

# CHAPTER 3

## Parliamentary Commissions Bill

### Key provisions

3.1 The key provisions of the Parliamentary Commissions Bill enable 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).

### *Preliminary matters*

3.2 Part 1 of the Parliamentary Commissions Bill deals with preliminary matters including the short title, commencement of provisions, objects and definitions. Of particular note, clause 7 provides that the definitions of 'proved', 'misbehaviour' and 'incapacity' have 'the same meaning as in section 72 of the Constitution'.<sup>1</sup>

### *Functions, powers and membership of commissions*

3.3 Part 2 of the Parliamentary Commissions Bill deals with the establishment, functions, powers and membership of any commissions. Subclause 9(1) provides that a commission is established 'if each House of the Parliament passes, in the same session, a resolution that a Commission is established...to investigate a specified allegation of misbehaviour or incapacity of a specified judicial officer'. Clause 13 provides that a commission consists of three members appointed on nomination of the Prime Minister, following consultation with the Leader of the Opposition, and that at least one member of each commission must be a former Commonwealth judicial officer or a judge, or former judge, of the supreme court of a state or territory.

### *Investigations by commissions*

3.4 Part 3 of the Parliamentary Commissions Bill deals with investigations by commissions.

3.5 Division 1 of Part 3 contains general provisions relating to how commissions will conduct investigations. In particular, it provides:

- a commission will decide questions in accordance with a majority of its members (subclause 18(1));
- a commission is not bound by the rules of evidence (subclause 19(1)); and

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1 However, the definitions for 'misbehaviour' and 'incapacity' exclude clause 73 of the Parliamentary Commission Bill dealing with misbehaviour or incapacity of commission members. These terms have their 'ordinary meaning' in clause 73.

- a commission must act in accordance with the rules of natural justice (subclause 20(1)).

3.6 Division 2 of Part 3 contains rules relating to a commission's investigation, including:

- a commission must conduct investigations as quickly as proper consideration of the matters before the commission permits (clause 22);
- a commission must hold its hearings in public, but may direct that part or all of its hearings be held in private if satisfied that it is desirable to do so (subclause 23(1));
- a commission may hold hearings for the purposes of its investigation (and the rules for such hearings) (clause 24);
- a member of a commission may, by notice, require a person to attend a hearing of the commission to give evidence or produce documents, or to require a person to produce a specified document or other things to a member of the staff of the commission (subclause 25(1)) (however, subclause 25(5) exempts a Commonwealth judicial officer or former Commonwealth judicial officer from this requirement);
- the presiding member of a commission may issue an arrest warrant for a person who fails to appear at a hearing in answer to a notice (clause 27);
- a commission can issue search warrants for any premises where there may be documents or other things connected with the matter the commission is investigating, however this power does not apply to premises occupied by a Commonwealth judicial officer or former Commonwealth judicial officer (clause 28); and
- the Commonwealth is liable to pay for the reasonable costs of legal representation for a Commonwealth judicial officer being investigated (clause 45).

### ***Reports of commissions***

3.7 Division 3 of Part 3 provides that the commission's report must be given to the Speaker of the House of Representatives and the President of the Senate for presentation to the parliament. The commission may also give a separate report in relation to sensitive matters, which is not tabled in the parliament, to the presiding officers. This separate report must be available to senators, members of the House of Representatives and the person in relation to whom the allegation was investigated by the commission (clause 48).

### ***Offence provisions***

3.8 Division 4 of Part 3 contains offences in relation to the conduct of commissions. These offences include:

- failing to comply with a requirement of a commission (such as a requirement to appear, produce a document or other thing, or be sworn or affirmed);
- offences in relation to private hearings (such as unauthorised presence at such a hearing or publishing material from such a hearing);
- giving false or misleading evidence to a hearing; and
- interfering with witnesses, or otherwise obstructing a commission.

3.9 In addition, subclause 54(1) of Division 4 of Part 3 provides that persons are not excused from producing a document or thing, or answering questions at a commission's hearing on the ground that it would tend to incriminate the person or expose the person to a penalty.

### ***Protection of commission members, witnesses and lawyers***

3.10 Division 5 of Part 3 deals with the protections that are provided to those who are connected with a commission (such as members of the commission, and witnesses and lawyers who appear at a hearing of a commission). In particular, clause 67 of Division 5 of Part 3 deals with the treatment of hearings and evidence of a commission under the *Parliamentary Privileges Act 1987* (Privileges Act).

3.11 Clause 67 provides that, for the purposes of section 10 and subsections 16(3), (4) and (6) of the Privileges Act, the proceedings of a commission, the formulation, making or publication of a report, and the report itself, are taken to be proceedings in parliament. Further, under clause 67, evidence before a commission is taken to be evidence before a committee of a House of the Parliament.

### ***Administrative matters***

3.12 Part 4 of the Parliamentary Commissions Bill set out the terms and conditions of the members of a commission in relation to remuneration, resignation, termination and cessation of employment.

3.13 Part 5 of the Parliamentary Commissions Bill outlines the administrative provisions relating to commissions: for example, the engagement of staff, consultants and counsel to assist the commission; the type of information, evidence or documents that may be disclosed by the commission and to whom; and the rules relating to the records of the commission.

### **Key issues**

3.14 Key issues highlighted in submissions in relation to the Parliamentary Commissions Bill include:

- the approach of the Parliamentary Commissions Bill;
- the membership of commissions;
- issues relating to the application of section 72 of the Constitution;

- judicial incapacity;
- the apparent misplaced emphasis on judicial 'misbehaviour', as opposed to a focus on 'incapacity';
- the accessibility of evidence and findings of any commission;
- the storage of commission separate reports on sensitive matters; and
- lack of clarity regarding parliamentary privilege issues.

### ***Approach of the Parliamentary Commissions Bill***

3.15 The Clerk of the Senate, Dr Rosemary Laing, highlighted the 'distinction between the limited powers of [a] commission and what we understand to be the very broad powers of a house of parliament'.<sup>2</sup> The Clerk of the Senate noted that the proposed commissions will have various inquiry powers, but that these inquiry powers are limited in respect of Commonwealth judicial officers:

A question that arises here is whether, with these limitations, a Commission could be effective in conducting inquiries into circumstances that are guaranteed to be difficult and controversial. A further question is why the Houses would delegate an investigation to a body with limited powers when they have full inquiry powers of their own which may be delegated to a committee? These powers include powers to compel witnesses (the only known limitation being members of other Houses).<sup>3</sup>

3.16 In particular, the Clerk of the Senate outlined that, under section 49 of the Constitution, the Australian Houses of Parliament have the powers, privileges and immunities of the House of Commons at 1901. The Clerk noted that this includes a 'broad power in terms of the ability to summon witnesses and to deal with any noncompliance'.<sup>4</sup> While the Clerk holds the view that the Senate has the power to summon a judge, she acknowledged that this power has never been tested and described the power as 'challengeable'.<sup>5</sup>

3.17 The Clerk of the Senate also raised the question of whether the establishment of a commission to investigate judicial misbehaviour or incapacity could diminish the protection otherwise provided by a bicameral parliament, noting commentary in *Odgers' Australian Senate Practice* on this matter:

It may be thought that an inquiry on behalf of both Houses would have something to commend it, but a strong argument could be made out that any inquiry should always be initiated and followed up by one House, and that the other House should not become involved at all until it receives a message requesting its concurrence in an address. The two Houses

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2 *Committee Hansard*, 11 May 2012, p. 4.

3 *Submission 2*, p. 3.

4 *Committee Hansard*, 11 May 2012, p. 4.

5 *Committee Hansard*, 11 May 2012, p. 5.

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proceeding separately in this way would give the judge who was the subject of the inquiry the safeguard of two hearings, which is probably what the framers of section 72 intended. Any joint action by the two Houses may remove this safeguard.<sup>6</sup>

3.18 Reverend Professor Michael Tate AO, a former senator who served on both Senate select committee inquiries into the conduct of the late Justice Murphy, highlighted 'the failure of the Bill to clarify two matters which were left expressly open by the Senate resolution of 6 September 1984 establishing the Senate Select Committee on Allegations Concerning a Judge'. These are: the meaning of the term 'misbehaviour'; and the question of the standard of proof of the conduct which could amount to misbehaviour.<sup>7</sup> He suggested that, without clarity in relation to these matters, the report of a commission could be 'patchwork and even contradictory' with different members taking different approaches.<sup>8</sup>

3.19 Father Tate concluded that 'there would be very few instances which would justify setting up this huge apparatus with such an inbuilt tendency to be unhelpful'.<sup>9</sup> He preferred the establishment of a parliamentary select committee:

Although being a member of a Select Committee (whether of a particular chamber or jointly) helping the parliament to discharge its function as provided for in Section 72 of the Constitution is to be burdened with a most difficult task, it is not beyond the capacity of parliamentarians to fulfil that role which, after all, would remain simply advisory as would be the case with the Parliamentary Commission. But it *may* be more likely to carry some weight with other members of the Parliament.<sup>10</sup>

3.20 The Gilbert and Tobin Centre of Public Law compared the commissions proposed under the Parliamentary Commissions Bill with the Judicial Commission of New South Wales. It emphasised that, while the NSW Judicial Commission provides a 'standing body that regularly receives and handles complaints, including by referring them to its Conduct Division[,],...a Parliamentary Commission as empowered by this bill would be for the purpose of addressing specific complaints received by the Parliament in respect of a particular judicial officer'.<sup>11</sup>

3.21 In its response to questions on notice, the Department emphasised that, 'to date', the parliament has only rarely considered removal of a judicial officer and that establishing a commission when one is required 'is a more practical and efficient

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6 *Submission 2*, p. 9, quoting Department of the Senate, *Odgers' Australian Senate Practice*, 12<sup>th</sup> edition, 2008, p. 516.

7 *Submission 14*, p. 1.

8 *Submission 14*, p. 2.

9 *Submission 14*, p. 2.

10 *Submission 14*, p. 2 (emphasis in original).

11 *Submission 3*, p. 3.

approach than a standing Commission'.<sup>12</sup> It noted that the proposed commissions could be established quickly and would not cause undue delay with an investigation. The Department also pointed to commentary by the ALRC on this issue:

The ALRC highlighted in its report *Managing Justice: A Review of the Federal Civil Justice System* the importance of a process within Parliament, rather than creating a commission as a creature of the executive, because of the terms of section 72(ii) of the Constitution...The ALRC suggested that section 72(ii) envisages that debate and decision making about the removal of a federal judge will be matters to be conducted openly by the people's elected representatives, rather than by any part of the executive government (as a judicial commission would be).<sup>13</sup>

### ***Membership***

3.22 As previously outlined, clause 13 of the Parliamentary Commissions Bill provides that membership of a commission will consist of three members appointed on nomination of the Prime Minister, in consultation with the Leader of the Opposition in the House of Representatives. Subclause 13(3) provides that at least one member of each commission must be (a) a former Commonwealth judicial officer; or (b) a judge, or former judge, of the Supreme Court of a state or territory.

3.23 The Adelaide Law School expressed two concerns with clause 13 of the Parliamentary Commissions Bill. First, it argued that the commission should be constituted entirely of former judicial officers:

Judicial officers with experience of the demands of judicial office are in a unique position to assess the performance of a fellow judge. At a preliminary hearing, where the ability to independently evaluate a complaint is called for, the involvement of people without such experience will most likely be unhelpful, and possibly even counter-productive. The initial hearing is an opportunity for a judicial officer who is subject to a complaint to be judged by his or her peers, which injects an important element of institutional independence into the complaints process.<sup>14</sup>

3.24 Second, the Adelaide Law School cautioned against the appointment of a serving judge of a state or territory supreme court:

[I]t is foreseeable that in the course of their judicial duties their judgments might be reviewed on appeal by a judicial officer whom they had investigated. In such an event, the appearance of bias would be unavoidable. There could also be a danger of the perception that such persons were seeking preferment (however unfounded the accusation may

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12 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 3.

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

14 *Submission 7*, p. 7.

be). We submit, therefore, that clause 13 of the Bill be amended to state that the Commission be constituted of former Commonwealth judicial officers or *former* judges of State or Territory Supreme Courts.<sup>15</sup>

3.25 The Department responded to these concerns by stating that the 'ambit of membership is intended to be broad and flexible so that a Commission can consist of members with skills and experience appropriate to the requirements of an investigation'. Further:

If for any reason it is inappropriate for a serving State Judge to be a part of a Commission due to the circumstances of the allegation, the Houses of Parliament are not bound to accept a nomination.

In the rare circumstances described by the University of Adelaide Law School where a federal judge who has been the subject of a Commission's investigation is subsequently called upon to undertake an appellate role in relation to decision by a State judge who was a member of the Commission, the legal system provides mechanisms for parties to litigation to challenge impartiality by reasons of apprehended bias or conflict of interest.<sup>16</sup>

3.26 The Clerk of the Senate also raised concerns with the process of nomination of members of commissions:

There is...in my view, an unnecessary intrusion by the executive into the appointment of members of a Commission in clause 13 and the choice of presiding member in clause 14, with the requirement that they be nominated by the Prime Minister. While the actual appointment is by resolution of each House, the need to specify the source of a nomination is not justified in the explanatory memorandum and was not a feature of the 1986 legislation where the choice of members and the presiding member...was solely by resolution of the Houses...How consultation between the chief officer of the executive in the parliament and the chief officer of the alternative executive, both members of only one house, reflects the joint parliamentary nature of the body is not – and cannot be – justified.<sup>17</sup>

### ***Issues relating to the application of section 72 of the Constitution***

3.27 As outlined in chapter 1, section 72 of the Constitution provides that Justices of the High Court, and justices of other courts created by the parliament, shall not be removed from office 'except by the Governor-General in Council, on address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

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15 *Submission 7*, p. 7 (emphasis in original).

16 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 3.

17 *Supplementary Submission 2*, pp 1-2.

3.28 The Clerk of the Senate noted that the object of the Parliamentary Commissions Bill is 'necessarily limited because the responsibility for action under section 72 remains firmly with the Houses'.<sup>18</sup> She highlighted that the Houses of Parliament remain free to appoint their own committees of inquiry in relation to judicial conduct should they feel the need to do so. Further, the Houses are not bound under the bill to establish a commission and, if the Houses are of a different view, then a commission under the bill cannot be established since it requires a resolution of both Houses.<sup>19</sup>

3.29 The Clerk of the Senate also noted that 'there are substantial tasks required of the Houses under section 72 that are not addressed by the bill', including matters which arose during the parliamentary consideration of the allegations against Justice Murphy.<sup>20</sup> For example:

- the appropriate procedures to be adopted by commissions to determine whether allegations are 'proved' (including application of the rules of evidence, adoption of trial-like procedures and application of a standard of proof);
- whether a judicial officer accused of misbehaviour should enjoy the same rights as the accused in a criminal matter (such as formulation of specific allegations, right to be present at hearings of evidence, right to cross-examine witnesses, right not to be compelled to give evidence and to make an unsworn non-examinable statement).<sup>21</sup>

*No definition of 'proved misbehaviour or incapacity'*

3.30 The lack of clarity in the wording of section 72 of the Constitution regarding the procedure for removing a federal court judge was highlighted in a number of submissions. For example, the Gilbert and Tobin Centre for Public Law commented:

The apparent simplicity of s 72 is...troubling. The most ambiguous word in the phrase 'proved misbehaviour or incapacity' is 'proved' which clearly suggests both a standard and a process. But on these the Constitution is unhelpfully silent.<sup>22</sup>

3.31 Similarly, the Adelaide Law School noted that 'the terms "proven misbehaviour or incapacity" are not defined which is an enduring source of uncertainty regarding the removing of judicial officers'. Further, these terms 'cannot be

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18 *Submission 2*, p. 2.

19 *Submission 2*, p. 3.

20 *Submission 2*, p. 4.

21 *Submission 2*, p. 4.

22 *Submission 3*, p. 1.



conclusively addressed by legislative definition, being ultimately a matter of constitutional interpretation'.<sup>23</sup>

3.32 The Clerk of the Senate expressed the following view:

[T]here can be little likelihood of any jurisprudence on the meaning of the term in section 72. This is because it is by no means clear that the removal of a judge on address under section 72 would be reviewable [by the High Court]. It appears to have been the intention of the framers that the removal of a judge would **not** be reviewable...There may well be jurisprudence in other contexts but, ultimately, the meaning of misbehaviour is a matter for the Houses to determine for themselves.<sup>24</sup>

### *Senate Standing Orders*

3.33 During the inquiry, issues were raised regarding the application of Senate Standing Order 193(3) to motions to establish a commission under the Parliamentary Commissions Bill.<sup>25</sup> Senate Standing Order 193(3) provides that senators shall not use offensive words, imputations of improper motives or personal reflections against a judicial officer. In an answer to a question on notice, the Clerk of the Senate stated:

[I]t is clear that references to matters going to a judge's misbehaviour or incapacity would not be taken to offend standing order 193(3) if made in debate on a substantive motion in relation to the judge's conduct or capacity, including a motion to establish a Commission under the bill.<sup>26</sup>

3.34 Civil Liberties Australia also expressed its concern that, by using section 72 of the Constitution, 'a future Parliament could mount a campaign to remove judges whose "misbehaviour" is simply the frustration of the Executive's wishes'. As an additional protection in situations where one party controls both Houses of Parliament, it recommended that both Houses of Parliament review their standing orders 'to ensure that a motion proposing the removal of a federal judge can only be moved if seconded by a member of another "party"'.<sup>27</sup> In that context, however, the Clerk of the Senate observed that 'there is no historical basis in Australia, the United Kingdom or the United States for an assumption that Parliaments would act to remove judges for political (and, by implication, improper) reasons'.<sup>28</sup> The Clerk commented further:

Houses of parliament are well capable of exercising their constitutional duties. They do it every day. As representatives of the people, they represent the highest source of authority in our system of government. To

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23 *Submission 7*, p. 2.

24 *Submission 2*, p. 5 (emphasis in original).

25 See, for example, *Committee Hansard*, 11 May 2012, pp 3 and 21.

26 Response to question on notice provided by the Clerk of the Senate on 16 May 2012.

27 *Submission 5*, p. 4.

28 *Submission 2*, p. 4.

suggest that they are somehow tainted by politics, I think, is a misunderstanding of their role and of the separation of powers.<sup>29</sup>

### ***Judicial incapacity***

3.35 The Gilbert and Tobin Centre of Public Law raised issues regarding the apparent emphasis in the Parliamentary Commissions Bill and the Judicial Complaints Bill on judicial misbehaviour. It considered that both bills display a 'preoccupation' with complaints in response to judicial misbehaviour, at the expense of processes designed to proactively address complaints regarding judicial incapacity. It contended that, with over 150 members of the federal judiciary, 'it seems that physical or mental impairment is far more likely to arise than misbehaviour'.<sup>30</sup> In particular:

What is striking about both bills is the absence of any provisions that expressly assist either the Parliamentary Commissions that may be established by parliament or the Conduct Committees that may be established by heads of jurisdiction to investigate the possibility and degree of incapacity arising from the mental health of a judge against whom a complaint has been made...<sup>31</sup>

3.36 Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law noted that two recent examples of consideration of judicial performance before the Parliament of New South Wales, both involved 'cases of mental incapacity which was treatable' and the judicial officers concerned 'were able to show that they had taken steps since the complaints that...led to treatment'.<sup>32</sup>

3.37 In contrast to the approach taken in the bills, the Gilbert and Tobin Centre of Public Law highlighted amendments made in 2006 to the *Judicial Officers Act 1986* (NSW) which enable a judge's head of jurisdiction to formally request that the NSW Judicial Commission investigate whether a judicial officer has an impairment affecting their performance of judicial or official duties.<sup>33</sup> Professor Lynch suggested 'that perhaps there needs to be a bit more in the legislation which guides the heads of jurisdiction and also the conduct committee if one is established when the issue that is being complained about appears to stem from incapacity'.<sup>34</sup>

3.38 The Department responded that as 'the same mechanism for removal of a judge is provided under the Constitution for both proved misbehaviour and incapacity, the intention of the bills is to provide for a flexible process which addresses both issues of misbehaviour and incapacity'. It noted that the Parliamentary Commissions

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29 *Committee Hansard*, 11 May 2012, p. 1.

30 *Submission 3*, p. 6.

31 *Submission 3*, p. 7.

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

33 *Submission 3*, p. 8.

34 *Committee Hansard*, 25 May 2012, p. 2.

Bill contains 'a number of provisions that support judges who are subject to complaints of incapacity in a way that also protects the privacy of information about a judge's personal health'.<sup>35</sup>

3.39 The ACT Government pointed out that it has its own 'legislative mechanisms in place for the establishment of a judicial commission...in order to examine complaints' regarding judicial officers.<sup>36</sup> The *Judicial Commission Act 1994* (ACT) includes a procedure that commissions can undertake in assessing the physical or mental fitness of judicial officers. Section 35 of that Act provides:

*Medical examination of judicial officer*

If, in the course of examining a complaint, a commission forms the opinion, on reasonable grounds, that the judicial officer concerned may be physically or mentally unfit to exercise efficiently the functions of his or her office, the commission may request the judicial officer to undergo such medical examination as the commission specifies.

If the judicial officer fails to comply with the commission's request, the commission must include in its report...a statement to that effect.

***Accessibility of commission evidence and findings***

3.40 The Clerk of the Senate noted commentary in *Odgers* in relation to the Parliamentary Commission established in 1986, which identified 'provisions for hearing evidence in private and for withholding it from the Houses as serious defects which should not be followed in any future cases'.<sup>37</sup> In relation to the Parliamentary Commissions Bill:

While the bill requires hearings to be in public, the Commission has a discretion to direct that evidence [is] to be heard in private under certain conditions (cl. 23). There is also a discretion for the Commission to determine whether evidence given in private is subsequently presented for tabling (cl. 48), raising the prospect that evidence will be withheld from those ultimately responsible for determining the issue.<sup>38</sup>

3.41 The Department responded:

Information which can be included in a separate report would be highly sensitive information. For example, a Commission may include in a separate report, information which is of a highly personal nature relating to a judge. The approach taken in the Bill strikes a balance between providing effective investigative tools to assist the Parliament and the protection of

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35 Response to questions on notice provided by the Attorney-General's Department on 24 May 2012, p. 7.

36 *Submission 13*, p. 1.

37 *Submission 2*, p. 7.

38 *Submission 2*, p. 7.

countervailing public interests, including the privacy of individual judicial officers who may be the subject of an investigation.<sup>39</sup>

### ***Storage of commission separate reports on sensitive matters***

3.42 As noted above, clause 48 of the Parliamentary Commissions Bill provides for sensitive matters to be included in a separate report given to the presiding officers and made available for inspection only to senators, members and the investigated person. However, under clause 82 of the Parliamentary Commission Bill, a 'Commission must give a House of Parliament possession of the Commission's records that it no longer needs'. The Clerk of the Senate considered that it is 'not clear' how clause 48 would work in practice and that 'the status of the document is unclear'.<sup>40</sup> Further:

I want to know what happens to that when a Presiding Officer finishes in office and comes across the corridor and says to the Clerk, 'What do I do with this document?' It is not something that has been tabled in the parliament. It seems to be in a bit of a limbo.<sup>41</sup>

3.43 The Clerk noted that under the legislation to repeal the 1986 Parliamentary Commission 'there is provision for custody of that Commission's documents and conditional access to some of them after 30 years'.<sup>42</sup>

3.44 In response to the concerns raised by the Clerk of the Senate, the Department stated:

It is the intention that all records, including the separate sensitive reports, would be able to be deemed as class A records for the Archives Act so that presiding officers have the discretion about how long they should be kept et cetera. It may well be that the deeming provision has not covered, effectively, the point about sensitive separate reports.<sup>43</sup>

### ***Parliamentary privilege issues***

3.45 The Clerk of the Senate indicated that issues may exist in relation to the application of parts of the *Parliamentary Privilege Act 1987* to the proceedings and evidence taken by a commission under the Parliamentary Commissions Bill.

3.46 Division 4 of Part 3 of the Parliamentary Commissions Bill creates a number of offences relating to investigations conducted by a commission. Clause 67 provides that proceedings of a commission (including the formulation, making or publication of

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

40 *Submission 2*, p. 7.

41 *Committee Hansard*, 11 May 2012, p. 2.

42 *Submission 2*, p. 7. See *Parliamentary Commission of Inquiry (Repeal) Act 1986*, section 6.

43 Ms Katrina Fairburn, Attorney-General's Department, *Committee Hansard*, 11 May 2012, p. 25.

a report) are taken to be proceedings in the Parliament, and that evidence before a commission is taken to be evidence before a committee of a House of Parliament for the purposes of section 10 and subsections 16(3), 16(4) and 16(6) of the *Parliamentary Privileges Act 1987*.

3.47 As the Clerk of the Senate explained:

Subsections 16(3) and (4) limit the use which may be made of proceedings in parliament in a court or tribunal, while subsection 16(6) relaxes those restrictions to allow for their use in relation to the prosecution of an offence against the *Parliamentary Privileges Act 1987* or an Act establishing a committee (such as the *Public Works Committee Act 1969*).<sup>44</sup>

3.48 In relation to clause 67, the EM to the Parliamentary Commissions Bill states:

As a Commission has its own legal status, these provisions are necessary to apply important aspects of the *Parliamentary Privileges Act 1987* to a Commission.

Application of subsections 16(3), (4) and (6) of the *Parliamentary Privileges Act 1987* will prevent the questioning or impeaching of proceedings of a Commission in proceedings of a Commission.<sup>45</sup>

3.49 The Clerk of the Senate commented:

From this explanation, it is not entirely clear to me what the intended effect of the provisions is:

- courts and tribunals cannot use proceedings of a Commission contrary to ss. 16(3) or admit evidence contrary to ss. 16(4)?
- a Commission (which comes under the definition of a tribunal in s. 3 of the [*Parliamentary Privileges Act 1987*]) cannot use the proceedings of another Commission contrary to ss. 16(3) or admit evidence from another Commission contrary to ss. 16(4)?<sup>46</sup>

3.50 The Department responded to the Clerk's concerns in relation to this issue:

The Bill is designed to prevent the use of the conclusions in a Commission report to prove facts in any subsequent legal proceedings...

Under the Bill, a Commission will have broad powers to access evidence and findings of previous official inquiries and investigations in the course of its investigation (while not limiting the operation of section 16 of the *Parliamentary Privileges Act 1987*). A Commission would be a 'tribunal' within the meaning of section 3 of the *Parliamentary Privileges Act 1987*. As each Commission would investigate specified allegations about a specified Commonwealth judicial officer, a Commission will be expected to

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44 *Submission 2*, p. 8.

45 EM, *Parliamentary Commissions Bill*, p. 40.

46 *Submission 2*, p. 8.

gather appropriate evidence in accordance with its own processes and present its own report to assist the Parliament in considering removal of a judge.<sup>47</sup>

3.51 The Clerk of the Senate also raised the issue of the use of the proceedings of a commission to prosecute the offences in the Parliamentary Commissions Bill:

It is also not clear whether the reference to ss.16(6) is intended to have the effect of allowing proceedings of a Commission to be used in relation to the prosecution of an offence under Division 4 of the bill against that Commission. If so, it might also need to be deemed that ss. 16(6) applies to a prosecution for an offence against the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act in respect of a particular Commission.<sup>48</sup>

3.52 The Clerk of the Senate indicated that it may be necessary to 'just tie off all the loose ends and apply [subsection 16(6)] to this [A]ct by saying that, in a prosecution against this [A]ct', the proceedings of a Commission can be used.<sup>49</sup>

3.53 In response to the issues raised by the Clerk of the Senate, the Department noted:

The Bill includes a number of specific offences relating to a Commission's investigation, including unauthorised presence at hearing...

Many of these offences relating to a Commission's investigation are similar to offences provided under the *Parliamentary Privileges Act 1987*.<sup>50</sup>

## Committee view

3.54 The majority of submissions received by the committee expressed support for the enactment of legislation to clarify the processes for addressing judicial complaints, particularly allegations which may warrant removal of a member of the federal judiciary under section 72 of the Constitution.<sup>51</sup> While the committee acknowledges the limitations in both bills identified by submitters and witnesses during the inquiry, in the view of the committee, the bills represent the right approach to a complex issue which finely balances respect for judicial independence with appropriate judicial accountability. The committee agrees that it is timely for the parliament to establish procedures to consider serious allegations regarding federal judicial officers under the

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

48 *Submission 2*, pp 8-9.

49 *Committee Hansard*, 11 May 2012, p. 2.

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

51 For example, Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 25 May 2012, p. 1; Liberty Victoria, *Submission 8*, p. 1.

process provided in section 72 of the Constitution. The committee concurs with the comments made by the ALRC in 2000 that 'the danger in the present situation is that when a particular case arises, the process itself becomes a major issue, with the potential of the merit or otherwise of the substantive allegations to become lost in the skirmishing'.<sup>52</sup>

3.55 It is important to note that the bills before the committee do not restrict the Houses of Parliament from establishing their own parliamentary inquiries into judicial misconduct or incapacity, if they choose to do so. The committee also recognises that, as highlighted by the former Clerk of the Senate, Mr Harry Evans, 'the removal of a judge under section 72 probably would be a protracted and difficult process, which would make great impositions upon the operation of the legislature and the executive government'.<sup>53</sup> In this context, the committee considers that the Parliamentary Commissions Bill will provide an additional option available to the Houses of Parliament should they determine that a commission is required to assist them in their responsibilities under section 72 of the Constitution.

### ***Membership of commissions***

3.56 The committee agrees with the concerns raised by the Clerk of the Senate that the process for the nomination and appointment of commission members in clause 13 of the Parliamentary Commissions Bill does not adequately reflect the joint parliamentary nature of the commissions. The committee considers that nominations of commission members should also involve the parliamentary presiding officers.

3.57 The committee concludes that it would be more appropriate if the members of a commission were appointed on nomination by the Prime Minister, following consultation with the Leader of the Opposition and the parliamentary presiding officers. This amendment would reflect the fact that, under the Parliamentary Commissions Bill, an established commission is to be taken to be part of either the Department of the House of Representatives or the Department of the Senate and that a commission provides reports to the parliamentary presiding officers for presentation to the parliament.<sup>54</sup>

3.58 Further, the committee agrees with the argument made by the Adelaide Law School against the appointment to commissions of serving judges of a supreme court of a state or territory. While the committee agrees with the Department that conflict of interest issues are likely to be rare, this is insufficient reason not to avoid these potential conflicts.

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52 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Litigation System*, Report 89, February 2000, pp 239-240.

53 Harry Evans, 'Parliament and the Judges: the removal of federal judges under section 72 of the Constitution', (1987) 2(2) *Legislative Studies*, p. 29.

54 Clauses 79 and 48, Parliamentary Commissions Bill.

## **Recommendation 2**

**3.59 The committee recommends that subclause 13(2) of the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 be amended to provide that the Prime Minister must consult with the Leader of the Opposition, and both parliamentary presiding officers, before nominating a member of a parliamentary commission.**

## **Recommendation 3**

**3.60 The committee recommends that subclause 13(3) of the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 be amended to exclude serving judges of a supreme court of a state or territory from appointment to a parliamentary commission.**

### *Constitutional issues*

3.61 The committee recognises the potential problems created by the lack of detail in section 72 of the Constitution regarding the phrase 'proved misbehaviour or incapacity'. There has been significant commentary on the appropriate meaning of this phrase, and the appropriate approach to a parliamentary investigation of judicial misbehaviour or incapacity. Ultimately, the meaning of 'proved misbehaviour and incapacity' remains for the Houses of Parliament to determine. However, in relation to the Parliamentary Commissions Bill, the ambiguity regarding these terms creates the potential for members of a commission to adopt differing interpretations, and possibly divergent findings, which is unlikely to be helpful for the Houses of Parliament in their consideration of allegations of judicial misconduct or incapacity.

3.62 In the view of the committee, the Houses of Parliament should either specify the standard of proof required for a commission's investigation and a definition of 'proved misbehaviour and incapacity' to be applied by the members of the commission at the time of the establishment of the commission, or require that the members of a commission agree and use a consistent standard and interpretation of these terms in their investigation and report. The committee notes that the setting of standards and definitions for the commission by the parliament, or a consistent interpretation agreed by members of a commission, would not bind the Houses of Parliament to adopt these standards and definitions in their own consideration of judicial misbehaviour or incapacity.

### *Accessibility of commission evidence and findings*

3.63 Clause 48 of the Parliamentary Commissions Bill outlines the contents of the reports by commissions, including a possible separate report in relation to sensitive matters which may be made to the parliamentary presiding officers. In relation to this issue, the committee notes the commentary in *Odgers* which identifies provisions for 'withholding evidence from the Houses' as one of the 'serious defects' of the Parliamentary Commission of Inquiry in 1986. In the view of the committee, clause 48 is ambiguous and should be clarified to ensure that all the evidence gathered, and findings made, by any commission is either included in the public report



tabled in the parliament or provided in the separate report on sensitive matters given to the parliamentary presiding officers for access by senators, members and the investigated person. There should be no uncertainty in the provisions of the Parliamentary Commissions Bill which may allow a commission to withhold from senators and members information or evidence gathered during an investigation into judicial misconduct or incapacity.

#### **Recommendation 4**

**3.64 The committee recommends that clause 48 of the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 be amended to make clear that all evidence gathered and findings made by a commission must be included in either the report tabled in the parliament, or in the separate report on sensitive matters provided to the parliamentary presiding officers.**

#### *Storage of commission separate report on sensitive matters*

3.65 The committee considers that, given the significance of the material likely to be included in a commission's separate report on sensitive matters, greater clarity regarding the long-term storage and custody of this report is required. In that context, the committee notes that section 6 of the *Parliamentary Commission of Inquiry (Repeal) Act 1986* provides significant detail regarding the custody of commission documents. In particular, section 6 provides a time limit of protection, identifies officials responsible for continued custody and protections for the former members and staff of the commission.

#### **Recommendation 5**

**3.66 The committee recommends that clause 48 of the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 be amended to explicitly provide guidance in relation to the long-term storage and custody of a commission's separate report on sensitive matters.**

#### *Parliamentary privilege*

3.67 The protections of parliamentary privilege will be essential to the effective functioning of commissions and their investigations. Parliamentary consideration of allegations regarding judicial misconduct or incapacity may result in peripheral litigation initiated by the investigated person or others. It is also possible that the Houses of Parliament may establish their own separate (but potentially overlapping) parliamentary committee inquiries into the relevant judicial misconduct or incapacity. Those giving evidence to a commission need to be assured that they will be granted protections equivalent to witnesses giving evidence to parliamentary committee inquiries. The evidence gathered by, and the proceedings and reports of, commissions should be protected by parliamentary privilege. A clear exception should apply for the prosecution of offences against commissions which are set out in the Parliamentary Commissions Bill.

3.68 In the view of the committee, this issue is not sufficiently addressed in the current drafting of the Parliamentary Commissions Bill. The expertise of the chamber departments should be utilised to clarify these matters before the Parliamentary Commissions Bill is passed. The committee notes that the Department has indicated that '[f]urther consideration will be given to clarifying in legislation the issues raised by the Clerk of the Senate'.<sup>55</sup>

#### **Recommendation 6**

**3.69 The committee recommends that clause 67 of the Parliamentary Commissions Bill be amended to clarify the application and protection of parliamentary privilege to the proceedings and reports of parliamentary commissions, and their use in the prosecution of offences against parliamentary commissions.**

#### **Recommendation 7**

**3.70 The committee recommends that, subject to recommendations 2 to 6, the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 be passed.**

**Senator Trish Crossin  
Chair**

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