Comments on the draft Governor-General Amendment Bill.

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Senator David Shoebridge has a draft private member's Bill which:
"Amends the **Governor-General Act 1974** to cease the payment of allowances to a former Governor-General, or a spouse of a former Governor-General, where they have engaged in serious misconduct."

The Bill provides two avenues for ceasing to pay allowances "when it is considered to be in the public interest."

"Firstly, the Minister may make a declaration through a legislative instrument that the former Governor-General, or a spouse of a former Governor-General, cease to be paid an allowance where the former Governor General has engaged in serious misconduct. Alternatively, a House of Parliament may pass a resolution declaring that the former Governor-General, or a spouse of the former Governor-General, cease to be paid an allowance where the former Governor- General has engaged in serious misconduct."

Details of the draft Bill are given in the ***Explanatory Memorandum***.
https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1369

In this document I comment on the Bill and raise questions about it.

1. **Is the "serious misconduct" in respect of exercising their role as Governor-General, or in respect of some other, possibly unrelated role?**

In the ***Explanatory Memorandum***, more detail is given to partly answer this question.

"Subsection 4AGB(6) provides that the Minister must disregard certain circumstances when making the declaration including when the former Governor-General was appointed, when the misconduct took place and whether the misconduct took place in Australia or outside of Australia."

The time and place of the alleged misconduct are to be disregarded. This suggests it could have arisen in the context of a different role, before or after the term of office of the Governor-General.

The ***Explanatory Memorandum*** to the draft Bill states that the current law provides that "a former Governor-General is entitled to receive an allowance even if they have been convicted of a serious crime."

Arguably this needs to be rectified, but see my comments, below, about the dangers over reach in the provisions of the Bill.

2. What constitutes "serious misconduct"?

There is some attempt in the draft Bill to define serious misconduct.

"Subsection 4AGB(1) provides that the Minister may make a declaration that a former Governor-General, or the spouse of a former Governor-General, cease to be paid a standard allowance if the Minster is satisfied that a former Governor-General had engaged in serious misconduct.

For the purposes of this Bill, serious misconduct involves inappropriate, improper, wrong or unlawful conduct. Examples of serious misconduct could include corruption, sexual misconduct, sexual harassment, theft, fraud and other criminal behaviour."

This covers quite a range of criminal, unethical and other forms of behaviour which might bring public disapproval. The seriousness of the examples varies widely, and the examples given represent "hand waving" examples rather than being well thought-out. The subsection falls well short of being a definition.

"Involves" is a very weak term. "Unlawful conduct" is clear, although I would prefer it if the draft specified "as determined by an appropriate court of law".

The words "inappropriate, improper, wrong" are so vague that it would be unjust, arbitrary and capricious in the extreme to base any consequences, let alone loss of entitlements, on them.

Subsection 4AGB(5) provides that serious misconduct includes an omission. This is alarmingly open-ended. It seems to be unrelated to any statement of the duties of the person, in their official role or some other role.

Senator Shoebridge needs to explain whether:

- omitting to perform some desirable action unrelated to the specific duties of the role of Governor-General, or

- omitting to perform any duty related to the role of Governor General, or

- omitting to perform a duty considered to be an essential role of major importance in the role of Governor-General

would be grounds for cessation of payment of entitlements under this Bill.

3. What is the legal status of the misconduct, and consequently in what forum should it be investigated?

"Serious misconduct" might be criminal, unethical according to a specific professional body, in violation of specific regulatory standards (such as investigated by ICAC) or unacceptable by broad community standards and expectations of office-holders. Each of these results in the matter being taken up in a different legal forum, where various processes and standards of proof apply.

In comparable examples:

- The NSW Premier would only lose their pension if convicted of a criminal offence, not if found to have committed other misconduct while in office.

- The ***Explanatory Memorandum*** refers to the existing legislation in Queensland which provides that "a former Governor may have their entitlement ceased if a tribunal makes a finding that the Governor misbehaved in a way that justifies ending the entitlement."

- Allegations may be dealt with via a civil suit for damages. This is of course different to criminal prosecution. These are current examples.

  https://www.theaustralian.com.au/nation/the-teachers-pet-podcast-inspired-legal-claims-against-predator-teachers-who-used-school-as-meat-market/news-story/f7e773c21a68bd060b0b5043b2e63246

  The defendant was not the alleged perpetrators directly, teachers in a NSW high school accused of sexual abuse of students, but their employer, the NSW Education Department.

In DP vs Bird the Supreme Court of Victoria considered in a civil case for damages, whether the Diocese and Bishop were vicariously liable for abuse by a priest.
https://www.supremecourt.vic.gov.au/sites/default/files/2021-12/DP%20v%20Bird%20Judgment%2021.12.2021.pdf

- An investigation by ICAC can find that an office-bearer is guilty of corruption, but this need not lead to criminal prosecution. A recent example is the finding that Gladys Berejiklian while NSW Premier engaged in corruption by funnelling funding to the electorate of her boyfriend at the time.

There are many examples of alleged criminal conduct where it is standard practice not to prosecute. For example, it is said that only about 10% of alleged rapes are prosecuted by the DPP. This does not mean they did not happen or that there might be other responses.

Responses to child sexual abuse have been criticised for their processes. See:

Child abuse: Australia late to the party in response to child exploitation | The Australian

The Robodebt prosecutions are now receiving a lot of publicity and raising huge concerns about accountability and effective scrutiny in the public sector.

PoliticsNow: Up to 20 referred for Robodebt prosecution | The Australian

Senator Shoebridge in the "hand waving" list of misconduct that I mentioned above lists "corruption" as a criminal offence. Not so. This was not referred to the DPP for criminal prosecution.

- Question 9 of this discussion refers to provisions in the Commonwealth Constitution for removal of Ministers, MPs and other Commonwealth office-holders.

I suggest that these examples should only be used as guides for the Bill, as they cover comparable circumstances.

4. By what standards of proof is the "serious misconduct" to be judged?

We live in a world, sometimes dubbed "post-truth", in which allegations are made, reputations are smirched, especially via toxic social media campaigns, and accused persons do not necessarily have the benefit of due process, or any process.

Consequences can be dire.

- Sometimes there may be a proper legal investigation but it is not necessarily a criminal prosecution.

As discussed above, examples include actions for civil damages, or investigations into corruption. Different burdens of proof apply.

- Sometimes no investigation is made.

The matter is aired, but this is little more than an argument between two sides. The "bunfight" over allegations of sexual misconduct made by three women against Brett Kavanagh, when he was nominated to be appointed to the Supreme Court of the United States was based on partisan political allegiance, not evidence. Complainants were believed by Democrats and discredited by Republicans. Kavanagh is now a justice of the SCOTUS, appointed for life. There is no provision for removal of judges on grounds of being unfit, corrupt or engaging in misconduct. The only grounds for removal are criminal conviction and incapacity.

Lack of processes to deal with inappropriate conduct within the judiciary in the US was recently in the news. This compel us to consider the effect of the misconduct. It is one thing for a judge to act in a way that corruptly favours one party or outcome. It is another matter to make the office a laughing stock.
https://www.nytimes.com/2023/07/03/nyregion/new-jersey-judge-gary-wilcox-tiktok.html?smid=nytcore-ios-share&referringSource=articleShare

Dominique Strauss Kahn faced an accusation that he had sexually harassed a hotel employee when he was head of the World Bank. It was never determined in a court of law, but because of the "taint" of accusation, he stood down from his job, an important leadership position, and was not nominated as a candidate for the French Presidency,

which he would otherwise have been likely to win. That's a huge price to pay for being accused without the accusations being investigated or proven.

- Sometimes there is a form of investigation but it does not meet the standards required in a court of law.

Due process can be conspicuously lacking. This casts doubt over the validity of the findings, does not serve the complainants and subjects the "accused" person being investigated to a protracted ordeal.

In the Diocese of Melbourne, the Anglican Church's professional standards investigation into Dr Peter Hollingworth, resulted in adverse findings of misconduct, may be one such example.

The Anglican Diocese of Melbourne Church's internal process was run at arm's length from the Church and arguably problematic in natureIt seems to have been excessively legalistic, while at the same time lacking in natural justice or procedural fairness which we expect when an accused person is being investigated in a competent legal forum.

The process was largely based upon "retributive justice", in other words finding a guilty party and punishing him. The process was a far cry from "restorative justice", which would have been more appropriate as a way a Church organisation deals with the issue of institutional abuse overall. It did not extend pastoral care to all parties, , implement a proper process of reconciliation between the parties, leaving them all dissatisfied with the outcome.

As such, the findings should not be the basis for action being taken pursuant to alleged misconduct.

5. The accused in such failed processes especially do not have the benefit of the "golden thread" running through our legal system since the days of Magna Carta; processes which are generally regarded as constituting natural justice, due process or procedural fairness.

These are:

- The presumption of innocence.
- The right to be informed of the charges and the evidence being brought forward in support of the charges.
- The right to cross examine witnesses for the complainant.
- The right to bring evidence in support of the accused.
- The right to appeal a decision.
- ➢ The Bill makes no provision for an appeal against the decisions of a Minister or a House.
- The principle of being found guilty "beyond reasonable doubt"; (this is the burden of proof in a criminal matter)

There is some confusion in the public mind about the standard in civil matters, "the balance of probabilities". Sometimes civil damages might be sought, for example. This leads to perceived contradictions in the public mind about "he did it" versus "he didn't

do it". People expect proceedings to result in a finding about "the truth", which is actually not the effect of court proceedings. It is common when awarding damages for a non-disclosure clause to be added, so that details of the misconduct and reasons for the decision are not available to the public.

6. What are the criteria for determining whether the action of ceasing payments is "in the public interest"?

- Is it in the opinion of the Minister?
- If so, does the Minister's opinion have to be based on reasonable grounds?
- Or is the Minister's declaration only valid if it is based on an independent process which determines misconduct?

The draft Bill includes a provision for a tribunal. There should be some guarantee in the Bill that if such action is possible, the "tribunal" should be set up with suitable processes of procedural fairness and terms of reference. It is likely that the tribunal's decision, about whether the conduct "justifies ending the entitlement", would at some stage be a matter for the HCA to consider if the Bill became law.

There is a need to spell out who sets up the Tribunal and what its terms of reference and procedures will be.

7. An action by a Minister to remove or curtail a person's rights or entitlements must not be taken lightly.

The HCA considered this matter in Lloyd v Wallach, in the context of WW1 being a state of emergency, and the Minister having the power to detain a person if the Minister considered the person to be disloyal. The Court considered whether the Minister's opinion had to be based on reasonable grounds. They held that it did not.

This in effect gave the Minister arbitrary powers of detention.

Care must be taken to deal with serious threats to the public interest, without proposed legislation or Ministerial power over reaching and undermining the principles that we seek to protect.

The draft Bill fails to make this fine line clear, and is so vague as to invite over reach and arbitrary penalisation of a former Governor-General.

The need to balance the rights of both complainants and accused people, and the public interest in seeing accountability served, by whatever processes are used is discussed in relation to calls to detail punishments for public servants involved in child abuse allegations. See:
https://www.abc.net.au/news/2023-07-04/punishments-for-public-servants-child-abuse-allegations/102546520

Subsection 4AGB(2) goes some way to guard against this.

It provides that "the Ministerial declaration must specify who the declaration applies to, the reasons for making the declaration and provide a summary of information used by the Minister in making the declaration."

However, this does not go so far as to say that the Minister will be bound by the information used. How much discretion the Minister has, and whether the Minister's decision has to be made on reasonable grounds is not spelt out.

Taking a broad view, Ministers do not have unfettered rights to make decisions according to their values or beliefs. They must take into consideration the requirements imposed by Parliament under the relevant Act. Activist organisations can and do challenge a Minister's decisions by going to court. Courts can overturn legislation and actions made under legislation for being ultra vires, beyond the scope of the Minister's power.

A finding of serious misconduct should be tethered to more than the opinion, personal whim or inclination of the Minister.

The Bill makes no provision for an appeal against the decisions of a Minister or a House. This invites a legal challenge, sometimes called "lawfare", which is costly, time-consuming and not practicable for all those affected. Internal appeals would be preferable if proper processes have been established.

If the Minister is acting pursuant to the decision of a competent Tribunal, then the concern about the Minister acting ultra vires has been answered.

There are still unresolved questions about the nature of the Tribunal and whether the Minister is bound by it.

8. Human rights implications.

The ***Explanatory Memorandum*** states that "This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 .

Overview of the Bill
This Bill ceases paying allowances to former Governors-General, or a spouse of a former Governor-General, where a former Governor-General has engaged in serious misconduct. A standard allowance may cease to be paid following a Ministerial declaration or a House of Parliament passing a declaration.

Human rights implications
This Bill does not engage any of the applicable rights or freedoms. This Bill promotes transparency and accountability of the payment of allowances.

Conclusion
This Bill is compatible with human rights as it does not raise any human rights issues."

In view of the doubts raised about due process, the lack of a clear definition of serious misconduct, and the mixing of behaviours which may or may not be criminal, may or

may not be unethical, may or may not be offensive to some people, or just "wrong", I suggest that the Draft Bill does raise human rights concerns.

9. How does the draft Bill relate to the Commonwealth Constitution, which contains various provisions relating to office-bearers?

The fundamental jurisprudential principle is that any allegation or imputation of serious misconduct has to be based on such misconduct being established by a Court of Competent Jurisdiction.

Should this be the "Tribunal" referred to in the draft Bill, or should other examples be used as a guide?

The constitutional requirement for removal of a Member of either House of Parliament, is found in s.44 (ii) of the Constitution, namely that the Member has been "…convicted, and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer".

Note also s.80 of the Constitution which provides that "The trial on indictment of any offence against any law of the Commonwealth shall be by jury …"

Proceedings against any officer of the Commonwealth falls under the original jurisdiction of the HCA. This was discussed by the court in Annika Smethurst's case. I don't see the need to refer to any of these provisions, other than in order to give comparable examples as guides for the provisions of the Bill.

10. Conclusions in relation to applying the Bill to Dr Peter Hollingworth.

While the draft Bill might aim to promote transparency and accountability, this aim is absent in the processes set up by the Bill as drafted.

The context of the Bill (the "big picture")

- A quick look at the news headlines any day suggests that Australia has a widespread and systemic problem with accountability and regulation in many different domains:

Public office holders, at Commonwealth and State levels, ranging from Prime Ministers and Premiers, Minsters, public servants, and consultants engaged by departments.
Statutory Authorities
Institutions and NGOs such as Churches and community not for profit associations such Scouts.
Sporting bodies such Cricket Australia.

- There is a wide range of conduct being considered in relation to these, from major to minor misconduct.

- Various forums are being used to deal with allegations. They include informal internal investigations, setting up of formal in-house investigations, referral to

independent bodies and actions in courts of law. These include both criminal prosecutions and civil lawsuits, which have different burdens of proof.

A well-considered Bill to bring about accountability in the office of the Governor-General should be drafted in this context, with types of misconduct and appropriate responses to investigated and impose penalties being considered in the light of all these broader issues and examples.

Specific detailed flaws of the Bill

It fails to accord procedural fairness to the past or present Governor-General.

It is vague in the extreme about what constitutes serious misconduct.

It does not spell out what legal forum determines whether misconduct has occurred.

It does not spell out how much discretion the Minister has in arriving at a decision to cease payments, or to what extent the Minister is bound by processes leading up to the decision.

It fails to accord the Governor-General with an avenue for appeal.

Senator Shoebridge refers to the findings of an "Anglican Church Inquiry", which found Dr Hollingworth guilty of misconduct.

These findings cannot be the basis for action under the proposed Bill, because the Anglican Diocese of Melbourne Professional Standards Board is not a Court of Competent Jurisdiction, and its process lacked procedural fairness.

In reference to the aspects of serious misconduct listed in the Bill:

- inappropriate
- improper
- wrong or
- unlawful conduct
- corruption
- sexual misconduct
- sexual harassment
- theft
- fraud and
- other criminal behaviour

Dr Hollingworth has not been convicted of any criminal offence, including theft or fraud.

He has not committed fraud either while Governor-General or at other times.

He has not been accused of nor found guilty of corruption while holding public office.

He has not been accused of nor been found guilty of sexual misconduct or sexual harassment.

He is not a perpetrator of abuse, and has not covered up abuse.

**As for conduct which could be described as "inappropriate",
"improper" or "wrong", these terms are so vague as to unanswerable. Dr Hollingworth has never claimed to be perfect, and has admitted to failings and errors of judgement in the past, for which he has apologised.**

In conclusion:

Nothing will be served by applying the provisions of this Bill to remove his entitlements.

It seems that proposed legislation to provide for accountability of office-holders has been drafted to create an avenue for punishing Dr Hollingworth for alleged misconduct unrelated to his role as Governor-General, conduct which, moreover, has not been properly established.

Even if the Bill were further amended to fix its current vagueness and lack of fairness, and then became law there would be a serious problem about retrospectivity. Dr Hollingworth's entitlements were earned before the Bill was drafted and should not be affected, even if future incumbents are treated in accordance with new legislation.