

An initiative of the Law Council of Australia

Policy on the Process of Judicial Appointments

Policy Statement

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Law Council
OF AUSTRALIA

Table of Contents

Introduction	3
Policy	3
Scope	3
Principles.....	3
Attachment A: Judicial Appointments Protocol	6
Appointment criteria.....	6
Identifying candidates	6
Consultation process	7
Interview process.....	7
Considering candidates for appointment.....	7
Recommendation by panel	8
Accountability and confidentiality	8

Introduction

This Policy on the Process of Judicial Appointments (**this Policy**) addresses the key processes and principles which the Law Council considers should govern the appointment of judicial officers in the Federal Courts and Tribunals of Australia.

This Policy is designed to ensure transparency in Federal judicial appointments and diversity in Australia's judicial officers. These outcomes will promote public trust in the administration of justice and further the Law Council's key objects to promote the rule of law in the public interest and to advance the profession and the ethical standards of legal institutions.

This Policy is the third which has been developed by the Law Council on the subject of judicial appointment processes and builds upon changes made to the original policy (dated 2002) in the second policy (dated 2008). This Policy was approved by Law Council Directors in June 2021.

Policy

Scope

This Policy applies to the appointment of:

- Judges (and those exercising a judicial function) within the Family Court of Australia, the Federal Circuit Court of Australia and the Federal Court of Australia (**the Federal Courts**); and
- Members/Presidents of the Administrative Appeals Tribunal (**the AAT**).

The Law Council recognises that the Members/Presidents of other Federal Tribunals and quasi-judicial Federal bodies may also perform judicial or quasi-judicial functions. These include Members/Presidents of the Fair Work Commission, Remuneration Tribunal, Australian Competition Tribunal, Copyright Tribunal of Australia, National Native Title Tribunal, Pharmaceutical Benefits Remuneration Tribunal and Defence Force Discipline Appeals Tribunal. It may in some instances be beneficial to consider this Policy when appointments are made to these Tribunals and bodies, though in other instances this Policy may be less applicable or relevant.

Similarly, while Royal Commissioners do not exercise a judicial function (in accordance with constitutional law principles),¹ consideration of this Policy may also assist when appointments of lawyers to Royal Commissions are made.

Principles

Responsibility for judicial appointment decision-making

1. Judicial appointment should be a function of Executive Government performed by (or upon the advice of) the Federal Attorney-General and subject to the following principles, discharged at the discretion of Executive Government.
2. The Attorney-General should, in consultation with the respective judicial heads of the Federal Courts and Tribunals and the legal profession, establish, make publicly

¹ See, ALRC, 'Making Inquiries: A New Statutory Framework' (Final Report III, 2009) 39.

available and implement a formal Judicial Appointments Protocol (**the Protocol, Attachment A**) outlining the judicial appointment process for the Federal Courts and Tribunals. The Law Council has set out below recommendations for items to include in the Protocol.

3. The Law Council notes that if this Policy (and the principles and Protocol set out in it) are to be meaningfully implemented, the Executive Government must as a prerequisite dedicate sufficient funding for the proposed processes and functions to take place.

Recommendations and consultation for judicial appointment decision-making

4. As a precondition to exercising their power to appoint a judicial officer, the Attorney-General should consider the recommendations of a selection panel (**the panel**) according to the process described in the Protocol. The panel should be constituted as a matter of priority either:
 - within (and by) an independent and impartial body (**the Independent Body**), to be established as a new, standalone Judicial Appointments Commission or by incorporation into an existing (or proposed) independent and impartial body, such as a Federal Judicial Commission; or
 - by the Attorney-General.
5. If an Independent body is established, its membership and governance processes should be set out in legislation to ensure transparency and public confidence. The Independent Body should be comprised of the heads of jurisdictions, in addition to a majority of (non-judicial) community members of high standing who should be appointed by the Governor-General on nomination by the Attorney-General.²
6. To achieve genuine representation within the governance and membership of the Independent Body and its panel, or of the standalone panel constituted by the Attorney-General, consideration should be given as to proactively appointing members who are reflective of the diversity of each jurisdiction. This may involve identification and consideration of the proportion of members belonging to a particular dominant social, cultural or other group, whether in a specific jurisdiction or nationwide. It may also involve a 'comparative assessment' of the individual's profile against the current membership of the Independent Body and its panel or of the standalone panel, as applicable.
7. The panel should consist at least of:
 - the head of the court, tribunal or jurisdiction to which the appointment is being made (or their nominee);
 - a retired senior judicial officer or officers of the Commonwealth;
 - a current member of the Australian legal profession;
 - a senior official from the Attorney-General's Department; and
 - two community members of high standing who do not currently hold and have not held any form of elected office and who have never been a member of the Australian legal profession.

² Note, the majority of non-judicial members is necessary as public confidence is best promoted by assessment to public standards.

8. As well as performing the functions set out in the Protocol, the Independent Body or panel should give thorough and regular consideration as to how diversity can best be achieved in the judiciary while ensuring meritorious appointments. This may involve identification and consideration of the proportion of judicial officers belonging to a particular dominant social, cultural or other group, whether in a specific jurisdiction or nationwide.

Attachment A: Judicial Appointments Protocol

Appointment criteria

It is expected that successful candidates for judicial appointment (**candidates**) will possess at a minimum the following skills, attributes and experience (**the appointment criteria**)³:

- a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in professional practice; and
- either:
 - sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or
 - in the case of candidates with more specialised professional experience, the ability to acquire quickly an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience; and
- with respect to professional qualities:
 - intellectual and analytical ability;
 - decisiveness and the ability to discharge judicial duties promptly;
 - effective and clear written and verbal communication skills with peers and members of the public;
 - authority – the ability to inspire respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly;
 - effective workload management skills;
 - familiarity with, and ability to use, modern information technology or the willingness and capacity to attain the same; and
 - willingness to participate in ongoing judicial education; and
- with respect to personal qualities:
 - integrity, independence, good character and regard by others;
 - fairness, humanity and courtesy;
 - common sense and sound judgment; and
 - social and cultural awareness of and competency in variations in lived experience, including with respect to gender, cultural and ethnic background, disability, sexual orientation, socio-economic background, professional experience and state of origin and intersectionality, as well as experiences of discrimination and sexual harassment, amongst others.

It is also desirable that candidates for appointment to the High Court possess demonstrated capacity and willingness to undertake extra-judicial speeches and writings, and otherwise to provide intellectual leadership for the legal profession at large and impress upon the whole community the importance of the rule of law and its requirements.

Identifying candidates

The panel (as referred to at Principle 7 of the Policy above) should, as a matter of priority, clearly and nationally publicise opportunities for expressing an interest in appointment or

³ The Law Council acknowledges that certain Tribunals may require expertise in particular specialised areas, and such expertise may represent an additional requirement to those listed as appointment criteria in this Protocol.

in nominating a candidate. Such advertisements should be accompanied by clear appointment criteria and a clear explanation of the selection and appointment process.

Candidates may self-nominate, be nominated by third parties (including through the office-holder consultation process outlined below) or be directly approached by the panel and invited to apply for the relevant position.

Consultation process

As part of the assessment process, the panel should undertake a thorough and wide-ranging consultation of members of the Australian legal profession.

At a minimum, the panel should invite nominations from, and otherwise genuinely and thoroughly consult with, the following identified office holders:

- the Presidents of the Law Council of Australia and the Australian Bar Association;
- the President of the Bar Association (or equivalent) of the State or Territory where the appointee will be assigned, or predominantly assigned, upon appointment;
- the President of the Law Society (or equivalent) of the State and Territory where the appointee will be assigned, or predominantly assigned, upon appointment;
- representatives of the Bar Associations and Law Societies of the other States and Territories; and
- leaders of the peak representative bodies of lawyer groups in Australia including women lawyers, First Nations legal services, family violence prevention legal services, community legal centres, law deans and legal aid services, amongst others.

In addition, the panel should, as it thinks appropriate, seek feedback from Aboriginal and/or Torres Strait Islander persons or representative bodies such as senior practitioners, specialist legal services and relevant State or Territory-based organisations.

Interview process

The panel should shortlist suitable candidates from the initial pool of nominees and should conduct interviews of such candidates in accordance with the principles of natural justice.

Considering candidates for appointment

The panel should assess each candidate whose nomination is made within the timeframe requested in the public advertisement for the position (or otherwise allowing a reasonable time before the panel must make its recommendations to the Attorney-General). The panel should assess candidates against the published appointment criteria (as set out above) using all relevant evidence-based claims and evidence made available to the panel through the nomination, consultation and interview processes set out in this Protocol.

The panel should strive to create a pool of candidates that is reflective of the diversity of each jurisdiction while ensuring meritorious appointments. This may involve identification and consideration of the proportion of judicial officers belonging to a particular dominant social, cultural or other group, whether in a specific jurisdiction or nationwide. This recognises diversity as an essential feature in ensuring a responsive and well-informed judiciary. Where the panel is choosing between shortlisting two candidates who it has

assessed as equally suitable, it should prefer the candidate who will lend diversity to the Court.

Recommendation by panel

Following the above assessment process and in accordance with the Australian Constitution, the panel should provide a final shortlist of 'highly suitable' candidates to the Attorney-General. The panel should make its recommendation in a timely fashion and not exceeding three months from the date the relevant vacancy arose.

From this shortlist, the Attorney-General should, in a timely fashion, select one candidate to propose to Cabinet. The Attorney-General should strive to create a federal judiciary that is reflective of the diversity of each jurisdiction while ensuring meritorious appointments. This may involve identification and consideration of the proportion of judicial officers belonging to a particular dominant social, cultural or other group, whether in a specific jurisdiction or nationwide. Similarly, the Attorney-General should give due consideration to all legal experience, including that outside of mainstream legal practice. This recognises diversity as an essential feature in ensuring a responsive and well-informed judiciary. Where the Attorney-General is choosing between shortlisting two candidates who they have assessed as equally suitable, they should prefer the candidate who will lend diversity to the Court.

Subject to Cabinet approval the Attorney-General should then refer the candidate to the Governor-General to consider the appointment under the auspices of the Federal Executive Council.⁴

Accountability and confidentiality

All expressions of interest by, and nominations of, candidates will be treated as and kept confidential. All information gathered and documents prepared by the panel in the performance of its functions will be kept in a safe and secure location according to best practice file management and consistently with confidentiality, privacy and other legal requirements.

This means that all references and feedback which the panel receives will also remain confidential. However, should the panel propose to consider any negative (evidence-based) feedback in making its decision about shortlisted candidates, it will notify the relevant candidate of the substance of the comment and allow them an opportunity to respond.

Finally, should the Attorney-General choose to elect a candidate who was not named in the shortlist provided to them by the panel, they will publish an explanation of why they selected a candidate who was not shortlisted.

⁴ See, *Commonwealth of Australia Constitution Act* (Cth) s 72.