Justice for Children Australia

01 May 2012

By email: to legcon.sen@aph.gov.au

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

Dear Senators and staff

I am making this submission of behalf of **Justice for Children Australia** (J4C). Our comments are in blue to avoid confusion with quoted material that I may not have ascribed properly – apologies for that. I haven't been able to examine both Bills in detail so comments are fairly general.

Thanks for your time and patience and for the extension offered until today..

We have long been concerned about the lack of accountability of judges and magistrates in Family Law.

We believe that all branches of government should be accountable to the people, not only to each other. Despite the High Court decision in March 2011[1] most people still believe that legal processes should be transparent so that justice should not only be done but be seen to be done.

Yours sincerely

Chair
Justice for Children Australia Inc.

[1] The broadcaster applied to the High Court to have the contempt charges against him ruled unconstitutional on the grounds that suppression orders restrict an implied freedom of political communication and subvert the responsibility of the courts to be open and transparent.

The full bench of the High Court ruled against him, with Chief Justice Robert French describing Hinch's defence as "febrile rhetoric". **The Australian 11/03/11**

Submission – general comments

As far as I can discover, the only criteria in a code of conduct for Judges and Magistrates is that they must not take bribes or indulge in nepotism or similar conflict of interest situations. Surely these are not adequate provisions for ensuring that members of a 'Superior Court' – or indeed any court – behave with even minimum consideration, courtesy and decorum?

There are undoubtedly judges and magistrates who are fair, who listen to all sides and who make balanced wise and knowledgeable decisions.

Unfortunately, we know of many examples where this is not happening in Family Law. The suppression provisions do not work to protect the innocent but to shield the guilty. Judges and magistrates too often behave in a biased, capricious and unreasonable fashion and their decisions reflect ignorance of children's development, wellbeing or welfare. They very rarely listen to children's views and rely on the Independent Children's Lawyer (ICL) or the single expert to put forward the "best interests of the child".

Often the ICL has not met the child and has certainly not listened to or represented their views. The 'expert' may have spent less than an hour with the child.

The complexity of Family Law is generally acknowledged as in the submission made by the Chief Justice in 2009. [2]

The role of a Judge or Magistrate should surely be to assist people who appear before them without legal representation or with disadvantages such as CALD background with limited English. But many of them rather than helping such a person, criticise and belittle them.

"This submission notes that the *Family Law Act 1975* (Cth) is a voluminous statute that is difficult to navigate, particularly for people without legal training. It is submitted that any future changes to the *Family Law Act 1975* (Cth) should take into account methods for reducing the length and complexity of the Act. For example, if it is now technically possible provisions concerning the establishment of the Family Court and its powers and functions might well be placed in a separate statute.[3]

Justice Anthony Mason has said:

At the same time closer public scrutiny of the judicial process and the work of the courts, arising partly but by no means entirely, from criticism by interest groups, has focused critical attention on the composition of the judiciary and the procedures for the appointment of judges. In essence the claim is made that the judiciary is unrepresentative of society. **The unrepresentative composition of the existing judiciary is attributed to the lack of identified criteria for judicial appointment and**

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[2] Extract from **Senate Legal and Constitutional Committee Inquiry: Australia's Judicial System and the Role of Judges Joint Submission by the Chief Justice of the Family Court and the Chief Federal Magistrate on behalf of the Family Court of Australia and the Federal Magistrates Court of Australia13 May 2009**

[3] Ibid (footnote 1)

the present procedures for appointment. Those procedures are neither public nor open and they do not involve public participation. [4]

Extract from (see footnote 1)

"The *Family Law Act 1975* (Cth) relevantly provides that a person shall not be appointed a Judge of the Family Court unless the person is or has been a Judge of another court created by the Commonwealth or State/Territory Parliament, or has been enrolled as a legal practitioner of the High Court of Australia or of the Supreme Court of a State or Territory for not less than 5 years.9 **The person must also be, by reason of training, experience and personality, a suitable person to deal with matters of family law, a requirement that is unique amongst the federal courts.**10
Similar provisions also exist for the appointment,11 termination12 and qualification13 of Judicial Registrars. Judicial Registrars are judicial officers appointed under the *Family Law Act 1975* (Cth) who exercise delegated judicial powers. There are limitations on the powers Judicial Registrars may exercise, such as final parenting orders and property disputes over $2 million. There are currently two Judicial Registrars of the Family Court.
And
Termination of judicial appointments under the Constitution
No judge of a federal court, including the High Court, has been removed from office by virtue of proved misbehaviour under the *Constitution*. Further, it is noted that changes to the procedure for termination of judicial appointments would require alteration to s 72(ii) of the *Constitution*.1"

"The Family Court of Australia, through its specialist judges and staff, assists Australians to resolve their most complex legal family disputes. The Family Court is a superior court of record established by Parliament in 1975 under Chapter 3 of the Constitution. It commenced operations on 5 January 1976 and consists of a Chief Justice, a Deputy Chief Justice and other judges. The Court maintains registries in all Australian states and territories except Western Australia. The Court's goal is to deliver excellence in service for children, families and parties through effective judicial and non-judicial processes and high-quality and timely judgments while respecting the needs of separating families". [5]

Given the huge costs, incredibly long delays in judgements and other processes, and the almost universal (in our experience) lack of useful and relevant information, the Family Court could not possibly be achieving its quality standards. Do the Judges have any responsibility to see that the Court functions according to this idyllic description?

In her maiden speech in 1998, the current Attorney- General, Nicola Roxon said:

"The Industrial Relations Commission has had its powers curbed by the Howard government. The Human Rights and Equal Opportunities Commission is chronically underfunded. Legal Aid has been cut beyond the quick. These institutions were just some of Labor's ways of ensuring protection for all in the community, particularly those most likely to suffer at the hands of the more powerful like

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[4] *Fragile Bastion*. Judicial Commission of NSW education monograph 1 pub 1997

[5] **Family Court website at April 2012**

big business and government. These were methods for regulating a decent society. **They helped align our legal system more closely with our notions of justice. Our legal system under the current government is fast becoming a casino for the rich and inaccessible to all others.**

I would hope that in 26 years time we have a legal system in this country which protects people, and which is cheap and accessible to everybody. Without this we cannot ensure that our community will continue to have a peaceful way of resolving disputes. We must not weaken the system to the extent that we leave the powerful to run roughshod over others, or worse resort to violence and intimidation to get their way—as occurs in so many other countries around the world." ***(my emphasis)***

As Ovid said: "Laws were made to prevent the strong from always having their way".

My comments may appear irrelevant to you but I hope they go near to the heart of public trust in the judiciary and the legal system.

I don't have the time or talent to cover everything that needs to be said in this submission. I hope you won't find it too confusing.

Below are some comments relating to parts of the Explanatory notes accompanying the
JUDICIAL MISBEHAVIOUR AND INCAPACITY (PARLIAMENTARY COMMISSIONS) BILL 2012

At present the legal system is almost completely self-referential and therefore can be seen by many of its victims as a self-serving and self-perpetuating.

As far as I can discover, the only criteria in a code of conduct for Judges and Magistrates is that they must not take bribes or indulge in nepotism. Surely these are not adequate provisions for ensuring that members of a 'Superior Court' – or indeed any court – behave with even minimum consideration, courtesy and decorum?

What should be done to compensate the victims of decisions made by judicial officers suffering from physical and psychological incapacities?

We know of one case where the Chief Magistrate (in this instance) apologised for the behaviour of a Magistrate and suspended him for a short time, but there are countless others where no such action was taken.

It is very important that complainants should be protected and feel safe when they try to voice their opinions. Many people now are extremely reluctant to come forward for fear of reprisamls from the Court.

It is also important and urgent to devise a better way of removing a judicial officer (or ICL) on the grounds of bias. The current system where the judge decides if he/she should step down is patently ridiculous. Only (in our experience) the good, fair judges step down. The others continue on their destructive path.

Role and nature of a Commission

1. A Commission, as provided for under the Bill, would be established following a resolution by each House of the Parliament that it be established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer. It would be able to inquire into any federal judicial officer, including a Justice of the High Court of Australia.

This is too ponderous and long-winded. As it is, people who are involved with the legal system are already under great stress. Getting such a resolution through 'each' (presumably both) Houses could take months.

What is going to happen to those – eg children separated from loving protective parents and given to abusers - who have already suffered hardship or even death because of ill-founded decisions made by incompetent or biased judges. Are they going to be compensated?

2. The role of a Commission under the Bill would be to inquire into allegations and gather information and evidence so the Parliament could be well informed in its consideration of the removal of a judge. The character of a Commission's role would be investigative as it would not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge. A Commission's focus would be to consider the threshold question of whether there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity and report on these matters to the Houses of Parliament.

How can there be misbehaviour (except under the very restricted criteria set out in The Guide to Judicial Conduct 2nd ed. 2007 published by The Australasian Institute of Judicial Administration Incorporated) if there are no standards of even common decency?

We would all expect that Judges would (by training and by the nature of the grave responsibilities they have and the office they hold) adhere to such standards but **Justice for Children** can give many examples of judicial rudeness, bullying, dismissing evidence, bias etc. which have resulted in unjust and inhumane decisions and in some cases virtual death sentences.

Judicial conduct

A complaint about conduct of a judge in court or in connection with a case in the Family Court or in connection with the performance of a judge's judicial functions must be made by letter addressed to the Chief Justice.

If the Chief Justice considers that the complaint is about judicial conduct, she will determine whether the complaint, on its face, has substance. The complainant will receive a comprehensive response to all matters raised. Because the process cannot provide a mechanism for disciplining judges, the Court's response will not address anything other than the substance of the complaint.

If the matter warranted it, the Chief Justice would bring the conduct complained of to the attention of the Attorney-General. [6]

While we understand the idea of separation of powers and the independence of the judiciary, we feel that unaccountable independence can lead to disastrous consequences.

Adversarial court systems are not compatible with advancing the views of children in Family Law.

[6] FCA website at April 2012

All matters concerning their wellbeing, welfare, future and safety should be taken out of the legal system. An alternative means of assessing children's interests must be found and resourced using the best possible talent in areas such as human rights, child psychology and development, and related skills.

Meanwhile, judges in specialised areas such as Family Law must be skilled up and trained to recognise children and give them a voice, to understand some of the complexities of family violence and abuse and to follow at the very least the *Best Practice Principles* revised in 2011.[7]

1. A Commission would conduct its investigations in an inquisitorial, rather than adversarial, manner. A Commission would have appropriate, modern investigative and inquiry powers, including the power to require witnesses to appear at a Commission hearing, take evidence on oath, conduct hearings in private, require production of documents or things, and issue search warrants.

2. A Commission would be required to act in accordance with the rules of natural justice, with specific procedures included to ensure transparency and procedural fairness for judicial officers who were the subject of an investigation.

Human rights implications

Right to privacy and reputation

Right not to be unjustly deprived of work.

Conclusion

3. The Bill is compatible with human rights because it advances the protection of human rights, in particular for right to a fair trial, the right to privacy and reputation, and the right not to be unjustly deprived of work. To the extent that it may also limit human rights, those limitations are reasonable and proportionate.

Clause 13– Membership

4. This clause provides for the membership of a Commission.

5. Subclause 13(1) provides that a Commission will consist of three members. Members will be appointed on the nomination of the Prime Minister.

6. Subclause 13(2) requires the Prime Minister, before nominating a member of a Commission, to consult with the Leader of the Opposition in the House of Representatives. The requirement to consult on nomination of members of a Commission reflects the structure of a Commission as a joint Parliamentary body and the non-political role a Commission will undertake when executing its function.

7. Subclause 13(2) requires that at least one member must be either a former Commonwealth judicial officer or a judge or former judge of the Supreme Court of a State or Territory. Inclusion of a member with judicial experience is intended to bring relevant experience and expertise to a Commission's conduct of an investigation.

[7] Family Court and FM courts launched July 2011

It is a very good idea to make the membership not self-referencing! I.e. only one of 3 is as specified in 7.

All this seems to be heading in the right direction. Let's hope that one day soon these same principles will be applied to clients of the court system as well as judicial officers.

Attached please find a Media release put out by Justice for Children which somewhat describes what goes on for some of those clients at present.

I haven't had time to examine the whole Bill in detail so please excuse any errors and repetitions etc.

Media release from Justice for Children Australia 14 October 2011

Magistrates excused but children and mothers are condemned

The legal and parliamentary professions treat aberrant members with incredible leniency and tolerance. Magistrates, Judges and politicians are allowed a good deal of leeway even when their behaviour indicates grave psychological or other problems.

Why aren't the same levels of understanding, compassion and opportunities for natural justice applied to ordinary citizens passing through the system?

In particular children who are being driven mad by the inhumane and unreasonable workings of Family Law.

Justice for Children is particularly concerned about the belittling, bullying and plain inhumane treatment parents (mothers, mainly) and children often experience in the Family Court system.

Mothers who try to protect their children are labelled 'mad', 'delusional', 'too clever', over-anxious, depressed, too loud, too emotional, too calm and variations on all these - and worse - insults.

All of this opinion may be generated by a court-appointed 'expert' who has spent, perhaps, one hour with the mother in question.

Or it may be home-grown bias from the judge's personal store.

There is absolutely no accountability in Family Law – judges who are suffering from dementia and other ailments continue to wreak havoc on children and - even if there's nothing clinically wrong with these judicial officers - their inability to listen or understand and their ingrained prejudices make them a danger to justice.

Especially any kind of justice for children.

Transparency and accountability are not apparent in the Family Law system and judges take advantage of their 'discretion' to make unreasonable and cruel decisions e.g removing children from their primary carer because she raised concerns about abuse or violence.

Or even removing the child from their primary carer who had done no wrong because the child seemed a little 'anxious'. Any child expert would know that an abused child often discloses their worry and fear to their protective parent but not to others, including their abuser.

If the system had any integrity it would investigate the message, not slaughter the messenger.

It's time to fix Family Law so that children are treated fairly and kept safe and all participants in the family law process are treated with respect, given correct and relevant information and allowed a voice.