Submission to Senate Standing Committee on Legal and Constitutional Affairs

I have only recently become aware of the Committee Enquiry into the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.* I have an interest in the matter, having chaired the only Senate Committee Enquiries into the only allegations of misbehaviour by a Judicial Officer of the Commonwealth in the history of the Federation. (See Parliamentary Papers nos. 168 and 271 of 1984.)

I hope the Committee might be helped by the following comments made on a first glance of the Bill.

1. A Parliamentary Commission can only be established by resolution passed by each chamber of the Parliament in the same session. To make the obvious point it would be insufficient if, for example, the Senate but not the House of Representatives passed a resolution purporting to establish a Commission. But, this is exactly what happened in relation to the two Senate Select Committees mentioned above.

2. Whilst it is true that, in accordance with Section 72 of the Constitution a prayer for the removal of a judge by the Governor General can only be made by both Houses of Parliament, this cannot affect the right and capacity of either chamber to conduct (or arrange for the conduct of) an enquiry without the concurrence of, or indeed in the face of opposition by the other chamber.

3. Presumably the political dynamic which this Bill envisages includes an agreement to ensure the support of both chambers for an appropriate resolution. But if that cannot be achieved, that is not the end of the matter. It simply means that it is the end of any role for a Commission under the Act.

4. What I really want to respectfully point out to the Committee is 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.

5. One, amazingly enough, was as to meaning of the term “misbehaviour”. The Senate committee members were directed to indicate whether the proven conduct of the judge was properly characterised as “misbehaviour” *either* because it constituted an offence under the general law *or* merely because it was so improper as to be particularly reprehensible in a judge.

6. The second was the question of standard of proof of the conduct which could amount to misbehaviour. The Senate gave the committee two standards of proof: (i) beyond reasonable doubt and (ii) upon the balance of probabilities. This caused enormous difficulties for the members of the committee, particularly in the attempt to draft a report to the Senate.

7. In the end I, together with Senator Haines (Dem) found the relevant facts (broadly, of intent to pervert the course of justice) proved on the balance of probabilities only. Senator Lewis (Lib) found the intent proved beyond reasonable doubt and Senator Bolkus (Lab) found that on any meaning of

misbehaviour and on any standard of proof, the judge was not in jeopardy of any Address under the Constitution.

8. Perhaps more relevantly for your consideration of the Bill is the fact that the Senate required the appointment of two "Commissioners Assisting" who were required to submit their conclusions to the Committee using the Committee's terms of reference. One found that conduct amounting to a criminal offence had been proved beyond reasonable doubt. One found only that a significant impropriety had been committed, though that was proved beyond reasonable doubt.

9. And then the four Senator members of the select committee reported in the various fashions outlined above! In other words, even if the Parliamentary Commission envisaged by the Bill made a report to the Parliament, it could be as patchwork and even contradictory as that of the Commissioners Assisting as that noted above. And then Senators and Members of the House of Representative will come to their own conclusions both as to the facts and the way to characterise the facts. (Presumably on a free vote, as this function is more akin to the judicial than the legislative.)

10. I can't help thinking that there would be very few instances which would justify setting up this huge apparatus with such an inbuilt tendency to be unhelpful. 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.

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