

TABLED DOCUMENTS LABEL

Senate Legal & Constitutional Affairs References Committee
Inquiry: Australia's Judicial System and the Role of Judges

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COMPLAINTS AGAINST JUDICIAL OFFICERS

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COMPLAINTS AGAINST JUDICIAL OFFICERS

One of the responsibilities of the Judicial Commission under its legislative charter is to deal with complaints made against judicial officers.

A “judicial officer” under the *Judicial Officers Act*¹ means a -

- judge or associate judge of the Supreme Court of New South Wales;
- member (including a judicial member) of the Industrial Relations Commission of New South Wales;
- judge of the Land and Environment Court of New South Wales;
- judge of the District Court of New South Wales;
- magistrate; and
- the President of the Administrative Decisions Tribunal.

The definition of “judicial officer” does not include people such as Arbitrators, Registrars, Chamber Registrars or legal practitioners.

The Commission has no power to examine complaints against Federal judicial officers or a person who is no longer a judicial officer.

Making a Complaint

A complaint may be made by any person or, alternatively, may be referred to the Commission by the Attorney General. The *Judicial Officers Act*² requires that a complaint be in writing and that it identify the complainant and the judicial officer concerned. The *Judicial Officers Regulation 2005* requires that the particulars of a complaint be verified by statutory declaration and that the complaint be lodged with the Chief Executive of the Commission.

Investigating a Complaint

On receiving a complaint, the Commission is obliged to conduct a preliminary investigation into the matter. In every case, the judicial officer is advised of the fact that a complaint is made to the Commission and provided with a copy of the documentation.

The preliminary examination of all complaints must be undertaken by Commission Members at a properly constituted meeting of the Commission. The quorum for a meeting is seven Members, of whom at

¹*Judicial Officers Act 1986*, s3(1)

²*Judicial Officers Act 1986*, s17

least one must be an Appointed Member (non judicial member). The Commission cannot delegate the preliminary examination of a complaint except to a committee, which must consist entirely of Members and which must include at least one Appointed Member.

The Commission conducts a thorough investigation of every complaint received, which often involves an examination of transcripts, sound recordings, judgments and other material relevant to the complaint. If necessary, a response to the complaint is sought from the judicial officer.

Action Following Preliminary Examination

Following its preliminary examination, the Commission must take one of the following actions:

- summarily dismiss the complaint;
- refer the complaint to the relevant head of jurisdiction; or
- refer the complaint to the Conduct Division.

The Commission will act in accordance with the principles of natural justice in conducting its examination of a complaint. Before referring a matter to the head of jurisdiction or the Conduct Division, the Commission provides the judicial officer with an opportunity to respond to the complaint and to present additional information that may assist the Commission in its investigation into the matter.

Summary Dismissal

A complaint must be summarily dismissed if one or more of the grounds under section 20(1) of the Act exist, whether or not it appears to be substantiated. These grounds are:

- the complaint is one that the Commission is required not to deal with;
- the complaint is frivolous, vexatious or not in good faith;
- the subject matter of the complaint is trivial;
- the matter complained about occurred at too remote a time to justify further consideration;
- the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review;
- the person who is the subject of the complaint is no longer a judicial officer; or,
- in all the circumstances further consideration of the complaint is unnecessary or unjustifiable.

Where a complaint is summarily dismissed the Commission will, as soon as practicable after its determination is made, inform the complainant in writing and provide the reasons for dismissing the complaint. This will include a reference to the relevant provisions of the legislation that have been applied in the handling and determination of the complaint. The judicial officer will also be advised in writing of the Commission's determination.

Many of the complaints that are dismissed by the Commission, because they disclose no misconduct, are nonetheless helpful in the improvement of the judicial system. The feedback from the examination of complaints has provided valuable information for the further development of judicial education programs conducted by the Commission.

Reference to a head of jurisdiction

Where a complaint has not been dismissed following the preliminary examination by the Commission, but in its opinion it does not justify reference to the Conduct Division, the Commission may refer the matter to the relevant head of jurisdiction.

The Commission will notify the head of jurisdiction in writing of its decision and will formally refer the matter, including all relevant material, for attention.

In referring a complaint to the head of jurisdiction the Commission may include recommendations as to what steps might be taken to deal with the complaint, such as counselling by the head of jurisdiction.

Where a complaint is referred to the relevant head of jurisdiction the Commission will, as soon as practicable after the decision is made, advise the complainant and judicial officer of the action taken.

Reference to the Conduct Division

Where a complaint has not been dismissed following the preliminary examination by the Commission, and has not been referred to the head of jurisdiction, it must be referred to the Conduct Division.

The function of a Conduct Division is to examine and deal with a particular complaint that has been referred to it by the Commission.

The Conduct Division comprises a panel of two judicial officers (one of whom may be a retired judicial officer) and one of the two community representatives nominated by Parliament. The membership of the Conduct Division will be determined by the Commission. The Commission will also appoint one member of the Conduct Division as Chairperson.

Where a complaint is referred to the Conduct Division the Commission will, as soon as practicable after the decision is made, advise the complainant and the judicial officer of the action taken. The Commission will also advise the Attorney General of its decision and, in each case, request the appointment of a legal practitioner or practitioners to assist the conduct Division as counsel.

The Commission's Function

The Commission's function, including the Conduct Division, is to investigate a complaint, not to discipline a judicial officer. There is no power in the Commission or the Conduct Division, or the head of jurisdiction, to impose any form of punishment on a judicial officer. The Commission is not a disciplinary body and has not been invested with such powers. It cannot punish a judicial officer by imposing fines, demotions or similar penalties. The end result of a successful "serious" complaint against a judicial officer would be removal by the Governor on an address of both Houses of Parliament. In relation to a complaint referred to the head of jurisdiction, the head of jurisdiction may counsel the judicial officer, or make administrative arrangements within his or her court which are designed to avoid a recurrence of a problem.

In considering the nature of matters that come before the Commission, it is important to bear in mind two things. First, the Commission is not a forum for the administration of criminal justice. If an allegation of criminal conduct were made against a judicial officer, then that person would be entitled to due process of law and, in the ordinary course, the matter would be taken up by the prosecuting authorities. Second, the existence of the Independent Commission Against Corruption in New South Wales has a bearing upon the work of the Commission. Allegations of corruption against judicial officers would ordinarily fall to be investigated by the Independent Commission Against Corruption rather than the Judicial Commission.

The Conduct Division of the Commission

The function of a Conduct Division of the Commission is to examine and deal with a particular complaint that has been referred to it by the Commission. The legislation provides that the Conduct Division may hold hearings in relation to a complaint and that a hearing may be held in public or in private, as the Conduct Division may determine (section 24(2)).

The Conduct Division has the functions, protections and immunities conferred by the *Royal Commissions Act 1923* on commissioners appointed under that Act. *The Royal Commissions Act* applies to any witness summoned by or appearing before the Conduct Division.

The ultimate power of a Conduct Division in relation to a complaint is to make a report to the Governor, setting out its findings as to whether the complaint that has been investigated is wholly or partly substantiated, and whether it could justify Parliamentary consideration of the removal of the judicial officer from office. In New South Wales the holder of a judicial office can only be removed by the Governor on an address from both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity³.

The Nature and Scope of Complaints Made to the Commission

In the period 1 July 2007 to 30 June 2008 a total of 65 complaints about 51 judicial officers were made by 59 individual complainants.

In addition the Commission received a reference from the Attorney General under section 16(1) of the *Judicial Officers Act*. These references are treated as complaints under the legislation.

In any consideration of the statistics of the complaints dealt with by the Commission it must be remembered that there are approximately 300 judicial officers in New South Wales who in the relevant period dealt with in excess of 500,000 matters.

The most obvious aspect of the pattern that emerges from a consideration of the nature of complaints, year by year, is that apprehension of bias, and allegations of failure to give a fair hearing, are the most common grounds of complaints made to the Commission.

A high proportion of complaints alleged that the judicial officer in question, either unfairly or improperly, prevented the losing party to litigation from properly putting his or her case or favoured the winning party. Complaints of this nature are assessed by examining the detail of the record and, where appropriate, seeking an explanation from the judicial officer involved. In the case of many of these complaints, a sound recording of the proceedings is listened to, or a written transcript is examined.

Some complaints involve allegations of incompetence. In evaluating these complaints the members of the Commission consider the issues and evidence in the case in question, and take into account their own knowledge and judicial experience, where appropriate.

Frequently, complaints are made in apparent substitution for appeals to a higher court. Standing alone, this is not a proper basis for a complaint. However, where the complainant goes on to allege that not merely was the decision wrong, but also that it was such that no reasonable person could have made it, and for that reason it reveals some inadequacy on the part of the judicial officer, then the

³*Constitution Act 1902*, s53

Commission gives close consideration to the material that was before the judicial officer in order to see whether such a charge can be substantiated.

Sometimes a complainant will allege that a judicial officer has made a wrong decision and that this was said to involve judicial misbehaviour on the part of the judicial officer. However, to make an erroneous decision does not of itself amount to judicial misconduct, and there is a difference between an allegation of judicial error and an allegation of judicial misconduct. In many matters of this type the Commission is required to dismiss the complaint on the basis that it relates to the exercise of a judicial function that is or was subject to adequate appeal or review rights.

From a positive point of view, the small number of complaints (relative to the number of judicial officers in the State and the huge volume of litigation with which they deal) is an encouraging indication of the general community's willingness to accept even adverse decisions if they are made in accordance with due process of law.

The complaints process

