

High Court Appointments: The Need for Reform

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1. Introduction

It has long been argued that the means of selecting the judges of the High Court of Australia should be reformed. It is not hard to see why. The process in place since its first judges were appointed in 1903 gives an unfettered power to the executive. There is no transparency and little accountability in the making of the decision. While governments have usually exercised this power with due care and regard for the Court, including that it be composed of the best legal talent and that it be able to maintain public confidence in the administration of justice, there are cases where political and other factors have held sway. Unfortunately, the secretive nature of the process means that the extent to which such factors have played a role is unclear. This itself is a problem because it can cast doubt generally on the appointments made to the Court.

The argument for reform does not start with the idea that politics should play no role in High Court selection. Clearly, in any constitutional system in which the executive or Parliament has a role in checking the power of a court, such considerations cannot be excluded. Instead, the case for reform is based on the idea that the appointment of High Court judges should occur as part of a fair process that limits the influence of factors, political or otherwise, that may be harmful to the Court and the justice system.

One problem is that the current process does not always ensure that the full range of talented candidates is given consideration. For example, no-one should be excluded due to their gender, yet there is a strong argument that the process discriminates against women. Over more than a century, only two of the 45 judges of the High Court have been female. Justice Mary Gaudron joined the Court in 1987 and retired in 2003, and Justice Susan Crennan was appointed in 2005. Significantly, no woman was appointed to the Court between 1987 and 2005 despite an increasing number of suitable candidates and despite the number of female appointments made to other final courts of appeal around the world. Indeed, in the years immediately preceding the appointment of Crennan J, every other comparable nation had at least one woman on its highest court.

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This was the subject of speeches made by Justice Michael McHugh, who retired in October 2005 after 16 years on the High Court and was replaced by Crennan J. In a frank assessment in October 2004, he recognised that, ‘Regrettably, discrimination against female lawyers has been rife throughout the 43 years I have been a member of the legal profession’ and that ‘unless we redress the present gender imbalance in judicial appointments, there is an ever-increasing risk in the society of today that the public support on which the legitimacy of the judiciary rests will erode’.¹ In a further speech given in August 2005, he stated that ‘there is nothing in the work of a High Court Justice that cannot be done by a first class woman lawyer who has the energy to cope with the workload ... there are at least 10 women judges serving in the Supreme Courts of the State[s] and the Federal Court who would make first class High Court Justices I think that there is an overpowering case for appointing a woman as my successor and to at least some of the other three vacancies in the High Court that will occur in the next three and a half years.’²

2. *The Process of Appointment*

The only provision in the Commonwealth Constitution relating to the process of appointment to the High Court is s 72(i), which states that justices of the Court ‘[s]hall be appointed by the Governor-General in Council’. In practice, this means that the Governor-General makes the appointment acting on the advice of the government of the day. Other than prohibiting the appointment of judges who have reached the retirement age of 70 years,³ the Constitution makes no mention of qualifications or background, and contains no other procedural requirements. It does not even require that an appointee be qualified as a lawyer.

The *High Court of Australia Act 1979* (Cth) is more prescriptive. Section 7 requires that an appointee be a judge of a federal or State court, or have been enrolled as a legal practitioner in Australia for not less than five years. Section 6 states that, before making an appointment, the ‘Attorney-General shall ... consult with the Attorneys-General of the States’ (no mention is made of the Attorneys-General of the Territories). However, the extent and form of consultation is not specified and it is unlikely that this process has any real effect on the appointment made by the federal government.

According to former federal Attorney-General Daryl Williams, appointees are selected on ‘the essential criterion’ of merit,⁴ an approach that has been confirmed by the current Attorney-General Philip Ruddock.⁵ As for more specific criteria,

1 Michael McHugh, ‘Women Justices for the High Court’, speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004 <www.hcourt.gov.au/speeches/mchughj/mchughj_27oct04.html>.

2 Michael McHugh, ‘Working as A High Court Justice’, Speech to the Women Lawyers Association of New South Wales and the Law Society of Newcastle, 17 August 2005 <www.hcourt.gov.au/speeches/mchughj/mchughj_17AUG05.htm>.

3 Commonwealth Constitution s 72, which states: ‘The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.’

Williams has said: 'It is enough to say that outstanding professional skills and personal qualities, such as integrity and industry, are required, together with a proper appreciation of the role of the Court'.⁶ In making this judgement, the Attorney relies upon confidential consultations or 'informal discussions' with selected people and groups. As part of the process to choose the replacement for McHugh J, for example, Ruddock stated that 'the existing appointment system had served Australia well and he would consult Chief Justice Murray Gleeson, State governments, professional associations such as the Law Council of Australia and other judges'.⁷

It does not appear that those 'consulted' are requested to assess candidates against specific criteria, and are instead simply asked for their personal opinion or 'impression'. According to former Chief Justice of the High Court, Sir Harry Gibbs, the extent to which the views of those consulted are actually taken into account varies, as does the extent of consultations.⁸ For the appointment made to the High Court in February 2003, Attorney-General Williams also conducted private interviews with candidates, but did not indicate what questions were put to candidates or how this information was used in the selection process.⁹ As former federal Attorney-General Michael Lavarch has said: 'If equity could be said to vary depending on the size of the Chancellor's foot, then the selection process, for Commonwealth judges at least, can alter with each Attorney-General'.¹⁰

After 'consulting', the Attorney-General informs Cabinet of his or her recommendation. Cabinet then considers the recommendation and may accept it or may decide on an entirely different person. It is unclear what information, other than the candidate's name, Cabinet has before it when it makes its decision. However, the limited evidence available of instances where an Attorney-General's preferred candidate has not been accepted by Cabinet demonstrates that the choice has been influenced by considerations as diverse as the potential appointee's 'politics, state of origin, friendships, and the views of sitting Justices'.¹¹

The Attorney-General, after securing the agreement of the nominee chosen by Cabinet, formally recommends the appointment to the Governor-General. In

4 For example, see Daryl Williams quoted in 'High Court Appointment', *Sky News* (17 December 2002).

5 See, for example, Phillip Hudson, 'Call to Appoint Woman Judge', *Sunday Age* (11 September 2005) 9 ('Mr Ruddock has drawn up a shortlist of candidates but rejected calls to consider gender or geography, saying the judge will be chosen on merit').

6 Daryl Williams, 'Judicial Independence and the High Court' (1998) 27 *University of Western Australia Law Review* 140 at 149.

7 Phillip Hudson, 'Call to Appoint Woman Judge', *Sunday Age* (11 September 2005) 9.

8 Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 7 at 11.

9 Chris Merritt, 'Court Row as Williams Vets Judges', *Australian Financial Review* (11 December 2002) 1. See also Anthony Mason, 'The Centenary of the High Court of Australia' (2002) 5 *Constitutional Law and Policy Review* 41 at 44.

10 Michael Lavarch, 'The Appointment of Judges', in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 153 at 153.

11 Troy Simpson, 'Appointments that Might Have Been', in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 23 at 23.

practice then the Governor-General in Council has no active involvement in the process and the decision is entirely in the hands of a small group in the executive. The lack of established criteria (beyond the vague notion of 'merit'), and of an entrenched process of public consultation, means that appointments to the High Court have been accurately described as being 'the gift' of the government of the day.¹²

3. *Models for Reform*

In a thorough analysis in 1987 of possible models of judicial appointment, George Winterton concluded that while the results of the current method of appointment to the High Court, 'assessed in terms of legal competence', are 'very favourable',¹³ the procedural aspects could be 'justifiably criticized'.¹⁴ In the years since Winterton's analysis, the models for appointment, particularly judicial appointments commissions, have been developed and improved upon in a range of common law countries, in part because of a desire for a more professionalised and transparent selection process. Canada, for example, has moved from a system of executive appointment similar to that in Australia to a judicial appointment commission system intended to depoliticise the process and increase transparency. At the federal level in Canada, such an advisory committee system for appointments to the Provincial and territorial superior courts and the Federal and Tax Courts of Canada (but not the Supreme Court) has been in place since 1988.

The United Kingdom has also moved from a system similar to Australia's to one based upon clear criteria and great transparency that is designed to be more open and fair and to increase diversity in the judiciary.¹⁵ Hence, the *Constitutional Reform Act 2005* (UK), in creating a Supreme Court for the United Kingdom as its final court of appeal, set down a new process of appointment. While under that Act the final appointment takes the form of a recommendation by the Prime Minister to the Queen, s 26(4) provides that the Prime Minister 'must recommend any person whose name is notified to him under section 29' and 'may not recommend any other person'. The key role is played by a new Judicial Appointments Commission, which consists of 15 people, the chair of which must be a lay member. The Commission, after consulting widely has the task of providing a report to the Lord Chancellor stating whom it has selected to be a judge of the Court. The Lord Chancellor may twice reject the selection or require the

12 The expression has been used, for example, by Tony Blackshield, 'The Appointment and Removal of Federal Judges', in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 400 at 426 and Simon Evans, 'Appointment of Justices', in *The Oxford Companion to the High Court of Australia*, above n 11, 19 at 21.

13 George Winterton, 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review* 185 at 188.

14 Id at 189.

15 See 'Judicial Appointments in England and Wales Policies and Procedures' <www.dca.gov.uk/judicial/appoinfr/jappinfr.htm>.

commission to reconsider its choice, but by the third occasion the Lord Chancellor must under s 29 notify the selection, or one of the names put forward at either of the first two stages, to the Prime Minister.

There have also been important changes in the way that judges are appointed in Australia to courts other than the High Court. These developments are summarised in a useful discussion paper published in 2005 on judicial selection by Justice Ronald Sackville, of the Federal Court of Australia, for the Judicial Conference of Australia.¹⁶ Most innovation has occurred at the State level. For example, in Victoria since 2000, advertisements have been placed seeking expressions of interest for appointment to the Magistrates Court. A database of applicants' contact details is maintained by the Department of Justice and a shortlist of candidates is interviewed by a panel comprising the Chief Magistrate, a Deputy Secretary of the Department of Justice and a third person. This panel then makes a recommendation to the Attorney-General. Since 2001, advertisements have been also placed for expressions of interest for the higher Victorian courts. A database of applicant's contact details is maintained and, while interviews are not usually conducted, the Attorney-General uses the database to assist in making the decision of whom to appoint. In 2003, this meant that even the position of Chief Justice of the Supreme Court of Victoria was advertised.

Reform has taken a further step in Tasmania. According to the *Appointment Process for Judges and Magistrates* published in 2002 by the Department of Justice, advertisements are placed calling for expressions of interest for positions as both magistrates and judges. The procedure sets out the selection criteria to be used in the appointment process. These are a person's legal knowledge and experience, their skills and abilities (such as intellectual ability, decisiveness and authority) and personal qualities (such as integrity, understanding of people and society, and courtesy and humanity). While there had been no formal process for the interview of candidates for either the Magistrates Court or the Supreme Court, a Tasmanian Department of Justice Protocol now requires the Attorney-General to nominate an appointments committee of people who have expressed interest in participating in such a committee following its public advertisement. The committee is to be composed of two senior lawyers – one with commercial and the other with litigation experience – and two lay persons experienced in the selection of staff. All candidates that meet the selection criteria are interviewed by this committee. The committee must consult with the Law Society, the Bar Association, the Chief Magistrate and the referees nominated by the applicant. The committee provides a report to the Attorney-General detailing the suitability of each candidate by reference to the selection criteria, as well as the names of all candidates that were not interviewed and a brief statement of why they were not interviewed. The Attorney-General then nominates a candidate to Cabinet for appointment from this shortlist.

16 Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117.

4. *A Path Forward*

New processes in operation in nations ranging from Canada to the United Kingdom and in the Australia States, especially Tasmania and Victoria, suggest a path forward for reform of the High Court appointment process. As Sackville J has noted, ‘Recent experience in the United Kingdom and New Zealand suggests that there is growing support for the idea of an independent commission having responsibility for making appointments to judicial office, or at least for making recommendations to government concerning such appointments’.¹⁷ He lists the potential advantages of such reform as including greater transparency and public confidence in the appointments process, ‘which will be seen as less susceptible to political influences and more likely to produce appointments on genuine merit’.¹⁸

While the final say should remain with our elected representatives, the process should be reformed in two main ways. First, criteria should be developed that give meaning and substance to the inherently subjective notion of ‘merit’. These should fall under four broad categories: legal knowledge and experience; professional qualities; personal qualities; and diversity in the judiciary.

Second, these criteria should be applied by a new judicial appointments commission established for all federal judicial appointments. The commission should be designed according to what has proved to be effective in comparable common law jurisdictions, such as Canada and the United Kingdom. The central features of an Australian judicial appointments commission should be:

- The commission must include men and women from diverse backgrounds, some of whom must be lay members, chosen by a process that ensures that the commission has an appropriate level of independence from the executive;
- The commission should be activated for each federal judicial appointment by a request from the Attorney-General to supply a short list of names (specified as a minimum of two);
- 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;

¹⁷ Id at 142-143.

¹⁸ Id at 143.

- 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.

Justices of the High Court should thus in the future be appointed by the executive with the benefit of advice from a judicial appointments commission applying accepted and known criteria. A more open and accountable system of this kind should over time produce judges of the highest quality and will work to maintain or even increase public confidence in the judges of the High Court and in the Australian legal system.

