**Australia’s Response: OHCHR Questionnaire on the exercise of freedom of expression, association and peaceful assembly by judges and prosecutors**

1. **Provide detailed information on the constitutional, legislative and regulatory provisions on the right to freedom of expression, association and peaceful assembly and political rights of judges and prosecutors. Do these provisions expressly cover the exercise of rights online for instance through digital technologies such as the internet and social media?**

Judges and prosecutors’ rights to freedom of expression, association and assembly, and other civil and political rights, are protected in a number of ways throughout Australia, including legislation, systems of governance, and a vibrant civil society.

General protections

Australia’s Constitution includes an implied freedom of political communication. Two Australian jurisdictions, Victoria and the Australian Capital Territory (ACT), have also enacted statutory Charters of Rights. These statutory Charters identify the basic rights and freedoms, based on the *International Covenant on Civil and Political Rights* (ICCPR). Specifically, the Charters require the executive to act and make decisions in a manner consistent with human rights and the judiciary to interpret legislation in a manner consistent with human rights.

Judicial independence

Judicial independence is provided under the Australian Constitution to ensure that disputes between people, and between people and governments, are resolved by judges who are impartial and are not subject to improper control or pressure, whether governmental or private. Under Australia's Constitution there is a strict separation between the judiciary on the one hand and the Parliament and the Executive on the other. This in turn protects judicial officers’ freedom of expression, association and peaceful assembly by ensuring that they are able to carry out their role independently and free of undue influence by parliament or the executive government.

Section 72 of the Constitution also protects judicial independence by providing judges with security of tenure. Section 72 operates to ensure that federal judges can only be removed from office by the Governor-General in Council, on an address from both houses of Parliament, asking for such removal on the grounds of proved misbehaviour or incapacity. The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) provides a standard mechanism to assist the Parliament in the rare event that it would need to consider the removal from office of a judicial officer under the Constitution, by establishing a Parliamentary Commission. No federal judge has been removed from office under this constitutional provision.

A further protection to the independence of the judiciary is that the Australian Human Rights Commission is not empowered to enquire into complaints that a judicial officer has discriminated in the exercise of their judicial powers. Rather, consistent with the independence of the judiciary under the Constitution, courts are responsible for handling complaints against judicial officers in accordance with the *Courts Legislation (Judicial Complaints) Act 2012*. The Chief Justices of the Federal Court and the Family Court and the Chief Judge of the Federal Circuit Court are empowered to investigate, and otherwise handle complaints that are referred to them. Complaints under this Act may only be made in the context of a judge’s performance of their judicial or official duties.

Protections for prosecutors

While the Commonwealth Director of Public Prosecutions (CDPP) is within the Commonwealth Attorney-General’s portfolio, it operates independently of both the Attorney-General and the political process. However, the Attorney-General has power under the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act) to issue directions or guidelines to the Director. These must be in writing and tabled in Parliament, and there must be prior consultation between the Attorney-General and the Director. The CDPP is bound by such directions or guidelines issued by the Attorney-General. In the past 30 years, seven directions have been issued, with none issued in the year ending 30 June 2018.

The DPP Act provides immunity from civil proceedings (including, for example, defamation) for prosecutors and other relevant staff for acts done in performance of the prosecution function. The DPP Act also provides specific safeguards around the position of Director, including providing specific grounds on which termination may occur, guarding against political reprisal. Prosecutors enjoy all the rights and privileges of other legal professionals practicing in their official capacity in court (DPP Act section 16).

1. **Provide information on cases where judges and prosecutors in Australia have been subject to legal or disciplinary proceedings for an alleged breach of their obligations and duties in the exercise of their fundamental freedoms, both offline and online. Provide information on cases where judges or prosecutors have been subject to threats, pressure, interference or reprisal in connection with, or as a result to, the exercise of their fundamental freedoms.**

We are not aware of any instances where federal court judges or prosecutors have been subject to legal or disciplinary proceedings for an alleged breach of their obligations and duties in the exercise of their fundamental freedoms either online or offline, or of cases where judges have been subject to threats, pressure, interference or reprisal in connection with the exercise of their fundamental freedoms.

1. **Provide information on whether, and to what extent, the exercise of the fundamental freedoms referred to above have been regulated in codes of judicial ethics or professional conduct developed by professional associations of judges and prosecutors in Australia. Do these codes include provisions concerning the exercise of these rights through the use of digital technologies?**

Judges

Australian professional associations of judges responsible for the development and implementation of codes of judicial ethics and/or professional conduct include the National Judicial College of Australia (NJCA) and Australasian Institute of Judicial Administration (AIJA).

AIJA, on behalf of the Council of Chief Justices of Australia, has published the *Guide to Judicial Conduct* to provide principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in, determining a course of conduct, in a range of circumstances, including online. The Guide sets out a code of conduct that is not binding on judicial officers and is based on the key principles of impartiality, judicial independence and integrity and personal behaviour.

The Guide to Judicial Conduct provides that notwithstanding that judges are entitled to exercise the rights and freedoms available to all citizens, there are limitations on judicial officers’ private and public conduct. The rationale for any restrictions placed on judges is to uphold the status and reputation of the judiciary and to avoid conduct that may diminish public confidence in, and respect for, the judiciary.

The Guide regulates judicial officers’ membership of government advisory bodies or committees, non-judicial tribunals and/or parole boards. The Guide also notes that judges should ensure their conduct maintains public confidence in their impartiality, giving due consideration to their public statements or expressions of opinion on controversial social issues, or matters in issue in litigation made before or after their appointment.

To promote judicial officers’ adherence with these principles, the Guide provides examples of recommended judicial officer’s behaviour. For example, judicial officers should take care to avoid causing unnecessary hurt in the exercise of the judicial function, including taking care about comments made in court.

The NJCA is responsible for developing and administering a National Curriculum for Professional Development of Australian Judicial Officers (Curriculum). The Curriculum is not intended to be prescriptive, rather, intends to harmonise/streamline judicial training. The program provided by NJCA includes training for judicial officers on applying appropriate standards of judicial conduct by providing guidelines in regard to judicial conduct and ethical problems which arise in and outside of the courtroom.

Prosecutors

Commonwealth Director of Public Prosecutions (CDPP) staff employed under the *Public Service Act 1999* (Cth) are subject to the same responsibilities as other Australian Public Service (APS) employees. APS employees must at all times behave in a way that upholds the APS Values, including impartiality, and the integrity and good reputation of the APS. Prosecutors are also subject to the same ethical obligations applying to other legal professionals.

1. **What kind of restrictions (constitutional, legal or regulatory) can be found in the Australian legal system to the exercise of these freedoms? What is the rationale for these restrictions? Do these restrictions apply both offline and online? And if not are there particular restrictions on the exercise of these rights through the use of digital technologies?**

The response to question 1 deals with these issues.

1. **Elaborate on the nature of restrictions specifically applicable to the exercise of fundamental freedoms by judges and prosecutors. In particular:**
   * **Are these restrictions dependent on the position and matters over which the particular judge/prosecutor has jurisdiction?**
   * **Should the venue or capacity in which these opinions are given be taken into account (for instance, whether or not they were exercising or could be understood to be exercising their official duties)?**
   * **Should the purpose of such opinions or demonstrations be taken into account?**
   * **To what extent, if at all, is the context – such as democratic crisis, a breakdown of constitutional order or a reform of the judicial system – relevant when evaluating the applicability of these restrictions?**

In relation to complaints about judicial conduct under the *Courts Legislation Amendment (Judicial Complaints) Act 2012,* the federal courts’ respective enabling acts provide that complaints against judicial officers are made in relation to their conduct in the performance of their official duties only.

In relation to the conduct proscribed by the *Guide to Judicial Conduct*, the Guide makes it clear that a judge should have regard to the principles of impartiality, judicial independence and integrity and personal behaviour in their conduct both in the context of the performance of their duties in their official capacity as well as in a personal capacity. Judges are expected to have regard to these principles in their engagement in activities ranging from commercial or business activities to personal or family financial activities.

1. **Provide information on the scope or interpretation that has been given to these restrictions by national courts, national judicial councils, prosecutorial councils or equivalent independent authorities with general responsibilities for disciplinary proceedings against judges and where applicable, prosecutors. Provide specific examples of these instances.**

As outlined above, there are no circumstances where federal court judicial officers have been removed from office under the Constitution or the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth). We are also not aware of any instances where judicial officers have been formally disciplined under the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth)*.* In the circumstances, we are unable to provide information on the scope or interpretation of any restrictions on judges’ personal freedoms that may be imposed by this legislation.

1. **Provide information on initiatives undertaken by professional associations of judges to raise awareness of the risks associated with the exercise of their rights online, particularly on social media.**

As outlined above AIJA’s *Guide to Judicial Conduct* provides that at all times a judge is governed by the principles of, and must act in a matter that promotes, public confidence in judicial impartiality, independence and integrity. To that end, judges should be mindful of the risk that their use of social media may appear to compromise these principles. The Guide recommends that judges consider the content of any interaction using social media and the persons with whom they have a connection through social media. The Guide recommends that judges should not use social media to disseminate material that would embarrass the judge if it became public. It also recommends that judges should also consider who sees what they disseminate and obtain advice on privacy settings.