

CHAPTER 1

Introduction

Referral of the inquiry

1.1 The Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Judicial Complaints Bill) and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Parliamentary Commissions Bill) were introduced into the House of Representatives by the Attorney-General, the Hon Nicola Roxon MP, on 14 March 2012.¹ On 22 March 2012, the provisions of both bills were jointly referred to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 18 June 2012.² The reporting date was subsequently extended to 13 July 2012.³ On 13 July 2012, the committee presented an interim report in which it indicated its intention to table its final report by 2 August 2012.

Purpose of the bills

1.2 In her Second Reading Speech for the Parliamentary Commissions Bill, the Attorney-General outlined that this bill, and the Judicial Complaints Bill, are important steps 'to ensure our federal judicial system is responsive, impartial, and capable of resolving serious complaints'.⁴ The Attorney-General indicated that the bills had been 'developed in consultation with, and are supported by, the heads of federal courts jurisdiction'.⁵

Judicial Complaints Bill

1.3 The Judicial Complaints Bill amends the *Family Law Act 1975* (Family Law Act), the *Federal Court of Australia Act 1976* (Federal Court Act) and the *Federal Magistrates Act 1999* (Federal Magistrates Act) to establish a framework to enable the Chief Justices of the Federal Court and the Family Court, and the Chief

1 *House of Representatives Votes and Proceedings*, 14 March 2012, p. 1303.

2 *Journals of the Senate*, 22 March 2012, p. 2351. Both bills were also referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs (House committee) on 15 March 2012, *House of Representatives Votes and Proceedings*, 15 March 2012, p. 1322; *House of Representatives Hansard*, 15 March 2012, p. 61. The House committee tabled an advisory report on 25 June 2012 which recommended that both bills be passed. The advisory report is available via the House committee's website at: www.aph.gov.au/spla (accessed 26 June 2012).

3 *Journals of the Senate*, 18 June 2012, p. 2485.

4 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 14 March 2012, p. 2785.

5 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 14 March 2012, p. 2785.

Federal Magistrate (the heads of jurisdiction), to manage complaints that are referred to them regarding judicial officers. The bill also amends the *Freedom of Information Act 1982* (FOI Act) to exclude documents created through the complaints handling scheme from the operation of the FOI Act.

1.4 The Explanatory Memorandum (EM) to the Judicial Complaints Bill states that it is designed to support a largely non-legislative framework to assist the relevant head of jurisdiction to manage complaints regarding judicial officers which are referred to them. In particular, the Judicial Complaints Bill will:

- provide a statutory basis for these heads of jurisdiction to deal with complaints about judicial officers;
- provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints-handling process; and
- exclude from the operation of the FOI Act documents arising in the context of consideration and handling of a complaint about a judicial officer.⁶

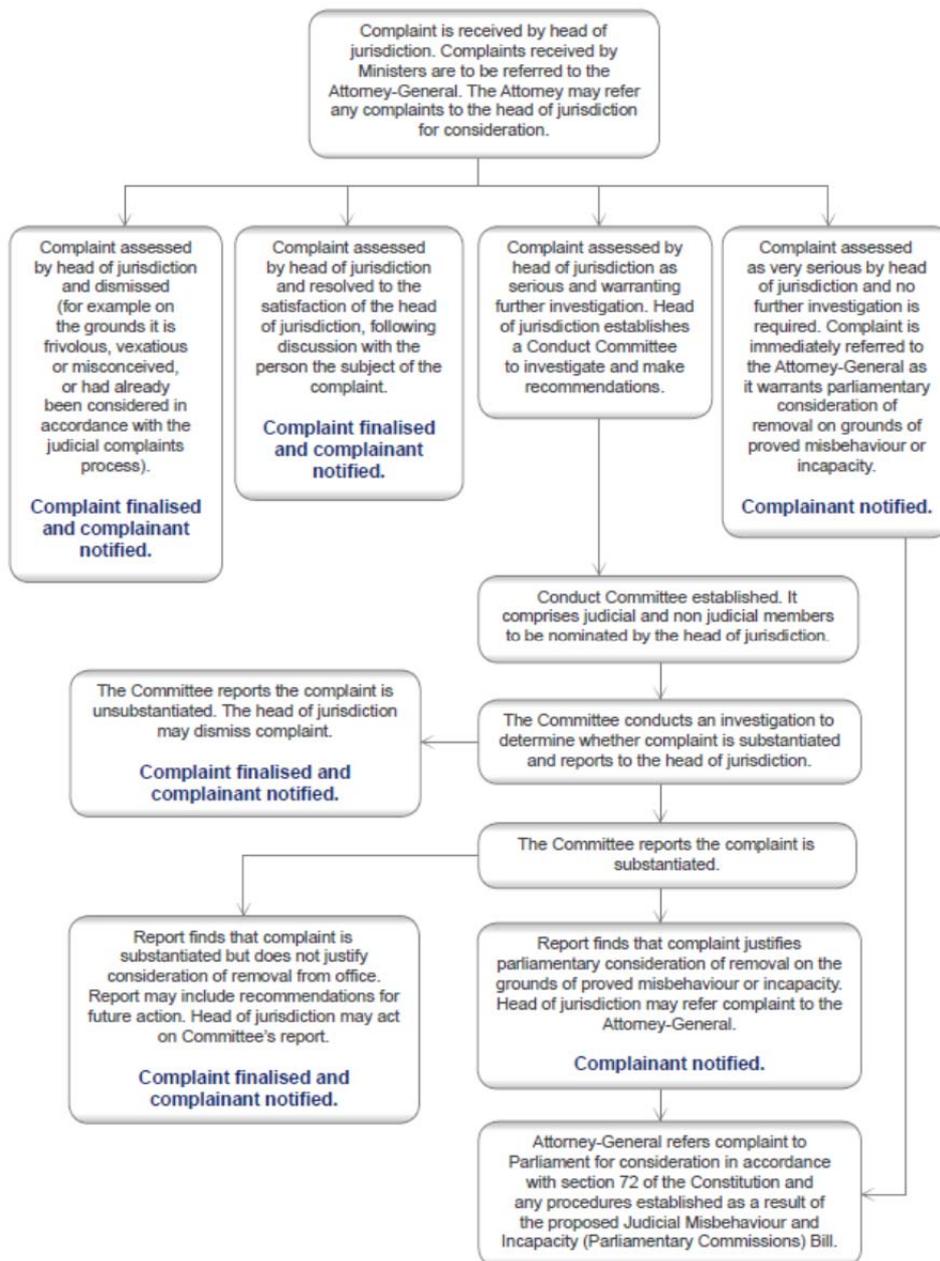
1.5 In her Second Reading Speech, the Attorney-General emphasised that the Judicial Complaints Bill would 'provide heads of jurisdiction with an option to establish a conduct committee to investigate the basis of a complaint and report on what action should be taken about the complaint'.⁷ The EM to the Judicial Complaints Bill contains a diagram of the proposed non-statutory process for the handling of judicial complaints which will be supported by the Judicial Complaints Bill:⁸

6 EM, Judicial Complaints Bill, p. 2.

7 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 14 March 2012, p. 2785.

8 EM, Judicial Complaints Bill, p. 2.

Diagram 1: Proposed non-statutory process for judicial complaints handling



Parliamentary Commissions Bill

1.6 The Parliamentary Commissions Bill enables parliamentary commissions to be established following a resolution by each House of the Parliament to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer (including a Justice of the High Court of Australia).

1.7 The EM to the Parliamentary Commissions Bill states:

The Bill provides a standard mechanism to assist the Parliament in its consideration of removal of a judge or federal magistrate from office under the Constitution...While instances of removal of judges from office in Australia have been extremely rare, it is important that a clear framework is in place in the event that such a circumstance were to arise. Currently, there is no standard mechanism by which allegations about misbehaviour or incapacity against federal judicial officers would be investigated to assist Parliament's consideration of removal of a federal judicial officer under paragraph 72(ii) of the Constitution.⁹

1.8 In her Second Reading Speech, the Attorney-General outlined the key features of the Parliamentary Commissions Bill:

This bill establishes an effective tool that the parliament can employ to inform itself about the factual basis of an allegation of serious misbehaviour or incapacity against a Commonwealth judicial officer...

A commission would provide for an independent investigation into the factual basis of the allegation, in order to provide parliament with appropriate evidence for its consideration.

A commission would in no way usurp parliament's role in determining whether the conduct of a judicial officer amounted to proved misbehaviour or incapacity...

It enables a commission to operate in an inquisitorial manner, similar to the way that parliamentary committees operate.

A commission will be required to act in accordance with the rules of natural justice, and the bill specifies procedures a commission must follow to ensure the Commonwealth judicial officer who is the subject of an investigation is treated fairly.

Chapter III of the Constitution establishes the independence of the Commonwealth judiciary from other limbs of government. Consistent with this independence, a commission would not have power to require the participation of current and former Commonwealth judicial officers in its investigation into an allegation.

9 EM, Parliamentary Commissions Bill, p. 2.

Commonwealth judicial officers could still participate and assist a commission's investigation should they choose to do so.¹⁰

Background

1.9 Under section 72 of the Constitution, Justices of the High Court of Australia (High Court) and of other courts created by the Federal Parliament, once appointed, cannot be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session 'praying for such removal on the ground of proved misbehaviour or incapacity'. This protection of judicial tenure is recognised as an important safeguard of judicial independence in the constitutional separation of powers.¹¹

1.10 Currently, the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Federal Magistrates Court each have similar informal and largely non-legislative judicial complaints procedures.¹² While some differences exist between the courts,¹³ these procedures involve mechanisms to deal with complaints regarding delay or judicial misconduct made to the Chief Justice of the Federal Court, the Chief Judge of the Family Court, or the Chief Magistrate of the Federal Magistrates Court. However:

This complaints procedure does not, and cannot, provide a mechanism for disciplining a judge [or federal magistrate]. It does, however, offer a process by which complaints made about judicial conduct by members of the public can be brought to the attention of the [head of jurisdiction] and the judge [or federal magistrate] concerned and it provides an opportunity for a complaint to be dealt with in an appropriate manner.

For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its judges [or federal magistrates] and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred and, if it

10 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 14 March 2012, p. 2786.

11 Department of the Senate, *Odgers' Australian Senate Practice*, 12th edition, 2008, pp 511-513; Enid Campbell and HP Lee, *The Australian Judiciary*, 2001, p. 101.

12 For example, see Family Court of Australia, *Judicial Complaints Procedure*, available at: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Feedback/FCOA_complaints_judicial (accessed 2 May 2012).

13 For example, in the Family Court, the Deputy Chief Judge manages judicial complaints assisted by a Judicial Complaints Adviser.

should fall short of judicial standards, to improve the performance of the Court.¹⁴

1.11 The procedure provided for under section 72 of the Constitution for the removal of a federal judge has never been used but, in 1986, the parliament passed the *Parliamentary Commission of Inquiry Act 1986*. This legislation established a commission to inquire into, and advise the parliament on, whether the conduct of then High Court Justice the Hon Lionel Murphy had 'been such as to amount...in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution'.¹⁵ Following revelations that Justice Murphy was terminally ill, the commission was terminated by repealing legislation. Prior to the establishment of the commission, two Senate select committee inquiries were conducted in 1984 and criminal proceedings took place in 1985 against Justice Murphy in the Supreme Court of New South Wales. The criminal proceedings resulted in a conviction for one of two charges of attempting to pervert the course of justice; however, this conviction was quashed following an appeal and Justice Murphy was acquitted at the second trial.¹⁶

1.12 There are also examples of state parliaments dealing with allegations of misconduct or incapacity against judicial officers.¹⁷ These include a statutory Parliamentary Judges Commission of Inquiry established by the Legislative Assembly of Queensland in 1988 to investigate whether the behaviour of Justice Angelo Vasta warranted his removal from office as a judge the Supreme Court. That commission reported that Justice Vasta's behaviour warranted his removal. Justice Vasta was allowed to address the Legislative Assembly to show cause why he should not be removed from office. However, the Legislative Assembly agreed with the findings of the commission and resolved to address the Governor of Queensland requesting the

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- 14 See Federal Court of Australia, *Judicial complaints procedure*, available at: http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html (accessed 2 May 2012); Family Court of Australia, *Judicial Complaints Procedure*, available at: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Feedback/FCOA_complaints_judicial (accessed 2 May 2012); Federal Magistrates Court, *Judicial Complaints Procedure*, available at: http://www.fmc.gov.au/pubs/docs/Judicial_Complaints_Procedure.pdf (accessed 2 May 2012).
- 15 *Parliamentary Commission of Inquiry Act 1986*, subsection 5(1). Repealed by *Parliamentary Commission of Inquiry (Repeal) Act 1986*. Further discussion and commentary on this matter is provided in Department of the Senate, *Odgers' Australian Senate Practice*, 12th edition, 2008, pp 511-538; see also Enid Campbell and HP Lee, *The Australian Judiciary*, 2001, pp 102-103.
- 16 Enid Campbell and HP Lee, *The Australian Judiciary*, 2001, pp 102-103.
- 17 Further examples in NSW are outlined in Department of the Senate, *Odgers' Australian Senate Practice*, 13th edition, 2012, pp 684-685, extract tabled by the Clerk of the Senate at the committee's public hearing on 11 May 2012; see also Enid Campbell and HP Lee, *The Australian Judiciary*, 2001, pp 106-108.

removal of Justice Vasta on 7 June 1989. Following presentation of the address, Justice Vasta was removed from office by the Governor.¹⁸

Constitutional Commission report

1.13 In 1988, possible reform of the mechanism for the removal of judicial officers in section 72 of the Constitution was proposed by the then Constitutional Commission. In its *Final Report*, the Constitutional Commission recommended that section 72 be altered. The alterations proposed that an address for removal of a justice 'shall not be made unless a Judicial Tribunal, requested by a Minister of State for the Commonwealth to inquire into an allegation of misbehaviour by or incapacity of the Justice, has reported the facts found by it could amount to misbehaviour or incapacity warranting removal'.¹⁹ Further, 'the address of each House of Parliament must be based on facts found by the Tribunal'. The proposed alterations specified that a member of the Judicial Tribunal 'must be a Justice of a superior federal court other than the High Court or a judge of the Supreme Court of a State or Territory'.²⁰

Australian Law Reform Commission report

1.14 In February 2000, the Australian Law Reform Commission (ALRC) tabled its report, *Managing Justice: A Review of the Federal Civil Litigation System*. In relation to the issue of complaints against Commonwealth judicial officers, the ALRC noted that it had 'moved away from a proposal...to establish a standing national judicial commission to receive and investigate complaints against federal judges' and had 'concluded that the establishment of such a body would be problematic under chapter III of the Constitution'.²¹ Instead, the ALRC recommended that 'each federal court develop a transparent internal system of complaints handling' and that 'both Houses of federal Parliament develop rules or a protocol designed to ensure the smooth transfer and certain handling of the rare complaints against federal judges of sufficient seriousness and substance to merit consideration of whether to remove the judge from office'.²² In particular, the ALRC recommended:

18 See Enid Campbell and HP Lee, *The Australian Judiciary*, 2001, pp 105-106; The Hon James Thomas AM, *Judicial Ethics in Australia*, 3rd edition, 2009, pp 155-157; Department of the Senate, *Odgers' Australian Senate Practice*, 13th edition, 2012, pp 683-684, extract tabled by the Clerk of the Senate at the committee's public hearing on 11 May 2012.

19 Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1, 1988, p. 406.

20 Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1, 1988, p. 406.

21 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Litigation System*, Report 89, February 2000, p. 11, available at www.alrc.gov.au/report-89 (accessed 5 May 2012).

22 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Litigation System*, Report 89, February 2000, p. 12.

Parliament should give consideration to whether, and in what circumstances, the protocol might provide for the establishment of an independent committee, drawn from a panel of distinguished retired judges (or other suitably qualified persons), to investigate the complaint and prepare a report to assist Parliament with its deliberations. Such a provision should not derogate from the flexible powers presently possessed by the two Houses to fashion and control their own procedures.²³

Previous Senate Committee report

1.15 In December 2009, the Senate Legal and Constitutional Affairs References Committee (References Committee) tabled its report titled *Australia's Judicial System and the Role of Judges*.²⁴ The References Committee made a number of recommendations in relation to establishing processes to handle complaints regarding judicial officers. In particular, the References Committee recommended that, subject to constitutional limitations and consultation with the federal courts, the Australian Government should establish a judicial commission modelled on the Judicial Commission of New South Wales.²⁵

1.16 In relation to complaints against judicial officers, the References Committee commented:

The committee is persuaded that because of the simplicity of the conduct requirements in section 72 there are legislative gaps in the existing arrangements. In the first place the section does not address the process required for any inquiry into serious misconduct or incapacity. Secondly, there are no statutory arrangements for dealing with less serious complaints of judicial misconduct. Courts are left to adopt informal mechanisms and

23 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Litigation System*, Report 89, February 2000, p. 31.

24 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, available from the committee's website: www.aph.gov.au/senate/legalcon.

25 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, p. 95. The Judicial Commission of NSW was established under the *Judicial Officers Act 1986* (NSW). It functions to assist that state's courts achieve consistency in sentencing, and it supervises appropriate judicial education, as well as examining complaints against judicial officers. Judicial complaints which are investigated by the Judicial Commission of NSW can be dismissed, referred to the relevant head of jurisdiction for appropriate action, or referred to a Conduct Division for further investigation. In investigating judicial complaints, the Conduct Division has the functions, protections and immunities of a royal commission. The Conduct Division must either provide a report to the relevant head of jurisdiction or a report to the Governor setting out whether a complaint is wholly or partly substantiated, and whether it could justify parliamentary consideration of the removal of the judicial officer from office: Judicial Commission of NSW, *Guide for Complainants*, available at: www.judcom.nsw.gov.au (accessed 5 May 2012).

have no specific investigative or complaint handling resources or expertise.²⁶

1.17 The References Committee's report also recommended that the Australian Government implement an interim procedure for addressing judicial complaints, including a federal process to enable the establishment of an ad hoc tribunal to investigate complaints of judicial misconduct or incapacity, and guidelines for the investigation of less serious misconduct or incapacity issues.²⁷

1.18 The Australian Government's response in 2010 to the References Committee's report noted its recommendations and indicated that the Australian Government was working within the then Standing Committee of Attorneys-General on a range of options for handling complaints against judicial officers.²⁸

1.19 The High Court does not have a procedure for dealing with complaints regarding judicial officers. The References Committee's report recommended that the High Court 'adopt a written complaint handling policy and make it publicly available'.²⁹ In its response to the References Committee's report, the Australian Government noted that, on 17 December 2009, the Chief Justice of the High Court had written to the then Attorney-General in relation to this matter. In his letter, the Chief Justice stated:

There is no statutory or other basis for establishing any procedure for 'handling complaints' against Justices of the High Court. Because it seems inevitable that any question as to the constitutional validity of procedures of that kind would come to this Court for decision, the Court will make no further comment on the issue.³⁰

Previous legislation

1.20 Previous attempts have been made to pass legislation to establish a parliamentary commission to investigate judicial complaints at the federal court level. On 11 September 2007, Senator Linda Kirk introduced a private senator's bill, titled the Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2007 (Kirk Bill) and, on 22 February 2010, the Hon Duncan Kerr SC MP, introduced a

26 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, p. 73.

27 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, p. 97.

28 Australian Government response to Senate Legal and Constitutional Affairs References Committee's report *Australia's Judicial System and the Role of Judges*, pp 4-5, available from the committee's website: www.aph.gov.au/senate_legalcon.

29 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, p. 7.

30 Australian Government response to Senate Legal and Constitutional Affairs Committee report *Australia's Judicial System and the Role of Judges*, p. 1.

private member's bill, titled the Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2010 (Kerr Bill). Both the Kirk Bill and the Kerr Bill proposed the establishment of a commission to assist the parliament in the exercise of its constitutional responsibility in instances of alleged misbehaviour by, or incapacity of, a federal court justice.³¹ Both the Kirk Bill and the Kerr Bill lapsed at the dissolution of the 42nd Parliament.

Conduct of the inquiry

1.21 The committee advertised the inquiry in *The Australian* newspaper on 11 April 2012. Details of the inquiry, including links to the Bills and associated documents, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to a number of organisations and individuals, inviting submissions by 13 April 2012.

1.22 The committee received 15 submissions, which are listed at Appendix 1. All public submissions were published on the committee's website.

1.23 The committee held public hearings for the inquiry on 11 May 2012 and 25 May 2012 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

Acknowledgement

1.24 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.25 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

31 Senator Linda Kirk, *Senate Hansard*, 11 September 2007, p. 35; the Hon Duncan Kerr SC MP, *House of Representatives Hansard*, 31 May 2010, p. 4709.