



## THE AUSTRALIAN BAR ASSOCIATION

### CHARTER OF JUDICIAL INDEPENDENCE 2004

#### INTRODUCTION

1. Confidence in the impartiality of those who adjudicate and resolve disputes has been recognised as a necessary feature of organised societies since time immemorial, including amongst Australia's original inhabitants.
2. The constitutions of the Commonwealth of Australia and its constituent jurisdictions contain measures designed to protect the independence of the judiciary, although to varying extents and with different degrees of entrenchment.
3. Throughout the twentieth century, the protection of judicial independence has been the subject matter of international human rights instruments and resolutions.<sup>1</sup>
4. The protection of judicial independence requires the maintenance of careful balances relevant to local contexts, not all of which can be reduced to universal declarations or even national legislation. It has therefore been the practice of the judiciary and legal professions in many countries to issue their own statements about judicial independence to supplement international instruments and domestic laws.<sup>2</sup>
5. In March 1991, the Australian Bar Association issued a lengthy statement entitled "The Independence of the Judiciary".<sup>3</sup> With the experience of the past decade and the advent of a new century in mind, and taking into account the Beijing

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<sup>1</sup> See in particular, the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant On Civil and Political Rights (1966) and the United Nations Basic Principles on the Independence of the Judiciary (1985).

<sup>2</sup> This Charter draws in particular upon the International Bar Association Code of Minimum Standards of Judicial Independence (1982), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995) ("the Beijing Statement") and the Declaration of Principles of Judicial Independence by the Eight State and Territory Chief Justices of Australia (1997) ("the State and Territory Chief Justices' Declaration").

<sup>3</sup> This is referred to hereafter as "ABA 1991".

Statement by most of this region' chief justices in 1995<sup>4</sup> and the Australian State and Territory Chief Justices' Declaration in 1997,<sup>5</sup> it is timely that a new statement should be made. It takes the form of a Charter appropriate for Australia as a democratic society governed by the Rule of Law and a member of the international community. Except to the extent contradicted by this Charter, the policies expressed in the 1991 Statement remain in effect.

## **THE SCOPE OF THIS CHARTER**

6. This Charter is concerned with judges, judicial registrars, masters and magistrates in Australia.<sup>6</sup> It is also intended to apply, with necessary modifications, to tribunals and commissions that exercise judicial power or power of a similar nature.<sup>7</sup> Words such as "court", "judge" and "judicial" are to be construed accordingly.

## **THE IMPORTANCE OF AN INDEPENDENT JUDICIARY**

7. Judicial independence is protected for the benefit of the public not for the benefit of judges.
8. Judicial independence, and the conspicuous protection of it, are designed to promote justifiable confidence in courts by assuring the public that decisions are made fairly, impartially and in accordance with law. Without public confidence in the institutions of justice, the Rule of Law (on which liberty in a democratic society depends) is imperilled.
9. Judicial independence carries with it responsibilities upon judges relating to impartiality, competence, and behaviour that is ethical and appropriate.<sup>8</sup>

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<sup>4</sup> This Statement was adopted unanimously on 19 August 1995 by chief justices from 20 countries in the LAWASIA region, including the then Chief Justice of the High Court of Australia, Sir Gerard Brennan.

<sup>5</sup> This Declaration was issued on 10 April 1997 by the eight State and Territory Chief Justices.

<sup>6</sup> In ABA 1991, para 4.1.7, it was thought that magistrates might be in a different position from other judicial officers and that lesser procedures may be appropriate for their removal. With the increase in the civil and criminal jurisdictions of magistrates in 1990s, and with the emergence of a clearer understanding that magistrates are but the first tier of a judicial system, it is no longer thought appropriate that a distinction be drawn.

<sup>7</sup> Australian jurisdictions contain a wide range of bodies and officials who apply the law in a judicial manner to determine rights and liabilities or settle controversies. In the Australian states, some bodies described as tribunals clearly exercise the judicial power of the state. The Commonwealth Constitution, as interpreted by the High Court of Australia, generally requires that the Commonwealth's judicial power be exercised only by the High Court, federal courts created by the Parliament or other courts invested with federal jurisdiction. This means that bodies such as the Administrative Appeals Tribunal do not exercise the judicial power of the Commonwealth. For many citizens resort to tribunals exhausts the remedies practically available to them and the Australian Bar Association regards the policies in this Charter as generally relevant to tribunals and similar bodies in all jurisdictions.

<sup>8</sup> These expectations upon a judge relate back to the criterion of merit for her or his appointment. They require that judges continue to warrant the confidence that was placed in them at the time of appointment. They may involve, in their context, an expectation that a judge engages in continuous

## **THE MINIMUM CONDITIONS FOR THE PROTECTION OF JUDICIAL INDEPENDENCE**

10. In the appointment of judges, the paramount considerations are that judges should be appointed, without discrimination,<sup>9</sup> from amongst all those who are suitably qualified for the positions they are to hold and on the basis of merit.<sup>10</sup>
11. To the extent compatible with assuring that these paramount considerations are met and that candidates of the highest quality will continue to be willing to serve in the judiciary, procedures for the appointment of judges should be clearly defined and formalised.
12. Information about these procedures should be available to the public.<sup>11</sup>
13. Nothing in the appointment process should lead to any reasonably held perception that a judge might be under a continuing sense of obligation to the government that appointed her or him.
14. Once appointed, when exercising judicial powers a judge must exercise independent judgement irrespective of her or his position within a court.<sup>12</sup>
15. The requirements in s.72(ii) of the Commonwealth Constitution as to security of tenure of judges should be adopted, with the equivalent degree of entrenchment, in all Australian jurisdictions.<sup>13</sup>

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self-education or judicial studies. These expectations should also be understood in the context of a constitutional arrangement of separation of powers between the executive, the legislature and the judiciary. See also “Guide to Judicial Conduct” - Council of Chief Justices of Australia and New Zealand.

<sup>9</sup> The Australian Bar Association adopts the principles in article 13 of the Beijing Statement that in the selection of judges “there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.”

<sup>10</sup> Article 11 of the Beijing Statement refers to “competence, integrity and independence”. The Australian Bar Association regards these qualities as fundamental to “merit” for these purposes.

<sup>11</sup> The requirements of clear definition, formality and information are drawn from the Beijing Statement, article 16.

<sup>12</sup> This requirement draws upon article 6 of the Beijing Statement which provides that “any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with [an impartial assessment of the facts and an unbiased understanding of the law]”.

<sup>13</sup> This subsection provides that federal judges “shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.”

16. Subject to the above, a judge should be appointed until he or she attains a statutory retirement age appropriate to the jurisdiction in question, which should not be less than the age of 65.<sup>14</sup>
17. Whether or not a judicial commission or similar body exists in the jurisdiction in question, proceedings for the removal of a judge must comply with the principles of natural justice and be conducted in a way that does not damage public confidence in the judiciary generally.
18. Proceedings for the removal of a judge should not be commenced unless a preliminary examination indicates that there are adequate reasons for taking them.<sup>15</sup>
19. The appointment of an acting judge who lacks the security of tenure of a permanent appointee will only be justifiable in limited circumstances to meet a temporary need in the particular jurisdiction. The appointment should only be for a single term and made with the prior approval of the judicial head of the court in question.<sup>16</sup>
20. The requirements in s.72(iii) of the Commonwealth Constitution as to the remuneration of judges should be adopted, with the equivalent degree of entrenchment, in all Australian jurisdictions.<sup>17</sup> The requirement that remuneration should not be diminished during a judge's continuance in office should be interpreted so that (a) "remuneration" includes those benefits reasonably expected to follow upon retirement; and (b) the prohibition on diminution of remuneration extends to decisions made after a judge's retirement.<sup>18</sup>
21. In addition to other considerations to be taken into account in deciding remuneration, the level of remuneration should be such as to attract lawyers of the highest quality to serve as judges and to minimise the reasonable likelihood

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<sup>14</sup> Security of tenure until a fixed retirement age is not primarily for the benefit of judges but is to enable litigants and society at large to have confidence in the impartiality of judges and the courts. It is designed to prevent judges' dependence upon Executive Governments for renewals of their commission, and any public perception of such dependence.

<sup>15</sup> This provision is based upon article 25 of the Beijing Statement. In ABA 1991, the Australian Bar Association said that disappointed litigants will always have a motive to complain about the judiciary. "Care must therefore be taken to ensure that unwarranted complaints are not given more credence than they deserve. Accordingly, proper vetting processes must be introduced to guard against action upon unjustifiable complaints from disgruntled litigants; see para 4.1.5."

<sup>16</sup> The State and Territory Chief Justices' Declaration stipulates further requirements to do with acting judges. The Australian Bar Association assumes that the requirement for the prior approval of the head of the court will ensure that such further stipulations will be met.

<sup>17</sup> This subsection provides that federal judges "shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office".

<sup>18</sup> The decision to accept judicial office reasonably includes consideration of judicial pensions or other post-retirement benefits. It is in the public interest that judges whilst in office should not be subject to unreasonable pressures concerning their financial position once they retire. Nor is it in the public interest for Executive Governments to be able to place improper pressure on the judiciary or courts through raising questions about changes to judicial pensions. Remuneration includes: Salaries, allowances and other benefits.

that judges once appointed will be affected by improper, extraneous considerations.

22. Informed and balanced public scrutiny of judges' decisions and the work of the courts may maintain or improve the quality of the administration of justice, and is to be encouraged. Ill-informed, extravagant, or erroneous criticism, and comment about judges personally rather than their decisions or their capacity to perform the functions of a judge, has the potential to damage public confidence in the justice system and the balances required in a constitutional system of separation of powers, and should be condemned.

### **THE ABOLITION OF COURTS**

23. Subject to constitutional restrictions, legislatures have the power to create, reconstruct and abolish courts but their decisions to do so may, depending upon motive and consequences, have implications for judicial independence. The legislative and executive arms of governments should not exercise their powers so as to place improper pressure upon judges individually or collectively.
24. The abolition of a court is not of itself a sufficient reason for the removal of a judge.
25. Where a court is abolished or reconstructed, all existing members of the court must be reappointed to its replacement, or appointed to another judicial office of equivalent status, tenure and conditions. If there be no equivalent court or judicial office, proper compensation must be provided to the judges affected.<sup>19</sup>

### **COURTS AND JUDICIAL ADMINISTRATION**

26. The legislative and executive arms of government must provide courts with sufficient resources to carry out their functions properly.<sup>20</sup> The budget of a court should be prepared in collaboration with the judiciary, having regard to the needs of the independence of the judiciary and judicial administration.<sup>21</sup>
27. The legislative and executive arms of governments must not use control over resources, including the power to appoint new judges, directly or indirectly as a means of exercising control or influence over judges' decisions.

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<sup>19</sup> These provisions are based upon article 29 of the Beijing Statement and the Judicial Conference of Australia's Guidelines on The Abolition of Courts, <http://www.law.monash.edu.au/JCA/abolition.html>.

<sup>20</sup> In ABA 1991, resources was taken to include funds, premises, facilities and staff; see paragraphs 4.2.2 and 4.2.3.

<sup>21</sup> This is based upon article 37 of the Beijing Statement.

## **THE LEGAL PROFESSION**

28. The majority of judicial officers will continue to be drawn from the practising profession, whether in private practice or in employment elsewhere. For this and other reasons, it is essential that the highest standards of competence, integrity and responsibility are maintained amongst legal practitioners so that these qualities are continued in the judiciary.
29. For similar reasons, it is essential also that the independence of the legal profession from improper government control or influence, direct or indirect, is maintained.

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