

INTERNATIONAL ASSOCIATION OF JUDGES: FIRST STUDY COMMISSION

WAYS TO IDENTIFY AND CLASSIFY CRITERIA, OBJECTIVE AND SUBJECTIVE, BY REFERENCE TO WHICH THE INDEPENDENCE OF THE JUDICIARY MAY BE ASSESSED

Response of the Australian Association of Judges

1. *Does your country's judiciary include prosecutors (or equivalent)? If so, do prosecutors benefit from the same guarantees of judicial independence as other judges?*

Australia's judiciary does not include prosecutors. The role of judges and prosecutors is entirely separate in Australia.

2. *How would you define "judicial independence" in the context of the political and social system of your country today?*

The Guide to Judicial Conduct (2nd Edition) published by the Australasian Institute of Judicial Administration for the Council of Chief Justices of Australia describes judicial independence as "a cornerstone of our system of Government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law". The guide refers to two aspects of the concept of judicial independence: constitutional independence and independence in the discharge of judicial duties.

Constitutional independence is guaranteed by the principle of the separation of powers. The principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual members, must be, and be seen to be, independent of the legislative and executive branches of Government.

The Guide recognises that the relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper roles of the others. An appropriate distance should be maintained between the judiciary and the executive, bearing in mind the frequency with which the executive is a litigant before the Courts. The Council of Chief Justices has held that communication with other branches of government on behalf of the judiciary is the responsibility of the head of the jurisdiction or of the Chief Justice.

The second principle is independence in discharge of judicial duties. The Guide provides that judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence. Judges in Australia bear in mind that the principle of judicial independence extends well beyond the traditional separation of powers and requires that a judge be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests. The independence of the judiciary and of the

individual judge will best be served by reliance on personal integrity and the dictates of conscience. The concept of judicial independence is therefore another aspect of judicial integrity and judicial impartiality.

3. Which **objective** criteria would you identify as indicating that the judiciary of your country is independent and why?

- *Security of tenure* All judges have security of tenure until the age of 70 and such security of tenure is protected by the constitutions of the Commonwealth of Australia and its various States.
- *Having a body independent from other organs of state for:*
 - (a) *deciding on appointment to judicial office:* There is no body independent from the other organs of State for deciding on appointment to judicial office, that role being entrusted to the Executive. However there are various statutes or conventions requiring the relevant Attorney-General to consult with or take advice from other interested parties;
 - (b) *fixing judicial salaries:* Independent bodies fix or recommend increases to judicial salaries and allowances. There is a constitutional principle that a judicial salary may not be decreased during the term of office;
 - (c) *deciding on promotion:* Promotion is not a relevant concept within Australia's judiciary. A judge may be appointed to another or higher Court or another division of the Court, but that is not regarded as a promotion;
 - (d) *considering ethical/disciplinary problems and procedures:* There is in one State in Australia (New South Wales) an independent body for considering ethical/disciplinary problems and procedures. Judges cannot be removed in Australia except by an address to the the relevant houses of Parliament for proved misbehaviour;
 - (e) *judicial Training:* There are a number of bodies which conduct judicial training in Australia which are controlled by the Judges, the National Judicial College of Australia and the Australian Institute of Judicial Administration are the most important of these.
- *Constitutional guarantee/other constitutional provision to ensure that the executive or other organs of the state cannot interfere with a judge's work or decision and/or trials:* Chapter 3 of the Constitution of Australia vests the judicial power of the Commonwealth in the High Court of Australia and in such other federal courts as the Parliament creates or invests with Federal jurisdiction. Chapter 3 protects the judges' appointment tenure and remuneration and deals with the original and appellate jurisdiction of those courts. There are similar provisions in the State constitutions.
- *Laws ensuring judges have freedom of expression and association:* Australia does not have any laws ensuring judges have freedom of expression and association. However, importantly, it does not have any laws which impinge upon that freedom. The Guide to Judicial Conduct advises that judges should be experienced in assessing the perception of reasonable fair-minded and informed members of the

community in deciding whether conduct is or is not likely to diminish respect in the minds of such persons. In that framework the judge is expected to exercise discretion in personal relationships, social conduct, contacts and activities. The fundamental principle is said to be that a judge should not engage in an activity that raises a real risk that the judge will be disqualified from performing judicial duties, nor engage in an activity that would compromise the objective or infringe the principles of impartiality and integrity and judicial independence. In particular it is expected that a judge will sever all ties with any political parties after appointment; and that a judge should be cautious about associations of a business or a social kind and with associations or persons who might be litigants or witnesses in the judge's court.

- *Administration of the courts/judges that is run by judges or a service that is independent of the executive/legislature:* Practices vary within Australia. Some courts have independent administration and some have administration that is part of a civil service but is nevertheless under the control of the head of the court's jurisdiction.
 - *A budget for court/judicial administration that is free from inference by the Executive/legislature:* Practices vary across various states and various courts in Australia. Some have a budget which is free from interference by the Executive. None have a budget that is free from control by the legislature.
- (4) Which **subjective** criteria would you identify as indicating that the judiciary of your country is independent and why?
- *Public opinion/the media/the legislature regards the judges/legal system in its country as independent and/or free from corruption:* Judges enjoy wide spread public approval in Australia as independent and free from corruption. There is no serious opinion to the contrary.
 - *Independent bodies (such as Council of Europe, UNO) regard the judges/judicial system in a country as independent and/or free from corruption:* The Australian judges are unaware of any international body which has taken the view that Australian judges are not independent or are corrupt.
- (5) If you have to identify the three most important criteria for indicating judicial independence in your country, what would they be and why?

In Australia, the three most important criteria are:

1. constitutional and statutory guarantee of independence;
2. the commitment of judges to impartiality, integrity and independence as set out by the Council of Chief Justices of Australia; and
3. public confidence in the independence of the judiciary in Australia.

The reason why these criteria have been chosen is that they indicate that the judges themselves, the other organs of Government and the public at large regard the independence of the judiciary as a cornerstone of democracy in Australia.