

- Chapter 2 provides an outline of the context for the inquiry and an introduction to the issues;
- Chapter 3 discusses methods of judicial appointment and selection criteria, including whether there is a need in Australia for a judicial appointments commission;
- Chapter 4 addresses judicial terms of appointment, including tenure and age of retirement, and the use of acting and part-time appointments;
- Chapter 5 considers jurisdictional issues and the interface between the federal and state judicial systems, such as judicial exchange, the possibility of a national judiciary, and the cross-vesting of cases;
- Chapter 6 discusses termination of a judicial appointment (other than through retirement or reaching the compulsory retirement age) before dealing with existing complaint handling procedures and some concerns about the current arrangements; and
- Chapter 7 explores options for more sophisticated judicial complaints handling: primarily the possibility of establishing a judicial complaints commission and whether an intermediate process is needed in the interim.

1.8 Of relevance to reading this report is consideration of what is meant by the term *judicial officer*. In New South Wales, the *Judicial Officers Act* defines *judicial officer* to mean:

- a judge or associate judge of the Supreme Court of New South Wales;
- a member (including a judicial member) of the Industrial Relations Commission of New South Wales;
- a judge of the Land and Environment Court of New South Wales;
- a judge of the District Court of New South Wales;
- a magistrate; and
- the President of the Administrative Decisions Tribunal.

The definition of "judicial officer" does not include people such as Arbitrators, Registrars, Chamber Registrars or legal practitioners.¹

1.9 The committee also notes that the Association of Australian Magistrates argues that 'there is no longer any reason to distinguish "magistrates" from "judges", as the obligations of the judicial role do not differ.'²

1 Section 3(1) *Judicial Officers Act 1986*, referred to in *Complaints Against Judicial Officers* by Mr Ernest Schmatt, Chief Executive of the Judicial Commission of New South Wales, p. 1 tabled with the committee on 11 June 2009.

2 *Submission 4*, p. 1.

1.10 This report does not specifically define the terms *judge*, *judicial officer*, or *judicial commission* on each occasion that they are used. However, for the purposes of this report the committee has adopted the New South Wales approach insofar as the term 'judicial officer' applies to officers of a range of courts, including magistrates. It will be a matter of future detail to determine the precise meaning of the term *judicial officer* in any particular circumstance.

Acknowledgement

1.11 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.12 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

Background

Terms of Reference

2.1 As outlined in the previous chapter, the terms of reference for this inquiry cover four primary areas, namely procedures for appointment and method of termination of judges; terms of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements; the judicial complaints handling system; and jurisdictional issues, for example, the interface between the federal and state judicial system. There is much written about these topics already. It is the purpose of this report to undertake a snapshot analysis of the current health of our federal judicial system rather than to analyse the entire system in detail.

2.2 This chapter will provide background for the first 3 of these areas, and touch on the fourth, prior to their examination in turn over the remainder of the report. It begins by examining current arrangements.

Current arrangements for Federal courts – appointments and complaint handling

2.3 There are four principal federal courts in Australia – the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court. The Attorney-General's Department has summarised the arrangements for judicial appointments to these courts as follows:

Federal judges and magistrates are appointed by the government of the day.

The Australian Constitution does not set out specific qualifications required by federal judges and magistrates. However, laws made by the Commonwealth Parliament provide that, to be appointed as a federal judge, a person must have been a legal practitioner for at least five years or be a judge of another court. To be appointed as a federal magistrate, a person must have been a legal practitioner for at least five years. To be appointed as a judge of the Family Court of Australia, a person must also be suitable to deal with family law matters by reason of training, experience and personality.

All federal judges and magistrates are appointed to the age of 70. The Australian Constitution provides that a federal judge or magistrate can only be removed from office on the ground of proved misbehaviour or incapacity, on an address from both the House of Representatives and the Senate in the same session. The Australian Constitution provides that the remuneration of a federal judge or magistrate cannot be reduced while the person holds office. These guarantees of tenure and remuneration assist in securing judicial independence.

The independence of the courts, and their separation from the legislative and executive arms of government, is regarded as of great importance in Australia and it is taken for granted that judges, in interpreting and applying the law, act independently of the Government.¹

2.4 In early 2008 the Attorney-General introduced new processes for appointing judges and magistrates to federal courts, including:

- broad consultation to identify persons who are suitable for appointment;
- notices in national and regional media seeking expressions of interest and nominations;
- notification of appointment criteria; and
- appointing advisory panels to assess expressions of interest and nominations against the appointment criteria to develop a shortlist of highly suitable candidates.²

2.5 Specific detail in relation to each court is outlined below.

High Court

2.6 Under section 72 of the Constitution, Justices of the High Court:

- are appointed by the Governor-General in Council;
- cannot be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity;
- receive such remuneration as the Parliament may fix, but the remuneration shall not be diminished during their continuance in office; and
- must retire on attaining the age of 70 years.³

2.7 Part II of the *High Court of Australia Act 1979* contains further provisions concerning the court and the justices, including:

- the Attorney-General shall, before an appointment is made to a vacant office, consult with the attorneys-general of the states in relation to the appointment;
- a person shall not be appointed as a justice unless:

1 Attorney-General's website, *The Courts* page, accessed 3 April 2009: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts.

2 Attorney-General's Department website *Court Appointments* page, accessed 3 April 2009: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_CourtAppointments.

3 High Court of Australia, *Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 25.

- he or she has been a judge of a court created by the parliament or of a court of a State or Territory; or
- he or she has been enrolled as a barrister or solicitor or as a legal practitioner of the High Court or of a Supreme Court of a State or Territory for not less than five years;
- a Justice is not capable of accepting or holding any other office of profit within Australia; and
- the Chief Justice and the other Justices shall receive a salary and other allowances at such rates as are fixed from time to time by Parliament.⁴

2.8 There is no published complaints procedure for the High Court available on the High Court of Australia website and the committee understands that there is no written procedure for handling complaints against judicial officers.⁵ In its 2007 *Commonwealth courts and tribunals* publication the Commonwealth Ombudsman notes that the High Court handles complaints received on a case-by-case basis by a senior executive, usually the Principal Registrar of the court.⁶

Recommendation 1

2.9 The committee recommends that the High Court of Australia adopt a written complaint handling policy and make it publicly available, including on its website, within 1 month of the tabling of this report.

*Federal Court of Australia*⁷

2.10 The *Federal Court of Australia Act 1976* provides that the court consists of a chief justice, and such other judges as are appointed. The chief justice is the senior judge of the court and is responsible for ensuring the orderly and expeditious discharge of the business of the court.

2.11 Judges of the court are appointed by the Governor-General, by commission. Like the judges of the High Court, judges may not be removed except by the Governor-General on an address from both Houses of Parliament, in the same session, praying for the judge's removal on the ground of proved misbehaviour or incapacity. The requirement is contained in section 72 of the *Commonwealth of Australia Constitution Act 1901* and Part II of the *Federal Court of Australia Act*.

4 High Court of Australia, *Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 25.

5 *Additional information*, Parliamentary Library Client Memorandum *Complaints Against Judges*, 6 November 2009, pp 9 and 10.

6 Commonwealth Ombudsman, *Report 12, 2007 Commonwealth courts and tribunals: complaint-handling processes and the ombudsman's jurisdiction*, August 2007, pp 13 to 15.

7 Unless otherwise attributed, information for this section was obtained from the Federal Court of Australia website <http://www.fedcourt.gov.au/aboutct/jj.html> accessed 7 May 2009 and *Additional Information*, Parliamentary Library Client Memorandum *Judicial appointment, termination and retirement age in like countries*, 9 April 2009.

2.12 Until 1977 judges were appointed for life. As a consequence of the constitutional referendum in that year, all judges appointed after 1977 must retire at the age of 70.

2.13 Judges other than the Chief Justice may hold more than one judicial office at the one time. Most judges have other commissions and appointments.

2.14 The Federal Court manages its own 'judicial complaints procedure'. The court asserts that to protect judicial independence judges '...cannot be subject to direct discipline by anyone else, except in the extreme cases of proved misbehaviour or incapacity. In those circumstances, and in those only, a judge may be removed from office by the Governor-General upon a request from both Houses of Parliament.'

2.15 The complaints procedure does not (and, constitutionally, cannot) provide a mechanism for disciplining a judge. This means that the only action the head of jurisdiction can take, if any is needed, is informal. The types of complaints that the procedure mentions are delay, cases that could be dealt with on appeal or by prerogative writ and judicial conduct.⁸

Family Court of Australia

2.16 Judges of the Family Court are appointed by the Governor-General, usually from the ranks of the legal profession. Appointments to the Family Court have also included academics with special expertise in family law.⁹

2.17 The Chief Justice of the Family Court and the Chief Federal Magistrate of the Federal Magistrates Court are responsible for overseeing the management of complaints about the judicial work of those Courts. A complaint can be made to the Chief Justice or the Chief Federal Magistrate about the conduct of a judicial officer during the course of, or after, a hearing or about an unreasonable delay in the delivery of a judgment. The Family Court website provides complainants with the details needed to write to the Chief Justice of the Family Court.¹⁰

Federal Magistrates Court

2.18 The Attorney-General announced this year that as a result of the Semple Review, the Federal Magistrates Court will be abolished and its functions

8 Federal Court of Australia website accessed April 2009:
http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html.

9 Family Court of Australia website accessed 7 May 2009:
http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Organisation/Judges/FCOA_co_Judges.

10 Family Court publication *Complaints Fact Sheet* accessed on 8 May 2009:
http://www.familycourt.gov.au/wps/wcm/resources/file/ebc64b455b4961c/Complaints_feedback.htm.

amalgamated with the Federal Court and the Family Court. A timeframe for this has yet to be established.¹¹

Recommendation 2

2.19 The committee recommends that, following consultation about the best way to achieve this, all federal courts publish quarterly complaint handling summary status reports on their websites recording the number of complaints received and, in relation to each complaint, the date it was received, the nature of the complaint, the date on which it was resolved and a summary of any action taken in response to the complaint.

2.20 The committee recommends that no personal details of either the complainant or judicial officer be identifiable from these reports.

International obligations

2.21 Australia ratified the *International Covenant on Civil and Political Rights* and it came into effect for Australia on 13 November 1980. Article 14 of the covenant relevantly states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...[emphasis added]¹²

2.22 The United Nations Human Rights Committee, in its *General Comment No 32*, states that, 'The requirement of competence, independence and impartiality of the judiciary is an absolute right that is not subject to any exception.'¹³ A *General Comment* is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.¹⁴

2.23 The Human Rights Law Resource Centre notes in its submission that 'the importance of competence, independence and impartiality of the judiciary has also been emphasised by the United Nations Basic Principles on the Independence of the Judiciary.' They state further that:

The Basic Principles are persuasive, useful interpretative guides and provide detailed minimum standards concerning the elements of

11 The Attorney-General, the Hon. Robert McClelland MP, media release, *Rudd Government to Reform Federal Courts*, 5 May 2009.

12 A copy of Article 14 of the *International Covenant on Civil and Political Rights*, an extract from the United National Human Rights Committee, *General Comment No 32*, and the United Nations *Basic Principles on the Independence of the Judiciary* appear at Appendix 3 to this report.

13 Human Rights Law Resource Centre, *Submission j1*, p. 27.

14 Human Rights Law Resource Centre, *Submission j1*, p. 12.

independence, impartiality and competence contained in the right to a fair hearing.

On the elements of independence and impartiality, the Basic Principles provide that:

- a) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.¹⁵

...

2.24 On the element of competence, the Basic Principles provide that:

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person...except a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.¹⁶

2.25 *General Comment 32* expands and elaborates on the guidance in the Basic Principles on the element of independence and states:

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.¹⁷

International experiences

2.26 An outline of the major judicial organisations established to support the appointments and complaints processes for some overseas jurisdictions is at Appendix 4.

15 Human Rights Law Resource Centre, *Submission j1*, p 27.

16 As quoted in the Human Rights Law Resource Centre, *Submission j1*, p. 27.

17 As quoted in the Human Rights Law Resource Centre, *Submission j1*, pp 27 and 28.