Law Reform Commission of Western Australia

Complaints Against Judiciary

Project 102

Final Report

August 2013

The Law Reform Commission of Western Australia

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ISBN: 978-1-74035-084-6

Printed by Quality Press, Western Australia

This document can be provided in alternative formats for people with disabilities.

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Acknowledgements

The Commission expresses its gratitude to the writer for this project, the Hon Neville Owen, formerly the President of the Court of Appeal, Supreme Court of Western Australia.

His Honour's eminence, wide experience and familiarity with courts and judicial officers in a number of jurisdictions contributed greatly to the consideration of the subject matter of this reference.

The Commission also wishes to thank the following student researchers who assisted on this reference: Heather Anderson, Robert Clarke, Claire Cummings, Thomas Fearis, Annabel Lagrange, Joanna Vincent, Michael Workman and Joanna Yoon.

Special thanks to Dr Tatum Hands (Legal Editor), Cheryl MacFarlane (Technical Editor) and Sharne Cranston (Executive Assistant) for their invaluable assistance throughout this project.

Introduction

TERMS OF REFERENCE

On 30 May 2011 the then Attorney General for the State of Western Australia formally referred to the Law Reform Commission a matter concerning complaints against members of the state judiciary. The terms of reference are as follows:

> The Law Reform Commission of Western Australia is to examine and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to complaints or allegations of misbehaviour or incapacity against state judicial officers in Western Australia require reform and the responses to any such conduct, and in particular giving close consideration to:
>
> (i) the need to protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government;
>
> (ii) the benefits of establishing a system for dealing with such complaints and allegations that is efficient, accessible, transparent and accountable;
>
> (iii) the need to ensure that any system for dealing with such complaints and allegations is suited to the conditions in Western Australia, having regard to the number of serving state judicial officers and the number of complaints or allegations warranting investigation that may be expected to arise;
>
> (iv) the need to develop standardised and consistent procedures when dealing with such complaints, thus reducing the potential for allegations of bias to be made in relation to procedures which are developed after the complaint or allegation is made;
>
> (v) the recent establishment of judicial complaints systems in other jurisdictions both nationally and internationally;
>
> and to report on the adequacy of, and on any desirable changes to, the existing principles, practices and procedures in relation thereto.

THE DISCUSSION PAPER AND THIS FINAL REPORT

In September 2012 the Commission released a discussion paper on this reference. In it the Commission noted that the terms of reference acknowledged the need to protect and preserve judicial independence while recognising that the system must also enhance judicial accountability. The Discussion Paper included an analysis of the current complaints systems in Western Australia, in other jurisdictions in Australia and in some comparable overseas jurisdictions. The Paper then sets out six proposals and posed questions in relation to them. In summary the six proposals were:

1. There should be a formal system for investigating complaints against judicial officers.

2. A judicial commission should be established to administer the formal system, generally based on the similar body operating in New South Wales.

3. Any person should be able to complain to the judicial commission about the conduct of a judicial officer.

4. Relevant legislation should be amended to provide that the grounds for removal from office of a judicial officer are misbehaviour or incapacity.

5. Power to remove a judicial officer from office should be reserved to Parliament.

6. Rules of procedural fairness should be recognised and applied at all stages of the complaints process.

It has to be said that the fifth proposal was infelicitously worded. The power of removal should only be exercised by the Governor in Council following an address by both Houses of Parliament.

The Commission received a number of submissions in response to the discussion paper. They are listed in Appendix C. The submissions were overwhelmingly in support of the general tenor of the proposals, with useful comments on matters of detail.

The recommendations in this Report are in line with the earlier proposals. However, to ensure that the rationale for the recommendations (particularly the concepts of judicial accountability and judicial independence) and the reasons for drawing on the experience of New South Wales are properly understood, much of the background material and comparative analysis that was contained in the Discussion Paper is repeated here. Where appropriate, the information in those sections has been revised to reflect the position as at May 2013.

BACKGROUND

The constitutional system in Australia recognises the judiciary as one of the three arms of government, along with the legislature and the executive. It also recognises the need for the judiciary to be accountable and independent if it is properly to fulfil its constitutional role. The integrity of the system and public confidence in it depend on an appropriate balance between the concepts of accountability and independence.

As former Chief Justice Sir Gerard Brennan has noted, '[t]he first role of the judge is to preside and to hear' – to be informed about the material required for judgment and dispassionately to make findings of fact and to apply the law.[1] It is of the essence of the judicial process that it be carried out in the public interest. It is in the public interest that the judiciary be accountable for the manner of the exercise of its functions. An aspect of accountability is that persons with concerns about the conduct of judges should have a

1. Brennan G, 'The Role of the Judge' (Paper prepared for the National Judicial Orientation Programme, Wollongong, 13 October 1996).

proper means by which to raise those concerns and to have them addressed. The appellate process is one way in which this occurs. It is designed to identify and correct legal and factual error in the decision-making process. Another aspect of accountability is that legitimate concerns about the conduct of a judicial officer that are not amenable to the appellate process should also be capable of review in an appropriate case.

Judges hold office until they resign or reach a compulsory retirement age of 70 years. Until then, their commissions 'remain in full force during their good behaviour'.[2] This provision is modelled on England's *Act of Settlement 1701,*[3] as are the comparable provisions in the Australian Constitution[4] and the constitutions or constitutive legislation for courts in other states.[5] Those provisions limit removal of a judge to instances of 'proved misbehaviour or incapacity'.[6] It can be assumed that the reference in the Western Australian provision to 'good behaviour' is to be construed similarly.

It follows that judges have security of tenure. This is an important feature of our constitutional system because it allows judicial functions to be exercised impartially and without fear or favour. It is a critical element of the concept of judicial independence and it is in the public interest that it be respected.

Phrases in the terms of reference such as 'complaints or allegations of misbehaviour or incapacity' against state judicial officers, 'protect[ing] and preserv[ing] the independence and impartiality of state courts' and 'the principles, practices and procedures pertaining to complaints or allegations' of that nature, need to be understood against this background.

DEALING WITH COMPLAINTS

There is no legislation prescribing how complaints against the Western Australian judiciary are to be lodged, investigated or dealt with, save for the removal of a judge from office and some provisions in the *Magistrates Court Act 2004* (WA). Some other jurisdictions either have, or are contemplating, legislation for a more formal complaints system.[7]

The experience of the courts is that complaints cover a broad spectrum, both in relation to subject matter and level of seriousness. Some complaints emerge from a lack of understanding of the legal system and (or) from disappointment that a decision, on its face regular, has gone against the person concerned. Many concerns relate to delay in

2. *Constitution Act 1889* (WA) s 54. A more complete discussion of these provisions (and those governing the continuance in office of magistrates) appears below.
3. *Act of Settlement 1701* Art III, s 7.
4. *Constitution Act 1900* (Cth) s 72(ii).
5. See, eg, *Constitution Act 1975* (Vic) s 87AAB(1); *Constitution Act 1902* (NSW) s 53(1); *Constitution of Queensland 2001* (Qld) s 60(1); *Supreme Court Act* (NT) s 40(1); *Constitution Act 1934* (SA) s 74; *Supreme Court (Judges' Independence) Act* 1847 (Tas) s 1; *Judicial Commissions Act 1994* (ACT) s 4.
6. *Constitution Act 1900* (Cth) s 72(ii).
7. See 'Australian Federal Courts', ch 3 below, concerning federal jurisdictions, New South Wales and Victoria.

delivery of reserved decisions. Others allege rudeness or insensitivity to varying degrees by a judicial officer in the course of court proceedings. Some complaints of this nature can be resolved relatively simply by communication between the person concerned and the relevant court or judicial officer.

From time to time complaints arise that are more serious. Some of them, albeit very few, allege material misbehaviour and (or) call into question the capacity of the judicial officer to hold office. It is complaints of this nature that raise peculiar difficulties in terms of investigation and resolution and to which the terms of reference appear primarily to be directed. However, for the purposes of this project, it is necessary to consider the broader range of complaint categories.

COMPLAINT CATEGORIES

Complaints about the conduct of state judicial officers are generally handled by the court or tribunal of which that officer is a member. This is done under a nonlegislative document called the 'Protocol for Complaints Against Judicial Officers in Western Australian Courts' ('the Protocol'). [8] The preamble indicates that the Protocol is 'modelled on the draft approved by the Council of Chief Justices of Australia and New Zealand for adoption by courts as they think fit'. The Protocol divides complaints into three categories:

(a) delay in delivering reserved decisions;

(b) complaints alleging non-criminal misconduct; and

(c) complaints received by the Police Service.

In attempting to identify the nature and incidence of complaints it may be more appropriate to utilise a different method of categorisation, namely:

(a) ordinary complaints – that is, complaints of non-criminal misconduct of a less serious kind and which would normally be disposed of without any (or with minimal) investigation; for example, complaints:

    (i) for which it is difficult to discern a rational basis;

    (ii) that arise because of a misunderstanding of the legal system;

    (iii) the subject matter of which could or should have been the subject of an appellate or other review process; and

    (iv) arising from delays in delivery of reserved judgments or other delays in bringing the matter to finality;

8. Department of the Attorney General (WA), *Protocol for Complaints against Judicial Officers in Western Australian Courts* (August 2007).

(b) behavioural issues – that is, complaints of matters such as rudeness, insensitivity, perceptions of unfair treatment or other conduct falling short of the level expected of a judicial officer but which, if established, could not reasonably be regarded as warranting removal from office;

(c) complaints of criminal misconduct; and

(d) complaints alleging misbehaviour or incapacity of a level of seriousness that suggests unfitness for office and which may warrant removal from office.

THE INCIDENCE OF COMPLAINTS

The terms of reference note the need to ensure that any system for dealing with such complaints and allegations is suited to the conditions in Western Australia, having regard to the number of serving state judicial officers and the number of complaints or allegations warranting investigation that may be expected to arise.

As at May 2012 there were 135 judicial officers covered by the complaints mechanism set out in the Protocol. This figure excludes the 115 non-judicial members of the State Administrative Tribunal who, as non-judicial officers, are not subject to the Protocol. A breakdown of that number (as between the several courts and tribunals) is contained in Appendix B, which also sets out comparative numbers of judicial officers in other states and territories. The information in this regard is approximate because nomenclature and court structures are not standard across the jurisdictions and exact comparisons are difficult to draw.

The workload of the courts in this state is significant. Given the large number of matters that are dealt with by the judicial system, the incidence of complaints about judicial conduct is low. Complaints that raise a serious prospect of removal of a judge from office are rare. There is no recorded instance of a motion in Parliament for the removal from office of a Western Australian judge. There have been motions of that type in other Australian jurisdictions but they are few and far between. As the system for making complaints against judicial officers in Western Australia is relatively informal and the circumstances and procedures vary widely, it is not easy to quantify the nature and extent of the issue or the level of community concern about judicial conduct. No formal statistics are available and estimates of the number of complaints that are made can only be gleaned from the correspondence files of the several courts.

The correspondence files maintained by the Chief Justice indicate that in 2009 there were 47 complaints made direct to him concerning judicial officers at all levels of the court system. In 2010 the number was 33. Using the categorisation set out above, the complaints can be described as set out in the following table.

	Ordinary Complaints	Behavioural Issues	Criminal Misconduct	Misbehaviour or Incapacity	Total
2009	40	7	0	0	47
2010	27	6	0	0	33

Records maintained by the Chief Justice also indicate that 13 complaints were made to him in 2011 in relation to the judges, master and registrars of the Supreme Court. The comparative figure for 2012 was 16. No information is available to characterise those complaints by category.

These figures do not include matters relating to delays in the delivery of reserved decisions, many of which would be characterised as 'inquiries' rather than complaints.

The correspondence files maintained by the Chief Judge of the District Court indicate that in 2011 and 2012 he received seven and three complaints respectively. However, of those 10 complaints eight related to the merits of decisions and one concerned delay in delivery of a reserved judgment.

The correspondence files maintained by the Chief Magistrate indicate that in 2011 a total of 115 complaints were received. Of these, 19 were of behavioural issues and the remainder were ordinary complaints. There were no complaints of criminal misconduct or of misbehaviour or incapacity. In 2010 one complaint falling into the 'misbehaviour or incapacity' category was referred by the Chief Magistrate to the Attorney General. After investigation under the relevant provisions of the *Magistrates Court Act* the Attorney decided that the subject matter of the complaint did not justify taking further action against the judicial officer concerned. The Chief Magistrate has also reported that in 2012 he received 109 letters of complaint concerning magistrates. Of these, six would be characterised as behavioural issues and the balance would fall in the category of ordinary complaints.

Information provided by the Corruption and Crime Commission (CCC) indicates that since 2005 there have been 39 complaints about judicial officers made to the CCC. Of these:

- 26 did not meet the requirements of s 27 of the *Corruption and Crime Commission Act 2003* (WA);
- six involved insufficient evidence or grounds to justify further action by the CCC;
- eight were deemed to involve no misconduct;
- one was referred to the Department of the Attorney General; and
- one was referred to the Western Australia Police.[9]

9. Corruption and Crime Commission, letter to the Commission (10 August 2012), tables.

Although it is difficult to draw much from the statistical information described in the preceding paragraphs, it appears that:

(a) the level of complaints is low;

(b) most complaints fall within the category of ordinary complaints;

(c) no complainants have alleged criminal misconduct; and

(d) with the one exception mentioned, no complainants have alleged judicial misbehaviour or incapacity.

It is not possible to assess whether, and if so to what extent, the low incidence of complaints reflects a lack of knowledge about the avenues for complaint currently open to affected parties. However, it should be noted that in New South Wales (which has had a more formal system since 1985) the number of complaints is small considering the many dealings which members of the public have with the court system.[10]

PERCEIVED PROBLEMS WITH THE CURRENT SYSTEM

The perceived deficiencies in the current system for handling complaints against members of the judiciary are best viewed from the perspective of various groups having a direct interest in the process.

Litigants and members of the public

It is difficult to gauge the level of awareness that the public has as to the existence of the Protocol or generally of mechanisms for dealing with complaints against the judiciary.[11] There may be, among disappointed litigants and some members of the public, a perception that the system is not transparent, impartial or accountable. This impression may arise from the fact that complaints are presently made to, and dealt with by, the head of jurisdiction (herself or himself a judicial officer). Regardless of the merits, a resolution of the dispute unfavourable to the complainant may therefore engender a sense that the result was inevitable and unfair.

The Commission has received comments from a former member of Parliament and from organisations which regularly appear before the courts expressing dissatisfaction with the current arrangements for dealing with complaints.

10. Ibid. For further discussion, see 'Other Australian Jurisdictions: New South Wales', ch 3 below.
11. The Protocol is available on the Supreme Court of Western Australia's website (see <http://www.supremecourt.wa.gov.au/_manifest/2007_complaints_protocol_31082007.jmf>), but there have been no surveys or research to assess the level of public awareness of the system.

Parliament and the executive

Historically, both Parliament and the executive have acknowledged the importance of the principle of judicial independence and have been sensitive to intrusions into it. The role of these arms of government in the complaints process raises constitutional and practical problems.

The explanatory memorandum to a Bill that was before the federal Parliament in 2012 describes the issue in this way:

> While instances of removal of judges from office in Australia have been extremely rare, it is important that a clear framework is in place in the event that such a circumstance were to arise. Currently, there is no standard mechanism by which allegations about misbehaviour or incapacity against ... judicial officers would be investigated to assist Parliament's consideration of removal of a ... judicial officer under [state legislation].[12]

Judges and the courts

Each head of jurisdiction has responsibility for the management or her or his court or tribunal. Handling of complaints by heads of jurisdiction is difficult, time consuming and resource intensive. They involve peculiar personnel management problems related to the fact that the principle of judicial independence applies to judges individually as well as collectively. Dealing with complaints against individual judicial officers presents a head of jurisdiction with difficult management issues given the nature of judicial office and the limited avenues that are available to deal with complaints found to have substance. The courts also lack the resources and the expertise properly to investigate complaints of a more serious nature.

Heads of jurisdiction often receive multiple complaints from the same individual who has become disenchanted with the legal system and (or) with the way her or his case has been (or is being) handled. Dealing with complaints of this nature presents peculiar problems, especially when appellate processes are underway. On occasions, the head of jurisdiction has no alternative other than to discontinue correspondence with the complainant. This is not a satisfactory outcome given the public interest in issues of this nature.

The Commission has also received comments from a body representing the interests of magistrates expressing dissatisfaction at the complaints handling process generally and the relevant provision of the *Magistrates Court Act* in particular.[13]

12. Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Cth), Explanatory Memorandum, [5].
13. *Magistrates Court Act 2004* (WA) sch 1.

The absence of established mechanisms by which Parliament is to investigate, and deliberate on, a serious complaint that came before it raises many issues. Among them is a real question about how procedural fairness would be afforded to the judicial officer concerned.

STRUCTURE OF THIS REPORT

The terms of reference recognise that a complaints system:

(a) must 'protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government';

(b) ought to be efficient, accessible, transparent and accountable; and

(c) should be established having regard to the experience of other jurisdictions.

This report first considers concepts of judicial accountability and judicial independence. It then analyses the current complaints systems in Western Australia, in other jurisdictions in Australia and in some comparable overseas jurisdictions. The report then makes 18 recommendations, having regard to the submissions received following the publication of the preliminary report. A full list of recommendations can be found in Appendix A.

Chapter 1

Judicial Accountability and Judicial Independence

Contents

1 Judicial accountability

The concept of accountability refers to a person (or class of persons) being answerable for his or her actions and decisions to some clearly identified individual or body.[1] In the context of a democracy, those who wield public power are considered to be accountable to the community for their actions. Judicial accountability therefore refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance.

In recent years, there has been an increased focus on public accountability generally and this includes holders of judicial office.[2] There is a natural inclination to look at accountability primarily from the perspective of removal from an office or position. But the peculiar nature of judicial office, and in particular its position in the Australian constitutional system, requires a much broader view of accountability in this context.

One author has commented that 'accountability of the judiciary … must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective'.[3] The principle of open justice is important in this respect and it facilitates the scrutiny and evaluation of judicial decisions in numerous ways.

A large part of the work of a judge is done in the public eye: trials are, with very few exceptions, open to the public and the media.[4] Generally speaking, media reports of court proceedings are protected by the law of defamation. The way in which judges conduct themselves (as well as the decision at which they arrive) is therefore open to public scrutiny in the performance of their judicial functions. However, the value of this aspect of accountability may depend on the level of understanding of the system held by those who report the process and by interested members of the public.[5]

The obligation to give reasons for decisions is another aspect of judicial accountability.[6] A judge must detail the grounds for his or her decision and these reasons are published in law reports and online, available to be read by anyone with an interest in doing so. The requirement to give reasons is often explained in the context of the appellate process. All Australian judges, aside from those sitting in the appellate division of the High Court, are by law accountable through the appeal process.[7] On appeal, the legality of a judgment is evaluated and the decision may be overturned. However, accountability through the

1. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 14.
2. Kirby M, 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 41, 42; Griffith, ibid.
3. Kirby, ibid 43.
4. Kirby, ibid 45.
5. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 17.
6. Kirby M, 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 41, 46.
7. Ibid 41.

appeal process is constrained by the rules governing appellate intervention.[8] Also, the appeal of a decision is not a personal evaluation of an individual judge, only of the ruling.[9] But the importance of reasons for decision goes beyond protecting rights of appeal. They are, in themselves, a bulwark against the arbitrary exercise of judicial power and in this sense they facilitate accountability.

Judicial officers in inferior courts may be held to account by a superior court on issues of bias, procedural unfairness or where they have acted in excess of their powers.[10] But this judicial review is restricted to legal errors and does not extend to an examination of the professional qualities of the judge.[11]

Judges, like other citizens, are required to abide by the criminal law. They are therefore accountable to society, as is every citizen, for behaviour that contravenes the criminal law. They are also accountable to peer opinion, which has been described as a particularly powerful form of scrutiny in the judicial context.[12] Finally, as mentioned earlier, the actions of judges are subject to scrutiny by the media. The concept of open justice ensures that media have the opportunity to report on their actions. This can be a strong factor in public scrutiny and attendant criticism of judicial performance.[13]

8. Ibid 46. See *Supreme Court (Court of Appeal) Rules 2005* (WA).
9. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 17.
10. Clark D, *Principles of Australian Public Law* (Sydney: LexisNexis Butterworth, 2003) 269.
11. Lane WB & Young S, Administrative Law in Australia (Sydney: Lawbook Company, 2007) 35.
12. Doyle J, 'Judicial Independence' (1998) 16 *Australian Bar Review* 212, 219.
13. Rares S, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 133.

1 Judicial independence

THE MEANING OF 'JUDICIAL INDEPENDENCE'

Judicial independence is one of the essential principles of the constitutional system.[1] The core principle is that judges are independent of influence in their role of making judicial decisions and the performance of their judicial function.[2]

The essence of judicial independence is encapsulated in the following statement:

> The independence of the judiciary lies at the heart of the rule of law and hence of the administration of justice itself. The essence of judicial independence is that the judge in carrying out his judicial duties, and in particular in making judicial decisions, is subject to no other authority than the law.... In particular, the judiciary should be free from the control of the executive government or of any department or branch of it.[3]

The rationale for judicial independence is essentially the impartial administration of justice.[4] It exists to serve the interest of the public, not the interests of individual judges. As stated by former Chief Justice of the High Court Sir Gerard Brennan:

> Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors, but the governed.[5]

True independence relies on freedom from influence. These influences encompass influences both external and internal to the judiciary. External influences include pressure from another branch of government, strong interests groups or the media.[6] Internal influences could be the opinions of other colleagues, or personal attitudes and prejudices.[7] In order to maintain the judiciary as independent, it is necessary that there are legal and institutional measures to ensure that judges are independent from influences both individually and collectively.[8] Such measures include security of tenure, adequacy of salary, and immunity from suit for their decisions.[9]

It is essential that there is public confidence in the independence of the judiciary. If the impartiality of a judge is in question there is likely to be a lack of confidence in the decision made by the judge. Public confidence is maintained by judges making decisions according to the law, recognising the constraints on the exercise of judicial power, and

1. Clark D, *Principles of Australian Public Law* (LexisNexis Butterworth, 2003) 242.
2. See generally, Doyle J, 'Judicial Independence' (1998) 16 *Australian Bar Review* 212.
3. *R v Moss: Ex parte Mancici* (1982) 29 SASR 385, 388 (King CJ).
4. Clark D, *Principles of Australian Public Law* (LexisNexis Butterworth, 2003) 244.
5. Brennan G, 'Judicial Independence' (Speech delivered at Australian Judicial Conference, Australian National University, Canberra, 2 November 1996).
6. Debeljak J, 'Judicial Independence: A Collection of Material for the Judicial Conference of Australia' (Speech delivered at Judicial Conference of Australia, Uluru, April 2001).
7. Griffith G, *Judicial Accountability*, Background Paper No 1 (NSW Parliamentary Library Research Service, 1998) 14, 17.
8. Ibid.
9. Debelle B, 'Judicial Independence and the Rule of Law' (2001) 75 *Australian Law Journal* 556, 561.

being clearly accountable for their decisions.[10] Public confidence will be at risk unless it is clear that a judicial decision was reached 'impartially and fearlessly' and in accordance with the rule of law.[11] Once again, the provision of reasons is an important component of the decision-making process.[12]

One of the most obvious exemplars of judicial independence is security of tenure. Judges hold office until they resign or reach a compulsory retirement age. There are limits on the ability of the Governor to remove a judge from office. Generally speaking, this can only be achieved upon an address in Parliament and there is a strong convention that removal is reserved to exceptional cases and for proved misbehaviour of a serious kind.[13] What is perhaps less well understood is that the concept of judicial independence applies to individual judges as well as to courts as entities. Each judge is afforded the protection of the doctrine. There are, therefore, limits to the amenability of an individual judge to 'discipline', even within the structure of the court of which she or he is a member.

HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE

Prior to the 17th century, the English system of justice was essentially a system of royal justice where the monarch had ultimate power over both the courts and the executive.[14] The judges who presided over the various courts were civil servants who held office at the pleasure of the Crown, and could be appointed and dismissed like any other office bearer.[15] Judges also performed administrative functions and would on occasion advise the Crown on legal matters and draft legislation.[16] They were not paid a regular salary and thus were open to bribes.[17] After the revolution of 1688, there was an attempt to entrench judicial security of tenure in the Bill of Rights, but it was not until the *Act of Settlement* in 1701 that judges held office while of good behaviour and could only be removed upon address by both Houses of Parliament [18]

The *Act of Settlement 1701* was not part of the inherited imperial law on settlement, and colonial judges were treated simply as colonial servants.[19] The British Crown had control over the appointment and removal of judges until federation. The enactment of Chapter III

10. Ibid 562.
11. Warren M, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 482.
12. Ibid.
13. Campbell E, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63.
14. Debelle B, 'Judicial Independence and the Rule of Law' (2001) 75 *Australian Law Journal* 556, 559.
15. Ibid.
16. Clark D, *Principles of Australian Public Law* (LexisNexis Butterworth, 2003) 245.
17. Debelle B, 'Judicial Independence and the Rule of Law' (2001) 75 *Australian Law Journal* 556, 559.
18. Clark D, *Principles of Australian Public Law* (LexisNexis Butterworth, 2003) 245–6; ibid 560.
19. Clark, ibid 246.

of the Australian Constitution, the various state constitutions and legislation establishing the state courts entrenched the relevant principles in Australian law.

JUDICIAL INDEPENDENCE AND THE RULE OF LAW

The rule of law is a fundamental part of the Australian legal system. Its implementation depends on the existence of a judiciary that is 'seen to be impartial, independent of government and of any other centre of financial and social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism'.[20] There is, therefore, a critical relationship between judicial independence and the rule of law.[21]

The phrase 'the rule of law' is usually attributed to Professor AV Dicey who wrote of the concept in the late 19th century, but its origins can be traced back to Aristotle.[22] This concept is multi-faceted. The two elements of the rule of law that are most relevant to the issue of judicial independence are that laws will be administered impartially, and that no person or body is beyond the reach of the law.[23] The first element guarantees that all persons subject to the law will be treated equally. The second establishes that officials and members of the government (including judges) are subject to the same laws that govern the lives of every citizen.

The role of judges is to apply the rule of law, treating every person or body which comes before them impartially and equally and according to the law which has been passed by the legislature. In order to facilitate the proper application of the rule of law, it is fundamental to have a judiciary that is free from influence and bias.

JUDICIAL INDEPENDENCE AND THE DOCTRINE OF SEPARATION OF POWERS

The modern doctrine of separation of powers is considered to have emerged in the second half of the 17th century.[24] The doctrine dictates that each branch of government is to be separate from the others; that is, the legislature, executive and judiciary are all to be distinct institutions. This separation is to ensure that no one branch becomes overpowerful and to allow each branch to act as a check or balance on the others. This being the case, the separation of powers doctrine is fundamental to the concept of judicial independence because it allows the judiciary to be free from the influences of the other branches of

20. Brennan G, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33.
21. Bingham T, *The Rule of Law* (Penguin, 2012) 25, 91–2.
22. Ibid 3 and following.
23. Griffith G, *Judicial Accountability*, Background Paper No 1 (NSW Parliamentary Library Research Service, 1998) 14, 17.
24. Clark D, *Principles of Australian Public Law* (LexisNexis Butterworth, 2003) 85.

government, and allows it to review the laws made by the legislature and the actions of the executive in an impartial manner.

The Australian constitutional system incorporates a partial separation of powers, as members of the political executive are also members of the legislature. There are also differences in the application of the separation of powers at federal and state levels. The recognition of the division between the judiciary and the other branches of government is much stricter and more formal at the federal level; this is due to the enshrinement of the separation of the judiciary in the provisions of Chapter III of the Australian Constitution.[25] The state constitutions do not have analogous provisions. However, the organisation and procedures of the state courts are similar to those of the federal courts.[26] The High Court has recently affirmed the significant role of the state Supreme Courts in the supervision and guardianship of their own jurisdictions.[27] This has been described as 'the very foundation of judicial independence'.[28] Although the partial separation of powers at state level is not as clear – either conceptually or practically – as it is at federal level, the judiciary is still considered to be an independent branch of government.

25. Warren M, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 484.
26. Ibid.
27. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
28. Warren M, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 485.

Chapter 2

Current Complaints System in Western Australia

Contents

The complaints system in Western Australia

2

As discussed in the introduction to this Final Report, complaints against the Western Australian judiciary are dealt with under the Protocol. The introduction describes the categories of complaints as they are set out in the Protocol and indicates that a different categorisation is preferred by the Commission and used throughout this paper; namely:

(a) ordinary complaints – that is, complaints of non-criminal misconduct of a less serious kind;

(b) behavioural issues;

(c) complaints of criminal misconduct; and

(d) complaints alleging misbehaviour or incapacity thus demonstrating unfitness for office and which may warrant removal from office.

When discussing complaints regimes in other jurisdictions, the same categorisation of complaints will be used to the extent that it can be discerned from the published policies or protocols of those jurisdictions. In each instance the heading 'ordinary complaints' is intended to encompass complaints in both categories (a) and (b) above.

A diagrammatic representation of the complaints handling system as it presently exists under the Department of the Attorney General (WA) appears in Chart 1.

JUDICIAL OFFICER

The term 'judicial officer' is defined in the Protocol to include:

(a) a 'holder of a judicial office' within the meaning of that phrase in s 121 of the Criminal Code (WA); and

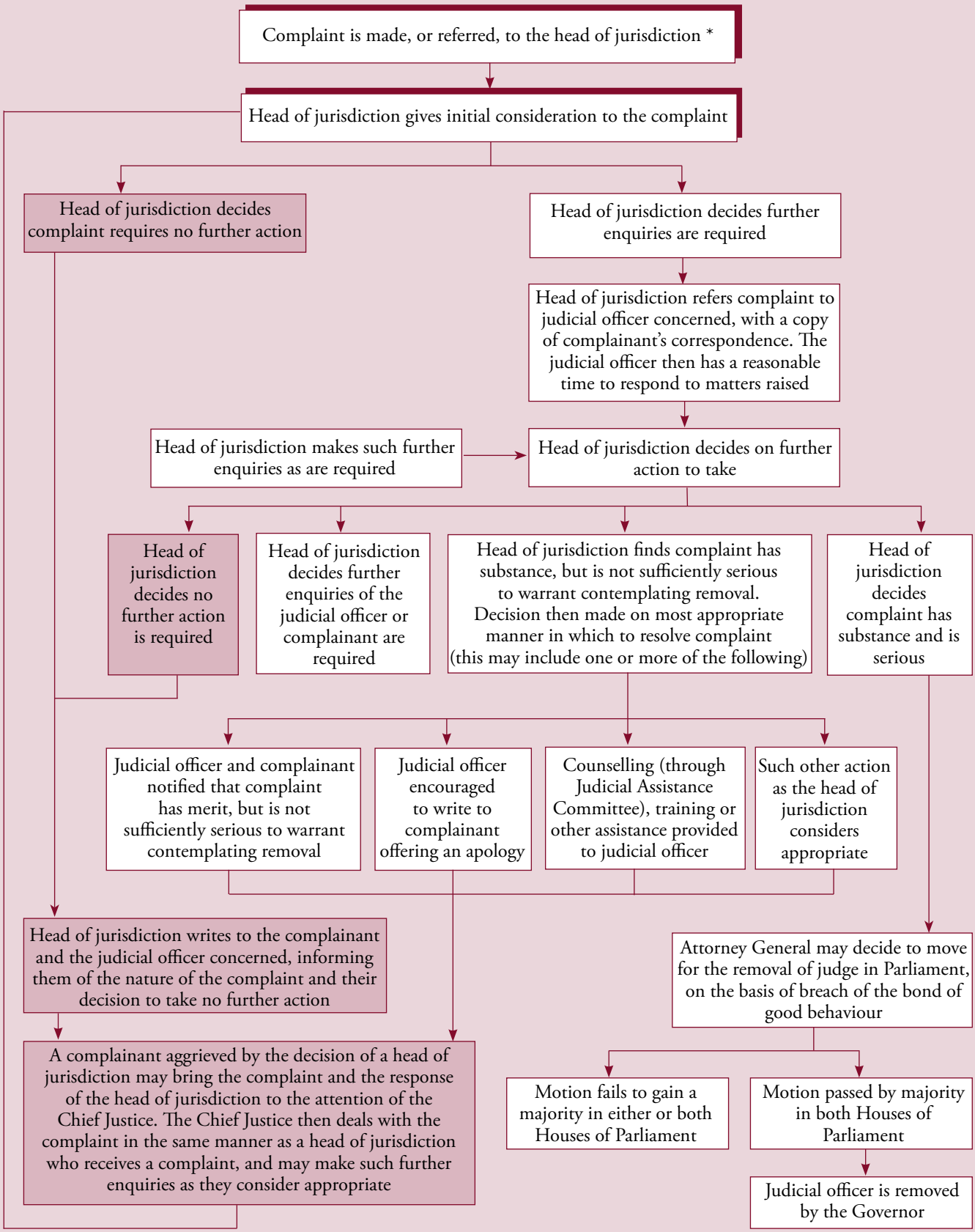
(b) a Registrar of the Supreme Court, Family Court of Western Australia, or District Court when acting judicially.[1]

The term 'holder of judicial office' is not exhaustively defined in s 121 of the Criminal Code. The section simply states that the term includes an 'arbitrator or umpire and any member of any board or court of conciliation or arbitration'.[2] However, the text of the Protocol suggests that it is designed primarily to cover complaints against office holders of the Supreme, District, Family, Magistrates and Children's Courts and the State Administrative Tribunal.[3] The Protocol does not apply to non-judicial members of the State Administrative Tribunal.[4]

1. Department of the Attorney General (WA), *Protocol for Complaints against Judicial Officers in Western Australian Courts* (August 2007) ('Protocol') 1.
2. *Criminal Code Act Compilation Act 1913* (WA) s 121.
3. Protocol [18]
4. Protocol [9]; *State Administrative Tribunal Act 2004* (WA) ss 122, 123.

CHART 1

The complaints handling process under the Department of the Attorney General (WA)



The complaints handling process under Department of the Attorney General (WA), *Protocol for Complaints Against Judicial Officers in Western Australian Courts* (August 2007). There is an additional process for the suspension and removal of magistrates

*Note: If the complaint regards the head of a jurisdiction, it is made to the Chief Justice of the Supreme Court. If the complaint about the Chief Justice, it is made to the next most senior member of the Supreme Court.

ORDINARY COMPLAINTS

The Protocol records the guidelines issued by the respective courts and tribunal for the delivery of reserved judgments and indicates that enquiries should be made of the presiding judge or the head of jurisdiction.[5]

In relation to other non-criminal misconduct, any person affected is entitled to make a complaint regarding any member of the judiciary, concerning the performance by that judicial officer of his or her judicial functions.[6] The complaint should be dismissed if it relates to, or involves, the merits of a judicial decision or any other matter that may be the subject of appeal or review.[7]

Complaints of non-criminal misconduct in the course of judicial functions are ordinarily made to the head of the relevant jurisdiction.[8] The 'head of jurisdiction' refers to the chief judicial officer of each court and the State Administrative Tribunal.[9] If the complaint regards the head of a jurisdiction, it is made to the Chief Justice of the Supreme Court.[10] If the complaint is made about the Chief Justice, it is made to the next most senior member of the Supreme Court.[11]

Some complaints of non-criminal misconduct may be made to the Western Australia Police (including 'rudeness', 'professional negligence' and 'unethical behaviour').[12] However, it appears that in practice the Western Australia Police ultimately direct complaints of this nature to the relevant head of jurisdiction.[13]

The head of jurisdiction is responsible for initially considering each complaint. At this stage, he or she may make a decision that 'no further action is required', or that 'further enquiries should be made'.[14]

If the head of jurisdiction decides that no further action is required, the judicial officer concerned should be informed of the nature of the complaint and the decision on it. The complainant should also be informed of the decision.[15]

If further enquiries are made, the head of jurisdiction must refer the matter to the judicial officer who is the subject of the complaint, and provide the judicial officer with a copy

5. Protocol [1]–[8].
6. Protocol [9].
7. Protocol [12].
8. Protocol [10].
9. Protocol 1.
10. Protocol [10].
11. Protocol [10].
12. Protocol [18].
13. Protocol [18].
14. Protocol [13].
15. Protocol [13], [14].

of the complainant's correspondence. The judicial officer must also be given a reasonable time within which to respond to the matters raised by the complainant.[16] After receiving the judicial officer's response, the head of jurisdiction may decide that:

(a) no further action is required, and inform the complainant and the judicial officer that the complaint has been dismissed; [or]

(b) further enquiries should be made of either the judicial officer or the complainant before a decision can be made; [or]

(c) the complaint has substance but is not sufficiently serious to contemplate removal; [or]

(d) the complaint has substance and is serious.[17]

If the head of jurisdiction decides that the complaint has substance but is not sufficiently serious to contemplate removal, consideration should be given to the most appropriate manner in which to resolve the complaint, including:

(a) noting that the complaint has merit, both the judicial officer and complainant being notified accordingly; [or]

(b) suggesting that the judicial officer concerned write to the complainant offering an apology; [or]

(c) [recommending] counselling (through the Judicial Assistance Committee), training or the provision of assistance to the judicial officer concerned.[18]

If the head of jurisdiction decides that the complaint has substance and is serious, the complaint must be dealt with according to procedures that have been established by law.[19] This is dealt with in a later section headed 'Complaints alleging unfitness for office'.

'Where a complainant is aggrieved by the decision of a head of jurisdiction other than the Chief Justice, the complainant [may] bring the complaint, and the nature of the head of jurisdiction's response, to the attention of the Chief Justice'. In this case, 'the Chief Justice is under the same obligations … as any other head of jurisdiction dealing with such a complaint', and 'may make any enquiries he or she considers appropriate in resolving the complaint'.[20]

16. Protocol [15].
17. Protocol [16].
18. Protocol [16]. The Judicial Assistance Committee is an informal body convened as and when a need is seen to arise.
19. Protocol [16].
20. Protocol [17].

COMPLAINTS OF CRIMINAL MISCONDUCT

Complaints of criminal misconduct are ordinarily made to the Western Australia Police. They are reported to the Assistant Commissioner of Police for Corruption Prevention and Investigation, who forwards them to the Commissioner of Police and the head of jurisdiction.[21]

The Corruption and Crime Commission (CCC) also has a limited role in this area. Under s 27(3) of the *Corruption and Crime Commission Act 2003* (WA), the CCC must not receive or initiate a complaint against a judicial officer unless the allegation:

(a) relates to an offence under s 121 of the Criminal Code (which deals with judicial corruption), including attempt, incitement and conspiracy to commit such an office; or

(b) if established, would constitute grounds for removal from judicial office.[22]

Most complaints received by the CCC are ultimately referred to the agency of the relevant official. This might suggest that complaints would generally be dealt with by the Department of the Attorney General.[23] However, in practice it is likely that the Corruption and Crime Commissioner would refer the matter to the Chief Justice. Under ss 27(4) and 27(5), when investigating a complaint against a judicial officer the CCC must:

(a) proceed having regard to the preservation of judicial independence; and

(b) act in accordance with conditions and procedures formulated in consultation with the Chief Justice.

It is not entirely clear whether s 27(3) is intended to be a code governing the CCC's jurisdiction in relation to complaints against judicial officers or whether the definition of 'misconduct' in s 4 of the Act has some residual application in addition to the specific dictates.

If a judge were found to have committed a serious criminal offence, it is likely that he or she would be subject to the procedure described in the next section.

21. Protocol [18].
22. *Corruption and Crime Commission Act 2003* (WA) s 27(3); Protocol [18].
23. Corruption and Crime Commission (WA), *Reporting Misconduct Process*, 'Dealing with Your Misconduct Report' <http://www.ccc.wa.gov.au/Reporting/Process/Pages/default.aspx>.

2

COMPLAINTS ALLEGING UNFITNESS FOR OFFICE

The category of complaints alleging unfitness for office includes serious allegations that may warrant removal from office. The complaints procedure is initiated and proceeds in the manner set out above.[24] If, after investigating the matter, the head of jurisdiction decides that the complaint has substance, is serious and that the subject matter indicates unfitness for office, further proceedings may ensue as established by law and described in the following paragraphs.

Judges of the Supreme Court who attain the age of 70 years 'shall retire from office on the day on which he [or she] attains such age'.[25] In other words, there is a compulsory retirement age. Until the age of compulsory retirement, 'all the judges of the Supreme Court shall hold their offices during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament'. [26]

Neither the Protocol nor the *Supreme Court Act 1935* (WA) defines or gives examples of what would or might infringe the stipulation of 'good behaviour', thus justifying intervention. Nor is there detail of the procedure to be followed. It seems likely that responsibility for preparing the case for removal would fall to the Attorney General.[27]

These provisions are duplicated in the constitutive legislation concerning judges of the District Court and the Family Court of Western Australia and judicial members of the State Administrative Tribunal. [28]

Magistrates have a compulsory retiring age of 65.[29] They, too, hold office during good behaviour. But the Governor may terminate an appointment upon an address in both houses of Parliament.[30] There are two other relevant provisions affecting magistrates. First, the Attorney General may relieve a magistrate from duties if the Attorney is of the opinion that the magistrate 'is incapable of performing satisfactorily his or her official functions due to physical or mental incapacity other that due to temporary illness'. The matter is then referred to the Chief Justice who appoints a committee of a judge and two medical practitioners to investigate. The committee reports to the Governor who may either reinstate the magistrate to her or his duties or terminate the magistrate's appointment.[31]

24. See above, 'Ordinary Complaints'.
25. *Judges Retirement Act 1937* (WA) s 3.
26. *Supreme Court Act 1935* (WA) s 9. See also ss 11(3), 11AA(4)(c), 11A(3) and the *Constitution Act 1889* (WA) ss 54, 55.
27. Jordan R, *Client Memorandum – Complaints Against Judges* (November 2009).
28. *District Court of Western Australia Act 1969* (WA) ss 11(1), 18(4)(b), 18A(4)(b); *Family Court Act 1997* (WA) s 18(3); *State Administrative Tribunal Act 2004* (WA) ss 110, 114.
29. *Magistrates Court Act 2004* (WA) sch 1, cl 11.
30. *Magistrates Court Act 2004* (WA) sch 1, cl 15.
31. *Magistrates Court Act 2004* (WA) sch 1 cl, 13.

Secondly, the legislation provides for the grounds on which 'proper reason for suspending a magistrate from office' exists. Grounds include that the magistrate:

(a) has shown incompetence or neglect in performing his or her functions; or

(b) has misbehaved or engaged in any conduct that renders him or her unfit to hold office as a magistrate, whether or not the conduct relates to those functions.[32]

The legislation provides that the Attorney General may give a magistrate notice to show cause why he or she should not be suspended from office. The Attorney, after consulting the Chief Magistrate, must allege that a proper reason exists for suspending the magistrate. A copy of the notice to show cause must be given to the Chief Justice. The Chief Justice, or a judge nominated by him, is to make an inquiry into 'the truth of the allegation, unless the magistrate, in writing, admits the allegation'.

The Chief Justice or nominated judge must make recommendations as to whether the magistrate should be reinstated to his or her duties or suspended pending a consideration of his or her removal under clause 15. The Governor must act in accordance with that recommendation.

32. *Magistrates Court Act 2004* (WA) sch 1 cl, 14.

Chapter 3

Other Complaints Regimes

Contents

3 Australian federal courts

INTRODUCTION

Section 72(ii) of the Australian Constitution provides for the possibility of removal from office of justices of the High Court and judges of other federal courts created by the Federal Parliament. A judge may be removed from office by the Governor General upon a request from both Houses of Parliament, on the grounds of proved misbehaviour or incapacity.[1]

A diagrammatic representation of the federal complaints handling system as it presently exists appears in Chart 2.

Until recently there were no formal systems governing the handling of complaints against federal judicial officers. That changed in 2012 when the Federal Parliament passed two pieces of related legislation dealing with complaints. They are the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* ('the *Parliamentary Commissions Act*') and the *Courts Legislation Amendment (Judicial Complaints) Act 2012* ('the *Judicial Complaints Act*'). Both pieces of legislation received Royal Assent on 11 December 2012 and the substantive parts came into operation from the date of proclamation; namely 12 April 2013.

For reasons that will become apparent, it is possible that some elements of the previous informal regime may continue to apply under the legislation. Accordingly, it is appropriate to describe the system as it applied prior to the coming into operation of the two statutes before dealing with the statutory regime. In the discussion about the previous regime the present tense has been used.

THE REGIME BEFORE 12 APRIL 2013

High Court of Australia

There is no published complaints procedure for handling complaints against judges of the High Court and nor does there appear to be a written procedure for handling such complaints.

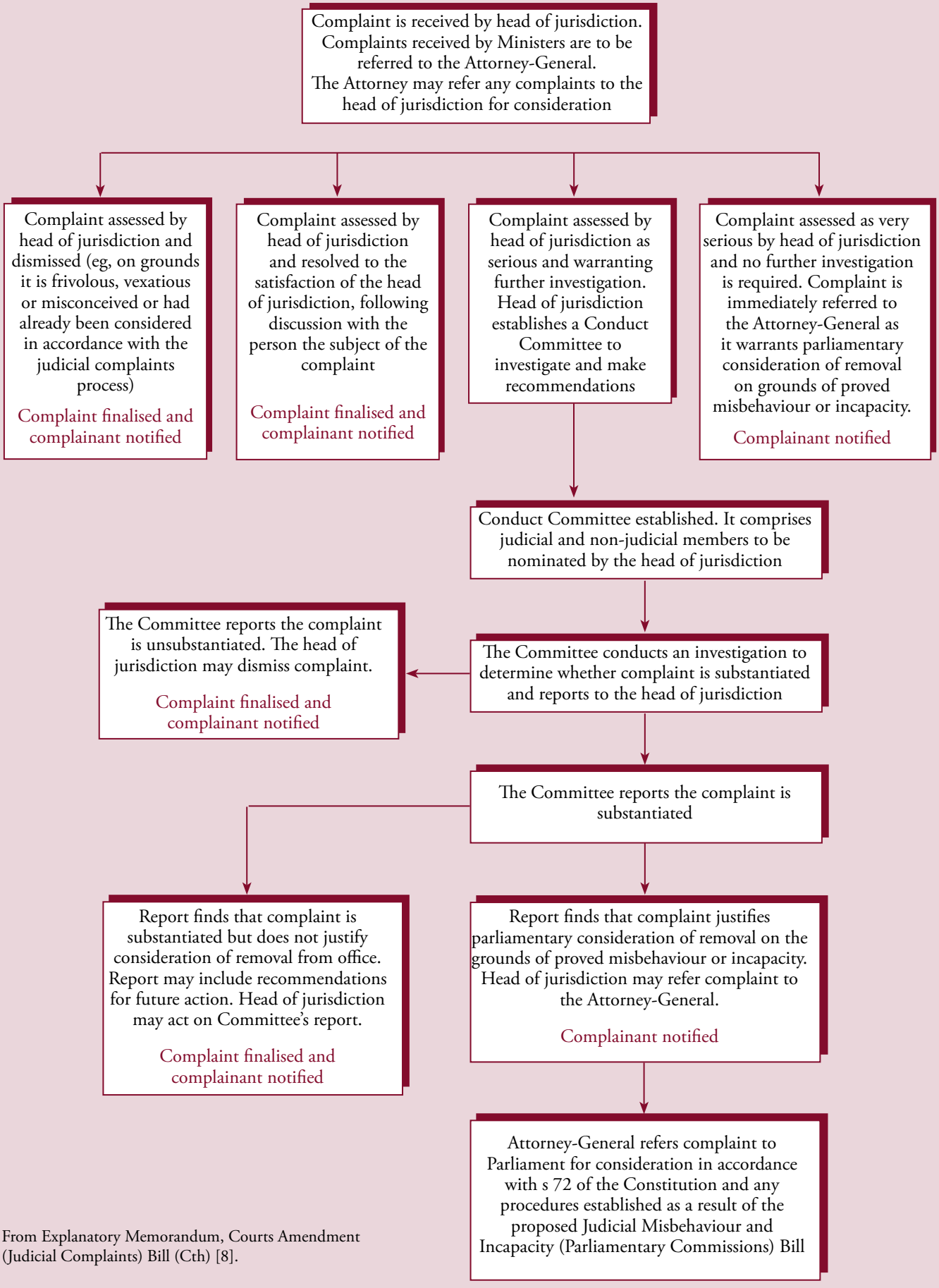
Federal Court of Australia

The constituent legislation for the Federal Court of Australia made provision for the Chief Justice to deal with complaints against judges. But it is in broad terms and the processes were spelt out in Federal Court's Judicial Complaints Procedure ('the Procedure').[2]

1. *Commonwealth of Australia Constitution Act* s 72(ii).
2. Federal Court of Australia, *Judicial Complaints Procedure* <http://www.fedcourt.gov.au/contacts/ contacts_other_complaints.html>.

CHART 2

New federal complaints process



From Explanatory Memorandum, Courts Amendment (Judicial Complaints) Bill (Cth) [8].

The term 'judicial officer' is not defined and the Procedure makes reference only to 'judges'. The Federal Court manages its own 'judicial complaints procedure' which is outlined in the Procedure. The complaints procedure is not a mechanism for disciplining a judge. Rather it provides a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Judge and the judge concerned. It also provides an opportunity for a complaint to be dealt with in an appropriate manner. The participation of a judge in responding to a complaint is entirely voluntary.[3]

Specific provision is made for complaints about delay in delivering a judgment and those the subject of which could or should be dealt with by the appellate process.

'Judicial conduct' is defined as 'the conduct of a judge in court or in connection with a case in the Federal Court, or in connection with the performance of a judge's judicial functions'. Responsibility for determining how best to deal with a complaint lies with the Chief Justice.[4] The method of complaint is by letter addressed to the Chief Justice. The letter must identify the complainant, the judge about whom the complaint is made, and the judicial conduct about which the complaint is made.[5]

'If the Chief Justice decides that the complaint is about judicial conduct, he [or she] will then determine whether … the complaint has substance'. If it does:

> [T]he complaint will be referred for response to the judge whose conduct is in question.... The Chief Justice, or the Registrar on his behalf, will acknowledge a letter of complaint and advise the complainant of the outcome of the complaint....
>
> If the Chief Justice considers that dealing with the complaint might have an adverse affect on the disposition of a matter currently before the court, he or she may defer dealing with the complaint until after the determination of that matter.[6]

A judge of the Federal Court may be removed from office by the Governor-General upon a request from both Houses of Parliament, on the grounds of proved misbehaviour or incapacity.[7]

Family Court of Australia

The Family Court manages its own 'judicial complaints procedure' which is outlined in the Family Court *Judicial Complaints Procedure*.[8] The procedure is relevantly the same as that applying in the Federal Court, save that primary responsibility for dealing with

3. Ibid [4].
4. Ibid [7].
5. Ibid [9].
6. Ibid [11], [13].
7. *Commonwealth of Australia Constitution Act* s 72(ii).
8. Family Court of Australia, Judicial Complaints Procedure: <http://www.familycourt.gov.au/wps/wcm/ connect/FCOA/home/about/Feedback/FCOA_complaints_judicial>.

complaints seems to lie with the Deputy Chief Justice. In discharging this responsibility, the Deputy Chief Justice is assisted by a Judicial Complaints Adviser (a registrar) and a report is made to the Chief Justice.[9]

THE NEW STATUTORY REGIME

The *Parliamentary Commissions Act* is directed at complaints that could result in removal of a judge from office; that is, the most serious species of complaint. The Act provides for the establishment of a commission (as a joint parliamentary body with its own legal status) to assist the Parliament where necessary in discharging its responsibilities under s 72(ii) of the Constitution. The Explanatory Memorandum tabled during debate on the Bill describes the role and functions of the Commission as follows:

> 4. The Bill provides a standard mechanism to assist Parliament in its consideration of removal of a judge … from office under the Constitution.
>
> …
>
> 6. The Bill creates an independent, transparent and accountable framework by enabling the establishment of Parliamentary Commissions to investigate specified allegations about misbehaviour or incapacity in relation to federal judicial officers when required.
>
> 7. A Commission, as provided for under the Bill, would be established following a resolution by each House of the Parliament that it be established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer. [10] It would be able to inquire into any federal judicial officer, including a Justice of the High Court of Australia.
>
> 8. The role of a Commission under the Bill would be to inquire into allegations and gather information and evidence so the Parliament could be well informed in its consideration of the removal of a judge. The character of a Commission's role would be investigative as it would not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge. A Commission's focus would be to consider the threshold question of whether there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity and report on these matters to the Houses of Parliament.[11]
>
> 9. The Bill supports the Constitutional role of the Houses of the Parliament in determining whether or not allegations of judicial misbehaviour or incapacity are proved.
>
> …
>
> 18. Current and former Commonwealth judicial officers would be exempted from the application of coercive powers of a Commission. This is appropriate to support judicial independence under Chapter III of the Constitution. The framers of section 72 of the Constitution aimed to achieve a high degree of independence of the judiciary from the other branches of government, while

9. Ibid [13].
10. See *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012 (Cth) s 9(1).
11. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 48(3).

providing a mechanism for the removal of unfit judges. It would not be appropriate for the Parliament to require judicial officers to give evidence or be subject to search warrants issued by a Commission.

19. Parliamentary Commissions, as provided for under the Bill, will provide the Parliament with a clear, certain and accountable mechanism to consider the removal from office of a federal judicial officer under the Constitution. In this way, the measures provided under the Bill will strengthen public confidence in the federal judiciary while supporting the separation of powers and independence of the judiciary.[12]

The Act defines 'Commonwealth judicial officer' as a justice of the High Court or a judge or justice of a court created by the Parliament. It therefore covers (among others) members of the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia.[13] In relation to judicial officers, the terms 'incapacity' and 'misbehaviour' are defined to have the same meaning as in s 72 of the Constitution.[14]

The *Parliamentary Commissions Act* and the *Judicial Complaints Act* have to be read together. The Explanatory Memorandum for latter legislation (at the Bill stage) included a diagrammatic representation of the proposed system.[15] A copy of that diagram has been reproduced as Chart 2 above. In relation to complaints falling into the most serious category, it appears that they are to be dealt with as follows:

- If made to a Minister, they are to be referred to the Attorney-General who may, in turn, refer them to the relevant head of jurisdiction.
- If the initial assessment of the complaint is found to be very serious, no further investigation is required but it is to be referred to the Attorney-General to initiate the processes under the Parliamentary Commissions Act; namely, the establishment of a commission.
- The Commission is to carry out an investigation and report its 'opinion of whether or not there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity is proved'.[16]
- '[T]he Commission must give a report to the parliamentary presiding officers [that is, President of the Senate and the Speaker of the House of Representatives] for presentation to the Parliament'.[17]

12 Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Cth), Explanatory Memorandum 1–3.
13. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 7.
14. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 7.
15. Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth), Explanatory Memorandum [8].
16. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 10(b).
17. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 48(1).

A commission is to be constituted by three members nominated by the Prime Minister. At least one member must be a former Commonwealth judicial officer or a former judge of the Supreme Court of a State or Territory.[18] Such commission is to have broad investigative powers[19] but is required to act in accordance with the rules of natural justice (procedural fairness).[20] The Commonwealth is to meet the reasonable costs of legal representation for a judicial officer being investigated under the Act.[21]

It is important to recognise that the role of the commission is not to determine facts. Rather, it is to consider whether there is evidence upon which Parliament could reach a conclusion that conduct complained constituted misbehaviour or incapacity. The ultimate decision rests with Parliament.

The *Judicial Complaints Act* is directed primarily at complaints other than those falling into the most serious category, although it does cover initial enquiries about complaints that might later be found to fall into that category. The Act relates to the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia but not the High Court of Australia. The Explanatory Memorandum described the general purport of the legislation as follows:

> 4. This Bill amends the Family Law Act 1975, the Federal Court of Australia Act 1976, the Federal Magistrates Act 1999 and the Freedom of Information Act 1982 to:
>
> - provide a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers,[22]
> - provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints handling process,[23] and
> - exclude from the operation of the Freedom of Information Act 1982 documents arising in the context of consideration and handling of a complaint about a judicial officer.
>
> 5. The Bill extends powers to deal with complaints and immunity from suit to apply whether or not the complaint was made before, on or after commencement of the legislation.
>
> 6. The Bill also outlines the measures a head of jurisdiction may take in relation to a judicial officer should the head of jurisdiction believe it reasonably necessary in order to maintain public confidence in the Court. …
>
> 7. These amendments are designed to support a largely non-legislative framework to assist the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints that are referred to them. The framework will provide a broad and flexible

18. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 13.
19. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) Div 2 Subdiv C.
20. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 20.
21. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 45.
22. See, eg, *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) s 6, enacting s 25B(1A) of the *Family Law Act 1975* (Cth).
23. See, eg, *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) s 22 enacting s18XA of the *Federal Court of Australia Act 1976* (Cth).

> model that augments complaints procedures that currently operate within the federal courts. The seriousness and nature of a complaint may vary widely. The framework outlines, in general terms, the different options a head of jurisdiction may pursue when dealing with a complaint where they consider it appropriate. It is anticipated that the vast majority of complaints would be dealt with through this internal mechanism. Parliamentary consideration of removal of a judge from office under paragraph 72(ii) of the Constitution would only be triggered in the rarest of circumstances.

The broad outline of the 'largely non-legislative' regime is exemplified by the following subsections of s 15 of the *Federal Court of Australia Act 1976* (Cth) (mirrored in the constituent legislation of the other relevant courts[24]):

> 15 (1AAA). The Chief Justice may, if a complaint is made about another Judge, deal with the complaint by doing either or both of the following in respect of the complaint:
>
> (a) deciding whether or not to handle the complaint and then doing one of the following:
>
> (i) dismissing the complaint;
>
> (ii) handling the complaint if the Chief Justice has a relevant belief in relation to the complaint about the other Judge;
>
> (iii) arranging for any other complaint handlers to assist the Chief Justice to handle the complaint if the Chief Justice has a relevant belief in relation to the complaint about the other Judge;
>
> (b) arranging for any other complaint handlers to decide whether or not to handle the complaint and then to do one of the following:
>
> (i) dismiss the complaint;
>
> (ii) handle the complaint if each of the complaint handlers has a relevant belief in relation to the complaint about the other Judge.
>
> Note: A complaint handler (other than the Chief Justice) may handle a complaint by referring it to the Chief Justice. The Chief Justice may then do either or both of the things referred to in paragraph (a) or (b) in respect of the complaint.
>
> 15 (1AAB) The Chief Justice may authorise, in writing, a person or a body to do one or more of the following:
>
> (a) assist the Chief Justice to handle complaints or a specified complaint;
>
> (b) decide whether or not to handle complaints or a specified complaint;
>
> (c) dismiss complaints or a specified complaint;
>
> (d) handle complaints or a specified complaint.

The terms 'handle' and 'relevant belief' are defined terms. Section 4 of the *Federal Court of Australia Act* provides, relevantly (once again mirrored in legislation concerning the other courts[25]):

24. *Family Law Act 1975* (Cth) ss 21B(1A), 21B(3A); *Federal Circuit Court of Australia Act 1999* (Cth) ss12(3AA), 12(3AB).
25. *Family Law Act 1975* (Cth) s 4(1); *Federal Circuit Court of Australia Act 1999* (Cth) s 5.

handle a complaint means do one or more of the following acts relating to the complaint:

(a) consider the complaint;

(b) investigate the complaint;

(c) report on an investigation of the complaint;

(d) deal with a report of an investigation of the complaint;

(e) dispose of the complaint;

(f) refer the complaint to a person or body.

relevant belief: a person has a ***relevant belief*** in relation to a complaint about a Judge if:

(a) the person believes that one or more of the circumstances that gave rise to the complaint may, if substantiated, justify consideration of the removal of the Judge in accordance with paragraph 72(ii) of the Constitution; or

(b) the person believes that one or more of the circumstances that gave rise to the complaint may, if substantiated:

  (i) adversely affect, or have adversely affected, the performance of judicial or official duties by the Judge; or

  (ii) have the capacity to adversely affect, or have adversely affected, the reputation of the Court.

The statements in paragraph 7 that the regime is 'largely non-legislative' and the framework aims to 'provide a broad and flexible model that augments complaints procedures that currently operate within federal courts' explains the comment made earlier in this report that some elements of the previous complaints handling systems (eg, the Federal Court's *Judicial Complaints Procedure*) may continue to have currency. The broad general nature of the legislative provisions set out above also points in that direction. The definition of 'relevant belief' illustrates the interrelationship between the *Judicial Complaints Act* and the *Parliamentary Commissions Act.*

3 Other Australian jurisdictions

NEW SOUTH WALES

New South Wales has an independent standing body to handle all ordinary complaints against judicial officers: the 'Judicial Commission of New South Wales'.[1] The Judicial Commission was established in 1986 in response to calls for a formal mechanism to review sentences and sentencing practice, and to give effect to judicial accountability.[2]

The Judicial Commission of New South Wales is comprised of ten members: six 'official' members (the heads of a number of jurisdictions) and four appointed by the Governor on the nomination of a Minister from among legal practitioners and members of the community.[3]

One of the main functions of the Judicial Commission is to examine complaints against judicial officers.[4] However, it has a range of other functions, including collecting and disseminating information about criminal sentencing matters[5] and the organisation and supervision of judicial information.[6]

The legislation also establishes the Conduct Division, the powers and functions of which are described below. A Conduct Division is appointed by the Judicial Commission to investigate an individual complaint that has been subject to a preliminary assessment by the Commission and has not been dismissed summarily. A Conduct Division consists of two judicial officers (one of whom may be a retired judicial officer) and one community representative nominated by Parliament. A Conduct Division has the functions, protections and immunities of a Royal Commission.

A diagrammatic representation of the New South Wales complaints handling system as it presently exists appears in Chart 3.

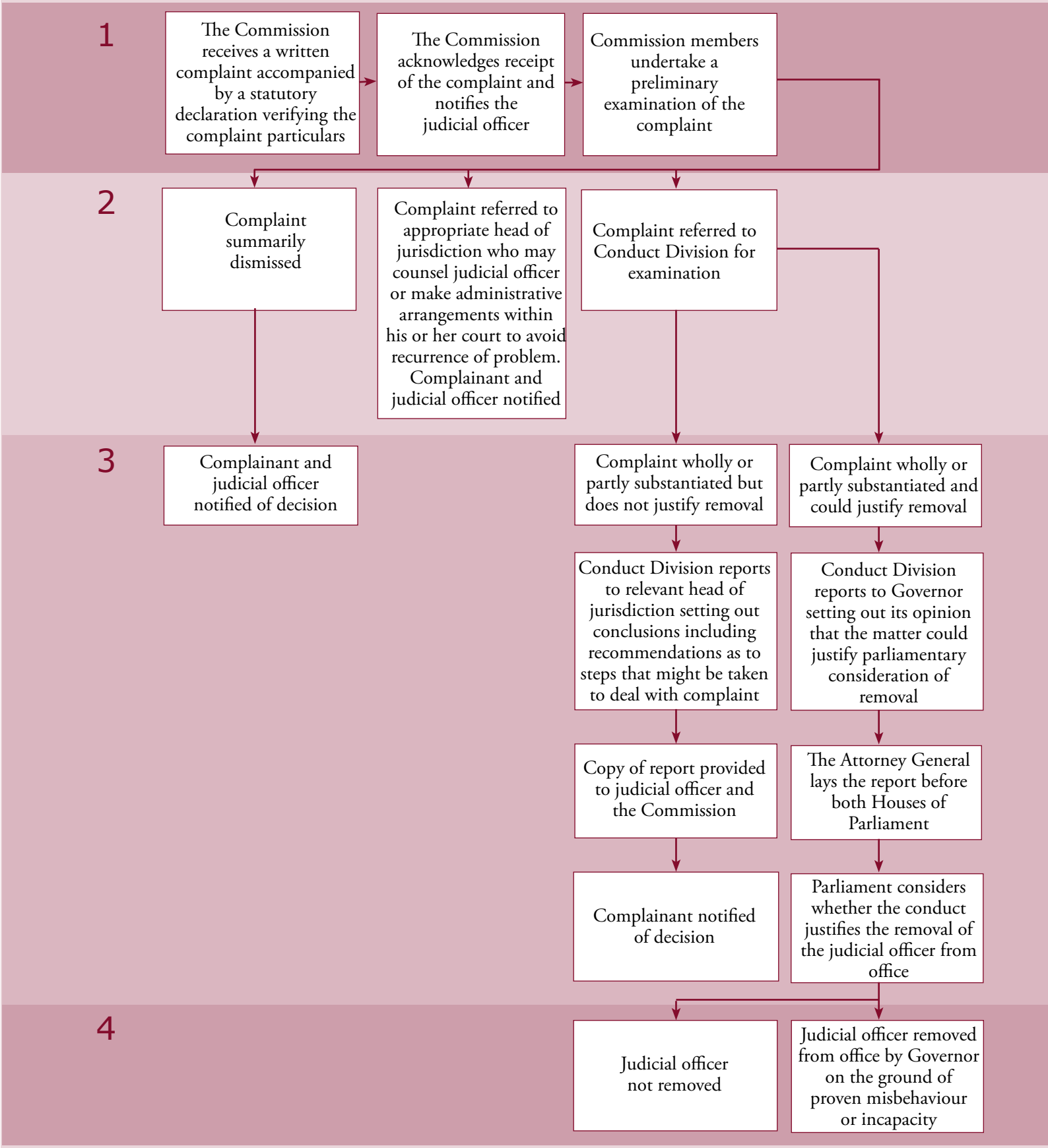
Incidence of complaints

In the year 2010–2011, Judicial Commission staff attended to 450 telephone, face-to-face and written enquiries from the public about complaints. However, only 60 complaints were thought sufficiently serious to require investigation.[7]

1. *Judicial Officers Act 1986* (NSW) s 5(1).
2. Judicial Commission of New South Wales, 'Our History' <http://www.judcom.nsw.gov.au/about-the-commission/our-history> (accessed 10 September 2011).
3. *Judicial Officers Act 1986* (NSW) s 5.
4. *Judicial Officers Act 1986* (NSW) s 15.
5. *Judicial Officers Act 1986* (NSW) s 8.
6. *Judicial Officers Act 1986* (NSW) s 9.
7. Judicial Commission of New South Wales, *Annual Report 2010–11* (2011) 45, 54.

CHART 3

New South Wales complaints process



Judicial Commission of New South Wales, *Annual Report 2010–2011* (2011) 43.

3

Judicial officer

'Judicial officer' is defined in s 3 of the *Judicial Officers Act 1986* (NSW) to include:

(a) a Judge or associate Judge of the Supreme Court;

(b) a member (including a judicial member) of the Industrial Relations Commission;

(c) a Judge of the Land and Environment Court;

(d) a Judge of the District Court;

(e) the President of the Children's Court;

(f) a Magistrate; or

(g) the President of the Administrative Decisions Tribunal.

Jurisdiction of the Judicial Commission

The Judicial Commission's jurisdiction is broad. However, it cannot deal with a complaint unless it appears to the Commission that:

(a) the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office; or

(b) although the matter, if substantiated, might not justify parliamentary consideration of the removal of the judicial officer from office, the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties by the officer.[8]

Examples of complaints that the Judicial Commission has pursued include failure to provide a fair trial, apprehension of bias, discourtesy, delay and alleged mental or physical impairment.[9]

Process

'Any person may complain to the [Judicial] Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer'.[10] The Attorney-General may also 'refer any matter relating to a judicial officer to the [Judicial] Commission'.[11]

'A complaint must be in writing, and must identify the complainant and the judicial officer' about whom the complaint is made.[12] After the Judicial Commission has received the complaint, it will acknowledge receipt and notify the judicial officer concerned. Commission members then undertake a preliminary examination of the complaint.[13]

8. *Judicial Officers Act 1986* (NSW) s 15(2).
9. Judicial Commission of New South Wales, *Annual Report 2009–2010* (2010) 40.
10. *Judicial Officers Act 1986* (NSW) s 15(1).
11. *Judicial Officers Act 1986* (NSW) s 16.
12. *Judicial Officers Act 1986* (NSW) s 17(2).
13. *Judicial Officers Act 1986* (NSW) s 18.

Following its preliminary examination of the complaint, the Judicial Commission can deal with a complaint in one of the following ways.

Summarily dismiss the complaint[14]

The Judicial Commission must summarily dismiss a complaint if it falls within certain categories. These include: if the complaint is frivolous, vexatious or not in good faith; the subject matter is trivial; some other means of redress is available; appeal rights are or were available; or further investigation is unnecessary.[15]

Refer the complaint to the Conduct Division[16]

A complaint that is not dismissed must be referred to the Conduct Division, unless the Judicial Commission decides to refer it to the head of the court.[17] The Conduct Division conducts an investigation of each complaint referred to it, to determine whether the complaint is wholly or partly substantiated, and could warrant parliamentary consideration of removal.[18]

If the Conduct Division finds that a complaint could warrant parliamentary consideration of removal, it must report its conclusions to the Governor and the relevant Minister.[19] The Attorney-General then lays the report before both Houses of Parliament, and Parliament considers whether the conduct justifies the removal of the judicial officer from office.[20] The judicial officer will either remain in office, or be removed by the Governor on the ground of proved misbehaviour or incapacity.

If the Conduct Division finds that a complaint is wholly or partly substantiated, but would not justify parliamentary consideration of removal, it must report its conclusions to the head of the relevant court.[21]

It should be noted that complaints are referred to the Conduct Division by the Judicial Commission, and not by the Attorney-General or any other executive official. This is a notable difference between New South Wales and the systems that are in place in the Australian Capital Territory, Victoria and Queensland. In these jurisdictions, although legislation provides for investigation by an independent body, the process can only be begun by political decision.[22]

14. *Judicial Officers Act 1986* (NSW) s 20.
15. *Judicial Officers Act 1986* (NSW) s 20(1).
16. Judicial Officers Act 1986 (NSW) s 21(1).
17. *Judicial Officers Act 1986* (NSW) s 21(2).
18. *Judicial Officers Act 1986* (NSW) ss 23, 28(1)(a).
19. *Judicial Officers Act 1986* (NSW) s 29(1).
20. *Judicial Officers Act 1986* (NSW) s 29(3).
21. *Judicial Officers Act 1986* (NSW) s 28(1)(b).
22. Judicial Conference of Australia, *Second Report of the Complaints Against Judicial Officers Committee* (January 2010) 1–3.

Refer the complaint to the head of the court

If the complaint is referred to the head of the court, the Judicial Commission may make recommendations to the head of the court as to what steps might be taken to respond to the complaint. [23]

Complaints of criminal misconduct

The Independent Commission Against Corruption (ICAC) has jurisdiction to investigate complaints of criminal misconduct by any 'public official', including judges.[24] The ICAC has no enforcement powers against judges, although its findings may be referred to the Judicial Commission or Parliament.[25] The Judicial Commission has jurisdiction to investigate complaints of criminal misconduct but in practice it does not do so.[26]

Complaints alleging unfitness for office

The Governor may remove a judge from office upon a request from both Houses of Parliament.[27] However, the Governor can only receive such an address after the Judicial Commission has received a complaint and referred it to the Conduct Division, and the Conduct Division has reported that there are sufficient grounds to justify parliamentary consideration of removal.[28] The Conduct Division may recommend that the Governor or head of jurisdiction suspend the judge in the interim.[29]

VICTORIA

There is no formal mechanism to address conduct that, although of concern, falls short of misbehaviour or incapacity that would justify the removal of a judicial officer. Heads of courts have no power to discipline other judicial officers.

However following a review in 2002,[30] each of the courts and the Victorian Civil and Administrative Tribunal (VCAT) published complaints protocols.[31] The protocols are based on the *Guide to Judicial Conduct,* which was developed by the Australian Institute

23. *Judicial Officers Act 1986* (NSW) s 21(2).
24. *Independent Commission Against Corruption Act 1988* (NSW) ss 3(1), 8–10.
25. *Independent Commission Against Corruption Act 1988* (NSW) s 53.
26. *Independent Commission Against Corruption Act 1988* (NSW) ss 15(6), 16 (referred by Minister); cf Judicial Commission of New South Wales, *Annual Report 2009–2010* (2010) 36.
27. *Constitution Act 1902* (NSW) s 53(2).
28. *Judicial Officers Act 1986* (NSW) s 41.
29. *Judicial Officers Act 1986* (NSW) ss 40(1), 43.
30. See Sallman PA, *The Judicial Conduct and Complaints System in Victoria*, Discussion Paper (2002) 17.
31. Courts that have protocols are the Magistrates Court, County Court, Supreme Court, VCAT, the Children's Court and the Coroners Court.

of Judicial Administration for the Council of Chief Justices of Australia and New Zealand.[32]

In 2010, a Bill to establish a judicial commission along the lines of the New South Wales body was introduced into the Victorian Parliament. However, the Bill had not been passed at the time of prorogation of Parliament and lapsed. Following the election there was a change of government. The present government has stated its intention to introduce a Judicial Complaints Commission. On 22 November 2011 the Attorney-General made the following statement in Parliament:

> We have already committed to and are preparing legislation to introduce a judicial complaints commission, which will allow ordinary citizens to lodge complaints where there are allegations of poor performance or inappropriate behaviour by judicial officers and to have those complaints investigated and acted upon by an independent body.

The Victorian Parliament has enacted the *Independent Broad-based Anti-corruption Commission Act 2011*. The Independent Broad-based Anti-corruption Commission (IBAC) has power to conduct an investigation about the conduct of judicial officers, defined in s 3 to cover judges, associate judges and judicial registrars of the Supreme Court and the County Court and magistrates. In conducting the investigation, IBAC must have proper regard for the preservation of the independence of judicial officers and notify and consult the relevant head of jurisdiction unless doing so would prejudice the investigation. Further, s 62 prohibits the inclusion of any finding of corrupt conduct of a judicial officer or other adverse finding in a special report or annual report.

A diagrammatic representation of the complaints handling system under IBAC appears in Chart 4.

Finally, where the complaint or notification directly relates to the merits of a decision or order made, or a judgement given by a judicial officer, the Commission must dismiss a complaint or notification about the conduct of the judicial officer.

The balance of the discussion in this section relates to the handling of complaints other than by IBAC.

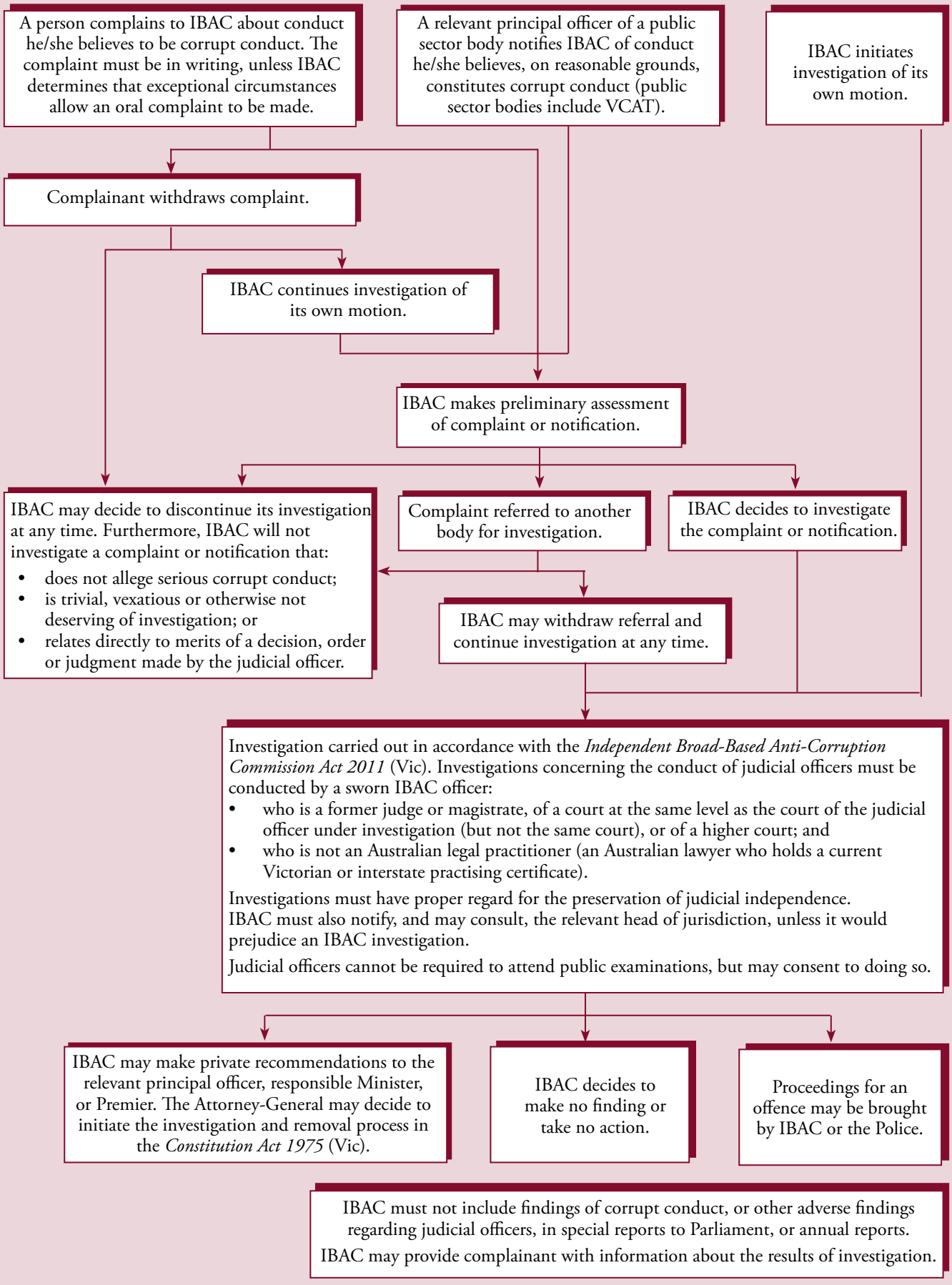
Incidence of complaints

No statistics are available regarding the prevalence of complaints against members of the judiciary in Victoria. The Chief Justice has commented that a significant proportion of complaints received are found to constitute a complaint about the failure of a party's case rather than judicial conduct.[33]

32. Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Melbourne: Australian Institute of Judicial Administration, 2nd ed, 2007).
33. Chambers of Chief Justice of the Supreme Court of Victoria, letter to the Commission (15 May 2012) 3.

CHART 4

Investigations of Independent Broad-based Anti-corruption Commission (IBAC) (Victoria)



Ordinary complaints

The protocols for each court or tribunal outline the complaints process. They provide that complaints should be made to the head of court, who then determines how to approach the matter. Complaints can also be received by the Attorney-General and the Department of Justice. These complaints are usually referred to the head of the relevant court, although sometimes the department will prepare a response together with the head of the court.

The Attorney-General's formal role in the complaints procedure against judicial officers is to convene the investigating committee. However, the Attorney-General can only convene a committee if satisfied that there are reasonable grounds for investigating matters that could result in the judicial officer's removal from office (see below).

Complaints alleging unfitness for office

The *Constitution Act 1975* (Vic) establishes a procedure for dealing with complaints that could justify removal from office. 'Judicial office' is defined to mean the office of any of the following –

(a) Judge of the Supreme Court;
(b) Associate Judge of the Supreme Court;
(c) judge of the County Court;
(d) associate judge of the County Court;
(e) magistrate.[34]

A Victorian judicial officer can be removed from office by the Governor in Council, acting on a request by both Houses of Parliament, on the grounds of proved misbehaviour or incapacity.[35] The removal process can only occur if an investigating committee has found that facts exist which could amount to proven misbehaviour[36] or incapacity such as to warrant the removal of the judicial officer from office.[37] An investigating committee is appointed by the Attorney-General if he or she is satisfied that there are reasonable grounds for carrying out an investigation.[38] No judicial officer can be removed from office on any other grounds or by any other process.[39]

The investigating committee consists of three members of the Judicial Panel, appointed by the Attorney-General on the recommendation of the most senior member of the panel.[40] The Judicial Panel is comprised of seven retired judges from higher-level, non-Victorian

34. *Constitution Act 1975* (Vic) s 87AAA.
35. *Constitution Act 1975* (Vic) s 87AAB.
36. See, eg, *Constitution Act 1975* (Vic) ss 87AAB(1), 87AAD(1).
37. *Constitution Act 1975* (Vic) ss 87AAD(1), 87AAE.
38. *Constitution Act 1975* (Vic) s 87AAD(1).
39. *Constitution Act 1975* (Vic) s 87AAB(4).
40. *Constitution Act 1975* (Vic) s 87AAD(2).

courts.[41] The members of the Judicial Panel have no duties or responsibilities unless they are appointed by the Attorney-General to form an investigating committee.

The investigating committee must prepare a report which sets out its conclusions as to whether facts exist that could amount to proven misbehaviour or incapacity such as to warrant the removal of that judicial officer from office.[42] The Attorney-General may then table the report in Parliament.[43]

A finding by the investigatory committee that removal could be warranted is a prerequisite for removal by Parliament. However, the decision ultimately rests with Parliament, because Parliament is not obliged to remove a judicial officer even if the committee makes that finding.

QUEENSLAND

Incidence of complaints

No statistics are available as to the prevalence of complaints in Queensland. The Chief Justice has commented that, as a matter of impression, the rate of complaints is low.[44]

Ordinary complaints

The procedure for dealing with ordinary complaints in Queensland is similar to that applying in Victoria.

Complaints of criminal misconduct

For the purposes of complaints of criminal misconduct *only*, 'judicial officer' is defined as –

(a) a judge of, or other person holding judicial office in, a State court; or

(b) a member of a tribunal that is a court of record.[45]

The Queensland Crime and Misconduct Commission (CMC) has jurisdiction over conduct that could lead to removal from office.[46] The CMC has authority to investigate such conduct,[47] but only subject to an agreed process following consultation with the

41. *Constitution Act 1975* (Vic) ss 87AAA, 87AAC.
42. *Constitution Act 1975* (Vic) s 87AAH(1)–(2).
43. *Constitution Act 1975* (Vic) s 87AAH(3).
44. Chief Justice of Queensland, letter to the Commission (9 May 2012).
45. *Crimes and Misconduct Act 2001* (Qld) s 58(5).
46. *Crimes and Misconduct Act 2001* (Qld) ss 49, 58(2), 70(2).
47. *Crimes and Misconduct Act 2001* (Qld) s 58(2).

Chief Justice.[48] The CMC is required to hand all relevant material to any investigating tribunal dealing with the same allegation.[49]

Complaints alleging unfitness for office

The *Constitution of Queensland 2001* (Qld) establishes a procedure for dealing with complaints that could justify removal from office. It is not dissimilar to that applying in Victoria. The term 'judicial officer' is not defined in the legislation. The term 'judge' is defined to mean a judge of the Supreme Court or District Court.[50] The term 'office' is defined to include any of the following offices –

(a) Chief Justice of Queensland;
(b) President of the Court of Appeal;
(c) Senior Judge Administrator;
(d) Judge of Appeal of the Supreme Court;
(e) Judge of the Supreme Court;
(f) Chief Judge of the District Court;
(g) Judge Administrator;
(h) Judge of the District Court.[51]

A judge may be removed from 'an office' by the Governor in Council, on an address of the Legislative Assembly, on the grounds of 'proved' misbehaviour justifying removal or incapacity to perform the duties of judicial office.[52] These grounds can only be proved if the Legislative Assembly accepts a report of an investigatory tribunal concluding that the relevant ground is established on the balance of probabilities.[53]

Investigatory tribunals are established on an ad hoc basis under special legislation.[54] They must consist of at least three members, appointed from among serving or retired judges by resolution of the Legislative Assembly.[55] A judge may not be removed from office by any other method.[56]

48. This is premised on a need to maintain judicial independence.
49. *Crimes and Misconduct Act 2001* (Qld) s 70(2).
50. *Constitution of Queensland 2001* (Qld) s 56.
51. *Constitution of Queensland 2001* (Qld) s 56.
52. *Constitution of Queensland 2001* (Qld) s 61(2).
53. *Constitution of Queensland 2001* (Qld) s 61(3)–(4).
54. *Constitution of Queensland 2001* (Qld) s 61(5).
55. *Constitution of Queensland 2001* (Qld) s 61(6)–(10).
56. *Constitution of Queensland 2001* (Qld) s 61(1).

3

SOUTH AUSTRALIA AND TASMANIA

There is no legislation in South Australia or Tasmania of the type to be found in New South Wales.[57] The courts in those states have not published protocols dealing with complaints against members of the judiciary.

In South Australia and Tasmania the Governor may remove a Judge of the Supreme Court from office, upon the address of both Houses of Parliament.[58] There are no prescribed grounds for removal.

The South Australian Supreme Court does not maintain statistics about the level of complaints. The Chief Justice reported that he had not received anything that could be described as a complaint warranting investigation for the last couple of years.[59]

Statistics available in relation to Tasmania are limited to the experience of the Supreme Court. In 2008 there were no complaints. In 2009 there was one complaint of rudeness to counsel. In 2010 there was one misconceived complaint. In 2011 there were four complaints, all concerning delays in delivering reserved judgments.[60]

AUSTRALIAN CAPITAL TERRITORY

The ACT has legislative mechanisms in place for the establishment of a judicial commission, similar to those contained in the Parliamentary Commissions Act (ie, the recently enacted federal statute).[61] But those mechanisms are directed to conduct constituting serious misbehaviour or incapacity (arguably warranting removal from office) and there is currently no legislated process for dealing with less serious complaints.[62]

Complaints concerning the conduct of judicial officers are dealt with in accordance with the ACT Law Courts and Tribunal Complaints and Feedback Policy ('the Complaints Policy').[63] The procedure is much the same as it is in Western Australia. One difference is that a complaint against the Chief Justice is made to the Attorney-General rather than to the next most senior member of the Supreme Court.

57. *Judicial Officers Act 1986* (NSW).
58. *Constitution Act 1934* (SA) s 75; *Supreme Court (Judges Independence) Act 1857* (Tas) s 1.
59. Chief Justice of South Australia, letter to the Commission (8 May 2012).
60. Chief Justice of Tasmania, letter to the Commission (14 May 2012).
61. *Judicial Commissions Act 1994* (ACT).
62. See Justice and Community Safety Directorate, *Judicial Complaints and Arrangement of Court Business*, Discussion Paper (December 2012) 9. A call for public submissions on the paper closed on 5 April and, so far as the Commission is aware, no further steps have occurred.
63. *Complaints and Feedback Policy for ACT Law Courts and Tribunal* (November 2009) ('Complaints Policy').

Incidence of complaints

No statistics are available concerning the level of complaints against judicial officers in courts of this jurisdiction.[64]

Judicial officer

'Judicial officer' is defined in the *Judicial Commissions Act 1994* (ACT) to mean:

(a) a judge of the Supreme Court, other than a person who is an additional judge appointed under the *Supreme Court Act 1933*, s 4A; or

(b) the master of the Supreme Court; or

(c) a magistrate; or

(d) a presidential member of the ACAT.[65]

In the Complaints Policy, 'judicial officer' also includes a registrar or deputy registrar when they are exercising judicial powers.

Ordinary complaints

Any person can make a complaint, even if they are not a party to the case.[66] The Complaints Policy provides that complaints should be made to the head of court, who then determines how to approach the matter.[67] The heads of court do not, however, have the power to discipline other judicial officers.

Complaints can also be received by the Attorney-General. However, the complaint will generally be referred to the head of the relevant court unless the subject matter justifies removal from office.

Complaints alleging unfitness for office

The complaint must be made to the Attorney-General. If the Attorney-General is satisfied on reasonable grounds that the complaint could, if substantiated, justify consideration of removal of the judicial officer by Parliament, he or she must request the executive to appoint a judicial commission.[68] The judicial commission comprises of three members who are appointed from among serving and retired judges.[69]

64. Chief Justice of the Australian Capital Territory, letter to the Commission (undated).
65. *Judicial Commission Act 1994* (ACT) s 2.
66. Complaints Policy, 2.
67. Complaints and Feedback Information Sheet, 1.
68. *Judicial Commission Act 1994* (ACT) s 5(2)(b).
69. *Judicial Commission Act 1994* (ACT) s 7.

If the judicial commission examines the complaint and concludes that the judge's behaviour or mental or physical condition might justify removal, the commission must submit a copy of its findings to the Attorney-General, who may then table the report in Parliament.[70] The judicial officer in question must also be allowed to address the Assembly.[71]

The judicial officer will be removed from office if, within 15 days of the report being tabled in Parliament, a majority of the Legislative Assembly passes the motion calling for removal.[72]

The ACT law automatically suspends, with pay, a judicial officer who is the subject of an investigation by a judicial commission.[73] A judicial officer who has not been 'excused' may not resume exercising judicial functions until

(a) the judicial commission has submitted a report to the Attorney-General stating that removal is not warranted;[74] or

(b) a motion in Parliament calling for removal has been defeated,[75] or does not occur within certain time limits.[76]

NORTHERN TERRITORY

Complaints concerning the conduct of judicial officers in the Supreme Court are dealt with in accordance with the Protocol for Complaints against Judicial Officers of the Supreme Court of the Northern Territory ('NT Protocol').

Incidence of complaints

No statistics are available as to the prevalence of complaints against members of the judiciary in the Northern Territory. According to the Chief Justice of the Northern Territory, there are very few complaints concerning Supreme Court judges, most are 'ordinary complaints' and so far as he is aware none would be characterised as complaints of serious misconduct.[77]

Judicial officer

The term 'judicial officer' is not defined. However, the NT Protocol applies to complaints made against judges, masters and registrars of the Supreme Court.[78]

70. *Judicial Commission Act 1994 (ACT)* s 5(3).
71. *Judicial Commission Act 1994* (ACT) s 5(2)–(3).
72. *Judicial Commission Act 1994* (ACT) s 5(2).
73. *Judicial Commission Act 1994* (ACT) s 19.
74. *Judicial Commission Act 1994* (ACT) s 19(2)(a).
75. *Judicial Commission Act 1994* (ACT) s 19(2)(c).
76. *Judicial Commission Act 1994* (ACT) s 19(2)(b).
77. Chief Justice of the Northern Territory, email communication (9 May 2012).
78. NT Protocol, 1.

Ordinary complaints

The NT Protocol explains that judges are not subject to the direct discipline of anyone, apart from in extreme cases where they may be removed from office on the grounds of proved misbehaviour or incapacity (see below).[79] The NT Protocol also explains that complaints cannot be made on the basis that the decision was incorrect or unfair, or that the judge, master or registrar did not handle a case properly.[80]

With all other complaints of non-criminal misconduct, the NT Protocol provides that complaints should be made to the relevant head of jurisdiction (ie, the Chief Justice or the delegate of the Chief Justice).[81] Any person affected can make a complaint of non-criminal misconduct, even if they are not a party to the case.[82]

Upon considering each complaint, the head of jurisdiction will decide that either no further action is required, or that further enquiries should be made.[83] If the head of jurisdiction decides that no further action is be required, the judicial officer concerned should be informed of the complaint and the decision made.[84]

If the head of jurisdiction decides that further enquiries are required, the matter must be referred to the judicial officer concerned. The judicial officer will then be given a reasonable time within which to respond to the matters raised by the complainant.[85]

On receipt of the judicial officer's response, the head of jurisdiction may decide that:

- no further action is required, and inform the complainant and the judicial officer that the complaint has been dismissed;
- further enquiry should be made of either the judicial officer, the complainant or third parties before a decision can be made;
- the complaint has substance but is not sufficiently serious to contemplate removal; or
- the complaint has substance and is serious (eg, the subject matter may be an indication of unfitness for office).[86]

If the head of jurisdiction concludes that the complaint has substance but is not sufficiently serious to contemplate removal, he or she will notify both the judicial officer and the

79. NT Protocol, 1.
80. NT Protocol, 2.
81. NT Protocol, 2.
82. NT Protocol, 2.
83. NT Protocol, 3.
84. NT Protocol, 3.
85. NT Protocol, 4.
86. NT Protocol, 4.

complainant accordingly. Appropriate remedial action will be taken and the complainant notified of the action taken.[87]

If the head of jurisdiction concludes that the complaint has substance and is serious, it must be dealt with in accordance with the applicable provisions of the *Supreme Court Act 1975* (NT).[88]

Complaints alleging unfitness for office

The Supreme Court Act provides that a judge may be removed from office by the Administrator on an address from the Legislative Assembly, on the grounds of proved misbehaviour or incapacity. A judge may not otherwise be removed from office.[89]

87. NT Protocol, 4.
88. NT Protocol, 4.
89. *Supreme Court Act 1975* (NT) s 40(1).

3 Overseas jurisdictions

ENGLAND AND WALES

In England and Wales, complaints against judicial officers are dealt with under the *Constitutional Reform Act 2005* ('the Act') and the *Judicial Discipline (Prescribed Procedures) Regulations 2006* ('the Regulations')[1] made under ss 115, 120 and 121 of the Act.

In this jurisdiction, the Lord Chancellor and the Lord Chief Justice are jointly responsible for considering and determining complaints about the conduct of the judiciary, and other cases in which disciplinary action is taken or contemplated.[2] They are supported by the Office for Judicial Complaints ('the Office'), which was established in April 2006 and is an associate office of the Ministry of Justice.[3]

Complaints must be in writing, unless the Office considers that in the circumstances it is reasonable to accept a complaint in a different form.[4] There is a 28-day time limit from the relevant conduct complained of within which complaints must be made.[5]

Judicial officer

'Judicial officer' is defined to include the office of a senior judge, or an office listed in Schedule 14 of the Act.[6] The holder of an office can also be designated by an order under s 118 of the Act. At the risk of oversimplification, 'senior judge' means a judge of the High Court. Complaints about magistrates and tribunal judges and members are dealt with under a different system.

Ordinary complaints

Initial stages

The Office receives both serious and less-serious complaints. The Office must dismiss a complaint if it falls into various categories, including that it is untrue, mistaken or misconceived, vexatious, not adequately particularised, or raises no question of misconduct.[7] However, the Lord Chancellor or the Lord Chief Justice may decide to consider a complaint that has been dismissed by the Office, where they deem that the complaint concerns misconduct that is sufficiently serious to warrant further consideration.[8]

1. As amended by *The Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008* (UK).
2. *The Judicial Discipline (Prescribed Regulations) Regulations* 2006 reg 3; *Constitutional Reform Act 2005* (UK) s 108(2).
3. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 3(2).
4. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 11.
5. *Constitutional Reform Act 2005* (UK) s 100(3).
6. *Constitutional Reform Act 2005* (UK) s 109(4).
7. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 14(1).
8. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 15.

If a complaint is not dismissed after the preliminary investigation, the Lord Chancellor and the Lord Chief Justice, or both, must refer the complaint to a nominated judge who will consider the matter.[9] The function of the nominated judge is to advise the Lord Chancellor and the Lord Chief Justice on a range of matters, such as whether a judicial investigation is required, and if so, how the investigation should be carried out, and whether disciplinary action should be taken.[10]

Complaints that need further investigation

If further investigations are required, the Lord Chancellor or the Lord Chief Justice may appoint an investigating judge.[11] The functions of the investigating judge are to advise the Lord Chancellor and the Lord Chief Justice on matters such as the facts of the case, whether the case is substantiated or not, whether disciplinary action should be taken, and any other matters in the terms of reference.[12]

The investigating judge must report his or her findings to the Lord Chancellor and the Lord Chief Justice, who will decide what, if any, disciplinary action to take.[13] Examples of action that may be taken include the Lord Chief Justice exercising one or more of his disciplinary powers,[14] or the Lord Chancellor exercising his power to remove the judicial officer in question from office.[15]

Review

These procedures and decisions are subject to review by at least two bodies. First, by a review body convened by the Lord Chancellor and the Lord Chief Justice.[16] The review body must comprise of two judges and two lay members, nominated by the Lord Chancellor in agreement with the Lord Chief Justice. Where a matter has been referred to the review body, the Lord Chancellor and the Lord Chief Justice must accept any findings of fact made by the review body and cannot impose a sanction on the office holder that is more severe than that recommended by the review body.[17]

9. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 16.
10. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 18.
11. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 19(1).
12. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 22(1).
13. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 25(7).
14. Apart from the power to remove a judicial officer, the Lord Chief Justice may give formal advice, warnings and reprimands, and can suspend a judicial officer who is subject to proceedings for removal or prosecution for an offence. The power to give formal advice, warnings and reprimands does not restrict the ability of the Lord Chief Justice to act informally. See *Constitutional Reform Act 2005* (UK) s 108.
15. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 26(1)(e).
16. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 26(1((f), 28(1), 29.
17. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* reg 26(2).

Secondly, decisions of the review body can be scrutinised by the Judicial Appointments and Conduct Ombudsman.[18] The function of the Ombudsman is to ensure that the procedures for investigating complaints are carried out fairly. The complainant and the judicial officer concerned may both apply to the Ombudsman for a review of the decision, on the grounds that there has been a failure to comply with prescribed procedures, or some other maladministration.[19]

Upon conducting a review, the Ombudsman must establish to what extent the grounds are established, and decide what action to take.[20] The Ombudsman must submit a report of his or her findings to the Lord Chancellor and the Lord Chief Justice.[21] If the Ombudsman finds that the grounds are established to any extent, he or she may make recommendations to the Lord Chancellor and Lord Chief Justice.[22] The Ombudsman may also set aside a determination by investigating authorities if the original investigation is thought to have been unreliable.[23]

Complaints alleging unfitness for office

A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.[24] The power of the Lord Chancellor to remove a person from office listed in Schedule 14 is exercisable only after the Lord Chancellor has complied with the prescribed procedures (as well as any other requirements to which the power is subject).[25]

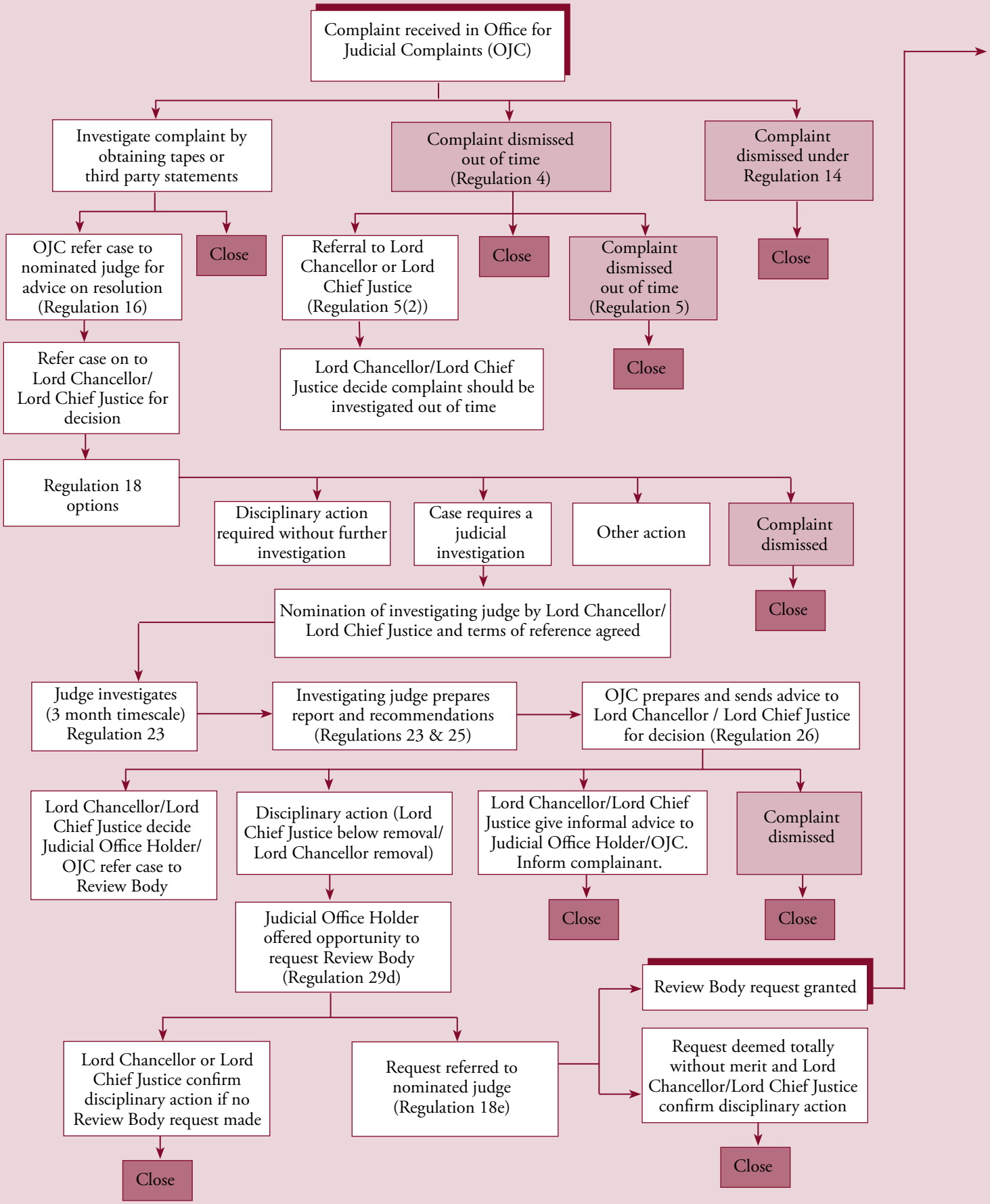
The Lord Chief Justice also has disciplinary powers set out in s 108 of the *Constitutional Reform Act 2005* (UK), including the power to suspend a judicial officer from office, but may only exercise them with the agreement of the Lord Chancellor and only after complying with prescribed procedures.[26]

Diagrammatic representations of the complaints handling system and review body system as they presently exist in England and Wales appear in Charts 5 and 6 respectively.

18. *Constitutional Reform Act 2005* (UK) ss 110–14.
19. *Constitutional Reform Act 2005* (UK) s 110(1).
20. *Constitutional Reform Act 2005* (UK) s 111(1).
21. *Constitutional Reform Act 2005* (UK) s 112(7).
22. *Constitutional Reform Act 2005* (UK) s 11(2).
23. *Constitutional Reform Act 2005* (UK) s 5.
24. *Constitutional Reform Act 2005* (UK) s 33.
25. *Constitutional Reform Act 2005* (UK) s 108(1).
26. *Constitutional Reform Act 2005* (UK) s 108(2).

CHART 5

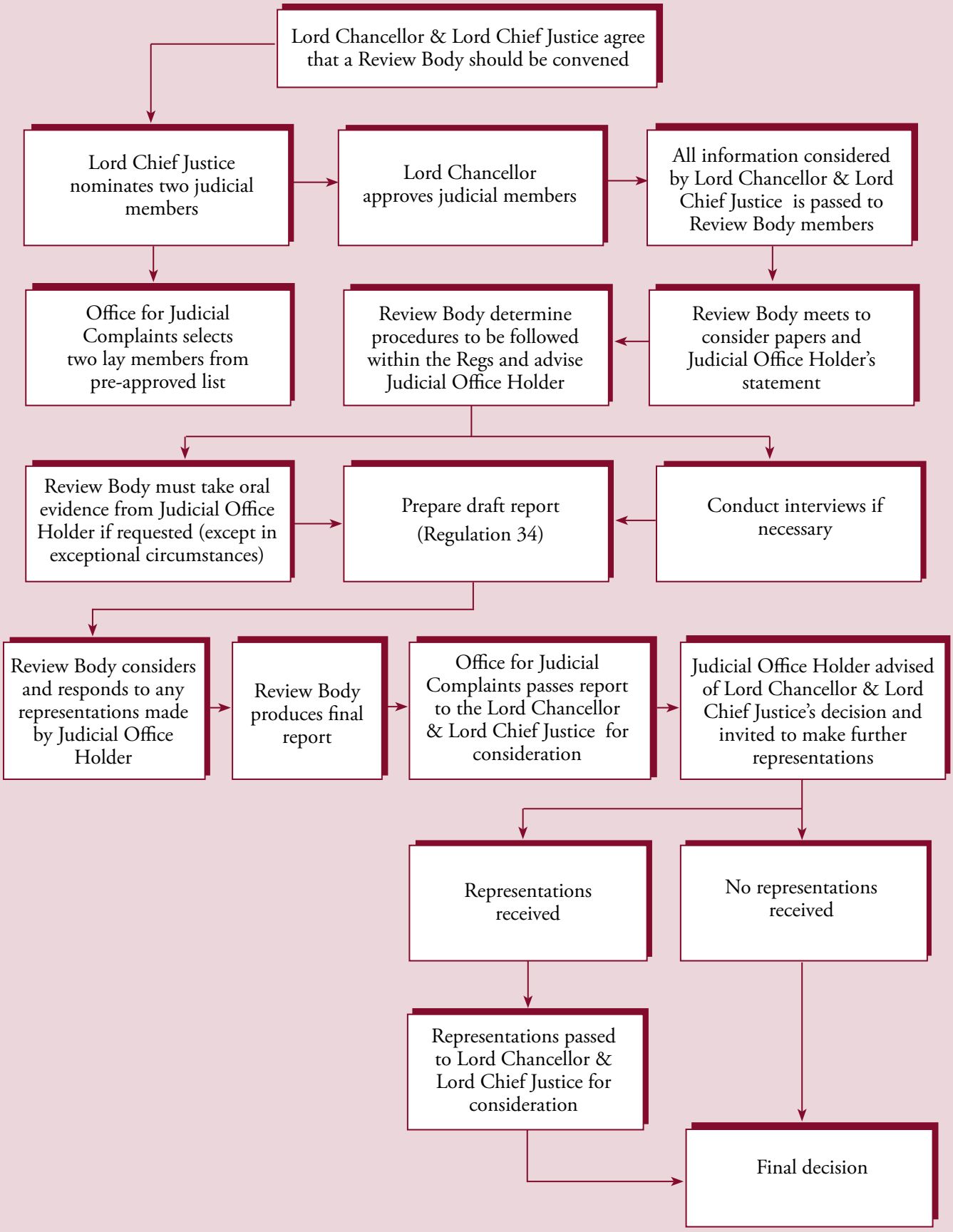
Mainstream judiciary and coroner complaint process (England and Wales)



Adapted from Office for Judicial Complaints, 'Mainstream Judiciary and Coroner Complaint Process', <http://judicialcomplaints.judiciary.gov.uk/docs/Courts_Judiciary_and_Coroner_Complaints_Process_Flowchart_page_1.pdf> (accessed 27 May 2012).

CHART 6

Review Body process (England and Wales)



Adapted from Office for Judicial Complaints, 'Review Body Process' <http://judicialcomplaints.judiciary.gov.uk/docs/Review_Body_Process_Flowchart.pdf> (accessed 27 May 2012).

3

SCOTLAND

In Scotland, the Lord President, as the head of the Scottish judiciary, is responsible for considering and determining complaints about the conduct of the judiciary.[27] The Lord President is supported by the Judicial Office, which was established by the Scottish Court Service.[28] Complaints procedures are detailed in the *Constitutional Reform Act 2005*(UK), the *Judiciary and Courts (Scotland) Act 2008* (Scot) ('the Act') and the *Complaints about the Judiciary (Scotland) Rules 2011,* made under s 28 of the Act.

Judicial officer

Judicial office holders who fall under the responsibility of the Lord President include judges, sheriffs, magistrates and justices of the peace.[29]

Ordinary complaints

The Act envisages a two-step process, which includes an initial investigation and then a possible review.[30] Complaints must be made in writing,[31] no later than three months after the incident that is the subject of the complaint.[32] The time limit for making a complaint can be extended by the disciplinary judge in exceptional circumstances.[33]

Initial stage

Upon receiving the complaint, the Judicial Office will send a copy to the judicial office holder concerned.[34] The Judicial Office will carry out an initial assessment of the complaint, and dismiss it if it:

(a) does not contain sufficient information to allow a proper understanding the complaint to be achieved;

(b) does not raise an issue of judicial conduct;

(c) raises matters which have already been dealt with; or

(d) raises a matter which is for the Judicial Complaints Reviewer.[35]

If the complaint is not dismissed, it is referred to a disciplinary judge, who will review the complaint. The disciplinary judge may decide that the complaint should be further

27. *Judiciary and Courts (Scotland) Act 2008* ss 2(2)(e), 28.
28. *Complaints about the Judiciary (Scotland) Rules 2011* r 4(1).
29. *Judiciary and Courts (Scotland) Act 2008* s 43.
30. *Judiciary and Courts (Scotland) Act 2008* s 28(1)(a), (b).
31. *Complaints about the Judiciary (Scotland) Rules 2011* r 5.
32. *Complaints about the Judiciary (Scotland) Rules 2011* r 6.
33. *Complaints about the Judiciary (Scotland) Rules 2011* r 6(2).
34. *Complaints about the Judiciary (Scotland) Rules 2011* r 8(2).
35. *Complaints about the Judiciary (Scotland) Rules 2011* r 9(3)–(4).

investigated by a nominated judge,[36] or may decide to dismiss it on the grounds that it is vexatious, without substance, insubstantial, or that the judge subject to the complaint has ceased to be a judge.[37]

If the disciplinary judge considers that the complaint is of such a serious nature that the judge's fitness for office might be called into question, the complaint must be referred to the Lord President.[38] The Lord President will then consider whether a tribunal to investigate the judge's fitness for office should be convened (see below).[39]

Complaints that need further investigation

If the disciplinary judge does refer the complaint to a nominated judge, the nominated judge may decide that the matter is capable of resolution without further investigation, in which case he or she may contact the complainant and the judicial office holder to discuss the matter.[40]

If the complaint is not capable of resolution, the nominated judge must investigate and determine the facts of the matter, and whether the allegation is substantiated.[41] If the matter is substantiated, the nominated judge must prepare a report for the judicial office, and recommend whether the Lord President should exercise one of his or her powers.[42] These powers include the ability to give formal advice, a formal warning or a reprimand.[43]

Once the Judicial Office has received the nominated judge's report, the disciplinary judge will review the determinations.[44] If the disciplinary judge does not require the nominated judge to review any of the determinations,[45] the Judicial Office will refer the report to the Lord President.[46] The Lord President may then decide to take disciplinary action against the judge concerned.[47] The Lord President is under no obligation to publish the outcome of an investigation once it has been concluded, or an account of what disciplinary powers, if any, have been used.

36. *Complaints about the Judiciary (Scotland) Rules 2011* r 11.
37. *Complaints about the Judiciary (Scotland) Rules 2011* r 10(4).
38. *Complaints about the Judiciary (Scotland) Rules 2011* r 10(9).
39. *Complaints about the Judiciary (Scotland) Rules 2011* r 10(9).
40. *Complaints about the Judiciary (Scotland) Rules 2011* r 11(6).
41. *Complaints about the Judiciary (Scotland) Rules 2011* r 12.
42. *Complaints about the Judiciary (Scotland) Rules 2011* r 12(2)(b).
43. *Judiciary and Courts (Scotland) Act 2008* s 29.
44. *Complaints about the Judiciary (Scotland) Rules 2011* r 14(3).
45. *Complaints about the Judiciary (Scotland) Rules 2011* r 14(4).
46. *Complaints about the Judiciary (Scotland) Rules 2011* r 15.
47. *Complaints about the Judiciary (Scotland) Rules 2011* r 15(4).

Judicial Complaints Reviewer

A Judicial Complaints Reviewer may be appointed to consider whether the procedures for investigating complaints against judicial office holders are operated fairly in respect both of the complainant and of the judicial office holder who is the subject of the complaint.[48] The Judicial Complaints Reviewer is appointed by Scottish Ministers with the consent of the Lord President.[49]

The Judicial Complaints Reviewer is intended to act as an oversight mechanism, in a similar way to an ombudsman. A case can be referred to the Judicial Complaints Reviewer by either the complainant or the judicial office holder against whom the complaint was made.[50]

The Judicial Complaints Reviewer's role is restricted to considering whether the investigation was conducted fairly – the Reviewer has no powers to review the merits of an investigation, recommendations made by the investigator or the disciplinary powers exercised by the Lord President. If the Judicial Complaints Reviewer decides that the complaint was not handled according to the prescribed rules and procedures, it may only refer the complaint back to the Lord President.[51]

Complaints alleging unfitness for office

Where the First Minister thinks fit, and when requested to do so by the Lord President, he or she must convene a tribunal to investigate and report on whether a person holding judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour.[52] The legislation applies to:

(a) the office of the Lord President,

(b) the office of the Lord Justice Clerk,

(c) the office of the judge of the Court of Session,

(d) the office of the Chairman of the Scottish Land Court, and

(e) the office of a temporary judge.[53]

48. *Judiciary and Courts (Scotland) Act 2008* s 30(1).
49. *Judiciary and Courts (Scotland) Act 2008* s 30(1).
50. *Judiciary and Courts (Scotland) Act 2008* s 30(2)(a).
51. *Judiciary and Courts (Scotland) Act 2008* s 30(2)(b).
52. *Judiciary and Courts (Scotland) Act 2008* s 35.
53. *Judiciary and Courts (Scotland) Act 2008* s 35(2).

Difference between the systems in England and Wales, and Scotland

In Scotland, the judiciary retains complete control over the content of the complaints procedure. The Lord President alone is responsible for prescribing the procedures on the investigation of judicial conduct. There is also no formal involvement of the Scottish Ministers either in the drafting of rules or their adoption. Rather, pursuant to s 28 of the Act, the Lord President may make rules for the investigation and determination of any matter concerning the conduct of judicial office holders, and reviews of any such determinations. However, it is important to note that the Judicial Complaints Reviewer may make recommendations on the content of the prescribed procedures.

In England and Wales, as Head of the Judiciary, the Lord Chief Justice is empowered to prescribe regulations on judicial conduct, but only with the agreement of the Lord Chancellor.[54] This means that the procedures require co-operation between the executive and judicial branches of government.

NEW ZEALAND

The Office of the Judicial Commissioner, established by the *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ), is responsible for receiving and dealing with complaints against judges.

Judges

The term 'judge' is defined to include judges of the Supreme Court, the Court of Appeal, judges and associate judges of the High Court, judges of the District Court and some specialist courts and coroners. Since 1980, stipendiary magistrates in New Zealand have had the status of District Court judges.

Complaints process

Any person may make a complaint about a judge in writing to the Judicial Commissioner.[55] The Judicial Commissioner may also act on his or her own initiative.[56]

When a complaint is made, the Commissioner will conduct a preliminary examination for the purposes of forming an opinion as to whether no further action should be taken; whether the complaint should be dismissed; whether the complaint could warrant referral

54. *Constitutional Reform Act 2005* (UK) s 115.
55. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 13.
56. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 12.

to the Head of Bench[57] or whether it could warrant consideration of the removal of the judge from office.[58] In the course of a preliminary examination, the views of the person the subject of the complaint may be sought.[59] The Commissioner may make any inquiries which he or she thinks to be appropriate, obtain any court documents relevant to an inquiry, or consult the Head of Bench.[60]

The Commissioner may take no further action in respect of a complaint if he or she is satisfied that further consideration would be unjustified.[61] It may be unjustified because the complaint has been resolved by an explanation from the judge, if it was based on a misunderstanding, or there is no reasonable prospect of the Commissioner being able to obtain the information necessary to continue the investigation.[62] However, an apology from the subject of the complaint to the complainant does not render further consideration unjustified.[63]

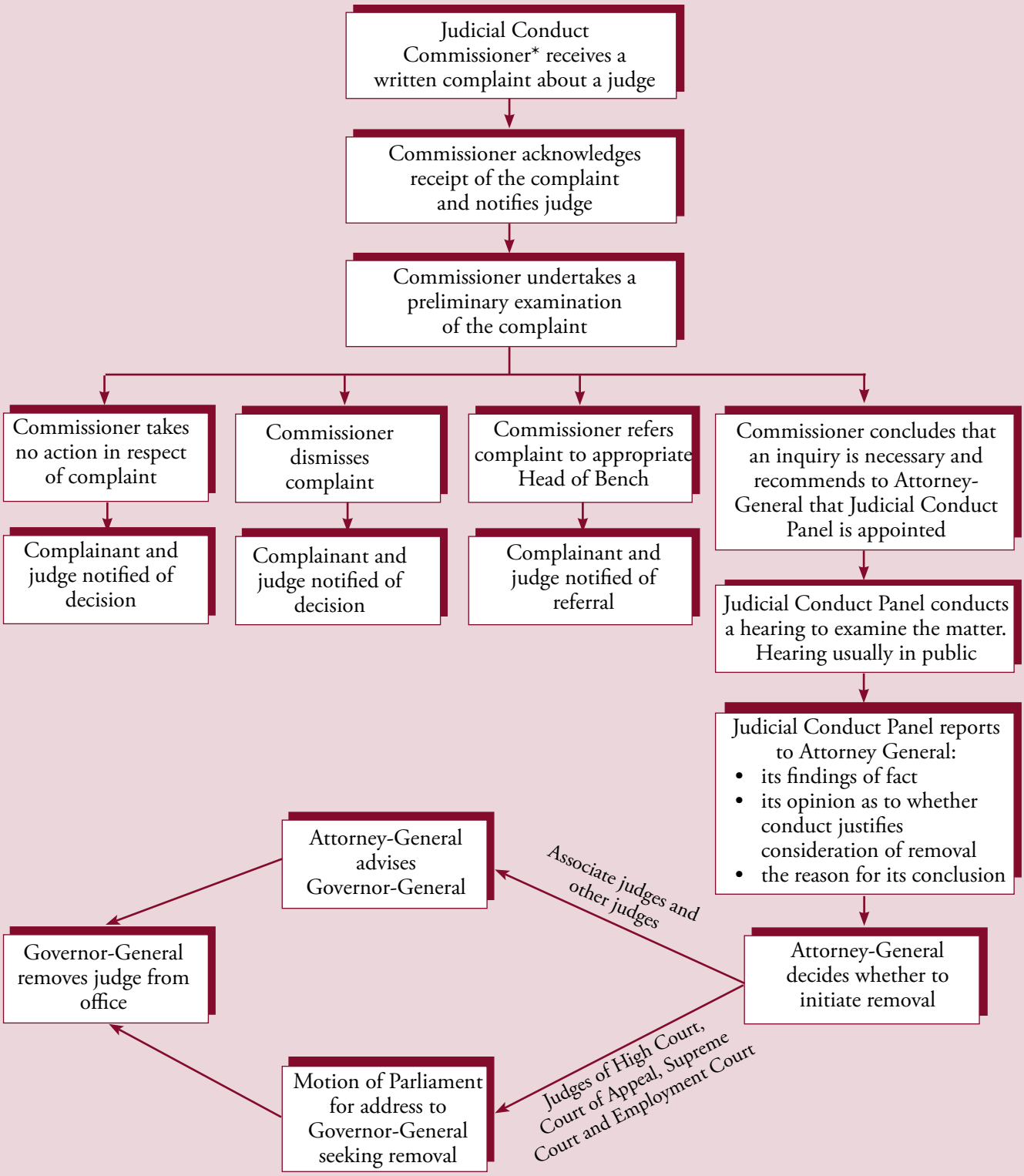
If a complaint does not reach the required threshold, which is possible for a variety of reasons, the complaint shall be dismissed.[64] If the Commissioner decides that further action is warranted, the Commissioner must refer the complaint to the Head of Bench, unless a Judicial Conduct Panel is going to be appointed.[65] The Commissioner has the power to recommend to the Attorney-General that a Judicial Conduct Panel be appointed if the Commissioner is of the opinion that an inquiry into the alleged conduct is necessary or justified and, if established, the conduct may warrant consideration of the removal of the judge.[66]

The Attorney-General may appoint a Judicial Conduct Panel on the opinion of the Commissioner, and must consult with the Chief Justice regarding the membership of the Panel.[67] There are specific requirements regarding the membership of the Panel.[68] The Panel has the power to conduct hearings at which the subject of the inquiry is entitled to appear (with representation if desired) and be heard.[69] A hearing is to be held in public unless the Panel considers it proper that the hearing be held in private.[70]

57. The Head of Bench is the judicial officer in charge of the relevant jurisdiction as defined in the *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 5.
58. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(1).
59. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(2).
60. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(4).
61. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(1).
62. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(2).
63. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(3).
64. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 16(1).
65. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 17(1).
66. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 18(1).
67. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 21(1).
68. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 22.
69. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) ss 26(1), 27(1).
70. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 29.

CHART 7

Overview of process for Judicial Conduct Commissioner and Judicial Conduct Panel (New Zealand)



* 'Judicial Conduct Commissioner' or 'Commissioner' includes a Deputy Judicial Conduct Commissioner carrying out the Commissioner's functions when the Commissioner has a conflict of interest, is absent from office, or is incapacitated, and during a vacancy in the office of Commissioner.

Chart has been adapted from Schedule 1: substituted on 23 March 2010 by s 10(3) of the *Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Act 2010* (NZ) (2010 No. 5).

At the conclusion of its inquiry, the Panel reports to the Attorney-General. Its report must set out the Panel's findings of fact, opinion as to whether consideration of removal of the judge is justified and the reasons for such a conclusion.[71] If the Panel is of the opinion that consideration of removal is justified, the Attorney-General has the discretion to determine whether the removal process should be initiated.[72] The Attorney-General cannot take steps to remove a judge unless it has been recommended by the Panel.[73] However, if the judge has been convicted of a serious criminal offence (punishable by imprisonment for two or more years), the Attorney-General can take steps independently to have the judge removed.[74]

Complaints alleging unfitness for office

A judge of the High Court cannot be removed from office except by the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that judge's misbehaviour or of that judge's incapacity to discharge the functions of office.[75]

A diagrammatic representation of the complaints handling system as it presently exists in New Zealand appears in Chart 7.

UNITED STATES OF AMERICA

The discussion in this section relates to courts in the federal system only. Many of the states make provision for elected judges. This renders comparison less apt.

In the United States, federal legislation provides for a process by which complaints may be filed against federal judges.[76] Any person may file a complaint constituted by a brief statement with the clerk of the relevant court alleging that a judge has engaged in conduct 'prejudicial to the effective and expeditious administration of the business of the courts' or alleging that a judge is unable to discharge all the duties of office by reason of a mental or physical disability.[77]

The clerk of the court will then transmit the complaint to the chief judge of the relevant court (or the next senior judge if it is the chief judge who is the subject of the complaint) and will also give a copy of the complaint to the judge whose conduct/ability is the subject of the complaint.[78]

71. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 32(2).
72. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 33(1).
73. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 33(2).
74. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 34.
75. *Constitution Act 1986* (NZ) s 23.
76. *Judicial Conduct and Disability Act of 1980*, 28-16 USC (2006).
77. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 351(a) (2006).
78. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 351(c) (2006).

The chief judge will review the complaint and may then conduct a limited inquiry for the purpose of determining whether appropriate corrective action has or can be taken without conducting a formal investigation, and whether the facts stated in the complaint are either plainly untrue or incapable of being established through investigation.[79] The chief judge may request the judge who is the subject of the complaint to file a written response to the complaint. The limited inquiry may include communication with the complainant, the subject of the complaint and the review of transcripts or other relevant documents.

After reviewing the matter, the chief judge may, by written order, dismiss the complaint if it is

(a) not in the required form,

(b) directly related to the merits of a decision or procedural ruling, or

(c) frivolous, lacking sufficient evidence or containing allegations incapable of being proven through investigation.[80]

The chief judge could also conclude the proceedings if it is found that appropriate corrective action has been taken or that action is no longer necessary due to intervening events.[81]

If the chief judge does not either dismiss the complaint or conclude the proceedings, he or she must appoint a special committee to investigate the complaint.[82] Both the complainant and the subject of the complaint will be notified of the special committee.[83]

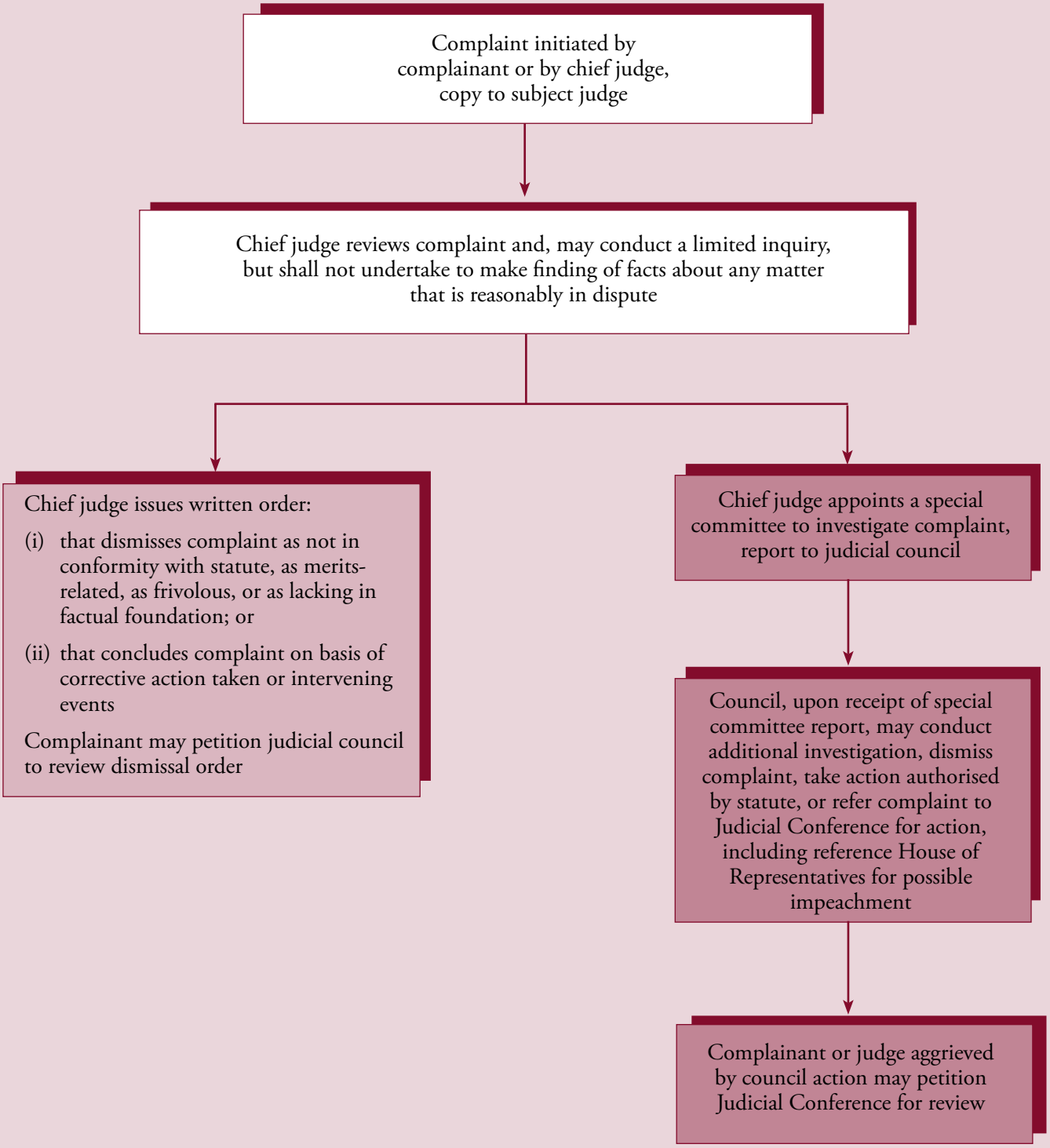
This special committee will investigate as extensively as it considers necessary, and then file a comprehensive report with the relevant judicial council, presenting the finding of the investigations and recommendations for actions.[84] The judicial council, upon receipt of the report, can conduct further investigation, dismiss the complaint, or take appropriate action.[85] This action can include ordering that no cases be assigned to the judge for a certain period of time, or reprimanding the judge in private or public.[86] The judicial council may also certify a disability of a judge and request that the judge voluntarily retire.[87] However, under no circumstances may the judicial council removal an Article III judge from office.[88]

If the judicial council determines that an Article III judge may have engaged in conduct which might constitute grounds of impeachment, or which, in the interests of justice, is not

79. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(a) (2006).
80. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(b)(1) (2006).
81. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(b)(2) (2006).
82. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(a)(1) (2006).
83. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(a)(3) (2006).
84. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(c) (2006).
85. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(1) (2006).
86. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(2) (2006).
87. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(2)(B) (2006).
88. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(3)(A) (2006).

CHART 8

Major steps in the United States federal complaints process



Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980* (September 2006) 15.
Adapted from Federal Judicial Center, <http://www.fjc.gov/public/pdf.nsf/lookup/breyer06.pdf/$file/breyer06.pdf> (accessed 27 May 2012).

amendable to resolution by the judicial council, it passes it to the Judicial Conference of the United States.[89] If the Judicial Conference of the United States, after considering the prior proceedings and undertaking any further investigation it considers appropriate, determines the consideration of impeachment to be warranted, it transmits that determination to the House of Representatives.[90] This decision is made by majority vote of the Conference.[91] This determination is then made public.

A complainant or judge aggrieved by a decision of the judicial council under s 354 can petition the Judicial Conference of the United States for a review of the decision.[92] However, there is no judicial review available for any order or determination.[93]

Article III of the United States Constitution does not expressly provide that removal only occur by way of such impeachment. It appears that, although such legislative power has not been exercised, it is open to the United States Congress to provide for the removal of federal judges by means other than impeachment before Congress.[94]

A diagrammatic representation of major steps in the complaints handling system as it presently exists in the United States federal system appears in Chart 8.

CANADA

The Canadian Judicial Council (CJC) is a federal body created under the *Judges Act*[95] with the mandate to promote efficiency, uniformity and accountability, and to improve the quality of judicial service in the superior courts of Canada.[96] The CJC is given the power to investigate complaints made by members of the public and the Attorney General about federally appointed judges. After investigation, the CJC can make recommendations, including the recommendation that the judge should be removed from office.[97]

Any member of the public can make a complaint to the CJC provided the complaint is about judicial conduct, is made in writing, and is about a specific federally appointed judge.[98] These complaints can be made anonymously.[99] The CJC can also initiate an inquiry.

89. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(b) (2006).
90. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 355(b)(1) (2006).
91. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 355(a) (2006).
92. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 357(a) (2006).
93. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 357(c) (2006).
94. Prakash S & Smith S, 'How To Remove a Federal Judge' (2006) 116 *Yale Law Journal* 72.
95. *Judges Act*, RS 1985.
96. See <http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp>.
97. Ibid.
98. Ibid.
99. Canadian Judicial Council, *Procedures for Dealing with Complaints Made to the Canadian Judicial Council about Federally Appointed Judges*, October 2010, <http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCMProcedures-2010.pdf> 2.3.

A complaint will be dealt with by either the Chairperson of the CJC or a Vice-Chairperson (the Chairperson).[100] The complaint will not proceed if the Chairperson believes it to be trivial, vexatious, made for an improper purpose, or manifestly without substance, nor if it is outside the jurisdiction of the Council.[101] The Chairperson can seek additional information from the complainant, and seek comments from the subject of the complaint and that judge's head of jurisdiction.[102]

The Chairperson will view all information and

(a) close the file if the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint;

(b) hold the file [while remedial action is carried out], or

(c) ask Outside Counsel to make further inquiries and prepare a report, if the Chairperson is of the view that such a report would assist in considering the complaint, or

(d) refer the file to a Panel.[103]

If outside counsel become involved, the Chairperson will review the opinion of the outside counsel, and then either close the file, wait while remedial action is carried out, or refer the file to a panel.[104] If the file is referred to a panel, the subject of the complaint is given a reasonable opportunity to make written submissions, including submissions as to whether an investigation should be commenced.[105]

After reviewing the file and considering any written submissions, the panel may decide to:

(a) direct outside counsel to make further inquiries; or

(b) close the file if it considers that no Inquiry Committee should be constituted because matter is not serious enough to warrant removal; or

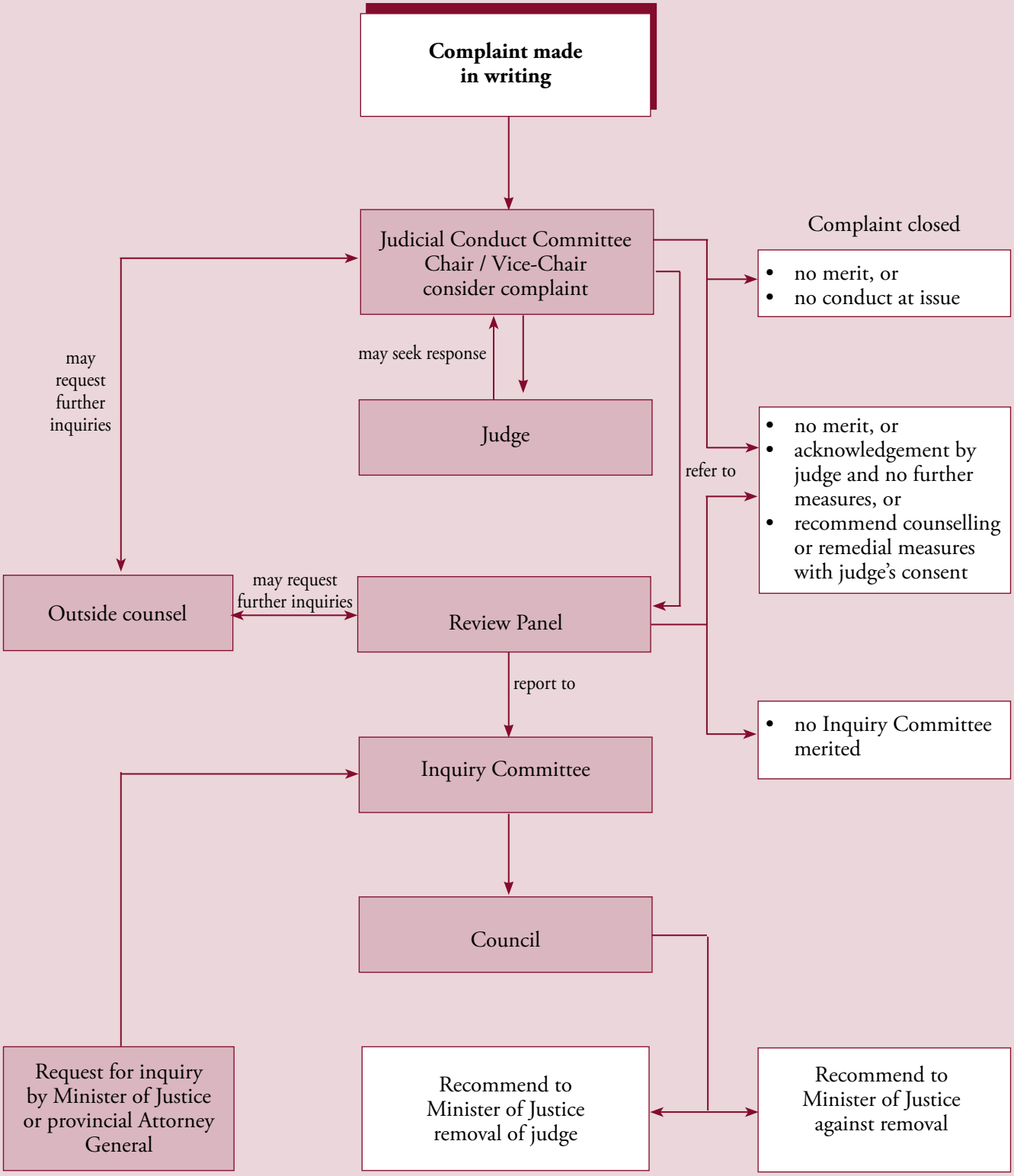
(c) hold the file while remedial action is pursued; or

(d) decide to constitute an Inquiry Committee because the matter may be serious enough to warrant removal.[106]

100. Ibid 3.2.
101. Ibid 3.5(a).
102. Ibid 3.5(b)–(c).
103. Ibid 5.1.
104. Ibid 8.1.
105. Ibid 9.5.
106. Ibid 9.6.

CHART 9

Canadian federal complaints process



Canadian Judicial Council, 'Council Complaint Procedure', <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?sel Menu=lawyers_complaintprocedure_en.asp> (accessed 27 May 2012).

When closing the file because the matter will not go to an Inquiry Committee, the panel may, in writing to the judge, provide an assessment of the judge's conduct and express any concerns the panel may have about the judge's conduct.[107]

The Inquiry Committee normally holds a public hearing, where the judge and the person who complained can attend and give evidence about the matter that led to the complaint. The Inquiry Committee prepares a report, which goes to the full Canadian Judicial Council for discussion.[108] After considering the Inquiry Committee's report, the Council must decide whether the judge's conduct has rendered the judge incapacitated or disabled from the due execution of the office of judge. Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office.[109]

A diagrammatic representation of the federal complaints handling system as it presently exists in Canada appears in Chart 9.

107. Ibid 9.7.
108. <http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp#wcmac>.
109. Ibid.

Chapter 4

Establishing a Formal Complaints Regime in Western Australia

Contents

4 A formal complaints regime

As already indicated, complaints of misbehaviour or incapacity that could raise a reasonable prospect of removal from office are rare. The Commission is not aware of any instances in which the removal of a judicial officer from office has been moved within Parliament. However, the Western Australian population is increasing and it is reasonable to assume that the demands on the justice system will continue to grow. This is likely to be accompanied by an increment in the number of judicial officers in the state. While there is no reason to suppose that instances of judicial misbehaviour are likely to become more common, the prospect that more judges will suffer physical or mental infirmities (bringing into question their fitness to continue in office) cannot be discounted.

There are two choices: continue with the existing informal structure or establish a more formal regime by legislation. The former has the advantage of flexibility. But it has all of the disadvantages referred to in the introduction to this paper, namely:

(a) the perception that complaints are not dealt with in a way that is transparent, impartial and accountable;

(b) a lack of certainty and guidance to Parliament as to the way in which its responsibilities should be carried out; and

(c) management and resource implications for the courts in dealing with complaints.

A more formal structure would provide greater certainty and consistency in the handing of complaints across the several jurisdictions that it would cover. It would facilitate the collection of statistics and will facilitate a more reasoned and informed approach to questions concerning judicial conduct.

RECOMMENDATION 1

Establish formal complaints regime

That a formal complaints regime be established in Western Australia.

THE APPROPRIATE FORM OF A COMPLAINTS HANDLING BODY

To serve the goals of efficiency, accessibility, transparency and accountability a complaints handling body would need to be permanently established with sufficient resources to carry out the responsibilities assigned to it. There are at least four alternatives that might be considered:

(a) a procedure similar to that applying in England and Wales;

(b) a judicial commissioner following the New Zealand model;

(c) a statutory regime modelled on the federal system (the Parliamentary Commissions Act and the Judicial Complaints Act); or

(d) a judicial commission modelled on the New South Wales body.

It should be noted that all models deal with the investigation of complaints and with their resolution. This is an important facet of an efficient scheme. It will be necessary to invest the complaints handling body with sufficient powers and protections to enable it properly to carry out its functions.

The English model is multilayered and would be resource intensive. In addition, the level of involvement of the Lord Chancellor (a member of the executive government) could create tension with the concepts of separations of powers and judicial independence prevailing in Australia.

If the New Zealand model (a judicial commissioner as opposed to a judicial commission) was to be followed it may be more resource intensive as it would not draw on the contributions of the heads of jurisdiction in the same way as would the judicial commission model. Also the role would have to be filled by a suitably qualified candidate irrespective of the number of complaints requiring investigation. It is arguable that the staff and other recurrent costs necessary to support the work of the complaints handling body and to conduct individual (and more intensive) investigations would be the same whether the body was a judicial commissioner or a judicial commission. But the judicial commissioner would be the person making decisions on complaints (save for those reserved to Parliament). Accordingly, the person appointed to that position would have to be of a level of seniority and expertise commensurate with responsibilities of that gravity. Steps would need to be taken to ensure that a judicial commissioner model was fully independent from the executive and legislative arms of government. It would also be necessary to set out in clear terms the relationship between the judicial commissioner, the Chief Justice and the other heads of jurisdiction.

Adopting the federal model would (save as set out below) be relatively cost effective because it would not require the creation of a standing body to handle complaints and the instances in which it became necessary to establish a commission would be rare. It would also provide certainty by establishing a 'standard mechanism to assist the Parliament' in considering whether a complaint of incapacity or misbehaviour warranted the removal of a judicial officer from office.[1]

1. Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Cth), Explanatory Memorandum [4].

However, it would do little (if anything) to meet the principal shortcomings of the current system of dealing with complaints other than those of the most serious kind. Importantly, it does not address the perception (regardless of whether or not the perception is justified) that the system is not transparent, impartial or accountable, mainly because complaints are made to, and dealt with by, the head of jurisdiction (herself or himself a judicial officer[2]). In other words, there must be doubt as to the capacity of such changes to enhance public confidence in the integrity of the justice system.

One of the shortcomings identified by judges, particularly heads of jurisdiction, is the lack of time, expertise and resources properly to investigate complaints. Without a commitment by government to provide resources to enable heads of jurisdiction to engage outside assistance in investigating complaints, it is unlikely that the burden on the courts represented by the current system would be alleviated.

An examination of the literature reveals arguments for and against the judicial commission model. As one commentator has said, a judicial commission has benefits including that:

- The formal process for handling complaints would ensure complaints are resolved quickly and efficiently, and give the public confidence that their concerns are being documented and taken seriously.
- It avoids any awkwardness associated with a superior judge having to counsel one of his or her colleagues.
- It may enforce integrity in the judiciary, ensuring unfit judicial officers are weeded out.
- It may give frustrated complainants a better understanding of judicial process, and in so doing, provide those members of the public with greater understanding of and confidence in the judiciary.[3]

Other commentators have argued that the complaint process of the Judicial Commission of New South Wales (and commissions of inquiry established in the 1980s) inappropriately imposes upon judicial independence.[4] One author has argued that the only valid form of discipline a commission can mete out is the recommendation for removal from office, and that decision ultimately rests with Parliament. Any other reprimanding powers of a commission impose upon judicial independence and would be inappropriate for the following reasons:

> If the principle of absolute judicial immunity is itself based on the need to protect judicial independence, it must be arguable that exercise by anyone, including some of the judges of a court, of disciplinary authority over the judicial conduct of other judges conflicts with the policy reflected in the immunity rule.[5]

2. But see, contra, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth) [3], [13, [14].
3. Karamicov D, 'Judicial Complaints and the Complaints Procedure: Is it time for an Independent Judicial Commission in Victoria?' (2010) 19 *Journal of Judicial Administration* 232, 242–4.
4 See, eg, Drummond D, 'Do Courts Need a Complaints Department?' (2001) *Australian Bar Review* 11, 22–6.
5. Ibid 25.

Another commentator raised more acute concerns about the possible encroachment on judicial independence:

> [T]he mere establishment of an official body with the express function of receiving complaints against judges as a first step in an official investigation renders judges vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected.[6]

However, other views have been expressed to the effect that, far from being an imposition on judicial independence, judicial commissions add to accountability and thus support independence. The following is an extract from one of the writings in which these contentions are advanced.

> If a given system of judicial accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability, and, at the same time, enhance judicial independence.[7]

It has been suggested that the Judicial Commission in New South Wales has become an integral part of the court system 'harbouring a good reputation and pioneering new methods and resource tools shared among the legal profession as a whole'.[8]

One advantage of the judicial commission model is that it is, by its very nature, independent from the executive and legislative arms of government. In relation to the New South Wales model, it is to be noted that the Judicial Commission has responsibilities (such as the collection and dissemination of sentencing statistics and judicial education) in addition to the handling of complaints. There is a public interest in facilitating activities of this nature.

The New South Wales model recognises the important role played by the heads of jurisdiction and is consistent with the principle of judicial independence as it limits involvement of the executive government. Given the relatively small number of Western Australian judicial officers, it would be an efficient use of resources to maintain the direct involvement of heads of jurisdiction. Having *ad hoc* panels (eg, a conduct division) appointed to deal with individual serious investigations, would be an efficient use of resources since they need only be convened where complaints pass the primary level of scrutiny. It would also:

6. McLelland J, 'Disciplining Australian Judges' (1991) 17 *Commonwealth Law Bulletin* 675, 677.
7. Morabito V, 'The *Judicial Officers Act 1986* (NSW): A Dangerous Precedent or a Model to be Followed?' (1993) 16 *University of New South Wales Law Journal* 481, 490.
8. Karamicov D, 'Judicial Complaints and the Complaints Procedure: Is it time for an Independent Judicial Commission in Victoria?' (2010) 19 *Journal of Judicial Administration* 232, 241–2.

- provide a means to give guidance to Parliament in the proper exercise of its functions under the *Supreme Court Act* and the *Constitution Act*; and
- foster public confidence by divorcing the investigative process from the courts or tribunals of which the judicial officer the subject of a complaint is a member.

In the Commission's opinion the judicial commission model provides an appropriate balance between the needs for accountability and independence, and is the one best suited to Western Australian conditions.

RECOMMENDATION 2

Establish judicial commission

That a judicial commission be established in Western Australia, generally based on the Commission operating in New South Wales and, in particular:

1. the judicial commission be established by legislation which, save as set out in other recommendations and otherwise as necessary or desirable to recognise jurisdictional differences, has provisions similar to the *Judicial Officers Act 1986* (NSW);
2. the judicial commission is a body corporate with perpetual succession; and
3. the judicial commission is independent of the executive and legislative arms of government and, so far as is practicable, independent of the courts whose members are subject to its jurisdiction.

MEMBERSHIP OF A JUDICIAL COMMISSION

The Judicial Commission of New South Wales is comprised of ten members: six 'official members' (the heads of jurisdiction) and four appointed by the Minister from among legal practitioners and members of the community.

Given the difference in numbers of judicial officers in the two states it may be possible to have a smaller commission in Western Australia. In the Commission's opinion the heads of jurisdiction ought to be members. The Commission also believes that public confidence in the work of the judicial commission will be enhanced if there is lay representation on its membership. Similarly, the presence of legally qualified members other than judges will add to the range of relevant and proximate experience necessary needed for tasks of this nature.

To preserve the independence of the judicial commission from the executive and parliamentary arms of government, the legislation should provide that a lay member of the judicial commission ought not be a current or past member of parliament. While (for the same reason) there would be merit in excluding members of the executive government from the appointment process, it is difficult to identify a person other than the Attorney General who should have responsibility to appoint a lay member.

Having heads of jurisdiction as official members of the judicial commission presents some practical difficulties. The normal rules and conventions concerning perceptions of conflict, partiality or bias would apply. It is trite to say that if a complaint were made against a head of jurisdiction, she or he could not be present during, or take any part in, investigations or deliberations concerning that complaint. The same would apply if the head of jurisdiction has initiated the complaint or if it were to involve a relative or a judicial officer who is a close personal friend. The Commission does not believe that the mere fact that a complaint is made against a member of the head of jurisdiction's court would, of itself, enliven the conflict rules. In the Commission's opinion, these matters are adequately covered by general administrative law principles and need not be included in the enabling legislation.

RECOMMENDATION 3

Composition of judicial commission

That the judicial commission comprise:

1. the Chief Justice;
2. the Chief Judge of the Family Court of Western Australia;
3. the Chief Judge of the District Court;
4. the Chief Magistrate;
5. the President of the State Administrative Tribunal;
6. a lawyer holding an unconditional practice certificate or a Western Australian government lawyer appointed by the Chief Justice after consultation with the presidents of the Law Society of Western Australia (Inc) and the Bar Association of Western Australian (Inc); and
7. a member of the public (whether or not legally qualified), not being a past or present member of an Australian parliament, appointed by the Attorney General.

The reason for the exclusion of members of parliament is to enhance the transparency of the process and to preserve the separation of powers.

COMPOSITION OF A CONDUCT DIVISION

In New South Wales a conduct division is appointed by the Judicial Commission to examine and deal with complaints that have not been dismissed following a preliminary examination by the Judicial Commission. The conduct division reports to the Governor if it determines that 'a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office'.[9] The conduct division is constituted by a panel of three persons, two of whom are to be judicial officers (one may be a retired judicial officer). The other persons making up the panel must be community representatives nominated by Parliament.[10] The legislation provides that such nominees cannot be legally qualified and must not be a member of the Judicial Commission.[11]

In the Commission's opinion, and for much the same reasons as advanced in the discussion about membership of the judicial commission, a conduct division should have lay representation. But due to technical issues that will usually arise and familiarity with court procedures and judicial ethics, there should be a majority of judges or other legally qualified members. The Commission sees no reason why a Western Australian judge should not be appointed to a conduct division provided he or she is not holding or did not hold office in the same court and at the same time as the person whose conduct is to be examined. This is seen as desirable in the interests of keeping costs within reason while respecting the need to avoid perceptions of conflict or partiality.

RECOMMENDATION 4

Appointment of a conduct division

That the judicial commission appoint a conduct division from time to time to examine and make recommendations on specific complaints. Each conduct division should be comprised of three persons; namely:

1. one or two qualified judges;
2. if only one qualified judge has been appointed, a qualified lawyer; and
3. a member of the public qualified for appointment to, but not a member of, the judicial commission drawn from a panel nominated by the Attorney General.

9. *Judicial Officers Act 1986* (NSW) s 29.
10. *Judicial Officers Act 1986* (NSW) s 22.
11. *Judicial Officers Act 1986* (NSW) sch 2A.

For the purposes of this recommendation:

- 'qualified judge' means a retired Supreme Court or Federal Court judge from any Australian jurisdiction (including Western Australia) or serving Supreme Court or Federal Court judge from any Australian jurisdiction (except Western Australia) who is not a member of the judicial commission; and
- 'qualified lawyer' means a lawyer holding an unconditional practice certificate in any Australian jurisdiction (including Western Australia) or a Western Australian government lawyer who is not a member of the judicial commission and who is not a past or present member of an Australian parliament.

As with the judicial commission, the constitution and procedures of a conduct division would be subject to the normal administrative law rules and conventions concerning such things as perceptions of bias and conflicts of interest. Again, it would not be necessary to include these provisions in the legislation.

Some practicalities of a judicial commission for Western Australia

4

JUDICIAL OFFICERS

It would be necessary to identify the courts, tribunals or officers that ought to be amenable to the complaints regime. The general trend in comparable jurisdictions is to limit coverage to bodies that clearly exercise judicial functions, namely courts (as that term would generally be understood) and at least judicial members of administrative review tribunals. This avoids the sometimes difficult assessment whether, and if so to what extent, a tribunal and similar body is exercising quasi-judicial functions.

This question is highlighted by the reference to 'other judicial officers' in the Protocol. It is not clear who might be subject to the system in accordance with that phrase and, if so, who would be the relevant head of jurisdiction. A case in point is the extension of the Protocol regime to arbitrators by virtue of the definition in s 121 of the Criminal Code.

RECOMMENDATION 5

Complaints regime

That the complaints regime apply to judicial officers defined as:

1. judges, masters and registrars of the Supreme Court;
2. judges and registrars of the District Court;
3. judges, registrars and magistrates of the Family Court of Western Australia;
4. magistrates in the Magistrates Court and the Children's Court;
5. members of the Coroners Court;
6. judicial members of the State Administrative Tribunal;
7. commissioners and persons formally appointed as acting or auxiliary judicial officers in any of the above capacities.

There are some issues that have to be noted in relation to this list. First, registrars are public service officers as defined in the *Public Sector Management Act 1994* (WA) and are therefore subject to the disciplinary regime operating under that legislation. In the Commission's opinion registrars should be subject to the jurisdiction of the judicial commission and, if a complaint is made, it should be left to the commission to decide whether to conduct an investigation or to refer the matter to be dealt with under the *Public Service Management Act*. Secondly, judicial officers in the Family Court of Western Australia hold both State

and Federal commissions. The application of the complaints regime to those officers would have to recognise the limits of State legislative power. Thirdly, the Commission does not believe that the regime should apply non-judicial members of the State Administrative Tribunal. They are engaged on fixed contractual terms and security of tenure is not an issue in that respect.

STANDING TO MAKE COMPLAINTS

The existing Protocol permits 'any person affected' to make a complaint about noncriminal misconduct.[1] The New South Wales legislation provides that any person may complain to the Judicial Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer.[2] It also empowers the Minister to refer any matter relating to a judicial officer to the Judicial Commission.[3] In England and Wales, complaints may be made by a 'qualifying complainant' namely, a complainant who claims to have been adversely affected by the maladministration complained of.[4]

RECOMMENDATION 6

Standing to make complaints

That any person may initiate a complaint. For clarity, the legislation should provide that the Attorney General, the Chief Justice and other heads of jurisdiction should have an express power to refer matters to the complaints body.

As there is not to be a standing test there should be a mechanism to deal with complaints of a repetitive and meritless nature. The New South Wales legislation provides that a person who habitually and persistently and mischievously or without reasonable grounds makes complaints may be declared by the Judicial Commission to be a vexatious complainant. The Judicial Commission may disregard a complaint made by a person while a declaration is in force.[5]

The Commission has some concerns about a body other than a duly appointed court of record making a declaration removing a statutory right. Accordingly, the Commission

1. Department of the Attorney General (WA), 'Protocol for Complaints Against Judicial Officers in Western Australian Courts' [9].
2. *Judicial Officers Act 1986* (NSW) s 15.
3. *Judicial Officers Act 1986* (NSW) s 16.
4. *Constitutional Reform Act 2005* (UK) s 99.
5. *Judicial Officers Act 1986* (NSW) s 38.

recommends that the Supreme Court be empowered to make an order restricting the ability of a person to make a complaint to the commission if the person has initiated or conducted vexatious complaints to the commission. It is suggested that the provision be modelled on the provisions in the *Vexatious Proceedings Restriction Act 2002* (WA) which empower certain courts to impose restrictions on persons who have initiated or conducted vexatious proceedings from initiating or continuing proceedings in certain courts or tribunals.

RECOMMENDATION 7

Vexatious complaints

1. That the Supreme Court be empowered to make an order restricting the ability of a person to make a complaint to the judicial commission if the person has initiated or conducted vexatious complaints to the commission.
2. That the provision be modelled on the provisions in the *Vexatious Proceedings Restriction Act 2002* (WA), which empower certain courts to impose restrictions on persons who have initiated or conducted vexatious proceedings from initiating or continuing proceedings in certain courts or tribunals.

COMPLAINTS COVERED BY THE PROPOSED REGIME

In the interests of certainty and consistency, there must be some definition of the types of conduct that can be the subject of a complaint.

Unwarranted or trivial complaints

There is a need for a mechanism by which unwarranted or trivial complaints can be filtered at an early stage. The need for a filtering process is highlighted by the experience in New South Wales in 2010–2011: 450 complaints were received but only 60 were deemed to require investigation. The New South Wales legislation deals with this issue by detailed provisions about the summary dismissal of complaints. This includes matters that were subject to adequate appeal or review rights.[6]

6. *Judicial Officers Act 1986* (NSW) s 20.

RECOMMENDATION 8

Unwarranted or trivial complaints

That provisions be included in the legislation so that unwarranted or trivial complaints can be filtered at an early stage, and that these provisions be based on the New South Wales legislation.

Delay in delivering reserved judgments

It is difficult to divorce considerations relating to delay in delivery of judgments from the allocation of cases within a court and the workload of individual judges. Those charged with the administration of the courts are in the best position to resolve queries or complaints of this nature.

RECOMMENDATION 9

Delays in delivering reserved judgments

That, save in one instance, complaints relating to delays in delivering reserved judgments not fall within the jurisdiction of the judicial commission. The exception should cover a situation where a head of jurisdiction forms the opinion that a delay or series of delays by an individual judicial officer raise questions as to the suitability of the officer to continue to hold office and refers the matter to the judicial commission.

Ordinary complaints – disciplinary powers

An individual judicial officer is protected by the concept of judicial independence and (save for misbehaviour) cannot be 'disciplined' as that term is understood in common parlance.

A question that arises is what should follow a finding by the complaints body that a complaint has been substantiated and ought not to be dismissed summarily but is not so serious as to warrant consideration by Parliament of removal from office. The Protocol refers to 'training or the provision of assistance to the judicial officer concerned'.[7] Common

7. 'Protocol for Complaints Against Judicial Officers in Western Australian Courts' [16].

experience suggests that counselling by the head of jurisdiction and the effect of peer pressure serve a similar function to formal discipline.

The New South Wales legislation allows the Judicial Commission in these circumstances to refer the complaint to the head of jurisdiction with recommendations as to what steps might be taken.[8] The legislation does not specify what those steps might be. In England and Wales there is a specific power enabling the Lord Chief Justice to give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes.

In the Commission's opinion there is a real danger that a formal system of warnings or reprimands might be prejudicial to public confidence in the judicial officer concerned. The Commission recommends that similar provisions to those applying in New South Wales should be enacted. In other words, there should not be a formal system of warnings and reprimands.

RECOMMENDATION 10

Warnings and reprimands

That there be no formal system of warnings and reprimands in Western Australia and that similar provisions to those applied in New South Wales be enacted.

Complaints of criminal misconduct

It should be noted that both the New South Wales and New Zealand models empower their respective complaints bodies to investigate complaints of criminal misconduct, although these powers seem rarely to be used. This may be explained by the lack of resources and expertise available to the investigating body.

It seems unlikely that a judicial commission in Western Australian would be in any different position but there may be circumstances in which it would wish to have some involvement in the resolution of a complaint, albeit one involving allegations of criminal activity. In the Commission's opinion, the primary investigative role should lie with the Western Australia Police. If, following investigations, criminal charges are laid, they should be dealt with through the criminal courts in the normal course. The circumstances may be such that the police decide that the evidence does not warrant the laying of charges but there is material that relates to the fitness of an individual to hold judicial office. The

8. *Judicial Officers Act 1986* (NSW) s 21.

matter would properly be referred by the police either to the judicial commission or to the head to jurisdiction. In the latter event the head of jurisdiction would be at liberty to refer the matter to the judicial commission. This is a reason why the retention of jurisdiction in the judicial commission is warranted.

The Protocol presently governs the relationship between the police and the heads of jurisdiction in relation to reporting and investigating allegations of criminal misconduct. If a complaint were to be made direct to the police it would, for practical reasons, be important for the head of jurisdiction to be aware of it. If these recommendations are adopted and a judicial commission is established it may be desirable for the relevant parties to revisit the wording of the Protocol in this respect.

In the Commission's opinion, the Corruption and Crime Commission (CCC) should continue to have powers in relation to judicial officers. However, the Commission has concerns about the potential reach of s 27(3) of the *Corruption and Crime Commission Act 2003* (WA). It applies expressly to allegations of judicial corruption (an offence under s 121 of the Criminal Code). But it also extends to conduct that, if established, would constitute grounds for removal from judicial office. It may also extend to general misconduct, being conduct that adversely affects honest performance of functions in public office whether or not the conduct occurred in the course of exercising official functions. In the Commission's opinion, conduct in the latter two categories ought to be within the exclusive jurisdiction of the judicial commission.

RECOMMENDATION 11

Criminal misconduct

1. The judicial commission have the power to investigate complaints involving criminal misconduct.
2. Nonetheless, the primary role for investigating complaints of that nature should lie with the Western Australia police.
3. Provision similar to those in the Protocol should govern the relationship between the police and the heads of jurisdiction and the judicial commission, although the drafting of these provisions may need to be reviewed.
4. The *Corruption and Crime Commission Act 2003* (WA) be amended to provide that, in relation to judicial officers, the Corruption and Crime Commission may only receive and investigate a complaint involving judicial corruption.

Complaints alleging unfitness for office

The removal of a judge from office under provisions based on the *Act of Settlement 1701*[9] can only occur for misbehaviour and following an address in Parliament. By convention, this is reserved for exceptional circumstances and for proven misbehaviour. This raises at least three questions. First, what is meant by 'misbehaviour'? Secondly, ought there to be an express extension to cover incapacity, for example, physical or mental impairment that renders the person unfit for office? Thirdly, should there be preconditions to moving an address?

There is little judicial authority dealing with the *Act of Settlement* and its equivalents and the very few occasions on which the power to remove on address has been exercised. In 1989 there was a Commission of Inquiry into the conduct of certain judges held in Queensland. In relation to the term 'misbehaviour', the commissioners said:

> The Commission therefore expresses its view that before an opinion can be reached that behaviour of a Judge of a Supreme Court warrants his removal from office, the behaviour must be such that, having regard to all the relevant surrounding circumstances, no right thinking member of the community could regard the fact of its having taken place as being consistent with the continued proper performance by the judge of judicial duties, and hence with the holding of judicial office. Put another way, if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary.[10]

In the Commission's opinion this provides an appropriate understanding of the term 'misbehaviour'. However, it is to be noted that the term is not defined in the *Act of Settlement*, the Australian Constitution or any other relevant legislation.[11] The Commission does not believe that a definition is necessary.

The second issue is whether incapacity ought to be a ground for an address. The *Magistrates Court Act 2004* (WA) and the *Judicial Officers Act 1986* (NSW) both make provision for intervention where the judicial officer has a physical or mental impairment that affects his or her performance of judicial or official duties. Common experience suggests that physical or mental incapacity may result in unfitness for office and this supports an extension of the definition to a condition of that type. The constitutional legislation in each of

9. Eg, *Constitution Act 1889* (WA) ss 54, 55.
10. *First Report of the Parliamentary Judges Commission of Inquiry* (1989) [1.5.9].
11. *Constitution Act 1900* (Cth) s 72(ii). See, eg, *Constitution Act 1975* (Vic) s 87AAB(1); *Constitution Act 1902* (NSW) s 53(1); *Constitution of Queensland 2001* (Qld) s 60(1); *Supreme Court Act (NT)* s 40(1); *Constitution Act 1934* (SA) s 74; *Supreme Court (Judges' Independence) Act 1847* (Tas) s 1; *Judicial Commissions Act 1994* (ACT) s 4.

Victoria, Queensland, the Australian Capital Territory and the Northern Territory and the Commonwealth legislation refers to 'incapacity' as well as misbehaviour.[12]

In New South Wales and Victoria an address cannot be moved in Parliament unless the relevant investigatory body has recommended that this course of action be followed.[13] This has the advantage that there is a usual investigative process to be adopted before Parliament could consider an address for removal. However, it is also true that such a provision would confine the present power of the Parliament to move an address for removal of a judicial officer without any prior deliberation (or recommendation) occurring. The Commission considers that judicial independence is best maintained if (as in New South Wales and Victoria) a removal address may be made only following receipt of an opinion from the conduct division that a complaint could justify parliamentary consideration of removal. As with other legislation, Parliament would remain free to remove such confinement by amending its own legislation were it to prove overly restrictive.

One of the submissions made in response to the discussion paper argued that the entire complaints power should be removed from the political arena and that Parliament should have no role to play in the removal of a person from judicial office. It is implicit in the submission that this power should rest with the judicial commission. In the Commission's opinion the argument involves too strict an application of the doctrine of separation of powers. It is the public, through the executive arm of government (drawn from its elected representatives), that appoints judges. It follows that in a matter so grave and unusual as the removal of a judge from office, it is, once again, the public, through its elected representatives, in whom should reside the responsibility for taking that action.

A judicial commission along the lines of that existing in New South Wales would create certainty and provide assistance to Parliament should an occasion arise when Parliament was called upon to consider removal of a judge from office. It would also obviate the problem of procedural fairness for the judge. The judicial commission would inquire into allegations, gather information and evidence and report to Parliament. It may make recommendations whether evidence exists of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity in the relevant sense. The Commission supports this approach.

12. *Constitution Act 1975* (Vic) s 87AAB; *Constitution of Queensland 2001* (Qld) s 61(2); *Judicial Commissions Act 1994* (ACT) ss 4, 5(1); *Supreme Court Act 1975* (NT) s 40(1); *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.
13. *Judicial Officers Act 1986* (NSW) s 41; *Constitution Act 1975* (Vic) s 87AAH.

RECOMMENDATION 12

Grounds for removal from office

That the legislation provide that:

1. The sole ground for removal of a judicial officer from office should be proven misbehaviour or physical or mental incapacity.

2. A judicial officer may only be removed from office by the Governor in Council following an address in both houses of Parliament and following a report by a conduct division to the Governor setting out an opinion that the matters referred to in the report could justify parliamentary consideration of the removal.

This will necessitate amendments to the *Constitution Act 1889* (WA) and the *Magistrates Court Act 2004* (WA).

SUSPENSION FROM OFFICE

Another question that arises is whether a judge who is the subject of a complaint that could justify parliamentary consideration of removal from office or whose mental or physical capacity is in issue or who has been charged with or convicted of a serious criminal offence ought remain in office pending resolution of the complaint or investigation.

Under the New South Wales legislation the head of jurisdiction may suspend the judicial officer in those circumstances.[14] If the officer concerned is a head of jurisdiction, suspension may be ordered by the Governor on the recommendation of the Judicial Commission.[15] In the Commission's opinion a power of suspension should not lie with the executive government, as it carries with it serious questions about separation of powers and judicial independence.[16] However, because of the seriousness of suspension the Commission is concerned about such a power residing in a head of jurisdiction. In the Commission's view the power to suspend a person from judicial office should only be exercised by the judicial commission or a conduct division once that body has formed an opinion that the officer has a case to answer. An order for suspension should be without prejudice to the officer's right to receive full salary and entitlements.

14. *Judicial Officers Act 1986* (NSW) s 40.
15. *Judicial Officers Act 1986* (NSW) s 43.
16. Cf *Magistrate Court Act 2004* (WA) sch 1, cl 13.

RECOMMENDATION 13

Power to suspend a judicial officer

1. The power to suspend a person from judicial office should only be exercised by the judicial commission or a conduct division once that body has formed an opinion that the officer has a case to answer.

2. During any period of suspension the officer should continue to receive full salary and entitlements.

PROCEDURAL FAIRNESS ISSUES

All formal processes for dealing with complaints must ensure that the subject of the complaint is afforded procedural fairness at all stages of the process. In the Commission's view, the right of a person to be afforded procedural fairness and the minimum content of the rules should be expressed in any instrument establishing the complaints process.

A related question is whether a judicial officer under investigation should have an entitlement to the costs of his or her representation paid by the State. Information received from the Judicial Commission of New South Wales indicates that there is no formal or enforceable protocol for funding legal costs incurred by judicial officers but that costs are routinely met from public sources. In contrast, the Commonwealth is required by statute to meet the reasonable costs of legal representation for a judicial officer being investigated under the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012 (Cth).[17] In Western Australia, the policy in relation to the provision of funding to current and former public officers in relation to their reasonable legal costs of defending or participating in a range of civil legal proceedings is presently addressed in government guidelines.[18] Those guidelines would not usually extend to an officer's legal costs incurred in relation to their defence of proceedings taken to dismiss or remove them from office, or related investigations. In certain circumstances however, such as in relation to an inquiry before the Corruption and Crime Commission, the guidelines are applied so that, in an appropriate case, an officer who has acted reasonably and in good faith may be reimbursed for their reasonable legal costs in relation to their participation as a witness in the inquiry. Where funding is provided under the guidelines a decision as to reimbursement of costs

17. Section 45.
18. 'Guidelines Relevant to Ministers and Officers Involved in Legal Proceedings', Legislative Council (10 July 1990).

is often not made until after the relevant proceedings have concluded and an informed assessment of the officer's conduct can be made.

In the Commission's view, while the provision of legal funding to meet the reasonable legal expenses of a judicial officer who is subject to an inquiry by a conduct division may be desirable, it is not an essential requirement that ought to be embodied in statute. There may well be reasons, such as resourcing and consistency, why such funding is not provided at all or only in certain circumstances. For example, if a judicial officer was ultimately removed from office for misconduct, it might be questioned whether the State should be liable to meet the officer's costs of legal representation before a conduct division inquiry.

RECOMMENDATION 14

Procedural fairness

That the legislation establishing a formal complaints process enshrine the right to procedural fairness. The rules should include, at a minimum:

1. the right to be heard;
2. the right of a judicial officer to know the case against him or her;
3. the right to representation by counsel; and
4. the right to put questions to any witness.

PUBLICITY

Transparency and accountability require that there be some publicity about complaints and how they are dealt with. However, the integrity of justice system and public confidence in the system generally and in relation to individual judicial officers could seriously be compromised by undue or untimely publicity. This is quintessentially a question of balance.

RECOMMENDATION 15

Publicity about complaints

1. There be a confidentiality regime applying to the complaints process generally and that it should be binding on the complainant.
2. In the first instance there should be no publication of the fact that a complaint has been made or of initial investigations or processes through to determination.
3. In relation to a determination made by the judicial commission, the commission should retain discretion as to the extent to which it should publish any aspects of the complaint or the determination.
4. If the judicial commission decides to empanel a conduct division, that fact and the name of the judicial officer should be published. The extent of further disclosure concerning the subject matter of the referral would be in the discretion of the judicial commission.
5. Once a conduct division has been empanelled, all matters of confidentiality relating to the referral, the proceedings and the determination are within the discretion of the conduct division.

There is a related issue, namely, the extent to which other legislation might be inconsistent with a confidentiality regime such as that envisaged in the recommendations. The *Freedom of Information Act 1992* (WA) is one possible example. At least in relation to the complaints regime, the role and activities of the judicial commission are akin to those of the courts and the public interest requires that the investigative functions be carried out in a similar fashion. With that in mind the rationale behind the disclosure regimes reflected in other legislation may not readily translate to these operations.

RECOMMENDATION 16

Confidentiality

That the confidentiality provisions in the legislation establishing a judicial commission take precedence over other relevant legislation and that, to the extent necessary, the judicial commission and a conduct division should be exempted expressly from the other disclosure requirements of other relevant legislation.

RESOURCES REQUIRED FOR A FORMAL COMPLAINTS REGIME

As discussed, and with the exception of the CCC in relation to matters within its jurisdiction, no body presently has formal powers of investigation concerning complaints against Western Australian judicial officers and resources are not allocated specifically for those tasks. When heads of jurisdiction are called upon to deal with complaints they must find resources from the general court budgets, often to the detriment of other areas within the administration of justice.

The creation and implementation of a formal structure will inevitably have resource implications. There may be a concern that the relatively small size of the judicial establishment and the low level of complaints would not justify the creation of a judicial commission. It has to be acknowledged that in 1986 (when the New South Wales Commission was created) there were 225 judicial officers in that state (compared to the current figure in this state of 135). However, when considering the allocation of resources, several things need to be borne in mind.

First, the resources to be allocated on a recurrent basis to support the day-to-day responsibilities of a judicial commission are unlikely to be extensive. A small staff with appropriate accommodation and logistical facilities ought to be able to handle the workload. Additional resources would be necessary to enable the commission properly to carry out more extensive investigations as and when the need arises in relation to serious complaints. Experience suggests that these instances would occur infrequently and the public interest would require that such investigations be properly funded in any event.

Secondly, the resource implications have to be measured against the critical concepts of judicial accountability and judicial independence and in the context of the clear public interest in the integrity of the justice system. Thirdly, resource concerns may be alleviated if the functions of the commission were to include other responsibilities such as education and sentencing statistics.

If a formal complaints process is to fulfil one of its objectives (namely, fostering public confidence by divorcing the complaints process from the court of which the judicial officer is a member), it would seem desirable to have a dedicated office to assist the judicial commission. The office should be separate from the courts and from the relevant government departments. It should be possible to conduct the work of the office with a relatively small number of staff members. Their primary duties would include:

- receiving and filtering complaints
- dealing with complaints that can be disposed of without any (or with minimal) investigation
- reporting to, and administering the work of, the judicial commission, and
- providing administrative assistance to a conduct division.

As previously mentioned, the recurrent costs associated with staffing and support services ought not to be significant. But it would be necessary for a Commission to have available to it additional resources for individual investigations.

The Commission has not been able to identify existing bodies whose functions are compatible with the area of operations and responsibilities of a judicial commission and that could provide administrative support.

RECOMMENDATION 17

Resources and administrative support

That the government commit such resources as are necessary for a judicial commission properly to carry out the functions assigned to it.

ADDITIONAL FUNCTIONS OF A JUDICIAL COMMISSION

A comment has already been made that a judicial commission could be invested with responsibilities in addition to complaints, as is the case in New South Wales. Two areas have previously been mentioned: education and research in sentencing matters.

At present, the courts are left to fund education of judges from their own budgets with little specific assistance from general revenue. Available programs are necessarily modest and rely on assistance from outside bodies on an ad hoc basis.[19] Most professional bodies now accept that continuing education is a necessity. The Judicial Commission of New South Wales has described its educative function as follows:

> Judicial officers are appointed after a successful and lengthy legal career, usually as a barrister or solicitor, sometimes as a legal academic. It is rare for anyone below the age of 40 to be appointed. The new judge or magistrate already has a stock of legal knowledge so that he or she can commence work immediately. The place of judicial education at this stage is to draw out already existing legal skills and assist in the transition from advocate to impartial adjudicator. From then on, our judicial education program focuses on a continuous renewal of professional education and a sharpening of judicial skills. Our mission is to promote the highest standards of behaviour befitting a judicial officer and to foster judicial capacity.[20]

Having a structured and properly resourced education programme for judicial officers in this state would also assist heads of jurisdiction in the management of the courts.

19. Eg, programmes offered by bodies such as the Institute of Judicial Administration, the National Judicial College of Australia and the Judicial Conference of Australia, all of which have limited resources.
20. Judicial Commission of New South Wales, *Annual Report 2010/11* (2011) 16.

A judicial commission with an educative responsibility could have an additional role namely, education of the public in matters relevant to the administration of justice. It is not uncommon for public bodies to carry such responsibilities.[21]

In relation to sentencing, in a 1988 report, the Australian Law Reform Commission recommended the establishment of a sentencing council and said:

> Judicial officers need reliable, accessible and up to date information, not only to impose appropriate penalties on individual offenders but also to help ensure that sentences imposed are consistent. Comparisons between sentences can only be made if a relatively standardised description of offences and offenders is collected and made available to sentencers, and other involved in the criminal justice system. For this purpose, an information system, with both quantitative and qualitative components is necessary. The report recommends that a sentencing council be established which provides judicial officers with detailed and comprehensive information, advises government on sentencing programmes, monitors sentencing practices and provides a public information service. An important function of the sentencing council should be to provide sentencing education programmes for judicial officers.[22]

The roles and responsibilities outlined in that recommendation cover the judicial and public education functions mentioned above as well as advice and assistance to governments on sentencing matters.

In the Commission's opinion vesting the judicial commission with these additional responsibilities is in the public interest. It may require a commitment of additional resources, for example, technology and expertise to support the collection, interpretation and dissemination of sentencing statistics. But this would be offset to some extent by the greater utilisation of the secretariat established for the judicial commission's complaints function and by the diversion of resources from other bodies presently charged with some of the responsibilities.

RECOMMENDATION 18

Responsibilities of a judicial commission

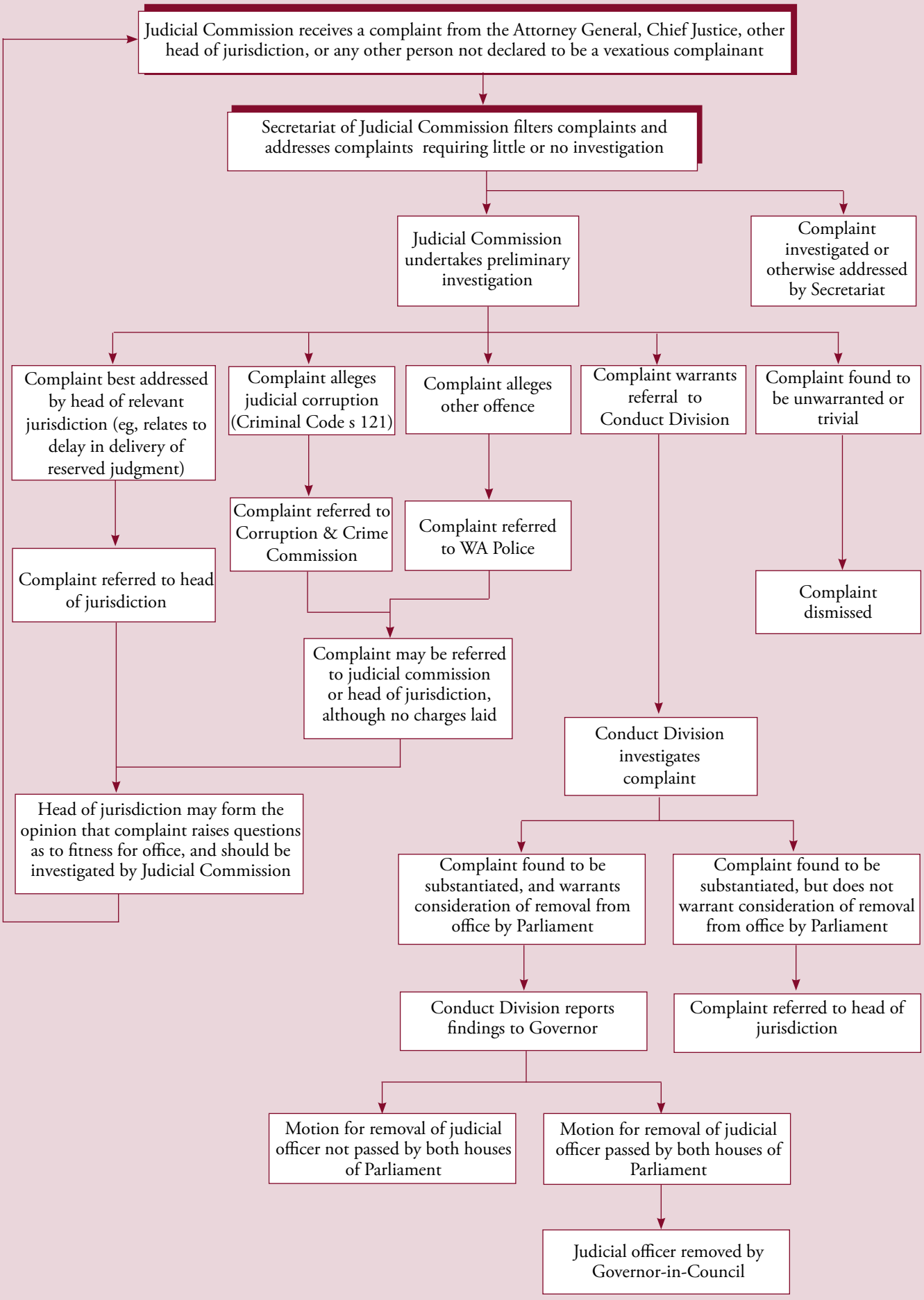
That, in addition to the complaints function, the judicial commission have responsibility for:

- education programmes for judicial officers and for the public in relation to the administration of the justice system; and
- the collation, interpretation and dissemination of sentencing statistics and information generally in relation to the sentencing process and associated subjects.

21. See, eg, *Electoral Act 1907* s 5F(1(d), *Corruption and Crime Commission Act 2003* s 17. This is also the primary function of the Constitutional Centre of Western Australia.
22. Australian Law Reform Commission, *Sentencing* (1988) Summary, xxvi.

CHART 10

The proposed complaints handling process (Western Australia)



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A FORMAL COMPLAINTS SYSTEM – DIAGRAMMATIC REPRESENTATION

A diagrammatic representation of a formal complaints system following the recommendations made in this report appears as Chart 10.

Appendices

Contents

Appendix A: Recommendations

RECOMMENDATION 1 **(page 75)**

Establish formal complaints regime

That a formal complaints regime be established in Western Australia.

RECOMMENDATION 2 **(page 79)**

Establish judicial commission

That a judicial commission be established in Western Australia, generally based on the Commission operating in New South Wales and, in particular:

1. the judicial commission be established by legislation which, save as set out in other recommendations and otherwise as necessary or desirable to recognise jurisdictional differences, has provisions similar to the *Judicial Officers Act 1986* (NSW);
2. the judicial commission is a body corporate with perpetual succession; and
3. the judicial commission is independent of the executive and legislative arms of government and, so far as is practicable, independent of the courts whose members are subject to its jurisdiction.

RECOMMENDATION 3 **(page 80)**

Composition of judicial commission

That the judicial commission comprise:

1. the Chief Justice;
2. the Chief Judge of the Family Court of Western Australia;
3. the Chief Judge of the District Court;
4. the Chief Magistrate;
5. the President of the State Administrative Tribunal;
6. a lawyer holding an unconditional practice certificate or a Western Australian government lawyer appointed by the Chief Justice after consultation with the presidents of the Law Society of Western Australia (Inc) and the Bar Association of Western Australian (Inc.); and
7. a member of the public (whether or not legally qualified), not being a past or present member of an Australian parliament, appointed by the Attorney General.

RECOMMENDATION 4 (pages 81-82)

Appointment of a conduct division

That the judicial commission appoint a conduct division from time to time to examine and make recommendations on specific complaints. Each conduct division should be comprised of three persons; namely:

1. one or two qualified judges;
2. if only one qualified judge has been appointed, a qualified lawyer; and
3. a member of the public qualified for appointment to, but not a member of, the judicial commission drawn from a panel nominated by the Attorney General.

For the purposes of this recommendation:

- 'qualified judge' means a retired Supreme Court or Federal Court judge from any Australian jurisdiction (including Western Australia) or serving Supreme Court or Federal Court judge from any Australian jurisdiction (except Western Australia) who is not a member of the judicial commission; and
- 'qualified lawyer' means a lawyer holding an unconditional practice certificate in any Australian jurisdiction (including Western Australia) or a Western Australian government lawyer who is not a member of the judicial commission and who is not a past or present member of an Australian parliament.

RECOMMENDATION 5 (page 83)

Complaints regime

That the complaints regime apply to judicial officers defined as:

1. judges, masters and registrars of the Supreme Court;
2. judges and registrars of the District Court;
3. judges, registrars and magistrates of the Family Court of Western Australia;
4. magistrates in the Magistrates Court and the Children's Court;
5. members of the Coroners Court;
6. judicial members of the State Administrative Tribunal;
7. commissioners and persons formally appointed as acting or auxiliary judicial officers in any of the above capacities.

RECOMMENDATION 6 (page 84)

Standing to make complaints

That any person may initiate a complaint. For clarity, the legislation should provide that the Attorney General, the Chief Justice and other heads of jurisdiction should have an express power to refer matters to the complaints body.

RECOMMENDATION 7 (page 85)

Vexatious complaints

1. That the Supreme Court be empowered to make an order restricting the ability of a person to make a complaint to the judicial commission if the person has initiated or conducted vexatious complaints to the commission.
2. That the provision be modelled on the provisions in the *Vexatious Proceedings Restriction Act 2002* (WA), which empower certain courts to impose restrictions on persons who have initiated or conducted vexatious proceedings from initiating or continuing proceedings in certain courts or tribunals.

RECOMMENDATION 8 (page 86)

Unwarranted or trivial complaints

That provisions be included in the legislation so that unwarranted or trivial complaints can be filtered at an early stage, and that these provisions be based on the New South Wales legislation.

RECOMMENDATION 9 (page 86)

Delays in delivering reserved judgments

That, save in one instance, complaints relating to delays in delivering reserved judgments not fall within the jurisdiction of the judicial commission. The exception should cover a situation where a head of jurisdiction forms the opinion that a delay or series of delays by an individual judicial officer raise questions as to the suitability of the officer to continue to hold office and refers the matter to the judicial commission.

RECOMMENDATION 10 (page 87)

Warnings and reprimands

That there be no formal system of warnings and reprimands in Western Australia and that similar provisions to those applied in New South Wales be enacted.

RECOMMENDATION 11 (page 88)

Criminal misconduct

1. The judicial commission have the power to investigate complaints involving criminal misconduct.
2. Nonetheless, the primary role for investigating complaints of that nature should lie with the Western Australia police.
3. Provision similar to those in the Protocol should govern the relationship between the police and the heads of jurisdiction and the judicial commission, although the drafting of these provisions may need to be reviewed.
4. The *Corruption and Crime Commission Act 2003* (WA) be amended to provide that, in relation to judicial officers, the Corruption and Crime Commission may only receive and investigate a complaint involving judicial corruption.

RECOMMENDATION 12 (page 91)

Grounds for removal from office

That the legislation provide that:

1. The sole ground for removal of a judicial officer from office should be proven misbehaviour or physical or mental incapacity.
2. A judicial officer may only be removed from office by the Governor in Council following an address in both houses of Parliament and following a report by a conduct division to the Governor setting out an opinion that the matters referred to in the report could justify parliamentary consideration of the removal.

RECOMMENDATION 13 (page 92)

Power to suspend a judicial officer

1. The power to suspend a person from judicial office should only be exercised by the judicial commission or a conduct division once that body has formed an opinion that the officer has a case to answer.
2. During any period of suspension the officer should continue to receive full salary and entitlements.

RECOMMENDATION 14 (page 93)

Procedural fairness

That the legislation establishing a formal complaints process enshrine the right to procedural fairness. The rules should include, at a minimum:

1. the right to be heard;
2. the right of a judicial officer to know the case against him or her;
3. the right to representation by counsel; and
4. the right to put questions to any witness.

RECOMMENDATION 15 (page 94)

Publicity about complaints

1. There be a confidentiality regime applying to the complaints process generally and that it should be binding on the complainant.
2. In the first instance there should be no publication of the fact that a complaint has been made or of initial investigations or processes through to determination.
3. In relation to a determination made by the judicial commission, the commission should retain discretion as to the extent to which it should publish any aspects of the complaint or the determination.
4. If the judicial commission decides to empanel a conduct division, that fact and the name of the judicial officer should be published. The extent of further disclosure concerning the subject matter of the referral would be in the discretion of the judicial commission.
5. Once a conduct division has been empanelled, all matters of confidentiality relating to the referral, the proceedings and the determination are within the discretion of the conduct division.

RECOMMENDATION 16 (page 94)

Confidentiality

That the confidentiality provisions in the legislation establishing a judicial commission take precedence over other relevant legislation and that, to the extent necessary, the judicial commission and a conduct division should be exempted expressly from the other disclosure requirements of other relevant legislation.

RECOMMENDATION 17 (page 96)

Resources and administrative support

That the government commit such resources as are necessary for a judicial commission properly to carry out the functions assigned to it.

RECOMMENDATION 18 (page 97)

Responsibilities of a judicial commission

That, in addition to the complaints function, the judicial commission have responsibility for:

1. education programmes for judicial officers and for the public in relation to the administration of the justice system; and
2. the collation, interpretation and dissemination of sentencing statistics and information generally in relation to the sentencing process and associated subjects.

Appendix B: Judicial officers

JUDICIAL OFFICERS IN WESTERN AUSTRALIAN COURTS AND TRIBUNALS[1]

As at May 2012

Court	Office		Total
Supreme Court	Judges	21[a]	
	Master	1	31
	Registrars	9	
District Court	Judges	27[b]	31
	Registrars	4	
Family Court of Western Australia	Judges	5	
	Magistrates	8[c]	15
	Registrars	2	
State Administrative Tribunal	Judicial members	3[d]	N/A
Magistrates Court	Magistrates	58[e]	58
Total			**135**

Notes:

(a) This figure includes the President of the State Administrative Tribunal and one Commissioner. It does not include three acting judges currently appointed to the court for the purpose of hearing a specific appeal.

(b) This figure includes the two Deputy Presidents of the State Administrative Tribunal and the President of the Children's Court.

(c) The Commission notes that in May 2012 the state government announced funding to enable appointment of a temporary family law magistrate to address delays in de facto property matters. This temporary appointment is not included in these figures.

(d) The judicial members of the State Administrative Tribunal are counted in the figures for the Supreme Court and District Court according to their appointments. In addition, the Tribunal has 17 Senior or Ordinary Members and 98 Sessional Members who are not subject to the Protocol.

(e) The figure for the Magistrates Court includes the State Coroner, Deputy State Coroner, Children's Court Magistrates and three acting magistrates.

1. Figures include part-time judicial appointments.

COMPARATIVE NUMBERS OF JUDICIAL OFFICERS IN WESTERN AUSTRALIA AND IN OTHER AUSTRALIAN JURISDICTIONS

State/Territory	Judges (or equivalent)	Registrars[1]	Magistrates	Total
Western Australia				135
New South Wales				300
Victoria	111	2	130	243
Queensland	65		87	152
South Australia	42	2	40	84
Tasmania	7	1	N/A	8
Australian Capital Territory	9	3	9	21
Northern Territory	7	2	14	23
Federal – High Court	7			7
Federal – Federal Court	43	34		77
Federal – Family Court	41	39		80
Federal – Magistrates Court	63			63

Notes:

(a) These figures are approximate as positions and nomenclature are not standard and direct comparisons are difficult.

(b) The information concerning New South Wales is derived from the Judicial Commission Annual Report for 2010–2011. The figures for the other jurisdictions were provided by the Chief Justices of the relevant States and Territories in May 2012.

(c) The figure for judges in the Family Court of Australia includes the judges of the Family Court of Western Australia.

(d) On 12 April 2013 the court formerly known as the Federal Magistrates Court was renamed the Federal Circuit Court of Australia with members of that court to be called 'judges' rather than 'magistrates'.[1]

1. See *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth) sch 1, items 1 and 14.

Appendix C: List of submissions

Anonymous

Arriadne Bradley

Chris Budgell (Canada)

Corruption and Crime Commission

Courts of Western Australia

Criminal Lawyers' Association

Director of Public Prosecutions

Legal Aid Western Australia

Magistrates Society of Western Australia

Public Sector Commission

State Coroner

The Law Society

WA Police

Giz Watson MLC

Western Australian Bar Association