

APPOINTING AUSTRALIAN JUDGES: A NEW MODEL

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THIS PAPER DOES NOT REPRESENT THE POSITION OF THE JUDICIAL CONFERENCE OF AUSTRALIA

[The paper argues for reform in the process by which members of the Australian judiciary are selected. In advocating reform we do not suggest that the appointment process to date has failed. Measured in historical and international terms the Australian judiciary is acknowledged to be of outstanding quality which has enjoyed the public's confidence. Rather, we advocate reform in order to ensure two things. First, that the judiciary retains the independence that is essential for it to discharge its constitutional functions. And, second, that it reflects the society from which it is drawn and continues to enjoy the confidence of that society.]

We recommend that Australia adopt a process for judicial appointments that is based on the process recently established for England and Wales under the Constitution Reform Act 2005 (UK). Appointments would continue to be made by the executive. Judicial Appointments Commissions (consisting of three judicial members, three legal members and three non legal members – including the Chair) would recommend three names to the executive from which the appointment must be made. The Commissions' recommendations would be the culmination of an evidence-based process involving applications, references, interviews and in some cases practical assessment of relevant skills]

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I INTRODUCTION

The paper argues for a particular set of reforms of the process by which members of the judiciary are selected. In advocating reform we do not suggest that the appointment process to date has failed. Measured in historical and international terms the Australian judiciary is acknowledged to be of outstanding quality and has enjoyed the public's confidence. Rather, we advocate reform in order to ensure two things. First, that the judiciary retains the independence that is essential for it to discharge its constitutional functions. And, second, that it reflects the society from which it is drawn and continues to enjoy the confidence of that society.

While the collective strength and quality of the Australian judiciary is not in doubt, it is the case that particular appointments have attracted criticism. This criticism has either related to the individual chosen or subsequent events during their term of office.¹ It is a notorious fact that judicial officers have been appointed whose character and intellectual and legal capacities have been doubted and whose appointments have been identified as instances of political patronage. These criticisms have not been limited to any particular court and has been made of members of the High Court.²

A further and persistent general criticism of the appointment process relates to the ultimate composition of the various courts that it produces. For instance, speaking in 1983, Justice Lionel Murphy noted that '[w]hen it comes to women judges we have not even reached the stage of tokenism.'³ Such criticisms are not limited to the gender composition of the Courts.⁴

¹ Enid Campbell and Hoong Phun Lee, *The Australian Judiciary* (2001) 77, 101–11.

² See, eg, James Douglas, 'Sir Charles Powers' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) 171.

³ Lionel Murphy, 'Address to the National Press Club' in Tony Maniaty (ed), *The Power of Speech* (1989) at 97.

⁴ Commonwealth Attorney-General Michael Lavarch, *Discussion Paper: Judicial Appointments – Procedure and Criteria* (1993), 6–9, 16–19; Greta Bird, 'Power, Politics and the Location of 'the Other' in Multicultural Australia' in *The Criminal Justice System in a Multicultural Society*, Australian Institute of Criminology Conference Proceedings, Melbourne, 4–6 May 1993,

The question of which individuals are chosen for judicial office is rightly an issue of public scrutiny and debate. In recent times speculation about impending appointments has been augmented by the discussion of the relative quality of the appointee and criticism of the process of consultation. There is no reason to believe that criticism surrounding the current system will disappear. Unchecked it will ultimately damage the status of the judiciary as a whole. However, the appointment of judicial officers is, and will remain, a political function. In the absence of constitutional reform on a dramatic scale the executive will continue to have a significant role in the appointment of judicial officers. This paper draws a distinction between the institutional political involvement in appointments and the politicisation of judicial appointment through appointments that are made on the basis of political patronage.

Australia is not alone in considering reform of the appointments process.⁵ Indeed, similar criticism has already resulted in review and reform in other parts of the common law world (for example the United Kingdom, Canada and New Zealand). Where change has been considered necessary in those jurisdictions it has been the result of considered and cautious innovation. Those experiences provide the models for the direction that Australia should now take.

The purpose of this paper is not to examine in detail the criticisms of the current appointments process or to survey the various appointment processes to be found in Australia and overseas. These tasks have already been undertaken by others.⁶ The purpose of this paper is to suggest a viable appointments model within the institutional and political constraints existing in Australia today that addresses the need to ensure an independent judiciary that has the confidence of a diverse society.

II A VIABLE APPOINTMENTS MODEL FOR AUSTRALIA

The question, therefore, is how to proceed in Australia. It would not be appropriate to adopt wholesale the approach in any other jurisdiction. Whatever approach is adopted must be integrated with the local political, legal and constitutional arrangements and traditions.

On the whole, the various approaches currently operating here have served Australia well. But it would be a serious mistake to regard them as a single approach and an equally serious mistake to regard them as static. Although there may be a superficial appearance of continuity and uniformity, there have been quite substantial changes and inter-jurisdictional divergence since they were put in place during the colonial era:⁷ appointments are made by local rather than imperial governments so that local politicians bear the political accountability for appointments; judges now hold office to the age of statutory or constitutional senility rather than for life; the magistracy has been professionalised and moved outside the public service; legal education has moved from the profession to the universities; several states have judicial commissions as part of the mechanisms

available at <<http://www.aic.gov.au/conferences/multiculturalism/>>; Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) 29, 33–4; Elizabeth Handsley, ‘“The judicial whisper goes around”: appointment of judicial officers in Australia’ in Kate Malleon and Peter H Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006).

⁵ See generally Kate Malleon and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006).

⁶ See, eg, Malleon and Russell, above n 5.

⁷ James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed 2004) 127.

for upholding standards of judicial behaviour and competence while seeking to preserve judicial independence; there has been an increase in the extent to which governments seek to staff courts with acting judges;⁸ the cohort from which appointments are made has expanded beyond the senior bar to include solicitors and academics; and in recent years there has been rapid expansion in the size of some courts.⁹

These developments have taken place in a broader and changing context. Perhaps the most striking of these is a general questioning of the role and functions of many 'public' institutions, including the parliament, the executive and, for that matter, the universities, professional registration bodies (particularly medical bodies) and the churches. In each of these contexts, there have been growing pressures for transparency in selection and/or accountability for the conduct of those selected.

Review of the appointments process should not be seen in isolation from these external developments, or from developments in the overall processes appointing judicial officers and supporting them during their tenure in office. The undoubted importance of selecting a meritorious candidate to hold judicial office is no greater than the need to support and develop the judicial officer throughout their career. Consistent with judicial independence are issues such as induction, judicial education, mentoring and complaints procedures. All should be seen as the subject of ongoing review and refinement.

The rest of this paper (following a summary of our recommendations) is in three parts. First, we set out the fundamental principles that must guide any set of arrangements for appointment to the Australian judiciary. Secondly, we develop a set of arrangements that is consistent with these principles. Thirdly, we consider and respond to some harmful side-effects that commentators have asserted reform of the appointments process may have on the selection of judicial officers.

III SUMMARY OF RECOMMENDATIONS

We recommend that Australia adopt a process for judicial appointments that is based on the process recently established for England and Wales under the *Constitution Reform Act 2005* (UK). Under this process, Commissions for Judicial Appointments in each jurisdiction, serviced by a shared secretariat, would recommend three suitably qualified candidates to government for appointment to each judicial vacancy.

The Commissions would be differently constituted for state and federal appointments. Each *state commission* would be a multimember body comprised of:

- The Chief Justice of the State, the Chief Judge of the County or District Court, and the Chief Magistrate or Chief Judge of the Local Court (in each case, if the head of jurisdiction is not willing to serve, then the next most senior member of each court willing to serve would become a member of the Commission)
- The President of the Bar Association or his or her nominee
- The President of Solicitors or his or her nominee

⁸ *Forge v Australian Securities and Investments Commission* [2006] HCA 44.

⁹ For example, the Federal Magistrates Court has expanded from fewer than 20 magistrates in January 2004 to nearly 50 in September 2006.

- A suitably qualified legal academic chosen by other members of the commission
- Three other suitable non-lawyers people qualified by experience and chosen by the other members of the Commission

The *federal commission* would be a multimember body comprised of:

- The Chief Justice of the Federal Court, the Chief Judge of the Family Court, the Chief Federal Magistrate or the next most senior member of each court willing to serve
- The President of the Australian Bar Association or his or her nominee
- The President of the Law Council of Australia or his or her nominee
- A suitably qualified legal academic chosen by other members of the commission
- Three other suitable non-lawyers people qualified by experience chosen by the other members of the Commission.

The Commission would apply the following criteria (modelled on the UK Act) in recommending appointments:

1. Selection must be solely on merit.
2. A person must not be selected unless the selecting body is satisfied that he 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.

An important part of the Commission's role would be to disaggregate the concept of merit into its constituent elements and ensure that recommendations for appointments were made on the basis of evidence that demonstrated the candidate's possession of those constituent elements.

The relevant Commission would identify potential candidates for appointment by advertising judicial vacancies and undertaking outreach programmes for judicial appointments to all Australian courts (with the exception, in the first instance, of appointments to the High Court). Each Commission would receive and considering applications for appointment that addressed the selection criteria based on the constituent elements of merit. After the applications had been received the Commission would first assess the list of candidates by sifting applications and preparing a short list (this task would most likely be performed by the secretariat). It would call for references from referees nominated by shortlisted applicants and from referees nominated by the Commission (and identified when the position was advertised). A subpanel of the Commission (consisting of one judicial member, one legal member and one 'lay' member as chair) would conduct interviews with shortlisted applicants. In some cases, it may use assessment centres to assess the practical skills of candidates. The subpanel would report to the Commission on applicants' performance against the selection criteria (based on the evidence assembled through applications, interviews, references and assessment centres).

Based on the subpanel's report, the Commission would then compile a shortlist of three names for the Attorney General. From the shortlist the Attorney General would recommend the appointment of one of the persons on the list. (We outline below the Attorney-General's options if he or she is not satisfied with the shortlist.)

IV PRINCIPLES

The model that we develop in Part VI of this paper is derived from what we are describing as principles. Those principles are: merit, independence, diversity, accountability and efficiency. We also consider institutional and practical constraints. We do not pretend that these principles represent an exhaustive list of what should inform a selection model. Indeed, even within this list there is a degree of overlap. However, they mark out the guiding values that inform the model.

A Merit

The first principle is that appointments to the Australian judiciary must be made solely on the basis of merit. The Attorney-General has said, ‘The Government believes that the essential criterion for appointment to the federal judiciary is merit.’¹⁰ Nothing in this paper is intended to cast the slightest doubt on this foundational principle.

A set of arrangements involving a judicial appointments commission need not be inconsistent with appointment on the basis of merit. The new arrangements in England and Wales (and for the UK Supreme Court) under the *Constitutional Reform Act*¹¹ establish a Judicial Appointments Commission whose mandate is to appoint solely on the basis of merit.¹² However, the concept of merit must be broken down into its constituent elements. As recently stated by Geoffrey Davies, former Judge of the Queensland Court of Appeal, ‘No word is more used or abused in this context [the criteria for judicial appointment] than merit.’¹³ Without a clear articulation of what constitutes merit, ‘the concept becomes almost wholly subjective, allowing each decision-maker to construct his or her own features which are significant.’¹⁴ The risk is that invocation of merit will simply collapse into the general tendency ‘to see merit in those who exhibit the same qualities as themselves’, with the result that those who appoint new judges will select those who share the professional, social and gender characteristics of their predecessors.¹⁵ These concerns are exacerbated by the closed nature of the judicial appointment process in Australia.¹⁶

The publication of selection criteria provides for greater transparency by allowing candidates to be assessed against a common set of standards,¹⁷ so enabling ‘a more realistic interpretation of what “merit” actually involves for a

¹⁰ Philip Ruddock, ‘Selection and Appointment of Judges’, (Speech delivered at the University of Sydney, 2 May 2005), [21].

¹¹ *Constitutional Reform Act 2005* (UK).

¹² Section 63(2) (‘Selection must be solely on merit’). Section 63(2) provides that the selecting body must be satisfied that appointees are of good character.

¹³ The Hon. Geoffrey L. Davies ‘Appointment of Judges’, (Speech delivered at the QUT Faculty of Law — Free Lecture Series, Banco Court, Brisbane, 31 August 2006) <<http://www.law.qut.edu.au/about/AppointmentofJudges.pdf>>, 5.

¹⁴ Sharyn Roach Anleu and Kathy Mack ‘Judicial Appointment and the Skills for Judicial Office’ (2005) 15 *Journal of Judicial Administration* 37, 38.

¹⁵ Justice Ruth McColl ‘Women in the Law’ (Speech delivered at the Anglo-Australian Society of Law, Court of Appeal, Supreme Court of New South Wales, 3 May 2006), available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll030506>, (quoting the Chief Justice of Canada, Beverley McLachlin PC).

¹⁶ Roach Anleu and Mack, above n 14, 38.

¹⁷ Justice Ronald Sackville, ‘Judicial Appointments: A Discussion Paper’ (2005) 14 *Journal of Judicial Administration* 117, 140.

particular job.’¹⁸ Disaggregating the components of merit also enables evaluation of the *values* that are implicit in the concept of merit.¹⁹ As argued by Justice Sackville, ‘[t]o the extent that publication of standards encourages public discussion and debate about the qualities required of judicial officers, this might be thought to promote greater public confidence in the judicial appointment process’.²⁰

The concept of merit in judicial appointments *can* be disaggregated into subcriteria. The current Federal Attorney-General, for instance, has said that ‘[m]erit means legal excellence, a demonstrated capacity for industry and a temperament suited to the performance of the judicial function’.²¹ That is a starting point. The concept can be further broken down. Its components have been articulated in Australia by Michael Lavarch and Sir Anthony Mason among others.²² In England and Wales, a list of competencies developed by the Department of Constitutional Affairs prior to the establishment of the Judicial Appointments Commission (‘JAC’),²³ has been subsumed within procedures developed by the JAC.²⁴ All these lists of criteria encompass legal skills, skills directed to the conduct of a courtroom and hearing, skills directed to the writing of judgments and apposite personal qualities. The legal skills go to knowledge of the law, intellectual capacity and experience. Skills addressed to the court room and hearing relate both to the conduct of the court room and facility with complex fact situations and arguments. The personal qualities listed include integrity, impartiality, industry, a strong sense of fairness, decisiveness, understanding and a sound temperament.²⁵ While these personal qualities may be essential elements of merit for appointment to all courts, other skills required of candidates may differ between courts. For example, forensic experience may be highly valuable for appointment to a criminal trial court but less important for appointment to an appellate court; equally, the intellectual skills required for appointment to an appellate court may be of less significance in evaluating candidates for appointment to high volume jurisdictions. One further implication of decomposing merit in this way is to recognise that there is no necessary correlation between successful practice at the bar and the skills required for judicial office.²⁶

Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitute merit. No other process is capable of providing reasonable assurance that the appointee is among

¹⁸ Roach Anleu and Mack, quoting Burton, above n 14, 47.

¹⁹ Roach Anleu and Mack, above n 14, 47.

²⁰ Sackville, above n 17, 140.

²¹ Ruddock, above n 10, [22].

²² Lavarch, above n 4, [2.2.1]–[2.13.4]; Sir Anthony Mason ‘The Appointment and Removal of Judges’ in Judicial Commission of New South Wales, *A Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 10–11. See also Law Council of Australia, *Policy on the Process of Judicial Appointments* (2000) <www.lawcouncil.asn.au/get/policies/1957352833/0.pdf> at 22 September 2006.

²³ Department of Constitutional Affairs, ‘Competency Frameworks’ in *Judicial Appointments in England and Wales: Policies and Procedures* (2005) <<http://www.dca.gov.uk/judicial/appointments/jappinfr.htm>> at 22 September 2006.

²⁴ Department of Constitutional Affairs, ‘Changes from 3 April 2006’ in *Judicial Appointments in England and Wales: Policies and Procedures* <<http://www.dca.gov.uk/judicial/process.htm#3rdaprilchanges>> at 22 September 2006.

²⁵ See Sackville, above n 17, 129 (referring to the selection criteria adopted by the Tasmanian Department of Justice), 133 (summarising the criteria for judicial appointment in England and Wales).

²⁶ *Ibid* 139.

the most qualified candidates for the position. Without an evidence-based approach, there is too great a risk of subjectivity re-entering the process, despite the attempts to limit it by breaking ‘merit’ down into its constituent elements.

If the concept of merit is disaggregated and clearly articulated and applied on the basis of evidence, it is consistent with the best of existing practice in judicial appointments and enables us to see some of the shortcomings of existing processes that fail to identify additional worthy candidates. As Roach Anleu and Mack have observed, there is no reason to think that merit resides predominantly in the narrow group that has historically dominated the Australian judiciary.²⁷

B *Independence*

The independence of the judiciary is a fundamental tenet in Australian constitutionalism. It is, however, not an end in itself. Judicial independence is both an institutional or functional set of arrangements *and* a mindset held by the polity as a whole.²⁸ Given the Australian constitutional arrangements and the current system of appointment it is not possible, and perhaps not desirable, that appointments be seen as wholly independent from politics. By judicial independence we do not mean the complete removal of the judiciary from the political branches of government. Ultimately, appointment, remuneration and removal are within the constitutional competence of the Executive and the parliament. Criticism of the role of the judiciary remains a legitimate point for members of the executive and the parliament. Indeed, any chance for reform in the area of judicial appointment will require the agreement of at least one side of politics.

What is essential is that decisional independence be guaranteed to judicial officers. They must be free from influence in the central judicial task of adjudicating disputes about legal rights that arise between private parties, between the state and private parties, and (in a federation) between components of the state. is the core of judicial independence. It is protected through institutional arrangements such as tenure, remuneration and the jurisdictional separation of powers.²⁹ As we have already noted, it is inescapable that politics will have role to play in the appointment process. However, when the political influence is such that appointments can sometimes be perceived to be made on the basis of political patronage there is a threat to (at least the appearance of) decisional independence. It is impossible – and undesirable – to remove the political entirely from the appointments process. What an appointments model should attempt to do is attenuate the direct influence of the political branch on the appointment process and subject its involvement in the appointment process to greater transparency and accountability, while preserving all the existing constitutional arrangements for ensuring decisional independence.

C *Diversity*

Judges are not representatives of any group or constituency. Their duty is to ‘do right to all manner of people according to law without fear or favour,

²⁷ Roach Anleu and Mack, above n 14, 39.

²⁸ See Peter Russell and David O’Brien, *Judicial Independence in the Age of Democracy* (2001) 3.

²⁹ *Grollo v Palmer* (1995) 184 CLR 348, 376–7; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 82.

affection or ill-will'.³⁰ Equally, the judiciary as a whole does not need to be representative of any group or constituency.

However, as the Secretary of State for Constitutional Affairs and Lord Chancellor Lord Falconer of Thoroton wrote, a judiciary — indeed any institution — that fails to reflect the makeup of the society from which it is drawn will sooner or later lose the confidence of that society.³¹ As Justice McHugh put it, 'when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution'.³² The Australian judiciary is such an institution. The Australian judiciary does not currently reflect Australian society. To focus just on gender: 'Currently there are 26 female judges of the State Supreme Courts, including two appellate Judges, one President of the Court of Appeal and one Chief Justice, namely Chief Justice Marilyn Warren of the Victorian Supreme Court. At the Federal level, there are 6 female judges of the Federal Court and 17 female judges of the Family Court, which is led by Chief Justice Diana Bryant'. This amounts to an approximate 20% representation on the bench of the superior courts.³³

The point is not that the present system results in the appointment of people who do not have the required qualities for judicial office. Rather, the current process systematically overlooks others who do have the required qualities.³⁴ A range of considerations support the argument that a judiciary should reflect the society of which it is part. Here we follow a summary of these considerations presented by Alan Paterson in his study of the Scottish appointments system.³⁵

- First, there should be no place in the appointments process for direct or indirect discrimination on unacceptable grounds. However, a system like the current system that relies on soundings and a network of contacts in conjunction with an unarticulated concept of merit is open to such influences and the perception of such influence.³⁶
- Second, as noted above, this perception is to the detriment of public confidence in the courts. This is the point made by Justice McHugh that we have set out above.
- Third, a judiciary that reflects the society from which it is drawn 'represents a sound use of human resources ... modern societies cannot afford to lose the intellectual power and energy of ... [so much of their] ...

³⁰ *High Court of Australia Act 1979* (Cth), sch, s 11.

³¹ Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003), forward, [24], [27]. See also The Commission for Judicial Appointments, *Annual Report 2002*, [8.3] and Mason, above n 22, 7.

³² Justice 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) <http://www.hcourt.gov.au/speeches/mchughj/mchughj_27oct04.html> at 11 September 2006.

³³ Chief Justice Terence Higgins, Australian Capital Territory (Speech delivered at the Sir Richard Blackburn Lecture, Pilgrim House, Canberra, 16 May 2006).

³⁴ *Annual Report 2002*, above n 31, [8.3].

³⁵ Alan Paterson, 'The Scottish Judicial Appointments Board: New Wine in Old Bottles?' in Kate Malleson and Peter H Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 13, 26–31. We place no weight on what Paterson identifies as the third consideration in his survey — that a wider range of appointments would change and perhaps improve judicial decision-making. As Paterson's survey demonstrates, opinions are widely divided on the evidence for this consideration: at 29–31. See also Cheryl Thomas, The Commission for Judicial Appointments, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (2005), available at: <http://www.cja.gov.uk/files/Judicial_Diversity_Review_Report_PDF.pdf>, 57–60.

³⁶ *Ibid* 26.

population’.³⁷ As Baroness Prashar, Chair of the Judicial Appointments Commission in the UK, recently said, ‘[t]he benefit of widening the range of applicants has a powerful simplicity. If more, well-qualified people apply to be judges, the merit of those selected will either remain the same as now or be enhanced. And if the appointments process excludes consideration of irrelevant factors then we might also expect appointed judges to come from a very wide range of backgrounds.’³⁸

- Fourth, judges from diverse backgrounds may serve as role models for wider community involvement in the legal profession.

As will be seen below, the model that we put forward is not a *guarantee* of greater diversity amongst the Australian judiciary, particularly as it does not purport to address the systematic biases in legal education and the legal profession that disadvantage under-represented groups.³⁹ However, within those limits, the principle of diversity operates to ensure that appointments are made from the widest range of possible applicants.

D Accountability through transparency

A basic premise in a Westminster system is the accountability for the exercise of executive power to the parliament and through the parliament ultimately to the people. This classical framework, that emphasises responsible and representative government, has been supported and supplemented through other institutional arrangements, such as parliamentary and statutory bodies. Parliamentary committees and the rise of the ‘new administrative law’ arrangements are examples of a modern and more robust institutional system of executive accountability. Outside the parliament, the media and civil society organisations regularly scrutinise the exercise of public power, complementing the formal institutional accountability mechanisms.

Accountability for the exercise of executive power is an aspect of a wider and pervasive principle of modern liberal constitutionalism that demands accountability for the exercise of *public* power in general. As a branch of government wielding public power, the judiciary is subject to this principle. Obviously the judiciary is accountable for its decisions through the right to open justice, an appellate procedure and an increasing willingness to engage in public discussion as to its role. The last of these, has been the result of changed understanding of the traditional function of the Attorney-General, particularly at the federal level.⁴⁰

The question that arises here is how best to ensure executive accountability in the appointment process. First, it is important to recognise how limited the current accountability measures are. As a means of holding the government to account for its appointee, the current system is both unfocused and lacks rigour. Moreover, the accountability of the government to the parliament is retrospective. Good public administration is founded upon the establishment of

³⁷ Chief Justice Beverly McLachlin of the Canadian Supreme Court ‘Promoting Gender Equality in the Judiciary’, Seminar to the Association of Women Barristers, House of Commons (2 July 2003) 6 cited in Paterson, above n 35, 31.

³⁸ Baroness Usha Prashar, ‘Speech at the Annual ILEX Luncheon’ (Clothworkers’ Hall, London, 17 May 2006) [10].

³⁹ See Thomas, above n 35 (discussing the need for reform of educational and professional structures in the UK to ensure that there is a diverse pool of candidates qualified for appointment to the judiciary).

⁴⁰ Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 261–2.

transparent processes and standards in advance of their operation and application. One of the consequences of the current lack of formal and articulated processes and standards is that it leads to disingenuous statements by Attorneys-General when announcing an appointment. They are forced to make the generally implausible comment that 'X was the outstanding candidate' which diminishes the wealth of talent available and further reinforces the idea that appointment can be based on proximity to the Attorney-General.

This does not mean that political accountability for appointments is unimportant or that responsibility for appointments should be transferred completely from the executive government to some other hands. The political accountability that attaches to appointments made by politicians may allow for a wider range of potential appointees than a process that is self-consciously depoliticised. James Allan has argued:

[Under systems of direct appointment by the executive government] someone and some political party can be held politically accountable for the selection. There is simply more openness and accountability (for choosing, say, another male or a former politician). Plus, a decision to opt for a less activist type of judge or for someone with unorthodox views on the proper way to interpret constitutional provisions can be deliberately and consciously taken. The government and its attorney-general will have to live with the political ramifications of such a decision, true, but I see no reason why such options should be foreclosed (or made extremely difficult, as surely they would be with an indirect process) in these days of highly powerful judiciaries.⁴¹

In Allan's view, an indirect appointments system blunts the political opposition: 'Quite simply, it is easier to attack the constitutional improprieties of an attorney-general than it is to mount a case against a Judicial Appointments Board, all of whose members appear thoroughly apolitical, legally qualified, and nice'.⁴² Allan's argument is overdrawn and focuses too narrowly on one dimension of the appointments process. But it is valuable in highlighting the role of political accountability than would be lost in a move to a model under which the attorney-general no longer played *any* role in appointments.

The limitations of current accountability mechanisms do not mean that the whole panoply of modern accountability mechanisms should be directed at judicial appointments. Judicial and administrative review of appointment decisions are plainly inappropriate.⁴³ Rather, it means that political accountability should be supplemented with accountability mechanisms that are appropriate to the nature of this kind of exercise. Transparency is a key means to provide greater accountability in the appointment process.⁴⁴ As noted above in other areas of public administration parliamentary and statutory measures of

⁴¹ James Allan, 'Judicial Appointments in New Zealand: If it were done when 'tis done, then 'twere well it were done openly and directly' in Kate Maleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 103, 115.

⁴² Ibid 116.

⁴³ See, eg, Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) 20–2 (factors that may exclude merits review: decisions to appoint a person to undertake a specified function, recommendations to ultimate decision-makers, decisions where there is no appropriate remedy); Administrative Review Council, *The Scope of Judicial Review* (2006) 57–8 (in most cases, limits on judicial review are justified for decisions where there is neither a right to a benefit nor a duty on the decision maker to consider conferring a benefit. Sometimes, limits on judicial review are justified for decisions where there is a particular need for certainty or decisions about policy).

⁴⁴ Some measure of retrospective accountability is also appropriate. We discuss this below.

accountability are present. By contrast the current process has minimum transparency. For instance, s 6 of the *High Court of Australia Act 1979* (Cth) requires that: 'Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment'. There is no external scrutiny of the current selection processes. This fact feeds distrust, perhaps misplaced, that selection is made upon a basis other than the merit of the candidate. In short, where transparency *can* be accommodated consistently with other important interests, including confidentiality, it *should* be accommodated. It should extend to the process and criteria for appointment and the identity of those making recommendations about appointment.⁴⁵

E Confidentiality

While the model outlined below calls for greater transparency and thus accountability in the selection process, transparency is not an overriding principle. There are powerful institutional and pragmatic reasons for preserving strict confidentiality of aspects of the process. For example if names of potential appointees, especially in small jurisdictions, were made public it may adversely affect relationships with clients. The upshot may be to discourage individuals to seek appointment. Even in larger jurisdictions, breaches of confidentiality would undermine the operation of the system. This is not special pleading for judicial appointments. Confidentiality is a common feature of appointments processes generally. Confidentiality of the identity of applicants ensures that meritorious candidates are not deterred by the prospect of disclosure of a candidacy that might be perceived as overreaching or that might (wrongly) be perceived as reflecting badly on the candidate if it was ultimately unsuccessful. Equally, confidentiality of references ensures that referees are not deterred from being full candid about the evidence that supports (or undermines) the candidate's application.

F Efficiency

The arrangements that we propose will inevitably demand more human and material resources than the current political arrangements. The benefits that they deliver must justify those additional resources. The arrangements must be flexible enough to meet the needs of the federal judiciary and the larger state judiciaries as well as those of the judiciaries of the smaller states and territories.

⁴⁵ Critics of appointments commissions also highlight the value of transparency. F L Morton recently argued that as power cannot be depoliticised (a point with which we agree), '[t]he best one can do is to make the exercise of power as transparent as possible, and then create effective checks and balances': F L Morton, 'Judicial Appointments in Post-Charter Canada: A System in Transition' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 56, 75. He agrees with Jim Allan that the best achievable system would be one in which 'the judges of the highest courts are appointed "'openly and directly by the elected government of the day"', with opportunity for opposition parties to question appointees (not, it seems, prospective appointees) on their legal and constitutional outlook: *ibid*. He concludes: 'The government will still get the judge it wants, but it can be held accountable for — or get credit for — its appointments at the next election': *ibid*. Plainly, Morton's concern is with the highest courts, particularly those exercising powers of judicial review on substantive rights issues. But even in relation to these courts his proposal is for a very diffuse form of accountability that (in Australia at least) would lead to a novel *overt* politicisation of the courts.

One example emerges from the experience in England and Wales. The Commission for Judicial Appointments concluded that ‘everything [they had] seen’ confirmed their view that the traditional automatic consultations with office holders should end.⁴⁶ The Commissioners’ reasons for this conclusion were that ‘[t]he present system is wasteful of judicial time (for example in seeking references from a large number of people about all candidates)’. They advocated better targeted and solicited input ‘focused on giving better quality responses to those candidates and about those issues where third party evidence is likely to be helpful ... The views of senior judges on candidates, of whom they have knowledge and experience, need to be captured in a more balanced and accountable way.’⁴⁷

G Institutional and practical constraints

The model that we are advancing must take into account the current constitutional and institutional arrangements. Chief amongst these are the federal structure and the separation of powers. While the model proceeds on the basis of general principles that are equally applicable to the Commonwealth and the States there is a degree of asymmetry between the two systems. There are a number of constraints that must be acknowledged in designing the models.

First, at the Commonwealth level the guarantees and limitation derived from Chapter III of the *Constitution* must be observed. While we believe the involvement of, say, the Chief Justice of the Federal Court as a member of a federal appointments commission is not incompatible with the judicial function (provided that he or she consents to his or her involvement)⁴⁸ there are limits upon the functions of any proposed commission. For instance under the current constitutional arrangements a federal appointments Commission would be a recommending body, not an appointing body. Thus any recommendations must be transmitted to the Governor General through the Federal Executive Council.⁴⁹ This maintains the current system of ministerial accountability for appointments.

Second, the situation for the States while not as constitutionally as rigid as the Commonwealth still suggests caution in radical departure from the current processes. Thus while there is no strict separation of powers at the state level,⁵⁰ there is merit in limiting the function of the appointments commission to recommending to the government suitably qualified candidates.

Third, there are a number of practical considerations that need to be taken into account both at the Commonwealth and State level. Should there for instance, be separate appointment bodies for the local or magistrates courts and one for senior courts? Alternatively should each State have a separate appointments commissions, or should there be a single national appointments commission? The likely workload of the appointments body given the size of the jurisdiction or jurisdictions involved, and the existing workloads of the likely members of the appointments body, will constrain the approach taken. We sketch our recommendations in relation to these issues below.

⁴⁶ Commission for Judicial Appointments, *The Commissioners’ Review of the High Court 2005 Competition: Report to the Lord Chancellor* (2006) [2.13].

⁴⁷ *Ibid.* See also the comments on judicial input in chapter 6.

⁴⁸ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 13, 41.

⁴⁹ *Australian Constitution* s 72.

⁵⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 77-78; *Forge v Australian Securities and Investments Commission* [2006] HCA 44, [36].

V MODELS

We noted above that many comparable common law jurisdictions had moved to reform their appointments processes in responses to similar concerns to those expressed in Australia about the need for transparency and diversity and the need to avoid perceptions of improper political involvement in appointments. Some of these reforms provide useful models for Australia to consider and adapt.

Others are clearly inappropriate for Australia: neither the system of elected judges (under which something like 90% of United States state judges are chosen) nor the system of partisan scrutiny by a Senate Committee (as a preliminary to the Senate's consent to federal judicial appointments) is appropriate for Australia. Each system is highly transparent but infects the appointment process with a partisan flavour that is alien to Australia's constitutional traditions.

Equally the South African model is inappropriate. This model was developed at the end of the apartheid era in order to help ameliorate the injustices the nation's history had embedded in its judicial system. The process centres on the constitutionally-established Judicial Services Commission, which includes five legal professionals, three judges, 11 politicians and four other politically selected members. The political representation and the openness of the process (the JSC publishes transcripts of interviews it holds with judicial candidates) may have been necessary to establish the legitimacy of the process as part of the post-apartheid constitutional settlement. But it would be problematic and unnecessary to adopt such a high level of transparency in Australia, especially in the smaller jurisdictions.

New Zealand's modifications of the traditional executive centred appointments process have been minor. Appointments are still made by the Governor-General, acting on the advice of the Attorney-General (or the case of the Chief Justice on the advice of the Prime Minister).⁵¹ The process is still regulated by convention rather than law. One such convention appears to be that judges are selected according to four 'clearly defined, transparent and publicly announced criteria': legal ability, qualities of character, personal technical skills and reflection of society.⁵² The Attorney-General also mentions appointments at Cabinet *after* they have been decided – convention suggests that Cabinet is not supposed to have any input into these decisions.⁵³ One may legitimately doubt whether these conventions tie the hands of the executive in any meaningful way. The controversy over the appointment of the initial complement of judges to the Supreme Court (although a somewhat special case) suggests that the executive retains a rather free hand.⁵⁴

Canada's judicial appointment process is largely grounded in the traditional executive appointment system.⁵⁵ Recently, however, the power of the executive

⁵¹ See *Judicature Act 1908* (NZ) ss 4(2) and 57(2) and *Supreme Court Act 2003* (NZ) s 17. There are a few exceptions to this statement. Allan, above n 41, fn 5.

⁵² *Judicial Appointments: Office of the High Court Judge* (2003) Ministry of Justice <<http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html#Criteria%20for%20appointment>> at 14 September 2006.

⁵³ *Judicial Appointments, Courts of New Zealand* <<http://www.courtsofnz.govt.nz/about/judges/appointments.html>> at 14 September 2006.

⁵⁴ Allan, above n 41, 115.

⁵⁵ Morton, above n 45, 58.

has been the subject of intense debate.⁵⁶ Since 1988 candidates for appointment to provincial superior courts have had to submit formal applications, be scrutinised by the Federal Commissioner of Judicial Affairs and be interviewed by provincial or territorial committees.⁵⁷ More recently, the executive's discretion in relation to Supreme Court appointments has been somewhat narrowed. After an interim process that applied to two appointments in 2004 appointments,⁵⁸ a new process was begun in 2005 but interrupted by the Liberal Party's loss at the general election. In accordance with a policy statement issued by the government early in 2005,⁵⁹ an ad hoc advisory committee was established to consider evidence of the qualifications of members of a long-list of nominees already identified by the government. The advisory committee consisted of a Member of Parliament from each recognized party, a retired judge, a nominee of the provincial Attorneys General, a nominee of the law societies and two prominent Canadians who were neither lawyers nor judges (each of these come from the region where the vacancy arose). Nominees did not appear before the Committee. The Committee recommended three candidates (without ranking them) to the Minister. The government could appoint one of these, or in exceptional circumstances, another person. The election intervened before any appointment was made. The new government decided to retain the Committee's list of candidates and make an appointment from that list. However, instead of the Minister then appearing before a parliamentary committee 'to explain the appointment process and the professional and personal qualities of the appointee', the appointee himself (now Justice Rothstein) appeared before the parliamentary committee. Professor Peter Hogg outlined the Committee's role:

'What the members of the Committee can and should do is to satisfy yourselves that this person has the right stuff to be a judge of the Supreme Court of Canada. Does he have the professional and personal qualities that will enable him to serve with distinction as a judge on our highest court? Let me suggest six qualities that you might want to explore in your questioning.

1. He must be able to resolve difficult legal issues, not just by virtue of technical legal skills, but also with wisdom, fairness and compassion.
2. He must have the energy and discipline to diligently study the materials that are filed in every appeal.
3. He must be able to maintain an open mind on every appeal until he has read all the pertinent material and heard from counsel on both sides.
4. He must always treat the counsel and the litigants who appear before him with patience and courtesy.
5. He must be able to write opinions that are well written and well reasoned.
6. He must be able to work cooperatively with his eight colleagues to help produce agreement on unanimous or majority decisions, and to do his share of the writing.'

⁵⁶ See eg Minister of Justice (Canada), *Proposal to Reform the Supreme Court of Canada Appointments Process* (April 2005), available at <<http://www.justice.gc.ca/en/dept/pub/scc/index.html>> (summarising the consideration of the issue to that date).

⁵⁷ Morton, above n 45, 67-68.

⁵⁸ See *Report Of The Interim Ad Hoc Committee On The Appointment Of Supreme Court Judges*, available at http://www.justice.gc.ca/en/dept/pub/scc_courtsup/index.html,

⁵⁹ Above n 56.

This interview process was broadcast live on Canadian television.⁶⁰ While this model may be appropriate for Canada's highest court, which has an thoroughly politicised role under the Charter and in Canadian federalism, it is inappropriate as a model for Australia's very different courts.

The most likely model for Australia is the model recently implemented in England and Wales under the *Constitution Reform Act 2005* (UK). Prior to April 2006 judicial appointments in England and Wales were the domain of the Lord Chancellor. (The Commission for Judicial Appointments had a limited oversight role pursuant to which it could review the judicial appointments processes carried out by the Lord Chancellor's Department and investigate complaints about those processes.) In April 2006, responsibility for identifying judges to be appointed was transferred to the Judicial Appointments Commission ('JAC').⁶¹

The JAC is established under the *Constitutional Reform Act 2005* (UK) ('CRA'). It is composed of 15 commissioners including six lay persons, five judges, one solicitor, one barrister, one magistrate and one tribunal member.⁶² Three of the judicial members are selected by the Judges' Council; the Chair and the other 11 members of the Commission by a selection panel.⁶³ The chair of the commission must be a lay person⁶⁴ and no Member of Parliament can be appointed to the commission. The remit of the JAC is to make a recommendation to the Secretary of State for Constitutional Affairs as to who should hold judicial offices for Courts below the Court of Appeal.⁶⁵

The CRA, establishing the JAC and the new judicial appointment process, sets out clear principles on which the commission's recommendations must be premised. It explicitly states that selections be founded solely on merit and that the person selected be of good character.⁶⁶ Additionally, the Act mandates that the commission 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'.⁶⁷ In order to help achieve diversity, the Lord Chancellor is permitted to issue guidance about selection procedures for identifying and assessing candidates.⁶⁸ To ensure this does not confer too much power on the Lord Chancellor and result in the appointments process being politicised, the Act provides that the Lord Chancellor must consult the Lord Chief Justice and that each house of Parliament must approve the proposed guidance prior to it being adopted by the commission.⁶⁹

⁶⁰ Peter W. Hogg, 'Judicial Interview Process. Opening Remarks to Ad Hoc Committee on Supreme Court Appointment' (Speech delivered at the Ad Hoc Committee on Supreme Court Appointment', Canada, 27 February 2006) <http://www.justice.gc.ca/en/dept/pub/scc/jud_interview.html> 26 September 2006.

⁶¹ The process is somewhat different for heads of division, the Court of Appeal and the Supreme Court.

⁶² *Constitutional Reform Act 2005* (UK) sch 12.

⁶³ The chairman of the appointing panel (who cannot be a practising lawyer or judge, a Commissioner or an MP) is appointed by agreement of the Lord Chancellor and Lord Chief Justice; the remaining members are the Lord Chief Justice, the chairman of the Judicial Appointments Commission (if he or she has been appointed) and a person nominated by the Chair of the appointing panel. See CRA schedule 12. The panel must consider the views of the Bar and Law Society in selecting the professional members of the Commission.

⁶⁴ *Constitutional Reform Act 2005* (UK) sch 12

⁶⁵ Judicial Appointments Commission <www.judicialappointments.gov.uk> at 26 September 2006.

⁶⁶ *Constitutional Reform Act 2005* (UK) s 63(2)-(3).

⁶⁷ *Constitutional Reform Act 2005* (UK) s 64(1).

⁶⁸ *Constitutional Reform Act 2005* (UK) s 65(1).

⁶⁹ *Constitutional Reform Act 2005* (UK) s 66(1).

Beyond these broad guiding principles, the Act leaves it to the commission to determine the precise selection process to be undertaken.⁷⁰ Since its inception the JAC has been working to formulate a selection procedure that accords with the principles articulated in the Act. To date it has identified two important preliminary components the judicial selection process will possess. First, it has specified common qualities and abilities all judicial candidates will be measured against.⁷¹ Second, it has devised mechanisms to ‘encourage a wide range of applicants’ and to minimise barriers individuals face to becoming part of the judiciary.⁷² The commission has determined to broaden the range of applicants by employing the media and professional organisations to raise awareness of appointment opportunities. It has also resolved to address this issue by developing targeted advertising campaigns for each judicial position that becomes available.⁷³

While the JAC has now published the way it intends to approach this initial outreach stage of the selection process, it is still determining the form the rest of the application process will take. A preliminary report of the commission indicates it is completely reviewing the method by which candidates will be assessed and processed after they have submitted an application.

Under the pre-JCA processes for judicial selection, modified for the transitional period until the new JCA systems are finalised, once the outreach and advertising process has been completed, the Judicial Appointments Applications Service (‘JAAS’) (within the Commission) processes applications to preliminarily assess candidates’ eligibility. A subcommittee of the Commission is then responsible for consulting the applicants’ referees. Senior judges and practitioners used to be consulted automatically. This practice attracted considerable criticism. In the most recent appointments processes (still under interim arrangements) the Commission instead identified senior judges and practitioners as ‘Commission referees’. The next stage of the selection process is a sifting panel. Pre-JCA this panel included a judge from the relevant jurisdiction, a senior official from the Department for Constitutional Affairs and a lay person. It composed a shortlist of candidates based on the information in the application only. It seems likely that this function will be taken over by a subpanel of the Commission, all of whose members will receive training in recruitment practices to ensure that they consider candidates in an objective manner. This sifting, or similarly constituted, panel then conducts a structured interview with each of the short listed candidates of 45 minutes to 1 hour duration. For some judicial appointments, assessment centres have been established in addition to the interview. Such centres require candidates to partake in role plays, written case studies, technical papers and a structured interview over the course of an entire day. Once this process has been completed the Commission must select one candidate whom it recommends to the Lord Chancellor.⁷⁴ It is then the responsibility of the Lord Chancellor to accept or reject the commission’s recommendation.

Under the newly established system if an applicant has a complaint about maladministration by the Commission or the Lord Chancellor during the

⁷⁰ See eg, *Constitutional Reform Act 2005* (UK) s 70(2)

⁷¹ Baroness Usha Prashar, above n 38.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Constitutional Reform Act 2005* (UK) s 96.

selection process he or she is entitled to complain directly to the body with which he or she has the complaint or to the Judicial Appointments and Conduct Ombudsman. The Ombudsman is responsible for evaluating all such complaints and determining whether or not it is necessary to investigate them. If it is determined that an investigation is necessary the Ombudsman must investigate the complaint and then issue a report on any action that is required.⁷⁵

VI A MODEL FOR AUSTRALIAN JUDICIAL APPOINTMENTS

The model selected to inform the Australian approach in this paper is a modified version of the system currently operating in the England and Wales.⁷⁶ A shared legal history between the United Kingdom and Australia is an obvious starting point for this decision. So too, the common Westminster system and the centrality of the executive branch in the appointment process further suggests following the path taken in the United Kingdom. However, these two features

⁷⁵ *Constitutional Reform Act 2005* (UK) ss 99-102.

⁷⁶ The system operating in Scotland is assessed in Paterson, above n 35. A somewhat different system operates in Northern Ireland: see Sackville, above n 17, 136. We are not the first to propose a judicial appointments commission for Australia. Other proposals include:

- The Hon Geoffrey Davies recently proposed a Queensland commission consisting of seven members, 'the Chief Justice; either another Supreme Court judge appointed by the Chief Justice or, if the appointment is to the District Court, the Chief Judge of that Court; the President of the Bar; the President of the Law Society; the head of a church in Queensland (to be rotated annually among the various churches); the editor of *The Courier Mail* or *The Australian*, to be rotated annually; the local President of Zonta': the Hon Geoffrey L Davies, 'Appointment of Judges', Speech delivered at the QUT Faculty of Law Free Lecture Series, Banco Court, Brisbane, 31 August 2006, <<http://www.law.qut.edu.au/about/AppointmentofJudges.pdf>> at 11 September 2006. Zonta is 'a global service organization of executives and professionals working together to advance the status of women worldwide through service and advocacy': Zonta International <http://www.zonta.org> at 26 September 2006.
- Sir Anthony Mason recommended a commission of 'not more than nine members of whom at least five should be judges and practising lawyers', perhaps 'two judges, a nominee of the relevant Bar Association, a nominee of the relevant Law Council or Society and a nominee of the Council of Law Deans, one or two nominees of government and two lay persons who should be selected having regard to their capacity to represent the community': Sir Anthony Mason, 'The Appointment and Removal of Judges' in *Judicial Commission of New South Wales, A Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997), 10-11.
- Sir Garfield Barwick suggested that there be some restraint on the executive in judicial appointments, including possibly a judicial appointments commission (including 'judges, practising lawyers, academic lawyers, and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees'): Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 494.
- The *Attorney General's Discussion Paper: Judicial Appointments Procedure and Criteria: Attorney General Discussion Paper* (1993) 24-26 summarises the composition of then existing and recommended appointments commissions in comparable jurisdictions (which include judges, practising and academic lawyers, community representatives, Attorneys-General, retired judges and politicians, serving politicians and media representatives).
- George Winterton's 1987 proposal differed from ours in insisting that the legal members not be representatives of their professional bodies 'so that they represent nothing but the public interest': George Winterton, 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review* 185, 210-211.

For general discussion and more general proposals, see also Amber Augustin, 'Federalism and the High Court: Fixing the appointment process' (2006) *IPA Review* 22; Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) *Journal of Judicial Administration* 117, 142-143; Elizabeth Handsley, "'The judicial whisper goes around": appointment of judicial officers in Australia' in Kate Malleson and Peter H Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 136-137; George Williams and Rachel Davis, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819, 859-863.

should not be exaggerated. As noted above, Australia and the United Kingdom have significant differences in their institutional arrangements.

What commends the judicial appointments commission model are a number of critical features. First, the model is a cautious and incremental development that does not break with Australia's legal traditions. A second element that has influenced our choice is the fact that the judicial appointment commission provides a workable model that best meets the principles outlined in the first part of the paper. The Commission on Judicial Appointment, the predecessor to the Judicial Appointment Commission, operated from 2001. While not extensive there is now a body of work reporting on its operation, its strengths and perceived weaknesses.

The models in operation in the United Kingdom also arguably represent best practices. As Kate Malleson concludes when examining the recent United Kingdom developments,

'Far from being a grab for power on the part of the government, as some commentators initially feared, the proposal for establishing a judicial appointments commission is a rare and commendable example of the executive giving away a source of political control and potential patronage. The creation of a commission has the potential to secure the long-term independence of the judicial system, to promote the diversification of the bench, and to enhance public confidence in the system. The record of commissions in other jurisdictions in achieving these goals is generally good, although success is not inevitable. The model of commission set up in England and Wales is sufficiently well-constructed to form the basis for a successful new system.'⁷⁷

While our model is informed by the English experience it is not a carbon copy of it. There are significant reasons for departing from some of its details while maintaining its fundamental structure. Opponents of a judicial appointments commissions have made the point that there is a huge difference between the number of judicial and quasi-judicial appointments made in the United Kingdom and Australia.⁷⁸ The English Commission is responsible for appointing more than 30,000 officers including tribunal members and lay Magistrates.⁷⁹ Constitutional limitations in Australia prevent widespread use of acting judges and recorders that provide important training ground for English appointments.⁸⁰ Thus, it is argued, there is no need for a judicial appointments commission in Australia. This is a pragmatic argument and does not respond to the principle-based approach that a judicial appointments commission represents. Indeed, even if there were only *one* appointment to be made by the Commonwealth or State and Territory governments this would not detract from the objectives and processes that the model seeks to enshrine.

The next section of the paper will outline some of the specific features of the proposed Australian model. It does not profess to proscribe the finer details of

⁷⁷ Kate Malleson, 'The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006) 39, 51.

⁷⁸ Ruddock, above n 10, [62] – [64].

⁷⁹ Malleson, above n 77, 48. We do not consider the process for appointing tribunal members in Australia. There is obviously a case for an independent appointments process for the independent merits review tribunals like the AAT.

⁸⁰ *Forge v Australian Securities and Investments Commission* [2006] HCA 44.

the operation of each Australian Judicial Appointment Commission.⁸¹ Many of those issues rightly should be left to the Commission to determine for itself in light of the general guidelines. What this model does is canvass many of the significant issues in accordance with the general principles previously outlined.

Under our proposal the Commission would:

- 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.
- When notified by the Attorney-General that the government wishes to make an appointment to a particular court, advertise and conduct outreach activities to identify possible candidates for appointment to the courts within their remit.
- 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 against the selection criteria. Evidence is contained in applications, references, structured interviews and (for some appointments) through formal assessment of applicant's practical skills.
- Recommend three suitably qualified candidates to the Attorney-General for appointment.⁸²

We now turn to some specific issues raised by the above points.

A Scope

As a matter of principle the model should apply to all jurisdictions in Australia (federal, state and territory) and to all levels of the judicial hierarchy in each jurisdiction. Although there is considerable diversity in the Australian court system in the various jurisdictions, the problems with the current appointments process that we have highlighted earlier in this article are broadly similar across those jurisdictions. (We will describe later how the model may need to be adapted between federal, state and territory jurisdictions to accommodate constitutional imperatives.) The magistracy in the states and territories is by far the largest in terms of the number of judicial officers and matters heard. It is also the most visible to the community. Given the number of judicial officers it also has the largest number of possible appointees in any given year. We also recommend the Commission should make recommendations in relation to appointments to specialist State courts, the County/District Courts and the State Supreme Courts as well as to all the federal courts below the High Court.

We are of the view that recommendations for appointments to the High Court should ultimately be made by a Commission. The visibility of the Court means that its inclusion in the model sends a leadership signal about the nature of appointments in Australia. However, we also believe that the federal Commission should be in operation for a period before any High Court appointments are made through this process. There are a number of significant

⁸¹ As will be noted below we do consider the establishment of State and Territory judicial appointment commissions. For ease of description we are explore the general model under the title AJAC. Whether there will be a national body, is itself and issue for consideration.

⁸² Where the Attorney-General proposes to make more than one appointment to the same registry of the same court. The AJAC would provide two more names than the proposed number of appointments.

issues regarding the High Court that need to be carefully considered and accommodated within the Commission framework. For instance, in the case of an unexpected vacancy there is a need for the Commission to move expeditiously. It is not desirable for the Court to have less than its full complement for an extended period of time. Further, the Chief Justice or the most senior Justice willing to serve would be included as a member of the Commission for appointments to the High Court.

B *Selection criteria*

The Commission should apply selection criteria that track ss 63 and 64 of the Constitution Reform Act:

1. Selection must be solely on merit.
2. A person must not be selected unless the selecting body is satisfied that he 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.

1 *Merit*

An important initial task for each Commission will be to develop the statutory merit criterion into selection criteria that are capable of being put into practice. Its non-legal members should include at least one member with expertise in developing such processes and it should be assisted by an expert secretariat. While merit has said to be an elusive or illusory concept there are now many articulations of its meaning in relation to judicial officers and their functions. A recent articulation of the qualities and skills needed for judicial officers was outlined in the Commission for Judicial Appointments' Report on the 2005 High Court appointments. They listed, for example, eight qualities and skills. They were:

1. Analysing and Decision Making
2. Legal Knowledge and Expertise
3. Integrity and Independence
4. Authority
5. Leadership & Administrative Duties
6. Managing Workload
7. Communicating
8. Treatment of Others.⁸³

This example is indicative of an approach that requires the application and assessment process to be made on the basis of known and articulated criteria. The model we suggest will require that the Commission develop a merit in line with best practice in comparable overseas jurisdictions.⁸⁴

The Commission should take into account that selection criteria should allow candidates to demonstrate that they have the capacity to develop (some) relevant skills within a reasonable time, rather than require them to demonstrate those

⁸³ *The Commissioners' Review of the High Court 2005 Competition* (2006) [4.3].

⁸⁴ While there is broad agreement on the main subcriteria of the concept of merit, and perhaps these could be spelt out in a statute establishing the Commission, it needs to be recognised that the concept of merit will need to be spelt out in different ways for different courts and will evolve over time. This flexibility is best achieved by leaving it to the Commission to specify the subcriteria. It will be accountable for its specifications through their publication in the course of each selection exercise and in its annual reports.

skills at the time of application. Some applicants – for example, barristers with a narrowly focussed practice, solicitors, Crown Solicitors, Parliamentary Counsel, Ombudsmen, academics and others – might already possess most of the skills necessary for appointment and be able to develop the others in an appropriate timeframe. This may be particularly true of candidates with less traditional backgrounds for judicial appointment than extensive practice at the Bar. They should not be excluded from selection on this basis. One ramification of the belief that lack of forensic skill should not automatically disqualify otherwise qualified individuals for judicial office is a need for well-resourced training to accompany appointments. As Chief Justice Gleeson noted when discussing the opening up of appointments to judiciary to non-traditional appointees:

I am not seeking to advocate the retention of the Bar's absolute monopoly on judicial appointment. My point is different; and one that has largely been ignored by people who profess to be interested in breaking down that monopoly. It is that, historically, the monopoly has been protected by the lack of proper arrangements for judicial training and development. Real change, as distinct from window-dressing, in the one area, requires real progress in the other.⁸⁵

2 Diversity

Seeking diversity remains for some the most controversial aspect of the use of an appointments commission. Even those in favour of a commission recognise that there are limits on the extent to which such mechanisms can be called upon to achieve a more representative judiciary.⁸⁶ On this model, merit remains the sole selection criterion. Diversity in appointments is achieved, not by making diversity a substantive selection criterion, but by recognising that the undifferentiated merit criterion applied to date implicitly limits diversity and by ensuring that candidates previously overlooked are encouraged to apply and be assessed against the articulated components of merit.

As outlined above this model does not endorse the use of quotas or other artificial means to achieve greater diversity amongst Australia's judicial officers. It does, however, recognise the problem associated with a failure to have a judiciary that more closely reflects the society from which it is drawn. Some of the problems associated with under-representation maybe traced to the problem of an unarticulated concept of merit. In better expressing what is meant by merit and how it is assessed the Commission will go some of the way to improving at least the means by which greater representation may be achieved.

The Commission needs to be conscious of the rate of applications from under-represented groups. The outreach programme will encourage people from diverse backgrounds to apply for judicial office.

Lastly the monitoring and reporting function of the Commission will better inform future appointment rounds and assist in the targeting of under-represented groups.

⁸⁵ Chief Justice M Gleeson, "Judicial Selection and Training: Two Sides of the One Coin" (Speech delivered at Judicial Conference of Australia, Colloquium – Darwin, 31st May 2003) <http://www.hcourt.gov.au/speeches/cj/cj_judicialselection.htm> at 18 September 2006.

⁸⁶ The Hon. G.L.Davies "Appointment of Judges", (Speech delivered at the QUT Faculty of Law – Free Lecture Series, Banco Court, Brisbane, 31 August 2006) <<http://www.law.qut.edu.au/about/AppointmentofJudges.pdf>> at 11 September 2006.

C Outreach and advertising

Transparency requires that all suitably qualified members of the legal community should be made aware of judicial vacancies for which it is proposed to make an appointment. It also reinforces to the public that judicial office is a public office that is selected solely on merit. Moreover, it is important that the judiciary should reflect the community that it serves and not be seen as the preserve of the government of the day. The Commission will be responsible for outreach into the legal community. It will positively encourage individuals to put themselves forward for consideration, especially those from under-representative groups. As the United Kingdom Commission challenged potential applicants, ‘don’t be shy – apply!’⁸⁷

A number of outreach techniques may be considered such as advertising positions, writing directly to all practitioners meeting the statutory criteria,⁸⁸ providing detailed application kits with biographical details of typical and atypical recent appointments.

We have considered whether the Commission should maintain lists of potential appointees. On balance we recommend against such a process. There might be some value in keeping such lists if it ensured that the Commission took into account all relevant candidates when a particular vacancy arose.⁸⁹ However, that objective can be achieved by other means that do not involve the risks associated with keeping lists of names. On a practical level the maintenance of up-to-date lists is a significant logistical exercise. Without resources these lists may quickly go stale. The collection of names also raises issues of confidentiality. A national list maintained by a national Commission would be of limited value (except for federal appointments) as appointments will be made against specific criteria that may differ between jurisdictions. A jurisdiction-specific list would also be of limited value as appointments will once again be made against specific criteria that will be different for each of the courts in that jurisdiction’s judicial hierarchy. For these reasons we believe that lists would not achieve more than a well-targeted outreach programme.

A persistent criticism of the outreach aspect of the model, and of appointments commission processes more generally, is that good people will not apply for judicial office if they must go through the processes outlined by the model. This is potentially a serious concern. The unduly burdensome ‘self assessment’ required of applicants for judicial office in England and Wales until recently certainly appears to have had this effect. A similar criticism, however, could be made of those that apply for any public office, or application for Silk at the Bar. We believe that whatever ‘damage’ the application process may be perceived to do to the judicial office are outweighed by the benefits provided by the reform to the appointment process, particularly if the process can be streamlined for applicants so that they are not required to provide significant amounts of material of doubtful relevance and slight weight. The experience in the United Kingdom has been that after some initial resistance a new culture of judicial appointment is

⁸⁷ Malleson, above n 77, 43.

⁸⁸ To avoid the irritation of unsolicited letters individuals will be able to opt out from being contacted by the AJAC.

⁸⁹ When several appointments are made at the one time (for example, when the size of a court is increased) or in very short succession, it may be possible to make recommendations based on information gathered the one selection process, rather than undertaking separate selection exercises.

emerging. Moreover, as the process is founded upon merit applicants will be assured that extraneous considerations will not be taken into account.

D Applications

The Commissioners, with the support of the secretariat, will undertake the consideration of applications for the advertised judicial vacancy. This core function will start with the receipt of the applications and will have a number of distinct phases.

A number of general points should be made about this process. First, applications should be made on a standard form based upon the criteria determined by the Commission. Again the disaggregated and articulated merit principle will shape the contents of the application.

Second, the application form will allow an applicant to demonstrate their capacity to comply with any statutory requirements (such as years of admission) and address the knowledge and skill requirements of the particular vacancy. The application form will provide for a degree of self-assessment on the part of the applicant against the criteria.

Third, the applicant may nominate referees that the Commission will contact as part of the consultation phase.

The secretariat will assess the application forms in this initial stage for completeness and objective qualifications, such as compliance with statutory requirements. The bureaucratic processes associated with the management of applications need to be efficient as well as thorough. Applicants need to be confident in the management of the process. In the United Kingdom some concerns have been raised of the overly bureaucratic nature of the application regime. This is a serious one and needs to be addressed by the Commission.

E Consultation

Consultation with interested parties about potential candidates for judicial office has historic, and in the case of the High Court statutory, foundations.⁹⁰ Judges have been consulted in the appointment process, either because they are regarded as the best assessors of the merit of prospective appointees or (particularly in the UK) because their central role is perceived to be an essential guarantor of the apolitical nature of appointments.⁹¹ Consultation is valuable when it has a clear rationale and scope. That should be to expand the range of prospective candidates and to provide evidence to the selection body about how candidates (and, in the outreach phase, prospective candidates) meet or fail to meet the selection criteria.⁹² It should be neither ritual nor deferential.⁹³ And the

⁹⁰ Famously Sir Garfield Barwick was critical of the degree of consultation that Mr Whitlam accorded him when selecting Justice Lionel Murphy. Reportedly Whitlam met with Barwick to discuss possible replacements for the vacancy left by the sudden death of Sir Douglas Menzies Murphy's name 'was not mentioned'. When Whitlam next contacted Barwick he announced that 'Murphy as agreed to accept the appointment'. Garfield Barwick, *A Radical Tory* (1995), 232-3.

⁹¹ The latter point is put forcefully by the UK Judges' Council response to the consultation papers on constitutional reform, available at <www.dca.gov.uk/judicial/pdfs/jcresp.pdf> [71].

⁹² In considering the use to be made of judicial panel members' personal knowledge of candidates it was recently stressed by the Commission for Judicial Appointments in the UK that use can be made of such knowledge subject to the all-important caveat that it is 'clearly evidence-based': The Commission for Judicial Appointments, *The Commissioners' Review of the High Court 2005 Competition: Report to the Lord Chancellor*, above n 46, [8.51]. See also [8.18]-[8.28].

selection process should rely on evidence disclosed through that process and not on rumour and supposition.⁹⁴

Once the concept of merit is disaggregated into its constituent components, it is clear that judges require a greater range of skills than those traditionally associated with the bar, from which the great majority of judges have been drawn. Moreover, many of those skills, such as industry, a capacity to listen courteously and to understand others,⁹⁵ are themselves generic and can be found in other parts of the profession. It is therefore important to recognise that assessment of candidates for appointment should not take into account a wider range of evidence than the views of the senior judiciary on the forensic and other courtroom skills of the barristers who appear before them.

The new Judicial Appointments Commission for England and Wales was established following consistent complaints about the transparency and accountability of the existing process which ‘relied to a large extent on secret “soundings” of the senior judiciary’.⁹⁶ The concern with secret soundings is that they work in favour of those more visible to the senior judiciary and establishment and allow the introduction of factors outside the advertised criteria for a given judicial position, to the detriment of a more diverse judiciary and public confidence in the appointment process.⁹⁷ The Commission for Judicial Appointments in England and Wales (the JCA’s predecessor) argued that the concerns arising from secret soundings, or reliance on personal knowledge of the applicants more generally, can be addressed by ensuring that such input is supported by detailed examples and is relevant to the needs of the post, and is available in a timely manner to those assessing candidates.⁹⁸ It therefore recommended that the practice of seeking input from the senior judiciary at a late stage in the selection process should cease as:

‘[i]t reinforces perceptions that judicial appointments are in the gift of the Senior Judiciary and that the system is susceptible to patronage. Judicial intelligence about the extent to which candidates fulfil the relevant criteria/

⁹³ The detrimental effects of a deferential approach to intervention by the senior judiciary is discussed in The Commission for Judicial Appointments, *The Commissioners’ Review of the Recorder 2004/05 Competition (Midland Circuit): Report to the Lord Chancellor* (2005) [3.37].

⁹⁴ On the need to determine whether rumours adverse to a candidate’s selection are substantiated when they first emerge, rather than later in the practitioner’s career see: *The Commissioners’ Review of the Recorder 2004/05 Competition (Midland Circuit)*, above n 93, [3.37] (recommendation 11).

⁹⁵ Mason, above n 22, 10..

⁹⁶ Cheryl Thomas, The Commission for Judicial Appointments, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (2005), available at: <http://www.cja.gov.uk/files/Judicial_Diversity_Review_Report_PDF.pdf#search=%22relied%20to%20a%20large%20extent%20on%20secret%20soundings%20of%20the%20senior%20judiciary%22>, section 1.3. See also *The Commissioners’ Review of the High Court 2005 Competition*, above n 83. For empirical findings attesting to suspicions in the pool of potential judicial applicants relating to the use of secret soundings in the judicial appointment process: see Centre for Research in Equality and Diversity, *Assessment Centres for Judicial Appointments and Diversity: Research Report for the Department of Constitutional Affairs* (2006) 11, 58, 62–3.

⁹⁷ The Commission for Judicial Appointments, *Report of the Commissioners’ Review of the Circuit Judge 2005/2006 Competition* (2006) [4.17]–[4.23]. These comments were addressed to observations of senior judicial intervention late in the appointments process.

⁹⁸ *Report of the Commissioners’ Review of the Circuit Judge 2005/2006 Competition*, above n 97, para 4.23.

competencies should be collected earlier in the process and taken into account in a clear and transparent way.⁹⁹

Our model maintains consultation but provides for a more structured process by which it is undertaken. Unstructured consultation tends to be haphazard and counterproductive. In general consultation brings with it both strengths and weaknesses to the appointment process. The strength is that it provides evidence-based assessment of the respective qualities of candidates. The weaknesses are that there is a real risk of non-evidence based assessment being entertained and it tends to privilege the more visible candidates. Arguably this is the nature of the current consultation process in Australia. The risks are particularly acute when consultations seek to ascertain the candidate's substantive legal or political views or involve the political branches of government.¹⁰⁰ In 1913 when Prime Minister Hughes was considering appointing Piddington to a vacancy on the High Court, he asked Piddington's brother-in-law to sound out his views on the relation between Commonwealth and State powers. Having satisfied himself that Piddington was 'in sympathy with supremacy of Commonwealth powers' Hughes appointed him to the High Court. In the face of intense criticism to the effect that Hughes was seeking to stack the High Court, Piddington decided to resign on the grounds that he had compromised himself.¹⁰¹

Recent English experience suggests that some forms of consultation do not address the selection criteria of merit. For instance in the Commission for Judicial Appointments' Report on the 2005 High Court appointments it was noted that:

'One assessor commented that the quality of responses was improving, but it had started from a very low base. Much automatic consultee input was useless. Many more senior judges had done a better job than previously, even though some continued only to offer the odd word. Some consultees offered only comments, but not scores. Some gave only summaries which effectively produced a rank order, but without evidence. There were now both good and bad examples of consultees [sic] responses that could be used to guide future respondents.'¹⁰²

As has been the situation in the United Kingdom the process of consultation needs to be carefully managed. The Commission must ensure that consultations with traditional sources of advice are maintained and expanded. These 'automatic consultees' need to respond with evidence-based assessments of the candidates or their assessments should be ignored. The automatic consultees extend beyond the traditional sources of advice to ensure that less visible candidates are not excluded from the pool of applications.

The last issue to be considered with regard to consultation is the availability of the consultees' reports to the applicant. There are two competing principles in terms of their disclosure. Obviously transparency and procedural fairness would suggest that adverse assessments should be made known to the application, if

⁹⁹ *The Commissioners' Review of the Recorder Competition 2004/05 Competition (Midland Circuit)*, above n 93, [3.37] (recommendation 12).

¹⁰⁰ For a recent allegation of inappropriate probing of the political views of candidates for the judiciary see Misha Ketchell, 'Is This How the Australian Government Selects its Top Judges?' (3 July 2006), copy on file with the authors. For an expansion on related points on the potential for political patronage in the current process: see Davies, above n 13, 3-4.

¹⁰¹ Morris Graham, 'Piddington' in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia* (2001) 534.

¹⁰² *The Commissioners' Review of the High Court 2005 Competition*, above n 83, [6.5].

only for them to know of its existence. Alternatively, the fundamental need for candour and frank assessments of applicant suggests that they should not be disclosed to an applicant. On balance we recommend that reports not be made available to an applicant but that if the Commission proposes to take into account negative comment (supported by evidence) contained in such reports that it disclose the gist of the information to the applicant and afford him or her an opportunity to respond. Given that applicant can nominate referees or consultees and the assessments are to be evidence based against set criteria, there is a balance and degree of fairness accorded to the applicant.

F *Assessing candidates*

1 *Shortlisting*

At this stage it will be necessary to sift or shortlist applications to identify the candidates to be interviewed. Because of the numbers of applicants, the shortlisting may need to be carried out by the Commission's secretariat. If so, it should be carried out under procedures developed and monitored by the Commission. The shortlisted candidates should be those whose formal applications are rated most highly when measured against the selection criteria.

2 *Interviews by panels of the Commission*

Shortlisted candidates should be interviewed by panels composed of Commission members. A panel system is considered the most appropriate given the full Commission is too large and unwieldy, and its members too busy, to carry out all the interviews. Each panel should consist of one judicial member, one legal member and one non-legal member, with the non-legal member presiding.

Where there are large numbers of applicants or candidates, it may be difficult to assess their suitability for the particular position in the absence of an interview. Through the interview process 'the interviewing panel...[can] become acquainted with applicants and...assess their qualities against appropriate criteria'.¹⁰³

Interviews must be structured and targeted to assessing the candidate's claims against the selection criteria. There should be no room for discussion of the candidate's substantive legal or political views. Subject to these overriding principles, the Commission should develop and publish protocols for interviews that are in line with international best practice.

A formal interview process is an important element in assessing the candidate's claims against the selection criteria. '[E]ven in the case of candidates known by repute, [a formal interviewing process might well reveal] aspects of their character or qualities that might not generally be appreciated.'¹⁰⁴

Systematising the interview process, and divorcing it from the political branches of government, helps counter the idea some candidates are favoured or appointed because of the content of their private interview with Attorney-General.

¹⁰³ Sackville, above n 17, 142. See to the same effect the recommendations of *The Commissioners' Review of the High Court 2005 Competition*, above n 83, [8.49].

¹⁰⁴ Sackville, above n 17, 142.

3 *Assessment of skills – assessment centres*

The skills associated with judicial office, as both the United Kingdom and Australian literature highlights, travel beyond the mastery of the law. One means by which these skills, which are themselves within the disaggregated concept of merit, can be assessed is through practical exercises designed to test legal skills in realistic but hypothetical situations. In the United Kingdom assessment centres are used to test the ability of applicants to deal with a range of situations such as difficult litigants or sensitive situations.

Generally Australian, unlike the United Kingdom, has not had the widespread practice of part-time judges that acts as both a training ground and career path for potential appointments. In particular the use of barristers as Recorders or acting judges has not been viewed as in keeping with notions of judicial independence as practised in Australia. This absence suggests that assessment centres may provide a useful tool in the selection process.

We recommend the use of assessment centres as a method of selection of candidates. In particular where appointments are being considered for local or magistrates courts where a practical demonstration of skill may assist the selection committee. The same argument can be made for higher courts. What will dictate the use of assessment centres is a view by the Commission as to the best means of assessing applicants against the stated criteria. This may vary depending on the nature of the jurisdiction.

4 *Appointment by the whole Commission rather than a subset*

In England, selections for some courts are made by panels drawn from the Commission rather than by the whole Commission and more generally the Commission has can delegate the power to make selections to subpanels. So, for example, under sections 79 and 80 of the Constitutional Reform Act, selections for appointments as a Lord Justice of Appeal are made by a panel of four consisting of the Lord Chief Justice, or his/her nominee, a Head of Division or Lord Justice of Appeal designated by the Lord Chief Justice, the chairman of the Judicial Appointments Commission or his/her nominee, and a lay member of the Commission. We do not recommend this approach in Australia. The Australian commissions are smaller than the English Commission and the number of appointments to be made is much smaller. The practical issues involved in convening the whole commission are therefore much attenuated. There is also a benefit to having the perspectives of each of the members of the Commission involved in the selection process, particularly if different Commissioners have been involved in different interview panels. Each has something to contribute.

G *Recommending names*

Once the Commission has assessed prospective candidates against the criteria for the particular appointment, it should provide a shortlist of appointable candidates to the Attorney-General of the jurisdiction concerned. We recommend that this list contain three names. It should not contain just one name. This is a departure from the English model. There are two reasons. First, there will rarely be a uniquely 'best qualified' person. Secondly, appointment has a political component that the Commission is not qualified to assess.

The process that we recommend is an adaptation and simplification of the process used in the England and Wales under the Constitution Reform Act:

- The Attorney-General must either recommend that the Governor or Governor-General appoint one of the three candidates recommended by the Commission or require the Commission to reconsider its recommendation.
- If the Attorney-General requires the Commission to reconsider its recommendation, then he or she must recommend to the Governor or Governor-General that they appoint one of the three candidates subsequently recommended by the Commission or one of the three candidates recommended at the first stage. (The Commission may recommend the same candidates.)
- The Attorney-General may only require the Commission to reconsider its recommendations once. If he or she does so, he must provide written reasons to the Commission for his or her opinion that there is not enough evidence that the person is suitable for appointment.

Clearly this proposal operates as a constraint on the ability of government to reject candidates on political grounds. But it strikes an appropriate balance between the various principles outlined above. In particular it acknowledges the traditional accountability process of the Attorney-General as well as producing a shortlist of qualified individuals assessed and selected on merit.¹⁰⁵

The *Constitution* may be thought to present obstacles to this process applying to federal judicial appointments. We do not agree. Our model is consistent with the explicit constitutional requirement that appointments of federal judges be made by the Governor-General.¹⁰⁶ Appointments of federal judges will continue to be made by the Governor-General on the advice of his or her Ministers. It has been suggested that there is a further constitutional requirement implied by, but not expressed in, the text of the *Constitution*. The suggested implication is that the federal executive government not be constrained by legislation in its exercise of the power to recommend to the Governor-General who should be appointed. In our view, the suggested implication is implausible. As a matter of principle, all executive power is subject to legislative control (unless the *Constitution* is clearly to the contrary). That is the consistent pattern of several centuries of legal development during which executive power has been progressively brought under the control of the democratic branches of government. It is always a matter for the legislature whether to bring executive power under legislative control or to leave power in the hands of the executive, subject to political control through parliamentary mechanisms. Other commentators who have considered this question agree.¹⁰⁷

H Composition of the Commission

The model outlined in this paper has described a generic Australian Judicial Appointments Commission. While there may be some merit, in particular in terms of resources, of a single national appointments body there is no reason

¹⁰⁵ We do not recommend that the Attorney-General be permitted to appoint a candidate not recommended by the Commission: cf Williams and Davis, above n 76, 858-859.

¹⁰⁶ *Australian Constitution* s 72.

¹⁰⁷ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 520; George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983), 95; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 262-263.

why that should be the case.¹⁰⁸ It is likely that there will be Commonwealth as well as State and Territory commissions with slight variations between them. For instance some States may wish to graft onto existing bodies, such as the Judicial Commission of NSW, the appointments function. Further, as with many innovations within the Australian legal system, one State or the Commonwealth may wish to take the lead in establishing a appointments commissions.

The State and Territory Commissions would consist of three judicial members, three professional members and three 'lay' members. The judicial members would be the head of each of the State courts (the Supreme Court, the County Court or District Court, and the Magistrates Court or Local Court) or the next most senior member of the Court willing and able to serve.¹⁰⁹ Two of the professional members would be the President or Chair of the state bar association and of the state solicitor's association or their nominee. The third professional member would be a senior legal academic. The three non-legal members would be selected on the basis that they were suitably qualified to contribute to the work of the Commission. One of them would chair the Commission and is likely to have substantial direct experience of senior appointments processes.

The membership of the Federal Commission would correspond with the State and territory commissions. It would consist of three judicial members, three professional members and three 'lay' members. The judicial members would be the Chief Justices of the Federal Court and of the Family Court and the Chief Federal Magistrate, or the next most senior member of each Court willing and able to serve.¹¹⁰ Two of the professional members would be the President of the Law Council of Australia and of the Australian Bar Association or their nominee. The third professional member would be a senior legal academic. Again, the three non-legal members would be selected on the basis that they were suitably qualified to contribute to the work of the Commission and one would chair the Commission.

The first function of the commissions is to ensure that judicial appointments in Australia continue to be based on merit. Accordingly, a majority of members of the Commission must be legally qualified. These members, including three

¹⁰⁸ A national body could consist of the members of the State, Territory and Commonwealth Commissions. The constituent bodies would continue to be responsible for recommending appointments in their respective jurisdictions. The national body would be too large and too disparate to function effectively as an appointing body. (Of course, it is consistent with the abstract principles of federalism for a national body to appoint state judges: see eg the Canadian system. And in principle a small and workable national Commission could be established to make State appointments. However, this would be a substantial departure from the Australian federal judicial model and would not be consistent with the Australian federal system, whatever its attractions in (say) Canada might be.) The national body on our model would therefore be a body with no formal functions other than supervision of the shared secretariat (through an executive council), and monitoring and policy development at a national level.

¹⁰⁹ Separation of powers issues, most acute at the federal level but still relevant at the small-c constitutional level in the states, mean that a judge cannot be forced to serve; the preservation of the appearance of judicial independence suggests that the most senior available judge should serve, rather than the nominee of the Chief Justice.

¹¹⁰ It could be argued that the role of the Chief Justices or other members of their court might raise separation of powers issue. We are of the view that while it may be a novel exercise of a non-judicial function it is not incompatible with the holding of a judicial office. This is particularly the case given that Chief Justices have traditionally been consulted on potential appointments. Further the function being conferred is strictly confined, and while it is an advisory function it is not 'political in character' in the sense outlined in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. However, a judge appointed to such a non-judicial role must be free to decline appointment. Hence the possibility of appointment falling through to the most senior judge willing to serve.

senior judges, have direct experience of those aspects of merit related to legal expertise.

The commissions are also intended to ensure three subsidiary implications of the merit principle, that is, the principle that judicial appointments must be made on the basis of a particularised and disaggregated understanding of what constitutes merit.

- First, judicial appointments must not be made on the basis of the appointee's connections (or perceived connections) to government. They would fail in this aspect of their work if they themselves were appointed by government. Even if members were not captured by government, there would be a risk of that *perception* arising. Establishing an appointments commission whose members were appointed by government would not eliminate the political element of the appointments process but simply remove one step to the appointment of the appointments commission.
- Secondly, judicial appointments must not be made on the basis of the gender, racial, professional and social similarity between appointees and current judges. The risk of appointment on this basis – known in the literature as homosocial reproduction – has been demonstrated in many contexts involving appointment to high level positions, particularly where the selection criteria have not been particularised and disaggregated.¹¹¹
- Thirdly, judicial appointments must be made on the basis of evidence demonstrating those particulars and the Commission must be constituted in a way that is appropriate for assessing that evidence.

These three implications of the merit principle have consequences for the structure of the various Commonwealth and State and Territory commissions.

- A majority of members of the Commissions should be appointed *ex officio* rather than by the government. On our model, five of the nine members are therefore appointed *ex officio*.¹¹² (Some previous commentators have objected that *ex officio* appointment of legal members mean that they will appear to *represent* their organisation on the Commission. We recognise that such an appearance of representation would be undesirable. However, the alternatives – appointment by government or appointment by judicial members of the Commission – would compromise the appearance of independence from government or from the judicial members of the Commission.)

We considered whether it would be possible to have all the members of the Commissions appointed *ex officio*. For example, the Auditor General, Public Service Commissioner and Ombudsman in each jurisdiction would have skills and attributes that are useful in appointing judges: in particular, statutory and temperamental independence (which would attenuate but not eliminate the risk of capture of the process by government) and familiarity with appointment processes. However, their existing workloads would seem to make it quite impossible to have them as active members of appointment commissions.

- We also considered the United Kingdom model of having a double layer of appointments. Under such a model, the members of the first small panel

¹¹¹ For a brief survey of the literature, see Ryan A Smith, 'Race, Gender, And Authority In The Workplace: Theory And Research' (2002) 28 *Annual Review of Sociology* 509, 521-522.

¹¹² With some modification in the case of federal judicial officers to ensure that the appointment is consistent with the *persona designata* principle.

are appointed ex officio. They in turn appoint the members of the JAC based on nominations from the Judges' Council, consultations with the professional bodies and competitive selection of the lay members. In principle such a system would be desirable but is likely to prove unworkable especially in Australia's smaller jurisdictions.

- Judges should not constitute a majority of the members of the Australian commissions. Although judges must be members of commissions (because of their expertise in assessing some of the professional components of merit), the risks of homosocial reproduction – in effect capture of the appointments process by the judges – are too great for them to constitute a majority.
- For the same reason, the Chair of each appointment commissions should be a non-legal member.
- Non-legal members are required to contribute expertise vital to the selection process and not commonly possessed by legal professionals and judges. (In particular, non-legal members will have expertise in selection processes.) They are not there to merely endorse the opinions of the judicial and legal professional members of the commission. The criteria for appointment should be spelt out in statute highlighting the experience and skill desirable in a commissioner. These may include experience in high level selection processes as well as public or private sector management experience. It is desirable that the commission achieve gender balance as a whole.¹¹³
- The non-legal member who is to be Chair of the Commission should be chosen by the judicial and professional members of the Commission after consulting the Attorney-General. The remaining non-legal members and the academic member should be appointed by the Chair and the judicial and professional members of the respective commission.¹¹⁴ Once again we considered and rejected the United Kingdom model of a separate appointing panel.
- All members of the Commission are appointed on the basis of the skills and expertise that they bring to the appointments process. In particular, this is the rationale for including a senior legal academic. He or she is likely to have a long term view of developments in Australian and comparative law and judging; to have an understanding of trends in legal scholarship and legal education; to have a grounded view on what constitutes good legal writing; to understand methods for assessing legal knowledge and legal writing; and to have experience of appointments processes.
- We considered whether the commissions should include politicians, such as in the South African model and the Canadian model for Supreme Court appointments. For reasons that we have already canvassed, it is important that there be political accountability for the appointment of judges. However, in our view that is not best achieved by having (say) representatives of government and opposition on the appointments

¹¹³ If a jurisdiction adopted an independent evidence-based process for appointment to statutory offices and government bodies, appointments to the Commission in that jurisdiction should be brought within that framework, rather than remain the responsibility of the Commission itself.

¹¹⁴ Once the Chair of the Commission (one of the lay members) is appointed, he or she should be a member of the panel appointing the other lay members and the legal academic.

commission. Although this would ensure a measure of accountability,¹¹⁵ it would increase the risk of the process leaking and would likely lead to a politicisation of the appointments process and a blanding out of the actual appointments made. Agreement between the political parties to have turn about in selection of judicial officers would only further institutionalise the politics of appointment.

The legal academic and the lay members of Commissions would be appointed for five year terms with the possibility of renewal for a further five year term. However, the first three lay members would be appointed for three, four and five year terms so that the end of their terms are staggered and the experience they develop is not lost all at once.

I *Secretariat*

Even in the smallest Australian jurisdictions, the appointments commissions will require the support of a secretariat. In the United Kingdom, the JAC has a 105 member secretariat. The United Kingdom is three times larger than Australia and the JAC appoints members of a much larger range of tribunals. Nonetheless, the total resource demands of the system that we are proposing should not be underestimated. Ideally, there would be a national secretariat servicing each of the Australian jurisdictions. That would give it a critical mass that enabled efficient resourcing and a sufficient volume of work to operate as a standing body. Without such centralisation, there is a risk of inefficiency due to small size and only occasional work. In small jurisdictions, the Secretariat may be absorbed back into the Attorney-General's Department or the Supreme Court, losing the independence that the system is designed to foster. As noted above, there are good federalist reasons for allowing the Commonwealth and the States and Territories to proceed independently of each other. That said, it would be possible for the Commonwealth or the States and Territories to share secretariat facilities while maintaining their own commissioners.

J *Audit and accountability*

The Commission is designed in part to enhance accountability in judicial appointments. It too must be subject to appropriate accountability mechanisms.

- It should publish the subcriteria into which it disaggregates the merit criterion.
- It should provide to the Parliament an annual report and a report on each appointments. These reports should contain an evaluation of the Commission's outreach activities and of the operation of the selection process.
- It should establish procedures for dealing with complaints by applicants about the operation of the selection process. The English experience with the Commission for Judicial Appointments has shown the value of such complaints in improving the operation of these processes.
- Applicants should also be able to lodge complaints with the Ombudsman. (In England, the CJA used to fill this role; it is now to be filled by the Judicial Appointments and Conduct Ombudsman. In jurisdictions with a Judicial Services Commission or Judicial Conduct Commission, it may fill

¹¹⁵ Allan, above n 41,,114-5; and generally FL Morton, above n 45.

this role.) Thought needs to be given about whether the Ombudsman should have unfettered access to the Commission's files or whether the interests of confidentiality require some restriction on access. We would be very careful before agreeing that there was a need for any such restriction.

- The FOI regime applying to the Commission (and parallel provisions restricting parliamentary access to documents) will need to be carefully designed to protect the confidentiality of applications, references, interviews and assessments, as well of the Commission's deliberations, while allowing for effective scrutiny of the Commission's processes.

VII RISKS

The model set out in this article is based on experience in comparable overseas jurisdictions, in particular in England and Wales (and to some extent Scotland). Although the Judicial Appointments Commission itself is very new, it is a carefully thought through development of earlier processes. However, as with any innovation in constitutional design, this model presents some risks. On balance, we do not think that any of the following risks, identified in the literature here and overseas, significantly undermine the model. Our reasons are as follows.

Some excellent candidates will not put their names forward. This has been identified as a risk of an appointments commission model by the current federal Attorney-General: An appointments commission process, 'while less public than the American system, has similar drawbacks in that good candidates, people of real talent, unassuming achievers would not allow their names to go forward because of concern about the Commission acting as a form of Star Chamber.'¹¹⁶ As we have noted above, this serious concern presents the need to change the culture surrounding appointments. We have argued that, on balance, a clear and rigorous assessment of merit outweighs this concern.

Abrogates the responsibility of the executive for appointments.¹¹⁷ This criticism is misplaced. A recommending appointments commission does not take over the executive's responsibility for appointments. It recognises that appointments are made by a political branch of government and that the political branch is ultimately responsible for those appointments. What the model insists is that there be a process that is transparent and evidence-based. Rather than attempting to remove politics from the process it strengthens the accountability measures by reducing the politicisation of the judiciary.

Some excellent judges would be unappointable under this model. Would this model lead to bland courts and prevent governments from taking steps to reinvigorate courts with atypical appointments who may broaden the ranks of the judiciary? Perhaps it is unlikely that a former politician appointed would be appointed under this model. The model may mean the end of appointments such as Sir Garfield Barwick or Lionel Murphy to the bench. However, continuing the counterfactual inquiry, it most likely would not have precluded Sir Samuel Griffith, Sir Edmund Barton, Sir Richard O'Connor, Sir Isaac Isaacs or H B Higgins from being appointed. Those appointments would be justified on the basis of the disaggregated merit principle. The point is that 'colourful'

¹¹⁶ Ruddock, above n 10, [56].

¹¹⁷ Ibid [66]-[67].

appointments *can* be made under this model.¹¹⁸ The risk of the Commission putting forward only compromise candidates is attenuated by having it recommend three names for each vacancy rather than a single name.

It would simply displace the politics of appointments into the appointment of the Commission. This is an entirely appropriate consideration. A Commission would be pointless – perhaps positively harmful – if it displaced the political dimension of appointments and diffused the line of accountability for appointments. Our proposal squarely aims to address this risk. The Commission is a recommending Commission rather than an Appointing Commission. A majority of its members are appointed *ex officio*. However, some of its members are appointed as a result of holding elective offices in professional organisations. It is unlikely that these positions will be subject to capture solely on the basis of the role of the incumbent in judicial appointments.

It would remove political accountability for appointments. Again the point has been made that the model does not seek to end political accountability. The Attorney-General will have responsibility for the choice of the three names provided to him or her. They will make the recommendation to the Governor-General. Moreover, if the Attorney-General rejects the advice of the commission that will be reported.

It is not needed. The volume of appointments is not at all comparable with the United Kingdom. According to Attorney-General Ruddock in 2001-2 the Lord Chancellor made over 900 appointments whereas the Federal Government in Australia made just six.¹¹⁹ This criticism misses the point of the reform. It is not to reduce the workload of the Attorney-General's department. It is to subject appointments to an independent, transparent and evidence based process.¹²⁰

¹¹⁸ Cf James Crawford. *Australian Courts of Law* (1st ed 1982) 53 quoted in George Winterton, 'Federal Judicial Appointments in Australia' (1987) 16 *Melbourne University Law Review* 185, 208.

¹¹⁹ Ruddock, above n 10 [63].

¹²⁰ Recent figures taking into account the expansion of the Federal Court and Federal Magistrates Court suggest that it is likely that there will be 8-12 appointments to the Federal Court, Family Court and Federal Magistrates Court each year.