

# CHAPTER 2

## Judicial Complaints Bill

### Key provisions

2.1 As noted in chapter 1, the key provisions of the Judicial Complaints Bill would establish a framework to enable the heads of jurisdiction of the Federal, Family and Federal Magistrates Courts, to manage complaints that are referred to them regarding judicial officers.

2.2 In essence, the Judicial Complaints Bill proposes identical amendments to the Family Law Act, the Federal Court Act and the Federal Magistrates Act. The Judicial Complaints Bill amends all of these Acts to:

- insert new definitions in relation to handling complaints;
- amend the responsibilities of the head of jurisdiction of each court to provide for them to handle complaints, to arrange for other complaint handlers to assist them, and to authorise persons or bodies to handle complaints;
- insert legal protections for those involved in the handling of complaints; and
- outline the application of the proposed amendments.

2.3 As these proposed amendments are replicated in the Family Law Act, the Federal Court Act and the Federal Magistrates Act, the following section will only set out the proposed amendments to the Family Law Act as an example.

### *Family Law Act amendments*

2.4 Items 1, 2, 3 and 4 of Schedule 1 insert into existing subsection 4(1) of the Family Law Act definitions for 'complaint', 'complaint handler', what it means to 'handle' a complaint, and what comprises a 'relevant belief'. The EM to the Judicial Complaints Bill notes that the definition of 'complaint handler' and what it means to 'handle' a complaint enable the Chief Judge of the Family Court to refer a complaint to a conduct committee, and enable the conduct committee to investigate the complaint and provide a report to a Chief Judge for further consideration.<sup>1</sup> However, there is no requirement in the bill for heads of jurisdiction to establish a conduct committee.

2.5 Items 5, 6, 7, 8, 9, 10 and 11 of Schedule 1 make amendments to various subsections of existing section 21B of the Family Law Act, which currently establishes the responsibility of the Chief Judge of the Family Court to ensure the 'effective, orderly and expeditious discharge of the business of the Court'. The amendments provide for the Chief Judge of the Family Court to handle complaints

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1 EM, Judicial Complaints Bill, pp 8-9.

about other judges, to arrange for other complaint handlers to handle complaints, and to authorise another person or body to handle complaints.

2.6 Item 5 of Schedule 1 inserts into existing subsection 21B(1A) two new paragraphs relating to the power of the Chief Judge to deal with a complaint about another judge's performance of his or her judicial or official duties.

2.7 Proposed new paragraph 21B(1A)(c) extends the Chief Judge's specific powers to include a power to deal with a complaint about the performance by another judge of his or her judicial or official duties. Proposed new paragraph 21B(1A)(d) gives the Chief Judge power to take any measures that he or she believes are reasonably necessary to maintain public confidence in the court, including the ability to temporarily restrict another judge to non-sitting duties. This power operates whether or not there has been a complaint about the judge.<sup>2</sup>

2.8 Item 12 of Schedule 1 inserts proposed new section 38Y titled 'Protection of persons involved in handling etc. complaints'. The proposed new section provides that a complaint handler (or a person authorised to handle a complaint) under the proposed amendments to section 21B has the same protection and immunity as a Justice of the High Court. Similarly, a witness appearing before a complaint handler has the same protections, and is subject to the same liabilities, as a witness in a proceeding tried by the High Court. A lawyer assisting, or appearing on behalf of, a person before a complaint handler has the same protection and immunity as a barrister appearing for a party in a proceeding before the High Court.

### **Key issues**

2.9 Key issues raised by submitters and witnesses during the course of the inquiry in relation to the Judicial Complaints Bill include:

- the approach taken in the bill;
- the exclusion of the High Court from the bill's operation;
- the discretion of heads of jurisdiction in handling complaints; and
- legal costs for judicial officers.

### ***Approach of the Judicial Complaints Bill***

2.10 Several submissions expressed broad support for the approach of the Judicial Complaints Bill. For example, the Judicial Conference of Australia noted that it is desirable to have 'in each jurisdiction a mechanism for dealing with complaints against judicial officers which preserves judicial independence, is appropriately transparent and promotes justice as between the complainant and the judicial officer'.<sup>3</sup>

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2 EM, Judicial Complaints Bill, pp 9-10.

3 *Submission 4*, p. 1.

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### *Exclusion of heads of jurisdiction*

2.11 The scholars from the University of Adelaide Law School (Adelaide Law School) supported the approach of the Judicial Complaints Bill in 'formalising the (currently informal) role of the head of the court', in view of the constitutional constraints on the parliament in disciplining judicial officers. However, it emphasised that the coverage of the Judicial Complaints Bill is limited in that it does not apply to complaints directly relating to the head of jurisdiction in each court. The Adelaide Law School considered that the lack of coverage of the Judicial Complaints Bill over complaints against a head of jurisdiction 'undermines the achievement of the Bill's objectives',<sup>4</sup> suggesting that this 'could be remedied by making provision for complaints against the head of the jurisdiction to be dealt with by the next most senior judge in the jurisdiction, or by a judicial officer from a higher court'.<sup>5</sup>

2.12 In this context, the Attorney-General's Department (Department) highlighted the special position of the heads of jurisdiction:

[I]t is considered inappropriate to have the conduct of a head of jurisdiction subjected to scrutiny within that court by designated persons who occupy positions lower in the judicial hierarchy.

Heads of jurisdiction are subject to section 72(ii) of the Constitution and would be covered by the Parliamentary Commissions Bill. Serious concerns about the conduct of a head of jurisdiction that may warrant removal from office would be able to be referred for the Parliament to consider under paragraph 72(ii) of the Constitution.<sup>6</sup>

### *Other issues*

2.13 The Adelaide Law School also highlighted a number of other specific areas for improvement in the Judicial Complaints Bill:

- provision for the process of handling complaints regarding judicial officers to be explained and made accessible to the public, and provision for ongoing information about the way the system is working;
- additional protection of the sensitive or personal information of the parties to a complaint (noting that 'the actions of the head of jurisdiction under the Bill may be the subject of judicial review and therefore the information may still come into the public domain'); and

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4 *Submission 7*, p. 4.

5 *Submission 7*, p. 4.

6 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 2.

- provision for dealing with a judicial officer who refuses to comply with measures imposed by the head of jurisdiction, such as a temporary restriction to non-sitting duties.<sup>7</sup>

### ***Exclusion of the High Court***

2.14 The Judicial Complaints Bill applies to federal courts created by the parliament, but not to the High Court. In its submission, the Adelaide Law School noted that the Attorney-General has explained this differential treatment by reference to the High Court's position at 'the apex of the Australian judicial system' and the fact that the High Court 'could be called upon to determine the validity of any structure established to handle judicial complaints'.<sup>8</sup> The Adelaide Law School disagreed with this position, noting that the High Court has previously considered legislation that directly touched upon the judiciary 'without fear or favour'. The Adelaide Law School also argued that any matters relating to High Court justices 'deserve to be dealt with in a way no less transparent than matters arising in other federal courts', and recommended that the Judicial Complaints Bill should apply to all federal courts, including the High Court.<sup>9</sup>

2.15 In a response to a question on notice, the Department reiterated that the approach 'adopted by the Government to exclude the High Court from the operation of the Judicial Complaints Bill recognises the special position of the High Court', but the committee was not provided with a specific constitutional reason for the exclusion.<sup>10</sup> The Department did, however, note that paragraph 72(ii) of the Constitution applies to all federal judges, including Justices of the High Court, meaning that the commissions proposed under the Parliamentary Commissions Bill would be able to investigate allegations about a Justice of the High Court.<sup>11</sup>

2.16 Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law agreed with the exclusion of the High Court from the Judicial Complaints Bill, arguing that 'the High Court is distinguished not just by its seniority but also by its size'. Professor Lynch differentiated the position of the Chief Justice of the High Court from the positions of the heads of jurisdiction of the other federal courts:

The Chief Justice [of the High Court] as a head of jurisdiction...is simply one individual amongst the seven that sit always together on major cases...It

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7 *Submission 7*, pp 4-6.

8 *Submission 7*, p. 3.

9 *Submission 7*, p. 3.

10 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 1.

11 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 1.

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is very different from the Chief Justice of the Federal Court, who is the head of jurisdiction over many, many other judges.<sup>12</sup>

### *Discretion of heads of jurisdiction*

2.17 The broad discretion granted to the heads of jurisdiction under the Judicial Complaints Bill was highlighted during the inquiry.

#### *Temporary restriction to non-sitting duties*

2.18 A number of submitters commented on the head of jurisdiction's power under the Judicial Complaints Bill to take any measures the head of jurisdiction believes are reasonably necessary to maintain public confidence in the court. For example, the Adelaide Law School proposed provision for other measures for heads of jurisdiction to take in dealing with judicial complaints, in addition to 'temporarily restricting another Judge to non-sitting duties', including (in serious cases) public admonishment and reprimand.<sup>13</sup>

2.19 In their submission, Professor Sharyn Roach Anleu and Professor Kathy Mack from Flinders University noted that 'the Bill and the Memorandum are silent on what responses or sanctions might be available if a complaint is found to be justified'.<sup>14</sup> They highlighted that the only measure referred to in the Judicial Complaints Bill is the 'statutory power to "temporarily restrict a judge to non-sitting duties"'. Further:

This response may be appropriate while a complaint is being considered, or as a remedy or sanction in relation to certain kinds of complaints, but it does not address the personal, situational or institutional factors which may have led to the complaint. It may even aggravate them, as taking [a] judicial officer out of the sitting lists, while still on full pay, will only increase the workload on colleagues. Under the present workload allocation systems, heads of jurisdiction and judicial colleagues can and will provide some relief to judicial officers whose health or personal circumstances or work capacity require it, within limits. However, neither the current informal system nor the Bill create any additional measures or responses or sanctions which might directly address the problems which led to the complaint.<sup>15</sup>

#### *Guiding criteria*

2.20 The Adelaide Law School suggested that the Judicial Complaints Bill could also be improved by the provision of criteria to guide decision-making by heads of jurisdiction in handling complaints regarding judicial officers. It argued that, by

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12 *Committee Hansard*, 25 May 2012, p. 4.

13 *Submission 7*, pp 4-6.

14 *Submission 6*, p. 5.

15 *Submission 6*, p. 5.

failing to set down guiding criteria for the head of jurisdiction, the Judicial Complaints Bill 'undermines its chief purpose, which is to increase transparency and strengthen public confidence in the judiciary'. The Adelaide Law School also considered that there is 'enough scholarship on judicial ethics and what constitutes judicial misbehaviour to compile a non-exhaustive list of criteria to guide the judge's discretion in handling complaints'.<sup>16</sup>

2.21 In evidence, Dr Suzanne Le Mire from the Adelaide Law School suggested that the responsibilities of the heads of jurisdiction outlined in the Judicial Complaints Bill 'could be fleshed out to include some non-exclusive statement of the standards expected of judges'.<sup>17</sup> Specifically:

[Guidelines] would potentially give more guidance not only to those who are potentially subject to the system, the judges, but also to members of the public who are looking at this from outside as to what kinds of standards for judges there are within our system. Having some guidance could be an important signal to both judges and complainants about the criteria against which these complaints are going to be assessed.<sup>18</sup>

2.22 Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law also argued that it is desirable to have 'some kind of statement or guidance in the legislation that [is] a factor that the head of jurisdiction needs to bear in mind, particularly in relation to using quite a remarkable power such as suspension from sitting duties'.<sup>19</sup> In particular:

[A] statutory power to suspend that depends simply on the belief of the head of jurisdiction that this is 'reasonably necessary to maintain public confidence in the court', as this bill does, seems worryingly loose. Following the example of New South Wales law, our view is that it would seem preferable for the [C]omplaints [B]ill to require the occurrence of specific factual triggers before a head of jurisdiction may proceed to use his or her discretion to suspend. Examples are either the passage of a motion to establish a parliamentary commission or, even earlier, the delivery of a report by the conduct committee that the head of jurisdiction has established. Our view...is that it is important to establish clear and suitably serious thresholds before a step such as suspension is taken.<sup>20</sup>

2.23 In relation to the need for guiding criteria for heads of jurisdiction, the Department responded:

The Judicial Complaints Bill has been developed to support a largely non-legislative framework for complaints handling undertaken within the courts.

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16 *Submission 7*, p. 5.

17 *Committee Hansard*, 11 May 2012, p. 8.

18 *Committee Hansard*, 11 May 2012, p. 8.

19 *Committee Hansard*, 25 May 2012, p. 3.

20 *Committee Hansard*, 25 May 2012, p. 1.

Under the Bill, the power of a head of jurisdiction to handle complaints is part of the broad responsibility of the head of jurisdiction for ensuring the effective, orderly and expeditious discharge of the business of the Court. This forms the overarching criteria for a head of jurisdiction to consider in handling complaints about judicial officers within the court. It would be a matter for an individual court to adopt non-exhaustive factors to guide consideration consistent with their own operating procedures.

Details in relation to the procedures for complaints to be made, the possible outcomes that might flow from a complaint and the rights of complainants to be informed of the progress of their complaint will be addressed through the non-statutory model for complaints handling within the courts which is being finalised in consultation with heads of jurisdiction.<sup>21</sup>

### ***Legal costs***

2.24 In their submissions, the Federal Court of Australia and the Judicial Conference of Australia highlighted that, while clause 45 of the Parliamentary Commissions Bill provides that the Commonwealth will pay the reasonable legal costs of a judicial officer being investigated in relation to an allegation of misbehaviour or incapacity, there is no corresponding provision in the Judicial Complaints Bills.<sup>22</sup> Both submissions proposed an amendment to the Judicial Complaints Bill for the Commonwealth to provide for the reasonable legal costs of a judicial officer in responding to a complaint. The Judicial Conference of Australia noted two reasons for such an amendment:

One is to provide fairness to the judicial officer...Secondly and importantly, such a provision would encourage judicial officers to participate fully and voluntarily in the handling of the complaint. Necessarily, the participation of a judicial officer in this process must be voluntary. It would be regrettable if the operation of this statute was affected by a reluctance on the part of judicial officers to cooperatively participate, for fear of the burden of the cost of necessary legal representation.<sup>23</sup>

2.25 However, in commenting on the submission from the Federal Court of Australia, Civil Liberties Australia disagreed with the suggestion that judicial officers should be 'reimbursed reasonable costs associated with responding to or appearing before a complaint handler':

This proposal, if accepted, would lead to a perception that ordinary Australians are subject to one law, while judges (who are paid multiple times the average weekly wage by the Commonwealth) are subject to another...Few, if any, other Australians could expect their employer to pay

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21 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 4.

22 Federal Court of Australia, *Submission 1*, p. 1; Judicial Conference of Australia, *Submission 4*, pp 1-2.

23 *Submission 4*, p. 2.

their reasonable legal costs when they were subject to a workplace investigation, even where dismissal and loss of employment were a real possibility...[A] judge, like any other employee, should expect a fair hearing by their employer; be able to request the presence of a support person of their choice; and be able to appeal an adverse decision against them. They should not, however, have their costs covered by the Commonwealth.<sup>24</sup>

2.26 The Department noted that provision has been made in the Parliamentary Commissions Bill for a judicial officer's legal costs to be paid 'in recognition that a judicial officer is subject to a parliamentary process by virtue of their constitutional standing as a Chapter III judge'.<sup>25</sup> In contrast to the approach taken in the Parliamentary Commissions Bill, the Department outlined that the approach to reimbursement of legal costs in the Judicial Complaints Bill is 'consistent with the character of an internal complaints handling process'. Further, the Department noted that federal courts are responsible for their own operation and management, and that the heads of jurisdiction could offer to reimburse the legal costs of a judicial officer where they consider it appropriate in the circumstances.<sup>26</sup>

## **Committee view**

### ***Exclusion of heads of jurisdiction***

2.27 The committee notes the concerns raised in submissions and by witnesses regarding the exclusion of heads of jurisdictions from the coverage of the Judicial Complaints Bill. However, the committee considers that a number of practical problems exist with the alternative proposal to transfer the responsibility for handling complaints regarding the possible misconduct or incapacity of a head of jurisdiction to another judge of the court or to a judicial officer of another court. For example, as the Department noted, 'it is inappropriate to have the conduct of a head of jurisdiction subjected to scrutiny within that court by designated persons who occupy positions lower in the judicial hierarchy'.<sup>27</sup> Given the importance of these senior judicial officers, the committee considers that, where appropriate, complaints regarding allegations of misconduct or incapacity of a head of jurisdiction should proceed to consideration by the parliament under section 72 of the Constitution, either under the process established by the Parliamentary Commissions Bill, or otherwise as the parliament determines.

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24 *Submission 5*, p. 9.

25 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 5.

26 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 5.

27 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 2.

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### ***Exclusion of the High Court***

2.28 The Department did not provide the committee with a clear constitutional reason for the exclusion of the High Court from the Judicial Complaints Bill. Nonetheless, the different position of the High Court and the Chief Justice of the High Court is apparent in the fact that, unlike the other federal courts which have been created by the parliament (which place responsibility for management of the relevant court with the head of jurisdiction), the *High Court of Australia Act 1976* provides that the 'High Court shall administer its own affairs'.<sup>28</sup> In the view of the committee, any complaints regarding the conduct or capacity of High Court justices should be referred to the parliament to be dealt with under section 72 of the Constitution, either under the process established by the Parliamentary Commissions Bill, or otherwise as the parliament determines.

### ***Guiding criteria for heads of jurisdiction***

2.29 The committee acknowledges the points made by witnesses, and in submissions, regarding the benefit of guiding criteria to assist heads of jurisdiction exercise the broad discretion granted to them under the Judicial Complaints Bill. In the view of the committee, it would be beneficial if each of the federal courts make publicly available a document containing the recognised basic standards expected of judicial officers. These statements of recognised basic standards of judicial conduct could assist members of the public, users of the court, the federal judiciary and the heads of jurisdiction. In particular, they could assist heads of jurisdiction in exercising their discretion in managing their respective courts. The committee considers, however, that formalising these recognised basic standards is a matter for the courts themselves.

2.30 The committee notes that a number of other comparable jurisdictions, such as Canada, have published codes of conduct or ethical principles which clarify the high standard of conduct expected of judicial officers.<sup>29</sup> No formal code of conduct or ethical guidelines have been established for the Australian federal judiciary, although the committee notes that the Council of Chief Justices of Australia and the Australasian Institute of Judicial Administration have published a *Guide to*

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28 Section 17, *High Court of Australia Act 1976*.

29 For example, Canadian Judicial Council, *Ethical Principles for Judges*, 2004, available at: <http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf> (accessed 30 May 2012).

*Judicial Conduct*.<sup>30</sup> This publication is intended to provide 'practical guidance' to all members of the Australian judiciary.<sup>31</sup>

### ***Legal costs***

2.31 The committee notes the position of the Judicial Conference of Australia and the Federal Court of Australia regarding reimbursement of legal costs of judicial officers subject to complaints handling procedures. However, the committee does not agree with the argument that public funding of legal costs will necessarily encourage the participation of judicial officers in complaints handling processes. In the view of the committee, it is not appropriate for the Judicial Complaints Bill to provide that the public will always fund the legal costs of judicial officers during complaint handling processes. As the Department noted, the federal courts themselves have the capacity to reimburse the legal costs of judicial officers where they consider it is appropriate.

### **Recommendation 1**

**2.32 The committee recommends that the Courts Legislation Amendment (Judicial Complaints) Bill 2012 be passed.**

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30 Council of Chief Justices of Australia and Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 2<sup>nd</sup> ed, 2007, available at: [http://www.supremecourt.wa.gov.au/publications/pdf/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.supremecourt.wa.gov.au/publications/pdf/GuidetoJudicialConduct(2ndEd).pdf) (accessed 30 May 2012).

31 Council of Chief Justices of Australia and Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 2<sup>nd</sup> ed, 2007, p. 1 (Guide). The Guide identifies three objectives of the principles applicable to judicial conduct: to uphold public confidence in the administration of justice; to enhance public respect for the institution of the judiciary; and to protect the reputation of individual judicial officers and of the judiciary. The Guide also identifies three basic principles against which judicial conduct should be tested to ensure compliance with the above objectives: impartiality; judicial independence; and integrity and personal behaviour (p. 3).