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Nicola Roxon MP, Shadow Attorney-General
Comment on Proposal for Judicial Appointments Commission

Good morning and thank you for the invitation to participate in this weekend's colloquium. Can I particularly acknowledge, amongst this room of dignitaries, Justice Ronald Sackville, retiring Chair of the Judicial Conference of Australia, and incoming Chair of the JCA, Justice Bruce Debelle.

The Judicial Conference of Australia plays an important role in the promotion of a strong and independent judiciary in Australia, and this forum is an excellent opportunity for interaction between judicial officers, as well as between judges, academics and politicians.

I'm especially pleased to be part of this forum as I have a particular interest in all matters affecting the courts and the impact it has on confidence in, and access, to justice. Not just because I am the Shadow Attorney-General, but because of my background. For almost all my time in practice I worked with people who could not afford lawyers through regular processes and I then had the privilege to be an associate to Justice Gaudron at the High Court.

Accordingly, I feel I have an insiders view of the workings of two arms of government – the Courts and the legislature. And I am of course very keen to get a look in at the third – the executive!

I also welcome the opportunity to be involved in this important discussion about judicial appointments. As people who have all been appointed by one government or other, I know you would share my view that, whatever failings of the current system, we have, perhaps in spite of rather than because if it, been blessed with an extraordinarily high calibre of judges in this country and been remarkably free of major issues of corruption or illegal behaviour.

So I approach this debate from the perspective of wanting to improve and consolidate that strength for the future. I do hold the view that there are some new, worrying signs that demand consideration of the best way to maintain quality appointments. And, even more strongly, I hold the view that we are at a turning point in the community's perception of the Courts and the legal system that also demands more attention be given to how appointments are viewed than in the past.

Some of these changes include a general interest in accountability of public institutions, increased media scrutiny of the courts and their decisions, more political debate on laws and sentencing, increasingly litigious governments, more matters coming before our courts with a political component and, unfortunately, more contentious appointments.

I don't believe that our current process, so lacking in transparency, and even at its best so dependent on behind the scenes consultations with the profession, can provide the ongoing confidence in the system that is needed.

These are just some of many reasons that require more attention be given to ensuring our processes provide the community with full confidence that appointments are made on merit, rather than mateship. That when they go before a court, or a matter affects them is before the court, that it will be decided on the law – not personal friendships, political views or favours. We need to start now to future-proof the courts from growing cynicism in our system of justice.

The old fashioned deference, given to judges and courts, simply because of the institutions they were part of, no longer exists. Nor does it necessarily have a place in modern Australia. Nevertheless the importance of a continuing respect in the law and confidence in our courts and the laws they administer is just as important as ever.

So I am going to approach my task of commenting on the very comprehensive paper presented today as one of context. I'm going to look not just at the content of the proposal, but also whether it is part of any broader public purpose or debate and of its political viability.

Can I first thank Professor John Williams and Dr Simon Evans for their very comprehensive paper and proposal for a judicial appointments commission in Australia to make recommendations to the Attorney-General for judicial appointment.

I personally support the general thrust of the proposed change, although I am not at this point wedded to it as the only option.

It is one way to tackle the existing process which lacks transparency and of which I have been on the record for some time arguing for the need to

debate change –and it has the virtue of being up and running in a jurisdiction from which many of our legal traditions have evolved.

One of the main criticisms of the current system, which this proposal would help cure, is the tendency to appoint those known to the Attorney, or those inside a very small “legal club.”

The legal world is already small enough, that drawing appointments from an even smaller subset can’t be desirable long term. And with no disrespect to the High Court, the current over-representation of graduates from Sydney University amply demonstrates this point!

For non-lawyers in the legal system, the whole court process is already peculiar enough – with its own special formalities and language – that the secrecy of the appointments process and the lack of any public criteria for appointment feeds in to the sense that everyone else is in a club for which you are an outsider. This club-like appearance diminishes public confidence in the courts, undermining an elementary requirement for the maintenance of the rule of law. This is apart from the lack of variety in terms of age, gender, cultural background and geographic origin to flag just a few factors that could helpfully be considered in a new appointments process.

For me, the two major attractions of the proposal are its transparency and its focus on articulating more thoroughly what attributes a meritorious candidate should have. As part of the vital challenge to continue to bolster political accountability and the community’s confidence in the law these two are critical.

I particularly approve of the development of selection criteria to assess applicants and an appreciation of the differences there might be for trial and appellate courts. The current process for judicial appointments reflects a lack of preparedness to talk about what skills are required for judicial officers, and a tendency to limit qualification to a narrow band of experience, traditionally associated with the Bar. The formulation and application of selection criteria against which applicants are judged will counter these tendencies – although I am not yet convinced that determining them must be entirely a job for the new commission as proposed. A mechanism for broader feedback into this process might be valuable – a consumer perspective, for example, might be quite important or desirable.

I also note the authors' suggestion that the Commission should take into account that the selection criteria should allow candidates to demonstrate their capacity to develop skills within a reasonable time, rather than demonstrate these skills at the time of application. Again, I believe this would open the process of appointment up to a wider pool of potential applicants who, with some modest assistance, could gain those skills.

Just as importantly, more emphasis on training throughout a judicial career would be desirable – whether it be on complex, new areas of law, areas within which an appointee did not practice, courtroom management, research and writing skills or techniques for handling certain categories of witness (eg children) or new technologies. Maybe this debate will provide a chance to discuss these long term issues in a sensible way, without the immediate counter that this rather innocuous idea would somehow necessarily lead to political interference with judicial decision making.

I also agree with the authors' emphasis on the need for the judiciary to reflect the society from which it is drawn. The application process, addressing known and articulated selection criteria, and employing proactive outreach techniques and public advertising in addition to consultation with interested parties, will assist in identifying and attracting "less visible" candidates. Varied input from people with different backgrounds, life experiences and points of view must be beneficial to the judicial process. This is not to suggest that the court should be a completely representative cross-section of society – that is impossible given that legal training and experience is a pre-requisite to meeting the demanding technical aspects of the job. But any process that improves the diversity of the court is certainly worth consideration.

The proposed assessment of candidates through a Judicial Commission (and its Secretariat) utilises what, in the rest of the employment market, are standard recruitment practices. I have been at a loss to understand the level of criticism some of my state colleagues have received for even modest reforms in this area – notifying positions available and calling for expressions of interest. Within in our current system this can only help increase the pool of talent considered, not restrict it.

I think some of the other practices proposed in the paper such as interviews and assessment centres will need a lot more thought and debate (like you are having here today) to ensure they will – at least over time – have the support of the profession. The risk that the public nature of an appointments commission model may preclude some excellent candidates is real and consideration still needs to be given how to avoid that – although I suspect I agree with the authors that the other benefits

probably ultimately outweigh this concern. Perhaps we will be able to see some results from the UK soon and learn from their experience.

It won't surprise you that I endorse the maintenance of a political role in the proposal, not least because it makes the proposal more politically viable. At the Commonwealth level it also has the virtue of making it possible. It also maintains an accountability mechanism in some part which would be removed if the Commission appointed judges directly.

The proposal that the Commission recommend a shortlist of 3 appropriate candidates to appoint is a sensible variation from the UK model. In fact, I would query whether the list could even be longer. If the main concern is to ensure only qualified individuals assessed and selected on merit can be appointed, does it matter if the Attorney selects one of, say, 10 provided they have met this criteria?

I do believe there are a number of other areas where this proposal may be improved by further consideration.

I am concerned that the structure proposed for those making up the Commission is still too much of an "insiders club". I understand the attraction of using office holders and the security and independence that brings. But it is not only political prejudices that we should hope to tackle if we were to introduce this new system – it is also to protect against any in-built biases that may exist within the judiciary and profession.

So … if the lay people are then to chosen by the other insiders I'm not convinced we would be setting up the Commission itself to have the breadth of perspective we are hoping this system will help our courts

maintain. I'm not sure yet what a better process would be, but am not averse to some of those positions being appointed according to an established criteria.

In terms of the political viability of the proposal – it is clear to me, and I am sure you, that not many politicians like to give up power that they have. My suspicion is that over history we could find those who wanted to maintain this power merely for their own ego, rather than to attempt to control judicial decision making long term, but I'm sure the reverse is easy to find too. Less pessimistically, there is an argument to be made the political appointment process does allow for some quicker responsiveness to the community's needs. So any change does have to meet this requirement. Another example is attention to issues such as geography that may be relevant to our federal system but not to consideration of merit, for example, the lack of any justices from South Australia on the High Court.

However, more importantly I suspect the viability of this proposal does depend on whether it is seen to be a part of tackling existing problems within our legal system. The argument for a new appointment process needs to be seen within that context. And it is only one issue. If a proposal to fix appointments is put forward in the absence of other issues being dealt with, I'm uncertain whether the case for change is as persuasive politically.

On the other hand, given the complexity of just this issue, I do understand the reason for focussing first on this. But, politically, we do not always have the luxury of such an isolated single issue debate.

Some obvious other matters for consideration, and requiring just as detailed and careful analysis and debate, include:

- Whether we should look at removal mechanisms within the context of the appointments commission model
- The broader need, as mentioned already, to address ongoing training, professional development and education needs of judges
- The desirability of developing mechanisms to deal with performance issues, and complaints against judges – ranging from the mischievous to more serious matters of health or misconduct
- The need to ensure adequate and equitable remuneration, including superannuation, and retirement and disability benefits, for judges
- Whether we should revisit retirement ages, in line with the general health improvement of our population as it reaches beyond the age of 70. A counter consideration, of course, is whether the courts benefit from reasonably regular turn over of judicial officers, allowing for changed attitudes in the community to be reflected in the courts.
- And finally, structural issues which may improve community access to the legal system, reduce the turn-around time of decisions or reduce costs associated with the legal system

In conclusion, I would suggest that the question of a refined appointments process is a vital component in the wider discussion regarding the future of our courts, and particularly our federal court system.

In a recent parliamentary speech I lamented the Attorney's lack of a long term plan for dealing with our federal courts.

I do not need to tell this audience that our court system is the vital third arm of government in our system of democracy, yet the judiciary and all these issues, do not get the careful attention, consideration and debate that they deserve. Other than one question of pensions, no parliamentary committee has considered any issue affecting the judiciary in the life of this Government.

I would argue it is now time for a Joint Select Committee into the Judiciary to be established to consider a range of these structural matters in a thorough and proper way. It could help air some of these difficult issues and set up an appropriate mechanism for dialogue between parliament, the courts, the profession and, importantly, the broader community. It would also build political awareness, if not necessarily support, for this sort of change.

I strongly believe that we need a plan for our courts that goes beyond any one electoral cycle. We must address how the various federal courts are structured and interact, the work we expect them to do and whether they have adequate resources to do it well for the community.

Reforming the judicial appointments process, together with developing mechanisms to improve judicial training and to deal with judicial complaints, are vital components of that wider discussion, and I would welcome further consideration of these issues if given the opportunity to be Australia's Attorney-General.