

File No.: 17/1348#16

January 2018

**Subject: Australian Response to Questionnaire of the Special Rapporteur on the independence of judges and lawyers**

The Australian Government has the pleasure to provide the following information to assist in the preparation of the Special Rapporteur on the independence of judges and lawyers’ report to the UN Human Rights Council on national judicial councils and/or other national organs or mechanisms in charge of selecting, appointing, promoting, transferring or removing judges.

***Introduction***

This information relates only to the federal courts of Australia. Courts of Australian States and Territories are the responsibility of the respective State and Territory governments. All references to the ‘Government’ below refer to the Federal Government of the Commonwealth of Australia, not the State and Territory governments.

In Australia, there are four federal courts: the High Court of Australia (High Court), the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court), which are collectively referred to as the ‘federal courts’.

The process of appointing a judicial officer to a federal court involves various officers/bodies within the executive arm of Government, including the Commonwealth Attorney-General (Attorney-General), Cabinet, the Federal Executive Council (Executive Council) and the Governor-General of Australia (Governor-General). The powers of these officers/bodies are derived from the Constitution of Australia (Constitution) and the enabling legislation of each of the federal courts.

***Separation of powers and independence of judges***

The power to make laws in Australia is divided between the executive, the Parliament and the judiciary. This is known as the separation of powers doctrine and is an essential feature of the Australian system of government.

Under Australia’s Constitution, Australia’s judiciary is independent from the other arms of Government. The separation of powers doctrine means that in interpreting and applying the law, judicial officers act independently and without interference from the Parliament or the executive. The constitutional guarantees of tenure and remuneration outlined further below assist in securing judicial independence.

***Selection***

The eligibility criteria for appointments to the federal courts is prescribed by the enabling legislation of each court. The *High Court of Australia Act 1979* (Cth) (High Court Act) for example, provides that to be a judge of the High Court, a person must either have been a judge of a federal or state court or have been a legal practitioner of a federal, state or territory court for at least 5 years. Section 22 of the *Family Law Act 1975* (Cth) (Family Law Act) provides that to be eligible as a judge of the Family Court, a person must also be deemed ‘suitable’ to deal with family law matters.

**Table 1** below provides an overview of the relevant federal courts’ enabling legislation:

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| **Court** | **Legislation** | **Provision** | **Selection Criteria** |
| High Court | High Court Act | s 7 | A person has either been: a judge of a court created by Parliament or a court of a State or Territory; or a legal practitioner of the High Court or the Supreme Court of a State or Territory for at least 5 years. |
| Federal Court | *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) | s 6 | As for the High Court. |
| Family Court | Family Law Act | s 22 | As for the High Court. The person must also be ‘suitable’ by reason of training, experience and personality to deal with family law matters. |
| Federal Circuit Court | *Federal Circuit Court of Australia Act 1999* (Cth) (Federal Circuit Court Act) | s 1 (of Schedule 1 to the Act) | A person has been enrolled as a legal practitioner of the High Court or the Supreme Court of a State or Territory for at least 5 years. |

In practice, the Commonwealth Attorney-General (Attorney-General), who is the Government’s First Law Officer, consults the head(s) of the relevant federal court(s) to identify a vacancy and suitable candidate(s). Section 6 of the High Court Act requires that the Attorney-General consult with the Attorneys-General of the States in relation to vacancy(ies) in the High Court.

The Attorney-General then makes a recommendation to the Prime Minister through Cabinet, which is the key decision-making body of the executive arm of Government. The Cabinet then makes a recommendation to the Governor-General through the Federal Executive Council (Executive Council).

***Appointment***

Section 72 of the Constitution provides that judges of the federal courts are appointed by the Governor-General on advice from the Executive Council. This provision is replicated in the enabling legislation of each of the federal courts.

***Remuneration and Conditions of Service***

Judges’ remuneration is determined by the Remuneration Tribunal, which is an independent statutory authority that determines the remuneration of key Commonwealth offices. Section 72 of the Constitution provides that a judge’s salary cannot be reduced while they are in office. The power of the Remuneration Tribunal to determine judges’ salaries is provided for in each of the federal courts’ enabling legislation.

**Table 2** below outlines the sections of each of the federal courts’ enabling acts which prescribe the conditions of service for judicial officers.

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| **Legislation** | **Provision(s)** | **Condition(s)** |
| High Court Act | s 10  s 11 | Judges must not hold any other office of profit  Judges must take an oath or affirmation of allegiance |
| Federal Court Act | s 6  s 6A  s 11 | Judges must be assigned to a particular location  Judges may be assigned to a particular Division  Judges must take an oath or affirmation of allegiance |
| Family Law Act | s 22  s 26 | Judges must be assigned to a particular location (except for the Chief Justice)  Judges must take an oath or affirmation of allegiance |
| Federal Circuit Court Act | Schedule 1 | Judges may be assigned to a particular Division  Judges must take an oath or affirmation of allegiance  Judges must not engage in paid work outside their office  Governor-General may prescribe other terms and conditions |

***Duration and Security of Tenure***

Section 22 of the Constitution provides that judges of the federal courts are appointed for a term expiring upon their reaching the age of 70 years or, with the exception of judges of the High Court, as otherwise determined by Parliament.

Judges’ security of tenure is protected by the Constitution. Section 72 of the Constitution provides that a judge’s tenure will only be terminated upon:

1. the judge attaining the age of 70 years;
2. the judge giving written notice of their resignation to the Governor-General; or
3. the Governor-General removing the judge on address from both Houses of Parliament in the same session, on the ground of proved misbehaviour or incapacity.

Notably, section 72 of the Constitution also provides that where an Act of Parliament reduces the retirement age for judges of any federal court (except judges of the High Court), the legislation does not apply retrospectively to judges that have already been appointed.

***Promotion***

There is no automatic entitlement to or procedure for the promotion of judges prescribed by either the Constitution or the courts’ enabling legislation. Candidates for judicial appointments are selected on the basis of merit and their fulfilment of the selection criteria as outlined in the ‘Selection’ and ‘Appointment’ sections above.

Nevertheless, the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) and the Family Law Act contain provisions which prescribe the seniority of judges. Section 8 of the Federal Court Act, for example, provides that the Chief Justice is more senior than other judges of the Court, who are accorded seniority based on the dates on which their commissions took effect.

Section 22 of the Family Law Act also provides that the Governor-General may assign a judge to the Appeal Division of the Family Court either at the time of their appointment or at a later date with the consent of the judge.

***Transfer***

There is no specific legislation or procedure for the transfer of judges from one federal court to another. However, judges of the Federal Court and of the Family Court are assigned to a particular court location and cannot sit at another location on a permanent basis except with the consent of the Attorney-General and the Chief Justice.

Section 6A of the Federal Court Act also provides that the Governor-General may assign a judge, other than the Chief Justice, to one of the Divisions of the Federal Court, either at the time of the judge’s appointment or at a later time with the consent of the judge.

***Resignation***

Section 72 of the Constitution provides that judges of the federal courts may resign by writing to the Governor-General. The Federal Court, Family Court and Federal Circuit Court also have provisions in their enabling legislation which prescribe the date that the resignation takes effect, being either the date that the notice is received by the Governor-General or on a later date as set out in the notice.

***Suspension***

Complaints about the conduct of federal judicial officers are handled almost exclusively through internal complaints processes that operate within each of the federal courts.

Under the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) (Judicial Complaints Act) the Chief Judges of the federal courts, with the exception of the High Court, are empowered to consider, investigate, and otherwise handle complaints that are referred to them. The Act provides the Chief Judges with the power to establish a Conduct Committee to assist with the investigation of a complaint and make recommendations to him or her about any action that may be taken in response to a complaint.

The Federal Court Act and the Federal Circuit Court Act also provide the Chief Justice or the Chief Judge with the power to temporarily restrict a judge to non-sitting duties.

The High Court Act does not prescribe a procedure for the suspension of judges. While, High Court judges are subject to the same procedure for the removal of judges detailed below.

***Removal***

Complaints about the conduct of a judicial officer that may warrant consideration of removal of the judge from office are considered by the Parliament under section 72 of the Constitution. Section 72 provides that judges of the federal courts shall not be removed except by the Governor‑General in Council, on address from both Houses of Parliament in the same session, asking for removal on the grounds of proved misbehaviour or incapacity.

The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) (Parliamentary Commissions Act) provides a standard mechanism to assist the Parliament to consider the removal from office of a judicial officer under the Constitution, by establishing a Parliamentary Commission.