



STATE OF JUDICIAL INDEPENDENCE IN AUSTRALIA

Public Statement

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

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

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

The research paper is the first of its kind in Australia to use the Judicial Independence Monitor. An academic reference group of eminent legal scholars¹ provided oversight of Dr Kerr's research and her paper has been considered by both the Standing Committee on Judicial Independence and a Review Committee comprising the Hon Robert French AC, the former President of the AJOA Justice Michael Walton, myself as the former Vice President, Justice Chrissa Loukas-Karlsson and Justice Darryl Rangiah.

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

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

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

Australia has a generally excellent record for stability and longevity in democratic institutions, ranking highly on international indices of perceptions of corruption and trust in government. There has been an independent judiciary operating continuously in Australia for over two hundred years. Judges, who are selected from the ranks of senior legal professionals, enjoy high regard internationally as independent and impartial. They are insulated from overt external interference or pressure by a variety of constitutional and statutory rules, and their decisions are generally respected by government and society more broadly. ...

While the importance of judicial independence in Australia may be ‘clear and uncontested’, levels of confidence in public institutions have diminished over time, and the Australian judiciary is not immune to this trend. ... The pace and breadth of reforms and institutional developments affecting the judiciary is increasing, and not all of these developments are judicially led. Meanwhile, workload and resourcing pressures on judges and courts are mounting, as are the pressures resulting from unprecedented online scrutiny and criticism. The COVID-19 pandemic has highlighted the potential and risks of rapid developments in court-related technology, as well as the fundamental, enduring role of courts in holding governments to account. Further, in a country where the government of the day not only funds the operations of the judiciary but appoints the next generation of judges, the politicisation of those choices is an ‘ever-present danger’.

² Omitting footnotes (and in subsequent references below).

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

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

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

(a) On *resourcing*:

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

(b) On *safety and wellbeing*.

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

(c) On *threats to judges*.

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

(d) On *judicial immunity*.

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

(e) On *regulation of the judiciary*.

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

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

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

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

Justice Steven Moore

President

AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION