



Australian Government
Attorney-General's Department

Access to Justice Division

**Courts Legislation Amendment (Judicial Complaints) Bill 2012 and
Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012**

Senate Legal and Constitutional Affairs Legislation Committee

Questions on notice

Senator Trish Crossin

[Question 1] The High Court has previously considered legislation specifically relating to the judiciary. Can you respond to the issues raised on page 3 of the Adelaide Law School submission in relation to this, and advise if there is a specific constitutional reason why complaints against High Court justices cannot be included in the Judicial Complaints Bill?

The approach adopted by the Government to exclude the High Court from the operation of Judicial Complaints Bill recognises the special position of the High Court. The power for heads of jurisdiction to manage complaints about judicial officers reflects their responsibility as provided under courts legislation. The Judicial Complaints Bill forms part of a package of legislation to support implementation of reforms to the system of complaints handling about judicial officers. The reforms include not only internal courts complaints processes but also the Parliament's consideration of complaints that may warrant consideration of removal from office.

Paragraph 72(ii) of the Constitution applies to all federal judges, including Justices of the High Court. It is appropriate that a Commission be able to investigate allegations about a Justice of the High Court because such an investigation is to assist the Parliament in discharging its responsibilities under paragraph 72(ii).

[Question 2] Can you explain why the Judicial Complaints Bill does not apply to the heads of jurisdiction? Is there a specific legal or policy reason why the complaints against a head of jurisdiction could not be dealt with other by members of the court?

The Judicial Complaints Bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to provide additional powers to courts' heads of jurisdiction to support their existing broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court.

The approach taken was based on the view that it would be inappropriate for another federal judge or magistrate in the court to consider or handle a complaint about a head of jurisdiction, given the special position of a head of jurisdiction within the Court.

The power to consider and handle a complaint under the Judicial Complaints Bill reflects the head of jurisdiction's position in the court. It would be inappropriate and impractical to have a head of jurisdiction consider or handle a complaint relating to themselves. The Bill does not intend for another judicial officer to consider or handle a complaint about the head of jurisdiction as it 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.

The approach taken in the Judicial Complaints Bill aims to support a framework for complaints handling that is most likely to achieve consistency with existing powers and reduce the possibility for uncertainty and challenge to the arrangements.

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. There is nothing in the Judicial Complaints Bill which would prevent this from occurring.

[Question 3] Could you explain the rationale for the government's policy decision to pursue the approach in the Parliamentary Commissions Bill, rather than establish a permanent commission for judicial complaints such as the Judicial Commission of NSW?

To date Parliament's consideration of the removal of a judge from office has been triggered only very rarely. Establishing a Commission when one is required is a more practical and efficient approach than a standing Commission as it is difficult to predict when and how often the Parliament may be called upon to discharge its responsibilities under paragraph 72(ii) of the Constitution.

Establishing a Commission at the time a serious complaint about a judge is referred to the Parliament can occur quickly and will not cause undue delay in proceeding with an investigation. Having Members of a Commission appointed at the time a Commission is established avoids problems where a Member may not be able to discharge their role, in relation to allegation about a particular judge, due to reasons of personal conflict.

The NSW Judicial Commission has substantially wider functions than a Commission under the Parliamentary Commissions Bill. These include preliminary investigations of complaints at first instance and education functions. At the federal level, judicial education can be accessed through the National Judicial College of Australia. The Judicial Complaints Bill supports a largely non-statutory process of handling complaints about judicial officers, under which the relevant head of jurisdiction would ordinarily be expected to handle most complaints in the first instance.

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 accepted in its report that 'there are special requirements which arise in Australia under Chapter III

of the Constitution with respect to the federal courts'. 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). The Parliamentary Commissions Bill ensures that a Commission would only be established upon resolution of both Houses of Parliament.

In its *Managing Justice: A Review of the Federal Civil Justice System* report in 2000, the ALRC noted that the status of a standing Commission would inevitably be challenged upon its first use, adding complexity and uncertainty to the proceedings rather than facilitating a smooth process. As the aim of the Parliamentary Commissions Bill is to create a clear and effective process, this would not be desirable in the rare instances in which a Commission would be required.

[Question 4] The University of Adelaide Law School submission raised concerns with the appropriateness of appointing current judges of a State or Territory Supreme Court to a Commission as per clause 13 of the Parliamentary Commissions Bill (Sub 7, p.7). What is the rationale for this approach? Should the Parliamentary Commissions Bill be amended to only allow former judges to be appointed to a Commission?

The Parliamentary Commissions Bill provides that a Commission consists of three members and that at least one member of each Commission must be a former Commonwealth judicial officer or a judge, or former judge, of the Supreme Court of a State or Territory.

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. The rationale for the approach of allowing for the appointment of current or former State or Territory judges is that it increases the range of persons who have the necessary judicial experience to be suitable for appointment to a Commission.

The appointment of a State or Territory judge to a Commission would be in his or her personal capacity and the ability of a State judge to accept an appointment may be limited by any State legislation or practical considerations, such as it being necessary for a serving State or Territory judge to obtain leave in order to sit as a member of a Commission.

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.

[Question 5] Could you respond to the concerns about the Judicial Complaints Bill raised by the University of Adelaide Law School in relation to public accessibility of information regarding judicial complaints (Sub 7, p. 4) and the lack of guiding criteria for heads of jurisdiction in exercising their discretion (Sub 7, p.5). Did the Department consider including any guiding criteria in the Judicial Complaints Bill? Did the Department seek any legal advice on the constitutional limitations relating to including guiding criteria for heads of jurisdiction and, if so, please provide details about the nature of that advice and how it has informed the drafting and content of the bill.

[Did the Department consider including any guiding criteria in the Judicial Complaints Bill?]

The Judicial Complaints Bill and the Parliamentary Commission Bill have been developed in consultation with and are supported by the Chief Justices of the High Court, Federal Court and Family Court and the Chief Federal Magistrate.

The Judicial Complaints Bill has been developed to support a largely non-legislative framework for complaints handling undertaken within the courts. 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.

[Did the Department seek any legal advice on the constitutional limitations relating to including guiding criteria for heads of jurisdiction and, if so, please provide details about the nature of that advice and how it has informed the drafting and content of the Bill.]

The Department has obtained legal advice from the Solicitor-General and the Australian Government Solicitor in relation to the capacity of heads of jurisdiction to manage judicial performance, which has been taken into account in drafting the Bill.

It is not appropriate to disclose the content of the legal advice.

[Question 6] Clause 48 of the Parliamentary Commissions Bill allows for a Commission to withhold evidence of some its proceedings from its report tabled in parliament. Is it appropriate for the Commission to withhold information collected during its inquiries from the parliament?

Clause 48 provides that as soon as practicable after a Commission finishes its investigation, the Commission must give a report to the parliamentary presiding officers for presentation to the

Parliament. If the Commission believes that, if any of its findings or conclusions, or any of the evidence before the Commission, were to be laid before the Houses of the Parliament, it would cause specified harm, the Commission may provide a separate report to the parliamentary presiding officers with a statement of the Commission's belief.

Subclause 48(7) requires the parliamentary presiding officers to make such a report available for inspection by members and Senators and the Commonwealth judicial officer who is the subject of an investigation.

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 countervailing public interests, including the privacy of individual judicial officers who may be the subject of an investigation.

[Question 7] The Federal Court of Australia and the Judicial Conference of Australia have both raised the issue of reimbursement of the reasonable legal costs of judicial officers responding to allegations of misconduct under the Judicial Complaints Bill. Could you explain why the Parliamentary Commissions Bill provides for the reimbursement of a judicial officer's legal costs but the Judicial Complaints Bill does not?

Provision has been made for the costs of legal representation when a judicial officer is being investigated by a Parliamentary Commission in recognition that a judicial officer is subject to a parliamentary process by virtue of their constitutional standing as a Chapter III judge. Participation in a Commission inquiry may create an onerous financial burden on any judge needing to respond to an allegation that has been referred to Parliament.

By contrast, the approach to reimbursement of the costs of legal representation in the Judicial Complaints Bill is consistent with the character of an internal complaints handling process. The complaints handling process within the courts is guided by a largely non-legislative framework developed in consultation with heads of jurisdiction. The federal courts are each responsible for their own operation and management, including the allocation of resources to support core areas of responsibility.

If a head of jurisdiction considers it appropriate in the circumstances to offer reimbursement of legal representation costs, they are able to do so.

The submission to this Senate inquiry from Civil Liberties Australia supports the current approach to the reimbursement of the reasonable legal costs of judicial officers who may respond to a complaint being considered within a court:

‘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 their reasonable legal costs when they were subject to a workplace investigation, even where dismissal and loss of employment were a real possibility.'

[Question 8] Can you outline in detail how the principles of parliamentary privilege are intended to apply to the Commissions, its proceedings and documents? Could you respond to the specific concerns raised by the Clerk of the Senate in relation to the Parliamentary Commissions Bill (Sub 2, pp 7-8) and indicate to the committee how these concerns will be addressed?

Under the Parliamentary Commissions Bill, a Parliamentary Commission would be a joint Parliamentary body. The Bill provides specific powers and offences in respect of a Commission and applies certain privileges of the Parliament in a similar way as they would apply to a committee of a House of the Parliament.

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

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

- failure of witness to appear or produce documents
- false or misleading evidence
- bribery of or fraud on a witness
- obstruction of a Commission, and
- unauthorised publication of material.

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

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

Further consideration will be given to clarifying in legislation the issues raised by the Clerk of the Senate.

[Question 9] The Gilbert and Tobin Centre of Public Law submission highlights that the bills do not adequately address possible cases of judicial incapacity (Sub 3, p.6). They also note that the Statements of Compatibility with Human Rights (SCHR) for the bills do not refer to the rights

recognised by the UN Convention on the Rights of Persons with Disabilities (Sub 3, pp 8-9). Is there a reason why the bills and the SCHRs could not be amended to address these concerns?

‘Incapacity’ is defined in the Bills to have the same meaning as in section 72 of the Constitution. It is for the Parliament to determine whether an allegation satisfies the requirements of proved incapacity for the purposes of paragraph 72(ii) of the Constitution. 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. This can be tailored to the circumstances of an individual complaint.

Under section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a Statement of Compatibility must contain an assessment of whether the Bill is compatible with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. The rights articulated in Articles 22 (Respect for privacy) and 27 (The right of persons with disabilities to work) of the United Nations Convention on the Rights of Persons with Disability (CPRD) may be engaged by a complaints handling process established under the Bills. The Statement of Compatibility includes reference to the general right to privacy. Although the legislation indirectly engages the right of persons with disabilities to work, it is not closely linked to the purpose of the legislation, which is to establish a framework for complaints handling.

Although the rights may be indirectly engaged by a complaints handling or investigation process, each Bill is compatible with these rights.

The Parliamentary Commission 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. The Bill provides:

- under cl 19(1) a Commission is not bound by the rules of evidence and may be informed on any matter in any manner it thinks fit. This provision provides flexibility for a Commission to be able to appropriately and sensitively inform itself in relation to issues of personal incapacity.
- under cl 20 a Commission must act in accordance with the rules of natural justice. Cl 20(2) imposes strict requirements on a Commission to allow a judicial officer opportunity to comment on material received by a Commission. These provisions allow a judicial officer to obtain and present medical evidence in relation to their health. The provisions also provide opportunities for a judicial officer to respond to material at intervals throughout an investigation which allows for a judicial officer to comment once any condition or incapacity may have stabilised or improved.
- Cl 23 requires Commission hearings to be public to the extent that this is appropriate in the circumstances. Allowing for a Commission to direct that all or part of its hearings be held in private is a way for a Commission to accommodate the particular sensitivities of a complaint or a condition affecting a judicial officer.

- Cl 24 provides that a Commission may hold a hearing at any place in Australia determined by the Commission. This provision allows a Commission to be considerate of a judicial officer who may have limited capacity to travel when determining the location(s) of a hearing. Cl 24(2) and 24(4) extend this by providing that the procedure at the hearing is as the Commission directs and that the judicial officer may attend and participate in the hearing with the assistance of legal representation.
- Cl 24(7) protects the privacy of a judicial officer in the event that a hearing or parts of a hearing are not open to the public by specifying who may be present at a private hearing. This provision is supplemented by cl 50 which makes unauthorised presence at hearing an offence.
- Cl 25(6) exempts current and former judicial officers from being compelled as a witness before a Commission.
- Cl 48(6), discussed above, allows a Commission to prepare a separate report on sensitive matters. Providing a Commission with discretion in this regard allows for the protection of privacy in cases considered appropriate by a Commission.

The Judicial Complaints Bill supports a process that provides flexibility to head of jurisdiction in selecting the person or body who may handle a complaint and allows for the sensitive handling of complaints of a personal nature. The exemption to accessing complaint related documents under the *Freedom of Information Act 1986* provides specific protection for complaint related evidence within the courts.

Senator Humphries asked the following question at the hearing on 11 May 2012

If a discussion or negotiation were held with the High Court and the court was minded to accept that such a model ought to apply to it as well, and if it, for example, included a complaints-handling process in the court rules, which the court is able to make, that would overcome any section 72 issues, would it not? If a court made its own rules to incorporate a conduct committee kind of approach, there would not be any issue under section 72, would there?

The answer to the honourable senator's question is as follows:

Section 86 of the *Judiciary Act 1903* enables the Justices of the High Court to make Rules of the Court. The *High Court Rules 2004* prescribe technical procedural requirements on matters in proceedings such as the filing of documents, use of the Registry Seal and the form of judgements and orders of the Court. The purpose of the Rules is to regulate procedure in proceedings before the High Court.

We also refer to our response to Q1.

Supplementary questions on notice

[Supplementary Question 1] The Clerk of the Senate notes the Parliamentary Commissions Bill's restrictions on Commissions summoning judges or making them subject to search warrants acknowledges the 'separate and independent functions' aspect of the constitutional doctrine of separation of powers, but ignores the 'checks and balances' aspect of the doctrine. She argues the 'limitations adopted in the bill inhibit [the] effective operation [of one of these checks and balances] in the preliminary investigation phase by a Commission.

Could you respond to this critique of the limitations in the Parliamentary Commissions Bill in respect of judges?

Under the Parliamentary Commissions Bill, current and former Commonwealth judicial officers would be exempted from the application of coercive powers of a Commission. The coercive powers of a Commission include requiring witnesses to give evidence on oath or produce documents or things, and issuing search warrants in relation to premises.

The Constitution establishes a strict separation of the federal judiciary from the other branches of the Commonwealth government. Section 72 establishes the mechanism for the removal of judges by the Governor-General on an address from both Houses of the Parliament in that context.

Provisions in the Parliamentary Commissions Bill are framed to ensure that the appearance before, or the provision of information to a Commission by a federal judge is voluntary. Analogous to a criminal trial, a judge's non-participation does not prevent a Commission from undertaking an investigation or completing a report to assist Parliament.

The approach taken is consistent with the separation of powers established by the Constitution.

The Parliamentary Commissions Bill provides Parliament with a standard way to fairly and appropriately investigate serious complaints about federal judicial officers.

[Supplementary Question 2] The Clerk of the Senate also notes her view that the provisions for appointment of members of a Commission indicate ‘an unnecessary intrusion by the executive’. She questions how the ‘consultation between the chief officer of the executive... and the chief officer of the alternative executive, both members of only one house’ could be justified if Commissions are to be joint parliamentary bodies.

Do you agree that these appointment provisions are inappropriate given the joint parliamentary nature of the proposed Commissions?

The approach taken to the appointments process reflects the joint parliamentary nature of a Commission and provides clear procedures for the prompt establishment of a Commission. Under the Bill, appointment of members to a Commission occurs through the resolution of each House of the Parliament on the nomination of the Prime Minister. The effect of the provisions is that the entire Parliament must agree to the nominations before members can be appointed and a Commission established.

Consultation by the Prime Minister with the Leader of the Opposition about proposed nominees reflects the non-partisan nature of a Commission’s function.