

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Inquiry into Australia's Judicial System and the Role of Judges

Attorney-General's Department Questions on Notice

- 1. The committee notes the Attorney-General's Department submission information about the Standing Committee of Attorneys General working group consideration of a national judicial commission. What are the aims of this project and the timeframe for its completion?**

As noted in the Department's written submission to the Committee (see p 5), the aim of the working group is to examine the feasibility of a national judicial complaints handling mechanism to facilitate consistent handling of complaints across jurisdictions.

No particular timeframe has been set for completing this project. The views of the Council of Chief Justices will be sought on options for a national judicial complaints mechanism prior to the working group reporting back to the Standing Committee of Attorneys-General (SCAG).

- 2. Has consideration been given to the establishment of a federal judicial commission? If so, what proposals were considered and what were considered to be the advantages and disadvantages of a judicial commission?**

The SCAG working group is considering a range of options for a national mechanism for handling complaints against judicial officers including the adoption of a consistent set of rules, procedures and standards and an appropriate complaints handling body. The working group's recommendations will assist with the Government's deliberations.

The Attorney-General has indicated his support for a single national complaints handling mechanism through the National Judicial College of Australia as one possible model. He has also indicated that consideration could be given to a single complaints handling mechanism for the federal courts.

Are there any Constitutional impediments to the establishment of a federal judicial commission?

The possible Constitutional constraints in implementing a national mechanism for handling complaints are being examined by the SCAG working group, drawing on assistance from the Special Committee of Solicitors-General.

Is a federal judicial commission viable given the size of the jurisdiction and the number of judges?

As noted above, the SCAG working group is considering a range of options which will assist the Government in its deliberations.

- 3. The committee notes the information provided in the Attorney-General's Department submission about the government's new processes for judicial appointments and that the**

**Attorney-General "...is considering the feedback received and has already made changes."
Please detail the current process for federal judicial appointments to all courts.**

The following sets out elements of the process that have been adopted for appointments made, or under consideration, since the Government took office.

Appointments to the High Court and the Chief Justice of the Federal Court

The Attorney-General invites nominations from a broad range of individuals and organisations including the heads of federal courts, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

Letters inviting nominations are also sent to State Attorneys-General (for High Court appointments this is required under section 6 of the *High Court of Australia Act 1979*), Justices of the High Court, State and Territory Chief Justices.

Candidates must meet the relevant qualifications set out in section 7 of the *High Court Act 1979* or section 6(2) of the *Federal Court Act 1976*.

The Attorney-General considers the candidates nominated and, for each position available, identifies the person whom he considers most suitable. He then recommends this appointment to the Cabinet.

Appointments are made by the Governor-General in Council.

Appointments to the Federal Court (other than the Chief Justice), Family Court and Federal Magistrates' Court

The Attorney-General invites nominations from a broad range of individuals and organisations including the Chief Justices of the Federal Court and Family Court, the Chief Federal Magistrate, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

Information regarding expressions of interest and nominations for appointment is also published in Public Notices in national and local newspapers and on the Attorney-General's Department's website.

Candidates must meet the relevant qualifications set out in section 6(2) of the *Federal Court Act 1976*, section 22 of the *Family Law Act 1975* or Schedule 1, Part 1 of the *Federal Magistrates Act 1999*.

Candidates for appointment to the Federal Court and Family Court must also demonstrate the following qualities to the highest degree:

- legal expertise
- conceptual, analytical and organisational skills
- decision-making skills

- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments
- the capacity to work effectively under pressure
- a commitment to professional development
- interpersonal and communication skills
- integrity, impartiality, tact and courtesy, and
- the capacity to inspire respect and confidence.

Candidates for appointment to the Federal Magistrates Court must also demonstrate the same qualities to a high degree.

An Advisory Panel which includes the Chief Justice (or Chief Federal Magistrate) or their nominee, a retired judge or senior member of the Federal or State judiciary and a senior member of the Attorney-General's Department considers the nominations and provides a report to the Attorney-General recommending appropriate candidates for appointment. To assist in preparing its report, the Advisory Panel may conduct interviews of candidates.

The Attorney-General considers the Advisory Panel's report and, for each position available, identifies the person whom he considers most suitable. He then recommends this appointment to the Cabinet.

Appointments are made by the Governor-General in Council.

Are any changes to this process being considered?

The Attorney-General has already made changes to the process, including by placing advertisements in relevant local newspapers. The Administrative Appeals Tribunal, Council of Australasian Tribunals and Veterans Review Board have been added to the consultation list for all appointments.

The Attorney-General has said he welcomes comments on the process and will continue to monitor and make changes to the process as necessary.

4. What qualities and skills are sought in candidates for judicial appointment? Is there a shortage of suitable candidates?

The personal and professional qualities sought are set out in the answer to question 3 above. Appointment processes since the Government took office have not indicated a shortage of suitable candidates.

5. Is the process for appointments to the High Court different to the process for other federal judicial appointments? If so, in what ways and what are the reasons for the difference? If not, has consideration been given to having a different process? Please provide details about what has been considered.

Yes. The process for appointments to the High Court is described in the answer to question 3.

The High Court, as the apex of Australia's judicial system, enjoys a different status from the other courts. Expressions of interest are not invited. As the candidates for appointment to the High Court are likely to be serving judges, and known to Government, face-to-face meetings with candidates are not considered appropriate.

6. An argument has been made that once a pool of suitable candidates for a judicial appointment has been identified based on primary criteria (such as relevant legal

qualifications and experience, merit etc), it can be appropriate to consider secondary criteria such as the composition of the bench eg does the bench reflect society in a range of ways such as gender, ethnicity, religion etc. To what extent are these factors taken into account, and by whom? If they are not taken into account, what consideration has been given to this approach?

The appointment Advisory Panels objectively assess candidates against the published appointment criteria and report to the Attorney-General with their recommendations on the candidates. The appointment criteria are set out in the answer to question 3.

The Attorney-General considers that greater transparency in the appointments process increases the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.¹

7. Are the views of existing and retired judges sought to identify potential candidates for judicial appointment? If not, has consideration been given to such a system? If this approach has been considered and rejected, what were the reasons for rejecting it?

The individuals consulted are identified in the answer to question 3.

Existing and retired judges also often sit on the Advisory Panels established by the Attorney-General to consider judicial appointments (see answer to question 3).

Existing and retired judges are also welcome to submit nominations for people they consider qualified and suitable for appointment.

8. Is the appointment process for federal magistrates the same as the process for judicial appointments? What are the differences and the reasons for any difference?

The process for appointments to the Federal Court, Family Court and Federal Magistrates Court is the same.

9. Has consideration been given to the merits of establishing an independent body to assist with judicial appointments? If so, what functions were considered for this body undertake? What role would the executive government retain?

The Attorney-General has said that the introduction of a formal judicial appointments commission is another possible approach open to Government but that setting up a whole new government agency for the purpose of assisting with judicial appointments would not be a step to be taken lightly.²

The Attorney-General commented that he would continue to follow with interest the developments in jurisdictions that have established such a body, including the United Kingdom.

10. What are the policy interests that need to be balanced to determine an optimal retirement age? Has consideration been given to whether any reasons for change are sufficient to justify the difficulty and cost involved in achieving an amendment to the Constitution?

¹ The Hon Robert McClelland MP, Speech to Judicial Appointments Forum, Bar Association of Queensland Annual Conference, 18 February 2008.

² *Ibid*

The retirement age for all federal courts is the maximum permitted by the Constitution (70). There is no proposal to amend the Constitution.

11. Have acting federal judges ever been appointed? What were the circumstances and period of the appointment in each case? Were concerns ever raised with the department that the appointment of an acting judge is inconsistent with the independence of the judiciary?

Section 72 of the Constitution does not permit a federal judicial officer to be appointed on an acting basis.

12. Have federal judges ever been appointed on a part-time basis? What are the policy considerations relevant to determining the advantages and disadvantages of appointing judges part-time?

Clause 1(6) of Schedule 1 to the *Federal Magistrates Act 1999* provides that a Federal Magistrate (other than the Chief Federal Magistrate) may hold office on a part-time basis if the Federal Magistrate's commission of appointment so specifies. To date, no Federal Magistrate has been appointed on a part-time basis.

At present, relevant legislation does not provide for the appointment of judges to the Federal Court or Family Court on a part-time basis.

13. Has the judicial exchange program being developed as part of the Standing Committee of Attorneys General agenda progressed? What are the aims of this project and what is the timeframe? What features and benefits are considered necessary to implement an effective judicial exchange program? Have any impediments to implementing such a system been identified?

In March 2008, SCAG approved in principle the development of an exchange program between judicial officers of interested State and Territory courts subject to the development of a proper legislative, administrative and financial framework. It was agreed that a SCAG working group be formed, comprising officers from all jurisdictions, to examine the legislative framework in each jurisdiction in order to facilitate exchanges.

The objectives of establishing a judicial exchange scheme include: enhanced knowledge and experience of judicial officers, retention of experienced officers for longer periods, more consistent body of national decision making in areas of common jurisdiction, improvement in the attractiveness of courts for prospective appointees and improved awareness between courts of the development of the law in areas of common jurisdiction.

On 5 June 2009, the Commonwealth Attorney-General approved model legislation and principles for judicial exchange which were developed by the working group. The model provisions encompass the amendments required to be made to State and Territory legislation to facilitate the scheme. The model provisions have been drafted to encompass a one-way transfer of a federal judge to a State or Territory court. The Commonwealth is waiting on the agreement of all SCAG Ministers to enable the scheme to be implemented nationally.

The placement on exchange of State judges in federal courts raises significant constitutional problems related to tenure and remuneration. The Department is working on an approach to enable State judges to sit in federal courts that seeks to address these problems.

No particular timeframe has been set for implementing the proposed judicial exchange scheme.

14. Has the department considered any other arrangements for judicial appointments?

In his address to the Judicial Appointments Forum, the Attorney-General noted the range of processes by which appointments may be made.

The Attorney-General has indicated that he does not support a US-style process of Senate ratification for Australia and that he would continue to follow with interest the developments in jurisdictions that have established such a body, including the United Kingdom.³

15. Has the department given consideration to amending the Constitution to enable a cross-vesting scheme to be re-established to allow matters to be heard interchangeably by federal and state courts? What are the impediments to achieving a national cross-vesting scheme?

The Department has given careful consideration to the High Court's decision in *Re Wakim; ex parte McNally* (1999) 198 CL 511. There is no proposal to amend the Constitution.

16. Has the Standing Committee of Attorneys-General or the Council of Australian Governments considered any aspects of the interface between federal and state judicial systems? If so, what is the outcome of this consideration?

At the July 2008 SCAG meeting, Ministers agreed to establish a working group to examine the feasibility of establishing a national judiciary. In August 2009, the SCAG working group put a proposal to SCAG that it determine the feasibility of implementing a national judicial framework in three phases: Phase 1- a national judicial complaints system and a judicial exchange program (being progressed separately by a SCAG working group); Phases 2 and 3 – possible development of common federal, State and Territory legislation relating to the pre-requisites for judicial appointment, tenure and retirement ages and development of more uniform judicial remuneration structures, and judicial remuneration packages and terms and conditions of office.

The judicial exchange and national complaints scheme currently being progressed by SCAG working groups would form part of the framework.

SCAG has referred the national judicial framework item to the National Justice CEOs (NJCEOs) Group to determine the feasibility of progressing proposals in Phases 2 and 3.

17. Does the Standing Committee of Attorneys-General consideration of a national judiciary include consideration of grounds of termination other than proved misbehaviour or incapacity? While the development of a national judiciary is being considered, are any other grounds of termination being contemplated for federal judges?

As noted in the Department's submission to the Inquiry (see page 2 of submission), under section 72 of the Constitution, the sole ground upon which a federal judge may be removed from office is 'proved misbehaviour or incapacity'. There is no proposal to amend section 72.

The issue of removal from office is not being considered as part of the national judicial framework project.

What are the competing policy interests to be considered when deciding on grounds for termination?

As no consideration is being given to other grounds of termination, this issue does not arise.

³ *Id*

18. Has consideration been given to determining the term of a judicial appointment in any way other than setting a compulsory retiring age?

As noted in the Department's submission, section 72 of the Constitution provides that the appointment of a Justice of a court created by the Commonwealth Parliament shall be for a fixed term expiring on the Justice attaining the age of 70 years or a lesser age fixed by the Parliament (see page 3 of submission). There is no proposal to amend section 72 of the Constitution.

19. What does removal for 'proved misbehaviour or incapacity' mean? Has consideration been given to expanding these grounds?

As no federal judicial officer has ever been removed from office, the constitutional expression has not been interpreted authoritatively.

These grounds are constitutionally enshrined and so cannot be changed without constitutional amendment. As noted in the response to question 18, there is no proposal to amend section 72 of the Constitution.

20. What is the policy approach to how complaints of lesser inappropriate conduct are dealt with? Is more weight given to the importance of judicial independence with a high level of security of tenure rather than to having a comprehensive ability to deal with complaints?

There is no form of sanction for misconduct or misbehaviour of a federal judicial officer other than removal from office provided for under the Constitution. Complaints of lesser inappropriate conduct are handled by the head of the relevant court who manages judicial performance issues informally in accordance with judicial independence.

Are any changes to this approach being contemplated?

There is no proposal to amend the Constitution to provide for mechanisms for other forms of sanction for judicial officers.

21. How are issues of judicial mental incapacity dealt with? Are they treated as a matter of 'complaint'?

Complaints about judges are currently handled, in the first instance, by the head of the relevant court in accordance with the court's complaints handling policies.

The federal courts have procedures in place to provide judicial officers with access to health and counselling services where required.

The Government has introduced legislation that supports and encourages the procedures already in place in the courts. Items 3, 10 and 12 of Schedule 3 of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 amend s 15 of the *Federal Court of Australia Act 1976*, s 21B of the *Family Law Act 1975* and s12 of the *Federal Magistrates Act 1999* respectively, to provide that it is the head of jurisdiction's responsibility to ensure arrangements are in place to provide judges with access to health assessments, counselling services and judicial education.

Are there ways to encourage early identification of problems and support for a member of the judiciary to work part-time or to take time off and then return to the bench when recovered rather than be 'removed'?

As noted above, the federal courts have procedures in place to provide judicial officers with access to health checks and counselling services. The Government has introduced legislation that supports and encourages the procedures already in place in the courts.

Would any federal anti-discrimination law apply to the appointment and removal of judges?

As noted in the answer to question 6, the Attorney-General considers that greater transparency in the appointments process will increase the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.

As noted in the Department's submission to the Inquiry (see page 2 of submission), under Section 72 of the Constitution, the sole ground upon which a federal judge may be removed from office is 'proved misbehaviour or incapacity'. There is no proposal to amend section 72.

22. Has any consideration been given to the adequacy of the process of removal being made by the Governor or the Governor-General following an address of parliament?

As noted in the response to question 17, there is no proposal to amend section 72 of the Constitution.

Has anyone been removed from his or her judicial appointment, and if so, by whom and on what grounds?

No federal judge has been removed from judicial office on the grounds of proved misbehaviour or incapacity.

23. Has consideration been given to having different methods of termination for judges at different levels? For example, consideration of a broader range of grounds for removal for a lower level court, but inappropriate for a higher level court?

As noted in the response to question 17, there is no proposal to amend section 72 of the Constitution.