



CHIEF JUSTICE OF WESTERN AUSTRALIA

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The Hon Jim McGinty MLA
Attorney General; Minister for Health, Electoral Affairs
4th Floor, London House
216 St Georges Terrace
Perth WA 6000

Attention: Ms Caroline Wright, Principal Policy Officer

Dear Attorney General

A Judicial Commission for Western Australia?

I refer to our recent discussions concerning the possible creation of a Judicial Commission in Western Australia and as promised, now enclose herewith a substantial dossier of information which, in my respectful view, provides substantial support for that proposal. The various enclosures are listed at the conclusion of this letter.

Complaints against Judicial Officers

First amongst those enclosures is a comparative analysis of the provision that is made for complaints handling in relation to judicial officers in various jurisdictions, both within Australia and internationally. It is interesting to note that the model provided by the Judicial Commission of New South Wales has been adopted with minor modifications in New Zealand and is to be adopted in Ireland. You will also note that it is now commonplace for specific provision to be made for the handling of complaints against judicial officers. In fact, within Australia, only this State, South Australia, Tasmania and the Northern Territory lack formal mechanisms for the receipt and investigation of such complaints. Comparable jurisdictions overseas including New Zealand, the United Kingdom, Canada and the United



States all have specific provisions and mechanisms for the handling of complaints against judicial officers.

Having considered the various possible options and models in other jurisdictions, in my view, the paradigm model is that provided by the Judicial Commission of New South Wales. I have accordingly enclosed a detailed report on the operations of that Commission, with a substantial number of attachments which are intended to provide you and those advising you with some specific illustrations of the valuable work performed by that Commission.

In my view, that model is much to be preferred to that which has recently been adopted in each of Queensland and Victoria. The difficulty with the models in those States is that they only provide mechanisms which respond to complaints which are of sufficient seriousness to possibly justify removal from office. But experience in most jurisdictions, including New South Wales, has shown that the vast majority of complaints are not of that kind.

That has also been my experience. I receive approximately two complaints per week relating to Judges and Magistrates in various Western Australian courts. I lack any facility or capacity to appropriately investigate or respond to those complaints, although obviously if they were of a kind which suggested significant misconduct, I would refer them to the appropriate Head of Jurisdiction for investigation. However, neither I nor any other Head of Jurisdiction has appropriate facilities or mechanisms for the conduct of such investigations, and there may well be situations in which it may be alleged by either the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such an investigation. In my own case, there are also potential difficulties in any personal involvement in complaint assessment if the complaint concerns the conduct of a case which is proceeding and in respect of which an appeal to the Supreme Court is a possibility, because of potential prejudice to my capacity to sit on that appeal, or the possibility of action on my part that might be said to prejudge the outcome of such an appeal.



If such a Commission were to be created in Western Australia to handle complaints against judicial officers, it would, I think, plainly be appropriate for that Commission to absorb the functions currently imposed upon each of the Attorney General and the Chief Justice under Schedule 1 to the *Magistrates Court Act 2004*. However, questions also arise as to the relationship between such a Commission and the provisions of the *Corruption and Crime Commission Act* and of the *State Administrative Tribunal Act* relating to members of that Tribunal.

The Corruption and Crime Commission

The relevant provisions of the *Corruption and Crime Commission Act 2003* are set out in the comparative analysis of complaints handling mechanisms in different jurisdictions. While it would be possible to invest the CCC with all functions and responsibilities relating to complaints against judicial officers, I would not recommend that course, because, as I have indicated, it is likely that a large majority of the complaints will not relate to matters of a kind ordinarily investigated by that Commission. Further, in the case of complaints which are of a kind that might ultimately justify removal from office (which are currently within the jurisdiction of the CCC), it would seem to me to be preferable for such matters to be investigated and assessed by a panel comprising three senior and experienced judicial officers, rather than by a single Commissioner, who may not always have judicial experience.

However, in relation to complaints which might constitute judicial corruption contrary to s 121 of the *Criminal Code*, it seems to me that the CCC would remain the most appropriate body to receive and investigate such complaints, because of its particular expertise in the investigation of complaints of possible criminal conduct.

Thus, if a Judicial Commission were to be created in Western Australia, my suggestion would be that the CCC should retain its jurisdiction to investigate a complaint which might lead to a conclusion that the offence of judicial corruption had been committed, but that otherwise all complaints relating to the conduct of judicial



officers be within the jurisdiction of the Judicial Commission. This is essentially the division of responsibilities which has been adopted in New South Wales.

The State Administrative Tribunal

In relation to members of the State Administrative Tribunal, the New South Wales Judicial Commission does not currently have jurisdiction in relation to Administrative Tribunal members. However, in my discussions with the CEO of that Commission, he could see no reason why such a body should not have jurisdiction in relation to such members. Perhaps there has not been impetus for such a move in New South Wales because, of course, New South Wales does not have a general umbrella Tribunal like the SAT (its ADT has significantly narrower jurisdiction). At all events, if a Judicial Commission is to be created in this State, consideration should be given to extending its jurisdiction to include members of the SAT.

Judicial Education and Criminal Justice System Support

The Judicial Commission of New South Wales has responsibilities significantly broader than those relating to complaints against judicial officers. As the paper summarizing its activities indicates, it plays important roles in relation to continuing judicial education and the provision of services to support the criminal justice system, including most particularly, the provision of a sentencing database which is available online to all judicial officers in New South Wales. During my visit to the Commission's offices, I had the advantage of seeing that database at work. In my opinion, the provision of a similar database to Western Australian judicial officers would be of invaluable assistance to them in the performance of the very important task of sentencing and would significantly promote consistency in sentencing throughout the State. It is perhaps significant to note that each of Queensland, New South Wales and Victoria provide comprehensive online services to their judicial officers in relation to sentencing. In fact, the Queensland service is provided by the Judicial Commission of New South Wales under contract with the State of Queensland, and in my discussions with the CEO of the NSW



Commission, he indicated that there is no reason why it could not provide a similar service for the judicial officers of this State (for a fee of course).

There could well be a role for the WA Crime Research Centre in overseeing the collection of the necessary data and assembling it for use in such a database, and in conducting specific research, identified by either the Courts or your Department, using the data which has been assembled. I have discussed this possibility with the Crime Research Centre and they would be very interested to discuss it further. They have also advised me that the data collected in the Eastern States goes well beyond anything collected in this State, and that the additional data covering such things as the age and circumstances of the offender, aggravating and mitigating circumstances would very significantly increase the utility of the data collected.

In relation to judicial education, while the adoption of such a responsibility by a Judicial Commission would no doubt add to its overall budget, this is a function which has to be performed, and which will cost money whoever is responsible for its performance. In my discussions with each of the Chief Justice of New South Wales and the CEO of the Judicial Commission, they were firmly of the opinion that there were enormous benefits to be derived from the co-location of complaints handling and the function of continuing judicial education, because of the synergy between those two functions - a synergy which is explained more fully in the attachments to this letter.

In summary therefore, while the addition of responsibilities for continuing judicial education and the provision of criminal justice system support would undoubtedly add to the budget of a Judicial Commission, these are functions which, in my view, would provide invaluable support to the judiciary of Western Australia and significantly improve the efficiency of our justice system. However, if Government did not agree, it would, of course, be possible to create a Commission limited to the complaints handling function, for significantly less expense.



I am also enclosing a draft Bill for the possible creation of a Judicial Commission in this State which has been modeled on the legislation in New South Wales and New Zealand (which is quite similar). By enclosing such a Bill, I do not, of course, mean to usurp in any way the function of Parliamentary Counsel, but merely to indicate the structure which such legislation might take if it were to receive the support of the Government.

When you and your advisors have had the opportunity to consider the voluminous material enclosed herewith, I would, of course, be pleased to attend upon you at your convenience in order to further discuss this proposal.

Yours sincerely

The Hon Wayne Martin
Chief Justice of Western Australia

cc: Her Honour Chief Judge Kennedy
His Honour Chief Judge Holden
His Honour Chief Magistrate S Heath
President Barker, SAT



Attachments

1. Draft Bill for the creation of a Judicial Commission in Western Australia
2. Comparative analysis of complaints handling mechanisms in other jurisdictions.
3. Report on the operation of the New South Wales Judicial Commission, including the following attachments:
 1. Notes of meeting between Chief Justice Martin and Judicial Commission CEO, Ernest Schmitt.
 2. *Judicial Officers Act 1986* (NSW)
 3. "Dealing with Judicial Misconduct" - paper by Spigelman CJ
 4. Pamphlet - "Complaints Against Judicial Officers"
 5. "Instructions for Lodging a Complaint Against a Judicial Officer" and complaint form
 6. Complaints Against Judicial Officers - Guidelines
 7. Guidelines for Examination of Complaints
 8. Judicial Officers' Bulletin - April 2006
 9. Judicial Officers' Bulletin - August 2006
 10. "The Judicial Review" - September 2006
 11. Annual Report 2004-05
 12. "A Matter of Judgment"
 13. Disabilities Information
 14. Sentencing Bench Book
 15. List of Recent Research Monographs
 16. Circle Sentencing in New South Wales
 17. Crown Appeals Against Sentence
 18. Sentencing Offenders Convicted of Child Sex Assault
 19. Partial Defences to Murder in New South Wales 1990-2004
 20. List of Recent Publications - "Sentencing Trends and Issues"
 21. Sentencing Trends and Issues - No 35