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## Executive and High Court Appointments



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## Executive and High Court Appointments

The Vision in Hindsight: Parliament and the Constitution: Paper No. 8

### ***Vision in Hindsight***

*Vision in Hindsight* is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

*The Vision in Hindsight: Parliament and the Constitution* will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the eighth.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-  
2001

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# Contents

Major Issues .....	i
Introduction .....	1
The Framers' Vision .....	3
Appointments to the Executive .....	3
Ministers of State.....	3
Other Executive Appointments: the Public Service .....	5
Appointments to the Judiciary.....	12
Options for Selecting High Court Judges: a Brief Overview.....	14
The Current Position—Appointment by the Governor-General in Council .....	14
Appointment by the Executive Following Formal Consultation with a Judicial Appointments Commission.....	16
Appointment a Judicial Appointments Commission or by the Executive on the Recommendation of the Commission .....	17
Appointment by Parliament.....	18
Constitutional Commissions .....	19
Parliamentarian's Views .....	20
Conclusion.....	25
Endnotes .....	25
Appendix 1: Judges of the High Court.....	33
Bibliography.....	35



## Major Issues

In a democratic system of government, how should appointments to senior executive and judicial positions be made? Is it necessary that Ministers also sit in Parliament? How are senior public servants—departmental heads—to be chosen? Should High Court judges be elected by the people, by Parliament, or should they be appointed by the government of the day? And what role, if any, has Parliament in the selection and appointment of persons to these positions?

The Constitution requires that Ministers be chosen from those elected to Parliament. However, as was pointed out during the convention debates in the 1890s this is not essential for responsible government. It is possible for Ministers to be appointed directly from the community. Since then there has been only very isolated criticism of the constitutional requirement for Ministers to sit in Parliament.

The method of appointing other executive officers—for example, senior officers of the Public Service—has, however, been subject to considerable debate and discussion. In recent years attention has focussed on what is seen by some commentators as the increasing politicisation of the Public Service—whether at the Commonwealth or State level. The debate over how best to select and appoint public servants is not new and, as will be discussed below, was considered by those who drafted the Commonwealth Constitution.

The selection and appointment of judges in Australia is also not free of controversy. The debate about how best to select judges is, however, somewhat sporadic, and tends, usually, to immediately precede or follow an actual appointment, particularly an appointment to the High Court. This debate is more often than not carried out by members of the media and academic commentators. While members of the Commonwealth Parliament may criticise an individual appointment, such criticism almost never extends to proposals for a reform of the selection process.

Judges on Australian courts, whether Federal or State, are appointed by the government of the day. While it is true that there has been no concerted or sustained campaign to change the manner in which judges are chosen, it is also true that in recent years there has been some level of dissatisfaction with the way in which judges are chosen and there have been calls for reform to the appointment process.

Academics, the media, members of the legal profession and judges themselves have all put forward proposals for change. This Research Paper does not, however, set out to rehearse in detail these arguments. Rather, its focus is on the role of the Federal Parliament in that debate, and in particular in relation to how High Court judges are selected.



## Introduction

The Commonwealth Constitution provides that persons appointed to the Commonwealth Executive—Ministers—must hold seats in Parliament. Writing in 1994, David Hamer expressed doubts about the continued reliance on Ministers being chosen from the ranks of government supporters elected to Parliament. He asked why not 'fill some Ministerial vacancies with highly qualified individuals from the community?' This would lead, Hamer suggested, to an overall improvement in the quality of Ministers.<sup>1</sup> Bob Hawke, in the 1979 Boyer Lectures, also suggested that the Ministry should be open to persons not elected to Parliament.<sup>2</sup> While Hamer and Hawke have criticised the constitutional requirement for Ministers to be Members of Parliament, there has been very little discussion, whether in or out of Parliament of alternative methods of selecting and appointing Ministers. This paper briefly outlines the views of the delegates to the Constitutional Conventions on this issue.

In recent years, at least, there has been considerably more discussion on how best to appoint—and indeed terminate the appointment of—other members of the Executive, namely, public servants, particularly in the context of concern over the arguably increasing politicisation of the Public Service at Commonwealth and State levels. This paper outlines the views of the drafters of the Constitution on the appointment of Commonwealth public servants and considers briefly the views of Parliamentarians in 1901 and in more recent times.

Appointments to judicial office have attracted considerable attention over the past century, and they continue to do so. There is an abundance of articles, books, papers and speeches by judges, academics, journalists and others, in Australia and elsewhere, on how best to select candidates for judicial office.<sup>3</sup> For example, former High Court Chief Judge, Sir Harry Gibbs, in a speech given at the opening of the Queensland Supreme Court Library's Rare Books Room said:

Although everyone would pay lip service to the notion that judges should be independent, it is not unnatural for some members of government, like most people, to prefer to hear what they want to hear rather than what they ought to hear. ... Similarly, nowadays everybody would pay lip service to the notion that appointments to the bench should be made on merit, which of course includes character and temperament as well as ability and experience. ... Political appointments have not been unknown in Australia, but they are never acknowledged as such. At one time in Queensland religion seemed to be a determinative factor but those days fortunately have long since gone. A more recent heresy is that the bench should be representative and that the sex of the aspirant or perhaps his or her ethnic origin should be a more important consideration than merit.<sup>4</sup>

Sir Harry Gibbs also called for reform to the existing appointment process:

It is difficult to suggest any workable alternative to appointments by the government. However, society would benefit if the process of making judicial appointments were required to be more transparent. One way in which that could be done would be for the law to provide that the Attorney-General should consult, say, the Chief Justice, the President of the Bar Association, and the President of the Law Society, and that the Attorney-General should, at the time of making an appointment, reveal the recommendations that had been made. The Attorney-General would not be obliged to appoint any of the candidates who were recommended but if he or she departed from the recommendations, it would be necessary to account to the public for the departure. There may be other ways of ensuring that judicial appointments are made openly, in a way that reveals that they are made on merit, and not as a result of patronage, ideology or idiosyncrasy.<sup>5</sup>

In Australia discussion and critical commentary often centres on appointments to the High Court and, just as often, immediately precedes or follows an actual High Court appointment.<sup>6</sup> While appointments to the Federal and Family Courts, and the State Supreme, District and Magistrates Courts are very important, this Research Paper focuses on the appointment of federal judges, and in particular, appointments to the High Court. The High Court is of special significance in politics and law in Australia. It is the final court of appeal and the interpreter of the Constitution.

As Professor Brian Galligan (University of Melbourne) notes: 'From the very beginning of the Federation discussion it was asserted that the court would play a vital role in the federal system.'<sup>7</sup> Speaking of the proposed High Court during the Constitutional Convention Debates, Dobson (Tas.) said on 19 April 1897:

It is something far above the lawyers. It is the rights and protections of citizens. Mr Wise has pointed out that this judiciary is an inherent part of the Constitution, and I would remind members that it is to be the interpreter of the Constitution.<sup>8</sup>

The fundamental importance of the High Court to the success of the Federation is also reflected in the following statement made by Barton (NSW) on 23 March 1897:

It seems to me that if we are to have Federation in all its strength and power we are forced to the conclusion that the power which will best hold the Federation together, and will best preserve the honour of the Constitution, is the peaceful arbitrament of a Federal Court.<sup>9</sup>

A brief survey of the literature on the most appropriate means of selecting judges soon reveals some common themes. Judges may be chosen by popular election, that is, by those electors enrolled to vote for candidates for the House of Representatives and the Senate. Although in some states of the United States of America judges may be chosen by popular election, in Australia, to date, this method of selecting judges has almost invariably received short shrift, and will not be further discussed in this paper.<sup>10</sup>

The debate in Australia, on the other hand, concentrates on how best to appoint judges. While many words have been written on this subject, advocates for change, in this country at least, have not been overly creative, and surprisingly few alternatives have emerged. In short, the most often repeated alternatives involve variations of the following:

- appointment by the Governor-General in Council (the present position)
- appointment by the Executive following formal consultation with a Judicial Appointments Commission
- appointment by a Judicial Appointments Commission, and
- appointment by Parliament.

## **The Framers' Vision**

It is a commonplace that the Australian polity is a mixture of the British system of 'responsible government' and that of federalism derived largely from the example of the United States. Simply put, responsible government means that the Executive Government, chosen from those elected to Parliament, is accountable to Parliament, and through Parliament to the people.

Sir Samuel Griffith (Qld), speaking during the Convention Debates on 4 March 1891, said that the system of responsible government 'is the best that has yet been invented in the history of the world for carrying out the good government of the people.'<sup>11</sup> According to Wise (NSW), despotism and government by bureaucracy could only be avoided by a 'strict adherence to responsible government and to the parliamentary system as we know it today.'<sup>12</sup> 'We find in responsible government', Deakin (Vic.) suggested, 'the promptest, the most sympathetic means of expression and execution of the popular will consistent with the deliberate consideration of the problems to be solved.'<sup>13</sup> Playford (SA) too commented that it would be 'a mistake to go away from the old responsible government under which we have been brought up.'<sup>14</sup> And, as Isaacs (Vic.) noted on 26 March 1897:

Responsible government is the keystone of this federal arch.<sup>15</sup>

## **Appointments to the Executive**

### **Ministers of State**

Addressing the Convention on 4 March 1891, Griffith said that while all the delegates were well aware of the system of responsible government there were 'many misapprehensions' as to the essence of that system.<sup>16</sup> The notion that Ministers must hold

seats in Parliament, Griffith continued, is a mere 'accident of responsible government'; the essence of that system is that 'Ministers are appointed by the head of state, the Sovereign, or her representative, and that they may hold seats in Parliament.'<sup>17</sup> In contrast, under the United States system, Ministers must not sit in Parliament. Further:

The origin of this difference lies in the fact that the framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament, and they thought it extremely desirable to separate the Executive and legislative branches of government, following the arguments of a great writer—I should rather say a celebrated writer—of those days, Montesquieu, the wisdom of whose observations and the accuracy of whose deductions and assumption of principles may be, I submit with great respect, very open to doubt. But the Americans adopted that system—that the Executive shall be entirely dissociated from Parliament, and therefore may not sit in Parliament.<sup>18</sup>

The system adopted in the United States, Griffith continued, has proven to be unwise, and not as conducive to good government as that where 'Ministers are intimately associated with Parliament.'<sup>19</sup> Thus Griffith proposed that the Constitution should provide that Ministers may sit in Parliament not that they must do so.<sup>20</sup> This was not without precedent. Queensland, for example, did not in the late nineteenth century, and still does not, constitutionally require Ministers to hold seats in Parliament—although in practice this has always been the case.

In the event, the draft Constitution Bill adopted by the Constitutional Convention on 9 April 1891 provided that the Governor-General may appoint Ministers of State to administer the Executive Government of the Commonwealth. Further, such officers hold office during the pleasure of the Governor-General and shall be capable of being chosen and sitting in Parliament. According to this draft Bill a person could be appointed a Minister although not a member of Parliament.

However, matters did not rest there, and delegates returned to this issue in the 1897.

Sir Richard Baker (SA), on 23 March 1897, queried whether responsible government—the Cabinet system—was consistent with true Federation. He feared that if the Cabinet system was adopted Federation would be killed or it would kill the Cabinet system. The system adopted by the United States, whereby the Executive was disassociated from Parliament was also unsatisfactory. Baker therefore advocated the adoption of the Swiss system whereby 'the Executive is elected directly by Parliament, and not one branch of Parliament, but by two branches.'<sup>21</sup>

In light of Baker's proposal, Dr Quick (Vic.) also mooted the notion that the Executive be elected by Parliament, arguing that 'an Executive elected by the Federal Parliament would be one that would come within the essence of responsible government, namely, a government dependent on the will of the people as expressed in the Federal Parliament.'<sup>22</sup>

And, Dr Cockburn (SA) speaking on 17 September 1897 also expressed support for the 'principle of an elective Ministry' suggesting that rather than destroy the principle of responsible government, it would 'make each Minister more directly responsible than ever to Parliament.'<sup>23</sup> However, Cockburn was confident that the 'principle of an elective Ministry' would not be adopted by the Convention. His confidence proved well founded and the delegates showed little enthusiasm for a Ministry elected by Parliament.

In the event, on 17 September 1897 it was agreed by a vote of 21 to 14 that after the first Commonwealth election, no Minister shall hold office for longer than three months unless elected to Parliament. Barton noted that this additional clause—requiring Ministers to be elected to Parliament—was inserted 'as a safeguard to responsible government.'<sup>24</sup>

And on 16 March 1898 the draft Constitution adopted by the Convention included s. 64 (Ministers of State) as we now know it.

Section 64 provides:

Ministers of State.—The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers may hold office during the pleasure of the Governor-General. They shall be members of the Federal executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament.—After the first general election no Minister of State will hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives.

There seems little enthusiasm, either inside or outside Parliament to change the manner in which Ministers are appointed, notwithstanding the proposals put forward by Hamer and Hawke. Hamer suggests that as ministerial office 'is regarded as one of the spoils of electoral victory ... an attempt to amend the Australian Constitution to eliminate the requirement of a minister to be a member of one of the two houses would face implacable resistance from politicians (of both sides) and would certainly fail.'<sup>25</sup>

### Other Executive Appointments: the Public Service

The drafters of the Constitution also turned their minds, albeit briefly, to how best to appoint persons to the Commonwealth Public Service, or at least how best to guard against their improper dismissal.

Wise (NSW) was concerned to prevent the development in Australia of a 'spoils' system, which he considered a 'drawback to the public life of the United States.'<sup>26</sup> To this end,

Wise advocated including in the Constitution a clause providing that public servants shall only be removed for cause assigned. Wise argued:

My real object is to put into this Constitution a clause which will establish a custom, which will ripen into a law, and will prevent civil servants from being removed from office for purely political reasons.<sup>27</sup>

Turner (Vic.) opposed Wise's proposed clause suggesting that the United States practice is unlikely to be adopted in Australia:

They have an Executive not responsible to Parliament. Here the Executive will be responsible to Parliament, and I do not think would ever dare to take this step of dismissing a large number of public servants for the purpose of putting their friends into their places. If a Ministry in our colony were to do that they would not sit on the Treasury benches for twenty-four hours.<sup>28</sup>

Similarly, Trenwith (Vic.) said that in the United States the Senate is not responsible to Parliament, and further, the 'immense amount of logrolling' that goes on there 'could not happen here.'<sup>29</sup> Trenwith was also concerned about the damage to the reputations of public servants dismissed for cause, as well as their future employment prospects—who for example would employ a public servant dismissed for reasons publicly stated?

Sir John Downer (SA) too opposed Wise's amendment but on the basis that the amendment was not a matter to be dealt with in a Constitution. Downer continued:

Having established a Government which shall be responsible to Parliament, we may fairly leave the control of officers in the hands of the Government, without introducing provisions which might do the greatest injustice to individuals.<sup>30</sup>

In rejecting the amendment, Isaacs too said it was 'not a matter for the Constitution at all. We are not framing a code. We are not legislating in a Federal Parliament.'<sup>31</sup> Further Isaacs stated that no colony in Australia would 'dream of dismissing civil servants, if they had it in their power, for political reasons.'<sup>32</sup>

Moreover, Isaacs while agreeing that public servants should not be dismissed for political reasons, and stating that he was prepared to support real protections for public servants, said that the amendment proposed by Wise would merely give the illusion of protection. The amendment proposes that a public servant can only be dismissed for a stated cause. But, said Isaacs, as no authority is to be established to monitor the reasons given, to decide whether the reason 'is right or wrong or justifiable or not' the protection offered is only illusory.<sup>33</sup>

Finally, Symon (SA) said:

Suppose a man is dismissed, and a reason has to be assigned. The reason would simply be 'because his services are no longer required.' You would never be able to pin a Government down to a reason when they wished to get rid of an undesirable civil

servant. To carry the amendment would be to introduce words having no real effect, affording no real protection, and beneath the dignity of the Constitution.<sup>34</sup>

In the event the amendment was rejected by 28 votes to eight votes.

Section 67 of the Constitution, dealing with the appointment of public servants, provides:

Appointment of civil servants.—Until the Parliament otherwise provides, the appointment and removal of all other offices of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

The Commonwealth Parliament opened on 9 May 1901. Less than one month later, on 5 June 1901, Sir William Lyne (Nationalist Protectionist Union Party), Minister for Home Affairs in the first Barton Protectionist Government, introduced the Public Service Bill into the House of Representatives.<sup>35</sup>

An overriding concern of those who contributed to the debate over the Public Service Bill was to ensure that political patronage played no part in appointments to, or promotions within, the Commonwealth Public Service. Mr Ewing (Protectionist) noted that the first great principle of the Bill 'appears to be that it is absolutely free of political influence.'<sup>36</sup> Deakin (Protectionist), too, considered it in the interests of the Service and the public 'to banish the personal element and political patronage.'<sup>37</sup> Mr Hume Cook strongly approved 'of having the Public Service Act ... free from political control.'<sup>38</sup> And, Mr Salmon agreed with 'honourable members in desiring that that service shall as far as possible be absolutely of a non-political character.'<sup>39</sup> The only way this could be obtained, Salmon continued, was by the introduction of 'fair, equitable, and just legislation'. Further:

It is only by the proper treatment of those employed in the service of the public, that we can hope to make that service a success as a non-political organisation. So long as we fail by legislation to make proper provision for the tenure of office, the conditions under which the men work, the hours during which they labour, and especially the amount of remuneration paid, so that they shall not be subject to capricious treatment by any particular officer in their department, so long shall we have appeals to the highest authority—the Parliament—in order to remedy their grievances.<sup>40</sup>

In guarding against political patronage, the debate over the Public Service Bill also drew attention to the need to guard against, what Ewing referred to as, 'bureaucratic influence, or what might be called departmental favour or patronage.'<sup>41</sup> Similarly, Lyne did not wish to see 'social influence' substituted for political influence.<sup>42</sup> Salmon stated that the law enacted by the Parliament must be such that it will be 'impossible for any man to be foisted on the Public Service either by a Minister or by a Member of Parliament, or by the exercise of social influence.'<sup>43</sup>

Quick (Protectionist) commended to the House the provisions of the Bill relating to appointments to the Public Service. A potential appointee must first pass both physical and educational examinations. He is also required to serve a probationary period of six months, during which time his fitness and aptitude for office may be assessed. These provisions, Quick contended, 'will put entry of a person into the Service absolutely beyond the reach of political patronage, political influence, or nepotism of any kind.'<sup>44</sup>

Speakers on the Bill, while preferring a decline in political influence, nevertheless voted for the retention of parliamentary control over the Public Service.<sup>45</sup>

The *Public Service Act 1902* (Cwlth) provided for entry to the Service by 'open, competitive, and written examinations', appointments at a junior level with more senior positions closed to outside entrants.<sup>46</sup> As the 1959 Report of the Committee of Inquiry into Public Service Recruitment, the Boyer Report, observed, the system of appointment 'was adopted at a time when the evil effects of political patronage and official nepotism were still vivid in the minds of legislators and electors.'<sup>47</sup>

In 1920, the first Public Service Commissioner (1902–1916), Duncan McLaughlan, provided his Report of the Royal Commission on Public Service Administration. McLaughlan recommended that appointment and promotion of departmental heads 'should be made by the Governor-General on the recommendation of the Commissioner, and that where the Governor-General is unable to accept any such recommendation, the matter should be made subject of a report to Parliament.'<sup>48</sup> This would ensure, McLaughlan continued that such appointments were free 'from any suspicion of outside influence.'<sup>49</sup>

The *Public Service Act 1902* (Cwlth) was replaced by the *Public Service Act 1922* (Cwlth), however, McLaughlan's recommendation was not adopted.

In 1959 the Boyer Report stated that s. 54 of the *Public Service Act 1922* (Cwlth) 'embodies the principle that the Executive Government should have the final word in the appointment of its chief policy advisers.'<sup>50</sup> At that time s. 54(1) provided that subject to s. 54(2) all First Division appointments were to be made by the Governor-General on the recommendation of the Board of Commissioners. Section 54(2), however, provided that 'notwithstanding anything contained in this Act, appointments may be made by the Governor-General without reference to the Board.'

The Boyer Report noted that while generally the Board of Commissioners was consulted in relation to First Division appointments, s. 54(2) left open the 'making of a purely political appointment, should any future Government be so minded.'<sup>51</sup> It was therefore recommended that legislation be enacted requiring the Government to consult with the Board of Commissioners before appointments are made at this level. The Report also recommended that 'any departure from the recommendation of the Board should be required to be notified to Parliament.'<sup>52</sup> The recommendation was not adopted, and s. 54(2) remained in the Act until its repeal in 1976 by the *Public Service Amendment (First Division Officers) Act 1976* (Cwlth).



From time to time, departmental head appointments have been subject to some degree of controversy. After becoming Prime Minister Gorton (Liberal) replaced the then head of the Prime Minister's Department, Sir John Bunting, with Mr Len Hewitt, 'a long term friend of the Prime Minister'.<sup>53</sup> This, it has been said, caused resentment in the Public Service—not because of Bunting's removal (he was appointed head of the new Cabinet Secretariat)—but because of the 'needlessly humiliating manner' in which it was done.<sup>54</sup>

In 1974, Mr Katter (CP) criticised the then Whitlam Labor Government for its 'unique ability ... to provide jobs for the boys' which had led to a 'complete dropping of morale in the Public Service of this nation'.<sup>55</sup> Mr Katter criticised, for example, the appointment of Mr John Menadue. In 1974, Mr Menadue had been appointed Secretary to the Department of Prime Minister and Cabinet. The Whitlam Government appointed 21 departmental heads between 1972 and 1975, 'seven from outside the Service. This kind of turnover was quite without precedent in Australian political history'.<sup>56</sup>

In response to Mr Katter, Dr Gun (ALP) noted the large number of appointments, particularly to ambassardorial positions, made by Liberal-Country Party Governments and concluded:

Perhaps the most overt political appointment of the lot was the appointment of the present Chief Justice of the High Court [i.e. Barwick] who was becoming a threat to the then Prime Minister.<sup>57</sup>

Little more was said on this issue at the time and Dr Gun went on to address the 'dangerous practice of the sale to children of chocolates which are packaged to resemble cigarettes'.<sup>58</sup>

The 1976 Royal Commission on Australian Government Administration, the Coombs Report, described the prevailing practice of appointing departmental heads as follows:

In practice the minister and the Prime Minister in most cases consult the [Public Service] Board, and recommendations receive Cabinet approval before being submitted to the Governor-General.<sup>59</sup>

The Coombs Report made a number of recommendations in relation to the appointment of departmental heads. First it recommended the abolition of the designation, 'permanent head', and the use of the term 'head of department'. Further it recommended that vacancies at the departmental head level be advertised, that a panel appointed by the Prime Minister and the relevant Minister following consultation with the Chair of the Public Service Board nominate a short list of potential appointees, that the Minister be able to nominate a candidate, that a short list in order of preference be given to the Prime Minister and the Minister and that the relevant Minister and Cabinet approve the selection.<sup>60</sup> The Report also advocated the rotation of departmental officers but rejected the notion of fixed term contractual appointments.<sup>61</sup>

In introducing the Public Service Amendment (First Division Officers) Bill 1976 in November 1976, Liberal Prime Minister Malcolm Fraser said that 'the political neutrality of the Public Service' was an important foundation of the parliamentary system of government.<sup>62</sup> Fraser continued:

One of the best safeguards of the political neutrality of the Public Service is a system of appointment—particularly of appointment to senior positions—which minimises the possibility of appointment for purely partisan reasons and increases the chance of making the best possible appointment.<sup>63</sup>

To this end, s. 54 of the *Public Service Amendment (First Divisions Officers) Act 1976* (Cwlth) provided that appointments in the First Division were to be made by the Governor-General, and in the case of a departmental head, the appointment was to be made on the recommendation of the Prime Minister. The Prime Minister had to first receive a report from a committee which included at least two departmental heads and was chaired by the Chairman of the Public Service Board.

Section 54 of the *Public Service Amendment (First Divisions Officers) Act 1976* (Cwlth) distinguished between appointees drawn from within the Public Service from outside candidates. Outside candidates were appointed for a period not exceeding five years, but subject to reappointment: s. 54(8). The appointment of a candidate from outside the Public Service could be terminated by the Governor-General prior to the end of the five year period if the Prime Minister making the recommendation to terminate the appointment was of a political party different to the Prime Minister who recommended the appointment: s. 54(9).

In 1984 the Hawke Labor Government introduced the *Public Service Reform Act 1984* (Cwlth), repealing the appointment provisions inserted by the Fraser Government in 1976. In the second reading speech to the Public Service Reform Bill 1984, then Minister Assisting the Prime Minister for Public Service Matters in the Hawke Labor Government, the Hon. John Dawkins MP, said that the provisions introduced by the Fraser Government 'are gratuitous and they place inappropriate power in the hands of the public servants involved.'<sup>64</sup> This Bill, Dawkins continued, requires the Governor-General to appoint departmental heads on the recommendation of the Prime Minister, after the Prime Minister has obtained a report from the Chair of the Public Service Board.<sup>65</sup>

In indicating support for the Bill, Mr Ruddock (Liberal) said that the proposed legislation could change the nature of the Public Service from having a 'capacity to offer apolitical advice'. However Ruddock noted that should this occur, the Opposition will draw it to the public's attention.<sup>66</sup> And Mr Connolly (Liberal) stated:

Under the new arrangements the Government may appoint people from outside as heads of departments. ... we [i.e. the Opposition] believe that it is essential that it always be incumbent upon the government of the day to be ultimately responsible not only for the quality of public administration but also for the appointment of those officers who

ultimately are responsible for the application of policy as required by the government of the day.<sup>67</sup>

After two years before the Parliament, the *Public Service Act 1999* (Cwlth) was enacted in late 1999 by the Howard Coalition Government. It was described by the responsible Minister, the Hon. Dr David Kemp MP, as 'the biggest overhaul and reform of the Australian Public Service in more than 75 years.'<sup>68</sup> The Hon. Peter Reith MP, noted that the Public Service Bill 1997 'provides a wholly new conceptual framework.'<sup>69</sup> Further, Minister Reith noted that 'the employment decisions for which secretaries are responsible must be made without nepotism, patronage, administrative favouritism or political influence.'<sup>70</sup>

In relation to the appointment of departmental heads, s. 58 of the *Public Service Act 1999* (Cwlth) provides that the 'Prime Minister may appoint a person to be Secretary of a Department for a period of up to five years'. In relation to appointments to the office of Secretary of the Department of Prime Minister and Cabinet the Prime Minister must first receive a report from the Public Service Commissioner. In relation to other head of department appointments the Prime Minister must receive a report from the Secretary of the Prime Minister's Department. As the Explanatory Memorandum to the Public Service Bill 1997 points out, s. 58(1) is similar to the previous Act except that the appointment power now rests with the Prime Minister rather than the Governor-General.

This brief overview of the various processes in place from time to time over the past 100 years for appointing departmental heads may suggest a very limited role of Parliament in that process. There has not, for example, been any legislative requirement for Parliament to approve the appointment of departmental heads, and proposals to increase Parliamentary scrutiny by, for example, requiring reports to Parliament in certain circumstances have not been adopted.<sup>71</sup>

But does this reflect disinterestedness on the part of Parliament? Perhaps not. There is, after all, no Constitutional requirement for the employment of Commonwealth public servants, including senior public servants, to be governed by legislation. Nevertheless, Parliament has seen fit to regulate by legislation, Public Service employment—including the employment of departmental heads—over the past century, and continues to do so. It is true that Parliament does not have a direct role in the selection and appointment of departmental heads, or other public servants for that matter. Perhaps there is general agreement amongst Parliamentarians with the view expressed by Minister Dawkins in the mid-1980s that decisions concerning departmental heads 'have always been ultimately and properly for the government of the day.'<sup>72</sup>

This view would no doubt have found considerable support amongst the framers of the Constitution. As Barton noted in the context of appointments to the High Court, encumbrances should not be placed on the right of the Executive to make appointments 'to offices high or small'.<sup>73</sup>

## **Appointments to the Judiciary**

The method of appointing federal judges, that is, by the Governor-General in Council, has remained unchanged since Federation. Indeed, the method of appointing federal judges is the same as that proposed in the draft Constitutional Bill adopted by the Constitutional Convention on 9 April 1891. Clause 3 of chapter 3 of the draft Bill provides in part:

The Judges of the Supreme Court and of the other Courts of the Commonwealth shall be appointed ... by the Governor-General by and with the advice of the Federal executive Council.

In the late nineteenth century, spurred on by economic, security and immigration concerns, the delegates to the Constitutional Conventions sought to create a Federation from a number of independent, self-governing colonies. The Parliaments of the various colonies were jealous to protect their legislative powers and the proposed Federal Parliament was to have only those powers given to it by the Constitution.

The Convention delegates understood that the role of the High Court would be pivotal to the success of the proposed Federation. Essentially, the delegates considered that the Court would decide disputes between the Commonwealth and the States as to their respective legislative powers. As Trenwith said on 1 February 1898:

If at any time a difference arises between a state Parliament and the Federal Parliament as to the powers of either, the High Court will be the tribunal to finally decide the issue.<sup>74</sup>

Similarly in April 1897, Trenwith said:

We want to create a unification in a central body for specific purposes, but we are extremely anxious that the central body shall deal with nothing else but what we submit to it. Therefore, we shall have a strong and dignified custodian of the Constitution.<sup>75</sup>

And on 20 April 1897, Downer stated:

I look upon this part of the Bill as the most important of all, because this court is what we have to look to, what all the States have to look to, for the protection of the Constitution.<sup>76</sup>

The framers of the Constitution did not consider the High Court to be a protector of human, or individual rights, a role more recently ascribed to the Court by some commentators. The role of the High Court has been succinctly stated by David Solomon:

The High Court of Australia stands at the peak of the of legal system. Since 1986 it has been the ultimate court of appeal for all Australian courts. It is responsible for determining the meaning of the Commonwealth Constitution, and it has the final say on the meaning of laws passed by the Commonwealth, State and Territory Parliaments. It also determines the common law for Australia ...<sup>77</sup>

The framers regarded it as settled that judges chosen to sit on the High Court would be appointed by the federal executive. Given their adherence to, and understanding of, responsible government, they considered the people would hold the government accountable should improper appointments be made. For example, in rejecting the proposal that restrictions should be placed on the appointment of politicians to the federal judiciary, O'Connor (NSW) noted that the people must be left to judge 'and to watch over the purity of the administration.'<sup>78</sup> Barton too did not believe impediments should be placed in the way of the Executive making appointments to offices, high or low:

The Executive of the Commonwealth are, in a constitutional sense, the guardians of every right and privilege of the people, and being the constitutional guardians of the people, their right in the choice of appointment to offices high or small should not have an encumbrance placed in its way.<sup>79</sup>

They were, however, keen to ensure that the Court would be independent of the Executive and Parliament and that it would be strong. For example, a proposal put forward by Glynn (SA) that, initially at least, the High Court would consist of a Chief Justice and the Chief Justices of the States,<sup>80</sup> was strongly opposed by a number of delegates and failed to win the support of the Convention.

Barton, for example, maintained that the High Court should be open to talent, wherever that talent may reside. Downer agreed, stating:

I would not limit the area of selection in the slightest degree; but I would do two things. I would do this—I would say that a Judge of the Federal Court should not occupy the dual position of Judge of the Federal Court and Judge of any state court.<sup>81</sup>

Further, Barton argued that Glynn's proposal would lead to suspicion that the judges on the High Court were not impartial and that they were appointed to represent the State from which they came. Glynn's proposal would lead:

to a suspicion that the Chief Justices chosen from the various states were intended to be in some sort of way the representatives of provincial interests, and that it was not intended that the court in its impartiality should be representative of the Commonwealth as distinct from the provinces.<sup>82</sup>

Symon (SA) made similar criticisms. The Federal Executive should not be limited as to who it may appoint to the High Court. Further when a judge is appointed from a State Supreme Court he should resign his position on that Court. Otherwise, Symon said:

You are sending an arbitrator from each state to sit on the judicial bench, who will go, as arbitrators often do, as a partisan.<sup>83</sup>

There was also a concern, expressed by Higgins (Vic.) that if Glynn's proposal was accepted High Court judges may in practice be elected. After all Higgins reminded the

delegates there is nothing in the Constitutions of the States to prohibit the States from choosing their Supreme Court judges by election:

It is quite true, and very happily so, that under the different Constitutions of the different states of Australia it is the practice to appoint the Chief Justice and all Judges of the Supreme Court during good behaviour. But there is nothing to hinder the Judges being made elective as in America. ... and I can only say from my slight experience of the working of the American courts, that I sincerely hope we shall never have our Judges elected.<sup>84</sup>

In order to maintain the independence of the High Court, the delegates argued that the Constitution should provide for a minimum number of judges, and that the judges, once appointed, could only be removed by the Governor-General on an address from both Houses of Parliament on the basis of proved misbehaviour or incapacity.<sup>85</sup> The proposal, that there be a minimum number of judges, was to guard against the temptation of an Executive dissatisfied with a decision of the Court simply not making appointments until it secured a bench of its liking. The delegates were well aware the decisions of the Court may not always be popular and hence the Court needed to be protected.

## **Options for Selecting High Court Judges: a Brief Overview**

### **The Current Position—Appointment by the Governor-General in Council**

The Constitution says very little about the selection and appointment of High Court judges. The Constitution provides that High Court appointees must be less than 70 years of age and that the Court shall consist of a Chief Justice and at least two other Justices. At present, the High Court consists of seven judges: the Chief Justice and six Justices. There have been seven judges on the Court since 1947. From 1903 to 1906 there were three judges; from 1906–1912 there were five judges; from 1912 to 1931 there were seven judges; from 1931–1947 there were six judges.<sup>86</sup>

Section 72 of the Constitution provides for the appointment, tenure and remuneration of federal judges. As to tenure, a federal judge may only be removed by the Governor-General on an address from both Houses of Parliament on the 'ground of proved misbehaviour or incapacity.' A federal judge must retire at age 70.

On the appointment process itself, the Constitution is very brief. Section 72 relevantly provides:

The Justices of the High Court and of the other courts created by the Parliament—

Shall be appointed by the Governor-General in Council

As Jacobs said in 1938:

High Court judges are appointed by the Governor-General in Council; other judges by the Governor in Council. In reality of course, the appointments are made by the Federal and State ministries on the recommendation of the Federal and State Attorneys-General. The actual part played by the Attorney-General when an appointment is made, no doubt varies in different cases. His Ministerial colleagues may or may not agree to appoint his nominee, and may overrule him. Theoretically, I suppose, an Attorney-General should resign his position in such a case, though I have never heard of so strange a thing happening.<sup>87</sup>

And, as former High Court Chief Justice, Sir Anthony Mason has observed, in practice, the appointment of judges by the Governor-General in Council 'means an appointment by Cabinet on the recommendation of the Attorney-General.'<sup>88</sup>

In 1975 a NSW Legislative Assembly Select Committee Report on the appointment of High Court judges recommended the establishment of a High Court Appointments Commission made up of the Commonwealth and State Attorneys-General. The Commission would play an advisory role in relation to High Court appointments, with appointments being made by the Governor-General on the advice of the Federal Executive.<sup>89</sup> This advisory Commission was never established.

Although there was no Constitutional or legislative requirement for the federal executive to seek the views of anyone, in 1978, the then Attorney-General in the Fraser Coalition Government, Senator Durack, gave an undertaking that he 'would consult with State Attorneys-General about future appointments by that Government to the High Court.'<sup>90</sup> Durack did not, however, 'consult on a formal basis with professional bodies because I felt there could be some possible conflict of interest.' Further:

My practice was to consult on a informal basis with a number of people whose views I respected. The idea was, in the first place, to get a short list from which a final recommendation would be made.

There was usually prior discussion with the Prime Minister and some other members of Cabinet about possible appointees. This would have been on an informal basis. I only put one name to Cabinet but other names would have been raised by colleagues in both the prior informal process as well as in Cabinet.<sup>91</sup>

In 1979 the *High Court of Australia Act 1979* (Cwlth) was amended by the insertion of s. 6 which provides that the Commonwealth Attorney-General is to consult with the State Attorneys-General before an appointment to the High Court is made.

The *High Court of Australia Act 1979* (Cwlth) only requires consultation: the Commonwealth Attorney-General is not required to seek the approval of the State Attorneys-General. Further, while not required to do so, the Attorney-General usually consults more widely, including, for example, senior members of the judiciary and the

legal profession. This was recently acknowledged by Justice Michael Kirby. In advocating 'a more open procedure of consultation and appointment', his Honour said:

The procedure of consultation is now quite formalised. The federal Attorney-General also takes considerable time in consulting judges, legal professional groups, political parties and others.<sup>92</sup>

In 1997 the then Premier of Queensland, Mr Borbidge speaking about the consultation process particularly as it relates to s. 6 of the *High Court of Australia Act 1979* (Cwlth), stated that the 'experience of the States has been uniformly disappointing. The obligation to consult is largely empty.'<sup>93</sup>

The process of appointing judges to the High Court of Australia is not unique. Indeed, appointment to the superior courts in each of the Australian States and Territories, in Great Britain, Canada and New Zealand is by the government of the day. Further, 'in most jurisdictions where judges are appointed by the Executive, no clear standardised procedures exist beyond statutory requirements of professional qualifications.'<sup>94</sup>

### Appointment by the Executive Following Formal Consultation with a Judicial Appointments Commission

Appointment by the Executive following formal consultation with a Judicial Appointments Commission is, to some extent, a formalisation of the existing ad hoc procedure. A Judicial Appointments Commission would be tasked with developing and promulgating appropriate selection criteria and possibly interviewing potential appointees. The Attorney-General would then be required to consult with the Commission on possible judicial candidates. The Commission would most likely consist of a membership appointed by the Executive, and including, for example, the Chief Justice of the High Court and perhaps representatives from the State Supreme Courts, State Attorneys-General, senior members of the legal profession, legal academics and community representatives.

Writing in 1980, John Basten, then Senior Lecturer in Law, University of New South Wales, succinctly summarised the underlying rationale for this model:

It is perfectly acceptable in a democratic system that an elected minister should be able to appoint public officials. The Attorney-General effectively holds and, in my view, should retain that power. On the other hand there is a need for a body that can assist in selecting and vetting candidates for appointment.<sup>95</sup>

High Court Judge, Justice Michael Kirby, has, however, criticised the proposal arguing that a Judicial Commission 'has all the hallmarks of an institutional arrangement that could deprive our judiciary of the light and shade that tend to come from the present system.'<sup>96</sup> Further, in rejecting Sir Garfield Barwick's proposal for the introduction of a judicial commission, Senator Peter Durack said in 1980:



I think that the traditional English methods under which the Executive exercises and accepts responsibility for judicial appointments provides the appropriate balance. It would be regrettable if we developed a judicial class remote from the concerns and feelings of the community.<sup>97</sup>

### Appointment a Judicial Appointments Commission or by the Executive on the Recommendation of the Commission

Under this model the power of appointment is effectively taken out of the hands of the Executive and placed with a Judicial Appointments Commission. Some variants of this model transfer the power of appointment to the Judicial Appointments Commission. Even where the Commission is tasked only with making recommendations to the Executive, which retains the power of appointment, the role and power of the Executive is clearly limited as it can only choose from the candidates recommended to it.

Membership of the Commission would most likely include senior judges, senior members of the legal profession, legal academics and perhaps community representatives. Parliamentary representation may or may not be included.

This model is quite different to the current regime, and indeed, to the formal consultative model referred to above. South Africa has adopted a version of this model in relation to appointments to its courts, including to the South African Constitutional Court.

The South African Constitutional Court consists of a President, a Deputy President and 9 other judges. The President of South Africa appoints the President and Deputy President of the Constitutional Court 'after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly.'<sup>98</sup> The South African President also appoints the other judges of the Constitutional Court after consulting the President of the Court and the leaders of the parties represented in the National Assembly. The following procedure must be followed:

- a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.<sup>99</sup>

The Judicial Service Commission consists of 23 members as follows:

- three senior judges, including the President of the Constitutional Court

- the Justice Minister
- two barristers, nominated by the Bar
- two solicitors, nominated by the profession
- a legal academic designated by university teachers of law
- six members of the National Assembly (three of whom must be members of the Opposition)
- four permanent delegates of the National Council of Provinces, and
- four persons designated by the President following consultation with leaders of all political parties in the National Assembly.<sup>100</sup>

The Judicial Service Commission may determine its own procedures.<sup>101</sup> For example, it conducts interviews with potential candidates for judicial office in public and indeed transcripts of interview are published on the Internet.<sup>102</sup>

One of the key concerns with the previous method of appointing judges—that is by the Executive—was the way in which the entire process was shrouded in secrecy. However, in a recent review of the Judicial Service Commission, Lecturer in Law at the University of London, Dr Kate Malleson has noted that while the interviews of candidates may be in public, 'very few observers attend in person. ... The effect of the current arrangements is that the majority of the country probably have no greater knowledge of the judges who are being appointed or the process by which they are chosen than they did under the old appointment process.'<sup>103</sup>

Sir Garfield Barwick, in 1995, suggested that High Court judges should be chosen by a Judicial Appointments Committee following the receipt of nominations from the Executive. Sir Garfield's proposal, and his earlier, more general proposals, aired in 1977, are discussed further below.

## Appointment by Parliament

Again there are various versions of this model. The Executive might nominate candidates who are then subjected to scrutiny and ratification by, for example, a joint sitting of both Houses of Parliament, one House of Parliament (say, the Senate) or by a Joint Parliamentary Committee. Alternatively, Parliament may elect judges from, for example, candidates nominated by the Executive.

This model is most often associated with the system adopted in the United States for appointments to the Supreme Court, as well as other federal courts.

Article II, s. 2 of the United States Constitution provides in part that the President:

shall nominate, and by and with the advice and consent of the Senate, shall appoint ...  
judges of the Supreme Court.

There are no standard procedures or guidelines that must be followed by a President in selecting a nominee for the Supreme Court, so that the process may, and does, vary from one President to the next. By way of example, however, Goldman and Slotnick have described the nomination and appointment process in relation to federal judges during the Clinton Administration.<sup>104</sup> Before the President puts forward a nomination to the Senate a relatively extended screening process is carried out.

First the White House counsel's office sends a list of potential nominees to the Justice Department. The Justice Department then assigns lawyers to individually vet each nominee. The lawyer reviews all the printed material written by or about the nominee. The lawyer then conducts a one to two hour telephone interview with the nominee. References are then sought from a wide range of people, including for example, judges before whom the nominee has appeared, co-counsel and opposing counsel. A working group within the Justice Department then meets and considers the material gathered by each lawyer. Senior members of the Justice Department may then interview the nominee, and if he or she is successful assessments will be obtained from the FBI and the American Bar Association. Finally, a joint White-House-Justice Department committee (the Judicial Selection Group) will meet and decide whether to recommend nomination to the President.<sup>105</sup>

The President then forwards his nomination to the Senate, for consideration by the Senate Judiciary Committee. The staff of individual Committee members will then investigate the nominees, the members are lobbied by a range of groups and hearings are usually held.

Critics of the process of judicial appointment suggest that it has become too political and that the system has broken down. However, Watson and Stookey argue that any attempt to choose Supreme Court judges on the basis of 'objective merit' rather than political deliberations is doomed to fail.<sup>106</sup> In 1992, then presidential candidate, Bill Clinton was asked whether judicial appointments should only be made from a list of candidates prepared by a commission of lawyers and others. Clinton's answer was:

It's an interesting idea and worth consideration. Ultimately, however, judicial appointments are the fundamental responsibility of the president.<sup>107</sup>

## **Constitutional Commissions**

Since Federation there have been a number of commissions or conventions set up to review the operation of the Constitution, the most recent in 1998. The 1998 Convention focused on whether Australia should move from a constitutional monarchy to a republic, and if so, how the president of that republic should be chosen. The Convention was not invited to review the Constitution generally, and it did not consider the issue of whether the current procedure for appointing High Court judges should be amended.

The appointment process was, however, considered by Constitutional Conventions in the mid-1970s and the late 1980s.

The Australian Constitutional Convention 1973–85 considered it unnecessary to make a recommendation with respect to the appointment of federal judges. Further, proposals that the Constitution be amended to provide for State participation in the appointment of High Court judges or that the Commonwealth must first confer with the States before making an appointment, were not accepted.<sup>108</sup>

In its 1988 Report, the Constitutional Commission 1985–88, set up by the Hawke Labor Government in December 1985, recommended that 'no alteration be made to the Constitution relating to the appointment of federal judges.'<sup>109</sup>

## **Parliamentarians' Views**

Very few Attorneys-General, or indeed other Parliamentarians, have offered their views on how members of the judiciary should be chosen. In a paper delivered to the Judicial Conference of Australia in November 1996, the then president of the Australian Bar Association, Mr Gotterson QC, observed:

I suggest that we may glean in the apparent reticence of Attorneys-General to write candidly upon the subject, a strong desire on the part of the Executive government of all political colours for the maintenance of the current constitutional arrangements whereby judges are appointed by the Governor-General in Council or a Governor in Council.<sup>110</sup>

While there has been criticism in Parliament following the appointment of some High Court judges, the Parliamentary Debates do not reveal any overall dissatisfaction with the method of appointment itself.

The reaction to the appointment of Albert Piddington to the High Court in 1913 is an illustrative example. Piddington was appointed after Attorney-General Hughes (then Labor) first confirmed Piddington's views on the supremacy of Commonwealth powers in relation to those of the States.<sup>111</sup> While there was considerable unrest following the announcement of Piddington's appointment, particularly from the New South Wales and Victorian Bars, and from the media,<sup>112</sup> Parliament itself did not however call for changes to the process of appointment. In the event, Piddington resigned before taking his seat on the Court.

In September 1913, Dr Maloney criticised the appointment of Piddington to the InterState Commission, arguing if Piddington was not good enough for the High Court he was not good enough to serve on the InterState Commission. Maloney observed that 'because a few members of the Lawyers' Trade Union (i.e. the Bar association) did not think he was fit to be a High Court judge' Piddington 'climbed down'.<sup>113</sup> Maloney then called for judges

to be elected by Parliament, observing that when Parliament elects judges 'there will be more justice in the land.'<sup>114</sup> Maloney's call was, however, not responded to.

In 1930, while Prime Minister Scullin and Attorney-General Brennan were overseas, the Labor Caucus 'instructed cabinet to make two appointments to the High Court',<sup>115</sup> and Justices Evatt and McTiernan were appointed in December 1930. There was some debate in Parliament following their appointments, Archdale Parkhill (UAP) suggesting there was 'something sinister about the appointments'<sup>116</sup> and Opposition Leader Latham—himself a later appointee to the High Court—moved a motion of no confidence in the Government. There were no calls for wholesale changes to the method of appointment—quite the contrary. On 17 March 1931, Mr Latham criticised the Government of the day for straying from its proper duty:

The Government has the grave responsibility of appointing judges. In Great Britain, and in all the dominions under the British Crown, the people, the Parliaments, and the governments have, up to the present, sternly resisted any appointment of judges by votes of electors, or by votes of any political party. This objection to any system of electing judges is an essential part of responsible government as we know it.<sup>117</sup>

In his response, Mr Scullin agreed that he, along with the Attorney-General, Mr Brennan, had protested the appointments of Justices Evatt and McTiernan in their absence, and continued:

I take the view that no suspicion of political influence should surround an appointment to the High Court. I always have, and always will, hold that view.<sup>118</sup>

Earlier, on 11 March 1931, Scullin had, with some irony, reminded the House that the Opposition, when in Government, had appointed serving politicians to the Bench and asked whether:

such appointments to the High Court by a Labor Government savour of political partisanship, while similar appointments made by a non-Labour government are in a different category.<sup>119</sup>

The appointment of Lionel Murphy, Attorney-General in the Whitlam Labor Government, to the High Court in early 1975 again illustrates the theme that while there may be opposition, indeed in some cases strident opposition, to individual appointments, Parliamentarians have been most reluctant to call for changes to the appointment process itself.

For example in relation to the appointment of Murphy to the Court, Mr Viner, Liberal Member for Stirling, said on 19 February 1975:

There can be no doubt of the constitutional propriety of the actions of the Prime Minister (Mr Whitlam), through his Government, and of the advice which his Government gave

to the Governor-General to have the then Attorney-General appointed to the High Court.<sup>120</sup>

Sir Garfield Barwick, Attorney-General in the Menzies Government and Chief Justice of the High Court from 1964 to 1981, however rejected the prevailing method of appointment in favour of appointment by a judicial services commission. Barwick considered appointment by the Executive alone was inappropriate,<sup>121</sup> arguing in 1995 that:

Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation, or at least an expected affinity in judgment to the philosophies of the party, form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it, even to the point of choosing the appointee merely to resolve a possible threat to the leadership.<sup>122</sup>

Barwick's attitude on the inappropriateness of the system of appointment by the Executive seems to have been formed in the mid-1970s. And, we may only speculate as to the extent to which the appointment of Murphy to the High Court consolidated Barwick's views. In 1977 he said that the time had now arrived for the Executive's unrestricted power of appointment to be curtailed, and he suggested the introduction of a judicial commission to advise the Executive on appointments.<sup>123</sup> Further, Barwick said:

Some may prefer to pass the actual choice of appointee to such a body; others may prefer that recommendations only may be made by it; yet others may prefer to require the submission by that body of a short panel of names, outside of which the Executive Government may not go; or may not go without public explanation of the reason for doing so.<sup>124</sup>

Barwick did not, in 1977, express his own view on the preferable approach. In 1995, however, he stated he preferred the model whereby the Executive put forward possible candidates from which the judicial commission would choose.

Barwick proposed that a 'standing commission, presided over by the appropriate Chief Justice and consisting of senior representatives of the Bar and solicitors, representatives of academic lawyers and of an appropriate section of the general public' should replace appointment by the Executive.<sup>125</sup> The Executive, represented by the Attorney-General would put forward names to the commission. The commission would consider the candidates put forward and either appoint them to the court or request the Attorney-General put forward further names. According to Barwick, 'the initiative should remain with the Executive, but the commission would have the final say.'<sup>126</sup> In this way, Barwick argued, the Executive would likely put forward only candidates of 'professional eminence, competence, integrity and capacity for judgment.'<sup>127</sup>

Lionel Murphy, High Court Justice from 1975 until 1986, also expressed concerns about the process of appointing judges. However, he did not advocate turning the power of appointment over to a judicial services commission. Indeed he may well have opposed the

establishment of such a body as he was concerned at 'the tendency for executive power to slide away from the elected to appointed officers and bodies is a remarkable feature of our political life.'<sup>128</sup> Rather, Murphy considered more effort should be focused on achieving balance in those appointed to the judiciary.

[I]t is extremely important what kind of person is appointed to the courts. In many countries there seems to be a reasonable balance of social classes, of races, of sexes. ... In Australia no attempt is made to achieve any balance.<sup>129</sup>

When Labor Shadow Attorney-General, Senator Gareth Evans published a paper, *The Politics of Justice: An Agenda for Reform*, in which he argued that High Court judges should continue to be appointed by the government of the day.<sup>130</sup> Evans stated:

[T]here is no point at all in the government of the day being coy or hypocritical about the appointment of judges. It should not relinquish the power of appointment to anyone else, and should use such opportunities to appoint to the Bench men—and women—who are known to be in general sympathy with its own aims and perspectives. This will happen anyway, just as appointments have always been made on this basis in the past. The notion that it is possible for the benches of the courts of the land, and especially the High Court, to be composed of wholly disinterested, wholly dispassionate, ideological eunuchs is another one of those fairy stories which we should have all outgrown.<sup>131</sup>

However, Evans was not advocating the appointment of 'malleable party hacks' to the Court,<sup>132</sup> and he continued listing six criteria he considered essential for appointment: intellectual capacity, intellectual creativity, intellectual integrity, experience of the 'real political world', personal integrity and 'a capacity to inspire general respect and confidence.'<sup>133</sup>

And former Attorney-General Durack has recently disclosed the qualifications that he considered a potential appointee should possess.

The appointee was required to be:

1. An absolutely first rate lawyer at the top of the legal profession. In view of the structure of the profession in Australia that virtually dictates that the person is either a judge of a superior court or a leading barrister.
2. A person of impeccable character, integrity, and independence.
3. An adherent of established legal doctrine, e.g. deciding cases according to legal principles.

Having chosen a list on that basis I would then have regard to a number of other matters. The person needed to have a sense of public duty and preferable some experience in Constitutional cases as well as the workings of Government and Parliament. However most leading barristers would almost certainly have had briefs from government on

constitutional and administrative matters. It seemed obvious that a judge of the High Court should have a sound understanding of the Federal system.

Known support for the government of the day should not be, and was not, required. I was looking for someone who would uphold the principles of the law.<sup>134</sup>

In September 1993 the then Labor Attorney-General, Michael Lavarch published a discussion paper, *Judicial Appointments—Procedure and Criteria*. The discussion paper stated that the aim of the judicial selection process should be to:

- make the selection process visible, and hence increase public confidence in the judiciary
- ensure the best possible candidates, and
- ensure no artificial barriers prevent the consideration of women and members of other groups on the basis of merit.

Further, in his address to the Australian Institute for Judicial Administration in late 1994, Mr Lavarch noted the importance of broadening the pool of potential appointees, as well as the need to carefully develop selection criteria.

On Friday 19 November 1993, Senator Carr (ALP) asked Senator Bolkus, the Minister representing the Attorney-General in the Senate what the Government was doing to 'implement its commitment to broadening the selection procedure for the judiciary?'<sup>135</sup> After advising the Senate of the appointment of Ms Sally Brown to the Family Court, Senator Bolkus noted there had been a positive community response to Mr Lavarch's discussion paper and that he, that is Mr Lavarch, hoped to be in a position to formulate proposals in the new year. Senator Bolkus continued:

It is very much the government's objective to have a judiciary which is much more reflective of the population, indeed much more reflective of the entire legal profession.<sup>136</sup>

Little, however, seems to have come of the discussion paper.

More recently, Senator Andrew Murray (AD), has suggested that a Judicial Appointments Committee be established to recommend appointees to the High Court.<sup>137</sup> While the Committee would recommend potential appointees, appointment would be made by the Governor-General in Council. The Committee would consist of the Commonwealth Attorney-General, one representative each from the Australian Bar Association and the Law Council of Australia, one academic (constitutional law), one community representative and two representatives from the States. Senator Murray argued:

The aim of the appointment process to the High Court should be to:

- make the selection process **transparent** and **open** to scrutiny



- ensure that appointment is on the basis of **merit**, and
- ensure **no artificial barriers** prevent the appointment of women and other under represented groups (*emphasis in original*).<sup>138</sup>

Senator Murray did not envisage a greater role for Parliament in the appointment process. Quite the contrary:

The Democrats' view is that the need for the three arms of Australian government to be independent precludes a greater role for Parliament in High Court appointments.<sup>139</sup>

## Conclusion

The framers of the Constitution were imbued with the notion of responsible government. To this end they required Ministers to hold seats in Parliament. There is almost no interest, either in or out of Parliament to amend the Constitution to allow Ministers to be chosen by other means—be it by Parliamentary election or by the appointment of talented members of the community who are not elected to Parliament. In relation to other executive appointments—to for example, the Public Service—those Parliamentarians who joined in the debate over the *Public Service Act 1902* (Cwlth) were keen to ensure a Public Service free of political patronage and influence. Their speeches indicate an experience of the evils of a Public Service infected by political influence and patronage and a desire to see it eradicated.

The framers saw the High Court as playing a pivotal role in the Federation and hence desired to see a strong and independent Court. Adhering to the principle of responsible government the framers considered that the appointment of judges to the High Court must be made by the Executive. Since Federation there has been criticism of individual appointments to the Court and there have been some calls for changes to the appointment process. Parliamentarians, themselves, however, have been most reluctant to advocate change to the appointment process. Further, to alter the method of appointing judges to the Court would alter fundamentally the structure of Australia's system of government, and those who advocate such change should clearly articulate their underlying political philosophy.

## Endnotes

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1. David Hamer, *Can Responsible Government Survive in Australia?*, Centre for Research in Public Sector Management, Belconnen, ACT, 1994, p. 73.
  2. R. J. L. Hawke, *The Resolution of Conflict*, Boyer Lectures, Australian Broadcasting Commission, Sydney, 1979, pp. 23–24.

3. See, for example: S. Cooney, 'Gender and judicial selection: should there be more women on the courts?' (1993) 19 *Melbourne University Law Review* 20; S. Fredman, 'Allies or subversives? The judiciary and democracy', (1998) 32(3) *Israel Law Review* 407; H. Gibbs, 'The appointment and removal of judges', (1987) 17(3) *Federal Law Review* 141; B. Harris, 'Appointments to the Bench—the role of a Judicial Services Commission (1993) 15 *Adelaide Law Review* 191; L. King, 'The Attorney-General, politics and the judiciary', Paper delivered at the Judicial Conference of Australia November 1999; M. Kirby *The Judges*, Australian Broadcasting Commission, Sydney 1983; T. Lawrence, 'Judicial Appointments—A system fit for change', (1993) 33 *Medicine, Science and Law* 280; K. Malleson, 'Assessing the performance of the Judicial Service Commission', (1999) 116(1) *South African Law Journal* pp. 36–49; A. Marfording, 'The need for a more balanced judiciary: the German approach' (1997) 7 *Journal of Judicial Administration* 33; A. Mason, 'The State of the Judicature', (1994) 68 *Australian Law Journal* 125; D. Meagher, 'Appointment of Judges', (1993) 2(3) *Journal of Judicial Administration* 190; P. Nicholson, 'Appointing High Court judges: Need for reform?', (1996) 68(3) *Australian Quarterly* 69; D. O'Sullivan, 'Gender and Judicial Appointment' (1996) 19(1) *University of Queensland Law Journal* 107; S. Shetreet, *Judges on Trial: A history of the appointment and accountability of the English Judiciary*, North-Holland Publishing Co., Amsterdam 1976; R. Thomson, *The Judges*, Allen & Unwin, Sydney 1987; M. Vranken, 'Judicial appointments in Belgium and the aftermath of the Dutroux Affair', (1999) 9 *Journal of Judicial Administration* 70; R. Watt, 'Judicial Appointments within a Federal Structure', (1996–97) *Lawasia* pp 51–64; and G. Winterton, 'Appointment of Federal Judges in Australia', (1987) 16(2) *Melbourne University Law Review* 185.
4. Sir H. Gibbs, Oration delivered at the opening of the Supreme Court Library's Rare Books Room, 11 February 2000, available at: [http://www.courts.qld.gov.au/library/rbr\\_gibbspeech.htm](http://www.courts.qld.gov.au/library/rbr_gibbspeech.htm)
5. *ibid.*
6. See for example, debate concerning the proposed appointment of Robert Ellicott to the High Court, *Sydney Morning Herald*, 29 January 1981, *Canberra Times*, 30 January 1981 and *Sydney Morning Herald*, 30 January 1981; and the appointments of J. Callinan, *Australian*, 19 December 1997, *Courier Mail*, 19 December 1997, J. Murphy, *National Times*, 17 February 1975, *Nation Review*, 27 February 1975 and of course Albert Piddington in 1913, see: D. Hodgkinson 'Albert Bathurst Piddington and appointments to the High Court of Australia', *Brief*, September 1999, pp. 26–27.
7. B. Galligan, *Politics of the High Court*, University of Queensland Press, St Lucia, Qld, 1987, p. 48.
8. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, Govt. Printer, Adelaide 1897, 19 April 1897, p. 937.
9. *ibid.*, 23 March 1897, p. 25.
10. At a speech to the Queensland Farmers' Federation in Brisbane on 18 February 1997, the then Queensland Premier, Mr Borbidge, put forward a number of suggestions aimed at stimulating discussion about the appointment of High Court judges. One suggestion was that High Court judges be elected at a referendum. This option, Mr Borbidge said 'recognises

that all Australians are directly affected by High Court decisions, and that when it comes to our fundamental law, the principle of democratic participation should apply.' Also for a discussion of 'judicial activism' and calls for increased political accountability of the High Court see: G. Craven, 'Judicial Activism in the High Court—A response to John Toohey' (1999) 28 *University of Western Australia Law Review*, 214 at p. 223. In 1987, George Winterton remarked that selecting judges by popular election 'is not really worthy of serious consideration': 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review*, 185 at p. 192. For a brief discussion of the system of election in the United States, see: E. Skordaki, *Judicial Appointments: An international review of existing models*, London, 1991, pp. 11–12.

11. Official report of the National Australasian Convention debates, Sydney, 2 March to 9 April, 1891, Govt. Printer, Sydney, 1891, 4 March 1891, p 36.
12. Official record of the debates of the Australasian Federal Convention; third session, Melbourne, 20th January to 17th March, 1898, Govt. Printer, Melbourne, 1898, vol. 2., 22nd February to 17th March 1898, 10 March 1898, pp. 2198–2199.
13. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, op. cit., 26 March 1897, p. 288.
14. Official report of the National Australasian Convention debates, Sydney, 2 March to 9 April, 1891, op. cit., 5 March 1891, p. 60.
15. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, op. cit., 26 March 1897, p. 169.
16. Official report of the National Australasian Convention debates, Sydney, 2 March to 9 April, 1891, op. cit., 4 March 1891, p. 34.
17. *ibid.*
18. *ibid.*, p. 35.
19. *ibid.*
20. *ibid.*, p. 40.
21. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, op. cit., 23 March 1897, p. 29.
22. *ibid.*, 26 March 1897, p. 184.
23. Proceedings of the Australasian Federal Convention held at Parliament House, Sydney, September 2nd to September 24th, 1897, Govt. Printer, Sydney, 1897, 17 September 1897, p. 791.
24. *ibid.*, p. 794.
25. Hamer, *Can Responsible Government survive in Australia?*, op. cit., p. 189.
26. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, op. cit., 19 April 1897, p. 916.
27. *ibid.*

28. *ibid.*, pp. 916–917.
29. *ibid.*, p. 917.
30. *ibid.*
31. *ibid.*, p. 919.
32. *ibid.*
33. *ibid.*
34. *ibid.*, pp. 919–920.
35. Senate and House of Representatives, *Debates*, 5 June 1901, p. 743.
36. *ibid.*, 13 June 1901, p. 1112.
37. *ibid.*, p. 1299.
38. *ibid.*, p. 1093.
39. *ibid.*, p. 1131.
40. *ibid.*
41. *ibid.*
42. *ibid.*, p. 1080.
43. *ibid.*, p. 1133.
44. *ibid.*, 19 June 1901, p. 1259.
45. *ibid.*, 13 June 1901, p. 1267, per Mr McCay.
46. Report of the Committee of Inquiry into Public Service Recruitment, [Boyer Report], Australian Government Printer, Canberra, 1959, p. 5.
47. *ibid.*
48. Report of the Royal Commission on Public Service Administration, Government Printer, Melbourne, 1920, p. 50.
49. *ibid.*
50. Report of the Committee of Inquiry into Public Service Recruitment, *op. cit.*, p. 28.
51. *ibid.*
52. *ibid.*
53. A. Reid, *The Gorton Experiment*, Shakepeare Head Press, Sydney, 1971, p. 45.
54. *ibid.*
55. House of Representatives, *Debates*, 31 October 1974, p. 3260.
56. S. Encel, 'Commentary on E. Campbell Ministers, Public Servants and the Executive Branch', in *Labor and the Constitution 1972–1975*, Gareth Evans, ed., Heinemann, Melbourne, 1977, p. 160.

57. House of Representatives, *Debates*, 31 October 1974, p. 3262.
58. *ibid.*
59. Royal Commission on Australian Government Administration, [Coombs Report], AGPS, Canberra, 1976, p. 98.
60. *id.*, at pp. 98–99.
61. *id.*, at p. 100.
62. House of Representatives, *Debates*, 18 November 1976, p. 2865.
63. *ibid.*
64. House of Representatives, *Debates*, 9 May 1984, p. 2152.
65. *ibid.*
66. *ibid.*, s, 30 May 1984, p. 2429.
67. *ibid.*, 30 May 1984, p. 2378.
68. *Public Service Bill Passed—a New Act for a New Century*, Ministerial Press Release, 20 October 1999.
69. House of Representatives, *Debates*, 26 June 1997, p. 6461.
70. *ibid.*, 26 June 1997, p. 6463.
71. Although in one jurisdiction in Australia, namely the Australian Capital Territory, employment contracts of departmental heads must be tabled in the Legislative Assembly: see s. 31A of the *Public Sector Management Act 1994* (ACT).
72. J. S. Dawkins, 'Reform in the Canberra system of public administration', *Australian Journal of Public Administration*, March 1985, 59 at p. 65.
73. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, *op. cit.*, 17 April 1897, p. 753.
74. Official record of the debates of the Australasian Federal Convention; third session, Melbourne, 20th January to 17th March, 1898, *op. cit.*, vol. 1, 20th January to 22nd February 1898, 1 February 1898, p. 367.
75. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, *op. cit.*, 19 April 1897, p. 940.
76. *ibid.*, 20 April 1897, p. 956.
77. D. Solomon, *The political impact of the High Court*, Allen & Unwin, North Sydney, 1992, p. 3. The Constitution provides for appeals to the Privy Council. Section 11 of the *Australia Act 1986* (Cwlth) ended appeals from the State Supreme Courts to the Privy Council, and for practical purposes the High Court is now the final court of appeal in Australia.
78. Official report of the National Australasian Convention debates, Adelaide, March 22 to May 5, 1897, *op. cit.*, 17 April 1897, p. 749.
79. *ibid.*, p. 753.

80. Official record of the debates of the Australasian Federal Convention; third session, Melbourne, 20th January to 17th March, 1898, op. cit.. v.1. 20th January to 22nd February 1898, 28 January 1898, p. 265.
81. *ibid.*, p. 276.
82. *ibid.*, p. 269.
83. *ibid.*, p. 270.
84. *ibid.*, p. 280.
85. Constitution, s. 72(ii).
86. E. Neumann, *The High Court of Australia: A collective portrait 1903–1972*, 2nd ed., University of Sydney, Sydney, 1973, p. 8. See Appendix 1 for Table of High Court Judges.
87. P. A. Jacobs, 'The mode of appointing judges', *Australian Law Journal*, 1938, 227 at pp. 277–228. In his article, Jacobs went on to recommend that judicial appointments should be made by the relevant Chief Justice, or failing that by the Executive on the recommendation of the relevant Chief Justice.
88. Quoted in R. Gotterson, 'The appointment of judges', Paper presented at the Judicial Conference of Australia, pp. 6–8, November 1998.
89. Report from the Select Committee of the Legislative Assembly upon the appointment of judges to the High Court of Australia Sydney, Government Printer, Sydney, 1975, p. 21.
90. Durack, Memorandum provided to author, 30 May 2000.
91. *ibid.*
92. M. Kirby, 'Modes of appointment and training of Judges—a common law perspective', Speech given at the ICJ/CIJL and CAJ Seminar, Belfast, 8 June 1999.
93. Borbidge, Speech to the Queensland Farmers' Federation, Brisbane, 18 February 1997.
94. E. Skordaki, *Judicial Appointments: An international review of existing models*, Law Society, London, 1991, p. 12.
95. J. Basten, 'Judicial accountability: a proposal for a judicial commission', 52(4), *Australian Quarterly*, 1980, 468 at p. 477.
96. M. Kirby, *The Judges*, Australian Broadcasting Commission, Sydney, 1983, p. 23.
97. Quoted in R. Thomson, *The Judges*, Allen & Unwin, Sydney, 1986, p. 82.
98. Section 174(3).
99. Section 174(4).
100. Section 178.
101. Section 178(6).
102. For example, the Commission's interview with Associate Professor Catherine O'Regan is at: <http://www.law.wits.ac.za/court/oregan.html>. Some of the questions put to Associate Professor O'Regan, who was in fact appointed a Judge of the Constitutional Court, include

questions about her age, the age of her children, how she would rate the South African Constitution in comparison with other Constitutions, whether she had ever been an active member of a political party and the appropriate method of appointing judges to the Constitutional Court.

103. K. Malleson, 'Assessing the performance of the Judicial Service Commission', 116(1), *South African Law Journal*, 1999, 36 at p. 45.
104. S. Goldman and E. Slotnick, 'Picking judges under fire', 82(6), *Judicature*, 1999, p. 265.
105. *id.*, at pp. 265–266.
106. G. Watson and J. Stookey, *Shaping America: The politics of Supreme Court appointments*, HarperCollins College Publishers, New York, 1995, p. 219.
107. *ibid.*
108. Australian Constitutional Convention, Melbourne, September 1975, pp. 24–26, 'Standing Committee D', *Report to Executive Committee*, 1 August 1974, p. 34.
109. Constitutional Commission, *Final Report*, vol. 1, Canberra, AGPS, 1988, p. 398.
110. R. Gotterson, 'The appointment of judges', Paper presented at the Judicial Conference of Australia, 6–8 November 1998.
111. Galligan, *Politics of the High Court*, *op. cit.*, p. 93.
112. *ibid.*
113. Senate and House of Representatives, *Debates*, 3 September 1913, p. 833.
114. *ibid.*
115. Galligan, *Politics of the High Court*, *op. cit.*, p. 107.
116. Senate and House of Representatives, *Debates*, 12 March 1931, p. 154.
117. *ibid.*, 17 March 1931, p. 271.
118. *ibid.*, p. 274.
119. *ibid.*, 11 March 1931, pp. 96–97.
120. House of Representatives, *Debates*, 18 February 1975, p. 512.
121. G. Barwick, *Radical Tory*, Federation Press, Sydney, 1995, p. 230.
122. *ibid.*
123. G. Barwick, 'The State of the Australian Judicature', 51, *Australian Law Journal*, 1977, 480 at p. 494.
124. *ibid.*
125. G. Barwick, *Radical Tory*, *op. cit.*, p. 230.
126. *ibid.*
127. *ibid.*

128. Quoted in J. Hocking, *Lionel Murphy: A political biography*, Cambridge University Press, Cambridge, 1997, p. 279.
129. *id.*, at p. 225.
130. G. Evans, 'The Politics of Justice: An Agenda for Reform', *Victorian Fabian Pamphlet*, Melbourne, 1981.
131. *id.*, pp. 13–14.
132. *id.*, at p. 14.
133. *id.*, at pp. 15–16.
134. Durack, Memorandum provided to author, 30 May 2000.
135. Senate, *Debates*, 19 November 1993, p. 3282.
136. *id.*, pp. 3282–3283.
137. Senator Andrew Murray '*Judging the Judges: Improving the procedures for judicial appointments to the High Court of Australia*', Self Published, 1997, p. 4.
138. *id.*, at p. 3.
139. Andrew Murray and Felicity Maher, 'Judging the Judges', *Alternative Law Journal*, August 1998, 185 at p. 186.



## Appendix 1: Judges of the High Court

Judge	Years of Service on Court	Age on Court	State	Prior Political Experience	
				Colonial and State	Commonwealth
1. Griffith C.J.	1903–19	58–74	Qld	M.L.A.; Minister; Chief Justice; Lieut-Governor	–
2. Barton J.	1903–20	54–71	NSW	M.L.A.; M.L.C.; Minister	M.H.R.; Prime Minister
3. O'Connor J.	1903–12	52–61	NSW	M.L.C.; Minister	Senator; Minister
4. Isaacs J. and C.J.	1906–30 (C.J. 1930)	51–75	Vic.	M.L.A.; Minister	M.H.R.; Minister
5. Higgins J.	1906–29	55–78	Vic.	M.L.A.	M.H.R.; Minister
6. Piddington J.	1913*	51	NSW	M.L.A.	–
7. Gavan Duffy J. and C.J.	1913–35 (C.J. 1931–35)	61–83	Vic.	–	–
8. Powers J.	1913–29	60–76	Qld	M.L.A.; Minister	Crown-Solicitor (non-Parl.)
9. Rich J.	1913–50	50–87	NSW	(NSW Supreme Ct)	–
10. Knox C.J.	1919–30	55–66	NSW	M.L.A.;	–
11. Starke J.	1920–50	49–79	Vic.	–	–
12. Dixon J. and C.J.	1929–64 (C.J. 1952)	43–77	Vic.	–	–
13. Evatt J.	1930–40	35–46	NSW	M.L.A. (Labour)	–
14. McTiernan J.	1930–76	38–84	NSW	M.L.A.; Minister (Labour)	M.H.R.
15. Latham C.J.	1935–52	58–75	Vic.	–	M.H.R.; Minister
16. Williams J.	1940–58	51–69	NSW	(NSW Supreme Ct)	–
17. Webb J.	1946–58	57–69	Qld	(Qld Supreme Ct)	–
18. Fullagar J.	1950–61	58–69	Vic.	(Vic. Supreme Ct)	–
19. Kitto J.	1950–70	47–67	NSW	–	–
20. Taylor J.	1952–69	51–68	NSW	–	–
21. Menzies J.	1958–74	51–67	Vic.	(Non-Parl. Member of Young Nationalists and Liberal Party)	–
22. Windeyer J.	1958–72	58–71	NSW	–	Senate pre- selection candidate
23. Owen J.	1961–72	62–72	NSW	(NSW Supreme Ct). State candidate	–
24. Barwick C.J.	1964–81	60–77	NSW	–	M.H.R.; Minister

Judge	Years of Service on Court	Age on Court	State	Prior Political Experience	
				Colonial and State	Commonwealth
25. Walsh J.	1960–73	60–64	NSW	(NSW Supreme Ct)	–
26. Gibbs J. and C.J.	1970–87 (C.J. 1981–87)	53–70	Qld	(QLD Supreme Ct)	(C'w Bankruptcy Ct)
27. Stephen J.	1972–82	48–59	Vic.	(Vic. Supreme Ct)	–
28. Mason J.	1972–95 (CJ 1987– 95)	47–70	NSW	(NSW Supreme Ct)	Solicitor-General
29. Jacobs J.	1974–79	56–61	NSW	(NSW Supreme Ct)	Liberal candidate
30. Murphy J.	1975–86	52–64	NSW	–	Senator; Minister
31. Aickin J.	1976–82	60–66	Vic.	–	–
32. Wilson J.	1979–89	57–67	WA	Solicitor-General	–
33. Brennan J.	1981–98 (CJ 1995– 98)	53–70	Qld	–	(Aust. Indust. Ct; Law Reform Cm; Federal Ct)
34. Deane J.	1982–95	51–64	NSW	(NSW Supreme Ct)	(Federal Court; T.P. Cm)
35. Dawson J.	1982–97	48–64	Vic.	Solicitor-General	–
36. Gaudron J.	1987–	44–	NSW	Solicitor-General ; NSW 1981–87	(Dep Pres Aust Conciliation & Arbitration. Comm.)
37. McHugh J.	1989–	54–	NSW	(NSW Supreme Ct) (NSW Court of Appeal)	–
38. Gummow J.	1995–	53–	NSW	–	(Federal Court)
39. Kirby J.	1996–	57–	NSW	(NSW Supreme Court); (NSW Appeal Ct); (Pres. Ct of Appeal)	(Dep Pres Aust Conciliation & Arbitration. Comm.)
40. Hayne J.	1997–	52–	Vic.	(Vic. Supreme Ct) (Vic. Crt of Appeal)	–
41. Callinan J.	1998–	61–	Qld	–	–
42. Gleeson C.J.	1998–	60–	NSW	(C.J. NSW Supreme Court)	–

\* Piddington resigned without commencing work on Bench: cf. L.F. Fitzhardinge, *William Morris Hughes*: vol. 1, Syd., 1964, pp. 271–83

Source: *Australian National Government*, L.F. Crisp, Longman Cheshire, Melbourne, 1984, pp. 66–67.

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