

30 March 2005

Hon Rob Hulls MP
Attorney-General for Victoria,
Parliament House,
Spring Street,
Melbourne 3000

Dear Mr Hulls,

Re: Acting Judicial Officers

I write to you concerning the *Courts Legislation (Judicial Appointments and other Amendments) Bill 2004* which has already passed the Legislative Assembly in relation to Acting Judicial Officers.

Liberty remains very concerned about this legislation.

The primary concern relates to the separation of powers, and the necessary erosion of that constitutional principle which the appointment of acting judges represents.

This is not merely a theoretical concern. The writer has spoken to past members of the Commonwealth AAT who were expressly told by the relevant Minister that their performance was being assessed by that Minister. In circumstances where that Minister made the decision as to reappointment, the compromise of the independence of the AAT is obvious. The Commonwealth AAT is not a court, but it is important that similar difficulties are not permitted to develop in our legal system.

We are also concerned about the perception of bias in judicial officers who may in future accept work from those appearing before them.

Therefore, Liberty Victoria's primary position is that this legislation should not be enacted.

If, however, contrary to this view, the legislation is to proceed, then Liberty makes the following suggestions to ameliorate its impact on the separation of powers in Victoria:

- (a) the legislation should provide an exhaustive list of the circumstances in which acting judges could be used;
- (b) any protocols for the use of such judges should be legislated rather than by way of instruments which might readily (and even privately) be amended;
- (c) acting judges should not sit in any case where the government or a government instrumentality or officer is a party;
- (d) acting judges should avoid sitting in cases where government policy or conduct is likely to become an issue (always recognising that it is often hard to foresee such matters);

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- (e) the legislation should itself limit the number of acting judicial officers appointed at any one time;
- (f) the legislation should provide that acting judicial officers may not be reappointed in that capacity – in other words (subject to completion of part heard matters) either they are to be reappointed permanently, or not at all;
- (g) so far as reasonably practicable, the use of acting judicial officers should be for the heads of jurisdictions, rather than the executive, to initiate and authorize;
- (h) Insofar as acting judicial officers are barristers, they should not sit on cases in which the instructing solicitor of either party is one who briefs the acting judicial officer when he or she is at the bar;
- (i) in no way should budgetary constraints operate so as to place pressure on the judiciary to use the method of acting judges where a permanent appointment is warranted.

We trust these views are of assistance.

In order to provide input into the debate in the Legislative Council, we have copied this letter to other Members of the Victorian Parliament.

Yours faithfully,

Brian Walters SC
President

cc Andrew McIntosh MLA
Shadow Attorney General,
Parliament House,
Spring Street,
Melbourne 3000

Peter Ryan MLA
Leader of the Nationals,
Parliament House,
Spring Street,
Melbourne 3000