

LAW COUNCIL OF AUSTRALIA GUIDELINES FOR TRIAL OBSERVER MISSIONS

1.0 INTRODUCTION

- 1.1 The Law Council of Australia has always been deeply interested in promoting the principles of the rule of law and the importance of international human rights in the broader community. It is a member of a number of international legal organisations dedicated to upholding the rule of law, including the International Bar Association (IBA) and LAWASIA.
- 1.2 This interest has seen the Law Council participate in the work of, for instance, the IBA Human Rights Institute and, on an ad-hoc basis, send Australian lawyers on trial observer missions.
- 1.3 In the current global security climate, greater pressure has been placed upon legal organisations such as the Law Council to promote the importance of the preservation of the rule of law.
- 1.4 The LCA's International Law Section has responded to this need by resolving to adopt a set of formal guidelines detailing the circumstances in which trial observer missions might be sponsored by the Law Council.
- 1.5 These guidelines set out the circumstances in which trial observer missions should be eligible for consideration for sponsorship by the Law Council.

2.0 WHEN THE LAW COUNCIL WILL CONSIDER SPONSORING TRIAL OBSERVER MISSIONS

- 2.1 The broad test to be applied in each case will centre on whether there are grounds for reasonably suspecting that the trial may be unfair or improper in any respect, having regard to universal human rights standards. A trial may be considered unfair for a number of reasons including (but not limited to):
 - The absence of an independent judge; and/or
 - The curtailment of an accused person's access to independent legal representation, or to a lawyer of their own choosing, having regard for the rules of practice in the applicable jurisdiction; and/or
 - Ongoing detention without charge and/or without a statement of reasons for arrest; and/or
 - A curtailment of rights in trial proceedings, for example failing to recognise the principles of the rules of evidence, or the curtailment of the right to cross-examine prosecution witnesses.
- 2.2 Although the primary purpose of any observer mission is to impartially observe and report upon the process followed during a trial, even where it may be suspected that the accused's right to a fair trial may be infringed upon it is foreseeable that cases may arise where the overall interests of human rights are not served by sending a trial observer. The primary objective of

trial observer missions must always be to encourage the observation of basic human rights standards.

2.3 In making a decision to recommend sending an observer, the LCA will carefully balance these competing considerations to ensure that the overall interests of human rights are best served by the presence of an observer.

2.4 No set of criteria can ever completely account in advance for the array of factual scenarios which might present to the Law Council in its future consideration of prospective trial observer missions.

3.0 BASIC APPROACH

3.1 In undertaking trial observations the LCA will concentrate its efforts in the Asia-Pacific region and will seek to co-operate with, rather than duplicate, the efforts of other human rights organisations, especially those associated with the legal profession.

4.0 SELECTION OF CASES

4.1 If a recommendation is made by the Co-Chairs of the Panel, the LCA President, in consultation with the LCA executive where appropriate, will determine whether it is appropriate to send LCA trial observers to a case. The recommendation may be made by the Co-Chairs of their own volition or at the request of or in conjunction with other national bar associations, the IBA, LAWASIA, the International Law Section, the Commonwealth Lawyers Association, the International Commission of Jurists or the UIA.

5.0 THE CO-CHAIRS

5.1 The Co-Chairs for the Human Rights Panel will be appointed by the Executive of the International Law Section (ILS) of the LCA in consultation with the President.

5.2 The Co-Chairs will be lawyers with a sustained interest in human rights issues, high level experience in the field of criminal or international law, and a deep commitment to upholding the rule of law.

6.0 PANEL MEMBERSHIP

6.1 Eminent Australian lawyers may be appointed by the ILS to become part of the Panel, the intention being that the Panel will include a large number of suitably qualified Australian practising or retired lawyers from whom trial observers may be drawn from time to time.

6.2 Candidates must have demonstrated competence in international, human rights or criminal law and procedure as well as the necessary relevant experience, whether as a judge, prosecutor, defence lawyer, advocate or in other similar capacity.

6.3 The Co-Chairs will approve the appointment of applicants to the Panel having regard to their experience and qualifications, together with a demonstrated interest in and commitment to human rights issues.

6.4 Preference in appointment to the Panel will be given to individual members of Sections of the Law Council.

6.5 The Co-Chairs may, if they think fit, remove a person's name from the Panel if that person is no longer in a position to accept a request to undertake trial observation for the law Council or for any other reason.

7.0 OBJECTIVES OF TRIAL OBSERVER MISSIONS

7.1 The objectives of each trial observer mission will depend largely upon the circumstances of the individual case. However it will important to clearly define the objectives of any mission. Trial observer proposals submitted to the President will normally provide a detailed list of trial observer objectives.

7.2 The United Nations has identified five primary objectives for trial observation missions. These are:

- First hand monitoring in order to prepare an objective and impartial report on the proceedings;
- The presence of an observer will make the participants (particularly the judge and prosecutor) aware they are under scrutiny, influencing them to be fair;
- The presence of an observer is a symbol of international concern about the fairness of the trial;
- The presence of an observer sends a message to the defendant, the defence attorney and the defendant's supporters of a sense of international assistance which may renew their confidence; and
- First hand monitoring will help to make sure justice is done, and is seen to be done¹.

7.3 Unless the Co-Chairs for any reason propose to the contrary, it will be assumed that these objectives apply to any LCA mission.

8.0 SELECTION OF OBSERVERS

8.1 Where a decision is made for the LCA to send an observer on an LCA mission the Co-Chairs will propose to the President members of the Panel to undertake the assignment.

8.2 The LCA will discuss the mission with those Panel members nominated by the Co-Chairs, to determine their availability and willingness to undertake the mission. When the request is made the request will include the nature and scope of the mission, the circumstances that gave rise to the request, the LCA's objectives in undertaking the mission, the security and accreditation arrangements and the proposed financial arrangements.

¹ United Nations High Commissioner for Human Rights, "Trial Observation and Monitoring the Administration of Justice", ChXIII of *Training Manual on human Rights Monitoring*.
<http://www1.umn.edu/humanrts/monitoring/chapter13.html>

8.3 There is no obligation on any member of the Panel to accept appointment for a mission. Members may decline to accept a mission for any reason.

8.4 Where a Panel member accepts appointment the terms of appointment will be set out in writing by the LCA President or a Co-Chair.

9.0 OBSERVER REPORTS

9.1 In the course of a trial observation and at the conclusion of the trial, the trial observer will provide reports to the President and the Co-Chairs. The President, after consultation with the Co-Chairs, has authority to release the reports in whole or in part as he or she thinks fit.

9.2 The observer is not entitled to release any reports to the media or otherwise publicly or make any public statements which do not accord with the official media protocols of the LCA².

10.0 ADMINISTRATION

10.1 The Panel is under the administration of the International Law Section of the Law Council of Australia. The Executive of the ILS may, with the approval of the President, amend these rules from time to time as it deems appropriate.

Adopted by the Executive
of the International Law Section
Law Council of Australia Ltd
6 July 2004
Updated 26 November 2004

² See *Law Council Media Protocols* (as approved by LCA Executive October 2002).