The Senate

Legal and Constitutional Affairs Legislation Committee

Courts Legislation Amendment (Judicial Complaints) Bill 2012 [Provisions]

Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 [Provisions]

August 2012

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

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.

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.

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.

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.

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

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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]

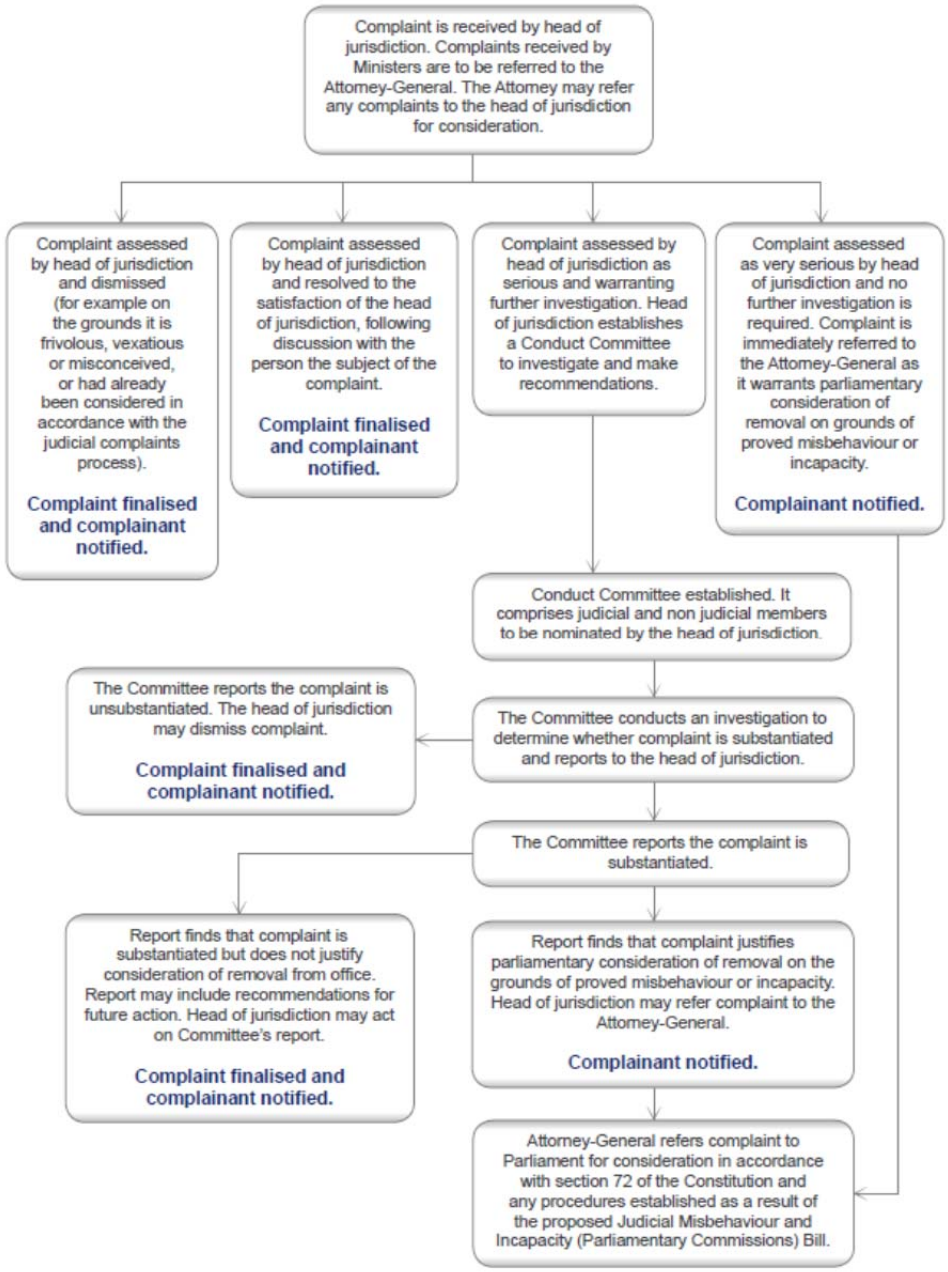
1.5 In her Second Reading Speech, the Attorney-General emphasised that the Judicial Complaints Bill would 'provide heads of jurisdiction with an option to establish a conduct committee to investigate the basis of a complaint and report on what action should be taken about the complaint'.[7] The EM to 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

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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:

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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

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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

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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.

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.[1] 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.[2]

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'.[3]

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

3 *Submission 4*, p. 1.

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',[4] 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'.[5]

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.[6]

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

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.[7]

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'.[8] 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.[9]

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.[10] 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.[11]

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

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.

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

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.[13]

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'.[14] 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.[15]

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'.[16]

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'.[17] 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.[18]

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'.[19] 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.[20]

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.[21]

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.[22] 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.[23]

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.[24]

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'.[25] 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.[26]

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'.[27] 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.

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'.[28] 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.[29] 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.[30] This publication is intended to provide 'practical guidance' to all members of the Australian judiciary.[31]

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.

30 Council of Chief Justices of Australia and Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 2nd ed, 2007, available at: 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*, 2nd 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).

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'.[1]

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 of 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'.[2] 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).[3]

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'.[4] 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'.[5]

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.

> 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.[6]

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.[7] 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.[8]

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'.[9] 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.[10]

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'.[11]

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*, 12th 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'.[12] 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).[13]

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.[14]

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.[15]

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.[16]

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.[17]

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'.[18] 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.[19]

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.[20] 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).[21]

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.[22]

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

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'.[23]

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.[24]

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.[25] 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.[26]

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"'.[27] 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'.[28] 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.[29]

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'.[30] 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...[31]

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'.[32]

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.[33] 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'.[34]

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'.[35]

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.[36] 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'.[37] 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.[38]

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

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.[39]

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'.[40] 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.[41]

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'.[42]

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.[43]

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*).[44]

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.[45]

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)? [46]

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.[47]

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.[48]

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.[49]

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*. [50]

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.[51] 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'.[52]

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'.[53] 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.[54]

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'.[55]

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

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

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

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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.

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.

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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

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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.

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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.

Senator the Hon Bill Heffernan
Liberal Senator for New South Wales

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Federal Court of Australia
2	Dr Rosemary Laing, Clerk of the Senate
3	Gilbert + Tobin Centre of Public Law
4	The Judicial Conference of Australia
5	Civil Liberties Australia
6	Professor Sharyn Roach Anleu and Professor Kathy Mack
7	Scholars from the University of Adelaide Law School
8	Liberty Victoria
9	Law Council of Australia
10	Justice for Children Australia
11	Mr W Pearson
12	Ms Denise King
13	ACT Government
14	Reverend Professor Michael Tate AO
15	Confidential

ADDITIONAL INFORMATION RECEIVED

1 Extract from 'Odgers' Australian Senate Practice', 13th edition, tabled by the Clerk of the Senate at public hearing on 11 May 2012

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

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

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 11 May 2012

FAIRBURN, Ms Katrina, Principal Legal Officer, Judiciary and Court Structure Team, Attorney-General's Department

LAING, Dr Rosemary, Clerk of the Senate

LE MIRE, Dr Suzanne, Senior Lecturer, Adelaide Law School, University of Adelaide

LYNCH, Professor Andrew, Director, Gilbert and Tobin Centre of Public Law

SMRDEL, Dr Albin, Assistant Secretary, Federal Courts Branch, Attorney-General's Department

WILLIAMS, Professor John, Dean of Law, Adelaide Law School, University of Adelaide

Canberra, 25 May 2012

LYNCH, Professor Andrew, Director, Gilbert and Tobin Centre of Public Law