

**Justice Philip McMurdo**  
**Supreme and Federal Courts Judges' Conference**  
**Darwin, 9 July 2014**  
**“Hot Topics”**

I wish to speak about two topics which are relevant for all courts, although one arises from the criminal law.

One topic is the process of appointment to judicial office, a topic which has attracted much heat (if not light) from the recent controversy in Queensland. But before going there, I will discuss another matter, which is the increasing trend of governments in disparaging the performance of courts. I refer particularly to the incidence, across all Australian jurisdictions, of the criticism of courts in the administration of the criminal law, particularly in relation to sentencing and bail matters. The same trend can also be seen in other matters where courts or judges have had a role in deciding whether to parole prisoners or to order the continuing detention of prisoners who have served their sentences.

Each of these contexts involves essentially the same elements: (a) a person has committed or is alleged to have committed a crime which draws a response of outrage from some members of the public and some parts of the media; (b) a protest that a decision of a court or a judge, as to what should happen to the offender, was not as unfavourable to the offender as it might or should have been; (c) a response by the government that the court concerned, or courts generally, are not in tune with public opinion and that the government will take some action to remedy the outcome or prevent it from happening again.

In a sense none of this criticism of the courts is new, although there is substantial evidence to the effect that it did not occur at least 30 or 40 years ago. My concern is for what I see as its increasing prevalence.

Take the subject of mandatory sentencing, the incidence of which is surely increasing in Australia. The traditional justification for mandatory minimum terms of imprisonment, as claimed by governments, has been that the sentences which the courts were imposing for the relevant offence were inadequate. That claim, which was once exceptional, is becoming common.

But now mandatory sentencing is also imposed in another context, which is where a new offence is created. There are at least two recent examples of that phenomenon. One is the prescription of mandatory minimum sentences for the newly created offences under the so-called bikie laws of Queensland which were enacted late last year. Another is the enactment of the New South Wales Parliament earlier this year of what some have described as the “one punch law”.<sup>1</sup> This created a new offence which is committed where a death is caused by an assault involving the intentional hitting of another person with or without an object held by the assailant. There is a prescribed maximum penalty for that offence (20 years). But where the offence is committed with the circumstance that the offender was intoxicated, there is not only a higher maximum penalty (25 years), but also a mandatory minimum penalty (eight year’s

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<sup>1</sup> *Crimes Act 1900 (NSW)*, s 25A.

imprisonment). In such a case any non-parole period for the sentence is also required to be not less than the mandatory minimum sentence.<sup>2</sup>

The explanation for that legislation is found largely in a case involving the death of a young man from an assault by another young man at Kings Cross in 2012. The offender was intoxicated. The case was widely reported. Indisputably, this was a tragic death. But it attracted an exceptional level of media attention, in the midst of which the offender was sentenced last November. The sentence was appealed by the DPP. But without waiting for the outcome of that appeal, the government moved immediately, announcing in the same month that it would introduce this new law. Then the government went further, announcing a number of increases in maximum penalties and the introduction of mandatory minimum penalties for various existing offences in the nature of assault. In the heat of these developments, the then Premier of New South Wales said that these laws would not be necessary if the judiciary was doing its job. Yet the particular case which had stirred the government to this response was one which was still before the courts and the law had not previously required that intoxication was to be an aggravating factor.

Last Friday, the Court of Criminal Appeal gave judgment in the case which brought this about.<sup>3</sup> It allowed the DPP's appeal against sentence, increasing the sentence for manslaughter to ten and a half years with seven years to be served before parole. As the reasons make clear, this was not the least serious example of this offence. Yet had this incident occurred after the enactment of the new law, the Court would have been bound to impose a yet heavier sentence.

Nor is this trend limited to two States. For example, there is the resolve of the government of Tasmania to remove the courts' power to suspend sentences. No jurisdiction has been immune from his trend.

The underlying premise of each of these responses by governments is that courts cannot be trusted to administer the laws which the Parliament has enacted in the way in which, at that moment in time, the government says is demanded by the public. Of course it is within the power of governments to impose mandatory minimum sentences or to remove the option of suspended sentences. But the disturbing trend is in the readiness of governments to restrict the ability of courts to perform their core judicial functions such as sentencing.

Another example of the same trend is the response of the New South Wales government to the operation of its new Bail Act which was enacted less than two months ago. In 2011, the new government of New South Wales asked the Law Reform Commission to review the law governing bail. A report by the Commission was tabled in the Parliament in mid 2012.<sup>4</sup> From there it received a detailed consideration by the government and other interests which culminated in this statute. As explained in the Second Reading Speech of the then Attorney-General,<sup>5</sup> the government's intention was to simplify the decision making process in relation to bail and to apply the broad test of whether the grant of bail would create an unacceptable

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<sup>2</sup> Ibid s 25B(1).

<sup>3</sup> *R v Loveridge* [2014] NSWCCA 120.

<sup>4</sup> New South Wales Law Reform Commission, *Bail*, Report No 133 (2012).

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 May 2013, 19838 (Greg Smith, Attorney-General and Minister for Justice).

risk of a relevant kind, such as the risk of reoffending. The Attorney there referred to evidence from the Bureau of Crime Statistics and Research in New South Wales and to the extensive consultation which had preceded the introduction of the Bill.

But this law, despite its long gestation, may have a short life. The Act commenced on 21 May. The subsequent release on bail of two persons, each accused of murder, has stirred parts of the media and the community to apparent outrage. The government has responded immediately. It has asked a former Attorney-General (in a previous government) to urgently review its own law and to report to the Parliament next month. This review is unlikely to have a substantial evidentiary basis. The New South Wales Bar Association has described the review as “premature and misconceived”.<sup>6</sup> Its Vice President has said that such a review of the law after just four weeks of operation was “unprecedented” and was a “knee-jerk reaction simply because of a concern raised in a media report”.<sup>7</sup>

Yet another example is the ill-fated legislation enacted by the Queensland Parliament late last year to enhance the government’s prospects of securing the continuing detention of sexual offenders beyond their terms of imprisonment. Since 2003 in Queensland, sexual offenders have been able to be detained beyond the terms of their sentences, by an order of the Supreme Court, if the court is persuaded that the prisoner’s detention is necessary for the adequate protection of the community. Under the 2013 enactment, the executive was to be given a power to be exercised if and when the Supreme Court, upon an application by the Attorney-General for the continuing detention of the prisoner, instead ordered the prisoner’s release. In that event the executive was to be given its own power to detain the prisoner. The Court of Appeal held that this new enactment was beyond the constitutional power of the Queensland Parliament.<sup>8</sup> The government’s response was to announce that it would look for other ways in which to detain prisoners whom courts were not be prepared to detain. Again the premise is that the courts cannot be trusted to decide cases in a way which, it is asserted, the public are entitled to expect.

Chief Justice Warren and Chief Justice Bathurst have each spoken of the problems of mandatory sentencing in speeches given earlier this year. And courts are employing new ways to inform the public of their work and in particular their work in sentencing. To this end the Supreme Court of New South Wales has held three seminars to facilitate better community understanding of the judiciary’s work, particularly in relation to sentencing. (A video of the most recent seminar can be seen on the court’s website.) This initiative is surely worthwhile. The seminars have allowed the court to engage directly with media representatives, members of the New South Wales Parliament and representatives of relevant community groups which have a particular connection with the criminal justice system. But courts must send a message to a wider and a more resistant audience.

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<sup>6</sup> New South Wales Bar Association, ‘Government Bail Act Review is Premature’ (Media Release, 30 June 2014) p 1.

<sup>7</sup> Michaela Whitbourn, ‘Former DPP Boss Nicholas Cowdery Slams Baird Government Over Bail Act Review’, *Sydney Morning Herald* (Sydney), 30 June 2014.

<sup>8</sup> *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

Speaking to the 2004 Colloquium of the Judicial Conference of Australia, Chief Justice Gleeson said:<sup>9</sup>

“We are developing institutional methods of communicating with the public. We can communicate effectively only if we have a good level of understanding of the people to whom our message is directed. ... A lot of preaching on this subject [judicial independence and impartiality] is addressed to the converted. We should be looking at better ways to popularise the message.”

These demands for heavier sentences, continuing detention and refusal of bail are not based in evidence : for example in Queensland the expressed dissatisfaction with the release of sexual offenders has not referred to the evidence, if any, of the rate of reoffending by those who have been released. These demands derive essentially from emotion. Emotions such as anxiety or anger cannot be dismissed by courts as irrelevant. As the eminent criminologist Professor Ian Loader has written, emotions are “the soul of punishment”.<sup>10</sup> This emotional response of some of the public can be encouraged, but not explained only by the actions of the media or the government. The proper role and work of courts needs to be explained also to hostile audiences, as well as receptive ones. The challenge is to find the means to address our message to those who begin from different premises, such as a different view about rehabilitation of offenders. My concern is that our efforts will be hampered by some governments, who sense that their immediate their political interests are advanced by sending a contrary message.

And now to the second topic: the process of judicial appointment.

This has long been a subject of discussion in Australian jurisdictions. The topic is always simmering but from time to time it boils over and, I have to say, Queensland has made it again a hot topic. The recent controversies surrounding the appointment of the Chief Justice of Queensland have thrown up new issues as well as familiar ones.

Prior to the recent events in Queensland, the Judicial Conference had begun its own review of this subject with the intention of formulating a model or models which it would recommend for the process of selection of judges and magistrates. Coincidentally, the Australian Institute of Judicial Administration had decided to review the same subject. More recently, the JCA and the AIJA have agreed to a joint endeavour. I hope that by this discussion today at least some of you will contribute to that review by submitting your own views.

It is a subject on which we will have varying levels of interest and concern, I accept, according to our levels of comfort with the outcomes of the present process. But as will be clear to all of us, it is a subject of critical importance to the independence of courts and to the rule of law.

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<sup>9</sup> The Hon Murray Gleeson AC QC, ‘Out of Touch or Out of Reach?’ (Speech delivered at the Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004), p 7.

<sup>10</sup> Ian Loader, ‘Playing with Fire? Democracy and the Emotions of Crime and Punishment’ in Susanne Karstedt, Ian Loader and Heather Strang (eds), *Emotions, Crime and Justice* (Hart Publishing Limited, 2011) 347, 348.

Some things here are fundamental and uncontroversial. Courts should exercise their powers independently of the influence of the other arms of government, although it is the executive arm of government which does and should appoint the judges. The executive should exercise that power only for the purpose of promoting the rule of law through courts which are populated by competent and independent judges.

But the interests of the executive government, or at least its political interests as it perceives them to be, can conflict with its duty to exercise the power of judicial appointment only for that proper purpose. Our constitutional structure therefore has a point of weakness.

One contributing factor to this tension is that in nearly every court, the executive government is the most frequent litigant. There are also political influences.

Governments which have a political agenda of attracting support from voters who are dissatisfied with institutions, and in particular, courts, can be inclined to judicial appointees whom they can represent as outsiders and reformers. And governments which are prepared to personalise their criticisms of the judiciary can be inclined to the promotion of judicial personalities.

Not all governments are so politically self interested and disrespectful of their institutions. Most governments, I accept, do try to maintain the standing and operation of courts by their selection of judges. Nevertheless, they too can be influenced by political instincts. Speaking on this subject in 2006, my former colleague Geoff Davies observed that “politicians appear to have come to believe that there are only two kinds of judges; those who are on their side and those who are on the other side”.<sup>11</sup> There seems to be now an inclination of many governments to seek to make courts in their own image.

Of course, in reality, the political persuasion of an appointee is irrelevant in the performance of his or her judicial work. For nearly all of us, few cases will have any political element or consequence. The belief to which Geoff Davies referred comes from a limitation in the understanding by governments of what amounts to the day to day work of judging.

The issue here is the process of judicial appointments, rather than the criteria for selection. A process of selection should be upon a stated criterion or criteria, although that might be, as in the United Kingdom, simply the criterion of “merit” but with a regard also to the encouragement of diversity. I will return to the UK model.

Currently in every Australian jurisdiction, appointments to the superior courts are selected by essentially the same process. The Attorney-General consults the head of the court and the heads of the professional associations. The Attorney may also consult more widely. But the consultations with the court and the profession are undertaken upon a confidential basis. That confidentiality is essential for the efficacy of the consultative process. If those consulted cannot expect that the confidence will be preserved, the Attorney-General cannot receive the candid advice about individuals which may have to be given.

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<sup>11</sup> The Hon Geoffrey Davies AO, ‘Why We Should Have a Judicial Appointments Commission’ (Paper presented at the ABA Forum on Judicial Appointments, Sydney, 27 October 2006) p 3.

Having engaged in that consultation, the Attorney-General and ultimately the executive government selects the appointee. The appointment is announced with the implied, and now more often the express representation that the Attorney-General has duly consulted. The appointment is almost never criticised by those who have been consulted or those whom they represented in the process. Perhaps that is because in most cases the executive's selection corresponds with the confidential recommendations.

This process has been widely criticised and there have been many calls for its replacement with others under which, it is said, there would be a transparency which would provide more assurance to the public that appointees are being selected for the right reasons.

The current process is also criticised as being too limited in the scope of potential candidates for consideration. It is said that it results in worthy candidates who are, for example, outside the practising Bar or indeed outside the practising profession, being overlooked.

The recent appointment of the Chief Justice of Queensland has brought many calls for a review of this process, including from bodies which have been ready participants in rather than critics of it. In the last few weeks, such calls have been made by the Australian Bar Association, the Queensland Bar Association and the Law Society of Queensland as well as by other commentators such as prominent academic lawyers. How did this controversy about process arise?

Unusually (at least for Queensland) the proposed appointment of the Chief Justice was announced by the government a week before the actual appointment, which was when his commission was signed by the Governor on 19 June to take effect on 8 July. This announcement was made by a media conference convened by the government, in which the speakers were the Premier, the Attorney-General and the proposed appointee. By this stage there was already a substantial public controversy about this anticipated appointment, a controversy which continued after the announcement and after the appointment itself. Just why the government announced its intention so long before making the appointment is unclear.

Prior to the announcement, the Attorney-General had consulted with the Presidents of the Bar Association and the Law Society. As the Presidents understood, those consultations had been upon the usual confidential basis.

But on the day after the announcement, the President of the Bar, Mr Davis QC, resigned, protesting that the confidence had been breached. These are the facts according to his published letter of resignation. He had met with the Attorney-General and one of his senior staff in the previous week and discussed the possible appointment of Judge Carmody as the next Chief Justice. Later that week, he began to receive information as to what he had discussed in that meeting, which he said could only have come from a participant in the meeting. And some of the information was a distortion of what had been said at the meeting. As a result, Mr Davis had convened a meeting of the Bar Council which resolved that he should write to the Attorney-General restating the Bar's position about this possible appointment, which he had put to the Attorney in the meeting. That letter was sent and shortly afterwards, Mr Davis learnt that another barrister (who was close to the government and was a

former Chief of Staff of the Attorney-General) was relating to others what Mr Davis had put to the Attorney-General as the Bar's position about the possible appointment of Judge Carmody. Moreover, this person was warning that as a result of the Bar's position, some of its statutory powers might be taken from it, such as the Bar's power to issue practising certificates. A little later, but still prior to the announcement of the appointment, Mr Davis spoke to Judge Carmody. Mr Davis said that it was "evident that the judge had been told of the substance of the confidential conversations I'd had with the Attorney-General concerning him".

I must say that the Attorney-General has denied that there was any breach of confidence. Mr Davis obviously believed that there had been a breach and concluded his letter of resignation by saying that as he had no faith in the integrity of the process of appointment of judges, he could not engage further in it and for that reason could not continue as the Bar President.

This brought statements of protest and concern about this suggested breach of confidence from, amongst others, the Law Council of Australia, the Australian Bar Association, the Queensland Law Society, a number of retired judges and other eminent commentators. As that controversy about confidentiality developed, some of the media failed to distinguish it from the controversy about the merit of the appointment. At first Mr Davis was careful to say that he was not commenting upon that question. But it soon became public that in those consultations, the Bar had not endorsed the possible appointment of Judge Carmody.

That suggested breach of confidence was preceded by a controversy in March this year, in which the Attorney-General related, or purported to relate, his conversation with the President of the Queensland Court of Appeal about an appointment to that court. The Attorney-General maintained that he had been entitled to breach the confidence in order to refute a public comment by the President about the consideration of gender in the making of judicial appointments. Her recollection of their conversation differed from the Attorney's version. I will not comment upon that contest except to say that it showed several ways in which this process of consultation can go awry. One is by a breach of confidence by an Attorney-General who thinks that it can be justified in order to make a political point. Another is in the potential for dispute as to what was the confidential discussion. Judges participating in these consultations are in a very poor position to argue their case if there is such a dispute. They do not have the armoury of the executive's media advisers and contacts. Short of litigation, how could that dispute be determined? And to refute an Attorney-General's version of something supposedly said in such a consultation could require a full account of the conversation and of the advice which the Attorney had been given, a course which could put into the public domain the view or views which had been conveyed in the consultation, perhaps to the embarrassment of some candidates. A judge in this predicament would have the further problem of the duty of confidence owed to those whose views he or she had related to the Attorney-General.

Now many would say that this is not a failure of the process and that it results simply from the actions of an individual. But it is the potential for such breaches of confidence which detracts from the process: if judges and others who are consulted by an Attorney-General cannot be satisfied of the confidentiality of the discussion, the process is immediately compromised.

The public controversy about the merit of the appointment of the Chief Justice has continued. Many of the commentators, both for or against the appointment, have been retired judges. Remarkably one commentator was a member of the court itself, who in a speech at a Bar dinner on the eve of the appointment, urged Judge Carmody not to accept it.<sup>12</sup> And Judge Carmody himself entered the debate, giving radio interviews to answer his critics.

I mean no criticism here of the merit of this appointment in stating the obvious, which is that in this case the process has seriously failed. In a letter published in *The Australian* on 20 June, the President of the Australian Bar Association wrote that:<sup>13</sup>

“[T]he ABA’s primary concern has been with the seriously flawed process leading up to the appointment being announced, and the apparent breaches of confidentiality in the consultation process that had been involved. . . . The ABA has consistently maintained that there should be a public discussion about the seriously flawed judicial appointment process undertaken in this case.”

My view is that the problems with this process go beyond the real or perceived breach of the confidentiality which is essential to it. Suppose the consultations had remained confidential, this appointment would have been highly controversial: it had become so prior to the claim of a breach of confidence. Had the consultations remained confidential, the views of each of the most authoritative advisers to the government would have remained unknown. Either the public would have not had the benefit of the Bar’s opinion in considering the subject that controversy, or it might have appeared misleadingly, from the Bar’s silence, that the Bar agreed with the government.

There is a view that it is preferable that the public should not learn of such an objection to a judicial appointment, lest it detract from the public’s respect for the institution. Does that secrecy ultimately enhance an enduring public confidence in courts?

So is there a better process of selection? As you will know, quite a different process has been followed in the United Kingdom now for nearly 10 years. Its details vary between the different levels of courts and tribunals and the nature of their work, with some differences also for appointments in Scotland or Northern Ireland. But in essence the process involves the selection of a suitable candidate by or through an independent statutory body which is the Judicial Appointments Commission.

This commission has 12 members who are appointed by the government and three who are selected by the judges’ council. Its chairman must be a lay member, the other 14 members to include five judicial members and a tribunal judge as well as two members from the legal profession. The commission selects judicial officers for appointment up to and including the High Court and it contributes members to different selection panels which are used for appointments to the Court of Appeal, the Supreme Court and as certain heads of jurisdiction.

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<sup>12</sup> The Hon Justice John Muir (Speech delivered at the North Queensland Bar Association Bi-Annual Court of Appeal Dinner, 18 June 2014).

<sup>13</sup> Mark Livesey QC President of the Australian Bar Association, Letter to the Editor, *The Australian*, 20 June 2014.

The commission recommends its selected candidate to the so-called Appropriate Authority which is, depending upon the court or tribunal concerned, the Lord Chancellor, the Lord Chief Justice or the Senior President of Tribunals.

The selection by the commission (or a selection panel) must be “solely on merit”.<sup>14</sup> A person must not be selected unless the commission is satisfied that he or she is of good character.<sup>15</sup> The commission must have regard to the need to encourage diversity in the range of persons available for selection for appointments but subject always to the selection being solely on merit.<sup>16</sup>

It is for the commission to determine its selection process to be applied for a particular appointment.

I will describe the process for an appointment to the High Court. The commission must consult the Lord Chief Justice and another person who has held the office to which the appointment is to be made or has other relevant experience. After making its selection the commission must report in writing to the Lord Chancellor, describing the selection process undertaken, stating the selection made, stating any recommendation made by a person who had been consulted, giving reasons where the commission has not followed such a recommendation and containing any other information as required by the Lord Chancellor.

The Lord Chancellor may then accept the selection, reject it or require the commission to reconsider it. There may then be a so-called stage two, in which the commission can submit a different name or the same name if that person was not rejected in stage one. At this stage, the Lord Chancellor has a more limited power to reject or require reconsideration of the selection. There is then a potential stage three in which the Lord Chancellor must accept a selection of the commission. There is no power in the government to appoint outside this process and, in particular, to make its own selection.

The Lord Chancellor may reject a selection only if, in the Lord Chancellor’s opinion, the person selected is not suitable for the office or particular functions of that office. The Lord Chancellor may require the commission to reconsider a selection only if, in the Lord Chancellor’s opinion, there is not enough evidence that the person is suitable for the office or there is evidence that the person is not the best candidate on merit. In rejecting or requiring reconsideration of a selection, the Lord Chancellor must give written reasons.

As many of you will have heard or read, this process has not been universally commended. One criticism has been that it all takes too long. This is said to be detrimental to the operation of the court concerned and to the prospects of attracting many to offer themselves for appointment. The statute provides for certain steps to be undertaken even prior to the actual selection of an appointee, under which the commission will seek to identify persons who would be suitable for anticipated appointments.<sup>17</sup> In that task, the commission is required to consult the Lord Chief Justice and another experienced person before submitting a report to the Lord

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<sup>14</sup> *Constitutional Reform Act 2005 (UK) c4, s 63(2).*

<sup>15</sup> *Ibid s 63(3).*

<sup>16</sup> *Ibid s 64.*

<sup>17</sup> *Ibid s 94.*

Chancellor about the extent to which it has identified suitable persons. It appears that in practice potential appointees are approached well ahead of an anticipated vacancy and the selection process itself. Understandably, this could make some worthy candidates disinclined to participate.

And the means by which the commission evaluates the merits of candidates has had its critics. When the composition of the commission is considered, it can be seen why it approaches the task differently from that which occurs where the candidates are well known to each of the selectors. The selection is to be made upon a basis of that merit which the members of the commission are able to assess for themselves.

The commission advertises when a selection is to be made and calls for applications. It shortlists those candidates who are to proceed to the so-called selection day. To be shortlisted, candidates undertake an online test designed to assess their ability to perform in a judicial role, by analysing case studies, identifying issues and applying the law. Candidates must identify personal and professional referees. At the selection day, candidates may be interviewed by a panel of three to five members and be required to engage in a role play simulating a court environment in which the candidates take the role of judge. The interviewing panel then identifies which candidates best meet the required qualities of the office and reports to the commission.

As many here will know, such an extensive process was employed last year in the selection of the Lord Chief Justice. The shortlisted candidates were each already senior judges, being members of the Court of Appeal and one being President of the Queens Bench Division. The process required them to write essays, make presentations and undergo more than one interview. In this country at least, many would think it unlikely that anything could be gleaned from an essay written in this context which was not already apparent from the accumulated learning of the candidate's judgments. Nor would many of us accept that such presentations and interviews could reveal something of the professional and personal qualities of the candidate which he or she had not already demonstrated by years of outstanding judicial service which, necessarily, had been performed in public.

This process for the selection of judges in the United Kingdom, of course, was conceived in the context of a wider constitutional restructure in the United Kingdom which was designed to effect, or at least to make manifest, a separation of powers in that country. That circumstance does not exist in this country and such substantial limitations upon the powers of the executive in the appointment of judges are unlikely to be accepted here.

Until last year, the Commonwealth government did have an appointment protocol, under which there was not a selection but an advisory panel for appointments to be made to the Federal Court, the Family Court and the Federal Magistrates Court (as it then was).

That protocol has been abandoned by the present government. But it remains the preferred policy of the Law Council of Australia,<sup>18</sup> as it recently stated in commenting

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<sup>18</sup> Law Council of Australia, 'The Process of Judicial Appointments' (Policy Statement, September 2008)

upon the Queensland controversy. It provides for a panel, to be established by the Attorney-General, to assess all applications and nominations for an appointment, and to consist of the head of the court or jurisdiction concerned, a retired senior judicial officer of the Commonwealth and a senior official from the Attorney-General's department. The panel would develop a "shortlist of suitable candidates" which it would provide to the Attorney-General "who [would] be expected to propose to Cabinet the actual appointee from amongst those so-identified suitable candidates". Under this protocol, the process would include advertisement for expressions of interest for an appointment and, where thought appropriate, an interview with a candidate.

There are elements of that process which may be more suited to appointments to the Federal Circuit Court, for which there would be a larger pool of candidates and where less might be known by the panel of the particular attributes of each. Whether formal applications and interviews are apt for an appointment to the Federal Court (or a Supreme Court) is another matter. And the process of an interview has its own limitations. At a time when judges now recognise the risks of relying upon demeanour in the assessment of witnesses, it seems curious to regard an interview in this context as entirely reliable.

The Commonwealth government's reasons for abandoning this protocol are not apparent, except that obviously it believes that the process was unnecessary. It could rightly point to the quality of the appointments which it has made to the Federal Court thus far as proof of its position.

But that is not to say that the process which is now employed cannot be improved or that there are not ways in which the former protocol might be amended to eliminate some of its drawbacks, while still providing a reliable structure under which the government would be independently advised.

Any review of the process of judicial appointment must keep in mind certain practicalities. The first is that it must avoid undue delay in the appointment process. The second is that the process should not deter every meritorious person from making himself or herself available for selection. But with those practicalities in mind, it is yet possible to devise a scheme by which, through changing political climates, appointments are consistently made which are meritorious and widely accepted.

The general experience in Australia has been that judicial appointments have received bipartisan political support. That is not to say that only appointments which have that bipartisan support should be made; rather it is that bipartisan support is important in that the process of appointment should promote it.

The idea of a different process is not at all new in this country. Chief Justice Garfield Barwick called for a Judicial Appointments Commission in 1977,<sup>19</sup> as did Chief Justice Brennan in 2007.<sup>20</sup>

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<sup>19</sup> Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 494.

<sup>20</sup> The Hon Sir Gerard Brennan AC KBE, 'The Selection of Judges for Commonwealth Courts' (Paper presented as a lecture in the Senate Occasional Lecture Series, Parliament House Canberra, 10 August 2007) p 6.

In my own view, there is much to be said for a process by which an independent panel recommends a shortlist to the Attorney-General of those who are considered suitable or most suitable for the appointment. The government could then appoint from outside that shortlist. But should it do so, it is important that this be disclosed to the public, for otherwise the public could be misled to think that the appointee had been recommended as suitable. There are many possible refinements to that process, such as a requirement that if the government intends to appoint someone who was not on the shortlist, it should ask the panel for its opinion as to whether that person is a suitable appointee. Again, the government should have to publicly disclose a negative answer to that question.

It is said, usually by politicians, that they are answerable at the ballot box for their judicial appointments. I agree with Justice Sackville, who wrote in 2008 that “political accountability may be present in theory, but in practice, it is largely illusory, since the effects of a sub-optimal appointment are usually not clear until the Attorney-General responsible has moved on or the government has lost office”.<sup>21</sup>

I am mindful of the political reality of persuading governments to limit in any way their powers of preferment. But it is I think incumbent upon the judiciary to consider this process and, within proper bounds, to agitate for any worthwhile reform. And ultimately, some significant advance might be made by a structure which would require little or no agreement by governments. For example, courts and the professional associations should form effectively their own advisory body, (perhaps augmented by the involvement of non-lawyers) agreeing with each other to publish the fact of whether an appointment had been endorsed by them.

These are only one judge’s views. But I do urge you to consider the subject and to provide your views to the review by the JCA and the AIJA.

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<sup>21</sup> The Hon Ronald Sackville AO, ‘Three Issues Facing the Australian Judiciary’ (2008) 20(3) *Judicial Officers Bulletin* 17, 20.