AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600

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Ms Dennett
Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms Dennett

JUDICIAL MISBEHAVIOUR AND INCAPACITY (PARLIAMENTARY COMMISSIONS) BILL 2012

Thank you for the Committee's invitation to provide a submission on two bills relating to judicial complaints and judicial misbehaviour. My comments relate only to the Judicial Misbehaviour and Incapacity (Parliamentary Commission) Bill 2012 and are largely drawn from Chapter 20 of *Odgers' Australian Senate Practice*, 12th edition, 'Relations with the judiciary' (which I attach by means of a link and which should be considered to be part of my submission). They include comments on matters of principle and matters of detail.

Clerks sometimes have to take on the role of critical questioner in order to highlight matters of institutional importance. I hope that these comments may be of some assistance to the Committee in raising useful questions about the bill.

The first – and obvious – question that arises is about the need for the bill and whether it is an effective solution to a perceived problem.

The starting point for the bill is the provision in paragraph 72(ii) of the Constitution of a mechanism and grounds for the removal of judges appointed to the High Court and other federal courts. Such judges "shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity". These restrictions on the method and grounds of removal protect the independence of federal judges by securing their tenure against all but the specified circumstances.

Action to remove a judge under section 72 has only ever commenced in one case, the case of Justice Murphy. There is no doubt that the case exposed numerous difficulties in implementing the provisions but the question to ask is whether enactment of the bill will

necessarily provide a solution to those difficulties. These are matters for the committee in the first instance to judge.

Use of other bodies to advise

In the Murphy case, the Senate, in establishing two select committees, and the Parliament, in legislating to establish the Parliamentary Commission of Inquiry, accepted that it was open to them to delegate a body to find facts and provide advice.

The bill, in providing a permanent mechanism to establish case-specific Commissions to report to the Houses on whether or not there is evidence that would let them conclude that the alleged misbehaviour or incapacity is proved, follows a precedent set in that earlier case. It should be noted that the object of the bill is necessarily limited because the responsibility for action under section 72 remains firmly with the Houses. All that a Commission can do is to investigate allegations concerning a Commonwealth judicial officer and report to the Houses "so they can be well-informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution" (cl. 3). It remains open to the Houses to take whatever other action is needed to make the required determination. These limitations are confirmed in the general outline of the bill contained in the explanatory memorandum, particularly paragraph 8 as follows:

> 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 the facts are proven 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.

In the consideration of the relevant part of section 72, it has been assumed that the procedures adopted by the Houses should be judicial in character involving the formulation of specific charges, evidence gathering, fact-finding and a formal hearing of the evidence with the opportunity for the accused judge to be heard (presumably by the Houses, separately) and to answer the charges. It is apparent that the role of a Commission as envisaged under the bill would go only to the evidence gathering aspect of this process. While there is provision for a Commission to conduct hearings, the limitations on its powers and its freedom from the rules of evidence – and the consequent value of the hearings as formal hearings of evidence – are further considered below. In any case, the substantial task of the Houses in determining whether to pray for the removal of a judge on ground of proved misbehaviour or incapacity would remain to be achieved by means other than the mechanism established by the bill. This aspect is also considered further below.

Limitation on investigative powers

Under the bill, Commissions are to have various inquiry powers but those powers are limited in respect of Commonwealth judicial officers:

- a Commonwealth judicial officer (or former officer) is not required to answer questions (cl. 24)
- the Commission's power to summon witnesses, require them to produce documents and take evidence on oath does not apply to a Commonwealth judicial officer (or former officer) (cl. 25)
- the Commission's power to issue and execute search warrants does not apply to a Commonwealth judicial officer (or former officer) (cl. 28).

According to the explanatory memorandum, the exemption of Commonwealth judicial officers from the application of coercive powers of a Commission is regarded as appropriate to support judicial independence under Chapter III of the Constitution:

> The framers of section 72 of the Constitution aimed to achieve a high degree of independence of the judiciary from the other branches of government, while providing a mechanism for the removal of unfit judges. It would not be appropriate for the Parliament to require judicial officers to give evidence or be subject to search warrants issued by a Commission.

A question that arises here is whether, with these limitations, a Commission could be effective in conducting inquiries into circumstances that are guaranteed to be difficult and controversial. A further question is why the Houses would delegate an investigation to a body with limited powers when they have full inquiry powers of their own which may be delegated to a committee? These powers include powers to compel witnesses (the only known limitation being members of other Houses).

An answer to these questions may be that the Houses remain free to appoint their own committees of inquiry should they feel the need to do so. They are not bound to establish a Commission and if the Houses are of a different view, then a Commission under the bill cannot be established since it requires a resolution of both Houses.

On the compellability of judges as witnesses before the Houses or their committees, I draw the Committee's attention to the discussion in *Odgers'* at pages 519-20. It should be noted that while no conclusion has been reached on the question of whether the Senate or its committees could summon a High Court or any judge (because it has never been attempted, let alone adjudicated), judges have been summoned by and appeared before the House of Commons from which the Australian Houses derive their powers.

In the context of who is best placed to perform the function, I also draw the Committee's attention to the discussion of proposals to change section 72 and the matters of constitutional principle discussed at pages 522-5 of *Odgers* under the heading 'Should section 72 be changed?'. One rationale for measures of the kind proposed in the bill is that legislatures

cannot be trusted not to act politically: Parliament needs to be provided with "a clear, certain and accountable mechanism to consider the removal from office of a federal judicial officer under the Constitution"[1]. In fact, there is no historical basis in Australia, the United Kingdom or the United States for an assumption that Parliaments would act to remove judges for political (and, by implication, improper) reasons.[2] As the discussion referred to demonstrates, constitutional principle requires legislatures to perform this role because it best preserves the separation of powers and the independence of the judiciary.

Questions the bill does not answer

As noted above, there are substantial tasks required of the Houses under section 72 that are not addressed by the bill. These include matters that arose in the consideration of the case of Justice Murphy[3] such as:

- questions of the appropriate procedures to adopt to determine whether allegations are 'proved' (including application of the rules of evidence, adoption of trial-like procedures and the application of a standard of proof)
- the meaning of misbehaviour
- whether a judge accused of misbehaviour should enjoy the same rights as the accused in a criminal matter (formulation of specific allegations, presence at hearings of evidence, right to cross-examine witnesses, right not to be compelled to give evidence and to make an unsworn non-examinable statement).

—Procedural issues

With regard to process, a Commission is an inquisitorial rather than adversarial body. It is not bound by the rules of evidence, must consider the outcome of any official inquiry or investigation (cl. 19) and must act in accordance with the rules of natural justice as defined in clause 20. No standard of proof is included because this is a matter for the Houses. According to the Explanatory Memorandum, a "Commission would report on whether conduct ***could*** be capable of being regarded by the Parliament as proved misbehaviour or incapacity" (*emphasis added*).

It may be reasonable to assume that in their report to the Houses, the Commissioners would address the question of how the evidence supported a finding according to both the criminal and civil standards of proof, but this is not a requirement. The second Senate select committee was required to make findings by both standards of proof (and on the two different interpretations of the meaning of misbehaviour – see below) because the Senate had not come to a conclusion on either of those questions. On the other hand, there is no provision in the bill for the Houses to elaborate on the terms of reference for a Commission or to ask particular questions (such as a House could specify in terms of reference to its own committees). It is interesting to contemplate what the effect would be if a House included in a resolution under clause 9 of the bill "to investigate a specified allegation of misbehaviour or incapacity of a

1 Explanatory Memorandum, p. 3, paragraph 19.
2 *Odgers*, p. 523.
3 See *Odgers*, pp. 516-21.

specified Commonwealth judicial officer" a request for an opinion on whether the evidence would satisfy a finding against a specified standard of proof. The answer to this question may well be an indication of how far the mechanism is designed to assist the Houses, or whether it is actually a means of addressing other concerns.

—Meaning of misbehaviour

One of the most difficult issues arising from section 72 is the meaning of "misbehaviour". There is no authority in the Constitution for the Parliament to make laws with respect to the grounds for removal of judges so this is not an area where the bill can provide clarification or assistance. The bill therefore defines "misbehaviour" by reference to section 72.

In the context of the Murphy case, five learned opinions were given on the meaning of "misbehaviour":

- by the Commonwealth Solicitor-General, dated 24 February 1984
- by counsel to the Senate Select Committee on the Conduct of a Judge
- by each of the three Commissioners of the Parliamentary Commission of Inquiry appointed under the 1986 Parliamentary Commission of Inquiry Act.[4]

The opinions followed two different schools of thought. The Solicitor-General favoured a restricted view of misbehaviour based on common law authorities limiting misbehaviour in respect of an office to misbehaviour in respect of the performance of the duties of that office, and to conviction for "infamous offences" not connected with the duties of the office. All other opinions took a wider view of misbehaviour as any conduct indicating unfitness for judicial office.[5]

In any future case of the potential removal of a judge under section 72 for "proved misbehaviour", the meaning of the term remains a fundamental question to be addressed by the Houses in respect of the particular case. The outcome of any Commission established under the terms of the bill would therefore be only a starting point for the consideration by the Houses of threshold questions.

Another source of guidance on the meaning of the term might be the High Court itself, but there can be little likelihood of any jurisprudence on the meaning of the term in section 72. This is because it is by no means clear that the removal of a judge on address under section 72 would be reviewable. It appears to have been the intention of the framers that the removal of a judge would ***not*** be reviewable and early commentators took this view. However, two of the Parliamentary Commissioners took a different view.[6] There may well be jurisprudence in other contexts but, ultimately, the meaning of misbehaviour is a matter for the Houses to determine for themselves.

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4 The opinion of the Solicitor-General and counsel to the select committee were published in the report of the select committee, PP 168/1984, while the Commissioners' opinions were presented to each House on 21 August 1986, PP 443/1986.

5 *Odgers*, p. 513.

6 *Odgers*, p.515. Also see the section Discretion of the Governor-General on whether the Governor-General would be bound to act on the addresses, another unsettled question.

—Rights of the accused in a criminal matter

Clauses 24 and 25 of the bill provide, among other things, that a Commonwealth judicial officer or former judicial officer is not compellable and may give sworn or unsworn evidence. This issue arose during the inquiries into Justice Murphy (see *Odgers*, p. 521 under 'The rights of the accused judge'). *Odgers* continues:

> It may be argued that a judge accused of misbehaviour should *not* enjoy all the rights of an accused in a criminal matter. The rights to have specific charges or allegations formulated, to be present at the hearing of evidence and to cross-examine witnesses may not be disputed, and were granted in respect of the second Senate committee and the Parliamentary Commission of Inquiry. The right not to be compelled to give evidence and to make an unsworn non-examinable statement, which Mr Justice Murphy, in effect, exercised before the second Senate committee, is more controversial and has been questioned even in relation to persons accused of offences. It may well be contended that, as a holder of high office in whom the public must have confidence, a judge should be obliged to answer any case reasonably made against him. This view seems to have been taken by the government in drafting the Parliamentary Commission of Inquiry Act and inserting the provision concerning the giving of evidence by the judge, to which reference has already been made. [The Parliamentary Commission of Inquiry was empowered to require the judge to give evidence, but only where it formed the opinion that it had before it evidence of misbehaviour within the meaning of section 72 sufficient to require an answer.]

It would be open to the Houses, after a Commission had reported, to revisit this question and require re-examination of the judicial officer under different conditions.

Perceived flaws in the 1986 Parliamentary Commission of Inquiry legislation

The 1986 Commission was established after the two Senate select committees and criminal proceedings against Justice Murphy in NSW (which led to the enactment of the *Parliamentary Privileges Act 1987*) to:

- consider all outstanding allegations against the judge
- formulate precise allegations in respect of those considered worthy of investigation
- conduct hearings of the evidence in closed session.

The Commissioners were precluded from examining the issues dealt with in the criminal trials except for the purpose of examining other issues. The Commission was empowered to compel the judge if it thought there were matters he should answer. It was restricted to taking evidence that would be admissible in a court and was to report to the Houses only such evidence as it considered necessary to support its findings and conclusions. Justice Murphy's failing health led to the repeal of the legislation establishing the Commission.[7]

[7] The constitutionality of the Commission was challenged but the High Court rejected an application for an injunction to restrain the Commission and deferred hearing arguments on the validity of the

Apart from questions of constitutionality, *Odgers* identifies provisions for hearing evidence in private and for withholding it from the Houses as serious defects which should not be followed in any future cases.

While the bill requires hearings to be in public, the Commission has a discretion to direct that evidence to be heard in private under certain conditions (cl. 23). There is also a discretion for the Commission to determine whether evidence given in private is subsequently presented for tabling (cl. 48), raising the prospect that evidence will be withheld from those ultimately responsible for determining the issue. Thus the bill does not wholly address the serious defects identified as features of the 1986 Commission.

—a matter arising: certain records of a Commission

A provision for sensitive matters, including evidence, to be included in a separate report given to the Presiding Officers and made available for inspection only to senators and members and the investigated person is contained in subclause. 48(7). It is not clear how such a provision would work in practice and the status of the document is unclear. Thought should be given to the ultimate fate of such a report once the immediate issue has been dealt with.[8] For example, under the *Parliamentary Commission of Inquiry (Repeal) Act 1986* there is provision for custody of that Commission's documents and conditional access to some of them after 30 years. The mechanism allows the Presiding Officers to designate persons (such as the Clerks of the Houses) to make arrangements for secure custody, allowing both continuity and security of such arrangements. A sensitive report is neither a tabled document nor a document in possession of the Commission, unless it is to be returned to the Commission by the Presiding Officers before the Commission is terminated (in which case clause 82 would apply).

Parliamentary privilege issues

A Commission is designed to be a 'Parliamentary body' and '[m]any privileges and immunities of the Parliament would apply to a Commission in a similar way as a committee of a House of the Parliament, although the Bill provides specific powers and offences in respect of a Commission'.[9]

Earlier attempts to establish a parliamentary commission to inform the Houses were the subject of several private members' and senators' bills. Most recently, the Parliamentary (Judicial Misbehaviour or Incapacity) Bill 2010, introduced by Mr Duncan Kerr, was debated in the House of Representatives on 31 May 2010. Like its predecessor, the bill contained a provision which would have had the effect of undermining the whole principle and basis of

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legislation establishing it (*Murphy v Lush* (1986) 65 ALR 651). The challenge was subsequently abandoned.

8 Clause 82 provides for a Commission to give a House possession of the records it no longer needs. (This would be the House which supported a particular Commission.) The copies of the sensitive report given to the Presiding Officers under clause 48 would not be in the Commission's possession to hand over and there may also be a question whether special access conditions should apply in later years as they do to the papers of the 1986 Commission.

9 Explanatory Memorandum, p. 2, paragraphs 11-12.

the *Parliamentary Privileges Act 1987* by allowing evidence to a House or committee to be used to test the credibility of a person if that evidence was inconsistent with evidence given by the person in a court or tribunal. Fortunately, the bill did not pass and that feature has not been replicated in the bill currently before the Committee.[10]

Division 4 of the bill creates numerous offences relating to investigations conducted by a Commission. Clause 67 provides that proceedings of a Commission (including the formulation, making or publication of a report) are taken to be proceedings in Parliament for the purposes of section 10 and subsections 16(3), (4) and (6) of the *Parliamentary Privileges Act 1987*, and evidence before a Commission is taken to be evidence before a parliamentary committee for the same purposes.

Section 10 of the *Parliamentary Privileges Act 1987* relates to reports of proceedings and provides a defence of qualified privilege in actions for defamation (unless the report is of material not authorised for publication). Subsections 16(3) and (4) limit the use which may be made of proceedings in parliament in a court or tribunal, while subsection 16(6) relaxes those restrictions to allow for their use in relation to the prosecution of an offence against the *Parliamentary Privileges Act 1987* or an Act establishing a committee (such as the *Public Works Committee Act 1969*).[11]

The explanation for the application of parts of section 16 to proceedings of a Commission is as follows:

> 344. Application of subsections 16(3), (4) and (6) of the *Parliamentary Privileges Act 1987* will prevent the questioning or impeaching of proceedings of a Commission in proceedings of a Commission.

From this explanation, it is not entirely clear to me what the intended effect of the provisions is:

- courts and tribunals cannot use proceedings of a Commission contrary to ss. 16(3) or admit evidence contrary to ss. 16(4)?
- a Commission (which comes under the definition of a tribunal in s. 3 of the PPA) cannot use the proceedings of another Commission contrary to ss. 16(3) or admit evidence from another Commission contrary to ss. 16(4)?

It is also not clear whether the reference to ss.16(6) is intended to have the effect of allowing proceedings of a Commission to be used in relation to the prosecution of an offence under Division 4 of the bill against that Commission. If so, it might also need to be deemed that ss. 16(6) applies to a prosecution for an offence against the Judicial Misbehaviour and Incapacity

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[10] Such a provision was considered when the *Parliamentary Privileges Act 1987* was enacted – in the context of the Murphy cases – but it was recognised that it would undermine the principle of the bill. For a discussion of this point, see *Odgers*, Chapter 2, pp. 41-2.

[11] The creation of such offences and the permitted use of proceedings in parliament for the purposes of their prosecution is itself an inroad into the immunity of proceedings in parliament from question in the courts – see commentary on ss. 16(6) in *Odgers*, Chapter 2, pp. 40-1.

(Parliamentary Commissions) Act in respect of a particular Commission. The Committee may wish to clarify these matters.

A final question

There is no doubt that paragraph 72(ii) was intended to provide a strong safeguard of the independence of the judiciary. One element of that protection lies in the bicameral character of the legislature under Chapter I and the requirement for both Houses in the same session to make an address to the executive arm of government established under Chapter II for the removal of a Chapter III judge. The final question is whether the establishment of a Commission to perform the same – albeit preliminary – function for both Houses diminishes the protection otherwise provided by a bicameral parliament. On this question, *Odgers* makes the following comments:

> It may be thought that an inquiry on behalf of both Houses would have something to commend it, but a strong argument could be made out that any inquiry should always be initiated and followed up by one House, and that the other House should not become involved at all until it receives a message requesting its concurrence in an address. The two Houses proceeding separately in this way would give the judge who was the subject of the inquiry the safeguard of two hearings, which is probably what the framers of section 72 intended. Any joint action by the two Houses may remove this safeguard.[12]

Please let me know if I can provide the Committee with any further assistance on this matter.

Yours sincerely

(Rosemary Laing)

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12 *Odgers*, p. 516.