Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13

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Abstract

In this article, we describe and consider the impetus for the reforms to federal judicial appointments that were initiated by Attorney-General Robert McClelland in 2008 and applied during the life of the Labor Government until 2013. We then proceed to evaluate those reforms by reference to the central idea of transparency. Looking first at the role of the express criteria in identifying a candidate and then at the way in which particular appointments were publicly justified by the Attorney-General, we assess how adequately all the factors leading to an individual's selection were acknowledged under the reformed process. This takes us to a fairly familiar controversy — the relationship between 'merit' (whether expressed as a one-word concept or through elaborate criteria) and diversity. Our discussion of this relationship draws on the experience of judicial appointments reform in the United Kingdom over the last decade. McClelland was candid about his interest in promoting diversity, but refrained from its direct inclusion in the design of the appointments model. Nevertheless, we argue that diversity considerations found a way into the appointments process. We suggest this was both inevitable and defensible. However, the failure to acknowledge the role of those considerations meant that the model did not ultimately deliver the degree of transparency that was proclaimed as its central rationale.

I Introduction

In 2008, the Commonwealth Attorney-General, Robert McClelland, made significant changes to the process of appointing individuals to the federal judiciary. These included a public description of the criteria and processes for identifying and assessing candidates for appointment to the Federal Court, the Family Court and the Federal Circuit Court. Although undoubtedly modest by international standards,[1] the McClelland reforms were a substantial development towards

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[1] For two surveys of different national approaches to judicial appointment, see Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from*

greater transparency and public confidence that the selection of members of the federal judiciary was uninfluenced by political considerations. The basic features of the new system received the bipartisan endorsement of the Senate Legal and Constitutional Affairs Committee ('Senate Committee') in its 2009 inquiry into the Australian judiciary and McClelland's two Labor Party successors as Attorney-General maintained the new criteria and processes in making judicial appointments.[2]

However, the Attorney-General in the current Coalition Government, Senator George Brandis QC, has discontinued those practices and reverted to the traditional approach. With neither fanfare nor warning, all trace of the processes initiated by McClelland slipped from the departmental website. On the topic of court appointments, the Attorney-General's Department now simply advises that, 'As the nation's first law officer, the Attorney-General is responsible for recommending judicial appointments to the Australian Government'.[3] In making appointments to the federal judiciary since taking office, the Attorney-General has not advertised the relevant vacancy beforehand, nor has there been anything in the media releases announcing these appointments to suggest that they were the outcome of any particular process.[4]

The reversion to an unfettered discretion to select persons for judicial appointment (neatly described as being 'in the gift of' the executive)[5] indicates that the political consensus of the 2009 Senate inquiry (in which Brandis was a participating member) has been lost. The process by which judges are appointed to a court — or rather, to be more precise, whether or not there is a publicly-articulated process at all — is now apparently a matter of contest between the two main Australian political parties.[6]

Ironically, not long after the Commonwealth reforms were discarded, the desirability of ensuring that judicial appointments are made against ascertainable criteria and with greater independence from partisan considerations was sharply underscored by controversy over a state appointment. The selection of Tim Carmody as the new Chief Justice of Queensland in June 2014 drew unprecedented

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Around the World (University of Toronto Press, 2006); and H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011).

2 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009).

3 Attorney-General's Department, Australian Government, *Court Appointments* <http://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>.

4 See, eg, Attorney-General's Department, Australian Government, 'Appointments to the Federal Judiciary' (News Release, 11 December 2014).

5 Elizabeth Handsley, '"The Judicial Whisper Goes Around": Appointment of Judicial Officers in Australia' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006), 122, 141.

6 That division was in fact signalled during the 2013 Federal election campaign by the different answers given by Brandis and Labor's Attorney-General Mark Dreyfus QC to the question 'What will your government do to promote greater diversity in the judiciary?'. While Dreyfus pointed to his Government's instigation of advertising judicial vacancies and 'merit-based selection through independent advisory panels', Brandis responded merely by stating, 'The Coalition believes judicial appointments should be based on merit': Cover Story, 'Dreyfus v Brandis: Federal Election Q&A' (2013) 87(7) *Law Institute Journal* 18, 19. We are grateful to William Mudford for pointing out this reference.

public criticism — including from past and present members of the judiciary.[7] Not only was doubt openly expressed that Carmody possessed the necessary qualities and skills for the position, but concerns about the integrity of the process leading to his selection also prompted the President of the Queensland Bar Association to resign and the Australian Bar Association to express its consternation.[8] Neither Carmody nor the Queensland Government backed down, and he was duly sworn in as Chief Justice. However, the extraordinary boycott of his welcome ceremony by every serving Supreme Court judge indicated that the controversy over his elevation was unlikely to simply dissolve.[9] Evidence of that was provided by press reports early in 2015, which unfavourably compared the number of Carmody's decisions after six months as Chief Justice with the performance of his predecessor, and also highlighted the overturning of a number of his decisions by the State's Court of Appeal.[10] Regardless of its fairness or otherwise, this subsequent media attention unquestionably stems from the circumstances under which Carmody came to office. Further controversy flared in March 2015,[11] and just two months later the Chief Justice, while on medical leave from the Court and following his reluctant recusal from an appeal matter at the urging of his colleagues, publicly revealed his willingness to resign if certain conditions were satisfied, including his receipt of 'just terms' from the Queensland government.[12] The whole affair highlights that the case for clear and consistent processes of appointment, with some devolution of executive control, is not abstract. Quite aside from the likely benefit of ensuring public confidence in a quality judiciary, government itself might recognise that adopting a more rigorous process is in its own interest — if only to save it from the repercussions of its own audacity. Thus it seems highly probable that the McClelland reforms, or something similar, will remain attractive and may be reintroduced at some later time either federally or in a state jurisdiction.

For that reason, we offer some considered reflection on those initiatives. In particular, we seek to examine the way in which the model operated — and also was explained — from the perspective of the Labor Government's stated goal of increasing judicial diversity.[13] McClelland highlighted gender, residential location, professional experience and cultural background as targeted attributes, but we do

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7 Andrew Lynch, 'Chief Justice Carmody and the "Merit Principle"', *Inside Story* (online), 18 August 2014 <http://inside.org.au/chief-justice-carmody-and-the-merit-principle/>.

8 Australian Bar Association, 'Independence of Judiciary Under Threat in Queensland' (Media Release, 14 June 2014) <http://www.austbar.asn.au/archives/1369>.

9 Australian Associated Press, 'Queensland Judges Snub Chief Justice Tim Carmody's Welcome Ceremony', *The Guardian* (online), 1 August 2014 <http://www.theguardian.com/world/2014/aug/01/queensland-judges-snub-chief-justice-tim-carmodys-welcome-ceremony>.

10 Joshua Robertson, 'Queensland Chief Justice Tim Carmody's Work Rate Far Less Than Predecessor' *The Guardian* (online), 9 January 2015 <http://www.theguardian.com/australia-news/2015/jan/09/queensland-chief-justice-tim-carmody-work-rate-less-than-predecessor>.

11 For an account of these subsequent developments see Andrew Lynch, 'Campbell Newman's Most Contentious Legacy', *Inside Story* (online), 13 April 2015 <http://insidestory.org.au/campbell-newmans-most-contentious-legacy>.

12 Hedley Thomas, 'Chief Justice Tim Carmody: I'll Quit to 'Stop the Bleeding" *The Australian* (Sydney), 25 May 2015, 1.

13 Attorney-General's Department, Australian Government, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (April 2010) 1.

not discount the relevance of other forms of diversity, including the widely accepted relevance of an individual's area of legal expertise. Diversity provides an ideal lens through which to assess the McClelland model's achievement of the much-vaunted objective of transparency.

A central way in which that transparency was to occur was through publicly available criteria, unpacking the qualities and skills assumed within the traditional rubric of 'merit'. While any attempt to articulate the composite meaning of that concept is commendable, there appears to be a natural limit to its ability to determine appointment in the majority of, if not all, cases. As Malleson has written, 'the determination of merit beyond a threshold of key measurable qualities and abilities is a highly contextualised and dynamic process which involves a significant qualitative and subject [sic] element'.[14] This does not merely create space for other considerations to bear upon the Attorney-General's selection of a 'preferred' candidate, but inevitably *requires* such a supplementation of the criteria. Those considerations may encompass 'diversity' in its various wide or narrow forms, but attention to any of them necessitates a 'comparative assessment' of the individual's profile and the court's current membership.[15] This seems entirely desirable since what any particular individual will bring to the court as a collective institution must surely be relevant to his or her selection.

Our exploration of the relationship between 'merit' and diversity draws upon recent debates in the United Kingdom ('UK'). The 2005 reform of judicial appointments in that jurisdiction was cited by McClelland as a catalyst for his own effort in respect of Australia's federal court system. But while the public presentation of both models features identical rhetoric of promoting judicial diversity while retaining merit as the sole criterion, the two are distinct in key respects. For one thing, the McClelland reforms did not apply to the High Court, while appointment to the UK Supreme Court is covered by its statutory scheme, albeit with some modifications. We discuss this difference, but our main focus is upon the way the design of the UK model so closely adheres to the 'merit principle'. This has resulted in the model drawing criticism for being based on untenable assumptions and thwarting efforts to broaden the profile of the UK judiciary. However, the UK model displays a consistency between rhetoric and form that was less obvious in the Australian experiment. In the latter, it was unclear exactly *how* the Attorney-General selected from among a shortlist of 'highly suitable' candidates, presumably of relatively commensurate quality in most cases. This suggested a gap between how the Government described the process and its operation in practice.

We also assess transparency from a slightly different angle, being the use made of diversity in justifying particular appointments. To what extent were Labor Attorneys-General candid about individuals' satisfaction of diversity considerations as relevant to their appointment? In this regard, the experience was mixed. The fact that an individual would bring to the court to which they were appointed some

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[14] Kate Malleson, 'Gender Quotas for the Judiciary in England and Wales' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 481, 492.

[15] Erika Rackley, 'Rethinking Judicial Diversity' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 501, 505.

experience or attribute that was otherwise underrepresented was certainly mentioned in media releases or swearing-in speeches during the life of the reforms. But, as we explain, this trod a careful line, never stepping over to an explicit acknowledgment of such considerations having influenced selection. The picture is further muddied when we consider the messaging of Attorney-General Nicola Roxon regarding her two appointments to the High Court. Having initially, and to a unique degree, laid great emphasis upon diversity as a factor before making those decisions, Roxon then retreated to a flat invocation of 'merit' to justify her eventual choices. Although the High Court was exempt from the McClelland reforms, this episode is instructive — both in its contrast with the public explanations of other appointments over the same time and also for illuminating the constraints upon public justification. We conclude this aspect of the discussion by asking whether reticence about diversity, and especially the executive's role in deliberately advancing it, is understandable — and even defensible.

The structure of this article follows those general contours. In Part II, we describe the traditional approach to judicial appointments and the lead-up to McClelland's reform, before detailing the new process he initiated. In Part III, we examine the content and role of the express criteria and describe their inherent limitations as a full explanation of how persons were selected for appointment. This involves a close consideration of the relationship between 'merit' and diversity, informed by contrasting the Australian and UK approaches. Part IV looks at the part played by public justification of individual appointments toward the overarching goal of a transparent process that the public understands and in which they can have confidence. Part V offers concluding observations on the McClelland experiment and the future of reform.

II The McClelland Reforms

A *Tradition and the Impetus for Change*

The traditional approach of the Australian Commonwealth to judicial appointments may be succinctly described as informal — lacking any stipulated criteria or consistent and open process. There are only two types of statutory requirement imposed upon the executive in making an appointment. The first is an eligibility threshold for all federal courts of judicial service or enrolment as a legal practitioner for not less than 5 years.[16] Additionally, in the case of appointment to the Family Court of Australia, it is required that 'by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.[17] The second type of requirement is procedural, existing only in respect of appointments to the High Court of Australia: the Commonwealth Attorney-General must 'consult' with his or her state counterparts before filling a vacancy on that

[16] *High Court of Australia Act 1979* (Cth) s 7; *Federal Court of Australia Act 1976* (Cth) s 6(2); *Family Law Act 1975* (Cth) s 22(2)(a); *Federal Circuit Court of Australia Act 1999* (Cth) sch 1 pt 1 cl 1 (which does not refer to prior judicial service).

[17] *Family Law Act 1975* (Cth) s 22(2)(b). No guidance is offered as to how that suitability is to be established.

Court.[18] This statutory recognition of state interest in appointments to the court at the apex of the nation's judicial system is a gesture towards concerns about the geographical diversity of the Court's members and its role as an arbiter of constitutional disputes between the Commonwealth and the states.[19]

Beyond those very minimal requirements, the manner of judicial appointment adopted by the Commonwealth Government at any point in time is unconstrained. As Chief Justice Gibbs remarked in 1987, 'sometimes an appointment may be made without any consultation … [or] the advice given by those consulted may be ignored'.[20] Even prior to the McClelland reforms, the extent of consultation exceeded the statutory requirement of state Attorney-Generals to include the head of the court, other judges, and legal professional bodies such as the Law Council of Australia.[21] However, in the absence of explicitly stated criteria by reference to which the feedback elicited might be structured, there was a danger such consultations would gather largely impressionistic views.[22]

On at least three occasions, the Attorney-General is known to have communicated with individuals under consideration for a vacancy on the High Court — the first being via the infamous telegram exchange between Attorney-General Billy Hughes and Albert Piddington in 1913,[23] and the other two being a number of private interviews held by Attorney-General Daryl Williams with individuals before appointing Murray Gleeson and Dyson Heydon to the High Court in 1998 and 2003 respectively.[24] It is not known whether, in respect of other vacancies, the views of candidates on various questions have been directly sought by the government of the day, but it is fair to assume that perceptions of what those views might be have been a factor in at least some selections — along with 'politics, state of origin, friendships, and the views of sitting Justices'.[25] Those

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18 *High Court of Australia Act 1979* (Cth) s 6.

19 See John Wanna et al, 'Common Cause: Strengthening Australia's Cooperative Federalism' (Report, *Council for the Australian Federation*, May 2009) 21. For discussion of those concerns, see Andrew Lynch and Marianna Matevosian, 'Preserving the 'Federal Balance' Through Judicial Diversity: Clutching at Straws?' (2011) 13(3) *Constitutional Law & Policy Review* 42.

20 Sir Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 7, 11. Presumably, Sir Gibbs was not suggesting the absence of consultation pursuant to s 6 of the *High Court of Australia Act 1979* (Cth) after the introduction of that requirement.

21 Phillip Hudson, 'Call To Appoint Woman Judge', *The Sunday Age* (Melbourne), 11 September 2005, 9.

22 George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163, 165.

23 See Morris Graham, 'Piddington, Albert Bathurst' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 533, 534.

24 The former occasion was only recently revealed in Michael Pelly, *Murray Gleeson: The Smiler* (The Federation Press, 2014) 178, while Williams' practice was discussed in Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5(3) *Constitutional Law & Policy Review* 41, 44.

25 Troy Simpson, 'Appointments that Might Have Been', in Tony Blackshield, Michael Coper and George Williams (eds), The Oxford Companion to the High Court of Australia (2001) 23, 23. For example see AJ Brown, 'The 'Inevitable Judge': A Biographer's Note' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 49, 69.

considerations also feature in the decision of the Cabinet to accept or reject the Attorney-General's choice.[26]

That the appointments process might benefit from greater clarity and consistency has been recognised for some time. Commencement of the modern era of Australian debate on the issue may be pinpointed to the 1993 production of a discussion paper by the Commonwealth Attorney-General's Department under the Labor Party's Michael Lavarch. The discussion paper did much to open up the topic of judicial appointments and subject the traditional opacity to challenge. A notable way in which it did so was through the compilation of a list of possible criteria for the selection of judges. As one of us has written elsewhere, 'the radical nature of this list cannot be overestimated'.[27] Included among the criteria were 'vision'; 'fair reflection of society by the judiciary'; 'practicality and common sense' and 'temper, gender and cultural sensitivity'.[28] The discussion paper provocatively suggested that advocacy skills were not of predominant importance in choosing judges, even asserting that some of those skills 'might be counter-productive to judicial performance'.[29] The following year, in response to community concern over gender bias, the Senate Standing Committee on Legal and Constitutional Affairs produced a report that recommended the creation of explicitly stated appointment criteria and the establishment of a committee, on which lay persons would serve alongside judges and lawyers, to advise the Attorney-General on individuals suitable for elevation to the Bench.[30] However, neither the discussion paper nor the Senate Committee report resulted in any alteration to Commonwealth practice in the appointment of federal judges.

Nevertheless, the issue remained a fertile one, garnering regular academic and community attention. This was so for two reasons. First, there were occasions on which the topic of appointments to the High Court became a matter of public disquiet. Among these we might identify the remark in July 1997 by the Deputy Prime Minister, Tim Fischer, that the Coalition Government wished to appoint 'capital C conservatives' to the Court.[31] This was an unusually blatant acknowledgment of the executive's capacity to use its broad discretion over appointments to produce an institution more politically sympathetic to the Government. In 2003, the Court's return to an exclusively male membership upon the retirement of Justice Gaudron also prompted dissatisfaction with the status quo.[32]

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[26] An example of this was Cabinet's rejection of Attorney-General Daryl Williams' choice of John von Doussa QC in favour of Ian Callinan QC in 1998: Pelly, above n 24, 177.

[27] Handsley, above n 5, 132.

[28] Michael Lavarch, 'Judicial Appointments: Procedure and Criteria' (Discussion Paper, Attorney-General's Department, Australian Government, 1993) 5–10.

[29] Ibid 6.

[30] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (1994) 90–91 [5.44]–[5.55].

[31] Bernard Lagan, 'Conservatives on Court Shortlist', *The Sydney Morning Herald* (Sydney), 19 July 1997, 3.

[32] Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819.

Second, the reform of appointments processes in other common law jurisdictions underscored concerns about the adequacy of Australia's continued reliance on unconstrained executive discretion. Of particular significance was the establishment of a highly sophisticated appointments system, including the establishment of an independent Judicial Appointments Commission ('JAC'), in the UK by the *Constitutional Reform Act 2005* (UK) ('the CRA').[33] The JAC handles the majority of judicial appointments while special selection commissions are convened for senior positions.[34] The composition of the latter were originally specified in the CRA and were amended in 2013 in order to reduce the representation of serving members of the judiciary.[35] Depending on the judicial office, the JAC or special commission recommends to the Lord Chancellor, the Lord Chief Justice or nominee, a single name for the filling of any vacant judicial post.[36] Although that recommendation need not be accepted, if the appropriate authority rejects it or requests its reconsideration (either action must be accompanied by reasons) this simply returns the question of selection back to the commission. After three separate recommendations have been made, the appropriate authority must select one of the names provided.[37] The overall effect of the CRA reform of judicial appointments has been described as leaving the executive with 'a much reduced role in the process, almost a purely formal one'.[38]

The contrast between the UK reforms and the untrammelled discretion retained by the Commonwealth Attorney-General over judicial appointments is stark. But as significant as that experience was in fuelling Australian discussion of the topic, it would be remiss not to acknowledge the possible influence of developments elsewhere. These include the Canadian Government's experimentation with

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33 *Constitutional Reform Act 2005* (UK), s 61, sch 12. The Australian work that most directly draws upon the UK reforms to propose a detailed model for judicial appointments in Australia is Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295.

34 For example, the establishment and composition of the selection panel convened by the Lord Chancellor for Supreme Court vacancies is addressed by *Constitutional Reform Act 2005* (UK), ss 26(5), (5A), 27, 27A; *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), regs 5, 11.

35 *Crime and Courts Act 2013* (UK), sch 13; see also *The Supreme Court (Judicial Appointments) Regulations 2013* (UK) and *The Judicial Appointments Regulations 2013* (UK). For a description of the changes, see Alysia Blackham, 'Court Appointment Processes and Judicial Diversity' (2013) 24 *Public Law Review* 233, 237. For concerns about the appointments model enabling serving judges to self-perpetuate the judiciary in their own image and democratic deficit, see Michael Kirby, 'A Darwinian Reflection on Judicial Values and Appointments to Final National Courts' in James Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 9, 33; Kate Malleson, 'Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 117, 122; Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, March 2012) <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>.

36 *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 19; *The Judicial Appointments Regulations 2013* (UK), regs 7, 13, 19, 25, 31.

37 *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 20; *The Judicial Appointments Regulations 2013* (UK), regs 8(4), (5), 14(4), (5), 20(4), (5), 26(4), (5), 32(5), (6).

38 Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) 67. See also, Mark Bevir, *Democratic Governance* (Princeton University Press, 2010) 163.

parliamentary involvement in the confirmation of appointments to that country's Supreme Court,[39] similar interest in an appointments commission across the Tasman following the establishment of the Supreme Court of New Zealand,[40] and incremental reforms at the state level, notably in Victoria and Tasmania.[41]

B *A New Approach*

It was against this backdrop that Attorney-General McClelland unveiled changes to the processes and criteria for Commonwealth judicial appointments early in 2008.[42] Acknowledging the 'wealth of literature' on the topic and steps taken in comparable jurisdictions,[43] McClelland succinctly stated his own motivations for reform:

> The mystery surrounding the current judicial appointments process and controversy over past appointments has two negative consequences. First, it can tarnish or detract from the honour of being appointed to judicial office. Second, at a broader level it can diminish public confidence in the courts and the justice system.
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> I am committed to reviewing this process to ensure:
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> - greater transparency and public confidence in the process
> - that all appointments are based on merit and suitability, and
> - that everyone who has the qualities necessary for appointment as a judge or magistrate is fairly and properly considered — whether they are barristers, solicitors or academics, and whether or not they are well known to government. This will increase the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.[44]

McClelland's concern that the community should be confident that appointments were not determined by 'personal or political affiliation and that consultation beyond a small circle of insiders has occurred'[45] led him to initiate systematic and criterion-based processes. The key features of the reforms were as follows.

Once a decision to appoint a judge to a federal court was made, the Attorney-General would seek nominations

> from a broad range of individuals and organisations including the Chief Justices of the Federal Court and Family Court, the Chief Federal Magistrate, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar

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39 Nadia Verrelli, 'Introduction' in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada's Supreme Court* (Institute of Intergovernmental Relations, 2013) 1, 1–2.

40 Philip A Joseph, 'Appointment, Discipline and Removal of Judges in New Zealand' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 66, 70–71.

41 Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117; Lenny Roth, 'Judicial Appointments' (Briefing Paper No 3, Parliamentary Library, Parliament of New South Wales, 2012) 10–15.

42 Robert McClelland, 'Judicial Appointments Forum' (Speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008).

43 Ibid [31]–[33].

44 Ibid [18]–[20].

45 Ibid [7].

> Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.[46]

In respect of the appointment of a High Court justice, the chief justices of the federal and family courts, and the Chief Federal Magistrate, the same individuals and organisations were to be contacted, but also state attorneys-general (statutorily required in respect of High Court appointments) and justices of the High Court, and state and territory chief justices.[47]

Additionally, in respect of general appointments to the federal courts, expressions of interest or nominations from eligible individuals were publicly sought through advertisement of the judicial vacancy online and in print media. This was geared towards the third objective revealed by McClelland above — by consulting much more widely and enabling individuals to come forward and indicate their own interest, the appointments process is better placed to find talent and increase the diversity of the Bench. The specific attributes in respect of which the Labor Government expressed its desire to diversify the federal judiciary were gender, residential location, professional experience and cultural background.[48]

For all judicial vacancies, excepting those on the High Court or as head of the three other federal courts, the Attorney-General convened an advisory panel. The Panel assessed nominated individuals against an extensive set of criteria.[49] Membership of the panel typically comprised the Chief Justice of either the Federal Court or Family Court or Chief Judge of the Federal Circuit Court, or their nominee; a retired judge or senior member of the federal or state judiciary; and a senior member of the Commonwealth Attorney-General's Department.[50] Initially, McClelland flagged that only for the Federal Circuit Court was there 'an expectation that short-listed candidates will have an opportunity to meet with the selection panel and put forward their claims to appointment'.[51] In respect of the federal and family courts, he was content for the particular panel to decide whether interviews would be of assistance.[52]

Upon concluding its consideration of eligible individuals, the panel then reported to the Attorney-General with a list of those persons recommended as 'highly suitable for appointment'.[53] From that list the Attorney-General would select one name to take to Cabinet. Upon Cabinet approval, the name would be

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46 Senate Legal and Constitutional Affairs References Committee, above n 2, 13 [3.12]. In 2008, McClelland stated that 'this process of consultation is broader than has occurred in the past': McClelland, above n 42, [43].

47 Senate Legal and Constitutional Affairs References Committee, above n 2, 13 [3.8].

48 Attorney-General's Department, Australian Government, above n 13, 1.

49 These are discussed in Part III below.

50 Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.17]. Though greater representation of former judicial officers seems to have occurred: see Kirby, above n 35, 29.

51 McClelland, above n 42, [48].

52 Ibid [51]–[53]. McClelland added that 'face-to-face meetings with candidates are inappropriate for appointments to the High Court': ibid [62].

53 Attorney-General's Department, Australian Government, above n 13, 2.

forwarded to the Governor-General in Executive Council, in whom the power of appointment is formally placed by s 72(i) of the *Constitution*.

In sum, the three pillars of the reformed process were: (1) the articulation of publicly available criteria; (2) the advertisement of vacancies and call for nominations; and (3) the use of an advisory panel to make recommendations to the Attorney-General.

C *The Limits of Reform*

The appointment of persons to the High Court of Australia or as head of one of the three other federal courts was essentially insulated from the broader reform agenda. In fact, beyond a commitment to consult widely with professional and community bodies, it is no exaggeration to say that in relation to these judicial posts — arguably those which are most susceptible to the intrusion of political considerations and the operation of powerful networks — there was simply no change to past practice. Those particular vacancies were not advertised in order to procure expressions of interest or nominations directly from interested individuals themselves. Nor was an advisory panel convened by the Attorney-General to assist him or her in narrowing down potential appointees for these positions. Without a panel to consider nominations, it is also not clear whether the published criteria for judicial appointment had any relevance in the context of these positions.[54]

One reason offered for treating the High Court and heads of court positions differently was that these appointments 'are likely to come from the serving judiciary and would therefore already be known to government'.[55] But of course, there is no requirement that the individual selected be one who already holds judicial office, with Justices Callinan and Gageler being two recent examples of appointments direct to the High Court from the Bar. It is also open to question whether the Commonwealth enjoys a comparable degree of familiarity with potential candidates serving on state courts. But the critical point is that the justification, that such appointments are 'already … known to government',[56] blithely disregards the purported value of developing a more arm's length and inclusive process.

More enigmatic was the claim that the High Court's exclusion from the reforms was justified merely because, 'as the apex of Australia's judicial system, [it] enjoys a different status to other federal courts'.[57] The Law Council of

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[54] Though it seems from the report of the Senate Legal and Constitutional Affairs References Committee that the criteria applied only to general appointments to the federal, family and federal circuit courts: above n 2, 13–14 [3.15]–[3.16].

[55] Attorney-General's Department, Australian Government, above n 13, 3. See further, in respect of the High Court, McClelland, above n 42, [63], where he said that serving judges 'are already well known to the Government, the judiciary, the legal profession, and, often, the general public'. A similar justification was given in the UK for exclusion of senior judicial posts from the remit of the Commission for Judicial Appointments, the forerunner to the JAC: Kate Malleson, 'Selecting Judges in the Era of Devolution and Human Rights' in Andrew Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford University Press, 2004) 295, 305.

[56] Attorney-General's Department, Australian Government, above n 13, 3.

[57] Ibid.

Australia, in its submission to the 2009 Senate inquiry, endorsed this view that the 'High Court is in a unique position as the ultimate appellate court for Australia'.[58] But this stance invites more questions than it answers — especially when comparable legal systems, notably the UK, have been willing to adopt systematic reform that reaches all the way to their very highest courts.

In the absence of any clearer explanation, the particular exclusions from the McClelland reforms suggest an attitude that there is something slightly undignified about nominating oneself for high office or the prospect of transparent processes being applied to highly visible courts with few members. As to the former consideration, Justice Ruth McColl, representing the Judicial Conference of Australia before the 2009 Senate inquiry, confirmed that 'those who are in the pool from which appointment at the High Court might be considered would not expect to have to self-nominate'.[59] The discomfort of scrutiny, meanwhile, was cited by the Law Society of New South Wales as the basis for rejecting any suggestion that a JAC should be established at all: 'The creation of an official selection body is opposed for the reason that many eminently suitable persons would be reluctant to go through a public process of selection'.[60] It is fair to extrapolate from this that candidates for appointment to the High Court might, given its prominence, be especially wary. Either or both factors may account for a reluctance to extend transparency measures to loftier institutions. This is not, perhaps, terribly surprising: in the course of such a major cultural shift, it is only natural that certain aspects of the old culture should hang on, either temporarily or permanently. But it is important to understand these objections for what they are. Neither is an adequate basis for assuming that the higher a court, then the less formality or transparency is required or justified in appointments to it.

In fact, the visibility of the High Court, both as the apex of the Australian court system and in making decisions that bear upon important national political debates, suggests it must logically be the central focus of efforts to ensure community confidence in the independence of the Australian judiciary. The Senate Committee, which was 'not persuaded that a model identical to that of the other federal courts is necessary to maintain confidence in judicial appointments to the High Court',[61] still saw the value of much greater transparency. It recommended that, apart from use of an advisory panel, all features of the McClelland reforms be extended to the Court, even suggesting that distinct 'selection criteria that constitute merit for appointment to the High Court' should be devised.[62] The committee also included the Court in its general recommendation that 'the

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58 Law Council of Australia, Submission No 11 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australian Judicial System and the Role of Judges*, 30 April 2009, 17.

59 Justice Ruth McColl quoted by the Senate Legal and Constitutional Affairs References Committee, above n 2, 23 [3.64]. See also H P Lee, 'Appointment, Discipline and Removal of Judges in Australia' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27, 30.

60 Law Society of New South Wales, Submission No 7 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australian Judicial System and the Role of Judges*, 30 April 2009, 1.

61 Senate Legal and Constitutional Affairs References Committee, above n 2, 25 [3.69].

62 Ibid 25 [3.70].

Attorney-General will make public the number (not the names) of candidates considered for appointment (whether they were nominated by another person, self-nominated or suggested by government)'.[63] While these recommendations lend further support to the view that a total exemption of the senior judicial positions is hard to justify, the Committee was still unable to explain why use of an advisory panel was problematic in making such appointments.

In the remainder of this article, we evaluate the McClelland reforms by reference to the central idea of transparency. Looking first at the role of the express criteria in identifying a candidate and then at the way in which particular appointments were publicly justified by the Attorney-General, we assess how adequately all the factors leading to an individual's selection were acknowledged under the reformed process. As indicated in the Introduction, this takes us to a fairly familiar controversy — the relationship between 'merit' (whether expressed as a one-word concept or through elaborate criteria) and diversity. McClelland was candid about his interest in promoting diversity, but refrained from its direct inclusion in the design of the appointments model. Nevertheless, we argue below that diversity considerations found a way into the appointments process. That is something we suggest was both inevitable and defensible. But the failure to acknowledge this meant that the model did not ultimately deliver the degree of transparency that was proclaimed as its central rationale.

III Transparency of Selection: Criteria and Beyond

In public law and political theory, the value of transparency is almost axiomatic. However, it is worth briefly unpacking the reasons why this is so broadly accepted. The first is captured by United States Supreme Court Justice Louis D Brandeis' aphorism on sunlight as a disinfectant: if procedures are transparent — meaning that their workings are readily visible to outsiders — then that is likely to result in them operating as intended.[64] Normally this would mean that they are fair and rational, not corrupt and arbitrary. If there is no general agreement on how a procedure should work, keeping it transparent at least leaves room for an effective debate on this question, leading ultimately to the establishment of some optimal process. Transparency throughout this development makes it possible for outsiders to initiate and participate in that debate on the basis of the fullest possible information.

The second reason is related to the first, but worth mentioning separately since it was emphasised as a key rationale for the 2008 reforms to federal judicial appointments: transparency enables observers to *have confidence* that procedures are operating as intended. Public institutions, including the judiciary, cannot operate effectively unless there is broad acceptance of their legitimacy, and that includes (or is another way of saying) confidence in them. The precise form which that confidence takes will vary depending on the role and functions of different

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63 Ibid 25 [3.71].

64 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman': Louis D Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Company, 1914) 92.

types of institutions, but in the case of the courts their authority depends greatly on the community's faith in their independence and probity. Avoiding any perception that political, social or familial networks are a key means to appointment, and that all those who are properly qualified for appointment are given the same consideration, is obviously vital to this end.[65]

McClelland encapsulated this connection when he stated that: 'Australians rightly demand that justice should be administered "without fear or favour". It is just as important that judges and magistrates should be *seen* to be *appointed* on a similarly impartial basis'.[66] In Australia, this consideration has effectively ended the earlier practice of governments occasionally appointing party politicians to the Bench. But, as the recent controversy over the appointment of Tim Carmody as Chief Justice in Queensland illustrates, the danger to be avoided need not be so blatant as that — a perception that an appointee has, through prior words or actions, shown himself or herself to be 'too close' to government may be hugely damaging.[67] Beyond the matter of political sympathies, these days a more frequently cited factor bearing upon public confidence in the courts is the extent to which those appointed to them are seen to reflect the community's diversity.[68] This may be put most strongly as the need to dispel any perception that the selection of judicial officers reflects some systemic discrimination against women or minority groups.

At least two things generally support the achievement of transparency and confidence in a process: first, ensuring that criteria are publicly articulated and used as a yardstick to guide decision-making; and second, a meaningful public justification of the outcome. In the context of Australian judicial appointments, both the criteria and justification have traditionally been reduced to a single word: 'merit'. Despite unanimity that those persons appointed to judicial office should be of the highest quality, there has long been dissatisfaction over the insufficiency and opacity of 'merit' as a guide to selection. So far as what the term might actually signify, one of us has reflected elsewhere that

> [d]efenders of the status quo reveal a dismaying tendency to attack proponents of change for wanting to dilute "merit" but rarely show any evidence of having properly reflected on whether the traditionally assumed content of merit really describes what makes a good judge.[69]

Faced with that traditional reticence, in the last decade various academic studies have offered an articulation of the criteria by which meaning might be given to the

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65 Advisory Panel on Judicial Diversity, 'The Report of the Advisory Panel on Judicial Diversity 2010', (Ministry of Justice (UK) 2010) 15.

66 McClelland, above n 42, [21].

67 See Michael Pelly, 'Tim Carmody's Words Have Not Helped His Cause', *The Australian* (online), 20 June 2014 <http://www.theaustralian.com.au/business/legal-affairs/tim-carmodys-words-have-not-helped-his-cause/story-e6frg97x-1226960437425>.

68 Davis and Williams, above n 32, 846; Justice Ruth McColl, 'Judicial Appointment' (2008) 30 *Sydney Law Review* 155, 157; Michael H McHugh, 'Women Justices for the High Court' extracted in George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams' Australian Constitution Law and Theory: Commentary & Materials* (Federation Press, 6th ed, 2014) 224, 225.

69 Handsley, above n 5, 138.

term.[70] Ultimately, these were reflected in the criteria introduced by Attorney-General McClelland and to which we now turn.

A *Selection Criteria — Unpacking 'Merit'*

If it is to have value, any attempt to articulate the constituent elements of 'merit' must be meaningful. If the selection criteria are unconvincingly broad or vague then any purported transparency is an illusion. There is a danger that criteria will be simply retrofitted so as to describe those who have always been chosen to do the job, failing to articulate attributes shared by others who might perform it at least as well. In this regard, the determination of relevant criteria matters greatly to the aim, albeit routinely couched as subsidiary to 'merit', of enhancing judicial diversity. In particular, the goal of attracting to the Bench persons with a range of different legal professional backgrounds and experiences risks being undone if criteria affirm the importance of particular skillsets which have been traditionally used to guide appointment — most notably, advocacy.

Under the McClelland reforms, advisory panels evaluated persons under consideration against the following 'requisite qualities for appointment':

- legal expertise;
- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;
- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and
- capacity to inspire respect and confidence.[71]

These approximate the qualities identified by academic studies and professional bodies as relevant to judicial work and were endorsed by the 2009 Senate Committee Inquiry as 'not inconsistent with a selection process based on merit'.[72] They are similar to an equivalent list used by the JAC in the UK.[73] The degree of consensus around these attributes as ones ideally possessed by effective members of the judiciary is unsurprising. They are all clearly things we would expect, or at least aspire to have, in persons holding judicial office.[74]

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[70] See, eg, Sharyn Roach Anleu and Kathy Mack, 'Judicial Appointment and the Skills for Judicial Office' (2005) 15 *Journal of Judicial Administration* 37; Davis and Williams, above n 32, 830–47; Evans and Williams, above n 33, 297–9.

[71] Department of Attorney-General, Australian Government, *Federal Court of Australia: Information for Persons Who Wish to Nominate Another Person for Appointment or Lodge an Expression of Interest* <http://www.ag.gov.au/LegalSystem/Courts/Documents/Federal%20Court%20information%20pack.doc>.

[72] Senate Legal and Constitutional Affairs References Committee, above n 2, 18 [3.41].

[73] Select Committee on the Constitution, *Judicial Appointments*, House of Lords Paper No 25, Session 2010–2012 (2012) 29–30 [85].

[74] This is not to ignore the perspective that our attempts to articulate what is meant by merit reflect certain gendered assumptions about what it is to be a 'good' judge and that efforts to increase judicial diversity require a reappraisal of either the criteria themselves or the ways in which we

Ideally, the criteria should be such that an advisory panel may be satisfied of an individual's possession of them independently of the views of professional peers in support. Otherwise it may appear that reputation, more than the criteria themselves, is determinative. While the opinion of an individual's professional peers as to his or her qualities and skills is a matter to be properly considered by a panel, the precise role of those views needs to be articulated and limited. We might also assess the utility of the criteria in enabling a panel to evaluate the respective merits of different candidates and sort them from each other. How, for instance, is a person not currently holding judicial office evaluated against the third and fourth criteria? We do not think challenges of that sort inevitably reveal the criteria to have been a mere veneer. Even less do they suggest that they are inapt for what is required of those holding judicial office. But clearly the utility of the criteria in assisting selection depends greatly on the processes adopted for their evaluation.

It is here that the other features of the McClelland changes reinforced the value of the criteria. The call for nominations — both directly from persons interested in being considered and from others supporting a particular individual — provided a means by which direct evidence could be adduced. For example, in order to demonstrate 'commitment to professional development' a candidate might bring forward an array of indicators: conference attendance and presentation; teaching in continuing legal education, Legal Profession Admission Board or university programs; service on professional associations or advisory boards; pro bono work and so on. The opportunity for these to be explicitly identified in writing, rather than left to unreliable impression ensures the meaningfulness of such a criterion in practice. The much wider public consultation — beyond the comparatively closed circles of the Bar — also had the potential to elicit information that could be used to construct a well-rounded picture of the individuals under consideration and to examine their relative strengths as against each other under the criteria. Lastly, the use of face-to-face meetings with possible appointees provided the opportunity for an advisory panel to make its own firsthand assessment of many of the attributes of an individual, as well as ensuring it had a full and correct appreciation of the extent of his or her accomplishments.

B *The Limit of Selection Criteria — What Lies Beyond?*

Quite aside from the utility of the criteria, it is open to question just how significant they are beyond the panel's shortlisting of candidates. The Senate Committee expressed concern that the Attorney-General's ultimate selection was described as 'the person whom he [or she] considers most suitable' — suggesting that the final decision was not guided by the criteria.[75] In 2010, the Government signalled this

identify their satisfaction. This discussion is beyond the scope of this article, but see Margaret Thornton, '"Otherness" on the Bench: How Merit is Gendered' (2007) 29 *Sydney Law Review* 391; Hilary Sommerland, 'Diversity, Merit, and the English Judiciary: The Lessons that can be Learned from the Reform of Selection Processes, a UK Contribution' (2013) 40 *Fordham Urban Law Journal City Square* 94, 99–103.

75 Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.20].

even more strongly, by stating that the Attorney-General identified 'a preferred candidate' from the names forwarded to him or her by the advisory panel.[76]

This invites speculation as to the extent of the criteria's purpose and the degree to which the decision-making power of the executive is constrained at the point of selection. After enabling the advisory panel to shortlist those persons who are 'highly suitable' for appointment, have the criteria effectively done their work? Is it feasible that they can really be used to further narrow down the shortlisted contenders to a final selection? If there is a clearly discernible gap between one individual and other shortlisted candidates in their satisfaction of the criteria, then the latter may be said to operate to present the Attorney-General with an obvious outcome. But it would seem unlikely that the panel would typically devise a shortlist comprising persons of dramatically different quality and standing. Instead, it seems implicit in the scheme that the individuals reported by the panel to the Attorney-General are ones whose qualities would be essentially on par with each other. It would be surprising if the criteria per se served to distinguish between them moving forward from that point. At best we might say that the *different ways* in which shortlisted candidates each meet those criteria are relevant. For example, the disparate areas of law in which individuals have developed 'legal expertise' may lean the Attorney-General towards one candidate over others based on an assessment of the existing areas of strength or deficiency on the relevant court.[77] Similarly, the form in which individuals demonstrate their respective 'commitment to professional development' might guide selection.

However, it seems awkward to say that bringing such considerations to bear is a decision, in the words of the Senate Committee, 'directly based on the selection criteria'.[78] Instead, there is a broader and simpler way of characterising the use of such considerations to choose among approximate equals at the final stage of the process: judicial diversity. The examples just cited show that 'diversity' can refer to a variety of considerations. Surely the least controversial of these is attending to the underrepresentation of specific areas of legal expertise on the Bench. Almost everyone agrees that the High Court should be comprised of the nation's best legal minds,[79] but no one would suggest that the institution is strengthened by ignoring what each individual is able to contribute to its collective wisdom. Instead, we are quite accustomed to the idea that, while all High Court judges should be strong 'generalists',[80] there should be some kind of breadth in the doctrinal expertise found on its bench. It would, for example, be undesirable for no member to have a professional background in criminal law, given the many appeals the Court hears in that area. Conversely, an overrepresentation of criminal

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76 Attorney-General's Department, Australian Government, above n 13, 2.

77 For reflection on the role of individual expertise in the decision-making of judges on multimember courts, see Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 196.

78 Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.20].

79 For an argument against the appointment of 'uber-smart judges', see James Allan, 'Objections Must Be Ruled Out of Order', *The Australian* (online), 20 June 2014 <http://www.theaustralian.com.au/business/legal-affairs/objections-must-be-ruled-out-of-order/story-e6frg97x-1226960443280>. For a judicial response to Allan, see Justice Patrick Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (Speech delivered at Judicial Conference of Australia Colloquium, Noosa, 11 October 2014) 3–4.

80 The term used by Gageler, above n 77, 196.

law expertise might suggest a worrying weakness in other areas, say, commercial or public law. Similar arguments apply to other courts, though of course their larger size may mean that the importance of each individual appointment to meeting the same institutional need is less acute. Yet even this form of judicial diversity — widely appreciated, we suggest, among the profession[81] — is seldom, if ever, acknowledged by the executive as something that legitimately bears upon judicial selection.

Slightly more broadly, a commitment to judicial diversity may describe the practice of consciously appointing people with a range of different types of career, even within the narrow confines of the senior Bar. In its stated objective of 'pursuing the evolution of the federal judiciary into one that better reflects the rich diversity of the Australian community', the Labor Government included 'professional background'.[82] Alongside that was placed the more personal attributes that have dominated, and indeed characterised, this debate for many years — gender, ethnicity and geography.[83]

But the Labor Government clearly baulked at including diversity — in either a general or any particular sense — among its stated criteria for appointment. That reluctance not only accords with substantial academic and political opinion in this country,[84] but also, as discussed below, with the similar insistence in the UK that, while judicial diversity is to be 'encouraged',[85] appointment is to be 'solely on merit'.[86] However, it seems highly likely that diversity in some sense must enter into the process — and, in fact, strange to argue that it should not. There is already broad recognition of the benefits that accrue from a more diverse judiciary,[87] but for present purposes it suffices to merely note

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81 In evidence to a 2012 House of Lords committee inquiry, Lord Phillips suggested that the UK Supreme Court appointments might be described as 'that candidate who will best meet the needs of the Court having regard to the judicial qualities required of a Supreme Court Justice and to the current composition of the Court': Select Committee on the Constitution, above n 73, 32 [91]. See also Lord Jonathan Sumption, 'Home Truths about Judicial Diversity' (Speech delivered at the Bar Council Law Reform Lecture, London, 15 November 2012) 4.

82 Attorney-General's Department, Australian Government, above n 13, 1.

83 Ibid.

84 For its part, the Senate Committee effectively endorsed the description of the UK approach offered by Evans and Williams, above n 33, 313, as one which 'emphasises merit and promotes diversity': Senate Legal and Constitutional Affairs References Committee, above n 2, 23 [3.60]. The debate about the relation between these two concepts has continued in that jurisdiction: see Advisory Panel on Judicial Diversity, above n 65, 32–3 [97]–[100]; and Select Committee on the Constitution, above n 73, ch 3.

85 *Constitutional Reform Act 2005* (UK), s 137A.

86 *Constitutional Reform Act 2005* (UK), s 63(2). With respect to the Supreme Court, s 27(5) says simply: 'Selection must be on merit'.

87 In addition to those examples cited above n 68, which emphasise public confidence, there are firsthand accounts that stress the value of diversity for judging itself: see Lord Justice Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727; Baroness Hale, 'A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319; Lady Baroness Hale, 'Equality in the Judiciary' (Speech delivered at the Kuttan Menon Memorial Lecture, London, 21 February 2013); Justice Michael Kirby, 'Judicial Dissent — Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379. The most sustained presentation of the argument that 'the judiciary is stronger, and the justice dispensed better, the more diverse its decision-makers' is from Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013), 201. Further, Rackley's argument about the capacity for diversity on

Blackshield's astute observation that the size of appellate courts alone suggests that judicial *homogeneity* cannot be an objective of appointment.[88] Accordingly, the qualities and experiences that are among the judiciary both as a whole and on the particular court to which an appointment is being made are surely relevant *institutional* considerations that bear upon the selection of any individual.

But even more simply, some recourse to 'diversity' considerations, either to a narrow or a wide degree (even so as to exercise a bias *against* candidates on the basis of them) will almost inevitably be required in order that a choice is made of one candidate from among others. Gageler, before his own appointment to the High Court, highlighted this necessity when he stated that a belief that appointments are made on 'merit' alone is 'naïve', since 'at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice'.[89] Having dismissed the proposition that 'merit' alone determined appointment, he went on to make a positive case for the relevance of other factors, saying that 'considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance'.[90] Acknowledging that it was 'perhaps more controversial', Gageler also opined that 'considerations of judicial style and legal policy … ought not to be ignored'.[91]

That the McClelland criteria did not accord weight to such personal attributes and experiences does not mean that the criteria are just a more elaborate version of the flat insistence upon 'merit' to obscure the real basis for the Attorney-General's selection. As already noted, the list of criteria undeniably illuminates the several and varied qualities that comprise 'merit'. It effectively decodes that all-important label and ensures that the persons under consideration by the Attorney-General are ones that the panel has identified as having the requisite skills and aptitude for appointment. This is very different from the Attorney-General appointing a judge from an entirely open field and justified against a one-word yardstick.

But the question remains: what guides the ultimate decision after the criteria have done their job of establishing the 'merit' of those on the shortlist? The Senate Committee was dissatisfied with the lack of clarity over the relevance of the criteria to the Attorney-General's final selection:

> If the Attorney-General identifies the most suitable person based on their assessment against the selection criteria then it is desirable for this to be articulated. On the other hand, if the Attorney-General is not willing to state

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the Bench to result in different outcomes has been demonstrated by the outputs of the Feminist Judgments Project: Rosemary Hunter, Claire McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010); Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014). Cf Sumption, above n 81.

88 Anthony R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 400, 429–30.

89 Stephen Gageler, 'Judicial Appointment' (2008) 30 *Sydney Law Review* 159, 160.

90 Ibid.

91 Ibid.

> that selection is directly based on the selection criteria then this should also be articulated.[92]

That seems a reasonable request. In his preferred model of appointments, Gageler advocated an explicit sequencing of the process, and was plain as to when the role of the standard criteria was fulfilled:

> I would have one method for identifying the pool of potential judicial candidates and another for choosing amongst them. Both stages would be transparent. The first stage would be solely concerned with identifying persons having what I have described as the essential judicial attributes. At the second stage, I would be happy to see the broader considerations to which I have referred openly brought to the fore and debated.[93]

This approach is commonly referred to in the literature as one of 'minimal merit' and is distinguished from an insistence that merit alone supplies the only acceptable basis for selecting an individual for judicial office (so-called, 'maximal merit').[94] We submit that the McClelland reforms essentially brought about the model that was presented by Gageler — except in one key respect: there was only muffled acknowledgment of the 'broader considerations' that influenced or guided the selection at the second stage. Later, in Part IV of this article, we examine the extent to which Labor Attorneys-General recognised diversity in the public justification of their appointments. But before that, we reflect on the significance of a two-stage model — that of recommendation followed by selection — for the legitimacy of the stated criteria. Specifically, is such a model, as the Government claimed, still one that is 'based upon merit'?[95]

C *Merit and Diversity*

The traditional retort to any suggestion that judicial diversity should be consciously addressed when making appointments is that doing so risks improperly reducing the emphasis upon merit.[96] This explains a persistent political wariness about giving explicit weight to diversity in the process of selection — which remains stubbornly presented as dictated by the 'sole criterion' of merit (including its expression as itemised qualities and skills).[97] But in fact the use of other considerations to guide the selection of one individual from among a group all identified as suitably meritorious presents no departure from a merit-*based* model. While Rackley is correct to say of the 'minimal merit' model that 'the upshot of this approach is that, to this extent, appointments will no longer be made simply on merit', the conclusion she goes on to draw from this does not follow. She argues that:

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92 Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.20].

93 Gageler, above n 89, 161.

94 Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press, 2003) 340.

95 Attorney-General's Department, Australian Government, above n 13, 1.

96 See Bruce Debelle QC, 'Judicial Appointments: the Case for Reform' in *Upholding the Australian Constitution – Volume 21* (Sir Samuel Griffith Society, 2009) 82; Gibbs, above n 20, 10.

97 Select Committee on the Constitution, above n 73, 33 [97]; (more ambiguously) Senate Legal and Constitutional Affairs References Committee, above n 2, 23 [3.60]; Attorney-General's Department, Australian Government, above n 13, 1.

> we should see this for what it is: appointment on *something in addition to* merit. As such those making these arguments would do better to bite the bullet and to make the case *against* appointment on merit, to present the argument for why the gains of diversity should trump appointing the person best able to do the job.[98]

But the candid recognition of factors in addition to merit does not amount to any kind of rejection of merit. On the contrary, merit remains central as the threshold that all individuals must cross before they are seriously in the running for appointment. Rackley's anxiety about how this model will be seized upon by opponents of judicial diversity and who will object that it is a diminishment of the 'merit principle' is understandable. But for them to insist that 'merit' must remain the *exclusive* basis for appointment requires them either to dispute Gageler's assessment that there are, at any point in time, a sizable number of persons with the requisite qualities for appointment to judicial office or to believe that the suitability of those candidates may be objectively measured and ranked with exactitude.[99] Regarding the latter, Malleson has argued that the usual statement of criteria for appointment are simply not fit for such an exercise: 'they are essentially qualitative in nature and difficult to measure in the sort of precise comparative way which is required for a rigorous ranking merit system'.[100]

Recent UK experience appears to demonstrate the problems associated with constructing a formal process around the fiction of 'merit alone' as the basis for appointment. The practice in that jurisdiction of the Lord Chancellor, Lord Chief Justice or nominee receiving only a single name from the JAC or a specially convened selection commission, was described earlier. The appropriate authority is limited as to the grounds upon which he or she may reject the selection or require its reconsideration and must give the relevant commission reasons in writing for taking either course.[101] Consequently, this is unlikely to be done lightly.[102] Even allowing for the fact that up to two replacement nominations may be required of the commission, the process is manifestly predicated upon the idea that merit is ultimately determinative. The requirement that the commission

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98 Rackley, above n 87, 190 (emphasis in original). To be clear, Rackley does not advocate such a course. Rather, she insists that merit is validly prioritised, but she is uncomfortable with it being merely supplemented by diversity factors. Instead, and building on the substantial case she has made that 'diversity is essential to the *quality* of judicial decision-making', she wants merit and diversity to operate holistically to, 'stand and fall together': Rackley, above n 87, 195 (emphasis in original). While we accept her central argument that a more diverse judiciary results in *substantive* benefits to the work of courts, we do not accept that an appointments model which applies individual merit as a threshold and then allows the final selection to be guided by publicly-articulated diversity considerations is accurately described as one that still requires us 'to choose between advancing diversity and appointment on merit': Rackley, above n 87, 194. As we argue in the main text, this is because we reject Rackley's portrayal of the 'minimal merit' model as amounting to one which is essentially '*against* appointment on merit': Rackley, above n 87, 190 (emphasis in original).

99 Malleson, above n 14, 489. But she says: 'The sort of judiciary, which fits with a ranking merit model of judicial selection, is the career judiciary common in many European civil law systems'.

100 Ibid 490.

101 *The Supreme Court (Judicial Appointments) Regulations 2013* (UK), reg 21; *The Judicial Appointments Regulations 2013* (UK), regs 9, 15, 21, 27, 33.

102 Bogdanor suggests that a convention may ultimately develop that the Lord Chancellor simply appoints the first name received: above n 38, 68.

identify a single individual who satisfies the criteria signals, however improbably, that the latter dictate a certain ranking of eligible persons. It may never be baldly acknowledged, but it is surely implicit that when put by the appropriate authority to the task of furnishing him or her with a second or third name the commission must inevitably be turning to a person it earlier identified as runner up to its first recommended candidate.

That unfortunate impression might be easily avoided if the JAC or special commission was empowered to provide a shortlist of persons it viewed as meeting the criteria for appointment. Such an approach would recognise the open-textured qualitative nature of the assessment, and the availability of several persons of suitable merit. But this was apparently seen to produce an insufficiently depoliticised method of judicial appointments. The determination to severely reduce the executive's role in selection has reinforced the notion that at any point in time there is but a single individual whose meritorious qualities trump those of anyone else. Traditionally, Australian governments have justified appointments made in their absolute discretion on the basis of the individual's unequalled merit.[103] It is interesting that the substantial removal of that discretion in the UK has not been accompanied by any greater frankness about the existence of sufficient merit more broadly across the profession.

This reluctance has been criticised as contributing to the slow pace of the diversification of the UK judiciary. Malleson, prior to the 2013 divesting of the Lord Chancellor as the decisional authority in respect of all judicial appointments, advocated that a move toward that officeholder receiving a shortlist of candidates 'whom the commissions consider to be very well-qualified and appointable … would open space for the Lord Chancellor to promote greater diversity though his choice of candidates while maintaining selection on merit'.[104] She argued that diversity 'requires political will to drive forward proactive changes, some of which are not supported by the judiciary or the legal profession'.[105] The House of Lords Select Committee on the Constitution rejected this view because 'unless a Lord Chancellor is committed to the promotion of diversity, the use of shortlists could have the reverse effect of reducing the diversity of the judiciary'.[106] Instead, the CRA was amended to make it clear that while appointments remain 'solely on merit', this does not prevent the selection commission, 'where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity'.[107] Merit remains tightly conceived — and is expected to be

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[103] Simon Evans, 'Appointment of Justices' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 19–23; Williams, above n 22, 164.

[104] Kate Malleson, *'Taking the Politics Out of Judicial Appointments?* (21 February 2012)' UK Constitutional Law Association <http://ukconstitutionallaw.org/2012/02/21/kate-malleson-taking-the-politics-out-of-judicial-appointments/>. Malleson had emphasised the importance of shortlists at the time of the JAC's creation: Malleson, above n 55, 313.

[105] Ibid. See also Kirby, above n 35, 26–7.

[106] Select Committee on the Constitution, above n 73, 16–17 [36].

[107] *Constitutional Reform Act 2005* (UK) ss 27(5A), 63(2), 63(4), inserted by *Crimes and Courts Act 2013* (UK) schs 13, 9, 10 respectively.

the sole determinative of appointment in most cases.[108] The fact that the so-called 'tipping point' provision itself refers only to a situation 'where two persons are of equal merit', also signals that Parliament did not contemplate that a greater number of individuals might, through their possession of a diverse range of experiences and qualifications, be judged to be equally meritorious. The JAC, in announcing how it intends to implement the provision, avoided being so rigid.[109]

It is unlikely that any future reform of Australian judicial appointments would limit the power of the Attorney-General to accepting a single recommendation from an advisory panel or commission. For one thing, there is, of course, a constitutional difficulty with any model that appears to fetter the executive's choice under s 72 of the *Constitution*.[110] It would also amount to a polar, rather than incremental shift, along the spectrum of design options; the practice of forwarding, in the first instance, just one name to the executive is itself 'unique' to the UK.[111] But it is useful to be able to observe that system as illustrating why the familiar insistence upon 'merit alone' should be resisted. The House of Lords Committee went so far as to declare that 'the use of shortlists would undermine judicial independence and be contrary to the principle of appointment on merit'.[112] That is not a view that found any support in Australia's consideration of appointment processes — the 2009 Senate Committee inquiry did not receive a single submission from the judiciary, legal professional associations or academics voicing that concern. While the Committee itself made the usual noises about selection on merit, it clearly did not see the forwarding by advisory panels of shortlists to the Attorney-General as existing in any tension with that principle. Indeed, the Committee went so far as to recommend that the number of persons shortlisted for a vacancy be made public.[113]

Whatever criticisms may be made of assumptions underlying the UK approach, there is at least a consistency between the rhetoric of 'merit alone' and the process of appointment in that jurisdiction. By contrast, it seems that the Labor Government in Australia experimented with a process that highlighted the non-determinative nature of the criteria for judicial appointment but was reticent about acknowledging how other considerations were brought into play. So much was evident from the use of shortlists, but also from the Government's candour that the Attorney-General identified his or her 'preferred candidate' from that list. In the next Part, we assess whether that tension might be avoided by making

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108 This sentiment was expressed by both the JAC: Ministry of Justice (UK), 'Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010', May 2011, 33; and senior judges: Select Committee on the Constitution, above n 73, 34 [99]. See also Graham Gee and Kate Malleson, '*Judicial Appointments, Diversity and the Equal Merit Provision*' (6 May 2014) UK Constitutional Law Association <http://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision/>.

109 The JAC policy is to apply the provision in relation to 'two or more candidates' of equal merit: JAC, *Equal Merit Provision Policy* (8 April 2014) 3 [3] <https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/emp_policy_0.pdf>.

110 Evans and Williams, above n 33, 322.

111 Professor Cheryl Thomas quoted by House of Lords: Select Committee on the Constitution, above n 73, 16 [36].

112 Select Committee on the Constitution, above n 73, 17 [37].

113 Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.23]–[3.24] (Recommendation 3).

explicit the 'broader considerations' guiding that preference, as Gageler advocated. Although the Senate Committee saw this as a matter regarding the relevance and transparency of criteria throughout the entire process, it appears, in line with our discussion to this point, better to examine the question as a matter of how the executive publicly justifies its ultimate selection from the shortlist.

IV Transparency of Selection: Justification

A public statement by the Attorney-General announcing judicial appointments has been more or less common practice in Australia for some time. While such statements provide a succinct account of the individual's professional experience and qualifications, traditionally they have revealed nothing about the process by which the choice was made nor the criteria that were applied — beyond perhaps that of 'merit' as a single-word concept. They have certainly offered no acknowledgment of the existence of other candidates also possessing sufficient merit and from among which the new judge is selected.

During the currency of the McClelland reforms, the information provided by the Attorney-General's Department about the criteria and the use of advisory panels to consider nominees and prepare a shortlist explained those particular mysteries about the process. But the reasons justifying the ultimate selection by the Attorney-General of one individual over the others on the shortlist were left enigmatic.

This is not to say, however, that there was no allusion to the considerations beyond those articulated in the criteria. The press statement of McClelland, announcing the first appointments to the Federal Court made after the introduction of his reforms, was actually rather revealing:

> Mr McClelland said, 'The more transparent process can give the public confidence that the appointments were made on merit.'
>
> 'I am also pleased that this process has resulted in appointments reflecting expertise, diversity and experience.' …
>
> 'I am impressed that more than 100 nominations and expressions of interest were received for the positions.'
>
> All three appointees are respected as extremely talented lawyers, with experience across many areas of law and will bring new diversity to the Federal Court.[114]

Although McClelland did not say that diversity considerations guided his selection of Justices Jagot, Foster and Perram, his remarks offer some confirmation that such factors were relevant. As we have seen, diversity was not included in the criteria, nor was it a matter within the advisory panel's purview. Although the Government had said the development of a more diverse judiciary was a desired outcome of the move towards calling for nominations,[115] it would be strange for

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[114] Attorney-General's Department, Australian Government, 'Three New Judges Appointed To The Federal Court' (News Release, 051/2008, 25 June 2008).

[115] Attorney-General's Department, Australian Government, above n 13, 1.

this to be the only means employed, especially when the Attorney-General holds the discretion to choose from among several meritorious candidates. Given the latter, it is odd that McClelland depicted his own role in the appointment of three persons who will 'bring new diversity to the Federal Court' as passive, rather than active. Additionally, although the brief profiles of each new judge attached to the Media Release detailing their respective areas of practice provided some clues, the specific way in which each of the appointments contributed to the achievement of such diversity was not made explicit.

This approach of emphasising the appointee's satisfaction of the 'merit' criteria before acknowledging the different quality or perspective which he or she brings to the Bench is also demonstrated by the remarks of McClelland's successor, Nicola Roxon, when she welcomed Justice Farrell to the Federal Court in 2012. The Attorney-General said:

> In the history of the Federal Court, the appointment of a solicitor is a rare event. I have made no secret of my view that improving the professional, cultural and gender diversity of courts across the country can only strengthen and deepen the role, and the respect in which the court is held. Of course these appointments must also be of the highest professional and legal calibre, and your appointment, easily, meets all of those standards.[116]

When one looks through announcements of the appointment of other new judges and the speeches the Attorneys-General made at their swearing-in ceremonies over the life of the McClelland reforms, similar references to matters falling within what Gageler called the 'broader considerations' can be found. But each Attorney-General stopped short of explicit affirmation that he or she was, in the words of the Senate Committee, 'making appointments other than based on an assessment against selection criteria'.[117] We suggest that so much was simply obvious both from the process itself and from the relevant remarks. But it is interesting to ponder the reason for the Government's disinclination to acknowledge the influence of the 'broader considerations' as a distinct second stage in the appointments process, after an individual's merit had been established at the threshold.

Political wariness about an open embrace of judicial diversity as a factor in Commonwealth appointments is understandable. While the view that diversity and merit are antithetical has significantly declined,[118] as already acknowledged, unease appears to linger about explaining judicial appointments in any way that risks complicating their description as 'merit-based'. Although it is well-recognised that public confidence in the courts depends upon them being generally representative of the wider community,[119] there is an obvious danger in exposing the appointments process to allegations of 'tokenism' or 'political

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[116] Nicola Roxon, Speech delivered at the Swearing In of the Honourable Justice Kathleen Farrell, Federal Court of Australia, Sydney, 5 December 2012.

[117] Senate Legal and Constitutional Affairs References Committee, above n 2, 14 [3.21].

[118] Only the submission of the Association of Australian Magistrates received by the 2009 Senate Committee expressed the view that an active policy of increasing judicial diversity is unnecessary: Senate Legal and Constitutional Affairs References Committee, above n 2, 22 [3.59].

[119] See McHugh, above n 68; Malleson, above n 55, 304.

correctness' that undermine faith in the quality of the judiciary.[120] That possibility is magnified in respect of specific appointments as distinct from the process generally. While it is one thing for the Attorney-General to observe that an individual's background further enhances the diversity of persons sitting in the court to which he or she is appointed, it risks sending quite a different message to state that this was a distinct consideration in their selection. Although the individual's merit has been unquestionably established before such factors assume any relevance, there is a distinct danger that this will be lost sight of in the way the appointment is subsequently reported and discussed. Neither the individual concerned, nor those who were shortlisted but passed over, would benefit from the process being construed as driven by diversity factors.

None of this is to take issue with Gageler's suggestion that the 'broader considerations' should be 'openly brought to the fore and debated'.[121] We take him to mean this generally, rather than in specific cases. McClelland was commendably precise in this regard, nominating 'gender', 'residential location', 'professional background and experience, and cultural background' as the areas in which its efforts to increase diversity were directed.[122] It was perhaps surprising that the 2009 Senate Committee did not individually assess these various fields, nor consider the acceptability of others. So far, it might be said there has been little debate on these considerations,[123] but perhaps this reflects a consensus about their relevance and desirability?

Ultimately, and with an appreciation of the need for some political pragmatism, we submit that the Labor Government under Prime Ministers Rudd and Gillard struck a sound balance in the public justification of its appointments — emphasising that these continued to be based on merit, while also highlighting the growing diversity of the federal judiciary.

However, this was far less convincingly managed in respect of High Court appointments. In particular, Attorney-General Roxon sent confusing signals about Labor's priorities in judicial appointments by repeatedly stressing her desire to draw on a much wider pool of candidates in order to diversify the senior judiciary[124] and then, after making two squarely traditional appointments to the

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120 These concerns have been more fully ventilated in discussions in the UK regarding the use of quotas and targets for the gender and racial diversification of the judiciary: see Select Committee on the Constitution, above n 73, 34–6 [102]–[108]; Malleson, above n 14; Geoffrey Bindman and Karon Monaghan, 'Judicial Diversity: Accelerating Change' (Report prepared for Shadow Secretary of State for Justice, Sadiq Khan, November 2014) <http://www.matrixlaw.co.uk/uploads/other/06_11_2014_12_11_31_06.11.14.pdf>.

121 Gageler, above n 89, 161.

122 Attorney-General's Department, Australian Government, above n 13, 1.

123 Though regarding geography see Lynch and Matevosian, above n 19.

124 Attorney-General's Department, Australian Government, 'Wide Net Cast in Search for Two New High Court Justices' (Media Release, 23 March 2012); Nicola Roxon, 'Fairness: Good Laws, Good Application and Good Processes' (Speech delivered at the Australasian Institute of Judicial Administration and National Judicial College of Australia Discovery Seminar, Melbourne, 23 March 2012). See also Andrew Lynch, 'Roxon's High Court Dilemma' *Inside Story* (online), 9 July 2012 <http://inside.org.au/roxon-high-court-dilemma/>.

High Court in the form of Justices Keane and Gageler, falling back on unsatisfyingly generic claims about 'merit'.[125]

While Roxon's mixed messaging did not help, in many respects the opacity was only to be expected given the exclusion of the High Court from the reach of most aspects of the McClelland reforms — particularly the use of explicit criteria and an advisory panel. It is conceivable that either or both of Roxon's appointments, while superficially orthodox in appearance, may have featured non-traditional considerations as some part of the equation, not discernible to those outside the selection process. Indeed, the very distinct institutional features of the High Court might be expected to require that weight be given to a range of matters that are less obviously important when appointing individuals to a lower court. We have already, for example, acknowledged the desirability of a spread of specialist expertise on the High Court. Additionally, the selection may be influenced by that Court's broader role in providing intellectual leadership for the legal profession at large and impressing upon the whole community the importance of the rule of law and its requirements. Individual judges, to varying degrees, contribute to this aspect of the Court's function through their extra-judicial speeches and writings. It seems quite defensible for a willingness and capacity to engage in those activities to be considered when selecting a new High Court appointment from among a shortlist of contenders. A further consideration might be the fact that the individual will work alongside six colleagues. Paterson's recent examination of the institutional practices and culture of the UK Supreme Court led him to remark that it 'requires a different skill set in the participants than was once required of the Law Lords'; these include an 'ability to negotiate, to compromise, to persuade whilst robustly defending a position of principle'.[126] In recent years in Australia, High Court judges have given starkly contrasting conceptions of the judicial role on a multi-member appellate court.[127] Might an individual's demonstration of certain interpersonal skills and a temperament and capacity for professional cooperation also be appropriate factors in his or her selection for judicial appointment?

Essentially, it remains very difficult to know how High Court judges are selected. That presents as nothing new, but the contrast of approaches under Labor only highlighted the importance of transparency in respect of the nation's most senior appointments. It is for these, more than any other, that the public should be given a clear explanation as to how the Attorney-General has determined the identity of his or her 'preferred' candidate.

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[125] We do not, we are keen to stress, suggest that either Gageler or Keane JJ was not an eminently suitable appointment to the High Court.

[126] Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 314.

[127] Justice Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205; Gageler, above n 77; Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554; Keane, above n 79.

V Conclusion

Reform of judicial appointments to federal courts is at a crossroads. It is conceivable that the current Attorney-General's reversion to unfettered executive discretion will diminish Labor's commitment to reviving some more transparent and accessible process upon its eventual return to government. After all, abnegation of power is the least likely of political impulses. If the Coalition holds government for several terms, then the fact that the McClelland reforms were on foot for only a brief time may lead to them being seen as merely a novel experiment that did not take hold. However, the case for a more transparent and independent process will remain undimmed, bolstered by reform in comparable jurisdictions. The McClelland model, albeit modest by international standards, will be undoubtedly influential on any future attempt to meet that case.

McClelland deserves credit for initiating change and his approach had numerous strengths. It cast a wide net for candidates and consulted broadly with stakeholders. It articulated a sophisticated and informative meaning of 'merit'. It identified suitable candidates for appointment through the involvement of an independent and well-qualified advisory panel. All these aspects of the model were likely to instil public confidence in the quality and independence of the judiciary, and dispel any sense that appointment was determined by establishment networks or partisan allegiances.

However, we have focused on two deficiencies of the reforms that would warrant a different approach in future. The simplest of these to remedy is the exclusion of the High Court and heads of jurisdiction. The weak justifications for that exclusion are overwhelmed by the clear importance of ensuring that these appointments, above all others, be seen to be free from political taint. Quite aside from this being reflected in the design of overseas appointment models, the recent Carmody affair in Queensland provides local confirmation of this point. The fact that Tim Carmody was not simply elevated to the Bench of the Supreme Court, but to the head of the State's judiciary, undoubtedly fuelled and sustained criticism of his appointment. The higher the office, the stronger the need to ensure public confidence in the independence and qualities of the person appointed to it.

The second deficiency of the McClelland model is more challenging. It concerns the tension between the goal of a transparent process and the tendency to leave unacknowledged the role that 'broader considerations' inevitably still play in the selection of one individual from among others for appointment. Overcoming this requires candour about the obvious inability of express criteria defining 'merit' to conclusively determine the outcome in the vast majority of cases. The McClelland reforms avoided the restrictive approach to 'merit' of the UK model which suggests the concept enables a precise ranking of candidates. That assumption, which goes hand-in-hand with the very limited discretion left to the executive, underpins much of the continued criticism of the UK model for its failure to appreciably diversify the English judiciary over the last decade. However, and as the Senate Committee noted, if the criteria's role is essentially exhausted by the shortlisting of the advisory panel, there was a failure by the Australian model to make plain what considerations guided the Attorney-General

in selecting his or her 'preferred candidate'. We have argued that those considerations should be ones that go to judicial diversity — whether narrowly in the sense of fields of legal expertise and professional experiences, or attuned more generally to personal attributes such as gender or ethnicity. In contradistinction from other considerations that have perhaps informed selection in the past, these are ones that are legitimate, or at least debatable. They should be publicly articulated. McClelland did go so far as to identify the attributes Labor wished to see diversified in the federal judiciary — but refrained from explaining the actual role these were to play in the process.

Acknowledging the utility of diversity considerations in supplementing merit as a threshold satisfies the objective of a truly transparent appointments model. But there is an even wider point that arises from this. Admitting the existence and necessity of choice at the second stage of selection sharpens our appreciation of the executive function in this context. A narrow notion of 'merit' has been used to virtually oust the executive from being responsible for appointments in the UK.[128] It would be understandable, particularly in the immediate wake of a controversy such as that which has occurred in Queensland, if reformers were tempted to emulate that approach. But as much as we need to develop an appointments process that provides an independent judiciary, government should be kept in the picture. Quite aside from the importance of ensuring a basic democratic accountability for the judicial arm, the executive has an important role to play. Accepting that 'merit' may be demonstrated in diverse ways and that the Australian judiciary is constructed through the selection of some individuals from among others of a comparable calibre should lead to support for retaining a role for the executive, while also ensuring this is both better understood and more meaningfully guided.

[128] Rackley laments the curtailment of the Lord Chancellor's role, saying that it was never intended that it 'should be downgraded to that of the selection panel's messenger': Rackley, above n 87, 86.