International Commission of Jurists Queensland Inc
PO Box 12249
George Street
BRISBANE QLD 4003

INTERNATIONAL
COMMISSION
OF JURISTS

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

lacsc@parliament.qld.gov.au

Inquiry into *Justice and Other Legislation Amendment Bill* 2013 (Qld)

SUBMISSION RE: Parts 14 and 36

Background

On 5 June 2013 the Attorney-General of Queensland, The Honourable Jarrod Bleijie introduced the *Justice and Other Legislation Amendment Bill* 2013 ("the Bill") into Parliament. The Bill was automatically referred to the Legal Affairs and Community Safety Committee, in accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, for detailed consideration after its first reading.

It is understood that the Committee will report back to the Legislative Assembly about the Bill on 12 August 2013, and we thank you for the opportunity to provide submissions for consideration.

We note that Parts 14 and 36 of the Bill propose to enable the Minister, after consultation with the Chief Justice or Chief Judge, to appoint a retired District or Supreme Court judge to act as a judge for "a period of not more than 2 years" and "on a full-time sessional basis". Retired judges may be appointed "more than once" up to the age of 78 years.

There has been little public debate about this Bill, and even less about the proposed re-appointment of retired judicial officers.

This submission focuses solely on Part 14 and Part 36 of the Bill, and expresses concern about the inconsistency of this aspect of the Bill with judicial tenure. The ICJ (Qld) Inc. sees judicial tenure as essential to the independence of the judiciary, which in turn is essential to the rule of law.

About the International Commission of Jurists (ICJ)

The International Commission of Jurists (ICJ), founded in Berlin in 1952, is a non-governmental international legal organisation, focused on the protection and promotion of human rights through the rule of law. At a global level, the ICJ holds consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organisation, the Council of Europe and the African Union.

The International Commission of Jurists (Qld) Inc is the Queensland chapter of the ICJ. As part of its mandate, ICJ (Qld) Inc strives to educate on the importance of the rule of law and to raise awareness of human rights issues within the Queensland community.

Summary of recommendations

This submission raises concern about Parts 14 and 36 of the Bill, and provisions associated with the re-appointment of judges who are retired or approaching retirement, on the basis that these provisions undermine the concept judicial independence as we know it.

Ultimately, the ICJ (Qld) Inc recommends that:

1. Parts 14 and 36 of the Bill be removed; and

2. Provisions associated with the implementation of Parts 14 and 36 be removed.

3. If Recommendations 1 and 2 are not adopted, Parts 14 and 36 of the Bill ought to be amended by:

    (a) limiting re-appointments to where "special circumstances" exist;

    (b) requiring re-appointment to only be made by the Chief Justice or Chief Judge (and not the Minister or any member of the Executive Government); and

    (c) limiting re-appointment to one term only.

Considerations

"An independent judiciary, although a formidable protector of individual liberty, is at the same time a very valuable institution, a fragile bastion indeed."[1]

Rationale of the proposed legislation

As mentioned above, little has been said, at least as yet, about the Bill and its proposal to allow re-appointment of judicial officers in this State. Though the Bill seeks to change the notion of judicial tenure in Queensland, the Explanatory Notes to the Bill do not address the specific rationale behind Parts 14 and 36. Rather, they merely outline the practical effect of the proposed amendments to the *District Court of Queensland Act* 1967, *Supreme Court of Queensland Act* 1991, *Judges (Pensions and Long Leave) Act* 1957 and *Judicial Remuneration Act* 2007.

The Explanatory Notes state that one of the broad objectives of the Bill is to "improve provisions concerning the operation of various commission, court, tribunal and registry processes". Though this objective is somewhat vague, it is assumed, in the absence of

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

explanation, that the proposed judicial re-appointments may be designed to meet the growing caseload demands of the District and Supreme Court of Queensland.

The Bill does not stipulate any special circumstances that must exist before re-appointment is sought or endorsed.

Judicial independence and the importance of tenure

In Queensland, as in other States, tenure for District and Supreme Court judges is provided for by legislation. The tenure of High Court judges (and judges of federal courts) is safeguarded by Chapter III of the Constitution.

Notwithstanding the differences between State and Commonwealth judges, judicial tenure has long been recognised throughout Australia and elsewhere as integral to judicial independence and the rule of law.

The rationale behind Parts 14 and 36 may be well intended. Indeed, the raising of age for compulsory retirement of judges is a topic the ICJ (Qld) would like to see examined. However, in its current form the Bill is arguably inconsistent with the notion of judicial tenure, a core safeguard of judicial independence.

In 1998 Kirby J spoke of the dangers involved in acting judicial appointments and the subsequent need or desire of acting judges to seek re-appointment.

His Honour noted that this concept can give rise to the appearance of bias and thereby erodes public confidence in the judicial system:

> "1. It undermines the tenured judiciary; and tenure has commonly been regarded as essential to judicial independence. When you think of the many countries which do not have this feature and the long constitutional struggle that lies behind Australia's achievement of it, it seems a trifle reckless to throw it away so easily...
>
> 2. When it said that the dangers are "theoretical", what is meant is that critics cannot point to an actual case where a judge has tailored his or her decision to avoid government of client displeasure. But judicial impartiality is not only a matter of avoiding actual bias. Our law defends people who come to our courts from the appearance of reasonable apprehension of bias. Of its very nature, that cannot be proved empirically. It rests on appearances. If a barrister would love to be a permanent judge, may he or she not be tempted or appear to be tempted, to avoid a decision that might upset the appointing government? If a solicitor generally acts for insurance companies (or workers) might he or she not be tempted (or appear to be tempted) to avoid making decisions that upset actual or potential clients? With sections of the media baying for law and order and stiffer penalties, might an appointee hoping for a permanent seat not be influenced by the need to avoid an unpopular decision, however merited it might seem on the evidence and argument? These are not theoretical questions. Every informed member of the legal profession knows of stories that are circulating. I certainly know of acting judges who were disappointed not to secure permanent appointment. Ambition for appointment in an acting judge is potentially a very dangerous thing."

His Honour allowed that sometimes "attacks on judicial independence...come in different form. Sometimes they arise out of well-intended innovation designed to service public

needs." This Bill may have so arisen, but it is highly questionable whether anything that challenges notions of judicial tenure and independence should ever be supported.

In a fundamental way, judicial tenure serves to instil public confidence in the justice system and safeguard against not only actual bias but any *appearance* of possible bias. As Gleeson CJ explained in an address at the *Judicial Conference on Australia* in 2002:

> "Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.
>
> Tenure is the primary means by which the system seeks to reinforce public confidence in the independence of judges. In the case of federal judges, this tenure is secured by Chapter III of the Constitution. State judges enjoy similar constitutional protection. Judges may only be removed from office, before they reach the age of compulsory retirement, by a formal act of the Governor-General or Governor, following a resolution of Parliament, on grounds of proved misbehaviour or incapacity. Modern employment practices, including those affecting public servants or academics, are such that tenure of this kind is now unusual. But it exists to serve a constitutional purpose. It exists to maintain public confidence in the independence and impartiality of the judiciary. It is not for the personal benefit of judges. In the case of some judges, it operates to their personal disadvantage. There are judges, who, if they were free to negotiate individual contracts with a government, would be distinctly better off than under the present system. The inflexibility of their terms of engagement leaves some judges at a large disadvantage compared with people of comparable skill and responsibility in both the public and private sectors; but it goes with the job." [2]

It must follow from Gleeson CJ's explanation that security of tenure, and, as part of this, the inability to seek re-appointment upon the expiration of tenure, is essential to the safeguarding of judicial impartiality and integrity.

International instruments, standards and statements of principle

The importance of judicial independence, and therefore judicial tenure, is reflected in a number of key international instruments and also international and more localised statements of principle.

Parts 14 and 36 of the Bill are, it is submitted, inconsistent with these international instruments and principles.

As a starting point, Article 10 of the *Universal Declaration of Human Rights* and Article 14 of the *International Covenant on Civil and Political Rights*, (to which Australia is a signatory) impose an international law obligation to ensure the continued independence and impartiality of the judiciary in Australia.

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[2] Speech by Chief Justice Murray Gleeson 'Public Confidence in the Judiciary', Judicial Conference of Australia, Launceston, 27 April 2002. Access here: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_jca.htm

> *Article 10 (Universal Declaration of Human Rights)*
> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[3]
>
> *Article 14 (International Covenant on Civil and Political Rights)*
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...[4]

Beyond these broad obligations, the principles and conditions of judicial independence, and more specifically, judicial tenure, are outlined in a number of international standards and statements of principle. These instruments provide clear guidance on the manner in which fair and independent legal systems, such as ours, should operate.

Importantly, a common thread in these international instruments is the requirement that judges have tenure until a compulsory retirement age. This ensures freedom from external pressure and the removal of any perception, in the wider community, of bias in our justice system.

One of the earliest international standards on judicial independence was formulated in 1982 by the International Bar Association at a conference in New Delhi. These standards mandate retirement from judicial office at a fixed age. Notably, Standard 22 of *The Minimum Standards of Judicial Independence*, commonly known as the New Delhi Standards, provides that:

> 22. (a) Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement, at an age fixed by law at the date of appointment.[5]

The UN General Assembly subsequently formulated and adopted the *Basic Principles on the Independence of the Judiciary* ("the Basic Principles") in 1985, and participants were invited to "respect the Basic Principles and to take them into account within the framework of their national legislation and practice." [6]

Of note, the Basic Principles provide that 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." It then stipulates the basic conditions of tenure:

> *Conditions of service and tenure*

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[3] Article 10 of the *Universal Declaration of Human Rights* (access: http://www.un.org/en/documents/udhr/)

[4] Article 14 of the *International Covenant on Civil and Political Rights* (access here: http://www.humanrights.gov.au/international-covenant-civil-and-political-rights-human-rights-your-fingertips-human-rights-your)

[5] Access the New Delhi Standards here: http://www.jiwp.org/#!new-delhi-declaration/c134r

[6] 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.) Access: ghttp://www.unrol.org/doc.aspx?d=2248

> 11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
>
> 12. Judges, whether appointed or elected, shall have guaranteed tenure until a **mandatory retirement age** or the expiry of their term of office, where such exists. (our emphasis)
>
> 13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
>
> 14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

It follows that a mandatory retirement age for judicial officers is a basic principle of judicial independence, rather than a 'best practice'.

At the Sixth Conference of Chief Justices of Asia and the Pacific Region in August 1995, the *Beijing Statement of Principles of the Independence of the Judiciary* in the LAWASIA Region 1995 was adopted. The *Beijing Statement* was further refined at the 7th Conference of Chief Justices held in Manila in August 1997. Chief Justice Sir Gerard Brennan was signatory on behalf of Australia, and the Statement was agreed upon by each Chief Justice in the Asia-Pacific region. Its purpose serves to outline the "minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary."

Relevant sections of the *Beijing Statement* are extracted below: [7]

> *Tenure*
>
> 18. Judges must have security of tenure.
>
> 19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedures.
>
> 20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to **expire upon the attainment of a particular age.**
>
> Relationship with the Executive
>
> 38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.
>
> 39. **Inducements or benefits** should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.[8] (our emphasis)

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[7] http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf

[8] http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf

Consistent with prior statements on the principles of judicial independence, the *Beijing Statement* recognises the importance of judicial terms expiring upon the attainment of a particular age. This is a minimum, rather than optional, standard. It also notes that in order to preserve independence, inducement or benefits should not be offered to judges.

The potential for re-appointment at the end of tenure is at least capable of becoming significant inducement or benefit.

Security of judicial tenure has also received detailed consideration by judicial officers in Australia. On 10 April 1997, the Chief Justices of the Supreme Courts of all six Australian States, the Australian Capital Territory and the Northern Territory issued the *Declaration of Principles on Judicial Independence*. This is presently the only joint statement on judicial tenure by judicial officers from each of the States. At the time of the Declaration it was described by Sir Gerard Brennan as "timely", and he explained that the High Court and federal courts were not signatories to the Declaration because their independence was protected by the Commonwealth Constitution. Due consideration of the *Declaration* is therefore necessary, particularly given the comparative vulnerability of judicial tenure in states such as Queensland.

At the outset the Declaration refers to various international instruments, in particular the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. The following principles are then enunciated in the Declaration, relating to the appointment of judges of the State and Territory Courts:

> (1) Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:
>
> > (a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or
> >
> > (b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the Court to which the judge is appointed and provided that the appointment is **made only in special circumstances which render it necessary**.
>
> (2) **The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.**
>
> **(3) The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office.**
>
> (4) There is no objection in principle to the Executive Government appointing a judge, who holds a judicial office on terms consistent with principle (1), to exercise a particular jurisdiction associated with the judge's office, to an additional judicial office, in either case for a limited term provided that:
>
> > (a) the judge consents;
> >
> > (b) the appointment is made with the consent of the judicial head of the Court from which the judge is chosen;
> >
> > (c) the appointment is for a substantial term, and is not renewable;
> >
> > (d) the appointment is not terminable or revocable during its term by the Executive Government unless:
> >
> > > (i) the judge is removed from the first mentioned judicial office; or

(ii) the particular jurisdiction or additional judicial office is abolished.

(5) It should not be within the power of Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office.

(6) There is no objection in principle to the appointment of judges to positions of administrative responsibility within Courts for limited terms provided that such appointments are made by the Court concerned or by the judicial head of the Court concerned.

(our emphasis)

Importantly, the Declaration makes clear that the appointment of a retired judge must only be made in "special circumstances". It saw the ability to re-appoint as something that ought to be strictly limited, presumably because of its encroachment upon the notion of judicial tenure, a concept integral to judicial independence. Of further relevance is that it was declared objectionable for the holder of judicial office to have their right to continue in office subject to a decision of the Executive Government.

Contrary to the Declaration, it is noted that Parts 14 and 36 of the Bill do not make any attempt to narrow the circumstances for the appointment of a retired judge. Indeed they provide for any judge – irrespective of the motivation and without need for special reason – to seek reappointment past the age of 70, up to the age of 78. Disturbingly, re-appointment, and indeed renewal of appointment once a judge is past the age of 70 is ultimately determined by the Minister, a representative of the Executive Government. Consultation with the Chief Judge or Chief Justice is just that, consultation.

Most recently, the International Association of Judicial Independence and World Peace approved the *Mt Scopus Approved Revised International Standards of Judicial Independence*. This is the latest statement of principles underpinning judicial independence and was created by legal academics and jurists over a number of conferences.

Consistent with other international and also Australian standards on judicial tenure, it too provides for compulsory retirement of judicial officers upon attainment of a certain age:[9]

4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

4.1. The method of judicial selection shall safeguard against judicial appointments for improper motives and shall not threaten judicial independence.

4.2.
a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in

[9] Access here: http://www.jiwp.org/#!mt-scopus-standards/c14de.

judicial appointments provided that due consideration is given to the principle of Judicial Independence.

b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature, the Executive, the Judiciary and the legal profession take part, should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment. (our emphasis)

4.3.1. Retirement age shall not be reduced for existing judges.

4.4. Promotion of judges shall be based on objective factors, in particular merit, integrity and experience.

4.5. Judicial appointments and promotions shall be based on transparency of the procedures and standards and shall be based on professional qualifications, integrity, ability and efficiency.

4.6. Judges should not be appointed for probationary periods except in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment, and provided that permanent appointment will be granted on merit.

4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

4.8. Part-time judges should be appointed only with proper safeguards secured by law.

4.9. The number of the members of the highest court should be fixed, with the exception of courts modeled after the courts of cassion, and in the case of all courts, should not be altered for improper motives.

12. SECURITY OF TENURE

12.1 Judges shall have security of tenure in relations to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

12.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

The reiteration of the principles discussed above serves to support the position that we submit should be adopted.

Conclusion

A consideration of international instruments and statements of principle reveals that judicial tenure, secured to a certain age and requiring compulsory retirement upon that age, is integral to the independence of the judiciary.

The purpose of the proposed Parts 14 and 36 may well be designed to meet a public need. The idea of allowing learned judicial officers to continue to serve after the age of 70 should be explored. But the proposed process of judicial re-appointment fundamentally encroaches upon the concept of judicial tenure, and may thereby compromise the independence of the judiciary in this State. With such notions under threat, it is highly questionable whether any public policy need for the proposed amendments could possibly outweigh its consequences.

The proposed process of re-appointment gives rise, at the very least, to a perception of possible bias in our legal system. It allows for suggestion that external pressure or influence upon judges to decide matters a certain way, lest they fall out of favour with the government of the day or with judicial colleagues who might be consulted about their re-appointment.

It may well be argued that such a scenario is presently inconceivable in this State. But a robust legal system must be proactive in guarding against not just actual, but perceived bias.

Even if it was to be allowed that in limited or special circumstances the re-appointment of a retired judge could be justified, it is of real concern that the Bill does not limit the re-appointment to cases where special reasons or circumstances exist.[10] And the relevant concerns are only compounded by the fact that the re-appointment can occur up to 4 times.

It is accordingly recommended that:

4. Parts 14 and 36 of the Bill be removed; and

5. Provisions associated with the implementation of Parts 14 and 36 be removed.

6. If Recommendations 1 and 2 are not adopted, Parts 14 and 36 of the Bill ought to be strengthened by:

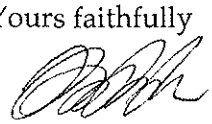
    (a) limiting re-appointments to where "special circumstances" exist;

    (b) requiring re-appointment to only be made by the Chief Justice or Chief Judge (and not the Minister or any member of the Executive Government); and

    (c) limiting re-appointment to one term only.

We are happy to provide any further assistance to the Committee as required.

Yours faithfully



P.J. Callaghan SC

President, ICJ (Qld) Inc

5 July 2013

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[10] *Declaration of Principles on Judicial Independence* 1997.