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JUDICIAL INDEPENDENCE: A COLLECTION OF MATERIAL FOR THE JUDICIAL CONFERENCE OF AUSTRALIA

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Introduction

Thank you for inviting me to this Conference. I am wearing two hats as I speak today: the first as co-editor of the Collection of Materials on Judicial Independence, and the second as a doctorate student that is being sponsored by the Judicial Conference. The purpose of this session is to launch the Collection of Materials; however, I will also use this opportunity to give you an update on my doctoral thesis.

I will discuss the purpose of the Collection, identify the major themes pertaining to judicial independence, and overview the material included in the Collection. But I should begin with an examination of the concept of judicial independence.

Judicial Independence

As we are all aware, the independence of the judiciary is a cornerstone of a liberal democracy. It is a hallmark of a civilized society. It embraces two fundamental principles: the separation of powers and the rule of law.

Separation of powers

The doctrine of the separation of powers dictates that each branch of government is to be separate from the others. The twin objects behind this doctrine are to ensure that no branch of government becomes too powerful and to allow each branch to act as a check or balance on the others.

The constitutional system adopted in Australia does not abide by a strict application of separation of powers. As in the United Kingdom, we insist more strongly on the independence of the judiciary from the legislative and executive branches of government. However, there are some exceptions to this: most notably, judges are appointed by the executive and can be removed from office through constitutional processes that require an Address of the legislature. In sharp contrast to the United States, however, there is no clear separation of power between the executive and the legislature in Australia. Executive government is conferred on the political party with the largest majority in the Lower House, and members of parliament head the various departments of executive government.

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It should be recalled, however, that pure separation of power does not provide stable government.[1] The Australian constitutional system accommodates this by ensuring that other imperative political ideas, such as mixed government and checks and balances, are in place. Separation of powers does not imply unaccountable power, such that each branch of our government has some role to play in other branches.

Rule of Law

As for the rule of law, we must consider its constituent elements. One element is that laws will be administered impartially, guaranteeing that all persons subject to the law will be treated equally. This requires a judiciary that is independent from improper influences. Another element is that no person or body is beyond the reach of the law. The legal system is based on government *through* laws as well as government *under* laws. This means that members of government are subject to the same rules that govern the lives of ordinary citizens. Again, this requires a judiciary that is independent from improper influences. Let's say a judge was to favour the government in the application of the law, confidence in the system would swiftly be diminished and the rule of law would break down.

Independence of the judiciary

So what is meant by independence of the judiciary? True independence depends on freedom from improper influences. Improper influences might stem from sources external to the judiciary, such as, another branch of government, or from powerful interest groups within society, or from "public opinion", perhaps as articulated in the media. A stable society needs legal and institutional measures to ensure that judges individually are, and the judiciary collectively is, independent from such external forces.

In addition, there may be improper internal influences on judges. Judges must also be afforded independence from their judicial colleagues, so that it is the judge sitting on a case, who has heard the evidence and arguments, who makes the decision on the basis of an application of the law to the evidence and arguments presented. This statement encapsulates personal independence and substantive independence.[2] Again, legal and institutional measures are necessary to ensure the independence of each judicial officer within the judicial institution.

Judicial independence is as much about perception as reality. It involves removing reasons to *suspect* the judiciary of partiality or bias. The main ways our system maintains the perception of independence include: judicial appointment on merit; security of tenure until a fixed retirement age (subject to removal on grounds of improper conduct or incapacity); protection of terms and conditions of work; and immunity from suit for actions taken or words said in a judicial capacity.

Most Australians would consider our judiciary to be immune from serious threats to their independence. In most part this is true; however, we should not ignore subtle, yet equally undermining, influences which threaten judicial independence. The most recent examples of potential threats to the judicial independence of Australian judges should not be taken lightly. Attorneys-General are consistently refusing to defend the judiciary from (at times) ill-informed and inappropriate public criticism. This has left judges in a precarious position: remain silent in the face of such criticism with the attendant risk of a loss in confidence, or be drawn into the public debate with the attendant risk of allegations of bias, pre-judgment or improperly entering the political domain. A classic case of 'damned if you do and damned if you don't.'

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[1] Maurice Vile, *Constitutionalism and the Separation of Powers*, 1967, extracts in Winterton et al, *Australian Federal constitutional Law: Commentary and Materials*, Law Book Company, Sydney, 1999

[2] Personal independence means that each judge is free from the influence of other judges; substantive independence means that judges are subject to no authority other than the law when making decisions and exercising official duties.

Even greater cause for concern is when a court (or tribunal) is abolished without the reappointment/redeployment of former office holders to the replacement court or another court of equal standing. We can add to this the continuing apprehension about occasional, part-time and probationary appointments to courts. In each case it is the perception of judicial independence that is at risk. Such appointments may be perceived to be on grounds of political allegiance rather than best fitness for the task.

We should not forget that judicial independence, and the essential public confidence that accompanies it, is more easily destroyed than built up. As Sir Ninian Stephen says:

> an independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed.[3]

Although the Australian judiciary may not face the blatant pressures from governments, parliaments, or the military that may be witnessed in some other countries, we are not immune from a subtle undermining of judicial independence.

Judicial Independence and the Citizenry

Courts in liberal democracies, including Australia, depend crucially upon public confidence to be effective. The eminent American jurist, Justice Felix Frankfurter, expressed this well when he said:

> The Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.[4]

This confidence is indelibly linked to judicial independence. Citizens would not be willing to submit to the decisions of the judiciary if they perceived that the judiciary was unfair or partial in its decision-making. Loss of confidence in the impartiality of the judiciary may lead to disrespect for the law generally, threatening the peace and order of the country.

It is those that are governed by the law that are the beneficiaries of judicial independence. Judges have a duty to maintain their independence on behalf of the citizenry.

The Purpose of the Collection

This Collection is intended for the members of the Judicial Conference of Australia as a resource rather than a monograph to be read from cover to cover. It is hoped that the Collection will develop over time, according to the interests and needs of its readership, although given the voluminous literature on judicial independence robust editorial decisions will always be needed.

The aim of the Collection is to provide a fuller understanding of the concept of the independence of the judiciary, how it operates in the Australian context, to highlight the potential threats to judicial independence, and to guide judges in their daily task of maintaining the rule of law.

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[3] Sir N Stephen, 'Southey Memorial Lecture: Judicial Independence - A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334 at 339.

[4] Quoted in Ministry of Attorney-General, Ontario, *Civil Justice Review*, First Report, 1995, 6

The Major Themes

There is a wide degree of consensus about the need for, and the essential elements of, judicial independence, albeit expressed in different terms. This section will focus on the themes common to the materials in the Collection.

The agreed objectives and functions of the judiciary require judges:

- To administer the law impartially between citizen and citizen, and between citizen and state;
- To promote, within the proper limit of the judicial function, the observance and the attainment of human rights; and
- To ensure that all peoples are able to live securely under the rule of law.[5]

It is the impartiality required in fulfilling these objectives and functions that, in turn, necessitates the independence of the judiciary. The protective safeguards, which secure this independence, are generally accepted to be:

- Judges that are, and are seen to be, free to decide matters impartially;
- Judges that fulfill their duty to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, whether direct or indirect, from any quarter or for any reason. This includes the need for judges to be independent of their judicial colleagues and superiors when deciding matters before them;
- A judiciary that is institutionally independent of the Executive and Legislature; and
- A judiciary that has jurisdiction, directly or by way of review, over all issues of a judicial nature.

The role of the judiciary in securing protection and promotion of human rights and fundamental freedoms is increasingly being emphasised. The independence of the judiciary is described as an "essential safeguard"[6] for the protection of human rights. Judges, as well as lawyers and law enforcement officers, are obliged to be informed of international human rights instruments, principles, norms and jurisprudence. Judges must implement them as far as possible when deciding cases before them.

In the common law context of Australia, this means that when resolving any ambiguity or uncertainty in constitution law, statute law or common law, reference must be made to Australia's international human rights obligations. Where the national law is clearly and unambiguously inconsistent with international obligations, the courts must give priority to the national law. However, such inconsistency must be brought to the attention of the legislature and the executive as the supremacy of national law does not excuse a breach of the international legal obligation that is undertaken by Australia. The terms of the Bangalore Principles and the subsequent Georgetown Principles provide excellent guidance in this respect.[7]

And, of course, there is firm agreement that safeguards must be in place in relation to the appointment of, and the conditions of holding office for, judges. Qualification for judicial office must be on merit. The executive should not solely control selection of judges. An independent body should provide training for judges, preferably the judiciary themselves. Disqualification, discipline or removal of judges must be based on specified criteria pertaining to a judge's ability to fulfil judicial functions. The decision to disqualify, discipline or remove a judge should be made

[5] See below: Montreal Declaration, Tokyo, Beijing Principles.
[6] See below: UN Basic Principles, Montreal Declaration, Beijing Principles.
[7] See below.

preferably by judicial peers after the impugned judge has been given an opportunity to be heard. Judges must have security of tenure so that they may adjudicate without fear or favour; and similarly, judicial immunity and privileges for actions taken or words uttered in performance of judicial office is necessary. The judiciary should have the primary role of administering the court system.

Although this summary represents "best practice" in relation to judicial independence, each society has its own history, legal tradition, political system, culture, values and priorities. No single mechanism for maintaining an independent judiciary can be transplanted elsewhere without amendment and be expected to have the same effectiveness. Each jurisdiction must reflect on its existing safeguards and evaluate their effectiveness in securing an independent and impartial judiciary.

An Overview of the Collection

This section provides an overview of the main documents included in the Collection, being the documents from which the major themes have been drawn. In fulfilling the aims of the Collection, inclusion of a great deal of international material was thought imperative. Both the internationalization of the world's legal systems, and the ever-expanding body of international norms relating specifically to judicial independence,[8] mean that the Australian judiciary must be aware of and familiar with these external influences on judicial independence. The Collection thus concentrates on international material and general commentary rather than primary Australian constitutional, legislative and judicial sources.

International Norms and Statements

International Norms

The Collection begins with the international norms relating to judicial independence, in particular Article 10 of the *Universal Declaration of Human Rights* and Article 14 of the *International Covenant on Civil and Political Rights.*[9] Both instruments require that an independent and impartial tribunal determine the rights and obligations of an individual in a civil suit, and determine any criminal charge against an individual. Australia is a party to the *International Covenant* and thus is under an international law obligation to ensure the continued independence and impartiality of the judiciary.

The General Assembly of the United Nations has also adopted Basic Principles on the Independence of the Judiciary, which are reproduced. Governments were invited to "respect [the Basic Principles] and to take them into account within the framework of their national legislation and practice."[10] The Basic Principles are the United Nations key instrument on judicial independence.

The Basic Principles identify numerous requirements necessary for judicial independence. There is the 'duty of all governmental and other institutions to respect and observe the independence of the judiciary,' as well as the duty to 'provide adequate resources to enable the judiciary to properly

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[8] See C. Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power* (New York University Press, New York, 1995); Kate Malleson, *The New Judiciary: The effects of Expansion and Activism* (Ashgate Dartmouth, Aldershot 1999).

[9] See also the Human Rights Committee General Comment 13 on Article 14.

[10] GA Res. 40/32 of 29 November 1985, para 5, UN GAOR, 40th Session, Supp. No. 53, at 205 (UN Doc A/40/53 (1985)); and GA Res. 40/146 of 13 December 1985, para 2 especially (UN. GAOR 40th Sess, Supp No 53, at 254, UN Doc A/40/53 (1985)) respectively.

perform its functions.'[11] The 'judiciary shall decide matters before it impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'[12] The judiciary must have jurisdiction over all matters of a judicial nature, and must have exclusive jurisdiction to decide whether an issue comes within its competence.[13] Inappropriate or unwarranted interference with the judicial process is not allowed. Finally, 'independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.'[14]

The Basic Principles also make provision for the freedom of expression and association of judges; the qualifications, selection and training of judges; professional secrecy and immunity of judges; and the discipline, suspension and removal from office of judges.

The Collection then contains statements made by various international organisations dealing with issues relevant to judicial independence.

The International Commission of Jurists' Statements

The International Commission of Jurists ("ICJ") have issued two statements, the first discussing the judiciary under the rule of law and the second exploring the responsibility of the judiciary for the protection of the rights of the individual in society.[15] The ICJ emphasise that, although 'judicial independence implies freedom from interference by the executive or legislature with the exercise of the judicial function, [it] does not mean that the judge is entitled to act in an arbitrary manner.'[16] The judiciary is accountable to the extent that its 'duty is to interpret the law and fundamental principles and assumptions that underlie it.'[17] The statement continues by way of discussion of the methods that secure judicial independence: appointment, re-appointment, promotion, irremovability, and the organization of judicial business.

The Montreal Declaration

At the First World Conference on the Independence of Justice the Montreal Declaration[18] was adopted. The Montreal Declaration is designed to ensure the free exercise of fundamental human rights and peace through respect for the rule of law. It also seeks to promote the objectives of various international instruments, which embrace the independence of the administration of justice, including the Charter of the United Nations, the Universal Declaration, and the International Covenant. The Montreal Declaration focuses on all actors in the judicial process: international judges, national judges, lawyers, jurors and assessors.

In relation to national judges, the functions and objectives of the judiciary include 'to administer the law impartially between citizen and citizen, and between citizen and state; to promote, within the proper limit of the judicial function, the observance and the attainment of human rights; [and] to ensure that all peoples are able to live securely under the rule of law.'[19] Four overarching elements to "independence" were identified:

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[11] United Nations Basic Principles on the Independence of the Judiciary, Principles 1 and 7.
[12] Id., Principle 2.
[13] Id., Principle 3.
[14] Id., Principle 6.
[15] International Commission of Jurists, *The Rule of Law and Human Rights: The Judiciary and the Rule of Law* 1959-62.
[16], Id., para 1.
[17] Ibid.
[18] *Universal Declaration on the Independence of Justice* 1983.
[19] Id., para 2.01.

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03 In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04 The judiciary shall be independent of the Executive and Legislature.

2.05 The judiciary shall have jurisdiction, directly, or by way of review, over all issues of a judicial nature.

The Montreal Declaration expands on these four basic requirements. It also requires judges to 'keep themselves informed about international conventions and other instruments establishing human rights' norms, and [for judges to] seek to implement them as far as feasible, within the limits set by their national constitutions and laws.'[20] The Montreal Declaration also addresses the qualification, selections and training for judges; the posting, promotion and transfer of judges; judicial tenure; judicial immunity and privileges; the disqualification, discipline and removal of judges; and court administration.

The Montreal Declaration is the culmination of the Syracuse Principles, the Tokyo Principles and the New Delhi Standards.

1. The International Association of Penal Law and the ICJ drafted the Syracuse Principles.[21] The Syracuse Principles were considered a first attempt to 'formulate principles guaranteeing the existence and proper functioning of an independent judiciary as an essential condition for the respect and protection of human rights under the rule of law.'[22] The Preamble refers to the fact that both the Universal Declaration and the International Covenant guarantee to everyone a fair and public hearing by a competent, independent and impartial tribunal, and state that '[a]n independent judiciary is indispensable for the implementation of this right.'[23] "Independence of the judiciary" is defined in essentially the same terms as paragraphs 2.02, 2.04 and 2.05 of the Montreal Declaration.[24]

   The difficult role facing the judiciary in a changing society is acknowledged, with a discussion of the main tension between 'understand[ing] and giv[ing] due weight to the goals and policies of the changing society when construing legislation or reviewing administrative decisions … [and] uphold[ing] the human right of individuals and groups which are laid down in the constitution, laws and where applicable, international instruments, or which reflect lasting values of the society.'[25] In resolving this tension, justice requires an impartial judiciary.

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[20] Id., para 2.48.
[21] *The Syracuse Draft Principles on the Independence of the Judiciary* 1981
[22] Id., Introduction to text.
[23] Id., Article 1.
[24] Id., Article 2: 'Independence of the judiciary means that every judge is free to decide matters before him in accordance with his assessment of the face and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and that the judiciary is independent of the executive and legislature, and has jurisdiction, directly, or by way of review, over all issues of a judicial nature.'
[25] Id., Article 28.

Moreover, the role of judicial independence in protecting human rights is examined. The independence of judges is described as 'an essential safeguard for the attainment of justice, liberty and respect for the rule of law, and for the protection of human rights of all persons in any society,' and judges are directed to 'keep themselves informed about international conventions and other instruments establishing international human rights norms, and [to] seek to implement them as far as feasible, within the limits set by their national constitutions and laws.'[26]

The Principles also stipulate in depth matters pertaining to the qualification, selection and training of judges; the posting, transfer and promotion of judges; the retirement, discipline, removal and immunity of judges; and the working conditions, administrative and financial arrangements of the judiciary.

2. The Tokyo Principles[27] were formulated by the LAWASIA Human Rights Standing Committee. The Committee discussed the principle of the independence of the judiciary in the context of the history and culture of Asian countries, culminating in the statement of the Tokyo Principles.

The objectives and functions of the judiciary identified under the Tokyo Principles are identical to those included in the Montreal Declaration.[28] The institutions of government were recognised as bearing a duty to ensure that the judiciary has, and is perceived to have, the high standing and regard within society necessary to enable it to fulfill its functions.[29] In depth analysis of the appointment and tenure of judges, the relationship of the judiciary with the executive, and the remuneration and facilities of the judiciary was also undertaken.

3. The New Delhi Standards[30] are the International Bar Association Code outlining the minimum standards necessary for the existence of judicial independence. The Standards recognise the need for personal independence, substantive independence and the collective independence of the judiciary.[31]

The Standards address the relationship between the press, the judiciary and the courts, stressing that 'judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.'[32] In this context, judges may write articles and give interviews for the press, and the press should curb reporting on pending cases so that the outcome of a case is not unduly influenced.

Moreover, the Standards canvass in detail the following matters: the relationship between the judiciary and the executive; the relationship between the judiciary and the legislature; the terms and nature of judicial appointments; judicial removal and discipline; standards of conduct for judges; the securing of independence and impartiality; and matters of internal independence of the judiciary.

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[26] Id., Articles 29 and 31 respectively.
[27] *Independence of the Judiciary in the LAWASIA Region: Principles and Conclusion*, 1982
[28] Id., Conclusion 4: The objectives and functions of the judiciary include 'to ensure that all peoples are able to live securely under the rule of law; to promote, within the proper limits of the judicial function, the observance and attainment of human rights within its own society; to administer the law impartially between citizen and citizen and between citizen and state.'
[29] Id., Conclusion 8.
[30] *The International Bar Association Code of Minimum Standards of Judicial Independence* 1982.
[31] Id., Standard 1. In this context, "personal independence" means the freedom of individual judges from executive control; "substantive independence" means that a judges duties are discharged subject to nothing but the law and their conscience; and "collective independence" means that the judiciary as an institution should be free from the influence of the executive.
[32] Id., Standard 33.

The Bangalore Principles

At a high level judicial colloquium on the *Domestic Application of International Human Rights Norms* held in Bangalore (1988), a "Chairman's Concluding Statement" was adopted. The Statement, known as the Bangalore Principles, outlines the relevance of international human rights norms in domestic jurisprudence. The Bangalore Principles refer to the many international human rights instruments that protect the inherent right of all to the protection and promotion of their human rights and freedoms, as well as the body of international and national jurisprudence interpreting the scope of these rights and freedoms.

In relation to common law jurisdictions, although international instruments are not directly enforceable in national courts, 'there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.'[33] Reference to international obligations to resolve ambiguity or uncertainty under constitutions, legislation or the common law 'is within the proper nature of the judicial process and well-established judicial functions.'[34] However, the Bangalore Principles emphasise the superiority of national laws where the national laws are *clear*, yet inconsistent with international obligations. In this case the 'courts should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of international legal obligation which is undertaken by a country.'[35]

The need for education in relation to the 'remarkable and comprehensive developments' in international human rights norms is required for judges, lawyers and law enforcement officials.[36] The Bangalore Principles are 'expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.'[37]

The Georgetown Conclusions are the product of the seventh such high level judicial colloquia (held in Georgetown, Guyana).[38] The conclusions emphasise that the values and principles enshrined in international human rights law are now recognised in the common law. They affirm that it is the duty of the independent judiciary to develop the common law in the light of these values and principles, as well as to interpret and apply national constitutions and ordinary legislation in the light of these values and principles. Moreover, the protections given to the judiciary enable it to discharge this responsibility impartially within the national legal frameworks.

Beijing Statement

At the sixth Conference of Chief Justices of Asia and the Pacific Region, the Beijing Statement of Principles[39] was adopted. The Beijing Statement is intended to outline the "minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary."[40] The Hon Sir Gerard Brennan, then Chief Justice of Australia, is signatory to the Beijing Principles.

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[33] *Domestic Application of International Human Rights Norms*, Principle 4.
[34] Id., Principle 7.
[35] Id., Principle 8.
[36] Id., Principle 9.
[37] Id., Principle 10.
[38] *The Georgetown Conclusions on the Effective Protection of Human Rights Through Norms* (1996)
[39] *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* 1995
[40] id., page 8.

Independence of the judiciary, under the Beijing Principles, requires the judiciary to 'decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and the judiciary [to have] jurisdiction, directly and by way of review, over all issues of a justiciable nature.'[41] The objectives and functions of the judiciary in this document mirror those in the Montreal Declaration and the Tokyo Principles.[42] All institutions of government, including the judiciary, have the duty to observe the functions and proper functioning of other institutions of government.[43]

Other matters provided for in the Beijing Statement include the appointment procedure and tenure of judges; the conditions of judicial office; the jurisdiction of courts; judicial administration of the courts; the relationship of the judiciary with the executive; resources of the judiciary; and derogations from judicial independence that may be necessary in states of emergency.

Domestic Norms and Statements

Australian Bar Association Statement

Also included in the Collection is the Australian Bar Association ("ABA") Statement on *The Independence of the Judiciary* (1990). This statement is a somewhat discursive approach to judicial independence, which forcefully illustrates the need for vigilance within Australia. The ABA suggest that the task of the judiciary is to ensure that those that wield power exercise it in accordance with the law, an impossible task without the independence of the judiciary.[44] The ABA recognise that, although in rhetoric the executive supports the independence of the judiciary, in practice '[p]oliticians and bureaucrats do not necessarily appreciate the impact which their actions and decisions may have upon the delicate structures on which judicial independence depends... The result is a piecemeal, insidious, and very dangerous atrophy of judicial independence.'[45]

Australia's record of upholding judicial independence is critically assessed. The ABA reviews many cases in which the letter and spirit of the requirement of tenure for judicial office holders[46] has been disrespected. Instances include the replacement of the Reconciliation and Arbitration Commission with the Australian Industrial Relations Commission and the non-reappointment of Justice Staples; the acquisition by the Federal Court of the powers of the Australian Industrial Court and the non-reappointment of Justices Dunphy and Joske to alternative courts of equal jurisdiction;[47] and the non-reappointment of five magistrates in New South Wales to the new Local Court which replaced the Courts of Petty Sessions.[48] Such behaviour encourages a public perception that the judiciary is not independent of the executive, and that individual judges may not be impartial.

[41] Id., paragraph 3.
[42] Id., paragraph 10.
[43] Id., paragraph 5
[44] Australian Bar Association, *The Independence of the Judiciary*, paragraph 2.5.
[45] Id., paragraph 2.8.
[46] Including office holders whom, although not technically judges, hold an office which demands the type of independence required of judges.
[47] Both Justices nominally retained their seats in the Industrial Court which, in effect, had no jurisdiction.
[48] See above, fn 44, paragraphs 3.1 to 3.10.

The ABA also discusses situations where the government has unacceptably interfered in the process of review of judicial remuneration,[49] and laments the practice of transferring matters from the jurisdiction of the courts to the jurisdiction of tribunals which lack independence.[50] It suggests reforms for the process of removal of office holders, and expresses its concern about appointing acting judges. It also discusses the need for judicial control over the administration and operation of the courts.

Statement of the Chief Justices of Australia

The Eight State and Territory Chief Justices of Australia issued this Declaration on 10 April 1997.[51] It is the Chief Justices' vision of the requirements of judicial independence, in light of Universal Declaration, the International Covenant and the Beijing Statement. In the introduction to the statement, the Chief Justices' note that 'the key to public confidence in the judiciary is its manifest impartiality' and that '[t]here is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards.'[52]

The Statement relates solely to the appointment of judges. It requires security of tenure for judicial office. Temporary appointments should only be made 'in special circumstances which render it necessary' and never used 'to avoid meeting a need for a permanent appointment.'[53] The executive should not appoint a judge to any position of seniority or administrative responsibility or of increased status within the judiciary, for a limited renewable term or subject to a revocation power held by the executive, subject to temporary absence of the judicial head.[54] The relevant court, or the judicial head of that court, must make any appointment of a judge to an administrative role if it is to be for a limited term.[55]

General Commentary

The Collection also contains general commentary on the independence of the judiciary from leading judges, jurists and academics.

[49] Id., paragraphs 3.11 to 3.16.
[50] Id., paragraphs 3.17 and 3.18: 'There is little legitimate point in giving independence to judges while removing from them jurisdiction which is then conferred upon tribunals which are not independent. In particular, it is totally inappropriate that presiding members of a tribunal which must decide matters in which governments or public authorities are directly interested do not have the independence of a judge.'
[51] *Declaration of Principles on Judicial Independence*, issued by the Chief Justices of the Australian States and Territories
[52] Id.
[53] Id., paragraphs 1 and 2.
[54] Id., paragraph 5.
[55] Id., paragraph 6.

Conclusion

In conclusion, there are two matters I wish to emphasise. Firstly, the power of the media was only mentioned in one of the international statements.[56] The media has a powerful role in keeping the judiciary accountable to the citizens, the citizens being the primary beneficiaries of judicial independence. The judiciary does wield power and such accountability is welcome. However, it is a double edge sword. The media also has the capacity to undermine the legitimacy of the judiciary if their criticism is ill-informed or unnecessarily virulent. Firmer standards and norms exploring and helping to resolve this tension would be welcome.

Second, out of political convenience, the executive and legislature are increasingly leaving certain issues for resolution by the courts. Many of these issues are economic and political in nature. This "convenience-based process of judicialisation"[57] is welcome by many commentators, including Simon Shetreet. He argues that if the public has more confidence in the courts than the political branches of government, and the political branches shift the burden of resolving embarrassing disputes to the courts, it falls on the judiciary to serve a useful social function. Views on this differ, and there are clear risks to the perceived independence of the judiciary. Movements in this direction may be inevitable, but we must proceed cautiously and on a principled basis, lest independence be compromised forever. The Australian Bar Association eloquently remind us what is at stake:

> Human ingenuity has been able to devise only one effective mechanism for restraining the misuse of power. That mechanism is the rule of law… An independent judiciary is an indispensable requirement of the rule of law. And it is the universal and impartial application of the law … that is the essence of a society in which freedom and order and justice each receive their due.[58]

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[56] The New Delhi Standards, see above, fn 32.
[57] Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschenes (eds), *Judicial Independence: The Contemporary Debate*, 1985.
[58] See above, fn 44, para 5.2-5.3.