The Senate Legal and Constitutional Affairs References Committee Report on *Australia's Judicial System and the Role of Judges* (December 2009)

Government Response

The Government welcomes the report of the Committee on Australia's Judicial System and the Role of Judges. It is a significant contribution to the body of work in this area and will assist in the ongoing debate and growing impetus for a more effective complaints handling system.

The Government welcomes the Committee's endorsement of its judicial appointments processes. The Government has improved processes for appointing judicial officers to the federal courts by implementing more transparent processes. While recognising the quality of the Australian judiciary, transparency and merit based appointments have strengthened the quality of appointments and ensured that the process is fair and effective. The Attorney-General has received significant support and positive feedback regarding the implementation of the new processes.

The Government also welcomes the Committee's support of the work currently underway in relation to judicial complaints handling. A transparent, impartial and accountable system of judicial complaints handling has the potential to enhance public confidence in the administration of justice, and ultimately, to strengthen the judiciary itself. At the request of the Attorney-General, the Standing Committee of Attorneys-General (SCAG) has established a working group to examine the feasibility of a national judicial complaints handling mechanism.

Recommendation 1

2.9 The committee recommends that the High Court of Australia adopt a written complaint handling policy and makes it publicly available, including on its website, within 1 month of the tabling of this report.

The Government notes this recommendation.

The implementation of this recommendation is a matter for the High Court of Australia.

The Attorney-General received a letter from the Chief Justice of the High Court of Australia dated 17 December 2009 in which his Honour stated:

> Section 72 of the *Constitution* provides that the Justices of the High Court shall not be removed from office 'except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, ... on the ground of proved misbehaviour or incapacity'.
>
> There is no statutory or other basis for establishing any procedure for 'handling complaints' against Justices of the High Court. Because it seems inevitable that any question as to the constitutional validity of procedures of that kind would come to this Court for decision, the Court will make no further comment on the issue.

Recommendation 2

2.19 The committee recommends that, following consultation about the best way to achieve this, all federal courts publish quarterly complaint handling summary status reports on their websites recording the number of complaints received and, in relation to each complaint, the date it was received, the nature of the complaint, the date on which it was resolved and a summary of any action taken in response to the complaint.

2.20 The committee recommends that no personal details of either the complainant or judicial officer be identifiable from these reports.

The Government notes this recommendation.

The implementation of this recommendation is a matter for each of the federal courts.

Recommendation 3

3.23 The committee recommends that 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.

3.24 If the government or department prepared a short-list of candidates for any appointment, the number of people on the list should also be made public.

The Government accepts this recommendation in part.

The Government proposes that on the announcement of the appointment of federal judicial officers, the number of nominations and applications received (if sought) would be included in the announcement.

Recommendation 4

3.72 The committee recommends that the process for appointments to the High Court should be principled and transparent. The committee recommends that 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.

The Government accepts this recommendation in part.

Appointments to the High Court are made on merit having regard to the qualifications for appointment in section 7 of the *High Court of Australia Act 1979*.

The Government agrees with the Committee's observation that the special position of the High Court means that an identical judicial appointments process to that used in other courts is not appropriate.

The Government will continue to consult widely on all appointments. With respect to appointments to the High Court, the Attorney-General will continue to invite nominations for appointment from a broad range of individuals and organisations and from State Attorneys-General (as required under section 6 of the High Court of Australia Act).

In light of the high profile nature of appointments to the High Court, and that most of the candidates will themselves be known to Government, advertising vacancies will achieve little in addition to the broad consultation detailed above.

Recommendation 5

4.27 The committee recommends that all jurisdictions set a nationally consistent compulsory retirement age for judicial officers and encourages each jurisdiction to implement it within the next 4 years.

The Government does not accept this recommendation.

The retirement age for all federal courts is the maximum permitted by the Constitution. There is no proposal to amend section 72 of the Federal Constitution.

The compulsory retirement age for State and Territory judicial officers is a matter for each State and Territory.

Recommendation 6

4.28 The committee recommends that at the next Commonwealth referendum section 72 of the Constitution should be amended in relation to the compulsory retirement age for judges to provide that federal judicial officers are appointed until an age fixed by Parliament.

The Government does not accept this recommendation.

As noted in relation to Recommendation 5, there is no proposal to amend section 72 of the Constitution.

Recommendation 7

4.64 The committee recommends that the *High Court of Australia Act 1969* (Cth) prohibition on federal judges holding another office of profit be retained.

The Government accepts this recommendation.

Recommendation 8

4.70 The committee recommends that by 30 June 2010 the Attorney-General develop and implement a protocol that provides guidelines to federal courts for the appropriate use of short and long term part-time working arrangements for judicial officers.

Recommendation 9

4.71 The committee recommends that the Attorney-General present the protocol to the Standing Committee of Attorneys-General for consideration at the first meeting after 30 June 2010.

The Government notes recommendations 8 and 9.

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 their commission of appointment so specifies, although no Federal Magistrate has been appointed on a part-time basis to date.

The *High Court of Australia Act* 1979, the *Federal Court of Australia Act 1976* and the *Family Law Act 1975* do not provide for the appointment of judges on a part-time basis. There is no proposal to amend these Acts to provide for part-time appointments at this stage.

Recommendation 10

7.82 The committee recommends that the Commonwealth government establish a federal judicial commission modelled on the Judicial Commission of New South Wales.

The Government notes this recommendation.

The Government is currently working within SCAG to consider possible models for a national mechanism for judicial complaints handling. A range of options are being considered including adopting a consistent set of rules, procedures and standards and the establishment of an appropriate complaints handling body.

A federal mechanism could be either an interim step or complement a national mechanism. The SCAG working group's recommendations will assist the Commonwealth Government's consideration of an appropriate federal mechanism.

Recommendation 11

7.83 The committee recommends that this new judicial commission include the three functions of complaints handling, assisting courts to achieve consistency in sentencing and judicial education.

The Government notes this recommendation. As outlined in relation to recommendation 10, the Government is working within SCAG on a range of options.

Recommendation 12

7.84 The committee recommends that the functions currently fulfilled by the National Judicial College of Australia be incorporated into the new judicial commission.

The Government notes this recommendation. As outlined in relation to recommendation 10, the Government is working within SCAG on a range of options.

Recommendation 13

7.85 The committee recommends that within 12 months the government undertake planning and budgetary processes necessary for the establishment of this commission.

The Government notes this recommendation. As outlined in relation to recommendation 10, the Government is working within SCAG on a range of options.

Recommendation 14

7.86 The committee recommends that within 18 months the government introduce a bill to establish the new judicial commission.

The Government notes this recommendation. As outlined in relation to recommendation 10, the Government is working within SCAG on a range of options.

Recommendation 15

7.87 The committee recommends that recommendations 10 to 14 above are implemented subject to any constitutional limits and in consultation with the federal courts.

The Government notes this recommendation.

In the consideration of judicial complaints handling mechanisms at both the SCAG and federal levels, the Government has been mindful of the Constitutional protections on judicial independence. This has included drawing on assistance from the Special Committee of Solicitors-General and the Commonwealth Solicitor-General.

The Attorney-General, in his recent speech to the Annual Conference of Supreme and Federal Court Judges at **Attachment A**, invited all judicial officers to engage positively with the issue and to have input into proposals as they are developed.

Recommendation 16

7.96 The committee recommends that as soon as possible, and no later than, 30 June 2010 the government:

- **implement a federal process enabling it to establish an ad hoc tribunal when one is needed to investigate complaints of judicial misconduct or incapacity;**
- **establish guidelines for the investigation of less serious misconduct or incapacity issues; and**
- **implement the Family Court and Federal Magistrates Court proposal for an oversight committee.**

The Government notes this recommendation.

As outlined in relation to recommendation 10, the Government is working within SCAG on a range of options for handling complaints against judicial officers.

The proposal raised by Chief Justice Bryant and Chief Federal Magistrate Pascoe for an oversight committee, to assist heads of jurisdictions in the investigation of complaints, is currently being considered by the Government.

Attachment A

Speech by the Attorney General,
the Hon Robert McClelland MP to the
Supreme and Federal Court Judges' Conference
Canberra - 25 January 2010

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

Thank you for the opportunity to speak today on the topic of 'Strengthening the Australian judiciary'.

A strong judiciary is fundamental to the rule of law.

Today, I would like to discuss the practical steps the Government is taking to bolster and support this fundamental tenet.

Role of Government

The independence of the judiciary from the executive and the legislature is a hallmark of our system of Government. The fundamental principle that justice will be administered "without fear or favour" underpins the community's confidence in our justice system.

I recently had the pleasure of visiting the new Supreme Court of the United Kingdom. On the Library walls are quotes of the practical meaning of the rule of law. One I particularly liked was from Ovid:

"Laws were made to prevent the strong from always having their way".

It means that even if a citizen's grievance is with the Government they will have it fairly adjudicated by impartial judges who owe an allegiance only to the law – not to any man, woman, institution or interest group.

While this independence is vital -the roles of the three arms of Government are nonetheless interdependent.

It is the role of Governments, for example, to create a system that facilitates and supports the proper functioning of the judiciary. This function must be facilitative not controlling, putting mechanisms in place that enable judges to discharge their duties impartially and effectively.

The task of strengthening our judiciary is therefore a joint responsibility of both judges and the Government.

But what denotes a strong judiciary?

Constitutional independence from Government, legal skills and competence are often identified, however they are not the only aspects. A strong judiciary also has the confidence and support of the community.

The vast majority of the Australian community will never have direct contact with the Australian judiciary. For that greater proportion of the community, their views and perceptions are established through the outcomes of the court process.

The ordinary citizen reading a newspaper report on a recent sentencing will form a view about the system from the journalist's report of the decision and the judge's comments. Hopefully the reporting will be accurate and balanced so the community is properly informed of the court's determination on a point of law. However, what judges have done in the past impacts on the daily lives of all of us. Whether it is a disclaimer on chair lift ticket, terms of a hire car agreement, or a holiday rental agreement - the content of what they read is the product of the common law as much as it is legislation. These examples exemplify the reach and significance of the legal system. For the community to have faith that the law is applied rationally, impartially, consistently, predictably and fairly, they must also have faith in the system that interprets, applies and enforces the law.

The strength of the judiciary in this context lies in the strength of its ability to articulate and communicate its reasoning as well as the accessibility, efficiency and fairness of its processes.

Judicial Appointments

Strengthening the judiciary in this context requires that judges with appropriate skills are appointed to judicial office.

These judges should not only possess keen legal minds, but also the capacity to discharge their judicial functions such that those matters capable of resolution are resolved as expeditiously and cost effectively as possible. And those matters that require adjudication are similarly resolved with appropriate direction to maintain the focus on pertinent issues.

Since taking office, I have been committed to improving the processes for appointing judicial officers to the federal courts.

Accordingly, the Government has implemented more transparent processes to ensure that appointments are clearly based on merit, so that the public can have confidence that the Government is making the best possible judicial appointments.

Boastfully I can say we are.

While recognising the quality of the Australian judiciary generally, I have no doubt that transparency and merit based appointments have strengthened the quality of appointments and ensure that the process is fair and effective.

These new processes involve public notices, broad consultation, published appointment criteria and the use of advisory panels to assess candidates against these criteria and recommend those who are highly suitable for appointment.

These processes are now used for appointments to each of the federal courts, and are currently being used for replacement appointments to the Family Court of Australia and the Federal Magistrates Court.

For the appointment of Justices of the High Court, I have adopted a slightly different approach, reflecting the fact that most of the candidates for appointment to the High Court are likely to be serving judges and already known to the Government.

For this reason it has not been necessary to advertise High Court positions or use advisory panels. Rather, the Government undertakes extensive consultations with a range of stakeholders – including the States and Territories, Courts and Tribunals, professional associations and law schools – to identify suitable candidates. I am undertaking a similar approach in the appointment of a new Chief Justice of the Federal Court.

I am pleased to say that I have received significant support and positive feedback regarding the implementation of these new processes. I have also been pleased with the support and feedback I have received for the high quality of judicial officers selected for appointment as a result.

Indeed, the Senate Legal and Constitutional Affairs Reference Committee, in its report on Australia's Judicial System and the Role of Judges, broadly endorsed the judicial appointments processes the Government has implemented.

This commitment to improving the judicial appointments process does not end there however. The Government will continue to monitor and, if necessary, adapt processes to ensure that future appointments continue to be based upon merit and that everyone who possesses the qualities for appointment as a judicial officer is fairly and properly considered.

National Judiciary, Dual Commissions and Judicial Exchange

Ongoing exposure to new influences and new learning serves to further strengthen the judiciary.

In his speech to the Judicial Conference of Australia's 2005 Colloquium, titled 'Judicial Exchange: Debalkanising the Courts', the Chief Justice of the High Court, the Hon Robert French, then a judge of the Federal Court, remarked:

"To the extent that Australian judges can be exposed to diversity within the national judicial system they have the opportunity to be better judges and make their courts better courts."

The Standing Committee of Attorneys-General (SCAG) has established a working group to examine the feasibility of creating a national judicial framework.

The working group is focussing on:

- a national judicial complaints system
- a judicial exchange program, and
- a system of concurrent judicial appointments.

I believe that facilitating the sharing of experience within the judiciary will assist in creating a more integrated, and therefore stronger, Australian judicial system.

Of course, there are constitutional limits on the extent to which the federal judiciary can engage in these programs. There are a number of instances where Federal Judges have served on state Courts to provide particular expertise but the reverse is admittedly far more complex.

Last October I jointly announced with my Victorian colleague, the Hon Rob Hulls, an intention to establish Australia's first dual commission for a judge to the Federal Court and a State Supreme Court.

I am enthusiastic about the opportunity this presents for progressing dual commissions. However I acknowledge that a number of practical challenges remain before a dual commission can be implemented.

As you are all aware, no judge can be forced to accept a commission from another jurisdiction. Similarly, no Government can be forced to appoint a judicial officer from another jurisdiction. I expect that, once appointed, working arrangements for the holders of a dual commission would be the subject of discussion and arrangement between heads of jurisdictions.

I believe the benefits of dual commissions, in the context of sharing expertise and supporting the ongoing development of judicial officers, justify our continued efforts to implement the system. I remain committed to working closely with jurisdictions to ensure that dual commissions can function effectively in both form and substance.

This initiative compliments the work SCAG has been doing on judicial exchange which is another means of promoting nationally consistent standards of judicial decision-making.

These initiatives provide greater scope for the sharing of expertise across jurisdictions, will encourage a dynamic judiciary, and will provide for greater uniformity and consistency in the application of laws that have national significance.

Overseas Judicial Assistance and Exchange

I am also keen to strengthen our approach to the provision of law and justice assistance to the countries in our region, including a more targeted and coherent approach to Australia's engagement in the Pacific.

Significant Australian assistance is being provided across the law and justice sectors of all Pacific island countries, both by government and by the judiciary.

I am keen to develop a whole of government strategy on Pacific law and justice issues. To this end, a draft Framework for Australia's law and justice engagement in the Pacific has recently been prepared.

The Government is currently consulting with Pacific island countries, the States and Territories and the legal, judicial and non-government donor sectors on this draft framework. I would also be keen to hear your views.

The framework will promote a more targeted and coherent approach to Australia's engagement on law and justice issues in the Pacific, including addressing the role of State and Territory agencies and private organisations.

Law and justice development assistance is critical to supporting the rule of law and good governance in Australia's neighbouring countries.

Judicial Complaints

In his remarks to the 5th World Wide Common Law Judiciary Conference in 2003 on judicial misconduct, the Hon Justice Spigelman noted that:

"The rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially. Judicial misconduct and judicial incompetence are incompatible with each of these objectives. Fairness requires reasonable consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decisionmaker to be indifferent to the outcome. Judicial misconduct, particularly improper external influence, distorts all of these objectives."

I'm not suggesting that his Honour has advocated the creation of a model for handling of judicial complaints. But clearly the existence or absence of an appropriate mechanism to deal with cogent complaints about the conduct of judicial officers has the potential to impact on public confidence in the judiciary.

Despite the transparency and public scrutiny present in the appeals process, there is insufficient transparency in the way that complaints about federal judges are dealt with, particularly for matters where the substance of the complaint does not give rise to an appeal.

This is a weakness that I am keen to address. Currently, complaints are made to either me or the relevant federal court. I stress that I do believe that complaints are properly dealt with; however, there is a case for greater transparency in the process – the appearance of justice being done.

Momentum for reform in this area is growing.

At my request SCAG has established a working group to examine the feasibility of a national judicial complaints handling mechanism. The working group is considering a range of options including the adoption of a consistent set of rules, procedures and standards and the consideration of an appropriate complaints handling body.

The Senate Committee Report I referred to earlier recommended a number of steps leading to the establishment of a judicial complaints body.

I understand the Judicial Conference of Australia has also been considering whether a complaints handling mechanism should be adopted and models for any such mechanism.

Last year Victoria released a discussion paper to generate debate about a new complaints handling process in that State.

Clearly there is growing impetus for establishing a system of complaints handling that is more visible to the community. This is an area in which reform should be jointly pursued by governments and judges.

A transparent, impartial and accountable system of judicial complaints handling has the potential to enhance public confidence in the administration of justice, and ultimately, to strengthen the judiciary itself.

I invite all judicial officers to continue to engage positively with this issue and have input into proposals as they are developed.

The Changing Role of the Judiciary

The core role of the judiciary continues to be to hear and decide cases that come before the courts. However, the judiciary is evolving to meet changing community expectations.

This evolution can be seen in the increasing use of alternative dispute resolution and case management processes. In large part the evolution is being driven by the judiciary itself.

It is generally acknowledged that to foster public confidence in our courts we need to make sure they are accessible and that, once before the court, cases are resolved as efficiently as possible.

In November 2009, the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* was passed by the Parliament. In proposing the legislation I specifically acknowledged the valuable contribution of the Federal Court.

The key reform and centre-piece of this legislation is a new overarching obligation on the Federal Court that requires the Court, litigants and legal practitioners to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

The provision will enable judges to confidently employ case management powers, including for example referring parties to alternative dispute resolution (ADR), requiring parties to

narrow the issues in dispute, limiting the length of submissions or the number of witnesses called, or adhering to a time limit for the completion of part of a proceeding. This will be particularly useful when dealing with 'mega-litigation' and class actions.

By setting out the Court's case management powers in legislation it will be clear that the Court, parties and practitioners are expected to conduct litigation efficiently. Over time I believe this will encourage a cultural shift in the approach taken to resolving disputes.

With the court, litigants and their lawyers all working towards the same purpose, there will be an improvement in the early resolution of disputes in the Federal Court. This will in turn free up resources in the court, allowing other matters that are not capable of resolution or those that involve a novel or important question of law to be dealt with more quickly and cost effectively.

The overall effect of the reforms is to support the changing role of the judiciary and to improve public confidence in the federal courts.

Cost Recovery

The Strategic Framework for Access to Justice also identified options for cost recovery to manage mega-litigation and reduce the burden on tax payers for cases that are primarily of benefit to the parties rather than the public more broadly.

I am mindful of the warning offered by the Australian Law Reform Commission, that:

"a policy which treats the civil justice system merely as a service to be offered at cost in the marketplace, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function".

However, I am keen to further explore options to reduce needlessly protracted litigation that unnecessarily uses up our finite court resources.

Former Justice Sackville noted the powerlessness of judges "in the face of litigants who, for whatever reason, decide to press on notwithstanding huge and often disproportionate costs burdens."

In my view there is fertile ground in exploring the setting of court fees to reflect to a greater extent the true cost to the justice system of large scale litigation.

I also remain convinced of the enormous value of alternative dispute resolution in encouraging prompt dispute resolution, reducing costs and freeing up court time and resources.

That is not to say that Courts are mere dispute resolvers. Judges have been and must continue to be at the pinnacle of our legal system to determine cases according to the law and in so doing contribute to the evolution of the common law. But nor does it mean that the CD must be replayed and replayed when there is already a clear and applicable judicial determination of an issue that is in dispute between the parties.

In short, I am firmly of the view that appropriate interaction with ADR mechanisms has the potential to significantly enhance the overall effective functioning of our judicial system.

Conclusion

We are temporary custodians of a very important heritage – the rule of law. There is already a co-operative partnership between Government and the judiciary in working together to implement reforms to strengthen the judiciary and enhance our justice system. I am keen to explore ways for that relationship to be further developed.

I can assure you that I, and the Government, will be working hard with the judiciary to put mechanisms in place that give you the opportunity to maximise the contribution you can make as judges to undertake the work of our Courts and further improve the functioning of our legal system.

Thank you.