CHAPTER 6

Judicial Complaints Handling

6.1 The terms of reference for the inquiry include consideration of the judicial complaint handling system and the method of termination of judicial appointment. Arrangements for judicial complaint handling are of particular importance to the committee and also for a number of submitters.

6.2 Aside from compulsory retirement, which is discussed in chapter 3, the only method of termination is for a judge to be removed on the statutory grounds of misconduct or incapacity. (It is, of course, always open to a judicial officer to voluntarily resign or retire from his or her judicial position at any time.)

6.3 This chapter commences discussion of the termination of judicial appointments arising from a complaint about judicial conduct. This chapter deals with:

- some basic principles underpinning appropriate termination;
- an outline of the current arrangements for judicial complaint handling; and
- a critique of their adequacy.

Termination

Introduction

6.4 Fair and effective complaints handling is a critical component of a judicial system that is both respected and just, and seen to be so. To assess whether a model is adequate, it is relevant for the committee to consider questions such as: does the complaints handling model reflect the importance of judicial independence? And is this also balanced by the ability to ensure that behaviour ranging from undesirable to unacceptable can be dealt with appropriately?

6.5 The importance of a comprehensive judicial system was concisely explained by the Flinders Judicial Research Project:

> Guarantee of judicial tenure during good behaviour, with removal requiring executive and legislative action, is the core protection for security of tenure, which underpins judicial independence and impartiality. Methods of termination and handling of complaints each raise issues of security of tenure.[1]

6.6 Some key principles that should underpin arrangements for termination were articulated to the committee by the ICJ-Victoria which noted that:

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1 Flinders University Judicial Research Project, *Submission J4*, p. 9.

> …judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches of government. Removal of judges from office must be limited to fair and transparent proceedings for serious misconduct within judicial office, criminal offence, or such incapacity that renders a judge unable to discharge his or her functions. The system prevalent throughout Australia of removal being made by the Governor-General or the Governor following an address of parliament should continue. No lesser system is appropriate; nor could it guarantee the same independence from political interference which the Australian judiciary presently enjoys.[2]

6.7 The committee agrees with the ICJ-Victoria that the severe step of revoking a judicial appointment should follow the requirements described and should be limited to very serious misconduct or incapacity. This is consistent with the current federal arrangements. However, this system does not establish a procedure for determining when removal is justified, nor does it address what should occur when judicial conduct (both inside and outside court) is less serious, but still undesirable.

Current statutory arrangements

6.8 There are two grounds on which federal judges can be removed for inappropriate behaviour: proved misconduct or incapacity. Relevantly, section 72 of the Australian Constitution provides that:

> The Justices of the High Court and of the other courts created by the Parliament – (ii) shall not 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 ground of proved misbehaviour or incapacity.

6.9 The Gilbert + Tobin Centre has observed in relation to section 72 that:

> …while s 72 has secured the integrity of the federal judiciary, its apparent simplicity is nevertheless troubling. Parliament is able to remove a judge only for 'proved misbehaviour or incapacity'. The most ambiguous word in that phrase is 'proved' which clearly suggests both a standard and a process. But on these the Constitution is unhelpfully silent.[3]

6.10 There is no settled process for the application of section 72. A current Member of Parliament, the Hon Duncan Kerr SC MP, has articulated the need for reform in this area for many years. His concerns include that a clear mechanism needs to be in place for the operation of s 72 before it is needed, otherwise:

> …any ad hoc procedure put in place after a specific allegation of judicial misconduct or incapacity has been brought to light can, and almost certainly

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2 International Commission of Jurists, Victoria, *Submission J2,* p.3.

3 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3.

> will, be criticised as lacking at least some of the institutional attributes appropriate for a fair hearing and respect for the rule of law.[4]

6.11 In Victoria, Part IIIAA of the *Constitution Act 1975* sets out a process for the independent investigation of allegations of misbehaviour or incapacity and the procedure for removal. The Chief Justice of Victoria's view of this arrangement is that, 'While the test for removal remains consistent with other Australian jurisdictions, the procedure provides transparency and certainty should there be a need to invoke it, rather than relying on an ad hoc arrangement.'[5]

6.12 The Gilbert + Tobin Centre has undertaken helpful analysis of some of the problems presented by the formulation of s 72 in relation to 'incapacity'. It is worth setting out the Centre's consideration:

> Greater attention should also be given to the particular problems of proving 'incapacity' which has traditionally been obscured by a focus on the controversial ground of 'misbehaviour'. This is odd since uncertainties over standards, rights and procedures must be even greater in a case of incapacity given that the criminal justice process would not provide a suitably analogous model for resolution of the problem. Additionally, with over 150 members of the federal judiciary, it seems that physical or mental impairment is far more likely to arise than inappropriate behaviour. In light of recent incidents involving State judges, the incidence of mental or psychological incapacity, far less immediately detectable than a physical impairment and yet likely to be a much greater impediment to fulfilment of judicial duties, demands particular attention and care.
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> At present it appears there are only two alternatives when a member of the federal judiciary becomes incapacitated by mental illness. There is the constitutional response – removal by both houses – which is likely to encompass some kind of ad hoc investigatory body attended by many of the doubts which Mr Kerr has highlighted. Or there is the possibility of an informal approach made by the individual's colleagues.
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> We submit that the Committee should closely examine the approach to incapacity enabled by the powers and procedures of the Judicial Commission of New South Wales.[6]

6.13 The problems associated with the investigation of incapacity issues are similar to those affecting the ability to respond to inappropriate behaviour by judges. The section 72 problem emphasised by the Hon Duncan Kerr MP applies both to misconduct and incapacity issues. In addition, there is neither a process nor official judicial authority to deal with 'misconduct' or 'incapacity' if the conduct is undesirable

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4 The Hon Duncan Kerr SC MP, *The removal of federal justices: qui custodio custodis?*, 2005 Australian Institute of Administrative Law, Administrative Law Forum, Canberra, 30 June 2005, p. 9.

5 Chief Justice of the Supreme Court of Victoria, *Submission J3*, p.3.

6 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 4.

but not serious enough to form the basis for removal. In these cases the only option is, as discussed above, an informal approach made by the individual's colleagues, usually the head of the jurisdiction.

Current approaches to complaint handling

6.14 The Federal Court, Family Court and Federal Magistrates Court have all adopted similar complaints handling protocols, which were mentioned in chapter 2.[7] It has been noted that, '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.'[8]

6.15 These have similarities with the protocols adopted in the states and territories, which 'come originally from a draft approved by the Council of Chief Justices of Australia and New Zealand.'[9] However, the grounds upon which judges of inferior courts and magistrates may be removed from office can be broader than those for other judges. Grounds vary from jurisdiction to jurisdiction, and examples include that a magistrate can be removed 'following a Supreme Court determination that "proper cause" exists.'[10]

6.16 For the purpose of this discussion of federal arrangements, the committee considered in detail the Family Court complaint handling process. The Family Court judicial complaints handling policy is readily available on the Family Court website or upon request to individuals. The Family Court detailed its approach to complaint handling in its submission to the committee. As this detail is of particular interest to the committee in considering the adequacy of judicial complaint handling it has been repeated in full in the box below.[11]

Family Court Complaint Handling Protocol

6.17 The Family Court takes seriously complaints about judicial officers or about the administration of the Court and the conduct of its staff. The policy does acknowledge the importance of the public providing feedback about judicial conduct so that the Chief Justice and the judge concerned may deal with the complaint appropriately.

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7 Registrar and Chief Executive Officer, Federal Court of Australia, *Submission 3*, p. 3.

8 For example Queensland *Magistrates Act 1991* (Qld), ss 43-46 and South Australia *Magistrates Act 1983* (SA), ss 10-12 have this provision: *The Laws of Australia* (Thomson), para [19.4.430] quoted in *Additional Information*, Parliamentary Library, Client Memorandum, *Complaints Against Judges*, 6 November 2009, p. 10.

9 Justice McColl, *Committee Hansard*, 13 July 2009, p. 2.

10 *Additional Information*, Parliamentary Library, Client Memorandum, *Complaints Against Judges*, 6 November 2009, p. 8.

11 The following information is taken from Family Court and Federal Magistrates Court, *Submission 8*, pp 12 to 15.

6.18 Family law, by its very nature, generates unhappiness and discontent amongst those who are involved in the processes. Certainly not all litigants feel satisfied with the outcome of proceedings. Because of the highly personal and emotional nature of family law litigation the parties are not necessarily able to satisfactorily comprehend the way in which the processes have worked and frequently their ability to make rational decisions is impeded. This situation is aggravated where the litigant is self-represented.

6.19 The Deputy Chief Justice, on behalf of the Chief Justice, has primary responsibility for the management of complaints against judicial officers and is assisted in the consideration and investigation of the complaints by a Judicial Complaints Adviser (a legally qualified Registrar of the Family Court). The first step in the process is for an assessment to be made of the complaint to ensure that it is about the conduct of the judicial officer, rather than the result of a judicial decision or a matter in proceedings which might be raised as a ground of appeal. Care is taken to ensure that if the complaint is primarily about the result of a judicial decision the complainant is advised immediately about his or her rights of appeal.

6.20 Many complainants wrongly believe that the Chief Justice can interfere and overturn the decision of a Trial Judge independently of the appeal system. Such instances need to be identified quickly and the complainant advised of his or her appeal rights under the *Family Law Act 1975* (Cth).

6.21 Once the nature of the complaint has been identified, an appropriate initial response acknowledging the complaint is provided as soon as practicable. If the complaint pertains to conduct of a judicial officer, a detailed consideration of the proceedings may be undertaken. This may involve an examination of the transcript or a review of the available audio of the proceedings.

6.22 A detailed and comprehensive reply is then prepared by the Judicial Complaints Adviser, and is reviewed and settled by the Deputy Chief Justice. In certain circumstances, the judge concerned will be sent a copy of the complaint by the Deputy Chief Justice and invited to respond should the Judge wish.

6.23 Depending on the focus of the complaint, the response may also provide explanation about such matters like:

- the manner in which judicial appointments are made;
- the doctrine of the separation of powers and the role of the Judiciary in that context;
- the oath or affirmation a Judge is required to take before the Chief Justice of the Family Court (or another Judge);
- the professional training or experience of Judges of the Court;
- the power of the Court to make decisions when an application is made to the Court, based on findings of fact pertaining to relevant evidence presented to

the Court; or

- the ability of individuals to request Judges disqualify themselves (through the filing of an appropriate application) because of a real possibility of biased or prejudiced mindset being brought by the Judge to the determination of an application, or that there might be a conflict of interest.

6.24 Complaints about perceived administrative deficiencies may be made through the Family Court's complaint process and will be investigated and dealt with accordingly. Complaints about the delay in the delivery of judgments, by protocol, are made through the relevant State or Territory Law Society or Bar Association. This ensures that anonymity for the person enquiring is maintained and that any perception there might be prejudice against that person in the construction and delivery of the judgment is obviated.

6.25 Importantly, if a complaint might have an adverse effect on the disposition of the matter which is currently before the Court, a response to the complaint may be deferred until after the final determination of the matter. The complainant would ordinarily be advised of this course of action.

6.26 The Family Court also has a general feedback complaints policy which explains what action an individual may take in relation to perceived administrative failures. It provides that 'complainants who are dissatisfied with the Family Court's response in relation to administrative issues may seek an internal review within the Family Court.'[12]

6.27 The Federal Magistrates Court has advised that it has similar complaint handling policies for both judicial and administrative complaints.[13]

6.28 The committee commends these courts for their continuing commitment to transparent and effective complaint handling.

6.29 The Family Court protocol is reproduced above, and the Federal Court protocol and the Federal Magistrates Court *Judicial Complaints Procedure* are attached at Appendix 8. A copy of each of the policies is also available on the website of the respective court. As noted in chapter 2 of this report, the High Court does not have a written complaint handling policy.[14]

12 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

13 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

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

Evidence to the committee

6.30 The Law Council of Australia is of the view that the current system of judicial complaint handling established by section 72 of the Constitution supplemented by complaint handling policies is working well. The Council has stated:

> The Federal Courts have each established effective informal complaints handling mechanisms with usually the head of the jurisdiction being ultimately responsible for deciding the response to a complaint. The Law Council believes that these existing mechanisms of dealing with complaints have operated successfully.[15]

6.31 The Law Council notes that the protocols recognise 'the constitutional limitations and safeguards' for dealing with complaints against the judiciary so they cannot provide a mechanism for disciplining a judge. However, the Chief Justice is nonetheless able to 'advise, warn, and take appropriate administrative steps' in relation to alleged misconduct.[16]

6.32 The courts themselves are not as sanguine about the current system. While of the view that the existing protocols have promoted judicial accountability, they are open to improving the current system while also ensuring judicial independence.

6.33 Senior judges have pointed to a lack of options for dealing with complaints against members of their courts. For example, Chief Justice Wayne Martin of the Supreme Court of Western Australia's experience is:

> 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.[17]

6.34 The Chief Justice of the Family Court addressed the issue directly with the committee when asked if she is entirely comfortable about the responsibility of the head of jurisdiction in complaint handling or whether there is an argument for going outside the court system:

> I am not entirely comfortable. I think if you asked any of the heads of jurisdiction of any of the jurisdictions they would say they were not. I think

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15 Law Council of Australia, *Submission 11*, p. 10.

16 Law Council of Australia, *Submission 11*, p. 10.

17 *Additional Information*, Chief Justice Wayne Martin, letter to the then WA Attorney-General the Hon Jim McGinty MLA, dated 10 November 2006, p. 2.

> the Judicial Commission of New South Wales works extremely well because the responsibility is removed from the Chief Justice. If we could have some sort of a commission then I would be in favour of it.
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> …
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> I am aware of the discussions that are going on at the Standing Committee of Attorneys-General and between the Council of Chief Justices and the Attorney-General's Department about a commission. I just think it is a long way off—desirable, but a long way off.[18]

6.35 Interestingly, Chief Justice Bryant and Chief Federal Magistrate Pascoe have proposed developing a joint complaints oversight committee between the two courts. The purpose of the oversight committee is to provide a second tier of review for complaints made against judicial officers.[19]

6.36 The suggestion for a new approach to complaint handling apparently arose from a desire to adopt some elements of the New South Wales Judicial Commission approach by providing some independent scrutiny of complaints. Federal Chief Magistrate Pascoe explained that the proposed 'oversight committee' model would provide the opportunity to incorporate, for example, a very experienced retired judge and perhaps [a person with] other qualifications such as psychology.[20]

6.37 In addition to allowing complainants to 'feel that they were being heard by an external party who would have a completely independent view'[21] it is anticipated that the panel would also 'build up some expertise in the sorts of complaints that occur in family law and maybe help [the Family Court and Federal Magistrates Court] to develop some further protocols on, if necessary, changing court procedures or making judicial officers aware that some things may be done unwittingly which can offend or upset some litigants.'[22]

6.38 The preliminary idea has been given careful thought by the Chief Justice and the Chief Federal Magistrate and has been developed to quite a level of detail. The Chief Justice explained:

> I have in mind that the committee might have on it the Ombudsman—I am not sure as to the Constitution but it probably would not have me. In a sense that committee could then review. They would have to be careful about the wording because they would not have any disciplinary powers either. But it could review the first letter and, if they want, they could make recommendations that something further be done—another letter be written, an apology be made or even an ex gratia payment or something could be

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18 Chief Justice Bryant, *Committee Hansard*, 12 June 2009, p. 58.

19 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

20 *Committee Hansard*, 11 June 2009, p. 43.

21 Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 43.

22 Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 46.

> made in cases like that. This would just add a bit more transparency to the process for the public.[23]

Other submissions

6.39 A significant number of submissions to the committee sought to put forward detailed case histories, and most recalled circumstances that would lend themselves to at least a chance of resolution if a judicial commission were available. While the committee does not suggest that the majority, or even many, submitters would be likely to meet with success through a judicial commission process as discussed in the preceding section, it is likely that a significant number would find solace from at least having their complaints reviewed through an independent process.

6.40 Many submitters relating personal experiences were received in camera, and cannot be quoted, but they commonly displayed disaffection with the judicial process and frequently with individual judges. Submission 32 to the inquiry alleges that a judge failed to recuse himself in spite of a personal relationship with a respondent to a matter in which the author, the applicant, was unsuccessful. While acknowledging that unsuccessful litigants are often frustrated by decisions going against them, the author contends that there is a possibility that the judge was biased by virtue of his personal relationship, and considered that:

> If a judicial commission were available to review the conduct of judicial officers, this uncertainty could be clarified and litigants would know whether they had received a decision from an impartial judge.[24]

6.41 Some other examples provided to the committee were by a member of the committee, Senator Heffernan. Some of the types of matters of concern to Senator Heffernan were outlined by him during the public hearing process in the following terms:

> For instance, in a hypothetical situation, where there is police information and surveillance et cetera coming in, where police gain information of a judge who may have assisted in the writing of a submission to a court and that judge eventually sat in judgment of that submission when it appeared in court. If that sort of information came to the police, there is nothing in the present system the police can do about it.[25]

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23 Chief Justice Bryant, *Committee Hansard*, 12 June 2009, p. 57.

24 *Submission 32*, p. 2.

25 *Committee Hansard*, 12 June 2009, p. 90. The committee notes that a number of witnesses expressed the view that there are remedies available in the matter of a judge assisting with writing a submission and then sitting in judgment on the case. For example, see the evidence of Justice Lasry and Mr McGowan of the International Commission of Jurists, Victoria, *Committee Hansard*, 12 June 2009, pp 10 and 11.

6.42 Mr Ernest Schmatt, Chief Executive of the Judicial Commission of New South Wales, gave evidence on the role of the Commission in relation to interviewing potential complainants:

> If those people make an appointment and see me, I will spend time with them. I will listen to their grievance. I have been in practice for a long time and I am very familiar with all the court processes, so I can usually determine from what they are saying what their real grievance is about. Many of them are complaining about their solicitor or their barrister and, if that is the case, I can refer them to the appropriate authorities. Some of them have a complaint about other people who are really not even involved, so I can point them in the direction. I obviously do not give any legal advice. Many people are just looking for an appeal. Again I would not give them legal advice but what I would say to them is that they should seek some independent advice as to what appeal rights may be available to them. Most of those people go away happy. They have had somewhere where they can air their grievance that has not been a formal complaint but it has been dealt with, in my opinion, effectively. I sometimes do that by telephone calls as well.[26]

6.43 Mr Schmatt also pointed out that the Commission benefited both the complainant and the judicial officer. He said the Commission:

> [P]rovides people who have a grievance with a place where they can take their grievance and it will be properly investigated by an independent body. It also protects judges from scurrilous complaints because, during that preliminary investigation stage, everything is dealt with in private so there is no harm done to the reputation of the judicial officer.[27]

Committee view

6.44 It is of particular interest to the committee that not only did individuals relate experiences with the justice system which left them feeling strongly that current avenues of complaint are seriously inadequate, but also that courts themselves are seeking to establish more sophisticated processes for dealing with complaints. It seems to the committee that courts find themselves dealing with a range of complaints and that processes currently available to them are inadequate in many ways.

6.45 Even when a court has detailed its thorough approach to complaint handling (such as the Family Court procedure discussed above) this still does not address the concern that it is the judges who are judging the judges.[28] In addition, even when a process exists, it is questionable whether a system with a limited statutory framework and a constrained ability to deal with complaints is adequate.

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26 *Committee Hansard*, 11 June 2009, p. 62.

27 *Committee Hansard*, 11 June 2009, p. 63.

28 For example, see the evidence of Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 43 that, 'Sometimes the view is expressed that the court receives the complaint about the court and does not deal with it in the same way that a truly external party would do.'

6.46 In the committee's view it is important to ensure that there is a complete statutory framework for termination that is principled and comprehensive. Along with thorough and appropriately transparent appointment processes and terms of appointment, the committee's vision is for an updated system from which to continue to build an impressive judicial model that brings with it the benefit of a national approach but properly preserves the unique aspects each jurisdiction wishes to retain.

6.47 It is not enough to have a judicial system that only deals with misbehaviour at the level of serious misconduct or incapacity. Any robust complaint handling mechanisms need to be able to deal appropriately with conduct that falls short of these levels of conduct, but which is nonetheless undesirable or inappropriate. Of course, an appropriate complaint handling system is one that is balanced with safeguards for judicial independence.

6.48 The committee is persuaded that because of the simplicity of the conduct requirements in section 72 there are legislative gaps in the existing arrangements. In the first place the section does not address the process required for any inquiry into serious misconduct or incapacity. Secondly, there are no statutory arrangements for dealing with less serious complaints of judicial misconduct. Courts are left to adopt informal mechanisms and have no specific investigative or complaint handling resources or expertise.

6.49 Although to date there appears to have been no disastrous outcomes from the existing arrangements, it is apparent that there is the potential for this to occur. The committee is also mindful of the opportunity to build on the strong foundations of our existing judicial system to equip judicial officers with best practice arrangements for the next 100 years.

6.50 In the committee's view the Family Court and Federal Magistrates Court suggestion to develop a more sophisticated approach to complaint handling by introducing an 'oversight committee' is commendable. However, it seems to the committee that there is still a question about whether permanent alternative arrangements, such as an established judicial commission, would be preferable. This is discussed in detail in the next chapter.