

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO AUSTRALIA'S JUDICIAL SYSTEM, AND THE ROLE OF JUDGES

In January 2009 an Access to Justice Taskforce was established within the Attorney-General's Department to develop a strategic framework for the Government's approach to justice. The Attorney-General has indicated that his aim in doing so is:

- to identify priorities for reform that will increase the capacity of individuals to understand the laws that affect them
- to empower people to find their own solutions to disputes
- to ensure that the use of public resources is proportionate to the issues in dispute, and
- to improve the scope for resolving disputes, quickly, simply and cost-effectively.

(Speech delivered at the Queensland Law Society Symposium, 28 March 2009)

Responses to the terms of reference

(a) procedures for appointment and method of termination of judges

2. The Government has introduced new processes for the appointment of judicial officers. The Attorney-General said in the House of Representatives: 'the Rudd Government is committed to open government, and that is why we have introduced greater transparency and broader consultation...' [19 Feb 2008 - **Attachment A**].
3. The Attorney-General has outlined the objectives for implementing a transparent process:
 - to ensure greater transparency and public confidence in the process
 - to ensure all appointments are based on merit and suitability, and
 - to ensure that everyone who has the qualities necessary are fairly and properly considered – whether they are barristers, solicitors or academics, and whether or not they are well known to government.
 - 'The mystery surrounding the current judicial appointments process and controversy over past appointments has two negative consequences.' 'First, it can tarnish or detract from the honour of being appointed to judicial office. Second, at a broader level it can diminish public confidence in the courts and the justice system' [AG speech 17 Feb 2008 – **Attachment B** and AG speech 12 Sept 2008 – **Attachment C**].
4. The Attorney-General has outlined the process in a number of speeches.
 - Speech to House of Reps, inviting input from MPs [19 Feb 2008 – **Attachment A**].
 - Speech to Queensland Bar Association inviting input from legal profession and the public [17 Feb 2008 – **Attachment B**].
 - Speech to the Anglo-Australasian Lawyers Society [12 Sept 2008 - **Attachment C**].

- Speech at the Judicial Conference of Australia provided an update on [11 Oct 2008 – **Attachment D**].
5. Whilst the process may be different for each court, it may include:
 - public notices
 - wide consultation with legal community
 - published appointment criteria, and
 - an advisory panel to assess candidates against criteria and make recommendations to the Attorney-General.
 6. Extensive consultation includes:
 - State and Territory Attorneys-General
 - Justices of High Court
 - Chief Justices of Federal Court and Family Court
 - Chief Federal Magistrate and State and Territory Chief Justices
 - heads of the Law Council of Australia and Australian Bar Association
 - heads of each State and Territory Bar Association and Law Society
 - head of Australian Women Lawyers
 - heads of the National Association of Community Legal Centres and National Legal Aid, and
 - the Deans of law schools.
 7. The new process has been used for appointments to High Court, Federal Court and Federal Magistrates Court and for the current Family Court appointment process for a Judge in Newcastle.
 8. The Attorney-General has welcomed input, is considering the feedback received and has already made changes.
 9. He has consulted AAT and Council of Australasian Tribunals as part of four appointments (federal magistrate (Cairns), judge (Federal Court, Perth), judge (High Court) and judge (Family Court Newcastle)). He has also said ‘we will be making public notices more accessible by ensuring they appear in local and not just national press’ [AG speech 12 Sept 2008 - Attachment C].

Method of termination

10. Section 72(1) of the Constitution provides that judicial officers can only be removed 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.
11. The Standing Committee of Attorneys-General (SCAG) is currently considering the development of a national judiciary aimed at promoting greater consistency and uniformity in the provision of judicial services in Australia. Possible components of a national judicial framework currently under consideration include the harmonisation of federal, State and Territory prerequisites for judicial appointment, tenure in office and retirement ages. It is anticipated that the framework will be put to ministers for consideration at the July 2009 SCAG meeting.

(b) term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements

12. Section 72 of the Constitution provides that the appointment of a Justice of a court created by the Commonwealth Parliament shall be for a term expiring upon the Justice attaining the age of 70 years or a lesser age fixed by the Parliament. A person shall not be appointed as a Justice of such a court if they have attained the age of 70 years.

13. A possible component of a national judicial framework currently under consideration by SCAG (as above) includes the harmonisation of tenure in office for permanent appointments. It is anticipated that the framework will be put to ministers for consideration at the July 2009 SCAG meeting.

(c) jurisdictional issues, for example, the interface between the federal and state judicial system

14. Federal jurisdiction is co-extensive with the matters specified in sections 75 and 76 of the Constitution. Section 75 sets out the entrenched original jurisdiction of the High Court and section 76 sets out other matters in which original jurisdiction may be conferred on the High Court.

15. The Commonwealth Parliament may confer federal jurisdiction on federal, State and Territory courts.

16. From the time the High Court began in 1903, it has had jurisdiction in constitutional matters, given by section 30(a) of the *Judiciary Act 1903*. This jurisdiction is not exclusive of that of other courts but the High Court may order the removal from other courts of proceedings or parts of proceedings that raise constitutional issues.

17. As the highest court in Australia, the High Court decides cases of special significance including challenges to the constitutional validity of laws and appeals, by special leave, from federal, State and Territory courts. The High Court's appellate jurisdiction is conferred by section 73 of the Constitution and is unlimited as to subject matter.

18. The Federal Court has a broad original jurisdiction conferred by section 39B of the Judiciary Act, including in matters arising under Commonwealth laws. Over 150 Acts of Parliament also specifically confer jurisdiction on the Federal Court. The Court's jurisdiction covers almost all federal civil matters and some summary criminal matters. The *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* will, if enacted, confer indictable criminal jurisdiction on the Federal Court in cartel offences. Major areas of the Court's civil jurisdiction include judicial review, trade practices, bankruptcy, human rights, administrative law, industrial relations, taxation, native title, Corporations Act matters and copyright, patents, designs and trade marks. The Court has an extensive appellate jurisdiction, hearing appeals from single Judges of the Court, from decisions of the Federal Magistrates Court in non-family law matters and from State and Territory courts exercising certain federal jurisdiction.

19. The Family Court has original jurisdiction in all matters arising under the *Family Law Act 1975* and other Commonwealth Acts dealing with family law issues. The Appeal Division of the Family Court hears appeals from single Judges of the Court, from the Family Court of Western Australia, from a single Judge of the Supreme Court of a State or Territory exercising jurisdiction under the Family Law Act, and from the Federal Magistrates Court.

20. Most of the Federal Magistrates Court's jurisdiction is shared with the Family or Federal Court and it hears less complex and shorter matters. It has concurrent jurisdiction with the Family Court, except in matters relating to annulments and the validity of marriages and divorces. The Federal Magistrates Court also has jurisdiction in some general federal law matters, including migration, bankruptcy, administrative law, trade practices and industrial law, and in matters transferred to it from the Federal Court in which it would not otherwise have jurisdiction.

21. Under the Judiciary Act, State courts are invested with all federal jurisdiction subject to their normal jurisdictional limits (eg. locality, subject matter). The exceptions are matters exclusive to the High Court and those excluded by subsequent Commonwealth Acts. The federal jurisdiction of Territory courts is more restricted, especially in the lower courts. The main areas in which the jurisdiction of the Federal Court is exclusive of the jurisdiction of State and Territory courts include judicial review, federal human rights, migration and native title.

22. On 5 May 2009, the Attorney-General announced that the federal courts would be restructured by 'merging the Federal Magistrates Court into the Family Court and Federal Court' [media release – **Attachment E**]. The Attorney-General has also said that restructuring the federal courts will result in 'a more co-ordinated and cohesive structure ... better able to more effectively and cheaply give justice to the 40 per cent of people who come into contact with the family law system' (*Australian* 8/5/09).

23. A single Family Court and a single Federal Court, each with upper and lower tiers of judicial officers, will be created. Federal Magistrates will be offered appointment to the lower tiers, which will deal with a high volume of less complex cases. There will be a one stop shop for family law disputes - and a one stop shop for workplace relations disputes and other federal disputes.

24. The restructure is a key recommendation made by the Review of the delivery by the federal courts of family law services, which was commissioned by the Attorney-General in 2008. The Review found that the existence of two federal courts delivering family law services created confusion for litigants, conflicts over resources and inefficiencies in administration which have impeded the delivery of these services to the Australian community. The Report of the Review, *Future Governance Options for Federal Family Law Courts in Australia - Striking the Right Balance* and further background is available on the Department's website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_AbetterframeworkforFederalCourts-Consultation_AbetterframeworkforFederalCourts-Consultation#consultation.

The interface between the federal and state judicial system

25. As mentioned above, federal jurisdiction can be conferred on federal, State and Territory courts. The Constitution enables the Commonwealth Parliament to make laws defining the extent to which the jurisdiction of any federal court shall be exclusive of the jurisdiction of State courts.

26. A number of factors are usually considered when allocating federal jurisdiction. One factor is the need to limit conferral of additional original jurisdiction on the High Court, to ensure it can focus on the most important cases. Another is the need to ensure uniformity of law. Conferring jurisdiction on a single federal court may achieve greater uniformity than if different State/Territory courts were exercising federal jurisdiction. Conferring federal jurisdiction on federal courts also enables specialist expertise to be developed in particular subject areas. Judicial review, industrial law, bankruptcy, native title and migration are traditionally areas where the federal courts have exclusive jurisdiction. As part of a Review of the *International Arbitration Act 1974*, the Government asked in its Discussion Paper for comments on whether exclusive jurisdiction under

that Act should be conferred on the federal courts and is currently considering submissions. The Discussion Paper is available at <http://www.ag.gov.au/internationalarbitration>.

27. Appeals in federal matters are usually heard by courts within the same hierarchy as the first instance court (i.e. appeals from a State District Court exercising federal jurisdiction would be heard in the State Supreme Court), except where cross-jurisdictional appeals are provided for. The rationale behind these appeals is to achieve uniform interpretation of federal law.

28. A judicial exchange arrangement between State and Territory courts is being developed as part of the SCAG agenda. The Government is considering options to allow participation of the federal courts within the framework of the Constitution.

(d) the judicial complaints handling system

29. A judiciary recognised by the community as being of the highest standing is a key component of a democratic society. A transparent, impartial and accountable system of judicial complaints handling has the potential to enhance public confidence in the judiciary. Currently there is no formal transparent process for receiving and investigating complaints made against judicial officers in any Australian jurisdiction other than NSW.

30. In jurisdictions other than NSW, complaints are handled by a range of office holders and bodies including the head of the relevant court, court registry staff, legal departments, Attorneys General and their advisers. The approach is ad hoc, lacks transparency and can result in complainants lodging complaints in multiple places.

31. At the Commonwealth Attorney-General's request, the Standing Committee of Attorneys General (with the exception of NSW) established a working group to examine the feasibility of establishing a national judicial complaints handling mechanism. The working group is currently identifying options to receive and consider judicial complaints.