



Parliament of Australia

Department of Parliamentary Services

Parliamentary Library

Information, analysis and advice for the Parliament

---

## Client Memorandum

Parliament House  
Canberra ACT 2600

**To:** Senate Legal and Constitutional Affairs References Committee  
**Attention:** Tim Watling  
**From:** Roy Jordan, Senior Law Librarian  
**Section:** Law and Bills Digest  
**Date:** 6 November 2009 (updated 30 November 2009)  
**File:** R16

### Complaints against judges

You asked for an outline of the complaints handling mechanisms against judges for the States and Territories.

Complaints may fall into three main categories:

- Serious complaints which fall within the definition of misbehaviour or incapacity for which the penalty is usually removal from office. These are usually provided for in the Constitution of each State and the self governing act for a Territory and are handled by the Attorney-General of each jurisdiction who presents the case for removal to the legislature which then votes on the issue.
- Accusations of criminal behaviour by a judge. These are dealt with by the criminal law process or sometimes by a misconduct commission for public officials such as the Crime and Misconduct Commission of Queensland.
- The remaining complaints do not fall into either of these categories and tend to be resolved by the chief justice of the court itself (called the “head of jurisdiction” in some commentaries). New South Wales has established a Judicial Commission to hear some of these complaints, although the evidence is that most complaints are dismissed. According to its latest annual report the Commission received 65 complaints from 59 individuals against 51 judges. Of the complaints

---

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the Copyright Act 1968, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

Information and advice contained in this memorandum may be made available to other Senators and Members making a similar request to the Parliamentary Library.

This work has been prepared to meet the requirements of the client's specific request and to support the work of the Australian Parliament using information available at the time of production. Where possible, clients are requested to cite the source material provided within the document, rather than the document itself. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion. Individual Library staff are not to be quoted as having provided information, research or advice.

---

finalised that year 92% were dismissed.<sup>1</sup> Miscellaneous complaints may deal with court delays, outcomes which do not favour one party (these may possibly be appealed and are generally not processed by the Judicial Commission of New South Wales), judicial rudeness etc. There is concern in other jurisdictions that establishing such a commission to hear minor complaints, although politically attractive, may not be cost effective.<sup>2</sup>

Only New South Wales has a 'one stop shop' to receive all complaints against judges, whether serious or less serious and whether referred by the Attorney-General or by the public. This has the advantage of being a simple procedure for the public and being seen to be apart from or independent of the court process. The Australian Capital Territory and Victoria have legislated for ad hoc investigating committees to be set up by the Attorney-General to investigate serious complaints against judges as the need arises. Outside New South Wales, it may be difficult for a member of the public, especially a self represented litigant, to know how to pursue a complaint. Some courts, such as the Supreme Court of Victoria, have adopted protocols for handling complaints and these may be found on court websites or at the court's registry enquiry counter.

Further details relating to complaints against judges of the higher courts (eg each Supreme Court) are outlined in the following table.

- 
1. Judicial Commission of New South Wales, *Annual report 2007–08*, p. 31, viewed 2 November 2009, <http://www.judcom.nsw.gov.au/about-the-commission/annual-reports/annual-report-2007-2008/ar08-full-report.pdf>
  2. For example see the comments by the Chief Justice of Queensland, Paul de Jersey, in 'Judging the judges: do we need a national judicial complaints body?', *Proctor*, v.28(7), August 2008, p. 21-22, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjmart%2FSZAR6%2>  
The 2003 Sallman report in Victoria (referenced below) recommended against a judicial commission, although more recently the Chief Justice of Victoria stated that judges in Victoria would prefer a judicial commission, see M. Warren, *Public Confidence In The Judiciary: a Response to the Announcement by the Honourable the Attorney-General*, Speech delivered by the Honourable Marilyn Warren AC at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009, viewed 4 November 2009, <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb659b446d8bf8e/JCA%20Colloquium%20Remarks.pdf>

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
Australian Capital Territory	<p><u><a href="#">Australian Capital Territory (Self-Government) Act 1988 (Cth), s 48D:</a></u></p> <p>An enactment relating to the removal from office of a judicial officer must provide that:</p> <p>(a) a judicial officer may only be removed from office if:</p> <p>(i) a judicial commission appointed by the Executive to examine a complaint concerning the judicial officer has submitted to the Attorney-General of the Territory a report that:</p> <p>(A) sets out the facts found by the commission in relation to the subject matter of the complaint; and</p> <p>(B) states that, in the commission's opinion, the facts so found could amount to misbehaviour or physical or mental incapacity (as the case may</p>	No separate body.	<p>No separate body. Complaints are dealt with by the chief judicial officer of the court.</p> <p><i>See Complaints and feedback policy for ACT Law Courts and Tribunals [2008?]</i>  <a href="http://www.courts.act.gov.au/magistrates/Complaints%20policy.pdf">http://www.courts.act.gov.au/magistrates/Complaints%20policy.pdf</a></p>

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
	<p>be) warranting the officer's removal from office; and</p> <p>(ii) the Assembly:</p> <p>(A) has determined that the facts so found amount to misbehaviour or physical or mental incapacity identified by the commission; and (B) has passed a motion requiring the Executive to remove the officer from office on the ground of that misbehaviour or incapacity; and</p> <p>(b) a judicial officer may only be removed from office by the Executive in writing.</p> <p>See also <a href="#">Judicial Commissions Act 1994 (ACT)</a> for detailed procedure. This enables an ad hoc commission to be established to inquire into judicial misconduct. There is no standing commission to deal with general complaints from the public.</p>		
New South Wales	<a href="#">Constitution Act 1902 (NSW)</a> , s 53(2): judicial officers of that State may	The Judicial Commission of New South	The <a href="#">Judicial Commission of New South Wales</a> handles all other complaints ( <a href="#">Judicial Officers Act 1986</a> Part 6).

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
	<p>be removed "by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity".</p> <p>See also s 41 of the <a href="#">Judicial Officers Act 1986 (NSW)</a>, whereby the Governor may not remove a judicial officer in the absence of a report from the Conduct Division of the Judicial Commission stating that there are sufficient grounds to justify Parliamentary consideration of the removal for proved misbehaviour or incapacity. This act also establishes the Judicial Commission of New South Wales (s.5)</p>	<p>Wales may deal with criminal offences by judges (<a href="#">Judicial Officers Act 1986</a> s. 15(6)).</p> <p>A judge is, for the purposes of the Independent Commission Against Corruption Act 1988 (NSW), a "public official" and is thus subject to investigation in relation to "corrupt conduct" by the Independent Commission Against Corruption. The findings of an investigation have no direct effect, but they may be referred to the Judicial Commission or Parliament for further consideration (<a href="#">Independent Commission Against Corruption</a>)</p>	

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
		<a href="#">Act 1988 (NSW)</a> , s 53)	
Northern Territory	<a href="#">Supreme Court Act (NT)</a> , s. 40: A Judge ... may be removed from office by the Administrator on an address from the Legislative Assembly praying for his removal on the ground of proved misbehaviour or incapacity, but shall not otherwise be removed from office.	No separate body.	No separate body. Complaints are dealt with by the chief judicial officer of the court.  <i>See Protocol for Complaints against Judicial Officers of the Supreme Court of the Northern Territory</i> [2009?] <a href="http://www.supremecourt.nt.gov.au/about/documents/Complaints_Judicial_Officers.pdf">http://www.supremecourt.nt.gov.au/about/documents/Complaints_Judicial_Officers.pdf</a>
Queensland	<a href="#">Constitution of Queensland Act 2001 (Qld)</a> , s 61: a judge may be removed from office by the Governor on an address of the Legislative Assembly for proved misbehaviour or incapacity. A tribunal must be established to investigate the allegation. The tribunal must consist of three members appointed by resolution of the Legislative Assembly. Each member must be a former judge of a State or Federal superior court, but not a member of the same court as the judge to whom the allegation relates. A judge can only be removed from office if the Legislative Assembly accepts a finding of a tribunal proving misbehaviour or incapacity on the balance of probabilities.	Under the <a href="#">Crime and Misconduct Act 2001 (Qld)</a> , a judge is a person holding an appointment in a "unit of public administration" and is thus subject to investigation by the <a href="#">Crime and Misconduct Commission</a> . A report of the Commission is not a sufficient ground for an address by the legislature for removal, but the legislature may appoint a tribunal of serving or retired judges	No separate body. Complaints are dealt with by the chief judicial officer of the court.  See: Dept of Justice and Attorney-General, <i>Complaint Management Policy, 2007</i> <a href="http://www.justice.qld.gov.au/files/AboutUs/complaintmanagementpolicy07.pdf">http://www.justice.qld.gov.au/files/AboutUs/complaintmanagementpolicy07.pdf</a> . referred to on the Queensland courts website at <a href="http://www.courts.qld.gov.au/4328.htm">http://www.courts.qld.gov.au/4328.htm</a> .  Not a court but a departmental protocol which also applies to courts.

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
		to investigate further the matters raised by a report.	
South Australia	<a href="#">Constitution Act 1934 (SA)</a> , ss 74, 75: A judge may be removed from office by the executive either for misbehaviour or upon an address of the legislature.	No separate body.	No separate body. Complaints are dealt with by the chief judicial officer of the court. No protocol found.
Tasmania	The <a href="#">Supreme Court (Judges' Independence) Act 1857 (Tas)</a> states that a judge may be removed or suspended only upon the address of both Houses. Insofar as the legislation purports to be exhaustive, it may be invalid. Furthermore, its relationship with the Charter of Justice 1830 (1 Will 4) (UK), cl 4, which provides that if a judge accepts another office of profit under the Crown it shall be deemed that he or she has avoided his or her judicial office, is unclear. ( <a href="#">The Laws of Australia</a> , Thomson, para [19.4.410])	No separate body.	No separate body. Complaints are dealt with by the chief judicial officer of the court. No protocol found.
Victoria	<a href="#">Constitution Act 1975 (Vic)</a> , Part IIIA: judges may be removed by the Governor on an address of both Houses of Parliament “agreed to by a special majority in the same session praying for removal on the ground of proved misbehaviour or incapacity”. A resolution of Parliament praying for	No separate body.	No separate body. Complaints are dealt with by the chief judicial officer of the court. See <i>Supreme Court of Victoria Complaints</i> [2009?] <a href="http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb41fc054f44dbc/COMPLAINTS[1].pdf">http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb41fc054f44dbc/COMPLAINTS[1].pdf</a>

Jurisdiction	Removal for misbehaviour by legislature on motion by Attorney-General	Criminal misconduct	Other complaints
	removal is void unless a report from an investigating committee concludes that facts exist that could amount to proved misbehaviour or incapacity. An investigating committee is appointed by the Attorney-General and consists of three members, who must have been superior court judges.		
Western Australia	<a href="#">Constitution Act 1889 (WA)</a> , ss 54, 55: A judge may be removed from office by the executive either for misbehaviour or upon an address of the legislature.	Section 27 of the <a href="#">Corruption and Crime Commission Act 2003 (WA)</a> allows the <a href="#">Corruption and Crime Commission</a> to investigate serious offences by judges.	No separate body. Complaints are dealt with by the chief judicial officer of the court.  <i>See Protocol for Complaints Against Judicial Officers In Western Australian Courts, 27 August 2007.</i> <a href="http://www.supremecourt.wa.gov.au/publications/pdf/2007_Complaints_Protocol_31082007.pdf">http://www.supremecourt.wa.gov.au/publications/pdf/2007_Complaints_Protocol_31082007.pdf</a>

The Complaints Protocol of Western Australia says that it is “modelled on the draft approved by the Council of Chief Justices of Australia and New Zealand for adoption by Courts as they think fit.” In the time available I have not been able to locate a copy of the draft nor have I found any commentary on it or why the courts have not all used a uniform protocol. The Western Australian protocol is 7 pages and has 18 clauses, while the Supreme Court of Victoria protocol is one page with 5 clauses. I would suggest the Committee approach the Council through its secretary who is the Registrar of the High Court.

It should be noted that legislation establishing an ombudsman in each jurisdiction excludes courts or judges or magistrates from the jurisdiction of the ombudsman.

Procedures for dealing with serious complaints against judges of lower courts or magistrates may differ from the above procedures. *The Laws of Australia* says:

The grounds upon which judges of inferior courts and magistrates may be removed from office vary from jurisdiction to jurisdiction. In New South Wales and the Australian Capital Territory, all judicial officers are removable on the same grounds.<sup>1</sup> Judges of intermediate courts, that is, District or County Courts, enjoy tenure similar or equivalent to Supreme Court judges in Queensland,<sup>2</sup> South Australia,<sup>3</sup> Victoria<sup>4</sup> and Western Australia.<sup>5</sup> In Tasmania magistrates enjoy tenure similar



to that of federal judges, except that they may be suspended before removal.<sup>6</sup> Magistrates in Western Australia hold office upon Act of Settlement 1700 12 & 13 Will 3 c 2 (Eng) terms, but may be suspended from office before removal.<sup>7</sup> A magistrate in Victoria holds office on terms equivalent to intermediate and Supreme Court judges in that State.<sup>8</sup> In Queensland,<sup>9</sup> and South Australia<sup>10</sup> magistrates hold office on terms similar to one another. In each of these States, a magistrate may be removed following a Supreme Court determination that "proper cause" exists to remove him or her. The proper causes are similar in each State and include mental or physical incapability, conviction of an indictable offence, and incompetence or neglect of duty. A magistrate in the Northern Territory may be removed by the executive if he or she fails to comply with a direction given by the Chief Magistrate, or is incapable of or incompetent in carrying out his or her duties, or if for any other reason he or she is unsuited to the performance of his or her duties.<sup>11</sup>

1 Australian Capital Territory (Self-Government) Act 1988 (Cth), s 48D; Judicial Commissions Act 1994 (ACT), s 3 (definition of "judicial officer"), s 5; Constitution Act 1902 (NSW), ss 52(1), 53.

2 Constitution of Queensland Act 2001 (Qld), s 61.

3 District Court Act 1991 (SA), s 15. Arguably, District Court judges are more secure than Supreme Court judges in South Australia, because they may only be removed by an address from both Houses of Parliament.

4 Constitution Act 1975 (Vic), s 87AAB. The tenure of County Court judges used not to be so secure: see *R v Rogers*; *Ex parte Lewis* (1878) 4 VLR (L) 334 (FC).

5 District Court of Western Australia Act 1969 (WA), s 11.

6 Magistrates Court Act 1987 (Tas), s 9.

7 Magistrates Court Act 2004 (WA), s 5, Sch 1.

8 Constitution Act 1975 (Vic), ss 87AAB – 87AAH

9 Magistrates Act 1991 (Qld), ss 43 – 46.

10 Magistrates Act 1983 (SA), ss 10 – 12.

11 Magistrates Act 1977 (NT), s 10.<sup>3</sup>

#### According to the Chief Justice of Victoria:

In September 2008 the Judicial Conference [of Australia] established a committee to look at a national system for dealing with complaints against judicial officers. It is preparing a second draft report due by the end of the year [2009]. It will be a substantive piece of work. The committee consists of the Chief Justice of Western Australia, judges from the Supreme and Federal Courts, the District Courts and also includes some chief magistrates.

The judiciary both nationally and in this state view the matter of complaints against members of the judiciary with the utmost gravity.<sup>4</sup>

#### Also in July 2008,

Ministers [of the Standing Committee of Attorneys-General] agreed to establish a working group to examine the feasibility of establishing a national judicial complaints handling mechanism and report back to Ministers at the next meeting. Ministers noted that NSW will not participate in this project.<sup>5</sup>

#### In November 2008,

- 
3. *The Laws of Australia*, (Thomson), para [19.4.430]. (Government > Judiciary > Constitution of the judiciary > Removal of judges > Judges of inferior courts and magistrates), viewed 4 November 2009, <http://legalonline.thomson.com.au/tla/>
  4. M. Warren, *Public Confidence In The Judiciary: a Response to the Announcement by the Honourable the Attorney-General*, Speech delivered by the Honourable Marilyn Warren AC at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009, p. 13, viewed 4 November 2009, <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb659b446d8bf8e/JCA%20Colloquium%20Remarks.pdf>.
  5. SCAG Summary of Decisions - July 2008, viewed 4 November 2009, [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Summary\\_of\\_Decisions\\_July\\_08.doc/\\$file/SCAG\\_Summary\\_of\\_Decisions\\_July\\_08.doc](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Summary_of_Decisions_July_08.doc/$file/SCAG_Summary_of_Decisions_July_08.doc)

Ministers, with the exception of NSW which has an existing judicial complaints system, asked the working group to identify options to receive and consider judicial complaints. A transparent, impartial and accountable system of judicial complaints handling has the potential to enhance public confidence in Australia's judiciary.<sup>6</sup>

In April 2009,

The SCAG working group will continue to develop options for the consistent handling of complaints across jurisdictions which will be referred to the Council of Chief Justices.<sup>7</sup>

## Federal Courts

All major federal courts except the High Court have complaints procedures published on their websites. Further details are below.

### High Court of Australia

According to the Court's Manager of Public Information "the High Court does not have any written procedures for making complaints against judicial officers".<sup>8</sup> There is also nothing on its website about making complaints.

### Federal Court of Australia

*Judicial Complaints Procedure* (2002)  
[http://www.fedcourt.gov.au/contacts/contacts\\_other\\_complaints.html](http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html)

### Family Court of Australia

*Family Court Judicial Complaints Procedure* (2008)  
[http://www.familycourt.gov.au/wps/wcm/resources/file/eb20ea0fc01d83e/Judicial\\_Complaints\\_Procedure\\_June\\_08.pdf](http://www.familycourt.gov.au/wps/wcm/resources/file/eb20ea0fc01d83e/Judicial_Complaints_Procedure_June_08.pdf)

### Federal Magistrates Court

General information for the public <http://www.fmc.gov.au/html/complaints.htm>. This page includes a link to the Courts *Judicial\_Complaints\_Procedure* (2008)  
[http://www.fmc.gov.au/pubs/docs/Judicial\\_Complaints\\_Procedure.pdf](http://www.fmc.gov.au/pubs/docs/Judicial_Complaints_Procedure.pdf)

### Administrative Appeals Tribunal

Complaints procedures are contained in the AAT *Service Charter* at <http://www.aat.gov.au/CorporatePublications/Charter.htm#comments>

All the federal complaints procedures are slightly different in their wording but indicate that the complaint will be dealt with by the chief judge of each court.

---

6. SCAG Summary of Decisions - November 2008, viewed 4 November 2009, [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC/\\$file/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/$file/SCAG_Communique_6-7_November_2008_FINAL.DOC)

7. SCAG Summary of Decisions - April 2009, viewed 4 November 2009, [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAGApril2009Communique-versionCth2.doc/\\$file/SCAGApril2009Communique-versionCth2.doc](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAGApril2009Communique-versionCth2.doc/$file/SCAGApril2009Communique-versionCth2.doc)

8. Email from Jane Mussett dated 6 November 2009 (attached below). Ms Mussett went on to say "I cannot take it upon myself to provide a copy of a draft document of the Council of Chief Justices of Australia and New Zealand without the authority of the Council. You may be able to obtain a copy of the document relied on by the Supreme Court of Western Australia from that court." The Registrar of the High Court, Andrew Phelan, who is also the secretary of the Council of Chief Justices of Australia and New Zealand, was overseas at the time this email was written.

## Further reading

- P De Jersey, 'Judging the judges: do we need a national judicial complaints body?', *Proctor*, v.28(7), August 2008, p. 21-22, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FSZAR6%22>. Describes Queensland judicial complaints mechanisms and argues against a national system as proposed by the Commonwealth Attorney-General.
- D Wells & M McArdle, 'Judging the judges: the debate continues', *Proctor*, v. 28(8), September 2008, p. 30-31, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FTGLR6%22>. Former Queensland Attorney-General, Dean Wells, does not see how a national judicial complaints body would improve on the current Queensland Crime and Misconduct Commission. Mark McArdle, Liberal National Party deputy leader, sees merit in a national body.
- J McConvill, 'Judging the judges', *Online Opinion*, 25 May 2006, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FAKUJ6%22>. Calls for parliamentary committees to handle serious complaints against judges, rather than executive bodies such as judicial commissions.
- P A. Sallmann, *Judicial Conduct: Still a Live Issue?* Judicial Conference of Australia, 2005 Colloquium Paper, 3 September 2005, viewed 4 November 2009, [http://www.jca.asn.au/attachments/2005-Sallmann\\_Paper.pdf](http://www.jca.asn.au/attachments/2005-Sallmann_Paper.pdf). Perspective from a Victorian point of view and includes copy of the Judicial Complaints protocol of the Supreme Court of Victoria. Response from Hon Justice Peter McClellan of the Supreme Court of New South Wales [http://www.jca.asn.au/attachments/2005-McClellan\\_Paper.pdf](http://www.jca.asn.au/attachments/2005-McClellan_Paper.pdf)
- P A. Sallmann, *Report on the judicial conduct and complaints system in Victoria*, Department of Justice, Victoria, Melbourne, 2003. The report recommended against a Judicial Commission as established in New South Wales. Its recommendations of an ad hoc investigating committee were implemented by amendments to the *Constitution Act 1975* (Vic) in 2005.
- The Hon Mr Justice Mahoney & the Hon Mr Justice McGarvie, *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers*, Australian Institute of Judicial Administration, Melbourne, 1989.

I hope this information has been helpful and please do not hesitate to contact me for further assistance if the above does not meet your needs, or you require clarification.