

# CHAPTER 7

## A Judicial Complaints Commission?

7.1 Based on the discussion of current arrangements for judicial complaint handling in the previous chapter, it is obvious to the committee that there are flaws in the current federal constitutional model and not everyone is satisfied that the existing processes adequately deal with all types of complaints about judicial conduct. As Sir Anthony Mason has noted:

...the constitutional procedure does not address cases of misconduct or incapacity which are incapable of justifying removal. A judge may be guilty of delay, discourtesy, gender bias or of less serious misconduct which does not justify removal but could merit an expression of disapproval, a caution or counselling by a head of jurisdiction.<sup>1</sup>

7.2 As discussed in chapter 6, there are also difficulties for those involved in responding to complaints because heads of jurisdiction have no formal authority to discipline judges. Professors Mack and Roach Anleu observed that:

In general in Australia, there is no formal process for addressing judicial misconduct which does not justify removal. Traditionally, when a judge or magistrate is not performing up to standard, it is the role of the chief judicial officer of the court to address the matter internally and informally.<sup>2</sup>

7.3 Furthermore, if conduct is serious enough that, if proven, it would constitute statutory misbehaviour there are no statutory guidelines that should be followed to ensure that any investigative process is appropriate. It seems to be preferable to have procedures in place before any allegation arises to avoid arguments about procedural fairness or inappropriate political influence.

7.4 With the evolution of a more sophisticated understanding of the features of a comprehensive complaints handling system, the committee believes it is timely to address all of these issues. The committee acknowledges that the existing arrangements have provided a solid footing and have, in the main, served the Australian community well since federation. However, it is appropriate for our judicial system to continue to evolve to meet increasingly sophisticated circumstances and community standards.

7.5 The accumulated evidence before the committee suggests that there may be an important role for a federal or national judicial complaints commission. This issue is considered in detail in this chapter. In doing so it is relevant for the committee to:

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1 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin, Ireland, 6 May 2000, p. 112.

2 Flinders University Judicial Research Project, *Submission J4*, p. 11.

- explore the main judicial complaint handling options;
- consider existing models; and
- consider establishing a permanent federal or national judicial complaints body, including arguments against this approach, the possible role and functions of such a body and the constitutional issues faced.

7.6 Mindful of the fact that setting up a new complaints commission is a significant undertaking, the committee also considers in this chapter whether it would be worthwhile to implement an interim investigative process so that, if needed, an effective *ad hoc* inquiry could be established at short notice to assist parliamentary consideration of a complaint.

### **Judicial complaint handling options**

7.7 The main options for federal judicial complaint handling are:

- retaining the current statutory arrangements without establishing any additional procedures;
- establishing a permanent judicial complaints handling body; and
- supplementing the existing arrangements with additional investigative processes.

7.8 The first option - retaining the current statutory arrangements without establishing any additional procedures – is not favoured by the committee because it is persuaded that the existing system could be significantly improved. Therefore, the committee considered alternative approaches. Of great interest to the committee was whether establishing a permanent judicial complaints handling body is warranted.

### **Should a federal or national complaints handling body be established?**

#### ***Existing and proposed models***

##### *Judicial Commission of New South Wales*

7.9 Many submitters referred the committee's attention to the role of the Judicial Commission of New South Wales (JCNSW). The committee was fortunate to receive evidence from Mr Ernest Schmatt PSM, the Chief Executive of the JCNSW since its inception and to have visited the commission at its premises in Sydney.

7.10 As the Law Society of New South Wales observed about the commission:

The NSW Judicial Commission has provided a suitable complaints handling system for the judiciary. A similar system federally would be desirable...<sup>3</sup>

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3 Law Society of New South Wales, *Submission 7*, p. 1.

7.11 The JCNSW is the only permanent body in Australia to which the public can raise concerns about the ability or behaviour of a judicial officer. It was announced by the New South Wales government in 1986 and it commenced operation in 1987. Its introduction was highly controversial and apparently generated 'heated exchanges in Parliament and between the Chief Justice of the Supreme Court...and the Attorney-General...Members of the judiciary and the legal profession, watching from the sidelines, wondered whether it could work.'<sup>4</sup> It has not only worked well,<sup>5</sup> but has now 'established a reputation as one of the leading institutions of its kind in the world'.<sup>6</sup>

7.12 An unusual feature of the JCNSW is that its role is not limited to complaint handling, it has three principal functions:

The first is to provide a scheme of ongoing education and training for judicial officers. The second function of the commission is to monitor sentencing in New South Wales and provide sentencing information to the courts to assist in achieving consistency in approach to sentencing. The third function of the commission is to examine complaints about the ability and behaviour of New South Wales judicial officers. The term 'judicial officers' covers both judges and magistrates...<sup>7</sup>

7.13 As Chief Justice Spigelman of the New South Wales Supreme Court has observed:

...[the] fact that the same institution provides assistance to judges in a form and at a level of quality that has been universally regarded as exceptional, has had a lot to do with the acceptance by the judiciary of the complaints handling function by the Commission.<sup>8</sup>

7.14 For the purposes of this inquiry the most important of the three functions is 'to examine complaints about the ability and behaviour of New South Wales judicial officers.' The committee received briefing documents about the commission from Mr Schmatt: *The judicial commission of New South Wales and Complaints against judicial officers*.<sup>9</sup>

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4 Judicial Commission of New South Wales, *From controversy to credibility: 20 years of the Judicial Commission of New South Wales*, 2008, p. 1.

5 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin, Ireland, 6 May 2000, p. 111.

6 *Additional Information*, Mr Ernest Schmatt PSM, Chief Executive, *The Judicial Commission of New South Wales*, received by the committee on 10 June 2009, p. 3.

7 Mr Schmatt, *Committee Hansard*, 11 June 2009, p. 51.

8 As quoted in the Judicial Commission of New South Wales, *From controversy to credibility: 20 years of the Judicial Commission of New South Wales*, 2008, p. 3.

9 *Additional Information*, Mr Ernest Schmatt PSM, Chief Executive, *The Judicial Commission of New South Wales and Complaints against judicial officers* both received by the committee on 10 June 2009.

7.15 It is relevant to this inquiry to outline in detail the operation of the complaint handling function:<sup>10</sup>

- A complaint may be made by any member of the public (including another judicial officer) or referred by the NSW Attorney-General. On receiving a complaint in an appropriate form, the JCNSW is required to conduct a preliminary investigation. On the basis of this, the JCNSW may summarily dismiss the complaint; classify the complaint as 'minor'; or classify it as 'serious'. The JCNSW considers a complaint 'serious' where, if substantiated, the grounds would justify parliamentary consideration of the removal from office of the judicial officer in question. Where a complaint is considered 'minor' it may be referred to the appropriate head of jurisdiction or to the Conduct Division.
- All serious complaints are referred to the Conduct Division, a panel made up of two judicial officers and one community representative nominated by Parliament.<sup>11</sup> The Conduct Division must prepare a report to the Governor after investigating the complaint, setting out the Division's conclusions. The Conduct Division has all the powers of a royal commission. It may determine its own procedures, including whether the hearing takes place in public or private, and it may request the judicial officer to undergo a specified medical or psychological examination. If the judicial officer resigns, the panel must cease to hear the complaint.
- In cases where a complaint is wholly or partly substantiated, and the Conduct Division is of the view that the matter may justify parliamentary consideration of the removal of the judge or magistrate from office, the Attorney-General must lay the report before both Houses of Parliament.
- The JCNSW ordinarily does not consider allegations of criminal conduct (for example, corruption), which are left to prosecuting authorities (including the NSW Independent Commission Against Corruption).
- The JCNSW investigates complaints but has no power to impose penalties or otherwise discipline judicial officers. Serious complaints may result in parliamentary action. Less serious matters may result in

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10 This description is drawn from information in the Australian Law Reform Commission *Discussion Paper 62, Review of the Federal Civil Justice System*, paragraphs 3.140 to 3.147; *Additional Information*, Mr Ernest Schmatt PSM, Chief Executive, *The Judicial Commission of New South Wales*, received by the committee on 10 June 2009; the *Judicial Officers Act 1986* (NSW); and the evidence given to the committee by Mr Ernest Schmatt, *Committee Hansard*, 11 June 2009, p. 52.

11 *Judicial Officers Act 1986* (NSW), s 22. A community representative must be a person of high standing in the community nominated by Parliament in accordance with Schedule 2A: s 22(2)(b). The inclusion of a community representative on the Conduct Division occurred in July 2007 with the commencement of the *Judicial Officers Amendment Act 2007* (NSW).

action by the head of the relevant jurisdiction, such as counselling or making new administrative arrangements to deal with the source of the problem. There is no provision for a judicial officer found to be performing unsatisfactorily – but perhaps not so poorly as to warrant outright dismissal – to be required to undertake a program of judicial education, but this could potentially be considered in a national scheme.

7.16 All complaints made to the commission must be considered at a meeting of the commission, known as the preliminary examination (referred to above). There are 10 members of the commission, comprising six judicial members (the head of jurisdiction of the five NSW courts plus the President of the Court of Appeal), a representative of the barristers and solicitors and there are three community representatives. These 10 people are required to make decisions about each complaint made to the commission, by majority.<sup>12</sup>

7.17 In relation to complaints, Mr Schmatt emphasised to the committee that the investigation of complaints is focused on the ability and behaviour of judicial officers – criminal conduct and alleged corrupt behaviour are usually the responsibility of other bodies.<sup>13</sup> In addition, the commission cannot initiate investigations, but once a complaint has been made in the required form, the commission's legislative power includes the ability to examine complaints about matters that occurred prior to appointment to office if the matter complained of, if substantiated, would justify removal.<sup>14</sup>

7.18 The detail of the preliminary examination process outlined by Mr Schmatt in evidence included the following points<sup>15</sup>:

- all complaints made to the commission must be lodged with the chief executive who first notifies the judicial officer of the complaint and provides him or her with a copy;
- the chief executive then decides how to investigate the particular matter – whether to obtain court records, including the court file, transcript or sound recordings; whether other written information is relevant; and whether to interview witnesses and take statements. The chief executive utilises retired senior judicial officers to assist in preparing the information to go before the commission;<sup>16</sup> and
- all information is collected and analysed and referred to a formal meeting of the commission to determine what should happen with the complaint.

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12 Mr Schmatt, *Committee Hansard*, 11 June 2009, p. 56.

13 *Committee Hansard*, 11 June 2009, p. 51.

14 Mr Schmatt, *Committee Hansard*, 11 June 2009, p. 54.

15 Taken from Mr Schmatt's evidence to the committee, *Committee Hansard*, 11 June 2009, p. 52.

16 This point was made in evidence by Mr Schmatt: *Committee Hansard*, 11 June 2009, p. 62.

7.19 In addition to complaint handling, the other functions of the commission referred to above relate to consistency in sentencing and judicial education. All of these roles are interrelated and Mr Schmatt's view is that this builds public confidence in the commission:

I think all of the functions of the commission lead to public confidence in a number of ways: through the complaints function, in that, if a person has a grievance, it will be properly dealt with; in the fact that decision-making takes place by people who are well-educated and who participate in an ongoing program of professional development; and in the fact that there is very valuable sentencing information provided to the courts to achieve a greater consistency in the process of sentencing.<sup>17</sup>

7.20 The JCNSW has used its role to assist courts to achieve consistency in sentencing to develop a world's best practice approach. The foundation of the commission's success centres on the Judicial Information Research System, which is a particular feature of the JCNSW. The system is known as JIRS and is 'a computerised database containing legally and statistically relevant information on sentencing'. As described by Mr Schmatt:

JIRS is the first of its kind in Australia and is a world leader in the field of computerised sentencing databases. It is an extensive, interrelated and hypertext linked sentencing resource that provides discrete modules of reference material. The object of the JIRS is not to limit the sentencing discretion of each judicial officer. Its purpose is to provide judicial officers with rapid and easy access to the collective wisdom of the courts in order to assist them with their sentencing decisions.<sup>18</sup>

7.21 JIRS includes a number of impressive components:

- sentencing statistics;
- case summaries;
- judgments;
- sentencing principles and practice;
- services directory (rehabilitation facilities that may be relevant to an offender facing sentencing);
- advances notes (case summaries);
- electronic bench books; and
- legislation<sup>19</sup>

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17 *Committee Hansard*, 11 June 2009, p. 66.

18 *Additional Information*, Mr Ernest Schmatt, PSM, Chief Executive Judicial Commission of New South Wales, *The Judicial Commission of New South Wales*, tabled on 10 June 2009, p. 7.

19 *Additional Information*, Mr Ernest Schmatt, PSM, Chief Executive Judicial Commission of New South Wales, *The Judicial Commission of New South Wales*, tabled on 10 June 2009, pp 7 and 8.

7.22 The database also contains features that are applicable to the research requirements of other courts, such as the Land and Environment Court, and publications.<sup>20</sup>

7.23 The third major commission function relates to judicial education. Mr Schmatt has summarised the education function of the JCNSW as follows:

To ensure that the Commission's scheme of judicial education and training remains relevant and functional, an on-going process of consultation with judicial officers takes place regarding the most appropriate content and direction of their education programmes. Three key factors taken into account in this consultation process and in the development of education and training programmes are the:

- professional experience of judicial officers;
- needs of different jurisdictions; and
- education and training requirements of new judicial officers.<sup>21</sup>

7.24 The development of the education program is also influenced by the *judicial education committees* established in each court in New South Wales and the education program is supplemented by an active publishing program which includes:

- bench books (working aids or practice and procedure manuals);
- judicial officers' bulletin (a monthly publication that includes significant recent decisions, legislative changes and major developments of interest); and
- judicial review (a collection of papers from judicial education programs, including the JCNSW program).<sup>22</sup>

7.25 Mr Schmatt also emphasised that one aspect relating to the structure of the commission that he considers to be essential to the independence of the JCNSW (and has been central to its success) is that the Chief Executive and the staff of the commission are not employed by the executive government. Mr Schmatt explained:

I am employed by the 10 members of the Judicial Commission. I am employed under the Judicial Officers Act; I am not a public servant in the usual sense. When the Judicial Officers Act was first enacted in 1986, the staff of the commission were to be public servants employed under the Public Service Act. The then Chief Justice, Sir Laurence Street, and the judges of the Supreme Court were very much opposed to that, due to the fact that this was an intrusion into judicial independence, and I totally agree

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20 *Additional Information*, Mr Ernest Schmatt, PSM, Chief Executive Judicial Commission of New South Wales, *The Judicial Commission of New South Wales*, tabled on 10 June 2009, p. 8.

21 *Additional Information*, Mr Ernest Schmatt, PSM, Chief Executive Judicial Commission of New South Wales, *The Judicial Commission of New South Wales*, tabled on 10 June 2009, p. 4.

22 *Additional Information*, Mr Ernest Schmatt, PSM, Chief Executive Judicial Commission of New South Wales, *The Judicial Commission of New South Wales*, tabled on 10 June 2009, p. 6.

that it would have been. There was an amendment in 1987 to constitute the commission as a statutory corporation and to give it total independence from the executive government—and the Judicial Commission is part of the judicial arm of government, not part of the executive arm of government. Without the independence that the commission was given at that time and has enjoyed from the time it has existed, we would never have been able to get to the point where we are today.<sup>23</sup>

7.26 To undertake all of its functions the budget of the JCNSW is approximately \$5.1 million.<sup>24</sup>

7.27 In giving evidence to the inquiry, Justice McColl of the Supreme Court of New South Wales noted that '...in New South Wales, a judicial commission has been established for some two decades or so. It was originally the subject of opposition by then members of the judiciary. It has worked very well in practice.'<sup>25</sup> Federal Chief Magistrate Pascoe also advised the committee that he supports the establishment of a body like the NSW Judicial Commission in the federal sphere.<sup>26</sup>

#### *Western Australia proposal*

7.28 The Chief Justice of the Supreme Court of Western Australia, Wayne Martin, has a long-standing interest in the establishment of a judicial commission for Western Australia.<sup>27</sup> This culminated in a formal proposal to the Western Australian Attorney-General in 2006, which Chief Justice Martin has kindly made available to the committee.

7.29 Chief Justice Martin proposed that WA adopt a judicial commission modelled on the JCNSW, including the local corruption investigation body retaining its jurisdiction. Chief Justice Martin seeks to extend the jurisdiction of any judicial commission to include the specialised WA State Administrative Tribunal. The Chief Justice's proposal was developed to such an extent that he even prepared a draft Bill for the possible creation of a judicial commission for WA.<sup>28</sup>

7.30 There has been no formal response to this proposal. Mr John Staude, Law Society of WA, commenting on the proposed WA reform noted that this did not appear to be due to any particular resistance to the proposal or flaw in the suggestion:

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23 Mr Schmitt, *Committee Hansard*, 11 June 2009, p. 64.

24 Mr Schmitt, *Committee Hansard*, 11 June 2009, p. 56.

25 *Committee Hansard*, 11 June 2009, p. 6.

26 *Committee Hansard*, 11 June 2009, p. 39.

27 Chief Justice Martin is also the current Chair of the Council of the National Judicial College of Australia.

28 The Bill was referred to in *Additional Information*, Chief Justice Wayne Martin, letter to the then WA Attorney-General the Hon Jim McGinty MLA, dated 10 November 2006, p. 6.



I do not think that the judicial commission concept was one that was opposed for any particular reason by anyone in the last government, nor I do not think there would be any reason for anyone in the present government to oppose it. But I suspect it is a question of legislative priorities and resourcing, and that in the context of a situation which has not so far presented any hard cases probably explains why the matter has not been progressed locally.<sup>29</sup>

### *Victorian consideration of ways to address less serious complaints*

7.31 On 12 November 2000 the Victorian Government released a discussion paper to assist it to 'explore potential processes to address less serious complaints about judicial misconduct and unprofessional behaviour; as well as issues of ill health and competency if a judicial officer becomes unable to continue with the full range of judicial duties.'<sup>30</sup> The three options on which the government is seeking comment are:

- Option 1 – retain the status quo;
- Option 2 – increase or clarify the powers and duties of heads of courts; and
- Option 3 – establish an independent complaints body.

7.32 The government has sought submissions by 18 December 2009.

## **A federal judicial commission?**

### *Support for a federal judicial commission*

7.33 The Chief Executive of the JCNSW speaks with the voice of 20 years of experience when he comments on the effectiveness of that judicial commission:

It provides 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. It is only if the matter is ever before a conduct division that it will ever be a public hearing. I also think that the education programs of the commission—and I would add in the sentencing function there as well, because that is education; if you are getting better sentencing results and greater consistency in approach to sentencing there is a huge benefit to the community of New South Wales.<sup>31</sup>

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29 *Committee Hansard*, 13 July 2009, p. 10.

30 *Investigating complaints and concerns regarding judicial conduct, Discussion Paper*, Department of Justice, State Government of Victoria, November 2009, foreword.

31 Mr Schmitt, *Committee Hansard*, 11 June 2009, p. 63.

7.34 Chief Justice Bryant of the Family Court indicated that she could understand the perception that the current approach, in which the only method of complaint handling for the majority of complaints (those which do not warrant removal from office) is that senior judges informally counsel those complained of, seems self-serving:

I am certainly aware that, as far as the public is concerned, it cannot be seen by the public to be a particularly transparent process when the Chief Justice is the one looking at complaints about their own court.<sup>32</sup>

7.35 In expressing his support for a federal judicial commission, Federal Chief Magistrate Pascoe told the committee:

I think one of the problems for me in dealing with complaints is that there is a misunderstanding as to what the head of jurisdiction can actually do, and I often get letters from people who are asking me to reverse a decision of a federal magistrate or to interfere in some way in the manner in which proceedings are conducted in his or her court. Obviously, these are not matters for me. In fact, the head of jurisdiction has very limited ability to deal with complaints.<sup>33</sup>

7.36 In addition to the limited ability to deal with complaints, the current system places an unnecessary burden on the relationship between the head of jurisdiction and the judges of the court. In the view of Federal Chief Magistrate Pascoe, a federal judicial commission would assist a head of jurisdiction to deal with complaints:

My understanding is that the commission in New South Wales is well placed to offer counselling and advice to judicial officers, which, in some instances, may be better received from members of an outside body than the head of jurisdiction.<sup>34</sup>

7.37 Lawyers also see the opportunity to improve the legal system. As Mr Peter Faris QC explained to the committee:

I believe there should be a Federal Judicial Commission.

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As things stand, there is no satisfactory system for making complaints against Federal Judges (or for that matter, Victorian judicial officers). It is very difficult for lawyers to do so for fear that, consciously or unconsciously, they will be "punished" or suffer future prejudice from the judge in question or his colleagues...

When I have had serious concerns about the conduct of a judge, I have resolved the matter by approaching the bar association who, in turn, may speak informally to the Chief Justice or to the judge himself. This is no

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32 *Committee Hansard*, 13 June 2009, p. 57.

33 *Committee Hansard*, 11 June 2009, pp 39 and 40.

34 *Committee Hansard*, 11 June 2009, p. 42.

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substitute for a proper formal complaint. It is also not really available to members of the public. It has no transparency and accountability.<sup>35</sup>

7.38 A commission can provide a 'gatekeeper' role for complaint assessment, and can provide first investigative resources and expertise and later, if a complaint is worthy of further action, authority to heads of jurisdiction when the matter is referred to them for action (such as counselling). Indeed, it was put to the committee that the existence of a commission could, of itself, improve judicial behaviour:

Such a commission would do two things: it would give me an avenue where I could do something about it, but also the fact that the avenue exists would improve conduct. The deterrent factor, I think, is important.<sup>36</sup>

7.39 It also can be of assistance in dealing with very serious allegations, such as a hypothetical example raised with the committee by Chief Justice Bryant:

We talked about an for example where the Chief Justice finds out there is an allegation of sexual assault or paedophilia or something on the part of a judge. They are the difficult ones for heads of jurisdiction. What do you do? Do you go to the judge and ask them about it? You might be interfering with a police investigation. Do you go to the police and not tell the judge?<sup>37</sup>

7.40 The committee noted, however, that despite these examples the Chief Justice does not personally think that duplicating the JCNSW is necessary.<sup>38</sup>

7.41 Another benefit of a judicial commission articulated by Professor Williams of the Gilbert + Tobin Centre relates to the ability to deal effectively with unwarranted complaints.

I also see that one of the advantages of having a complaints process is to deal with illegitimate complaints... Sometimes you can see there is no basis whatsoever but there is no way for those people to get satisfaction that their issue is being properly looked at, and also no possibility for the judge concerned to have a process to determine that there has been no wrongdoing and no basis for the complaint. I think it is both a matter of real complaints being dealt with and the ones that do not have substance equally being disposed of.<sup>39</sup>

7.42 Interestingly, the Attorney-General's Department has advised the committee that a Standing Committee of Attorneys-General working group is currently

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35 Mr Peter Faris QC, *Submission 12*, p. 2.

36 *Committee Hansard*, 12 June 2009, p. 83.

37 *Committee Hansard*, 12 June 2009, p. 59.

38 *Committee Hansard*, 12 June 2009, p. 60.

39 *Committee Hansard*, 11 June 2009, p. 33.

examining '...the feasibility of a national judicial complaints handling mechanism to facilitate consistent handling of complaints across jurisdictions.'<sup>40</sup> In particular:

The SCAG working group is considering a range of options for a national mechanism for handling complaints against judicial officers including the adoption of a consistent set of rules, procedures and standards and an appropriate complaints handling body. The working group's recommendations will assist with the Government's deliberations.<sup>41</sup>

7.43 This feasibility study apparently includes an option to establish a single national judicial body to hear complaints against both federal and state judges:

The proposal is that such a body would operate as a division of the National Judicial College of Australia, which would then model future education and training programs for judicial officers around problem areas identified in complaints.

The proposed national judicial complaints body is reportedly being based upon the Judicial Commission of NSW (JCNSW), which has a role in both education and discipline.<sup>42</sup>

7.44 Support for this approach is found in a number of places including the Law Society of New South Wales.<sup>43</sup>

### ***Opposition to a federal judicial commission***

7.45 Justice Lex Lasry, representing the International Commission of Jurists, Victoria, observed in relation to the handling of complaints in different courts that '...I do not understand that there is a significant problem about these issues.'<sup>44</sup> Justice Lasry explained that:

I think the supervision by head of jurisdiction, certainly in our court; the operation of the Judicial College of Victoria and its education program which is very substantial and operates very effectively. I do not perceive that there is a public lack of confidence in the court because of errant judges not being able to be disciplined.<sup>45</sup>

7.46 The Law Council of Australia is also not convinced that that a federal or national judicial commission is needed. The Law Council stated that '...the time is not right to invest considerable effort in this idea. That emerges from a perception of a

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40 *Additional Information*, Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 1.

41 *Additional Information*, Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 1.

42 Law Council of Australia, *Submission 11*, p. 11.

43 Law Society of New South Wales, *Submission 7*, p. 1.

44 *Committee Hansard*, 12 June 2009, p. 6.

45 *Committee Hansard*, 12 June 2009, p. 9.

number of the constituent bodies that there really is not a significant problem.<sup>46</sup> and advised the committee that:

The Law Council is not aware of any clearly articulated policy requirement for the introduction of a national system, nor that a national complaints system would necessarily be the best model to adopt as a replacement to improve upon existing systems.<sup>47</sup>

7.47 In further articulating its opposition to a judicial commission the Law Council explained:

The fundamental issue is how to balance the demand for greater accountability against the maintenance of the independence of the judiciary. It appears that the community's perception of judicial accountability now demands that there should be a procedure enshrined for receiving and investigating complaints against the judiciary. The Law Council believes the existing procedures adopted by the courts perform this function adequately, without incurring unnecessary cost or diverting judicial resources...the view of the Law Council is against a proposed national complaints handling system having regard to the various issues and obstacles discussed below.<sup>48</sup>

7.48 The issues to which the Law Council refer are 'the potential constitutional issues that it may face, the apparent lack of any need for it and the fact that not all [states] are yet willing to commit to such a body.'<sup>49</sup>

7.49 The Law Council also argues that a judicial commission would take up a lot of time and effort.<sup>50</sup> However, Dr Lynch of the Gilbert + Tobin Centre for International Law is not persuaded by this view:

But I would agree that giving people an avenue - and appeal is not often the avenue that they might even be seeking and certainly is not going to be an appropriate one - by which they can make a complaint and have a response from the court system is, I think, very valuable. I would not necessarily see that simply as just being a waste of time because so many of these complaints are going to be baseless.<sup>51</sup>

7.50 Professor Williams is also not persuaded that the cost would be unwarranted. He noted that as the size of the federal judiciary is now so large '...that it is

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46 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 29.

47 Law Council of Australia, *Submission 11*, p. 16. Chief Justice Bryant informed the committee that a recent Council of Chief Justices overwhelmingly expressed the view that there should not be a national judicial commission: *Committee Hansard*, 12 June 2009, p. 64.

48 Law Council of Australia, *Submission 11*, p. 12.

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

50 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 28.

51 *Committee Hansard*, 11 June 2009, p. 33.

appropriate that there is a complaints-handling system and also a system to deal with issues of incapacity' and Professor Williams thinks that '...the costs of not doing it could ultimately be larger when you look at the risk of the damage it can do to the judiciary and also the possibility that judges may remain on the bench when they should no longer do so.'<sup>52</sup>

7.51 Another argument made against the establishment of a commission is that this sort of judicial commission attacks the independence of judges. For example, it was predicted that the JCNSW would 'harass and pressure judges and that the 'official quality and institutional trappings of the complaints procedure will almost inevitably ensure that any complaint...will assume a status and significance which it would not otherwise have possessed.'"<sup>53</sup>

7.52 Mr Peter Faris QC is not persuaded that a properly established judicial commission interferes with the independence of the judiciary:

In my opinion, it does nothing of the sort. Good judges would be the first to acknowledge that they should be held responsible for their conduct. I regard myself as an independent lawyer who is briefed to act in his client's interests: the fact that I am supervised by the Legal Services Commission does not interfere with my independence. This is true of all lawyers.<sup>54</sup>

7.53 Indeed, Chief Justice Martin informed the committee in relation to the JCNSW that:

As I understand it, there was opposition to its creation back in the mid-eighties, but every judge from New South Wales I have spoken to now regards it as having been a very good thing because it in fact provides protection to the judiciary by providing a transparent and independent process which very often vindicates the judicial officer, the subject of the complaint...perhaps counter-intuitively, the creation of the judicial commission in New South Wales has actually strengthened the position of the judiciary in that state in relation to complaints that are made of misconduct.<sup>55</sup>

7.54 The strong judicial criticisms alluded to by Chief Justice Martin in his reference to 'opposition to its creation' included:

- rendering judges vulnerable to harassment and pressure;
- that vexatious complaints could be made to cause a judge to stand aside from a particular case;

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52 *Committee Hansard*, 11 June 2009, p. 34.

53 As quoted in the Judicial Commission of New South Wales, *From controversy to credibility: 20 years of the Judicial Commission of New South Wales*, 2008, p. 3.

54 Mr Peter Faris QC, *Submission 12*, p. 2.

55 *Committee Hansard*, 17 November 2009, p. 6.

- waste of judicial time;
- that a judicial officer could have a complaint determined by a judge of lower rank; and
- that public confidence could be undermined by a process of investigation<sup>56</sup>

7.55 Former Chief Justice Mason of the High Court of Australia in commenting on the JCNSW, offered this response to these objections:

In the opinion both of the present Chief Justice [then Murray Gleeson AC] and his predecessor [Sir Gerard Brennan] as well as Mr Jackson QC (one of Australia's leading Queen's Counsel and a former member of the Commission) the Commission has worked well, effectively and fairly, without endangering the independence of the judiciary, or the reputation of individual judges. Moreover, judicial time has not been wasted.<sup>57</sup>

7.56 It appears that there are two main kinds of objections to the establishment of a federal or national judicial commission:

- in principle objections (such as concern that a commission undermines the independence of the judiciary or that there is no need for one); and
- concern that the cost of establishing a commission is not warranted.

7.57 There will always be people, including learned and reasonable members of the public, legal profession and government, who oppose the establishment of a judicial commission. It seems to the committee that the real question is not whether there is any objection to it, but whether there are persuasive reasons for supporting it. It is ultimately the government's role to determine its view about the relative merits of complaint handling options and their potential value to the community.

### ***Possible role and functions of a Federal Judicial Commission***

7.58 The Gilbert + Tobin Centre has argued for a commission system with a complaint handling function which incorporates the making and hearing of complaints about judges. The Centre's submission notes that two reasons are traditionally given against establishing a body with these powers. In particular:

The first is that there is a hesitancy to create mechanisms which might diminish judicial independence. The second is that the appeal process

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56 Summarised from observations in a paper given by former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 111.

57 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 111.

already provides litigants with an avenue to overturn a judicial decision with which they are dissatisfied.<sup>58</sup>

7.59 The Centre goes on to discredit these arguments:

Neither of these objections stands up to much scrutiny. We reject that a federal judicial commission cannot be designed in such a way that it both preserves the Parliament's constitutional power of removal under s 72 of the Constitution and also protects the courts from political interference. Fears that this is not possible seem to be an overstate[ment]...

7.60 Misconceptions about a judicial complaints body include that the body itself can discipline a judge or that a matter can be overturned. It is clear from the JCNSW that a complaints handling commission does not need to include these features.

7.61 Subject to any constitutional constraints (see further discussion below), the committee strongly favours a body with complaints handling functions based directly on the JCNSW model. The committee also agrees that it could be very useful to consider including all functions of the JCNSW in a federal or national model: that is, its complaints handling, education and sentencing functions.

7.62 It would also be possible to consider some additional powers, but these are not essential. For example, Sir Anthony Mason has suggested that it is an oversight that the New South Wales act does not provide the power to require a judge found to have engaged in misconduct to make an apology.<sup>59</sup>

7.63 At the federal level, establishing a judicial commission gives rise to a question about whether it should be federal or national in scope. It appears to the committee that each approach has advantages and disadvantages. The primary disadvantage of restricting a commission to a federal jurisdiction is that the cost of establishing it may be difficult to justify, but it would be much less complex than implementing a national model. The primary disadvantage of a commission with national jurisdiction is that it would be extremely complex to establish.

7.64 As noted earlier in the chapter, the SCAG consideration 'of a range of options for a national mechanism for handling complaints against judicial officers' includes considering 'a single national complaints handling mechanism through the National Judicial College of Australia as one possible model.'<sup>60</sup> Chief Justice Martin of the Supreme Court of Western Australia is also the current Chair of the Council of the National Judicial Council. Chief Justice Martin is proponent of judicial commissions

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58 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 8.

59 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 114.

60 *Additional Information*, Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 1.



and a supporter of the JCNSW, but he has explained to the committee why there are significant practical hurdles to grafting complaint handling functions onto the National Judicial College's existing role:

If the complaints handling were to focus only on the federal courts then its current governance structure would not be appropriate because the governance structure is essentially aimed at all the courts of the states and territories. So I think you would need quite a separate governance structure if it was to be only focused on the federal courts... if you were to attempt to cover...the other states and territories then I do not think a centralised body would be practical because you would need people on the ground in at least the more populous jurisdictions to actually deal with complainants and resolve their complaints with some local context and knowledge.<sup>61</sup>

7.65 For these reasons Chief Justice Martin favours the establishment of a separate entity,<sup>62</sup> but thinks that whether a commission is established 'at a national level or whether there be separate entities in each jurisdiction cooperating together' is an open question.<sup>63</sup>

7.66 In relation to establishing a national complaints handling commission, Chief Justice Martin noted that 'there are constitutional questions that are raised from time to time about the extent to which such a body is consistent with the independence of the Commonwealth judiciary under chapter III of the Constitution.'<sup>64</sup> These issues are considered in the next section of this chapter.

### ***Constitutional issues***

7.67 Consideration of establishing new federal judicial complaint handling arrangements necessarily requires consideration of the constitutional limits, if any, that would currently constrain reform of the judicial system. As the Federal Court has noted:

Proposals for any judicial complaints system necessarily involve issues that go to the very core of the constitutional principles of the separation of powers embodied in Chapter III of the Constitution. These issues must be kept very firmly in mind and are unlikely to have easy or clear answers.<sup>65</sup>

7.68 The Law Society of New South Wales supports the establishment of a federal judicial commission, but states that 'whether such a Commission is *ultra vires* Chapter Three of the Australian Constitution is a debateable issue.'<sup>66</sup>

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61 *Committee Hansard*, 17 November 2009, p. 3.

62 *Committee Hansard*, 17 November 2009, p. 5.

63 *Committee Hansard*, 17 November 2009, p. 6.

64 *Committee Hansard*, 17 November 2009, p. 6.

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

66 Law Society of New South Wales, *Submission 7*, p. 1.

7.69 The argument that judicial accountability outside the narrow regime in Chapter III of the Australian Constitution is unconstitutional has been summarised by former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE:

Very briefly the argument is that, when s.72(ii) of the Australian Constitution provides that federal judges shall not be removed except by the Governor-General in Council on an address from both Houses of Parliament for proved misbehaviour or incapacity, it constitutes the only mode of disciplining judges authorised by the Constitution...As the object of Ch.III of the Australian Constitution (which deals with the federal judicial power and includes s.72) was to protect the independence of the judiciary, the judges argue that the Constitution should not be interpreted as permitting the establishment by statute of a regime outside s.72(ii) for the disciplining of federal judges when that regime involves the exercise of powers by a commission which is not acting on behalf of Parliament or in aid of the Parliamentary procedure for which the Constitution provides.<sup>67</sup>

7.70 In then responding to this view former Chief Justice Mason observes that:

There are some criticisms that can be made of this constitutional argument. It certainly seems to read a lot into the Australian Constitution. It also places very considerable emphasis on judicial independence despite the fact that, according to our experience, neither the NSW model nor the Canadian model appears to have constituted a threat to judicial independence. The argument is consistent with the tendency of judges to treat judicial independence as a shield for themselves rather than as a protection for the people. Indeed, there is a lot to be said for the view that judges have devalued judicial independence in the public estimation by relying upon it in order to protect their own position and privileges. Reliance upon the concept in the present context may be seen by others as an example of that tendency.<sup>68</sup>

7.71 Chief Federal Magistrate Pascoe has succinctly summed up the constitutional position in practical terms:

I think the argument is, insofar as the removal or disciplining of judicial officers, that it is a matter for the parliament and is dealt with in the Constitution. I think there are two views; one view is that it is perfectly reasonable to have a judicial commission to deal with these issues; the other is that it would simply be unconstitutional for such a body to be established.<sup>69</sup>

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67 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 109.

68 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 110.

69 *Committee Hansard*, 11 June 2009, p. 45.

7.72 Chief Federal Magistrate Pascoe also provided his support for the view that 'it ought to be possible to set up a body similar to the New South Wales Judicial Commission' and emphasised that '...the establishment of such a body would be very useful to certainly the heads of jurisdiction, and I think it would add to public confidence in the judiciary.'<sup>70</sup>

7.73 The Attorney-General's Department has advised in relation to possible constitutional impediments to the establishment of a federal judicial commission that:

The possible Constitutional constraints in implementing a national mechanism for handling complaints are being examined by the SCAG working group, drawing on assistance from the Special Committee of Solicitors-General.<sup>71</sup>

### **Committee view**

7.74 The approach to judicial complaints handling, including to the level of terminating an appointment, is a mark of the quality and sophistication of a judicial complaints handling system. In considering reform in this area, the committee is mindful of the powerful competing policy interests that need to be considered. For example, would a judicial commission be effective and is there an unfulfilled need that would justify the cost of establishing a commission?

7.75 Despite the view of some submitters that the current system is quite adequate, the committee is persuaded that steps need to be taken to create more sophisticated and effective complaints handling processes. The committee has received evidence from many people who are dissatisfied with the experience they had in court or who are involved in the judicial system and can see that it would benefit greatly from a more comprehensive system.

7.76 Improving the system by creating a federal or national judicial commission would involve some cost. The budget of the JCNSW is approximately \$5.1 million and one-third of all judicial officers in Australia operate in New South Wales' courts.<sup>72</sup> However, based on the New South Wales experience the committee's view is that the benefits available to a community and its judicial system through a commission's education, sentencing and complaint handling functions fully justify this expense. The committee was particularly impressed with Mr Schmatt's evidence about the benefits obtained by having these three functions undertaken by the one organisation.

7.77 It has been argued that constitutional difficulties could mean that '...too much time and effort put into [a judicial commission] may be at the expense of other areas

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70 *Committee Hansard*, 11 June 2009, p. 46.

71 *Additional Information*, Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 1.

72 *Committee Hansard*, 11 June 2009, p. 69.

where intellectual effort could be more productive.<sup>73</sup> However, there is a strong countervailing view that constitutional issues are far from insurmountable. Therefore this does not seem to be a significant deterrent to seeking to improve judicial complaint handling in Australia.

7.78 The committee's view is that a national judicial commission would be an ideal outcome, but understands that this is a longer term project. The committee therefore supports a staged approach, which involves initially planning a federal judicial complaints commission (based on the JCNSW model) and then seeking the agreement of other jurisdictions to be involved in a national judicial commission of either a cooperative or fully integrated model.

7.79 A cooperative model could involve a uniform national approach, with jurisdictions able to operate independently or to combine resources. It has been noted that New South Wales is not interested in participating in a national judicial commission and that 'without NSW it makes it rather hard for it to be an effective national complaints authority'.<sup>74</sup> It seems that this could be accommodated in a cooperative model, or that New South Wales could take a leadership role in establishing a national commission based on its model.

7.80 The committee is interested in the SCAG work currently being undertaken and the fact that SCAG is apparently considering a range of options 'for a national mechanism for handling complaints against judicial officers...'.<sup>75</sup> The committee supports and encourages this work.

7.81 The committee requests any judicial officers who are concerned that the establishment of a judicial commission would undermine the independence of the judiciary to investigate the experience in New South Wales, and to consider Chief Justice Martin's view that 'perhaps counter-intuitively, the creation of the judicial commission in New South Wales has actually strengthened the position of the judiciary in that state...'.<sup>76</sup> In addition, Sir Anthony Mason has noted:

...if the judges do not voluntarily participate in the shaping of an appropriate regime of regulation, they could end up at some time in the future, in a very unfavourable climate, with a scheme thrust upon them which contains inadequate safeguards<sup>77</sup>

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73 *Committee Hansard*, 12 June 2009, p. 18.

74 *Committee Hansard*, 12 June 2009, p. 18.

75 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 1.

76 *Committee Hansard*, 17 November 2009, p. 6.

77 Former Chief Justice of the High Court the Hon. Sir Anthony Mason AC KBE, *Judicial Accountability, Judicial Conduct and Ethics* Conference papers, Dublin Ireland, 6 May 2000, p. 114.

### **Recommendation 10**

**7.82 The committee recommends that the Commonwealth government establish a federal judicial commission modelled on the Judicial Commission of New South Wales.**

### **Recommendation 11**

**7.83 The committee recommends that this new judicial commission include the three functions of complaints handling, assisting courts to achieve consistency in sentencing and judicial education.**

### **Recommendation 12**

**7.84 The committee recommends that the functions currently fulfilled by the National Judicial College of Australia be incorporated into the new judicial commission.**

### **Recommendation 13**

**7.85 The committee recommends that within 12 months the government undertake planning and budgetary processes necessary for the establishment of this commission.**

### **Recommendation 14**

**7.86 The committee recommends that within 18 months the government introduce a bill to establish the new judicial commission.**

### **Recommendation 15**

**7.87 The committee recommends that recommendations 10 to 14 above are implemented subject to any constitutional limits and in consultation with the federal courts.**

### **Is an intermediate process needed?**

7.88 Notwithstanding the committee view strongly in favour of the establishment of a federal, and eventually a national, judicial commission there is also benefit in considering whether establishing an interim process in the short term would be valuable. This issue arises from the concern that there is no settled process for the application of section 72 of the Constitution. For example, a number of commentators over the years, including in evidence to this committee, pointed out that the circumstances surrounding the Justice Murphy complaints identified that there are uncertainties about how a federal complaint could be investigated<sup>78</sup> and these have not been resolved. As Justice McColl explained to the committee:

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78 For example, see: the Hon Duncan Kerr SC MP, *The removal of federal justices: qui custodio custodis?*, 2005 AIAL Administrative Law Forum, Canberra, 30 June 2005.

We know from what happened when Justice Murphy was in difficulty many years ago that there was a great controversy about how, if at all, his conduct could be investigated. There is no certainty about how a matter like that could be dealt with in the federal sphere.<sup>79</sup>

7.89 If there is no process in place to apply section 72 of the Constitution when an allegation of serious misconduct or incapacity is made, Parliament will need both to gather the facts and to determine the outcome of the matter based on those facts. This does not seem to adequately preserve the independence of the judiciary from the possibility or perception of political interference. Having an independent investigative process in place would provide a protection for Parliament and for the judiciary while allowing Parliament to discharge its constitutional responsibilities.

7.90 Some improvements could be made to the existing arrangements relatively quickly as a preliminary step to implementing a permanent judicial commission. The primary options of interest to the committee for an intermediate federal process that would go some way to addressing the gaps in the current arrangements are:

- to create a federal process to establish an *ad hoc* tribunal to investigate complaints of judicial misconduct or incapacity;
- to establish guidelines for the investigation of less serious misconduct or incapacity issues; and
- to implement the Family Court and Federal Magistrates Court proposal for an oversight committee (outlined in chapter 6 of this report).

7.91 In Queensland, Victoria and the Australian Capital Territory there are established systems '...where, if there is a complaint which would warrant removal, there is a procedure involving a tribunal or some sort of appointed body to consider it.'<sup>80</sup> In spite of having no permanent judicial complaints handling body, these jurisdictions all require allegations of judicial misbehaviour or incapacity to be independently investigated before Parliament considers removal.<sup>81</sup>

7.92 These have been described as 'intermediate models'<sup>82</sup> that are not fully established judicial commissions, but which provide a formal process for judicial complaint handling. Although this approach does not have the benefits of an established judicial commission (discussed in detail earlier in this chapter) in the committee's view it does constitute an improvement on the federal arrangements currently in place.

7.93 Dr Lynch of the Gilbert + Tobin Centre was also supportive of an intermediate approach as a step towards establishing a permanent commission:

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79 *Committee Hansard*, 11 June 2009, p. 8.

80 *Committee Hansard*, 11 June 2009, p. 6.

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

82 *Committee Hansard*, 11 June 2009, p. 7.

I was interested to note that the Victorian Constitution changes of 2005 produce a removal process which aims to overcome the crudeness of the tradition of parliament simply removing for misbehaviour or incapacity. The Victorian Constitution has now recognised this committee which will assist parliament in making a decision on that. That is one way I think you can improve upon that process but that is a long way short of a judicial commission which is aiming to address this.<sup>83</sup>

7.94 The committee strongly supports the view that there should be a more comprehensive complaints handling system in place before any allegation of serious judicial misconduct or incapacity arises. Ensuring appropriate investigative processes are in place before a complaint is received will avoid arguments about procedural fairness or inappropriate political influence. Recent events in the Australian Capital Territory have highlighted the importance of this.<sup>84</sup>

7.95 The establishment of an interim procedure would also be supported by establishing guidelines for all federal courts for the investigation of less serious misconduct or incapacity issues (building on the protocols that some courts already have in place), and implementing the Family Court and Federal Magistrates Court proposal for an oversight committee for those courts.

## **Recommendation 16**

**7.96 The committee recommends that as soon as possible and no later than 30 June 2010, the government:**

- **implement a federal process enabling it to establish an *ad hoc* tribunal when one is needed to investigate complaints of judicial misconduct or incapacity;**
- **establish guidelines for the investigation of less serious misconduct or incapacity issues; and**
- **implement the Family Court and Federal Magistrates Court proposal for an oversight committee.**

**Senator Guy Barnett**  
**Chair**

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83 *Committee Hansard*, 11 June 2009, p. 34.

84 In November 2009 the ACT government ordered a judicial inquiry into the conduct of the Chief Magistrate as a result of two 'serious complaints' of misconduct. For example, see <http://www.sbs.com.au/news/article/1128892/latest-from-wire/> (accessed 26 November 2009).

