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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
BY EMAIL: legcon.sen@aph.gov.au

Dear Secretary

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

The Courts Legislation Amendment (Judicial Complaints) Bill 2012 ('Judicial Complaints Bill') and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 ('Parliamentary Commissions Bill') introduce measures for handling complaints against the federal judiciary. The transparency and effectiveness of such complaint handling measures is important for maintaining public confidence in the judiciary. At the same time, the use of such measures raises concerns about compromising the fundamental constitutional principle of judicial independence. In this submission, we focus on the requirement of balancing the principles of accountability and judicial independence in the Bills.

Introducing processes to facilitate the resolution of complaints against the judiciary immediately raises the possibility that such processes may be abused for political ends. In Australia, a number of episodes have served to demonstrate the need to safeguard the judiciary from misconceived investigations. In particular, the myriad processes employed to investigate the conduct of Justice Lionel Murphy in the mid-1980s demonstrated the need to have a standing and consistent system of investigating complaints of misbehaviour against members of the judiciary. Other more recent episodes involving allegations of misconduct against Justices Ian Callinan and Michael Kirby have demonstrated how politicised these issues can become in the Parliament.

Each of these episodes highlights the importance of having processes in place that allow for complaints against individual judicial officers to be investigated and dealt with. With no current serious allegations against individual members of the federal judiciary, this is an appropriate time to address the question of process for the future, and we commend the Commonwealth Government for taking this initiative. Attempting to establish a reputable process once allegations have arisen, as was the case when accusations were made against Murphy J in the 1980s, is inadvisable and likely

to be unsuccessful in providing an investigation that is respected across the party-political spectrum as well as by the public at large.

Although we support the Bills in principle, there are a number of concerns we hold with the current form of the Bills. We expand on these concerns below.

Constitutional context

The Commonwealth Constitution deals only sparingly with oversight of the federal judiciary, providing for removal by the Governor-General in Council on a joint address from both Houses of the Parliament in the same session, praying for such removal on the grounds of 'proved misbehaviour' or 'incapacity'. Neither of these terms is defined, which is an enduring source of uncertainty regarding the removal of federal judicial officers, but cannot be conclusively addressed by legislative definition, being ultimately a matter of constitutional interpretation.[1]

There is no constitutional process for dealing with complaints against federal judicial officers short of removal. However, it is likely the Commonwealth Parliament has power to pass laws dealing with complaints. There are strong grounds to argue that the incidental legislative power in s 51(xxxix) of the Constitution[2] would support legislation that introduces processes which: (a) facilitate investigations into matters that may become the subject of an address of the Houses of Parliament under s 72; or (b) provide for a process of dealing with complaints about judicial officers and provide a form of redress short of removal under s 72 of the Constitution.

However it would be constitutionally impermissible for laws passed on these subjects to establish an independent oversight body (that is, one not composed of judicial officers) with the power to discipline judges, make recommendations binding on the Parliament in the exercise of its power under s 72, or restrict the exercise of that power in any way. Such a body would be contrary to the separation of powers implied in the Constitution, and the guarantees of judicial independence set out in Chapter III. Indeed, the 1988 Constitutional Commission recommended the *amendment* of the Constitution to allow for a body with some of these powers to be constituted. It recommended that the Constitution be altered to provide:

(i) that there be a Judicial Tribunal established by the Parliament to determine whether the facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge; and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State or a Territory;

(ii) that an address under section 72 of the Constitution shall not be made unless:

- the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal, and

[1] See further discussion of the different views of the interpretation of what amounts to misconduct in Geoffrey Lindell, 'The Murphy Affair in Retrospect' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 280, 287-290.

[2] Which gives the federal Parliament the power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

- the address of each House is made no later than the next session after the report of the Tribunal.[3]

Given the acknowledged difficulty of securing the necessary public approval for an amendment to the Constitution, this proposal is unlikely to be accepted (at least in the short term). Given these constitutional restrictions, and the difficulty of amending the Constitution, we support in principle the mechanisms adopted by the Bills as the most appropriate vehicles to bring transparency and certainty to the process of disciplining and removing federal judicial officers.

Judicial Complaints Bill

Constitutionally, the Parliament is constrained in how it can discipline federal judicial officers. As such, formalising the (currently informal) role of the head of the court is a sensible way of creating greater transparency in the accountability of the judiciary and strengthening public confidence in the courts whilst maintaining, and perhaps strengthening, judicial independence and impartiality. In the context of the discipline of lawyers more generally there has been a clear shift in favour of disciplinary transparency as a method for enhancing public confidence. This approach is enshrined in the legislation regulating lawyers in most jurisdictions,[4] and has been endorsed by the judiciary in several cases.[5]

However, the coverage of the Judicial Complaints Bill is limited in two important respects. ***First***, the Bill does not apply to the High Court of Australia. The Attorney-General in her Second Reading Speech explains this by reference to the Court's position at the apex of the Australian judicial system and that therefore 'it could be called upon to determine the validity of any structure established to handle judicial complaints'. While we fully appreciate the position being put by the Attorney-General we disagree that this is an overarching reason for not applying the provisions of the Bill to the High Court. The Parliamentary Commissions Bill applies to the High Court and the High Court may similarly have to make determinations about its validity; as it may in relation to other pieces of legislation that apply to it (for example, the *High Court of Australia Act 1979* (Cth) or the *Judiciary Act 1903* (Cth)). The High Court has in the past had to consider legislation that directly touched upon the judiciary and did so without fear or favour.[6] The overall intention of the Bill is somewhat undermined by its failure to apply to the highest court: after all, as the three episodes mentioned at the start of our submission demonstrate, it is matters relating to Justices of the High Court that are likely to attract the most public attention, and deserve to be dealt with in a way no less transparent than matters arising in other federal courts. We recommend that the Judicial Complaints Bill be amended to apply to all federal courts, including the High Court.

Secondly, the Bill does not provide for the investigation of complaints against the head of the jurisdiction. The Chief Judge, Chief Justice, or Chief Federal Magistrate is empowered to deal with a

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[3] *Final Report of the Constitutional Commission*, Volume 1, (Australian Government Publishing Service, 1988) 402.
[4] See, for example, *Legal Practitioners Act 1981* (SA) s 84A; *Legal Profession Act* 2004 (Vic) s 4.4.25-4.4.31; *Legal Profession Act 2004* (NSW) s 560.
[5] See, for example, Slicer J in *Law Society of Tasmania v LH* [2003] TASSC 90 at [6] stating that '[t]ransparency and public exposure in cases involving a profession are required by public policy as a means of maintaining public confidence'.
[6] *Austin v Commonwealth* (2003) 215 CLR 185.

complaint if a complaint is made about another judge.[7] This could be remedied by making provision for complaints against the head of the jurisdiction to be deal with by the next most senior judge in the jurisdiction, or by a judicial officer from a higher court. Again, the lack of complete coverage undermines the achievement of the Bill's objectives. However, we note that if the Bill were amended in this way, it would be important to put a provision in the Bill that prevented a complainant from abusing the process; that is, complaining about the handling of their initial complaint by the head of jurisdiction if they perceived it was dealt with insufficiently.

We have a number of more specific concerns with the processes adopted in the Judicial Complaints Bill:

1. It is the acknowledged purpose of this Bill to 'introduce greater transparency and accountability in the handling of complaints about judicial officers'.[8] In order to build a transparent system for dealing with complaints about judicial conduct a number of elements should be considered that are not currently addressed by the Bill.[9] First, the process itself needs to be explained and made accessible to the public. Such explanations should include making public the standards expected of judges,[10] 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. The second element is the provision of on-going information about the way the system is working. Such information could include reports containing statistical information about the numbers of complaints received and the outcomes of those complaints.

   This then raises a further question about whether specific information about particular complaints should be made available to the complainant or the public. A complainant may not be satisfied with a complaints system in which they are provided with no further information as to the progress of the complaint. In England and Wales, the Office for Judicial Complaints undertakes to keep the judge and the complainant updated about the progress of the complaint every four weeks. If the complaint is dismissed, the complainant is informed of the reason for this.[11] In Canada, the Canadian Judicial Council undertakes to advise the complainant in writing after the complaint has been considered and a decision reached.[12]

2. The Bill provides no criteria by reference to which the head of jurisdiction is to handle complaints. This may be, on the one hand, desirable, as the Bill is simply formalising what

[7] See clause 6, amending s 21B of the *Family Law Act 1975* (Cth); clause 19, amending s 15 of the *Federal Court of Australia Act 1976* (Cth) and clause 29, amending s 12 of the *Federal Magistrates Act 1999* (Cth). We note that the definition of 'complaint handler' in clauses 2, 15 and 25 of the Judicial Complaints Bill might be thought to remedy this situation because of their provision for the 'complaint handler' to be a person authorised by the head of jurisdiction. However, this definition is inapposite to displace the words 'another Judge' in the sections referred to above.
[8] Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth) 1.
[9] See Sarah M R Cravens, 'Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practices in Four Common Law Countries' (2010) 42 *McGeorge Law Review* 177, 205 ff.
[10] This could be taken from the *Guide to Judicial Conduct* (2nd ed, Australasian Institute of Judicial Administration Incorporated, 2007), a document released by the Council of Chief Justices of Australia.
[11] See Office for Judicial Complaints Website: http://judicialcomplaints.judiciary.gov.uk/complaints/complaints_whatwedo.htm accessed 26 April 2012.
[12] See Canadian Judicial Council Website, http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp#whaymc and http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_faq_en.asp#faq14 accessed 26 April 2012.

happens now informally and it would be undesirable to limit the powers of the head of jurisdiction in that process. However, we are concerned that by failing to set down at least *guiding* criteria that the head of jurisdiction ought to consider in handling complaints, the Bill undermines its chief purpose, which is to increase transparency and strengthen public confidence in the judiciary.

There is enough scholarship on judicial ethics and what constitutes judicial misbehaviour to compile a non-exhaustive list of criteria to guide the judge's discretion in handling complaints.[13]

3. The Bill states that the measures the head of jurisdiction may take include 'temporarily restricting another Judge to non-sitting duties' but otherwise do not list any of the measures that may be used. We would suggest that other measures, including in serious cases public admonishment and reprimand, be included as potential tools available to the head of jurisdiction. This would increase the transparency of the process for complainants and the public. In terms of public admonishment we note that superior courts have on rare occasions voiced disquiet at errant or inappropriate behaviour by judicial officers when giving reasons in appeal cases.

   A question has been raised about the power of a Chief Justice (or other judge) to issue a public reprimand.[14] We argue that the power may be conferred as part of the Parliament's incidental power (section 51(xxxix)) when read in conjunction with section 72(ii). We understand there may be concerns about the power to issue public admonishments and reprimands. These could decrease public confidence in the judiciary – particularly for those future litigants who may come before a reprimanded judicial officer. These are important concerns, but our opinion is nonetheless that public confidence in the judiciary will be better served by allowing complainants to know the outcome of their complaints. Public reprimand is an effective method of achieving this in appropriate cases. In England and Wales, for example, public reprimands have been issued by the Lord Chancellor and the Lord Chief Justice against members of the judiciary in serious cases.[15] In Canada, the Canadian Judicial Council reports to the Minister of Justice and these reports are published.[16] This can operate as a public censure even where the conduct is not serious enough to warrant recommendation that the judge be removed. The public has now become much more realistic in its attitude towards the fallibility of public officials, including judicial officers, and it is unlikely that public confidence will be significantly decreased through the use of public reprimand.

4. Despite the attempts in the Bill to protect sensitive or personal information that may be created in the course of dealing with a complaint from freedom of information, we note that

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[13] See, eg, the *Guide to Judicial* Conduct, above n 10; and Justice J B Thomas, *Judicial Ethics in Australia* (2nd ed, Law Book Co, 1997).

[14] See, eg, The Hon. JJ Spigelman, *Dealing with Judicial Misconduct* (paper presented at 5th World Wide Common Law Judiciary Conference, Sydney, 8 April 2003).

[15] See, eg, Office for Judicial Complaints, *Annual Report 2010-11*, page 7, available at *http://judicialcomplaints.judiciary.gov.uk/docs/OJC_Annual_Report_2010_-_11.pdf* accessed 26 April 2012.

[16] Available at http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp, accessed 26 April 2012.

the actions of the head of jurisdiction under the Bill may be the subject of judicial review and therefore the information may still come into the public domain. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) excludes from review under that Act decisions made under the relevant sections of the *Family Law Act 1975* (Cth), *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth). However, the original jurisdiction of the Federal Court of Australia in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth (section 39B (1) of the *Judiciary Act 1903* (Cth)) has not been ousted. Neither has, nor could, the jurisdiction of the High Court in these matters under s 75(v) of the Constitution. There is the possibility that this jurisdiction could be engaged by an aggrieved complainant or future litigant before a judge, if standing could be proven, or more obviously by a judge who has been the subject of a complaint him or herself.

5. The Bill does not provide for dealing with a 'difficult' judge; that is, a judicial officer who refuses to comply with measures imposed by the head of the jurisdiction, such as temporarily restricting another judge to non-sitting duties. The empowerment of the head of jurisdictions in the *Family Law Act 1975* (Cth), *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth) does not carry with it any enforcement provision that would *compel* a judge who was determined not to comply with such a measure if it were imposed.

Parliamentary Commissions Bill

The objective of creating a standing process that can be used if and when allegations emerge against a federal judicial officer is commendable, and past incidents demonstrate the need for it. The requirement in section 72 that there be 'proved misbehaviour' indicates there must be some sort of investigation and hearing. This establishment of a Parliamentary Commission recognises that Parliament is not a suitable forum in which to commence this process.

It is important to note that the process created by the Bill does not replace the task facing the Houses of the Parliament and the Governor-General in Council under section 72, which Quick and Garran said 'is practically indistinguishable from a strictly judicial duty'.[17] The Parliamentary Commissions Bill thus does not displace the heavy responsibility which falls on the Parliament and Governor-General under section 72, but provides a standing process for the undertaking of independent preliminary investigations of matters before they are addressed by the Houses.

Our major concerns with the processes set out in the Parliamentary Commissions Bill relate to the membership of the Commission (clause 13). The Commission is to include *at least* one member who is a former or serving judicial officer. We have two concerns with this provision. First, we submit that the Commission should be constituted entirely of former judicial officers. We note the recommendation of the 1988 Constitutional Commission for such a Commission to be an entirely judicial one. The Commission argued that judges had the expertise and experience in dealing with issues of evidence; and that the tribunal need not be representative, as the involvement of

[17] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 731.

Parliament later in the process would achieve this aim. We endorse this position. Judicial officers with experience of the demands of judicial office are in a unique position to assess the performance of a fellow judge. At a preliminary hearing, where the ability to independently evaluate a complaint is called for, the involvement of people without such experience will most likely be unhelpful, and possibly even counter-productive. The initial hearing is an opportunity for a judicial officer who is subject to a complaint to be judged by his or her peers, which injects an important element of institutional independence into the complaints process.

Secondly, we would caution against the appointment of a serving judge of a Supreme Court of a State or Territory. Leaving to one side whether it would be constitutionally permissible, it is foreseeable that in the course of their judicial duties their judgments might be reviewed on appeal by a judicial officer whom they had investigated. In such an event, the appearance of bias would be unavoidable. There could also be a danger of the perception that such persons were seeking preferment (however unfounded the accusation may be).

We submit, therefore, that clause 13 of the Bill be amended to state that the Commission be constituted of former Commonwealth judicial officers or *former* judges of State or Territory Supreme Courts.

The Constitutional Commission also recommended that the investigation undertaken by the Judicial Tribunal be an essential precondition to pursuing the removal of a judge under section 72 of the Constitution. While we support this position in principle, this cannot be achieved by the current Bill because it would require constitutional amendment on the basis it intrudes on the power and duty vested in the Houses of the Parliament under section 72. We recommend that it be made clear that the preliminary hearing is not an essential precondition to seeking removal to avoid the constitutional problem.

The powers given to the Commission are extensive, and include the power to compel testimony (clause 25) in abrogation of the privilege against self-incrimination (clause 54(1)). Any abrogation of the privilege against self-incrimination is a serious matter, and the inclusion of this power in the Bill is indicative of the importance placed on the transparency and accountability of the judiciary. We note that clause 54(2) provides that information gained in abrogation of the privilege against self-incrimination may not be used in a variety of other contexts – an important protection. A more important protection is that offered by clause 25(5), which limits the power of the Commission to compel testimony from a current or former Commonwealth judicial officer. In addition to serving the purpose of ensuring the separation of powers is not offended, this sub-clause has the effect of preserving the choice of a judicial officer subject to a complaint to provide evidence or not, and of protecting that judicial officer from the compulsory disclosure in abrogation of the privilege against self-incrimination that would otherwise arise from clause 54 were its operation not subject to the limitation of the scope of clause 25. This is an appropriate balance between the objectives of transparency and accountability, on the one hand, and the imperative of maintaining the independence of the judiciary, on the other.

Subject to the above observations and recommendations, we support, in principle, the enactment of the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.

Yours sincerely

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