

# **Judicial Appointments in Queensland: options for reform**

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Researched and authored by law students

**Joshua Sproule and Amina Karcic**

For and on behalf of the Law and Justice Institute (Qld) Inc

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## Introduction

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Recent events in Queensland have provided an unprecedented level of interest in the process by which our judges and magistrates are appointed. The ensuing public debate has called into question the effectiveness of the present model for their determination. Such questions are of great importance to any constitutional democracy. The separation of powers demands an independent judiciary free from political influence in order to ensure impartial and sound decision making according to law.

An often-stated basis for judicial appointments is ‘merit’, but there is little legal or academic agreement on the precise content of the term.<sup>1</sup> What system best guarantees the appointment of judges? Our research is premised on the bold statement of Britain’s Lord Chancellor that “[i]n a modern democratic society, it is no longer acceptable for judicial appointment to be left entirely in the hands of a Government Minister”.<sup>2</sup> If we accept that our system currently suffers from this weakness, debate arises as to how to remedy its weaknesses.

This brief seeks to contribute to the discussion on judicial appointment in Queensland by comparisons with other jurisdictions. In addition, we consider trends in judicial appointments under the present Queensland government.

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<sup>1</sup> For example, as stated by The Hon. Geoffrey L. Davis: “No word is more used or more abused in this context than ‘merit’. It is used by almost everyone who discusses this topic as a summary of the criteria which he or she would apply in appointing a judge”; ‘Appointment of Judges’, (Speech delivered at the QUT Faculty of Law - Free Lecture Series, Banco Court, Brisbane, 31 August 2006).

<sup>2</sup> Department for Constitutional Affairs United Kingdom, ‘Constitutional reform: a new way of appointing judges’, Foreword by Lord Falconer of Thoroton, July 2003 p3.

## Queensland

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In Queensland the Governor in Council appoints judges by commission.<sup>3</sup> In practice, and by convention, the Attorney-General decides the appointment *or* brings the name to Cabinet for discussion and approval. The Governor effectively rubber-stamps the selection.

The Attorney-General has almost unbridled discretion in relation to who is appointed. Only basic eligibility criteria circumscribe that discretion. The person appointed must be less than 70 years old, and be an admitted barrister or solicitor in the State of at least 5 years standing.<sup>4</sup>

The informal custom is that the Attorney General will, or at least should, consult prominent members of the legal profession and other key stakeholders about the appointment. In some cases, consultation is mandated. Notably, the Attorney-General must consult the Chief Magistrate before appointing a magistrate.<sup>5</sup> Even so, there is no legal requirement that the advice be heeded or that the appointment be made from the candidates proffered or supported by that legal fraternity. Further, there is no advertising process, procedure for nomination and no opportunity for public engagement.

In sum, a judicial appointment is within the ‘gift’ of the Attorney-General. How that gift is bestowed is unreviewable and ultimately unknowable.

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<sup>3</sup> *Constitution of Queensland 2001* (Qld) s 59; the term ‘judge’ is defined in s 56 as “a judge of the Supreme Court or District Court”. The constitutional provision applies generally, but is sometimes mirrored or the Attorney-General’s discretion constrained in the Acts related to each court: *Supreme Court of Queensland Act 1991* (Qld) ss 4, 6, 12, 34, 37, and 48; *District Court of Queensland Act 1967* (Qld) ss 10 and 17; *Magistrates Court Act 1991* (Qld) s 4 and 5.

<sup>4</sup> *Constitution of Queensland 2001* (Qld) s 59 (Supreme and District Court appointments); *Magistrates Court Act 1991* (Qld).

<sup>5</sup> *Magistrates Court Act 1991* (Qld) s 5.

## Trends

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30% of serving judges are women.<sup>6</sup> The Newman Government, since its election in 2012, has appointed a total of 19 judicial officers to the various Courts in Queensland. Of these, only two have been women (that is, 10.5%).

The average number of years after admission before judicial appointment was about 27.75 years. The most senior was admitted 39 years prior to appointment, and the most junior was 10 years. The median is 32 years. The standard deviation is 8.81 years. The analysis excludes admission dates below that are unverified (indicated by ~).

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<sup>6</sup> The Australasian Institute of Judicial Administration, 'Gender Statistics' (12 March 2014). Found at: <http://www.ajia.org.au/index.php/gender-statistics>

## Appointment of Judges in Queensland since 2012

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<u>Court</u>	<u>Judge</u>	<u>Year Appointed</u>	<u>Year of Admission</u>
Supreme Court	Chief Justice Tim Carmody	2014	1982
Supreme Court	Justice Peter Flanagan	2014	1982
Supreme Court	Justice Robert Gotterson	2012	1973
Supreme Court	Justice Philip Morrison	2013	1976
Supreme Court	Justice David Jackson	2012	1977
Supreme Court	Justice David Thomas (and president of QCAT)	2013	1979
District Court	Judge Alexander Horneman-Wren	2012	1993
District Court Magistrates Court	Chief Magistrate Orazio Rinaudo (and Judge of District Court)	2014	1979
District Court Children's Court	Judge Paul Smith	2013	1985
Magistrates Court	Mr Haydn Sternqvist	2012	2000
Magistrates Court	Ms Leanne O'Shea (Children's Court;	2014	1979

	appointed Deputy Chief Magistrate)		
Magistrates Court	Mr Terry Ryan (State Coroner)	2013	~ 2001 <sup>7</sup>
Magistrates Court	Mr Anthony Gett (Cairns)	2012	~ 2000 <sup>8</sup>
Magistrates Court	Mr Terry Gardiner (Charleville)	2012	1987
Magistrates Court	Mr Stuart Shearer (Emerald)	2012	2002
Magistrates Court	Mr Aaron Simpson (Ipswich)	2013	1999
Magistrates Court, Coroner Court	Mr David O'Connell (Mackay)	2012	~ 1991 <sup>9</sup>
Magistrates Court	Ms Penelope Hay (Richlands)	2013	1996
Magistrates Court	Mr Steven Mosch (Townsville)	2013	1989

## Criticisms

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The current Queensland approach to judicial appointments may be criticised on a number of grounds. First and foremost, there is a lack of transparency. Worthy persons who may be eligible are not provided the means of appropriately expressing their interest. The lack of a requirement for consultation results in selections that may not be

<sup>7</sup> He started work with DJAG in 2001 according to LinkedIn.

<sup>8</sup> He became a solicitor at DPP in 2000: <http://www.linkedin.com/pub/anthony-gett/39/659/0>

<sup>9</sup> According to: <http://www.macamiet.com.au/about/history/>

scrutinized or supported amongst the legal fraternity. Indeed, a process of consultation may reveal persons who might not otherwise have been considered. The Attorney-General's virtually unbridled discretion to decide an appointment carries with it the risk of a poor decision. And when the reasons for such a decision are unknown and hence not able to be questioned, irrespective of the appointee's merits.

It is not suggested that previous appointments have been unmeritorious or politically motivated. That is a matter on which reasonable minds may disagree. Rather, we contend that the potential for such an appointment is dangerously high due to the lack of safeguards. This is especially so in a unicameral system of government where there is no upper house to effectively check any politico-legal excess. More specifically, on the basis of the figures identified, the current process is suspected of contributing to a lack of gender diversity in the Queensland bench. Even if unfounded, such suspicions are undesirable, and may erode confidence in the administration of justice.<sup>10</sup>

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<sup>10</sup> For example, see: Zoe Rathus, 'Missing' female judges all but invisible in Queensland row' in *The Conversation* (3 April 2014), found at: <https://theconversation.com/missing-female-judges-all-but-invisible-in-queensland-row-24904>; Sean Cooney, 'Gender and Judicial Selection: Should There Be More Women on Our Courts?' (1993) 19 *Melbourne University Law Review* 20; Margaret Thornton, "'Otherness" on the Bench: How Merit is Gendered' (2007) 29 *Sydney Law Review* 391; Hilary Sommerlad, 'Diversity, Merit and the English Judiciary: The Lessons that Can be Learned from the Reform of Selection Processes, a UK Contribution' (2013) 40 *City Square, Fordham Urban Law Journal* 94.



## Options for Reform

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The remainder of this brief looks at options for reform. The situation in other jurisdictions is considered.

### Commonwealth

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The *Constitution* in s 72(i) provides that the Governor-General in Council must appoint the judges of Ch III courts. They are appointed by commission.<sup>11</sup> The eligibility criteria are that the person be younger than 70 years of age<sup>12</sup> and have been, at the very least, a legal practitioner in Australia for not less than 5 years.<sup>13</sup> In practice, the decision of who is appointed is that of the Government of the day. The decision is typically made by the Attorney-General, but the matter will usually go to Cabinet for approval.

In 2010 The Attorney-General, Robert McClelland MP, published a policy<sup>14</sup> on the Government's process for making judicial appointments.

The policy indicates that for appointments to federal courts, the process is as follows. First, the Attorney-General "consults widely, writing to interested bodies inviting nominations of suitable candidates".<sup>15</sup> Those consulted include the federal heads of jurisdiction and professional bodies. Public notices calling for expressions of interest and nominations are also published, along with appointment criteria. Second, the standing Advisory Panels preliminarily assess the nominations and expressions of interest, and may conduct interviews,

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<sup>11</sup> *High Court of Australia Act 1979* (Cth) s 5; *Federal Court of Australia Act 1976* (Cth) s 6(1); *Family Law Act 1975* (Cth) s 22(1); *Federal Circuit Court of Australia Act 1999* (Cth) s 9, Schedule 1, cl 1(1).

<sup>12</sup> *Constitution*, s 72.

<sup>13</sup> *High Court of Australia Act 1979* (Cth) s 7; *Federal Court of Australia Act 1976* (Cth) s 6(2), (7); *Family Law Act 1975* (Cth) s 22(2); *Federal Circuit Court of Australia Act 1999* (Cth) s 9, Schedule 1, cl 1(2).

<sup>14</sup> Found here: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/FedJudicialAppointmentsPolicy\\_May2010.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/FedJudicialAppointmentsPolicy_May2010.pdf)

<sup>15</sup> *Ibid* pg. 3, 4.

before reporting a list of persons it considers ‘highly suitable’ for appointment. The Panels are comprised by the Head of the relevant court, a retired judge, and a senior official from the Attorney-General’s Department. Third, and finally, the Attorney-General considers the report and writes to the Prime Minister and/or Cabinet seeking their approval.

Only a small part of the Attorney-General’s consultation in relation to Federal appointments is statutorily prescribed. In relation to the appointment of judges to the High Court, the Commonwealth Attorney-General is required to ‘consult’ with the Attorneys-General of the States (but not the Territories).<sup>16</sup> The requirement is only to ‘consult’; nothing specifies the nature of this consultation nor is it required that the Commonwealth Attorney-General heed or consider the advice of his counterparts. The policy also states that the Attorney-General will not place advertisements nor publish appointment criteria. However, in addition to the aforementioned bodies to be consulted, the Attorney-General will also consult the State Attorneys-General, the Justices of the High Court, and the Chief Justices of the State and Territories.

## Victoria

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In Victoria, judicial officers are still recommended by the Attorney-General and appointed by the Governor in Council. However, there is also an advertising process whereby expressions of interest are sought for appointments ranging from officers of the Victorian Supreme Court to acting coroners.<sup>17</sup> The candidates are referred to a ‘Framework

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<sup>16</sup> *High Court of Australia Act 1979* (Cth) s 6.

<sup>17</sup> Courts and Tribunals Victoria, ‘Courts – Expressions of Interests’, 2014, <https://www.courts.vic.gov.au/judicial-appointments/courts-expressions-interest>.

of Judicial Abilities and Qualities for Victorian Judicial Officers' that operates as a broad-brush selection criteria for potential appointees.<sup>18</sup>

## New Zealand

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In New Zealand, the judges of the superior courts are “appointed by the Governor-General”.<sup>19</sup> To be eligible, the person must have been a practicing barrister or solicitor for 7 years.<sup>20</sup> By convention, the Attorney-General decides upon a nominee and ‘announces’ that decision, but does not ‘discuss’ it, in Cabinet.<sup>21</sup> The Attorney-General then recommends the person to the Governor-General who formally appoints them. Two major exceptions to the Attorney-General’s appointing power exist. First, the Prime Minister appoints the Chief Justice, since he or she is the head of the jurisdiction;<sup>22</sup> and second, the Minister of Māori Affairs administers appointments to the Maori Land Court.<sup>23</sup>

The Attorney-General, along with the Ministry of Justice, formalised a protocol<sup>24</sup> for judicial appointments to the High Court, the Court of Appeal, and the Supreme Court in 1999. It is not legally binding, but provides guiding principles. The protocol also outlines broad selection criteria, namely: legal ability, qualities of character, personal technical skills, demonstrating social awareness, and reflecting diversity.

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18 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)>. Similarly in NSW vacancies for judges on the District Court and Local Court are advertised, although appointments to the Supreme Court are not, see 'Careers for Judicial and Other Statutory Officers' 2014 <<http://www.lawlink.nsw.gov.au/appointments>>

19 *Judicature Act 1908* (NZ) ss 4(2) and 57(2); *Supreme Court Act 2003* (NZ) s 17.

20 *Judicature Act 1908* (NZ) s 6; *District Courts Act 1947* (NZ) s 5.

21 Philip A. Joseph, 'Appointment, discipline and removal of judges in New Zealand' in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011) pg. 67.

22 *Supreme Court Act 2003* (NZ) s 18(1).

23 *Maori Land Act 1993* (NZ), s 7(2A).

24 Found here (April 2013): <http://www.justice.govt.nz/about-the-ministry/judges-of-the-high-court-expressions-of-interest/high-court-judges-judicial-appointments-procedures>

The Judicial Appointments Unit in the Ministry of Justice provides administrative support throughout the appointment process. Expressions of interest are sought upon a vacancy arising, as well as periodically. Prospective candidates either respond or are nominated. A confidential register of candidates is kept. The Solicitor-General reviews the names and consults with persons such as the Attorney-General and the Chief Justice in order to determine whether additional names should be added to the list. The Solicitor-General then seeks comments from key stakeholders about those on the list. The candidates are then 'rated' by the Attorney-General and heads of jurisdiction on their suitability. This 'longlist' is then presented to the Attorney-General along with the advice received during the consultation process. For appointment, the Attorney-General must consult in so far as he or she thinks necessary, and with the agreement of the Chief Justice, arrive at a short-list of no more than three names. An interview with the shortlisted candidates may be sought. Background checks are then conducted. The Attorney-General must then decide to recommend a person for appointment from the short-list to Cabinet and then to the Governor-General.

Prior to 2005, the Queen in Council appointed, by commission, the judges of England and Wales upon the advice of the Prime Minister, who in turn, was instructed on the selection by the Lord Chancellor after traditional consultation with stakeholders. This constitutional system was reformed in 2005 and again in 2013.

A person is eligible for appointment to the Supreme Court of the United Kingdom if they have either held high judicial office for a period of 2 years or been a legal practitioner for 15 years.<sup>25</sup>

Since 2005, for appointments to the Supreme Court, the Lord Chancellor must convene an *ad hoc* 'selection commission' upon a vacancy arising.<sup>26</sup> The commission, after consultation with various stakeholders such as the heads of jurisdiction and other judges of the Supreme Court, must select one person on the basis of merit to be appointed.<sup>27</sup> The commission then reports to the Lord Chancellor as to who has been selected and also consulted.<sup>28</sup> Upon receipt of the report, the Lord Chancellor must again consult with the relevant stakeholders.<sup>29</sup> The Lord Chancellor then has a choice about the person selected. The Lord Chancellor must either: (a) accept and notify the selection to the Prime Minister, (b) reject it, or (c) require the commission to reconsider.<sup>30</sup>

The Lord Chancellor may reject or seek a reconsideration up to twice.<sup>31</sup> The commission cannot re-select a rejected selection.<sup>32</sup>

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<sup>25</sup> Constitutional Reform Act 2005 (UK) s 25(1).

<sup>26</sup> Constitutional Reform Act 2005 (UK) s 26(5).

<sup>27</sup> Constitutional Reform Act 2005 (UK) s 27.

<sup>28</sup> Constitutional Reform Act 2005 (UK) s 28.

<sup>29</sup> Constitutional Reform Act 2005 (UK) s 28.

<sup>30</sup> Constitutional Reform Act 2005 (UK) s 29 (2).

<sup>31</sup> Constitutional Reform Act 2005 (UK) s 29 (3).

<sup>32</sup> Constitutional Reform Act 2005 (UK) 31.

However, at the third time, the Lord Chancellor must appoint the person selected.<sup>33</sup> In seeking to reject the selection, the Lord Chancellor must provide written reasons for doing so, and the only available ground is that the person selected is not suitable for the office concerned.<sup>34</sup> The Lord Chancellor, if he asks the commission to reconsider a selection, must only do so on the bases that: there is not enough evidence that the person is suitable, or there is evidence that the person is not the best candidate on merit, or there is not enough evidence that the candidate has enough legal knowledge or experience.<sup>35</sup> The Prime Minister must then recommend the person notified to him by the Lord Chancellor.<sup>36</sup> Thus, whilst technically the commissions only make 'recommendations' in relation to appointments, in practical terms, they actually do decide since the relevant minister's discretion is severely constrained.

The selection panel consists of President of the Supreme Court (chair), the Deputy President, and a representative from each of the three United Kingdom appointment commissions (England and Wales, Scotland, Ireland).<sup>37</sup> The aforementioned processes are slightly modified for particular judicial appointments; e.g. Lord Chief Justice.<sup>38</sup> A standing 'Judicial Appointments Commission', with a similar process, exists for appointments to the lower judicial ranks.<sup>39</sup> Lay members assist in the selection.<sup>40</sup>

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<sup>33</sup> Constitutional Reform Act 2005 (UK) s 29 (4).

<sup>34</sup> Constitutional Reform Act 2005 (UK) s 30 (1), (2).

<sup>35</sup> Constitutional Reform Act 2005 (UK) s 30 (3).

<sup>36</sup> Constitutional Reform Act 2005 (UK) s 26(3).

<sup>37</sup> Constitutional Reform Act 2005 (UK) Schedule 8, cl 1.

<sup>38</sup> Constitutional Reform Act 2005 (UK) ss 67-94B. In the case of the Lord Chief Justice, the changes mainly relate to *who* sits on the selection panel. For most appointments, the head of the relevant jurisdiction participates. This is clearly inappropriate where the head of jurisdiction itself is being selected. Hence, the responsibility falls to the next most senior judicial officer in that jurisdiction.

<sup>39</sup> Constitutional Reform Act 2005 (UK) Schedule 12.

<sup>40</sup> Constitutional Reform Act 2005 (UK) Schedule 12, cl 2.

This entire scheme was substantially amended again in 2013.<sup>41</sup> In sum, the changes vest the power to make judicial appointments for the lower courts almost entirely within the purview of the judiciary as opposed to the Lord Chancellor<sup>42</sup> For example, ‘lay justices’ are to be appointed by the Lord Chief Justice.<sup>43</sup> The reforms also affect the membership of the selection commission for Supreme Court justices where a ‘non-legally-qualified’ member is now involved.<sup>44</sup>

Finally, in the selection of judges, the 2013 reforms state that where two candidates for judicial office are of equal merit, the selection may involve diversity considerations.<sup>45</sup> In fact, the relevant selectors are imposed with a duty to take steps to ‘encourage judicial diversity’.<sup>46</sup>

## South Africa

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South Africa's judicial appointment processes accord with the Westminster system, reflective of its prior status as a colony and dominion of Great Britain. As such, judges were previously appointed by the Governor-General in Council effectively informed by the Minister of Justice in cabinet. This continued beyond South Africa becoming a republic in 1961. A Judicial Service Commission (JSC) was created in a range of sweeping reforms in the 1990s.

The JSC is composed of representatives from a range of constituencies chaired by the Chief Justice. Those represented include

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<sup>41</sup> Crime and Courts Act 2013 (UK) s 20 and Schedule 13.

<sup>42</sup> Crime and Courts Act 2013 (UK) Schedule 13, Part 4.

<sup>43</sup> Crime and Courts Act 2013 (UK) Schedule 13, cl 39.

<sup>44</sup> Crime and Courts Act 2013 (UK) Schedule 13, cl 4.

<sup>45</sup> Crime and Courts Act 2013 (UK) Schedule 13, cl 9.

<sup>46</sup> Crime and Courts Act 2013 (UK) Schedule 13, cl 11.

representatives of the judiciary, professional bodies of advocates, a teacher of law, the Minister of Justice and Constitutional Affairs, ten serving members of Parliament from both Houses and four members designated by South Africa's President representing the executive. Corder notes that, in practice, 15 of 23 of the ordinary members selected are chosen for their broadly political views rather than their standing as lawyers, with 12 of the 15 likely to be loyal to the Government of the day.<sup>47</sup>

The JSC's role in appointing judges is part of its broader mandate to advise the government of matters generally which pertain to the administration of justice or relate to the judiciary. Its position is enshrined in the Constitution of the Republic of South Africa.<sup>48</sup> According to the Constitution, any 'fit and proper person' may be appointed, with citizenship a requirement only for judicial candidates for the Constitutional Court. The JSC compiles a shortlist of candidates, and convenes between April to October of each year to conduct the interviews and consequent deliberation. The recommendations are then referred to the President of South Africa who must, according to the Constitution, appoint those recommended on advice of the JSC. The JSC procedure operates as if it were a court of law when interviewing and is open to the public; however its deliberation procedures are private.<sup>49</sup>

Since its establishment, the JSC has been publicly viewed as successful in transforming the composition of the judicial bench to appropriately represent the South African community with regards to

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<sup>47</sup> Hugh Corder, 'Appointment, Discipline & Removal of Judges in South Africa' in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011), 101.

<sup>48</sup> Constitution of the Republic of South Africa, Act 108 of 1996, section 174.

<sup>49</sup> Such was decided after an attempt to establish a closed-door policy for interviews was publicly rebuked by academic representative of the commission Professor Etienne Mureinik; Corder, above n47, 103.



race, however less successful in terms of representing gender.<sup>50</sup> A criticism of the appointment process is the apparent requirement of the JSC in its practical approach that anyone seeking appointment to judicial office must have served as Acting Judge at some point. The practice of appointing senior advocates as acting justices for one to three month periods has drawn criticism from the UN Special Rapporteur on Judicial Independence, who nonetheless commented favourably on judicial independence in South Africa.<sup>51</sup>

## Germany

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Germany's judiciary is an example of the contrasting civil law system and inquisitorial nature. Germany has a “career judiciary” with a distinct career path. Law students pass two state examinations to enter the legal profession, with the ensuing crossroads to become either lawyers or judges very early in their working life. Research notes that after the second stage of examinations, only 10% of trainees choose the judicial route.<sup>52</sup> The candidates start working at the courts immediately, by application to a recruitment commission at the relevant court in each 'Lander'.<sup>53</sup> With some variation, the recruitment commission will vote on the candidate's application and pass referrals to the Minister of Justice or president of the court.<sup>54</sup> In 8 of the Lander, there are judicial electoral committees which, with variation, include parliamentarians and legal professionals; appointees require a

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<sup>50</sup> Corder, above n47, 104: “From the almost all-white, all-male bench in place in early 1994, the current demographic composition of judicial ranks is as follows... of the 203 judges permanently appointed to the bench, just over 55 per cent were broadly ‘black’, while only just over 20 per cent were female”.

<sup>51</sup> UN (Economic and Social Council) Commission on Human Rights, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Addendum: Mission to South Africa, ref. E/CN.4/2001/65/Add 2, dated 25 January 2001.

<sup>52</sup> Fiona O’Connell & Ray McCaffrey, ‘Judicial Appointments in Germany and the United States’ (Research Paper No 60, Northern Ireland Assembly, 2012), 11.

<sup>53</sup> Germany is made up of 16 states or 'Lander', referring to singular portions of Land.

<sup>54</sup> O’Connell & McCaffrey, above n 52, 11.

concurrent vote for appointment.<sup>55</sup> There is a probationary three year period, with relatively easy dismissal within the first two years.<sup>56</sup> Other routes to the judiciary include an initial career as prosecutor, civil servant or professor.

At a federal level, no such formal recruitment process exists. Judicial appointment and promotion is decided by the Federal electoral committee and relevant Minister. The process permits both Executive and judicial involvement, as the Federal electoral committee comprises of 16 Ministers of Justice of each Lander and 16 members of Federal Parliament.<sup>57</sup> Importantly, each member of the Committee can present its own candidate with no formal procedure for doing so. The judiciary is also given right of participation in an advisory capacity, by lending their opinion through a representative body known as the presidential council ('Prasidialrat').<sup>58</sup>

Differences exist at a Constitutional Court level. This supreme court has 16 judges divided in two; half are elected by the upper chamber of Parliament ('Bundesrat') and half by the lower chamber ('Bundestag').<sup>59</sup> The lower chamber relies on a parliamentary committee of 12 members of representative parties, with private deliberations.<sup>60</sup> The upper chamber relies on a committee comprised of the Ministers of Justice in each Lander, with formal election in its plenary sessions. Lists of eligible candidates generally include judges from the highest federal courts, and those otherwise nominated by the Federal Parliament or various State governments.<sup>61</sup> In this sense, the judiciary is effectively

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<sup>55</sup> O'Connell & McCaffrey, above n 52, 14.

<sup>56</sup> O'Connell & McCaffrey, above n 52, 11.

<sup>57</sup> O'Connell & McCaffrey, above n 52, 15.

<sup>58</sup> O'Connell & McCaffrey, above n 52, 16.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

chosen by Parliament as each house of the legislature selects an equal number of appointees upon a supermajority vote.<sup>62</sup> The Federal Constitutional Court has a special judicial review capacity, termed by German scholar Volker Heinz “the guardian of the Constitution”, which can critically invalidate parliamentary enactments.<sup>63</sup> Interestingly, it does not have appellate jurisdiction from the lower courts nor does it hear matters of federal law.

Independence has been a time-honoured concept within the German courts. However 1950s tension between the executive and judiciary resulted in rejection of the judiciary's attempt to remove all political intervention, fearing the judiciary would become a 'self-perpetuating elite profession ... excessively insulated from the democratic concerns of democratic authorities'.<sup>64</sup> Safeguards ensuring the German appointment process remains largely apolitical include presumptions that the Minister will act on the basis of professional evaluations by judges and the possibility of judicial review.<sup>65</sup> To this end, the Constitution also states that judges 'shall be independent and subject only to the law'.<sup>66</sup> Judges are insulated from removal unless authorised by a special Court of Judicial Office (“Richterdienstgericht”), and enjoy the luxuries of civil service employment including life tenure, adequate remuneration and reasonable protection from civil and criminal liability.<sup>67</sup>

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<sup>62</sup> United States Institute of Peace, *Judicial Appointments and Judicial Independence* (January 2009) <<http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf>>

<sup>63</sup> Volker Heinz, 'Appointment of Judges in Germany' (Speech delivered on 4 August 1998) <<http://www.heinzlegal.com/sites/default/files/AppointOfJudgesInGermany.pdf>>.

<sup>64</sup> O'Connell & McCaffrey, above n 52, 9.

<sup>65</sup> Ibid.

<sup>66</sup> Basic Law for the Federal Republic of Germany, Article 97, para 1.

<sup>67</sup> Heinz, above n 63, 4.

The Federal government of Canada is responsible for judicial appointments both at a federal level<sup>68</sup> as well as for the superior courts of the provinces.<sup>69</sup> The lower provincial courts are filled by the provincial legislatures by various mechanisms.<sup>70</sup> Strictly speaking, judges are appointed by the Governor in Council by commission.<sup>71</sup> The eligibility requirements for appointment are that the person must either have been a judge or be a barrister or advocate of at least 10 years standing at the bar of a province.<sup>72</sup> Three judges on the Supreme Court must hail from the province of Quebec, which is a Francophone civil law system.<sup>73</sup> Traditionally, of the other six judges, three come from Ontario, two from western Canada, and one from the Atlantic provinces.<sup>74</sup>

A formal process for federal judicial appointments has existed since 1988, but in various iterations.

The Commission for Federal Judicial Affairs Canada has a Judicial Appointments Secretariat which manages and administers numerous advisory committees that evaluate candidates and report back to the Minister of Justice.<sup>75</sup> The process for appointment, though, is different between that for the provinces and territories and other federal courts, and the Supreme Court of Canada.

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<sup>68</sup> Constitution Act 1867, s 101.

<sup>69</sup> Constitution Act 1867, s 96.

<sup>70</sup> Constitution Act 1867, s 92.

<sup>71</sup> E.g. Supreme Court Act (R.S.C., 1985, c. S-26), s 4(2).

<sup>72</sup> Judges Act, s 3. See also, Supreme Court Act (R.S.C., 1985, c. S-26), s 5.

<sup>73</sup> Supreme Court Act (R.S.C., 1985, c. S-26), s 6.

<sup>74</sup> <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html>

<sup>75</sup> <http://www.fja.gc.ca/home-accueil/index-eng.html>

For federal appointments to the superior courts of the provinces and territories,<sup>76</sup> there are permanent advisory committees. After the Harper government changes in 2006, each committee consists of eight members, who screen and vet candidates. Interviews are encouraged but not required. Appointments are recommended according to two categories: 'recommended' and 'unable to recommend'. The category of 'highly recommended' was scrapped to give the government wider discretion to pick who they wished. The committee is comprised of: a member of the police, judicial member, a person from the bar, a member of the general public, and two other persons selected by the Minister of Justice. The judicial member cannot vote except in the case of a tie. However, since the government appoints 4 of the 7 voting members, they effectively control the committees.

Turning to appointments to the Supreme Court of Canada,<sup>77</sup> in the past the candidate was chosen by Cabinet alone. However, in more recent times, there has been strong political pressure to involve parliament and an outside advisory committee, to some extent. In 2006, Prime Minister Harper selected a candidate from a list of 3 names sent to the Minister of Justice by a committee. The committee was comprised of parliamentarians, lawyers, and others who chose the 3 names from a longer list of 6 names sent to it by the former liberal government. An ad hoc parliamentary hearing was held where the candidate was questioned, 'gently'.

In 2008, an alternative process was proposed, but ultimately failed. A parliamentary committee of five was proposed; it was comprised of 2 members from government and one from each opposition party. The committee would review, in camera, a list of names put forward by the

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<sup>76</sup> Martin L. Friedland, 'Appointment, discipline and removal of judges in Canada' in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011) pgs. 52-56

<sup>77</sup> Martin L. Friedland, 'Appointment, discipline and removal of judges in Canada' in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011) pg. 57-58

government and provide a 3-candidate short list from which the government would select. The person selected would appear at a public hearing of an ad hoc parliamentary committee. Due to an internal committee disagreement, no shortlist was agreed upon. As such, Prime Minister Harper selected a candidate, but just before confirmation before the parliamentary committee, parliament was prorogued. In sum, the candidate was appointed without compliance with any of the proposed processes. No formal or institutionalised process for Supreme Court appointments in Canada can be said to properly exist. The system is still in a turbulent transition.

## United States of America

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Judicial selection in the United States is widely regarded a highly political process. The federal court system in the United States has four tiers, with the highest in the national court hierarchy being the Supreme Court of the United States. Only appointments in this court will be considered, with minor digressions concerning Federal courts of appeal and District Courts. The Supreme Court consists of nine judges. Its jurisdiction is over all cases involving national law, constitutional law, and over all decisions of the federal courts of appeal.<sup>78</sup>

Theoretically, the appointment process is simple. The Supreme Court's nine judges are each nominated by the President when a vacancy occurs. They are then confirmed by the Senate.<sup>79</sup> In practice, names of potential nominees are also recommended by senators or members of the House in the President's political party.<sup>80</sup> Supreme

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<sup>78</sup> Constitution of the United States Article III, Section 2.

<sup>79</sup> Constitution of the United States Article II, Section 2, 2.

<sup>80</sup> Roger Handberg & Harold Hill, 'Predicting the Judicial Performance of Presidential Appointments to the United States Supreme Court' (1984) 14 (4) *Presidential Studies Quarterly* 538, 538.

Court nominees have been observed to mirror the views of their appointing party, crippling the public perception of judicial independence.<sup>81</sup> Once confirmed, federal court judges have tenure until impeachment, death or retirement.<sup>82</sup> The central procedure is the confirmation process, discussed below.

No independent judicial selection commission exists at the State or Federal level. At a Supreme Court level, a Senate Committee on the Judiciary assists with the confirmation process.

A series of hearings before the Senate Judiciary Committee conclude in a vote which determines whether the nomination should go to the full Senate via positive, neutral or negative report. The Senate Judiciary Committee is a standing committee of 18 congress members.

Special interest groups lobby the Senate Judiciary Committee to confirm or reject nominees depending on their broad ideological views. If referred to the full Senate, the nominee requires a simple majority to confirm their appointment. Of the rejected Supreme Court nominees, most notable is the 1987 nomination of Robert Bork during the Reagan administration; Bork lost confirmation due to controversial political views, as well as his role in the unfair dismissal of special prosecutor of the Watergate burglary Archibald Cox, during the Nixon administration.<sup>83</sup>

At a State level, senators now convene judicial selection committees for the purpose of shortlisting potential nominees for their State's

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<sup>81</sup> Mark Tushnet, 'Judicial Selection, Removal and Discipline in the United States, in H. P. Lee (ed). *Judiciaries in Comparative Perspective* (2011), 136.

<sup>82</sup> Constitution of the United States Article III, Section 1 states that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour". Tushnet, above n 81, 135: Tushnet states this is interpreted to mean that only death, impeachment or retirement can remove a federal court judge in the United States.

<sup>83</sup> White, A.J. 2012, Bork Won, *Commentary*, New York, 134 ProQuest p54.

district judiciary.<sup>84</sup> Accordingly, observers have noted the process screens candidates largely for political support rather than professionalism.<sup>85</sup>

The Constitution also guarantees that compensation cannot be reduced after appointment, and *United States v Will* held this guarantee applies even in cases of Government-wide salary reductions or freezes.<sup>86</sup> There are no formal qualifications for federal court appointment stipulated in the Constitution, but largely judges are appointed from the practicing bar at all levels.<sup>87</sup> A 'respectful address' to the President and Senate of the United States suggested criteria for judicial appointment in the Supreme Court included profound and practical understanding of principles of law arising under the Constitution, treaties and maritime jurisdiction, and the laws, policy, decisions and judicial systems within the different States.<sup>88</sup> Handberg and Hill cited research on behalf of US Congress suggesting that each President has emphasised two key selection criteria: high professionalism and conformity with the basic Constitutional values and Presidential views of judicial role in the Constitution.<sup>89</sup>

The politicisation of the Federal court appointment process appears more evidently in the United States' intermediate appellate court – the Federal courts of appeals. These courts represent the final barrier to the Supreme Court, who may hear its appeals on a discretionary basis.

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<sup>84</sup> Tushnet, above n 81, 137.

<sup>85</sup> Ibid.

<sup>86</sup> 499 US 200 (1980).

<sup>87</sup> Tushnet, above n 81, 138.

<sup>88</sup> Samuel S Boyd, 'Considerations on the appointment of a justice of the Supreme Court of the United States : respectfully addressed to the President and Senate' (1852) *The Making of Modern Law*, updated 17 July 2014 <<http://galenet.galegroup.com.ezproxy.library.uq.edu.au/servlet/MOML?af=RN&ae=F3701804094&srchtp=a&ste=14>> p8.

<sup>89</sup> Handberg & Hill, above n 80, 539.



It sits as a panel of three, where room for ideological tensions based on appointment can be easily deduced. Kastellac pointed to the ideologically divided 2007 Court of Appeal which ruled 2:1 that the George Bush government could not indefinitely imprison a US resident suspected of being an enemy combatant.<sup>90</sup> Majority judges Diana Motz and Roger Gregory were appointed under the Clinton administration, while Bush appointee Henry Hudson was in dissent.<sup>91</sup>

The politicisation of judicial nominations at a Federal level are observed as almost subsumed by considerations regarding re-election, patronage, representation and ideology.<sup>92</sup> The politicisation of the nomination process can be seen where a vacancy occurs during a critical period for re-election, such as 1956 example of President Dwight Eisenhower using a Catholic State Supreme Court Justice nomination to ensure Catholic support in north-eastern states.<sup>93</sup> More recently, steady judicial politicisation had led to a backlog of vacancies in 2010; 110 of the 876 federal judgeships were vacant due to an infamously slow confirmation rate for Obama's nominees by the Senate.<sup>94</sup> The Economist pointed to ancillary political controls by putting silent, individual “holds” on a nominee which halts progression to a Senate vote and often frustrates the appointment process.<sup>95</sup>

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<sup>90</sup> J P Kastellac 'Panel Composition and Voting on the US Courts of Appeals Over Time' (2008) Department of Political Science, Columbia University <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=101211](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=101211)>.

<sup>91</sup> Ibid.

<sup>92</sup> Tushnet, above n 81, 138-9.

<sup>93</sup> Tushnet, above n 81, 139.

<sup>94</sup> The Economist notes: "Just 46% of his choices have been confirmed by the Senate, despite the Democrats' large majority there during the first two years of his term"; 'United States: Judge not; Judicial appointments 2010', The Economist Intelligence Unit, London <<http://search.proquest.com.ezproxy.library.uq.edu.au/docview/817314022?accountid=14723>>.

<sup>95</sup> Ibid; Michael Tolley referred to these extra-parliamentary practices as 'silent filibusters': Michael Tolley, 'Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments' in K. Malleson & P. Russell (ed.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from the World* (2006), 81.

Tushnet argues the politics of representation have also influenced judicial nominations. Political appointees have been responsive to shifting concerns from regional representation, religious representation and presently, the representation of women and ethnic minorities.<sup>96</sup> Handberg and Hill (1984) discussed political representation as increasingly reliant on race and sex.<sup>97</sup> Similarly in accordance with Tushnet's conception of patronage, a discerning factor is the potential nominee's sympathy to the 'thrust of the president's policy aims'.<sup>98</sup>

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<sup>96</sup> Tushnet, above n 81, 139.

<sup>97</sup> Handberg & Hill, above n 80, 538.

<sup>98</sup> Handberg & Hill, above n 80, 538.

## Conclusion: Which model for Queensland?

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An effective appointment process aims to achieve the goals of independence, merit, integrity and legal expertise in the judiciary. There is, of course, no definitive answer as to which of the canvassed appointment models best attract these qualities in judicial officers. Recent judicial appointments in Queensland have cast doubt over the transparency and independence of the system. Thus demonstrating that the current executive-dominated decision-making is no longer appropriate.

By drawing comparisons with other jurisdictions, we argue that judicial and legal involvement in the selection process is crucial. The establishment of consultative appointment mechanisms provide reassuring checks and balances on an otherwise unrefined system and help promote diversity.

The authors support a permanent commission on judicial appointments similar to the UK model that is modified to the Queensland context. The proposed Queensland Judicial Appointments Commission ('QJAC') would be set up by legislation. Its composition should of itself be the product of considerable discussion and debate, but might include and the heads of jurisdiction (e.g. Chief Justice), retired judicial officers, representatives of the legal profession (e.g. Bar Association, Solicitor General) and a distinguished lay person as chair. QJAC would accept expressions of interest from candidates, publish selection criteria, conduct interviews, and consult widely within the profession. A 'short list' would be presented to the Attorney-General and his/her opposition counterpart for comment before the name of the candidate selected by QJAC is notified to the Attorney-General for approval. The Attorney-General would have limited powers to reject or ask the commission to reconsider, similar to the UK model. Reasons would have to be provided if such a power is exercised by the Attorney-

General and the grounds would be lack of evidence of merit or evidence of impropriety. Thus, though provided with considerable guidance, the executive discretion would not be removed.

The above would require substantial reforms, and may not be feasible in the short term. In the meantime, there is nothing to prevent Queensland from adopting a formal protocol outlining and clarifying the current appointment process, allowing expressions of interest, devising selection criteria, and specifying persons to be consulted. This could be done at once, and it would improve, immediately, the transparency of and confidence in judicial appointments in Queensland.