Submission to

Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

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INTRODUCTION

The need for more explicit and transparent processes to deal with complaints against judicial officers, including allegations of misbehaviour and incapacity, was identified in a previous Senate report *Australia's Judicial System and the Role of Judges* (2009). Our submission to that report described a number of concerns about existing legislation and processes, including the informal role of heads of jurisdictions and the inconsistency in powers to suspend judicial officers.

This submission is drawn from research findings about the Australian judiciary based on data gathered as part of the Magistrates Research Project and Judicial Research Project,[1] beginning in 2001, including the

- National Survey of Australian Magistrates 2002
- National Court Observation Study 2006
- National Survey of Australian Judges 2007
- National Survey of Australian Magistrates 2007
- Judicial Workload Allocation Study 2010

Further information on the research projects is available from the project website: http://ehlt.flinders.edu.au/law/judicialresearch/

More detailed and in-depth analysis of this research has been published in articles and research listed below as references. For simplicity, detailed footnotes,

[1] This research initially was funded initially by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (AAM) as the partners and also received financial support from the Australasian Institute of Judicial Administration. Until 2005, it was funded by an Australian Research Council (ARC) Linkage Project Grant (LP210306), 2002-2005, with AAM and all Chief Magistrates and their courts as industry partners and with support from Flinders University as the host institution. From 2006, the research was funded by an ARC Discovery Grant (DP0665198), 2006-2008 and an ARC Linkage Project Grant (LP 0669168) 2006-2009. From 2010 the Project has been funded by an ARC Discovery Grant (DP 1096888).

references and bibliography have been omitted from this submission; complete references are contained in the articles or research reports as indicated in the text.

Our research raises three issues in relation to the Bills:

- The importance of context when assessing misconduct or incapacity;
- The nature of public confidence; and
- The limited measures available to a head of jurisdiction in cases of justified complaints against a judicial officer short of those which merit referral for consideration of removal.

CONTEXT AND MISCONDUCT OR INCAPACITY

The processes developed in these Bills focus on the individual, as is sensible when behaviour of a particular judicial officer raises concern. However, individual conduct is located in a wider institutional context. There are two aspects to this. The first is to have judicial selection and appointment regimes that are effective in ensuring that those appointed to judicial office have the capacity for and are suited to the work. The second is to recognise that individual work performance is partly controlled by the work environment, including workloads and work organisation.

Judicial selection

There is a considerable literature on judicial appointment and selection in Australia and overseas, attempting to articulate aspects of merit in relation to judicial office and suggesting selection processes which will produce meritorious candidates. One assumption behind current selection processes is that everyone appointed to a court can do everything that comes before that court. However, just as the legal profession is increasingly specialised, so is the judiciary and the roles for judicial officers are changing.[2] A judicial officer who has excellent capacity for some types of work or cases may have more limited capacity for others. This creates challenges for heads of jurisdiction in allocating work within courts.[3]

Another aspect of judicial selection is self-selection: ensuring that meritorious candidates have a good understanding of what the judicial role actually entails and

[2] Mack Kathy, and Sharyn Roach Anleu (2011) 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' 37 (1) *Monash University Law Review* 187-215.

[3] Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (forthcoming 2012)

will be suited to the work in various ways, such as temperament and lifestyle. As one judicial officer stated in response to a survey question:

> *… becoming a judge was a leap of faith for me. I had no idea whether (a) I would be good at it, & (b) whether I would enjoy it. It was flattering to be asked, but that does not guarantee the outcome … I had absolutely no training or preparation for the role of being a judge…. Despite the 'sink or swim' attitude to judicial education, I felt 'at home' from Day 2, and I have continued to feel that way. I love the job*

Survey responses indicate that most in the judiciary are pulled into the position by the intrinsic nature of the work and some aspects of the working conditions and are attracted to the idea of doing something that they regard as valuable to society, in circumstances where they are ready for a change and are approached by someone in the court or government. Few appear to be motivated by a desire to leave their previous positions or as a longer-term career plan to become a magistrate or judge. [4]

While our survey findings indicate that very high proportions of judicial officers are satisfied with the aspects of their work which led them to undertake judicial office, and would choose a judicial role again, there are those who enter the judiciary and then find they are unsuited to it. Some comments in the survey describe this problem:

> *Its [sic] like a lot of jobs - you don't really know what is involved until you start actually doing it and then you find out that its [sic] just like being on a treadmill over which you have no control whatsoever doing essentially repetitive, boring work.*
>
> *I was a barrister for 18 years. I have been a judge for about the same amount of time. The bar is more creative, challenging, varied & exciting. I have always regretted becoming a judge. I preferred being a barrister.*
>
> *Overall, I've enjoyed it. You only find out if you have an aptitude for it when you actually do it. Some of the best lawyers find they can't make decisions, and their life becomes hell. I have found I can make decisions for others, and sleep at night. I'm one of the lucky ones*

In England and Wales, judicial candidates job shadow or sit as acting judges before permanent appointment, in order to reduce the risk of unsuitable appointments.

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[4] See Kathy Mack and Sharyn Roach Anleu, "The National Survey of Australian Judges: An Overview of Findings" (2008) 18 *Journal of Judicial Administration* 5, 14-15; Kathy Mack and Sharyn Roach Anleu, "Entering the Australian Judiciary: Gender and Court Hierarchy" (2012) 34 *Law and Policy* 313 (forthcoming).

Some survey respondents identified the lack of preparation for judicial office in Australia, as in this comment:

> *Although now different and better to when I was appointed, we can still do more and better to prepare appointees for judicial office.*
> *The availability of mentors, whether formal, or informal, is essential*
> *Too little attention is devoted to aspects of judicial life, such as health, stress management, time management*

Work practices

There are considerable demands and stresses in judicial work that can be ameliorated or aggravated by volume of work and the organisation of work. Part of any investigation of a complaint or alleged misconduct must also consider these aspects of judicial work. As shown in our research, about one third of the Australian judiciary at all levels agrees or strongly agrees that making decisions is difficult and three-quarters regard the volume of work as unrelenting. If these demands are not properly managed, then judicial and court staff performance will suffer, making complaints against the judiciary more likely. While individual complaints may be justified, the response may need to be systemic rather than individual.[5]

PUBLIC CONFIDENCE

The concept of public confidence is an important theme in judicial independence and in concerns about judicial performance. However, it is not clear how heads of jurisdiction are to be accurately informed about public attitudes, which are not necessarily the same as the views most strongly expressed in the media.[6]

Insight into Australian public attitudes towards courts and the judiciary is provided by the findings from a large national social survey (Australian Survey of Social Attitudes [AuSSA] 2007; 2769 respondents).[7] AUSSA findings indicate that Australians place a high value on the importance of courts, but express lower levels of confidence in the courts and legal system. This tension between high value and low confidence is complicated by the fact that very few Australians have any firsthand experience of their courts; only one third indicate presence at a court proceeding during the past decade and only six per cent report contact with the criminal courts in the past year.

[5] Kathy Mack, Sharyn Roach Anleu and Anne Wallace "Everyday Work in the Magistrates Courts: Time and Tasks" (2011) *Journal of Judicial Administration* 34-53.
[6] Pamela Schulz *Courts on Trial: Analysing and Managing the Discourses of Disapproval* (2010); See also Sentencing Advisory Council of Victoria research on public opinion and sentencing http://www.sentencingcouncil.vic.gov.au/page/our-work/projects/public-opinion accessed 29 April 2012.
[7] Sharyn Roach Anleu and Kathy Mack "The Work of the Australian Judiciary: Public and Judicial Attitudes" (2010) *Journal of Judicial Administration* 3-17.

This data suggests that Australians may derive most of their information about courts and judges from sources such as print and electronic news and entertainment or what they are told about experiences of other people, rather than via their own direct experience or observation. However, closer analysis of public attitudes on a range of facets of judicial work generates a more nuanced and complex understanding of public opinion and the justice system. This is especially the case where local research has been carried out in relation to the courts in a particular jurisdiction.

SANCTIONS

The proposed Judicial Complaints Bill attempts to clarify the informal role of the chief judicial officer of a court in addressing complaints which would not justify removal. While the legislation itself is minimal, the Explanatory Memorandum sets out a detailed process which the legislation would authorise.

However, the Bill and the Memorandum are silent on what responses or sanctions might be available if a complaint is found to be justified. The Bill refers to handling a complaint or dealing with a complaint or disposing of a complaint. The explanatory memorandum states that the Bill "outlines the measures a head of jurisdiction may take." The only measure referred to is the statutory power to "temporarily restrict a judge to non-sitting duties". This can be done in a range of circumstances, whether or not there has been a complaint. 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 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.

CONCLUSION

The research summarised in this submission bears on several issues raised by the Bills. Empirical research, especially when it engages directly with the courts and the judiciary, provides valuable data on public policy issues, such as those raised by these Bills.

Selected recent publications

Mack, Kathy and Roach Anleu, Sharyn, "Entering the Australian Judiciary: Gender and Court Hierarchy" (2012) 34 *Law & Policy* (forthcoming).

Mack, Kathy, Roach Anleu, Sharyn and Wallace, Anne, "Everyday work in the magistrates courts: Time and tasks" (2011) 21 *Journal of Judicial Administration* 34-53.

Roach Anleu, Sharyn and Mack, Kathy, "The Work of the Australian Judiciary: Public and Judicial Attitudes" (2010) 20 *Journal of Judicial Administration* 3-17.

Roach Anleu, Sharyn and Mack, Kathy, "Trial Courts and Adjudication" in Cane and Kritzer (eds), *Oxford Handbook of Empirical Legal Research*, (OUP, 2010) 546-66.

Mack, Kathy and Roach Anleu, Sharyn, "Performing Neutrality: Judicial Demeanor and Legitimacy" (2010) 35(1) *Law & Social Inquiry* 137-73.

Mack, Kathy and Roach Anleu, Sharyn, "Women in the Australian Judiciary" in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis, 2010) 370-388.

Mack, Kathy and Roach Anleu, Sharyn, "The National Survey of Australian Judges: An overview of findings" (2008) 18 *Journal of Judicial Administration* 5-21.