

Temporary Judicial Officers in Australia

**A Report Commissioned by the
Judicial Conference of Australia**

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Terms of Reference

That you prepare a paper which provides background information and considers policy issues in regard to:

1. The issues involved in:
 - the appointment of retired judicial officers, as either acting, temporary, part-time or reserve judges
 - the renewal of such appointments
 - the allocation of these judges to cases.
2. Whether there should be a maximum age at which a judicial officer could act as an acting, temporary, part-time or reserve judge.
3. Whether the qualification for such an appointment should be restricted to former judicial officers and, if not, the qualification for such an appointment by a person who is not a retired judicial officer and the conditions upon which those appointments are made.
4. A full consideration of the policy implications of having a common retirement age for judicial officers across jurisdictions and levels of courts, in particular how a common retirement age would impact upon the use and availability of acting judges.

The project does not encompass the appointment of tenured judges who sit part-time, including job sharing by permanent judicial officers.

1. Introduction

The appointment of Temporary Judicial Officers can arouse strong opinions. In 2016, the appointment of such officers to the South Australian Supreme Court attracted negative commentary.¹ In *Forge v Australian Securities and Investments Commission*, Kirby J, when considering whether New South Wales legislative provisions allowing the appointment of Temporary Judicial Officers were constitutional, asserted that the ‘time has come ... to draw a line and forbid the practice’.² At the same time such appointments can assist the courts, and hence serve the public interest, in significant ways. They allow for the appropriate management of conflicts of interest, strengthen a bench that is depleted due to temporary illness or unavailability, and may provide a cost effective way to manage short-term workload pressures. This Report, commissioned by the Judicial Conference of Australia (‘JCA’) in May 2016, on the use of Temporary Judicial Officers in Australian courts examines the challenges and the advantages of the use of temporary judicial officers. The Terms of Reference accompanying the commission are stated on page iv.

The Terms of Reference identify the subject of this Report as ‘either acting, temporary, part-time or reserve judges’. The extent to which part-time judges are to be discussed in the Report is, however, qualified by the exclusion stated at the end of the Terms of Reference. As we point out at the commencement of Part 2, the four alternative names used in the Terms of Reference are not exhaustive. After identifying all relevant descriptors across Australian court systems, we adopt the expression ‘Temporary Judicial Officers’ throughout this Report as a generic reference for these positions. As no such appointments are able to be made in respect of the federal judiciary due to the strict constitutional separation of judicial power that exists under the Commonwealth Constitution, this Report is almost exclusively concerned with the state and territory judicial systems. However, some discussion of the federal judiciary is relevant to the topic of a common retirement age in point 4 of the Terms of Reference.

The request that we provide ‘background information’ on the use of Temporary Judicial Officers was one that we interpreted to require more than the comprehensive audit of existing statutory regulation, which is presented thematically in Part 2 (with an overview of that information provided in tabular form in Schedule 1). Accordingly, we initiated a data-driven study of the phenomenon of Temporary Judicial Officers as a matter of practice. We are grateful to the JCA for its support for this empirical aspect of the project and its assistance in seeking relevant information from state and territory courts. We also thank the Heads of Jurisdiction and the court staff involved in responding to the requests for information. The material gathered, supplemented from court Annual Reports as necessary, is presented in Part 4 of this Report, which commences with a full description of the methodology involved in data collection and analysis. The data on the utilisation of Temporary Judicial Officers is the first of its kind in Australia, and adds significantly to any assessment of this practice.

Point 1 of the Terms of Reference required us to consider a range of issues arising from the appointment, renewal, case allocation and retirement of Temporary Judicial Officers. Point 3 drew attention to the potential (at least in some jurisdictions) for the appointment as Temporary Judicial Officers of persons who have not formerly held judicial office. In the interests of both clarity and comprehensiveness, we included such persons in our discussion of the issues highlighted at Point 1 of the Terms of

¹ Sean Fewster, ‘Judge Barry Beazley publicly named as new Acting Supreme Court Justice after having already refused the position’, *The Advertiser*, 1 April 2016.

² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 94 [125].

Reference, rather than limiting this to the ‘retired judicial officers’ expressly referred to there. In so doing, we were better able to respond to the question asked in Point 3.

Points 2 and 4 concerned the use of age limits to judicial service. Point 2 focussed on a maximum age for service as a Temporary Judicial Officer. Point 4 required a much broader discussion about the policy implications of a common retirement age for judicial service generally, but noting the impact of such a development on the use and availability of Temporary Judicial Officers. Discussion of these issues was assisted by other recent empirical research that we have carried out independently of this commission. In the first half of 2016, we sent a survey to judicial officers in many Australian courts asking for their responses to a range of questions. Amongst these, respondents were asked to indicate the extent to which they agreed both that the ‘use of acting judicial officers’ was a ‘challenge confronting the judiciary’ and that ‘post-retirement age limits on the use of acting judicial officers are appropriate’. Additionally, respondents’ views were also sought on the use of a mandatory retirement age for Permanent Judicial Officers and the appropriateness of requesting judicial officers to undergo capacity checks. The quantitative and qualitative data resulting from these survey questions is referred to in relevant parts of this Report and is also presented in summary form in Schedule 2.

The Report’s response to the Terms of Reference draws not only on the statutory and empirical research already mentioned, but also incorporates a thorough literature review of primary and secondary sources. This was especially important in the identification of the various justifications and concerns around the use of Temporary Judicial Officers, which we set forth in Part 3. With the benefit of the data on use of Temporary Judicial Officers in practice that is presented in Part 4, those concerns are organised in three broad areas over the course of Part 5: appointment and judicial independence; performance and remuneration; and termination and pension. The Report concludes with a discussion in Part 6 on the topic of a common retirement age for judicial officers across jurisdictions and levels of courts.

Schedule 3 of the Report provides a succinct comparative perspective on the issue of Temporary Judicial Officers by short country reports on arrangements in New Zealand, the United Kingdom and the United States. Although necessarily brief, the comparative material assists to put the inconsistencies and concerns arising from the Australian jurisdictions into perspective.

What emerges very clearly from the Report is that the arrangements for the use of Temporary Judicial Officers across Australia are highly varied. While that may not be regarded as problematic in itself, the fact that there appears to be so little principled consideration underpinning the different arrangements relating to the appointment, conditions, remuneration and termination suggests at least a need for greater knowledge of cross-jurisdictional practices. This may lead to more principled, efficient and effective use of Temporary Judicial Officers across Australian Court systems. There is also an important benefit in greater transparency in court reporting about their reliance on Temporary Judicial Officers so that the significance of their contribution to the administration of justice may be properly assessed. In this regard, it is noteworthy that the data analysed in Part 4 goes a considerable way to allaying frequently expressed concerns about the contemporary practice of such appointments in Australia.

We gratefully acknowledge the excellent research assistance of Mr Harry Hobbs in our preparation of this Report. We also thank Tanya Wade for her data analysis of the material found in Schedule 2.

2. Legislative Overview of Temporary Judicial Officers

2.1 Introduction

Writing with the majority, Justice Heydon's decision in *Forge v Australian Securities and Investments Commission* as to whether Chapter III of the Constitution contemplates acting judicial appointments in state courts was heavily informed by the extensive history of appointing acting judges in the Australian colonies since before federation.³ He explained that it was Edmund Barton who, as New South Wales Attorney-General, extended the use of acting judicial appointments under the *Judicial Offices Act 1892*; both Barton and Richard O'Connor served as acting judges of the New South Wales Supreme Court.⁴ All of the other colonies had similar, and often colourful, pre-federation experience with the appointment of acting judicial officers.⁵ Today, the statutory regulation of Temporary Judicial Officers across Australia is diverse, with variances horizontally across the states and territories and vertically between courts within a jurisdiction. Victoria is the only jurisdiction with a consistent approach to regulation, applying the same clear legislative rules for all Temporary Judicial Officers across all court levels with respect to appointment; eligibility; terms of office; renewal; mandatory retirement age; salary and entitlements; outside work; and security of tenure. As the following thematic overview illustrates, no other jurisdiction has a similar comprehensive regime.

Before exploring the statutory regime, however, it is necessary to define our terminology. In referring to Temporary Judicial Officers we mean judicial officers, whether judges or magistrates, appointed temporarily for a finite period (often not exceeding 12 months, but in some jurisdictions up to five years). This distinguishes them from Permanent Judicial Officers: judicial officers appointed for an unlimited term until the age of mandatory retirement. The terminology to describe Temporary Judicial Officers differs across Australia: a review of the statutes indicates that they may be called 'acting',⁶ 'auxiliary',⁷ 'reserve',⁸ 'temporary',⁹ or 'special'¹⁰ judicial officers. Throughout this Report, all such positions are referred to as 'Temporary Judicial Officers', with the exception where a distinction is drawn between the conditions of appointment of different types of Temporary Judicial Officers. For

³ *Forge v ASIC* (2006) 228 CLR 45, 149-150 [277].

⁴ *Forge v ASIC* (2006) 228 CLR 45, 141-143 [256].

⁵ *Forge v ASIC* (2006) 228 CLR 45, 141-143 [256]-[267]. See *Supreme Court and Circuit Courts Act 1900* (NSW), s 13; *Supreme Court Act 1890* (Vic), s 14; *Acting Judges Act 1873* (Q), s 1; *Supreme Court Act 1855-56* (SA), s 5; *Supreme Court Act 1880* (WA), s 12; *Australian Courts Act 1828* (Imp) (9 Geo IV c 83), s 1. See further *Forge v ASIC* (2006) 228 CLR 45, 95 [127] (Kirby J).

⁶ See: *Supreme Court Act 1970* (NSW) ss 37(1); 111 (for acting Associate Judges); *Local Court Act 2007* (NSW) s 16(1); *District Court Act 1973* (NSW) s 18(1); *Supreme Court of Queensland Act 1991* (Qld) s 16(1); *Magistrates Act 1991* (Qld) ss 6(1) and (1A); *District Court of Queensland Act 1967* (Qld) s 17(1)(a)-(c); *Supreme Court Act 1935* (WA) s 11; *District Court of Western Australia Act 1969* (WA) s 18; *Magistrates Court Act 2004* (WA) sch 1 cl 9; *Supreme Court Act 1935* (SA) s 11; *Magistrates Court Act 1983* (SA) s 5(3); *Supreme Court Act 1887* (Tas) s 3(1); *Supreme Court Act 1933* (ACT) s 4B(1); *Magistrates Court Act 1930* (ACT) s 7 and *Legislation Act 2001* (ACT) Part 19.3, Division 19.3.2; *Supreme Court Act* (NT) s 32(2); *Local Court Act* (NT) s 60(1).

⁷ See: *Supreme Court Act 1970* (WA) s 11AA; *District Court of Western Australia Act 1969* (WA) s 18A; *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3.

⁸ See: *Constitution Act 1975* (Vic) s 81; *Magistrates Court Act 1989* (Vic) s 9A; *County Court Act 1958* (Vic) ss 12. For reserve associate judges see *Supreme Court Act 1986* (Vic) s 105B(1) and *County Court Act 1958* (Vic) 17KA.

⁹ See: *Magistrates Court Act 1987* (Tas) s 4(4).

¹⁰ See: *Magistrates Court Act 1930* (ACT) s 8.

example, in the Western Australian Supreme and District Courts, a distinction is drawn between Acting and Auxiliary Judicial Officers. Similarly, South Australia permits the appointment of acting judges and magistrates as well as auxiliary judicial officers at all court levels.¹¹ In those instances, we have used the statutory terminology.

2.2 Appointment

Appointing authority: As with Permanent Judicial Officers, in almost all jurisdictions, the appointment of Temporary Judicial Officers is by the executive: it is formally made by either the Governor, the Governor in Council or Administrator of the jurisdiction. In the ACT where no such position exists, appointment is simply made by the executive.¹² In the ACT, where provision is made for temporary judicial appointments under judicial exchange arrangements, the appointment is made by the Head of Jurisdiction.¹³ The appointment of a Temporary Judicial Officer to the Northern Territory Local Court may be made by the Administrator or the Minister,¹⁴ which is in contrast to the fact that appointment of a Permanent Judicial Officer to that Court may only be made by the Administrator.¹⁵ In Victoria the appointment of a Temporary Judicial Officer is a two-stage affair. First, he or she must be ‘appointed’ as a reserve judge or magistrate by the Governor in Council,¹⁶ and then he or she must be ‘engaged’ by the Head of Jurisdiction.¹⁷

Consultation: By convention, state Governors and the Northern Territory Administrators act on the advice of the relevant Minister, who would act in accordance with the decision of Cabinet and may also have, in practice, consulted the Head of Jurisdiction of the relevant court, as well as other professional bodies, such as the relevant bar association and the law society. In Queensland the statute compels consultation. The appointment of Temporary Judicial Officers to the Magistrates Court is made by the Governor in Council after consultation between the relevant Minister and the Chief Magistrate;¹⁸ for temporary appointments to the District Court, the relevant Minister must consult with the Chief Judge only if the candidate is a retired District Court Judge and in other cases the Governor in Council may appoint a Temporary Judicial Officer to the District Court without consultation;¹⁹ finally, in the Supreme Court, the Minister must consult the Chief Justice before making a temporary appointment, or such appointment must be made at the Chief Justice’s request,²⁰ except where the appointment is of a person who is or has been a judge of another state or territory or the Federal Court.²¹ In South Australia the appointment of auxiliary judicial officers to all courts requires a more decisive involvement of the Chief Justice, whose concurrence in the appointment is

¹¹ *Supreme Court Act 1935* (SA) s 11; *Magistrates Court Act 1983* (SA) s 5; *District Court Act 1991* (SA) s 12; *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3.

¹² *Supreme Court Act 1933* (ACT) s 4B(1); *Magistrates Court Act 1930* (ACT) ss 7 and 8.

¹³ *Magistrates Court Act 1930* (ACT) s 9E(2); *Supreme Court Act 1933* (ACT) s 69C(2).

¹⁴ *Local Court Act* (NT) s 60(1).

¹⁵ *Local Court Act* (NT) s 53(1).

¹⁶ *Magistrates’ Court 1989* (Vic) s 9A; *County Court Act 1958* (Vic) 12(1); *Constitution Act 1975* (Vic) s 81(1). For reserve associate judges see *County Court Act 1958* (Vic) s 17KA and *Supreme Court Act 1986* (Vic) s 105B.

¹⁷ *Magistrates’ Court Act 1989* (Vic) s 9C; *County Court Act 1958* (Vic) 12B; *Constitution Act 1975* (Vic) s 81B. For Reserve Associate Judges see *County Court Act 1958* (Vic) s 17KC and *Supreme Court Act 1986* (Vic) s 105D.

¹⁸ *Magistrates Act 1991* (Qld), s 6(1A).

¹⁹ *District Court of Queensland Act 1967* (Qld) s 17(1)-(4).

²⁰ *Supreme Court of Queensland Act 1991* (Qld) s 6(1), (2) and (5).

²¹ *Supreme Court of Queensland Act 1991* (Qld) s 6(3).

necessary.²² However for acting judicial officers there is no requirement of concurrence, or even consultation with the Chief Justice or any other head of jurisdiction.²³ There is an explicit statutory requirement for the Attorney-General's recommendation for appointment of an acting magistrate,²⁴ but not for appointment to the Supreme or District Courts.²⁵ In the ACT, for temporary judicial appointments under judicial exchange arrangements, the Head of Jurisdiction must act with the agreement of the exchanging Head of Jurisdiction.²⁶

Justification: The statutory provisions permitting the appointment of Temporary Judicial Officers do not always explicitly refer to the justification for doing so. In Victoria, the Governor may appoint as many Temporary Judicial Officers 'as necessary' for transacting the business of the Court'.²⁷ In Queensland, Western Australia, South Australia and Tasmania, various formulations for justifications of appointment are found in the statute. These include references to situations of 'a temporary nature' 'in which it is necessary or desirable, in the public interest',²⁸ or 'as the Governor thinks necessary for the proper administration of justice',²⁹ where a Judicial Officer is or is expected to be absent³⁰ or is otherwise unable to perform their role,³¹ and also when the proper conduct of the business of the Court,³² or the interests of the administration of justice,³³ requires an additional appointment. In Queensland, different justifications give rise to different eligibility criteria and term limits.

2.3 Eligibility

Across the jurisdictions, eligibility for appointment as a Temporary Judicial Officer generally follows similar criteria as appointment for a Permanent Judicial Officer. Section 37 of the *Supreme Court Act 1970* (NSW) serves as an appropriate example:

- 37(2) In subsection (1) **qualified person** means any of the following persons:
- (a) a person qualified for appointment as a Judge of the Supreme Court of New South Wales,
 - (b) a person who is or has been a judge of the Federal Court of Australia,
 - (c) a person who is or has been a judge of the Supreme Court of another State or Territory.³⁴

²² *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(1).

²³ *Supreme Court Act 1935* (SA) s 11; *Magistrates Court Act 1983* (SA) s 5; *District Court Act 1991* (SA) s 12.

²⁴ *Magistrates Act 1983* (SA) s 5(1)-(3).

²⁵ *Supreme Court Act 1935* (SA) s 11(1); *District Court Act 1991* (SA) s 12(1).

²⁶ *Magistrates Court Act 1930* (ACT) s 9E(2); *Supreme Court Act 1933* (ACT) s 69C(2).

²⁷ *Constitution Act 1975* (Vic) s 81(1); *County Court Act 1958* (Vic) s 12(1); *Magistrates Court Act 1989* (Vic) s 9A(1). For Reserve Associate Judges see *County Court Act 1958* (Vic) 17KA(1) and *Supreme Court Act 1986* (Vic) s 105B(1).

²⁸ *Supreme Court Act 1887* (Tas) s 3(1).

²⁹ *Magistrates Court Act 1983* (SA) s 5(1).

³⁰ *Supreme Court Act 1935* (WA) s 11(1).

³¹ *Supreme Court Act 1991* (Qld) s 6(1).

³² *District Court of Queensland Act 1967* (Qld) s 17(1); *District Court of Western Australia Act 1969* (WA) s 18A(1).

³³ *Supreme Court Act 1935* (SA) s 11(1).

³⁴ *Supreme Court Act 1970* (NSW) s 37(2). See further *Local Court Act 2007* (NSW) s 16(1); *District Court Act 1973* (NSW) s 18(1)-(2); *Supreme Court Act 1986* (Vic) s 105B(2)(b)(i)-(iii); *County Court Act 1958* (Vic) s 12(b)(i)-(ii); *Magistrates' Court Act 1989* (Vic) s 9A(2)(b)(i)-(ii); *Supreme Court of Queensland Act 1991* (Qld) s 6(3); *Magistrates Act 1991* (Qld) s 6(1); *District Court of Queensland Act 1967* (Qld) s 17(1)-(3); *Supreme Court Act 1935* (WA) s 11AA(1)(a)-(b), see also s 11(1)-(2); *Magistrates Court Act 2004* (WA) Schedule 1, cl 9(2); *District Court of Western Australia Act 1969* (WA) s 18A(1); *Supreme*

In this subsection, paragraphs (b) and (c) echo the requirement in s 26 of the Act that a person is qualified for appointment as a Permanent Judicial Officer of the Supreme Court if the person ‘holds or has held a judicial office of this State or of the Commonwealth, another State or a Territory’. However, s 37(2)(a) also contemplates the appointment of Temporary Judicial Officers who are not current or former judicial officers, namely, a person who ‘is an Australian lawyer of at least 7 years’ standing’, since such persons are also qualified for permanent appointment under s 26.

Most jurisdictions include a mandatory retirement age for temporary appointments (see full discussion in Part 2.6). This should be read as part of the eligibility requirements and in some jurisdictions, this connection is explicit. For instance, in the Northern Territory *Local Court Act*, s 60(3)(a) states ‘A person is eligible to be appointed if the person is under 75 years of age.’³⁵ Another example comes from New South Wales, where s 37(4) and (4A) of the *Supreme Court Act 1970* provide that a retired judge may be appointed, even though the judge has reached the age of 72 years (for former NSW judges) or 70 (for former judges of other courts), but that the Temporary Judicial Officer ‘may not be so appointed for any period that extends beyond the day on which he or she reaches the age of 77 years’.³⁶

Some jurisdictions expressly state that persons who are ineligible for permanent appointment on the basis of attaining the compulsory retirement age are nonetheless eligible for appointment as Temporary Judicial Officers. Section 37(4) and (4A) of the *Supreme Court Act 1970* (NSW) provide an example of this. Another instance is found in s 11AA of the *Supreme Court Act 1935* (WA), which provides:

11AA Auxiliary judges

- (1) When for any reason the conduct of the business of the Court requires, in the opinion of the Governor, the appointment of an auxiliary judge, the Governor may by commission under the Public Seal of the State appoint a person —
 - (a) who would, but for the fact that he or she has attained the age referred to in section 3 of the *Judges’ Retirement Act 1937* [70 years], be qualified to be appointed a judge or an acting judge; or
 - (b) who is a retired judge or a retired District Court judge but has not yet attained that age,
 to be an auxiliary judge for such period not exceeding 12 months as is specified in that commission.³⁷

Court Act 1935 (SA) s 11(1)-(1a); *District Court Act 1991* (SA) s 12(3); *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(2)(a); *Supreme Court Act 1887* (Tas) s 3(1)-(1A); *Magistrates Court Act 1987* (Tas) s 4(4)-(4A); *Supreme Court Act* (NT) s 32(2); *Local Court Act* (NT) s 60(3).

³⁵ No such eligibility criterion applies to the Northern Territory Supreme Court.

³⁶ Similar provisions exist in: *Local Court Act 2007* (NSW) s 16(2); *District Court Act 1973* (NSW) s 18(4)-(4B); *Supreme Court Act 1970* (NSW) s 111(6) for Acting Associate Judges; *Constitution Act 1975* (Vic) s 81(2)(a); *County Court Act 1958* (Vic) s 12(2)(a); *Magistrates’ Court Act 1989* (Vic) s 9A(2)(a); *Supreme Court Act 1986* (Vic) s 105B(2)(a) and *County Court Act 1958* (Vic) 17KA(2)(a) for Reserve Associate Judges; *Supreme Court of Queensland Act 1991* (Qld) s 6(6); *District Court of Queensland Act 1967* (Qld) s 17(5); *Magistrates Court Act 2004* (WA) s 9(3)(a); *Magistrates Court Act 1930* (ACT) s 8A(2) (for Special Magistrates) and for acting appointments under a judicial exchange, see *Magistrates Court Act 1930* (ACT) s 9E(5); *Supreme Court Act 1933* (ACT) s 69C(5)

³⁷ See also *District Court of Western Australia Act 1969* (WA) s 18A(1); *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(2); *Supreme Court Act 1935* (SA) s 11(1a); *Magistrates Court Act 1983* (SA) s 5(3a); *District Court Act 1991* (SA) s 12(3).

Victoria is the only jurisdiction that restricts eligibility of Temporary Judicial Officers to former Judicial Officers. For each level of court in the Victorian hierarchy, a person is only eligible to serve as a Temporary Judicial Officer if he or she is or has been a judicial officer of that court either in Victoria or its equivalent elsewhere in Australia.³⁸ In South Australia, s 5(3a) of the *Magistrates Act 1983* (SA) provides that a former magistrate who has retired from office is eligible for appointment as an acting magistrate. This is a similar eligibility standard for acting appointments to the South Australian Supreme and District Courts.³⁹ The *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) also indicates persons are eligible for appointment as an auxiliary judicial officer if they are eligible for appointment as a Permanent Judicial Officer, or ineligible for the latter only on the basis of having attained compulsory retirement age.⁴⁰

Some jurisdictions establish more generous eligibility requirements for Temporary Judicial Officers than permanent appointments. In Queensland, a clerk of the Magistrates Court may be appointed a Temporary Judicial Officer for that Court.⁴¹ In the ACT, an admitted lawyer of 5 years standing is eligible for temporary appointment to the Supreme Court;⁴² and acting appointments under a judicial exchange must meet no further eligibility criteria, but such an appointment cannot extend beyond the retirement age for that court.⁴³ In the ACT Magistrates Court there appear to be two types of Temporary Judicial Officers. Magistrates may be appointed in an acting capacity,⁴⁴ in which case the eligibility criteria are the same as for Magistrates.⁴⁵ No eligibility requirements are set out in statute for temporary appointment as a Special Magistrate beyond the requirement that appointees must be younger than 70 years of age.⁴⁶ Rather, s 8AA of the *Magistrates Court Act 1930* (ACT) provides:

8AA Requirements of appointment—special magistrates

- (1) The Executive must, in relation to the appointment of special magistrates, determine—
 - (a) the criteria that apply to the selection of a person for appointment; and
 - (b) the process for selecting the person.
- (2) A determination is a notifiable instrument.

The Magistrates Court (Special Magistrates Appointment Requirements) Determination 2015 (No 1),⁴⁷ does not require a candidate to have served as a judicial officer or even to be admitted as a lawyer. The selection criteria require that a successful candidate have, *inter alia*: appropriate knowledge of the relevant law and its underlying principles; integrity and independence of mind; sound judgment; an ability to understand and deal fairly with all persons whatever their background; the ability to inspire respect and confidence, and to explain procedures and decisions reached clearly and succinctly; and the ability to work at speed and under pressure.

³⁸ *Constitution Act 1975* (Vic) s 81(2)(b); *County Court Act 1958* (Vic) s 12(2)(b); *Magistrates Court Act 1989* (Vic) s 9A(2)(b). See also *Supreme Court Act 1986* (Vic) s 105B(2) and *County Court Act 1958* (Vic) s 17KA(2) for Reserve Associate Judges.

³⁹ *Supreme Court Act 1935* (SA) s 11(1a); *District Court Act 1991* (SA) s 12(3).

⁴⁰ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(2).

⁴¹ *Magistrates Act 1991* (Qld) s 6(1)(a).

⁴² *Supreme Court Act 1933* (ACT) s 4B(3).

⁴³ *Supreme Court Act 1933* (ACT) s 69C(3) and (5).

⁴⁴ *Magistrates Court Act 1930* (ACT) s 7(2); *Legislation Act 2001* (ACT) Part 19.3; Div 19.3.2.

⁴⁵ *Magistrates Court Act 1930* (ACT) ss 7AA(1) and 7A.

⁴⁶ *Magistrates Court Act 1930* (ACT) s 8A(2).

⁴⁷ Notifiable Instrument NI2015-579 (7 October 2015).

2.4 Duration of term

Temporary Judicial Officers are appointed to serve only for a limited term. Nevertheless, there is a wide diversity among states and territories concerning the upper limit of their term of office. In only two jurisdictions (Victoria and South Australia) is the upper limit consistent across all Courts within the hierarchy. In New South Wales, terms of temporary appointment to the Local Court, District Court and Supreme Court are consistent, but there is no upper limit set for Acting Associate Judges.⁴⁸ In two jurisdictions the professional history of the appointee (Queensland) or the method of appointment (Northern Territory) is relevant to ascertaining the term of office.

At the upper end of the spectrum, Temporary Judicial Officers in New South Wales across all courts may serve ‘for a time not exceeding 5 years’.⁴⁹ This textual formulation provides explicit statutory authority for the appointment of a Temporary Judicial Officer in New South Wales for a period shorter than 5 years. Indeed, the New South Wales Attorney-General, Ms Gabrielle Upton, made this point when introducing the *Courts and Crimes Legislation Amendment Act 2015* (NSW), which increased the upper term limit from 12 months to 5 years, stating that ‘[t]he provision still allows acting judges to be given shorter terms than five years’.⁵⁰ The appointment of a Temporary Judicial Officer in Victoria ceases at ‘the end of 5 years from the date of his or her appointment’⁵¹, but within that appointment period they may have a series of engagements, each no longer than six months.⁵²

Acting and auxiliary judicial officers appointed to the Supreme, District and Magistrates Courts of South Australia, and Temporary Judicial Officers in the Northern Territory Supreme Court may serve for a period not exceeding 12 months.⁵³ In the ACT Supreme Court, a Temporary Judicial Officer may serve for a period not exceeding 12 months,⁵⁴ unless the appointment is made under a judicial exchange arrangement, in which case the period must not exceed 6 months.⁵⁵ No time limit is specified for appointment to the Queensland, Western Australian or the ACT Magistrates Courts;⁵⁶ unless in the ACT the temporary appointment is made under a judicial exchange arrangement, in which case the period must not exceed 6 months.⁵⁷ No time limit is specified for appointment to any Court in Tasmania, where the term of office is, under the statute entirely at the discretion of the Governor.⁵⁸ In the Tasmanian Supreme Court, the appointment is expressed to be made ‘until the

⁴⁸ *Supreme Court Act 1970* (NSW) s 115(3).

⁴⁹ *Supreme Court Act 1970* (NSW) s 37(1); *Local Court Act 2007* (NSW) s 16(1); *District Court Act 1973* (NSW) s 18(1).

⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 185 (Gabrielle Upton, Attorney-General).

⁵¹ *Constitution Act 1975* (Vic) s 81A(1); *Magistrates Court Act 1989* (Vic) s 9B(1); *County Court Act 1958* (Vic) ss 12A(1). For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105C(1); *County Court Act 1958* (Vic) 17KB(1).

⁵² *Constitution Act 1975* (Vic) s 81B(4); *County Court Act 1958* (Vic) s 12B; *Magistrates Court Act 1989* (Vic) s 9C. For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105D; *County Court Act 1958* (Vic) 17KC.

⁵³ *Supreme Court Act 1935* (SA) s 11(1b); *District Court Act 1991* (SA) s 12(3); *Magistrates Act 1983* (SA) s 5(3); *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(4); *Supreme Court Act* (NT) s 32(2).

⁵⁴ *Supreme Court Act 1933* (ACT) s 4B(2).

⁵⁵ *Supreme Court Act 1933* (ACT) s 69C(4).

⁵⁶ *Magistrates Act 1991* (Qld) s 6(2); *Magistrates Court Act 2004* (WA) Schedule 1, cl 9(3); *Magistrates Court Act 1930* (ACT) s 7 and *Legislation Act 2001* (ACT) Part 19.3; Division 19.3.2; s 8A(1).

⁵⁷ *Magistrates Court Act 1930* (ACT) s 9E(4).

⁵⁸ *Supreme Court Act 1887* (Tas) s 3(1); *Magistrates Court Act 1987* (Tas) s 4(4).

happening of such event, or for such period' as is specified in the instrument of appointment. A distinction arises in Western Australia between 'auxiliary' and 'acting' judicial officers. A 12-month limit applies to auxiliary judges appointed to the Western Australian District and Supreme Courts.⁵⁹ By contrast, acting judicial officers in the District and Supreme Courts are appointed until their period of appointment expires, 'for the period during which [a permanent] judge is absent from duty', or until the Permanent Judicial Officer vacancy upon which their appointment is predicated is filled.⁶⁰ This latter type of appointment is not subject to the 12-month cap that applies to auxiliary judicial officers.

For appointment as a Temporary Judicial Officer to the Queensland Supreme and District Courts, the term of office varies according to the professional history of the candidate. A person qualified to be a Judge of the Supreme Court may be appointed as a Temporary Judicial Officer of that Court for a period of no longer than 6 months, although the reasons for this appointment are restricted.⁶¹ However, if that person is or has been a Judge in any court of another state or the Federal Court of Australia, he or she may serve for up to 1 year,⁶² and if he or she is a retired Judge of the Queensland Supreme Court he or she may be appointed for a 2 year period.⁶³ Similar arrangements exist for the appointment of former judges to serve as Temporary Judicial Officers in the Queensland District Court, but curiously no time limit is stipulated for the appointment of a person who is qualified to be a judicial officer of the court, although the reasons for this appointment are restricted.⁶⁴ It may be that the specific justifications cited in respect of such an appointment are to be understood as short-term ones, pertaining for less than one year. Under section 6(2) of the *Magistrates Act 1991* (Qld), appointments may be 'for a specified period or for a specified matter.'

The term of office for appointment to the Northern Territory Local Court is dependent on the method of appointment. If the Administrator has made the appointment, the Temporary Judicial Officer may serve for 12 months, but if the Minister has made the appointment, he or she may only serve for 3 months.⁶⁵

2.5 Renewal

No states or territories expressly preclude reappointment of Temporary Judicial Officers, although only five (Victoria, Queensland, Western Australia, South Australia and the Northern Territory) provide unambiguous statutory authority permitting reappointment. Within these five jurisdictions, a number of distinctions emerge. As Victoria does not distinguish among courts in its judicial hierarchy, all Temporary Judicial Officers are eligible for reappointment.⁶⁶ Likewise, in Western Australia and South Australia auxiliary judicial officers are permitted multiple reappointments, but

⁵⁹ *District Court of Western Australia Act 1969* (WA) s 18A(1); *Supreme Court Act 1935* (WA) s 11AA(3).

⁶⁰ *Supreme Court Act 1935* (WA) s 11(1) and (2); *District Court of Western Australia Act 1969* (WA) s18(3).

⁶¹ *Supreme Court of Queensland Act 1991* (Qld) s 6(1) and (2).

⁶² *Supreme Court of Queensland Act 1991* (Qld) s 6(3).

⁶³ *Supreme Court of Queensland Act 1991* (Qld) s 6(4).

⁶⁴ See *District Court of Queensland Act 1967* (Qld) s 17(1)-(3).

⁶⁵ *Local Court Act* (NT) s 60(4)(a)-(b).

⁶⁶ *Constitution Act 1975* (Vic) s 81(4); *County Court Act 1958* (Vic) s 12(4); *Magistrates Court Act 1989* (Vic) s 9A(4). For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105B(4); *County Court Act 1958* (Vic) 17KA(4).

only for 12 months at a time.⁶⁷ In Queensland, only Temporary Judicial Officers appointed to the Supreme or District Court are explicitly eligible for reappointment;⁶⁸ there is nothing addressing renewal as a Temporary Judicial Officer to the Magistrates Court. A Temporary Judicial Officer appointed to the Northern Territory Local Court may be reappointed, regardless of whether he or she was appointed by the Administrator or the Minister;⁶⁹ no explicit provision is made for the Supreme Court. In the ACT, there is an implied reference to the possibility of renewal for acting appointments made under an exchange arrangement (the provisions state ‘an appointment under this section may be made *on any one occasion*’ for 6 months),⁷⁰ but otherwise the legislation is silent.

2.6 Mandatory retirement age

All jurisdictions establish a mandatory statutory retirement age for Permanent Judicial Officers (see Part 6 of this Report). However, not all jurisdictions explicitly set out a mandatory statutory retirement age for Temporary Judicial Officers. Those that do set retirement at different ages. As noted above, the relevant cap should be read as part of the eligibility criteria.

In Victoria, all Temporary Judicial Officers cease to hold office upon attaining 78 years of age.⁷¹ In Queensland, Temporary Judicial Officers serving on the Supreme or District Court, who are retired Queensland judges, cease to hold office upon attaining 78 years of age;⁷² otherwise, Temporary Judicial Officers on these courts appear to fall within the general provisions that require retirement at 70.⁷³ Those on the Queensland Magistrates Court cease to hold office at 70 years of age.⁷⁴ Temporary Judicial Officers on the Western Australian Magistrates Courts also cease to hold office at 70 years of age.⁷⁵ In the Northern Territory a person may not serve as a Temporary Judicial Officer on the Local Court if he or she has reached 75 years of age.⁷⁶ In the Northern Territory, Temporary Judicial Officers of the Supreme Court are explicitly exempted from the mandatory retirement age provisions applicable to Permanent Judicial Officers.⁷⁷ In the ACT Supreme Court, Temporary Judicial Officers are not included the mandatory statutory age limits for Permanent Judicial Officers (70 years),⁷⁸ except when appointed under a judicial exchange, in which case the appointment cannot extend beyond the retirement age of the Court.⁷⁹ On the ACT Magistrates Court, Special Magistrates cease to hold office at the end of their specified term, or, if no term is set, 70 years of age.⁸⁰ Acting Magistrates in the ACT appear to be subject to the ordinary retirement age of 65 years,⁸¹ and acting magistrates

⁶⁷ *Supreme Court Act 1935* (WA) s 11AA(3); *District Court of Western Australia Act 1969* (WA) s 18A(3); *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(4).

⁶⁸ *Supreme Court of Queensland Act 1991* (Qld) s 6(7); *District Court of Queensland Act 1967* (Qld) s 17(6).

⁶⁹ *Local Court Act* (NT) s 60(5).

⁷⁰ *Supreme Court Act 1933* (ACT) s 69C(4); *Magistrates Court Act 1930* (ACT) s 9E(4).

⁷¹ *Constitution Act 1975* (Vic) s 81A(1)(b); *County Court Act 1958* (Vic) s 12A(1)(b); *Magistrates Court Act 1989* (Vic) s 9B(1)(b). For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105C(1)(b); *County Court Act 1958* (Vic) s 17KB(1)(b).

⁷² *Supreme Court Act 1991* (Qld) s 6(6); *District Court Act 1967* (Qld) s 17(5).

⁷³ *Supreme Court Act 1991* (Qld) s 21; *District Court Act 1967* (Qld) s 14.

⁷⁴ *Magistrates Act 1991* (Qld) ss 4(1), 6(1), (5), 42.

⁷⁵ *Magistrates Court Act 2004* (WA) Schedule 1, cl 9(3).

⁷⁶ *Local Court Act* (NT) s 63(b).

⁷⁷ *Supreme Court Act* (NT) s 38.

⁷⁸ *Supreme Court Act 1933* (ACT) s 4(3).

⁷⁹ *Supreme Court Act 1933* (ACT) s 69C(5).

⁸⁰ *Magistrates Court Act 1930* (ACT) s 8A(1)(b), (2).

⁸¹ *Magistrates Court Act 1930* (ACT) s s 7D(1).

appointed under an exchange arrangement cannot extend beyond the retirement age of the court.⁸² In Tasmania, the mandatory retirement provisions do not apply to Temporary Judicial Officers in the Magistrates Court,⁸³ but in the Supreme Court, Temporary Judicial Officers appear to be caught by the general requirement for retirement at 72 years of age.⁸⁴

For all courts in New South Wales, the mandatory retirement age for Temporary Judicial Officers who are not former Judicial Officers is 72 years of age.⁸⁵ Former Judicial Officers serving in a temporary capacity cease to hold office at 77 years of age.⁸⁶

The situation in Western Australia as it pertains to the Supreme Court and District Court is complex and differs between Auxiliary and Acting Judicial Officers. Under s 11AA(1)(b) of the *Supreme Court Act 1935* (WA), a retired Judicial Officer is eligible for appointment as an Auxiliary Judge on the court if he or she has not attained the compulsory retirement age for Permanent Judicial Officers,⁸⁷ but the provision does not address whether the appointment of such a person ceases upon him or her reaching that age. However, under s 11AA(1)(a), a person is eligible for appointment as an Auxiliary Judicial Officer if he or she is qualified to be appointed in a permanent capacity but for the fact that he or she has already attained the age of compulsory retirement. In contrast, Acting Judicial Officers are included in the ambit of s 3 *Judges' Retirement Act 1937* (WA), which provides for mandatory retirement at age 70. The same distinctions between Auxiliary and Acting Judicial Officers exist in the District Court.⁸⁸

In South Australia there is no explicit statutory retirement age for Temporary Judicial Officers in any court, but the *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) indicates persons are eligible for appointment as an auxiliary judicial officer if they have attained compulsory retirement age, implying that the general age limits do not apply.⁸⁹ Similarly, there appears to be no explicit restriction for acting judges in the Supreme and District Courts.⁹⁰ In the Magistrates Court it is possible to construe the interaction between ss 3, 5(3) and 9(1) of the *Magistrates Act 1983* (SA) as requiring retirement of Temporary Judicial Officers at 70 years of age.

2.7 Outside work

Most jurisdictions do not explicitly state whether Temporary Judicial Officers may engage in work outside of their judicial duties. It is likely that the same rules that apply for Permanent Judicial Officers (full-time and part-time) apply to Temporary Judicial Officers (that is, generally, no outside work without permission of the Attorney-General), unless the individual commission expressly includes an exception

⁸² *Magistrates Court Act 1930* (ACT) s 9E(5).

⁸³ *Magistrates Court Act 1987* (Tas) s 8(3).

⁸⁴ *Supreme Court Act 1887* (Tas) s 6A; although note *Supreme Court Act 1959* (Tas) s 5(2) contemplates the appointment of an acting Associate Judge (a very limited role in that jurisdiction) beyond the age of 72 years.

⁸⁵ *Judicial Officers Act 1986* (NSW) s 44; which applies to Temporary Judicial Officers through s 3(3A).

⁸⁶ *Supreme Court Act 1970* (NSW) s 37(4)-(4A) and 111(6) (for Acting Associate Judges); *Local Court Act 2007* (NSW) s 16(2); *District Court Act 1973* (NSW) s 18(4)-(4B).

⁸⁷ *Supreme Court Act 1935* (WA) s 11AA(1)(b).

⁸⁸ See *District Court of Western Australia Act 1969* (WA) ss 18 (Acting Judges) and 18A (Auxiliary Judges), together with s 16 of that Act and s 3 of the *Judges' Retirement Act 1937* (WA).

⁸⁹ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(1)(b).

⁹⁰ *Supreme Court Act 1935* (SA) s 11(1a); *District Court Act 1991* (SA) s 12(3).

to this rule.⁹¹ For example, Queensland does not set out specific rules relating to Temporary Judicial Officers performing outside work. However, s 22 of the *Supreme Court of Queensland Act 1991* (Qld) provides clear rules that all judicial officers must abide by:

22 Accepting and holding other public offices

- (1) Subject to this section, a judge may accept and hold another public office.
- (2) A judge who accepts another public office—
 - (a) must immediately notify the Attorney-General in writing; and
 - (b) must immediately resign the other public office if the Governor in Council decides, after consultation between the Attorney-General and the Chief Justice, that the holding of that office, or the conditions on which it is held, would be inconsistent with the proper discharge of the office of a judge.
- (3) A judge may receive remuneration in relation to the acceptance or holding of another public office only with the approval of the Governor in Council.⁹²

Victoria is the only jurisdiction that establishes a clear statutory rule for all Temporary Judicial Officers seeking to engage in outside work. Temporary Judicial Officers in Victoria must obtain the approval of the Head of Jurisdiction before engaging in legal practice, undertaking paid employment or conducting a business, trade or profession of any kind, or holding office in an entity for which he or she receives remuneration.⁹³

Western Australia, South Australia, Tasmania, the Northern Territory and the ACT also provide specific rules concerning Temporary Judicial Officers ability to perform outside work. These rules do not apply uniformly to courts within the state or territory. For example, although Temporary Judicial Officers appointed to the Western Australian Magistrates Court may not perform other work unless permitted to do so by the Governor,⁹⁴ there are no explicit rules applicable to temporary appointments to the Supreme or District Courts. A similar position exists in the Northern Territory, with explicit restrictions on the Local Court⁹⁵ but no explicit rules applying to the Supreme Court. In contrast, although Temporary Judicial Officers appointed to the ACT Supreme Court may not engage in remunerative employment or hold another judicial office without the written approval of the executive in consultation with the Chief Justice,⁹⁶ no explicit rule exists for Special Magistrates in the Magistrates Court, but acting Magistrates would appear to fall within a prohibition against outside work without the consent of the Attorney-General.⁹⁷ In South Australia, part-time magistrates are unable to practice in the legal profession and any other outside work may only be undertaken with the 'written approval of the Chief Justice given with the concurrence of the Chief Magistrate'.⁹⁸ This applies to acting magistrates unless their instrument of appointment says otherwise.⁹⁹ There are no explicit rules for Temporary Judicial Officers in the other South Australian

⁹¹ For example, s 18A of the *Magistrates Act 1983* (SA) states that the prohibition on a part-time magistrate performing legal or other work 'does not apply to an acting magistrate to the extent specified in the magistrate's instrument of appointment'.

⁹² See also *Magistrates Act 1991* (Qld) s 41; *District Court of Queensland Act 1967* (Qld) s 13.

⁹³ *Constitution Act 1975* (Vic) ss 81E and 84; *County Court Act 1958* (Vic) ss 12E, 13; *Magistrates Court Act 1989* (Vic) s 9F. For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105G; *County Court Act 1958* (Vic) s 17KF.

⁹⁴ *Magistrates Court Act 2004* (WA) Schedule 1, cl 9(5).

⁹⁵ *Local Court Act* (NT) s 66.

⁹⁶ *Supreme Court Act 1933* (ACT) s 16(2).

⁹⁷ *Magistrates Court Act 1930* (ACT) s 7G.

⁹⁸ *Magistrates Act 1983* (SA) s 18A(4).

⁹⁹ *Magistrates Act 1983* (SA) s 18A(7).

courts. In Tasmania, the provisions restricting outside work for magistrates are explicitly excluded from applying to Temporary Judicial Officers.¹⁰⁰

2.8 Salary

The salary paid to Temporary Judicial Officers is generally set at the same pro rata rate as Permanent Judicial Officers. There are however, some distinctions across jurisdictions depending on the particular court as to whether entitlements such as leave are included, and, in Queensland, depending on whether the Temporary Judicial Officer is a former Judicial Officer.

Only Victoria and New South Wales make no distinction between courts within their judicial hierarchy and establish a clear and consistent rule aligning the salary and allowances of Temporary Judicial Officers to those of Permanent Judicial Officers. Temporary Judicial Officers throughout Victoria are entitled to receive the same salary and allowances of a Permanent Judicial Officer appointed to the respective court set under the *Judicial Entitlements Act 2015* (Vic).¹⁰¹ The same is true in New South Wales.¹⁰²

In distinction to the approach in Victoria and New South Wales, other jurisdictions adopt different rules depending on the particular court. Until late 2016, Temporary Judicial Officers appointed to the Tasmanian Supreme Court received the same salary as the equivalent full time position, but there is now capacity for the appointment of part-time Temporary Judicial Officers who are paid a daily rate or for part of a day.¹⁰³ Individuals temporarily appointed to the ACT Supreme Court are granted the same entitlements as permanent judges, ‘other than in relation to leave or pension’.¹⁰⁴ Acting appointments to either the ACT Supreme or Magistrates Courts made under a judicial exchange arrangement are not entitled to receive remuneration.¹⁰⁵ Western Australian auxiliary judges are entitled to the same salary as the equivalent Permanent Judicial Officer, but if the auxiliary judge is receiving a pension they are only entitled to ‘the difference between the rate of that pension and the rate of the annual salary payable’ (see further discussion of similar arrangements in other jurisdictions in Part 2.9, below).¹⁰⁶ The salary of Western Australian acting judicial officers in the Magistrates, District and Supreme Courts is pegged to that of the equivalent Permanent Judicial Officer.¹⁰⁷

In practice, Queensland adopts a similar approach to Victoria and South Wales. But in the case of the Supreme Court of Queensland, the remuneration of Temporary Judicial Officers is formally dependent on their professional history. A former Supreme Court Judge serving in a temporary capacity is entitled to be paid in accordance with the *Judicial Remuneration Act 2007* (Qld),¹⁰⁸ whereas a person, other than a former Supreme Court Judge, serving as a temporary Judicial Officer has their

¹⁰⁰ *Magistrates Court Act 1987* (Tas) s 4(5); s 12.

¹⁰¹ *Constitution Act 1975* (Vic) s 81F; *County Court Act 1958* (Vic) s 12F(1); *Magistrates Court Act 1989* (Vic) s 10(2); Schedule 1, Part 2, s 11. For Reserve Associate Judges see. *Constitution Act 1975* (Vic) s 83B; *County Court Act 1958* (Vic) s 17KG.

¹⁰² *Supreme Court Act 1970* (NSW) s 37(5); *District Court Act 1973* (NSW) s 18(3B); *Local Court Act 2007* (NSW) Schedule 1, Part 4, s 12(4).

¹⁰³ *Supreme Court Act 1887* (Tas) s 3(2) and (3); *Supreme Court Act* (NT) s 41. For new arrangements for part-time appointments, see *Supreme Court Act 1887* (Tas) s 3(3A).

¹⁰⁴ *Supreme Court Act 1933* (ACT) s 37V.

¹⁰⁵ *Magistrates Court Act 1930* (ACT) s 9F (3)(a); *Supreme Court Act 1933* (ACT) s 69D(3)(a).

¹⁰⁶ *Judges’ Salaries and Pensions Act 1950* (WA) s 5(1b).

¹⁰⁷ *Judges’ Salaries and Pensions Act 1950* (WA) s 12A; *Magistrates Court Act 2004* (WA) Schedule 1, cl 3 and 9(4).

¹⁰⁸ *Judicial Remuneration Act 2007* (Qld) s 5A.

remuneration set by the Governor in Council.¹⁰⁹ In a safeguard to judicial independence, however, such remuneration cannot be less than that ‘paid and provided to a [permanent] judge’.¹¹⁰ Temporary Judicial Officers appointed to the Queensland Magistrates and District Court are paid at the same level as Permanent Judicial Officers of the respective court.¹¹¹

Some jurisdictions do not set the remuneration of Temporary Judicial Officers in statute at all. In all South Australian courts, the remuneration of auxiliary judicial officers is ‘determined by the Governor with the concurrence of the Chief Justice’.¹¹² For South Australian acting judicial officer remuneration appears to be tied to that of the equivalent Permanent Judicial Officer and set by the Remuneration Tribunal.¹¹³ In the Tasmanian and ACT Magistrates Courts, remuneration is specified in the person’s instrument of appointment;¹¹⁴ and in the Northern Territory Supreme Court the salary appears determined in the same way as for Permanent Judicial Officers, that is, by the Administrator;¹¹⁵ and in the Local Court, the salary, allowances and other benefits are determined by the person making the appointment, namely, the Administrator or Minister.¹¹⁶

2.9 Pension arrangements

A Temporary Judicial Officer is not entitled to accrue pension rights for the period of their commission in all jurisdictions except New South Wales, in some instances in Queensland, and in the Northern Territory. Many jurisdictions expressly preclude a Temporary Judicial Officer’s period of service as giving rise to pension rights.¹¹⁷ In Victoria, service as a Temporary Judicial Officer ‘does not count’ as service for the purposes of pension arrangements.¹¹⁸ In South Australia, a person ‘acquires no rights’ under the *Judges’ Pensions Act 1971* (SA) in respect of service as a Temporary Judicial Officer.¹¹⁹ In Tasmania a temporary commission as a Supreme Court judge ‘is not taken to be service’ for the purposes of the *Judges’ Contributory Pensions Act 1968* (Tas),¹²⁰ but Temporary Judicial Officers in both the Supreme and Magistrates Courts appear to be eligible for contributory superannuation schemes.

In contrast, in the Supreme and District Courts in New South Wales, service as a Temporary Judicial Officer is deemed to be ‘prior judicial service’ for the purpose of the *Judges’ Pension Act 1953* (NSW).¹²¹ However, the conditions or limitations specified in a Temporary Judicial Officer’s commission ‘may’ exclude the whole or any

¹⁰⁹ *Supreme Court of Queensland Act 1991* (Qld) s 6(9).

¹¹⁰ *Supreme Court of Queensland Act 1991* (Qld) s 6(9).

¹¹¹ *Judicial Remuneration Act 2007* (Qld) ss 9A, 28; *Magistrates Act 1991* (Qld) s 47A.

¹¹² *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(6).

¹¹³ *District Court Act 1991* (SA) s 13; *Supreme Court Act 1935* (SA) s 12; *Magistrates Act 1983* (SA) s 13; *Remuneration Act 1990* (SA) s 13.

¹¹⁴ *Magistrates Court Act 1987* (Tas) s 4(4), note s 4(5) and 10; *Magistrates Court Act 1930* (ACT) s 8B (for Special Magistrates) and under s 7C for acting Magistrates.

¹¹⁵ *Supreme Court Act* (NT) s 41.

¹¹⁶ *Local Court Act* (NT) ss 60, 62.

¹¹⁷ See *Supreme Court 1933* (ACT) s 37V and s 69D (in relation to appointments pursuant to a judicial exchange); *Magistrates Court Act 1930* (ACT) s 9F (3)(b) (in relation to appointments pursuant to a judicial exchange); *Judges’ Salaries and Pensions Act 1950* (WA) s 5(1b).

¹¹⁸ *Constitution Act 1975* (Vic) s 83; *County Court Act 1958* (Vic) s 12D; *Magistrates Court Act 1989* (Vic) s 9D. For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105F(1); *County Court Act 1958* (Vic) s 17KE.

¹¹⁹ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(7).

¹²⁰ *Supreme Court Act 1887* (Tas) s 3(4).

¹²¹ *Judges’ Pension Act 1953* (NSW) s 8(3).

part of the period of appointment from being regarded as prior judicial service.¹²² In the Local Court, Temporary Judicial Officers are not explicitly entitled to enroll in the superannuation scheme.¹²³ In Queensland, service as a Temporary Judicial Officer in the Supreme and District Courts counts as prior judicial service under the *Judges (Pensions and Long Leave) Act 1957* (Qld), other than if the appointee is a retired District Court or Supreme Court judge.¹²⁴ The minimum defined benefit does not apply to acting District Court and Supreme Court judges.¹²⁵

In the Northern Territory Supreme Court, a period of service of a Temporary Judicial Officers is explicitly added to and deemed part of the period of service as a judge, but otherwise acting judges are excluded from that Act.¹²⁶ In the Supreme and Local Courts it appears that a Temporary Judicial Officer's conditions are determined entirely by the person making the appointment, ie. the Administrator or the Minister; in the Supreme Court these conditions are not expanded upon;¹²⁷ in the Local Court, they include 'salary, allowances and other benefits'.¹²⁸

Beyond the question of accrual of pension rights, a further issue is the ability of a Temporary Judicial Officer to draw both a pension and a salary. As discussed above, in Western Australia, if an auxiliary judge is receiving a pension they are only entitled to 'the difference between the rate of that pension and the rate of the annual salary payable'.¹²⁹ In Queensland, a former Judicial Officer serving as a Temporary Judicial Officer in Queensland is to be paid the salary of a Permanent Judicial Officer less any amount the retired Judicial Officer receives as a pension.¹³⁰ If a former Judicial Officer is serving as a Judicial Officer, including a Temporary Judicial Officer, in another jurisdiction, that individual's pension entitlements are to be reduced for the period they receive a salary by the amount of the salary, with some exceptions where the judge is 65 years old or more, and if the service is of a limited nature (as defined).¹³¹ In Victoria, former Judicial Officers appear to lose their entitlement to a judicial pension if appointed as a Temporary Judicial Officer in any jurisdiction other than the same Victorian jurisdiction in which they were a Permanent Judicial Officer.¹³² No other statutory regime appears to deal with this issue.

2.10 Security of tenure

Security of tenure arrangements for Temporary Judicial Officers differ across jurisdictions and courts.

In New South Wales, Victoria and Western Australia the tenure of Temporary Judicial Officers in all courts is expressly equated with that of Permanent Judicial Officers. In New South Wales, Temporary Judicial Officers are expressly protected by the general protections of tenure granted to all judicial officers under s 53 of the *Constitution Act 1902* (NSW), which provides:

¹²² *Supreme Court Act 1970* (NSW) s 37(5); *District Court Act 1973* (NSW) s 18(5),

¹²³ *Local Court Act 2007* (NSW) sch 1, Part 1 and contra sch 1, Part 4.

¹²⁴ *Judges (Pensions and Long Leave) Act 1957* (Qld) s 2A.

¹²⁵ *Judges (Pensions and Long Leave) Act 1957* (Qld) s 2C(3).

¹²⁶ *Supreme Court (Judicial Pensions) Act* (NT) s3(2).

¹²⁷ *Supreme Court Act* (NT) s 32(2).

¹²⁸ *Local Court Act* (NT) s 62. A similar approach is adopted in the ACT Magistrates Court: *Magistrates Court Act 1930* (ACT) s 8B.

¹²⁹ *Judges' Salaries and Pensions Act 1950* (WA) s 5(1b).

¹³⁰ *Judicial Remuneration Act 2007* (Qld) s 5A(1).

¹³¹ *Judges (Pensions and Long Leave) Act 1957* (Qld) s 18.

¹³² *Constitution Act 1975* (Vic) ss 83(4); 81D(2); *Supreme Court Act 1986* ss 104A(7); 105F(2); *County Court Act 1958* (Vic) ss 14(3A); 12D; *Magistrates' Court Act 1989* (Vic) ss 10A(2) and 9D.

53 Removal from judicial office

- (1) No holder of a judicial office can be removed from the office, except as provided by this Part.
- (2) The holder of a judicial office can be removed from the office 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.

...

- (5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.

In the Supreme, County and Magistrates Court in Victoria a Temporary Judicial Officer 'may only be removed from office in the same way and on the same grounds as [a Permanent Judicial Officer] is liable to be removed from office'.¹³³ Similar provisions exist for the Western Australian Supreme, District and Magistrates Courts.¹³⁴

In some jurisdictions, the tenure of Temporary Judicial Officers appears to be secured by the same general provisions that secure the tenure of Permanent Judicial Officers. In South Australia, acting judges on the Supreme Court would appear to be included in the tenure given generally to judges of that Court,¹³⁵ as with the District Court.¹³⁶ In the South Australian Magistrates Court, acting Magistrates are more explicitly considered in the guarantees of tenure afforded to all Magistrates.¹³⁷ The appointment of auxiliary judicial officers in South Australia cannot be revoked.¹³⁸ In Queensland, Temporary Judicial Officers of the Supreme and District Courts appear to be given tenure by the broad terms protecting the tenure of all Judicial Officers of those Courts;¹³⁹ and Acting Magistrates by the provisions protecting the tenure of Magistrates generally.¹⁴⁰ In the ACT, the tenure of 'judicial officers' is guaranteed,¹⁴¹ which appears to extend to Temporary Judicial Officers of the Supreme Court and Magistrates Court, with the exception of acting judges appointed under an exchange arrangement.¹⁴² Tasmanian Supreme Court Temporary Judicial Officers appear to enjoy the same statutory guarantee of tenure under the *Supreme Court (Judges' Independence) Act 1857* (Tas).¹⁴³ However, Temporary Judicial Officers on the Tasmanian Magistrates Court are explicitly given less security of tenure than Permanent Judicial Officers. The provisions governing tenure do not apply to a person appointed as a Temporary Judicial Officer.¹⁴⁴ It would appear that tenure for these officers is protected by the instrument of appointment only.¹⁴⁵

¹³³ *Constitution Act 1975* (Vic) s 81A(2); *County Court Act 1958* (Vic) s 12A(2); *Magistrates Court Act 1989* (Vic) s 9B(2). For Reserve Associate Judges see *Supreme Court Act 1986* (Vic) s 105C(3); *County Court Act 1958* (Vic) s 17KB(3).

¹³⁴ *Supreme Court Act 1935* (WA) s 11(3) (Acting Judges), s 11AA(4)(c) (Auxiliary Judges); *District Court of Western Australia Act 1969* (WA) s 18(4)(b) (Acting Judges), s 18A(4)(b) (Auxiliary Judges); *Magistrates Court Act 2004* (WA) Schedule 1 cl 9(9) and cl 15.

¹³⁵ *Constitution Act 1934* (SA) s 74.

¹³⁶ *District Court Act 1991* (SA) s 15.

¹³⁷ *Magistrates Act 1983* (SA) s 9(1).

¹³⁸ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(5).

¹³⁹ *Constitution of Queensland 2001* (Qld) s 61; and see also *Supreme Court of Queensland Act 1991* (Qld) s 23.

¹⁴⁰ *Magistrates Act 1991* (Qld) ss 42 and 46.

¹⁴¹ *Judicial Commissions Act 1994* (ACT) s 5.

¹⁴² *Supreme Court Act 1933* (ACT) s 69D(3)(c); *Magistrates Court Act 1930* (ACT) s 9F(3)(c).

¹⁴³ An 'Acting Associate Judge', appointed under the *Supreme Court Act 1959* (Tas) has the same guarantees of tenure as an Associate Judge: s 4A(3)(c).

¹⁴⁴ *Magistrates Court Act 1987* (Tas) s 4(5).

¹⁴⁵ *Magistrates Court Act 1987* (Tas) s 4(4).

The security of tenure for Temporary Judicial Officers in the Northern Territory Local Court is also expressly lower than that of equivalent Permanent Judicial Officers. A Permanent Judicial Officer in the Northern Territory Supreme Court may only be removed by the Administrator on the grounds of proved misbehaviour or incapacity *after* an address from the Legislative Assembly praying for the officer's removal.¹⁴⁶ In contrast, s 40(2) of the Northern Territory *Supreme Court Act* provides that:

An acting Judge may be removed from office by the Administrator on the ground of proved misbehaviour or incapacity, but shall not otherwise be removed from office.

Similarly, s 63(d) of the Northern Territory *Local Court Act* provides that a Temporary Judicial Officer's appointment may be 'terminated by the appointer'. It does not appear that any grounds for removal are statutorily required, but may be set by the appointer.¹⁴⁷

¹⁴⁶ *Supreme Court Act* (NT) s 40(1).

¹⁴⁷ *Local Court Act* (NT) s 62.

3. Temporary Judicial Officers: Justifications and Concerns

3.1 Overview

Since the passage of the *Act of Settlement 1701*, security of judicial tenure has been revered in the common law as fundamental to the guarantee of judicial independence and through that, the rule of law and the restraint of arbitrary government. In Australia, judicial tenure until the age of 70 is constitutionally guaranteed for federal judicial officers under s 72 of the Commonwealth Constitution, excepting removal on an address of both houses of Parliament on the grounds of proved misbehaviour or incapacity. At the federal level in Australia the prospect of Temporary Judicial Officers is unavailable.

But at the state and territory level, the constitutional position is different. In Australia, the case that has confirmed the fairly generous constitutional boundaries for the appointment of Temporary Judicial Officers in state and territory jurisdictions is *Forge v Australian Securities and Investments Commission*.¹⁴⁸ That case concerned a constitutional challenge to s 37 of the *Supreme Court Act 1970* (NSW) based on the *Kable* principle.¹⁴⁹ This principle protects the institutional integrity of state and territory courts as part of the integrated federal judicial system established by Chapter III of the Constitution, and extends to protections of their independence and impartiality. Section 37 empowered the Governor to appoint any ‘qualified person’ (which includes former judges) as a Judge of the Supreme Court for a period of not more than 12 months. A majority of judges (6:1, with Kirby J dissenting) held that the provision was not necessarily inconsistent with the guarantees in Chapter III of the Constitution, and that those guarantees had not been breached by the appointment of a retired judicial officer as an acting judge in the case. This was despite the guarantees of tenure provided in s 72 for federal court judges. *Forge* thus establishes the position that, constitutionally, state and territory judges might be appointed on a temporary basis provided this does not occur to such an extent that the requisite qualities of judicial independence and impartiality, and the appearance of the same, are compromised. At least two judges (Kirby J and Gleeson CJ) indicated that sophisticated, fine-grained empirical data that reveal the extent of reliance upon Temporary Judicial Officers may inform such an analysis.

The *Declaration of Principles on Judicial Independence* issued by the Chief Justices of the Australian states and territories states that security of judicial tenure must be provided for Australian judicial officers, with two exceptions, one being the conferral of functions by the head of jurisdiction on former judges, and the other being the appointment of ‘an acting judge’, whether a former judge or not, subject to the appointment being made with the approval of the Head of Jurisdiction and ‘provided that the appointment is made only in special circumstances which render it necessary’.¹⁵⁰ This raises – but does not answer – the question of what special circumstances might render a temporary judicial appointment necessary.

A common justification for the appointment of Temporary Judicial Officers is to ‘overcome a temporary difficulty’ in the administration of justice.¹⁵¹ As we have

¹⁴⁸ (2006) 228 CLR 45.

¹⁴⁹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁵⁰ Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories, reproduced in ‘Independence of the Judiciary’ (1997) 15 *Australian Bar Review* 177.

¹⁵¹ Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 1, 9.

explained above at Part 2.2, the Queensland, Western Australia, South Australia and Tasmania legislative frameworks refer explicitly to this justification. Usually, the temporary appointment for the administration of justice has been justified by reference to workload issues: to reduce backlogs of cases, to deal with uneven workflow by providing a more cost effective arrangement than a permanent appointment, and to fill temporary absences caused by illness or long-service leave. However, a number of other reasons for the appointment of Temporary Judicial Officers can be identified, some of which are more easily justified than others, and some of which raise more acute concerns as to the effect upon judicial independence. These reasons include importing expertise for particular cases, avoiding conflicts of interest, retaining talented judicial officers who have reached the statutory retirement age for Permanent Judicial Officers, trying and testing the suitability of potential judicial appointees, and achieving benefits through judicial exchange between jurisdictions.

In this part of the Report we explain each of these justifications before examining the different concerns raised by the appointment of Temporary Judicial Officers. Our discussion of the justifications and concerns are also informed by empirical data that we have gained from a survey of 142 judicial officers from across Australia regarding the most pressing challenges facing the various levels of the judiciary, as set out further in Schedule 2 in this Report. Further data on the numbers and extent of use of Temporary Judicial Officers is set out and explained in detail, including its impact on the justifications and concerns that we consider in this Part, in Part 4 of this Report.

3.2 Justifications for appointment of Temporary Judicial Officers

3.2.1 *Workload and cost-saving*

Most commonly, the appointment of Temporary Judicial Officers has been justified on the basis that such appointments allow for fluctuations in workloads in particular courts. Temporary Judicial Officers might be brought in to address an unexpected influx of cases, a backlog of cases that might have accumulated in a court, or to fill sustained absences of Permanent Judicial Officers for reasons of illness or long-leave.¹⁵² Our survey of judicial officers indicated that the predominant advantage of using Temporary Judicial Officers was that they provided assistance with the management of workload demands:

... Without acting judicial officers, the efficient operation of the court during times of illness and the provision of out of hours services would be compromised.¹⁵³

They are a necessity given work-loads.¹⁵⁴

Appropriately qualified judicial officers, such as those recently retired allow Judicial administrators to more efficiently manage lists and circuits.¹⁵⁵

Appointment of appropriate acting judicial officers may be an efficient way to deal with case backlogs.¹⁵⁶

¹⁵² See for example, the New South Wales Guidelines for the Appointment of Acting Judicial Officers (2010).

¹⁵³ Magistrates/Local; 15-19 years.

¹⁵⁴ Magistrates/Local; 5-9 years.

¹⁵⁵ District/County/Federal Circuit; 25+ years.

¹⁵⁶ District/County/Federal Circuit; 10-14 years.

As these comments illustrate, the use of Temporary Judicial Officers to fill positions caused by an unusual influx of matters in a court (for example, a series of cases resulting from an unexpected event), or because of temporary, albeit sustained, absences on the Court is often presumed to be a cost-efficient way of dealing with a temporary problem that is not anticipated to be ongoing. Concerns arise, however, where appointment of Temporary Judicial Officers is not driven by *temporary* difficulties, but rather a sustained increase in workloads that is not being addressed by the appointment of Permanent Judicial Officers.¹⁵⁷ These concerns will be addressed in Part 3.3, below.

3.2.2 *Avoidance of conflicts of interest*

Another important justification for the appointment of Temporary Judicial Officers is that they can facilitate the administration of impartial justice in circumstances where a conflict of interest has arisen for the Permanent Judicial Officers of the court. This problem arises most frequently in smaller jurisdictions where it may be difficult to constitute benches from a small pool of judicial officers, which are untainted by apprehended bias, or where the parties concerned are connected to the administration of justice. Two recent instances of such appointments demonstrate the usefulness of Temporary Judicial Officers in these circumstances; others are reported in Part 4.10.

The first example comes from 2012, when the former Chief Justice of the Northern Territory, Brian Ross Martin, was appointed an Acting Justice of the Western Australian Supreme Court to preside over the trial of Lloyd Rayney. Mr Rayney was charged with killing his wife in 2007. Both Mr and Mrs Rayney were senior and well-known members of the Western Australian legal profession. Mr Rayney was a former lawyer in the WA Department of Public Prosecutions, and working at the time for the Corruption and Crime Commission. Mrs Rayney was a registrar for the Western Australian Supreme Court. On the request of Mr Rayney, the trial was heard by judge alone. Martin was appointed as a temporary Supreme Court judge to preside over the trial due to concerns over the appearance of bias for all permanent Western Australian judicial officers, given the careers and positions of both the victim and the defendant. Martin was sworn in as an Acting Judge solely for the purpose of conducting this trial.

A second instance arose in 2016 in Queensland and involved the appointment of Justice Cliff Hoeben of the New South Wales Supreme Court as a Temporary Justice of the Supreme Court of Queensland to act as a supplementary judicial member to the Queensland Civil and Administrative Tribunal (QCAT). The initial need for Justice Hoeben's temporary appointment arose after the Chief Justice of the Supreme Court, Catherine Holmes, filed a professional disciplinary complaint against lawyer Michael Bosscher. The complaint related to Bosscher's tendering of evidence containing defamatory allegations that the Chief Justice had engaged in criminal activity while she was a practicing barrister. Acting on the complaint, the Legal Services Commission commenced disciplinary proceedings against Bosscher in QCAT. This raised questions as to the impartiality of existing members of QCAT to hear the matter. The President of QCAT must be a Supreme Court judge.¹⁵⁸ The Deputy President must be a District Court judge.¹⁵⁹ Senior and Ordinary Tribunal members must be either legal professionals or in possession of particular expertise or

¹⁵⁷ See for example, Mason, above n 151; Michael Kirby, 'Acting Judges—A Non-theoretical Danger' (1998) 8 *Journal of Judicial Administration* 69, 73.

¹⁵⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 175(1).

¹⁵⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 176(1).

experience.¹⁶⁰ To resolve any potential perception of conflict of interest arising from the subject matter and circumstances of the initiation of the complaint against Bosscher, Justice Hoeben was appointed to preside over the matter. This was achieved through an acting appointment to the Supreme Court of Queensland and then an appointment as a supplementary member of QCAT. Supplementary members must be judicial officers of the Queensland Supreme Court, District Court or Magistrates Court.¹⁶¹ Although, problematically in terms of ensuring the complete appearance of impartiality from the Chief Justice, Supplementary QCAT Members can only be appointed after consultation with the relevant Head of Jurisdiction.¹⁶²

The temporary appointment of Justice Hoeben to avoid any perception of conflict of interest in the disciplinary hearing proved serendipitous, as he would later be required to preside over a second QCAT hearing involving the *former* Chief Justice of Queensland, Tim Carmody. In July 2015, after less than 12 months in the position, Carmody resigned as Chief Justice of the Supreme Court of Queensland. His tenure had been marked by controversy and a rather public deterioration in his relationship with other members of the bench. While resigning from the position of Chief Justice, Carmody retained his commission as a Justice of the Supreme Court and was appointed by the government as a supplementary judicial member of QCAT. During his tenure as Chief Justice, the *Courier-Mail* had lodged a right to information request to access a recording of a conversation between Carmody and two other Supreme Court judges. Justice Carmody and the Justice Department refused the request, claiming various exemptions, but lost their case before the Queensland Right to Information Commissioner. Justice Carmody then appealed the Commissioner's decision to QCAT.

When the matter came before the then President of QCAT, Justice David Thomas, he remarked, 'It seems reasonably clear that no judge in Queensland should hear the matter',¹⁶³ referring to the fact that the case would raise issues pertaining to the Queensland judiciary. This issue was resolved by setting the case before supplementary member and Acting Queensland Supreme Court Justice, Cliff Hoeben.

3.2.3 Importing expertise

Temporary Judicial Officers might be appointed for specific matters, or even to oversee entire lists of matters, in areas where the permanent judiciary is perceived to lack expertise. Defending the appointment of temporary judges to the South Australian Supreme Court in 2016, the Attorney-General of South Australia asserted as one of the justifications that '[t]hey are necessary from time to time to hear cases that may require specific legal expertise'.¹⁶⁴ This is unlikely to arise in areas of general jurisdiction – such as crime or civil matters – but rather in specialist areas, which might include large and complex commercial matters, or specialist jurisdictions where general practitioners and judges are unlikely to have had any experience, such

¹⁶⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 183(4) and (5).

¹⁶¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 192(2).

¹⁶² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 192(3).

¹⁶³ Melanie Petrinc, 'Justice Thomas: No Judge in Queensland should hear the matter', *Courier Mail*, 17 August 2016
<<http://www.couriermail.com.au/news/queensland/crime-and-justice/justice-thomas-no-judge-in-queensland-should-hear-the-matter/news-story/5ff0aafdc26315bf99b12e87de6201c8>>.

¹⁶⁴ The Hon John Rau MP quoted in Samantha Woodhill, 'Judge turns down temporary Supreme Court appointment' *Australasian Lawyer*, 4 April 2016,
<<http://www.australasianlawyer.com.au/news/judge-turns-down-temporary-supreme-court-appointment-213999.aspx>>.

as maritime or defamation law.¹⁶⁵ Further, the importing of expertise through the appointment of Temporary Judicial Officers is likely to be necessary only in smaller jurisdictions where there is no Permanent Judicial Officer with the relevant expertise available to be assigned to the matter or to oversee the list.¹⁶⁶

3.2.4 Retention of talented retirees

Two scholars have identified the advantages of appointing former judicial officers as Temporary Judicial Officers in order to retain talented individuals.¹⁶⁷ Professor Brian Opeskin argues that appointing former judges as acting judges is a ‘flexible tool for returning mandatory retirees to the bench’,¹⁶⁸ ameliorating ‘the consequences of forced departure’ which ‘deprive their courts of fine talent’.¹⁶⁹ Dr Alysia Blackham notes that appointing recently retired judges as acting judges is a useful method of avoiding arbitrary compulsory retirement ages and enables a jurisdiction to continue to rely on the experience and expertise of valuable judges while choosing not to reappoint judges whose faculties may have declined.

However, with this advantage, disadvantages are also identified. Blackham observes that ‘if the executive is choosing to reappoint certain judges (and not others), this may impair the appearance or reality of individual and institutional independence’.¹⁷⁰ This risk, and others, is explored in more depth in Part 3.3, below.

¹⁶⁵ The issue of judicial ‘expertise’ and the value of specialization is not without contention, see Chad M Oldfather, ‘Judging, Expertise, and the Rule of Law’ (2012) 89(4) *Washington University Law Review* 847.

¹⁶⁶ An example of this can be seen in the recent appointment of a London QC with expertise in LLPs, insolvency and financial services to the Commercial Court of the British Virgin Islands as a ‘visiting judge’ to clear a backlog of commercial cases. ‘Judge appointed to help clear cases’, *BVI News Online*, 20 October 2016, <<http://bvinews.com/new/judge-appointed-to-help-clear-cases/>>.

¹⁶⁷ See for example, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (2009) 42 [4.46], quoting from Acting Chief Justice Murray of the Western Australia Supreme Court.

¹⁶⁸ Brian Opeskin, ‘Models of Judicial Tenure’ (2015) 35 *Oxford Journal of Legal Studies* 627, 654.

¹⁶⁹ *Ibid.*, 653.

¹⁷⁰ Alysia Blackham, ‘Judges and Retirement Ages’ (2016) 39 *Melbourne University Law Review* 738, 750. See also Michael Kirby, ‘Judicial Independence in Australia reaches a moment of truth’ (1990) 13 *UNSW LJ* 187, 209; Michael Kirby, ‘The Future of Courts – Do they have one?’ (1999) 8 *Journal of Judicial Administration* 185, 186.

3.2.5 Testing the suitability of potential appointees

One of the most controversial justifications for the appointment of acting judges is, in Sir Anthony Mason's words, that it can provide 'judicial experience for those who are minded to become permanent judges and ascertaining their competence and suitability for such appointment'.¹⁷¹ The New Zealand Law Reform Commission referred to this as providing 'a training ground to determine whether the judge is suitable for permanent appointment'.¹⁷² In this respect, Sir Anthony referred to the advantages in the UK Recorder system, in which barristers or solicitors are appointed as part-time judicial officers to give potential Permanent Judicial Officers experience, although he noted it was vulnerable to 'criticism on the score of judicial independence'.¹⁷³ Looking at this issue from the perspective of the individuals concerned, a temporary appointment could provide a valuable opportunity to see whether the judicial role is one that they would like to take on in a permanent form. Such an opportunity could filter out candidates who find they are not temperamentally suited to, or likely to be suitably engaged with, a permanent judicial role. As one respondent in our survey indicated:

Trialing proposed new appointees for say 3 months is similarly not objectionable. Both the Court and appointees should have the opportunity for an obligation free fixed term trial.¹⁷⁴

The advantages of such appointments should be considered alongside the risks associated with 'trying out' a judicial role. These risks are considered below in Part 3.3.

3.2.6 Judicial exchange

Writing extra-judicially before his appointment as Chief Justice of the High Court, Robert French argued that the appointment of Temporary Judicial Officers could facilitate a program of judicial exchange.¹⁷⁵ Such a program could allow the sharing of knowledge and experience between judges, as well as developing a mutual awareness and respect between the Australian judiciary.¹⁷⁶ It could advance individual judicial performance; the performance of courts as institutions; the allocation of judicial resources to areas of local need, including the need for specific expertise; the attractiveness of judicial appointment in all jurisdictions; consistent Australia-wide approaches to administration of justice while maintaining institutional pluralism; and national collegiality.¹⁷⁷ French explained, 'a judge from one court visits another for a period and is appointed as an acting judge of the host court where he or she hears trials or participates in appellate work. Such a visitation could also involve the kind of observation, dialogue, discussion and report suggested for short-term non-participating visiting judges'.¹⁷⁸ French proposed exchanges to

¹⁷¹ Mason, above n 151.

¹⁷² NZ Law Reform Commission, *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (Issues Paper 29, February 2012) 31 [3.60].

¹⁷³ Mason, above n 151, 6;

¹⁷⁴ District/County/Federal Circuit; 25+ years.

¹⁷⁵ Robert French, 'Judicial exchange: Debalkanising the courts' (2006) 15 *Journal of Judicial Administration* 142. See also Robert French, 'Seeing visions and dreaming dreams' (Speech delivered at Judicial Conference of Australia Colloquium, 7 October 2016) 12-14.

¹⁷⁶ French, 'Judicial exchange', above n 175.

¹⁷⁷ French, 'Seeing visions and dreaming dreams', above n 175, 13.

¹⁷⁸ French, 'Judicial exchange', above n 175, 153. On the value of judicial exchange see also Jim Spigelman, 'Consistency and sentencing' (2008) 82 *Australian Law Journal* 450, 458, 459; Murray Gleeson 'The State of the Judicature' (2007) 14 *Australian Journal of Administrative Law* 118, 120: 'properly done, it could become a routine

occur both horizontally across jurisdictions, as well as vertically, between levels of the court hierarchy, whereby judges on inferior courts are appointed for a short time as an acting judge on a superior court.

method of creating more interaction between different judiciaries, to the benefit of the court system generally’.

3.3 Concerns raised by appointment of Temporary Judicial Officers

3.3.1 *Separation of powers and judicial independence*

The most frequently cited concern raised by the appointment of Temporary Judicial Officers is that such appointments have the potential to undermine the separation of powers, and particularly the independence of the judicial branch from the political branches. One participant in our survey articulated this view by saying simply that the appointment of Temporary Judicial Officers is ‘an anathema to the independence of the judiciary’.¹⁷⁹

The prospect of re-appointment of Temporary Judicial Officers raises concerns about executive preferment. Another respondent in our survey stated: ‘I am also concerned that acting appointments are subject to renewal at the instance of the AG and also the head of the court and this is a problem in terms of any potential impact upon independence of decision making.’ Another commented that Temporary Judicial Officers ‘may feel constrained, because of lack of tenure, in acting entirely independently’. One was more explicit regarding the nature of those reservations:

The State Government has been making use of Acting Magistrates over the past 5 years, instead of appointing additional magistrates. That has enabled the AG to select retiring magistrates whose approach, particularly to sentencing is consistent with the Government's law and order agenda. At a time when magistrates have been forced to retire on their 65th birthday certain favoured retiring magistrates have been appointed as Acting magistrates up to their 70th birthday, whilst others who would like to continue working have not received such a commission.¹⁸⁰

The New Zealand Law Reform Commission explains that, at least in that jurisdiction, ‘Given that the renewable tenure is normally one or two years, it can be said that it is only marginally removed from tenure at pleasure’.¹⁸¹ Clause 16 of the Australian Bar Association’s *Charter of Judicial Independence* explains:

Security of tenure until a fixed retirement age is not primarily for the benefit of judges but is to enable litigants and society at large to have confidence in the impartiality of judges and the courts. It is designed to prevent judges’ dependence upon Executive Governments for renewals of their commission, and any public perception of such dependence.¹⁸²

This is reflected in the strict separation of judicial power that pertains to the federal judiciary under the Commonwealth Constitution, and also the predominance of international instruments that emphasise judicial tenure as an unequivocal facet of judicial independence.¹⁸³ Foreign judgments have also emphasised judicial tenure as an essential component of judicial independence.¹⁸⁴

Professor Michael Taggart, writing in the New Zealand context, observed that one of the most problematic aspects of the appointment of acting judges in that jurisdiction – which applies equally to Australia – is the opacity surrounding the appointment

¹⁷⁹ Magistrates/Local; 15-19 years.

¹⁸⁰ Magistrates/Local; 5-9 years.

¹⁸¹ NZ Law Reform Commission, above n 172, 32 [3.65].

¹⁸² Australian Bar Association, *Charter of Judicial Independence 2004* (August 2004).

¹⁸³ See for example, UN Human Rights Committee, General Comment No. 32 (2007) [19]-[20]; *Beijing Statement of Principles on the Independence of the Judiciary in the Lawasia Region* (1997) [18]; Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009: [53]-[64].

¹⁸⁴ *Valente v R* [1985] 2 SCR 673.

and re-appointment process.¹⁸⁵ The lack of transparent criteria and processes governing temporary judicial appointment only adds to concerns that re-appointment may be based on executive favour.

The prospect of re-appointment and thus executive preferment arises in different guises for Temporary Judicial Officers. In *Forge*, Gummow, Hayne and Crennan JJ were concerned by the possibility of reappointment.¹⁸⁶ They noted, however, that this would bear differently on different appointees.¹⁸⁷ They identified three cases, with the first presenting the ‘more substantial issues’.¹⁸⁸ The first was ‘the person in active practice [who] may be thought by some to be concerned about prospects of future permanent appointment, or about the effect of what is done while an acting judge upon resumption of practice at the end of the period of appointment’.¹⁸⁹ This scenario raises worrying prospects that the individual may act in the temporary appointment in a manner that would be perceived favourably in the hope of obtaining a permanent appointment. Such prospects might be exacerbated where the statutory regime incentivises a transition from temporary to permanent appointment. For instance, in 2005 Justice Ronald Sackville expressed reservations about the Victorian regime, where an acting judge is not entitled to a pension, but, if appointed as a permanent judge, time as an acting judge will be counted in determining their pension entitlement.¹⁹⁰

In parliamentary debates around the introduction of the New South Wales *Courts and Crimes Legislation Amendment Act 2015*, which increased the period of appointment of Temporary Judicial Officers from ‘not exceeding 12 months’ to ‘not exceeding 5 years’, there was some consternation expressed over governments ‘trying out’ judges. The Greens argued that the change could herald the use of longer appointments by the government to ‘try out’ judges. It was also argued that five-year appointments may lead a government to choose younger acting judges from practitioners who are in the middle of their careers’, giving rise to ‘apprehension that their decisions on the bench could be coloured by the need to return to the profession as practitioners once their acting appointment concludes’.¹⁹¹

These reservations have been demonstrated to be more than simply theoretical. One of Britain’s most controversial judges, Peter Smith of the United Kingdom High Court of Justice, was approached by a law firm, Addleshaw Goddard, to take up employment with the firm should he take early retirement.¹⁹² The negotiations soured, terse words were exchanged between the judge and partners, and the judge retained his judicial appointment rather than joining the firm.¹⁹³ The failed negotiations however, led to a controversial bias application being made against the judge when a party appeared before him represented by Addleshaw Goddard. Smith

¹⁸⁵ Michael Taggart, ‘Acting Judges and the Supreme Court of NZ’ (2008) 14 *Canterbury Law Review* 217, 222–3.

¹⁸⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 79 [71].

¹⁸⁷ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 85–86 [92].

¹⁸⁸ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [97]–[98].

¹⁸⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [92].

¹⁹⁰ Ronald Sackville, ‘Acting Judges and Judicial Independence’, *The Age*, 28 Feb 2005, 3.

¹⁹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 226–228 (Jamie Parker).

¹⁹² Joshua Rozenberg, ‘Law: Mr Justice Peter Smith Loses His Judgment’, *The Telegraph*, 12 July 2007 <<http://www.telegraph.co.uk/news/uknews/1557197/Law-Mr-Justice-Peter-Smith-loses-his-judgment.html>>.

¹⁹³ *Ibid.*

refused to recuse himself, but this was later overturned on appeal.¹⁹⁴ The case attracted publicity and there were calls for Smith to resign over his handling of the matter. While Smith's case represents an extreme example, it demonstrates the controversies that may attend judicial return to the legal profession. With the appointment of Temporary Judicial Officers from the ranks of legal professionals, rather than retired judicial officers, such controversies might be anticipated to arise with greater frequency.

The second category identified by Gummow, Hayne and Crennan JJ in *Forge* was 'the person who holds some other judicial office [who] may be thought to be concerned about prospects of promotion to the Supreme Court'.¹⁹⁵ In many respects this raises the same issues as any prospect of judicial promotion, which is considered below.

The third was 'the retired judge [who] may be thought to be concerned about the prospect of being able to continue to act as a judge beyond retirement and beyond the statutory retiring age with its consequences for continued professional engagement and enjoyment of a larger income'.¹⁹⁶ While not entirely clear, as it refers to an already 'retired' judge, it appears this third category is referring to the individual who may act *towards* the end of his or her permanent judicial career in a manner that would be perceived favourably for temporary appointment following retirement. The prospect that judicial officers nearing the end of their permanent judicial tenure are likely to be considering such matters is explicitly referenced in the New South Wales *Guidelines for the Appointment of Acting Judicial Officers* (2010), which state: 'Retired judicial officers or judicial officers approaching retirement, who are interested in being appointed as acting judicial officers, should advise the relevant head of jurisdiction'.¹⁹⁷ But, as Blackham argues, 'if the executive is choosing to reappoint certain judges (and not others), this may impair the appearance or reality of individual and institutional independence'.¹⁹⁸

To the three categories identified by Gummow, Hayne and Crennan JJ can be added a fourth: where an individual (whether a former judicial officer or not) has been appointed for a short-term temporary judicial appointment and wishes to seek reappointment in that role, the individual may act in that temporary appointment in a manner that would be perceived favourably for a further temporary term. The New South Wales *Guidelines* provide, for example, that 'a previous appointment as an acting judicial officer does not give a person an entitlement to reappointment as an acting judicial officer'.¹⁹⁹ In this respect, the recent move in New South Wales to extend the term of temporary appointments was supported, with some caveats, by the Labor Opposition. They noted explicitly the benefit of an extended term on questions of judicial independence

The major criticism of the concept of acting judges and magistrates is that it strikes at the principle of independence of the judiciary. With judicial officers' positions effectively coming up for renewal every 12 months, a government that is unhappy with decisions of some judicial officers may not renew their appointment. Therefore, there is the danger of the perception of government acquiring decisions preferable to it rather than judicial officers being fiercely

¹⁹⁴ *Howell v Lees Millais* [2007] EWCA Civ 720.

¹⁹⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [92]; Heydon J notes this too: 149 [275].

¹⁹⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [92].

¹⁹⁷ New South Wales Guidelines for the Appointment of Acting Judicial Officers (2010) 2.

¹⁹⁸ Blackham, above n 170, 750. See also Kirby, 'Judicial Independence in Australia', above n 170, 209; Kirby, 'The Future of Courts', above n 170, 186.

¹⁹⁹ New South Wales Guidelines for the Appointment of Acting Judicial Officers (2010) 1.

independent. While the extension from 12 months to five years does not altogether eliminate that criticism, it does mitigate it to a significant degree.²⁰⁰

The amelioration of concerns over temporary judicial appointments by the extension of temporary terms is also found in the *Declaration of Principles on Judicial Independence* issued by the Chief Justices of the Australian states and territories, which stipulates in relation to limited term appointments, they must be ‘for a substantial term’, and ‘not renewable’.²⁰¹

While the danger of executive preferment is real, it should be considered in context. In *Forge*, Gleeson CJ emphasised that judicial independence is secured by a combination of institutional arrangements, of which tenure is ‘important’ but ‘only one of a number of’ aspects.²⁰² He went on to list some additional aspects, including their appointment by the same authority as Permanent Judicial Officers, the judicial oath, security of tenure during appointment, remuneration and accountability to the Judicial Commission of New South Wales and that state’s Independent Commission Against Corruption.²⁰³ Similar factors have also been referred to in the UK and in the European Court of Human Rights.²⁰⁴ In *Forge*, Gleeson CJ also pointed to the particular characteristics that might be attributed to an acting judge who was formerly a permanent judge, pointing out that professional standards and personal character are important constraints on self-interested behaviour.²⁰⁵ This raised the possibility that the appointment of a barrister as an acting judge might result in a different outcome.²⁰⁶

Gleeson CJ dismissed the concerns raised regarding executive preferment because of their similarity to those that arise in respect of any prospect of judicial promotion.²⁰⁷ In New Zealand, the Courts have also dismissed claims that the possibility of reappointment undermines judicial independence by reference to similar concerns over judicial promotion.²⁰⁸

Separate to the threat to independence posed by executive preferment, Professor Taggart also identified a threat posed by intra-judicial preferment. This arises in the New Zealand context because it is the Chief Justice of the Supreme Court who selects an acting judge to sit in a case where a permanent member is disqualified or otherwise unavailable. This, Professor Taggart argued, gives rise to perceptions of intra-court ‘stacking’. He cited empirical research from the California Supreme Court which demonstrated that the use of the power to appoint temporary judges to the Court by successive Chief Justices over a 25-year period showed that the temporary

²⁰⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 12 May 2015, 337 (Adam Searle).

²⁰¹ *Declaration of Principles on Judicial Independence* Issued by the Chief Justices of the Australian States and Territories, above n 150, Principle 4(c).

²⁰² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 66 [37]. See also the judgment of Heydon J, 146–8.

²⁰³ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 61 [24], 68 [43].

²⁰⁴ *Starrs v Ruxton* [2000] SLT 42; *Clancy v Caird* [2000] SC 441; *Kearney v Her Majesty’s Advocate* [2006] UKPC D1; *Findlay v UK* (1997) 24 EHRR 221.

²⁰⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 68 [44].

²⁰⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 62 [26].

²⁰⁷ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 68–69 [44].

²⁰⁸ *Wikio v AG* (2008) 8 HRNZ 544 (HC) [53]; *R v Te Kahu* [2006] 1 NZLR 459, 470 [40] (William Young J).

judges disproportionately voted the same way as three out of the four appointing Chief Justices.²⁰⁹

In addition to the dangers of executive and perhaps even intra-judicial preferment, judicial independence might be undermined by Temporary Judicial Officers because, as noted in Part 2.7 above, there are fewer restrictions on acting judges holding other offices or employment. Similarly, Kirby J in *Forge* noted that Temporary Judicial Officers might mix intervals of judicial services with other employment or activities that break down judicial culture as an exclusive, dedicated, tenured service. This prospect raises potential ethical concerns, for example, around conflict or perceived conflict of interest. This is addressed separately in Part 3.3.3 below.

In *Forge*, Kirby J also noted that Temporary Judicial Officers often did not enjoy the full privileges of judicial office, often lacking the staff, personal benefits and institutional resources of permanent judges, and playing a more limited role within the court more generally. This raises at least the perception that there are two ‘classes’ of judicial officers within the court, something that might cause concern to parties appearing before a Temporary rather than Permanent Judicial Officer.

While Gleeson CJ in *Forge* accepted that a regime of temporary judicial appointments did not ‘on that account alone’ deprive a body of the character of a Court,²¹⁰ he did warn against ‘extreme cases’, where an acting regime ‘could so affect the character of the Supreme Court that it no longer answered the description of a Court or satisfied minimum requirements of independence and impartiality’.²¹¹ He also cautioned that a ‘quantitative analysis may be misleading’²¹² in determining whether such a situation had been reached. Gummow, Hayne and Crennan JJ expressed a similar view, noting that one reason s 37 of the *Supreme Court Act 1970* (NSW) did not go so far as to undermine the institutional integrity of the Supreme Court was that it did not give the executive an unlimited power to make acting appointments.²¹³ Rather, the power was qualified by the requirement that the Court ‘must *principally* be constituted by permanent judges’ who have secure tenure.²¹⁴ However, they also warned against a quantitative criterion for assessing whether this line had been crossed, commenting, it ‘would inevitably be arbitrary in its content and application’.²¹⁵ Nevertheless, the institutional integrity of a Court would be ‘distorted’ by appointment of acting judges ‘if the informed observer may reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial’.²¹⁶

In this respect, concerns have been expressed in foreign jurisdictions when a court starts to rely too heavily on temporary judicial appointees. The Inter-American Commission on Human Rights has noted that ‘having a high percentage of provisional judges [judges who do not enjoy security of tenure in their positions and can be freely removed or suspended] has a serious detrimental impact on citizens’ right to proper

²⁰⁹ See Comment, ‘The Selection of Interim Justices in California: An Empirical Study’ (1980) 32 *Stanford Law Review* 433 discussed in Stephen Barnett and Daniel Rubinfeld, ‘The Assignment of Temporary Justices in the California Supreme Court’ (1985-1986) 17 *Pacific Law Review* 1045.

²¹⁰ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 68 [42].

²¹¹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 69 [46].

²¹² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 64 [33].

²¹³ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 79 [73].

²¹⁴ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 79 [73].

²¹⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 84 [86], 85 [90].

²¹⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 86 [93].

justice and on the judges' right to stability in their positions as a guarantee of judicial independence and autonomy'.²¹⁷

3.3.2 Funding and efficiency

The appointment of Temporary Judicial Officers is often justified as being a cost-efficient way of addressing backlogs and covering absences of Permanent Judicial Officers. However, on further examination, two potential concerns arise with this justification. The first is, as Opeskin contends, the appointment of Temporary Judicial Officers may in practice *not* be a cost-efficient solution. He explains that Temporary Judicial Officers, when appointed from the ranks of former judges, are generally 'remunerated at a daily rate in addition to any pension they are entitled to receive as retired judges'.²¹⁸ The only exception to this position is that which pertains in Victoria and Queensland, as explained in Part 2.9 above. Thus, where a Temporary Judicial Officer is a former judge or magistrate from the same jurisdiction, the financial burden of meeting both the full pension and salary falls on the same state or territory.

The second concern is that the appointment of Temporary Judicial Officers to fix 'backlogs' often allows governments to avoid questions of how such a backlog might have arisen,²¹⁹ including whether the judiciary is adequately funded and resourced to administer its ongoing case load. Failures to address ongoing funding shortages through additional budgetary allocation and the appointment of Permanent Judicial Officers can undermine the judiciary's independence from the political branches. As the *Declaration of Principles on Judicial Independence* issued by the Chief Justices of the Australian states and territories says, 'the appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.'²²⁰ In *Forge*, Gleeson CJ accepted that there might be 'sound practical reasons' behind temporary judicial appointments, however, he also warned that most people would consider that the executive should not 'use the power of appointing acting judges to evade the responsibility of providing an adequately resourced court system'.²²¹ Gummow, Hayne and Crennan JJ adopted a similar position on this issue.²²² This would suggest that temporary judicial positions that are regularly renewed, whether through the same or different appointees, are problematic.

3.3.3 Ethical concerns

The appointment of individuals as Temporary Judicial Officers raises particular ethical questions concomitant with, and occasionally additional to, those that arise for Permanent Judicial Officers. Faced with the prospect of only a short judicial commission, Temporary Judicial Officers might be more inclined to seek outside employment. The New South Wales *Guidelines* recognise this danger, requiring: 'During the term of any Commission, acting judicial appointees must be available to serve and must not be engaged in any activity or employment, which is incompatible with judicial office.'²²³ The *Guide to Judicial Conduct* of the Council of Chief Justices

²¹⁷ Report on the Situation of Human Rights in Venezuela, OAS document OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, [160]; cited in ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (Practitioners Guide No. 1, 2007) 52.

²¹⁸ Opeskin, above n 168, 654.

²¹⁹ Kirby, above n 157, 73.

²²⁰ *Declaration of Principles on Judicial Independence* Issued by the Chief Justices of the Australian States and Territories, above n 150, Principle 2.

²²¹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 69 [45].

²²² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [100].

²²³ *New South Wales Guidelines for the Appointment of Acting Judicial Officers* (2010) 1.

of Australia states that where retired judges are appointed in acting judicial roles, they ‘should consider carefully the appropriateness of other activities that the retired judge might be undertaking’.²²⁴ It states that:

The exercise of the judicial office on a part-time basis may require the observance of, or at least consideration of, some of the restrictions identified in this publication. Particular care should be exercised in relation to activities undertaken concurrently with part-time judicial work.²²⁵

The prospect of former judges taking on temporary judicial appointments that cause a conflict with other activities is very real. It is demonstrated by the actions of Roger Gyles QC, who retired from the Federal Court of Australia in 2008. Following this, he was appointed by the University of Sydney to conduct an investigation into the future of the Sydney Conservatorium of Music following a particularly tumultuous period of management. At the same time, Gyles was appointed as an acting judge of the New South Wales Supreme Court (between 1 September and 31 December 2008, during which time he acted as a Justice and Justice of Appeal for 42 days).²²⁶ The matter concerning the Conservatorium proved highly controversial. It made its way to the New South Wales Ombudsman²²⁷ and the Independent Commission against Corruption.²²⁸ Gyles reported in November 2008,²²⁹ and this report became the subject matter and evidence in legal proceedings brought by the former Dean of the Conservatorium against the University of Sydney in the New South Wales Supreme Court.²³⁰ Gyles’ report, delivered at a time when he was an acting judge of that Supreme Court, was thus the evidence in a matter to be determined by that Court.

3.3.4 Competency

The appointment of practising legal professionals to temporary judicial positions might raise a question as to whether such individuals possess the same competency for the judicial role – in terms of relevant professional experience and skills – as those selected for permanent appointment. This might be a particular worry if a government is using temporary judicial appointments to ‘train’ or ‘test’ the competence and suitability of individuals for future permanent judicial appointment. As Ronald Sackville has suggested, before appointing a candidate as an acting judge their capacity and aptitude should be clear.²³¹ Even if temporary appointees possess the necessary competence (and in most jurisdictions there are certainly legal practitioners who possess such competence), there is the danger of a perception amongst the public, and most troubling, the litigants who appear before such officers, that Temporary Judicial Officers are of a lesser quality.

²²⁴ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Australian Institute of Judicial Administration, 2nd ed, 2007) cl 7.2.4.

²²⁵ *Ibid.*

²²⁶ Supreme Court of New South Wales, *Annual Review 2008* (2008) 10.

²²⁷ Harriet Alexander, ‘Second Inquiry to Look at Uni’s Plagiarism Case’ *Sydney Morning Herald*, 7 August 2008 <www.smh.com.au/news/national/second-inquiry-to-look-at-unis-plagiarism-case/2008/08/06/1217702143410.html>.

²²⁸ Andrew Cook, ‘Sydney Conservatorium of Music Dean: 8yr War of Words in One Explosive Doc’, *Crikey*, 3 February 2012 <www.crikey.com.au/2012/03/02/sydney-conservatorium-of-music-dean-8yr-war-of-words-in-one-explosive-doc/>.

²²⁹ Steve Meacham, ‘Walker Launches Legal Proceedings’ *The Sydney Morning Herald* (Sydney), 3 December 2011 <www.smh.com.au/national/walker-launches-legal-proceedings-20111202-1obgk.html>.

²³⁰ *Ibid.*

²³¹ Ronald Sackville, ‘The judicial appointments process in Australia: Towards independence and accountability’ (2007) 16 *Journal of Judicial Administration* 125, 135.

3.3.5 Capacity

The appointment of Temporary Judicial Officers from the ranks of former judges is a common practice. In some Australian jurisdictions, ostensibly to temper the concerns regarding infractions into judicial independence, Temporary Judicial Officers are *only* appointed from these ranks.

The appointment, as temporary officers, of individuals who have passed the statutory age of compulsory judicial retirement raises questions as to whether they possess the necessary capacity in terms of being free of mental impairment, particularly age-related illness such as dementia. The symptoms of mental impairment may not be easily identified by others, including diagnosis by medical practitioners, and may also go unnoticed by the individual themselves. Of course questions of age-related deterioration in mental health are not unique to the temporary appointment of retired judicial officers, and affect the permanent ranks of the judiciary as well, but are amplified in such a cohort by virtue of their age.

Even where such reservations are unfounded in relation to individual former judges appointed as Temporary Judicial Officers, the fact that they are appointed *after* they have reached the mandatory statutory retirement age may give rise to a public perception that they are more likely to suffer age-related illnesses, or otherwise be beyond their peak. After all, this is at least part of the basis on which mandatory retirement ages were introduced (see Part 6 below).

3.3.6 Impeding turnover

While protecting judicial independence from the political branches of government, the system of judicial tenure operates as a tight restriction on turnover in this profession. The low rate of new appointees to the judicial role means that the reception by the courts of fresh ideas, both in terms of judicial craft but also on questions of administration and process, is postponed. This has the potential to enshrine a degree of conservatism within judicial ranks, which may inhibit the development of legal doctrine or efficient court practice. Mandatory retirement ages, to some degree, alleviate these potential disadvantages of judicial tenure.

However, the practice of appointing former judges as Temporary Judicial Officers exacerbates the already low turnover and these potentially detrimental consequences. Judicial Officers are certainly alive to these concerns, as one respondent to our survey observed:

There is some discussion, maybe even concern about the number of retired appeal judges returning to the Court of Appeal. Given the small number of appeal judges, and the capacity of a small number of them to exercise a disproportionate influence on appellate decisions, there is concern about the lack of renewal usually provided for by retirement. ... ²³²

And another said:

I am not persuaded that circumventing the retirement age by having retired judges come back as acting judges is a good idea. It tends to perpetuate the lack of diversity and it does not encourage generational change in our courts. ²³³

²³² District/County/Federal Circuit; 10-14 years.

²³³ Supreme/Federal/Family; 0-4 years.

4. Empirical Analysis of Temporary Judicial Officers

4.1 Desirability of data

The Terms of Reference asked us to address the policy issues regarding the appointment, renewal, and case allocation of Temporary Judicial Officers. In Part 3 of the Report, we explained that the use of Temporary Judicial Officers raises a number of theoretical concerns, but, to assess how significant these issues are in practice, it is necessary to determine the use made of Temporary Judicial Officers in Australian courts in empirical terms. (Please note that for ease in presenting and discussing the empirical data in this Part of the Report we adopt the acronym ‘TJO’ for Temporary Judicial Officers).²³⁴

The relevance of empiricism was addressed in the 2006 case, *Forge v Australian Securities and Investments Commission*, where the High Court considered a constitutional challenge to the legislation authorising the appointment of acting judges to the Supreme Court of New South Wales.²³⁵ As noted in Part 3, it was claimed that s 37 of the *Supreme Court Act 1970* (NSW) compromised the independence and impartiality that the Supreme Court was required to possess in order for the Court to be a suitable recipient of federal jurisdiction. Kirby J (dissenting) held that statistics on acting appointments in New South Wales were relevant to this question because they demonstrated a clear change in the composition of the Supreme Court over time, and this trend should enliven the concern and response of the Court.²³⁶ By contrast, Gummow, Hayne and Crennan JJ held that no quantitative criterion should be adopted as limiting the state’s power to appoint acting judges, while Gleeson CJ cautioned that ‘quantitative analysis may be misleading’.²³⁷ However, it is important to note that Gleeson CJ did not reject the relevance of data in answering the question posed in that case. Rather, His Honour rejected the unsophisticated use of data on acting judges – such as data that failed to consider the number of acting appointments relative to the number of permanent judges, or data that failed to reflect the actual time for which acting judges sat.

This study considers that proper attention to data can significantly inform our understanding and appreciation of the concerns around the practice of using TJOs. However, as Gleeson CJ indicated in *Forge v ASIC*, this understanding cannot flow from an artless use of statistics that fails to provide sufficiently fine-grained information about the patterns of use.

4.2 Data collection and analysis

Empirical data on the Australian judiciary is limited,²³⁸ and this is also true of data about TJOs. Official statistics are minimal, and publicly available data typically suffer from being too highly aggregated. For example, the Australian Productivity Commission produces an annual *Report on Government Services*, which gives data on the number of full-time equivalent (FTE) judicial officers in each state and territory court.²³⁹ However, the data do not distinguish between (a) the full-time service of

²³⁴ Correspondingly, Permanent Judicial Officers are referred to as ‘PJOs’ in this Part.

²³⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

²³⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 109 [155].

²³⁷ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 83-84 [86]–[87] (Gummow, Hayne and Crennan JJ), 64-65 [33] (Gleeson CJ).

²³⁸ Brian Opeskin, ‘The State of the Judicature: A Statistical Profile of Australian Courts and Judges’ (2013) 35 *Sydney Law Review* 489, 491–3.

²³⁹ Productivity Commission, *Report on Government Services 2016* (Productivity Commission, 2016) Volume C: Justice, Table 7A.27.

PJOs, (b) the fractional service of permanent part-time judicial officers, or (c) the additional service of TJOs. As a result, it is necessary to rely on two alternative sources of information on TJOs.

One potential source of information about TJOs is the reports that most courts publish annually, outlining their work and performance over the previous financial or calendar year. Some courts provide a fair amount of information on TJOs in these publications. In other courts, reporting on TJOs is minimal or entirely absent, making it difficult to make comparisons between courts within or across jurisdictions. Annual reports have been utilised in this study only where it has been necessary to source information that could not be obtained elsewhere.

To overcome this gap in knowledge, we requested that the Judicial Conference of Australia (JCA) seek information directly from state and territory courts. Information was requested from 21 courts, comprising all three levels of the court hierarchy (Supreme, District/County, and Magistrates/Local) in five jurisdictions (New South Wales, Victoria, Queensland, South Australia, Western Australia), and two levels of the court hierarchy (Supreme, Magistrates/Local) in three jurisdictions (Tasmania, Northern Territory, ACT). The federal courts were not canvassed because, as noted in Part 3 above, there is a constitutional barrier to appointing federal judicial officers on a temporary basis. Moreover, the study did not include specialist courts, such as the New South Wales Land and Environment Court; but this is unlikely to have a significant bearing on the overall findings because specialist courts form a very small proportion of the entire Australian judiciary.

The courts were asked to provide information for the past five annual reporting periods (2010/11 to 2014/15, or 2011–2015, depending on the reporting year adopted). Information was requested in response to nine questions that reflected issues identified as the principal concerns with respect to temporary judicial appointments. The topics of these questions were:

1. the number of TJOs holding office in the reporting year;
2. the number of PJOs holding office in the reporting year;
3. the number of days of service by all TJOs during the reporting year;
4. the number of days of service by all PJOs during the reporting year;
5. the length of commission of each TJO holding office during the reporting year;
6. the age of each TJO;
7. the number of TJOs who previously held a commission as a PJO of that court or another court;
8. the number of TJOs who previously held an appointment as a TJO of that court; and
9. whether the temporary status of a TJO is relevant to case allocation, and if so how.

Of the 21 courts approached by the JCA, substantive responses were received from 19 courts, comprising 7 Supreme Courts, 4 District/County Courts, and 8 Magistrates/Local Courts. This provides a rich source of data about the practice of using TJOs in Australian courts. The notable omissions were the Supreme Court of New South Wales and the District Court of New South Wales. Together, these two courts accounted for 12.6% of the FTE judiciary in the states and territories in 2015.²⁴⁰ Their omission is unfortunate because they are the largest Supreme Courts

²⁴⁰ Ibid, derived from Table 7A.27: $(58.2+57.9)/(1071.8-150.1)=0.126$.

and District Courts in Australia. To minimise the impact of this gap, as well as to supplement the responses made by courts where this proved to be incomplete or ambiguous, substantial efforts were taken to source relevant information from other published sources, including the courts' annual reports. However, the data available from these publications are not as detailed as that available from the direct survey of other courts. Where relevant, any gaps in the data are noted in the notes to the Figures below. For example, at the time of collating the data, the annual review of the New South Wales Supreme Court for 2015, and the annual report of the Victorian Supreme Court for 2014/15 were not available, resulting in one year of missing data for some variables for those courts.

Despite the breadth of the information obtained directly from the courts, there are inherent limitations in the data, which should be borne in mind when interpreting the results. The first limitation relates to *temporal coverage*. For reasons of practicality, the request made to the courts was limited to five years of data. It may be that significant trends in judicial practices are revealed only over longer time horizons, such as the 103 years of data presented by Kirby J in *Forge v ASIC*. Nevertheless, five years of data gives a useful contemporary snapshot, even if it is too short an interval from which to make confident predictions about long-term trends.

In any attempt to compare the data, it must be remembered that some courts provided the data by financial year and others by calendar year, in accordance with their regular reporting practices. The data for courts reporting by calendar year were aggregated with the financial year data as follows:

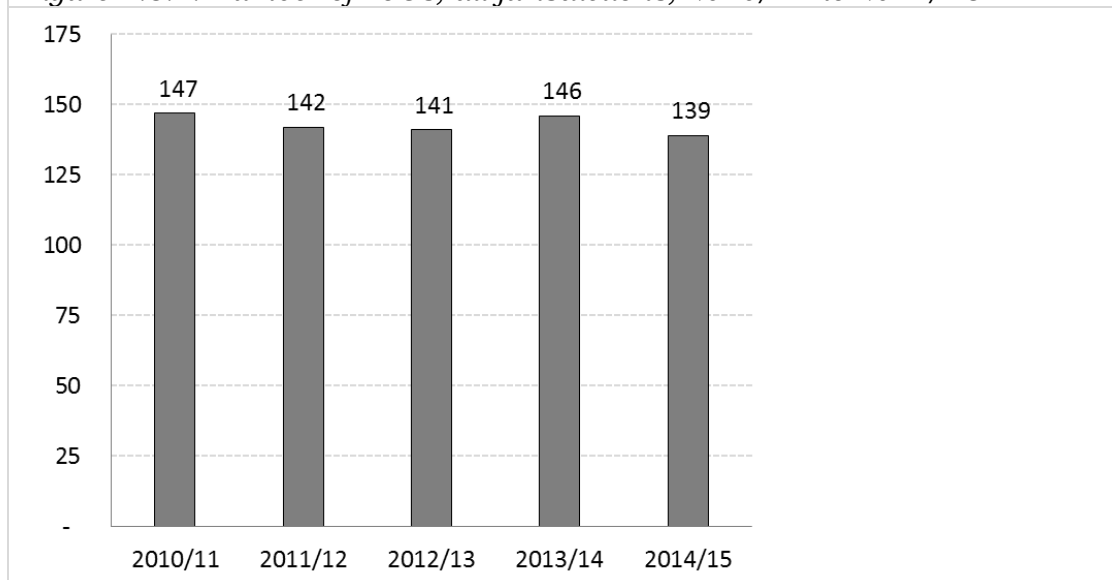
2011	2012	2013	2014	2015
FY2010-11	FY2011-12	FY2012-13	FY2013-14	FY2014-15

A second limitation relates to *consistency*. The questions addressed to the courts were couched in simple language, without detailed exposition of the 'counting rules' that should be employed to facilitate uniform data collection and analysis. This approach was taken to accommodate the considerable variety of practices across the 21 courts, and to minimise the burden on the courts in compiling the data. Wherever possible, we have made appropriate adjustments to compensate for apparent differences in the way individual courts counted the data. Where data are not available for specific courts, this is noted, bearing in mind that the specific gaps vary from question to question.

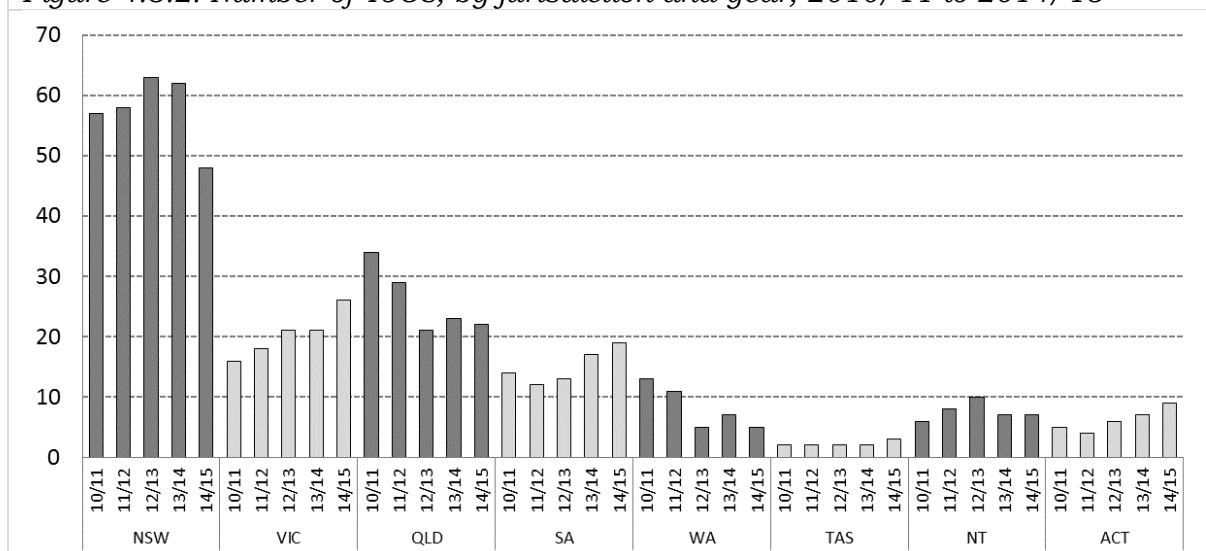
4.3 Number of Temporary Judicial Officers

Each court was asked to report on the number of TJOs who held office during the reporting year. This is a count of the number of *people* who held such office, not the number of commissions held. This is an important distinction given that TJOs may hold more than one commission during a 12-month period, and in some courts often do so. Moreover, the count is based on the number of individuals who held office *during the course of each year*, which differs from the number who hold office on a particular census day, for example, at the end of the reporting year. The intention was to include TJOs with short commissions, who would otherwise be undercounted in a census taken at the end of the reporting period.

The total number of persons who held office as TJOs across all states and territories was quite stable over the 5-year period 2010/11 to 2014/15. The overall number fell slightly from 147 officers in 2010/11 to 139 officers in 2014/15 (a fall of 5.4%), with a mean of 143.0 officers (Figure 4.3.1).

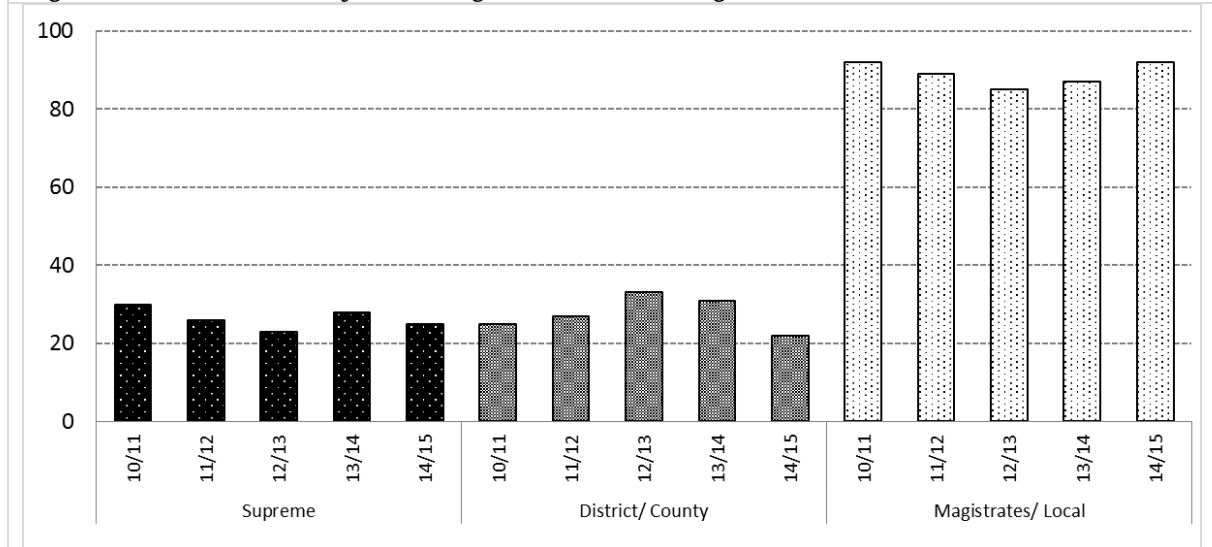
Figure 4.3.1: Number of TJOs, all jurisdictions, 2010/11 to 2014/15

Despite the relative stability over time in the total number of TJOs across Australia, there was substantial variation in numbers across jurisdictions (Figure 4.3.2). New South Wales had by far the greatest number of TJOs, averaging 57.6 annually over the 5-year period, followed by Queensland (25.8 TJOs), Victoria (20.4 TJOs) and South Australia (15 TJOs), with Tasmania being the smallest user (2.2 TJOs). There were also temporal trends in the data in some states and territories. The use of TJOs appears to have been rising in Victoria, South Australia and the ACT, but falling in Queensland and Western Australia.

Figure 4.3.2: Number of TJOs, by jurisdiction and year, 2010/11 to 2014/15

When examined by level of the court hierarchy, there was also significant variation in the observed pattern of TJOs (Figure 4.3.3). Aggregating courts of equivalent hierarchy across Australia, the Supreme Courts and District/County Courts accounted for similar numbers of TJOs – respectively averaging 26.4 and 27.6 TJOs annually. These values were fairly stable over time. The Magistrates/Local Courts accounted for more than three times the number of TJOs, averaging 89.0 over the same period.

Figure 4.3.3: Number of TJOs, by court level and year, 2010/11 to 2014/15



4.4 Ratio of Temporary Judicial Officers to Permanent Judicial Officers

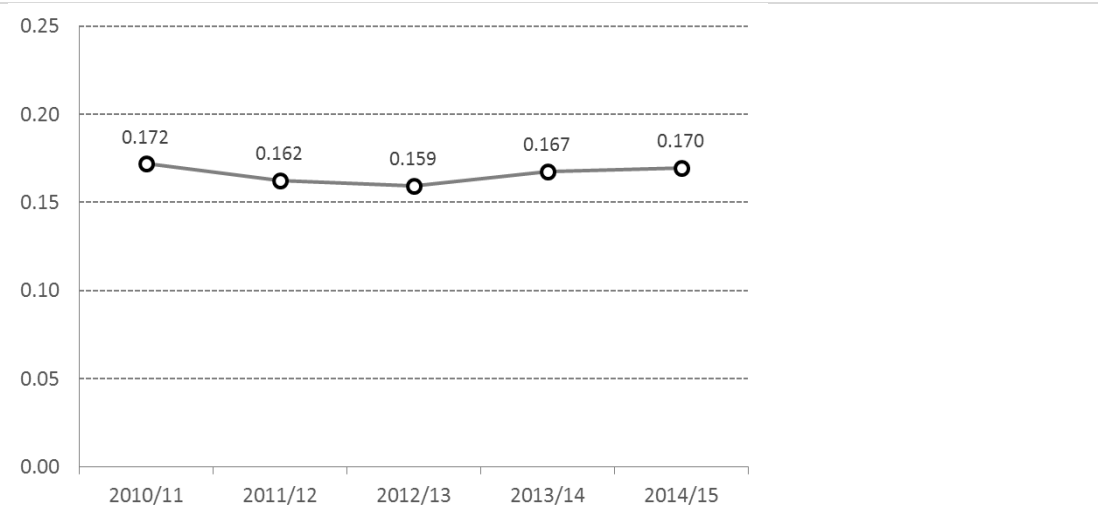
The absolute number of TJOs provides only a rough guide to the importance of this type of commission to the judicial system as a whole because it gives no measure of relative scale. Other things being equal, one would expect larger courts to have more TJOs than smaller courts. A significant consideration in evaluating TJOs is thus the size of this cohort relative to the number of Permanent Judicial Officers (PJOs) – a point made by Gleeson CJ in *Forge v ASIC*. To assess this, the courts were also asked to report on the number of PJOs who held office during each reporting year. As with the calculation of TJOs, this was a count of persons rather than commissions. It included both full-time and part-time judicial officers, but it is known from other studies that the proportion of the permanent judiciary who work part-time is very small.²⁴¹

The statistics provided by the courts were used to compute the ratio of TJOs to PJOs for Australia as a whole and by other categories. For convenience, we have designated this ratio, based on the count of persons, as R_{PER} . The interpretation of the ratio is straightforward. If court has, say, 10 TJOs and 40 PJOs, the value of R_{PER} is $10/40$, or 0.25. Alternatively stated, a ratio of 0.25 means that there are four times ($=1/0.25$) as many PJOs as TJOs.

For Australia as a whole, R_{PER} ranged between 0.159 and 0.172 over the five-year period in question, with an average value of 0.166 (Figure 4.4.1). In other words, there were approximately six times as many PJOs as TJOs in Australia in this period. This ratio was quite stable over the five-year interval, which is to be expected because the underlying number of TJOs and PJOs is itself quite stable over the period. This was true both for Australia as a whole and for most jurisdictions. In view of this, it is not necessary to examine further time trends, and reference will henceforth be made to data based on five-year averages.

²⁴¹ Brian Opeskin, 'The Supply of Judicial Labour: Optimising a Scarce Resource in Australia' (2017) 7 *Onati Socio-Legal Series* (forthcoming).

Figure 4.4.1: Ratio of TJOs to PJOs (R_{PER}), all jurisdictions, by year, 2010/11 to 2014/15



Notes: Data are unavailable for PJOs and TJOs in the NSW Supreme Court for 2015, and for TJOs in the Victorian Supreme Court in 2010/11 to 2012/13.

Despite the relative stability in R_{PER} across Australia over time, there is substantial variation by court hierarchy. The ratio is lowest in the District Courts ($R_{PER}=0.122$) and highest in the Magistrates Courts ($R_{PER}=0.193$), with the Supreme Courts occupying the middle of the field ($R_{PER}=0.152$) (see Figure 4.5, col A, below). This suggests that, for Australia as a whole, the intermediate courts are the most stably staffed by permanent appointees, while the lower courts rely more heavily on temporary commissions.

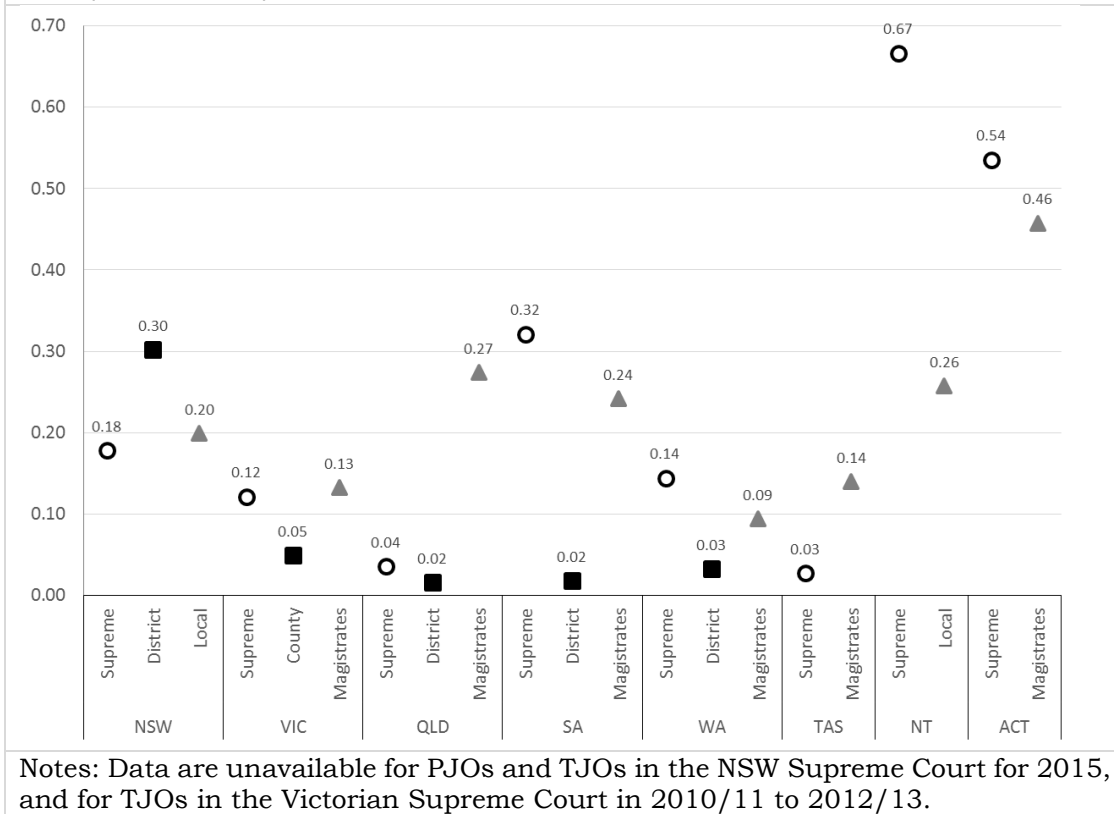
There are also significant differences from jurisdiction to jurisdiction. Figure 4.4.2 gives a disaggregated picture of the ratio of TJOs to PJOs by court level and jurisdiction. Thus, one can contrast a single court level across states (for example, all Supreme Courts use circle markers), or one can examine a jurisdiction across court levels (for example, by comparing the three different markers for New South Wales). The latter exercise demonstrates that, even within a single state or territory, substantially different practices arise from court to court.

Specifically, Western Australia ($R_{PER}=0.09$), Victoria ($R_{PER}=0.09$) and Tasmania ($R_{PER}=0.10$) make the least use of TJOs across their court systems (for simplicity, the figures quoted are aggregated data for all courts within each jurisdiction). For these jurisdictions, there are 10 or 11 times more PJOs than TJOs. These states may be contrasted with two small jurisdictions – Northern Territory ($R_{PER}=0.38$) and the ACT ($R_{PER}=0.49$) – where temporary commissions have a very high relative prominence. To a degree, these results can be explained by the size of the jurisdiction. In the ACT, for example, over the past five years there has been an annual average 6.2 TJOs against the 12.6 PJOs, and in that context a few temporary appointments can have a measurable bearing on the metrics. New South Wales, South Australia and Queensland are noteworthy because they are large jurisdictions, in terms of their judiciaries, and make quite high use of TJOs relative to PJOs, with ratios of $R_{PER}=0.23$, $R_{PER}=0.19$, and $R_{PER}=0.17$, respectively.

The ratio of TJOs to PJOs offers a valuable perspective on the use of TJOs in Australia. Consider, for example, the historical data presented by Kirby J in *Forge v ASIC*, referred to in Part 3 above. Justice Kirby discussed the large and growing number of TJOs in the New South Wales Supreme Court from 1989 to 2004, but Figure 4.4.2 shows that the number of TJOs relative to PJOs in that Court is not excessive relative to other Australian Courts. Over the period 2011-14 (which differs

from the period considered by Kirby J), there was an average of 9.8 TJOs to 54.8 PJOs, leading to a ratio of 0.18—in other words there were 5.6 permanent judges on the New South Wales Supreme Court for every temporary appointee. This is a better ratio than 9 of the 21 courts evaluated in this study, including the New South Wales District Court and Local Court.

Figure 4.4.2: Ratio of TJOs to PJOs (R_{PER}) by jurisdiction and court level, 2010/11 to 2014/15



4.5 Days of service

Some courts, although having the capacity to engage TJOs, do not use them to the full extent permitted by their commissions. For example, a TJO with a three-month commission might be asked to sit for only a few days during that period, depending on the needs of the court at the time. It is thus possible that the ratio of TJOs to PJOs considered in Part 4.4 still overstates the importance of TJOs in the staffing of the courts. This is because permanent officers, with regular court lists and institutionalised sitting arrangements, are likely to be more fully utilised than temporary officers in any sitting week. Courts were therefore asked to report on the *number of days of service* of TJOs during the reporting year, and to provide comparative data on the number of days of service of PJOs. From this it is possible to undertake a more detailed analysis based on the actual use of TJOs relative to PJOs, rather than relying solely on a count of heads.

Considerable work was required to make these comparisons possible. Some courts advised that statistics on sitting days were not available for PJOs. In such cases we constructed data based on annual court reports showing the composition of the court at a specified date, and known dates of judicial appointment, retirement or death. Other courts did provide the requested data, but it became apparent that the basis of their calculations differed, and it was thus necessary to revise the data so that the same counting rules applied across all courts. For example, if a TJO with a three-month commission was shown as sitting for 20 days, this was accepted at face value; but if a TJO with a three-month commission was shown as sitting for 90 days (which includes all weekends), an adjustment was necessary to reflect actual working days. This was done on the assumption that judicial officers work five out of seven days per week, so that 90 sitting days was scaled down to 64.3 sitting days ($=90 \times 5/7$). Similar adjustments were made for PJOs.

These adjustments do not take into account leave and court vacations, and consequently the calculated number of sitting days may be greater than the actual number. The same methodology was applied to the sitting days of TJOs (the numerator) and PJOs (the denominator), so the relativities would remain largely unaffected by the absence of an adjustment for leave and vacations, provided that TJOs and PJOs had equal access to these benefits. However, if PJOs are more likely than TJOs to have access to leave and court vacations (as discussed in Part 2), the results may be skewed. No information was available to us regarding the leave arrangements of TJOs, which may well depend on the length of their commissions. To the extent that PJOs are more likely than TJOs to have access to leave and holidays, the importance of TJOs relative to PJOs is likely to be understated by a small margin because the denominator (days of service of PJOs) will be overstated.

On this basis, the average number of sitting days of TJOs across the 5-year period was compared to the average number of sitting days of PJOs for each court and jurisdiction. The resultant ratio, calculated on days of service, has been designated R_{DOS} . Figure 4.5 shows the value of R_{DOS} (Column B), and compares this to the analogous ratio calculated in Part 4.4 by reference to the number persons rather than the number of days (Column A). In calculating the totals by level of court hierarchy, Western Australia and Tasmania were excluded due to unavailability of data for TJOs, PJOs, or both.

Figure 4.5: Ratio of TJOs to PJOs, by court level and jurisdiction, 2010/11 to 2014/15

	RATIO OF TJOs TO PJOs R_{PER} (number of persons)	RATIO OF TJOs TO PJOs R_{DOS} (days of service)	Relative Overstatement R_{PER}/R_{DOS}
	A	B	C
LEVEL OF HIERARCHY			
Supreme	0.152	0.041	3.67
District/County	0.122	0.022	5.43
Magistrates/Local	0.193	0.044	4.38
All Courts	0.166	0.038	4.41
JURISDICTION			
NSW	0.225	0.038	5.89
VIC	0.091	0.022	4.15
QLD	0.165	0.059	2.78
SA	0.194	0.020	9.65
NT	0.380	0.066	5.76
ACT	0.492	0.133	3.69

Notes: Western Australia and Tasmania are wholly excluded from the tally by court due to unavailability of data for TJOs, PJOs, or both. In addition, ratios for the listed courts do not include some years for which annual data are unavailable for TJOs, PJOs, or both.

To better explain the significance of the table, consider the example of New South Wales. Over the 5-year period 2010/11 to 2014/15 and three court levels, on average TJOs in New South Wales contributed 874 sitting days per court per year, while PJOs contributed 22,870 sitting days per court per year. For New South Wales as a whole, this results in a ratio of 0.038 TJOs per PJO (Column B), *based on sitting days* ($R_{DOS}=874/22,870$). However, when the same calculation is made on the basis of the *number of persons*, as it was in Part 4.4, TJOs appear to have greater significance. On average there were 20.6 TJOs per court per year compared to 91.3 PJOs. This yields a ratio of 0.225 ($R_{PER}=20.6/91.3$) (Column A). Comparison of the two ratios allows us to construct a measure of the relative overstatement, which is shown in Column C and calculated as the ratio of the ratios ($R_{PER}/R_{DOS}=0.225/0.038$), which in this case equals 5.89.

These data confirm the hypothesis that the ratio of TJOs to PJOs based on head count overstates the importance of TJOs in the staffing of the courts. When account is taken of the sitting days of TJOs, the use of TJOs in Australian courts is far more modest. Across all Australian courts (excluding Western Australia and Tasmania) the former measure overstates the use of TJOs relative to PJOs by a factor of 4.41 (Figure 4.5). This overstatement is greatest for South Australia and least for Queensland. However, these calculations should only be taken as generally indicative, given the limitations of the data and the methodology that has been adopted to accommodate this.

The survey of courts reveals only the raw statistics and the computed ratios. These do not in themselves answer the question of whether the use of TJOs has reached the levels at which there might be concern that they are affecting the character of the state courts, and undermining the requirement that these courts be *principally* constituted by permanent judges. When that line is crossed is not altogether clear. But we can say on the basis of the available data, that the ratios are relatively low when comparing the relative days of service between the temporary and permanent judicial workforce.

4.6 Duration of temporary commissions

The courts were asked to provide data on the term of appointment (that is, the length of commission) of each TJO who held office during the reporting year. Where a TJO held more than one commission during the year, courts were asked to specify the length of each commission. The purpose of this inquiry was to ascertain whether temporary positions are being used to fill small gaps in the judicial labour force or longer term shortfalls. Of the 21 courts surveyed, 15 provided data of sufficient granularity to enable useful calculations to be made. The data for individual courts reflects both the statutory framework, which typically limits the maximum duration of temporary commissions (see Part 2.4), and the practice of the executive in making appointments within those limits.

Summarising for Australia as a whole, the data set included 475 TJO commissions in the 5-year period under study. Of these, 15.2% (n=72) were in the Supreme Courts; 5.3% (n=25) were in the District/County Courts; and 79.6% (n=378) were in the Magistrates Courts (Figure 4.6). It should be noted, however, that this distribution reflects the non-responses from several key superior and intermediate courts. A weighted average duration can be computed from the available data, using the ratio of the number of commissions in each court to the total number of commissions as weights. On this basis, the Australia-wide weighted average TJO commission was 8.75 months in duration. This average is driven largely by the practice of two courts (New South Wales Magistrates and Victorian Magistrates), which together accounted for 56% of all TJO commissions over the 5-year period.

The data once again reveal substantial variations by court level and by jurisdiction (Figure 4.6). Some courts offered commissions for substantial terms on a regular basis. For example, the ACT Magistrates Court had a total of 16 TJO commissions over the 5-year period, of which 12 commissions were for 36 months and four were for 12 months. This is reflected in the average term of 30 months in that Court, which is the highest average of all the surveyed courts. Similarly, the New South Wales Local Court had a total of 136 TJO commissions over the 5-year period, and all but seven of them were for 12-month periods. This is reflected in the average term of 11.57 months in that Court. Nearly all the New South Wales data predates the statutory extension of the maximum term of acting judicial officers from 12 months to five years, which came into force on 15 May 2015.²⁴² It is not known to what extent the new maximum has since been reflected in the appointment practice of the executive.

By contrast, some courts engaged TJOs on quite short commissions, either on a one-off basis or on a recurring basis. The shortest commission in the data set was just 3 days (Victorian Magistrates Court), and other short commissions included one week (Western Australian Magistrates Court) and 23 days (Tasmanian Supreme Court). There were other courts in which the commissions of TJOs extended for a few months at a time, but several commissions were given to a single person in the course of a year. For example, in the Victorian Magistrates Court in 2014/15, 17 persons received 41 commissions as TJOs, and of these, four magistrates received one commission each, two magistrates received two commissions each, and 11 magistrates received three commissions each.

Gaps in the data make it difficult to discern clear trends across jurisdictions and court levels. Rounding out the picture provided by examining the relevant legislative provisions in Part 2, it appears that some jurisdictions generally appoint TJOs on longer-term commissions, and this practice is applied consistently across all court levels in that state or territory. An example is South Australia, where the average

²⁴² *Courts and Crimes Legislation Amendment Act 2015* (NSW) s 2 and sch 3.

length of commissions was 10.93 months in the Supreme Court, 12.0 months in the District Court, and 12.0 months in the Magistrates Court. In other courts the practice is consistently the other way, with shorter commissions being the norm. Thus, in Queensland, the average commission was 4.55 months in the Supreme Court and 2.27 months in the District Court.

Figure 4.6: Average duration of temporary commissions, by jurisdiction and court level, 2010/11 to 2014/15

	Supreme			District/County			Magistrates/Local			Contribution to weighted average (months)
	Duration	Commiss'n	Weight	Duration	Commiss'n	Weight	Duration	Commiss'n	Weight	
	(months)	(number)	(ratio)	(months)	(number)	(ratio)	(months)	(number)	(ratio)	
NSW			0.0000			0.0000	11.57	136	0.2863	3.31
VIC	3.55	23	0.0484	3.09	16	0.0337	5.50	130	0.2737	1.78
QLD	4.55	7	0.0147	2.27	3	0.0063			0.0000	0.08
SA	10.93	26	0.0547	12.00	2	0.0042	12.00	47	0.0989	1.84
WA	8.22	15	0.0316	6.38	4	0.0084	4.62	31	0.0653	0.61
TAS	0.76	1	0.0021						0.0000	0.00
NT			0.0000				2.91	18	0.0379	0.11
ACT			0.0000				30.00	16	0.0337	1.01
		72	0.1516		25	0.0526		378	0.7958	8.75

Notes: Data were unavailable for NSW (Supreme and District), Queensland (Magistrates), Tasmania (Magistrates), Northern Territory (Supreme) and ACT (Supreme). There is no District Court in Tasmania, Northern Territory or the ACT.

4.7 Age of Temporary Judicial Officers

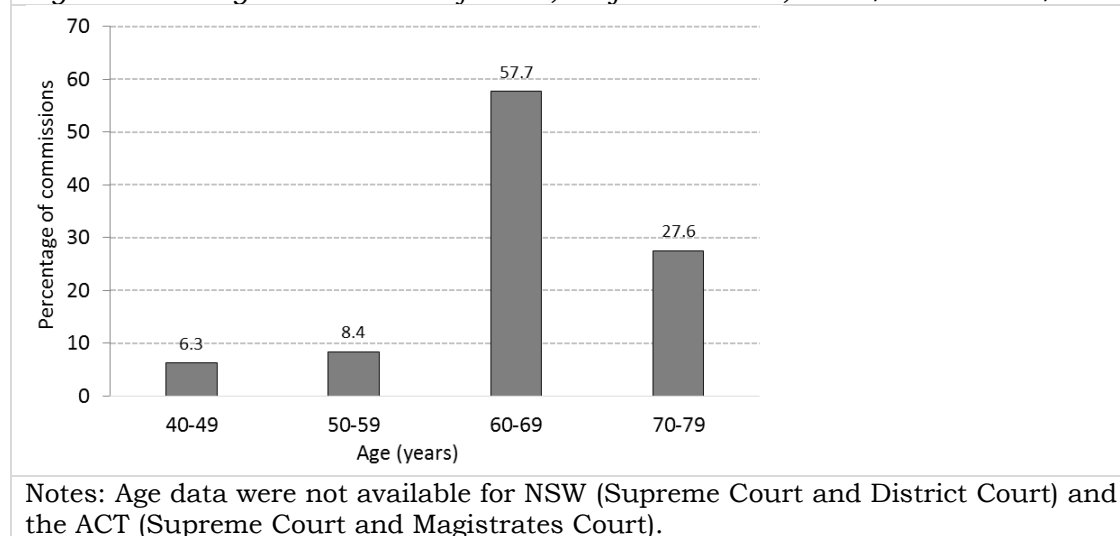
The age of TJOs offers potentially useful information about the type of person who fills temporary judicial roles and the circumstances in which they do so. For example, age data might indicate whether TJOs are typically judicial retirees or individuals at various levels of seniority in their legal careers. The courts were thus asked to provide data on the age (in years and months), at the end of the reporting year, of each TJO who held office during that year. Age data was collected from 17 courts; the omissions being the New South Wales Supreme Court and District Court, and the ACT Supreme Court and Magistrates Court. The data for individual courts reflects both the statutory framework, which typically limits the maximum age of TJOs (see Part 2.6), and the practice of the executive in making appointments within those age limits.

The data comprised annual statistics on the age of each TJO who held office during the reporting period. Viewed over the 5-year period, this is not a count of persons but rather 'age observations' based on an annual census at the end of the reporting period. For example, a magistrate who held office as a TJO for five successive years would yield five age observations—e.g., 65.5, 66.5, 67.5, 68.5 and 69.5 years. Across Australia, this counting method resulted in a total of 475 age observations.

For Australia as a whole, the age distribution of TJOs is illustrated in Figure 4.7.1. The largest group comprised those aged 60–69 years, which accounted for 57.7% (n=274) of all age observations, followed by those aged 70–79 years, which accounted for 27.6% (n=131). The fact that more than one-quarter of the observations related to the 70–79 age group indicates that judicial retirees are an important source of the TJO labour force. This is so because the mandatory retirement age for judicial officers is 70 or 72 years in nearly all jurisdictions (the exceptions being magistrates in Western Australia and the ACT, who must retire at age 65). While there is often an assumption that TJOs are drawn almost exclusively from the ranks of former judges

and magistrates, there were quite a number of TJOs aged in their 40s (6.3%, n=30), and in their 50s (8.4%, n=40).

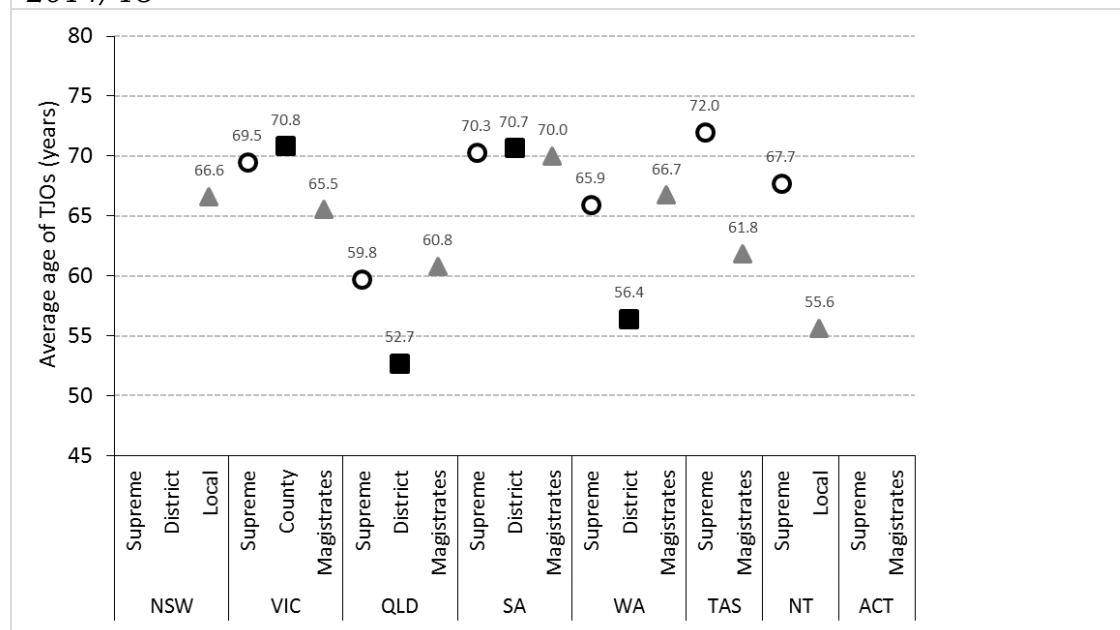
Figure 4.7.1: Age distribution of TJOs, all jurisdictions, 2010/11 to 2014/15



It is also useful to consider the age data disaggregated by jurisdiction and court (Figure 4.7.2). For each court for which information was provided, the figure shows the average of all TJO age observations over the 5-year period 2011/11 to 2014/15. The Australia-wide average across all 475 observations is 65.4 years, but the averages for individual courts ranged from a high of 72 years (Tasmanian Supreme Court) to a low of 52.7 years (Queensland District Court). Consistently with the frequency distribution shown above, Figure 4.7.2 also shows that the large majority of court averages fall in the 60–70 year band.

There are only a few discernible patterns of note. South Australia has relatively high average ages across all courts in its hierarchy, and Queensland conversely has relatively low average ages across all of its courts. The place of a court in the hierarchy generally seems to have no particular bearing on the average age of its TJOs.

Figure 4.7.2: Average age of TJOs, by jurisdiction and court, 2010/11 to 2014/15



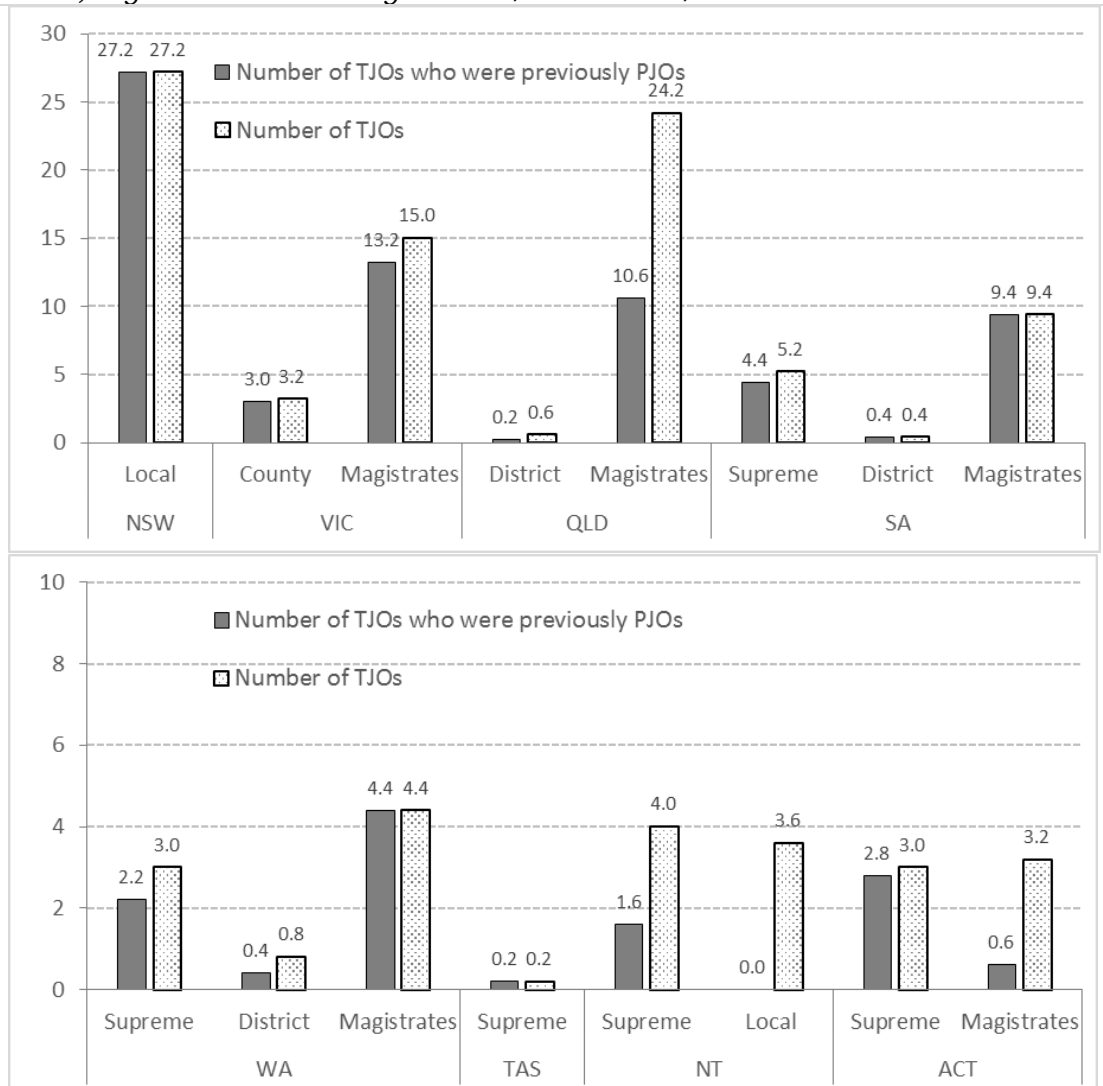
Notes: Age data were not available for NSW (Supreme Court and District Court) and the ACT (Supreme Court and Magistrates Court).

4.8 Prior permanent commissions

The courts were asked to report on the number of TJOs who previously held a commission as a PJO of that court or another court. Alternatively expressed, this was the number of TJOs in each reporting period who had, at some time, retired or resigned from a permanent judicial position. The purpose of the question was to ascertain the extent to which the workforce of TJOs is drawn from the ranks of former judges and magistrates. This has implications for their level of expertise, and is presumably also correlated with the average age of TJOs.

Of the courts surveyed, 16 provided answers to this question (the omitted courts are listed in the notes to Figure 4.8). The data comprised an annual tally of each TJO who held office on the court during the year who had also once been a PJO. The annual data were averaged to smooth out fluctuations, and thus provide a clearer picture of the courts' practice over the whole period under study. These averages are illustrated in Figure 4.8 by the dark shaded column for each court (the 16 courts are shown across two graphs for visual ease, but it should be noted that the scale of the vertical axis differs in the bottom panel to accommodate the small numbers in some jurisdictions).

Figure 4.8: Number of TJOs who were previously PJOs, by jurisdiction and court, 5-year annual averages 2010/11 to 2014/15



Notes: Data on the prior appointment history of TJOs were not available for NSW (Supreme Court and District Court), Victoria (Supreme Court), Queensland (Supreme Court) and Tasmania (Magistrates Court).

These figures gain meaning when compared to the total number of TJOs in each court (also based on 5-year annual averages), as discussed in Part 4.3 above. The later data are illustrated in Figure 4.8 by the light shaded column for each court. When a comparison is made between the height of the dark and light columns for each court, it is easy to see the relative importance of former PJOs in the TJO labour force. For example, in the Victorian Magistrates Court (top panel), on average 13.2 of the 15.0 TJOs held prior office as a PJO.

In five courts for which data are available (New South Wales Local Court, South Australian District Court and Magistrates Court, Western Australian Magistrates Court, and Tasmanian Supreme Court), the average number of TJOs who were previously PJOs is *identical* to the average number of TJOs. The implication is that every TJO in those courts was once a PJO. Moreover, in four other courts (Victoria County Court and Magistrates Court, South Australian Supreme Court, and ACT Supreme Court), the number of TJOs who were previously PJOs differs by no more than 20% from the total number of TJOs, suggesting heavy reliance on former PJOs. The courts that stand out as making least reliance on former PJOs are the

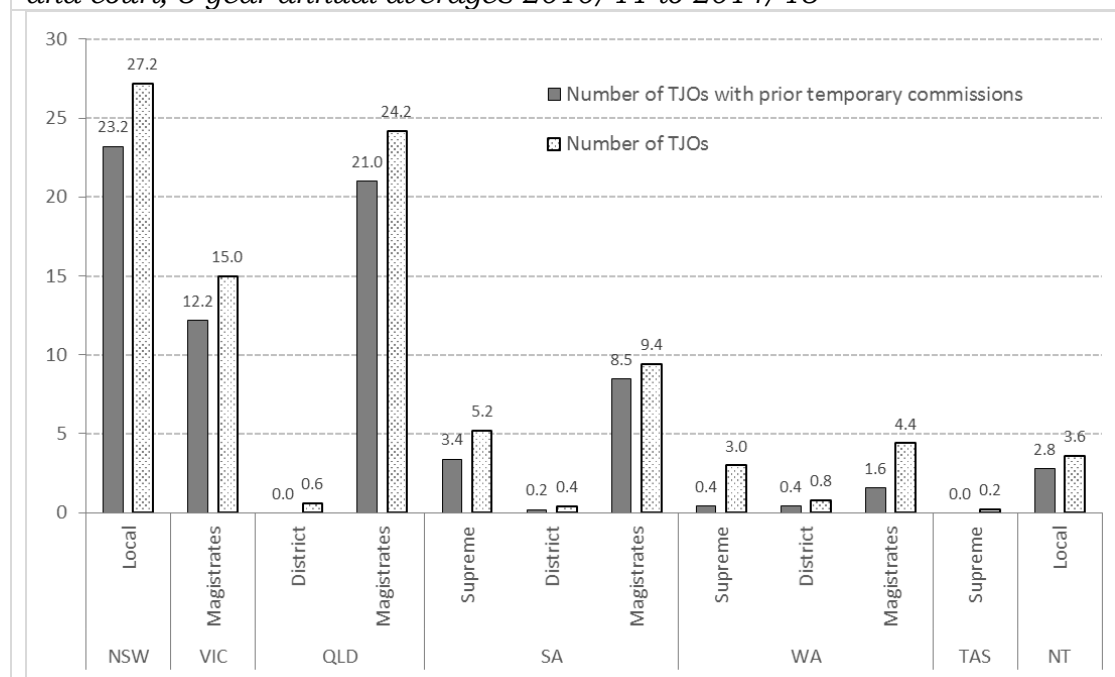
Queensland Magistrates Court, the Northern Territory Supreme Court and Local Court, and the ACT Magistrates Court.

4.9 Prior temporary commissions

The courts were asked to report on the number of TJOs who previously held a temporary commission on that court. The purpose of this question was to ascertain the extent to which TJOs are drawn from a pool of ‘repeat players’. As noted in Part 3.3, one of the concerns identified in the literature is the threat to judicial independence from recurring reappointment, and the risk that the appointee might be, or appear to be, beholden to the executive for continuation of judicial office.

Of the courts surveyed, only 11 provided answers to this question (the omitted courts are listed in the notes to Figure 4.9). This is just over half the total number of courts surveyed, representing about 66% of all persons appointed as TJOs in Australia over the period 2010/11 to 2014/15. The results should be interpreted with this sample limitation in mind. The data comprised an annual tally of each TJO who held office on the court during the year who had also once been a TJO of that court. As previously, the annual data were averaged to smooth out fluctuations. These averages are illustrated in Figure 4.9 by the dark shaded column for each court.

Figure 4.9: Number of TJOs with prior temporary commissions, by jurisdiction and court, 5-year annual averages 2010/11 to 2014/15



Notes: Data on the history of prior temporary appointments of TJOs were not available for NSW (Supreme, District), Victoria (Supreme, County), Queensland (Supreme), Tasmania (Magistrates), Northern Territory (Supreme), and ACT (Supreme, Magistrates).

Once again, these figures gain meaning when compared to the total number of TJOs in each court (also based on 5-year annual averages). The later data are illustrated in Figure 4.9 by the light shaded columns. When a comparison is made between the height of the dark and light columns for each court, it is easy to see the relative importance of former TJOs in the TJO labour force. For example, in the Victorian Magistrates Court, on average 12.2 of the 15.0 TJOs held prior office as a TJO.

In five courts, the number of TJOs who held previous office as a TJO differs by no more than 20% from the total number of TJOs, suggesting heavy reliance on the reappointment of TJOs. Interestingly, these courts were all Magistrates/Local Courts, being those in New South Wales, Victoria, Queensland, South Australia and the Northern Territory. There was a similar number of courts in which the ratio of TJOs with prior temporary commissions was low. These were Queensland (District), South Australia (District), all three courts in Western Australia, and Tasmania (Supreme).

Theory suggests that it is the Magistrates Courts – with the highest proportion of recurring appointments – that suffer the greatest threat to judicial independence from temporary commissions. At first this may appear surprising because the vast bulk of their work relates to less serious criminal offences, in which judicial accommodation of the views of the executive appears to be unlikely. However, it is consistent with the view expressed by one respondent to our survey of judicial officers (see Part 3.3.1 above), namely, that Attorneys-General have often selected as TJOs those retiring magistrates whose approach to sentencing is consistent with the government's 'law and order agenda'.

4.10 Case allocation of Temporary Judicial Officers

Finally, the courts were asked whether the temporary status of a TJO is relevant to case allocation in that court, and if so how. We were interested in examining whether the temporary nature of the judicial commission affected the type of cases determined by those officers, whether by reason of subject matter (for example, civil or criminal), expected length of hearing, or other circumstance. As discussed in Part 3, one circumstance identified in the literature is that TJOs—potentially beholden to the executive for renewal of their short commissions—might be allocated cases in which rights and liabilities could be adjudicated favourably to government.

Of the 21 courts surveyed, 16 responded to this question; the non-responses being New South Wales (Supreme Court and District Court), Tasmania (Magistrates Court), Northern Territory (Supreme Court), and ACT (Magistrates Court). Of the 16 responses, eight courts indicated unequivocally that the temporary status of a TJO was not relevant to case allocation. A representative response from this group was that of the Chief Magistrate of Victoria, Peter Lauritsen, who stated:

Reserve Magistrates in Victoria are treated no differently to full time magistrates, in respect to either case allocations or work expectations. They simply undertake whatever work or list that is requested of them, at any venues around the State.

Similarly, the Chief Magistrate of Queensland, Judge Orazio Rinaudo, stated:

An Acting Judicial Officer's acting status is not relevant to case allocation on court. Acting Magistrates are expected to take on any type of judicial function required of a permanent appointment.

However, other heads of jurisdiction suggested that the temporary status of the TJO might be relevant to case allocation for a range of reasons. One reason related to *subject matter*. The Chief Judge of the Western Australian District Court, Kevin Sleight, indicated that the allocation of an acting judicial officer to civil or criminal cases was sometimes determined by the commission of appointment. The Chief Magistrate of the Northern Territory stated that, while there was no formal restriction on case allocation, 'the majority of the time [an] acting Judicial Officer sits in the general bail and arrest court.'

A second circumstance that affected the allocation of TJOs to cases in some courts was the *short-term nature* of their appointment. The Chief Justice of Victoria, Marilyn Warren, observed that:

Status as a reserve judge is relevant to case allocation in as much as reserve judges are generally engaged for a certain period of time and therefore cases are allocated keeping in mind that the term of the engagement will cease at a certain date.

Her Honour noted that most reserve judges in the Supreme Court sit in the Court of Appeal, whose work is more compatible with engagement for a defined period. In her Honour's view 'it is more difficult to allocate trial work where settlement and running over is more prevalent'.

The Chief Justice of South Australia, Chris Kourakis, also identified length of trial as a relevant consideration in the allocation of civil cases to acting judicial officers in the District Court, but this factor pointed in the opposite direction. The implication seemed to be that long or complex civil trials can disrupt the roster of permanent judges and create an impediment to prompt judgment. In such circumstances, it might be appropriate to allocate such cases to a TJO, if one were available.

A third circumstance identified as affecting case allocation relates to the unusual circumstances that can prompt the appointment of TJOs in the first place (see Part 3.2). The Chief Justice of Western Australia, Wayne Martin, stated that all the circumstances in which an acting judicial officer had been appointed to his Court in the 5-year period were 'quite unusual'.²⁴³ Three of the four cases arose from *conflicts of interest*, which made it inappropriate for a permanent judge of the Court to hear the cases in question. These included a murder trial in which the victim had been a Registrar of the court (discussed in detail in Part 3.2.2); an appeal in the lengthy and complex *Bell* litigation; and a professional negligence claim in which a member of the Court had been briefed while at the Bar. Although not expressed in these terms, the implication from His Honour's comment was that the temporary status of the acting judge was critical to case allocation in each case because their status as an 'outsider' was the very reason for their appointment in an acting capacity.

The Chief Justice of Tasmania, Alan Blow, made a similar point in respect of the sole appointment of an acting judge to that Supreme Court in the period 2010/11 to 2014/15. That person 'was appointed to hear and determine a single case'. This was a case in which the Supreme Court was asked to review a decision of a magistrate in which the Tasmanian Director of Public Prosecutions had been found guilty of causing death by negligent driving. Presumably, that case too presented a conflict of interest issue.

In summary, the responses of heads of jurisdiction to this question made it clear that the temporary status of a TJO may affect the civil/criminal subject matter of proceedings allocated to them; their availability for long or complex cases; and the allocation of cases that cannot be heard by permanent members of a court because of conflicts of interest. However, beyond these considerations, there is no evidence that temporary status is relevant to case allocation.

²⁴³ This might be explained by the circumstance that, in Western Australia, the role typically attributed to 'acting judges' in other jurisdictions is there performed by 'auxiliary judges'.

5. Evaluating Temporary Judicial Officers

The use of Temporary Judicial Officers, when appointed for legitimate temporary reasons and under appropriate conditions, contributes to the effective functioning of the court system. However, to ensure the use of Temporary Judicial Officers is not abused for improper reasons, it must be subject to limits.

Part 2 identified the complex and varied regimes for the appointment and tenure of Temporary Judicial Officers across the Australian states and territories. It demonstrated the existence of substantial variation between jurisdictions and even levels of court within the one jurisdiction. Such variation can be positive, in that it facilitates the crafting of regimes that suit local conditions. However, our analysis reveals an unnecessary degree of statutory complexity and opacity. In Part 3, we explained the varied justifications and concerns about the use of and arrangements for Temporary Judicial Officers, including that they may undermine the proper functioning of, and public confidence in, the judiciary. Notably, the potential for Temporary Judicial Officers to be used as a temporary fix for a systemic workload problem or to undermine the independence of the judicial arm, were both raised as concerns by surveyed judicial officers. In Part 4, we analysed data provided by 19 Australian courts to reveal the nature and extent of the use of Temporary Judicial Officers, and drew on this data to throw light on the justifications and concerns set out in Part 3.

In this Part, we bring together the concerns regarding the lack of clarity and consistency in regimes with those more fundamental objections to the use of Temporary Judicial Officers. Recognising the ongoing benefits of local variation and adaptation, we evaluate the key risks associated with the use of Temporary Judicial Officers.

5.1 Threshold Matters

5.1.1 Quantitative restrictions

A significant driver for the appointment and use of Temporary Judicial Officers appears to be the funding and efficiency gains thought to be attendant on the appointment of judicial officers to meet short term or particular needs. As noted in Part 3.2 above, as a workload management strategy, this use of Temporary Judicial Officers has support from surveyed judicial officers (see further Schedule 2(A)).

In *Forge v ASIC*, Gleeson CJ issued a cautionary statement that the appointment of Temporary Judicial Officers could in ‘extreme cases’ affect the ‘character’ of the court,²⁴⁴ and put weight on the requirement in the legislation under consideration that the court be ‘principally’ staffed by Permanent Judicial Officers.²⁴⁵ This might suggest that some limit on the numbers and contribution of Temporary Judicial Officers should be stipulated.

Three sets of data speak to this possible concern: the ratio of Temporary Judicial Officers to Permanent Judicial Officers, the duration of Temporary Judicial Officer commissions, and the frequency of repeated appointments of Temporary Judicial Officers. However, given the limited extent of the existing data (see further Parts 4.4, 4.6 and 4.9)), it is difficult to make a general and conclusive assessment as to whether Temporary Judicial Officers are used to meet short-term needs or to address a long-term disparity between workload and staffing.

²⁴⁴ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 46, 69 [46].

²⁴⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 46, 79 [73].

The creation of quantitative limits on the use of Temporary Judicial Officers could be an appropriate regulatory step if there were evidence that this was excessive. However, given that there is no evidence at this point that this is occurring, it appears to be a solution in search of a problem. It is possible that over time more problematic ratios than those revealed by this Report may emerge. Alternatively, in some jurisdictions, reliance on Temporary Judicial Officers may be lessened in coming years. In such a potentially fluid environment, it would be precipitous to be prescriptive about the maximum permissible usage of Temporary Judicial Officers. We note also the potential for a quantitative limit to be arbitrary, as highlighted by Gummow, Hayne and Crennan JJ in *Forge*.²⁴⁶ Should the step be taken to identify a quantitative limit, it would need to be supported by appropriate evidence.

5.1.2 Transparency through ongoing reporting

What is clear from Parts 3 and 4 is that, presently, there is little transparency through the consistent provision of publicly available information about Temporary Judicial Officers, both in terms of their attributes (for example, the extent of appointment of former judicial officers, or the reappointment of Temporary Judicial Officers) and the extent of their use.

This lack of data inhibits comparison and the ability to identify problems should they emerge. It constrains political accountability for the maintenance of courts systems and public debate about their operation at any given moment. One helpful step could be that all courts disclose, at the very least, the following data on their use of Temporary Judicial Officers in their annual reports:

- (a) the number and length of commissions of Temporary Judicial Officers;
- (b) the number of sitting days of Temporary Judicial Officers during the annual reporting period;
- (c) the ratio of Temporary Judicial Officers to Permanent Judicial Officers (calculated by reference to the sitting days for each);
- (d) whether Temporary Judicial Officers are former Permanent Judicial Officers; and,
- (e) whether Temporary Judicial Officers have previously held an appointment as a Temporary Judicial Officer.

The disclosure of this information could provide assurance that Temporary Judicial Officers are being used appropriately and indicate whether any further intervention, such as the adoption of quantitative restrictions, is warranted.

5.2 Appointment and judicial independence

An oft-cited concern is that the appointment of Temporary Judicial Officers might undermine the separation of powers or judicial independence. In that context the opportunity for executive preferment or ‘tenure at pleasure’ is seen as particularly troubling. This Part considers whether aspects of the selection and appointment of Temporary Judicial Officers might be crafted in ways that support separation of powers and judicial independence to an appropriate level.

²⁴⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 46, 84 [87].

5.2.1 *Restriction to former Permanent Judicial Officers*

One particular aspect of the current approach that has attracted adverse comment has been a reliance on the use of retired or former judicial officers and the lack of turnover this may promote on the bench. According to one judicial survey respondent this ‘tends to perpetuate the lack of diversity and it does not encourage generational change’.²⁴⁷ The evidence of repeated use of former judicial officers can also raise concerns about the separation of powers and judicial independence in that it carries the potential for executive preferment, so that a retiring judge or magistrate may seek further judicial appointment as a Temporary Judicial Officer.

Against this must be weighed the alternative of appointing practitioners who have not previously held judicial office. The prospect of the government ‘trying out’ individuals for judicial office raises serious concerns about executive preferment and threats to judicial independence and impartiality.

In practice, former judicial officers are a significant, and in some jurisdictions sole, source of Temporary Judicial Officers. The data reveals that most Temporary Judicial Officers have previously served as Permanent Judicial Officers (see Part 4.8), and many Temporary Judicial Officers have previously held commissions as Temporary Judicial Officers (see Part 4.9). An obvious benefit of appointing Temporary Judicial Officers is that it facilitates the retention of experienced judicial talent post-retirement. Temporary Judicial Officers in this category can be particularly useful where a matter raises a conflict of interest with members of the existing bench, or where a matter requires specific expertise of a particular retired judge. Additionally, they are a vital resource if there is a need to fill an unexpected and temporary gap on an existing bench, perhaps due to illness or extended leave. This may well be the rationale behind the statutory restriction of Temporary Judicial Officer roles to former judicial officers in the Victorian Supreme, County and Magistrates Courts.²⁴⁸

While acknowledging the complaint that prolonged judicial service through the appointment of Temporary Judicial Officers inhibits diversity, it is important to see the appointment of Temporary Judicial Officers in the context of the bench as a whole. The question of whether there is an appropriate mix of newer and experienced judicial officers on a particular court must be considered with reference to both the Temporary Judicial Officers and the Permanent Judicial Officers. A succession pattern may occur through which younger judicial candidates are brought in via permanent appointments, and given appropriate support and induction, rather than through the appointment of Temporary Judicial Officers, where experience and the ability to step rapidly into a gap are a priority. While there is a need for the courts to have renewal over time, there is little convincing evidence that this renewal should occur wholly or even predominantly through appointment of practitioners as Temporary Judicial Officers. At the same time, taken as but an element of the many factors affecting judicial diversity, extending the service of a small number of former judicial officers by their appointment as Temporary Judicial Officers should be understood as having only a modest impact on judicial renewal.

One possible solution would be to draw all Temporary Judicial Officers exclusively from the ranks of former judicial officers, as is statutorily required in Victoria, and is the practice in some other jurisdictions. This would have the advantage of ensuring that highly experienced judicial officers are used to fill temporary vacancies. It would also avoid the risks to judicial independence and the conflicts of interest that could

²⁴⁷ Supreme/Federal/Family; 0-4 years.

²⁴⁸ *Supreme Court Act 1986* (Vic) s 105B(2); *Constitution Act 1975* (Vic) s 81(2); *Magistrates Court Act 1989* (Vic) s 9A(2); *County Court Act 1958* (Vic) ss 12(2) 17KA(2).

emerge with the appointment of senior practitioners. The concern that exclusive use of former Permanent Judicial Officers as Temporary Judicial Officers may have a conservative effect upon the institutional development of the courts and the emergence of fresh approaches both to the law and the administration of justice may be addressed by other strategies that are canvassed below, for instance, preventing the possibility of renewal or reappointment as a Temporary Judicial Officer; and ensuring the access of Temporary Judicial Officers to programs of judicial education and support. The potential for negative effects from the use of Temporary Judicial Officers in prolonging judicial careers and reducing generational change may be appropriately minimised (although not entirely removed) by each of these steps.

5.2.2 *Prohibition on reappointment of Temporary Judicial Officers*

There are two significant concerns that arise in relation to the reappointment of Temporary Judicial Officers. The first is the risk that the potential for executive preferment affects judicial independence and performance. The second is an increased danger that the executive may use repeated reappointments of Temporary Judicial Officers to address more systemic workload and funding issues within the court, thus avoiding the more appropriate appointment of Permanent Judicial Officers.

Against these concerns weigh arguments that restricting reappointment of Temporary Judicial Officers may unnecessarily narrow the pool of interested candidates. However, taking into consideration the relatively low numbers of appointments of Temporary Judicial Officers relative to the total numbers of former judicial officers across Australia, we do not believe this argument is sufficiently supported by the data on existing usage of Temporary Judicial Officers.

A restriction on the reappointment of Temporary Judicial Officers might possibly assist with managing the risk of the appearance and possibility of executive preferment. So, for example, Temporary Judicial Officers could be restricted to a single term, and not generally be eligible for reappointment. The appropriate length of such a term is discussed below (see Part 5.2.3). However, we also note that the risk to judicial independence is more acute when reappointment is made by the same state or territory. Accordingly, further appointment of a Temporary Judicial Officer to a court in another jurisdiction under the responsibility of a different executive is unlikely to cause concern.

5.2.3 *The justification for and term of Temporary Judicial Officers*

Concerns that the use of Temporary Judicial Officers is little more than a short-term solution to the problems faced by an insufficiently funded and overworked judicial system may also be addressed by greater clarity as to the justification for their appointment, and the tailoring of terms to these justifications. In Part 3.2, the use of Temporary Judicial Officers to manage temporary workload pressures due to ill health or the like, conflicts of interest, to gain or retain expertise and to try out new judicial officers were identified as common justifications, although the last is subject to robust disagreement. Conversely, the appointment of Temporary Judicial Officers to avoid a more permanent, but needed, appointment was seen as problematic.²⁴⁹

Attempts to address this issue have already been made through the incorporation of a justification for appointment into the legislative frameworks in several jurisdictions. As described in Part 2, in Queensland, Western Australia, South Australia and

²⁴⁹ *Declaration of Principles on Judicial Independence* Issued by the Chief Justices of the Australian States and Territories, above n 150.

Tasmania, statutory formulations provide that the Temporary Judicial Officer appointment must be of 'a temporary nature' which 'is necessary or desirable, in the public interest',²⁵⁰ where a Permanent Judicial Officers is or is expected to be absent²⁵¹ or is otherwise unable to perform their role,²⁵² and also where the proper conduct of the business of the Court,²⁵³ or the interests of the administration of justice²⁵⁴ requires. The existing language means that there is considerable latitude for varied justifications, but this approach seems preferable to that of the remaining jurisdictions, which give an unfettered discretion to the executive through either extremely general language or silence as to justification

It would be possible to tighten the existing legislative frameworks to require that Temporary Judicial Officers only be appointed where there is a temporary need. However, this course has some potential pitfalls. Care would need to be taken in drafting the relevant provisions to ensure that all legitimate justifications are captured. The prospect of an aggrieved litigant challenging the decision of a Temporary Judicial Officer on the basis that his or her appointment was made for a purpose not within those identified by the legislation is an unattractive one. As already noted, in *Forge* the High Court considered a challenge to the appointment of a former Federal Court judge as an acting judge of the Supreme Court of New South Wales under s 37 of the *Supreme Court Act 1970* (NSW). This litigation turned on the constitutionality of the provision in question and the appointment of acting judges generally, but nevertheless underlines the potential for litigants to challenge judicial decisions on the basis of the temporary appointment of the decision-maker. This suggests that it is appropriate to proceed cautiously with prescriptive legislative frameworks.

This matter could be addressed through the development of guidelines for the legitimate justification of commissioning Temporary Judicial Officers and a requirement of disclosure. The Council of Chief Justices of Australia and New Zealand appears to be an appropriate forum for developing such guidelines. The Council provides a forum to discuss matters of common concern, and to advance and maintain the independence of the judiciary. The individual members of this body also exercise considerable influence over the appointment of Temporary Judicial Officers through consultation by the executive. The guidelines could include an exhaustive list of legitimate justifications for appointing Temporary Judicial Officers. This would substantially develop the existing clause of the Chief Justices' *Declaration of Principles on Judicial Independence* that provides that acting appointments should be made 'only in special circumstances which render it necessary'.²⁵⁵

Disclosure could make explicit the justification for the appointment, and be done both contemporaneously as part of each appointment process (e.g. by specifying the reason in the instrument of appointment) and subsequently in the annual report for each court. More explicit and specific justification accompanying the making of temporary judicial appointments, would reduce reliance on an upper limit on the duration of the term of a Temporary Judicial Officer (beyond that of age, addressed in Part 5.3, below). Rather, the term could be tailored to the justification for the appointment. For example, a Temporary Judicial Officer appointed to cover for a

²⁵⁰ *Supreme Court Act 1887* (Tas) s 3(1).

²⁵¹ *Supreme Court Act 1935* (WA) s 11(1).

²⁵² *Supreme Court Act 1991* (Qld) s 16(1).

²⁵³ *District Court of Queensland Act 1967* (Qld) s 17(1); *District Court of Western Australia Act 1969* (WA) s 18A(1).

²⁵⁴ *Supreme Court Act 1935* (SA) s 11(1).

²⁵⁵ *Declaration of Principles on Judicial Independence* Issued by the Chief Justices of the Australian States and Territories, reproduced in 'Independence of the Judiciary' (1997) 15 *Australian Bar Review* 177.

Permanent Judicial Officer who is unable to work due to illness, could be appointed for the period of the anticipated absence of the Permanent Judicial Officer, with some allowance for uncertainty. Similarly, a Temporary Judicial Officer appointed to hear and determine a specific matter because of a conflict of interest could be appointed until that matter is concluded by the delivery of final judgment.²⁵⁶

5.2.4 *Transparency of appointments*

The introduction of an open and transparent appointment process with publicly available criteria could alleviate, to some extent, concerns about executive preferment. Enhancing the transparency of the appointment process by incorporating a call for expressions of interest publicly with reference to stipulated criteria would support public confidence in the appointments process. In jurisdictions where this already occurs in the context of Permanent Judicial Officers this would better align the appointments process for Permanent Judicial Officers and Temporary Judicial Officers.

It is possible that this could be done in advance of a specific appointment. The creation of a panel of appointable candidates who have expressed interest in Temporary Judicial Officer positions would ensure that appropriate persons could be accessed quickly should a temporary need arise.

If the list of panel members were shared across jurisdictions, this could also ensure that all jurisdictions have access to interested candidates across Australia. This would be particularly useful where the motivation for the appointment is the existence of a conflict of interest, as in the Rayney matter discussed above in Part 3.2.2, or where specific expertise not held within the jurisdiction is being sought.

5.2.5 *Role of Head of Jurisdiction in appointments*

As has been noted in Part 2, in two jurisdictions the appointment process for Temporary Judicial Officers incorporates a formal requirement for the involvement of the Head of Jurisdiction. In Queensland, the appointment of Temporary Judicial Officers to the Supreme Court and Magistrates Court requires consultation between the relevant Minister and, respectively, the Chief Justice or Chief Magistrate, except in the Supreme Court where the appointment is a person who is or has been a judge of another state or territory or the Federal Court.²⁵⁷ Also in Queensland, the relevant Minister must consult with the Chief Judge of the District Court when contemplating the appointment to that court of a Temporary Judicial Officer who is a retired District Court Judge.²⁵⁸ In South Australia, the appointment of Temporary Judicial Officers to all courts requires the concurrence of the Chief Justice.²⁵⁹ The remaining jurisdictions effectively provide that the appointment is the gift of the executive.²⁶⁰

The involvement of the Head of Jurisdiction in the appointment process could militate against the idea that Temporary Judicial Officer appointments undermine the separation of powers and carry a danger of executive preferment. It also, however, potentially places the Head of Jurisdiction in an invidious position of accepting additional judicial resources albeit on a temporary basis, or going without in the hope

²⁵⁶ Many statutes already make provisions for terms to be set by reference to the conclusion of matters, see, e.g., different forms of this in *Magistrates Act 1991* (Qld) s 6(2); *Supreme Court Act 1935* (SA) s 11(5).

²⁵⁷ *Supreme Court of Queensland Act 1991* (Qld) s 6(1), (2) and (5), and contrast (3); *Magistrates Act 1991* (Qld), s 6(1A).

²⁵⁸ *District Court of Queensland Act 1967* (Qld) s 17(1)-(4).

²⁵⁹ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(1).

²⁶⁰ See Part 2.2 above.

of a permanent judicial appointment.²⁶¹ Nonetheless, the involvement of the Head of Jurisdiction could be seen as an advance on the position that the executive appoints Temporary Judicial Officers with no formal reference to the judiciary whatsoever, and in this respect we note that consultation with the Head of Jurisdiction is consistent with the practices of judicial appointment more generally.

One logical approach would be for the distinctive circumstances surrounding the use of Temporary Judicial Officers to be reflected in the formal requirement for consultation with the Head of Jurisdiction. Relevantly, the central role of the Head of Jurisdiction in advising the executive as to the operational needs of the Court might be particularised so that the Head of Jurisdiction is in discussion with the executive about the need for each individual appointment of a Temporary Judicial Officer by reference to the legitimate justifications for and duration of the commission. In addition, the Head of Jurisdiction's views on the suitability of former judicial officers of the court for an additional period of service as a Temporary Judicial Officer could also be provided to the executive.

5.3 Performance and remuneration

5.3.1 *Outside employment and activities*

As explained in Part 3, the appointment of Temporary Judicial Officers raises distinct ethical concerns – most particularly, that they may hold other offices or employment either simultaneously with their temporary appointment, or between such appointments. This increases the prospect of an actual or perceived conflict of interest. These concerns are recognised, for example, in the New South Wales *Guidelines for the Appointment of Acting Judicial Officers*, which require that ‘acting judicial appointees must be available to serve and must not be engaged in any activity or employment, which is incompatible with judicial office.’²⁶²

The Council of Chief Justices’ *Guide to Judicial Conduct* is alive to the possibility that Temporary Judicial Officers will take on employment or appointments that would be inappropriate for a Permanent Judicial Officer to undertake. The *Guide* states that Temporary Judicial Officers ‘should consider carefully the appropriateness of other activities that the retired judge might be undertaking’.²⁶³ But then it goes on to say in relation to acting appointments, which are often part-time:

The exercise of the judicial office on a part-time basis *may require* the observance of, *or at least consideration of*, some of the restrictions identified in this publication. Particular care should be exercised in relation to activities undertaken concurrently with part-time judicial work.²⁶⁴

As the *Guide* indicates, the question as to whether Temporary Judicial Officers should comply with the same ethical obligations as those that apply to Permanent Judicial Officers is one that is closely related to the position of part-time judicial officers, and what other employment or appointments such officers might be permitted to undertake. In *R v Lippé*,²⁶⁵ the Supreme Court of Canada considered the question of whether a part-time judge might engage in the practice of law without violating the

²⁶¹ Suzanne Le Mire, ‘A Temporary Fix for a Permanent Problem: The Appointment of Auxiliary Judges in South Australia’ (2016) 19(1) *Legal Ethics* 160.

²⁶² *New South Wales Guidelines for the Appointment of Acting Judicial Officers* (2010) cl 8.

²⁶³ Council of Chief Justices’, above n 224, cl 7.2.4.

²⁶⁴ *Ibid.*

²⁶⁵ *R v Lippé* [1991] 2 SCR 114.

guarantee of a fair hearing before an independent and impartial tribunal.²⁶⁶ The Supreme Court found that certain activities or professions engaged in by part-time judges would be incompatible with their duties as judges, but the Court upheld the particular statutory regime under challenge. Members of the Court referred to the various safeguards that would maintain the perception of impartiality, including the legislative provision designed to minimise conflicts of interest, the judicial oath and the judicial code of ethics.

In recognition that part-time judicial officers may have not only the time to engage in other employment or enterprise, but may need to do so because of financial pressures, jurisdictions across Australia allow, but regulate, the type of work they may undertake. In most jurisdictions a distinction is made between outside employment as a legal practitioner and outside employment or remuneration in another capacity. In Victoria, Queensland, Western Australia, South Australia and the Northern Territory, employment as a legal practitioner is categorically prohibited, while employment in another capacity is permitted with the approval of the Chief Justice, Chief Magistrate, Governor in Council, Governor, or Minister.²⁶⁷ In Tasmania part-time judicial officers are prohibited from engaging in legal practice, and prohibited from undertaking other work where it ‘might reasonably be expected to interfere’ with their ability to perform the functions of the office of Magistrate.²⁶⁸ In the Federal Circuit Court, a part-time judicial officer ‘must not’ engage in work as a legal practitioner, and ‘must not’ engage in other paid work only ‘if that work is incompatible with the holding of a judicial office under Chapter III of the Constitution’.²⁶⁹ New South Wales does not distinguish between outside work as a legal practitioner or otherwise. Schedule 1, Part 1, cl 5(3) of the *Local Court Act 2007* (NSW) prohibits part-time Magistrates from engaging in remunerated and commercial work, including practising as a legal practitioner.

While there is some jurisdictional variation in the existing regimes for the regulation of outside employment by part-time Permanent Judicial Officers, there is a general coherence in the principle of restricting outside employment that may be incompatible with the holding of judicial office. While it may be desirable for greater consistency to be achieved across jurisdictions, that is a matter that lies outside the scope of this Report. Given the current variations, it would appear beneficial for the restrictions on outside employment for Temporary Judicial Officers to reflect the corresponding jurisdictional regulation on outside employment for part-time Permanent Judicial Officers.

5.3.2 *Disciplinary processes*

There is a separate but related question as to whether Temporary Judicial Officers are, or ought to be, subject to the same disciplinary processes as Permanent Judicial Officers. Only New South Wales, Victoria and South Australia have established institutionalised disciplinary processes. In each of these states, the complaints-related jurisdiction extends to judicial officers holding temporary appointments.²⁷⁰

²⁶⁶ *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) s 11(d); *Quebec Charter of Human Rights and Freedoms*, RSQ 1975, c C-12, s 23.

²⁶⁷ See for example, *Supreme Court Act 1986* (Vic) s 104JD; *Constitution Act 1975* (Vic) s 84A; *County Court Act 1958* (Vic) s 13A; *Magistrates’ Court Act 1989* (Vic) s 7(9)-(9B); *Magistrates Act 1991* (Qld) s 41(4); *Magistrates Court Act 2004* (WA) Sched 1, cl 9(5); *Magistrates’ Act 1983* (SA) s 18A(4)(b); *Local Court Act* (NT) s 66(1)(b)-(c).

²⁶⁸ *Magistrates Court Act 1987* (Tas) s 12(a)-(b) (

²⁶⁹ *Federal Circuit Court of Australia*, Schd 1, Pt 2, cl 4(1)-(2)(a)-(b).

²⁷⁰ *Judicial Officers Act 1986* (NSW) s 3(3A); *Judicial Conduct Commissioner Act 2015* (SA) s 4(1); *Judicial Commission of Victoria Act 2016* (Vic) s 3(1).

However, a further examination of these jurisdictions reveals a weakness particularly as they apply to Temporary Judicial Officers. In each jurisdiction, the Commission or Commissioner must dismiss the complaint if the person complained about is no longer a serving judicial officer.²⁷¹ The requirement to dismiss a complaint under these circumstances makes it more difficult for complaints to be made successfully against Temporary Judicial Officers. The data collected for this Report suggests that Temporary Judicial Officers are generally commissioned for a period of less than 12 months; the Australia-wide weighted average was 8.75 months (although this does not take into account the possibility that they may be subsequently re-appointed (see Part 4.9)).

In short, there is a much higher likelihood that a complaint made about the conduct of a Temporary Judicial Officer will be dismissed, not on substantive grounds, but on the ground that the person is no longer a judicial officer, either because they have completed their temporary term and have not been reappointed, or because they have resigned, an option that is easily available since it most likely carries a minimal loss of livelihood.

It could be argued that this result – that the individual who has been the subject of the complaint no longer holds judicial office – is satisfactory. Alternatively, it may be seen as a significant weakness in the disciplinary system as it fails to provide any possibility of resolution of the complaint. While acknowledging that substantive complaints against judicial officers are rare, this possibility could undermine public confidence that the judiciary is subject to appropriate and robust accountability mechanisms. One way to address this would be to extend the jurisdiction of those bodies tasked with receiving and investigating complaints against judicial officers, including Temporary Judicial Officers, to include the conduct of *former* Temporary Judicial Officers, where that conduct was engaged in during the individual's tenure as a judicial officer. This would mean that Temporary Judicial Officers could not avoid the consequences of a disciplinary investigation by resigning. If this change were made, there would have to be concomitant amendments to the powers of any investigating bodies so that they have the authority not only to make a finding of misconduct against a former Temporary Judicial Officer, but also to respond appropriately to that conduct.²⁷²

In those jurisdictions where the question of judicial discipline remains an informal matter that is left to the Head of Jurisdiction, there would appear little basis for distinguishing the treatment of Permanent and Temporary Judicial Officers.

5.3.3 *Provision of education, training and support*

There is a danger, as Kirby J identified in *Forge*, that if Temporary Judicial Officers are not given the same levels of support, for example in relation to staffing and institutional resources, as permanent judges, there will be two 'classes' of judicial officers. This raises the possibility that the performance of Temporary Judicial Officers will be significantly undermined by a lack of institutional support and education.

This outcome will be avoided if Temporary Judicial Officers are offered levels of support, commensurate with their workload. This might include staffing (including

²⁷¹ *Judicial Officers Act 1986* (NSW) ss 20(1)(g) and 26(1)(a); *Judicial Conduct Commissioner Act 2015* (SA) s 17(1)(f); *Judicial Commission of Victoria Act 2016* (Vic) s 16(3)(e).

²⁷² See further Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1, 54.

access to administrative assistants and associates as and when required); personal benefits, including travel and other allowances; and institutional resources, including access to chambers, library support and access to ongoing judicial education programs that are available to Permanent Judicial Officers.

5.3.4 *Competency*

In Part 3.3 it was suggested that the appointment as Temporary Judicial Officers of practitioners with no previous judicial experience may raise concerns as to their competency in terms of their possession of the necessary skills and experience. Since there are certainly legal practitioners who have the required level of competency, the issue needs to be understood as one largely of public perception. Those who have previously served in the judiciary are assumed to be suitable for appointment as Temporary Judicial Officers; those with no judicial experience may not enjoy the same degree of public confidence. As we have discussed above in Part 5.2.1, this concern could be addressed if only persons who have held permanent judicial office are regarded as eligible for appointment as Temporary Judicial Officers.

5.3.5 *Age and capacity*

The question of how to address effectively and fairly concerns that exist in respect of individual judicial capacity is a complex one. Age limits on judicial service were introduced in many places, including all Australian jurisdictions, over the course of the 20th century in part to avoid the problems of declining capacity in judicial officers who held tenure for life. The bluntness of age limits as a solution to issues of incapacity, and also the costs and inadequacies of that strategy, are canvassed in Part 6 of this Report. The use of Temporary Judicial Officers in the states and territories may be understood today as an attempt to offset, or work around, the negative consequences of a statutorily prescribed mandatory judicial retirement age.

However, as noted in Part 3, a tension exists in the appointment, as Temporary Judicial Officers, of individuals who have passed the mandatory judicial retirement age. If judicial careers are brought to an end through the use of age limits because of concerns about declining capacity as judges and magistrates age, then extending judicial service past that point (albeit on a selective basis) may be seen as logically inconsistent. On one level there is no reason why these concerns could not be addressed through the general arrangements in respect of judicial incapacity of Permanent Judicial Officers, such as they are. But it should be acknowledged that there is a higher probability of capacity issues arising in relation to Temporary Judicial Officers because of their age. Moreover, there may be ways to address this problem that are specific to the situation of Temporary Judicial Officers.

There are two principal means to address concerns over the capacity of Temporary Judicial Officers:

Age limits: As discussed in Part 6, the use of age limits to determine mandatory judicial retirement is not unproblematic. However, it is consistent with that practice that age is also used to determine the period in which individuals may be eligible to serve as Temporary Judicial Officers. Reflecting that fact, there are age limits on the holding of a commission as a Temporary Judicial Officer in most, but not all, jurisdictions. The age limits vary from 70 years, more usual in the case of lower courts, through to 78 years in Victoria and the intermediate and superior Queensland courts. An age limit for Temporary Judicial Officers that is proximate to the mandatory judicial retirement age for Permanent Judicial Officers could ameliorate concerns about the capacity of individuals to serve in the former role after their attainment of the latter. By ‘proximate’, we refer to an age limit on Temporary Judicial

Officers that does not exceed an additional five years beyond the current mandatory judicial retirement age for the relevant court.

Capacity Testing: No Australian jurisdiction presently employs compulsory capacity testing for judicial officers. There is a facility in some jurisdictions for judicial officers to be requested to undergo a medical or psychological examination.²⁷³ Where the Head of Jurisdiction has such a power, it is used in response to specific complaints or concerns about an individual rather than being exercised systemically. Our recent survey of judicial attitudes revealed little disquiet about empowering Heads of Jurisdiction or a judicial commission to request judicial officers to undergo capacity testing, with 77% of respondents in agreement, of whom 21% agreed strongly (see Schedule 2B of this Report).

Compulsory capacity testing for all judicial officers is a more complex proposition given legitimate concerns about protecting security of tenure. But a case may be made for treating Temporary Judicial Officers differently by virtue of the fact that their tenure is typically time-limited and that many are appointed after having passed the mandatory judicial retirement age. Imposing a requirement of compulsory capacity testing before individuals are commissioned as a Temporary Judicial Officer, or at some point during their term of appointment (e.g., where this is more than 12 months), or prior to reappointment (should that option remain in place) would seem defensible and likely to allay concerns about their continued capacity to carry out judicial work. However, to retain parity with the treatment of Permanent Judicial Officers, who are free from mandatory testing, any regime of capacity testing for Temporary Judicial Officers could be confined to individuals who are above the mandatory retirement age for Permanent Judicial Officers at the time of their appointment or who will exceed that age during their term of office as a Temporary Judicial Officer.

5.3.6 *Transparent allocation of cases*

The risk that Temporary Judicial Officers may seek or receive executive preferment, either through subsequent renewal or, if applicable, appointment to a permanent position, can be mitigated, at least in part, by ensuring that there is a transparent and even-handed allocation of cases to Temporary Judicial Officers.

The data discussed in Part 4 indicated that the allocation of cases to Temporary Judicial Officers is managed generally in the same way as the allocation of cases to Permanent Judicial Officers. Differences arise in three circumstances. First, the temporary nature of the Temporary Judicial Officer in question is considered when case allocation is being made for longer cases. Second, when the appointment is for the purpose of managing a conflict of interest scenario, this will naturally determine the allocation of the Temporary Judicial Officer to the relevant case. Finally, where the Temporary Judicial Officer is appointed to fill a gap in a particular legal field (e.g., a civil, criminal or commercial list) this will determine their sitting calendar.

²⁷³ See *Judicial Officers Act 1986* (NSW), s 39B(2), enabling the Head of Jurisdiction, at his or her own volition, to initiate such a request from the Judicial Commission of New South Wales. This is distinct from the power the Commission has under s 39D(1) to 'require' the judicial officer to undergo such an examination in response to a formal complaint. Additionally, the ability of a Head of Jurisdiction in the federal court system to request a judicial officer undergo capacity testing would seem contained within the statutory recognition given to their power to 'handle' complaints: *Federal Court of Australia Act 1976* (Cth), s 4; *Family Court of Australia Act 1975* (Cth), s 4(1); *Federal Circuit Court 1999* (Cth), s 5.

All of these are legitimate considerations when case allocation is made to Temporary Judicial Officers and could be used as the basis to guide Heads of Jurisdiction as they make case allocations to these officers.

5.3.7 Remuneration

Protection of the remuneration of judges has been an important facet of judicial independence ever since the *Act of Settlement 1701* provided that a judge's salary must be 'ascertained and established'. In Australia, that protection was enshrined and enhanced in the Commonwealth Constitution for federal judicial officers, such that judicial remuneration must be fixed by the parliament (not the executive), and 'shall not be diminished during a judge's continuance in office'.

However, the most pressing issue for Temporary Judicial Officers is not the diminution of salaries during office but the process by which they are determined. The issue is best highlighted by briefly contrasting the processes for determining the remuneration of Permanent Judicial Officers. Those processes have evolved over time, but the current *federal* model involves an independent tribunal making a determination at least once each year about the salaries of federal judges. The Remuneration Tribunal's determinations have the force of law unless disallowed by either House of Parliament.²⁷⁴

Historically, at the state level, most jurisdictions followed the federal model of establishing an independent tribunal to make periodic determinations about judicial salary. New South Wales, Western Australia and South Australia still adopt this approach. In effect, Tasmania does so too, since it pegs its judicial salaries to the average of corresponding salaries in Western Australia and South Australia. However, Queensland and Victoria now take a different path by fixing the remuneration of state judges by direct reference to the determinations of the federal Remuneration Tribunal.²⁷⁵

The contrast between these arrangements and those for Temporary Judicial Officers can be stark. Part 2.8 described the salary arrangements for Temporary Judicial Officers in some detail. We saw there that in several courts (especially in superior courts) the salary of Temporary Judicial Officers is aligned with that of Permanent Judicial officers – both as to quantum and the process for determining it. But this is not always so, especially at the magistrates' level, which is the level at which most temporary appointments are made (see Part 4.3). In New South Wales, a Temporary Judicial Officer in the Local Court is 'entitled to be paid such remuneration as the Governor considers appropriate'; in the Northern Territory, the Local Court salary is determined by the Administrator or Minister; and in the Tasmanian and ACT Magistrates Courts, remuneration is specified in the person's instrument of appointment – presumably therefore by the government. In South Australia, at all court levels, remuneration of Temporary Judicial Officers is 'determined by the Governor with the concurrence of the Chief Justice'.

Provisions such as these are a 'red flag' for concerns about judicial independence. Nor are they solved by provisions, such as those applying to the Queensland Supreme Court, that allow the Governor to determine the salary of Temporary Judicial Officers (if they were not previously Supreme Court judges), so long as they are paid no less than permanent judges.²⁷⁶ Executive preferment is as much threatened by paying

²⁷⁴ *Remuneration Tribunal Act 1973* (Cth) s 7.

²⁷⁵ Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population' (2011) 39 *Federal Law Review* 33, 40-43.

²⁷⁶ *Judicial Administration (Auxiliary Appointments and Powers) Act 1988* (SA) s 3(6).

higher salaries to temporary judicial officers as it is by allowing the possibility of lower ones.

In our view, the institutional arrangements for protecting judicial independence with respect to the remuneration of judges and magistrates should apply equally to Permanent and Temporary Judicial Officers. This is so not only with respect to the processes for determining salaries but also to their quantum, taking into account the fractional or sessional basis of some temporary appointments. Where states and territories have independent tribunals for determining judicial salaries, those bodies could be given the task of determining commensurate salaries for Temporary Judicial Officers. In jurisdictions that piggyback on the federal provisions there is a complication because there are no temporary judicial salaries at the federal level to incorporate by reference. In this case, consideration could be given to express legislative protections, such as those in Victoria, which mandate equal treatment by statute.²⁷⁷

5.4 Termination and pension

5.4.1 *Security of tenure during appointment*

The review of legislation in Part 2 indicated that once Temporary Judicial Officers are appointed they fulfil their functions on the same terms as Permanent Judicial Officers, except that they are appointed for a set period. In some courts, express provision is made equating the security of tenure of Temporary Judicial Officers and Permanent Judicial Officers. For example, in Victoria it is provided that a reserve judge of the Supreme Court ‘may only be removed from office in the same way and on the same grounds as a Judge of the Court is liable to be removed from office’.²⁷⁸ However, such provisions are not universal.

It is important that Temporary Judicial Officers should, during their term of office, operate with the same security of tenure as Permanent Judicial Officers. That is, they should only be subject to removal for cause ‘on the ground of proved misbehaviour or incapacity’, and according to the same processes as would apply to a Permanent Judicial Officer.²⁷⁹ This important protection of judicial independence is critical to the security of permanent officers and would appear similarly critical to the perception and reality of judicial independence for Temporary Judicial Officers.

5.4.2 *Service contribution to pension scheme*

There are a variety of pension arrangements for Temporary Judicial Officers across the jurisdictions. In considering these, two issues are raised. The first question, addressed in this section, is whether Temporary Judicial Officers should be entitled to *accrue* pension rights during their commission, i.e. whether time spent as a Temporary Judicial Officer should count as service for the purpose of satisfying the minimum period of service needed to qualify for a judicial pension. The second issue, addressed in Part 5.4.3 below, is whether a Temporary Judicial Officer who is a former Permanent Judicial Officer, should be entitled to *receive* a judicial pension while serving as a Temporary Judicial Officer in addition to whatever remuneration is provided to him or her as a Temporary Judicial Officer.

In relation to the former, a variety of approaches are taken (see Part 2.9). In many jurisdictions Temporary Judicial Officers are prevented from accruing pension rights.

²⁷⁷ See e.g. *Judicial Entitlements Act 2015* (Vic) s 6.

²⁷⁸ *Constitution Act 1975* (Vic) s 81A(1A).

²⁷⁹ *Australian Constitution* s 72(ii)

In some jurisdictions service as a Temporary Judicial Officer is explicitly included in the calculation of prior judicial service and in others there is a discretion.

On the one hand, it seems fair to allow a judicial officer to count as service the entire period during which he or she actually serves as a judge or magistrate. In some jurisdictions, such additional service can be substantial—e.g. up to five years in New South Wales. On the other hand, the right to count periods as a Temporary Judicial Officer as service for the purpose of determining pension rights has the potential to invest greater significance in receiving such an appointment. This might lead to perverse incentives, and increase the risk of the person seeking executive preferment. For example, consider a judge who is appointed at age 62 and must retire at age 70. In most jurisdictions a person only becomes eligible for a judicial pension after 10 years of service and reaching age 60. In this instance, the judge at retirement would be two years short of meeting the service requirement. Given the very substantial value of judicial pensions,²⁸⁰ there is a strong financial incentive for the judge to seek further office as a Temporary Judicial Officer. This in turn increases the risk of executive preferment during the judge's final years as a Permanent Judicial Officer.

5.4.3 *Interaction between salary and pension*

The second issue noted above is whether a Temporary Judicial Officer should be able to receive both a judicial pension and a judicial salary while serving in a temporary capacity. This issue only arises where the individual was formerly a Permanent Judicial Officer who has qualified for a judicial pension. In Part 4.8 we saw that, in many courts, an overwhelming majority of Temporary Judicial Officers are indeed former Permanent Judicial Officers. Moreover, the issue is likely to have even greater relevance should only former Permanent Judicial Officers be appointed as Temporary Judicial Officers.

The key policy question that this issue raises is essentially one of public finance, as applied in a federal system of government. If a Temporary Judicial Officer can draw both a pension and a salary, then on the assumption they are paid the equivalent of a full-time Permanent Judicial Officer, they will be remunerated at the rate of 160% of the salary of a Permanent Judicial Officer, since the judicial pension in most jurisdictions is set at 60% of the current salary of a judge holding equivalent office. Of course, some Temporary Judicial Officers may receive less than this, for instance, if the temporary appointment is made on a fractional or sessional basis. Some might see this as 'double dipping'; others might regard it as the legitimate price to be paid for drawing highly skilled legal personnel out of retirement.

As this intimates, the prospect of remuneration at 160% of the judicial salary might act as an incentive to attract former judicial officers back to public service on the bench. This might be considered a necessary part of adopting a system under which Temporary Judicial Officers perform a small but important role. On the other hand, it might be seen as undesirable due to the danger that such generous remuneration for former judicial officers may lead individuals to seek executive preferment during their final years on the bench in the hope of a future temporary appointment.

The alternative is for a Temporary Judicial Officer to have their remuneration (i.e. salary or pension) reduced during their period of service as a Temporary Judicial Officer. Only Queensland and Victoria make express provision for such arrangements, although they do so in different ways, and there are a number of other alternative models. In Queensland, a former judicial officer who serves as a Temporary Judicial Officer in Queensland is paid only the difference between the

²⁸⁰ See Opeskin above n 275.

pension and their salary as a Temporary Judicial Officer (model 1).²⁸¹ This is the same model adopted for auxiliary judges in Western Australia. If the former judicial officer serves as a Temporary Judicial Officer in another jurisdiction, their pension is reduced by the amount of the salary, with some exceptions (model 2).²⁸² In Victoria, former judicial officers appear to lose their pension rights if appointed as a Temporary Judicial Officer in a jurisdiction other than the one in which they are entitled to receive a pension (model 3).²⁸³ A fourth model is that Temporary Judicial Officers might be precluded from drawing a pension while appointed as a Temporary Judicial Officer. Under models 3 and 4, the judicial officer might find themselves financially disadvantaged. This could occur, for example, in circumstances where a Temporary Judicial Officer is being remunerated on a fractional basis, or where the after tax position of a Temporary Judicial Officer receiving 100% of the judicial salary is less advantageous than receiving the pension.

These alternatives are likely to be fiscally equivalent for the jurisdiction if the Temporary Judicial Officer was previously a Permanent Judicial Officer in the same jurisdiction, because both the salary and the pension come from the same Consolidated Revenue. However, this is not the case if there is a cross-jurisdictional appointment, as often happens when a temporary appointment is made to resolve a conflict of interest. Queensland has anticipated that instance by combining models (1) and (2), so the receiving state continues to be obliged to pay the full salary, and the sending state only paying any top-up pension (with some exceptions made under that particular regime). Without such a provision, if both sending state and receiving state adopted model 1, it could result in the sending state continuing to pay the full pension (60%) with the receiving state only paying the top-up salary (up to 40%). If both the sending and receiving state were to adopt model 2, 100% of the salary would be borne by the receiving state, and the sending state may have to pay any top up pension, in the event that the judicial salary is less than the pension entitlement. If both the sending and receiving state were to adopt the Victorian solution (model 3), 100% of the salary of the Temporary Judicial Officer would be borne by the receiving state, and the sending state would be entirely relieved of the liability to pay a pension. Under the fourth model, if both the sending and receiving state were to adopt the model, 100% of the salary of the Temporary Judicial Officer would be borne by the receiving state for the duration of the appointment, which would be relieved of meeting its pension liability for the duration of that appointment. Beyond this, there may be additional financial consequences for the individual, and for the state, which arise from the differing income tax treatment of pensions and salaries, but these are beyond the scope of this Report.

Temporary Judicial Officers, when appointed for legitimate temporary reasons and under appropriate conditions, contribute to the effective functioning of the court system. In order to encourage the participation of eligible individuals, the legislative framework in each jurisdiction should establish a robust and sustainable system for the appointment of Temporary Judicial Officers. That would require not only appropriate safeguards to maintain the independence and integrity of the officers and the system, but also appropriate incentives for high-quality candidates to accept appointments, including that they not be placed in a disadvantageous financial position by accepting a temporary appointment.

²⁸¹ *Judicial Remuneration Act 2007* (Qld) s 5A(1).

²⁸² *Judges (Pensions and Long Leave) Act 1957* (Qld) s 18.

²⁸³ *Constitution Act 1975* (Vic) s 83(4); *Supreme Court Act 1986* (Vic) s 104A(7); *County Court Act 1958* (Vic) s 13(3A); *Magistrates' Court Act 1989* (Vic) s 10A(2).

6. A Common Retirement Age

6.1 Overview of Existing Arrangements

6.1.1 Mandatory judicial retirement

In all Australian jurisdictions, judicial officers are subject to a mandatory retirement age. This is constitutionally entrenched for members of the federal judiciary following the 1977 amendment by referendum of s 72 of the Commonwealth Constitution.²⁸⁴ The introduction of mandatory retirement from judicial office at the Commonwealth level followed the earlier imposition of age limits upon the length of judicial service in the Supreme Courts of all states – with New South Wales being the first to do so in 1918.²⁸⁵ Provisions concerning judicial tenure are not constitutionally entrenched in the states and territories, with the exception of New South Wales. While the validity of the entrenchment in the New South Wales Constitution of a Part concerning judicial independence is questionable,²⁸⁶ for practical purposes the situation in that state is not materially different from other states. This is because s 55(1) of the *Constitution Act 1902* (NSW) preserves legislative flexibility by allowing ‘the fixing or a change of age at which all judicial officers, or all judicial officers of a court, are required to retire by legislation’.²⁸⁷

There are numerous arguments for and against the use of judicial age limits. The 1976 report of the Senate Standing Committee on Constitutional and Legal Affairs, which preceded the constitutional amendment of s 72 of the Commonwealth Constitution, identified four reasons for the introduction of mandatory judicial retirement:

- a) It is necessary to maintain vigorous and dynamic courts, which require the input of new and younger judges who will bring to the bench new ideas and fresh social attitudes...
- b) The relatively high average age of federal judges does, to some extent, limit the opportunity for able legal practitioners to serve on the bench while at the peak of their professional abilities and before suffering the limitations of declining health.
- c) In Australia and to a growing degree in comparable countries, there is an acceptance of the need for a compulsory retiring age for judges. In most Australian States and the mainland territories this age is 70 years.
- d) The introduction of a compulsory retiring age may result in the automatic removal of judges still capable of some years of service, but it will avoid the unfortunate necessity of removing a judge who, by reasons of declining health, ought not to continue in office, but who is unwilling to resign.²⁸⁸

²⁸⁴ Before that amendment, section 72 had been interpreted by the High Court as providing for life tenure: *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

²⁸⁵ *Judges Retirement Act 1918* (NSW). For an account of the enactment as motivated by ‘a variety of political imperatives and personal agendas and ... the product of a unique time’ see Tony Cuneen, ‘A Creature of Momentary Panic’ (Winter, 2010) *Bar News* 74, 83.

²⁸⁶ See Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 311, 736-37.

²⁸⁷ Such a change does not apply to those already holding office without their consent: *Constitution Act 1902* (NSW), s 55(2).

²⁸⁸ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Report on Retiring Age for Commonwealth Judges* (1976) 11. See also Opeskin, above n 168, 639-40. Opeskin explains that ‘the issue became a live one from the mid-1970s as

In a recent and extensive examination of the question, Dr Alysia Blackham identified a fifth consideration voiced in parliamentary debates on the constitutional amendment bill. This was that the skills of judicial officers forced into retirement would then be available for use in other contexts through the employment of former judges in different roles, including as Royal Commissioners.²⁸⁹

Dr Blackham subjected all five arguments, and their assumptions around age, capacity and community engagement, to a critical analysis before concluding that judicial age limits are ‘an arbitrary, discriminatory and outdated feature of Australian constitutional law’.²⁹⁰ The change in community attitudes towards ageing since the mid-1970s has indeed been significant, resulting in the abolition of mandatory retirement for most forms of employment. In its 2013 review into Commonwealth legal barriers to the participation of older persons in the workforce, the Australian Law Reform Commission stated its general conclusion that:

The imposition of compulsory retirement fails to account for the differing capacities of individuals at older ages, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.²⁹¹

Further, Professor Brian Opeskin has acknowledged the ‘compelling argument ... that judges as individuals are the bearers of rights and are entitled to be free from age discrimination’.²⁹²

The case against mandatory judicial retirement also emphasises the premature loss of judicial talent.²⁹³ In respect of the federal courts, that loss is, of course, irretrievable due to the unconstitutionality of enabling retired judicial officers to contribute further in the guise Temporary Judicial Officers. But at the state and territory level, it is obvious that a central rationale for the use of Temporary Judicial Officers is to ‘ameliorate the consequence of forced departure’.²⁹⁴ As the discussion in Part 3 of this Report makes clear, the constitutional capacity of the courts in those jurisdictions to retain the services of experienced and capable judicial officers in this way is subject to a range of concerns. Further, it is possible to argue that the widespread use of such schemes should not be accepted simply as an effective work around, extending the service of judicial officers, but as confirmation that use of an age limit to force judicial officers off the bench should be abandoned.²⁹⁵

Ultimately, for reasons of both principle and pragmatism, the use of age limits on judicial tenure in Australia appears secure. In 2009, reporting on its inquiry into Australia’s Judicial System and the Role of Judges, the Senate Legal and Constitutional Affairs Committee said that all four of the justifications given by its

the Australian parliament began to create new federal courts, invest them with jurisdiction and appoint judges to hear and determine the new matters’ (at 639).

²⁸⁹ Blackham, above n 170, 771.

²⁹⁰ Ibid 784. See also Australian Law Reform Commission (ALRC), *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013) 100.

²⁹¹ ALRC, above n 290, 98.

²⁹² Opeskin, above n 168, 635.

²⁹³ See Blackham, above n 170, 772-73; Louis Blom-Cooper, ‘The Age of Judicial Responsibility: The Retirement and Resignation of Appellate Court Judges’ in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, 2012) 339, 340-41.

²⁹⁴ Opeskin, above n 168, 653.

²⁹⁵ *Forge v ASIC* (2006) CLR 45, 132 (Kirby J, dissenting).

parliamentary ancestor in its 1976 report ‘still have relevance today’.²⁹⁶ While the Committee acknowledged that the arguments against the use of an age limit were ‘real considerations’, it reported that ‘no major concern’ was raised before it about the existence of a compulsory retirement age, which was generally viewed as ‘appropriate’.²⁹⁷

Unease over the ageist discrimination that inheres in mandatory judicial retirement is inevitably offset by competing considerations. This explains the decision of the Australian Law Reform Commission to recommend review by an independent inquiry of the ‘complexities associated with removing compulsory retirement for judicial officers such as Constitutional requirements and public policy reasons for compulsory retirement’.²⁹⁸ Chief amongst those issues is how to address the greater likelihood of cases of judicial incapacity under a system of life tenure while maintaining the independence of individual members of the judiciary from the political branches of government. While it is correct that ‘incapacity may occur at any age, and cannot always be addressed via mandatory retirement’, it is obviously a more common phenomenon among older judges.²⁹⁹ Opeskin has stated that ‘contemporary experience of increasing longevity and concomitant exposure to mental frailty in old age’ suggests that life tenure provides an ‘elevated degree of judicial independence [that] comes at too high a cost’.³⁰⁰ In 2012 the United Kingdom’s House of Lords Select Committee on the Constitution, acknowledged that ‘age is undoubtedly a blunt tool by which to assess whether someone is no longer fully capable of performing their job’ but was resigned to its use because ‘the principle of judicial independence necessarily makes it very difficult to force a judge to retire on the grounds of declining capacity to act’.³⁰¹

By contrast, even advocates for the reinstatement of judicial life tenure concede that it ‘is axiomatic that a retiring age for judges does not violate the fundamental principle of either their independence or their impartiality’.³⁰² So much was affirmed by Gleeson CJ in *Forge v ASIC* when he declared that the High Court did not become less independent as consequence of the change from life tenure to an age limit on federal judicial service in 1977: ‘Nothing better illustrates the room for legitimate choice that exists in connection with arrangements affecting judicial independence than the removal ... of the requirement of life tenure for federal judges’.³⁰³

Mandatory retirement ages, as a limit on judicial tenure, are likely to remain the practice in all Australian jurisdictions for the foreseeable future. They have no negative effect upon the principle of judicial independence, they facilitate generational change on the courts, and they reduce the need to resort to formal procedures to secure the removal of a judicial officer who has become incapacitated.

6.1.2 *The age limit upon mandatory judicial retirement*

In imposing an age limit on the judicial tenure of High Court judges, the amendment of s 72 of the Commonwealth Constitution entrenched mandatory retirement upon the judicial officer reaching 70 years of age. The maximum age of the judicial officers

²⁹⁶ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (2009) 32 [4.8].

²⁹⁷ Ibid 33 [4.12].

²⁹⁸ ALRC, above n 290, 101.

²⁹⁹ Blackham, above n 170, 763.

³⁰⁰ Opeskin, above n 168, 662.

³⁰¹ House of Lords Select Committee on the Constitution, Parliament of the United Kingdom, *Judicial Appointments* (2012) 59 [191].

³⁰² Blom-Cooper, above n 293, 339.

³⁰³ *Forge v ASIC* (2006) 228 CLR 45, 66 [37] (Gleeson CJ).

in other federal courts created by the Commonwealth Parliament was also capped at 70 years, but s 72 expressly empowers the Parliament to prescribe a lower maximum age for those judicial officers. At present the mandatory retirement age for all members of the federal judiciary is 70 years.

Seventy years is also the age limit for state and territory judicial officers with just a few exceptions. The mandatory retirement age in New South Wales and Tasmania for all judicial officers is set two years higher at age 72.³⁰⁴ The mandatory retirement age for Magistrates in Western Australia and the ACT is 65 years.³⁰⁵

The evidence received by the 2009 Senate Committee inquiry into the Australian Judiciary, as well as a survey of much of the literature in the field, indicates that the use of an age limit to judicial tenure is not especially contentious, but that the age at which such limits are set is the source of some debate and disquiet. Many of the concerns that have been already noted about mandatory retirement generally are just as applicable to a negative assessment of the practical operation of a specific age limit. The foremost concern in this respect is that judicial officers at the height of their powers and possessed of great experience are forced into retirement too early.³⁰⁶ Upon reaching 70 years, a judge is entirely lost to the federal court system. At the state and territory level, judicial expertise may be retained by the making of an appointment to the ranks of Temporary Judicial Officers, but this enlivens the various concerns and issues around the use of such appointments that are canvassed in Part 3 of this Report.

The 2009 Senate Committee Inquiry made the following observation on the evidence it received on this question:

As to an appropriate retirement age, divergent views were expressed, but the range of difference was small. No submitters argued that the federal retirement age is too high. However, some submitters and witnesses sought to persuade the committee that the retirement age is too low.³⁰⁷

The Committee voiced sympathy with the latter submissions, observing ‘that there are strong arguments for increasing the compulsory age of retirement to at least 72 and possibly to 75’.³⁰⁸ In discussion of the question in the Committee’s report, those arguments were exclusively focused upon the premature loss of talent and experience. The Committee did not consider the economic arguments about potentially retaining the services of judicial officers for a longer period before they retire and start receiving a pension.³⁰⁹ It did aver to the fact that the continued suitability of fixing mandatory retirement for the federal judiciary at 70 years might be further strained by ‘increases in life expectancy and advances in technology and support’ but did not substantially engage with this point.³¹⁰ Yet the increased

³⁰⁴ NSW: *Judicial Officers Act 1986* (NSW) s 44(1), (3); Tas: *Supreme Court Act 1887* (Tas) s 6A(1); *Magistrates Court Act 1987* (Tas) s 9(4)(a). It should be noted that transitional provisions preserving a judicial age limit of 72 for judicial officers in the Supreme Court and County Court of Victoria are now spent and all presently serving judicial officers in that State must retire at 70 years.

³⁰⁵ WA: *Magistrates Court Act 2004* (WA) sch 1 cl 11(1)(a); ACT: *Magistrates Court Act 1930* (ACT) s 7D.

³⁰⁶ Arthur Moses, ‘Increase the Retirement Age for Federal Judges’ (Winter, 2010) *Bar News* 20; Alexander Street SC in Senate Legal and Constitutional Affairs References Committee, above n 296, 33-34 [4.13].

³⁰⁷ Senate Legal and Constitutional Affairs References Committee, above n 296, 33 [4.13].

³⁰⁸ *Ibid* 36 [4.21].

³⁰⁹ See Opeskin, above n 275.

³¹⁰ Senate Legal and Constitutional Affairs References Committee, above n 296, 36 [4.24].

longevity of Australians' lives is undoubtedly relevant to a contemporary appraisal of all the justifications that underlie use of a mandatory retirement age and the question of what age limit is appropriate. As Opeskin has explained:

When the age limit for federal judges was adopted in Australia in 1977, male life expectancy at birth was 69.8 years, almost identical to the age limit of 70 years. By 2009, when the Senate recommended increasing the age limit to 72 or 75 years, male life expectancy had risen to 79.5 years; 14 per cent higher than the mandatory retirement age. How relevant will the Constitution be in 2061, when male life expectancy is projected to reach 92.1 years; 32 per cent higher than the current age limit?³¹¹

Aside from the extent to which it arises in the discussion in Part 6.2 below about a nationally consistent mandatory retirement age, the question of whether the age limits currently placed on judicial service should be increased is a question outside the scope of this Report.³¹² It is sufficient to note that given the costs involved in amending the age limit for the federal judiciary in s 72 of the Commonwealth Constitution, the Senate Committee determined that the matter was not a priority warranting immediate action. But the Committee did recommend 'that at the next Commonwealth referendum s 72 of the Constitution should be amended in relation to the compulsory retirement age for judges to provide that federal judicial officers are appointed until an age fixed by Parliament'.³¹³ Granting the Australian Parliament the flexibility to reset the age limit that terminates federal judicial service would amount to a reduction in the strength of judicial tenure that currently exists in s 72 of the Commonwealth Constitution. But, assuming that any such legislative changes would only operate prospectively and could not affect serving judicial officers,³¹⁴ or that a constitutional amendment would itself include such a limitation (as occurred with the 1977 amendment to s 72), it is difficult to see it as commensurately weakening judicial independence. It would appear to be within what Gleeson CJ identified as 'the room for legitimate choice that exists in connection with arrangements affecting judicial independence'.³¹⁵

The practical significance of such an amendment would be to enable responsiveness to shifting community attitudes around ageing that is essentially not possible when the specific age limit on judicial tenure is constitutionally entrenched. Placing the power of the Commonwealth Parliament on an equal footing with that of its state and territory counterparts in this regard would also assist in the achievement of a nationally consistent mandatory judicial retirement age.

6.2 A Case for Uniformity?

In recent years there have been two significant calls for 'national consistency' in the age limits applied to judicial tenure – from the Senate Legal and Constitution Committee in its 2009 report *Australia's Judicial System and the Role of Judges*, and

³¹¹ Opeskin, above n 168, 660.

³¹² Additionally, any discussion of related issues such as regular capacity testing for judicial officers is also outside the scope of this Report.

³¹³ Senate Legal and Constitutional Affairs References Committee, above n 296, 37 [4.28]; Recommendation 6.

³¹⁴ Ibid, 36-37 [4.26]. This would be consistent with the provision in s 72 of the Commonwealth Constitution that: 'The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.'

³¹⁵ *Forge v ASIC* (2006) 228 CLR 45, 66 (Gleeson CJ).

then the ALRC in its 2013 report *Access All Ages*.³¹⁶ In both instances, the focus appears to have been on a simple geographical consistency through a single age of judicial retirement for all judicial officers across the country. In neither report was there explicit engagement with the issue of different age limits applied to judicial officers depending on their place in the court hierarchy within a jurisdiction, beyond the extent to which that evidenced a general lack of national uniformity. As is explained below, a commitment to ‘national consistency’ across the Commonwealth, states and territories is not necessarily incompatible with the application of a multi-tiered approach to mandatory judicial retirement by reference to court level.

This Part examines the arguments for and against uniformity of tenure both within the court system of a single jurisdiction and in a geographic sense across the Federation. In doing so, it recognises the statutory flexibility over judicial retirement ages pertaining in the states and territories.³¹⁷ This stands in contrast to the entrenchment in s 72 of the Commonwealth Constitution of 70 years as the mandatory retirement age for Justices of the High Court of Australia and the use of that same age as the maximum for judicial officers of other federal courts. Until such time as the proposed constitutional amendment that was favoured by the 2009 Senate Committee is put to the Australian people at a referendum, it is the Commonwealth arrangements around which any drive for national consistency as to a maximum age must be inevitably framed.

6.2.1 *Between courts within a jurisdiction*

At present, Western Australia and the ACT are the only Australian jurisdictions that distinguish between courts in the prescription of age limits to judicial service. The Magistrates in both jurisdictions are required to retire upon attaining 65 years of age.³¹⁸ They may then serve as Temporary Judicial Officers, if so appointed, until the age of 70.

It should be noted at the outset that the use of 65 as a mandatory retirement age for the magistracy in these two jurisdictions is not a recent step, taken on the basis of a contemporary appraisal of the value of making such a distinction. Rather it is a legacy from a much earlier time when the introduction of a retirement age of 65 was consistent with the practice in other states. What is more, mandating 65 as the age for retirement was consistent with the fact that historically ‘Australian magistrates were part of a public service department’ and, as such, ‘they were subject to public service terms and conditions’.³¹⁹ The thoroughly judicial character of the modern magistracy has resulted in most jurisdictions bringing the tenure conditions of their Magistrates into line with that of their other judicial officers. The mandatory retirement age of the Magistrates in Western Australia and the ACT has yet to receive similar treatment.

³¹⁶ Senate Legal and Constitutional Affairs References Committee, above n 296, 37 [4.27] Recommendation 5; ALRC, above n 290, 101.

³¹⁷ *McCawley v The King* [1920] AC 691; *Forge v ASIC* (2006) 228 CLR 45. See Rebecca Ananian-Welsh and George Williams, ‘Judicial Independence from the Executive: A First-Principles Review of the Australian Cases’ (2015) 40 *Monash University Law Review* 594, 604-06.

³¹⁸ In Western Australia, the retirement age of 65 was introduced by the *Stipendiary Magistrates Act 1957* (WA), s 5(5) with the present day equivalent found in *Magistrates Court Act 2004* (WA), Sch 1, cl 11(1)(a). For the ACT see *Magistrates Court Act 1930* (ACT) s 7D.

³¹⁹ Kathy Mack and Sharon Anleu Roach, ‘The Security of Tenure of Australian Magistrates’ (2006) 30 *Melbourne University Law Review* 370, 375.

Understanding the differentiation as essentially historical does not mean that a younger mandatory retirement age for the judicial officers of lower courts may not be justified on particular grounds. These tend to focus on the distinct requirements of trial adjudication in contrast to the exercise of appellate jurisdiction. The 2012 House of Lords Select Committee thought that ‘the risk of older judges being viewed as out of touch applies to a greater degree to those having to determine the facts of a case’.³²⁰ The Committee also thought a later retirement age for appellate judges was justified by the fact that they sit in panels and are afforded the time to think about and decide cases in consultation with colleagues, whereas trial judges required ‘a greater degree of “quick and accurate recall”’.³²¹ In the same vein, Opeskin has suggested that the ‘heavy daily caseloads’ expected of the magistracy ‘might be thought too onerous for ageing judicial officers’.³²²

Sir Louis Blom-Cooper QC has reflected on why age limits, to the extent these are accepted as a blunt indicia of capacity, may be justifiably differentiated in respect of trial and appellate judges by contrasting the physical requirements of the two jobs:

Physical and mental decline is highly variable among people in later life. But impairment of hearing – even in middle age – is a common occurrence; even the minor problem of tinnitus, the sensation of ringing or buzzing in the ears, can be distractive in the listener. Also the tiredness and weariness associated with lengthy periods in court can produce torpor and inattention to witness evidence. These are the prime factors that are engaged in the process of the decision-maker who must hear all the evidence from witnesses and assess its weight. The essential orality of the English legal system calls for adjudication of testimony, given in the witness-box, examined in chief by counsel for one party and cross-examined by the opponent. To put it shortly, there is sound reason why these common afflictions of the human being should lead to compulsory retirement at an age commensurate with scientific (medical) knowledge of the ageing human condition. But these are afflictions that are infinitely more pertinent to the trial judge than to his appellate counterpart. Most of the work of an appellate judge is reading (often vast amounts of documentary material) and writing judgments. The hearings in the courtroom do require audio-reception, but only from counsel addressing the court. There is no fact-finding, which is the essence of the trial process. The facts of a litigated dispute, as assessed after evaluating the credibility and reliability of witnesses (in addition to documentary material) are already found by the trial judge. The appellate judge may review (or revise) the facts, but that is done by testing the written material. Thus while the ability to hear and see the witnesses is crucial to fact-finding, no such prerequisite applies in appellate proceedings.³²³

The view that different retirement ages may be justified by reference to the likelihood of declining capacities that are of particular importance to one form of judicial work over another is interesting, but contemporary standards and anti-discrimination law would suggest the need for a more sophisticated approach. In particular, the availability of possible workplace adjustments tailored to the individual’s circumstances and allowing them to continue in service should be given direct consideration.

There are other more systemic and principled reasons for the earlier retirement of judicial officers serving lower courts, relative to the limits upon tenure for the senior ranks of the judiciary. Traditionally judicial officers serving in the lower courts,

³²⁰ House of Lords Select Committee on the Constitution, above n 301, 59 [194].

³²¹ Ibid.

³²² Opeskin, above n 168, 661.

³²³ Blom-Cooper, above n 293, 344-45.

particularly as Magistrates, have tended to be appointed at a younger age and so may conceivably stay in their post for two or three decades. The House of Lords Select Committee was concerned that their delayed retirement could limit ‘opportunities for talented younger, and probably more diverse, lawyers to take their places’.³²⁴ Appellate judges could not be said to obstruct the career paths of younger lawyers to the same degree – if they reach the senior ranks by promotion from a lower court they would be opening up an entry-level space for another; they occupy fewer positions as a proportion of the total judiciary; and are appointed later and thus for a shorter period of time. While a younger age limit on tenure should facilitate the lower levels of the judiciary having a more dynamic and possibly diverse composition, this was not viewed as especially desirable in the senior judiciary ‘where proven judicial quality and experience are at a premium in the development of the law’.³²⁵ For these reasons, the Select Committee did not agree that there should be a uniform retirement age across the United Kingdom judiciary.

The use of different age limits for the judges of different courts in a jurisdiction may be motivated by recognition of the demands placed upon those carrying out a particular form of judicial service. Upon the Commonwealth Parliament acquiring the power to set an age limit for judicial officers on federal courts lower than the maximum of 70 years prescribed by the amendment to s 72 in 1977, the mandatory retirement age for judicial officers serving in the Family Court of Australia was set at 65 years.³²⁶ This was in contrast to a retirement age of 70 for the rest of the federal judiciary – a distinction maintained until 1991 when the Family Court judges were brought in line with their colleagues.³²⁷ The rationale for the difference was the ‘demanding and arduous’ nature of family law disputes and the importance of the judges working in the jurisdiction to ‘keep abreast of current social values and attitudes’.³²⁸ Opeskin has explained the later raising of the retirement age for Family Court justices as resulting from a desire to improve the status of the court in the eyes of the public by treating its judicial officers alike with judges of the Federal Court, which enjoyed an outstanding reputation.³²⁹

There are thus two discrete aspects to the issue of different mandatory retirement ages being applied to judicial officers serving in different courts within the same jurisdiction. To the extent that use of a different age limit is based not on a court’s position in the hierarchy, but on the subject matter of that court’s specialist jurisdiction, then this may create problems by placing the tenure of judicial officers who are formally equivalent to each other on a different footing. The initial requirement that the judicial officers of the Family Court retire earlier than their colleagues in the Federal Court of Australia may have been well intended, but with hindsight we may observe that it is undesirable for the members of superior courts of record in the same jurisdiction to be subject to different arrangements as to tenure.³³⁰

It appears less problematic to apply different age limits to the mandatory retirement of judicial officers who are serving at different court levels in the same jurisdiction.

³²⁴ House of Lords Select Committee on the Constitution, above n 301, 59 [193]. On the diversity argument, see Blackham, above n 170, 757-758 for a contrary view.

³²⁵ House of Lords Select Committee on the Constitution, above n 301, 60 [196].

³²⁶ *Family Law Amendment Act 1977* (Cth) s 4.

³²⁷ *Family Law Amendment Act (No 2) 1991* (Cth) s 3.

³²⁸ Commonwealth, *Parliamentary Debates*, Senate, 18 August 1977, 147 (Peter Durack).

³²⁹ Opeskin, above n 168, 661.

³³⁰ For a positive example, we note that upon its establishment the judges of the New South Wales Land and Environment Court were granted the same tenure as the judges of that State’s Supreme Court: *Land and Environment Court Act 1979* (NSW), s 9(3) (now repealed).

Where the differentiation aims to respond to the distinctive load and nature of the work of the respective courts, then this may provide reasonable grounds to resist calls for uniformity. Those grounds focus upon the benefits of a younger judiciary determining matters of fact that may depend on prevailing social standards or the existence of new and emerging technologies, working more quickly and responsively to the large caseloads of lower courts, and having a reduced likelihood of physical impairments that would diminish the judicial capacity necessary to the conduct of effective and fair trials. A lower retirement age will also open up opportunities for younger talented members of the legal profession, and in so doing may present the possibility of enhancing the diversity of the judiciary.

These arguments are not without merit. It is not necessary for present purposes to determine whether they amount to a positive case for differentiating the age limits imposed on judicial service in different courts of the one jurisdiction. In any case, it may be simply too late for that. While only two Australian jurisdictions presently apply a younger age limit of 65 years to the tenure of Magistrates, at the start of this decade there were five that did so. In 2010, Queensland, followed by South Australia and the Northern Territory in 2013, raised the mandatory retirement age of their Magistrates to 70 years.³³¹

Despite a lack of any express acknowledgement accompanying these legislative changes, it seems significant that in all three jurisdictions the raising of the age limit has effectively closed the gap between the retirement age and the age up to which retired Magistrates might be retained as Temporary Judicial Officers, which remains capped at 70 years. The appointment of Temporary Judicial Officers in those courts is still possible but with judicial officers no longer forced to retire at age 65, we might presume that reliance on such appointments has reduced. Of course this need not be the case if a substantial number of Magistrates choose to retire before reaching the mandatory age limit and then return to serve as Temporary Judicial Officers. There is some evidence that this is occurring in Figures 4.4.2 and 4.7.2 of this Report. These indicate, respectively, the ratio of Temporary Judicial Officers to Permanent Judicial Officers in the Magistrates Courts and the average age of Temporary Judicial Officers. Jurisdictions that have closed the gap between the mandatory retirement age and the age limit of Temporary Judicial Officers evidently do still find persons to appoint in the latter capacity.

While the move clearly seems to be away from the application of a two-tier or multi-tier set of age limits to judicial tenure within a jurisdiction, reasonable arguments may be mounted to justify a continued absence of uniformity in this respect. Significantly, if a two-tier or multi-tier approach were thought desirable, it need not require a reduction in the mandatory retirement age in lower courts, say to 65 years. Instead, it could be achieved by maintaining the present mandatory retirement age in lower courts, say at 70 or 72 years, while increasing the mandatory retirement age in superior courts to 72 or 75.

6.2.2 *Between jurisdictions*

As already noted, one of the justifications for the constitutional amendment of s 72 of the Commonwealth Constitution was so that the tenure of Commonwealth judicial officers would align with that of their state and territory counterparts. This extended to the selection of 70 years as the age limit for this purpose, based on prevailing state

³³¹ *Justice and Other Legislation Amendment Act 2010* (Qld), cl 148; *Magistrates (Miscellaneous) Amendment Act 2013* (SA), cl 10; *Justice Legislation Amendment (Age of Retirement) Act 2013* (NT) s 8.

practice. In short, ‘the desire for uniformity in state and federal practice was conspicuous’.³³²

Yet national consistency on the age limit for judicial service has proved elusive. Leaving to one side the continued use of a lower age limit in respect of the magistracy in Western Australia and the ACT, since the 1977 referendum both New South Wales and Tasmania have increased the age of mandatory retirement for all their judicial officers from 70 to 72 years.³³³ This is a path down which the Commonwealth is constitutionally prevented from going, although the other states and territories face no similar obstacle.

The significance of the constitutional constraint placed upon the Commonwealth by s 72 of the Commonwealth Constitution is that any completely nationally consistent age limit, applying to every judge from the High Court down, must necessarily, at the present time, be set at 70 years of age. Excluding the Justices of the High Court in an attempt to work around that limitation would not materially assist any effort to otherwise achieve national consistency on mandatory retirement. As s 72 stipulates that 70 years is the maximum age for judicial service in the other federal courts, then only that age or younger could be selected as the limit for a uniform scheme.³³⁴ But since the age of 70, the most common age limit across the country, is itself now seen by many as too young, it is difficult to imagine that a move toward a nationally consistent age limit would see a lower age of mandatory retirement.

In other words, absent constitutional amendment, a conversation about a nationally consistent judicial retirement age must take 70 years as the limiting age. Given that the Senate Committee did not urge a federal referendum to alter s 72 as a matter of priority, so much appears to have been implicit when it recommended ‘that all jurisdictions set a nationally consistent compulsory retirement age for judicial officers and encourages each jurisdiction to implement it within the next 4 years’.³³⁵ There was a certain irony in this recommendation in light of the sympathy expressed by the Senate Committee to those submissions it received which said the Commonwealth age limit of 70 years is too young.

The achievement of a nationally consistent mandatory retirement age would thus require New South Wales and Tasmania to lower their age limit from 72 back to 70, and for Western Australia and the ACT to increase their age limit for magistrates from 65 to 70. The Senate Committee’s report does not provide them with any clear and attractive reason for doing so. Additionally, under the current arrangements in New South Wales and Tasmania (which may be distinguished from those in Victoria and Queensland in this regard), employment as a Temporary Judicial Officer does not suspend payment of a judicial pension – the Temporary Judicial Officer receives both. Accordingly, there is an obvious economic disincentive to New South Wales and Tasmania in having judicial officers move from the payroll to the pension two years earlier, whereupon their services may be retained by additionally paying them to sit as Temporary Judicial Officers.

In 2008, the New South Wales Attorney-General, John Hatzistergos, successfully resisted the efforts of the Standing Committee of Attorneys-General to settle upon a

³³² Opeskin, above n 168, 640.

³³³ *Judicial Officers Act 1986* (NSW), s 44 (relevantly amended in 1990); *Statutory Officers (Age for Retirement) Act 2005* (Tas) Sch 1.

³³⁴ While there is no reason the States and Territories could not agree to co-ordinate a higher age limit on mandatory judicial retirement, without the federal judiciary this could hardly be described as a ‘nationally consistent’ approach.

³³⁵ Senate Legal and Constitutional Affairs References Committee, above n 296, 37 [4.27] Recommendation 5

nationally consistent age limit to judicial service, including that performed by Temporary Judicial Officers. In addition to revealing that he actually did not ‘accept the view that you reach a use-by date in the law’, Hatzistergos said he would not ‘go along with uniformity just for the sake of it’.³³⁶

The calls for a ‘nationally consistent’ mandatory judicial retirement age are rarely clear on the rationale behind that objective. The recommendation to this end in the 2009 Senate Committee report was not the result of any dedicated discussion of the issue beyond a single sentence that said ‘in determining an appropriate compulsory retirement age, the committee encourages jurisdictions to consider the merit of achieving national consistency’.³³⁷ The ALRC raised national consistency as the ‘minimum’ issue to be considered by the independent inquiry that it recommended be established to look at ‘alternatives to compulsory retirement ages’.³³⁸ It was clear that the use of age limits of any kind was its central concern.

The submission made by the South Australian government to that ALRC inquiry may supply the best answer to why a uniform mandatory judicial retirement age is warranted. After noting the various ‘discrepancies’ in age limits across the country, it also called for national consistency saying, ‘Although these legislative provisions only affect a small number of employees, they may have important implications in symbolically representing the capacity of people to work competently until they are of a certain age’.³³⁹ Given that this sentence followed an apparent acceptance of mandatory judicial retirement, it may be taken as a more precise concern that a lack of national consistency may send mixed messages to the public about the age at which judicial officers have the necessary capacity. To put the matter crudely, if federal judicial officers and those serving in the majority of state and territory jurisdictions must retire upon reaching 70 years of age, what is the implication of this for the public’s perception as to the capacity of those other judges allowed to remain in office until reaching some higher age?

The use of Temporary Judicial Officers in many jurisdictions means that there is far from a sharp picture conveyed about the cap on judicial service, since some of those officers are permitted to serve until age 78 or beyond (see Part 2.6). Even if we take the age limits on Temporary Judicial Officers into account, the lack of consistency persists. It is arguable that public confidence in the courts would be better served by a uniform ceiling on any judicial appointment rather than a situation where cases may be heard in one jurisdiction by a judicial officer who would not, by reason of his or her age, be able to sit in another. But there are dangers in assuming too much as essential to public confidence in the courts. Without a clearer sense of the value of a nationally consistent mandatory judicial retirement age, reluctance by a state or territory to abandon its existing age limit to achieve uniformity is understandable. This is especially so in light of the readily appreciable benefits of extending judicial tenure beyond the constitutionally entrenched maximum of 70 years for the federal judiciary and yet it is to that limit that any project of national consistency is inevitably tethered absent constitutional change.

Until such time as s 72 of the Commonwealth Constitution is amended either to stipulate a higher age limit upon the tenure of the federal judiciary or provide

³³⁶ Michael Pelly, ‘State goes it alone on judge age limit’, *The Australian* (24 November 2008).

³³⁷ Senate Legal and Constitutional Affairs References Committee, above n 296, 36 [4.24].

³³⁸ ALRC, above n 290, 101.

³³⁹ Government of South Australia, Submission No 30 to Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws* (Issue Paper 41) (June 2012) 16.

legislative flexibility over the identification of that limit, the desire for a nationally consistent mandatory judicial retirement age is likely to be unfulfilled.

It should be briefly noted that the application of differentiated age limits to judicial service across the court levels within a jurisdiction, discussed in the preceding section, is not inherently incompatible with the achievement of national consistency. A two-tier system of judicial age limits might be applied uniformly across all jurisdictions. This is within the legislative capacity of all jurisdictions since the Commonwealth Parliament may impose an age limit that is less than 70 years for federal courts other than the High Court of Australia. Thus there is no legislative impediment to the national adoption of the model that exists currently in Western Australia and the ACT by mandating the retirement of Magistrates at 65 years of age.³⁴⁰

The political challenges of achieving national consistency must presumably increase if all jurisdictions are required to agree on more than a single mandatory retirement age for their respective courts. But by the same token, should the two jurisdictions currently applying two-tiered age limits on judicial tenure prove determined to retain that approach, then a strong desire for national uniformity could be met by the Commonwealth, the other states and the Northern Territory deciding to do the same. As the earlier discussion illustrated there are reasonable justifications for two-tiered age limits within a jurisdiction. However, the fact that three jurisdictions have only recently discarded the use of a lower age limit for determining the tenure of their Magistrates and brought these judicial officers into alignment with their senior judiciary, as well as all federal judicial officers, suggests that a nationally consistent two-tier system is an unlikely development for the foreseeable future.

Finally, the existence of broader arguments against national uniformity of any kind in the use of judicial age limits should be acknowledged. These include a repetition of the case against mandatory judicial retirement generally on the basis that it is age discrimination and a crude means of addressing concerns about judicial capacity that results in a premature loss of talent in many individual cases. Additionally, the value of experimentation and diversity of approaches is not to be lightly set aside, and is often claimed to be one of the great strengths of a federal system of government.

6.3 Impact on use and availability of Temporary Judicial Officers

The impact of a nationally uniform mandatory judicial retirement age upon the use and availability of Temporary Judicial Officers would depend greatly on the age limit that was applied.

The different age caps imposed on the service of Temporary Judicial Officers in Australia were detailed in Part 2.6 (although it should be recalled that an age limit is not applied in respect of all courts in all jurisdictions). The highest age limit was 78 years for all Temporary Judicial Officers in Victoria and for Supreme Court and District Court Temporary Judicial Officers in Queensland. If a nationally uniform mandatory judicial retirement age of, say, 75, were introduced then this would considerably narrow the window between the compulsory retirement age of a Permanent Judicial Officer (currently 70 years in both those states) and the limit on service of Temporary Judicial Officers. It might be expected that the number of Temporary Judicial Officers appointed in order to serve an additional three years (76–78), as opposed to eight years (71–78) would be reduced. However, a corollary of the

³⁴⁰ As things now stand at the Commonwealth level, the judicial officers of the Federal Circuit Court are not Magistrates and thus would not be affected by such a move toward two-tier uniformity.

reduction in the supply of Temporary Judicial Officers is that the demand for such officers would also decrease because the length of service of Permanent Judicial Officers would expand as the age bar is raised. In other jurisdictions, where the age limit upon Temporary Judicial Officers is at or below 75 years (an example of the former is the Northern Territory), a new uniform mandatory retirement age of 75 would obviously eliminate any gap between the two and presumably would result in the curtailment of temporary appointments.³⁴¹

Given that earlier discussion has suggested that the constitutional entrenchment of the mandatory judicial retirement age at the Commonwealth level means that 70 years is the most likely age limit to be used as a national standard, it is worth reflecting on what that might mean for the use and availability of Temporary Judicial Officers. But the answer is not greatly different from existing arrangements. Assuming a single mandatory judicial retirement age is adopted (rather than a two-tier approach), then there would be only two distinct effects worth noting. Both would affect only future appointments to the bench and, given the average length of periods of judicial service of 15-20 years,³⁴² the impact of such a change would not be fully appreciable for some time.

First, in Western Australia and the ACT, Magistrates would be able to serve for an extra five years in a permanent capacity, thus eliminating any gap between the mandatory judicial retirement age and the cap on service as a Temporary Judicial Officer. This would, as already discussed in Part 6.2.1 above, presumably reduce reliance on Temporary Judicial Officers in the Magistrates Court of those two jurisdictions.

Secondly, in New South Wales and Tasmania, the mandatory judicial retirement age would be reduced by two years from 72 to 70 for all judicial officers. This would expand the window in which persons required to retire from permanent judicial service on the courts of those two states are available to return to the bench as a Temporary Judicial Officer (in New South Wales until age 77).³⁴³ However, without some further amendment of the relevant provisions, the lower mandatory judicial retirement age will not lead to longer periods of service by Temporary Judicial Officers in that jurisdiction since their commission is presently expressed to be ‘for a time not exceeding 5 years’.³⁴⁴

Tasmania does not explicitly provide a mandatory statutory retirement age for Temporary Judicial Officers in any of its courts. Thus the lowering of the mandatory judicial retirement age to 70 in order to achieve national consistency might increase the use of Temporary Judicial Officers, to offset the earlier departure of Permanent Judicial Officers from the bench. However, as shown in Figure 4.3.2, Tasmania’s recent use of Temporary Judicial Officers is minimal compared to other jurisdictions, and a small downward adjustment in retirement age may have little practical impact.

³⁴¹ It need not result in a complete end to such appointments in these jurisdictions since Permanent Judicial Officers may, of course, retire before attaining the mandatory retirement age and then return to the bench by appointment as a Temporary Judicial Officer. In some jurisdictions provisions currently exist that have this operation; that is, they do not countenance the service of Temporary Judicial Officers exceeding beyond the age limit imposed upon Permanent Judicial Officers (e.g. *Supreme Court Act 1935* (WA), s 11, in conjunction with *Judges’ Retirement Act 1937* (WA), s 3, regarding Acting Judicial Officers).

³⁴² See Opeskin, above n 168, 645-46 and, more generally, Opeskin, above n 275, 34-39, *Supreme Court Act 1970* (NSW), s 37(4) and (4A).

³⁴⁴ *Supreme Court Act 1970* (NSW), s 37(1). This replaced the earlier use of commissions of up to a maximum of 12 months only: *Courts and Crimes Legislation Amendment Act 2015* (NSW), Sch 3.8.

Overall, it is difficult to see that the introduction of a nationally consistent mandatory judicial retirement age set at the age of 70 years would have a marked effect on the use and availability of Temporary Judicial Officers.

A more significant change would be the establishment of a nationally consistent age limit applied to the use of Temporary Judicial Officers by all states and territories. This would have two related effects, which would be felt with little delay given the short terms for which Temporary Judicial Officers serve. First, a uniform age limit would either extend or curtail those that are presently applied across the various Australian jurisdictions regarding the service of Temporary Judicial Officers. Depending on what age was selected – but it would presumably be higher than 70 years – some jurisdictions would have an enhanced capacity to engage Temporary Judicial Officers while others would have a diminished capacity to do so.

Second, uniformity in this respect may be expected to diminish the ability of some jurisdictions to attract and appoint retired judicial officers from elsewhere. When explaining his resistance to ‘uniformity just for the sake of it’, New South Wales Attorney-General John Hatzistergos insisted that the higher age limit on Temporary Judicial Officers in his state meant that he was ‘taking national talent and utilising it in NSW’.³⁴⁵ The age limits in other jurisdictions – both on mandatory judicial retirement from permanent service and also as applied to temporary commissions – meant there was a pool of judicial talent available for New South Wales to access. Shortly after those statements, the New South Wales Attorney-General raised the age limit on Temporary Judicial Officers in that state from 75 to 77 years.³⁴⁶ With an age limit now of 78 years on service as a Temporary Judicial Officer in Victoria and the Supreme Court and District Courts of Queensland, the distinct advantage that New South Wales previously enjoyed in this respect has been lost.

³⁴⁵ Pelly, above n 336.

³⁴⁶ *Courts and Crimes Legislation Further Amendment Act 2008* (NSW), Sch 26.

Schedule 1: Temporary Judicial Officers: Table of Legislation

Court	Who makes appointment?	Is consultation required?	Justifications for appointment	Eligibility (only former JOs?)	Term of Office	Renewal	Mandatory Retirement Age	Outside Work?	Salary (set at same as PJOs?)	Pension (does time count as service for pension?)	Security of Tenure (same as PJOs?)
NEW SOUTH WALES											
Supreme	Governor	No	No	No	≤ 5 years Not specified for acting associate judges	Not specified	77 (if former J) Otherwise 72	Not specified	Yes	Yes, unless excluded	Yes
District	Governor	No	No	No	≤ 5 years	Not specified	77 (if former J) Otherwise 72	Not specified	Yes	Yes, unless excluded	Yes
Local	Governor	No	No	No	≤ 5 years	Not specified	77 (if former J) Otherwise 72	Not specified	Yes	No	Yes
VICTORIA											
Supreme	Governor in Council (then engaged by Chief Justice)	No	Yes	Yes	≤ 5 years	Yes	78	Need CJ approval	Yes	No	Yes
County	Governor in Council (then engaged by Chief Judge)	No	Yes	Yes	≤ 5 years	Yes	78	Need CJ approval	Yes	No	Yes
Magistrates	Governor in Council (then engaged by Chief Magistrate)	No	Yes	Yes	≤ 5 years	Yes	78	Need CJ approval	Yes	No	Yes
QUEENSLAND											
Supreme	Governor in Council	Yes	Yes for certain appointments	No	≤ 6 months except ≤ 1 year (if former J);	Yes	78 (if retired J) Otherwise 70	Not specified	Yes	Yes, unless retired judge	Yes

Court	Who makes appointment?	Is consultation required?	Justifications for appointment	Eligibility (only former JOs?)	Term of Office	Renewal	Mandatory Retirement Age	Outside Work?	Salary (set at same as PJOs?)	Pension (does time count as service for pension?)	Security of Tenure (same as PJOs?)
					≤ 2 years (if former Qld SC J)						
District	Governor in Council	Only when retired District Ct J appointed	Yes for certain appointments	No	Generally no limit except ≤ 1 year (if former J); ≤ 2 years (if former Qld DC J)	Yes	78 (if retired J) Otherwise 70	Not specified	Yes	Yes, unless retired judge	Yes
Magistrates	Governor	Yes	No	No	Not specified	Not specified	70	Not specified	Yes	No	Yes
WESTERN AUSTRALIA											
Supreme	Governor	No	Yes	No	Auxiliary ≤ 1 year Acting not specified	Auxiliary Yes Acting not specified	Not specified	Not specified	Yes (note modification with pension)	No	Yes
District	Governor	No	Yes	No	Auxiliary ≤ 1 year Acting not specified	Auxiliary Yes Acting not specified	Not specified	Not specified	Yes (note modification with pension)	No	Yes
Magistrates	Governor	No	Yes	No	Not specified	Not specified	70	Need Governor approval	Yes (note modification with pension)	No	Yes

Court	Who makes appointment?	Is consultation required?	Justifications for appointment	Eligibility (only former JOs?)	Term of Office	Renewal	Mandatory Retirement Age	Outside Work?	Salary (set at same as PJOs?)	Pension (does time count as service for pension?)	Security of Tenure (same as PJOs?)
SOUTH AUSTRALIA											
Supreme	Governor	Auxiliary: concurrence of the CJ	Auxiliary: No Acting :Yes	No	≤ 1 year	Auxiliary: yes Acting: Not specified	Not specified	Not specified	Auxiliary: No Acting :Yes	No	Yes
District	Governor	Auxiliary: concurrence of the CJ	Auxiliary: No Acting : No	No	≤ 1 year	Auxiliary: yes Acting: Not specified	Not specified	Not specified	Auxiliary: No Acting :Yes	No	Yes
Magistrates	Governor	Auxiliary: concurrence of the CJ; Acting: on recommendation of AG	Auxiliary: No Acting :Yes	No	≤ 1 year	Auxiliary: yes Acting: Not specified	Yes	Need approval of CJ and Chief Magistrate	Auxiliary: No Acting :Yes	No	Yes
TASMANIA											
Supreme	Governor	No	Yes	No	Not specified	Not specified	72	No restriction	Yes	No	Yes
Magistrates	Governor	No	No	No	Not specified	Not specified	Not subject to mandatory retirement age	No restriction	No	No	No

Court	Who makes appointment?	Is consultation required?	Justifications for appointment	Eligibility (only former JOs?)	Term of Office	Renewal	Mandatory Retirement Age	Outside Work?	Salary (set at same as PJOs?)	Pension (does time count as service for pension?)	Security of Tenure (same as PJOs?)
AUSTRALIAN CAPITAL TERRITORY											
Supreme	Executive; For judicial exchange: Chief Justice	No; For judicial exchange, must consult relevant head of jurisdiction	No	No	≤ 1 year; For judicial exchange ≤ 6 months	Not specified	Not subject to mandatory retirement age limit unless on judicial exchange: 70	Need executive approval	Yes, unless under judicial exchange	No	Yes, unless under judicial exchange
Magistrates	Executive; For judicial exchange: Chief Justice	No; For judicial exchange, must consult relevant head of jurisdiction	No	No	Not specified; For judicial exchange ≤ 6 months	Not specified	Acting Magistrates: 65; Special Magistrates not subject to mandatory retirement age; judicial exchange: 65	Not specified	No	Not specified	Yes, unless under judicial exchange
NORTHERN TERRITORY											
Supreme	Administrator	No	No	No	≤ 1 year	Not specified	Not subject to mandatory retirement age limit	Not specified	Yes	Yes	No
Local	Administrator or Minister	No	No	No	≤ 3 months if appointed by Minister; ≤ 1 year if appointed by Administrator	Yes	75	Need Ministerial approval	No	Not specified	No

Schedule 2: Judicial Survey Data

A Perspectives on Acting Judges

(See Report at 3.2)

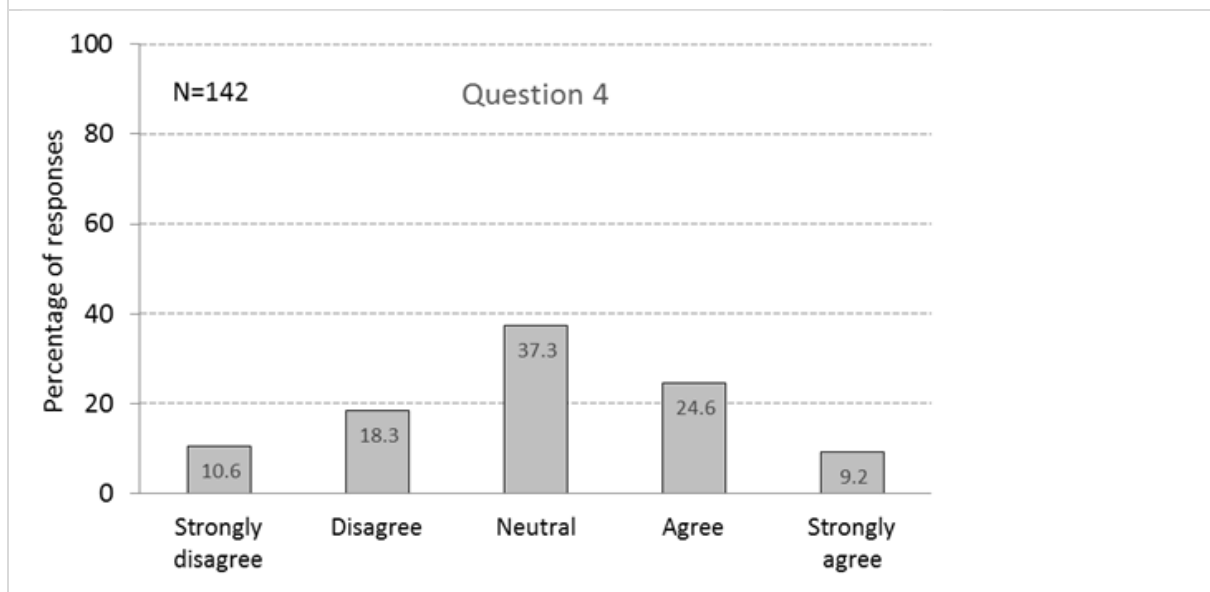
The authors of this Report conducted a survey of sitting judicial officers across Australia in 2016.³⁴⁷ Respondents were asked about a number of ‘challenges’ facing the modern judiciary. They were asked the extent to which they agreed that 13 specified issues were ‘challenges confronting the judiciary’ in their jurisdiction. Participants were asked to respond to the various questions by indicating on a five-point Likert scale the extent to which they agreed or disagreed with the statement. The available responses were: strongly agree, agree, neutral, disagree, and strongly disagree. In each case there was also an opportunity to contribute open comments.

Three survey questions are relevant to the issue of Temporary Judicial Officers considered in this Report. In the first of these, respondents were asked to indicate ‘the extent to which you agree that the following are challenges confronting the judiciary in your jurisdiction: Use of Acting judicial officers’. In the second, respondents were asked to indicate ‘the extent to which you agree that post-retirement age limits on the use of acting judicial officers are appropriate’. The responses received are considered below.

Q4: Use of Acting Judicial Officers

The responses to the proposition that the use of acting judges was a challenge showed that judicial opinions were mixed, but indicate that a significant percentage of judicial officers either agree or strongly agree that the use of acting judges represents a challenge.

³⁴⁷ The survey drew on the work of Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), July 2015. Participants were asked what they considered to be the most pressing challenges that face the various levels of the Australian judiciary, and whether the current regulatory and support environment achieves international best practice. The surveys were circulated to judicial officers with the consent of their Heads of Jurisdiction. Participants were invited to return the survey in hard copy or electronic form. Hard copies were transcribed into electronic form to facilitate data analysis. 142 responses were received from a total population of around 1200 judicial officers.

Figure S2.1 Challenges confronting the judiciary: Q4-Use of acting judicial officers

Of the 142 respondents, 29% either disagreed or strongly disagreed that this is a challenge, 37% indicated neutrality and 34% agreed or strongly agreed. These responses, together with the comments associated with this question, support the proposition that arguments can be marshalled both in favour and against the use of acting judges, but there is some disquiet among judicial officers surveyed about the appropriateness of the current approach.

The data indicate that two demographic factors can be correlated with different responses: gender and level of court. Female respondents were slightly more likely to indicate that the use of acting judges was a challenge. By court level, those respondents from superior courts (the Supreme, Federal and Family Courts, n=34) were more likely not to see the use of acting judges as a challenge when compared with those respondents appointed to either the lower courts (Magistrates, Local, n=48) or the intermediate courts (District, County, Federal Circuit, n=48). This might be partly explained by the fact that federal judges (including those in the Federal Court and Family Court) are not exposed to temporary judicial appointments due to the constitutional prohibition on such appointments.

Comments indicated that the predominant advantage of using acting judges was that they provided assistance with the management of workload demands. Typical comments were:

As the appointment of acting judicial officers are made from the ranks of recently retired judicial officers the usual concerns about tailoring outcomes to ensure political favour is maintained does not occur. Without acting judicial officers, the efficient operation of the court during times of illness and the provision of out of hours services would be compromised.³⁴⁸

They are a necessity given work-loads.³⁴⁹

³⁴⁸ Magistrates/Local; 15-19 years.

³⁴⁹ Magistrates/Local; 5-9 years.

Appropriately qualified judicial officers, such as those recently retired allow Judicial administrators to more efficiently manage lists and circuits.³⁵⁰

Appointment of appropriate acting judicial officers may be an efficient way to deal with case backlogs.³⁵¹

For another respondent the opportunity to 'try before you buy' was appealing:

Trialling proposed new appointees for say 3 months is similarly not objectionable. Both the Court and appointees should have the opportunity for an obligation free fixed term trial.³⁵²

A number of negative responses were focused on the threat to independence that was seen as accompanying temporary appointments:

Easily perceived as not independent and not part of the body of permanent judicial officers....also golf or surfing 3-4 days a week and one day work and to ensure full days salary string out the hearing of cases or get part heard to ensure more work.³⁵³

It is of concern when Acting JO's are used in substitute for permanent appointments. I am also concerned that acting appointments are subject to renewal at the instance of the AG and also the head of the court and this is a problem in terms of any potential impact upon independence of decision making.³⁵⁴

An anathema to the independence of the judiciary.³⁵⁵

They may feel constrained, because of lack of tenure, in acting entirely independently.³⁵⁶

The State Government has been making use of Acting Magistrates over the past 5 years, instead of appointing additional magistrates. That has enabled the AG to select retiring magistrates whose approach, particularly to sentencing is consistent with the Government's law and order agenda. At a time when magistrates have been forced to retire on their 65th birthday certain favoured retiring magistrates have been appointed as Acting magistrates up to their 70th birthday, whilst others who would like to continue working have not received such a commission.³⁵⁷

Others noted the impact of drawing on the banks of retired judges:

There is some discussion, maybe even concern about the number of retired appeal judges returning to the Court of Appeal. Given the small number of appeal judges, and the capacity of a small number of them to exercise a disproportionate influence on appellate decisions, there is concern about the

³⁵⁰ District/County/Federal Circuit; 25+ years.

³⁵¹ District/County/Federal Circuit; 10-14 years.

³⁵² District/County/Federal Circuit; 25+ years.

³⁵³ Level of Court not provided; Length of service not provided.

³⁵⁴ Magistrates/Local; 15-19 years.

³⁵⁵ District/County/Federal Circuit; 0-4 years

³⁵⁶ Magistrates/Local; 5-9 years.

³⁵⁷ Magistrates/Local; 10-14 years.

lack of renewal usually provided for by retirement. This is compounded by the 8-year window post retirement for appointment as an acting judge.³⁵⁸

I am not persuaded that circumventing the retirement age but having retired judges come back as acting judges is a good idea. It tends to perpetuate the lack of diversity and it does not encourage generational change in our courts.³⁵⁹

A few responses demonstrated empathy for the acting judges and indicated that drawing on acting judges could raise concerns about the degree to which such judges were being appropriately managed and supported:

Ok provided that they are given the same resources such as bench books. Lap tops etc to keep them up to date with the changes in the law.³⁶⁰

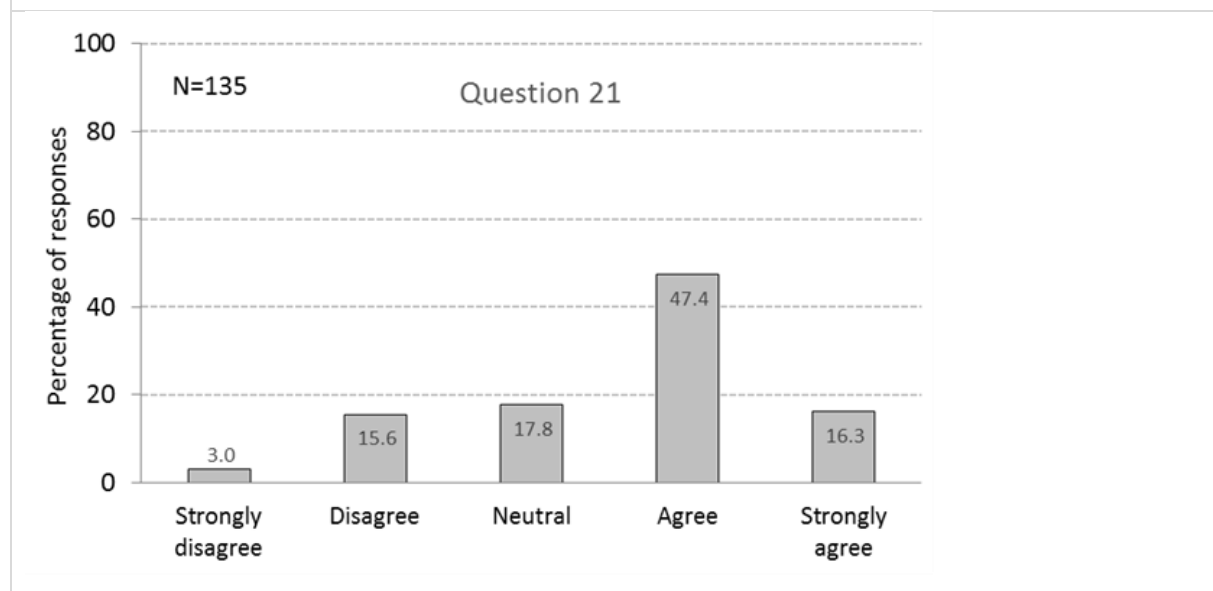
It's unfair of the gov [sic] to appoint acting Judges [sic] 5 or 6 times and then not appoint them to the position.³⁶¹

Subject to continuity of work to keep up to date.³⁶²

Q21: Post-retirement age limits on the use of acting judicial officers

The second relevant question asked respondents to indicate 'the extent to which you agree that post-retirement age limits on the use of acting judicial officers are appropriate'. The response was largely positive and indicates a majority of those who responded (n=135) either agree or strongly agree that the existing framework is appropriate (64%), or are neutral (18%). Some 19% have concerns about the appropriateness of the post-retirement age limits.

Figure S2.2 Challenges confronting the judiciary: Q21- Post-retirement age limits



³⁵⁸ District/County/Federal Circuit; 10-14 years.

³⁵⁹ Supreme/Federal/Family; 0-4 years.

³⁶⁰ Magistrates/Local; 15-19 years.

³⁶¹ District/County/Federal Circuit; 5-9 years.

³⁶² Magistrates/Local; 25+ years.

The main thrust of the comments focussed on capacity:

There are some judges who need to retire early while others are forced to retire when they are still perfectly capable. A good experienced competent judge is a really valuable asset and as long as appropriate capacity checks are in place I don't see the need for an age limit. People are far more healthy and vigorous than in the past so expecting a person to be less able at a particular age is not necessarily a reliable indicator. In the community generally people are expected to work longer, the age pension is expected to be lifted to 70 years, which although not totally on all fours with my argument, there is no reason why people's increased capacity to work to a later stage should not be reflected among judges.³⁶³

Providing they are properly resourced and have physical and mental capacity commensurate with performing the task allocated.³⁶⁴

One respondent noted that capacity problems could be easier to manage in the context of an acting appointment:

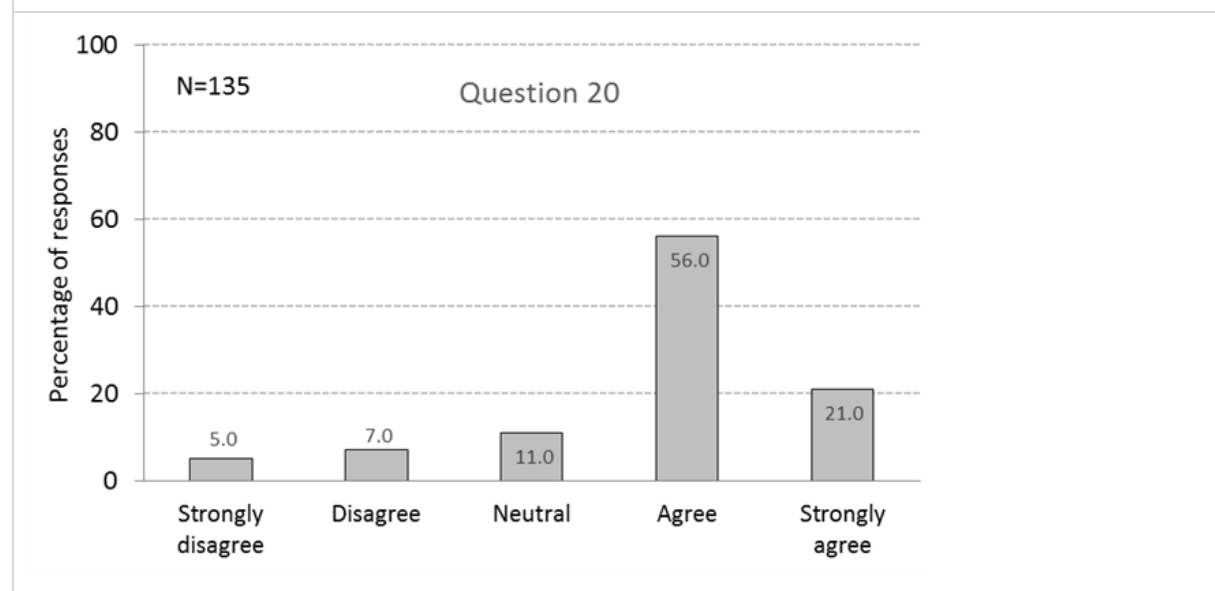
As the positions are acting only, there can be more discretion and an easier termination if a person is no longer acute enough to fill the role.³⁶⁵

B Perspectives on Capacity Testing

(See Report at 5.35)

Judicial officers were asked to 'indicate the extent to which you agree it would be appropriate for judicial officers to be asked to undergo capacity checks at the request of a Head of Jurisdiction or a relevant body constituted by judges'. Their responses are illustrated in Figure S2.3.

Figure S2.3 Challenges confronting the judiciary: Q20-Capacity checks



³⁶³ District/County/Federal Circuit; 10-14 years.

³⁶⁴ Magistrates/Local; 15-19 years.

³⁶⁵ District/County/Federal Circuit; 15-19 years.

Of the 135 respondents, just 12% expressed any form of disagreement, while 11% were neutral on the question. Those in agreement constituted 77% of respondents with 56% selecting 'agree' and 21% selecting 'strongly agree'. These responses, together with the comments associated with this question, support the proposition that there is little disquiet amongst the judiciary about the prospect of requests for capacity testing.

With such a significant percentage of respondents expressing agreement with the proposition, it is difficult to identify a clear correlation between particular demographic factors and different responses. But some points are worth noting regarding gender, length of service and level of court. First, responses were virtually indistinguishable on the basis of gender. Second, the longer respondents had served as judicial officers, the more likely they were to agree with the proposition, i.e. the more favourably they were disposed to capacity testing. Of the 15 respondents who had served 20 or more years, none expressed disagreement and only one was neutral. Third, as a proportion of their responses, judicial officers from the superior courts (the Supreme, Federal and Family Courts, n=34) had a higher level of agreement relative to disagreement or neutrality than respondents from the other court levels.

Comments in favour indicated that, although rare, the problem of judicial officers serving while at less than full capacity was not a theoretical one and a better response system was required. The more pointed comments included:

This is a very vexed issue and would require extraordinary sensitivity and safeguards, but the reality is that every head of jurisdiction would say that most of their "pastoral" time with members of their court is taken up with a small number and the rest just get on with the job. I think that there is much more understanding of depression and other debilitating health issues and certainly my experience is that if the individual asks for help it will be given generously and without judgment. The problem is the judicial officer who has problems (which are reflected adversely in her work) and they are not prepared to seek help. It is then that I think that the head of jurisdiction (perhaps after consulting senior colleagues) should have the capacity to compel such tests.³⁶⁶

These should be required annually from 70 with a system for removal for incapacity which did not involve the parliament.³⁶⁷

Although comparatively rare, senile judges present real problems. The existence of a formalised structure would make it easier to deal with.³⁶⁸

Several responses emphasized the importance of any such power of request to be accompanied by 'safeguards'³⁶⁹ or 'a proper and fair procedure'.³⁷⁰

Very few of those who gave a response indicating disagreement or neutrality also made a comment. A few of those respondents who did comment simply indicated a lack of certainty as to what was meant by 'capacity testing'.

³⁶⁶ District/County/Federal Circuit; 20-24 years.

³⁶⁷ Supreme/Federal/Family; 0-4 years.

³⁶⁸ Supreme/Federal/Family; 5-9 years.

³⁶⁹ Magistrates/Local; 10-14 years.

³⁷⁰ District/County/Federal Circuit; 10-14 years.

C Perspectives on Mandatory Retirement Ages

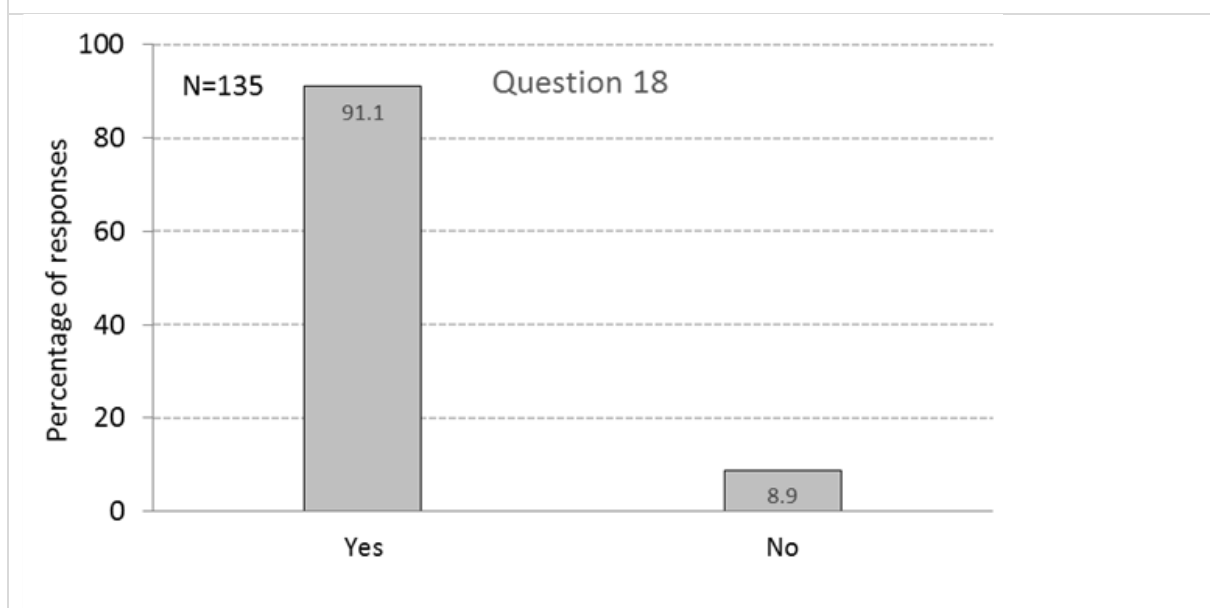
(see Report at Part 6)

Judicial officers were asked two questions about mandatory judicial retirement ages. The first was to 'indicate whether or not you think there should be a mandatory retirement age for judicial officers'. Those who selected 'Yes' for that question were then asked to 'indicate at what age retirement from the judiciary should be mandated'.

Use of an age limit

Of the 135 respondents, 9% (n=12) gave 'No' as their answer to the use of a mandatory judicial retirement age, representing overwhelming support amongst the judiciary for the current system of age limits determining judicial service in all Australian jurisdictions. There was no facility to make a comment in respect of this question.

Figure S2.4 Challenges confronting the judiciary: Q18-Use of mandatory retirement age



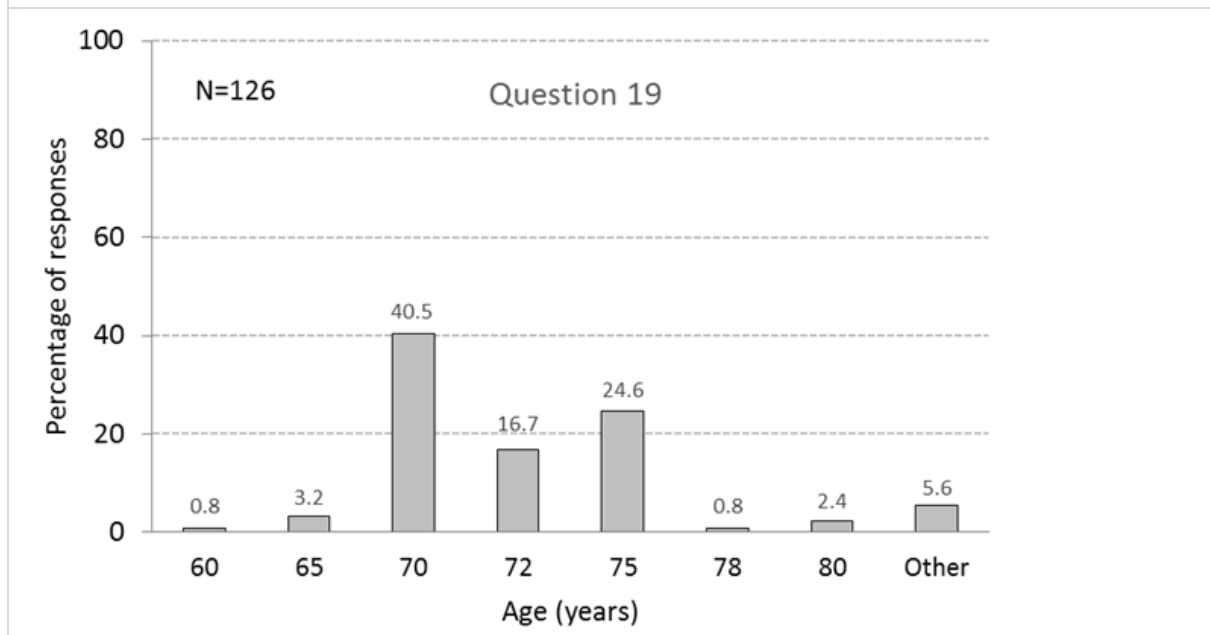
Age of Retirement

There were 126 responses to the follow up question asking for an indication of the age at which retirement should be mandated. Excluding outlier ages of 60, 65, 68 (n=1), 78 and 80, there were three ages that received substantial support for mandatory retirement: 70 (41%, n=56), 72 (17%, n=22) and 75 (25%, n=32). A small number of respondents (6%, n=7) indicated age ranges, such as 70–72 or 70–75 years, which are indicated in Figure S2.5 as 'Other'.

As New South Wales and Tasmania currently use an age limit of 72 years, one might have expected this to be somehow discernible in a jurisdictional breakdown of the results. Interestingly, of the 32 respondents from New South Wales, only 8 favoured the existing age limit, while 9 favoured 70 years and 13 favoured 75 years. Only three

judicial officers from Tasmania responded to this question, two favouring that state's existing retirement age limit of 72 years and one preferring 75 years.

Figure S2.5 Challenges confronting the judiciary: Q19-Age of mandatory retirement



Few respondents commented on this question, but a sample includes:

I think 70 works well. The legal profession is cumulative in terms of knowledge and experience and I think many people do their best work in their 50's and 60's.³⁷¹

I believe 70 is about right. I would make an exception for the High Court of 75.³⁷²

Around 70 is acceptable as long as service for at least 10 years is also a criterion eg to receive a full pension.³⁷³

One comment addressed the point made in Part 6 of this Report about the need for two age limits upon judicial service, namely 72 years for Permanent Judicial Officers and 75 years for acting appointments.³⁷⁴

³⁷¹ Supreme/Federal/Family; 0-4 years.

³⁷² Supreme/Federal/Family; 15-19 years.

³⁷³ Supreme/Federal/Family; 10-14 years.

³⁷⁴ District/County/Federal Circuit; 25+ years.

Schedule 3 Temporary Judicial Officers in Overseas Jurisdictions

A New Zealand

Relevant Legislation

Supreme Court Act 2003 (NZ) ('SCA')

Judicature Act 1908 (NZ) ('JA')

District Courts Act 1947 (NZ) ('DCA')

Overview

In New Zealand, Temporary Judicial Officers (TJOs) may be appointed to the Supreme Court, the High Court and District Courts. There is, however, no provision for the appointment of TJOs to the Court of Appeal. There are two types of TJOs in the New Zealand court system: 'acting' judicial officers (SCA s 23; JA s 11A; DCA s 10A) and 'temporary' judicial officers (JA s 11; DCA s 10). In short, 'acting' judicial officers are retired judges who are appointed for a two year period after their retirement to meet specific needs and work only when called to do so by the Supreme Court Chief Justice, Chief High Court Judge, or Chief District Court Judge. Consequently, they are paid only for the time that they actually work within their period of appointment. In contrast, 'temporary' judicial officers are appointed for a short period of time for a temporary purpose. This is a full-time position and those serving are paid for the entire period of service on the same basis as full-time judges. Both retired judges and practitioners who meet the general eligibility requirements for judicial appointment may be commissioned as 'temporary' judicial officers. The New Zealand Law Commission has noted that the provisions dealing with TJOs 'lack consistency'.³⁷⁵

In 2008, Professor Michael Taggart explained the principal reasons for the use of TJOs in New Zealand. He cited the small size of the New Zealand Supreme Court (5 judges), the requirement to sit *en banc* (a 5 judge quorum), and the small size of New Zealand society, which makes conflicts of interests more likely.³⁷⁶ These factors make it difficult to hold a full quorum of permanent judges in all cases, necessitating a roster of retired Court of Appeal and Supreme Court judges. Additionally, for lower courts, the number of permanent appointments is limited by statutory provisions that place a constraint on the ability of the executive to appoint permanent judges (JA s 4(1)(b); DCA 5(2)).

In the courts that permit the appointment of TJOs, appointment is formally made by the Governor-General. Nonetheless, the justification and procedure for appointment differs according to whether the position being appointed is that of an 'acting' or 'temporary' judicial officer. Persons, including retired Judges, may be appointed in the latter role to the High Court and District Courts to cover the 'illness or absence of any Judge, or for any temporary purpose' (JA s 11(1); DCA s 10(1)). In contrast, the Governor-General does not require any reason to appoint a retired judicial officer to be an 'acting' judge of the Supreme Court, High Court, or District Courts. This is because a distinction is made between appointment and service. For example, despite being appointed by the Governor-General, an 'acting' judicial officer may only

³⁷⁵ New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report 126, 2012) 78 [7.13].

³⁷⁶ Michael Taggart, 'Acting Judges and the Supreme Court of New Zealand' (2008) 14 *Canterbury Law Review* 217.

act as a member of the Supreme Court upon the Attorney-General receiving a certificate signed by the Chief Justice and at least two other permanent Judges of the Court stating that, in their opinion, it is necessary for the proper conduct of the Court's business for the retired judicial officer to be authorised to act as a member of the Court (SCA s 23(6)). This is only provided where the Chief Justice is satisfied that a vacancy exists, or a Judge is unable to hear proceedings (SCA s 23(5)). Likewise, a retired judge appointed as an 'acting' judicial officer to the High Court or District Court, may only act 'during such period or periods only and in such place or places only as the' Chief High Court Judge or Chief District Court Judge may determine (JA s 11A(2); DCA s 10A(4)).

In New Zealand, eligibility for appointment as a TJO is tied to mandatory retirement age (set at 70 years of age: JA s 13, DCA s 7(2)) as well as terms of office, and differs across the judicial hierarchy. Acting appointments to the Supreme Court are limited to retired Judges of that Court or the Court of Appeal, who have not reached the age of 75 years (SCA s 23(1)). An acting judge of the Supreme Court may only be appointed for a period not exceeding 24 months, and cannot serve beyond 75 years of age (SCA s 23(2)). The Act does not mention reappointment, but in practice, acting Supreme Court judges have been reappointed after their 24-month period has ended.³⁷⁷ For the High Court, persons appointed to serve as a 'temporary' judicial officer may do so for a term not exceeding 12 months (JA s 11(1)). He or she may be reappointed, but may not hold office for more than 2 years in the aggregate (JA s 11(2)). Only retired judges may be appointed as 'acting' judicial officers and this is for a 'term not exceeding 2 years or, if the former Judge has attained the age of 72 years, not exceeding 1 year, as the Governor-General may specify' (JA s 11A(1)). Although the Act does not mention whether 'acting' judicial officers may be reappointed, this was held to be the case in *R v Te Kahu* (CA 492/04, 28 September 2005), and in practice this has occurred.³⁷⁸ Appointment as a 'temporary' judge to the District Court is open to persons eligible for appointment as a permanent judge of that Court, including persons who have reached the mandatory retirement age (DCA s 10(2)). A person so appointed may serve for a period not exceeding 12 months, or for 2 or more periods not exceeding 4 years in the aggregate (DCA s 10(2)). Similarly to the High Court, only retired judges may be appointed as 'acting' judges on the District Court (DCA s 10A(1)). Each appointment is for a term not exceeding 2 years or, if the person has attained the age of 72 years, not exceeding 12 months (DCA s 10A(3)).

All TJOs are to be paid at the same rate as a permanent judge of the court on which the officer serves. However, under the distinction drawn between 'acting' and 'temporary' judicial officers, those retired judges who serve as 'acting' judicial officers are paid a salary only for the days on which the officer serves as a member of the court, not the whole appointment (SCA s 23(8); JA s 11A(3); DCA s 10A(5)). Conversely, persons appointed as 'temporary' judicial officers are paid for the entirety of their period of appointment: JCA s 11(3); DCA s 10(1).

³⁷⁷ See e.g. reappointment of the Honourable Noel Crossley Anderson, KNZM, retired Judge of the Supreme Court of New Zealand as an Acting Judge of the Supreme Court: New Zealand, *Appointment of Acting Judge of the Supreme Court*, Gazette No 70, 24 June 2010, 2027; New Zealand, *Appointment of Acting Judge of the Supreme Court*, Gazette No 122, 4 October 2012, 3484.

³⁷⁸ See e.g. reappointment of the Honourable Colin Maurice Nicholson an Acting Judge of the High Court for a term of one year: New Zealand, *Appointment of Acting Judge of the High Court*, Gazette No 60, 27 May 2004, 1440; New Zealand, *Appointment of Acting Judge of the High Court*, Gazette No 91, 16 June 2005, 2137.

No statute refers to pension arrangements or whether a TJO may perform outside work. As ‘temporary’ judicial officers are employed on a full-time basis, it is likely that the same rules as for Permanent Judicial Officers are in force. Conversely, as retired judicial officers are only paid for the period that they actually work as ‘acting’ judicial officers, different rules may apply.

B United Kingdom

Relevant Legislation

Constitutional Reform Act 2005 (c. 4) (‘CRA’)

Courts Act 1971 (c. 23) (‘CA’)

Judiciary and Courts (Scotland) Act 2008 (‘JC(S)A’)

Judicial Pensions and Retirement Act 1993 (‘JPRA’)

Overview

In the United Kingdom, TJOs may be appointed to the Supreme Court, the Crown Court, the High Court, and the Scottish Courts. The use of TJOs on the Supreme Court is governed by CRA ss 38-9. Under s 38(1), the President of the Court is empowered to request the service of a TJO, drawn from two categories of people. The first is any person serving as a ‘senior territorial judge’, defined as a judge of the Court of Appeal of England and Wales, the Inner House of the Court of Session, or the Court of Appeal in Northern Ireland (unless the Judge holds that office only by virtue of being a puisne judge of the High Court in Northern Ireland) (CRA, s 38(8)). The second category consists of members of the supplementary panel established under s 39. Membership of the supplementary panel is restricted to Supreme Court justices and territorial judges (CRA, s 39(4)) who have retired from judicial service within the past five years and are younger than 75 years of age (CRA, s 39(9)). The mandatory retirement age for Permanent Judicial Officers is 70 years of age (JPRA, s 26(1)). A person ceases to be a member of the supplementary panel upon exceeding either of those caps, whichever is first. Appointment is made only after the President of the Court gives the Lord Chancellor notice in writing (CRA, s 39(4)). As at 6 January 2017, there are four retired Justices on the supplementary list.³⁷⁹

The remuneration and allowances of TJOs on the Supreme Court are determined by the Lord Chancellor with the agreement of the Treasury (CRA, s 38(7)). Service as a TJO is not treated as judicial service for the purposes of pension arrangements (CRA, s 38(6)). The CRA does not indicate whether a TJO on the Supreme Court may perform outside work. However, as s 38(4) provides that TJOs are ‘to be treated for all purposes as a judge of the Supreme Court’ subject to appointment, retirement, removal, disqualification, tenure, remuneration, allowances, and pension (CRA, s 38(5)), it is likely that the same arrangements for Permanent Judicial Officers are in force. These are found in the Supreme Court’s *Guide to Judicial Conduct*, and permit a limited range of activities that do not interfere with the performance of their judicial duties or are inconsistent with perceived impartiality and neutrality.³⁸⁰

Recorders are part-time judges of the Crown Court. Appointment is formally made by the Queen on recommendation of the Lord Chancellor, subject to approval by the Judicial Appointments Commission (CA, s 21(1)). Eligibility is restricted to persons

³⁷⁹ The Supreme Court, ‘Supplementary List’, *Judicial Committee of the Privy Council* <<https://www.supremecourt.uk/about/supplementary-panel.html>>.

³⁸⁰ United Kingdom Supreme Court, *Guide to Judicial Conduct* (2009) 5.5-5.10.

of 7 years standing (CA, s 21(2)). A person holds office as a Recorder for five years. This term is usually automatically extended by the Lord Chancellor for further successive five-year terms.³⁸¹ A person ceases to hold the office of Recorder at 70 years of age, though the Lord Chancellor may authorise continuance in office up to age of 75 (CA, s 21(5)). Recorders are expected to sit between 3-6 weeks a year and are paid a daily fee determined by the Lord Chancellor, with the approval of the Minister for the Civil Service (CA, s 21(7)). Recorders are therefore permitted to continue to perform outside work including their bar practice. A Recorder requested to sit as a judge of the High Court is not treated as such for the purposes of pension arrangements (CA, s 23(3)(c)).

TJOs, known as temporary sheriffs, are a feature of the Scottish Judiciary. They are used to cover for permanent officers who may be away from business on leave, attending training, or to meet additional workload that may arise from time to time.³⁸² TJOs may be appointed to the Court of Session (the supreme civil court) and the High Court of Justiciary (the supreme criminal court). In 2000, the European Court of Human Rights found the then office of temporary sheriffs incompatible with the European Convention on Human Rights. The Court held that the provisions providing one-year tenure and situating the power to recommend whether commissions should be renewed in the Lord Advocate, a member of the Scottish executive and the official responsible for all criminal prosecutions, was incompatible with the right of an accused to a fair trial by an independent and impartial tribunal under art 6 of the Convention.³⁸³ The system of temporary sheriffs has been substantially amended as a result, and has since been twice upheld as compatible with art 6 of the Convention.³⁸⁴

In Scotland, TJOs are appointed by the executive for five years (JC(S)A, s 20B(4)) they are eligible for reappointment, and must retire when they reach the age of 70 (JC(S)A, s 20C(1)). An individual is eligible only if they are qualified for appoint as a permanent judge of the Court, and the executive has consulted the Lord President: (JC(S)A, s 20B(3)). A TJO is paid at a rate determined by the executive, which may differ among individuals (JC(S)A, s 20G(1)-(2)). Service is not treated as judicial service for the purposes of a judicial pension (JC(S)A, s 20B(6)(b)). A TJO may perform outside work 'not inconsistent with the individual acting as a judge' (JC(S)A, s 20B(7)). At the date of the last published list (9 November 2016), there were 21 TJOs appointed in Scotland.³⁸⁵

C United States (federal judges)

Relevant Legislation

28 U.S. Code § 371

³⁸¹ Judicial Office, 'Recorder', *Courts and Tribunals Judiciary* <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/recorder/>>.

³⁸² Lord President the Rt. Hon. Lord Gill, *Guidance Note: The Office of Part-Time Sheriff* (2013) 1 [4].

³⁸³ *Starrs v Ruxton* [2000] SLT 42.

³⁸⁴ *Clancy v Caird* [2000] HRLR 557; *Kearney v Her Majesty's Advocate* [2006] UKPC D1.

³⁸⁵ Judicial Office for Scotland, 'Temporary Judges—Expiry Dates for Current Commissions' <http://www.scotland-judiciary.org.uk/55/0/Temporary-Judges> (6 January 2017).

Overview

At the federal level in the United States, TJOs operate in a distinct manner. Rather than appointing retired judicial officers for a renewable term, currently serving federal judges may adopt 'senior status', permitting them to work a reduced caseload. Senior status is detailed under 28 U.S.C. § 371. To be eligible for senior status, a judicial officer must satisfy an age and service requirement, known as the 'rule of 80' (28 U.S.C. § 371(c)). This means that the Judicial Officer's age and years of service must sum to at least 80, examples of which are given in Table 1.

Table 1: Age and service requirement:

Attained age	Years of service
65	15
66	14
67	13
68	12
69	11
70	10

To remain eligible, a judicial officer must be annually certified by the chief judge as having met at least one of the following criteria:

1. Having carried, in the preceding calendar year, a caseload involving courtroom participation which is equal to or greater than the amount of similar work which an average judge in active service would perform in three months (28 U.S.C. §371(e)(1)(a)).
2. Having performed, in the preceding calendar year, substantial judicial duties not involving courtroom participation, but including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned (28 U.S.C. §371(e)(1)(b)).
3. Having performed substantial administrative duties, either directly relating to the operation of the courts, or for a Federal or State governmental entity (28 U.S.C. §371(e)(1)(d)).

However, 28 U.S.C. §371(e)(1)(e) provides that a judge not meeting these criteria may still be certified as being in senior status by the chief judge, provided that the judge did not meet those criteria 'because of a temporary or permanent disability'. A senior judge may retire at any time.

A judicial officer who takes senior service is entitled to draw a full salary (28 U.S.C. § 371(a)), but does not receive a pension. As a Judicial Officer who takes 'full retirement' is ordinarily entitled to a pension equal to the salary at the time of retirement, senior judges essentially provide volunteer service to the courts, but with the benefit of an office and staff. It is estimated that senior judges handle about 15 per cent of the federal courts' workload annually.³⁸⁶ A senior judge is considered a

³⁸⁶ United States Courts, 'FAQs: Federal Judges' <<http://www.uscourts.gov/faqs-federal-judges#faq-What-is-a-senior-judge?>>

retired judge, permitting the President to appoint a new full-time judge to fill that position.

See further:

Frederic Block, 'Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings' (2007) 92 *Cornell Law Review* 533.