



**Judicial Conference of Australia**

# **JUDICIAL APPOINTMENTS**

**A comparative study**

**April 2015**

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## **Abbreviations**

ACT	Australian Capital Territory
AIJA	Australasian Institute of Judicial Administration
EOI	Expression of interest
JAC	Judicial Appointments Commission (England & Wales)
JCA	Judicial Conference of Australia
NSW	New South Wales
SLCARC	Commonwealth Senate Legal and Constitutional Affairs References Committee

## Introduction

The Judicial Conference of Australia (JCA) considers that a concomitant of judicial independence is the recognition by the judiciary that, under the current constitutional arrangements in the Commonwealth and each State and Territory, it is the unfettered prerogative of the Executive government of each polity to appoint judicial officers. The decision of the High Court in *Attorney-General (NSW) v Quin*<sup>1</sup> established that prerogative power. The various models and suggestions discussed in this paper are intended to stimulate public debate.

The JCA considers that long experience has proved the considerable benefit that the Executive government generally will gain from confidential consultation with heads of jurisdiction and others about the suitability and qualities of potential appointees to judicial office. In the end, however, Executive governments are responsible for such appointments and are answerable to Parliament and, ultimately, their electorates for their decisions.

It is a political decision for the Executive and, possibly, Parliament whether to change the traditional process of appointing judicial officers. There have been changes in that process in recent years, such as the advertising in some Australian jurisdictions of some judicial offices for which an appointment is being considered.

The JCA would suggest that, if a decision of the Executive government is made to use an advisory panel system, the panel should be independent of the Executive government and, if despite its recommendations, someone else is appointed that fact should be made transparent at the time. Otherwise, the panel will not attract persons who are prepared to give independent, disinterested advice.

Whatever process the Executive government chooses to use, it will no doubt be conscious of the important public interest in maintaining confidence in

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<sup>1</sup> (1990) 170 CLR 1

the institutional independence and integrity of the judiciary as a core value in our democratic system of government.

The Hon Justice Steven Rares

President

## Preface

This comparison study is an update of an earlier paper produced by the Honourable Justice Ronald Sackville, AO, then Deputy Chairman of the JCA. That paper was initially prepared for the purpose of informing discussion on the process of appointing judicial officers in Australia which took place at the 2003 Annual General Meeting of the JCA. The paper was made publicly available on the JCA website, though not adopted or endorsed by the JCA. It was adapted and published in the *Journal of Judicial Administration* in 2005.<sup>2</sup>

In July 2013, the Governing Council of the JCA resolved that it consider the development of a policy in regard to the process of selection of appointees to judicial office and that a committee be formed to develop a draft policy. Subsequently it was decided to update the paper originally prepared by Justice Sackville. The research has been undertaken by Jeremy Leith, Administrative Assistant in the Secretariat of the JCA. In March 2015 the Governing Council resolved to publish this paper so as to inform public debate.

This paper is a comprehensive compilation of existing practices, in Australia and other comparable countries, as well as of proposals for reform. The sources include departmental information originally obtained by Justice Sackville, what is currently publicly obtainable, and information obtained by the Australasian Institute of Judicial Administration (AIJA) from various sources and provided to the JCA.<sup>3</sup> A valuable overview and discussion from an earlier time is found in Sir Harry Gibb's article on 'The Appointment of Judges' in the January 1987 *Australian Law Journal*.<sup>4</sup> Where available, references have been provided.

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2 Ronald Sackville, 'Judicial Appointments: A Discussion Paper', (2005) 14 *Journal of Judicial Administration*, 117 - 143.

3 The AIJA has published a proposed set of criteria to be applied in making judicial appointments, and they are included in this report in Appendix G.

4 (1987) 61 *Australian Law Journal* 7.

In 2014 the JCA published a report prepared by Rebecca Ananian-Welsh and Professor George Williams, AO entitled *Judicial Independence from the Executive*.<sup>5</sup> In that report the authors proposed that the four key indicators of judicial independence relate to –<sup>6</sup>

- appointment, tenure and remuneration
- operational independence
- decisional independence
- personal independence.

The policies and procedures discussed in this paper are, of course, subject to change from time to time depending, for example, upon the government of the day.

Christopher Roper, AM  
Secretary, April 2015

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5 R Ananian-Welsh and G Williams, *Judicial Independence from the Executive*, Judicial Conference of Australia, Sydney, 2014.

6 *Ibid*, 1.

## **Summary of the current situation in Australia**

A summary in tabular form of the appointment processes for State and Territory courts in Australia is in Appendix A to this report.

### **Criteria for appointment**

Stated criteria are not used for the federal courts, except the Family Court of Australia, nor in Queensland or South Australia. They are used in the Australian Capital Territory (ACT), New South Wales (NSW), the Northern Territory (informally), Tasmania, Victoria (referred to as attributes) and in Western Australia

### **Advertising or calls for expressions of interest**

Advertising, or a call for expressions of interest, is not used for any of the federal courts. However, generally it is used in States and Territories for appointments to the Magistrates Courts: although in Queensland the advertising is only within the legal profession. Advertising for the District or County Courts is used only in NSW and Victoria. Advertising for the Supreme Courts is only used in the ACT, Tasmania and Victoria. In the case of Victoria there is a permanent call for expressions of interest for all courts on the Court Services Victoria website.

### **Consultation**

There is a prescribed consultation process for the High Court; otherwise there is apparently no requirement or formal process for consultation in regard to other federal courts.

Consultation with various people and bodies, and in various ways, is common for all levels of State and Territory courts, although it may be informal and there is not necessarily a formal commitment to it.

### **Assessment or selection panels or committees**

Assessment or selection panels or committees are not used for appointments to any federal courts. They are used for all Magistrates Court appointments except in Queensland. For District Court appointments they are used only in NSW and possibly in Victoria for the County Court. They are used for Supreme Court appointments in the Northern Territory and Tasmania, but not apparently in other States and Territories.

### **Formal interviews**

Formal interviews are, apparently, not conducted for appointments to any federal courts. Potential appointees to the Magistrates Courts are interviewed by panels in all States and Territories except Queensland. Interviews are, however, only used for District Court in NSW, where the interview is conducted by the Attorney General. Formal interviews are only conducted for appointments to the Supreme Court of Tasmania.

# 1 THE APPOINTMENT PROCESS FOR FEDERAL COURTS IN AUSTRALIA

This chapter considers the appointments process for the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia. The following elements are considered:

- The authority to appoint
- Eligibility for appointment
- Criteria for appointment
- The selection process, including:
  - Advertising or calls for expressions of interest
  - Consultations
  - The use of assessment or selection panels
  - Formal interviews.

## 1.1 Authority to appoint

Section 72 of the *Commonwealth Constitution* provides for the appointment, tenure and remuneration of federal judges. Section 72(i) states that justices of the High Court and of the other courts created by Parliament shall be appointed by the Governor-General in Council.<sup>7</sup> In practice, the appointment of judges by the Governor-General in Council is a selection by Cabinet on the recommendation of the Attorney-General, with no active involvement in the process by the Governor-General.<sup>8</sup> After the appointment is made by the Governor-General, the nominee, by oath or affirmation of office, assumes judicial duties.<sup>9</sup>

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<sup>7</sup> This is mirrored in the relevant statute for each Commonwealth court: *High Court of Australia Act 1979* (Cth) s 5; *Federal Court of Australia Act 1976* (Cth) s 6(1)(a); *Federal Circuit Court of Australia Act 1999* (Cth) sch 1 pt 1(1); *Family Law Act 1975* (Cth) ss 22(1)(a).

<sup>8</sup> George Williams, 'High Court appointments: the need for reform' (2008) 30(1) *Sydney Law Review*, 163, 164–166.

<sup>9</sup> Ibid; Daryl Williams, 'Judicial independence and the High Court' (1998) 27 *Western Australian Law Review* 140; Enid Campbell and Hoong P Lee, *The Australian Judiciary*

Tenure for federal judges is until 70 years of age.<sup>10</sup>

## **1.2 Eligibility for appointment**

Section 7 of the *High Court of Australia Act 1979* (Cth) requires that any person appointed as a justice of the High Court must have previously been a judge of a Commonwealth, State or Territory court,<sup>11</sup> or have been a barrister, solicitor or legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than five years.<sup>12</sup>

Appointment eligibility for the Federal Court, Family Court and Federal Circuit Court mirrors that of the High Court.<sup>13</sup>

## **1.3 Criteria for appointment**

There are no stated criteria, except for the Family Court. Presumably the proven competence of the person to be appointed is essential, and appointments are made on merit. During a 2013 Federal election campaign debate, Senator George Brandis, QC, who subsequently assumed the office of Attorney-General, stated that ‘all judicial appointments under the Coalition will be based on meritocratic principles’.<sup>14</sup>

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(Cambridge University Press, 1<sup>st</sup> ed, 2001) 76, Max Spry, ‘Executive and High Court Appointments’ in Geoffrey Lindell and Robert Bennett (eds), *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 419, 434.

<sup>10</sup> *Commonwealth Constitution*, s 72; *Federal Circuit Court of Australia Act 1999* (Cth) sch 1 pt 1(3)– (5).

<sup>11</sup> *High Court of Australia Act 1979* (Cth) s 7(a).

<sup>12</sup> *High Court of Australia Act 1979* (Cth) s 7(b).

<sup>13</sup> *Federal Court of Australia Act 1976 Act* (Cth) s 6(2); *Federal Circuit Court of Australia Act 1999* (Cth) sch 1 pt 1(2); *Family Law Act 1975* (Cth) ss 22(2)(a).

<sup>14</sup> Marcus Priest, Mark Dreyfus, George Brandis, ‘Australian Financial Review Legal Affairs Debate’, (Debate delivered at the Australian Financial Review Legal Affairs Debate, Norton Rose Fulbright, Sydney, 26 August 2013) <<http://www.lawchat.com.au/wp-content/uploads/2013/08/AFR-Legal-debate-26-August-2013.pdf>>.

For appointment to the Family Court of Australia, persons must be suitable to deal with matters of family law by reason of their training, experience and personality.<sup>15</sup>

## **1.4 The selection process**

The federal Attorney-General's website states that 'there are no current judicial appointment processes' for each of the four federal courts and that 'as the nation's first law officer, the Attorney-General is responsible for recommending judicial appointments to the Australian government'.<sup>16</sup> The inference is, presumably, that the appointment process has reverted to a more traditional model.<sup>17</sup>

### **1.4.1 Advertising or calls for expressions of interest**

Since assuming office, Attorney-General Brandis has appointed several judges to the Federal Court and the Federal Circuit Court. The vacancies were not advertised on the Department's website.<sup>18</sup> Accordingly, it can be inferred that there is no current practice to advertise in respect of potential appointees to federal courts.

There is discussion of the previous practice in Appendix B. A copy of the information previously provided to persons who wished to nominate a person for appointment to the Federal Court, or to lodge an expression of

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15 *Family Law Act 1975* (Cth) ss 22(2)(b).

16 Attorney-General's Department (Cth), *Court Appointments* <<http://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>>. As at April 2015.

17 See speech by Justice Ruth McColl, 'Address to New South Wales Women Lawyers' (Speech delivered to the Women Lawyers Association of NSW, Union, Sydney, 27 February 2014).

18 Andrew Lynch, 'Chief-justice controversy sounds an important warning', *The Australian* (online), 20 June 2014 <<http://www.theaustralian.com.au/business/legal-affairs/chiefjustice-controversy-sounds-an-important-warning/story-e6frg97x-1226960301844>>.

interest themselves, is in Appendix C. The Expression of Interest form formerly used for the Federal Court is in Appendix D.

### **1.4.2 Consultation**

The only statutory requirement for consultation relates to the appointment of High Court justices. Section 6 of the *High Court of Australia Act 1979* (Cth) provides that the Commonwealth Attorney-General must consult with the State Attorneys-General before an appointment is made to a vacant office in the High Court.

The statutory requirement for consultation was introduced when questions of Commonwealth-State powers dominated the work of the High Court. According to Professor Blackshield, the States believed that the Commonwealth's monopoly on High Court appointments was creating a Court the members of which unduly favoured the Commonwealth.<sup>19</sup> The object of the provision was explained this way in Parliament:<sup>20</sup>

[b]y requiring the process to be undertaken whenever a vacancy on the High Court occurs, this provision should do much to ensure that the Court continues to be truly national in character and fully equipped to discharge its constitutional functions as a federal Supreme Court.

According to a 1987 report to the Constitutional Commission, the consultation process then consisted of the Attorney-General for the Commonwealth writing to the Attorneys-General of the States, asking them to provide names of those whom they wished to have considered for appointment. The names put forward were then considered by the Attorney-General before a recommendation was made to Cabinet. There was and is,

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<sup>19</sup> Anthony R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian R Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 430–431.

<sup>20</sup> Commonwealth, *Parliamentary Debates*, (House of Representatives) 25 October 1979, 2500 (Robert I Viner) quoted in Daryl Williams, 'Judicial independence and the High Court' (1998) 27 *Western Australian Law Review*, 145.

however, no requirement that the appointment be made from those proposed by the States.<sup>21</sup> It is not known if this practice is current.

Background material, including the history of the process used by the 2007-2013 Labor Government, can be found in Appendix B. The process outlined in Appendix B has not been used by the current Attorney-General, Senator George Brandis. It is understood that heads of jurisdiction are consulted, as a courtesy, before names are submitted to Cabinet, but not as a strict requirement.

There is further discussion of the consultation process in Appendix B.

### **1.4.3 The use of assessment or selection panels**

There is no current practice to use advisory panels. In June 2009, during the Senate's Legal and Constitutional Affairs References Committee's *Inquiry into Australia's Judicial System and the Role of Judges*, Senator Brandis QC, then shadow Commonwealth Attorney-General, questioned whether it was appropriate for there to be a preliminary decision-making forum prior to the decision by Cabinet on advice of the Attorney-General:

Senator BRANDIS – The Attorney-General will always have a shortlist. But those who propound a panel procedure are not talking about a shortlist at all. What they are really saying is that there should be two sets of decision makers on judicial appointments. At the ultimate stage it should be the cabinet on the advice of the Attorney-General, but at an anterior stage it should be people other than the cabinet or the Attorney-General, who narrow the range of names from among whom the Attorney-General might choose so as to make it more difficult for the Attorney-General or the government of the day to appoint somebody who does not appear on that list. It is a bit like having a bicameral parliament, you have to get past one stage first and then you have to get past the second stage.

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<sup>21</sup> Advisory Committee to the Constitutional Convention, 'Separation of powers, appointment and removal of judges', *Australian Judicial System* (1987), Ch 5.

I question whether that is an appropriate thing. Why should not the government and the minister in particular, in this case the Attorney, who makes the appointment or recommends the appointment to cabinet take responsibility for the appointment that is ultimately made, and if they should, then how can it be appropriate by some rigidified process to exclude from their consideration suitable people?

... [I]t seems to me that when you break it down what you are saying really is that appointments should be made against publicly known criteria and that appointments should be made on the basis of the appointor being as well informed as to the qualities of the people under consideration as possible. Those are the two matters you have identified and I agree with you in relation to both of them. But neither of those is an argument for a panel doing something that the Attorney-General himself could not do.

Dr Lowndes – The difficulty with that is that it may not be publicly known what criteria the Attorney applies.

Senator BRANDIS – Well, the Attorney-General would publish it, just as Mr McClelland has published the criteria that should go to the panel... <sup>22</sup>

#### **1.4.4 Formal interviews**

It appears that it is not the current practice to conduct interviews. There is discussion of the previous practice in Appendix B.

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22 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 12 June 2009, 73–75 (Senator George Brandis and Dr John Lowndes, President, Association of Australian Magistrates).

## **2 THE APPOINTMENT PROCESS FOR STATE AND TERRITORY COURTS IN AUSTRALIA**

The following elements are considered:

- The authority to appoint
- Eligibility for appointment
- Criteria for appointment
- The selection process, including:
  - Advertising or calls for expressions of interest
  - Consultations
  - The use of assessment or selection panels
  - Interviews.

A summary of the situation in all States and Territories is in tabular form in Appendix A.

## 2.1 Appointments in the Australian Capital Territory

### 2.1.1 Authority to appoint

The *Supreme Court Act 1933* (ACT) and *Magistrates Court Act 1930* (ACT) provide the Executive with the statutory authority to appoint judicial officers within the ACT courts.<sup>23</sup> The practice is for the Attorney-General to submit a nominee or a short list of nominees to Cabinet for discussion to determine who should be appointed.<sup>24</sup>

### 2.1.2 Eligibility for appointment

For the Supreme Court, persons are only eligible to be appointed a resident judge if they have been a judge of a superior court of record of the Commonwealth or a State, or a judge or acting judge of the Supreme Court of the ACT, or a legal practitioner for not less than five years, and have not attained the age of 70 years.<sup>25</sup> To be eligible to become a magistrate or special (acting) magistrate in the ACT, a person must have been a lawyer for at least five years.<sup>26</sup>

### 2.1.3 Criteria for appointment

Following amendments in 2009, the Executive is required by statute to make publicly available as a notifiable instrument the process and criteria

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23 *Supreme Court Act 1933* (ACT) s 4; *Magistrates Court Act 1930* (ACT) s 7.

24 *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT), Notifiable Instrument NI2009 – 643 <<http://www.legislation.act.gov.au/ni/2009-643/current/pdf/2009-643.pdf>>; *Supreme Court (Resident Judges Appointment Requirements) Determination 2010* (ACT), Notifiable Instrument NI2010 – 14 <<http://www.legislation.act.gov.au/ni/2010-14/current/rtf/2010-14.rtf>>.

25 *Supreme Court Act 1933* (ACT) s 4(2). For acting judges, see ss 4B(3)(a)-(b). Acting judges may be appointed for no longer than 12 months: *Supreme Court Act 1933* (ACT) s 4B(2).

26 *Magistrates Court Act 1930* (ACT) s 7A. In regard to special (i.e. acting) magistrates, see *Magistrates Court Act 1930* (ACT) s 8 and *Legislation Act 2001* (ACT) s 209(3)(a).

that apply to the selection of a person for appointment.<sup>27</sup> The criteria for the Supreme Court and Magistrates Court are currently identical:<sup>28</sup>

Intellectual capacity:

- Appropriate knowledge of the relevant law and its underlying principles
- High level of expertise in your chosen area or profession
- Ability to quickly absorb and analyse information

Personal qualities:

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally

An ability to understand and deal fairly:

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy

Authority and communication skills:

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged

Efficiency:

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgements expeditiously
- Ability to work constructively with others (including leadership and

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27 *Supreme Court Act 1933 (ACT) s 4AA; Magistrates Court Act 1930 (ACT) s 7AA.*

28 *Magistrates Court (Magistrates Appointment Requirements) Determination 2009 (ACT), Notifiable Instrument NI2009 – 643; Supreme Court (Resident Judges Appointment Requirements) Determination 2010 (ACT), Notifiable Instrument NI2010 – 14.*

managerial skills where appropriate)

Experience in a dispute resolution environment would be an advantage.

#### **2.1.4 The selection process**

##### **(a) Advertising or calls for expressions of interest**

The current Determinations require the Attorney-General to seek expressions of interest for the Supreme Court and Magistrates Court by public notice,<sup>29</sup> which includes advertisement of the positions in local and national media.<sup>30</sup> This practice has been followed for the most recent appointments to the Supreme Court and presumably will be followed for appointments to the Magistrates Court.

The expression of interest is to include personal details, educational and professional qualifications, examples of how the candidate has demonstrated the selection criteria, three referees, and the completion of a Private Interest Declaration form.<sup>31</sup>

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29 *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT), Notifiable Instrument NI2009 – 643; *Supreme Court (Resident Judges Appointment Requirements) Determination 2010* (ACT), Notifiable Instrument NI2010 – 14.

30 Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 19 August 2009, 4492 (Mr Corbell, Attorney-General).

31 Justice and Safety Community Directorate, *Magistrates Court: Expression of Interest Form* (22 May 2013)

<[http://cdn.justice.act.gov.au/resources/uploads/Expression\\_Interest\\_Magistrate.doc](http://cdn.justice.act.gov.au/resources/uploads/Expression_Interest_Magistrate.doc)>; Justice and Safety Community Directorate, *Expressions of Interest for Appointment as a Magistrate of the Magistrates Court of the Australian Capital Territory* (22 May 2013) <<http://www.justice.act.gov.au/review/view/25/title/expressions-of-interest-for-appointment>>; Justice and Safety Community Directorate, *Expression of Interest: Chief Justice Form* (29 November 2012)

<[http://cdn.justice.act.gov.au/resources/uploads/Chief\\_Justice\\_and\\_Master/Expression\\_Interest\\_Chief\\_Justice.doc](http://cdn.justice.act.gov.au/resources/uploads/Chief_Justice_and_Master/Expression_Interest_Chief_Justice.doc)>; Justice and Safety Community Directorate, *Expressions of Interest: Chief Justice or Master of the Supreme Court* (17 April 2013) <<http://www.justice.act.gov.au/review/view/20/title/expressions-of-interest-chief-justice>>.

The Attorney-General is also required to write to 'key ACT stakeholders', inviting them to suggest or nominate people who are suitably qualified for appointment.<sup>32</sup>

In 2009, the then Attorney-General, Simon Corbell, described the process as follows:<sup>33</sup>

Recognising that not all suitable candidates will necessarily put themselves forward for consideration by this process, the call for expressions of interest is supplemented by letters seeking nominations from the courts themselves, the legal profession, including groups that represent women lawyers, and broader community stakeholders. Through this process, groups including the ACT Law Society, the Bar Association, the Women Lawyers Association of the ACT and community stakeholders such as the Welfare Rights and Legal Centre and the ACT Council of Social Service are all consulted.

**(b) Consultation**

In addition to that described above, the current Determinations require the Attorney-General to consult with the head of jurisdiction about possible appointees to his/her Court.

For the Supreme Court, there may be further consultation with the Chief Justice and representatives of the Bar Association and the Law Society before a final nomination is prepared for consideration by the Government.

For the Magistrates Court, after the interview panel's interview of candidates (see below), and its assessment of candidates having been provided to the Attorney-General, the Chief Justice, Chief Magistrate and representatives of

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<sup>32</sup> *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT), Notifiable Instrument NI2009 – 643 <<http://www.legislation.act.gov.au/ni/2009-643/current/pdf/2009-643.pdf>>; *Supreme Court (Resident Judges Appointment Requirements) Determination 2010* (ACT), Notifiable Instrument NI2010 – 14 <<http://www.legislation.act.gov.au/ni/2010-14/current/rtf/2010-14.rtf>>.

<sup>33</sup> Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 19 August 2009, 4492 (Mr Corbell, Attorney-General).

the Bar Association and the Law Society have been further consulted prior to preparing a final nomination for consideration by the Government.

**(c) Use of assessment or selection panels**

For magistrates' appointments, it is generally current practice for the Attorney-General to request the Department to prepare a short list of candidates and to facilitate a selection process with an interview panel.

For the vacancy of the office of Chief Magistrate in 2011, the selection panel consisted of the Director-General of the Department, a sitting Chief Magistrate from another jurisdiction, and a retired tribunal member. The current Chief Magistrate sat on the panel(s) for recent appointments to the Magistrates Court.

**(d) Formal interviews**

For appointments to the Magistrates Court, but not the Supreme Court, the panel interviews short-listed candidates, and subsequently provides a report on their views as to the suitability of candidates to the Attorney-General.<sup>34</sup>

It is not clear whether future appointment processes will replicate the processes described above.

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<sup>34</sup> Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 19 August 2009, 4492 (Mr Corbell, Attorney-General).

## 2.2 Appointments in New South Wales

### 2.2.1 Authority to appoint

Judges and magistrates in New South Wales (NSW) are formally appointed by the Governor in Council.<sup>35</sup> A nominee is selected by Cabinet on the recommendation of the Attorney-General, who then informs the Governor of the nominee for appointment.<sup>36</sup>

### 2.2.2 Eligibility for appointment

The current legislation governing the eligibility of judges to the Supreme, District, and Land & Environment Courts of NSW provides that a person is qualified for appointment as a judge if she or he holds, or has held, judicial office in Australia, or if the person is an Australian lawyer of at least seven years standing.<sup>37</sup> For the Local Court, a person is qualified for appointment as a magistrate if she or he holds, or has held, judicial office in Australia, or has been an Australian lawyer of at least five years standing.<sup>38</sup> Tenure for judicial officers in NSW is until the age of 72.<sup>39</sup>

Acting judicial officers may be appointed in the Supreme, District, Local, and Land & Environment Courts for a term not exceeding 12 months.<sup>40</sup> The eligibility of a person to be appointed an acting judge or magistrate is the same as for permanent judges.<sup>41</sup> According to the Attorney-General Department's guidelines, 'generally only a former judicial officer will be

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35 *Supreme Court Act 1970* (NSW) ss 26(1), 27(1), 31(1), 32(1); *District Court Act 1973* (NSW) ss 13(1), (4), 18(1); *Local Courts Act 1982* (NSW) ss 13(1), 14(1), 15(1), 16(1); *Industrial Relations Act 1996* (NSW) ss 149(1), 381(1); *Land and Environment Court Act 1979* (NSW) ss 8(1), 11(1).

36 Lenny Roth, 'Judicial Appointments' (Briefing Paper No 3/2012, Parliamentary Library, Parliament of New South Wales, 2012) 8.

37 *Supreme Court Act 1970* (NSW) ss 26(2)(a)-(b); *District Court Act 1973* (NSW) ss 13(2)(a)-(b); *Land and Environment Court Act 1979* (NSW) ss 8(2)(a)-(c).

38 *Local Courts Act 1982* (NSW) ss 13(2)(a)-(b).

39 *Judicial Officers Act 1986* (NSW) s 44.

40 *Supreme Court Act 1970* (NSW) s 37(1); *District Court Act 1973* (NSW) s 18(1); *Local Court Act 2007* (NSW) s 16(1); *Land and Environment Court Act 1979* (NSW) s 11(1).

41 *Supreme Court Act 1970* (NSW) s 37(2); *District Court Act 1973* (NSW) s 18(2); *Local Court Act 2007* (NSW) s 16(1); *Land and Environment Court Act 1979* (NSW) s 11(2).

appointed as an acting judicial officer' and that the 'appointments will be limited in number and are not intended to replace the permanent judicial strength of a court.'<sup>42</sup>

### **2.2.3 Criteria for appointment**

In 2008, the NSW Attorney-General approved a list of personal and professional criteria to be considered in selecting candidates for every judicial office in the State. The criteria are publicly available on the Departmental website:<sup>43</sup>

#### **Overriding Principle**

Appointments will be made on the basis of merit. Subject to this principle, including the relevant considerations listed below, there is a commitment to actively promoting diversity in the judiciary. Consideration will be given to all legal experience, including that outside mainstream legal practice.

#### **Professional qualities**

- Proficiency in the law and its underlying principles
- High level of professional expertise and ability in the area(s) of professional specialisation
- Applied experience (through the practice of law or other branches of legal practice)
- Intellectual and analytical ability
- Ability to discharge duties promptly
- Capacity to work under pressure
- Effective oral, written and interpersonal communication skills with

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42 Department of Attorney-General and Justice (NSW), *Guidelines for the appointment of acting judicial officers* (17 November 2010)  
<[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/Guidelines-for-Acting-Judicial-Officers-FINAL-October2010.doc/\\$file/Guidelines-for-Acting-Judicial-Officers-FINAL-October2010.doc](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Guidelines-for-Acting-Judicial-Officers-FINAL-October2010.doc/$file/Guidelines-for-Acting-Judicial-Officers-FINAL-October2010.doc)>.

43 Department of Attorney-General and Justice (NSW), *Careers for Judicial and Other Statutory Officers* (6 January 2014)  
<[http://www.lawlink.nsw.gov.au/lawlink/corporate/ll\\_corporate.nsf/pages/LL\\_Home\\_page\\_career\\_appointment#SelectionCriteria](http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/LL_Home_page_career_appointment#SelectionCriteria)>.

peers and members of the public

- Ability to clearly explain procedure and decisions to all parties
- Effective management of workload
- Ability to maintain authority and inspire respect
- Willingness to participate in ongoing judicial education
- Ability to use, or willingness to learn modern information technology

**Personal qualities**

- Integrity
- Independence and impartiality
- Good character
- Common sense and good judgement
- Courtesy and patience
- Social awareness

## 2.2.4 The selection process

### (a) ***Advertising or calls for expressions of interest***

According to Justice Sackville's 2005 paper in the *Journal of Judicial Administration*, calls for expressions of interest and nominations for magistrates positions in the Local Court occurred periodically, and did not necessarily correspond with vacancies actually occurring.<sup>44</sup> Following reforms in 2008, vacancies for both Local Court magistrates and District Court judges are advertised in local and national newspapers, as well as on the Attorney-General's *Lawlink* website, calling for expressions of interest.<sup>45</sup> In addition, the Law Society of NSW and the NSW Bar Association are

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44 Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 122. For example, Sackville notes that prior to publication the last advertisement placed in respect of full-time positions was in 2002 and, prior to that, in 1999. In the intervening period, an advertisement called for expressions of interest in part-time positions, following the commencement of the *Local Courts Amendment (Part-time Magistrates) Act 1999* (NSW), which allowed for the appointment of part-time magistrates.

45 Roth, 'Judicial Appointments' (Briefing Paper No 3/2012, Parliamentary Library, Parliament of New South Wales, 2012) 8.

notified of the vacancy. The NSW Bar Association may then subsequently advertise these vacancies.<sup>46</sup> However, it appears that in some cases appointments continue to be made of persons who have not applied.<sup>47</sup>

The *Lawlink* webpage notes that, while expressions of interest are commonly submitted in response to an advertisement, interested persons are able to submit an expression of interest at any time in relation to potential future vacancies. The list of candidates may then be drawn upon by the Attorney-General when vacancies do arise. This list of expressions of interest is active until the next advertisement calling for expressions of interest, with the period between advertisements being between 12 to 18 months.<sup>48</sup>

It is unclear as to whether advertising is used in the appointment process for the superior courts in NSW.

**(b) Consultation**

There are no statutory requirements for consultation in the appointment of judicial officers in NSW. The current practice for the appointment of judicial officers to Local and District Courts includes consultation with the referees provided by those that have submitted an expression of interest, in addition to ‘stakeholders’, a term which is left undefined on the Attorney-General’s website.<sup>49</sup>

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46 The New South Wales Bar Association, ‘Applications and nominations sought for Acting Commissioner Land and Environment Court of NSW’ *In Brief* (online), 16 December 2013

<[http://archive.nswbar.asn.au/database/in\\_brief/inbrief.article.php?i=5566](http://archive.nswbar.asn.au/database/in_brief/inbrief.article.php?i=5566)>.

47 Based on advice provided by Judge Garry Neilson, March 2015.

48 Department of Attorney-General and Justice (NSW), *Judicial careers and statutory appointments* (6 January 2014).

<<http://www.justice.nsw.gov.au/Pages/careers/Judicialcareers-statutoryappointments.aspx#Termsandconditionsoffice>>.

49 Ibid.

The appointment of judges to the higher courts and of heads of jurisdiction is made ‘traditionally’, with the head of jurisdiction and relevant legal professional bodies usually being consulted.<sup>50</sup>

**(c) Use of assessment or selection panels**

For the Local and District Courts, a selection panel is convened to review expressions of interest in reference to the selection criteria. A panel comprises the head of the jurisdiction, the Director General of the Attorney-General’s Department, a leading member of the legal profession and a prominent community member.<sup>51</sup>

**(d) Formal interviews**

As noted above, selection panels are usually convened to evaluate candidates for the Local Court and District Court although, in some cases, appointments to the District Court are made without the person being interviewed.<sup>52</sup> The panel develops a short-list of candidates for interview and, following the interview, provides a report to the Attorney-General with an assessment as to whether the candidate is highly suitable, suitable or unsuitable for judicial office. However, as the *Lawlink* webpage notes, the process supplements the traditional selection process, and the Attorney-General may propose a nominee for appointment ‘where this is felt necessary in appropriate cases’.<sup>53</sup>

Formal interviews do not appear to be used in the appointment process for superior courts in New South Wales.

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50 Ibid; Letter from Chief Justice T F Bathurst of the Supreme Court of New South Wales to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 28 June 2013.

51 Department of Attorney-General and Justice (NSW), *Judicial careers and statutory appointments* (6 January 2014) <<http://www.justice.nsw.gov.au/Pages/careers/Judicialcareers-statutoryappointments.aspx#Termsandconditionsoffice>>.

52 Based on advice provided by Judge Garrry Neilson, March 2015.

53 Ibid.

## 2.3 Appointments in the Northern Territory

### 2.3.1 Authority to appoint

The Administrator has the authority to appoint judicial officers to the Supreme Court,<sup>54</sup> including the Chief Justice, judges, additional judges,<sup>55</sup> acting judges<sup>56</sup> and masters.<sup>57</sup>

Similarly, the Administrator also has the authority to appoint magistrates.<sup>58</sup> Acting magistrates may be appointed by either the Administrator or the Attorney-General,<sup>59</sup> and relieving magistrates may be appointed by the Attorney-General alone.<sup>60</sup>

In practice, the Attorney-General puts up an Executive Council Submission recommending the Administrator appoint a person as a judge, magistrate or master.<sup>61</sup>

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54 *Supreme Court Act* (NT), s 32.

55 Additional judges are most commonly judges who are appointed to other Courts in Australia, and reside interstate, but sit periodically in the Northern Territory: *Supreme Court Act* (NT), s 32(1). Northern Territory judges who have retired from full-time commission before the age of 70 may be appointed in this capacity. Appointments are 'sessional' rather than full-time in nature, i.e. although members hold standing commissions as additional judges, they sit only when required and available, and those not holding permanent appointments in other jurisdictions are remunerated by way of daily stipend. A person may only be appointed as an additional Judge of the Court if they have not attained the age of 70 years.

56 Acting Judges are appointed for a period not exceeding 12 months: *Supreme Court Act* (NT), s 32(2). By convention, acting judges are appointed at the request and on the recommendation of the Chief Justice, and subject to the same 'sessional' arrangements as for additional Judges. There is no age limit applicable to the appointment of an acting judge. Those appointed as acting judges are invariably former permanent judges. Acting appointments have also been made for the purpose of hearing particular matters in circumstances where local judges are unable to sit.

57 *Supreme Court Act* (NT), s 41A.

58 *Magistrates Act* (NT), s 4.

59 *Magistrates Act* (NT), s 9(2).

60 Relieving magistrates are appointed where the Attorney-General is of the opinion that the efficient administration of justice requires it, for a period not exceeding six months: *Magistrates Act* (NT), s 9A

61 Northern Territory Department of Justice, Submission to the Victorian Department of Justice, Judicial Appointments Review, 1 September 2010, 1  
<[https://assets.justice.vic.gov.au/justice/resources/eca66bfa-32e7-4692-af0d-ea69bf505889/dept\\_of\\_justice\\_northern\\_territory.pdf](https://assets.justice.vic.gov.au/justice/resources/eca66bfa-32e7-4692-af0d-ea69bf505889/dept_of_justice_northern_territory.pdf)>.

### 2.3.2 Eligibility for appointment

#### Judges

To be appointed as a judge in the Supreme Court, one must have been a judge of a court of the Commonwealth or a State, or a lawyer for not less than 10 years, and have not attained the age of 70 years.<sup>62</sup>

#### Magistrates

To be eligible for appointment as a magistrate, one must have been a lawyer for not less than five years and have not attained the age of 70 years.<sup>63</sup> In addition, persons may be appointed as magistrates if they were admitted to the legal profession for at least five years in New Zealand, Papua New Guinea, England, Scotland, Northern Ireland or held the position of magistrate, or its equivalent, in one of those jurisdictions and have the approved academic qualifications for admission as a local lawyer.<sup>64</sup>

### 2.3.3 Criteria for appointment<sup>65</sup>

In assessing candidates, the assessment panel applies the attributes put forward by the Law Council of Australia's Judicial Appointments Policy of September 2008, but without making express reference to the Law Council's document or checking off each attribute from a list. A copy of the Policy is in Appendix E to this report. The Department of Justice noted in 2010 that each attribute was assessed in such a way that those from various areas of the legal profession with suitable experience were given consideration, rather than exclusively barristers.<sup>66</sup>

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62 *Supreme Court Act* (NT), s 32(1).

63 *Magistrates Act* (NT), ss 5(a), 7(2).

64 *Magistrates Act* (NT), ss 5(b),(c).

65 Much of this information in this and the following parts of this section, dealing with the Northern Territory, is based on advice provided by the Solicitor-General of the Northern Territory to Justice Judith Kelly in October 2014.

66 Department of the Attorney-General and Justice, Northern Territory Government, Submission to the Department of Justice, Government of Victoria, *Judicial Appointments Review*, 1 September 2010, 2.

The preference of Attorneys-General in recent times has been to make appointments from within the Northern Territory legal profession. There is no fixed policy position that appointments must or will be made from the local profession. Although all current members of the Supreme Court have been appointed from within the local profession, it is recognised that there may be circumstances in which an outside appointment is most appropriate or preferable.

### **2.3.4 The selection process**

#### **(a) Advertising or calls for expressions of interest**

Vacancies in the Supreme Court are not advertised, but rather the consultative process described above is employed.<sup>67</sup>

The positions of acting and additional judges are not advertised.

Calls for expressions of interest for positions as magistrates are usually made following vacancies.<sup>68</sup> In 2013 the position of Chief Magistrate was advertised nationally in *The Australian*, as well as in the *Northern Territory News*.

Although temporary appointments are not advertised, calls for expressions of interest for permanent appointment frequently contain a statement to the effect that applicants for permanent appointment who may be interested in appointment as a relieving magistrate are invited to indicate that interest.

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67 Ronald Sackville, 'Judicial appointments: A discussion paper' (2005) 14 *Journal of Judicial Administration* 117, 131.

68 Department of Justice (NT), 'New Chief Magistrate Appointed' (Media Release, 7 June 2006) <<http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/index454a.html?fuseaction=printRelease&ID=933>>; Northern Territory Department of Justice, Submission to the Victorian Department of Justice, Judicial Appointments Review, 1 September 2010, 2.

Those expressions of interest are taken into consideration when making acting or relieving appointments, although not exclusively.<sup>69</sup>

**(b) Consultation**

For Supreme Court appointments, the Chief Justice of the Supreme Court, the President of the Bar Association and the President of the Law Society are consulted for recommendations of suitable persons and to discuss those identified by an assessment panel. When the panel consults with the Chief Justice a range of potential candidates are discussed. The Chief Justice in turn seeks the views of other judges of the Court.<sup>70</sup> Following that consultation process, a pool of suitable candidates is recommended to the Attorney-General. The Attorney-General has not recently sought any determination from the panel as to a preferred candidate or candidates. The Attorney-General has taken his own selection from that pool of candidates to Cabinet.<sup>71</sup>

When making selections for magistrate appointments, there is no formal consultation with the President of the Bar Association and the President of the Law Society in relation to suitable candidates. On most occasions, however, there will be some informal discussion with those organisations once the panel has identified candidates considered suitable for appointment. There is also no formal consultation with the Chief Justice in relation to the matter, although again the candidates identified by the panel as suitable for appointment are generally the subject of informal discussions with the Chief Justice to ensure there is no objection from him/her. The Chief Magistrate is generally ensured a voice in the matter by his/her participation in the panel process, or that of a nominee.<sup>72</sup>

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69 Information provided by the Solicitor General of the Northern Territory to Justice Judith Kelly, October 2014.

70 Letter from Chief Justice Trevor Riley of the Supreme Court of the Northern Territory of Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 18 June 2013.

71 Information provided by the Solicitor-General of the Northern Territory to Justice Judith Kelly, October 2014.

72 Ibid.

Because appointments as acting and additional judges are made from the ranks of retired judges or those serving in other jurisdictions, there is no process of consultation for these appointments.

**(c) *Use of assessment or selection panels***

The Attorney-General typically nominates an assessment panel to report to him or her in relation to candidates who may be suitable for appointment, and the relative suitability of those candidates. Since August 2012 the Attorney-General has assumed a direct role in the initial assessment process and has determined to convene a single panel to deal with both Supreme Court and magistrate vacancies.

For more recent appointments, the panel has comprised the Attorney-General himself, a former Administrator and Chief Justice of the Northern Territory, the Solicitor-General and the President of the Law Society. The President of the Bar Association is also likely to be invited to join the panel unless he/she is a candidate for appointment. The panel identifies suitable candidates for Cabinet's consideration.

In regard to magistrates, the process is the same in that a panel is appointed to assess the candidates. The composition of the panel has varied from time to time. Since August 2012, the composition of the panel has been as described above. For approximately ten years leading up to August 2012, the panel was generally comprised by the Solicitor-General, the Chief Magistrate, the Chief Executive of the Department of the Attorney-General and Justice (or his/her nominee) and, on occasion, a nominee from the Department of the Chief Minister. The involvement of the Chief Executive or his/her nominee has been a constant. The balance of the panel has sometimes been made up of magistrates, and sometimes a magistrate and

another senior public servant. On rare occasions, a judge of the Supreme Court has been included on the panel.<sup>73</sup>

Acting magistrates are appointed by the Attorney-General, in either an acting or relieving capacity, depending on the circumstances. The selection is made in the Attorney-General's office, and the mechanics of the appointment are attended to by the Department of the Attorney-General and Justice.

**(d) Formal interviews**

Interviews are not conducted for Supreme Court appointments.

Candidates for magistrates' positions are usually interviewed, but there has been no standard process for the conduct of interviews. That matter has been left to the discretion of the panel. On some occasions applicants have been shortlisted and interviews conducted. On other occasions there has been no interview process. This appears to depend largely upon whether the leading candidates practise within the Territory and are known to the panel. In those circumstances, interviews are usually considered unnecessary. On the other hand, it has been considered necessary to conduct interviews where there are candidates from outside the jurisdiction whose applications demonstrate a strong claim for appointment.<sup>74</sup>

At the conclusion of the assessment process for both judge and magistrate positions, the panel formulates a shortlist of candidates for recommendation to the Attorney-General for submission to Cabinet. The convention has been that the panel will nominate no fewer than two suitable candidates so that Cabinet is presented with an effective choice. The recommendations are drafted on the basis that the purpose of the selection process is to

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73 There has been no readily discernible or particular reason for the inclusion of a judge on those occasions, beyond the disposition and preference of the Chief Executive at that time.

74 Information provided by the Solicitor-General of the Northern Territory to Justice Judith Kelly, October 2014.

ensure that only suitable candidates, and those with the greatest relative merit, are placed before Cabinet. Once that screening process had been conducted, it is considered a matter for the Cabinet to bring an independent scrutiny to bear. For that reason, the recommendation documents do not seek to conduct an exhaustive analysis of the relative merits of the nominated candidates. It has been customary for the Attorney-General of the day to speak informally to one or more members of the selection panel in relation to those issues. In the ordinary course, the Attorney-General then takes those names and that information to Cabinet, which makes a final selection.<sup>75</sup>

### **2.3.5 Appointment of Masters and Acting Masters**

There would not appear to be a fixed process for the selection of the Master of the Supreme Court. The appointment is made by the Administrator acting on the advice of the Executive Council, on the recommendation of the Chief Justice. The process appears to have been left to the discretion of the Chief Justice of the day.

For Acting Masters, the Chief Justice may authorise a person to act in the office of Master in the event of vacancy in the office, or absence or inability on the part of the Master. Acting appointments are not invariably made in the event of vacancy or absence. It is frequently the case that the judges assume the Master's judicial duties during those periods.

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75 *ibid.*

## 2.4 Appointments in Queensland

### 2.4.1 Authority to appoint

The Governor in Council has the authority to appoint judges and magistrates to the Queensland courts.<sup>76</sup> In practice, the Attorney-General makes a recommendation to Cabinet for consideration, before informing the Governor of whom is to be appointed.<sup>77</sup>

### 2.4.2 Eligibility for appointment

For the Supreme and District Courts, persons appointed must have been a barrister or solicitor of at least five years standing,<sup>78</sup> the tenure of a judge being until the age of 70.<sup>79</sup> For acting judges appointed to the Supreme and District Courts for no longer than six months, the same eligibility criteria are applied.<sup>80</sup> However, an acting judge who has previously served as a judge of a corresponding or higher court in another State or Territory, or as a judge of the Federal Court of Australia, may be appointed for one year, and a retired judge of the same Queensland court may be appointed for two years.<sup>81</sup> However, despite the limits on the duration of tenure, acting judges may be appointed more than once.<sup>82</sup> The appointment of a former judge of a

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76 *Constitution of Queensland Act 2001* (Qld) s 59(1). See also *Supreme Court of Queensland Act 1991* (Qld) s 12 for the appointment of the Chief Justice, s 34 for the appointment of a judge of appeal, s 6 for acting judges, and *District Court of Queensland Act 1967* (Qld) s 10 for the appointment of Chief Judge and s 17 for acting judges. For appointment of magistrates, the Chief Magistrate, and acting magistrates, see respectively *Magistrates Act 1991* (Qld) ss 5(1), 5(6), s 6.

77 The role of the Attorney-General is implied in the legislation regarding the appointment of Magistrates. See *Magistrates Act 1991* (Qld) ss 5(1)-(2).

78 *Constitution of Queensland Act 2001* (Qld) s 59(1). See also *Supreme Court of Queensland Act 1991* (Qld) s 12, 34 respectively for the appointment of the Chief Justice and for the appointment of a judge of appeal, and *District Court of Queensland Act 1967* (Qld) s 10 for the appointment of Chief Judge.

79 *Supreme Court of Queensland Act 1991* (Qld) s 21(1); *District Court of Queensland Act 1967* (Qld) s 14(1).

80 *Supreme Court of Queensland Act 1991* (Qld) s 6(1)-(2); *District Court of Queensland Act 1967* (Qld) s 17.

81 *Supreme Court of Queensland Act 1991* (Qld) s 6(3)-(4); *District Court of Queensland Act 1967* (Qld) s 17(2)-(3).

82 *Supreme Court of Queensland Act 1991* (Qld) s 6(7)(a); *District Court of Queensland Act 1967* (Qld) s 17(6)(a).

Queensland court to the same court as an acting judge must not extend beyond the date when the judge reaches the age of 78.<sup>83</sup>

For the Magistrates Court, a person is qualified if he or she has been a barrister or solicitor of the Supreme Court of at least five years standing, or a barrister, solicitor, or legal practitioner of the Supreme Court of another State or Territory, or the High Court, of at least five years standing, and has not attained the age of 70.<sup>84</sup> The following persons may be appointed as acting magistrates: a person qualified to be appointed as a magistrate, a retired magistrate, a judge or magistrate of another State or Territory, a judge of a federal court or a federal magistrate (presumably now referring to the Federal Circuit Court), or a Supreme Court or District Court judge, if the head of the jurisdiction consents.<sup>85</sup> In addition, a clerk of the court may be appointed, and if the clerk is not qualified to be a magistrate, the Minister responsible must be satisfied that there are 'exceptional circumstances' for this appointment.<sup>86</sup>

### **2.4.3 Criteria for appointment**

There are no published criteria for appointment in Queensland.<sup>87</sup>

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83 *Supreme Court of Queensland Act 1991* (Qld) s 6(6); *District Court of Queensland Act 1967* (Qld) s 17(5).

84 *Magistrates Act 1991* (Qld) s 4.

85 *Magistrates Act 1991* (Qld) s 6(1).

86 *Magistrates Act 1991* (Qld) s 6(1B).

87 This was confirmed by Chief Magistrate Brendan Butler in respect to the Magistrates Court of Queensland and by Chief Justice Paul de Jersey in respect to the Supreme Court of Queensland. Letter from Chief Magistrate Brendan Butler of the Magistrates' Court of Queensland to Professor Greg Reinhardt of the Australasian Institute of Judicial Administration, 22 July 2013; Letter from Chief Justice Paul de Jersey of the Supreme Court of Queensland to Professor Greg Reinhardt of the Australasian Institute of Judicial Administration, 18 June 2013. The only publicly available criteria found relates to the Queensland Civil and Administrative Tribunal. Queensland Civil and Administrative Tribunal, *Information Kit: Ordinary Member on a sessional basis expression of interest* <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/182885/application-kit.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/182885/application-kit.pdf)>.

#### 2.4.4 The selection process

**(a) Advertising or calls for expressions of interest**

There is a practice of calling for expressions of interest through advertising via the Bar Association and Law Society, when making appointments to the Magistrates Court.<sup>88</sup> Vacancies in superior courts are not advertised.<sup>89</sup>

**(b) Consultation**

The only statutory requirement in regard to consultation is for the appointment of magistrates, acting magistrates and acting judges. The Minister is obliged to consult with the head of jurisdiction prior to making a recommendation to the Governor in Council for those positions.<sup>90</sup> In March 2014 the then Attorney-General, Jarrod Bleijie, stated that he consulted with the former and current Chief Magistrate, the Chief Justice, the President of the Court of Appeal, and the Law Society and Bar Association for the 17 judicial vacancies filled by his Government.<sup>91</sup>

At the time of Sackville's 2005 paper, there was an informal process of consultation between the Attorney-General and judicial officers and professional associations in Queensland, notably the relevant head of jurisdiction and the Presidents of the Bar Association and Law Society.<sup>92</sup>

This process has since been confirmed, by Chief Magistrate Brendan Butler, in relation to the Magistrates Court.<sup>93</sup>

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88 Ibid.

89 Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 125.

90 *Magistrates Act 1991* (Qld) ss 5(2), 6(1A); *District Court of Queensland Act 1967* (Qld) s 17(4); *Supreme Court of Queensland Act 1991* (Qld) s 6(1), (5).

91 Michael McKenna, 'Newman defends A-G over call to go', *The Australian*, Australia, 26 March 2014, 5.

92 Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 125.

93 Letter from Chief Magistrate Brendan Butler of the Magistrates Court of Queensland to Professor Greg Reinhardt of the Australasian Institute of Judicial Administration, 22 July 2013.

**(c) *Use of assessment or selection panels***

There is not a practice of using assessment or selection panels.

**(d) *Formal interviews***

Sackville noted in his 2005 paper that it was a discretionary practice of the Attorney-General to informally meet with appointees to judicial office.<sup>94</sup> There is now no such practice.

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94 Ibid.

## 2.5 Appointments in South Australia

### 2.5.1 Authority to appoint

Formally, judicial officers are appointed in South Australia by the Governor-in-Council.<sup>95</sup> In practice, the appointee is selected by Cabinet, on the recommendation of the Attorney-General. In regard to the appointment of magistrates, the recommendation of an appointee by the Attorney-General to the Governor is a statutory requirement.<sup>96</sup>

### 2.5.2 Eligibility for appointment

The only requirement for appointment provided by legislation relates to the number of years that a person must have been a legal practitioner.<sup>97</sup> For appointment to the Supreme Court a person must have been a practitioner of the court for at least 10 years, and for appointment as Chief Justice, unless already a judge of the court, for at least 15 years. For appointment as a master, the period is seven years.

For appointment to the District Court a person must have been a practitioner of the Supreme Court for at least ten years to be qualified for appointment as Chief Judge, seven years for appointment as a judge, and five years for appointment as a master. For appointment to the Magistrates Court an appointee must have been a practitioner of at least five years standing.

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95 *Supreme Court Act 1935* (SA) s 9; *District Court Act 1991* (SA) s 12; *Magistrates Act 1983* (SA) s 5.

96 *Magistrates Act 1983* (SA) s 5(1).

97 *Supreme Court Act 1935* (SA) s 8. *District Court Act 1991* (SA) s 4. *Magistrates Court Act 1991* (SA) s 5(5). For determining whether a candidate has the standing necessary for appointment, periods of legal practice and judicial service within and outside the State will be taken into account where relevant: *Supreme Court Act 1935* (SA) s 8(4); *District Court Act 1991* (SA) s 12(5); *Magistrates Court Act 1991* (SA) s 5(6).

Acting magistrates must have been a retired magistrate,<sup>98</sup> whereas the eligibility requirements for acting judges in the Supreme Court remains the same as for a permanent judge.<sup>99</sup>

In regard to tenure, judicial officers must retire at the age of 70.<sup>100</sup>

### **2.5.3 Criteria for appointment**

There appear to be no published criteria for judicial appointment.

### **2.5.4 The selection process**

#### **(a) *Advertising or calls for expressions of interest***

There is a practice of calling for expressions of interest in appointment to the Magistrates Court.<sup>101</sup> Advertising has not been used to attract candidates for appointment to superior courts in South Australia.

#### **(b) *Consultation***

Section 5(4) of the *Magistrates Act 1983* (SA) provides that the Attorney-General is obligated to consult with the Chief Justice and Chief Magistrate in relation to a proposed appointment to the Magistrates Court. Similarly, the appointment of a judge of the Supreme Court to be the Chief Judge of

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98 *Magistrates Act 1983* (SA) s 5(3a).

99 *Supreme Court Act 1935* (SA) ss 11(1)-(1a).

100 *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16; *Magistrates Act 1983* (SA) s 9(1)(c).

101 Letter from Chief Magistrate Elizabeth Bolton of the Magistrates Court of South Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 10 July 2013; Letter from Chief Justice Chris Kourakis of the Supreme Court of South Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 8 July 2013.

the District Court requires the Attorney-General to consult with the Chief Justice of the Supreme Court.<sup>102</sup>

Appointments to the District Court and the Supreme Court are made after an informal consultation process. The Chief Justice is consulted about appointments to the Supreme Court and the District Court. The Chief Judge of the District Court is consulted about appointments to the District Court and may be consulted about appointments to the Supreme Court. The Presidents of the Law Society and Bar Association are also consulted. The Solicitor-General is also usually consulted on appointments to both courts.<sup>103</sup>

**(c) Use of assessment or selection panels**

An interviewing panel is used for vacancies in the Magistrates Court and consists of the Chief Magistrate, officers of the Attorney General's Department, and an independent person or persons nominated by the Attorney General.<sup>104</sup> This practice is not followed for the District or Supreme Courts.

**(d) Formal interviews**

Potential candidates for vacancies in the Magistrates Court are interviewed.<sup>105</sup> After the interviews a short-list of those candidates

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102 *District Court Act 1991* (SA) s 11A(2). Consultation also occurred in regard to an appointment to the Industrial Relations Court.

103 Letter from Chief Justice Chris Kourakis of the Supreme Court of South Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 8 July 2013. Less recently, for four judicial appointments made in 2003, the Chief Justice, the President of the Law Society, the President of the Bar Association and the Shadow Attorney-General were consulted: 'Historic influx of women to the Court Bench', *Law Society of South Australia Bulletin* (2003) 25(9) 31, 31.

104 *Ibid.*

105 Letter from Chief Magistrate Elizabeth Bolton of the Magistrates Court of South Australia, Adelaide to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 10 July 2013.

considered fit to hold office is prepared for the Attorney General for submission to Cabinet.

With the exception of a recent appointment to the Supreme Court, formal interviews are not conducted for appointments to superior courts in South Australia. However potential appointees are asked 'to provide an undetailed assurance as to the non-existence of matters which might compromise their capacity to discharge the duties of their office'.<sup>106</sup>

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106 Ibid.

## 2.6 Appointments in Tasmania

In 2002 the Tasmanian Department of Justice produced a Protocol for Judicial Appointments, which was subsequently revised in 2009.<sup>107</sup> The Protocol provides an explanation of the appointments process and deals with calls for expression of interest, the assessment panel and other consultations. It also sets out the selection criteria for judicial appointments.

There was a change of Government in Tasmania in March 2014. The new Government adhered to the Protocol when appointing two magistrates in 2014.

### 2.6.1 Authority to appoint

The Governor of Tasmania appoints judges and magistrates,<sup>108</sup> with the process being conducted by the Attorney-General.<sup>109</sup> According to government policy on senior appointments, Cabinet must consider all judicial appointments prior to submission to the Governor-in-Council.<sup>110</sup> Following consideration by Cabinet, the Attorney-General will then recommend an appointment to the Governor-in-Council.<sup>111</sup>

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107 Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013)  
<[http://www.justice.tas.gov.au/corporate/policies/protocol\\_for\\_judicial\\_appointments](http://www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments)>.

108 For Chief Justice and judges and acting judges of the Supreme Court see *Supreme Court Act 1887* (Tas) ss 5, 3; Chief Magistrate, Deputy Chief Magistrate, full time, part time and temporary Magistrates of the Magistrates Court see the *Magistrates Court Act 1987* (Tas) ss 5, 6, and ss 4(1), 4(4).

109 Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013)  
<[http://www.justice.tas.gov.au/corporate/policies/protocol\\_for\\_judicial\\_appointments](http://www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments)>.

110 Department of Prime Minister and Cabinet, Government of Tasmania, 'Cabinet Handbook' (February 2012), 1.5.1.  
<[http://www.dpac.tas.gov.au/\\_\\_data/assets/pdf\\_file/0011/158717/Tasmanian\\_Government\\_Cabinet\\_Handbook.pdf](http://www.dpac.tas.gov.au/__data/assets/pdf_file/0011/158717/Tasmanian_Government_Cabinet_Handbook.pdf)>.

111 Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013).

## 2.6.2 Eligibility for appointment

To be eligible for appointment as a justice of the Supreme Court of Tasmania, persons must be a barrister of the Supreme Court or of another Supreme Court of any State of the Commonwealth or New Zealand for not less than 10 years and at least 35 years of age.<sup>112</sup> Acting judges must meet the same eligibility criteria, unless they are, or have been, a judge of the Federal Court or a Supreme Court of another State or Territory.<sup>113</sup>

For permanent judicial officers of the Magistrates Court, persons must be an Australian lawyer of not less than five years standing as an Australian legal practitioner and have not attained the age of 72 years.<sup>114</sup> For the appointment of temporary magistrates, persons may also have been a judge of the Federal Court, Federal Circuit Court or a magistrate or judge of a court of another State or Territory.<sup>115</sup>

## 2.6.3 Criteria for appointment

In addition to the statutory provisions outlined, the Protocol also provides the following criteria by which candidates are assessed. Suitable candidates should be:<sup>116</sup>

- An experienced legal practitioner with a high record of professional achievement coupled with a knowledge and understanding of the law consistent with judicial office.
- An excellent conceptual and analytical thinker, displaying independence and clarity of thought.

112 *Supreme Court Act 1887* (Tas) s 4.

113 *Supreme Court Act 1887* (Tas) s 3(1A).

114 *Magistrates Court Act 1987* (Tas) s 8.

115 *Magistrates Court Act 1987* (Tas) s 4(4A).

116 Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013)  
<[http://www.justice.tas.gov.au/corporate/policies/protocol\\_for\\_judicial\\_appointments](http://www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments)>.

- An effective oral and verbal communicator in dealing with legal professionals, litigants and witnesses and able to explain technical issues to non-specialists.
- Highly organised, able to demonstrate or develop sound court management skills and work well under pressure.
- Capable of making fair, balanced and consistent decisions according to law without undue delay.
- A person of maturity, discretion, patience and integrity who inspires respect and confidence.
- Committed to the proper administration of justice and continuous improvement in court practice, working collegiately with judicial colleagues and effectively with court officers to those ends.

## **2.6.4 The selection process**

### **(a) Advertising or calls for expressions of interest**

The Attorney-General advertises the call for expressions of interest in an appointment to the Supreme or Magistrates Court by advertising in three Tasmanian daily newspapers, one national newspaper and on the Department of Justice website. The advertisement provides the criteria included above, in addition to more specific criteria if applicable.<sup>117</sup> In addition, the Attorney-General may also invite a specific person to submit an expression of interest.<sup>118</sup>

The expression of interest form requires the inclusion of a curriculum vitae and three professional referees, and allows for candidates to provide additional material that relates to the criteria for appointment.<sup>119</sup>

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117 Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013)  
<[http://www.justice.tas.gov.au/corporate/policies/protocol\\_for\\_judicial\\_appointments](http://www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments)>.

118 Ibid.

119 Department of Justice, 'Appointments as Chief Justice of the Supreme Court and Justice of the Supreme Court' (Media Release, 25 July 2013)

For the position of Chief Justice, Chief Magistrate or Deputy Chief Magistrate, the current members of the Court will automatically be considered by the assessment panel and therefore are not required to submit an expression of interest, though may choose to do so.<sup>120</sup>

**(b) Consultation**

There are no statutory requirements for consultation in relation to judicial appointments in Tasmania. According to the Protocol and assuming it continues to apply, the Attorney-General will confidentially consult with the Opposition Spokespersons and the various major bodies representing the interests of the legal profession as to who may be suitable for appointment and should be encouraged to apply.

The assessment panel for the Magistrates Court may consult the referees nominated in the expression of interest and also the views of relevant third parties as to the suitability of a candidate.

After the assessment panel for the Magistrates Court has provided its opinion to the Attorney General (see below), the Protocol notes that the Attorney-General has the discretion to further consult on a confidential basis with any person he or she sees fit. Following the identification by the Attorney-General of a preferred candidate, the Executive Director of the Law Society of Tasmania and Chair of the Legal Profession Board will be contacted on a confidential basis to enquire as to whether there is any reason why the appointment should not proceed.

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<sup>120</sup> <[http://www.justice.tas.gov.au/justice/news/archive/chief\\_justice\\_and\\_justice\\_appointment](http://www.justice.tas.gov.au/justice/news/archive/chief_justice_and_justice_appointment)>. Department of Justice, Government of Tasmania, *Protocol for Judicial Appointments* (25 July 2013) <[http://www.justice.tas.gov.au/corporate/policies/protocol\\_for\\_judicial\\_appointments](http://www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments)>.

**(c) Use of assessment or selection panels**

Assessment panels are used for Supreme Court and Magistrates Court vacancies. Such panels comprise the Secretary of the Department of Justice or his or her nominee and a nominee of the Attorney-General for Supreme Court appointments. The Protocol makes no provision for the Chief Justice, or any judge, to be a member of the assessment panel. It has been reported that former Chief Justice Crawford took the view that it would be embarrassing for a judge, particularly the Chief Justice, if there were an appointment of someone about whom that judge had made adverse comments during the selection process.<sup>121</sup> However, when his retirement was approaching, Chief Justice Crawford served on the assessment panel that considered expressions of interest in relation to the Chief Justice's position and a forthcoming vacancy for a puisne judge as the Attorney-General's nominee.<sup>122</sup>

For the Magistrates Court, the panel also includes the Chief Magistrate or his or her nominee and for the Supreme Court a representative of a professional legal body chosen by the Attorney-General.<sup>123</sup>

After the panel for the Magistrates Court has consulted the referees nominated in the expression of interest and the views of relevant third parties as to the suitability of a candidate, it then assesses the candidates as to whether they are suitable or unsuitable, and in the event that more than five applicants have been assessed as suitable, the panel will provide the Attorney-General with their collective opinion of which five are most suitable, with a statement of reasons provided. All assessments are provided to the Attorney-General.

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121 Letter from Chief Justice Alan Blow of the Supreme Court of Tasmania to Professor Greg Reinhardt of the Australasian Institute of Judicial Administration, 20 June 2013.

122 Ibid.

123 According to the Protocol, if the Chief Magistrate declines to become a panel member or to nominate a replacement, the Attorney-General will appoint a replacement who 'preferably has had experience as a member of the Court in which the appointment is to take place or who possesses significant judicial experience.' Department of Justice, Government of Tasmania, above n 111.

**(d) Formal interviews**

According to the 2005 Sackville paper, the Department of Justice Protocol previously provided for candidates who met the selection criteria to be interviewed by the appointments committee.<sup>124</sup> Although the 2009 revision does not indicate that candidates are interviewed by either the appointments panel or the Attorney-General, a Victorian discussion paper on judicial appointments notes that advisory panels may interview candidates for the Tasmanian Supreme Court.<sup>125</sup> An assessment panel conducted a number of interviews in late 2012 after expressions of interest had been submitted in relation to Supreme Court vacancies.<sup>126</sup>

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124 Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 129–130.

125 Department of Justice, Government of Victoria, 'Reviewing the judicial appointments process in Victoria' (Discussion Paper, July 2010) 21, footnote 29.

126 Letter from Chief Justice Alan Blow of the Supreme Court of Tasmania to Professor Greg Reinhardt of the Australasian Institute of Judicial Administration, 20 June 2013.

## 2.7 Appointments in Victoria

As a result of the change of government in December 2014, the present position is uncertain. The only current statement on the Court Services Victoria website is that “the Attorney-General seeks expressions of interest from qualified persons for appointment” to the various courts, and there is a reference to the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* which, the website says, “outlines the attributes the government, courts and community expect from judicial appointees”.<sup>127</sup>

The protocols which were adopted in previous periods are as described below.

In 2010, the then Attorney-General of Victoria introduced reforms to the appointments process for the purpose of making it more transparent and to broaden the pool from which judicial officers are appointed.<sup>128</sup> The following reforms were outlined in a discussion paper produced for public consultation:<sup>129</sup>

- publishing selection criteria for all judicial positions
- advertising for expressions of interest from eligible candidates for all judicial positions
- conducting wider consultation before deciding on a preferred candidate, including with the judiciary, the Victorian Bar, the Law Institute of Victoria, Victoria Legal Aid, and the Victorian Government Solicitor.

It was also noted in the discussion paper that the Attorney-General had continued the practice of using advisory panels to provide advice on judicial appointments to the Magistrates’ Court.

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127 [http://.courts.vic.gov.au/judicial appointments/court appointments](http://.courts.vic.gov.au/judicial%20appointments/court%20appointments).

128 Department of Justice (VIC), ‘Reviewing the judicial appointments process in Victoria’ (Discussion Paper, July 2010), 8  
<[https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial\\_appointments\\_review\\_discussion\\_paper.pdf](https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial_appointments_review_discussion_paper.pdf)>.

129 Ibid.

There was a change of Government in December 2010. The newly elected State Government (Liberal/National Coalition) had committed to the appointment of a judicial advisory panel as part of its election promises.<sup>130</sup>

A general description of what was proposed in the discussion paper is as follows:<sup>131</sup>

In Victoria, the Attorney-General discusses with the head of jurisdiction the nature of the judicial vacancy, any particular skills and attributes which may be appropriate, and the present and future needs of the court. The Attorney-General assesses the suitability of candidates who have lodged an expression of interest and other people who have been identified as possible candidates. This assessment includes consideration of the contents of the expression of interest application (if any), feedback arising from consultations undertaken by the Attorney, and the results of probity checks. For appointments of judges and magistrates, the Attorney-General will have a face-to-face meeting with the proposed candidate before forming a concluded view about whether to recommend the person for appointment.

As mentioned above, the most recent change of government in December 2014 means that it is not at present clear what protocols will in future be followed apart from the invitation to express an interest.

### **2.7.1 Authority to appoint**

Judges are appointed to the Supreme Court by the Governor on the advice of the Executive Council.<sup>132</sup> Similar legislation is in place for appointment of judges to the County Court and magistrates to the Magistrates' Court.<sup>133</sup> In

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130 Letter from Chief Judge Michael Rozenes of the County Court of Victoria to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 1 August 2013.

131 Ibid 19.

132 *Constitution Act 1975* (Vic) s 75B(2).

133 *County Court Act 1958* (Vic) s 8(1); *Magistrates Court Act 1989* (Vic) s 7(3).

practice, the Attorney-General selects a nominee and provides the recommendation to the Governor following Cabinet approval.<sup>134</sup>

### **2.7.2 Eligibility for appointment**

A person is eligible for appointment to the Supreme Court if he or she is, or has been, a judge of a Commonwealth court or the court of any State or Territory, or has been admitted to practice in an Australian jurisdiction for at least five years.<sup>135</sup> Similar criteria also now govern appointments to the County Court and the Magistrates' Court.<sup>136</sup>

In regard to the Magistrates' Court, these criteria apply to magistrates appointed on a full-time and part-time basis.<sup>137</sup> A part-time magistrate has the same powers, duties, protection and immunity as a full-time magistrate and must not engage in legal practice at any time during the term of her or his appointment.<sup>138</sup>

A person may not be appointed to judicial office if he or she has attained the age of 70 years.<sup>139</sup>

Recent amendments have repealed the office of acting judges and magistrates, and provided for the appointment of reserve judicial officers. Under the previous legislation, acting judges were appointed for renewable

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134 Department of Justice, Government of Victoria, 'Reviewing the judicial appointments process in Victoria' (Discussion Paper, July 2010) 8; Courts and Tribunals Victoria, Government of Victoria, *Court Appointments* (18 December 2013).

<<http://www.courts.vic.gov.au/judicial-appointments>>.

135 *Constitution Act 1975* (Vic) ss 75B(1)(a)-(b) as amended by the *Constitution (Supreme Court) Act 2003* (Vic) s 3.

136 *County Court Act 1958* (Vic) ss 8(1A)(a)-(b); *Magistrates Court Act 1989* (Vic) ss 7(3)(a)-(b). Both statutes were amended by the *Courts Legislation (Judicial Appointments) Act 2004* (Vic) ss 4(2), 10(2).

137 *Magistrates Court Act 1989* (Vic) ss 7(1)(A), (3)(a)-(b).

138 *Magistrates Court Act 1989* (Vic) ss 7(8), (9).

139 *Constitution Act 1975* (VIC) s 77(3); *County Court Act 1958* (VIC) s 8(3); *Magistrates' Court Act 1989* (VIC) s 7(4).

five-year terms.<sup>140</sup> A person was eligible to be appointed an acting judge of the Supreme Court provided he or she had been admitted to legal practice in an Australian jurisdiction for at least five years.<sup>141</sup> Similar legislation provided for the appointment of acting judges in the County Court<sup>142</sup> and acting magistrates in the Magistrates' Court.<sup>143</sup> In contrast, a person is only eligible to be appointed a reserve judge if he or she is, or has been, a judge of the Supreme Court of an Australian State or Territory or the Federal Court of Australia.<sup>144</sup> Corresponding requirements apply to the appointment of reserve County Court judges and reserve magistrates of the Magistrates' Court.<sup>145</sup>

### **2.7.3 Criteria for appointment**

The Courts Services Victoria website states that the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*, developed by the Judicial College of Victoria from policies prepared by the Judicial Studies Board of England and Wales,<sup>146</sup> outlines the attributes expected from judicial appointees. The framework 'identifies the knowledge, skills, behaviours and attitudes that Victorian judicial officers are expected to demonstrate in performing their role', under the headings of:

- knowledge and technical skill
- communication and authority
- decision making

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140 *Constitution Act 1975* (Vic) ss 80D(6)(b)-(c), repealed by *Courts Legislation Amendment (Reserve Judicial Officers) Act 2013* s 10.

141 *Constitution Act 1975* (Vic) ss 80D(2)(a)-(b), repealed by *Courts Legislation Amendment (Reserve Judicial Officers) Act 2013* s 10.

142 *County Court Act 1958* (Vic) s 11, repealed by *Courts Legislation Amendment (Reserve Judicial Officers) Act 2013* (Vic) s 24.

143 *Magistrates' Court Act 1989* (Vic) s 7, repealed by *Courts Legislation Amendment (Reserve Judicial Officers) Act 2013* (Vic) s 34.

144 *Constitution Act 1975* (Vic) s 81(2)(b).

145 *County Court Act 1958* (Vic) s 12(2)(b); *Magistrates' Court Act 1989* (Vic), s 9A(2)(b).

146 Judicial College of Victoria, 'Framework of Judicial Abilities and Qualities for Victorian Judicial Officers' (September 2008)  
<[http://www.judicialcollege.vic.edu.au/sites/default/files/2009JCVFramework-JCVsite\\_0.pdf](http://www.judicialcollege.vic.edu.au/sites/default/files/2009JCVFramework-JCVsite_0.pdf)>.

- professionalism and integrity
- efficiency
- leadership and management.<sup>147</sup>

In addition, as part of the expression of interest form, to be discussed below, a self-assessment must be prepared with reference to the following qualities and abilities:<sup>148</sup>

- Substantial legal experience and knowledge of jurisdictions of the relevant court
- Command authority in the court
- Analytical skills
- Sound judgement
- Ability to communicate fairly, effectively and courteously to all court users
- Integrity and independence
- Commitment to ongoing judicial education
- Managing workload
- Communicating
- A demonstrated interest in appropriate dispute resolution
- Commitment to the use of information technology.

#### **2.7.4 The selection process**

##### ***(a) Advertising or calls for expressions of interest***

For some time after 2000 it was the established practice to advertise for expressions of interest and nominations for appointments to the

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<sup>147</sup> Ibid 3.

<sup>148</sup> Attorney-General's Office, Department of Justice, Government of Victoria, *Judicial Expression of Interest Form* (May 2013) 4  
<[http://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/Judicial\\_Expression\\_of\\_Interest\\_Form.pdf](http://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/Judicial_Expression_of_Interest_Form.pdf)>.

Magistrates' Court in Victoria.<sup>149</sup> In 2003, the Attorney-General advertised the position of Chief Justice of Victoria. This was reported as being part of a 'wider push to promote greater diversity among the State's judges'.<sup>150</sup> This practice was expanded to include advertisements being placed in newspapers for all judicial appointments. Such advertisements expressly encouraged expressions of interest from 'women, people with disabilities and people of Indigenous and culturally diverse backgrounds'.<sup>151</sup> Under the Liberal/National Coalition, which governed from 2010 to 2014, expressions of interest and advertisements were not used for appointments. However, there is now a permanent call for expressions of interest on the Court Services Victoria website.

The expression of interest form is similar to that used in NSW. It requires candidates to nominate the court and position in which they are interested, and provide personal details, professional information, a curriculum vitae, self-assessment, three referees, and responses to questions relating to the candidate's character.<sup>152</sup> Candidates' details are compiled on a database that is maintained by the Department of Justice, and considered by the Attorney-General for vacancies.

### **(b) Consultation**

There are no statutory requirements for consultation. Current practice is for the Attorney-General to discuss the judicial vacancy with the head of jurisdiction to determine the appropriate skills and attributes required.<sup>153</sup>

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149 Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 124.

150 Mark Skulley, 'Debate likely over role of judge', *Australian Financial Review* (Melbourne), 2 May 2003, 5.

151 Department of Justice, Government of Victoria, 'Reviewing the judicial appointments process in Victoria' (Discussion Paper, July 2010) 15.

152 Attorney-General's Office, Department of Justice, Government of Victoria, *Expression of Interest Form* (May 2013) <[http://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/Judicial\\_Expression\\_of\\_Interest\\_Form.pdf](http://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/Judicial_Expression_of_Interest_Form.pdf)>.

153 For example, Chief Magistrate Peter Lauritsen of the Magistrates' Court noted that the Attorney-General discusses potential appointees, and then interviews candidates if it is deemed necessary. Letter from Chief Magistrate Peter Lauritsen of the Magistrates'

Consultations are also had with other members of the judiciary, the Victorian Bar, the Law Institute of Victoria, Victoria Legal Aid and the Victorian Government Solicitor.<sup>154</sup> Consultation is provided via the use of advisory panels, discussed below.

**(c) Use of assessment or selection panels**

Advisory panels are established to provide advice to the Attorney-General when a vacancy arises in the Magistrates' Court. From the database maintained by the Department of Justice, the panel assesses the expressions of interest according to the selection criteria, interviews short-listed candidates and contacts the referees provided by the candidate. According to the 2010 discussion paper, the panel comprises the Chief Magistrate, a senior public servant from the Department of Justice and a third person, such as another judicial officer or the Chief Executive Officer of the Judicial College of Victoria or the Sentencing Advisory Council.<sup>155</sup>

The Attorney-General is not, however, bound to draw from this database and may put forward his or her own recommendation provided the person meets the statutory requirements. The discussion paper notes that the Attorney-General has yet to appoint anyone assessed as being unsuitable by an advisory panel.<sup>156</sup>

**(d) Formal interviews**

From 2010 to 2014, under the Liberal/National Coalition, it was not the practice for the Attorney-General to have a face-to-face meeting with the proposed candidate for judges before deciding on whether to recommend the

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Court of Victoria to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, June 19 2013.

154 Department of Justice, Department of Justice, Government of Victoria, 'Reviewing the judicial appointments process in Victoria' (Discussion Paper, July 2010) 8.

155 Ibid 22.

156 Ibid 19.

person for appointment. It is not clear if interviews were conducted for appointments to the magistracy. The current situation is not clear.

## 2.8 Appointments in Western Australia

### 2.8.1 Authority to appoint

Formally, the Governor has the authority to appoint judges and magistrates in Western Australian courts.<sup>157</sup> In practice, Cabinet selects the appointee, usually on the recommendation of the Attorney-General. The Attorney-General then informs the Governor of the nominee for appointment. Appointments to the Family Court of Western Australia must be approved by both the State and Federal Governments.<sup>158</sup> The process preceding appointment is largely managed by the Solicitor General.<sup>159</sup>

### 2.8.2 Eligibility for appointment

A judge of the Supreme or District Courts must have been an Australian lawyer, with not less than eight years' legal experience.<sup>160</sup> An acting judge of the Supreme Court must be, or have been, a judge of the Supreme Court of another State, or Territory, or a judge of the Federal Court of Australia,<sup>161</sup> whereas an acting judge of the District Court is to be similarly qualified as for permanent judges of that Court.<sup>162</sup>

The retiring age for judges in Western Australia is 70 years.<sup>163</sup>

For the Family Court of Western Australia, a person is not eligible for appointment unless that person has been an Australian lawyer of at least

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157 See *Supreme Court Act 1935* (WA) s 7A; *District Court of Western Australia Act 1969* (WA) s 10; *Magistrates Court Act 2004* (WA), s 5, sch 1 cl 3.

158 Letter from Chief Judge Stephen Thackray of the Family Court of Western Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 27 June 2013.

159 Letter from Chief Justice Wayne Martin of the Supreme Court of Western Australia, Perth, to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 19 June 2013.

160 *Supreme Court Act 1935* (WA) s 8(1); *District Court of Western Australia Act 1969* (WA) s 10(2).

161 *Supreme Court Act 1935* (WA) s 8(2).

162 *District Court of Western Australia Act 1969* (WA) s 18(3).

163 *Judges' Retirement Act 1937* (WA) s 3(1).

eight years' legal experience and by reason of training, experience and personality, is suitable to deal with matters of family law.<sup>164</sup>

A person is qualified to be appointed as a magistrate of the Court if he or she has had at least five years' legal experience and is under 65 years of age, that being the age of retirement.<sup>165</sup> Legal experience is defined as either practice as a legal practitioner within the meaning of section 3 of the *Legal Profession Act 2008* (WA) or judicial service (including service as a judge of a court, a magistrate or other judicial officer in the State or elsewhere in a common law jurisdiction).<sup>166</sup> An acting magistrate must be similarly qualified and either a magistrate who is about to reach 65 years of age or a person who has ceased to be a magistrate on reaching 65 years and who is under 70 years of age.<sup>167</sup>

### **2.8.3 Criteria for appointment**

In advertisements for magistrates' positions in Western Australia, applicants have been requested to address the following selection criteria in writing in their application:<sup>168</sup>

- . relevant knowledge and experience of the law, practice and procedure
- . demonstrated competence, skill, impartiality and temperament;
- . integrity and good character
- . case management skills
- . the ability to manage a large list of cases each day
- . demonstrated experience in management and administration
- . the capacity to introduce and manage change; and
- . the ability to take effective leadership and educative roles in the community.

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164 *Family Court Act 1887* (WA) s 11(3).

165 *Magistrates Court Act 2004* (WA) sch 1 sub-cl 2(2), 11(1)(a).

166 *Magistrates Court Act 2004* (WA) sch 1 sub-cl 2(1).

167 *Magistrates Court Act 2004* (WA) sch 1 sub-cl 9(2).

168 Letter from Chief Magistrate Steven Heath, Magistrates Court of Western Australia, Perth, to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 19 June 2013.

In 2013, the following criteria were applied for the appointment of a District Court judge:<sup>169</sup>

*First*, the person to be appointed must be of complete and unquestioned integrity. The person must have a universally recognized reputation for honesty, discretion and plain dealing with the courts, colleagues and clients.

*Second*, the person to be appointed must be capable of discharging the job in the sense of intellectual capacity and comprehensive and up to date knowledge of the law which comes before the District Court. Further to this second criterion; the person should, in my view, be able to discharge the duties from the time of appointment. It is not ideal to appoint a person who might have the capacity to do the job at some time in the future, after learning it on the job. Capability from the time of appointment, in the District Court, can only really be satisfied by an appointee having practiced before courts as an advocate and appeared regularly in the District Court in matters that come within its jurisdiction.

*Third*, the person to be appointed must have a judicial temperament. In particular; they must be even tempered; they must go about their work unobtrusively; they must be humble; they must be capable of relating to the people who will appear before the Court; parties (including accused persons), witnesses and jurors. They must possess a realistic expectation of the role and capabilities of counsel who will appear before them, and an appreciation that the role may require helpful, measured advice and guidance to practitioners, particularly younger practitioners. Ideally, the person would be professionally fulfilled by this appointment and not hanker for promotion.

*Fourth*, the person to be appointed must be capable of being a good colleague. They must be prepared to help others on the court and work well with their colleagues and the staff of the court. They must be of a character that resists intriguing and disruption in the work environment of the court.

*Fifth*, the person to be appointed must be capable of working expeditiously. They must be capable of making rulings quickly, directing juries without undue delay and delivering reserved judgments quickly.

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169 Letter from Grant Donaldson, Solicitor General of Western Australia, to the Hon Michael Mischin, Attorney General of Western Australia, 10 April 2013.

*Sixth*, the person to be appointed must be capable of enduring the unrelenting grind of the work of the District Court. In particular, they must be capable of presiding over back to back criminal trials for extended periods, sit on numerous trials involving sexual offences and extensive circuit work without affect to their well being.

*Seventh*, age is relevant. The appointment of a young person to the District Court is problematic. Ideally, District Court judges should retire at the retirement age of 70. Retirement at age 55 after 10 year's service is undesirable.

*Eighth*, diversity in the composition of the District Court is relevant. Diversity as regards gender and (perhaps) ethnicity is relevant. The District Court has had many women judges and it is desirable that women be appointed as judges. That said, although gender is, in my opinion, a relevant consideration it would be wrong to appoint a woman candidate who was inferior to a male candidate on each of the criteria addressed above solely on the basis of gender. The (extremely helpful) representatives of the Women Lawyers Association with whom I consulted agreed wholeheartedly with this.

Similar criteria were applied for the appointment to the General (trial) Division of the Supreme Court in 2014. The criteria which differed from that described above are as follows:<sup>170</sup>

*Second*, the person to be appointed must be capable of discharging the job in the sense of intellectual capacity and comprehensive and up to date knowledge of the law which comes before the Supreme Court. The General Division of the Supreme Court deals, broadly, with commercial matters, wills and estates matters, general Equity matters, public law and (increasingly) criminal matters. As to the latter, this is capital matters, armed robbery and arson. In federal jurisdiction, the Supreme Court deals with large complex criminal matters (tax, "white collar" crime and drug importation)...

*Third*, because it is common to appoint to the Court of Appeal from the General Division, it is desirable, in making appointments to the General Division, to have regard to the capacity of appointees to the General Division to be elevated to appellate work...

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170 Ibid.

*Ninth*, diversity in the composition of the Supreme Court is relevant. Diversity as regards gender and (perhaps) ethnicity is relevant. In particular, it is desirable that women be appointed as judges. That said, although matters of diversity are, in my opinion, a relevant consideration, it would be wrong to appoint an inferior candidate solely on the basis of diversity. The (extremely helpful) representatives of the Women Lawyers Association with whom I consulted agreed wholeheartedly with this.

#### **2.8.4 The selection process**

The following has been sourced from Sackville's 2005 paper.<sup>171</sup> There is no publicly available information on the current practices.

##### **(a) Advertising or calls for expressions of interest**

Advertisements often seek expressions of interest for magistrates' positions in Western Australia. The advertisements may be published throughout Australia. It is not current practice to advertise for expressions of interest in positions in the superior courts in Western Australia.

##### **(b) Consultation**

There are no statutory requirements for consultation in relation to judicial appointments in Western Australia. In practice, the Solicitor-General undertakes consultations, discussing possible candidates with the relevant head of jurisdiction, the Law Society, the Bar Association, Women Lawyers, the Criminal Lawyers Association, and other interested bodies. The Solicitor-General recommends a candidate to the Attorney-General and discusses other candidates whose names have been suggested. The Attorney-General has responsibility for the carriage of the matter in Cabinet.

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171 Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 127.

**(c) Use of assessment or selection panels**

There does not appear to be a practice of using assessment or selection panels.

**(d) Formal interviews**

A short list of applicants for magistrates' positions is prepared and those on the list interviewed. The interviewing panel is chaired by the Solicitor-General and includes a judge of the District Court, the Chief Magistrate or his or her Deputy, and the Director of Court Services. Interviews are not conducted for vacancies in superior courts.

### 3 THE APPOINTMENT PROCESS IN NEW ZEALAND

This section describes the current practice. However, the New Zealand Parliament is currently considering the Judicature Modernisation Bill 2013 – an omnibus Bill introduced as the Government’s response to the New Zealand Law Commission’s report *Review of the Judicature Act 1908: Towards a New Courts Act*.<sup>172</sup> These potential reforms will be outlined in chapter 5.

#### 3.1 Authority to appoint

As in Australia, judicial appointments to New Zealand courts are made formally by the Governor-General, on the recommendation of the Attorney-General.<sup>173</sup> According to the Ministry of Justice, ‘putting the responsibility for all these [higher court] appointments in the hands of the Attorney-General is intended to help to ensure a consistent and principled approach’.<sup>174</sup> Exceptions to the practice of the Attorney-General recommending nominations are the appointment of judges of the Maori Land Court and Maori Appellate Court, who are appointed by the Governor-General on the recommendation of the Minister of Maori Affairs, and Community Magistrates, who are appointed by the Governor-General on the recommendation of the Minister of Justice.<sup>175</sup>

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172 Explanatory Note of the Bill.

The Law Commission report: <http://r126.publications.lawcom.govt.nz/>

173 Courts of New Zealand, Ministry of Justice (NZ), *Judicial Appointments* <<http://www.courtsofnz.govt.nz/about/judges/appointments>>. See for example the *Judicature Act 1908* (NZ) s 4(2); *Supreme Court Act 2003* (NZ) s 17(1)(b); *District Courts Act 1947* (NZ) s 5(1); *Maori Land Act 1993* (NZ) s 7(1).

174 Ministry of Justice (NZ), *High Court judges appointment protocol* (April 2013) <<http://www.crownlaw.govt.nz/uploads/appointments.pdf>>.

175 Ibid.

For appointments to the Environment Court, the Attorney-General is required to consult with the Minister for the Environment and the Minister for Maori Affairs. Ministry of Justice (NZ), *Judicial Appointments: Office of District Court Judge – August 2012* (August 2012) <<http://www.justice.govt.nz/publications/global-publications/j/judicial-appointments-office-of-district-court-judge/judicial-appointments-office-of-district-court-judge-march-2010#consultation>>.

## 3.2 Eligibility for appointment

To be appointed to the High Court, a person must have held a practising certificate as a barrister or solicitor for at least seven years.<sup>176</sup> No person can be appointed as a judge of the Supreme Court or Court of Appeal unless he or she is a judge of the High Court, unless appointed to the High Court when appointed to the Supreme Court.<sup>177</sup> For the District Court, candidates must have held a practising certificate as a barrister or solicitor for at least seven years.<sup>178</sup> Specialised courts have further requirements, such as the Maori Land Court, for which a person must have held a practising certificate as a barrister or solicitor for at least seven years, in addition to being suitable, having regard to their 'knowledge and experience of te reo Maori, tikanga Maori and the Treaty of Waitangi'.<sup>179</sup>

In regard to tenure, the retiring age of judges in New Zealand is 70 years.<sup>180</sup>

## 3.3 Criteria for appointment

The Ministry of Justice published in April 2013 the *Judicial Appointments Protocol*, which sets out the process for making judicial appointments to the higher courts.<sup>181</sup> It notes that appointments are based on merit, and that there is a commitment to actively promoting diversity within the judiciary,

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176 *Judicature Act 1908* (NZ) s 6.

177 *Supreme Court Act 2003* (NZ), ss 20(1)(a)–(b); *Judicature Act 1908* (NZ) ss 57(2)–(3).

178 *District Courts Act 1947* (NZ) s 5(a). Alternatively, one is eligible to be appointed to the District Court if they have been continuously employed as an officer of the responsible Department or Ministry of Justice for a period of at least ten years and during that period been employed for not less than seven years as the Clerk or Registrar of a court, and be a barrister or solicitor who has been qualified for admission, or admitted, as such for not less than seven years: *District Courts Act 1947* (NZ) s 5(3)(b).

179 *Maori Land Act 1993* (NZ) ss 7(2A)–(3).

180 *Judicature Act 1908* (NZ) s 13; *District Courts Act 1947* (NZ) s 7(2); *Maori Land Act 1993* (NZ) s 7(4).

181 Courts of New Zealand, Ministry of Justice (NZ), *Judicial Appointments* <<http://www.courtsofnz.govt.nz/about/judges/appointments>>.

taking into account all appropriate attributes.<sup>182</sup> The following are the criteria provided for the evaluation of applicants for the High Court, which closely resemble the criteria for appointment to the District Court:<sup>183</sup>

### **Legal Ability**

- Legal ability includes a sound knowledge of the law and experience of its application. Legal knowledge, in particular, is indicative of intellectual capacity and intelligence. Requisite applied experience is often derived from practice of law before the courts which is experience of direct relevance to being a Judge. But application of legal knowledge in other branches of legal practice, such as in an academic environment, public service or as a member of a legal tribunal may all qualify. At appellate level, legal ability includes the capacity to discern general principles of law and in doing so to weigh competing policies and values. More important than where legal knowledge and experience in application is serviced from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation.

### **Qualities of character**

- Personal qualities of character include personal honesty and integrity, open mindedness and impartiality, courtesy, patience and social sensitivity, good judgment and common sense, the ability to work hard, to listen and concentrate, collegiality, breadth of vision, independence, and acceptance of public scrutiny.

### **Personal technical skills**

- There are certain personal skills that are important, including skills of effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and

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182 Ministry of Justice, Government of New Zealand, *High Court judges appointment protocol* (April 2013).

183 Ibid. For the District Court criteria, see Ministry of Justice (NZ), *Judicial Appointments: Office of District Court Judge – August 2012*.

to maintain charge and control of a court. Judges often have to work at speed and under pressure. Accordingly, the ability to organise time effectively and produce clear reasoned judgments expeditiously is necessary.

**Reflection of society**

- This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. *The Report of the Royal Commission on the Courts* in 1978 put the point as the need for “a good knowledge, acquired by experience, of New Zealand’s life, customs and values”.

### **3.4 The selection process**

The Solicitor-General directs the administrative process of selecting candidates for the higher courts, whereas the Secretary for Justice directs the process for the District Court, Family Court, Environment Court, and Employment Court.<sup>184</sup> Administrative support is provided by the Attorney-General’s Judicial Appointments Unit, which is attached to the Ministry of Justice, yet maintains a separation of its records from those of the Ministry.<sup>185</sup>

The process for the High Court is as follows:

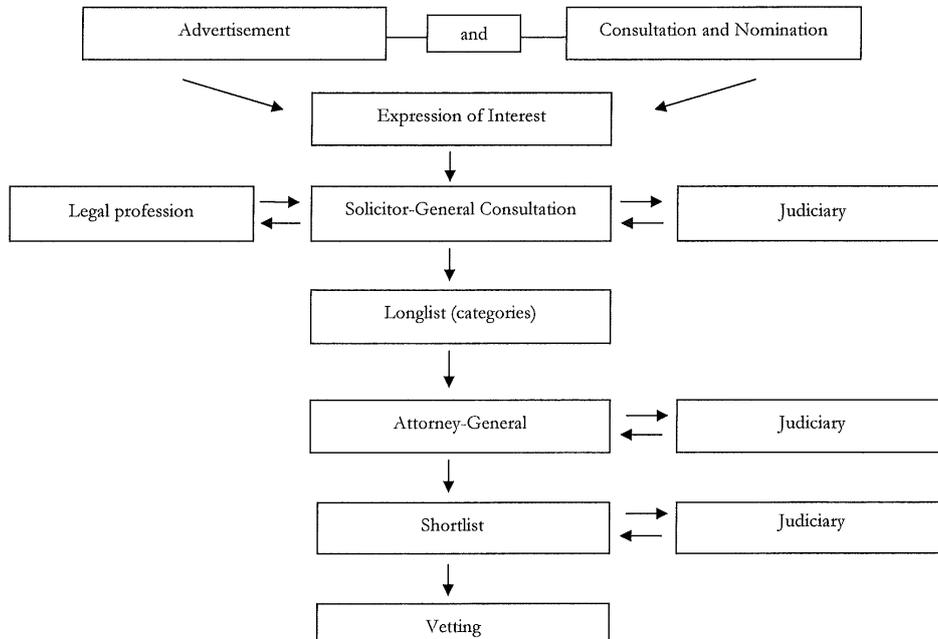
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184 Ministry of Justice, Government of New Zealand, *High Court judges appointment protocol* (April 2013)..

185 Ibid.

## Appointment process for the High Court<sup>186</sup>

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The selection process for the appellate court differs to the High Court, as candidates are generally sourced from the serving judiciary, and thus known to the Attorney-General.

### 3.4.1 Advertising and calls for expressions of interest

For appointments to the High Court and District Court, expressions of interest and nominations are called by public advertisements every three years.<sup>187</sup> Candidates may also submit an expression of interest form for the District Court at any time.<sup>188</sup> The expression of interest form requires personal details, a description of the candidate's legal experience, qualifications, and a curriculum vitae.<sup>189</sup> Three referees are required for the

186 Ibid.

187 Ibid.

188 Ibid.

189 For the current District Court EOI form, see Ministry of Justice, *Expression of interest to be appointed to the Bench of the District Court* (August 2012).

District Court expression of interest form, but not for the High Court. Candidates that are selected for interview are also asked to provide information on their financial security and health status.<sup>190</sup>

Nominations may also be sought from the Chair of the Parliamentary Justice and Electoral Select Committee and the Opposition Spokesperson for the Attorney-General portfolio.<sup>191</sup>

### **3.4.2 Consultation**

The following parties are consulted by the Solicitor-General and Attorney-General for the purpose of determining whether there are individuals that should be invited to apply for appointment to the High Court and District Court: the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the Secretary for Justice, the President of the Law Commission, the President of the New Zealand Bar Association, and the President of the New Zealand Law Society.<sup>192</sup> Other organisations that may be consulted include the Criminal Bar Association, the Maori Law Society, and women lawyers' associations.<sup>193</sup>

For High Court appointments, the parties listed are also consulted for comments on the finalised list of candidates. For the District Court, the Attorney-General further consults with the Solicitor-General and President of the Law Society following interviews.<sup>194</sup>

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<<http://www.justice.govt.nz/publications/global-publications/j/judicial-appointments-office-of-district-court-judge/documents/Expression%20of%20interest%20form-%2010%20Aug%202012.pdf>>. For the current High Court EOI form, see Ministry of Justice, *High Court judges expression of interest form* <<http://www.justice.govt.nz/about-the-ministry/judges-of-the-high-court-expressions-of-interest/high-court-judges-expression-of-interest-form>>.

190 Ministry of Justice, Government of New Zealand, *High Court judges appointment protocol* (April 2013)..

191 Ibid.

192 Ibid.

193 Ibid.

194 Ministry of Justice, Government of New Zealand, *Judicial Appointments: Office of District Court Judge – August 2012* (August 2012).

According to the 2013 Protocol:<sup>195</sup>

The Attorney-General consults with interested persons and bodies seeking their views on suitable candidates. The Attorney-General will then, with the agreement of the Chief Justice, who, in the case of appointments to the Court of Appeal, will confer with the President and, in the case of appointments to the Supreme Court, will confer with the other Judges of that Court, settle a shortlist of not more than three possible appointees. The Attorney-General may ask the Solicitor-General to confidentially consult relevant persons or bodies on his or her behalf. The Attorney-General then considers those on the shortlist. In addition to the criteria by which all judges are selected, the Attorney-General will consider the overall make-up of the court, including the diversity of the bench and the range of experience and expertise of the current judges. The appellate courts should consist of judges who collectively represent a range of expertise, skills, experience, qualities and perspectives. Once the Attorney-General has chosen the most suitable candidate from the shortlist, he will notify Cabinet of his decision and recommend the appointment to the Governor-General.

### **3.4.3 Use of assessment or selection panels**

For the District Court, shortlisted persons determined by the Attorney-General are interviewed by a panel that then provides its assessment to the Attorney-General. The interview panel consists of the Chief District Court Judge, the head of Bench where relevant, the Executive Judge for the relevant region and a representative of the Ministry of Justice.<sup>196</sup>

### **3.4.4 Interviews**

The 2013 Protocol notes that the Attorney-General may personally, or the Solicitor-General at his or her request on his or her behalf, interview a person interested in appointment to the High Court.<sup>197</sup>

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195 Ministry of Justice, Government of New Zealand, *High Court judges appointment protocol* (April 2013).

196 Ministry of Justice, Government of New Zealand, *Judicial Appointments: Office of District Court Judge – August 2012* (August 2012).

197 Ministry of Justice, Government of New Zealand, *High Court judges appointment protocol* (April 2013).

## 4 THE APPOINTMENTS PROCESS IN ENGLAND AND WALES

### 4.1 Background

Considerable attention has been paid in Australia to the selection process employed in the United Kingdom.<sup>198</sup> Significant reforms have been made, especially within the last decade, for the purpose of modernising the relationship between the executive, legislature and judiciary, and increasing diversity in the judiciary.

#### 4.1.1 Developments over the last 23 years

The developments over the last 23 years concerning judicial appointments in England and Wales include the following:

- In 1991, the Remuneration and Practice Development and Courts and Legal Services Committees of the Law Society published a Discussion Paper entitled *Judicial Appointments* which discussed the procedure involved in appointment to Assistant Recorder, and promotion from there to Recorder and Circuit judge.
- In 1992, the Lord Chancellor extended the consultation procedure, previously applicable to the Circuit Courts and High Court, to judicial appointments to the Court of Appeal and House of Lords.
- In 1994 the Lord Chancellor introduced a system for appointment to the Circuit Courts, which included advertising for applications, interviews by a panel and consultation with the judiciary and others.
- In 1995, the Lord Chancellor's Department released a set of guiding principles, which provided that before being considered for a full time

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198 J R T Wood, 'The Selection and Induction of Judicial Officers', (Speech delivered at The Australasian Institute of Judicial Administration (AIJA) Annual Conference, Adelaide, August 1999) 2-8; Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) *Sydney Law Review* 30 295, 310-11.

judicial post, a candidate must have served in that or a similar post in a part time capacity for a sufficient time to establish competence and suitability for appointment.

- In 1998, the Lord Chancellor extended the application and advertisement procedure, previously only used for Circuit and District benches, to the High Court.
- In 1999, the Lord Chancellor appointed Sir Leonard Peach to review the operation of the appointments procedures governing judicial appointments and the appointment of Queen's Counsel.
- In 2002, the Judicial Appointments Board for Scotland was established. It became an advisory Non-Department Public Body in 2009 following the introduction of the *Judiciary and Courts (Scotland) Act 2008* (UK).<sup>199</sup> The functions of the Board are to recommend to the members of the Scottish Executive individuals for appointment to judicial office within the Board's remit.<sup>200</sup>
- In July 2003, the Department for Constitutional Affairs published a Consultation Paper proposing the establishment of an independent Judicial Appointments Commission to 'enable [the system] to meet the needs and expectations of the public in the 21<sup>st</sup> century'.<sup>201</sup>
- In April 2006, the Judicial Appointments Commission was launched following the introduction of the *Constitutional Reform Act 2005* (UK). The Act also introduced the general rules for the making of judicial appointments, separate rules for appointment of judges to specific

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199 *Judiciary and Courts (Scotland) Act 2008* (UK) Ch 3. The introduction of the *Judiciary and Courts (Scotland) Act 2008* (UK) followed a public consultation on Scotland's judiciary. For the consultation paper and analysis of responses, see Scottish Executive, (2006) 'Strengthening Judicial Independence in a Modern Scotland' <<http://www.scotland.gov.uk/Resource/Doc/90982/0021845.pdf>>; Scottish Executive, (2008) 'Strengthening Judicial independence in a Modern Scotland: Analysis of written consultation responses' <<http://www.scotland.gov.uk/Publications/2008/01/18131617/0>>.

200 *Judiciary and Courts (Scotland) Act 2008* (UK) ss 9(2)(a)-(b). For a list of the judicial officers selected by the Board, see s 10. The Lord President and Lord Justice Clerk are recommended via a panel established by the First Minister, which must include the Chairing Member of the Board and another lay member: s 19, sch 2.

201 Department for Constitutional Affairs (UK), *Constitutional Reform: A New Way of Appointing Judges* (Consultation Paper, 2003) 18 <<http://webarchive.nationalarchives.gov.uk/20100512160448/dca.gov.uk/consult/jacommission/judges.pdf>>.

courts, and the provision for complaints about the appointment process.<sup>202</sup> The Act also provided for the appointment of a Judicial Appointments and Conduct Ombudsman, to investigate complaints about the judicial appointments process.<sup>203</sup>

- In 2007, the *Tribunals Courts and Enforcement Act 2007* (UK) reformed the eligibility requirements for judicial officers to encourage diversity in the judiciary, such as reducing the number of years required to have been qualified for judicial office. It also extended eligibility for some posts beyond solicitors and barristers to also include members of the Institute of Legal Executives, the Institute of Trade Mark Attorneys and Chartered Institute of Patent Attorneys.<sup>204</sup>
- In January 2008, the Government concluded a consultation entitled *The Governance of Britain – Judicial Appointments*,<sup>205</sup> which considered the transferral of functions in regard to authority to make appointments. Following the consultation, the Government determined that the Lord Chancellor should not be involved in the selection of judges below the High Court.<sup>206</sup>
- In 2013, the *Crime and Courts Act 2013* (UK) removed the Lord Chancellor's powers to accept, reject or ask for reconsideration of candidates for judicial appointment below the High Court that are recommended by the Judicial Appointments Commission, transferring such powers to the Lord Chief Justice.<sup>207</sup>

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202 Judicial Appointments Commission (UK), *The Organisation*  
<<http://jac.judiciary.gov.uk/about-jac/organisation.htm>>.

203 See Ministry of Justice (UK), *Judicial Appointments and Conduct Ombudsman homepage* (17 February 2012) <<https://www.justice.gov.uk/about/jaco>>.

204 Judicial Appointments Commission (UK), *Tribunals, Courts and Enforcement Act*  
<<http://jac.judiciary.gov.uk/about-jac/tribunals-courts-enforcement-act.htm>>.

205 Ministry of Justice (UK), 'The Governance of Britain: Judicial Appointments'  
(Consultation Paper No CP 25/07)  
<<http://www.official-documents.gov.uk/document/cm72/7210/7210.pdf>>.

206 Ministry of Justice (UK), 'The Governance of Britain: Constitutional Renewal' (March 2008, Cm 7342-I) 110-111  
<[http://www.official-documents.gov.uk/document/cm73/7342/7342\\_i.pdf](http://www.official-documents.gov.uk/document/cm73/7342/7342_i.pdf)>.

207 For the impact of the Act on the JAC, see Judicial Appointments Commission (UK), *Changes under the Crime and Courts Act 2013 start to take effect* (30 October 2013)  
<<http://jac.judiciary.gov.uk/about-jac/2608.htm>>.

### 4.1.2 The Judicial Appointments Commission

The Judicial Appointments Commission (JAC) is an Executive Non-Departmental Public Body sponsored by the Ministry of Justice, consisting of 12 commissioners appointed through open competition and three selected by the Judges' Council.<sup>208</sup> The Chairman of the Commission is required to be a lay member, whilst the other 14 members consist of five judicial members, two professional members, five lay members, one tribunal judge and one non-legally qualified judicial member.<sup>209</sup> The Commission is responsible for selecting judicial officers for appointment up to and including the High Court, and contributes members to the selection panels for the Court of Appeal, Supreme Court and heads of jurisdictions.<sup>210</sup>

The JAC selects the candidates for recommendation to the relevant 'Appropriate Authority' (Lord Chancellor, Lord Chief Justice, or Senior President of Tribunals).<sup>211</sup> The Appropriate Authority then has the authority to accept or reject a recommendation, or request for it to be reconsidered. However, this power can only be exercised once for each candidate and the Appropriate Authority may not select an alternative candidate.<sup>212</sup> The Commission also produces evaluations of the appointments process, annual reports, and research on the appointments process.<sup>213</sup>

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208 *Constitutional Reform Act 2005* (UK) sch 12 pt 1.

209 For the biographies of the current Commissioners, see Judicial Appointments Commission (UK), *Commissioners* <<http://jac.judiciary.gov.uk/about-jac/commissioners.htm>>.

210 For a list of the judicial officers selected by the JAC, see *Constitutional Reform Act 2005* (UK) sch 14. For a comprehensive description of the role and functions of the JAC, see Judicial Appointments Commission (UK) and the Ministry of Justice (UK), 'Framework Document: Ministry of Justice and the Judicial Appointments Commission' (October 2012) <[http://jac.judiciary.gov.uk/static/documents/JAC\\_Framework\\_Oct\\_2012\\_final.doc](http://jac.judiciary.gov.uk/static/documents/JAC_Framework_Oct_2012_final.doc)>

211 Judicial Appointments Commission (UK), *Selection Policy* <<http://jac.judiciary.gov.uk/about-jac/9.htm>>.

212 Ibid. See for example the selection of Lord Chief justice and Heads of Division: *Constitutional Reform Act 2005* (UK) pt 4 ch 1 ss 67-75.

213 Judicial Appointments Commission (UK), *Publications*, <<http://jac.judiciary.gov.uk/about-jac/publications.htm>>.

## 4.2 Authority to appoint

The authority to appoint judicial officers in England and Wales is formally vested in the Monarch, acting solely on the advice of the Lord Chancellor.<sup>214</sup> As will be discussed below, the judicial appointments process is managed by the JAC, and the Lord Chancellor is provided limited rights to veto candidates recommended by the JAC.

## 4.3 Eligibility for appointment

Judges must satisfy the relevant ‘judicial appointment eligibility condition’, which includes the possession of a relevant legal qualification and legal experience for the requisite period, generally either five or seven years.<sup>215</sup> The *Tribunals, Courts and Enforcement Act 2007* (UK) provides a comprehensive list of what constitutes legal experience, which goes beyond practice as a lawyer or barrister, including teaching or researching law, and acting as a mediator or arbitrator.<sup>216</sup> For salaried judicial appointments, applicants must normally have served as a fee-paid judicial office-holder for at least two years or have completed 30 sitting days since appointment in a fee-paid capacity.<sup>217</sup>

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214 Andrew Le Sueur, ‘Judicial Appointments’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2009).

215 HM Courts & Tribunal Service, Ministry of Justice (UK), *Becoming a judge: Basic requirements*, <<http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/judges-career-paths/becoming-a-judge#headingAnchor3>>.

216 *Tribunals, Courts and Enforcement Act 2007* (UK) s 52(4).

217 For example, to be eligible as a judge of the Supreme Court, a person must have held high judicial office for a period of at least 2 years, been a qualifying practitioner for a period of at least 15 years, and satisfied the judicial-appointment eligibility condition on a 15 year basis: *Constitutional Reform Act 2005* (UK) s 25. To be eligible as a Circuit judge, a person must satisfy the judicial-appointment eligibility condition on a 7 year basis, be a Recorder (fee-paid position of between 15-30 sitting days per year) or have held in a full-time capacity for at least three years an appointment to offices such as District Judge of the Magistrates’ Courts, Coroner, or member of the Medical Appeal Tribunals: *Courts Act 1971* (UK) s 16; sch 1 pt 1A.

Also see more generally: HM Courts & Tribunal Service, Ministry of Justice (UK), *Becoming a judge: Qualifications – legal positions* <<http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/judges-career-paths/becoming-a-judge#headingAnchor4>>.

## 4.4 Criteria for appointment

The JAC is statutorily required to select candidates solely on merit who are of good character, having regard to the need to encourage diversity in the range of persons available for selection for appointments.<sup>218</sup> Under the *Equality Act 2010* (UK), the JAC as a public authority is required to have regard to the need to eliminate unlawful discrimination and harassment, promote equality of opportunity and good relations between people of different racial groups, genders and those with and without disabilities.<sup>219</sup>

In addition, following reforms implemented by the *Constitutional Reform Act 2005* (UK), where two persons are of equal merit, the Commission is not prevented from preferring one candidate over another for the purpose of increasing diversity of judges of the Court.<sup>220</sup> Following a public consultation in mid-2013, the Commission is currently developing a policy to deal with how this equal merit provision can be facilitated.<sup>221</sup> The Lord Chief Justice and Lord Chancellor are also statutorily required to take steps that each office-holder considers appropriate for the purpose of encouraging judicial diversity.<sup>222</sup>

All criteria are made publicly available on the Commission's website. In regard to good character,<sup>223</sup> the JAC has developed a 'Good Character Guidance', which sets out all matters that candidates must disclose in their application.<sup>224</sup>

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218 *Constitutional Reform Act 2005* (UK) pt 4 ch 1 ss 63-4.

219 *Equality Act 2010* (UK) s 149; Judicial Appointments Commission (UK), 'JAC Equality Objectives 2012-2016' (February 2013) <[http://jac.judiciary.gov.uk/static/documents/jac\\_equality\\_objectives\\_2013.doc](http://jac.judiciary.gov.uk/static/documents/jac_equality_objectives_2013.doc)>.

220 As amended by the *Crime and Courts Act 2013* (UK) s 9.

221 Judicial Appointments Commission (UK), *Changes under the Crime and Courts Act 2013 start to take effect*, above n X.

222 As amended by *Crime and Courts Act 2013* (UK) s 11.

223 *Constitutional Reform Act 2005* (UK) s 63(3).

224 Judicial Appointments Commission (UK), 'Good Character Guidance' (10 July 2013) <[http://jac.judiciary.gov.uk/static/documents/Good\\_Character\\_Guidance\\_10\\_July\\_2013\\_.pdf](http://jac.judiciary.gov.uk/static/documents/Good_Character_Guidance_10_July_2013_.pdf)>.

The criteria by which merit is determined are as follows:<sup>225</sup>

### **Qualities and abilities**

Applicants for each selection exercise will be assessed against five of the six following qualities and abilities. For example, for posts requiring particular leadership skills, the efficiency quality may be replaced by the leadership and management skills quality.

#### **1. Intellectual Capacity**

- Expertise in your chosen area of profession
- Ability to quickly absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

#### **2. Personal Qualities**

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally

#### **3. An Ability to Understand and Deal Fairly**

- An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.
- Commitment to justice, independence, public service and fair treatment
- Willingness to listen with patience and courtesy

#### **4. Authority and Communication Skills**

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged

#### **5. Efficiency**

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously
- Ability to work constructively with others

#### **6. Leadership and Management Skills**

- Ability to form strategic objectives and to provide leadership to implement them effectively
- Ability to motivate, support and encourage the professional development of those for whom you are responsible
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively

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<sup>225</sup> Judicial Appointments Commission (UK), *Qualities and abilities*,  
<<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm>>.

- Ability to organise own and others time and manage available resources.

## 4.5 The selection process

The appointments selection process is described as follows on the JAC website.<sup>226</sup>

### **Vacancy request**

The selection process typically starts when the JAC receives a vacancy request from Her Majesty's Courts and Tribunals Service or the Ministry of Justice. The vacancy request includes the number of vacancies, a job description and the eligibility requirements set by statute for the post. It may also contain additional selection criteria set by the business area.

### **Advertising**

The JAC advertises all selection exercises on this website and in our email newsletter Judging Your Future. If you are interested in an exercise you can sign-up to receive alerts, and we will let you know when that exercise launches.

### **Applications**

The JAC tailors the application form for each selection exercise and prepares an information pack. The pack includes information about the post concerned, the selection process to be used, and the qualities and abilities (competencies) against which an assessment will be made. When we receive the completed application form, we check that the candidate meets the entry requirements. We also make an assessment of good character. You should submit your application to the JAC electronically. The JAC will only accept hard copy applications in exceptional circumstances.

### **Shortlisting**

The purpose of shortlisting is to identify candidates to proceed to the selection day. It is either undertaken on the basis of a test or by a paper sift.

- Tests - online tests designed to assess candidates' ability to perform in a judicial role, by analysing case studies, identifying issues and applying the

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226 For a more comprehensive description of the various stages, see Judicial Appointments Commission (UK), *Selection Process* <<http://jac.judiciary.gov.uk/selection-process/selection-process.htm>>. For the selection process of specific court appointments, see Judicial Appointments Commission (UK), *Selection Policy*, <<http://jac.judiciary.gov.uk/about-jac/9.htm>>.

law. They are usually prepared by judges from the relevant jurisdiction. The JAC uses qualifying tests for larger selection exercises; generally those below Senior Circuit Judge.

- Paper sift - undertaken by the selection panel - consisting of a lay panel chair, judicial member and independent member - and based on written evidence, including the candidate's self-assessment and references.

We prefer to use tests for making shortlisting decisions in the majority of exercises. We tailor our processes appropriately, however, so may not use them when there are small numbers of applicants, for example. We have now moved tests online. Candidates have told us they want this because it provides improved anonymity and enables them to sit a test at a convenient time and location. Online tests also improve the speed and cost effectiveness of selection processes. The expectation that candidates will take tests online is in accordance with the Government's strategy of 'digital by default' and the increasing need for IT skills by the business areas. Candidates can request reasonable adjustments to ensure they can participate in the selection process fairly. Alongside this we continue to explore alternative methods for shortlisting.

### **References**

References are required either before a paper sift, or after the qualifying test and we will make it clear in the information when in the process we expect you to provide references.

The JAC will seek information from people who are well placed to comment on how the candidate meets the qualities and abilities. References are required from the following groups:

**Personal** - candidates are required to identify referees they know personally or professionally. With regard to personal references, it is the responsibility of the candidate to choose, approach and explain to the referee what they need to do and to ensure they return the referee assessment form, included on the JAC website, to the JAC by the required date. The JAC will inform candidates when personal references need to be submitted, along with details of where the relevant forms and associated information can be found on the website.

**Professional** - candidates are also asked to nominate a professional referee, usually their line manager or equivalent. The JAC will normally approve these referees. Further information specific to each selection exercise is provided in the information pack.

References should be submitted to the JAC electronically. The JAC will only accept hard copy references in exceptional circumstances.

### **Candidate selection day**

If shortlisted, candidates are invited to a selection day, which may consist of a panel interview, interview and role play, interview and presentation or interview and situational questioning. Candidates will be expected to demonstrate the qualities and abilities required, using appropriate examples.

- **Interviews** - Interview panels consist of three to five panel members including a Chair, a Judicial Member and an Independent Member. You will be advised of who will be sitting on your panel prior to your selection day. [Information about interviews can be found here](#)
- **Role play** - Role play usually simulates a court or tribunal environment. Candidates are asked to take on the role of judge and respond to a simulated situation. These exercises assess how you would deal with situations you might face and decisions you would be asked to make if you were appointed. They enable you to demonstrate whether you have the required qualities and abilities and whether you can perform under challenge and pressure...
- **Situational questioning** - Situational questioning focuses on what a candidate would do in a specific situation. This technique involves questions concerning a hypothetical situation based on challenging, real-life, job-related occurrences and asks the candidate how they would handle the problem. You will be given material related to the hypothetical situation before the interview starts so you will have time to think and prepare your responses.

### **Panel report**

Panel members<sup>227</sup> assess all the information about each candidate (their performance in the interview and any role play, the candidate's self-assessment and references) and agree which candidates best meet the required qualities. The panel chair then completes a report providing an overall panel assessment. This forms part of the information presented to the Commission.

### **Statutory consultation**

As required by the Constitutional Reform Act (CRA) 2005, the JAC will carry out consultation as part of each selection exercise unless it is agreed in advance between the JAC Chairman and the Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) not to do so. When consultation is taking place, we are required to consult a person (other than the Appropriate Authority) who has held the office for which the selection is to be made or who has other relevant experience. This individual will be identified in the information pack for the selection exercise and summary reports will be sent to them for comment. The JAC may also consult another person who has held the office for which the selection is to be made or has other relevant experience. For High Court selection exercises, this is likely

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<sup>227</sup> See *Constitutional Reform Act 2005* (UK) sch 12 ss 8-10 for the statutory provisions relating to the selection and operation of panels.

to include the Lord Chief Justice, and one other person.

### **Checks**

In accordance with the JAC's statutory duty the good character of the candidates is also assessed. Guidance to enable candidates to decide whether there is anything in their past conduct or present circumstances that would affect their application for judicial appointment is available on the JAC website.

If the potential recommendation includes an existing salaried judicial office holder, the Office for Judicial Complaints is asked to check whether there are complaints outstanding against them. For other potential recommendations financial, criminal and professional background checks are carried out.

### **Selection decisions**

Commissioners make the final decision on which candidates to recommend to the Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) for appointment. In doing so, they consider those candidates that selection panels have assessed as the most meritorious for the role, having been provided with information gathered on those individuals during the whole process.

### **Report to the Appropriate Authority**

When reporting its final selections to the Appropriate Authority, the Commission must reflect the comments of the statutory consultees and discuss any divergence of opinion.

### **Quality assurance**

Quality assurance measures are applied throughout the process to ensure that the proper procedures are applied and the highest standards are maintained. The quality checks include:

- Assigning a Commissioner to each exercise, who works closely with the JAC selection exercise team to ensure standards are met. For example, the Assigned Commissioner will oversee development of tests and role plays, review results to check for anomalies or signs of bias, and help brief panel members to ensure they are fully prepared.
- Reviewing the progression of candidates through each stage of the process for any possible unfairness.
- Observing interviews to share good practice across panels; and overseeing the operation of tests and the results of panel assessments to ensure consistency (because of the number of candidates, many exercises will use more than one panel).

The Commission's website also includes resources for applicants, such as guidance on selecting referees, case studies of successful applicants, descriptions of the daily activities of judges, information on the Judicial Shadowing Scheme,<sup>228</sup> and frequently asked questions.

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228 A program that provides the opportunity for eligible qualified legal practitioners to observe a judge's main duties for up to three days. See HM Courts & Tribunal Service, Ministry of Justice (UK), *Information about shadowing a judge: Introduction* <<http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/information-about-shadowing-a-judge/introduction>>.

## 5 THE APPOINTMENTS PROCESS IN SCOTLAND

The Judicial Appointments Board for Scotland was established in 2002. It became an advisory Non-Department Public Body in 2009 following the introduction of the *Judiciary and Courts (Scotland) Act 2008* (UK).<sup>229</sup> The functions of the Board are to recommend to the members of the Scottish Executive individuals for appointment to judicial office within the Board's remit.<sup>230</sup> The relevant Minister (First Minister or Scottish Ministers) may only appoint or recommend an individual for appointment if recommended by the Board, however the Minister may, whilst providing reasons, reject a recommendation for reconsideration or for a further recommendation.<sup>231</sup>

The Board consists of three judicial members appointed by the Lord President, two legal members appointed by the Scottish Ministers, and five lay members appointed by the Scottish Ministers, one of which is the Chairing Member.<sup>232</sup> However, according to the relevant statute, the Board is not subject to the direction or control of the Scottish Executive.<sup>233</sup>

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229 *Judiciary and Courts (Scotland) Act 2008* (UK) Ch 3. The introduction of the *Judiciary and Courts (Scotland) Act 2008* (UK) followed a public consultation on Scotland's judiciary. For the consultation paper and analysis of responses, see Scottish Executive, (2006) 'Strengthening Judicial Independence in a Modern Scotland' <<http://www.scotland.gov.uk/Resource/Doc/90982/0021845.pdf>>; Scottish Executive, (2008) 'Strengthening Judicial independence in a Modern Scotland: Analysis of written consultation responses' <<http://www.scotland.gov.uk/Publications/2008/01/18131617/0>>.

230 *Judiciary and Courts (Scotland) Act 2008* (UK) ss 9(2)(a)-(b). For a list of the judicial officers selected by the Board, see s 10. The Lord President and Lord Justice Clerk are recommended via a panel established by the First Minister, which must include the Chairing Member of the Board and another lay member: s 19, sch 2.

231 *Judiciary and Courts (Scotland) Act 2008* (UK) s 11.

232 *Judiciary and Courts (Scotland) Act 2008* (UK) sch 1 ss 2-5. For the biographies of current Board members, see Judicial Appointments Board for Scotland, *Board Members* <[http://www.judicialappointmentsscotland.org.uk/About\\_Us/board\\_members](http://www.judicialappointmentsscotland.org.uk/About_Us/board_members)>.

233 *Judiciary and Courts (Scotland) Act 2008* (UK) s 9(3).

## **5.1 Authority to appoint**

The authority to appoint judicial officers in Scotland is formally vested in the monarch, acting solely on the advice of the First Minister.<sup>234</sup> As will be discussed below, the judicial appointments process is managed by the Judicial Appointments Board for Scotland, and the First Minister is provided limited rights to veto candidates recommended by the Board.

## **5.2 Eligibility for appointment**

To be eligible for appointment to the Court of Session or as Chairman of the Scottish Land Court, a candidate must be a Sherriff Principal or a Sherriff who has exercised those functions continuously for a period of at least five years, or an Advocate of five years standing, or a Solicitor who has had rights of audience before either the Court of Session or the High Court of Justiciary continuously for a period of not less than five years, or a Writer to the Signet of ten years standing who has passed the examination in civil law two years before taking up their seat on the Bench.<sup>235</sup> For appointment as a Sherriff Principal, Sheriff or Part-time Sheriffs, candidates must have been legally qualified as an Advocate or Solicitor for at least ten years, and, taking the retiring age into account, under the age of 70.<sup>236</sup>

## **5.3 Criteria for appointment**

The Board is statutorily required to select candidates for appointment solely on merit and only if satisfied that the individual is of good character.<sup>237</sup> The

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234 Andrew Le Sueur, 'Judicial Appointments' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2009).

235 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* (UK) s 35, Sch 4; Judicial Appointments Board for Scotland, *Eligibility for Judicial Appointment* <[http://www.judicialappointmentscotland.org.uk/Guide\\_to\\_Appointment\\_Process/Eligibility](http://www.judicialappointmentscotland.org.uk/Guide_to_Appointment_Process/Eligibility)>.

236 *Sheriff Courts (Scotland) Act 1971* (UK) ss 5-5A.

237 *Sheriff Courts (Scotland) Act 1971* (UK) s 12.

Board has separate criteria guidelines for judges, sheriff principals and sheriffs. The criteria for appointment to the Court of Session, High Court of Justiciary and the Scottish Land Court by which merit is determined are as follows:<sup>238</sup>

**Legal Knowledge, Skills and Competence**

- High level of legal knowledge and experience
- High level of skills and competence in interpretation and application of the law
- Ability to apply the law to make sustainable decisions

In assessing an applicant's knowledge of the law and ability to interpret and apply the law, the judicial and legal members of the Board will look for evidence of the following:

***Knowledge of the Law***

- A comprehensive knowledge of the law of evidence
- Thorough knowledge of the procedural law appropriate to the Court of Session
- A high and expert level of knowledge of the substantive law in the main area of the applicant's practice
- A fully developed understanding of the areas of substantive law most commonly encountered in the Court of Session, along with the motivation and demonstrable desire to master new and unfamiliar areas of the law that emerge during the period of service as a judge

***Skills and Competence in the Interpretation and Application of the Law***

- A thorough understanding of the theory and principles on which the law is based and an ability to analyse and explore legal problems creatively and imaginatively
- Excellent skills in the interpretation and analysis of case law and statute law
- Excellent skills in identifying and distinguishing issues of fact and law
- Excellent skills in applying the relevant law to relevant fact
- Demonstrable ability to interpret and apply the law in unfamiliar areas

***General***

- Court experience
- Case presentation skills

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238 Judicial Appointments Board for Scotland, 'Senator criteria' (2013) <[http://www.judicialappointmentsscotland.org.uk/files/senator\\_criteria\\_2013.doc](http://www.judicialappointmentsscotland.org.uk/files/senator_criteria_2013.doc)>. For the other criteria noted, see Judicial Appointments Board for Scotland, *Judicial Qualities* <[http://www.judicialappointmentsscotland.org.uk/Guide\\_to\\_Appointment\\_Process/Judicial\\_Qualities](http://www.judicialappointmentsscotland.org.uk/Guide_to_Appointment_Process/Judicial_Qualities)>.

## **Personal and Judicial Qualities**

### ***Intellectual capacity and powers of reasoning***

- Ability to marshal and analyse facts and competing arguments
- Ability to reason logically
- Ability to reach firm conclusions
- Sound judgment
- Ability to exercise discretion appropriately

### ***Personal characteristics***

- Integrity
- Independence of mind and moral courage
- Fairness and impartiality
- Common sense
- Understanding of people and society
- Responsible attitude and sound temperament
- Courteous and considerate
- Ability to command respect

### ***Case management skills and efficiency***

- Ability to manage cases efficiently and effectively
- Resolution, conscientiousness and diligence

### ***Communication skills***

- Good communication and listening skills
- Ability to communicate clearly with all court users
- Ability to clearly and concisely set out complex legal issues both orally and in writing
- Ability to reach legally sound judgments and explain the reasoned basis for any decision

## **5.4 The selection process**

### **5.4.1 The whole process**

The Scottish Ministers, or where relevant the Lord President, may issue guidance to the Board as to the procedures to be followed in carrying out its functions.<sup>239</sup> Prior to the formulation of guidance, the Board must be

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<sup>239</sup> *Judiciary and Courts (Scotland) Act 2008* (UK) s 15(1)-(2).

consulted and the guidance must be presented to the Scottish Parliament for a period of 21 days for potential recommendations by the Parliament.<sup>240</sup>

Currently, the Board uses separate processes for large appointment rounds (Sheriff and Part-time Sheriff) and smaller appointment rounds (judge, Chairman of the Scottish Land Court and Sheriff Principal). The processes published on the Board’s website are as follows:<sup>241</sup>

<b>Week</b>	<b>Large Appointment Round</b>	<b>Small Appointment Round</b>
1	Advertisement published and interested parties informed.	Advertisement published and interested parties informed.
4	Closing date for receipt of application forms.	Closing date for receipt of application forms and written work. Referee assessments are issued on receipt of the application.
6	n/a	Closing date for receipt of referee assessments.
8	Preliminary sift of applications. Applicants informed of the Board’s decision within 5 working days. Request for written work issued to successful applicants.	Sift of applications, written work and referee assessments. Applicants informed of Board’s decision within 5 working days. Judicial referee assessments and consultation forms issued for successful applicants.
10	Closing date for receipt of written work.	Closing date for judicial referee assessments and consultation forms.
12	n/a	Interview panels.
14	Second Sift of applications and written work. Applicants informed of the Board’s decision within 5 working days. Referee assessments and consultation forms issued.	Board’s decision on recommendation to the Scottish Ministers.
16	Closing date for referee assessments and consultation forms.	n/a
19	Interview panels.	n/a
20	Interview panels.	n/a
22	Board’s decision on group of individuals suitable for appointments.	n/a

<sup>240</sup> *Judiciary and Courts (Scotland) Act 2008 (UK) s 16.*

<sup>241</sup> Judicial Appointments Board for Scotland, *Step by Step*, 2–3  
<[http://www.judicialappointmentsscotland.org.uk/Guide\\_to\\_Appointment\\_Process/Step\\_by\\_Step\\_Guide](http://www.judicialappointmentsscotland.org.uk/Guide_to_Appointment_Process/Step_by_Step_Guide)>.

## 5.4.2 The interview

The interview is described by the Board as being in two stages:<sup>242</sup>

The first stage is a case study – Applicants are given time to consider legal material, some of which is provided in advance. They then have a discussion about this material with the judicial and legal members of the interview panel. The lay members of the panel are present but do not take part in this discussion.

The second stage is an interview, usually of around 50 minutes, focussing on the personal and judicial qualities required for judicial office.

For the appointment of a new head of the Scottish judiciary in 2012, the Lord President of the Court of Session, the First Minister established a selection panel, which interviewed shortlisted candidates and provided an assessment of those candidates.<sup>243</sup> The position was publicly advertised and an application was provided, which included information on the various duties of the position, eligibility requirements, and selection criteria. Applications were required to include a curriculum vitae, a cover letter addressing how the candidate meets the selection criteria, two referees, and three examples of written work – either judgments or opinions.<sup>244</sup>

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242 Judicial Appointments Board for Scotland, 'Frequently asked questions' (31 October 2013) <<http://www.judicialappointmentsscotland.org.uk/files/FAQs.doc>>.

243 Judiciary of Scotland, 'Appointment process for new Lord President announced (Media Release)' <<http://www.scotland-judiciary.org.uk/24/842/Appointment-process-for-new-Lord-President-announced>>.

244 For the information pack, Judicial Appointments Board for Scotland, 'Application Pack: The Office of Lord President of the Court of Session' <<http://www.scotland.gov.uk/Resource/Doc/925/0124706.pdf>>.

## 6 THE APPOINTMENT PROCESS IN CANADA

### 6.1 Authority to appoint

The Canadian Governor General, acting on the advice of the federal Cabinet, appoints judges to the federal courts and superior courts of the provinces and territories.<sup>245</sup> In practice, the Minister of Justice recommends puisne judges to the Governor General, whilst the Prime Minister recommends heads of jurisdiction.<sup>246</sup>

### 6.2 Eligibility for appointment

Candidates for appointment to a superior court in a province must be a barrister or advocate of at least ten years standing of the relevant bar of that province. Alternatively, a person is also eligible if he or she has been for an aggregate of ten years a barrister or advocate and, after becoming a barrister or advocate, exercised powers and performed duties and functions of a judicial nature on a full-time basis.<sup>247</sup> The Federal Court and Federal Court of Appeal, have similar requirements, also providing that a judge of a superior, county or district court in Canada is eligible for appointment.<sup>248</sup> For the Supreme Court, candidates must have been either a judge of a

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245 An exception being the Courts of Probate in Nova Scotia and New Brunswick: *Constitution Acts, 1867 to 1982* (Canada) s 96. *Supreme Court Act 1985* (Canada) s 4(2); *Tax Court of Canada Act 1985* (Canada) s 4(2); Office of the Commissioner for Federal Judicial Affairs Canada, *Process for an Application for Appointment* (6 October 2009) <<http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html>>. For an overview of the Canadian courts system, see Department of Justice (Canada), *Canada's Court System* (22 October 2013) <<http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html>>.

246 Office of the Commissioner for Federal Judicial Affairs Canada, *Process for an Application for Appointment* (6 October 2009), above n X.

247 *Judges Act 1985* (Canada) s 3. The eligibility requirements are similar to that governing appointment to the Tax Court of Canada. *Tax Court of Canada Act 1985* (Canada) s 4(2).

248 *Federal Courts Act 1985* (Canada) s 5.3.

superior court of a province or a barrister or advocate of at least ten years standing.<sup>249</sup>

The age of retirement for federally appointed judges is 75.<sup>250</sup>

### **6.3 Criteria for appointment**

The following criteria are provided by the Office of the Commissioner for Federal Judicial Affairs as a basis for assessing the suitability of candidates:<sup>251</sup>

#### **Professional Competence & Experience**

(While courtroom experience is an asset, it is only one of many factors which may be considered in assessing a candidate's suitability for the role of judge.)

- . general proficiency in the law
- . intellectual ability
- . analytical skills
- . ability to listen
- . ability to maintain an open mind while hearing all sides of an argument
- . ability to make decisions
- . capacity to exercise sound judgement
- . reputation among professional peers and in the general community
- . area(s) of professional specialization, specialized experience or special skills
- . ability to manage time and workload without supervision
- . capacity to handle heavy workload

249 *Supreme Court Act 1985* (Canada) s 5.

250 *Constitution Acts, 1867 to 1982* (Canada) s 99(2).

251 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Process for an Application for Appointment* (6 October 2009) <<http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html>>.

- . capacity to handle stress and pressures of the isolation of the judicial role
- . interpersonal skills - with peers and the general public
- . awareness of racial and gender issues
- . bilingual ability

**Personal Characteristics**

- . sense of ethics
- . patience
- . courtesy
- . honesty
- . common sense
- . tact
- . integrity
- . humility
- . punctuality
- . fairness
- . reliability
- . tolerance
- . sense of responsibility
- . consideration for others

**Potential Impediments to Appointment**

- . Any debilitating physical or mental medical condition, including drug or alcohol dependency, that would be likely to impair the candidate's ability to perform the duties of a judge
- . Any past or current disciplinary actions or matters against the candidate
- . Any current or past civil or criminal actions involving the candidate
- . Financial difficulties including bankruptcy, tax arrears or arrears of child support payments

## 6.4 The selection process

In 1988, the Office of the Commissioner for Federal Judicial Affairs was established, which is responsible for the administration of the appointments process on behalf of the Minister of Justice.<sup>252</sup> The Commission manages the process of recommending candidates for appointment to the superior courts of the provinces and territories, as well as the Federal courts, including the most recent appointments to the Supreme Court.<sup>253</sup>

### 6.4.1 Advertising or calls for expressions of interest

Applications and nominations for the superior court of a province or territory or the Federal Court of Appeal, the Federal Court or Tax Court of Canada are directed to the Commissioner for Federal Judicial Affairs Canada (Commissioner). Candidates complete a Personal History Form,<sup>254</sup> which requires six references, information on the candidates' educational qualifications and employment history, and an explanation of the 'personal qualities, professional skills and abilities, and life experiences' that the candidates believe equips them for the role of judge.<sup>255</sup> The Form also provides candidates the opportunity to provide information that would assist the objective of ensuring a diverse and representative judiciary.<sup>256</sup> Candidates must also consent to a background check, which will only be conducted following the assessment and recommendation by the Judicial Advisory Committee and upon selection by the Minister of Justice. Provincial

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252 *Judges Act*, RSC 1985 c 3 ss 73-74; Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Homepage* (15 August 2011) <<http://www.fja.gc.ca/home-accueil/index-eng.html>>.

253 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Homepage* (15 August 2011) <<http://www.fja.gc.ca/home-accueil/index-eng.html>>.

254 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Federal Judicial Appointments Personal History Form* <<http://www.fja.gc.ca/appointments-nominations/forms-formulaires/ph-fc/phf-fc-law-lois-eng.pdf>>.

255 *Ibid* 6.

256 *Ibid* 10.

and Territorial Court judges seeking appointment to a federal court must also register their interest with the Commissioner.<sup>257</sup>

## **6.4.2 Consultation**

In addition to providing interested parties the opportunity to nominate candidates, consultation with the legal profession and wider community is achieved in the composition of 17 Judicial Advisory Committees. These and the consultation process are described in 5.4.3 below.

## **6.4.3 Use of assessment or selection panels**

The 17 Judicial Advisory Committees are bodies convened for the purpose of assessing candidate applications, of which there is at least one per province and territory. According to the website of the Commissioner for Federal Judicial Affairs Canada:<sup>258</sup>

Each committee consists of eight members representing the bench, the bar, law enforcement associations and the general public:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice of the province or by the senior judge of the territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice;
- a nominee of the law enforcement community; and

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257 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Federal Judicial Appointments Personal History Form* <<http://www.fja.gc.ca/appointments-nominations/forms-formulaires/ph-fc/phf-fc-law-lois-eng.pdf>>.

258 Ibid. The composition of the Judicial Advisory Committee for the Tax Court of Canada is comprised of five members, including one judicial nominee and four nominees of the Minister of Justice from each region (Maritimes, Québec, Ontario and Western Canada).

- 3 nominees of the federal Minister of Justice representing the general public.

Each nominator is asked by the federal Minister of Justice to submit a list of names from whom an appointment to the relevant committee can be made. The Minister, with the assistance of the Commissioner for Federal Judicial Affairs Canada, then selects persons to serve on each committee who reflect factors appropriate to the jurisdiction, including geography, gender, language and multiculturalism. Committee members are appointed by the Minister of Justice to serve a three-year term, with the possibility of a single renewal.

The committees also conduct their own consultations via the assessment process, including with the referees provided by the candidate.<sup>259</sup> Following a review of the information provided by candidates and consultations with referees, the committee will classify candidates as to whether they are to be recommended or not. Candidates listed as recommended remain on a list available for judicial appointment for a period of two years.

Upon receiving recommendations from the relevant committee, the Minister may consult with members of the judiciary, the bar, and their provincial or territorial counterpart. If the Minister receives advice from a committee that is contrary to information received during his or her own consultations, the Minister may ask the committee for a reassessment of that candidate.<sup>260</sup>

For existing judges applying for higher appointment, the Minister may consult with the candidate's current head of jurisdiction and the head of the jurisdiction for which the candidate is applying for.<sup>261</sup> A committee is delegated the task of providing commentary on such candidates, but not a classification as to whether they are to be recommended or not.

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259 For a description of the common methods of consulting referees, see Office of the Commissioner for Federal Judicial Affairs Canada, *Guidelines for Advisory Committee members* (December 2006) <<http://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Consultations>>.

260 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Process for an Application for Appointment* (6 October 2009) <<http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html>>.

261 Ibid.

The most recent appointment to the Supreme Court of Canada applied a selection process that was first introduced in 2006.<sup>262</sup> In accordance with the statutory requirement that at least three judges of the Supreme Court be appointed from Québec,<sup>263</sup> in preparation for an appointment in October 2013, the Minister of Justice consulted with the Attorney-General of Québec, the Chief Justice of Québec, the Chief Justice of the Québec Superior Court, the Chief Justice of the Federal Court of Appeal, the Chief Justice of the Federal Court, in addition to legal organisations, including the Canadian Bar Association and the Bar of Québec (*Barreau du Québec*). Members of the public were also given an opportunity to provide recommendations.<sup>264</sup> Following consultations by the Minister, a list of qualified candidates was provided to the Supreme Court of Canada Appointments Selection Panel consisting of five Members of Parliament – three from the Government caucus, and one member from each Opposition caucus, as selected by the caucus leaders.<sup>265</sup> This panel subsequently selected three candidates for the Prime Minister and to the Minister of Justice to consider, of which one was chosen to recommend for appointment.

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262 Prime Minister of Canada, ‘Supreme Court of Canada Appointments Selection Process’ (Media Release, 30 September 2013) <<http://pm.gc.ca/eng/news/2013/09/30/supreme-court-canada-appointments-selection-process>>.

For context on the development of the current process, see Parliamentary Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, House of Commons of Canada, *Improving the Supreme Court of Canada Appointments Process* (2004)

<<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350880&Language=E&Mode=1&Parl=37&Ses=3>>.

263 *Supreme Court Act*, RSC 1985, c 4 s 6.

264 Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices, House of Commons of Canada, 1 October 2013, 1305 <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2013/doc\\_32972.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2013/doc_32972.html)>.

265 Prime Minister of Canada, ‘Supreme Court of Canada Appointments Selection Process’ (Media Release, 30 September 2013), <<http://pm.gc.ca/eng/news/2013/09/30/supreme-court-canada-appointments-selection-process>>.

#### 6.4.4 Formal interviews

Judicial Advisory Committees are not obligated to conduct interviews with candidates, although the committees are encouraged to do so if there is a division on which candidate to appoint.<sup>266</sup>

For the most recent appointment to the Supreme Court, the final nominee selected by the Prime Minister and Minister of Justice was required to attend a televised public hearing of an ad hoc committee, chaired by the Minister of Justice, to answer questions from the Selection Panel noted above.<sup>267</sup> According to the Minister of Justice, the purpose of the hearing was to inform the Prime Minister's final decision. However, the nominee did acknowledge during the hearing that he had already been offered the position.<sup>268</sup>

Prior to questioning by the panel, the Minister of Justice commenced the hearing by outlining the selection process undertaken and providing a biography of the nominee. This was followed by former judge of the Court of Appeal of Québec, the Honourable Jean-Louis Baudouin, providing an explanation of the functions of the Supreme Court and what qualities were required of a judge. In addition, he provided the following guidance for questioning the nominee:<sup>269</sup>

Since the process of appearing before the House of Commons was introduced, certain rules have been defined, and they must be followed. I believe we should stay away from the American model, which more closely resembles an aggressive cross-examination than a conversation or dialogue.

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266 Office of the Commissioner for Federal Judicial Affairs Canada, Government of Canada, *Guidelines for Advisory Committee members* (December 2006) <<http://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Consultations>>..

267 Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices, House of Commons of Canada, 1 October 2013. <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2013/doc\\_32972.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2013/doc_32972.html)>.

268 Ibid 1330. (Mr Justice Marc Nadon, as an individual).

269 Ibid 1325. (The Hon. Jean-Louis Baudouin, Former Judge of the Court of appeal of Quebec, as an individual).

Therefore, it is not appropriate to ask the candidate about pending matters, whether before the Supreme Court or other courts, or to ask him his personal opinion on highly controversial issues. Asking him to explain or, worse still, justify some of the decisions he has rendered during his career should also be avoided. Lastly, questions of a very personal nature—except, perhaps, about golf—such as those about his personal life, are clearly not acceptable. On the contrary, questions about his legal experience are. What should you do, then? You could—and I would even say should—sound out the Honourable Marc Nadon about how he perceives his role, what contribution he intends to make to the court, what he thinks about the role and evolution of the law and where his motivation comes from.

Questions related to the nominee's willingness to accept an increased workload, his perceived lack of judicial experience in particular areas of law, advice the nominee would provide to practising advocates, what elements of diversity the nominee thought he brought to the bench, and his view on the accountability of judges, the role of the judiciary *vis* the legislature, and of dissenting judgments. Two points of order were raised during the public hearing in response to a line of questioning on specific previous decisions of the nominee, which were considered inappropriate.<sup>270</sup> For the latter point of order, the nominee was provided the opportunity to determine whether he was comfortable in answering.

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<sup>270</sup> It was made apparent during the hearing that the nominee was requested to select five of his previous judgments in specific areas, such as administrative law, constitutional law and criminal law: See *Ibid* 1350. (Mr Justice Marc Nadon, as an individual).

## 7 PROPOSALS WHICH HAVE BEEN MADE FOR REFORM

### 7.1 Australian federal courts

There have been reforms proposed for the way in which judicial officers are selected for the federal courts. The two major proposals can be broadly categorised as:

- a judicial appointments protocol that includes criteria against which candidates can be measured, which is made publicly available, and
- the establishment of an advisory body, with diverse professional and lay membership, to advise the Executive on the merits of candidates for judicial appointment.

#### 7.1.1 Law Council of Australia's *Policy on the Process of Judicial Appointments*

In September 2008, the Law Council of Australia published a revised policy statement on the process of appointing Commonwealth judicial officers in response to the former Labor Government's announcement of its intention to make changes to the appointments process.<sup>271</sup> The policy was intended to apply to every level of judicial office in the Commonwealth courts, except for the High Court, due to the existing statutory requirement for consultation.<sup>272</sup>

The policy asserts that the appointment of judicial officers should remain a function of the Executive Government, yet advocates for a more transparent and formal process. It recommends that '[t]he Federal Attorney-General in consultation with the Chief Justice, chief judge and chief judicial officer of

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271 Law Council of Australia, *Policy on the Process of Judicial Appointments* (September 2008) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementJudicialAppointments.pdf>>.

272 *High Court of Australia Act 1979* (Cth) s 6.

courts within the jurisdiction and the legal profession should establish and make publicly available a formal Judicial Appointments Protocol', which would include criteria for assessing candidates and a list of office holders that the Attorney-General would be required to personally consult.<sup>273</sup> The process recommended by the Council is as follows:<sup>274</sup>

2. The Federal Attorney-General will arrange for public advertisements in the national media seeking expressions of interest and nominations for Federal judicial appointments. It is not an essential requirement that candidates self-nominate. Potential candidates may either be nominated by third parties, or, if a selection panel (as referred to below) believes there is a more desirable candidate that has not applied or been nominated, the panel may approach and invite that person to submit their name.
3. The Federal Attorney-General should undertake a thorough personal consultation with at least the individuals and professional bodies set out in Attachment B to this Policy.
4. A selection panel should be established by the Attorney-General to assess all applications and nominations against published criteria. The selection panel should consist of:
  - a) the head of the court or jurisdiction to which the appointment is being made (or their nominee);
  - b) a retired senior judicial officer or officers of the Commonwealth; and
  - c) a senior official from the Attorney-General's Department.
5. The published criteria should be in accordance with Attachment A to this document.
6. The selection panel will assess all applications and nominations against the published appointment criteria and develop a shortlist of suitable candidates. The panel will reserve the right to conduct, where thought appropriate, an interview with a candidate to assist in this process, but it is not obliged to do so.

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273 For the Council's recommended criteria, see Law Council of Australia, *Policy on the Process of Judicial Appointments* (September 2008), 4  
<<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementJudicialAppointments.pdf>>.

274 Ibid.

7. At the completion of its deliberations the panel will provide a shortlist of recommended suitable candidates to the Federal Attorney-General, who will be expected to propose to Cabinet the actual appointee from amongst those so-identified suitable candidates.

Office holders to be personally consulted by the Federal Attorney General include:<sup>275</sup>

- a) The current Chief Justice (or equivalent) of the relevant court;
- b) The Presidents of the Law Council of Australia and the Australian Bar Association;
- c) The President of the Bar Association of the State or Territory in which the appointee will be assigned;
- d) The President of the Law Society of the State or Territory in which the appointee will be assigned;
- e) Representatives of the Bar Associations and Law Societies of the other states and territories;
- f) The Council of Australian Law Deans;
- g) The President of Australian Women lawyers;
- h) The Chair, National Legal Aid; and
- i) The Director, National Association of Community Legal Centres.

The Law Council's proposal provides for a more modest approach to reforming the appointments process than an independent commission – namely ensuring that appointments remain a function of the Executive government, relatively unconstrained. It is of note that, according to the Law Council, the former Labor Government's appointments process adopted key elements of the Council's policy statement.<sup>276</sup> Chief Justice Marilyn Warren

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275 Ibid. Sir Anthony Mason has noted that an important consideration in regard to formulating a list of persons to be consulted is that the larger the list, the greater the difficulty in preserving confidentiality, which is required for obtaining an honest evaluation of the candidates. 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) 1, 10–11  
<<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>>.

276 Law Council of Australia, *Judicial Appointments Policy*,  
<<http://www.lawcouncil.asn.au/lawcouncil/index.php/ct-menu-item-160/ct-menu-item-162/ct-menu-item-180>>.

of Victoria noted in 2010 that she had advised the Victorian Government to adopt the process of the former Labor Government.<sup>277</sup>

### **7.1.2 Australian Bar Association's *Charter of Judicial Independence***

The Australian Bar Association has similarly advocated for formal, publicly available, procedures to be developed.<sup>278</sup> The Association's *Charter of Judicial Independence 2004* specifically notes that appointments should be made without discrimination, on the basis of merit, and that nothing in the appointments process should promote a perception that a judge is beholden to the government that appointed her or him.<sup>279</sup>

In a late 2008 media release praising the consultations conducted by the Attorney-General for federal court appointments, then President Tom Bathurst QC noted that the

procedure adopted [by the former Labor Government] in respect of the recent appointments demonstrated that an effective consultation process can occur without the need for a Judicial Appointments Commission or the Attorney-General being required to make a statement in the federal Parliament about individuals who were not appointed.<sup>280</sup>

Thus, an inference can be made that the position of the Australian Bar Association, at least in 2008, was against the establishment of an independent commission.

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277 James Campbell, 'Overhauling judges: Chief Justice floats new way', *Sunday Herald Sun*, (Melbourne) 1 August 2010, 18.

278 The Australian Bar Association, *Charter of Judicial Independence 2004* (2004), 3 [12] <[http://www.austbar.asn.au/index.php?option=com\\_docman&task=doc\\_download&id=53&Itemid=>](http://www.austbar.asn.au/index.php?option=com_docman&task=doc_download&id=53&Itemid=>).

279 Ibid 3 [10], [13].

280 Australian Bar Association, 'Australian Bar Praises Commonwealth Attorney-General's Consultation' (Media Release, 3 September 2008) <[>](http://www.austbar.asn.au/images/stories/PDFs/ABA_Media_Release_Sep03_2008.pdf).

### 7.1.3 Australian Law Reform Commission's recommendations

The Australian Law Reform Commission in 1994 recommended the establishment of an advisory commission to advise the Attorney General on suitable candidates for judicial office, noting that it would have the advantage of providing independence from the political process, which would increase the independence and impartiality of the judiciary.<sup>281</sup> The Commission also noted that an advisory commission 'offers the best chance of achieving greater diversity on the bench', as it would provide a forum for increased consultation with the community, and subsequently enable more candidates to be identified.<sup>282</sup> Finally, the Commission recommended that the membership of the advisory commission should reflect the ethnic and cultural makeup of the community, with a balance of men and women.<sup>283</sup>

### 7.1.4 Simon Evans and John Williams: "Appointing Australian Judges: a New Model"

In 2008 Professors Simon Evans and John Williams proposed in a paper<sup>284</sup> that Australia should establish a Judicial Appointments Commission, adapted from that of England and Wales,<sup>285</sup> for the purpose of ensuring that the judiciary maintains its independence, that judicial officers adequately reflect society,<sup>286</sup> and that public confidence in the judicial appointment

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281 Law Reform Commission, *Equality Before the Law: Women's Equality*, Report 69, Part 2 (1994), Ch 9, [9.39]–[9.41].

282 Ibid [9.41]

283 Ibid.

284 Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295. An earlier version of this paper was presented at the JCA Colloquium, 7-9 October 2006. This paper was thus prepared prior to the reforms introduced by the Rudd Government in 2008

285 For an explanation of the differences between the judicial systems of England and Wales and Australia vis the creation of a judicial appointments commission, see Ronald Sackville, 'The judicial appointments process in Australia: Towards independence and accountability' (2007) 16 *Journal of Judicial Administration* 125, 133-136.

286 By 'adequately reflect society', the authors do not propose that the judiciary must be strictly representative of particular groups or constituencies, but rather that the appointments process should be reformed to broaden the pool of qualified applicants and reduce the potential for direct or indirect discrimination. Alan Paterson, 'The Scottish Judicial Appointments Board: New Wine in Old Bottles?' in Kate Malleson

process is maintained. Professor Evans and Williams reference criticism of the current processes for selecting judicial officers.<sup>287</sup> However, as Justice Sackville has noted in support of a judicial appointments commission:

The arguments for a reformed system... do not depend on the validity of criticism directed at recent judicial appointments. Nonetheless, it is naïve to believe that the quality of the judiciary in every Australian jurisdiction is as high as the community is entitled to expect.<sup>288</sup>

The authors propose the following recommendations for State and Federal Australian judicial appointments commissions:<sup>289</sup>

- 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.<sup>290</sup>

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and Peter H Russel (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 13, 26-31 cited in Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review*, 295, 301.

Indeed, as Justice Ruth McColl has noted, it is undesirable to treat gender, race or religion as a criterion for judicial appointment as this reflects a naïve assumption, with no basis of evidence, that a judge of a particular gender, race or religion will determine controversies by those particular characteristics. Ruth McColl, 'Judicial Appointment' (2008) 30 *Sydney Law Review* 155, 157.

287 For a review of criticisms, see Lenny Roth, 'Judicial Appointments' (Briefing Paper No 3/2012, Parliamentary Library, Parliament of New South Wales, 2012) 15.

288 Ronald Sackville, 'The judicial appointments process in Australia: Towards independence and accountability' (2007) 16 *Journal of Judicial Administration* 125, 137.

289 Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 311-2.

290 In regard to establishing criteria, the authors note that it should provide the flexibility necessary to allow candidates to evidence that they have the capacity to develop some of the relevant skills within a reasonable time, rather than be required to demonstrate all skills at the time of application. Further, that this would require well-resourced training to accompany appointments. *Ibid* 313-4.

The authors reference a speech made by former President of the JCA, Justice Ruth McColl, in which she argued that the use of the general term 'merit' led to those appointing judicial officers to 'see merit in those who exhibit the same qualities as themselves', and that this would lead to judges being appointed who share the professional, social and gender characteristics of their predecessors. *Ibid* 299; Ruth McColl, 'Women in Law' (Speech delivered at the Anglo-Australian Society of Law, Court of Appeal, Supreme Court of New South Wales, 3 May 2006) <[www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_mccoll030506](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll030506)>.

- 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).<sup>291</sup>
- 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.<sup>292</sup>
  - Applications to be shortlisted according to the selection criteria and procedures developed and monitored by the Commission.
  - Shortlisted candidates interviewed by panels composed of Commission members, each panel consisting of one judicial member, one legal member and two non-legal members, with one of the non-legal members presiding. The interviews must be structured, following published protocols, 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.
  - The use of assessment centres, especially for magistrates or local

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291 The authors note that consultation with members of the judiciary should be conducted. However, those consulted must respond with evidence-based assessments of the candidates or their assessments should be ignored. Further, such consultation should not occur at a late stage in the selection process, lest there be a perception that appointments are a gift by the senior members of the judiciary. The Commissioners' Review of the Recorder Competition 2004/05 Competition (Midland Circuit): Report to the Lord Chancellor (2005) [3.37], cited in *ibid* 317. In regard to the results of consultations, the authors recommend that reports not be made available to an applicant, but that if the Commission intends on taking into account negative comments that are supported by evidence, it disclose the 'gist' of the information to the applicant and provide an opportunity for them to respond. See Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 319.

292 For a comprehensive description of the assessment process envisioned, see Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 319-320.

courts as a practical demonstration of skill may assist the selection committee.

- Unlike the England and Wales Commission, the authors recommend that the whole Commission, rather than a subset, conduct the final assessment.
- Recommend three suitably qualified candidates to the Attorney-General for appointment. Where there are multiple appointments to the same court, the commission would provide two more names than the proposed number of appointments.<sup>293</sup>
  - 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, then written reasons must be provided to the Commission for his or her opinion that there is not enough evidence that the person is suitable for appointment.

The authors argue that this system would not contravene s 72 of the Commonwealth Constitution, which requires Federal judicial officers to be appointed by the Governor-General on the advice of the Federal Executive Council.

Nonetheless, several commentators have recommended less restriction on the Attorney-General's authority to decide on the final candidate. Sir

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<sup>293</sup> The authors argue that this system would not contravene s 72 of the Commonwealth Constitution, which requires Federal judicial officers to be appointed by the Governor-General on the advice of the Federal Executive Council. See Ibid 321.

Anthony Mason has noted that to limit the Attorney General's selection from those recommended by the advisory commission 'would be to impose too strong a restraint on the government to appoint.'<sup>294</sup> Ronald Sackville has similarly proposed that the Attorney-General should retain the option to select a candidate other than the recommended person or persons of the Commission, but that she or he would then be required to table in Parliament a statement of reasons for selecting a candidate not supported by the Commission.<sup>295</sup>

Finally, in direct reference to Professors Evans and Williams' article, Sir Gerard Brennan has noted that, in light to s 72(i) of the *Constitution*, if the Government wishes to appoint a person not provided by the Commission, the Attorney-General should inform the Commission and provide reasons. He notes that, 'this is not a coercive sanction but it provides a sufficient incentive not to appoint an unlisted candidate for dubious reasons'.<sup>296</sup> The precise role envisioned for the Attorney-General in her or his final recommendation to the Governor General is thus currently disputed.

Evans and Williams recommend that the composition of each State or Territory Commission would consist of judicial, professional and lay members, comprising:<sup>297</sup>

- 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

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294 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) 1.

295 Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and accountability' (2007) 16 (3) *Journal of Judicial Administration* 125, 136. Professor George Williams agrees with this suggestion, George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163, 167.

296 Sir Gerard Brennan, 'The Selection of Judges for Commonwealth Courts' in Department of the Senate (Cth), *Papers on Parliament No. 48* (2008) <[http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/~/~/link.aspx?\\_id=0581B8C5C4E54E94AE84D59583521B24&\\_z=z](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~/link.aspx?_id=0581B8C5C4E54E94AE84D59583521B24&_z=z)>.

297 Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 323.

most senior member of each court willing to serve would become a member of the Commission)

- the President of the State or Territory Bar Association or his or her nominee
- the President of the State or Territory solicitors' association or his or her nominee
- a suitably qualified legal academic chosen by other members of the commission
- six other suitable non-lawyers qualified by experience and chosen by the other members of the Commission.

The Chair should be a non-legal member, chosen by the judicial and professional members after consulting the Attorney-General.

Evans and Williams recommend that the composition of the federal commission would comprise:<sup>298</sup>

- the Chief Justice of the Federal Court, the Chief Judge of the Family Court, the Chief Judge of the Federal Circuit Court 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
- six other suitable non-lawyers qualified by experience chosen by the other members of the Commission.

The Chair should be a non-legal member, chosen by the judicial and professional members after consulting the Attorney-General.

In regard to the lay members, the authors recommend criteria be developed for selecting the non-legal and academic members, and that lay members

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298 Ibid 323.

should not be considered to represent any particular group or interest. Further, the authors note that the Commissions should not include politicians, as this would likely lead to a politicisation of the appointments process.<sup>299</sup>

Sir Anthony Mason has recommended that if a committee were to be established, it should be confined to no more than nine members, five of which are to be judges and practising lawyers. Further he recommends that a nominee of the Council of Australian Law Deans be selected, one or two nominees of government, two lay persons selected having regard to their capacity to represent the community and a nominee of the relevant Bar Association and Law Council or Society.<sup>300</sup>

Sir Gerard Brennan has recommended that the head of jurisdiction should be provided the choice of either participating or providing a nominee, noting that having the head of jurisdiction involved in the selection process may make the relationship with the incoming judge more difficult, especially if it becomes known that the candidate was not one favoured by the head of jurisdiction.<sup>301</sup>

Professors Evans and Williams also suggest that the Commission should be subject to accountability mechanisms, such as annual reports and reports on individual rounds of applications presented to Parliament, the establishment of a complaints handling procedure, and the opportunity for applicants to lodge complaints with the Public Service Ombudsman or Judicial Conduct Commission.<sup>302</sup>

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299 Ibid 325.

300 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *A Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (Judicial Commission of New South Wales, 1997) 1, 10-11.

301 Sir Gerard Brennan, 'The Selection of Judges for Commonwealth Courts' in Department of the Senate, Australian Government, *Papers on Parliament No. 48* (2008)  
<[http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/~/\\_/link.aspx?id=0581B8C5C4E54E94AE84D59583521B24&z=z](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/_/link.aspx?id=0581B8C5C4E54E94AE84D59583521B24&z=z)>.

302 Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 327.

Thus, there have been many calls for the system of appointments to federal courts to be made more transparent. These include making more information available on appointments processes and publishing criteria against which candidates can be measured. In addition, several commentators have gone further and proposed the establishment of a judicial commission, which could potentially depoliticise the process of judicial appointments, and broaden the scope for consultations.

The Commonwealth Senate Legal and Constitutional Affairs References Committee (SLCARC) Final Report following the *Inquiry into Australia's Judicial System and the Role of Judges* noted the following in regard to the establishment of a Judicial Appointments Commission vis-à-vis the process at the time:<sup>303</sup>

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

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

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

3.90 However, the committee is mindful of the circumstances surrounding the appointment of a magistrate in 2007 in Tasmania that demonstrated that even when appropriate policies are in place, processes can be abused.<sup>77</sup> The establishment of a JAC would make the abuse of process extremely difficult, and it is therefore an issue that deserves to be monitored.

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303 Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 29–30.

## 7.2 Proposed reforms for Victoria

In the year 2000 a Judicial Appointments Working Party, established by the Law Institute of Victoria and the Victorian Bar at the initiative of Haddon Storey, QC, proposed Model Criteria for Appointment. The document proposed criteria under the three headings of Legal Knowledge and Experience, Skills and Abilities, and Personal Qualities. But it also went on to propose a system of judicial appointment.

The full document is set out in Appendix E.

## 7.3 Potential reform in New Zealand

The New Zealand Parliament is currently considering the Judicature Modernisation Bill 2013 – an omnibus Bill introduced as the Government’s response to the New Zealand Law Commission’s report *Review of the Judicature Act 1908: Towards a New Courts Act*.<sup>304</sup> In regard to judicial appointments, the Bill will require the Attorney-General to publish information about the process for seeking expressions of interest and recommendation, which, as noted above, is current practice.<sup>305</sup>

Other reforms include limiting appointments as non-permanent judges to former or current judges, rather than directly from the Bar, and setting more consistent appointment periods and age limits across courts.<sup>306</sup>

Additional recommendations made by the Law Commission, but not apparently adopted by the Bill, include it being a statutory requirement for the Attorney-General to consult with certain persons, such as the head of jurisdiction, the Solicitor-General, the President of the New Zealand Law

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304 New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act*, Report No 126 (2012) <<http://r126.publications.lawcom.govt.nz/>>.

305 Judicature Modernisation Bill 2013 (New Zealand) cl 93.

306 Explanatory Note, Judicature Modernisation Bill 2013 (New Zealand) pt 1. <<http://www.legislation.govt.nz/bill/government/2013/0178/18.0/DLM5759203.html>>.

Society, and the President of the New Zealand Bar Association, as well as including in statute that the Attorney-General is entitled to consult other persons considered appropriate.

Furthermore, it suggested additional statutory criteria to determine the appointment of a judge on merit, such as integrity, sound judgment, objectivity, relevant expertise and experience, and social awareness of the diverse communities in New Zealand.<sup>307</sup>

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307 New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act*, Report No 126 (2012) ch 5 <<http://r126.publications.lawcom.govt.nz/>>.

## Appendix A: Summary of the appointment processes for State and Territory courts in Australia

Note that the situation is always fluid and can change, for example with a change of government.

### Magistrates Courts

	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Stated criteria	Yes	Yes	Yes (informally)	No	No	Yes	Yes	Yes
Advertising or calls for expressions of interest	Yes	Yes	Yes	Yes (only within profession)	Yes	Yes	Yes	Yes
Consultation	Yes	Yes	Yes	Yes	Yes (limited)	Yes (limited)	Yes	Yes
Use of assessment/selection panel	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Formal interviews by selection panel or AG	Yes	Yes	Usually	No	Yes	Yes (probably)	Yes (panel)	Yes

### District/County Courts

	<b>NSW</b>	<b>QLD</b>	<b>SA</b>	<b>VIC</b>	<b>WA</b>
Stated criteria	Yes	No	No	Yes	Yes
Advertising or calls for expressions of interest	Yes	No	No	Yes	No
Consultation	Yes	No	Yes	Not clear	Yes
Use of assessment/selection panel	Yes	No	No	Not clear	No
Formal interviews by selection panel or AG	Yes	No	No	No	No

### Supreme Courts

	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Stated criteria	Yes	Yes	Yes (informally)	No	No	Yes	Yes	Yes
Advertising or calls for expressions of interest	Yes	No	No	No	No	Yes	Yes	No
Consultation	Yes	No	Yes	No	Yes	Yes (limited)	Yes	Yes
Use of assessment/selection panel	No	No	Yes	No	No	Yes	Not clear	No
Formal interviews by selection panel or AG	No	No	No	No	No	Yes	No	No

## Appendix B: Background information in regard to appointments to Australian federal courts

As was said in a 1993 discussion paper produced by the Commonwealth Attorney-General's Department:

Little is known publicly about the appointment process and no established internal rules for selecting judges have been developed. The appointment process has varied according to the personal preferences of individual Attorneys-General.<sup>308</sup>

### Recent reform

Since then some changes have occurred in the judicial selection process. In particular, in 2008 the then Labor Government published new policies for the appointment of federal judicial officers for the stated purposes of promoting greater transparency and public confidence, of ensuring that appointments were based on merit, and that those with the appropriate qualities for appointment were fairly and properly considered.<sup>309</sup>

This policy document, entitled *Judicial Appointments: ensuring a strong, independent and diverse judiciary through a transparent process*, noted that the reforms were an attempt to evolve the federal judiciary into one that better reflected the diversity of the Australian community and sought to increase the diversity of the federal judiciary in relation to gender, residential location, professional background and experience, and cultural background.<sup>310</sup> The following diagram provides an overview of the selection process envisaged in that policy document.

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308 Attorney-General's Department (Cth), *Judicial Appointments – Procedure and Criteria* (1993) 13.

309 Federal Courts Branch, Attorney-General's Department (Cth), *Judicial appointments: Ensuring a strong, independent and diverse judiciary through a transparent process* (first published 2008, republished 2012) 1  
<<http://www.ag.gov.au/LegalSystem/Courts/Documents/JudicialApptsEnsuringastrongandindependentjudiciarythroughatransparentprocess.pdf>>.

310 Ibid.

## Appointments Process for Judicial Officers<sup>311</sup>



### Selection criteria

Apart from what is outlined in chapter 1, there are no current selection criteria. An example of the selection criteria used for a period up to 2013 for those seeking to nominate or to provide an expression of interest for the Federal Court is as follows:<sup>312</sup>

311 Federal Courts Branch, Attorney-General's Department (Cth), above n X, 5.

312 Civil Justice and Legal Services Group, Attorney-General's Department (Cth), *Judicial Appointments Federal Court of Australia: Information for persons who wish to nominate another person for appointment or lodge an expression of interest* (28 May 2013) <<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDYQFjAC&url=http%3A%2F%2Fwww.ag.gov.au%2FLegalSystem%2FCourts%2FDocuments%2FFederalCourt-InformationPack.doc&ei=6EfGUvb6I4WAlQW4jICoCg&usg=AFQjCNFxm4fa04ho4HMtYTA7NT240ef4LQ&bvm=bv.58187178,d.dGI>>.

### **REQUISITE QUALITIES FOR APPOINTMENT**

To be eligible to be appointed as a Federal Court judge, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for at least 5 years.

In addition, judges must have the following personal and professional qualities to the highest degree:

- legal expertise
- conceptual, analytical and organisational skills
- decision-making skills
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments
- the capacity to work effectively under pressure
- a commitment to professional development
- interpersonal and communication skills
- integrity, impartiality, tact and courtesy, and
- the capacity to inspire respect and confidence.

Broad ranging expertise is also sought in the area of commercial law, including admiralty and maritime, competition, consumer protection, corporations, intellectual property and taxation law.

As outlined in 1.1.2, this use of published criteria is no longer current practice.

The Commonwealth Senate Legal and Constitutional Affairs References Committee (SLCARC) Final Report following the *Inquiry into Australia's Judicial System and the Role of Judges* noted that appointments were being made on merit,<sup>313</sup> yet recommended that the Attorney-General should confirm that selection is based on merit and should detail the selection criteria that constitute merit for appointment to the High Court.<sup>314</sup> The

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313 Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 29.

314 Ibid 54.

Government's response was to note that 'the special position of the High Court means that an identical judicial appointments process to that used in other courts is not appropriate' and that '[a]ppointments to the High Court are made on merit having regard to the qualifications for appointment in section 7 of the *High Court of Australia Act 1979*.'<sup>315</sup>

### **Advertising**

The *Judicial Appointments Process* policy document stated that, at the same time as consulting with various parties (see below), the Attorney-General's Department would place public notices in national and local media seeking expressions of interest and nominations, as well as publishing the appointment criteria on its website.<sup>316</sup> This did not apply to the High Court and the positions of Chief Justices and Chief Judge of the other three federal courts.<sup>317</sup> An example of the information that was provided to potential appointees is at Appendix C. An example of the expression of interest form that was to be completed by a person seeking consideration for appointment is at Appendix D. The SLCARC Final Report recommended that the Attorney-General should 'adopt a process that includes advertising vacancies widely' for the High Court,<sup>318</sup> which the Government disagreed with, reasoning that advertising will achieve little in addition to broad consultation and that most of the candidates will be known to Government.<sup>319</sup> The Final Report also recommended that the Attorney-General should make public the number of nominations and applications received for each vacancy when the judicial officer is announced and that if a short-list of candidates is prepared, the number of people on the list also

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315 Robert McClelland, Commonwealth Attorney-General, *Government Response to the Senate Legal and Constitutional Affairs References Committee Report on Australia's Judicial System and the Role of Judges* (2009) 2.

316 Ibid.

317 Federal Courts Branch, Attorney-General's Department, Australian Government, *Judicial appointments: Ensuring a strong, independent and diverse judiciary through a transparent process* (first published 2008, republished 2012) 2-3.

318 Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 54.

319 Robert McClelland, Commonwealth Attorney-General, *Government Response to the Senate Legal and Constitutional Affairs References Committee Report on Australia's Judicial System and the Role of Judges* (2009) 3.

be made public.<sup>320</sup> The Government accepted the recommendation in so far as making publicly available in the announcement of the judicial officer the number of nominations and applications received (if sought).<sup>321</sup>

### **Consultation process**

The statutory consultative process has not always satisfied all States. In 1997, for example, the then Premier of Queensland Mr Borbridge, stated that '[T]he experience of the States has been uniformly disappointing. The obligation to consult is largely empty.'<sup>322</sup>

Prior to 2008, no comprehensive government policies were made publicly available as to what constitutes 'consultation' in this context.<sup>323</sup> As indicated in chapter 1, the consultation process then consisted of the Attorney-General for the Commonwealth writing to the Attorneys-General of the States, asking them to provide names of those whom they wish to have considered for appointment. The names put forward were then considered by the Attorney-General before a recommendation was made to Cabinet. There was and is, however, no requirement that the appointment be made from those proposed by the States.<sup>324</sup>

The policy of the Attorney-General from 2003-2007, the Hon Philip Ruddock MP, was to continue the then existing practice of consulting the Chief Justice of the relevant court, State governments, professional associations

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320 Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 14.

321 Robert McClelland, Commonwealth Attorney-General, *Government Response to the Senate Legal and Constitutional Affairs References Committee Report on Australia's Judicial System and the Role of Judges* (2009) 2.

322 R Borbridge, 'Speech to the Queensland Farmers Federation' (Speech delivered at the Queensland Farmers Federation, Brisbane, 18 February 1997) cited in Max Spry, 'Executive and High Court Appointments' in Geoffrey Lindell and Robert Bennett (eds), *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 419, 439.

323 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *A Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (Judicial Commission of New South Wales, 1997) 1, 11-12; George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163, 164.

324 Advisory Committee to the Constitutional Convention, 'Separation of powers, appointment and removal of judges', *Australian Judicial System* (1987), Ch 5.

such as the Law Council of Australia, and serving and former judges.<sup>325</sup> It has been suggested that, in practice, Attorney-General Ruddock ‘ha[d] not [been] as extensive as his predecessor [the Hon Daryl Williams QC] ... in his consultations with the profession’,<sup>326</sup> with former Australian Bar Association President Stephen Estcourt QC publicly noting that there was a ‘continued refusal to consult’.<sup>327</sup>

The 2010 *Judicial Appointments Process* policy document provided the following overview:<sup>328</sup>

[T]he Attorney-General consults widely, writing to interested bodies inviting nominations of suitable candidates. These bodies include, but are not limited to, the Chief Justices of the Family and Federal Courts, the Chief Federal Magistrate [now Chief Judge of the Federal Circuit Court of Australia], the Law Council of Australia, the Australian Bar Association and their state and territory counterparts

In regard to two High Court appointments, former Attorney-General Nicola Roxon noted that she had written to the States, the shadow Attorney-General, law societies, universities and community legal centres for consultation on the appointments.<sup>329</sup>

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- 325 Philip Ruddock, ‘Official Opening’ (Speech delivered at the Colloquium of the Judicial Conference of Australia, Adelaide, 2004) <<http://jca.asn.au/wp-content/uploads/2013/11/2004-ruddock-3.pdf>>; Philip Hudson, ‘Call to Appoint Woman Judge’, *Sunday Age* (online), 11 September 2005 <<http://www.theage.com.au/news/national/call-to-appoint-woman-judge/2005/09/10/1125772732684.html>>.
- 326 Dominique Hogan-Doran, ‘Fighting for the Right to Decide’, *Lawyers Weekly* (Australia), 15 October 2004, 20.
- 327 Hedley Thomas, ‘Call for shake-up of top law postings’, *The Australian* (online), June 12 2007 <<http://www.theaustralian.com.au/news/nation/call-for-shake-up-of-top-law-postings/story-e6frg6nf-1111113728279>>
- 328 Federal Courts Branch, Attorney-General’s Department, Australian Government, *Judicial appointments: Ensuring a strong, independent and diverse judiciary through a transparent process* (first published 2008, republished 2012) 2–3.
- 329 Farah Farouque, ‘Roxon seeks judicial variety for the High Court’, *The Sydney Morning Herald* (online), 23 March 2012 <<http://www.smh.com.au/federal-politics/political-news/roxon-seeks-judicial-variety-for-the-high-court-20120322-1vmzk.html>>; Nicola Berkovic, ‘Leading judges and silks line up for next High Court seat’, *The Australian* (online), 17 February 2012. <<http://www.theaustralian.com.au/business/legal-affairs/leading-judges-and-silks-line-up-for-next-high-court-seat/story-e6frg97x-1226273197801#>>.

### **Advisory Panels**

As outlined in section 1.1.3, there is no current practice to use advisory panels.

The *Judicial Appointments Process* policy document stated that Advisory Panels were to be convened to assist the Attorney-General in assessing expressions of interest and nominations.

In 2008 former Attorney-General Robert McClelland stated that the proposed panels for making appointments to the Federal Circuit Court would 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 the Attorney-General's Department.<sup>330</sup> Upon appointment as Attorney-General, Mark Dreyfus QC continued the appointments process established by Robert McClelland.<sup>331</sup> An advisory panel comprising the Chief Justice of the Family Court, a former Family Court judge, an academic, and a senior representative of the Attorney-General's Department recommended the five appointees to that Court chosen by the then Attorney-General, Mark Dreyfus QC, in June, 2013.<sup>332</sup>

### **Interviews**

There is no current practice to interview candidates.

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'Solicitor-General Gageler appointed to High Court', *Australian Broadcasting Corporation (ABC) News* (online), 21 August 2012  
<<http://www.abc.net.au/news/2012-08-21/solicitor-general-appointed-to-high-court/4212774>>.

330 Robert McClelland, 'Judicial Appointments Forum' (Speech delivered at The Bar Association of Queensland Annual Conference, Sheraton Mirage, Gold Coast, 17 February 2008) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/2008/Firstquarter/18February2008JudicialAppointmentsForum.html>>.

331 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 29 May 2013, 163 (Roger Wilkins, Secretary, Attorney-General's Department).

332 Attorney-General's Department (Cth), 'Five Judges appointed to the Family Court of Australia' (Media Release, 28 June 2013)  
<<http://pandora.nla.gov.au/pan/132822/20130906-1028/attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/28June2013-FiveJudgesappointedtotheFamilyCourtofAustralia.html>>.

For a period of time, as described in the *Judicial Appointments Process* policy document, an Advisory Panel would interview candidates it considered suitable for appointment and prepare a report with a list of candidates suitable for appointment.<sup>333</sup>

The composition of these panels expanded on what was described by Justice Sackville in his 2005 paper, which referred to interview panels consisting of staff from the Attorney-General's Office and senior members of the Department.<sup>334</sup>

The Chief Justice of the Family Court of Australia noted in June 2013 that all shortlisted candidates are interviewed. The interview panel determines the suitability for appointment of the candidate and the references are contacted for those considered suitable (either suitable, very suitable or highly suitable).<sup>335</sup>

In regard to heads of federal courts, it is not clear if there was an interview process. The *Judicial Appointments Process* policy document notes that, following consultation, the Attorney-General then considered the field of candidates prior to putting forward a name to Cabinet.<sup>336</sup>

Although there is no formal process for interviewing persons being considered for appointment to the High Court, in 2003 the then Attorney-General, Daryl Williams QC, conducted private interviews with candidates for a vacancy in the High Court, which, in the event, was filled by Justice Heydon. Mr Williams did not disclose what questions were put to candidates

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333 Federal Courts Branch, Attorney-General's Department, Australian Government, *Judicial appointments: Ensuring a strong, independent and diverse judiciary through a transparent process* (first published 2008, republished 2012) 2.

334 Justice Ronald Sackville, 'Judicial appointments: A discussion paper' (2005) 14 *Journal of Judicial Administration* 117, 120.

335 Letter from Chief Justice Diana Bryant of the Family Court of Australia to Professor Greg Reinhardt, Australasian Institute of Judicial Administration, 20 June 2013.

336 Federal Courts Branch, Attorney-General's Department, Australian Government, *Judicial appointments: Ensuring a strong, independent and diverse judiciary through a transparent process* (first published 2008, republished 2012) 3.

or how the information was used.<sup>337</sup> The process generated considerable debate as to the propriety of the Attorney-General conducting, what one commentator described as, ‘secret interviews’ of prospective appointees.<sup>338</sup>

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337 Michael Lavarch, ‘The Appointment of Judges’, in Australian Institute of Judicial Administration and the Law Council of Australia (eds), *Courts in a Representative Democracy* (Australian Institute of Judicial Administration, 1995) 153, 153 cited in George Williams, ‘High Court Appointments: The Need for Reform’ (2008) 30 *Sydney Law Review* 163, 165.

338 See for example, the following media reports: Chris Merritt, ‘Court row as Williams vets judges’ *Australian Financial Review* (Melbourne), 11 December 2002 1; ‘Williams denies politicising search for High Court judge’ *Canberra Times* (Canberra), 12 December 2002; ‘High Court interviews ‘improper’’, *Australian Financial Review* (Melbourne), 12 December 2002; ‘High risk in Williams way’, *Australian Financial Review* (Melbourne) 12 December 2002; ‘Secret vetting taints court selection’ *Australian Financial Review* (Melbourne) 13 December 2002; ‘Billy Hughes sounded out prospective judge’ *Canberra Times* (Canberra), 13 December 2002; ‘No room for secrecy in judicial appointments process’, *Australian Financial Review* (Melbourne), 14 December 2002; ‘High Court selection now widens’, *Australian Financial Review* (Melbourne), 19 December 2002.

## **Appendix C: Federal Court of Australia: information previous supplied in regard to appointments<sup>339</sup>**

### **JUDICIAL APPOINTMENTS FEDERAL COURT OF AUSTRALIA**

#### **INFORMATION FOR PERSONS WHO WISH TO NOMINATE ANOTHER PERSON FOR APPOINTMENT OR LODGE AN EXPRESSION OF INTEREST**

The Federal Court consists of the Chief Justice and Judges located in all capital cities except Canberra and Hobart. The Court sits elsewhere in Australia from time to time.

The Federal Court of Australia was established in 1976. It is a superior court of record and a court of law and equity. It has original jurisdiction under more than 150 Acts of Parliament and a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Court and from the Federal Magistrates Court in non-family law matters. The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island.

Further information about the Federal Court of Australia can be found at [www.fedcourt.gov.au](http://www.fedcourt.gov.au).

#### **TERMS AND CONDITIONS OF OFFICE**

Judges of the Federal Court are appointed by the Governor-General to age 70. The position that is currently available is full-time.

The salary of a Federal Court judge is \$402,880 per annum. Judges accrue six months long leave after five years of service. When travelling within Australia on official business, a Federal Court judge is entitled to the highest available class of airline travel and travelling allowance at rates set by the Remuneration Tribunal.

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339 Department of Attorney-General (Cth), *Federal Court of Australia: Information for persons who wish to nominate another person for appointment or lodge an expression of interest*  
<<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDYQFjAC&url=http%3A%2F%2Fwww.ag.gov.au%2FLegalSystem%2FCourts%2FDocuments%2FFederalCourt-InformationPack.doc&ei=6EfGUvb6I4WAlQW4jICoCg&usg=AFQjCNFxm4fa04ho4HMtYTA7NT240ef4LQ&bvm=bv.58187178,d.dGI>>.

Under the *Judges' Pensions Act 1968*, Federal Court judges are entitled to a non-contributory pension of 60% of current judicial salary after attaining the age of 60 years and having served 10 years or more as a judge or upon retirement on the ground of permanent disability or infirmity. Pro rata pension is payable after six years service as a judge upon retirement at age 70.

Further information relating to Terms and Conditions can be found at [www.remtribunal.gov.au](http://www.remtribunal.gov.au). The current Remuneration Tribunal determination applying to Federal Court judges is Determination 2012/09: *Judicial and Related Offices – Remuneration and Allowances*.

## **APPOINTMENTS PROCESS**

In early 2008, the Government introduced new processes for appointing judges and magistrates to federal courts. These processes include:

- broad consultation to identify persons who are suitable for appointment
- publishing public notices seeking expressions of interest and nominations
- publishing of requisite qualities for appointment on the Attorney-General's Department website, and
- establishing appointments advisory panels to assess expressions of interest and nominations against the requisite qualities for appointment and to develop a shortlist of highly suitable candidates.

The processes are aimed at ensuring:

- greater transparency and public confidence in the judicial appointments process
- that all appointments are based on merit, and
- that everyone who has the qualities for appointment as a judge or magistrate is fairly and properly considered.

Persons under consideration for appointment should also be aware that enquiries relevant to their suitability for appointment may be made of referees and others, in particular, judicial officers and persons holding office in legal professional bodies. These enquiries will be made discretely and with regard to the privacy of persons under consideration, and will be treated with the utmost confidentiality and used only to assist in the selection process.

## **REQUISITE QUALITIES FOR APPOINTMENT**

To be eligible to be appointed as a Federal Court judge, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for at least 5 years.

In addition, judges must have the following personal and professional qualities to the highest degree:

- legal expertise
- conceptual, analytical and organisational skills
- decision-making skills

- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments
- the capacity to work effectively under pressure
- a commitment to professional development
- interpersonal and communication skills
- integrity, impartiality, tact and courtesy, and
- the capacity to inspire respect and confidence.

Broad ranging expertise is also sought in the area of commercial law, including admiralty and maritime, competition, consumer protection, corporations, intellectual property and taxation law.

## **EXPRESSIONS OF INTEREST**

Those interested in lodging an expression of interest should complete and submit the expression of interest form available for downloading at [www.ag.gov.au/courtappointments](http://www.ag.gov.au/courtappointments). The required information includes:

- the candidate's full name, date of birth, address and contact details
- the candidate's present position and date of admission to practice
- the candidate's educational and professional qualifications, areas of legal expertise and relevant experience, so as to show that they possess the requisite qualities for appointment
- the names of at least three referees, preferably drawn primarily from the candidate's peer group and including at least one referee who can attest to the candidate's general character,
- a Private Interests Declaration.

## **NOMINATIONS**

Those interested in nominating another person for appointment should complete and submit the nomination form available for downloading at [www.ag.gov.au/courtappointments](http://www.ag.gov.au/courtappointments). The information includes:

- the nominator's full name, address and contact number, and the capacity in which the nominator knows the nominee
- the nominee's full name, address, contact numbers and date of birth
- the nominee's present position and date of admission to practice
- the nominee's educational and professional qualifications, areas of legal expertise and relevant experience, so as to show that the nominee possesses the requisite qualities for appointment
- a statement that the nominee has agreed to being considered for appointment.

In addition, to enable nominations to be processed, all nominees will be required to provide a Private Interests Declaration. Nominees will be contacted by an Attorney General's Department Officer about the Declaration.

## **LODGING EXPRESSIONS OF INTEREST AND NOMINATIONS**

Expressions of interest and nominations should be forwarded to David Fredericks, Deputy Secretary, Civil Justice and Legal Services Group, Attorney-General's Department at [fedca.appointments@ag.gov.au](mailto:fedca.appointments@ag.gov.au).

Should you have any queries about electronic lodgement, or should you require further information, please contact Mr David Fredericks, Deputy Secretary, Civil Justice and Legal Services Group on (02) 6141 3175 or email [fedca.appointments@ag.gov.au](mailto:fedca.appointments@ag.gov.au).

## Appendix D: Federal Court of Australia: expression of interest form used formerly<sup>340</sup>

### Federal judicial appointments – Federal Court of Australia

#### Expression of interest for appointment in Sydney.

Thank you for your interest in appointment to the Federal Court of Australia.

On this occasion, an appointment will be made to the Sydney registry. Please note, any appointments made to the Federal Court Sydney registry in the next twelve months may be made from the expressions of interest and nominations received in this round of appointments. Please indicate your availability for appointment:

I wish to be considered for the current round of appointments only.

OR

I am not available for appointment for the current round but wish to be considered if further appointments are made in the next 12 months.

OR

I wish to be considered for the current round and any further appointments made to the Sydney registry in the next 12 months.

In order to lodge an expression of interest, please complete the following documentation and submit, with any supporting material, to [fedca.appointments@ag.gov.au](mailto:fedca.appointments@ag.gov.au).

**Private Interests Declaration:** A Private Interests Declaration form is at the last two pages of this documentation. To enable your expression of interest to be processed, please answer the questions in the declaration.

**Judicial appointments contact officer:** The contact officer for judicial appointments is Mr David Fredericks, Deputy Secretary, Civil Justice and Legal Services Group, Attorney-General's Department, who can be contacted on (02) 6141 3175, or [fedca.appointments@ag.gov.au](mailto:fedca.appointments@ag.gov.au).

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<sup>340</sup> Department of Attorney-General (Cth), *Expression of interest for appointment in Sydney*, <<http://www.ag.gov.au/LegalSystem/Courts/Documents/FederalCourt-ExpressionofInterest.PDF>>.



**First enrolment as a legal practitioner:** [*Please record relevant court, year of enrolment and, if applicable, specify whether enrolment was as a barrister or solicitor.*]

\*

**If applicable, other enrolments as a legal practitioner:** [*Please record relevant court, year of enrolment and, if applicable, specify whether enrolment was as a barrister or solicitor.*]

**If applicable, appointment as Senior Counsel or Queen's Counsel:** [*Please record designation (ie Senior Counsel or Queen's Counsel), State or Territory and year of appointment.*]

## Professional qualifications

[*Greater details relating to employment history can be provided in your curriculum vitae which you can submit with your expression of interest. Please provide a brief overview only in this section.*]

**Current position:**

\*

**Year commenced current position:**

\*

**Areas of specialisation:**

**Former positions of note:** [*eg Tribunal / judicial appointments.*]

**Additional comments:** [*eg Membership of specialist professional associations / other professional responsibilities.*]

**Details of Publications:**

**Responses to criteria**

Please give examples of how you have demonstrated the following professional skills and abilities and personal qualities relevant to judicial office.

**Legal expertise**

**Conceptual, analytical and organisational skills**

**Decision-making skills**

**Ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments**

**Capacity to work effectively under pressure**

**Commitment to professional development**

**Interpersonal and communication skills**

**Integrity, impartiality, tact and courtesy**

**Capacity to inspire respect and confidence**

## References

*[Please give the names and contacts details of three referees who may be approached in connection with this expression of interest. Please note that at least two of your referees should be able to comment upon your professional skills and abilities. Please include the area codes for land line telephone numbers.]*

### Referee # 1

**Name:**

**Current Occupation:**

**Phone Business Hours:**

**Mobile:**

**Business Email:**

### Referee # 2

**Name:**

**Current Occupation:**

**Phone Business Hours:**

**Mobile:**

**Business Email:**

### Referee # 3

**Name:**

**Current Occupation:**

**Phone Business Hours:**

**Mobile:**

**Business Email:**

## **Declaration**

By submitting this documentation electronically, I declare that the information I have provided is true and correct to the best of my knowledge.

I understand that in order for my expression of interest to be considered, I am required to complete the attached Private Interests Declaration form. I understand that I may be required to provide a signed declaration at a later date.

**Name:** \*

**Date:** \*

*[Please complete the Private Interests Declaration on the following page.]*

**PRIVATE INTERESTS DECLARATION**

POSITION & ORGANISATION	JUDGE FEDERAL COURT OF AUSTRALIA
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Please answer the following questions by circling the reply that applies to your personal circumstances. If you answer “yes” to any question, please provide details in an attachment to this form. Please note that answering “yes” to any question does not necessarily preclude you from being appointed. Your response will be treated as confidential and will only be used for purposes connected with this proposed appointment.

1. Do you have any disclosable criminal convictions, i.e. convictions as an adult that form part of your criminal history other than those protected by the Spent Convictions Scheme (see Part VIIC of the <i>Crimes Act 1914</i> )?	Yes/No
2. Are you, or have you been, the respondent or defendant in any civil or criminal court action (including as a company director or other office holder)?	Yes/No
3. (a) Have you ever been declared bankrupt, entered into a debt agreement under Part IX of the <i>Bankruptcy Act 1996</i> (the Bankruptcy Act) or entered into a personal insolvency agreement under Part X of the Bankruptcy Act? (b) If you are in a partnership, have any of your partners ever been declared bankrupt, entered into a debt agreement under Part IX of the Bankruptcy Act or entered into a personal insolvency agreement under Part X of the Bankruptcy Act?	Yes/No or N/A
4. Has any business or commercial enterprise for which you, or if applicable your partner(s), have had responsibility ever gone into receivership or a similar scheme or arrangement?	Yes/No
5. During the last 10 years have you, or if applicable your partner(s), been the subject of a court order in connection with monies owing to another party?	Yes/No
6. Have you ever been summonsed or charged concerning non-payment of tax or outstanding tax debts, investigated for tax evasion or defaults, or negotiated with the Australian Taxation Office over outstanding tax debts?	Yes/No
7. Have you ever been the subject of a complaint to a professional body which has been substantiated, or is currently under investigation?	Yes/No
8. Have you ever been dismissed from employment because of a discipline or misconduct issue?	Yes/No
9. Are you a lobbyist registered on the Australian Government’s Lobbyists Register or the register of a state or territory?	Yes/No
10. Is there any other information which could be relevant to your suitability for the proposed appointment?	Yes/No

**ASSURANCE**

**I advise that to the best of my knowledge my private, business and financial interests, including taxation affairs, would not conflict with my public duties or otherwise cause embarrassment to myself or to the Government during my term of appointment.**

.....  
Name
Signature
Date

## Appendix E: Law Council of Australia: Judicial Appointments Policy<sup>341</sup>

**Law Council of Australia**  
**Judicial Appointments Policy: 20 September 2008**

**Attributes of Candidates for Judicial Office**

*Legal Knowledge and Experience*

1. It is necessary that successful candidates:
  - a) will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in professional practice; and
  - b) will possess either:
    - (i) sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or
    - (ii) in the case of candidates with more specialised professional experience, the ability to acquire quickly an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience.
2. It is desirable that successful candidates have court or litigation experience.

*Professional Qualities*

3. It is desirable that successful candidates possess the following professional qualities:
  - a) intellectual and analytical ability;
  - b) sound judgment;
  - c) decisiveness and the ability to discharge judicial duties promptly;
  - d) written and verbal communication skills;

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<sup>341</sup> Law Council of Australia, *Policy Statement: The Process of Judicial Appointments* (September 2008) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementJudicialAppointments.pdf>>.

- e) authority – the ability to command respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly;
- f) capacity and willingness for sustained hard work;
- g) management skills, including case management skills;
- h) familiarity with, and ability to use, modern information technology or the capacity to attain the same; and
- i) willingness to participate in ongoing judicial education.

*Personal Qualities*

4. It is desirable that successful candidates possess the following personal qualities:
  - a) integrity, good character and reputation;
  - b) fairness;
  - c) independence and impartiality;
  - d) maturity and sound temperament;
  - e) courtesy and humanity; and
  - f) social awareness including gender and cultural awareness.

## Appendix F: Proposed model criteria for judicial appointments in Victoria

*Model Criteria for Appointment  
Settled by the Judicial Appointments Working Party  
30 March, 2000*

Qualities of judges and magistrates which might be considered as desirable criteria should comprise a mix of legal or jurisprudential skills, social skills and personal qualities including:

### Legal Knowledge and Experience

Successful candidates:

- (a) will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in professional practice; and
- (b) will possess either:
  - Sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or
  - In the case of candidates with more specialised professional experience, the ability to acquire an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience.

### Skills and Abilities

Successful candidates must have:

- (a) intellectual and analytical ability
- (b) sound judgement
- (c) decisiveness
- (d) written and verbal communication skills
- (e) authority – the ability to command respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly
- (f) management skills
- (g) familiarity with and ability to use of modern information technology or the capacity to acquire it
- (h) ability to discharge judicial abilities promptly

### Personal Qualities

Successful candidates will possess the following personal qualities:

- (a) integrity
- (b) fairness
- (c) understanding of people and society
- (d) social awareness including gender and cultural awareness
- (e) maturity and sound temperament
- (f) courtesy and humanity
- (g) commitment
- (h) capacity and willingness for sustained hard work and
- (i) willingness to participate in ongoing judicial education

*Views Expressed by Judicial Appointments Working Party  
Meeting on 9 February, 2000*

1. The system of judicial appointment:
  - (a) should permit the public to know the criteria upon which appointments are based and the process of inquiry and consultation followed in doing so; and
  - (b) should provide an established process for the Attorney-General to follow in making appointments; and
  - (c) should assist the Attorney-General to become aware of excellent candidates for appointment outside their own circle of knowledge.
2.
  - (a) there should be criteria for assessing the suitability of candidates for appointment to judicial office (the criteria)
  - (b) there should be a known process for identifying potential candidates for appointment.
3. The Attorney-General should be requested to adopt the process for identifying potential candidates and the criteria to be applied in their assessment, and to advise the community of his intention to adopt them.
4. The paramount criterion should be "merit", meaning capacity to discharge the duties of office expeditiously, skilfully and courteously.
5. The Attorney-General should take into account that the composition of the court to which the appointment is to be made should reflect the diversity of the community.
6. There should be a small Advisory Committee appointed by the Attorney-General which should:
  - (a) be established by convention rather than statute or regulation; and
  - (b) comprise the following persons appointed by the Attorney-General from time to time:
    - (i) a member of the Council of the Law Institute of Victoria
    - (ii) a member of the Victorian Bar Council
    - (iii) a Dean of law or other appropriately qualified legal academic
    - (iv) two non-lawyers who should be persons of standing in the community with skills relevant to the tasks of the Committee.
    - (v) A person to represent the Attorney-General
7. The Advisory Committee should:
  - (a) determine the desirable criteria for appointment. (a model draft of suitable criteria is attached)
  - (b) assist the Attorney-General in identifying persons suitable for appointment to judicial office, in the manner directed by each Attorney-General from time to time
8. Consideration of Further Proposals as Follows:
  - (i) The Advisory Committee should at the request of the Attorney-General from time to time compile lists of candidates suitable for appointment to courts in Victoria and for that purpose should:
    - (a) actively solicit candidates it regards as satisfactory
    - (b) if it considers it appropriate interview candidates for appointment

- (c) consult with judges, the Law Institute, the Victorian Bar Council, the Director of Public Prosecutions for Victoria, the Victorian Solicitor General, the Chief Magistrate of Victoria and the Secretary of the Victorian Department of Justice together with any other persons the committee considers appropriate
  - (d) provide to the Attorney-General a list of candidates it considers suitable for appointment to the court in question with no ranking of them;
  - (e) assist the Attorney-General in any other way requested by her or him in relation to the identification and assessment of suitable candidates for judicial appointment.
9. By its recommendations the Advisory Committee should not limit the discretion of the Attorney-General to appoint person to judicial office.
10. Members of the Advisory Committee should appoint the Chair of the Committee.

## **Appendix G: Criteria for appointment – proposed by the Australasian Institute of Judicial Administration**

### **Suggested Criteria for Judicial Appointments**

These suggested criteria have been developed by the AIJA. They are expressed to apply to all judicial appointments, but the list is not exhaustive and not all proposed criteria will apply equally to all judicial appointments. Judicial appointment will need to take into account factors such as the nature and volume of work of a particular court to which a candidate is to be appointed. Leadership qualities may be more important when considering the appointment of a head of jurisdiction, as may other qualities not listed in these suggested criteria.

The suggested criteria draw on information from a range of sources including research into the qualities and skills regarded as important by the Australian judiciary at all levels. The AIJA has reviewed criteria for judicial appointment from a large number of common law jurisdictions, particularly England and Wales, developed by the Judicial Appointments Commission.

1. Intellectual Capacity
  - Legal expertise
  - Litigation experience or familiarity with court processes, including alternative dispute resolution
  - Ability to absorb and analyse information
  - Appropriate knowledge of the law and its underlying principles, and the ability to acquire new knowledge.
  
2. Personal Qualities
  - Integrity and independence of mind
  - Sound judgement
  - Decisiveness
  - Objectivity
  - Diligence
  - Sound temperament
  - Ability and willingness to learn and develop professionally and to adapt to change
  
3. An Ability to Understand and Deal Fairly
  - Impartiality
  - Awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs
  - Commitment to justice, independence, public service and fair treatment
  - Willingness to listen with patience and courtesy

- Commitment to respect for all court users
4. Authority and Communication Skills
    - Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
    - Ability to inspire respect and confidence
    - Ability to maintain authority when challenged
    - Ability to communicate orally and in writing in clear standard English
  5. Efficiency
    - Ability to work expeditiously
    - Ability to organise time effectively to discharge duties promptly
    - Manages workload effectively
    - Ability to work constructively with others
  6. Leadership and Management Skills
    - Ability to form strategic objectives and to provide leadership to implement them effectively
    - Ability to engage constructively and collegially with others in the court, including courts administration.
    - Ability to represent the court appropriately including to external bodies such as the legal profession
    - Ability to motivate, support and encourage the professional development of others in the court
    - Ability to manage change effectively
    - Ability to manage available resources

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