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26 February 2015

Mr Matthew Goode
Attorney-General's Department
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BY EMAIL: agd@agd.sa.gov.au

Dear Mr Goode

Submission: Judicial Conduct Commissioner Bill 2015

Thank you for agreeing to receive our submission after the end of the formal submission period.

We congratulate the government for pursuing reform to the current system of judicial regulation as contained in the draft Judicial Conduct Commissioner Bill 2015. This Bill provides for a more developed, formalised system for handling judicial conduct complaints relating to South Australian judicial officers. The move towards a transparent and rigorous way to address judicial misbehaviour and incapacity is to be welcomed. If carefully crafted, we agree that this type of reform can enhance public confidence in the courts whilst also protecting the independence and impartiality of judicial officers.¹

However, while we endorse the general objective behind the system created by the Bill, we had some specific concerns about the proposed processes and structures. We believe that by addressing these concerns the proposed framework will be better able to promote public confidence in the integrity of the judiciary.

¹ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 38.

This submission is informed by our previous research into complaints systems, and specifically judicial complaints systems, and the following principles for crafting such a system that promotes institutional integrity:

- (i) A designated complaints handling body separate from the agencies under investigation and composed of properly qualified individuals.
- (ii) The system sorts complaints so that those involving substantive breaches are considered, to avoid time and resources being spent on frivolous or vexatious complaints.
- (iii) The standards of conduct are public and clear.
- (iv) An adequate opportunity to be heard is afforded to both the complainant and the respondent involved.
- (v) The range of consequences is clear and tailored to the types of transgressions and their degree of seriousness.
- (vi) The system is sufficiently transparent to promote public confidence in it.
- (vii) Mechanisms exist to protect the integrity of the complaints process so that it cannot be circumvented.
- (viii) The administration of the scheme is fair, accessible and timely.

The Judicial Conduct Commissioner

Appointment

According to clause 7 of the Bill, the Commissioner is to be appointed by the Governor, on recommendation by the executive. Prior to this the Statutory Officers Committee established under the *Parliamentary Committees Act 1991* must approve the appointment. This arrangement encompasses executive and parliamentary input into the appointments process, with some effort to draw on both opposition and government members and members sitting in both houses.² The arrangement does not provide any opportunity for either judicial or lay input into the appointment of the Commissioner.

Judicial input into the appointment of the Commissioner will promote the Commissioner's independence from the political branches of government (and the appearance of that independence). This will be an important step in allaying concerns that often accompany the establishment of a judicial complaints body that it poses a threat to the independence of the judiciary from the other branches of government. Inclusion of judicial involvement in the appointment process may be achieved by a statutory requirement for the Attorney-General to consult with the three Heads of Jurisdiction prior to formalising the appointment (closely resembling the consultation provision contained in clause 20(2) in relation to the appointment of a Judicial Conduct Panel).

Lay involvement in the regulation of judicial conduct is important. Leading scholar on judicial independence, Professor Shimon Shetreet has argued that a responsive or consumer-oriented

² *Parliamentary Committees Act 1991* (SA) s 15H.

model for judicial regulation 'best balances the values of independence and accountability'.³ We have argued elsewhere that providing formal ways to incorporate lay involvement in any judicial accountability system can be an important normative step towards recognising the public's stake in judicial integrity.⁴ While the South Australian reform proposal appears to draw on the New Zealand model, it has departed from that model by not incorporating the 'Lay Observer' into the system. While there is some input from lay members if a panel is convened,⁵ there is no opportunity for involvement prior to this. In New Zealand, the Lay Observer is given a role in assessing whether the Head of Bench's response to referred misconduct is satisfactory and requesting a review where the consequences are inadequate.⁶

We recommend that a sanctioned role for the lay voice earlier in the complaints handling structure be introduced.

We recommend that the government incorporate judicial views on the Commissioner's appointment.

Independence

Clause 7(2) of the Bill expressly provides that a Commissioner is eligible for reappointment, although there is a limit on an individual's term (a maximum is set at 10 years). The possibility of reappointment into a position creates a danger that the individual will lose independence, or lose the appearance of independence. This, coupled with the proposed appointment process that involves only the political branches of government, has the capacity to undermine the integrity of the proposed system.

We recommend that clause 7(2) be amended to provide that a Commissioner is not eligible for reappointment.

The Handling of Complaints

In essence the proposed system provides for a preliminary sorting of complaints (clause 13). In this process some complaints are either flagged for no further action (clause 15) or immediately dismissed (clause 16), some are referred to Heads of Jurisdiction (clause 17), some are examined by specially convened Judicial Conduct Panels (clause 19), and finally, for those most serious complaints, some brought before Parliament (clause 18). Aspects of these processes are considered below.

³ Simon Shetreet, 'The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1987' (1987) 10 *University of New South Wales Law Journal* 4, 13.

⁴ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' 2014) 38(1) *Melbourne University Law Review* 1, 49.

⁵ Clause 24 of the Bill.

⁶ Office of the Judicial Conduct Commissioner, *Referring a Complaint*
<http://www.jcc.govt.nz/template.asp?folder=REFERRING_A_COMPLAINT&lev1=4&lev2=1&no=3>.

Complaints that do not proceed

It is likely that many complaints that come to the Commissioner will be attempts to re-open litigious matters that have proceeded to an adjudication with which the complainant is dissatisfied. It is appropriate, and desirable, that matters of this type, vexatious or frivolous complaints, those that are resolved, or those not sufficiently specific, are not pursued.

Clause 16(1)(f) of the Bill relevantly provides that the Commissioner must dismiss the complaint if he or she is of the opinion that the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review. It is, however, possible that cases subject to appeal may also raise conduct issues that should be subjected to scrutiny. The appeal is a very specific mechanism for correcting legal errors and, as such, it is ill-suited to respond to all judicial conduct problems. For example, an inappropriate or uncivil direction about a witness in a jury trial may lead to an appeal, but arguably such conduct could also reflect an issue with the judge's conduct in court that would more appropriately be dealt with by the Commissioner.

Accordingly, we recommend that clause 16(1)(f) be removed, or amended to provide for dismissal of the complaint only in circumstances that the complaint about the judge's conduct is fully resolved by the appeal or judicial review.

Clause 16(1)(g), which requires the Commissioner to dismiss the complaint if he or she is of the opinion that the person who is the subject of the complaint is no longer a judicial officer also raises concerns. This potentially enables judicial officers who have been implicated in serious misconduct to relinquish office and avoid any public resolution or sanction. This is the experience in New Zealand where a precipitous resignation cut short a panel process, leaving the complaint untested but the judge's reputation damaged, and providing something of a public spectacle.⁷ In England and Wales recent amendments have dealt with this problem by allowing findings of misconduct to be made notwithstanding the fact that a person has ceased to hold office.⁸ We recommend that conduct that occurs before and while a judicial officer holds office should come within the Commissioner's purview. The responses for those who no longer hold judicial office will be necessarily more limited than they might be for a sitting judge, but providing some public and measured response to inappropriate conduct in such a case may effectively reassure the wider public of the institutional integrity of the judiciary.

We recommend the government remove the requirement for the dismissal of complaints that relate to those who are no longer holding judicial office (clause 16(1)(g)) and extend the framework to allow findings of misconduct against a former judge.

⁷ See, for example, B V Harris, 'New Zealand: Supreme Court Judge Resigns — Saga Raises Questions about Recently Enacted Judicial Complaints Legislation' [2011] *Public Law* 436, 438.

⁸ Judicial Discipline (Prescribed Procedures) Regulations 2013 (UK) SI 2013/1674 r 23.

A minor issue arises as to whether the relevant judicial officer should be advised about the existence of complaints where the commissioner determines that the complaint does not warrant further action (clause 15(4)), or immediately dismisses the complaint (clause 16(2)). In our view automatic communication with the judicial officer does not appear to be necessary at this point, and such a procedure may cause unnecessary stress. We recommend that the Commissioner be given discretion as to whether such complaints are communicated to relevant judicial officers.

We recommend the amendment of clauses 15(4) and 16(2) to give the Commissioner discretion as to whether such complaints are communicated to relevant judicial officers.

On a further minor matter, clause 15(2)(d) allows for the Commissioner to take no further action where the Commissioner has requested 'further information' from the complainant and the complainant has refused to provide such information, or has refused to do so in a reasonable time. We would recommend that this be clarified to extend only to requests for 'further relevant information'.

We recommend clause 15(2)(d) be amended to read 'that the Commissioner has requested further relevant information.'

Complaints Referred to Heads of Jurisdiction

In essence the arrangement in clause 17 allows Heads of Jurisdiction to take a role in responding to judicial conduct complaints. This reflects the current, informal process that operates when complaints are made. The Bill provides that all complaints that proceed but are not sufficiently serious to justify recourse to Parliament, or are not initially referred by the Head of Jurisdiction must be referred to the Head of Jurisdiction (clause 17(1)). This means that the vast majority of complaints that warrant scrutiny will be referred in this way. We would draw attention to four concerns with this arrangement:

First, the Head of Jurisdiction is given some legislative power under the proposed consequential amendments to sanction his or her fellow judges (proposed *Courts Administration Act 1993* (SA) s 27C). However, as we have noted elsewhere, the 'traditional conception of the head of jurisdiction as "first among equals" tends to undermine their ability to act definitively, and any decisive actions, such as removal from the lists, could be subject to challenge by judges within the court'.⁹ We note that the Bill anticipates the difficulties caused by the Head of Jurisdiction's position in the proposed s 27C(3) of the *Courts Administration Act 1993* (SA).

Second, the Commissioner is only directed to undertake a preliminary examination prior to referral to the Head of Jurisdiction. A secondary problem therefore arises in that the Heads of Jurisdiction do not have the capacity to undertake an investigation or any hearings. No provision is made for the circumstance where the complaint warrants further investigation prior to sanction. An example of how assistance might be provided to the Head of Jurisdiction is provided in the Commonwealth

⁹ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 30.

framework introduced in 2012 by the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

We recommend that the Head of Jurisdiction be given the power to undertake an investigation, or appoint another person or body to undertake an investigation, if it is in their opinion necessary, where a matter is referred under clause 17.

Third, there is little guidance provided by the Bill as to what actions the Commissioner can recommend the Head of Jurisdiction take (pursuant to clause 17(2) or those sanctions that are open to the Heads of Jurisdiction. Some possibilities are set out in the proposed amendments to the *Courts Administration Act 1993* (SA) (s 27C), but this is a non-exhaustive list that contains little guidance about some of the options that might be available. It is appropriate that a full range of consequences be available in order to address judicial misconduct problems with proportional and appropriate responses. This will increase the transparency of the process for complainants and judges. Options in play in other jurisdictions include suspension, a requirement to apologise, ongoing monitoring, issuing a private or public admonishment or reprimand, or requiring counselling or mandatory judicial education. This list is more expansive than the one that appears to be permitted by the reforms.

We recommend that clause 17(2) of the Bill and Schedule 1, clause 3 (proposed s 27C of the *Courts Administration Act*) be amended to include an exhaustive list of possible actions and sanctions that can be taken by the Head of Jurisdiction.

Fourth, reliance on the Head of Jurisdiction as a part of the proposed accountability system creates a structural weakness if the system is presented with a conduct issue involving a Head of Jurisdiction. The Commissioner could still consider the complaint, but they could only act to convene a Panel or refer the judicial officer to the Parliament for removal if the conduct was extremely serious. One way to address the structural issue is to allow a Judicial Conduct Panel to be convened in such a case, and to grant sanctioning powers to the Panel in the case of conduct short of that warranting removal (see below). Another option would be to allow the Commissioner to refer such a complaint to the next most senior judge.

We recommend that the Bill be amended to provide an avenue for dealing with complaints against Heads of Jurisdiction short of removal.

Complaints referred to Judicial Conduct Panels

The Attorney-General may convene a Judicial Conduct Panel following a recommendation from the Commissioner (clauses 19 and 20). The Panel's composition seems entirely appropriate and the presence of a lay member welcome. (There is a typographical error in the definition of eligible judicial officer in clause 20, which should, we believe, read 'a current or former judicial officer'.)

The circumstances that must exist before the Panel can be appointed are precisely identified in clause 19 and will only exist where the conduct is at the most serious end of the spectrum, that is the

Commissioner is of the view that removal is warranted (clause 19(1)(b)(ii)). As noted above we recommend that the government consider amending the Bill to allow for complaints about Heads of Jurisdiction that are significant but do not warrant removal also be referred to a Panel.

The panel is then charged with inquiring into and reporting on the conduct matters concerning the relevant judicial officer (clause 22(1)). Given the composition and powers of the Panel it seems appropriate that, where the Panel is not satisfied that the judicial officer should be removed, that they should be able to impose appropriate consequences on the judicial officer, or, at a minimum, make recommendations as to the most appropriate actions that could be taken.

We recommend that clause 24 be amended, allowing the Panel to report on whether actions/sanctions short of removal are justified.

The powers and responsibilities that rest with the Commissioner are significant and the provision in clause 28 for judicial review of the Commissioner's activities to be referred to the Full Court is to be commended.

Complaints reported to Parliament

Clause 18 allows the Commissioner to make an immediate report to Parliament in limited, specified circumstances. Clause 18(4) provides that the copy of such a report must be given to the complainant, the judicial officer, the relevant Head of Jurisdiction and the Attorney-General but provides the judge with no opportunity to be heard before the report is delivered. While we understand that reporting under this clause would be exceptional and often accompanied by some urgency, the consequences for the judge are very serious and we would recommend the judge be provided with an opportunity to be heard before such a report is made.

We recommend that clause 18 be amended to include an opportunity for the judicial officer to be heard before the Commissioner makes a report to Parliament.

Subject to the above observations and recommendations, we commend the government for proposing reform in this important area.

Yours sincerely,



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