AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION

# STATE OF JUDICIAL INDEPENDENCE IN AUSTRALIA

## Public Statement

As part of its commitment to the advancement and protection of judicial independence, the Australian Judicial Officers Association announces the publication of the attached research paper, 'Judicial Independence in Australia'. The paper has been prepared for the AJOA by Dr Jessica Kerr of the University of Western Australia.

The paper was commissioned on the recommendation of the AJOA's Standing Committee on Judicial Independence. The Standing Committee comprises members of Governing Council of the AJOA (Vice President Justice Darryl Rangiah, Justice Richard Weinstein, Justice Steven Dolphin and Associate Justice Michael Daly), and formerly also included the immediate past President of the AJOA, Justice Michael Walton, and me as the previous Vice President of the AJOA. The Standing Committee also includes leading academics, Professor Andrew Lynch, the Dean of Law at the University of New South Wales, and Associate Professor Rebecca Ananian-Welsh of the University of Queensland.

The paper authored by Dr Kerr provides a contemporary assessment of the state of judicial independence in Australia. It does so in the context of the established body of literature on the topic by applying the 'Judicial Independence Monitor', a methodology developed by the American Bar Association. The Judicial Independence Monitor identifies and assesses vulnerabilities to judicial independence across three categories: internal independence, external independence and accountability and transparency.

The research paper is the first of its kind in Australia to use the Judicial Independence Monitor. An academic reference group of eminent legal scholars[1] provided oversight of Dr Kerr's research and her paper has been considered by both the Standing Committee on Judicial Independence and a Review Committee comprising the Hon Robert French AC, the former President of the AJOA Justice Michael Walton, myself as the former Vice President, Justice Chrissa Loukas-Karlsson and Justice Darryl Rangiah.

---

1 Professor Andrew Lynch, Associate Professor Rebecca Ananian-Welsh, Professor Gabrielle Appleby, Professor Melissa Castan and Professor Sarah Murray.

Consistent with the methodology and purpose of the Judicial Independence Monitor, the research paper on 'Judicial Independence in Australia' is intended to provide a relatively brief overview of the topic drawn from a wide-ranging research exercise. It is intended to situate Australia within the currents of international discussion about the factors which bear upon judicial independence, and is intended as an accessible entry point for commentators and those interested in better understanding the state of judicial independence in Australia.

In her paper, Dr Kerr locates the consideration of the state of judicial independence in Australia in the following systemic context:[2]

> Australia has a generally excellent record for stability and longevity in democratic institutions, ranking highly on international indices of perceptions of corruption and trust in government. There has been an independent judiciary operating continuously in Australia for over two hundred years. Judges, who are selected from the ranks of senior legal professionals, enjoy high regard internationally as independent and impartial. They are insulated from overt external interference or pressure by a variety of constitutional and statutory rules, and their decisions are generally respected by government and society more broadly. …
>
> While the importance of judicial independence in Australia may be 'clear and uncontested', levels of confidence in public institutions have diminished over time, and the Australian judiciary is not immune to this trend. … The pace and breadth of reforms and institutional developments affecting the judiciary is increasing, and not all of these developments are judicially led. Meanwhile, workload and resourcing pressures on judges and courts are mounting, as are the pressures resulting from unprecedented online scrutiny and criticism. The COVID-19 pandemic has highlighted the potential and risks of rapid developments in court-related technology, as well as the fundamental, enduring role of courts in holding governments to account. Further, in a country where the government of the day not only funds the operations of the judiciary but appoints the next generation of judges, the politicisation of those choices is an 'ever-present danger'.

2 Omitting footnotes (and in subsequent references below).

Dr Kerr concludes by emphasising the need for continued vigilance in monitoring vulnerabilities and pressure points to judicial independence. She identifies pressure points for judicial independence in the following areas:

a. Resourcing and workload pressures
b. Transparency and coordination in judicial regulation
c. Appointments (including diversity, temporary appointments and inter-court promotions)
d. Evolving expectations of judicial conduct and competencies
e. Role of heads of jurisdiction (including administrative transfers and safeguarding)
f. Judicial stress and well-being
g. Responses to judicial misconduct and harassment
h. The scope of judicial immunity
i. New technologies, including artificial intelligence, within and beyond the courtroom
j. Legislative restrictions on open justice
k. Judicial independence in non-court environments
l. Retirement ages and pension schemes

As the paper identifies, this list is neither exhaustive nor static; the prominence of particular threats to judicial independence will vary over time and circumstance. However, the AJOA draws attention to the following threats to judicial independence as described by Dr Kerr in her report:

(a) On *resourcing*:

> Adequacy of resourcing is a significant current pressure point. Recent inquiries and extra-judicial speeches highlight the need for urgent and sustained investment in the 'institutional architecture' of judging, at all levels of the judicial system. This is essential if Australia is to continue to appoint enough judges and magistrates, responding to both current vacancies and anticipated future needs. It is also essential in order to support each of those judges in the independent discharge of their roles.

(b) On *safety and wellbeing*:

Judges in Australia do experience considerable work-related stress and trauma. This can include stress resulting from 'unfounded attacks' in mainstream and social media, in addition to the psychological and emotional impacts of much judicial work and the growing pressure of 'crushing' workloads, particularly in trial courts. The threat this poses to judges' mental and physical health, and their capacity to judge well, is increasingly understood.

(c) On *threats to judges*:

As Attorneys-General have stepped back from their traditional role as champions of the judiciary, the pressure on heads of jurisdiction to defend and safeguard their judicial colleagues has increased. Perceptions of independence and impartiality can be seriously undermined when judges are subject to unrealistic expectations or unjustified abuse. They may also, however, be undermined if the judiciary is seen as defensive or unaccountable. Striking this balance becomes still more complex in the face of technological developments like the rise of data analytics, which seek to identify patterns in the decision-making of specific judges or courts, and may be weaponised against the judiciary. External organisations, including professional organisations like the Law Council of Australia, have an essential role to play in supporting the work of heads of jurisdiction in response to rapid technological and broader social change.

(d) On *judicial immunity*:

There is a significant current issue of 'certainty and consistency' in the rules on immunity for Australian judicial officers. Until very recently, some federal judges were exposed to personal liability to court users for civil claims like false imprisonment. In a high-profile 2023 case, the Federal Court found that the common law doctrine of judicial immunity offered only limited protection to judges of 'inferior' courts. Nor was there an applicable statutory immunity. The resulting situation was described as placing these judges 'in an impossible position'. Legislation was swiftly passed at the federal level, ensuring that statutory immunities would apply consistently to all federal judicial officers. However, similar legislative gaps have been identified in at least one state, representing a similarly concerning pressure point for independence in that jurisdiction.

(e) On *regulation of the judiciary*.

> Australia has never had a national Judicial Council or other body to represent the interests of judges, or to regulate the judiciary as a whole. This is an aspect of the inherited common law judicial tradition which has attracted increasing critique internationally. It used to be assumed that the federal and state Attorneys-General, who are responsible for most judicial appointments, would act as the champions or guardians of the judiciary in the political realm. However, this role was a matter of convention (practice) rather than law, and it has eroded over time. It is in that context that the Australian Judicial Officers Association (formerly the Judicial Conference of Australia) assumed that role on a national basis.

Dr Kerr's report affirms the continuing importance of an independent, impartial and competent judiciary to the health of the whole Australian system of government. As she states in her conclusion:

> Judicial independence may operate as a shield for the judiciary, but it is not a luxury or privilege that we can afford to dispense with. Appointing independent judges, and supporting them to make independent decisions, is non-negotiable in any society committed to democratic governance and the rule of law. Evaluating the current state of judicial independence in Australia by the standards reflected in the *Judicial Independence Monitor* reveals that there is much to be proud of, but also much to do.

With the publication of the research paper, 'Judicial Independence in Australia', the AJOA seeks to further contribute to public discussion and awareness of this vital topic.

Justice Steven Moore
**President**
**AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION**

# Judicial Independence in Australia

A Research Paper prepared for the Australian Judicial Officers Association

August 2024

# Contents

# INTRODUCTION

*Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed.*

— Sir Gerard Brennan, former justice of the High Court of Australia, 1996

Judicial independence is a fundamental component of the rule of law, which requires that the law be applied equally to all. It shields judges from inappropriate influences from government or any other source, enabling them to make decisions based solely on the law and evidence, in accordance with their judicial oath. Genuine independence in judicial decision-making is critical to ensuring that governments are held accountable for the use of public power. It is also critical to creating and maintaining public trust in the judicial system, and in government more generally.

The importance of judicial independence is underscored by its inclusion in numerous international treaties and laws. Under Article 10 of the *Universal Declaration of Human Rights*, to take just one example, '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. In Australia, an entire chapter of the *Constitution* is dedicated to creating an independent judicial branch of the federal government. But the concept of judicial independence is also complex, nuanced, and context-dependent. Continuing political, social and economic shifts mean that even in stable democracies like Australia, it is vital not to take the independence of the judiciary for granted.

In November 2022, the American Bar Association published the *Judicial Independence Monitor*.[1] The purpose of the *Judicial Independence Monitor* is to establish a method for identifying areas where judicial independence in a particular jurisdiction is vulnerable or under pressure at a given point in time. It is intended to help governments and organisations to develop workable goals and benchmarks to improve the function of their own judiciaries. It is also intended to help identify broader trends in threats to judicial independence over time, contributing to the larger feedback loop that already exists in assessing political and governance systems globally.[2]

Applying the *Judicial Independence Monitor* toolkit involves mapping and assessing vulnerabilities to judicial independence across three broad categories, which can be summarised as follows:

1. **Internal independence**: how the judiciary governs itself. This includes the possibility of inappropriate or undue influence from within the judicial structure;
2. **External independence:** how judges are governed or influenced from outside the judiciary, particularly by other branches of government; and
3. **Accountability and transparency:** the degree to which the judiciary is perceived as independent, accountable and deserving of public trust.

This exercise extends beyond the rules and laws affecting the legal system to the question of how those rules and laws are applied. It may also include the more intangible elements of perception and trust in the legal process.

---

1 American Bar Association Rule of Law Initiative, *The Judicial Independence Monitor* (November 2022), available for download at <https://www.americanbar.org/advocacy/rule_of_law/publications/>.

2 See ibid 5–6.

This report shares the findings arising from the first application of the *Judicial Independence Monitor* toolkit in Australia. As contemplated by the toolkit itself, the report represents a relatively brief overview of a wide-ranging research exercise. It serves to situate Australia explicitly within an evolving international narrative of judicial independence, contributing to the larger 'feedback loop' envisaged by the American Bar Association in both domestic and comparative terms. It also offers an accessible entry point for commentators and citizens who may be curious — or concerned — about the state of judicial independence in Australia.

The report begins by outlining the systemic context and legislative framework for judicial independence (Parts A and B of the toolkit), before considering vulnerabilities and pressure points across the three categories listed above (Part C). The final section (Part D) presents a summary of these pressure points in Australia today, highlighting their dynamic and evolving nature.

## PART A SYSTEMIC CONTEXT

Australia is a federal democratic constitutional monarchy and a founding member of the British Commonwealth. The federation comprises six states and two internal territories, each with their own system of government.[3] These systems are colonial in origin, and were established without regard to pre-existing Indigenous (Aboriginal and Torres Strait Islander) systems of law and justice. The concept of judicial independence as discussed in this report is part of that colonial inheritance.

Australia has a generally excellent record for stability and longevity in democratic institutions, ranking highly on international indices of perceptions of corruption and trust in government.[4] There has been an independent judiciary operating continuously in Australia for over two hundred years.[5] Judges, who are selected from the ranks of senior legal professionals, enjoy high regard internationally as independent and impartial. They are insulated from overt external interference or pressure by a variety of constitutional and statutory rules, and their decisions are generally respected by government and society more broadly. As the Chief Justice of New South Wales recently said, '[s]uch respect is in a very real sense a litmus test for the health of the rule of law in any community'.[6]

While the importance of judicial independence in Australia may be 'clear and uncontested',[7] levels of confidence in public institutions have diminished over time, and the Australian judiciary is not immune to this trend.[8] A recent special issue of the *Australian Law Journal* highlights aspects of the judicial

---

3 Australia also has another internal territory (Jervis Bay) and several external territories with their own judicial arrangements, but these are generally excluded from discussions of the Australian judiciary. See Brian Opeskin and Sharyn Roach Anleu, *Judicial Diversity in Australia: A Roadmap for Data Collection* (Australasian Institute of Judicial Administration, August 2023) 13.

4 For example, Australia is currently ranked 13th equal in the World Justice Project's *Rule of Law Index* (<https://worldjusticeproject.org/rule-of-law-index/>) and 14th equal in Transparency International's *Corruption Perceptions Index* (<https://www.transparency.org/en/cpi/2023>). Australia also ranks highly across the World Bank's *Worldwide Governance Indicators* (<www.govindicators.org>).

5 2023 marked the bicentenaries of the first sittings of Supreme Courts in New South Wales and what is now Tasmania: Justice François Kunc, 'Current Issues: Introduction' (2023) 97 *Australian Law Journal* 599. Indigenous systems of law and justice had operated continuously for thousands of years before this.

6 Hon AS Bell, 'The Bicentenary of the Supreme Court and Its Significance' (Opening of Law Term Dinner Address 2024, Law Society of New South Wales, 31 January 2024) [18].

7 Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2014) 40(3) *Monash University Law Review* 593, 595.

8 See Justice Jacqueline Gleeson, 'Advancing Judicial Legitimacy: The Stakes and the Means' (2023) 15(1) *The Judicial Review* 1.

regulatory landscape which have been criticised as secretive, elitist, inefficient or unaccountable.[9] The pace and breadth of reforms and institutional developments affecting the judiciary is increasing, and not all of these developments are judicially led. Meanwhile, workload and resourcing pressures on judges and courts are mounting, as are the pressures resulting from unprecedented online scrutiny and criticism. The COVID-19 pandemic has highlighted the potential and risks of rapid developments in court-related technology, as well as the fundamental, enduring role of courts in holding governments to account. Further, in a country where the government of the day not only funds the operations of the judiciary but appoints the next generation of judges, the politicisation of those choices is an 'ever-present danger'.[10]

## PART B LEGISLATIVE FRAMEWORK

Although Australia has an integrated judicial system, this system is unified rather than uniform.[11] The High Court, at the top of the federal court hierarchy, provides overarching guidance on the core content of judicial independence and its relationship to other constitutional values. However, the legislation governing judges and judicial independence is unique to each state and territory, and different again at federal level.

The distinct location of judicial power in Chapter III of the *Australian Constitution* is understood to imply a strict separation of this power from the legislative and executive powers of government. This has important implications for the federal courts, including the High Court itself, but also for state Supreme Courts and other bodies which may be authorised to hear federal cases. No such body can be vested with any functions inconsistent with its institutional integrity as a court.[12] Nor, in general, can federal judicial functions be given to any body which is not a court.[13] This provides strong protection against indirect governmental interference in the operation of the courts, for example by creating processes which affect judges' decisional independence or require them to conduct an unfair trial.

While Australian state and territory constitutions do not have direct equivalents of Chapter III, they all contain guarantees of security of judicial tenure and remuneration.[14] Appointment as a judge of any Australian court is permanent, barring what has been described as the 'nuclear option'[15] of Parliamentary removal for misbehaviour or incapacity. Temporary or fixed-term appointments to the state and territory courts are generally permitted for recently retired judges but otherwise tightly controlled. Judicial salaries and other entitlements are statutorily prescribed and published. Statutory rules of this kind are generally stable in practice, and are sometimes entrenched to protect them from politically-motivated change.[16] However, these rules are a relatively small part of the picture. Much domestic judicial regulation takes place informally and without any independent oversight. This has

9 See Gabrielle Appleby, 'Introduction to the Special Issue on the Judiciary' (2023) 97 *Australian Law Journal* 600.

10 Ibid 601.

11 Rebecca Ananian-Welsh, 'CATs, Courts and the *Constitution*: The Place of Super-Tribunals in the National Judicial System' (2020) 43(3) *Melbourne University Law Review* 852, 861.

12 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

13 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

14 See, eg, Part 9 of the *Constitution Act 1902* (NSW); Part VA and s 73 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

15 Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 358 ('Contemporary Challenges').

16 See, eg, ss 18 and 85 of the *Constitution Act 1975* (Vic).

contributed to concerns about inclusion, coherence and transparency, especially in relation to appointments.[17]

As in other Commonwealth countries, there has been a shift in Australia towards establishing statutory bodies to handle specific aspects of judicial regulation, independently of both the judiciary and executive government. The federal government has, for example, recently committed to establishing a judicial commission to receive and consider complaints about federal judges,[18] reflecting the operation of similar bodies at state and territory level. While the use of judicial commissions should in principle be supportive of judicial independence and integrity,[19] submitters to the current federal 'scoping' exercise have highlighted potential risks to independence, particularly as regards procedural fairness and the threshold for justiciable complaints.[20] Risks of this kind will require careful mitigation in the legislative design process.

# PART C ANALYSIS

## CATEGORY 1 – INTERNAL INDEPENDENCE

### *Procedural and regulatory protections*

#### *Regulation of the judiciary*

Judicial independence in Australia is traditionally understood as requiring 'almost complete freedom from external control'.[21] Each court system receives dedicated funding through annual appropriations set by the legislative branch of government. Responsibility for regulating the affairs of individual courts is also allocated by statute. While this responsibility generally rests with the court's judicial leadership, there are exceptions, which have the potential to give rise to concerns about independence from executive government.[22] In the Federal Court, for example, responsibility for all 'corporate services' of that Court — extending, among other things, to finance and human resources — was transferred in 2014 from the Chief Justice to a Chief Executive Officer.[23] Whatever the overarching administrative structure, at the individual level, each judge is primarily responsible for their own 'self-management'.[24]

Australia has never had a national Judicial Council or other body to represent the interests of judges, or to regulate the judiciary as a whole. This is an aspect of the inherited common law judicial tradition

17 See generally Appleby (n 9).

18 Attorney-General's Department, *Scoping the Establishment of a Federal Judicial Commission* (Discussion Paper, January 2023).

19 See generally Gabrielle Appleby and Suzanne Le Mire, 'Opportunity Knocks: Designing Judicial Discipline Systems in Australia' (2023) 97 *Australian Law Journal* 678.

20 Many of these submissions have been published at <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/consultation/published_select_respondent>.

21 Julie Dodds-Streeton and Jack O'Connor, *Review of Recruitment and Working Arrangements of Judicial Staff Who Work in a Primary Relationship with Judicial Officers in Victorian Courts and VCAT* (Report, 2022) [92].

22 For a classic discussion of issues arising in this area see Sir Anthony Mason, 'Judicial Independence and the Separation of Powers: Some Problems Old and New' (1990) 13(2) *University of New South Wales Law Journal* 173, 175.

23 *Federal Court of Australia Act 1976* (Cth) ss 18A and 18Z.

24 Kathy Mack and Sharyn Roach Anleu, 'Managing Judicial Performance: The Changing Ethical Infrastructure' (2023) 97 *Australian Law Journal* 664.

which has attracted increasing critique internationally.[25] It used to be assumed that the federal and state Attorneys-General, who are responsible for most judicial appointments, would act as the champions or guardians of the judiciary in the political realm. However, this role was a matter of convention (practice) rather than law, and it has eroded over time.[26] It is in that context that the Australian Judicial Officers Association ( formerly the Judicial Conference of Australia) assumed that role on a national basis.

Adequacy of resourcing is a significant current pressure point. Recent inquiries and extra-judicial speeches highlight the need for urgent and sustained investment in the 'institutional architecture' of judging, at all levels of the judicial system.[27] This is essential if Australia is to continue to appoint enough judges and magistrates, responding to both current vacancies[28] and anticipated future needs.[29] It is also essential in order to support each of those judges in the independent discharge of their roles.

Within each court, leadership responsibility rests with a Chief Justice or other head of jurisdiction designated by statute, who is also a working judge. These heads of jurisdiction are 'first among equals', and depend on support from their judicial colleagues. They are traditionally responsible for matters like case assignment, administrative transfers, educational support, and informal discipline. Heads of jurisdiction are increasingly supported by specialist professional staff, who like all staff in the courts are technically employees of executive government. Heads of jurisdiction are also increasingly expected to account to government, court users and the wider public for the effective and efficient operation of their court.

There is significant collaboration and harmonisation between courts and across different systems, facilitated by the work of independent bodies like the Australasian Institute of Judicial Administration, the National Judicial College of Australia, and the Australian Judicial Officers Association. However, the level of this collaboration varies, reflecting differing local capacity and priorities over time, as well as differences in local laws.

The number of statutory regulatory bodies which engage with judges is increasing, especially at the state and territory level. Institutions like the Judicial Commission of New South Wales provide more structured and transparent external support for the work of heads of jurisdiction, particularly in matters like judicial education and complaint-handling. As such, the independence of their officeholders is important in its own right. Many, but not all, of these officeholders are sitting or retired

---

25 See Tim Bunjevac, 'From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration' (2017) 40(2) *University of New South Wales Law Journal* 806.

26 For example, the Attorney-General of New South Wales very recently emphasised that it is 'not [his] role' to comment or intervene on the judiciary's behalf in response to criticism and complaints laid by that state's Director of Public Prosecutions: see Nick Dole, 'NSW director of public prosecutions orders review of every sexual assault case committed for trial following criticism from judges' (*ABC News*, online, 7 March 2024) <https://www.abc.net.au>.

27 See, eg, Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) ('*Without Fear or Favour*'); Appleby (n 9); Bell (n 6).

28 See in this regard *Hameed v Canada (Prime Minister)* [2024] FC 242, a recent decision of the Federal Court of Canada, describing an ongoing failure to fill federal judicial vacancies in that jurisdiction as having escalated to an 'untenable and appalling crisis'.

29 See Brian Opeskin, 'Can the Australian Judicial System Meet the Structural Challenges of Future Population Change?' (2023) 97 *Australian Law Journal* 651.

judges; others may represent the legal profession, the academy, specific communities or the general public.[30]

The number of extra-statutory policies and guidance relating to judges and their work is also increasing, especially in areas like appointments, ethical conduct, and education.[31] However, there remain some areas, like mobility within or between courts over the course of judicial careers, where very little is prescribed or published. This creates potential pressure points for both perceived and actual independence, including from the perspective of individual judges, who may have limited opportunities to challenge decisions which affect them.

Judicial independence is normally associated with the courts. However, many Australian judges also work outside the courts, doing both judicial and non-judicial work on bodies like tribunals. Some of these judges never actually sit in court. Tribunals and similar bodies have a complicated place in the justice system, partly because of the constitutional requirements for the separation of federal judicial power.[32] At least some of the principles of judicial independence extend to anyone acting judicially in Australia, whatever their title.[33] But there are fewer institutional safeguards or supports in place as regards tribunal members who are not judges, especially those who are not lawyers.

### *Decision-making freedom*

Australian judges have traditionally enjoyed high levels of decisional independence. Consistent with English judicial practice, there is a strong tradition of dissenting and separate judgments at the appellate level. Judges are also free to speak publicly about past cases and their general views on the law, although this is normally done with restraint. Engagement with social media by individual judges remains relatively rare, and is not generally encouraged.[34]

The 'key institutional leadership role' of heads of jurisdiction[35] may extend to giving guidance on matters like extra-judicial speech, but it does not permit them to exert substantive influence or pressure on their colleagues in any specific case. It has occasionally been suggested that judges do experience this kind of pressure,[36] but these suggestions are not seen as representative.

---

30 The Judicial Commission of New South Wales, for example, comprises six judicial members (the heads of the State's five courts, plus the President of its Court of Appeal), one legal practitioner, and three appointed members of 'high standing in the community': *Judicial Officers Act 1986* (NSW) s 5.

31 For recent non-governmental examples see the Australasian Institute of Judicial Administration (AIJA)'s *Guide to Judicial Conduct* (revised in 2023) and *Suggested Criteria for Judicial Appointments* (updated in 2024), both available to download at <https://aija.org.au>. The National Judicial College of Australia is currently preparing a revised National Standard and Curriculum for the professional development of Australian judicial officers: see <https://www.njca.com.au/a-national-standard-for-professional-development-for-australian-judicial-officers/>.

32 For example, many tribunals combine the exercise of judicial and non-judicial (administrative) powers in a single body, which is not permitted in the federal court system.

33 See Commonwealth Magistrates and Judges Association, *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* (13 September 2018); Council of Australasian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide* (2016).

34 See Alysia Blackham and George Williams, 'Social Media and the Judiciary: A Challenge to Judicial Independence?' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence: Contemporary Challenges, Future Directions* (Federation Press, 2016) 223.

35 See Gabrielle Appleby and Heather Roberts, 'Studying Judges: The Role of the Chief Justice, and Other Institutional Actors' (2023) 13(S1) *Oñati Socio-Legal Series* S80.

36 See JD Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205.

There is an important ongoing discussion around how to reconcile decision-making freedom with the need for judges to be seen as competent and engaged with their communities. Increasingly, the emphasis is shifting from shielding or barring judges from potentially sensitive influences or interactions, towards proactively supporting them in navigating those interactions. This discussion reflects evolving expectations of courtroom conduct which is impartial while also being empathetic and culturally safe, particularly for Aboriginal and Torres Strait Islander peoples.[37] Judicial education programmes were historically regarded as a threat to independence but are now seen as essential to meeting these expectations, especially in areas like cross-cultural competence.[38] Current discussions are also motivated by the rapidly growing diversity of personal and professional backgrounds within the judiciary.[39] This has the clear potential to increase perceptions of representation and inclusion, but may also increase perceptions of inconsistency of treatment, whether or not those perceptions are well-founded.[40] Again, post-appointment education can support judicial 'self-management' in this regard.

There has been a recent focus on the issue of recusal: that is, when a judge should decide (or be told) that they cannot hear a specific case, because their impartiality in that case may be open to question. A major federal inquiry,[41] prompted by an allegation of bias in a Family Court case,[42] did not recommend substantial change to the law on recusal. The 2022 inquiry report, *Without Fear or Favour*, did however produce a set of wide-ranging recommendations in other areas, ranging from appointments to education to discipline. This reflects the multitude of factors that contribute to public perceptions of independent and impartial decision-making.

Where judges are sitting with lawyers or laypeople, for example as Presidents of 'super-tribunals' like VCAT (the Victorian Civil and Administrative Tribunal), special care is needed to preserve their independence. This need may be seen as exemplified by the pending reform of the federal AAT (Administrative Appeals Tribunal).[43] The same need for care arises in relation to judges and retired judges who act in high-profile public investigations like commissions of inquiry. These judges may hold their statutory appointments *persona designata*, which means in a personal rather than judicial capacity;[44] but there is still a risk that non-judicial work carried out in the public eye may be seen to call their independence into question.

## *Substantive protections*

### *Appointment and selection*

The appointment of judges has always been a point of vulnerability in countries like Australia. Current practices at federal, state and territory level vary, but the common element is that appointments are 'in the gift', or at the discretion, of executive government. This model has been criticised as

37 See for example Goal 3.1 of *Burra Lotjpa Dunguludja: The Victorian Aboriginal Justice Agreement (Phase 4)* (2018), which seeks to achieve 'culturally safe, responsive, inclusive and effective' justice services. See generally *Without Fear or Favour* (n 27).

38 See Julie Falck and Jessica Kerr, 'Centring Competence: Judicial Education in Australia' (2023) 97 *Australian Law Journal* 622.

39 See Opeskin and Roach Anleu (n 3).

40 See Jessica Kerr, 'Bias and Judicial Education', *Australian Public Law* (Blog post, 19 August 2022).

41 *Without Fear or Favour* (n 27).

42 See *Charisteas v Charisteas* (2021) 393 ALR 389.

43 As at February 2024, reform legislation had been introduced in the Federal Parliament: for updates, see <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review/>.

44 See *Grollo v Palmer* (1995) 184 CLR 348.

non-transparent, non-inclusive and non-accountable, and is increasingly rare internationally.[45] A growing number of Australian jurisdictions are addressing these criticisms by introducing procedures for expressions of interest, interviews and other assessment processes, and more structured consultation. These procedures tend to be extra-statutory and are therefore potentially unstable: at the federal level, for example, they were introduced in 2008, abandoned in 2013, and have now been re-introduced (albeit not for the High Court).[46] There remains relatively little support for the alternative model of independent, statutory appointment commissions. However, the current federal Attorney-General is committed to 'restoring integrity to the process of appointments',[47] and the recently appointed Chief Justice of the High Court has lent his 'vocal and enthusiastic support' to recommendations for continuing reform.[48]

The overwhelming majority of appointment decisions in Australia are uncontroversial and perceived as appropriately independent. The existing judiciary and the legal profession, from which judges are drawn, are normally closely involved in these decisions, even if their involvement is not clearly explained by government to the public.[49] However, one consequence of the current position is that it is difficult to confidently exclude the possibility of inappropriate political or personal influence on individual appointments. This can leave well-qualified appointees vulnerable to criticism which may itself be improperly motivated.[50] A related consequence is that it is difficult to hold government to account for the pursuit of broader regulatory objectives in appointments, for example in relation to judicial diversity or evolving judicial competencies.

### *Security of tenure and internal assignments*

Security of tenure is not an issue for the permanent court judiciary. However, most courts rely to some extent on temporary appointments of 'auxiliary' judges to help with managing workload. Most appointments to tribunals and similar bodies are also made for renewable fixed terms. Both practices raise risks, at least in theory, of improper influence or pressure on judges at risk of non-renewal.[51]

While judges' working conditions cannot be diminished during their tenure, judges are not generally appointed to a specific position within their court, and may be expected to preside over very different cases and in different environments during their time on the Bench. Judges also do not, as a rule, choose which cases they hear. Case assignment is normally randomised and managed administratively, consistent with international best practice for preserving independence. This is however affected by the number of available judges with relevant expertise, and potentially by other managerial considerations, which are not generally open to scrutiny or challenge.

---

45 See Hugh Corder and Jan van Zyl Smit (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Siber Ink, 2017).

46 See Andrew Lynch, 'Judicial Influence on Judicial Appointments' (2023) 97 *Australian Law Journal* 607, 607–608; Hon Mark Dreyfus, 'Expressions of Interest open for the Federal Court of Australia and Federal Circuit and Family Court of Australia' (Media Release, 21 July 2023).

47 Hon Mark Dreyfus, '2022 Seabrook Chambers Public Lecture' (Melbourne Law School, 13 October 2022).

48 Justice Stephen Gageler, 'Judicial Legitimacy' (2023) 97 *Australian Law Journal* 28, 34.

49 See Lynch (n 46).

50 In June 2023, for example, the Law Council of Australia raised concerns about 'unfair and unwarranted' media coverage of the appointment of a judge as the next President of the Australian Law Reform Commission: <https://lawcouncil.au/media/media-releases/appointment-of-justice-bromberg-as-president-of-the-australian-law-reform-commission>.

51 See Gabrielle Appleby et al, *Temporary Judicial Officers in Australia* (Judicial Conference of Australia, May 2017).

Most heads of jurisdiction have powers to transfer judges administratively (for example, to a different town or specialist division) or to restrict them to non-sitting duties (for example, while a complaint is investigated). Decisions of this kind are required to be made in the interests of the effective and legitimate operation of the relevant court as a whole.[52] They are not normally seen as threatening judicial tenure or remuneration, but do have the potential to create significant 'stress and frustration'.[53] They are not necessarily made with the consent of the judge involved, and there are no formal processes of oversight or appeal.

### *Salary*

Judicial salaries in Australia are fully transparent, as required by statute in every jurisdiction, although there is significantly less transparency in tribunals and similar bodies. Salary levels are also regularly, publicly reviewed. In combination with pensions and other entitlements, judicial remuneration is generally regarded as sufficient to achieve the dual purposes of attracting excellent candidates and insulating judges from inappropriate financial pressures. However, it bears noting that not all judges have equal access to pensions, both within and across jurisdictions.[54] Further, as national demographics continue to shift, the sustainability of the judicial pension scheme has been called into question.[55] Any reform to this scheme represents a potential pressure point for independence and may also have constitutional implications. A current federal taxation reform proposal has been identified as raising 'profound concerns' in both respects.[56]

### *Career development/progression*

There has never been a formal career path for Australian judges. Judges are generally appointed in their 40s or 50s from senior positions in the legal profession (traditionally at the independent Bar, although this is changing) and must retire when they reach a certain age (generally 70, but higher in NSW, Tasmania and the Northern Territory).[57] Most judges still complete their working life in the court to which they were initially appointed, although many take on internal management or leadership roles as their judicial experience increases. There is an ongoing effort within the courts and state-level judicial colleges to develop more tailored educational programmes for judges at different stages of their careers. There is a related emphasis on tailoring the provision of education and other internal support to reflect individual judges' backgrounds and pre-appointment experience.[58] Both these initiatives are complicated by the need for coordination across the federation. They are also resource-intensive and require considerable investment from government, although it is seen as critical to independence that they remain judicially led.[59]

As in other common law judiciaries, Australia has a tradition of promoting high-performing judges through appointment to higher courts, particularly from trial to appellate courts. Like fixed-term

---

52 See, eg, *Federal Court of Australia Act 1976* (Cth) s 15.

53 Mack and Roach Anleu (n 24) 668.

54 In Tasmania, judicial pensions have been phased out altogether: see Justice Alan Blow, 'Judicial Pensions and Superannuation' (Judicial Conference of Australia Colloquium, October 2004).

55 Opeskin (n 29).

56 Submission of the Australian Judicial Officers Association on the Exposure Draft of the Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 (30 October 2023), available at <https://treasury.gov.au/consultation/c2023-443986>.

57 Opeskin (n 29) 653–654.

58 The National Judicial College of Australia has recently begun encouraging tribunal members, magistrates and judges to 'build your own judicial education pathway', pending the release of an updated National Standard and Curriculum: see above n 31.

59 See generally Gabrielle Appleby et al, *Judicial Education in Australia: A Contemporary Overview* (Australasian Institute of Judicial Administration, December 2021).

appointments, promotion presents a theoretical risk to independence,[60] although this is less often raised as a concern in practice. Promotion decisions are made by the executive branch and might therefore encourage judges at lower levels to seek to curry favour in their decision-making. This risk may be seen as exacerbated by the lack of structure and transparency in current inter-court appointment practices, reflecting the concerns with appointment processes more generally.

## CATEGORY 2 – EXTERNAL INDEPENDENCE

In the words of a current Justice of the High Court, '[m]ost Australians assume that an Australian judge would not hesitate to find against the government or a government agency if the law requires that result'.[61] The decisions of judges are generally respected, even when they disrupt or derail government policy. In late 2023, for example, the High Court invalidated as unconstitutional a federal indefinite detention regime for non-deportable migrants.[62] The government accepted this outcome and introduced an alternative statutory scheme, which is now under separate constitutional challenge.[63] This said, politicians and other public figures are not always restrained in expressing their disagreement or disappointment with judicial decisions, or even their opinion of individual judges.[64] Tensions of this kind have the potential to fuel a public narrative which may implicitly or explicitly threaten the independence of the judiciary, as has been seen in comparator jurisdictions like the United Kingdom.[65]

### *Immunity*

As the federal Attorney-General recently emphasised, judicial immunity for conduct on the Bench (during court hearings) is essential to independence: 'Judges must be able to decide matters before them in accordance with their assessment of the facts and their understanding of the law, without the threat of being personally sued.'[66]

There is a significant current issue of 'certainty and consistency' in the rules on immunity for Australian judicial officers.[67] Until very recently, some federal judges were exposed to personal liability to court users for civil claims like false imprisonment. In a high-profile 2023 case, the Federal Court found that the common law doctrine of judicial immunity offered only limited protection to judges of 'inferior' courts.[68] Nor was there an applicable statutory immunity. The resulting situation was described as placing these judges 'in an impossible position'.[69] Legislation was swiftly passed at the federal level, ensuring that statutory immunities would apply consistently to all federal judicial officers.[70] However,

---

60 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 208.

61 Justice Jacqueline Gleeson, 'Judicial Independence and Liberal Democracy' (Australian Academy of Law, online, 22 August 2022) [5].

62 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

63 'ASRC launches High Court challenge on overreach of new Federal Government laws', *Asylum Seeker Resource Centre* (Media release, 1 December 2023).

64 For a current example of reported tensions see Dole (n 26).

65 See Gleeson, 'Judicial Independence and Liberal Democracy' (n 61).

66 Hon Mark Dreyfus, 'Judicial Immunity' (Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 24 October 2023).

67 'Judicial immunity', *Law Council of Australia* (Media release, 1 September 2023).

68 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020.

69 Michaela Whitbourn and Georgina Mitchell, 'Judges revolt amid legal threats from litigants following landmark ruling' *(Sydney Morning Herald*, online, 22 September 2023) <https://www.smh.com.au>, citing a spokesperson for the Federal Circuit Court.

70 *Federal Courts Legislation Amendment (Judicial Immunity) Act 2023* (Cth).

similar legislative gaps have been identified in at least one state,[71] representing a similarly concerning pressure point for independence in that jurisdiction.

Judicial immunity has no application to conduct off the Bench. While it remains very rare for an Australian judge to be accused of any crime, there are recent examples of investigations and prosecutions of sitting or retired judges, particularly in relation to harassment and assault, which have attracted significant media attention and public interest.[72] Accountability in these cases is critical to maintaining respect and trust for the judiciary, and can be a significant driver for reform in areas like education and discipline. It also, however, raises concerns about procedural fairness and reputational damage, which need to be carefully managed.

### *Appellate and judicial review*

Australia has two forms of judicial review of government action: constitutional review of the validity of legislation, as in the 2023 case mentioned above, and administrative review of executive decision-making. Notwithstanding some debate over how much weight should be given to government's views on the interpretation of the law, there is no general concern about Australian judges acting deferentially to avoid retaliation.[73]

Nor is there substantial concern about judges being unduly influenced by the threat of appeals from their decisions. As the Australian Judicial Officers Association recently observed, 'that judges may be overturned on appeal is an ordinary and essential feature of the legal system at work; it is an experience of which all judges are familiar'.[74] Current discussion focuses more on the potential risks to the well-being of individual trial judges, and to the broader legitimacy of their courts, where appellate decisions include unnecessarily harsh or derogatory language.[75]

### *Threats to judges*

Overt violence against Australian judges and courts is not an area of immediate concern.[76] Most, if not all, courts now have physical and electronic security arrangements in place, including processes for individual judges to request protection. Those processes are not generally publicised, although their absence has occasionally been highlighted in courts' annual reports.[77] There is growing attention to

---

71 Magistrates in Queensland have statutory immunity from criminal responsibility (*Criminal Code Act 1899* (Qld) s 30) and in respect of administrative (non-judicial) functions (*Magistrates Act 1991* (Qld) s 51), but there appears to be no corresponding immunity from civil action in respect of judicial functions. Contrast, eg, *Magistrates Court Act 1987* (Tas) s 10A, granting magistrates in that state 'the same immunities as a puisne judge of the Supreme Court'.

72 The most high-profile example is a former Justice of the High Court, Dyson Heydon, who was found by an independent inquiry in 2020 to have sexually harassed staff members while in office. This and other examples are discussed in Appleby and Le Mire (n 19) 694–695. As at February 2024, the state government in Tasmania has withdrawn a motion to suspend a Supreme Court judge who is facing multiple criminal charges, including breach of an apprehended domestic violence order. The judge in question remains on indefinite leave.

73 See Janina Boughey, 'A Perspective from a Jurisdiction without a Doctrine of Deference: Australia', *Australian Public Law* (Blog post, 4 October 2023).

74 'Statement re Appointment of Justice Mordecai Bromberg as President of the ALRC', *Australian Judicial Officers Association* (Media release, 23 June 2023).

75 See Gleeson, 'Advancing Judicial Legitimacy: The Stakes and the Means' (n 8) 17-18; Appleby and Le Mire (n 19).

76 Gleeson, 'Judicial Independence and Liberal Democracy' (n 61) [8].

77 See for example the Foreword to the *Local Court of New South Wales Annual Review 2015.*

the potential threat posed by individual so-called 'sovereign citizens', which may have increased in the wake of the COVID-19 pandemic.[78]

Judges in Australia do experience considerable work-related stress and trauma. This can include stress resulting from 'unfounded attacks' in mainstream and social media,[79] in addition to the psychological and emotional impacts of much judicial work and the growing pressure of 'crushing' workloads, particularly in trial courts.[80] The threat this poses to judges' mental and physical health, and their capacity to judge well, is increasingly understood.[81]

As Attorneys-General have stepped back from their traditional role as champions of the judiciary, the pressure on heads of jurisdiction to defend and safeguard their judicial colleagues has increased. Perceptions of independence and impartiality can be seriously undermined when judges are subject to unrealistic expectations or unjustified abuse.[82] They may also, however, be undermined if the judiciary is seen as defensive or unaccountable. Striking this balance becomes still more complex in the face of technological developments like the rise of data analytics, which seek to identify patterns in the decision-making of specific judges or courts, and may be weaponised against the judiciary.[83] External organisations, including professional organisations like the Law Council of Australia, have an essential role to play in supporting the work of heads of jurisdiction in response to rapid technological and broader social change.[84]

## CATEGORY 3 – ACCOUNTABILITY/TRANSPARENCY

### *Ethics, corruption and discipline*

Australia ranks highly on international anti-corruption indices, although that ranking has slipped over the last decade.[85] 2023 marked the long-awaited establishment of a National Anti-Corruption Commission, with jurisdiction over the Commonwealth (federal) public service.[86] Similar bodies have been operating at the state and territory level since 1989 (New South Wales), with the most recent established in 2018 (the Australian Capital Territory). While judges are potential subjects of investigation by these bodies, there are to date no documented examples of such investigation. Judges are also entitled to access confidential statutory reporting mechanisms for corrupt approaches, in addition to informal reporting through their head of jurisdiction.

78 Harry Hobbs, Stephen Young and Joe McIntyre, 'The Internationalisation of Pseudolaw: The Growth of Sovereign Citizen Arguments in Australia and Aotearoa New Zealand' (2024) 47(1) *University of New South Wales Law Journal* [forthcoming].

79 Justice John Logan, 'Judicial Accountability: New Developments and Threats' [2023] *Federal Judicial Scholarship* 7.

80 *Without Fear or Favour* (n 27); Mack and Roach Anleu (n 24). For a sample of judges' views on these issues see Appleby et al, 'Contemporary Challenges' (n 15).

81 Carly Schrever, Carol Hulbert and Tania Sourdin, 'Where Stress Presides: Predictors and Correlates of Stress among Australian Judges and Magistrates' (2022) 29(2) *Psychiatry, Psychology, and Law* 290.

82 See Logan (n 79).

83 See Daniel Ghezelbash et al, 'Data and Judicial Impartiality', *Australian Public Law* (Blog post, 19 August 2022); Tania Sourdin, 'Technology and Judges in Australia' (2023) 97 *Australian Law Journal* 636.

84 For a recent comparative example of this work, see Courts of New Zealand / Ngā Kōti o Aotearoa, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023).

85 For example, Australia was ranked 7th equal on Transparency International's *Corruption Perceptions Index* (n 4) in 2012; it is currently 14th equal.

86 See for example the *National Anti-Corruption Commission Act 2022* (Cth).

The broader 'ethical infrastructure' of the judiciary, like that of other Australian legal and political institutions, has emerged as a focus of academic commentary and calls for reform.[87] Judicial self-management has been gradually supplemented by the introduction of codes of conduct, mentoring, and other internal support mechanisms. All existing ethical guidance has been developed by judges themselves, although independent complaint-handling commissions are increasingly involved in articulating and developing norms of behaviour. There has until recently, however, been limited consideration of the application of ethical rules and disciplinary mechanisms to retired judges, or to other adjudicators like tribunal members.

Reflecting broader societal developments, the provision of safe and respectful workplaces has emerged as a focus of concern.[88] The traditional independence of judges in managing their own courts and staff is seen to have facilitated isolated but unacceptable instances of harassment, including at the highest level of the judiciary.[89] Courts and judicial institutions across Australia have responded with specific policies and training materials to provide greater clarity on unacceptable conduct and appropriate institutional responses, while respecting individual independence.[90]

Despite these judicial initiatives, the broader question of judicial misconduct (not amounting to corruption) is an enduring pressure point for public confidence. Misconduct is closely related to incapacity, the other statutory ground for Parliament to remove a judge from office.[91] Traditionally, short of that 'nuclear option',[92] Australia has followed the common law practice of insulating judges from any formal disciplinary process or performance review.

The overwhelming majority of Australian judges have excellent reputations within and beyond the legal community prior to appointment, and are never subject to a serious discipline or capacity complaint while on the Bench. When complaints do arise, though, it can be increasingly difficult for heads of jurisdiction to manage those complaints informally, as they were traditionally expected to do, in a way that meets public expectations of procedural and substantive justice (and any regulatory reporting requirements) without compromising the rights of the judge involved.[93]

As at 2024, every government in Australia has either established an independent complaint-handling commission, or is considering that step.[94] However, within the current federal system, there is no immediate prospect of a body with overarching national authority in matters of judicial conduct. Each specific commission acts as a bridge between judges and the relevant executive government and should play a proactive role in supporting judicial institutional development, as well as demonstrating accountability and maintaining (or restoring) public trust. The need to pursue these aims in a way

87 Mack and Roach Anleu (n 24); Gabrielle Appleby and Suzanne Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (2019) 47(3) *Federal Law Review* 335.

88 Gabrielle Appleby, Rosalind Dixon and Prabha Nandagopal, *Managing Misconduct: A Principled Response to Behavioural Misconduct in Constitutionally Significant Workplaces* (Gilbert + Tobin Centre of Public Law Report, November 2022).

89 See above n 72.

90 See for example the High Court of Australia's *Justices' Policy on Workplace Conduct* (March 2022).

91 The removal power may be supplemented by specific rules about the process which Parliament can follow: see for example the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

92 See above n 15 and accompanying text.

93 See the discussion in Appleby and Le Mire, 'Opportunity Knocks: Designing Judicial Discipline Systems in Australia' (n 19).

94 See above n 18 and accompanying text. In 2022, the Western Australian government publicly committed to establishing a judicial commission and the Queensland government published a discussion paper to 'explore the need' for one. The current policy position in these jurisdictions is not clear.

which respects and maintains independence has been consistently reiterated,[95] and the constitutionality of the commission processes has so far been upheld by the courts.[96]

### *Transparency*

The vast majority of Australian court proceedings are conducted in public, or at least in the presence of the media,[97] and result in fully reasoned, public judgments. The dramatic increase in online hearings during the COVID-19 pandemic presented both challenges and opportunities for the realisation of open justice.[98] Many courts are now taking additional transparency-enhancing steps like live-streaming cases online[99] or publishing short, accessible summaries of judgments.[100] Judges are accustomed to balancing this institutional commitment to open justice with the need to suppress sensitive information and protect the identity of vulnerable parties. This balance is generally understood and respected by the media and wider public.[101] However, it is easily undermined by 'unnecessary and oppressive' legislative intervention.[102] Laws facilitating, or requiring, the use of secret evidence and closed hearings in national security proceedings are a continuing focus of concern in this regard.[103]

There are broader, long-standing concerns about how well Australians understand the nature of judicial work, the constitutional role of judges, and the mechanisms already in place to ensure judicial accountability. These concerns were prominent in the recent federal inquiry into judicial impartiality, and are reflected in ongoing calls for greater institutional transparency, greater coordination across courts and jurisdictions, and more readily accessible public educational resources.[104]

### *Diversity*

The Australian judiciary was historically 'a highly homogeneous profession, comprised largely of white, middle-aged, Christian males from privileged socio-economic backgrounds'.[105] That picture is changing. Policies to promote diversity in judicial appointments were first introduced around the turn of the century, although they have not translated into legislative commitments or formal criteria for

---

95 See above n 20 and accompanying text.

96 See for example *A Judicial Officer v The Judicial Conduct Commissioner and the Judicial Conduct Panel* [2022] SASCA 42 (a decision of the Court of Appeal of South Australia, dismissing an application for judicial review by a magistrate who was the subject of a conduct inquiry).

97 The exclusion of journalists from hearings is regarded as exceptional and is likely to attract criticism: for a recent example, see Jano Gibson, 'Press freedom advocates condemn media ban at Justice Gregory Geason's court hearing, as Tasmanian government considers his future' (*ABC News*, online, 5 December 2023) <https://www.abc.net.au>.

98 See Joe McIntyre, Anna Olijnyk and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia' (2020) 45 *Alternative Law Journal* 195; Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal* 126.

99 For example, <https://www.youtube.com/@FederalCourtAus/streams>.

100 For example, <https://www.hcourt.gov.au/publications/judgment-summaries>.

101 See New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* (Report No 149, May 2022).

102 Independent National Security Legislation Monitor, *Review into the Operation and Effectiveness of the* National Security Information (Criminal and Civil Proceedings) Act 2004 *(Cth)* (Commonwealth of Australia, 2023) 6.

103 See Kieran Pender, 'Open Justice, Closed Courts and the Constitution: Australian and Comparative Perspectives' (2023) 42(2) *The University of Queensland Law Journal* 155.

104 As summarised in Appleby (n 9).

105 Opeskin and Roach Anleu (n 3) 7.

appointments.[106] An initial focus on gender has seen the representation of women in the judiciary rise slowly to 43%.[107] The focus has since expanded to include a range of personal identity characteristics, including but not limited to ethnic and socio-economic diversity, and, more recently, diversity in pre-appointment careers. The last two years have been notable for the retirement of Australia's first female Chief Justice, the Hon Susan Kiefel AC,[108] following a brief and unprecedented period in which the majority of Justices of the High Court were female. Several state and territory governments have also welcomed the first Indigenous appointments to their respective Supreme Courts.[109] However, a continuing 'data deficit' makes it difficult to reliably measure overall progress on diversity or to hold governments to account on their policy commitments. This has been emphasised by bodies like the Australasian Institute of Judicial Administration and the Australian Law Reform Commission,[110] and acknowledged by the current federal government.[111]

The diverse identities and experiences of court users can have a profound impact on their experiences of the justice system, including their expectations and perceptions of judicial independence. Many Indigenous Australians, in particular, continue to lack trust and confidence in the judiciary.[112] Pursuing diversity in appointments is only one part of an accelerating effort across government to make these processes more inclusive and legitimate in the eyes of the public.[113] The contribution which any individual judge can make to building this trust is constrained by their obligation to deliver impartial justice according to law, although there are an increasing number of specialist courts and processes which incorporate Indigenous knowledge and practices.[114] This said, as noted above, cross-cultural and other interpersonal skills are increasingly identified as part of the 'core competencies' for all Australian judges, whatever their background.[115]

## PART D CONCLUSION

This report is the first of its kind in Australia. Applying the comparative *Judicial Independence Monitor* toolkit, developed by the American Bar Association Rule of Law Initiative, the report has presented a necessarily brief overview of the current context and operation of judicial independence across the Australian federation, with a focus on identifying vulnerabilities and pressure points in this vitally important constitutional space. **The concluding recommendation is that this report should be revisited at regular intervals in future**.

---

106 The latest edition of the *Suggested Criteria for Judicial Appointments* (n 31) states (at 12) that '[t]he place of identity characteristics, and varied lived experiences, in judicial appointment are ultimately matters for policy and process, not criteria to apply to individual candidates'.

107 Opeskin and Roach Anleu (n 3) 7.

108 The first female Chief Justice of the Federal Court of Australia, Hon Debra Sue Mortimer, had taken office several months earlier.

109 Justice Lincoln Crowley (Warramunga) in Queensland; Justice Michael Lundberg in Western Australia; and Justice Louise Taylor (Kamilaroi) in the ACT.

110 See Opeskin and Roach Anleu (n 3).

111 Attorney-General's Department, *Government Response to Australian Law Reform Commission Report 138: Without Fear or Favour: Judicial Impartiality and the Law on Bias* (29 September 2022).

112 As recently emphasised by the then Chief Justice of New South Wales: Hon T F Bathurst, 'Trust in the judiciary' (2021) 14(4) *The Judicial Review* 263.

113 See for example the work of the Judicial Council on Diversity & Inclusion (<https://jcdi.org.au>).

114 See for example the discussion in Australian Law Reform Commission, *Pathways to Justice: Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) ch 10.

115 See *Without Fear or Favour* (n 27) ch 12.

While some of the challenges facing the Australian judiciary are familiar and enduring — take for example the 'ever-present danger' of the politicisation of appointments — others, particularly at the intersection of justice, technology and artificial intelligence, are only beginning to be articulated. As highlighted in the introduction to the *Judicial Independence Monitor*, we should be monitoring these existing and emerging challenges regularly, in the same way that the rule of law or the health of democracy are monitored.[116] Adopting the toolkit's wide-ranging but concise mode of reporting should make it easier to track and respond to the pace and extent of change over time.

As signalled in the Introduction, another objective of this reporting exercise was to provide an accessible entry point for commentators and citizens who may be interested in exploring specific issues of judicial independence in greater depth. To that end, the **current pressure points for judicial independence** identified in the discussion above may helpfully be summarised under the following broad headings:

- Resourcing and workload pressures
- Transparency and coordination in judicial regulation
- Appointments (including diversity, temporary appointments and inter-court promotions)
- Evolving expectations of judicial conduct and competencies
- Role of heads of jurisdiction (including administrative transfers and safeguarding)
- Judicial stress and well-being
- Responses to judicial misconduct and harassment
- The scope of judicial immunity
- New technologies, including artificial intelligence, within and beyond the courtroom
- Legislative restrictions on open justice
- Judicial independence in non-court environments
- Retirement ages and pension schemes

Subsequent reports might be expected to concentrate on a subset of these pressure points, and to consider 'possible recommendations for minimizing or addressing those pressures'.[117] Yet it bears emphasis that the list is neither exhaustive or static. Some matters touched upon in this report may prove to have been comprehensively addressed through pending legal or institutional reforms. Others may simply be displaced by more pressing concerns.

Above all, this report seeks to affirm the continuing importance of an independent, impartial and competent judiciary to the health of the whole Australian system of government. Judicial independence may operate as a shield for the judiciary, but it is not a luxury or privilege that we can afford to dispense with. Appointing independent judges, and supporting them to make independent decisions, is non-negotiable in any society committed to democratic governance and the rule of law. Evaluating the current state of judicial independence in Australia by the standards reflected in the *Judicial Independence Monitor* reveals that there is much to be proud of, but also much to do.

Dr Jessica Kerr

August 2024

116 *The Judicial Independence Monitor* (n 1) 2.

117 Ibid 8.