JUDICIAL APPOINTMENTS IN QUEENSLAND[1]

HG Fryberg QC[2]

Abstract

The process by which judicial appointees are selected in Queensland is shrouded in mystery. A consultation process is undertaken but there is little publicly available information about the process. Professional and personal qualities of prospective appointees are considered, but how these are weighed and compared is unknown. Allegations of political appointments have increased over the past 20 or 30 years. A distorted appointment process diminishes the professional quality of the judiciary. It can lead to the appointment of persons with character flaws or political baggage. Importantly it feeds public misconceptions about the judiciary and undermines public confidence in the courts. There are better ways to make appointments. Consideration of the process in other jurisdictions highlights a number of issues for the panel to discuss.

Introduction

[1] The title for this session begins by referring to "Integrity Institutions". I am not sure what that term means, nor whether it should be applied to the courts; but those uncertainties may be put to one side. My riding instructions ask that I "discuss how well the process of judicial appointments is serving the objectives of integrity and independence in the current day, whether public confidence in the separation of powers remains relevant, and how it can be best maintained". I shall leave the question of public confidence in the separation of powers for panel discussion; this paper assumes that such confidence remains relevant. For the sake of brevity I shall confine my references to the constitutional courts[3] and the Magistrates Court.

The present process of judicial appointments

[2] Queensland judges are appointed by the Governor in Council.[4] The sole statutory qualifications for appointment are that the appointee be less than 70 years of age and a barrister or solicitor of at least five years standing.[5] Of course by convention the Governor acts on the advice of his ministers. How that advice is formulated and

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1 Paper presented at the Accountability and the Law conference, Customs House, Brisbane, 9 February 2015.

2 Retired judge of the Supreme Court of Queensland.

3 The Supreme Court of Queensland and the District Court of Queensland: *Constitution of Queensland 2001*, s 57.

4 *Constitution of Queensland 2001*, s 59; *Magistrates Act 1991*, s 5

5 *Constitution of Queensland 2001*, ss 59, 60; *Magistrates Act 1991*, s 4. Appointees to the constitutional courts must be admitted as lawyers in Queensland; those to the Magistrates Court must be admitted in Australia.

delivered is not, so far as I can discover, the subject of any publicly available document. There is a convention that before any decision is made, the Attorney General consults the head of the relevant jurisdiction, the President of the Bar Association of Queensland and the President of the Queensland Law Society. He may take advice from officers of his department. He may consult with other persons in the community. The identities of those consulted and not consulted are not publicly revealed. Neither is the format of the consultation process. We do not know whether it is uniform for all persons consulted. We do not know whether the consultation is only about prospective appointees nominated by the particular consultant or whether other persons already under consideration are also discussed. We do not know whether the consultation is limited to the professional qualities of prospective appointees or whether their personal qualities are also discussed, and if the latter, which personal qualities are considered relevant.

[3] There is also uncertainty as to the identity of the effectual decision maker. It seems clear that most appointments are not taken to Cabinet. Informal enquiries suggest that there is a practice pursuant to which appointees to the Supreme and District Courts are decided by the Premier and the Attorney General, except perhaps for the Chief Justice, the President of the Court of Appeal division and the Chief Judge of the District Court. Appointees to the Magistrates Court are decided by the Attorney General, a process which has statutory recognition[6].

[4] Commonly, indeed almost invariably, appointments are said to have been made on merit. There is however no publicly accepted definition of merit, nor have Attorneys General over the years defined how they understand the term. We do not know how the decision maker balances professional and personal qualities. As long ago as 2006, Geoff Davies AO QC concluded that the former were being minimised:

> "The approach formerly adopted by Attorneys in Australia appears to have accorded generally with what Sir Thomas Legge has called the approach of maximal merit ; that is, accepting that all candidates are not of equal professional ability, the appointment, if possible, should be made of the candidate who best combines the qualities of intellectual capacity, legal knowledge and relevant experience provided that he or she also possesses the necessary personal qualities. As I have already mentioned, that was the principal purpose of professional consultation.
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> The current approach adopted by Attorneys, by contrast, appears to accord generally with what Sir Thomas called the approach of minimal merit. On this approach, all of those who reach a minimal standard of legal intellect, learning and relevant experience are, prima facie, qualified, professionally, for appointment. All those who reach this minimal standard are then, presumably, assessed by the Attorney or his or her advisers, possibly in respect of personal qualities, or perhaps some unspecified mixture of professional and personal qualities. This approach opens up to a wider field *[sic]* but plainly compromises professional quality.

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6 *Magistrates Act 1991*, s 5(2).

> I emphasise that, in each case, it is impossible to be sure what the respective approaches were and are because of the secrecy to which I referred earlier. But it is reasonable, I think, to draw the inferences I have from the appointments made and the candidates available."[7]

[5] While one may doubt the validity of the Legge's dichotomy, it serves to highlight the importance which ought to be attached to professional qualities.

The operation of the process

[6] It takes little thought to identify the potential for distortion or corruption of the process just described. That potential flows from the importance of the position of judge, the potential impact which a judge may have on the exercise of governmental power, the fact that the effective decision is made by politicians and the secrecy of the process. I have a fair amount of contact with Chinese judges. When I respond to requests to describe the method of judicial appointments in Queensland they are invariably astonished. They are too polite to criticise overtly, but their metaphorical eyebrows have to be retrieved from the ceiling!

[7] Despite that potential, in more than 150 years since Queensland became a separate self-governing entity the vast bulk of appointments have not attracted substantial criticism, and the appointees have performed at least passably well. Very few appointees have been accused of lacking integrity; only one has been removed from the Supreme Court for misbehaviour. Judicial decisions have frequently been criticised, but in cases where the judge has been criticised personally, it has usually been on the ground that the decision demonstrates a lack of professional capacity, not a lack of the qualities with which we are concerned today – integrity or independence.

[8] Over the last 20 or 30 years we have seen an increase in allegations that particular appointments are political appointments. These criticisms are not based simply on a previous association between an appointee and the party in government. Such an association is not a ground for disqualification from appointment, nor should it be: many of our best judges were politically active at some time in their previous lives. The sting of the criticisms arises when it is suggested that an appointment is made to pay out a long-term political supporter, to load a court with a party supporter or deny it a party opponent, or simply as a demonstration of naked power to appoint whomever the government likes. I will not pause to debate why there has been an increase in such appointments, although I note Geoff Davies' observation 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"[8]. The problem is that it continues to happen.

The consequences of the Queensland appointment process

[9] A person appointed to the bench for the political reasons just mentioned will not necessarily be a poor judge. There is however an increased risk that this will occur;

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7 G L Davies AO QC: *Why we should have a Judicial Appointments Commission*, paper delivered at the ABA Forum on Judicial Appointments, Sydney, 27 October 2006. A slightly earlier version of this paper is available at http://www.webcitation.org/5Xg5ok9jv.

8 *Loc cit*.

and in any event there is a high probability that such a person will not be the best available appointee. The distortion of the appointment process means that other factors relevant to the appointment are not given due consideration. The consequences of this can, in theory at least, be fourfold.

[10] Firstly, the professional quality of the judiciary is diminished. There will always be debate about how much weight should be given to professional qualities as against personal qualities. Moreover the appropriate level of professional qualities will vary depending upon the position under consideration. The skills needed to be a magistrate in Toowoomba are not the same as those needed to be a Judge of Appeal. That said, the capacity of the judge to get it right and to send litigants away with a sense that at least they had a fair hearing from a skilled jurist is important to the functioning of our court system. Appeals are expensive and time-consuming. Also, incompetence breeds disrespect among both lawyers and colleagues, which in turn inhibits the smooth functioning of a court.

[11] Secondly, a distorted process could lead to the appointment of persons of less than impeccable character. Assessing character is a difficult process at the best of times. It should not be distorted by political favouritism.

[12] Thirdly, a distorted process could lead to the appointment of persons unwilling to leave the political role behind. It is possible to exaggerate the risk of this occurring; I cannot think of any examples in recent Queensland history. Indeed, one of the virtues of judicial independence and security of tenure is the indifference to the desires of politicians which judges quickly develop. Political solidarity tends to fall by the wayside when it ceases to be necessary for survival.

[13] Finally, and importantly, appointments made by a distorted process feed public misconceptions about the judiciary. They lead people to seek explanations for judicial decisions not in the judge's reasons for judgement but in assumptions drawn from the political colour of the government which appointed the judge. Unsuccessful litigants always find it hard to accept that they have lost on the merits. They will readily believe that the judge was incompetent, particularly if the appointment process is not overtly apolitical. Public confidence in the courts is vital for their effective functioning. Even if judges are professionally qualified persons of impeccable character and free from political baggage, their function is impaired when the public believes otherwise. In the eyes of the public judicial independence is eroded. It is *a fortiori* if the misconception infects a subsequent government – as we have recently seen.

Is there a better process?

[14] I shall not consider appointment processes adopted in civil law countries because those processes are designed for a career judiciary, not for a common law judiciary appointed from experienced lawyers. I shall not refer to United States processes for election of judges and for the candidates' questioning and approval by the Senate, because I assume that these would be unacceptable in this state. Finally, I shall not consider processes for the appointment of judges in countries where those judges have direct power to enforce a Bill of Rights, because that raises additional complexities which do not exist in Queensland.

United Kingdom[9]

[15] Our present process is the descendant of our colonial inheritance. Its English parent bestowed upon the Prime Minister and the Lord Chancellor roles similar to those of the Premier and Attorney General of Queensland. In July 2003 the then Lord Chancellor, Lord Falconer, said, "In a modern democratic society, it is no longer acceptable for judicial appointments to be left entirely in the hands of a Government Minister."[10] It took until 2006 for a new process to be devised and implemented. It applies to all court and tribunal appointments, with slight variations depending upon the body to which the appointment is to be made.

[16] The selection of persons to be judges or tribunal members is effectively the task of a new body, the Judicial Appointments Commission.[11] That commission has 15 members who are appointed for a fixed term of not more than five years and who may be reappointed only once. Five of the 15 are judicial members: at least one a Lord Justice of Appeal, at least one a puisne judge of the High Court, a third who is either a Lord Justice of Appeal or a puisne judge of the High Court, a fourth a circuit judge, and a fifth a district judge. There must also be a practising barrister and a practising solicitor. There must be six lay members, one of whom is the chair of the JAC. Finally there must be a lay justice of the peace and a tribunal member. The first three judicial members are selected by the Judges' Council and all other members are selected by specially constituted panels of four persons. There are elaborate provisions to ensure the independence of these panels.

[17] When a vacancy occurs for (say) a puisne judge of the High Court, the JAC receives a vacancy request from the Lord Chancellor and publishes it.[12] Anyone can apply for the position using the JAC online facility. From the applications received the JAC creates a short list of candidates, usually by paper sift.[13] Paper sifts are carried out by a selection panel usually consisting of a lay panel chair, a judicial member and an independent member. This sift is based on the written evidence provided by the candidate including the candidate's self-assessment and references.

[18] The JAC then checks the eligibility and good character requirements of the shortlisted candidates. If these are satisfactory shortlisted candidates are invited to a selection day. A selection day may consist of a panel interview, role play, making a presentation and questions about situations or scenarios which might be faced as a judge (situational questioning), or a combination of these depending on the post applied for. Panel members assess all the information about each candidate and agree which candidates best meet the required qualities and abilities. The panel chair then completes a panel report providing an overall panel assessment to the JAC.

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9 I do not overlook the fact that the European Convention on Human Rights applies in the United Kingdom.

10 Cited in Davies, *loc cit*.

11 See generally *Constitutional Reform Act 2005*.

12 The process is described on its web page https://jac.judiciary.gov.uk/.

13 For larger selection exercises and those generally below the level of Circuit Judge, qualifying tests are used. These are online tests designed to assess candidates' ability to perform a judicial role. They are usually prepared by judges from the relevant jurisdiction.

[19] The JAC makes the final selection on the basis of the panel report unless it decides that there is no candidate of sufficient merit. It must consult the Lord Chancellor, the Lord Chief Justice and another person who has held office as a puisne judge during the selection process. It reports its selection to the Lord Chancellor. If it has not followed a recommendation of the Lord Chief Justice or the former puisne judge the report must give reasons for not doing so.

[20] The Lord Chancellor may accept the selection; reject it but only on the grounds that, in the Lord Chancellor's opinion, the person selected is not suitable for the office concerned or particular functions of that office; or request the JAC to reconsider it, but only if in his opinion there is not enough evidence that the person is suitable for the office concerned or particular functions of that office, or there is evidence that the person is not the best candidate on merit.

New South Wales

[21] Some information about judicial appointments in New South Wales has been published.[14] It includes a list of the professional and personal qualities used to assess merit for every judicial office in the state. Appointments are made by the Governor-in-Council on the recommendation of the Attorney General. Vacancies for judges in the District and Local Courts are advertised and a call is made for expressions of interest. A selection panel is appointed comprising the head of the jurisdiction, the secretary of the Department of Justice, a leading member of the legal profession and a prominent community member. Its task is to review expressions of interest against the selection criteria. Referees and stakeholders are consulted regarding persons being considered for appointment. The panel develops a short list of candidates for interview. Following interviews candidates are assessed as being highly suitable, suitable or unsuitable for judicial office. They are not otherwise ranked within these categories. The panel reports its assessment to the Attorney General; presumably the report is confidential. The process is said to be supplementary to the traditional selection process and the Attorney General retains the right to propose a nominee for appointment.

[22] There seems to be nothing published about the process for appointing Supreme Court judges apart from the list of professional and personal qualities used to assess merit.

Proposals for Australia

[23] Over the years many models have been proposed to reform the process for judicial appointments in Australia.[15] Most have involved the creation of some form of Judicial Appointments Commission. There is not time here to refer to all of them. I select one on parochial grounds: it was proposed by a retired Queensland judge, Geoff Davies AO QC. In the paper to which I have already referred[16], Davies summarised his proposal succinctly:

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14 According to the Department of Justice website: http://www.justice.nsw.gov.au/about-us/career-internships-volunteering/Judicialcareers-statutoryappointments.

15 See Evans,S and Williams, J: "Appointing Australian Judges: A New Model", (2008) 30 *Syd L Rev* 297, n 75.

16 Note 7.

> "My proposal … is for a Commission, the members of which are independent of Government, which recommends a panel of names from which the Government must choose its appointee or explain publicly why it has not.

[24] Davies postulated several essential requirements for a commission. They were: independence from government; minority lay membership; and a maximal merit approach to the assessment of professional qualifications subject only to limited modification to promote diversity within a given court.

[25] To ensure the independence of the commission, Davies proposed that its members be appointed

> "by reference to their representative status in bodies outside the control of executive government. In the case of legal appointees, that should prove no difficulty; the Chief Justice, the Presidents of the Bar and of the Law Society and the head of a Law School are obvious examples. But if it were appropriate to appoint to the Commission persons other than those having legal qualifications, as I believe it is, this may be a little more difficult but by no means impossible. The heads of charitable or community organisations are examples."

[26] Davies was proposing a model for use throughout Australia, including for the federal judiciary. His reason for proposing a commission which made recommendations, not selections, was to avoid conflict with the Constitution in relation to federal appointments.

[27] In Davies' view there were two reasons for including lay members on the commission:

> "In the first place, professional qualifications are unnecessary in assessing the personal qualities of candidates and, in that assessment, lay members may offer a wider perspective, being less likely, in making any such assessment, to be affected by the professional standing of the candidates. And secondly I believe that public perception is important and the inclusion of lay members may help to allay concerns about the narrowness of the background from which judges have been chosen in the past."

However he thought that legally qualified members should constitute a bare majority because only they were qualified to assess the professional qualities of prospective appointees.

[28] Finally, there is Davies' proposal for achieving diversity:

> "First follow the maximal merit approach, ranking all candidates in respect of professional quality; and see where, in following that approach, the most able candidate who would ensure diversity (" the diversity candidate") is ranked. Then assess whether the diversity candidate is capable of performing adequately and efficiently as a judge of that court. Then assess the extent of the gap, if any, between the highest ranked candidate who also possesses the necessary personal qualities and the diversity candidate. Then assess whether, in the light of those and other factors including other recent

appointments to that court, appointment of the diversity candidate is likely to materially diminish the standard and standing of that court."

Points for discussion

[29] I propose the following questions for the panel discussion:

1. In the interests of the quality, integrity and independence of our judges and the public perception of those matters, should the process of appointing judges in Queensland be changed?

If so:

2. Should the process involve a standing commission, a series of ad hoc panels or some other body?
3. What function should the body perform
   (a) select the appointee?
   (b) select a list (ranked or unranked?) from which the appointee must be drawn?
   (c) recommend a list from which the appointee may be drawn?
   (d) report on the suitability for appointment of all applicants/nominees?
4. What power should the Attorney General have to depart from the name or names put forward by the body? Who should be publicly accountable for appointments made?
5. How should prospective appointees be identified
   (a) by application?
   (b) by nomination?
   (c) otherwise?
6. How should the appointee or list of appointees be determined
   (a) on the papers?
   (b) by consultation of others, and if so, whom?
   (c) by interview as well?
   (d) by practical test as well?
7. How should members of the body be selected
   (a) ex officio?
   (b) by the government?
   (c) otherwise, and if so how?
8. How many members should the body have? Should it have members who are not legally qualified? If so should they be a minority or a majority?
9. What should be the rights of applicants/nominees who are not selected/recommended
   (a) reasons for rejection?
   (b) access to documents considered?
   (c) information about the contents of consultations?
   (d) judicial review?
   (e) ombudsman?