

DISSENTING REPORT BY SENATOR THE HON BILL HEFFERNAN

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) represent a missed opportunity to address the continued uncertainty regarding processes for handling complaints about federal judicial officers. In particular, the events surrounding allegations against the late Justice Lionel Murphy highlighted the practical difficulties of parliamentary consideration of judicial misconduct. The bills before the committee do not address these practical concerns. A standing federal judicial commission to investigate complaints regarding judicial conduct is a better approach.

Judicial Complaints Bill

1.2 As noted by the scholars from the University of Adelaide Law School, the Judicial Complaints Bill does not cover complaints made about Justices of the High Court of Australia (High Court).¹ In my view, there is no reason amendments could not be made to allow the Chief Justice of the High Court to assume the responsibilities of a head of jurisdiction for that court, including dealing with complaints about judicial conduct. This gap in judicial accountability is highlighted by the fact that the High Court does not have a public judicial complaints procedure.

1.3 Another failing of the Judicial Complaints Bill is the broad discretion granted to the head of jurisdiction of each court. As witnesses to the inquiry highlighted, there are no guiding criteria or standards for heads of jurisdiction to follow, or apply, in handling complaints about judicial conduct.² While the Judicial Complaints Bill is intended to promote transparency and public confidence in the courts regarding the processes for dealing with judicial complaints, this approach appears to encourage critical decisions to be made by senior judicial officers about their close working colleagues behind closed doors. A person with a legitimate complaint about the conduct of a judicial officer is unlikely to perceive the scheme created by the Judicial Complaints Bill as increasing public trust in the courts.

1 *Submission 7*, p. 3.

2 Scholars of the University of Adelaide Law School, *Submission 7*, p. 5; Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 11 May 2012, p. 8.

Parliamentary Commissions Bill

1.4 My key concern regarding the Parliamentary Commissions Bill is that the legislation has been constructed around concerns about judicial independence (rather than assisting the parliament with its constitutional responsibilities) to the extent that the proposed commissions can be described as 'designed to fail'. During the inquiry, the consultation undertaken with the federal courts in developing the legislation was highlighted, but the purpose of the legislation should be to assist the parliament, not the courts.

1.5 I continue to hold serious concerns about the practical issues involved in establishing a commission under the bill. The procedural 'high bar' to establish a commission requires both Houses of Parliament to pass in the same session a resolution to establish a commission to investigate specified allegations of a specified judicial officer. In reality, this is unlikely to occur in the partisan environment of a parliamentary session where the allegations about a federal judicial officer remain untested and without context. In particular, one side of politics is likely to have been responsible for appointment of the judicial officer concerned. Unfortunately, in my opinion, the temptation to politicise the establishment of a commission is likely to be too great in most cases. Further, an individual member of parliament, intending to move a motion to create a commission, may have considerable difficulty persuading the members of the other House of Parliament of the need for a commission.

1.6 In this regard, the difficult and drawn out process to establish a parliamentary commission to investigate allegations regarding the late Justice Murphy is instructive. As witnesses to the current inquiry highlighted, the Parliamentary Commissions Bill does nothing to clarify the outstanding issues arising from that parliamentary commission of inquiry.³ For example, the meaning of 'misbehaviour' and the standard of proof to be applied by a commission in its investigation (and its findings) are not clarified in the bill. Nor does the bill provide a process to determine these matters. There is a risk that the importance of the particular case will be lost in the arguments about definitions and procedure. As a former senator with direct experience of these issues, the Reverend Professor Michael Tate AO concluded that 'there would be very few instances which would justify setting up this huge apparatus with such an inbuilt tendency to be unhelpful'.⁴

1.7 The appointment provisions of the Parliamentary Commissions Bill also appear to reserve control over the establishment of commissions to the executive. Under the bill, the Prime Minister nominates the members of a commission, in consultation with the Leader of the Opposition. This restrictive appointment process does not provide an equal role for the Senate in selecting members of a commission

3 For example, see Clerk of the Senate, *Submission 2*, p. 4.

4 *Submission 14*, p. 2.

and ignores the possibility that the Houses of Parliament may prefer to establish a commission irrespective of the views of the Prime Minister of the day.

1.8 The Parliamentary Commissions Bill also handicaps the proposed commissions by giving them no capacity to summon judicial officers (or former judicial officers) to give evidence, or the ability to issue search warrants on the premises of these judicial officers (or former judicial officers). While constitutional justifications were raised in relation to this matter, it is clear that these restrictions would inhibit the conduct of investigations by commissions and limit the value of their findings.

1.9 I am also concerned about the use of evidence taken by a commission (which is protected by parliamentary privilege under the Parliamentary Commissions Bill) in subsequent legal proceedings. In the criminal trial against the late Justice Murphy, witnesses were questioned and cross-examined on the evidence they had provided to earlier Senate select committees.⁵ Subsequently, however, the *Parliamentary Privileges Act 1987* was passed, to clarify:

In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of —

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.⁶

1.10 It is clear that there has not been sufficient consideration of parliamentary privilege issues in the development of the Parliamentary Commissions Bill, and this is reflected in the recommendations contained in the committee majority's report. My concern relates to the impact on subsequent legal proceedings against a judicial officer (or former judicial officer) in circumstances where commission evidence is protected under parliamentary privilege. If a judicial officer commits a serious criminal offence, and is removed from office under section 72 of the Constitution (following an extensive investigation by a commission), the protections of parliamentary privilege should not operate to essentially shield that judicial officer in subsequent legal proceedings. Will a removed former judicial officer be able to claim that he cannot receive a fair trial because potentially exculpatory evidence is contained in a commission's separate report on sensitive matters? The interaction between parliamentary privilege and the use of commission evidence in subsequent legal

5 Department of the Senate, *Odgers' Australian Senate Practice*, 13th edition, 2012, p. 46-48.

6 Subsection 16(3).

proceedings does not seem to be adequately addressed in either the provisions of the bill or the explanatory memorandum.

1.11 Finally, the Gilbert and Tobin Centre of Public Law indicated to the committee that instances of judicial incapacity are more likely to occur than those of judicial misbehaviour.⁷ However, this is not reflected in the Parliamentary Commissions Bill. For example, there is no provision under the Parliamentary Commissions Bill for a commission to request that a judicial officer voluntarily undertake a confidential medical assessment.

Conclusion

1.12 My prediction is that, when the parliament is next required to consider a serious complaint about a federal judicial officer, the Parliamentary Commissions Bill will create more problems than it solves. I also do not consider that the Judicial Complaints Bill provides a consistent, clear or an effective system for handling complaints regarding federal judicial officers. Accordingly, I oppose the passage of both bills.

1.13 We are all human, with human flaws and vulnerabilities, even federal judicial officers. Appropriate mechanisms for judicial accountability are needed to balance the protections of judicial independence. Section 72 of the Constitution provides a role for the parliament to oversight the behaviour and capacity of the federal judiciary. However, the parliament is not well-equipped to investigate allegations, and will usually require assistance to fulfil this important responsibility. In my view, the best model to assist the parliament in this constitutional duty is a standing judicial commission, modelled on the successful Judicial Commission of New South Wales. This was the model recommended by the Senate Legal and Constitutional Affairs References Committee in 2009.⁸

1.14 This approach would provide for a permanent, independent and established structure to investigate judicial complaints which would provide certainty for complainants and the judiciary, and would be capable of developing expertise in conducting investigations into the conduct of judicial officers over time. Such a standing judicial commission would also allow for other functions to be undertaken in order to support the federal judiciary, such as judicial education services and measures to improve consistency in sentencing. Importantly, a standing commission would ensure an unhelpful political contest is avoided each time an ad hoc commission is required to be established to investigate an allegation of judicial misbehaviour or incapacity.

7 *Submission 3*, p. 6.

8 Senate Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges*, December 2009, p. 95.

Recommendation 1

That the Senate not pass the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.

Recommendation 2

That the Australian Government establish a federal judicial commission modelled on the Judicial Commission of New South Wales.

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