

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 The committee's report makes two recommendations to amend the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Parliamentary Commissions Bill) which Liberal Senators consider are not completely justified by the evidence received during the inquiry. In view of the relatively small number of submissions to the inquiry, our view is that a cautious approach should be taken in relation to these two matters.

Membership of commissions

1.2 Currently, subclause 13(2) of the Parliamentary Commissions Bill provides that commission members are appointed on nomination of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives. The majority report recommends that subclause 13(2) be amended to provide that a member of a commission is appointed on the nomination of the Prime Minister, following consultation with the Leader of the Opposition and the parliamentary presiding officers (Recommendation 2).

1.3 None of the witnesses and submitters to the inquiry proposed this particular amendment and Liberal Senators are not convinced this change will necessarily improve the selection of appropriate commission members. The Clerk of the Senate, Dr Rosemary Laing, argued that the nomination and appointment process for commission members provided in the Parliamentary Commissions Bill does not reflect the 'joint parliamentary nature' of the proposed commissions.¹ In our view, a 'fig leaf' of consultation by the Prime Minister with the parliamentary presiding officers regarding the nomination of commission members is unlikely to sufficiently address this concern.

1.4 In addition, Liberal Senators recognise that, under clause 14, a commission member is only appointed 'if each House of the Parliament passes, in the same session, a resolution to appoint the member'. If appointments to a commission ultimately depend on the agreement of both of the Houses of Parliament, the right to nominate and the right to be consulted would appear to be peripheral matters of concern. Ultimately, the Houses of Parliament have the power to establish parliamentary commissions to investigate judicial misconduct, regardless of the procedures provided for under the Parliamentary Commissions Bill, and to appoint commission members as they wish.

1.5 Nonetheless, Liberal Senators are of the view that there is value in the Parliamentary Commissions Bill providing a sensible process for the nomination and

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

appointment of commission members. In our view, this requires balancing a number of considerations: first, the expertise and resources of the executive government should be utilised to assess the appropriateness of a wide range of possible commission members; second, the process should ensure that nominated commission members have broad cross-party support; and, third, the process to appoint commission members should reflect the joint parliamentary nature of the proposed commissions. In our opinion, the recommendation in the majority report does not optimally balance these considerations.

Exclusion of state and territory supreme court justices

1.6 Recommendation 3 of the majority report proposes that subclause 13(3) of the Parliamentary Commissions Bill be amended to exclude serving state or territory supreme court justices from appointment to a commission. While Liberal Senators recognise the theoretical perception of bias issues raised during the inquiry by the scholars from the University of Adelaide Law School,² we do not agree that the Parliamentary Commissions Bill should be amended in this way.

1.7 In particular, Liberal Senators consider that the exclusion of serving state and territory supreme court justices would significantly reduce the pool of suitable candidates with high-level judicial experience who could be appointed to a commission. Further, as the Department noted, 'the legal system provides mechanisms for parties to litigation to challenge impartiality by reasons of apprehended bias or conflict of interest'.³ The number of instances of federal judicial misbehaviour or incapacity since Federation suggests that the establishment of commissions under the Parliamentary Commissions Bill is likely to be rare. Further, the possibility that a supreme court justice (who was a former commission member) would come under the appellate consideration of a judicial officer that he or she had investigated is remote. Accordingly, Liberal Senators consider that a complete exclusion of serving state and territory supreme court justices is not warranted.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

2 *Submission 7*, p. 7.

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