Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for providing Civil Liberties Australia (CLA) with the opportunity to comment on the Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Judicial Complaints Bill) and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Parliamentary Commissions Bill).

CLA is broadly in favour of both proposed Bills, as they provide an appropriate accountability mechanism for judicial officers, uphold the rule of law and maintain an appropriate separation of powers. CLA would, however, wish to draw the Committee's attention to certain provisions of concern, which should be amended before these Bills proceed.

Protection of Former Commonwealth Judicial Officers

CLA is concerned that, in deference to a misconstrued conception of the 'separation of powers', the Bill treats Australia's former judges as a precious species, deserving of protections not available to any other Australian who might be involved in an investigation.

For example, under the Parliamentary Commissions Bill, former judicial officers are protected from being summoned before a Commission.[1] Former judicial officers are also immune from having their property searched under a warrant issued under section 28 of the same Bill.

CLA has no issue with the protections afforded to current judicial officers, but objects to their extension to former judges. We disagree with the (rather light on) justification provided by the Explanatory Memorandum that such protections are "appropriate to support judicial independence" on the following grounds:

1. The doctrine of the separation of powers is designed to protect the *institutions* of government, not members *per se*.[2] As such, a current judge should be protected as such interference could give rise to a perception that one arm of government is undermining the operation of another. A former judge is simply an ordinary citizen and is no longer part of the protected 'institution'.
2. If separation of powers was a genuine concern, why are current and former Ministers (including the Attorney-General who recommended the appointment of the judge) not protected in a similar fashion, as members of the executive arm of Government?
3. Courts and the Chief Executive Officers of the courts, acting in their administrative functions, are already subject to parliamentary scrutiny. Supervision is provided through the Senate Estimates process and, more relevantly, the Commonwealth Ombudsman[3] – an executive appointee can compel the production of documents.

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[1] Section 25(5), Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.
[2] See analysis in Blackshield, Williams, *Australian Constitutional Law and Theory* (3rd ed.) (2002) 603-606.
[3] Section 5(2)(ba), *Ombudsman Act 1976* (Cth).

> Furthermore, the Senate has repeatedly affirmed its right to review and invalidate the rules produced by federal courts. As such, it is not correct to say that the judiciary is entirely shielded from and separate from accountability to the other branches of Government.

Finally, while the separation of powers is an important constitutional doctrine underpinning Australian politics, an equally important (and judicially recognised) principle is the 'rule of law'.[4] One manifestation of this principle is that all members of society are equal before the law; and, once no longer part of the judiciary, a former justice is simply an Australian. If a member of the public, public servant or former minister can be summoned before a Parliamentary Commission, then so too should a former judge who no longer holds a commission from the Governor-General.

This consideration is even stronger given the operation of section 54 negates the right of a witness to refuse to testify on the grounds that it may incriminate them, compounding the difference in treatment between current and former judges and ordinary Australians.

Even if the Committee does not agree with CLA's suggestions it should consider two anomalous operations of the proposed law.

First, the protection against having property searched and seized under section 28 applies to the 'premises' of the current or former judge,[5] not simply to the former judge's documents and communications. Consequently, documents and property of a partner of a former judicial officer (or indeed anyone else residing at a premise 'occupied by a person who is…a former Commonwealth judicial officer') are protected, notwithstanding their probative value.

This would appear to be too broad a protection and could undermine the functioning of a Commission, as it, in effect, recreates a form of spousal immunity. CLA finds this ironic as only last year the High Court held that the common law did not recognise a privilege against spousal incrimination.[6]

Second, unlikely as it is today, it has not been unprecedented for Federal judicial officers to retire from the bench and take up positions in Parliament or, indeed, the executive. 'Doc' Evatt, retired from the High Court shortly after his appointment to take up a position as Federal Attorney-General and later leader of the opposition. Under this proposed law he would have been immune from summons and search as a former judicial officer, notwithstanding his involvement in the selection, screening and appointment of judicial officers. A retired Attorney-General, who never held a commission as a judicial officer, would not be so protected.

Of greater concern, a former politician given a judicial post would be able to escape scrutiny for misconduct committed prior to their elevation to the Bench.

In the interest of upholding the rule of law, showing a commitment to the equal treatment of all Australians and to further the goals of the proposed legislation, CLA recommends that the Senate amends the Bill to allow a Commission to summon, question and issue a search warrant against a former commonwealth judicial officer.

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[4] 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer' *A v Hayden* (1984) 156 CLR 532 (per Gibbs CJ).
[5] Section 28(5), Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.
[6] *Australian Crime Commission v Stoddart* [2011] HCA 47

Response to Submission of the Federal Court of Australia

With respect, CLA disagrees with the suggestion that current Judicial Officers are reimbursed reasonable costs associated responding to or appearing before a complaint handler appointed pursuant to section 15 (1AAA) of the Judicial Complaints) Bill 2012. 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.

First, the Judicial Complaints Bill establishes a mechanism for investigating complaints made against judges, in effect, creating an employment performance management scheme. However a judge under review can refuse to participate and cannot lose their job even if the complaint is made out. Only Parliament can remove a federal judicial officer and it is in those proceedings that it may be appropriate for the Commonwealth to cover the reasonable legal costs of the judicial officer.

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. Indeed, under the *Fair Work Act 2009* a person is not entitled as of right to even employ their own lawyer to defend their livelihood when appealing to Fair Work Australia against their wrongful dismissal.[7]

A solicitor or barrister, who is subject to a disciplinary hearing, is not entitled to have their legal costs paid, even though they could lose their licence to practise. Likewise, a public servant does not have a right to representation (let alone *paid* representation) at an appeal against an action taken against them under the *Public Service Act 1999* (Cth). Ultimately, a judge, like any other employee, should expect a fair hearing by their employer; be able to request the presence of a support person of their choice; and be able to appeal an adverse decision against them. They should not, however, have their costs covered by the Commonwealth.

CLA recommends that the Committee reject the suggestion of the Federal Court of Australia to amend the Judicial Complaints Bill.

Fairness to witnesses

CLA is concerned that a witness before a Parliament Commission cannot refuse to testify on the grounds it may incriminate them. The protections against the direct use of incriminating evidence are not sufficient and, if retained, should be extended to protect documents or other evidence obtained as a result of the witness's incriminating testimony (i.e. 'secondary use' of incriminating evidence).

If the Committee rejects this submission then, in the interests of natural justice, it should recommend that section 23 of the Parliamentary Commissions Bill be amended so that a Parliamentary Committee <u>must</u> hear potentially incriminating evidence *in camera* should a witness request. This would also protect the reputation of a witness who is appearing before a non-judicial body, which will no doubt be the subject of extensive national and international media interest. This recommendation would accord with the protection of reputation and privacy under international human rights treaties and accords with the spirit of sections 44(1) and 48(6) of the Bill.

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[7] Section 596, *Fair Work Act 2009* (Cth).

Finally, and without wishing to comment on the correctness or desirability of the approach, CLA notes that a court can draw an inference adverse to a defendant in a civil action where a *prima facie* case has been established and the defendant has failed to produce contradictory evidence.[8] While recognising that a Parliamentary Commission is not a court, CLA questions whether section 20(1)(c) should be deleted as it is not a traditional element of the principle of 'natural justice', at least as far as that principle applies with regards to ordinary Australians.

Alternatively, and recognising that deleting section 20(1)(c) may result in a 'practical compunction' for a judicial officer to attend a hearing or produce documents contrary to their rights under sections 25(5) and 28(5), the Bill should be amended to clarify that the protection afforded by 20(1)(c) does not apply to a failure by the judicial officer to contradict any findings set out in the preliminary report.

Final comments

Australia has a highly regarded judiciary, served by dedicated and independent judges. CLA supports the intention of these Bills to protect this independence and ensure the power provided by section 72(ii) of the Constitution is exercised in a fair manner.

Noting, however, the shameful attacks on members of the judiciary by past and current members of Parliament, CLA is concerned that a future Parliament could mount a campaign to remove judges whose 'misbehaviour' is simply the frustration of the Executive's wishes. This concern is justified because *Odgers* suggests that a resolution to remove a judge under section 72(ii) of the Constitution is not judicially reviewable,[9] and section 3(2) of the Parliamentary Commissions Bill provides that its practices do not have to be followed by Parliament.

As it is possible that one party could control both Houses of Parliament (and could therefore pass a resolution 'praying' for a judge's removal) CLA recommends that each House review its Standing Orders, in particular SO171, to ensure that a motion proposing the removal of a federal judge can only be moved if seconded by a member of another 'party'. While a party with a majority in each House could subsequently amend the Standing Orders to suit their needs, this would at least delay opportunistic actions.

Civil Liberties Australia thanks the Committee for the opportunity to comment on these two Bills and would be happy to provide additional comment in person to the inquiry.

Yours sincerely,

Kristine Klugman OAM
President

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CLA acknowledges the work of Director Tim Vines in preparing this submission.

CLA Civil Liberties Australia A04043
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[8] *Jones v. Dunkel* (1959) 101 CLR 298.
[9] Odgers, Odgers' Australian Senate Practice (12th ed.), chapter 20. Available at: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap20 [accessed 23 April 2012].

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