

20 May 2009



Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By online submission

Dear Committee Secretary

Inquiry into Australia's Judicial System and the Role of Judges

About PIAC

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

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Term of appointment of judges

PIAC is concerned about the increasing tendency to appoint judges on a temporary basis.

Temporary appointments interfere with the doctrine of the separation of powers. It is important that Judges operate and are seen to operate impartially and in an environment that is free of pressures that could influence them to make a decision contrary to their conscience. The appointment of judges for life or until a fixed retirement age, and with guarantees of their pay and pension entitlements, is central to the independence of the judiciary and both the reality and appearance of impartiality in adjudication. Citizens are entitled to know that the judges deciding their rights are not dependent on anybody for advancement, that their livelihood is not at risk and that their cases are being heard by an independent and impartial court. Judges need to be able to make decisions without fear or favour, and to be seen without any shadow of doubt to be in a position to do so.

As stated by Xavier Connor QC:

Security of tenure is achieved by providing that: judicial officers cannot be removed from office (except for proved misbehaviour) until they reach a fixed retiring age known in advance; an adequate non-contributory pension is granted on retirement; and judicial salaries cannot be reduced during the term of judicial office.

These time-honoured safeguards have proven to be the best way to secure independence from powerful government and private influence. Acting judges have none of them. Thus, they may have something to gain personally from deciding a case in a particular way, namely their own reappointment as acting judges or their potential appointment as permanent judges. This is not to say that acting judges would necessarily decide cases according to their personal interests, but the mere perception that they could act in this manner must be avoided.

It is sobering to consider that totalitarian states do not have an independent and impartial judiciary. Judges in such regimes are expected to decide cases in accordance with the wishes and policies of the governments that appoint them. ('Acting Judges are Bad for Democracy', *The Age* online, 16 November 2004: <http://www.theage.com.au/articles/2004/11/15/1100384490438.html?from=storylhs>)

A litigant in proceedings involving the government, or a government agency, cannot be expected to be comfortable having their case heard by a judge whose future remuneration, and possibly retirement income, is dependent on their being given further appointments by the executive.

Section 72 of the *Constitution* prevents the appointment of acting Judges for fixed terms to federal courts. The High Court has recognised that the appointment of acting Judges in state and territory courts, in some circumstances at least, may give rise to questions as to whether the court concerned is perceived as truly impartial and independent. It follows that legislation authorising the appointment of acting Judges to state and territory courts might also give rise to constitutional questions if the appointments authorised by the legislation were, or could be, so extensive 'as to distort the character of the court concerned': *Re Governor, Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322 at 326.

As stated by Justice Ronald Sackville:

Judicial independence is too vital an element in our democratic society to be dependent on the discretion of the Executive. ('Acting Judges And Judicial Independence', *The Age*, 28 February 2005)

For these reasons, PIAC submits that Judges should only be appointed on a temporary or acting basis to deal with particular listing difficulties or a temporary backlog of judicial work. Even then, such appointments should be for a short period, for example six to twelve months. It should be to overcome a temporary difficulty, not to create a large and continuing pool of acting judges from which selections could be made from time to time.

Please do not hesitate to contact us regarding the above.

Yours sincerely


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