



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

26 April 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 and Courts Legislation Amendment (Judicial Complaints) Bill 2012

Thank you for the invitation to make a submission to the Committee's inquiry into the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 ('Parliamentary Commission Bill') and Courts Legislation Amendment (Judicial Complaints) Bill 2012 ('Judicial Complaints Bill'). We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

1. Introduction

1.1 Section 72 of the Constitution

Section 72 of the Commonwealth Constitution ('the Constitution') provides that federal judges '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'. Two limitations arise from this provision. First, the power of removal is conferred exclusively upon the Legislature. Second, the grounds for removal are restricted to 'proved misbehaviour or incapacity'.

The apparent simplicity of s 72 is nevertheless troubling. The most ambiguous word in the phrase 'proved misbehaviour or incapacity' is 'proved' which clearly suggests both a standard and a process. But on these the Constitution is unhelpfully silent. The handling (through two Senate Committee inquiries and a special Parliamentary Commission) of the allegations of misbehaviour made against Justice Lionel Murphy in the early 1980s highlighted the need to provide in advance for a clear and certain process that is both fair to the judicial officer who is the subject of the complaint and respectful of Parliament's constitutional prerogative.

SYDNEY 2052 AUSTRALIA
Email: a.lynch@unsw.edu.au
Telephone: +61 (2) 9385 9654
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

Neither of the current bills creates a body that is empowered to initiate an inquiry into a judge; has the aim of ‘proving’ misbehaviour or incapacity; or the capacity to sanction or remove serving judicial officers. To do any of these would constitute a usurpation of the Commonwealth Parliament’s constitutional responsibilities under section 72. Instead the Parliamentary Commission Bill and Judicial Complaints Bill introduce methods by which complaints against judicial officers can be heard and addressed, with the most serious response being the provision of a report to aid the Parliament in considering whether a judicial officer should be removed in accordance with section 72 of the Constitution. Support for the establishment of a more sophisticated complaints process of the kind offered by these two bills has been frequently expressed by parliamentary committees, law reform commissions, parliamentarians and senior members of the Australian judiciary. It is a goal that we also support.

1.2 *The precedent of the Judicial Officers Act 1986 (NSW)*

In discussing these bills it is relevant to consider the example provided by the Judicial Commission of New South Wales. Section 53(2) of the *Constitution Act 1902* (NSW) is identical to section 72(ii) of the Constitution. The NSW Judicial Commission, as established by the *Judicial Officers Act 1986* (NSW) and consisting principally of the six heads of jurisdiction and four appointed members, receives complaints from persons, including the Minister, about ‘the ability or behaviour of a judicial officer’ of the State. These complaints may be summarily dismissed by the Commission or referred to the relevant head of jurisdiction if, although appearing to be wholly or partly substantiated, the Commission does not think they justify the attention of the Conduct Division. All other complaints are referred to the Conduct Division of the Commission. The Conduct Division consists of two judicial officers (one of whom may be retired) and one community representative nominated by Parliament.

The Conduct Division enjoys the powers, functions and immunities of a royal commission.¹ If the Conduct Division decides that a complaint is wholly or partially substantiated, it may form the opinion that the matter could justify parliamentary removal of the officer. If so, the Conduct Division must provide a report on the matter to the Governor, with a copy provided to the Minister, who is obliged to lay it before both Houses of Parliament. Parliament is not bound to accept the opinion of the Conduct Division. There has been very recent demonstration of the fact that, despite the functions performed by the Judicial Commission, it is the Parliament of New South Wales alone that determines an issue of judicial removal. In 2011, the Conduct Division issued a report that the Parliament was capable of finding that two Magistrates, Jennifer Betts and Brian Maloney, should be removed on the grounds of incapacity due to mental illness. However, after both made oral appeals to the Parliament to retain their position, their continuation was affirmed by parliamentary vote. It is not even a requirement that a vote follow the tabling of such a report. As Priestley JA said in judicial consideration of the relevant provisions, ‘The fact of that report having been to the Governor empowers each House to consider whether it will address the Governor. It does not oblige either House to do so’.²

In responding to the suggestion that the establishment of a federal commission along these lines might be unconstitutional, Sir Anthony Mason, a former Chief Justice of Australia, has observed that the operation of the New South Wales model does not ‘appear to have constituted a threat to judicial independence’.³ During the 10 years of Chief Justice Murray Gleeson’s presidency, more than 92 per cent of complaints made to the New South Wales Judicial Commission were summarily dismissed.

¹ *Judicial Officers Act 1986* (NSW) ss 13, 25.

² *Bruce v Cole* (1998) 45 NSWLR 163, 207.

³ ‘Judicial Accountability’, Paper for the Judicial Conduct and Ethics Conference, Dublin, Ireland May 2000.

This trend continued throughout Chief Justice James Spigelman’s presidency, with the vast majority of complaints examined by the Commission being summarily dismissed on grounds that include that the complaint is frivolous, trivial, remote in time, or that other means of redress exist. The experience of the Commission in this regard did not bear out Sir Anthony’s initial concerns, voiced at the time of its establishment, that vexatious complaints would endanger judicial independence.⁴ In 2001, academic commentators noted that ‘the furore that erupted when the legislation for the establishment of the Judicial Commission of New South Wales was first proposed has now abated’.⁵

2. The Parliamentary Commission Bill

2.1 Summary of the Bill

The Parliamentary Commission Bill creates a mechanism to assist the Parliament in considering use of its powers under s 72 of the Constitution. It does so by providing that a Commission may be established following a resolution by each House of the Parliament in order to investigate specified allegations of misbehaviour or incapacity made in respect of a specific Commonwealth judicial officer.

The purpose of the Commission is to investigate, and not to determine facts or make recommendations. The Commission would have a range of inquisitive powers including the power to: require witnesses to appear at hearing, and take evidence on oath; conduct hearings in private; require production of documents; and issue search warrants. However, to ensure judicial independence, current and former Commonwealth judicial officers are expressly exempt from the application of coercive powers of the Commission. As such, search warrants cannot be issued on the premises of current or former Commonwealth judicial officers. The Commission is not required to act in accordance with the rules of evidence but must act in accordance with the rules of natural justice.

The Commission would provide a report to the Parliament on whether evidence exists that may be capable of being regarded by the parliament as misbehaviour or incapacity. It remains for the Parliament to determine whether the conduct is ‘proved’.

2.2 Analysis

It is very clear that the establishment of a Parliamentary Commission as empowered by this bill would be for the purpose of addressing specific complaints received by the Parliament in respect of a particular judicial officer. In contrast, the Judicial Commission of New South Wales is a standing body that regularly receives and handles complaints, including by referring them to its Conduct Division. Regardless of this distinction, neither entity exists to deliver a finding or recommendation in respect of the essential issue that is constitutionally the domain of the legislature – that of proved misbehaviour or incapacity.

It is worth noting the extent to which the bill safeguards against an ill-considered resort to its operative provisions. The Parliamentary Commission is established on the motion of *both* Houses of Parliament in the same session. This is a point of distinction between this bill and the earlier Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2010, introduced by the Hon Duncan Kerr SC, which empowered a permanent Commission to investigate a complaint referred to

⁴ ‘The State of the Australian Judicature’ (1987) 61 *Australian Law Journal* 681, 686.

⁵ E Campbell and HP Lee, *The Australian Judiciary* (2001) 120.

it by either house. The involvement of both Houses in establishment of the Commission accords with the constitutional requirement for the parliamentary address to the Governor-General in Council for removal.

Unlike the Parliamentary Commission proposed by the current bill, the Judicial Commission of New South Wales does not possess search warrant powers. However, there is an awareness of the potential intimidation of the judiciary that the existence of such a power might cause as the bill expressly limits the search warrant powers of the Parliamentary Commission so as not to extend to premises (which is defined very broadly) occupied by serving or former judicial officers.

2.3 Omission of powers for the suspension of judicial officers

An issue that is not addressed by the Parliamentary Commissions Bill (nor the Judicial Complaints Bill) is that of suspension of a judicial officer at any stage before parliament determines whether he or she is to be removed from office. This is almost certainly a prudent omission despite the Murphy affair illustrating that controversy over whether a Justice should continue to sit while under threat of removal is not a remote hypothetical. Justice Murphy refused to stand aside while under investigation by two successive Senate inquiries into his conduct and, following his acquittal on criminal charges (during which time he had stepped down from the bench), a subsequent Parliamentary Commission on Inquiry. The Chief Justice at the time, Sir Harry Gibbs, made public his opinion that Murphy's determination to exercise his 'constitutional right' to sit on the High Court was 'undesirable' in the interests of the Court.⁶

Section 40 of the *Judicial Officers Act 1986* (NSW) provides heads of jurisdiction with a statutory power to suspend judges when a complaint is made about a judicial officer or a report is made by the Conduct Division of the Judicial Commission setting out its opinion that a matter could justify parliamentary consideration of the removal of a judicial officer from office. Additionally, a judge charged with or convicted of an offence punishable by a year's imprisonment may also be suspended. However, section 54 of the *Constitution Act 1902* (NSW) is unique in the Australian federation in providing that legislation may confer a power of judicial suspension.⁷

By contrast, in her authoritative and detailed consideration of the issue, Emeritus Professor Enid Campbell AC stated that the 'general view' was that section 72(ii) of the Commonwealth Constitution, drawing as it does on the provision of security of judicial tenure by Article III, section 7 of the *Act of Settlement 1701* (Imp), does 'not authorise suspension from office'.⁸ As to whether that authority might be conferred by federal legislation based upon the express power in s 51(xxxix) of the Constitution to make laws 'incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature...', Professor Campbell concluded:

Section 51(xxxix) of the federal Constitution could not be construed as authorising legislation which gives the Governor-General in Council an unfettered power to suspend a federal judge. It would probably not be construed as authorising even legislation which provides for automatic suspension of a judge once a motion seeking removal of a judge has been moved in either House... It is, however, arguable that s 51(xxxix) would support a law which authorises the Governor-General in Council to

⁶ For accounts from either side of the relevant correspondence see Jenny Hocking, *Lionel Murphy: A Political Biography* (2003) 311-12 and Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995) 111-12.

⁷ It should be noted that several other States do have statutory provision for the suspension of Magistrates but not judges.

⁸ Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 65.

suspend a federal judge in respect of whom an adverse report has been presented by an extra-parliamentary commission of inquiry of the kind established to deal with the case of Justice Murphy.⁹

While the desirability of a power of suspension at the point identified by Professor Campbell at the conclusion of this quote may be worth considering, the period between the delivery of the Parliamentary Commission's report and Parliament's response might be expected to be quite brief. If a power to suspend a federal judicial officer is seen as a valuable mechanism it would seem that this is in respect of the role it might play while he or she is under investigation. However, the strict separation of judicial power under the Commonwealth Constitution suggests that any attempt to provide such a mechanism at that earlier stage would be of questionable validity.

Justice Murphy, in his correspondence with Chief Justice Gibbs, was most emphatic that his 'constitutional right to sit until death, resignation or removal under s 72' was central to the principle of judicial independence. In not seeking to provide for judicial suspension pending determination by a Parliamentary Commission of misbehaviour or incapacity, this Bill respects that principle.

3. Judicial Complaints Bill

3.1 Summary

The purpose of the Judicial Complaints Bill, which does not apply to the High Court, is to address those circumstances where the nature of the complaint made against a judicial officer might not warrant parliamentary removal under s 72 of the Constitution. Through amendments to the *Family Law Act 1975*, *Federal Court of Australia Act 1976*, *Federal Magistrates Act 1999* and the *Freedom of Information Act 1982*, the bill provides a statutory basis for relevant heads of jurisdiction to 'handle' complaints about judicial officers. These amendments support a more substantial 'non-legislative framework' devised by the Attorney-General's Department and outlined in the Explanatory Memorandum accompanying the Bill.

Under the resulting scheme, complaints received by the head of jurisdiction can be dealt with in four ways: assessed and dismissed (for example, on the ground that it is frivolous); assessed and resolved by the head of jurisdiction to their satisfaction following discussion with the person the subject of the complaint; assessed as serious and warranting further investigation, in which case a Conduct Committee is established to investigate and make recommendations; or assessed as being very serious and immediately referred to the Attorney-General as warranting parliamentary consideration for removal of the judicial officer.¹⁰

The processes for the establishment of a Conduct Committee are the most notable enhancement of existing informal practices. According to the Explanatory Memorandum, this Committee would be comprised of three members nominated by the head of jurisdiction, two of whom must be judges of an equivalent or higher seniority to the judicial officer who is the subject of the complaint. The Committee would then investigate the complaint and report as to whether the complaint is substantiated. If the Committee finds that the complaint justifies parliamentary consideration of removal on the grounds contained in s 72 of the Constitution, the head of the jurisdiction may refer the complaint to the Attorney-General who to refer to Parliament for consideration.

⁹ Ibid 75-6.

¹⁰ Commonwealth Parliament, Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012, 2.

Through addition to existing provisions in those pieces of legislation that it amends, the bill provides the measures that a head of jurisdiction may take in relation to a judicial officer should he or she believe that to do so is reasonably necessary in order to maintain public confidence in the Court. This expressly includes temporarily restricting the judicial officer to non-sitting duties.¹¹

3.2 Analysis

Given the relatively rarity of cases requiring parliamentary consideration of removal that is the concern of the Parliamentary Commissions bill, this bill is perhaps the more significant of the two under examination. It provides a more explicit statutory basis for the heads of jurisdiction to manage complaints against the officers of their courts. In particular, it empowers the creation of a Conduct Committee to investigate those complaints the seriousness of which warrants particular attention, but not necessarily that of the parliament. Two former Chief Justices, Sir Anthony Mason and Murray Gleeson, have cited the lack of a process for complaints based upon conduct falling short of that which would warrant removal as a very real difficulty with present arrangements.¹²

A likely way in which this may manifest itself is as an instance of incapacity of a temporary or treatable nature. Establishment of a process that is suitably formal and rigorous but also presents a respectful and flexible means of addressing issues of incapacity, particularly when caused by mental strain and illness, amongst federal judges is to be welcomed. Indeed, it may be supposed that issues of incapacity should, in the normal course of things, not stimulate resort to the Parliamentary Commission Bill until after the processes introduced by the Judicial Complaints Bill have been utilised.

However, as we detail in the next section, we submit that both bills would benefit from the inclusion of processes that are specifically directed towards the investigation and resolution of complaints alleging incapacity. In addition, we believe that consideration should be given to clearer statutory recognition of mechanisms that address incapacity which are not dependent on a complaint being made at all.

4. The Need to Better Address Issues of Incapacity

4.1 Processes for the investigation of incapacity issues

The challenge of ‘handling’ complaints arising from judicial incapacity has too often been obscured by a focus on designing processes in response to the ground of ‘misbehaviour’. The present bills, but especially the Parliamentary Commission Bill, display a preoccupation with the latter at the expense of the former. 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 misbehaviour. The *Federal Court of Australia Act 1976* (Cth) currently requires the Chief Justice of that court to

¹¹ Bill, cl 5, 18 and 28. This capacity already exists in the head of jurisdiction’s powers to manage his or her court; see for example, *Federal Court of Australia Act 1976* (Cth), s 15(1AA)(a)(iii).

¹² See Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in *The Fragile Bastion – Judicial independence in the Nineties and Beyond*, Paper published by the Judicial Commission of New South Wales, available at < <http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>> (accessed 16 April 2012); and Murray Gleeson, ‘Public Confidence in the Judiciary’, Judicial Conference of Australia, 27 April 2002, available at < http://www.highcourt.gov.au/speeches/cj/cj_jca.htm>.

ensure appropriate access to annual health assessments and short-term counselling services. It is unsatisfactory that this acknowledgment of the importance of maintaining a healthy federal judiciary is not reflected in the current bills, despite incapacity being one of the two constitutional grounds justifying removal of a judge.

What is striking about both bills is the absence of any provisions that expressly assist either the Parliamentary Commissions that may be established by parliament or the Conduct Committees that may be established by heads of jurisdiction to investigate the possibility and degree of incapacity arising from the mental health of a judge against whom a complaint has been made. Subdivision C of Pt 3 Div 2 of the Parliamentary Commission Bill extensively details the investigative powers enjoyed by the Parliamentary Commissions, but these strongly reflect the need to gather evidence of misbehaviour. Very few of those powers will assist an inquiry into questions of judicial capacity. There is, for example, nothing equivalent to the power of the Judicial Commission of New South Wales to ‘require the judicial officer concerned to undergo such medical or psychological examination as the Commission specifies’ (*Judicial Officers Act 1986* (NSW) s 39D). As recent experience has shown, incidences of mental or psychological incapacity (that are far less immediately detectable than a physical impairment and yet likely to be a much greater impediment to fulfilment of judicial duties) demand particular attention and care.

4.2 Addressing incapacity absent a complaint – the NSW model

To that end, the approach to judicial incapacity and impairment in New South Wales merits consideration generally. In 2006, amendments were made to the *Judicial Officers Act 1986* (NSW) so as to introduce a means by which health and capacity matters may be formally investigated without having to wait until litigants bring forward a formal complaint against a judge’s behaviour. This is clearly an important improvement upon leaving these issues simply to an informal approach by the judge’s peers. The latter might provide a resolution, either through the judge seeking treatment or retiring, but where it does not or the judge disputes suggestions as to his or her capacity, the 2006 changes now provide a path forward which the heads of jurisdiction can proactively pursue.

Part 6A of the *Judicial Officers Act* is titled ‘Suspected impairment of judicial officers’. It enables a judge’s head of jurisdiction to formally request the Commission to investigate whether a judicial officer has an impairment affecting their performance of judicial or official duties. The Act states expressly that this is not a complaint.

The Commission then undertakes a preliminary investigation and this must, as far as practicable, take place in private. As already noted, the Commission can require the judge to undergo such medical or psychological examination as it specifies. If the judge refuses to do so, then the Commission may proceed to deal with the matter as if it arose by complaint.

Where a psychological or medical report does not indicate a problem, the Commission may summarily dismiss the matter. If the report reveals that the judicial officer has an impairment the Commission will either report back to the relevant head of jurisdiction or refer the matter to its Conduct Division for further examination, depending upon the level of seriousness.

The Conduct Division may conduct a further examination. The Division will also have the power to dismiss the matter, report to the head of jurisdiction, or present a report to the Governor setting out their findings and opinion that the judicial officer’s impairment may warrant parliamentary consideration of his or her removal from office

In referring a matter to the head of jurisdiction, the Judicial Commission or the Conduct Division may make recommendations regarding steps that might be taken to manage the judicial officer's impairment. As occurs with complaints, the head of jurisdiction may either counsel the judicial officer or take such steps as are deemed appropriate regarding the administration of the court for which he or she is responsible.

These changes to the Judicial Commission of New South Wales were welcome developments. They were a response to the problems demonstrated by the attempt in the late 1990s to remove Justice Vince Bruce from the state's judiciary after his battle with clinical depression delayed judgment delivery. The couching of the whole Bruce affair within the framework of a complaint where the conduct was pursued on *either* ground of removal was not helpful to the process of investigation and certainly not sensitive to the needs of the judge concerned.

Part 6A enables the judiciary to pre-empt problems which may flow from the health of one of their colleagues, and give some structure to how the topic might be pursued after it is first broached. They also, helpfully, suggest that some level of accommodation might be possible. However, as the 2011 cases of Magistrates Betts and Maloney have demonstrated, the existence of these powers and processes does not mean that conditions of mental illness will not ever form the basis of a parliamentary motion of removal on the ground of incapacity. Significantly, both Magistrates were able to use their personal address to the New South Wales parliament to satisfy a majority of the elected representatives of their capacity while receiving treatment to fulfil their judicial functions.

4.3 *Incapacity and Disability Discrimination*

Lastly, the degree to which incapacity has been overlooked in the design of the processes under both bills is reflected in the absence in the accompanying Statements of Compatibility with Human Rights (now required under s 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)) of any mention of rights recognised by the United Nations Convention on the Rights of Persons with Disabilities (the CRPD), which are included in the definition of 'human rights' in s 3(1)(g) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The rights of judicial officers against whom complaints are made and action is taken, including removal, on the basis of physical or mental incapacity would certainly include those listed in the CRPD. While both Statements of Compatibility refer to the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*, mention should also be made of the corresponding right under Article 22 of the CRPD since this has particular importance in cases where an individual's health status or disability is at issue.

Even more relevant is Article 27 of the CRPD which prohibits discrimination on the basis of disability in respect of key aspects of the employment relationship, including working conditions and termination. Art 27(1)(i) requires parties to 'ensure that reasonable accommodation is provided to persons with disabilities in the workplace'.

The public reaction to the attempt to remove Magistrate Brian Maloney on the basis of his incapacity due to mental illness was strong, and was arguably a significant factor in a majority of parliament voting that he retain his position. Australia's Disability Discrimination Commissioner, Graeme Innes, voiced his opposition to dismissing Maloney on this ground, and other high-profile support was forthcoming from the Commonwealth Shadow Minister for Finance Andrew Robb, former New South Wales Liberal party leader John Brogden, the Black Dog Institute, SANE Australia, and the Schizophrenic Fellowship of NSW.

The bills would be improved by expressly recognising the obligation to explore reasonable accommodations that would enable judicial officers with a disability to perform their functions. The Statements of Compatibility should also be amended accordingly to include acknowledgment of the human rights of judges with a disability.

5. Conclusion

In summary, we support both bills and do not see constitutional difficulties with the mechanisms each will establish for investigating the misbehaviour or incapacity of members of the federal judiciary. However, we submit that both bills would benefit by the inclusion of provisions that are directly tailored to circumstances involving judicial incapacity. In particular, we emphasise the importance of ensuring that judges suffering from a disability are not discriminated against as a result of their condition and are treated in a respectful and fair manner.

Yours sincerely,

Professor Andrew Lynch
Centre Director

Ms Emily Burke
Social Justice Intern