



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

Judicial Appointments Forum
Bar Association of Queensland Annual Conference
Sheraton Mirage, Gold Coast
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CHECK AGAINST DELIVERY

[Acknowledgements]

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

[Other Acknowledgements]

- Chair – The Hon Justice John Byrne RFD, Supreme Court of Queensland
- My colleague, the Minister for Human Services
Senator Joe Ludwig
- The Queensland Attorney-General and Minister for Justice, Senator Kerry Shine

- Queensland's Shadow Attorney-General and Minister for Justice, Mark McArdle MP
- The Hon Geoff Davies AO QC, formerly of the Queensland Court of Appeal
- Sandra Pearson, from the Women Lawyers Association of Queensland
- Distinguished members of the judiciary and the legal profession
- Ladies and Gentlemen

[Introduction]

1. It's a pleasure to be here today to address such a distinguished audience wrestling with such an important topic.
2. All of us here today are familiar with the many calls over recent years – not only in Australia but overseas – for greater transparency in judicial appointments processes.
3. Some of those calls come from within the group of distinguished speakers here today.
4. As Attorney-General I have responsibility for responding to those calls.
5. But why are these calls being made?
6. In essence, it is because the process for selecting federal judges and magistrates has been ad hoc. It is fair to say that consultation has not always been as transparent and extensive as it could be.
7. This means the public has to take it on trust that appointments are made on merit and suitability rather than personal or political affiliation and that

consultation beyond a small circle of insiders has occurred.

8. It is, therefore, unsurprising that there is so much interest and debate about this topic. This reflects a healthy interest in our democratic institutions.
9. Judges administer justice.
10. The impartial and competent administration of justice is fundamental to the rule of law.
11. The rule of law underpins our democratic freedoms.
12. Courts are responsible for the administration of justice in accordance with the separation of powers enshrined in the Constitution.
13. The role of the executive, in choosing who will be responsible for ensuring the administration of justice according to law, impacts directly on public confidence in the courts and their decisions.
14. Selecting suitable candidates for appointment is an enormous responsibility. And it is one that I believe cannot properly be discharged without broader consultation and greater transparency.

15. Let me make it clear at the outset: I am not advocating that the system be reviewed because I am dissatisfied with the quality of current and past members of the federal judiciary – Australia’s judiciary is of the highest standing.
16. While at the end of the day responsibility for appointments must rest with Cabinet, I do think we can make improvements to enhance transparency and public confidence in the administration of justice. How those touchstones of increased transparency and greater consultation will be achieved is likely to differ from court to court. In this speech, I will outline a range of possible options for making what are very significant appointments and then ask for your feedback.
17. I should note that this is not an issue which is confined to the courts. The Rudd Labor Government is also committed to strengthening transparency and merit based selection in senior public service appointments. My colleague the Special Minister for State has already announced

new arrangements for appointments of agency heads and statutory officers working within or closely with public service agencies, delivering on our election commitment of improved government accountability.

[Reasons for changing the current system]

18. The mystery surrounding the current judicial appointments process and controversy over past appointments has two negative consequences.
19. First, it can tarnish or detract from the honour of being appointed to judicial office.
Second, at a broader level it can diminish public confidence in the courts and the justice system.
20. I am committed to reviewing this process to ensure:
 - greater transparency and public confidence in the process
 - that all appointments are based on merit and suitability, and
 - that everyone who has the qualities necessary for appointment as a judge or magistrate is fairly and

properly considered – whether they are barristers, solicitors or academics, and whether or not they are well known to government. This will increase the likelihood of greater diversity in the Government’s appointments as well as ensuring their quality.

21. Australians rightly demand that justice should be administered ‘without fear or favour’. It is just as important that judges and magistrates should be *seen* to be *appointed* on a similarly impartial basis.
22. Today I would like to outline some options on how these objectives can be achieved in the Australian federal context. And I invite further discussion and input from the profession, the public and my colleagues on this important issue.

[Ways to achieve greater transparency]

23. The process by which judicial appointments can be made ranges from creating an independent appointments commission to select judges, to leaving the task to the executive.
24. The United Kingdom has adopted the first approach.

25. The independent Judicial Appointments Commission recommends to the Lord Chancellor names of suitable candidates for appointment to most of the courts and tribunals of England and Wales.
26. The Lord Chancellor must appoint someone from the list drawn up by the Commission.
27. The approach that currently exists within Australia is more akin to the second approach – where the task is one solely for the executive.
28. The previous government supported this approach. The previous Attorney-General said he did so on the basis that the executive is responsible to the Parliament for the appointments it makes and, through that, is accountable to the Australian people.
29. I agree that governments should be held accountable for the quality of the judicial appointments made during their watch.
30. However that does not mean that we should not strive to improve the transparency of the system, reassure the public that appointments are being made

on merit and enhance public confidence in the administration of the law.

31. In considering how to improve our selection process, I have been greatly assisted by the wealth of literature on this topic.
32. Numerous commentators have proposed particular models for Australia that are worthy of consideration.
33. A number of comparable jurisdictions overseas have already taken steps to enhance the transparency of their judicial appointments processes.
34. We have the good fortune of being able to study those practices and to consider what is most suited to the Australian context.
35. I do not necessarily agree that a system that has been adopted in one country can be imposed upon another.

I do not, for example, support a US-style process of Senate ratification for Australia.

36. But we can certainly learn a lot from other jurisdictions, and use that information to inform our debate.

[Upcoming appointments to the Federal Magistrates Court]

37. I am currently reviewing the procedures for appointments to all the federal courts.

38. However, I have already been presented with an opportunity to take steps to increase transparency in the appointment process for federal magistrates.

39. For these immediate appointments I have taken the view that the Government should conduct a broad consultative process to identify people who may be suitable for appointment.

40. Public notices appeared in *The Australian* and the *Financial Review* on the 1st and 2nd of February and again in *The Australian* on 9 February, seeking expressions of interest and nominations for appointment as a federal magistrate in Brisbane, Sydney, Melbourne, Hobart and Adelaide.

41. People have been invited to submit expressions of interest and nominations by 29 February.
42. I have written to a number of bodies, seeking the names of people they consider to be eminently suitable for appointment to the Federal Magistrates Court.
43. This process of consultation is broader than has occurred in the past and includes not only:
- the Law Council of Australia
 - the Australian Bar Association
 - the Law Societies And Bar Associations of each State and Territory
- but also:
- Deans of Law Schools
 - Australian Women Lawyers
 - the National Association of Community Legal Centres, and
 - National Legal Aid.

44. Appointment criteria have been published on my Department's website. To be considered for appointment, a person will need to show that he or she possesses the following attributes to a high degree:

- legal expertise
- conceptual, analytical and organisational skills
- decision-making skills
- the ability to deliver clear and concise judgments
- the capacity to work effectively under pressure and to work across several areas of the Court's jurisdiction
- a commitment to professional development
- interpersonal and communication skills
- integrity, impartiality, tact and courtesy, and
- the capacity to inspire respect and confidence.

45. I will establish a selection panel to assess applications and nominations against the criteria.

46. The selection panel will be made up of:

- The head of the court or an experienced member of the court
- A retired judicial officer, and
- A senior official from my department.

47. The selection panel will assess applications and nominations against the published appointment criteria and develop a shortlist of suitable candidates.

48. For appointments to the Federal Magistrates Court, there will generally be an expectation that short-listed candidates will have an opportunity to meet with the selection panel and put forward their claims to appointment.

49. Following this, I have requested that the panel provide me with the names of up to five highly suitable candidates for each position.

I expect to propose appointments to the Government from among those candidates.

[Different courts, different considerations]

50. The process I have outlined for the immediate appointment of federal magistrates is one option available to improve transparency.
51. As I indicated earlier, how increased transparency and greater consultation are best achieved may differ between courts.
52. For example, as I said a moment ago, for appointments to the Federal Magistrates Court, the selection panel would normally meet with short-listed candidates.
53. But for appointments to the Federal Court and Family Court, the panel considering a particular appointment might be better placed to decide whether it would be assisted by face-to-face meetings with candidates.
54. The reason a different approach might be adopted when it comes to interviews is that federal magistrates are selected from a much larger pool of potentially suitable candidates.

55. Candidates for the Federal Magistrates Court are generally less well-known and it can be more difficult, in the absence of face-to-face meetings, to assess the comparative claims of candidates. It is unrealistic to expect members of the selection panel to know each and every candidate.

56. Indeed, it would be fairer on these short-listed candidates if they are given the opportunity to personally present their claims. The reality is that the skills required to be an effective judicial officer are different from those required to in other areas of legal endeavour. Many have found the transition difficult. It is essential that judicial officers have the right temperament and character for the work. Success in professional practice or in or academia does not guarantee that a person will make an effective judicial officer.

A judicial officer must be able to control proceedings while remaining impartial, courteous, attentive and empathetic.

He or she must command respect.

The judicial officer's independence must be unquestioned.

In the absence of personal knowledge, face-to-face meetings can present an opportunity to ascertain whether candidates possess these necessary qualities.

57. I should stress that if face to face meetings were held by the selection panel with candidates, this would never be a political vetting process.

58. In short, I am hopeful that a more consultative process will produce judicial officers of competence, with a balanced and courteous temperament, a solid work ethic and an ability progress through caseloads in a timely and considered way. I am interested in people who can provide justice to individuals while meeting the broader goals of our justice system.

[Appointments to the High Court]

59. So far I have discussed a possible alternative process for appointments to the Federal Magistrates Court, the Family Court and the Federal Court. However, there is much to be said for the view that the same

should not necessarily be adopted for the High Court.

60. I am firmly committed to undertaking extensive consultation on High Court appointments. Section 6 of the High Court of Australia Act requires consultation with State Attorneys-General. It is unquestionably possible to have a much broader consultation process than that mandated by the Act to ensure that the best possible candidate is identified.
61. However, there is room for argument about the appropriateness and applicability of other aspects of the proposed process that I have outlined in relation to the selection of federal magistrates.
62. I have previously made clear my view that face-to-face meetings with candidates are inappropriate for appointments to the High Court.
63. As Chief Justice Gleeson has observed, most of the candidates for High Court appointment are likely to be serving judges. They are already well known to

the Government, the judiciary, the legal profession, and, often, the general public.

64. However, I strongly encourage you to provide your views on this matter and judicial appointments generally.

[Judicial Appointments Commission]

65. I know a number of people have speculated about whether the Government would introduce a formal judicial appointments commission. This is another possible approach open to the Government.

66. Like many of you here today, I have watched with interest the recent establishment by the United Kingdom of such a body.

So far the UK experience seems mixed.

There have been criticisms that it is overly bureaucratic and the whole appointments process is unreasonably intrusive as well as taking too long.

As a result, concerns have arisen that the best candidates have not put themselves forward and there have been delays in the appointment of judges.

67. However, I will continue to follow with interest the developments in the United Kingdom and elsewhere and again I would welcome your views on this option.
68. Naturally, setting up a whole new government agency for the purpose of assisting with judicial appointments would not be a step to be taken lightly. There may well be as much controversy associated with selecting the selectors as with the judicial appointments themselves.

[Conclusion]

69. As I mentioned at the beginning of my speech, I envisage that the judicial appointments process will be shaped over time in light of the Government's experience in implementing the procedures I have outlined today in relation to federal magistrates.
70. I am firmly wedded to the principles of greater transparency, selection of candidates on merit only and ensuring greater diversity in appointments where possible.

However, I am not wedded to the detail of how this may occur.

71. I am keen to advance these ideas over the next few months and encourage you to put forward your ideas.

ENDS