CHAPTER 3

Judicial appointment

3.1 This chapter considers in detail the method of appointment of federal judges. In relation to appointment it includes discussion of:

- particulars of the process of appointment;
- the concept of merit;
- whether judicial vacancies should be advertised and nominations for judicial appointment invited;
- the issue of the diversity of judicial appointments;
- whether a separate process for appointments to the High Court is justified; and
- whether an appointments advisory commission is warranted.

Background

3.2 As the International Commission of Jurists –Victoria (ICJ-Victoria) observed, 'the procedure for appointment and the method of termination of judges goes to the heart of the constitutional principle of judicial independence.'[1] To emphasise its point, the ICJ-Victoria goes on to quote former Chief Justice Gleeson who outlined the principle as follows:

> What is at stake is not some personal or corporate privilege of judicial officers; it is the right of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.[2]

3.3 The Association of Australian Magistrates agreed that the methods of appointment and termination are important processes that can be implemented in a way that contributes to the quality of judicial appointments and even to establishing judicial independence:

> The need to secure judicial independence is one of the fundamental principles underpinning a system of judicial appointments. To that end the appointment process should be open and transparent, and judicial appointments should only be made on the basis of merit.[3]

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1 *Submission J2*, p 2.

2 *Submission J2*, p. 2 quoting Murray Gleeson, *Embracing Independence* (Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008) at p. 3.

3 *Submission 4, Supplementary Submission*, p.1.

3.4 This inquiry does not question the importance of an independent judiciary. However, there are a variety of ways in which appropriate procedures for appointment and termination can be formulated while still meeting the essential conditions of independence. Nor has there been particular criticism of recent appointees. Despite arguing for 'a new model' for appointing Australian judges, Simon Evans and John Williams have explained:

> …we do not suggest that the appointment process to date has entirely failed. Measured in historical and international terms the Australian judiciary is acknowledged to be of outstanding quality and has enjoyed the public's confidence.[4]
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> …
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> Rather, the current process systematically overlooks others who *do* have the required qualities.[5]

3.5 The committee's consideration of these issues was not underpinned by a view that there have been numerous flawed federal judicial appointments over the years. The purpose of the committee's inquiry was to explore whether the current processes sufficiently meet the standards required or whether they should be altered or supplemented to support and enhance the principle of judicial independence.

Appointment

Current appointment process

3.6 The Attorney-General's Department has described in detail the existing approach to federal appointments. As these processes are central to this aspect of the inquiry, the full detail is repeated in the following section.[6]

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

3.7 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.

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4 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 295.

5 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 301.

6 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, pp 2 and 3.

3.8 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.

3.9 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.*

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

3.11 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

3.12 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.

3.13 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.

3.14 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.*

3.15 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.

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

3.17 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.

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

3.19 Appointments are made by the Governor-General in Council.

Committee comment

3.20 The reference in this appointment process to the Attorney-General considering the Advisory Panel's report and then identifying 'the person whom he considers most suitable' is unfortunate. If the Attorney-General identifies the most suitable person based on their assessment against the selection criteria then it is desirable for this to be articulated. On the other hand, if the Attorney-General is not willing to state that selection is directly based on the selection criteria then this should also be articulated.

3.21 It is appropriate for the Attorney to retain the final decision making authority, but this point goes to the transparency of the process and, if the Attorney is making appointments other than based on an assessment against selection criteria, it also goes to the integrity of the process.

3.22 The committee also considers that the transparency of all federal judicial appointments would be improved by the Attorney-General making public the number of nominations and applications received for each vacancy and, if a short-list of candidates is part of the process, to make public the number of people on the short-list. The committee does not consider that personal details of a candidate, or any information that could identify him or her should be made public unless that person is appointed as a judicial officer and it is appropriate to do so.

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.

3.25 In relation to the High Court, the current process is significantly more flexible (and less transparent). Beyond meeting statutory requirements and consulting widely, appointments are selected after the 'Attorney-General considers the candidates nominated and…identifies the person whom he considers most suitable'.[7] There are mixed views about whether or not it is appropriate to have a different process for the High Court, and these are discussed below.

The appointment process and the concept of merit - evidence to the committee

3.26 The concept of merit and what is meant by it was raised with the committee by a number of submitters. The overwhelming view put to the committee is that merit should be the fundamental criterion for the selection of judicial appointments.[8] In particular the Law Council of Australia states that its own policy:

> …recognises that the open, consultative and transparent process adopted by the current Commonwealth Government is an improvement on what has occurred in the recent past. The Law Council's Policy was amended to generally reflect its approval of the Government's process in light of the changes to the previous federal judicial appointments process that occurred with the election of the current Government.[9]

3.27 The Judicial Conference of Australia, representing judges and magistrates from all jurisdictions and levels of the Australian court system, in its submission undertook some discussion of the meaning of merit. In the Judicial Conference's view:

> At the risk of speaking at too high a generalisation, it is clearly essential that all judges be selected on merit. However, as debate in recent years has highlighted, the concept of merit has a different meaning to different people. In the federal sphere, with which this inquiry is concerned, the system the Attorney-General has adopted - of advertising for appointments to the federal judiciary and identifying the core attributes for application - has well defined in a neutral manner what the Judicial Conference believes would be accepted by its members as indicative of the merits a judicial officer requires – namely, 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.[10]

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7 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

8 See for example, Law Society of New South Wales, *Submission 7*, p. 1, and Association of Australian Magistrates, *Submission 4, Supplementary Submission*, p. 5.

9 *Submission 11*, p. 5.

10 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

3.28 In a significant acknowledgement of the Attorney-General's current approach to appointments, the Judicial Conference considered that the current process is recognised as having 'well defined in a neutral manner what the Judicial Conference believes would be accepted by its members as indicative of the merits a judicial officer requires'.[11]

3.29 The Flinders University Judicial Research Project (the Project), which is run by Professor Kathy Mack (law) and Professor Sharon Roach Anleu (sociology) has involved a program of empirical research which commenced in 2001 and includes national surveys sent to all magistrates and judges in Australia. Having access to this information through the Project's submission was very valuable to the committee and this information was also supplemented by Professor Roach Anleu's appearance at a public hearing. The joint submission highlights the importance of appointment based on merit and notes the difficulties in reaching agreement about what constitutes merit for appointment to judicial office.[12] The project provides a rare opportunity to obtain direct insight into the skills of importance as identified by judiciary itself.

Legal values and legal skills

3.30 The Project survey has identified legal values (specified as impartiality, integrity/high ethical standards and a sense of fairness) as 'by far the most important type of quality to all judicial officers…'[13] In relation to this Professors Mack and Roach Anleu observed that:

> These survey findings are similar to the lists of qualities which are usually identified as necessary for merit in judicial appointment, which consistently stress qualities of character and integrity.[14]

3.31 After legal values, the next most important groups of skills identified by the judiciary in the project survey are legal skills (legal knowledge, legal analysis, fact-finding and problem solving) and then interpersonal skills (communication, courtesy and being a good listener).[15]

3.32 However, the Law Society of New South Wales makes the point that in making judicial appointments 'undue prominence' has been given to selecting the judiciary from the Bar.[16] The Society argues that:

> The skills and qualities of the other branches of the legal profession have been undervalued and this imbalance must be rectified. Solicitors and academic lawyers must be included in the selection process.[17]

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11 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

12 Flinders University Judicial Research Project, *Submission J4*, p 2.

13 Flinders University Judicial Research Project, *Submission J4*, p. 3.

14 Flinders University Judicial Research Project, *Submission J4*, p. 3.

15 Flinders University Judicial Research Project, *Submission J4,* p. 4.

16 Law Society of New South Wales, *Submission 7*, p. 1.

3.33 This view is not supported by the ICJ-Australia, which asserts that 'the conduct of trials is based on procedure and evidence, experience of which is acquired over a period of practice in the Courts'[18] and that '…academics do not tend to fulfil the sub-criteria of being able to handle a courtroom, as they do not have the insight and experience of a trial lawyer'.[19] However, they do note that this form of judicial suitability is 'not as relevant for appellate Courts, where the conduct of an appeal requires less advocacy skill and does not require the experience of, for instance, a complex criminal trial or civil jury matter.'[20]

Comparison with best practice judicial appointment policies

3.34 The preferred selection process for judicial appointments adopted by the Law Council in 2008 largely mirrors the process in place since the current government implemented changes shortly after taking office in 2007. In particular, the consultation and evaluation processes are very similar. The two primary points of distinction are that the Law Council:

- proposes to publish a formal Judicial Appointments Protocol to be followed when going about making an appointment; and
- suggest a significantly more detailed list of necessary qualities for a candidate being considered for appointment.[21]

3.35 A copy of the Law Council of Australia's approved *Attributes of candidates for judicial office* and *Office holders to be consulted personally by the Attorney-General of Australia* policies (Attachments A and B to the Council's submission) are at Appendix 5.

3.36 Similarly, the Law Society of New South Wales also provided the committee with a copy of its policy document on the *Selection Process for the Judiciary*, a copy of which is at Appendix 6.[22] The policy endorses an approach to selection that is very similar to the process followed by the federal Attorney-General, although the wording differs. The Law Society particularly promotes consultation between the Attorney-General and the New South Wales Bar Association, as well as with the Law Council itself.[23]

3.37 From an international law perspective, the Attorney-General's overall approach is considered to be consistent with the key international human rights

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17 Law Society of New South Wales, *Submission 7*, p. 1.

18 International Commission of Jurists, Australia, *Submission 5*, p. 3.

19 International Commission of Jurists, Australia, *Submission 5*, p. 4.

20 International Commission of Jurists, Australia, *Submission 5*, p. 3.

21 Law Council of Australia, *Submission 11*, Attachment A, p. 1.

22 Law Society of New South Wales, *Submission 7*, p. 1.

23 Law Society of New South Wales, *Submission 7*, attached *Selection Process for the Judiciary Policy Document*, p. 2.

principles regarding judicial appointment. The Human Rights Law Resource Centre outlined a relevant principle for the committee:

> … irrespective of the method of selection of judges, candidates' professional qualifications, their experience and their personal integrity must constitute the sole criteria for their selection.[24]

3.38 The Gilbert + Tobin Centre of Public Law also commented that 'the criteria which [have] been used [are] commendable for [their] detail and relevance to the nature of judicial work'.[25]

3.39 Despite the fact that the process for federal judicial appointment is at the whim of the Attorney-General of the day, the Law Council of Australia makes the point that there is no apparent necessity for the requisite qualities for appointment outlined by the Attorney-General 'to be given the force of law'.[26]

Judicial comment

3.40 Importantly, the Federal Court has welcomed the new arrangements and observed that they 'appear to be working well'[27] and the Family Court and Federal Magistrates Court also 'welcomed the Attorney-General's newly instituted process' and noted that it has already been utilised for both courts.[28]

Committee view

3.41 The committee agrees that the basis for the selection of judicial appointments must be merit. A candidate's merit must be measured by assessing characteristics relevant to the position, such as those outlined by the Attorney-General's Department. The committee has considered whether the Attorney-General's approach, as described by the Attorney-General's Department, meets this critical requirement. It was obvious to the committee that there is widespread endorsement from some of the most eminent legal organisations and bodies, including those directly representing federal courts, for the current approach. The committee believes that, while there will always be argument at the margins about the precise approach to be taken, the Attorney-General's approach is not inconsistent with a selection process based on merit.

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24 Mr Schokman, *Committee Hansard*, 12 June 2009, p. 95.

25 *Submission 1*, p. 2.

26 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 27.

27 Federal Court of Australia, *Submission 3*, p. 1.

28 *Submission 8*, p. 5. See also the evidence of Chief Justice Bryant to the committee: *Committee Hansard*, 12 June 2009, p. 65. Further support is found generally in *Submission 4, Supplementary Submission*, provided by the Association of Australian Magistrates.

Inviting applications for appointment

3.42 Much has been said, including in submissions to this inquiry, about the need to advertise judicial vacancies to ensure that the widest range of candidates is available from which to select appointees.[29] There was some related discussion before the committee about whether or not it is appropriate to require potential judicial candidates to self-nominate for appointment.

3.43 The work of the Flinders University Judicial Research Project once again provided a very useful perspective to the committee. In particular, evidence from Professor Roach Anleu on the motivations behind a judicial officer's decision to join the bench was pertinent:

> The surveys revealed that very few judges or magistrates planned to undertake a judicial career, but for most judges a personal approach by someone in court or government is very important in their decision to become a judge or magistrate.[30]

3.44 This indicates to the committee that it is important to take a comprehensive approach to judicial appointments to ensure that as many as possible meritorious candidates participate in the process. It appears that to rely solely on one approach - either only advertising or only privately canvassing people – could exclude worthy applicants.

3.45 The ICJ-Victoria has noted that, in its view, both approaches are acceptable:

> The system of inviting or permitting people to apply for appointment to judicial office does not adversely impact upon the achievement of independence.'[31]

Committee view

3.46 The approach taken by the Attorney-General, which includes a combination of broad consultation and advertising nationally and locally, seems well suited to maximising the range of possible appointees from which the Attorney-General can draw.

3.47 Because of the unique perspective it provides policy makers, the committee takes the opportunity to commend the work of the Judicial Research Project to the government for consideration in developing policy relating to the judiciary.

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29 See for example, *Submission 4, Supplementary Submission*, p. 3 and Law Council of Australia, *Submission 11*, p. 4.

30 *Committee Hansard*, 12 June 2009, p. 32.

31 *Submission J2*, p. 4.

Diversification

3.48 The question of the desirability of diversity of the judiciary – that is the extent to which the characteristics of each judge, such as gender and cultural background, are (dis)similar to those of other judges, particularly judges in the same court – elicited strong views. The key issue of concern is whether an approach to selection that encourages diversity is consistent with selection based on merit.

3.49 The Gilbert + Tobin Centre of Public Law contended that:

> There is consensus that Australian judges should be appointed based on merit and also that the public should have faith in the independence and impartiality of the judiciary. There is also broad support, in addition to those two objectives, for the diversification of professional and life experience amongst those who sit on the bench.[32]

3.50 The argument is that '…when you make judicial appointments, it is not simply a matter of appointing very good people but also a matter of how they fit within the larger body of people who are appointed.'[33] In pointed support of broader diversity of appointments, Professors Roach Anleu and Mack have observed that 'there is no reason to think that merit resides predominantly in the narrow group that has historically dominated the Australia judiciary.'[34]

3.51 Mr Stephen Gaegler SC, the current Commonwealth Solicitor-General, has observed that 'at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice'. Once these people have been identified, 'wider considerations can, and ought legitimately to be, brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance.'[35]

3.52 On the other hand, the Association of Australian Magistrates emphasises that merit needs to be the focus of appointments and does not agree that any steps need to be taken to increase diversity as it will evolve as a matter of course:

> We have not said a lot about cultural diversity but I think that one of the problems up until now in judicial appointments has been the paucity of diversity of people with the qualifications in the available pool. That is now rapidly changing. We have many people who have the requisite academic qualifications, the requisite experience in practice and the number of years in practice to be able to be selected from a wider pool. That could mean that the pool that is represented for selection is automatically wide enough that

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32 *Submission 1*, p. 1.

33 Professor Williams, *Committee Hansard*, 11 June 2009, p. 22.

34 As quoted in Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 299.

35 S Gaegler, *Judicial Appointment* (2008) 30 Sydney Law Review 159.

> you will get a fairly fast change in the demographic of who are considered to be the best candidates.[36]

3.53 Offering a different perspective, the Gilbert + Tobin Centre notes that diversity remains a controversial consideration in the appointment of judges but it is not clear why this is so as 'Diversity is not inconsistent with merit…'.[37] The Centre argues cogently in support of Mr Gaegler's view:

> 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. Homogeneity is certainly not an objective of judicial appointment, and so an appointments process should explicitly recognise that, all other things being equal, candidates for selection may be prioritised according to a variety of other considerations which distinguish meaningfully between them as individuals.[38]

3.54 The International Commission of Jurists Australia (ICJ-Australia) supports the view that in addition to the individual suitability of a candidate, 'the best judicial appointment [also] turns on how it contributes to the make-up of the judicature in terms of impartiality and a reflection of society'.[39] The ICJ-Australia endorsed the view expressed by then High Court Justice Michael McHugh that 'when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution.'[40] Support for 'the principles of equal opportunity' was also expressed by the Law Society of New South Wales.[41]

3.55 In its judicial appointment policy, the Law Council of Australia has recommended for a number of years that the President of Australian Women Lawyers be one of the office holders the Attorney-General of Australia should personally consult before making an appointment; and a desirable personal quality is 'social awareness including gender and cultural awareness'.[42] This approach was reinforced in evidence to the committee that '…there is a view that diversity is a desirable outcome of the process…while merit and professional attainments are undoubtedly among the

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36 Ms Kok, *Committee Hansard*, 12 June 2009, p. 71.

37 *Submission 1*, p. 7.

38 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 8.

39 *Submission 5*, p. 1.

40 Michael McHugh, *Women Justices for the High Court* , Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004, quoted in the International Commission of Jurists Australia submission to this inquiry, *Submission* 5, p.2.

41 *Submission* 7, p. 1 and Policy Document, p. 1.

42 *Submission 11*, pp 19 and 20.

most powerful factors, there are others that are relevant in creating a judiciary which works for the various societies that it has to serve.'[43] The Department advised the committee that it is now part of the appointment process that the Attorney-General does consult Australian Women Lawyers.

3.56 In recommending a judicial appointments commission (discussed further below), Evans and Williams propose a model that promotes diversity, but not at the expense of merit. They suggest adopting selection criteria that reflects the approach taken in the *Constitution Reform Act 2005* (UK):

1. Selection must be solely on merit.
2. A person must not be selected unless the selecting body is satisfied that he or she is of good character.
3. In performing its functions, the Commission must have regard to the need to encourage diversity in the range of persons available for selection for appointments.[44]

3.57 The criteria for appointment outlined by the Attorney-General's Department makes no reference to whether diversity is taken into account in the appointment process. It is not known whether this means that it is, or is not, actively considered as part of the selection process. However, the committee notes that a broad range of organisations, including women lawyers, are consulted in the selection process.[45]

Committee view

3.58 The committee has received extensive evidence about the importance of appointment based on merit and strongly supports this approach. Of course, the committee has also received considerable evidence, also discussed above, that appropriately encouraging diversity in judicial appointments is not inconsistent with the principle of merit selection.

3.59 Of the submitters who commented on the relationship between merit and diversity, the only view expressed that an active policy of increasing diversity is not necessary was made by the Association of Australian Magistrates.[46] Perhaps the association's view is explained by the significant differences in membership between the local courts and the superior courts – the significantly larger numbers of magistrates may allow diversity to occur naturally as part of the existing process.

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43 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 25.

44 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 313.

45 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

46 Ms Kok, *Committee Hansard*, 12 June 2009, pp 71 and 72 and *Submission 4*, *Supplementary Submission*, p 7.

3.60 On balance the committee considers that an approach consistent with the United Kingdom *Constitution Reform Act 2005*, which emphasises merit and promotes diversity, is worthy of consideration.

The High Court process

3.61 The information the Attorney-General's Department provided to the committee about processes for federal judicial appointments notes that candidates for appointment to the High Court '…must meet the relevant qualifications set out in section 7 of the *High Court Act 1979*…'.[47] Namely, that the candidate has 5 years or more experience as a legal practitioner (s 7(b)) or has been a federal or State or Territory judge (s 7(a)).

3.62 The department explained in relation to High Court appointments that:

> 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.[48]

3.63 This approach is supported by the Law Council of Australia. The Law Council has detailed policies relating to the process of judicial appointments,[49] but believes that these should not be applied to appointments to the High Court. In relation to its policy the Law Council explained that:

> This Policy applies to the Federal Courts and to all levels of judicial office in that jurisdiction except for judges of the High Court of Australia. The High Court is in a unique position as the ultimate appellate court for Australia, and judicial appointments to the High Court are already subject to a statutory requirement for consultation prior to appointment (section 6 of the *High Court of Australia Act 1979*).[50]

3.64 The Judicial Conference of Australia also points out that '…those who are in the pool from which appointment at the High Court might be considered would not expect to have to self-nominate.'[51]

3.65 Despite this support for a different selection process for the High Court, the committee also received evidence of significant concern about this approach. For

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47 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

48 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 3.

49 The policy documents were discussed in more detail earlier in the chapter. A copy of them is at Appendix 5 to this report.

50 *Submission 11*, Annexure A: *Law Council of Australia Policy on the Process of Judicial Appointments*, p. 17.

51 Justice McColl, *Committee Hansard* , 11 June 2009, p. 5.

example, Professors Mack and Roach Anleu argued against the Attorney-General's justification for the current process:

> Promotion from one judicial office to a position on a higher court has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian legal system. A number of survey respondents expressed this view. A judicial officer seeking promotion may appear to be tempted to decide cases in a way which will please the executive government…
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> …
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> Actual practices regarding appointments of judicial officers in Australia suggest that promotion from within the judiciary is more frequent than might be contemplated by the principles of judicial independence articulated above…it is a matter of public record that all current members of the High Court of Australia were previously judges in other courts.[52]

3.66 In distinguishing the current High Court process from other federal appointments, the Gilbert + Tobin Centre of Public Law observed that the High Court had had limited reform to its appointment process. The Centre criticised this and is of the view that 'excluding the highest court from any enhanced appointment system may be said to risk actively undermining public confidence in that institution and the quality and independence of its members. The arrangements should be uniform amongst all federal courts.'[53]

3.67 Although it is of concern to the committee that the Commonwealth approach to appointments to its highest court of review can be regarded as 'inconsistent with the principles of judicial independence', consideration of this issue does give rise to the question: what are the alternatives? If appointments to the High Court cannot be made from existing judges, the main alternative is for appointments to be made only from legal practitioners with no judicial experience.

3.68 Acting Chief Justice Murray of the Supreme Court of Western Australia provided some analysis that assisted the committee greatly. His view is that in principle there is no reason why the High Court should be treated differently, but in effect there is little to be gained from pursuing an identical process. As Acting Chief Justice Murray explained:

> … I think what needs to be borne in mind is that you are really seeking to search out a candidate of merit and the pool that you are working from is so small. The things that make the candidate a candidate of merit are things that are only ascertainable by knowing about the person and about the person's career history and things of that sort.

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52 Flinders University Judicial Research Project, *Submission J4*, p. 7.

53 *Submission 1*, p. 3.

> So far as the High Court is concerned…very often they are people who are appointed from other courts where they have had the opportunity or the requirement to display their qualities as a serving judicial officer.[54]

Committee view

3.69 The committee acknowledges the views expressed in favour of an appointments procedure that is consistent for all federal courts and supports the principle that all appointment procedures need to be principled and transparent. Nonetheless, the committee is not persuaded that a model identical to that of the other federal courts is necessary to maintain confidence in judicial appointments to the High Court.

3.70 However, the committee considers that there is scope to increase transparency in the existing process. Although an 'advisory panel' is not considered necessary, it is desirable for the Attorney-General to adopt the other procedures for appointments to federal courts. These should include to advertise vacancies widely, confirm that selection is based on merit and to detail the selection criteria that constitute merit for appointment to the High Court.

3.71 In addition, it is intended that Recommendation 3 above would also apply to appointments to the High Court so that the Attorney-General will make public the number (not the names) of candidates considered for appointment (whether they were nominated by another person, self-nominated or suggested by government).

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.

3.73 The committee notes that sound and transparent selection processes for all levels of appointment (though not necessarily identical processes) is an important factor in maintaining public confidence in the judiciary, but it is one component of an effective independent judicial system that needs to be supported by other features such appropriate judicial complaints handling and termination processes.

Appointments Advisory Commission

3.74 A small number of submitters argued strongly that the establishment of an independent judicial advisory commission (JAC) is desirable. The Gilbert + Tobin Centre of Public Law expressed the view that "Although Australia has been very well-served by its judicial officers, recognition of…' the priorities of appointment

54 *Committee Hansard*, 13 July 2009, pp 2 and 3.

based on merit, the independence and impartiality of the judiciary and support for the diversification of professional and life experience '…has rendered untenable the continuation of pure executive discretion as the means by which judges are appointed.'[55]

3.75 The Centre asserts that the 'significant reforms' to the appointment process introduced by the current Attorney-General occurred 'in apparent recognition of this,'[56] but that 'reform should not stop here…[and] these new processes need to be secured through creation of a Judicial Appointments Commission (JAC) independent of the Attorney-General's Department.'[57]

3.76 The establishment of a JAC is also supported by the Human Rights Law Resource Centre. The Director of the Centre, Mr Philip Lynch, advised the committee that it is the Centre's recommendation that:

> Australia should adopt an independent judicial appointment commission to make recommendations to the Attorney-General regarding suitable candidates for judicial positions.[58]

3.77 The model recommended by the Gilbert + Tobin Centre is advisory only as 'it is desirable that the elected government makes the final decision and is held accountable for its selection by the Parliament.'[59] The role envisaged by the Centre is to provide the Attorney-General with a short-list of potential appointees and 'the government should retain the power to appoint a person not on a commission short-list. However, where the government does so, it should be required to disclose this in a statement to Parliament.'[60]

3.78 The three principles identified by Professor George Williams, Foundation Director of the Gilbert and Tobin Centre as central to the establishment of a best-practice JAC process are that:

- any decision to appoint a judge should remain solely with the executive;
- more needs to be done to ensure that the process is more transparent; and

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55 *Submission 1*, p. 1. Professor George Williams, who is the Anthony Mason Professor of Law at the University of New South Wales, and Foundation Director of the Gilbert + Tobin Centre of Public Law, has also expressed this view elsewhere, including in the Sydney Morning Herald of July 14, 2009 at http://ww.smh.com.au/action/printArticle?id=630830.

56 *Submission 1*, p. 1.

57 *Submission 1*, p. 2. See also *Committee Hansard*, 11 June 2009, p. 21. This is similar to the view expressed by Mr Schokman and Mr Lynch of the Human Rights Law Reform Centre, *Committee Hansard*, 12 June 2009, p. 98.

58 *Committee Hansard*, 12 June 2009, p. 96.

59 *Submission 1*, p. 2.

60 *Submission 1*, p. 3.

- more needs to be done to improve community confidence that the process is a fair and appropriate one.[61]

3.79 Professor Williams also believes that more community involvement in the selection of appointees for judicial positions is warranted and that a JAC is one way 'to build laypeople into the process to a far greater degree than currently occurs' and that:

> … non-lawyers should play a leading role in the process of appointment of judges. I think it is too easy for lawyers and judges, generally, to get a bit caught up in a system that is meant to serve the community. It is not meant to be self-serving. An important way of avoiding that is to involve the community directly in the judicial appointments process.[62]

3.80 Professor Williams points to the United Kingdom JAC as a good example of the international experience showing that this process does work.[63]

3.81 Simon Evans and John Williams in a 2008 article undertook a comprehensive analysis of the process of judicial appointments in Australia and also proposed a modified version of the system operating in England and Wales.[64] They identified four key guiding principles for the appointment of judges as follows:

> These principles are matters of constitutional significance: appointments should be made solely on the basis of merit, properly understood; an appointments process should ensure judicial independence; an appointments process should ensure equality of opportunity, and hence diversity, in appointments in the interests of a judiciary that reflects the society from which it is drawn; and an appointments process should include appropriate accountability mechanisms.[65]

3.82 The Evans and Williams model does not give rise to constitutional concerns because it proposes a 'recommending body, not an appointing body'.[66] In summary, the proposed role of any Evans and Williams type JAC would be to:

- define subsidiary selection criteria tailored to the specific needs of each court that give effect to the primary statutory criterion that judicial appointments are made on merit;

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61 *Committee Hansard*, 11 June 2009, p. 22.

62 *Committee Hansard*, 11 June 2009, p. 22.

63 *Committee Hansard*, 11 June 2009, p. 23. For background, see the material Appendix 4, p. 1.

64 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008].

65 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 297.

66 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008] p. 304. See also the constitutional discussion at p. 322.

- advertise and conduct outreach activities for any appointment to identify possible candidates;
- receive applications for appointment that address the selection criteria;
- call for references from referees nominated by eligible applicants;
- call for references from the Commission's nominated referees (a published list of relevant office-holders);
- assess evidence of qualifications from all relevant sources of information against the selection criteria (including interviewing shortlisted candidates); and
- recommend three suitably qualified candidates to the Attorney-General for appointment.[67]

3.83 While supporting a JAC, the Gilbert + Tobin Centre express the view that a single national JAC is not feasible.[68] Evans and Williams also acknowledge the practical constraints arising from Australia's federal structure and take into account that each jurisdiction is likely to prefer to have its own JAC rather than have a national body. They do not see these constraints as rendering the proposal unworkable, but suggest shared expert secretariat resources for smaller states (or any other jurisdictions that wish to be involved).[69]

3.84 The ICJ-Australia offered the observation that it is not possible for the federal Attorney-General and his representatives to have the knowledge of trial advocates and the legal profession generally to the extent that it is possible in a particular state or territory.[70] They therefore recommend that a function of a judicial commission could include the examination and vetting of persons suitable for appointment to the bench to assist the executive in its appointment process.[71]

3.85 In contrast to these arguments, the Law Society of New South Wales does not agree that a body with an official function is needed to assist in the selection process:

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67 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], pp 311 and 312.

68 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3.

69 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 326.

70 *Submission 5*, p. 4.

71 International Commission of Jurists, Australia, *Submission 5*, pp. 4 and 5.

> The creation of an official selection body is opposed for the reason that many eminently suitable persons would be reluctant to go through a public process of selection.[72]

3.86 The Law Council of Australia endorses an appointments process that includes a selection panel to develop a shortlist of candidates (and for the Attorney-General to make a selection from the shortlist),[73] but has not called for the establishment of any sort of appointments advisory commission.

Committee view

3.87 The committee agrees that the minimum conditions for judicial independence, including judicial tenure and appointment based on merit are essential and these conditions are currently being met. The question is whether or not the committee would suggest meeting these conditions in a way that is different to the current approach.

3.88 In arguing for the establishment of a JAC, Evans and Williams observed that 'Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitute merit'[74] and that there should be '…a principle-based approach to judicial appointments.'[75]

3.89 The committee agrees with these principles (and the others outlined in favour of the establishment of a JAC), but is not convinced that a JAC is the only way to implement effective and appropriate selection processes. Despite apparently being internationally 'an exception in not having a body of this kind'[76], the committee is not persuaded that the cost of establishing a separate judicial appointments advisory commission is currently warranted.

3.90 However, the committee is mindful of the circumstances surrounding the appointment of a magistrate in 2007 in Tasmania that demonstrated that even when

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72 *Submission 7,* p. 1. While not agreeing that a Judicial Appointments Commission (JAC) is needed in Australia, the committee does not share the view of the Law Society of New South Wales that a public process is a necessary part of selection involving a JAC. Although it is likely that the general selection criteria and process of a JAC would circulated widely, it is not an inherent requirement of a JAC that *individual* appointments processes need to be undertaken publicly.

73 Mr Staude, *Committee Hansard*, 13 July 2009, p. 10.

74 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 299.

75 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 311.

76 Quoting Professor Williams' view, *Committee Hansard*, 11 June 2009, p. 29.

appropriate policies are in place, processes can be abused.[77] The establishment of a JAC would make the abuse of process extremely difficult, and it is therefore an issue that deserves to be monitored.

77 See the Parliament of Tasmania, Legislative Council Select Committee interim report on *Public Sector Executive Appointments*, April 2009, accessed at: http://www.parliament.tas.gov.au/ctee/Council/Reports/PSE.rep.090402.InterimReport%20Body.ch.008.pdf