THE JUDICIAL WORKPLACE AND THE INTERSECTION WITH JUDICIAL INDEPENDENCE

Fourth Study Commission Questionnaire—2023

Australia

1. APPOINTMENT TO JUDICIAL OFFICE

Brief overview of Australia's Court system

Under Australia's constitutional arrangements, our judiciary is independent from the other arms of government. The separation of powers doctrine means that in interpreting and applying the law, judicial officers act independently and without interference from the parliament or the executive. The constitutional guarantees of tenure and remuneration assist in securing judicial independence.

Federal Courts

High Court of Australia

The High Court of Australia is the highest Court in the Australian judicial hierarchy. It is the final Court of Appeal in Australia. It hears matters involving disputes about the interpretation of the Australian Constitution as well as final appeals of criminal and civil matters from all Courts in Australia.

Federal Court of Australia

The Federal Court is a superior Court with jurisdiction to hear civil disputes governed by Federal laws. It hears matters on a range of different subject matter including bankruptcy, corporations, industrial relations, native title, taxation and trade practices laws, and hears appeals from decisions (except family law decisions) of the Federal Circuit Court.

Federal Circuit Court and Family Court of Australia

The Court comprises two divisions:

Division 1 maintains the continuation of the Family Court of Australia as a superior court and deals only with family law matters.

Division 2 is a continuation of the Federal Circuit Court of Australia and deals with both family law and general law matters. It hears less complex family law matters and disputes in administrative law, admiralty law, bankruptcy, copyright, human rights, industrial law, migration, privacy and trade practices.

State and Territory Courts

The Court hierarchy in each state and territory in Australia varies. All states and mainland territories have a Supreme Court, which is the highest Court within that state

or territory. These Courts also have appeal divisions, known as the Court of Appeal (in civil or criminal matters), or the Court of Criminal Appeal (in criminal matters only).

In most Australian states and territories, the Court hierarchy is as follows:

- Supreme Court
- District Court (or County Court)
- Local Court (or Magistrates Court)
- Specialist Courts (Incl. Land and Environment Court; Industrial / Employment Court; Land Court.)

A. Please describe the process by which a person is appointed to judicial office in lower courts, intermediate courts and superior courts pointing out any relevant differences between appointment in criminal civil or appellate courts.

As a matter of general application, persons appointed judges and magistrates are required to have legal qualifications and are expected to have experience and training suitable for the position to which they are appointed. They are commonly appointed from the ranks of legal practitioners although some appointments have been made of persons with other suitable legal experience such as academics.

Federal Courts

In Australia, at the Federal level judges are appointed by the Governor-General in Council, having been selected by Cabinet on the advice of the Attorney-General.

To be eligible for appointment as a Federal Court or Federal Circuit and Family Court judge, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a state or territory for at least five years.

To be eligible for appointment as a Federal Circuit and Family Court of Australia (FCFCOA) (Division 1) judge a person must also by reason of knowledge, skills, experience and aptitude be a person suitable to deal with matters of family law, including matters involving family violence. This requirement also applies to appointments to the FCFCOA (Division 2) if the kind of matters that may be expected to come before that judge are family law matters.

Only a small part of the Attorney-General's consultation in relation to Federal appointments is statutorily prescribed. In relation to the appointment of judges to the High Court, the Commonwealth Attorney-General is required, pursuant to s 6 of the *High Court of Australia Act* 1979 (Cth) to 'consult' with the Attorneys-General of the States (but not the Territories).

However, in addition to the consultation with the State Attorneys-General, further consultations would occur with the peak legal professional bodies. There is no fetter on the nature or extent of any consultation that the Attorney-General can undertake.

In April 2021, a Consultation Paper was released by the Australian Law Reform Commission. Consultation Proposal 14 asked whether the 'Australian Government

should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community'.

The Commonwealth Attorney-General in making several recent appointments to the Federal Court of Australia observed that prior to making those appointments, he consulted extensively with key members of the legal community seeking nominations of suitable, qualified people. He advised that he established an advisory panel to assess the nominations and provide him with recommendations on suitable candidates.

State and Territory Judges

In the States and mainland Territories, the Governor or Administrator appoints judges and magistrates, having been selected by Cabinet on the advice of the Attorney-General.

Eligibility criteria for appointment varies between each state and territory. As a minimum, to be eligible for appointment as a judge or magistrate, a person must have been enrolled as a legal practitioner of a Supreme Court of a state or territory for at least five years.

In New South Wales, a qualified person for appointment as a judge of the Supreme and District Courts is an Australian lawyer of at least 7 years' standing or he or she holds or has held a judicial office of New South Wales, the Commonwealth or another State or Territory. To be appointed a magistrate of the Local Court a person must be an Australian Lawyer of 5 years' standing.

In Victoria, a person shall not be appointed as a judge of the Supreme Court of Victoria unless he or she has been a judge of the High Court of Australia, a court created by the Parliament of the Commonwealth, a court of Victoria or of another state or territory court or unless the person has been admitted to legal practice in Victoria, another State or Territory or has been enrolled as a legal practitioner of the High Court for not less than five years. For both the County Court of Victoria and the Magistrates' Court, a person shall not be appointed as a judge or magistrate unless he or she has been a judge of the High Court of Australia, a court created by the Parliament of the Commonwealth, a court of Victoria or of another state or territory court or unless the person is an Australian lawyer of at least 5 years' standing.

In Tasmania, a person shall not be appointed as a judge of the Supreme Court unless that person is an Australian lawyer of not less than 10 years' standing who has attained the age of 35 years or is, or has been, a judge of the Federal Court of Australia, the Family Court of Australia, the Supreme Court of another State or Territory, the High Court of New Zealand, the Supreme Court of New Zealand or is, or has been, appointed as a magistrate under the *Magistrates' Court Act* 1987. Appointment to the Magistrates' Court requires a person to be an Australian lawyer of not less than 5 years' standing.

In South Australia, to be appointed a judge of the Supreme Court, a person must be an Australian lawyer of not less than 10 years' standing; District Court requires a person to be an Australian lawyer of not less than 7 years' standing; and the Magistrates' Court requires a person to be an Australian legal practitioner of at least 5 years' standing.

In Western Australia, a person shall not be appointed as a judge of the Supreme Court unless that person is a lawyer and has had at least 8 years' legal experience and is, or has retired as, a judge of the Supreme Court of another State or Territory or a judge of the Federal Court of Australia. Appointment to the District Court of Western Australia requires a person to be a lawyer and has had at least 8 years' legal experience; and for the Magistrates' Court, a person shall not be appointed unless that person is under 70 years of age and has had at least 5 years' legal experience or judicial service in the State or elsewhere in a common law jurisdiction.

The Northern Territory requires a person seeking appointment as a judge of the Supreme Court to not have attained the age of 72 years, is or has been a judge of a court of the Commonwealth or of a State or Territory of the Commonwealth or is a lawyer who has been admitted to the legal profession for at least 10 years; and the Local Court of the Northern Territory requires a person to be under 72 years of age and a lawyer of at least 5 years' standing.

In the Australian Capital Territory, a person shall not be appointed as a resident judge of the Supreme Court unless he or she is or has been a judge of a superior court of record of the Commonwealth or a state, or has been a judge of the Supreme Court, or has been a legal practitioner for not less than 5 years, or he or she has attained the age of 70 years. For the Magistrates' Court, a person shall not be appointed as a magistrate unless the person is a lawyer of at least 5 years' standing.

To be appointed a judge of either the Supreme Court of Queensland or the District Court, a person must be a barrister or solicitor of the Supreme Court of at least 5 years' standing. For the Magistrates' Court, a person must be under the age of 70 years and a barrister or solicitor of the Supreme Court, a barrister, solicitor or legal practitioner of the Supreme Court of another State or Territory or the High Court, of at least 5 years' standing.

In Queensland, the government has adopted a Protocol for Judicial Appointments. This includes an expression-of-interest process and a judicial appointments advisory panel. The panel provides the Attorney-General with a shortlist of candidates. The shortlist must be based on six criteria set out by the Australasian Institute of Judicial Administration (AIJA); namely: Intellectual capacity; personal qualities (including, for instance, integrity and independence of mind); an ability to understand and deal fairly; authority and communication skills; efficiency; and leadership and management skills, particularly in the court, but also relating to those external to the court such as the legal profession.

The appointment of judges to the higher courts and the appointment of heads of jurisdiction continue to be made traditionally following consultation with the head of jurisdiction and relevant legal professional bodies.

In some Australian jurisdictions (Incl. Australian Capital Territory, Victoria, Queensland, Tasmania, Western Australia), the Attorney-General seeks expressions of interest from qualified persons for appointment to the Supreme, District/County and Magistrates' Courts.

In the New South Wales, District Court judges and Local Court magistrates' positions are advertised, with calls for expressions of interest. In the Northern Territory, the expressions of interest are limited to the Local Court.

B. If applicable, please identify whether political influences of any description bear upon in any way the appointment of a particular person to judicial office.

Political influence has no bearing and ought not to have any bearing on a particular person appointed to judicial office.

C. Is ethnic or gender diversity in any way relevant to appointment to judicial office, and if so, please describe why and in what respect each may be relevant.

Whilst it is accepted that judicial diversity is important, there has been some debate about how to promote diversity on the bench, and in particular, the issue of "whether an approach to selection that encourages diversity is consistent with selection based on merit".

The Queensland judicial appointments protocol requires the appointment panel to consider "opportunities for promoting diversity in the judiciary".

D. Describe whether and if so in what way the process of appointment to judicial office is independent of government.

In all Australian jurisdictions, the Executive makes appointments.

2. PROMOTION WITHIN THE JUDICIARY

A. Does scope exist for promotion within the judiciary and if so, please describe how and in what circumstances a magistrate or judge may be promoted.

Yes. Consequent upon a retirement, resignation, or an increasing court workload a vacancy will occur from time to time in a higher court. Consistent with the appointment processes referred to above, positions are publicly advertised and are subject to the same process of appointment.

B. To what extent is political affiliation of political partisanship relevant to promotion within the judiciary

As noted above, political influence has no bearing and ought not to have any bearing on the promotion of a particular person to judicial office.

C. Describe the transparency involved in the process of promotion within the judiciary.

As noted above, appointment to judicial office is undertaken by the Executive. Promotion within levels of the judicial hierarchy is merit based.

3. WORKLOAD WITHIN THE JUDICIARY

There is a growing recognition that judicial officers must manage a variety of stressors:

- large caseloads
- professional isolation
- intense scrutiny
- engagement with highly traumatic material.

Given the impact of judicial decisions in people's lives, and the pivotal role judicial officers play in our democratic system, Australian courts are becoming increasingly aware of their responsibility to individual judges to recognise potential risk factors and to promote judicial wellbeing.

Much of the recent research in Australia dealing with judicial stress suggests that judicial officers and courts need to take action to establish and maintain a culture of openly discussing the human dimension of judging, and to normalise participation in proactive counselling and debriefing to manage the inevitable periods of distress that arise in judicial work.

A. In broad terms, what are the requirements for magistrates and judges in relation to the number of sitting days per year or other measurement of judicial workload requirements?

The enabling legislation of most courts provides that the heads of jurisdiction are responsible for ensuring the 'effective, orderly and expeditious' discharge of the business of their respective court.

In doing so, they may assign caseloads, classes of cases or functions to particular judges, and may take any measures they believe to be reasonably necessary to maintain public confidence and to ensure that the business of the court is appropriately managed.

B. If a judge is encountering trouble keeping up with the workload, describe the regime that applies by which –

(i) that judge's workload is allocated to other judges;

As noted above, it is usually the head of jurisdiction who has the overall responsibility for managing the judicial workload of individual members of the court. For example, they may choose to:

(a) temporarily relieve the judge of existing sitting responsibilities pending the handing down of accumulated reserved judgments; or

(b) allocate to other judges cases which that judge would otherwise have been required to hear and determine.

(ii) the overloaded judge can recover from workload arrears and from any other disabling factor that led to overload.

See above.

(iii) there are other mechanisms to address judicial delinquency.

How this issue is managed will be dependent on the exact nature of the 'delinquency'. If the 'delinquency' is limited to managing of the workload, then the issue would normally be dealt with by the head of jurisdiction. However, if the 'delinquency' is of a more serious nature then some further action may be necessary. Some Australian jurisdictions have already established a mechanism to deal with such matters. Five of Australia's states and territories have an independent statutory mechanism to receive and manage complaints about judicial officers, namely New South Wales, Victoria, South Australia, Australian Capital Territory, and the Northern Territory. Except for South Australia, which has a single commissioner, the complaints bodies in the other four jurisdictions take the form of a commission or council and are each composed of heads of jurisdiction of the various courts of each jurisdiction along with non-judicial members. The complaints bodies receive complaints related to a wide range of behaviour, such as bias, rudeness, bullying, intimidation, or inappropriate questions or comments.

C. Are judges expected or required to assist other judges who may be adversely affected from overload so as to ensure that the business of the court is discharged in a timely manner.

While judges may not be expected or required to assist other judges, courts within Australia operate on a collegiate basis and the head of jurisdiction may, after consultation with the judge concerned, reallocate matters or reduce the caseload to give the judge an opportunity to deal with their outstanding matters. It is common for judicial colleagues to offer to share the workload should that be required.

4. REMOVAL FROM JUDICIAL OFFICE

Under Australia's Constitutional arrangements, our judiciary is independent from the other arms of government. The separation of powers doctrine means that in interpreting and applying the law, judicial officers act independently and without

interference from the parliament or the executive. The constitutional guarantees of tenure and remuneration assist in securing judicial independence.

The effective administration of justice is dependent on the public's confidence in the justice system and in the independence of our judiciary.

A. Does a regime currently exist in your country pursuant to which a sitting judge may be removed from office. If so, please describe any such regime, giving all relevant details including-

(i) who decides that the judge is to be removed from office;

Whilst traditionally in Australia the Executive have been solely responsible for the appointment of a judiciary, the removal of a judicial officer is a process that enfranchises the Parliament as well as the Executive.

Federal Courts

As observed above, security of tenure is an important safeguard of judicial independence, which is vital to upholding the rule of law as it allows judges the 'freedom to decide cases according to law, without fearing reprisal'.

Section 72 of the Australian Constitution provides that the only means by which a federal judge may be removed from office is '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.'

This high threshold for removal from office is to ensure that judges are free from political interference. No federal court judge has been removed from office under the Constitution, nor has the High Court been called upon to interpret the conditions for removal.

State and Territory Courts

A State or Territory judicial officer may be removed from office by the Governor-in-Council or Administrator in Council, on an address to Parliament.

By way of example, the New South Wales Constitution provides for the removal of a judicial officer by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

In Victoria, judicial officers can be removed from office, on the grounds of proved misbehaviour or incapacity, following an address by both Houses of Parliament. The address must be agreed to by a special majority of three-fifths of the members of both Houses. Further, an 'investigating committee', comprised of three members appointed by the Attorney General, must have concluded that facts exist so as to prove misbehaviour or incapacity as to warrant removal from office.

In South Australia, Tasmania and Western Australia, judicial officers may be removed from office following an address by both Houses of Parliament. However, the grounds for removal are not specified in the relevant legislation. The Constitution of South Australia provides that: 'It shall be lawful for the Governor to remove any Judge of the Supreme Court upon the address of both Houses of the Parliament.' The same applies in that State for the District Court. The *Supreme Court Act* 1935 (WA) provides that: 'All the Judges of the Supreme Court shall hold their offices during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament.' The same applies for District Court judges and magistrates.

In Queensland, a judicial officer may be removed after an address by the Legislative Assembly on proven grounds of misbehaviour or incapacity. The *Constitution of Queensland* 2001 provides some clarification of an aspect to the removal process; namely, the meaning of 'proved.' Section 61(3) provides that 'a judge's misbehaviour justifying removal from an office is proved only if the Legislative Assembly accepts a finding of a tribunal, stated in a report of the tribunal, that, on the balance of probabilities, the judge has misbehaved in a way that justifies removal from the office'.

(ii) does the judge have a right of audience on any such motion or otherwise possess a right to be heard against the removal and is there an appeal process if removed;

The judicial officer the subject of a motion for removal would have a right to be heard. Whether there would be a right to judicial review is an unanswered question. No precedent currently exists.

(iii) what are the grounds for seeking the removal of a sitting judge;

See answer (i) above**.**

(iv) what is the relationship between violation of the ethics code/principles and removal; and

The relationship between a violation of the ethics code/principles and removal will have relevance if it forms the ground/s for removal and the necessary threshold for removal from office is reached.

The Australian Institute of Judicial Administration (AIJA) has published a Guide to Judicial Conduct. The Council of Chief Justices of Australia and New Zealand has approved the publication. The purpose of the publication is to give principled and practical guidance to judicial officers as to what may be an appropriate course of conduct or matters to be considered in determining a course of conduct, in a range of circumstances.

(v) describe the transparency in the process.

The removal of a judicial officer would involve a high degree of transparency involving an open investigative process (Judicial Commission of Inquiry) and if a recommendation for removal is made, the matter being dealt with by Parliament.

B. If removed from office, describe the adverse consequences that may affect the removed judge including -

(a) financial (especially pension) consequences;

(b) future employment consequences following removal;

(c) societal consequences including loss of title or civic decorations; and

(d) disciplinary steps that may be taken against the removed judge.

In answer to the above questions, it goes without saying that removal from judicial office would have a significant and adverse impact on the standing of the person removed from office both financially and socially.

What further consequences that might flow from a removal from office would, in large measure, be dependent upon the exact nature and extent of the grounds for removal and the ultimate sanction imposed.