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Review of the Judicial Appointments Process in Queensland

Thank you for the opportunity to make a submission on the Discussion Paper for the Review of the Judicial Appointments Process in Queensland. We are writing this submission in our capacity as the Directors of the Judiciary Project in the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the content and views expressed in this submission.

Our submission responds to the four questions posed by the Discussion Paper after some brief opening contextual remarks.

A Judicial Appointments Reform – The Evolution of the Debate

The present review takes place against a long history of debate about judicial appointments reform in Australia. Calls for the establishment of a judicial appointments commission go back as far as 1977 and to no less a figure than the Chief Justice of Australia at the time, Sir Garfield Barwick.¹ The topic of appointments reform also attracted the attention of Barwick

¹ Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 494.

CJ's successors,² but was the subject of particular judicial and academic interest in the first decade of this century.³ A major catalyst for that interest was the reforms made to the selection of judges for appointment to the courts of England and Wales legislated in the *Constitutional Reform Act 2005* (UK), including the establishment of the Judicial Appointments Commission ('the JAC').

Accordingly, it was understandable for Justice Ronald Sackville to remark in 2007 that the 'parameters of the debate about the judicial appointments process have now been well defined'.⁴ However, things have not been simply static in the subsequent years.

There have been recent, high-profile controversies over particular appointments in Queensland and the Northern Territory that have exposed the weaknesses in the traditional model of purely executive discretion and had the potential to undermine public confidence in the judicial arm in both jurisdictions. Due to their very public nature, those episodes are sufficiently familiar so as to not require canvassing in this submission.

A number of important developments are omitted or their significance is not fully considered in the Discussion Paper. We draw the Review's attention particularly to developments that have emphasised the pursuit of diversity in judicial appointments in relation to gender, ethnicity and cultural background, geography and professional background and experience.

In summary, the key domestic and international developments since the initial debates of 2005-2008 that we believe should be emphasised in the Review's consideration of reform include:

2008 The reform of federal judicial appointments (excepting the High Court of Australia) by Attorney-General Robert McClelland (the 'McClelland reforms'). The three pillars of that reform were:

- (1) the articulation of publicly available criteria;
- (2) the advertisement of vacancies and call for nominations; and
- (3) the use of an advisory panel to make recommendations to the Attorney-General.⁵

At the same time, the reforms had the objective of 'pursuing the evolution of the

² Sir Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 7, Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion – Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 7.

³ See notably, Sir Gerard Brennan, 'The Selection of Judges for Commonwealth Courts' in Department of the Senate, *The Senate and Accountability*, Papers on Parliament No 48, (January 2008) 1; Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295; Justice Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117; Justice Ronald Sackville, 'The judicial appointments process in Australia: Towards independence and accountability' (2007) 16 *Journal of Judicial Administration* 125; George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163; and Geoffrey Davies, 'Appointment of Judges' (Speech delivered at the QUT Faculty of Law Free Lecture Series, Banco Court, Brisbane, 31 August 2006) available at <<http://www.webcitation.org/5Xg5ok9jv>>.

⁴ Sackville, 'The judicial appointments process', above n 3.

⁵ Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37 *Sydney Law Review* 187, 196-98; H P Lee, 'Appointment, discipline and removal of judges in Australia' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27, 29-30.

federal judiciary into one that better reflects the rich diversity of the Australian community'.⁶ The government specified gender, geography, professional background and experience, and cultural background as relevant forms of diversity.

- 2009 The recommendations of the 2009 Senate Legal and Constitutional Affairs References Committee inquiry on *Australia's Judicial System and the Role of Judges*, which endorsed the McClelland reforms, and indeed recommended their extension in some respects.
- 2010 The Victorian Coalition government's abandonment of the Victorian Labor government's practice of advertising all judicial positions, including that of the Chief Justice. During its term in office, the Victorian Coalition government did not advertise or call for expressions of interest ('EOI') for any appointments. Since returning to office in 2014, Labor has instituted a standing call for EOI in judicial appointment on its Courts website.
- 2013 The abandonment of the McClelland reforms by the Abbott government and the reversion to an entirely opaque process. This signalled an apparent breakdown in political consensus on federal appointment processes that had been evident as recently as the 2009 Senate Inquiry report.⁷
- 2013 In the United Kingdom, the *Crime and Courts Act 2013* (UK) amended the judicial selection process to introduce a new requirement to the provision that requires the Judicial Appointments Commission to appoint 'solely on merit'. The amendment introduced a 'tie-break' or 'tipping point' provision that allows the JAC to recommend a candidate to improve diversity where there are two candidates of equal merit.⁸ The *Crime and Courts Act 2013* also reformed the composition of selection panels for some specific senior judicial appointments and devolved a lot of the legislative detail on the appointments system to new delegated legislation.
- 2014 The review of appointment processes in the Northern Territory, headed by former South Australian Chief Justice, John Doyle QC ('the Doyle Review').⁹ The Doyle Review recommended the adoption of a protocol, central to which was the establishment of an Advisory Panel, which recommends suitable candidates to the Attorney-General (and Cabinet) 'having regard only to considerations of merit'. However, it also observed that the Cabinet, in deciding within the recommended candidates, may legitimately take into account factors such as specialist skills, gender balance and diversity of background.

⁶ Attorney-General's Department, Australian Government, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (April 2010) 1.

⁷ See further, 'Dreyfus v Brandis: Federal Election Q&A' (2013) 87(7) *Law Institute Journal* 18, 19.

⁸ See further Graham Gee and Kate Malleson, 'Judicial Appointments, Merit and the Equal Merit Provision' *UK Constitutional Law Blog*, 6 May 2014, <<http://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision/>>.

⁹ Hon John Doyle AC QC, Julie-Ann Schafer and Michael Grant QC, *Review of the Processes for the Appointment of Judicial Officers in The Northern Territory*, December 2014.

- 2015 The March announcement by the Premier of Victoria that his government will meet a 50 per cent quota for the appointment of women to the bench in that state.¹⁰
- 2015 A report published by the United Kingdom’s Bingham Rule of Law Centre in July providing a comparative analysis of best practice that enables comparison of Australian appointment practices with those across the Commonwealth group of nations.¹¹

From our consideration of these developments in Australia and overseas, we make two observations at the outset. The first is to highlight the general deficiency of current Australian practices in comparison with internationally recognised standards. The second is to emphasise the necessity of addressing judicial diversity in any reform proposal.

A *Current Australian Practices and International Standards*

As is obvious from the Discussion Paper’s extensive drawing upon the Judicial Conference of Australia’s April 2015 study,¹² beyond the unfettered discretion of the Attorney-General in selecting a name to take to Cabinet, there is little consistency across the nine Australian jurisdictions (Commonwealth, states and the two mainland territories) as to how persons are selected for appointment to the judiciary.

In addition, the JCA report acknowledges that ‘the situation is always fluid and can change, for example with a change of government’.¹³ The developments that we have outlined at the commencement of this submission, particularly in relation to the abandonment of the McClelland reforms and the changes in the Victorian processes between 2000-2015 demonstrate the vulnerability of appointment processes across all Australian jurisdictions to changes in government, confirming a partisan volatility to the topic.

Further, the instability of process makes it difficult for legal professionals and academics – let alone citizens – to learn how judges are appointed, and thus foster understanding – and potentially confidence – in the system. This is made clear by comparing the three comparative surveys of appointments in Australia that have been published since 2012.¹⁴ Each provides different information as practices alter in the states and territories. This problem is also evidenced by the amount of basic information that is described simply as ‘unknown’ in the inter-jurisdictional comparison table in Attachment 2 of the Discussion Paper. Even accepting that practices need not be identical across the different jurisdictions of a federal system, the present levels of inconsistency, instability and lack of publicly available

¹⁰ Daniel Andrews, Speech presented at State Labor Conference 2015, 28 March 2015, available at <<http://www.premier.vic.gov.au/speech-state-labor-conference-2015>>. For discussion, see Andrew Lynch, ‘Judicial gender diversity in Australia – can we talk about quotas’ on AUSPUBLAW (9 June 2015) <<http://auspublaw.org/2015/06/judicial-gender-diversity-in-australia-can-we-talk-about-quotas/>>.

¹¹ Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law)*, The British Institute of International and Comparative Law, 2015 (‘Bingham Report’).

¹² Judicial Conference of Australia, *Judicial Appointments: A Comparative Study*, April 2015

¹³ Ibid, 101.

¹⁴ Ibid; Lenny Roth, ‘Judicial Appointments’ (Briefing Paper No 3, Parliamentary Library, Parliament of New South Wales, 2012); and Doyle et al, above n 9.

information about how judges are appointed in this country can hardly be viewed as satisfactory and likely to promote public confidence in government processes.

It is also important to emphasise that collectively the jurisdictions of Australia have fallen behind international practice. The Bingham Report identifies ‘best practice’ against a set of principles agreed upon by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting in 2003.¹⁵ Those principles provide that judicial appointments should be made ‘on the basis of clearly defined criteria and by a publicly declared process’.¹⁶ Queensland clearly fails to satisfy this basic standard – but it is hardly alone amongst Australian jurisdictions in that respect. Twenty years ago, Sir Gerard Brennan, as Chief Justice of Australia, was an initial signatory to the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. Article 16 provides:

In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.¹⁷

The Beijing Statement is seen as particularly significant given that ‘the majority of Commonwealth jurisdictions with an executive-only appointment systems are located’ in the Asia-Pacific region.¹⁸ However, two decades on, arguably only New South Wales amongst Australian jurisdictions comes close to the aspiration in Article 16.

Then there is the question of where responsibility for appointments lies. The Bingham Report reveals that Australia is in a minority – just 18.7 per cent (or 9 out of 48) – of Commonwealth jurisdictions in which the executive still has sole responsibility for making appointments to superior courts.¹⁹ The other eight Commonwealth jurisdictions in which judges are selected by the executive alone are Bangladesh, Barbados, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore and Tuvalu.²⁰ In all the rest either a judicial appointments commission or the legislature has some say in selection.²¹

Even within the small group of Commonwealth countries in which judicial appointments remain exclusively in the province of the executive, Australia’s processes are exceptional for their opacity and informality. Canada and New Zealand, for example, utilise processes or protocols under which the government receives advice from an advisory committee or may make up a shortlist in consultation with the senior judiciary.²² In the Australian setting, only in Tasmania does that occur for all judicial appointments.

¹⁵ Commonwealth Heads of Government, *Commonwealth Latimer House Principles* (Abuja, 2003), Principle IV – Independence of the Judiciary; available at: <<http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>>

¹⁶ Ibid.

¹⁷ LAWASIA, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, 19 August 1995, accessible at <<http://lawasia.asn.au/objectlibrary/147filename=Beijing>>.

¹⁸ van Zyl Smit, above n 11, 18.

¹⁹ Ibid 16.

²⁰ Ibid.

²¹ See further, Jeffrey Jowell, ‘The Growing International Consensus in Favour of Independent Judicial Appointment Commissions’ in Jeffrey Jowell and Graham Gee (eds), *Judicial Appointments – Balancing Independence, Accountability and Legitimacy*, Judicial Appointments Commission, (London, 2010) 1, available at: <https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/ja_essay.pdf>.

²² Ibid 18-19.

In short, arrangements throughout Australia for the appointment of the judiciary may fairly be described as wanting. Although some states, notably New South Wales, Victoria and Tasmania, as well as the Australian Capital Territory, currently employ more sophisticated processes for at least some court levels, these are vulnerable to changes in government, just as the reforms implemented by McClelland proved to be at the Commonwealth level. While the ACT has entrenched its processes through a delegated legislative instrument, rather than adopting a new set of guidelines or a protocol, this still remains subject to change by the Executive. In their retention of unfettered executive discretion over appointments, it is important to appreciate that *all* Australian jurisdictions are outliers from international trends to ensure appointments processes contribute to the better securing of judicial independence. Accordingly, we submit that the review should not limit itself to modelling any proposal for reform of Queensland judicial appointments on the current practices of any other Australian jurisdiction. There is a much greater opportunity here – one in which the state might very usefully lead the way for reform throughout the Federation.

B Judicial Diversity

In our submission it is necessary that the review give serious thought to how a reformed judicial appointments process will not only ensure an independent and high quality judiciary for Queensland but also one that is suitably diverse. It is widely acknowledged that public confidence in the courts and the legitimacy of judicial decisions are enhanced by those decisions being made by a judiciary that offers a fair reflection of the community. Diversity of expertise, professional background, and life experience generally, is also widely seen as a positive for the quality of judicial deliberation and decision-making. Diversity is thus best seen not as an alternative or addition to the concept of achieving ‘merit’ in judicial appointment, but as contributory and conducive to it.

Occasionally, state governments have used their unfettered power over judicial appointments in a concerted effort to diversify the judiciary – at least in terms of gender. Notable examples are appointments made by Queensland’s Attorney-General Matt Foley in the 1990s and Victoria’s Attorney-General Rob Hulls in the mid-2000s.²³ Despite the Foley appointments, the percentage of female judges in Queensland is not noticeably high across the Federation (it is 30 per cent – only South Australia and Western Australia are, each at 28 per cent, lower).²⁴ Although we should point out that female representation in the most senior legal positions is high in Queensland. Victoria is the leading jurisdiction with 37 per cent of its judicial officers being women. That is very likely to continue in light of the current Premier’s announcement of a 1:1 ratio for all new government appointments. Aside from Victoria, only New South Wales now publicly declares a ‘commitment to actively promoting diversity in the judiciary’.²⁵ Although we note that the Western Australian Solicitor-General, Grant Donaldson SC, who (unusually) has the function of recommending persons to the Attorney-

²³ Barbara Hamilton, ‘Criteria for Judicial Appointment and ‘Merit’’ (1999) 15 *Queensland University of Technology Law Journal* 10 (describing Labor Attorney-General Matt Foley’s appointments in Queensland in the late 1990s); Margaret Thornton, ‘Otherness’ on the Bench: How Merit is Gendered’ (2007) 29 *Sydney Law Review* 391, 398-99 (describing Labor Attorney-General Rob Hulls’ appointments in Victoria in the mid-2000s).

²⁴ Australian Institute of Judicial Administration, ‘Judicial Gender Statistics’, 4 March 2015, available at <<http://www.aija.org.au/online/JudgesMagistrates.pdf>>.

²⁵ Department of Justice, ‘Judicial careers and statutory appointments’, New South Wales Government, available at <<http://www.justice.nsw.gov.au/about-us/career-internships-volunteering/Judicialcareers-statutoryappointments>>.

General for appointment to the Magistrates, District and Supreme Courts of that State, includes diversity as a relevant criterion in doing so.²⁶

As already outlined above, the 2008 McClelland reforms laid considerable emphasis on the diversification of the judiciary – although it must be said, it was not entirely clear how this aspiration was brought to bear on the appointments process directly.²⁷ This may be contrasted with the recommendations of the 2014 Doyle Review in the Northern Territory, which was explicit:

Once persons have been identified who are suitable for appointment, having regard to considerations of merit, it will be necessary for the Executive Government to make a decision as between those persons. ... Cabinet may legitimately take into account other factors. These could include matters such as the specialist skills of the person in question, the needs of the court for particular skills, achieving balance in the age of those on the court to avoid a number of retirements based on age occurring at the same time, gender balance and diversity of background.²⁸

We strongly encourage the review not to see the issue of diversity as secondary or even superfluous. As this very brief history indicates, it is an issue of importance that inheres in the question of judicial appointment models. The objective of judicial diversity has a strong bearing on the key design choices to be made in reforming judicial appointments.

The experience in England and Wales, mentioned briefly above and discussed in more detail in response to Question 3, forcefully demonstrates this as the reforms made there a decade ago have been the subject of steady complaint – and successive independent, government and parliamentary reviews – on the basis of their failure to deliver quickly enough on a diverse judiciary. The 2013 amendments to that scheme were at least substantially in response to concerns that the over-representation of the senior judiciary in the new appointments system risked what Evans and Williams called ‘homosocial reproduction’,²⁹ – or put more simply, judicial cloning. Diversity is an issue that needs to be addressed as fundamental because it provides an important counterbalance to the other design principles of independence and accountability.

Once again, we state that the current review provides the Queensland government with an opportunity to devise a sophisticated and modern judicial appointments process for the benefit of the courts and people of that state, as well as providing a positive model for reform in the other Australian jurisdictions.

²⁶ Judicial Conference of Australia, above n 12, 50-51.

²⁷ A complaint raised by the 2009 Senate Committee: see Handsley and Lynch, above n 5.

²⁸ Doyle et al, above n 9, 13.

²⁹ Evans and Williams, above n 3, 324-25.

B Responses to the Discussion Paper Questions

Question 1: *Should there be a formal, and publicly available, procedure for the appointment of judicial officers in Queensland?*

Response: *Yes.*

Maintenance of the traditional opacity that surrounds the selection of judges is irreconcilable with the fact that judicial office is a public position in the third arm of government. The legitimacy and authority of the courts depends upon the community's acceptance of the exercise of judicial power. The latter is secured through public confidence in the quality of the persons selected for the bench and their independence from the executive and legislature. That requires a defensible process of judicial appointment. That process must be formal rather than informal and public rather than secret. A formal, publicly available procedure is consistent with international standards and practice, as evident from the Bingham Centre's analysis and Article 16 of the *Beijing Statement of Principles of the Independence of the Judiciary*.

As the question suggests, the requirements of formality and transparency are distinguishable but nevertheless linked. There is not, for instance, any benefit in a purely informal process about which the government claims to be transparent. The present Commonwealth arrangements are of this ilk. The Commonwealth Attorney-General's Department website informs the public: 'As the nation's first law officer, the Attorney-General is responsible for recommending judicial appointments to the Australian Government'.³⁰ This is an accurate description of the one formal aspect of how federal judicial appointments are made, but is of course meaningless as an explanation of how it is that the Attorney-General actually selects one individual over others for appointment.

Question 2: *If so, should the procedure take the form of Guidelines or a Protocol approved by the Attorney-General (as in New South Wales and Tasmania), or a more formal Determination (as currently operates in the Australian Capital Territory for appointments to the Supreme and Magistrates Courts)?*

Response: *Any formal procedure for judicial appointments should be secured in primary legislation (whether in the State Constitution, or as a piece of standalone legislation) and supported, as necessary, by delegated legislation providing greater detail about the arrangements.*

As discussed in Part A, the experience of recent years at the Commonwealth and state level has revealed judicial appointments procedures to be highly vulnerable to changes in government. In part this must be a consequence of guidelines or protocols not being debated and determined through the legislature where some bipartisan investment and stability might be obtained.

³⁰ Attorney-General's Department, Australian Government, *Court Appointments* <<http://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>>.

It is extremely suboptimal for the judges sitting on any particular court to have been appointed by differing means, particularly where those differing means correlate to differences in the political persuasions of the appointing government. And yet this is now the case in many courts around the country.

In order to establish a stable and sustainable set of reforms, any new procedure for appointing the Queensland judiciary should be secured by *primary legislation*, whether as an amendment to the state Constitution or a standalone enactment, and supported as necessary by delegated legislation providing the greater detail about the arrangements. This follows the example of the way arrangements are now enshrined in the law of England and Wales. Initially, the judicial appointments reforms of 2005 were provided entirely in primary legislation – the *Constitutional Reform Act 2005* (UK). The changes made in 2013 by the *Crime and Courts Act 2013* (UK) have seen much of the detail in the earlier Act removed and supplanted by three discrete pieces of secondary legislation.³¹ The Ministry of Justice justified this revised approach as providing:

parliamentary scrutiny and the same degree of safeguard for transparency and accountability, while creating a greater degree of flexibility in the future to respond to changing requirements within the Justice system.³²

In large part, this revised approach is necessitated by the complex arrangements adopted under the English model across the different courts of that jurisdiction.

As a general proposition, we submit that lasting and stable judicial appointments reform is far more likely to be achieved as the result of legislative deliberation and enactment. Depending on the nature of the reform to be implemented in Queensland, it is likely that a single legislative instrument will suffice, supplemented where necessary by subordinate legislation.

Question 3: *Should a statutory body similar in purpose and form to the Judicial Appointments Commission (JAC) in England and Wales be established?*

Response: *Yes. We strongly support the establishment, through primary legislation, of a permanent judicial appointments commission. However, informed by the history of the JAC, we submit that any such Commission's composition and operations should differ in a number of fundamental respects. We submit that at least half the commissioners should be lay persons and that the Chair of the Commission must be a lay person. The Commission should be responsible for advertising judicial vacancies and for carriage of the process of selecting and shortlisting candidates eligible for appointment. The Commission should produce a shortlist of three candidates to the Attorney-General through the application of a merit-based set of criteria including a criterion related to awareness of and commitment to diversity. We submit that the Attorney-General should not be constrained to select a candidate shortlisted by the Commission, but if the executive wishes to appoint a candidate not shortlisted by the Commission, the Attorney-General should refer that name back to the Commission for it to reconsider its shortlist. If the executive still wishes to appoint a candidate that the*

³¹ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK); *The Judicial Appointments Regulations 2013* (UK); *The Judicial Appointments Commission Regulations 2013* (UK).

³² Ministry of Justice, 'Appointments and Diversity – 'A Judiciary for the 21st Century' – A Public Consultation', CP19/2011, 33.

Commission has chosen not to shortlist, the Attorney-General should be required to report this fact to Parliament.

(1) *Background*

In the United Kingdom, the effect of the *Constitutional Reform Act 2005* (UK) upon the executive's power of judicial appointment has been described as leaving it with 'a much reduced role in the process, almost a purely formal one'.³³

The first feature of the English system that must be emphasised is that it is two-tiered: different processes apply depending on whether the appointment is to a senior judicial position or to a lower court. In the vast majority of cases involving appointments to lower courts, the independent JAC itself is requested to conduct a selection process in respect of a judicial vacancy. For appointments to the Supreme Court, the Lord Chancellor is required to convene a special selection commission.³⁴ In respect of other senior appointments (Lord Chief Justice and Heads of Division, Lord Justices of Appeal, and Senior President of Tribunals), the selection panel sits as a committee of the JAC, but it has a particular composition determined in each case by regulation and reports to the Lord Chancellor.³⁵ The distinction between the processes at the lower and senior levels matters because criticism about the pace of judicial diversification is focused primarily upon appointments to the senior ranks.

The second – and unquestionably most important – feature of the English system to stress is that the JAC or special commission reports its selection of a *single* name for the relevant judicial office to the appropriate authority and the appointing authority's discretion as to whether to accept the selection is constrained.³⁶ The selection need not be accepted – the power exists to reject it or request the relevant commission to reconsider.³⁷ But this is constrained: rejection is only allowed on the ground that the person selected is 'not suitable for the office concerned'; while the power to request a reconsideration is exercisable on either that basis or because 'there is evidence that the person is not the best candidate on merit'.³⁸ In respect of the Supreme Court, a third ground exists for requesting reconsideration of the selection: that 'there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom'.³⁹ Any rejection or request for reconsideration must be

³³ Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) 67.

³⁴ The establishment and composition of the selection panel for Supreme Court vacancies is provided by *Constitutional Reform Act 2005* (UK), s 26(5) and Sch 8, Pt 1.

³⁵ New sections 27A and 94C inserted into the *Constitutional Reform Act 2005*, oblige the Lord Chancellor to make regulations governing selection processes 'with the agreement of', respectively, the 'senior judge of the Supreme Court' and 'the Lord Chief Justice'. See further *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), regs 5, 11; *The Judicial Appointments Regulations 2013* (UK), regs 5, 11, 17 and 23.

³⁶ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 19; *The Judicial Appointments Regulations 2013* (UK), regs 7, 13, 19, 25, and 31.

³⁷ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 20; *The Judicial Appointments Regulations 2013* (UK), regs 8, 14, 20, 26, and 32.

³⁸ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 21(1); (2)(a) and (2)(b); *The Judicial Appointments Regulations 2013* (UK), regs 9(1) and (2), 15(1) and (2), 21(1) and (2), 27(1) and (2), and 33(1) and (2).

³⁹ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 21(2)(c).

made to the selection commission giving ‘reasons in writing’.⁴⁰ After three separate (but not necessarily different) selections have been made, the process is exhausted and one of the persons selected by the relevant commission must be chosen for appointment.⁴¹

The English reforms of 2005 were highly significant in prompting renewed attention to judicial appointments in Australia.⁴² Although Commonwealth Attorney-General Robert McClelland demurred from establishing an independent commission when he unveiled his intended reforms in 2008,⁴³ the English model inevitably dominated discussion of the broader issues and strongly featured as a model for either adoption or adaptation in the public contributions to the Australian debate referred to in Part A, above.

The passage of time has allowed a more clear-eyed assessment of the strengths and deficiencies of the reforms to judicial appointment in England and Wales. The objections cited by McClelland – that the JAC is ‘overly bureaucratic and the whole appointments process is unreasonably intrusive as well as taking too long’⁴⁴ – appear to have been institutional teething problems that have since settled down.⁴⁵ Nonetheless, Australian perceptions of the process as overly elaborate endure.⁴⁶ But this must be expected when a commission-based model is compared to the operation of the traditional system – which, whatever else one may say of it, has the advantages of both ease and speed. Any commitment to a formal process will inevitably see both decline, but with commensurate gains. The answer is to design those processes optimally, not to shirk them.

What seems rarely appreciated in Australia is that the English reforms were quickly the subject of an almost unremitting cycle of review and, in some quarters, mounting dissatisfaction. The key reviews include:

- Advisory Panel on Judicial Diversity (UK), *Final Report*, February 2010;
- Ministry of Justice, ‘Appointments and Diversity – ‘A Judiciary for the 21st Century’ – A Public Consultation’, 2011; and
- House of Lords, Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010-12, 2012.

These reports led to the enactment of the *Crime and Courts Act 2013* (UK), which saw the Lord Chancellor’s already limited powers over appointments entirely devolved to the Lord Chief Justice or the Senior President of Tribunals in respect of all judicial appointments at and below the High Court level.⁴⁷ All three offices are now included within the definition of

⁴⁰ *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 21(3); *The Judicial Appointments Regulations 2013* (UK), regs 9(3), 15(3), 21(3), 27(3), and 33(3).

⁴¹ This will involve either the selection being formally recommended to Her Majesty or being made directly by the appropriate authority, see: *Constitutional Reform Act 2005* (UK), ss 26(3) and Sch 14; *The Judicial Appointments Regulations 2013* (UK), reg 37.

⁴² Handsley and Lynch, above n 5, 193-95. And see references in footnote 3, above.

⁴³ Robert McClelland, ‘Judicial Appointments Forum’ (Speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008).

⁴⁴ *Ibid* [66].

⁴⁵ Kate Malleon, ‘Appointment, discipline and removal of judges: fundamental reforms in the United Kingdom’ in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 117,125.

⁴⁶ Justice Philip McMurdo, ‘Hot Topics’, Supreme Court and Federal Judges’ Conference, Darwin, 9 July 2014.

⁴⁷ *Crime and Courts Act 2013* (UK), Sch 13, Pt 4, paras 29 and 30.

an ‘appropriate authority’ under section 94C(4) of the *Constitutional Reform Act 2005* (UK) and exercise similar powers in the appointment process.

Following the changes made by the *Crime and Courts Act 2013*, two other developments should be noted:

- Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity – Accelerating Change*, Report prepared for Shadow Secretary of State for Justice, Sadiq Khan, November 2014; and
- Establishment of a Diversity Committee of the Judges’ Council as one measure pursuant to the new duty placed upon the Lord Chief Justice under s 137A of the *Constitutional Reform Act 2005* to ‘take such steps as that office-holder considers appropriate for the purpose of encouraging judicial diversity’.

It is worth briefly noting here the two main grounds of complaint that have emerged about the English model since its inception. The first is that the substantial reduction in the executive’s role in appointments has simultaneously empowered the judicial class in selecting those who will join its ranks and weakened its democratic legitimacy. This has borne out the caution sounded by Australia’s Sir Anthony Mason almost 20 years ago when he warned that a ‘democratic deficit’ in the way judges are selected may have negative implications for their exercise of the judicial power of the state.⁴⁸

Second, and by relation, the risk of the judiciary self-replicating its current membership has dashed hopes that greater diversity would be realised. Section 63(2) of the *Constitutional Reform Act 2005* provides that ‘selection must be solely on merit’.⁴⁹ Section 64 provides that the JAC ‘must have regard to the need to encourage diversity in the range of persons available for selection for appointments’, but this is expressly subject to the preceding requirement that selection is on merit alone. Professor Erika Rackley has described the statutory interrelationship of merit-diversity as ‘an uneasy compromise between those who viewed the introduction of a more transparent appointments process as a judicious, but essentially cosmetic, exercise and those hoping that it would bring substantive change to the appointments made’.⁵⁰ While some have affirmed the view that reform of the process of appointment was not driven by the achievement of different outcomes, former Lord Chancellor Jack Straw insists that diversity was indeed a driving objective of the Blair government’s changes and that its failure to eventuate exposes the flaws in the specific model adopted.⁵¹

The creation of an independent commission is frequently claimed to be necessary in order to divest or constrain executive discretion over appointments. This clearly fixes upon the specific objective of depoliticising appointments which was dominant in the design of the United Kingdom model – and which it has unquestionably achieved. But as Straw has reflected, ‘In solving one problem (too much executive power) we went too far the other

⁴⁸ Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in Helen Cunningham (ed), *Fragile Bastion – Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 7.

⁴⁹ *Constitutional Reform Act 2005* (UK) s 63(2).

⁵⁰ Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013), 93.

⁵¹ Jack Straw, *The Hamlyn Lectures – Aspects of Law Reform: An Insider’s Perspective* (Cambridge University Press, 2013) 51-59.

way'.⁵² The consequence, as voiced by critics of the reforms, is a greatly empowered, less accountable judiciary whose composition remains less diverse than might have been the case had the executive retained a greater role in the selection of persons for appointment.

In response to the various inquiries and reports identifying the failure of the 2005 reforms to increase judicial diversity, a so-called 'tie-breaker' clause in s 63(4) was added to the *Constitutional Reform Act 2005* by the *Crime and Courts Act 2013*.⁵³ The effect of s 63(4) is to enable the selection of one person over another on the basis of 'increasing diversity' but only where the 'two persons are of equal merit'. However, the consensus is that this situation will arise very rarely in practice.⁵⁴ Further, the JAC has adopted a process that only narrowly applies the provision in two important respects. First, the JAC has indicated that it will apply the provision only at the final stage of shortlisting, rather than in the process of assessing candidates' skills, experience and expertise. Second, the JAC will only apply the provision to candidates 'with declared protected characteristics which are the least well represented in the office to which they are being recommended for appointment.'⁵⁵

Ultimately, England's reform of judicial appointments must be acknowledged in the context both of that country's pronounced hierarchical social history and that the JAC was, as indicated by the name of the law that established it, just one component of a much more sweeping constitutional reform agenda. Consequently, it should not be supposed that the implementation of a similar model in a different setting will operate in exactly the same way, giving rise to the same problems.

But nor is it wise to simply ignore the English experience. In particular, if a strongly curtailed executive discretion is viewed as a paramount objective in the name of increasing judicial independence, then it should be recognised that this is likely to come with costs associated with losses of democratic accountability and, potentially, judicial diversity.

Based on the English experience, we favour the establishment of a statutory body similar to the JAC in England and Wales in preference to the use of less formal advisory panels. Experience shows that commitment to use of the latter is vulnerable to changes in the political wind. If arrangements are going to be secure and stable then they should be made by legislation and the creation of a body independent of the executive but reporting to it seems the optimal approach. That points to the establishment of a permanent commission. But it is critical to get the specific detail of any commission's composition and operations correct in order to balance the principles of judicial independence, accountability and diversity. We turn now to those matters.

⁵² Ibid 59.

⁵³ In respect of Supreme Court appointments, see *Constitutional Reform Act 2005* (UK) s 27(5A).

⁵⁴ Ministry of Justice (UK), 'Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'', May 2011, 33); House of Lords, Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010-12, 34 [99]; Lord Jonathan Sumption, 'Home Truths about Judicial Diversity', speech delivered at the Bar Council Law Reform Lecture, London, 15 November 2012, 5-6.

⁵⁵ Judicial Appointments Commission, *Equal Merit Provision: JAC Policy* (April 2014) <https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/emp_policy_0.pdf>. See for analysis, Graham Gee and Kate Malleson, 'Judicial Appointments, Diversity and the Equal Merit Provision' (6 May 2014) UK Constitutional Law Association <<http://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision/>>.

(2) *Specific issues*

How such a commission would be established

In accordance with our response to Question 2, we submit that the Commission should be established by statute, with its procedures detailed as appropriate in delegated legislation.

Whether the body would be permanently established, with panels being created ad hoc as required (as per the model in England and Wales)

Despite the much smaller size of the Queensland judiciary, we believe the permanent establishment of a Commission is warranted in order to deliver the most optimal judicial selection process. Even if a system of ad hoc panels can be legislated for in order to overcome the aforementioned vulnerability, it appears undesirable to us for three reasons. First, it would be more likely to have a membership chosen only for the purpose of filling a specified vacancy and this may create opportunities for the government of the day to exert more influence over the panel's composition than if this is determined and regularised as part of the operations of a Commission. Second, and depending on how similar the processes of assessment of any new Commission were to those used by the JAC in England and Wales, there is actually quite a lot of work done outside of specific rounds in the development of materials and scoring exercises. Third, the JAC does an enormous amount of outreach work (its so-called 'roadshows') in pursuit of its statutory duty 'to encourage diversity in the range of persons available for selection for appointments'. If judicial appointments are seen in this fuller, more holistic sense, then a standing body is required.

How the membership of the Commission would be constituted, and particularly the balance between judicial, legal professional, and lay members

Under the McClelland reforms at the Commonwealth level, the Attorney-General was advised by a committee of just three persons, typically comprised of the head of jurisdiction or their nominee; a retired judge or senior member of the federal or state judiciary; and a senior member of the Commonwealth Attorney-General's Department.⁵⁶ Former High Court Justice, Michael Kirby, was highly critical of the composition of the advisory panels under the McClelland reforms:

Without disrespect to the very distinguished judges and other officials presently participating in such procedures, theirs is not the only (or even the main) voice that should be heard. To replace judicial appointment by elected politicians effectively by a system of judicial appointments selected by present or past judges is not only to sever the important link to democratic legitimacy for our judiciary ... it risks the effective imposition of an overly narrow perspective about what really matters in judicial performance.⁵⁷

That concern is one to which Sir Gerard Brennan, Justice Sackville, and Professor George Williams were all alive in developing their own respective appointments models, though they each had different views on where the balance should lie. Sir Gerard Brennan favoured two,

⁵⁶ Greater representation of former judicial officers seems to have occurred on occasion: see Michael Kirby, 'A Darwinian Reflection on Judicial Values and Appointments to Final National Courts' in James Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 9, 29.

⁵⁷ *Ibid* 33.

but possibly three, lay members sitting alongside four legally qualified persons, among whom only one was a judge (the Chief Justice of the relevant court).⁵⁸ Williams simply said ‘the commission must include men and women from diverse backgrounds, some of whom must be lay members’.⁵⁹ It was Justice Sackville who was most forceful on the importance of lay members:

There is no pressing need for judges and practising lawyers to account for a majority of the commission. On the contrary, a legal majority may create the risk that recommendations for appointment will too closely reflect the current composition of the judiciary in that jurisdiction. Moreover, community confidence in the appointments process is likely to be enhanced if non-lawyers are *at least equally* represented on the commission.⁶⁰

A selection panel comprised wholly of judges signals that the appointments system is merely an exercise in pursuit of political independence through greater transparency and constraints on the executive. The involvement of lay members signals that the purpose of the system goes further. It is possible to see the involvement of lay members as helping to offset any diminished accountability that would ensue from use of the judiciary and legal profession to otherwise attain that political independence, although the strength of lay members’ capacity to do so would depend on how they are selected.⁶¹ But there is more to it than that. By injecting into the process of selection the perspective of those associated with neither arm of government but the community itself, the value of a diverse, reflective judiciary receives a distinct emphasis.

We submit that at least half the commissioners should be lay persons. We also submit that the Chair of the Commission must be a lay person, as is the case with the JAC.

It is important to emphasise that lay persons must be carefully chosen and people of great experience and capacity. The potential for judicial members of the commission to dominate lay members has been recognised in the English literature. Paterson and Paterson described the involvement of both the President and Deputy President of the Supreme Court on selection panels for vacancies on that body as ‘a heavy (and indeed, exceptionally powerful) judicial presence’.⁶² They also noted the view of Lord Justice Etherton that there are ‘difficulties of the dynamics of having a junior judge on the United Kingdom Supreme Court appointments panel with the President and the Deputy President’.⁶³ Professor Kate Maleson has voiced her suspicion that while lay members ‘play an important part on the Commission

⁵⁸ Brennan, above n 3, 14.

⁵⁹ Williams, above n 3, 168.

⁶⁰ Our emphasis. Sackville, ‘The judicial appointments process’, above n 3, 137. He went on: ‘The commission’s membership should be equally divided between legal and lay members, although the former would assess and rank the *legal* qualifications, experience and ability of candidates. All commission members, however, should participate in making the final recommendations.’

⁶¹ For example, under the Evans-Williams model, lay members would be chosen not by the government but by the legally qualified members of the commission. Whether that degree of insulation from the executive is warranted is debatable, but it obviously denies any link at all between the commission and the representative government: Evans and Williams, above n 3.

⁶² Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centreforum 2012), 28

⁶³ Ibid.

and in the selection process ... they ultimately defer to the views of the judges on who will make a good judge, particularly in relation to senior appointments'.⁶⁴

Whether the Commission would play a role in the advertisement of judicial vacancies, and the selection of candidates

The Commission should be responsible for advertising judicial vacancies and for carriage of the process of selecting and shortlisting candidates eligible for appointment. In addition, the Commission may be given more proactive functions around preparing individuals for the making of an application for judicial appointment and promoting the judiciary as a career option for lawyers from diverse backgrounds, as occurs in England and Wales.

Just how sophisticated the processes adopted by the Commission for the selection of judges should be is something of an open question, which would benefit from much more direct consideration and consultation with the JAC should the decision be taken to establish a commission for Queensland. Concerns about the time involved in the processes of the JAC, which go beyond interviews to include various assessment exercises and role plays, need to be recognised and doubtless decisions would need to be taken by the Commission staff themselves in consultation with the Attorney-General and other stakeholders.

What selection criteria and assessment processes the Commission would adopt

In this submission, we do not attempt to prescribe any particular set of selection criteria from those found in Attachments 1, 3, 4, 5, 6 and 7, and summarised in Attachment 8 to the Discussion Paper. We emphasise, however, the importance that any such criteria go to requisite judicial competencies in respect of intellect, expertise, experience and leadership. Removal and discipline of judges is strictly limited, available only on the grounds of misbehaviour and incapacity. It is appropriate that in the interest of maintaining judicial independence, judges cannot be removed or disciplined for incompetence, unless it manifests as misbehaviour. Competency must be primarily addressed through the appointment process, although it may also be supported through the appeal process and ongoing education regimes.⁶⁵

In relation to specific criteria, we bring to the attention of the review the selection criteria used by the Commonwealth Labor government between 2008 and 2013. Under the McClelland reforms, advisory panels evaluated persons under consideration against the following 'requisite qualities for appointment':

- legal expertise;
- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;

⁶⁴ Kate Malleon, 'The presence of women in the British judiciary', paper presented at *The Judge is a Woman: Cogitations about the reality of and the justifications for gender diversity on the Bench*, Université Libre de Bruxelles, 7-8 November 2013, 7.

⁶⁵ See further Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1, 9.

- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and
- capacity to inspire respect and confidence.⁶⁶

These approximate the qualities identified by academic studies and professional bodies as relevant to judicial work and were endorsed by the 2009 Senate Committee Inquiry.⁶⁷ The criteria used by the JAC in the United Kingdom to identify ‘merit’ are more extensive but essentially similar, excepting the requirement that candidates possess ‘an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs’. That criterion was added in response to a recommendation made by the 2010 Advisory Panel on Judicial Diversity and was welcomed by the 2012 House of Lords committee.⁶⁸ It also appears amongst those stated in the AIJA proposed criteria (Attachment 1 to the Discussion Paper). The AIJA list appears to be the most comprehensive of the proposed Australian criteria, as Attachment 8 to the Discussion Paper illustrates.

It is important that the criteria should be understood as applying only – or at least, primarily – to the selection of applicants for a shortlist. Subject to what is said below about the nature of the report to the Attorney-General and her or his powers of selection, after that point the ultimate selection of an individual may depend on other factors, indeed, ones that the Attorney-General need not explain publicly. We submit that the criteria which stipulate the various qualities going towards an assessment of individual merit cannot themselves be determinative of the ultimate selection but act simply as a threshold. This idea was neatly explained by Stephen Gageler SC, prior to his appointment to the High Court:

I would have one method for identifying the pool of potential judicial candidates and another for choosing amongst them. Both stages would be transparent. The first stage would be solely concerned with identifying persons having what I have described as the essential judicial attributes. At the second stage, I would be happy to see the broader considerations to which I have referred openly brought to the fore and debated.⁶⁹

The ‘broader considerations’ to which Justice Gageler referred were ones of ‘geography, gender and ethnicity [which] all can, and should, legitimately weigh in the balance’.⁷⁰ He also suggested that ‘considerations of judicial style and legal policy ... ought not to be ignored’.⁷¹ Earlier in this submission, we quoted from the 2014 Doyle Review, which made essentially the same recommendation to the Northern Territory government.

Such an approach is commonly referred to as one of ‘minimal merit’ and is distinguished from a more familiar insistence that merit alone supplies the only acceptable basis for

⁶⁶ Department of Attorney-General, Australian Government, *Federal Court of Australia: Information for Persons Who Wish to Nominate Another Person for Appointment or Lodge an Expression of Interest* <<http://www.ag.gov.au/LegalSystem/Courts/Documents/Federal%20Court%20information%20pack.doc>> (accessed 10 December 2015).

⁶⁷ Senate Legal and Constitutional Affairs Committee, *Inquiry into Australian Judicial System and the Role of Judges* (December 2009) [3.41].

⁶⁸ House of Lords, Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010-12, 29-30.

⁶⁹ Stephen Gageler, ‘Judicial Appointment’ (2008) 30 *Sydney Law Review* 159, 161.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

selecting an individual for judicial office (so-called, ‘maximal merit’).⁷² We anticipate that explicit adoption of a ‘minimal merit’ approach may meet with the objection that this is a compromise on merit.⁷³ An insistence that merit is the ‘sole criterion’ (even when it finds expression as itemised and distinct qualities and skills) appears designed to guard against the relevance of other factors. To the extent those other factors are blatantly political considerations then the value of appointing ‘solely’ on merit is readily appreciable. But this is far more contestable when the considerations are ones that go to the aspiration of judicial diversity. While judges are not of course ‘representative’ (wholly or sectionally) of the community, we have already noted that the authority and legitimacy of the courts depends upon the maintenance of public confidence and that this depends, not just on the quality and fairness of judicial decisions and the clarity of the reasons provided for them, but also on those decisions being made by a judicial class that is a ‘fair reflection’ of the community it serves. In light of the broad acknowledgment of this point, an insistence upon merit to the exclusion of diversity – either as intrinsically or additionally relevant – is difficult to understand. Indeed, Professor Kate Malleon has said that the issue transcends one of simple relevance and that in fact ‘the use of a threshold merit system is both *inevitable and necessary*’ given that ‘the determination of merit beyond a threshold of key measurable qualities and abilities is a highly contextualised and dynamic process which involves a significant qualitative and subject [sic] element’.⁷⁴ In other words, merit alone cannot determine selection of individuals from the field. Justice Gageler’s remarks appear to concur with this view; he said it was ‘important to recognise that at any time’ the essential attributes ‘can be shared by a fairly wide pool of potential judicial candidates’.⁷⁵

The use of other considerations – whether publicly acknowledged or not – to guide the selection by the executive of one individual from among a group all identified as suitably meritorious by an independent commission presents no departure from a merit-based model.

How the Commission would report to the Attorney-General, whether through a general report covering all candidates, or a report that recommends a certain number of candidates for consideration

If the Commission is to fulfil the purpose for which it is created then its report to the Attorney-General must recommend a number of candidates rather than all of those who applied or were considered. If the Commission does not refine and narrow down the field then it is neither assisting the Attorney-General in her or his selection nor is it operating as a meaningful mechanism for the depoliticisation of judicial appointments.

No existing Australian reform proposal for a JAC-style body has endorsed the English practice of the executive being supplied with a single recommended name. Although the Lord Chancellor or other ‘appropriate authority’ has, in the English system, the power to reject the single name provided to her or him or to request reconsideration, this power is limited to specified reasons and in practice is subject to a strong disincentive in the requirement that

⁷² Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press, 2003) 340.

⁷³ See Bruce DeBelle QC, ‘Judicial Appointments: the Case for Reform’ in *Upholding the Australian Constitution – Volume 21* (Sir Samuel Griffith Society, 2009) 82; Sir Harry Gibbs, ‘The Appointment of Judges’ (1987) 61 *Australian Law Journal* 7, 10.

⁷⁴ Kate Malleon, ‘Gender Quotas for the Judiciary in England and Wales’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 481, 492.

⁷⁵ Gageler, above n 69, 160.

reasons in writing be given should either course be taken. It is also finite, with the power extinguished after the third occasion that a name is recommended for a particular vacancy.

Proposed models for Australia have been averse to a similar approach out of respect for the appointment of judges to be, however vaguely, linked to political accountability. For example, Evans and Williams recognised that ‘there will rarely be a uniquely ‘best qualified’ person’ and that ‘judicial appointments have a “political”... component that the Commission is not qualified to assess’.⁷⁶ The aim is to ensure some meaningful role of selection is exercised by the executive branch. Doing so avoids the Attorney-General’s role being merely ‘that of the selection panel’s messenger’ as has been alleged in respect of the Lord Chancellor.⁷⁷ Similarly, the Doyle Review was explicit in recommending the advisory panel send ‘the names of at least two persons’ to the Northern Territory Attorney-General for forwarding to the Cabinet: ‘this will permit the Executive Government to make a choice ... as Cabinet is accountable for an appointment’.⁷⁸

Additionally, and to connect this approach to the discussion of merit-diversity in the preceding section, the United Kingdom’s Professor Maleson has advocated the use of shortlists of candidates ‘whom the commissions consider to be very well-qualified and appointable’ since these ‘would open space for the Lord Chancellor to promote greater diversity though his choice of candidates while maintaining selection on merit’.⁷⁹ That benefit has received less emphasis in Australian proposals than it should have, but it is clearly consistent with the broader value of preserving meaningful executive responsibility for appointments to the bench.

The Commission should report to the Attorney-General a shortlist of no more than three candidates. This would enable persons of diverse attributes and experience to be considered for appointment and will ensure that the executive is presented with a meaningful choice to make but is at the same time limited (subject to what is said below) by the Commission’s selection. If the shortlist provided by the Commission is too long then the body is deprived of a sufficiently robust function. In this regard, the experience in the Republic of Ireland is instructive. In that country, there is a statutory requirement that the Judicial Appointments Advisory Board shall recommend to the Minister ‘at least seven persons for appointment’ to judicial office.⁸⁰ In their submission on a reformed process, the Irish judiciary appeared to be of the view that this was one of the features of the Board’s operation that had prevented it from succeeding in removing political patronage from judicial appointments. The judges submitted that the executive be provided with a far less accommodating shortlist of just three names.⁸¹

⁷⁶ Ibid 321.

⁷⁷ Rackley, above n 50, 86.

⁷⁸ Doyle et al, above n 9, 16.

⁷⁹ Kate Maleson, ‘Taking the Politics Out of Judicial Appointments?’ (21 February 2012) UK Constitutional Law Association <<http://ukconstitutionallaw.org/2012/02/21/kate-maleson-taking-the-politics-out-of-judicial-appointments/>>. Maleson had emphasised the importance of shortlists at the time of the JAC’s creation: Kate Maleson, ‘Selecting Judges in the Era of Devolution and Human Rights’ in Andrew Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (Oxford University Press, 2004) 295, 313.

⁸⁰ *Courts and Court Officers Act 1995* (Ireland), s 16(2).

⁸¹ Judicial Appointments Review Committee, *Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process*, 30 January 2014 [http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/%28WebFiles%29/51E71A71B9961BD680257C70005CCE2D/\\$FILE/A%20Preliminary%20Submission%20of%20J.A.R.C.%2030.01.2014.pdf](http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/%28WebFiles%29/51E71A71B9961BD680257C70005CCE2D/$FILE/A%20Preliminary%20Submission%20of%20J.A.R.C.%2030.01.2014.pdf), 39-40, 54-55.

The Attorney-General's powers on receipt of the Commission's recommendation/s

As we have already explained, it is our submission that the Commission should recommend a shortlist of candidates to the Attorney-General. What remains to be considered is whether the government should be restrained in appointing candidates from that shortlist, and if not, what obligations the Attorney-General has to consult with the Commission or provide a public report. The answers to these questions must be informed by the objectives underpinning appointments reform and the systemic problems that exist in particular jurisdictions.

Of previously proposed Australian models, only that of Evans and Williams seeks to constrain the executive to the shortlisted candidates. All other proposals preserve for the executive government a right to appoint from outside the names provided by the Commission. Evans and Williams argue that allowing this discretion unravels the entire purpose of reform. However, this over-emphasises depoliticisation as the objective of appointments reform. The political independence of judicial appointments is an important and desirable reform objective. Indeed, its importance has been highlighted by the controversies that have recently arisen in Australia over the perception of improper political considerations in the appointments of Tim Carmody as Chief Justice of Queensland and Peter Maley as a Magistrate in the Northern Territory.

However, the English experience strongly suggests that excessive regard to depoliticisation in the design of judicial appointments processes risks inhibiting the achievement of other objectives of reform, and more specifically, in achieving greater diversity within the judiciary. That trade-off may be deliberate and may even be desirable if a corrective is needed to a dominant norm of political patronage in the selection of judges. However, while the Carmody and Maley appointments illustrated the potential for uncomfortably 'political' factors to feature under the traditional appointments system, we should not lose sight of those episodes as exceptional. The outcry in each case, and the eventual resignation of both men from their posts, is further evidence that Australia does not have a systemic problem in this regard. Certainly the problem is not of such magnitude that we should risk binding political responsibility so tightly that efforts towards the objective of judicial diversity are collaterally stymied.

Most other proposals for appointments reform in Australia have retained the Attorney-General's discretion, essentially at large. In his 2007 remarks on the topic Justice Sackville said that political accountability for judicial appointments could be strengthened 'by establishing an independent commission that *recommends* the appointment of candidates to judicial office, but does not *appoint* particular candidates (whether directly or as the result of an elaborate process such as that adopted in England and Wales).'⁸² To Justice Sackville, and also Sir Gerard Brennan and George Williams both writing around the same time, that difference turned on the Attorney-General retaining the capacity to appoint a person who was *not* recommended by the commission.⁸³

Maintaining political discretion within the model, as we have emphasised in our analysis above, provides the opportunity for the government to promote greater diversity on the bench or to pursue other legitimate objectives in judicial appointments. Justice Sackville explained the rationale for preserving the Attorney-General's discretion as follows:

⁸² Sackville, 'The judicial appointments process', above n 3, 136.

⁸³ *Ibid*; Brennan, above n 3, 1, 14; and Williams, above n 3, 169.

... there may be circumstances in which an Attorney-General has valid reasons for not wishing to appoint from a recommended short list or, alternatively, wishes to appoint a particular person from outside any existing list. Legitimate reasons could include the need to add a judge with particular expertise to a court or to take advantage of a 'window of opportunity' to appoint a candidate whom the commission did not know was available for appointment when it prepared its recommended short list. They could also include the need for geographic balance in a particular court. A less legitimate reason, but one for which the Attorney-General might nonetheless be prepared to accept political responsibility in the face of a contrary recommendation, is that he or she simply prefers a person with different qualifications, experience or, perhaps, views.⁸⁴

To avoid the risk that this discretion undermines the independent process and merit-based criteria applied by the Commission, Justice Sackville, Williams and Sir Gerard Brennan each recommend a further process that would enhance transparency and accountability should the government wish to appoint from outside the Commission's shortlist.

Both Justice Sackville and Williams required the Attorney-General to disclose the fact in a statement to Parliament, although the former arguably wanted slightly more from the Minister explaining his or her departure from the commission's advice.⁸⁵ Sir Gerard Brennan proposed something different, suggesting that if the Attorney-General wished to appoint someone not recommended by the Commission, then the name in question should be referred to the Commission with a request to reconsider the list provided. If the Commission declined to recommend the individual upon reconsideration then he or she may still be appointed but the Attorney-General is to inform the Commission in writing of its reasons for appointing outside the list.⁸⁶ Sir Gerard Brennan's decision to limit the communication in this way, rather than proposing a statement to the parliament, was borne of concern that, as appointments to the High Court are 'usually made from the ranks of serving judges, it would be invidious to publish communications ... about the relative merits of candidates'.⁸⁷ Even an anonymised explanation to Parliament by the executive about why the Commission's recommendations were passed over may be said to pose risks for public confidence in the judiciary as a whole.

Justice Philip McMurdo, then President of the Judicial Conference of Australia, indicated his general support for a model along the lines of that proposed by Sir Gerard Brennan. Justice McMurdo proposed that if the government proceeds with its own selection after having referred the name to the commission, then the fact that a negative report was obtained on the individual should be publicly disclosed.⁸⁸ The Doyle Review also recommended that Cabinet's preference for another name should require the consideration and comment of both the advisory panel and the Chief Justice (and, in the case of appointments to the Magistrates Court, the Chief Magistrate also), but did not address what should happen if the appointment proceeded without the support of either.

The Queensland government should adopt a model that seeks to enhance the independence, and perceived independence, of judicial appointments from improper partisan political influence, while maintaining appropriate political input to allow the democratically elected and accountable government to promote other objectives, including judicial diversity, in a

⁸⁴ Sackville, 'The judicial appointments process', above n 3, 136.

⁸⁵ Ibid 136.

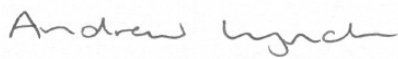
⁸⁶ Brennan, above n 3, 14-15.

⁸⁷ Ibid, 15.

⁸⁸ McMurdo, above n 46, 12.

transparent manner. We therefore submit that the Attorney-General should not be constrained to select a candidate shortlisted by the Commission. However, if the Attorney-General wishes to select a candidate outside of the Commission's shortlist, she or he should refer that name back to the Commission for it to reconsider its shortlist. If, following this exercise, the executive still wishes to appoint a candidate that the Commission has chosen not to shortlist, the Attorney-General should be required to report this fact to Parliament. Mindful of the concerns expressed by Sir Gerard regarding possible reputational damage to existing judicial appointments together with privacy concerns for the individuals involved, we would not go so far as to require that the Attorney-General provide a public account of her or his reasons. The Attorney-General may, of course, choose to provide a further public account, but should not be obliged to do so. We would anticipate that such a power would be used sparingly, if at all, but preserving the executive's ultimate discretion is an important recognition of the representative government's political accountability for appointments.

Yours sincerely



Professor Andrew Lynch



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