

2005 Policy document



Independence of the Judiciary

The Australian Lawyers Alliance believes that individual freedoms ultimately depend on equal access to justice before a truly independent judiciary. We support the principles and institutions of our common law system, which serve to ensure equality and fairness before the law and a fearless independent judiciary free that is from political influence, as required under the Westminster system of government.

Public confidence in this system requires that it is perceived to adhere to these principles, as well as to adhere to them in fact. It is crucial for the judiciary both to be and to be seen as independent of the government, as work involves reviewing and interpreting acts of the executive. Judges have security of employment by nature of their tenured appointment, and this security allows them the freedom to make decisions that may not be popular with government. Independence means that a judge has no personal stake in the outcome other than determining a correct and fair decision. Impartial decision-making means that there is less chance of any perception of bias and that the judiciary will enjoy the respect and trust of the community. Chapter III of the Australian Constitution provides security of tenure maintaining a retiring age for judges at seventy in both the High Court of Australia and Federal courts.

However, judges can be appointed on a fixed-term basis (so-called 'acting judges') to state courts thereby threatening to undermine the judicial independence protected by security of tenure. In Victoria proposals to allow the Governor-in-Council to appoint as many acting judges of the Supreme Court as are necessary for transacting the business of the court would seriously impair the judicial independence of judges. An acting judge is eligible for appointment for a second five-year term subject to the government's discretion, and not entitled to reappointment thereafter. Fixed term appointments are likely to generate the perception that appointees are subject to political pressure. Even if the government has no intention of putting any pressure on appointees to act in a particular manner, appointees must be aware that, after their term expires, any further appointment is entirely at the discretion of the government.

Similar proposals have been made to modify the appointment of president of the Administrative Appeals tribunal (AAT) from a tenured position to a fixed term. Tenured appointments were seen as reducing the flexibility of the tribunal to respond to the changing caseload. Why that would be the case is unclear. There is no valid reason why the standard of judicial independence in the AAT, Australia's highest administrative tribunal, should be any lower than that guaranteed to judges of federal courts.

The Australian Lawyers Alliance believes that removing guaranteed tenure will erode judicial independence. No efficiency or fiscal imperative should supersede the interests of justice, both in fact and perception.