2007

appointment. The JAC provides the assessments to the Minister of Justice. These assessments remain valid for a period of two years.

- *Minister can seek further information:* Following receipt of the JAC's assessment, the Minister of Justice may at his discretion seek further information from the JAC on any candidate. If a JAC's advice is contrary to the information received from other sources by the Minister, the Minister may ask the JAC for a reassessment.
- *Recommendations to Cabinet:* The Minister makes recommendations to Cabinet from the names which have been recommended by the JAC, and from the provincial court judges who have applied for higher office. Before making a recommendation to Cabinet, the Minister may consult with members of the judiciary and the bar, with his or her provincial counterparts, as well as with members of the public.

In May 2007, a House of Commons Standing Committee in the Canadian Parliament tabled a report which examined the "recent changes made to the federal judicial nominations process".¹⁰¹ The changes were made to the composition and operation of the JACs and included:

- Adding an eighth member to JACs, which would be selected by the Minister of Justice to represent the law enforcement community;
- Requiring the judicial member of JACs to act as the Chair of the JAC and only permitting the Chair to vote in the event of a tie;
- Removing one of the three categories of assessment that could be made by JACs (namely, the "highly recommended" category).

A majority of the Committee considered that the first two of these changes increased the Government's control over the JACs, and that the third change increased the scope for the Minister of Justice to make partisan appointments. Accordingly, the majority concluded that the revised procedure "bears flagrant signs of partisanship and ideological influence", and it recommended that the Canadian Government reverse those changes. Committee Members from the ruling Conservative Party issued a strong dissenting opinion.

9.4 Provincial courts

The appointment process for "provincial courts" (the lowest level of courts) varies across the provinces. In Ontario, appointments are made by the Attorney-General on the basis of recommendations made by a Judicial Appointments Advisory Committee (JAAC).¹⁰² The JAAC is comprised of 13 members including seven lay members appointed by the Attorney-General, two judges appointed by the Chief Justice, one member appointed by the Ontario

¹⁰¹ House of Commons Canada, [Preserving independence in the judicial appointments system](#), Report of the Standing Committee on Justice and Human Rights, 2007

¹⁰² Ontario Court of Justice, *Judicial Appointments Advisory Committee*, [\[online\]](#)

Judicial Council, and three members appointed from legal professional bodies. The composition of the JAAC is required by the legislation to reflect the diversity of Ontario's population. In summary, the selection process is as follows: vacancies are advertised, the JAAC reviews applications, prepares a short list, and then selects candidates for interviews. After reference checks, confidential inquiries and interviews, the JAAC sends a ranked list of its recommendations to the Attorney-General. The Attorney-General must appoint from that list.

10. CONCLUSION

The judicial appointment process in NSW and in some other Australian jurisdictions has evolved in response to a number of criticisms which, over the years, have been levelled against it. However, questions remain about whether more should be done to ensure that the judiciary is sufficiently independent, that appointments are merit-based, that there is diversity on the bench, and that the process has appropriate levels of transparency and accountability.

One option for reform in NSW is to make further incremental changes to the existing model. This could include: publishing a judicial appointments protocol; establishing a more formal consultation process; involving advisory panels in appointments to the Supreme Court; and/or setting limits on the Executive's power to reject an advisory panel's recommendation, or requiring the Executive to explain when it rejects a recommendation. The Executive could also be required to report annually on issues relating to judicial diversity.

Another, more major reform, would be to establish an independent Judicial Appointments Commission, along the lines of the commissions or committees that have been set up in the United Kingdom and Canada. Several commentators in Australia have supported this option although there has also been some opposition to this proposal on grounds, including: the costs involved; the argument that well-informed politicians are much more likely to make better decisions than a group of lawyers; and also on the basis of criticisms of the performance of UK Judicial Appointments Commission.

Another far-reaching reform would be to give Parliament a greater role in making or scrutinising appointments. This is a feature of the system used for appointing federal judges in the United States. In addition, in Canada, a Parliamentary Committee is now involved in the selection process for Supreme Court judges. There are, however, problems with these approaches and they have met firm resistance in Australia and the UK. A recent UK inquiry concluded against parliamentary involvement, either through pre or post appointment hearings, or including Members on selection panels.