Judicial Conference of Australia

Reports of the Complaints Against Judicial Officers Committee

JUDICIAL CONFERENCE OF AUSTRALIA

REPORT OF THE COMPLAINTS AGAINST JUDICIAL OFFICERS COMMITTEE

1. In the view of the "Complaints Against Judicial Officers Committee" the JCA has no choice but to formulate a position on this topic. Much has been written and spoken about it for more than a decade. The indications are that some politicians have decided that the time for talking is over. The matter is now high on the agenda of the Standing Committee of Attorneys-General. Action is likely to follow. Inactivity on the part of the JCA will probably result in someone else's scheme, no matter how imperfect, being imposed upon Australian judicial officers.

2. Because the JCA represents judicial officers, it should be judicious in expressing its views. The Committee is of the opinion that, consistently with this, the JCA should not, in dealing with the question of complaints against judicial officers, act as a body the first duty of which is to protect the immediate interests of its members. In any event, one of the objects of the JCA is "to maintain, promote and improve the quality of the judicial system in Australia".[1] To the extent that, on an objective assessment, a mechanism for dealing with complaints against judicial officers preserves judicial independence, is appropriately transparent, and promotes justice as between complainant and judicial officer, that mechanism should be supported as

[1] Judicial conference of Australia Inc: Rules, clause 3(e).

being consistent with rule 3(e). Another factor is that opposition might be a public relations disaster.

3. Judicial officers are human. We are therefore imperfect. Inevitably, some of us will occasionally fail to conduct ourselves as judicial officers should. When that happens it is likely that some of those affected by that misconduct will wish to complain about it. There will either be a system for dealing with such complaints or there will not. If there is to be a system of dealing with complaints against the judiciary, the long term interests of judicial officers will, in the view of the Committee, be best served if that system does not shield those officers against complaints which, if made out, would expose judicial misconduct.

4. On the other hand, any system must, as Gleeson CJ said in his "*The State of the Judicature*" address to the Australian Legal Convention in Canberra on 10 October 1999, reconcile "the requirements of accountability with the constitutional imperative of judicial independence". His Honour also said, in that address:

> "Our society attaches importance to accountability on the part of all governmental institutions. People seek ways of evaluating the performance of judges at a personal level, and of courts at an institutional level. This is appropriate, so long as the mechanics of evaluation are not permitted to define the objectives of the courts.
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> …
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> The most important measure of the performance of the court system is the extent to which the public have confidence in its independence, integrity and impartiality."

5. The importance of the preservation of judicial independence is a central point of reference in any consideration of a system of complaints against

judicial officers. It is, for example, essential that any system for dealing with complaints against judicial officers not enable complainants corruptly to influence the judicial process. If there were a prospect that, by making false allegations of improper conduct against a judicial officer, litigants or potential litigants could enhance their prospects of a desired outcome from litigation, some of those litigants would seek to exploit that situation. It is equally obvious that any system of dealing with complaints must be free of influence by other vested interests, or by governments. It follows that, of all the objects to be advanced or preserved by a system of dealing with complaints, the maintenance of judicial independence must be foremost.

6. Judicial independence may nevertheless be put at risk if it is over-emphasised, as it was when it was put forward as a reason why the judiciary should not participate in continuing professional education. The vacuity of that argument has long been exposed; but in the meantime it distorted in the public mind a true appreciation of the value of judicial independence. Another example of the danger may be seen at the intersection between issues of judicial independence and issues of transparency. A complaints system which is not appropriately transparent may be regarded by the media, and through the media by the public, as one which confirms their suspicion that judicial independence operates for the personal benefit of members of the judiciary rather than as a protection for the public.

7. It is important to make the point quite clear. Judicial independence is far too valuable to be put in jeopardy because overblown claims are made in its name.

8. For this reason, there is danger in the JCA advancing the argument that the establishment of a federal/national judicial commission might be held to be unconstitutional because it would be an attempt to establish a regime outside Chapter III of the Constitution. Sir Anthony Mason, in a paper for a conference on judicial conduct and ethics held in Dublin in May 2000 said:

> "There are some criticisms that can be made of this argument. It certainly seems to read a lot into the Australian Constitution. It also places very considerable emphasis on judicial independence despite the fact that neither the New South Wales model nor the Canadian model appears to have constituted a threat to judicial independence. The argument is consistent with a tendency of judges to treat judicial independence as a shield for themselves rather than as a protection for the people. Indeed, there is a lot to be said for the view that judges have devalued judicial independence in the public estimation by relying upon it in order to protect their own position and privileges."

9. In the view of the Committee, this is a mistake which the JCA should not repeat; and, in the Committee's opinion, a relevant conclusion flows from that consideration. There may be a debate about whether the various parliaments, including the Commonwealth Parliament, have the constitutional power to establish complaint bodies such as the Judicial Commission of New South Wales. Consistently with the proposition that the JCA ought to act in the national, and not in what might be thought to be its parochial, interest, the Committee is of the view that the JCA should not join in that debate. It also follows that the JCA should not oppose, simply on the basis that it might be unconstitutional, an otherwise acceptable system for managing complaints against judicial officers.

10. Transparency is in itself an essential element in any system that seeks to deal justly with complaints. Justice must not only be done, but be seen to be

done. A system in which complaints are dealt with by a colleague (the head of jurisdiction) of the person against whom the complaint is made might be seen to be what it is - a negation of that truth. Judges and magistrates, of all people, ought therefore to be wary of such a system. It ordinarily represents the opposite of the behavioral norms upon which the judiciary prides itself, and upon which it routinely insists. At the same time, transparency must, in any acceptable scheme for dealing with complaints against judicial officers, sometimes be adjusted so as to leave appropriate space for other necessary elements. And it must never play so prominent a role as to negate judicial independence.

11. There is an argument that heads of jurisdiction possess such moral authority as will ensure acceptance of the way a complaint has been dealt with. This, the argument runs, is so even in the absence of transparency in that treatment. The need for transparency can be therefore be dismissed. The Committee respects, but the majority of the Committee does not share, that view. In the modern world, where a colleague of the person against whom the complaint has been made is responsible for investigating that complaint, and where information - which the complainant might reasonably think is relevant – may have been withheld, many will simply not believe that their complaint has been handled as it should. The experience of a significant number, if not the majority, of heads of jurisdiction, is precisely to this effect. As Gleeson CJ observed in the passage quoted above, society attaches importance to accountability on the part of all governmental institutions. Yet the assumption that, despite this evidence, heads of jurisdiction command the necessary moral authority, is one which, in all Australian jurisdictions with the exception of New South Wales underpins the system in place for the handling of complaints disclosing judicial

misconduct not warranting dismissal. For in every Australian jurisdiction, with the exception of New South Wales, the head of jurisdiction carries the responsibility (and, in the larger jurisdictions at least, bears the considerable burden) of dealing with such complaints, with or without some contribution from the Attorney-General.

12. In the opinion of the majority of the Committee, the mechanisms by which minor complaints against judicial officers are presently handled in jurisdictions other than that of New South Wales must put at risk the confidence of the public in the independence, integrity and impartiality of the judiciary. The point was made by McClellan J in his commentary at the 2005 JCA Colloquium on Professor Peter Sallmann's paper on judicial conduct. His Honour then said:

> "It is important to recognise the significance of maintaining public confidence in any complaint process. The development of consumer interest groups, a product of an increasingly well educated and sophisticated society, cannot be ignored. Any complaint body will be criticised and its outcomes less acceptable unless it is able to be informed about and reflect appropriate community expectations in its decisions. If the process of investigation and the resolution of complaints are not generally accepted public confidence in the judiciary will be diminished. If that happens the currently accepted conventions which provide for an independent judiciary will come under challenge."

13. There is an argument that because substantive complaints are few, no formal, transparent process for investigating them is necessary. This is an argument well put by Drummond J in a paper entitled "*Do Courts Need a Complaints Department?*" (2001) 21 Australian Bar Review at p.11. His Honour there expresses the view that, in these circumstances, a complaints system would be likely to encourage complaints where no judicial

misconduct had occurred. His Honour further posits that not only is such a system unnecessary, but that "it verges on the irresponsible to urge the establishment of formal mechanisms for receiving and dealing with complaints about judges: the establishment of such mechanisms in an attempt to force the courts into the currently fashionable business model, when there is no justifiable need for such processes, can only help foster the false impression that there is something rotten in the judiciary."[2]

14. A different view is expressed by the Australian Law Reform Commission in its report (No.89, January 2000) on *Managing Justice*. At para. 2.248, the Commission said:

> "Although bona fide serious complaints against … judicial officers are very rare, and complaints often confuse disappointment over the outcome with impropriety on the part of the court, the existence of proper complaint procedures is important both for reasons of providing a further measure of democratic accountability and providing the information needed to make continuous improvements to systems. It should be recognised that '[c]omplaints are a measure of client dissatisfaction, but the inverse does not necessarily apply – low levels of complaints may not equal high levels of satisfaction. Many organisations make assumptions based on negative data, particularly complaints. It is very difficult to develop a client-focused organisation without good quality information on client satisfaction. Measures of satisfaction should be both direct and detailed enough to indicate which areas of process, product or service require most urgent attention'."

15. In his paper on judicial conduct presented at the 2005 JCA Colloquium, Professor Sallmann expressed the same view (at para.18). He said:

> "It is probably also worth making the standard remark that even if particular cases were not arising it behoves a modern, progressive judicial system to have appropriate machinery and

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[2] At p.47.

> procedures to deal with matters when, and if, they do arise. It seems to me hard to argue with the wisdom of that proposition. Otherwise, one is really saying that there is not a problem worth worrying too much about or, even if there are difficulties, the present machinery is able to deal with them satisfactorily. I suspect that not too many people would agree with either of those propositions."

16. Drummond J speaks in his paper of there being "no justifiable need" for formal processes of dealing with complaints about judges. The majority of the Committee respectfully disagrees. Whenever judicial misconduct occurs, rare though those instances will be, there must be a formal and transparent process of dealing with complaints about it. Were the judiciary to suggest otherwise, the impression that there was something rotten in the state of the judiciary would in many minds be confirmed even though false.

17. Drummond J points out that "[i]t is cynical to say that a formal process for complaining about … judges is … desirable so that a person with an unjustified complaint can have the satisfaction of feeling that the complaint has been listened to and that the judge has not got away with it, that a disciplinary body has at least demanded that the judge give an explanation for that which has given offence." The majority of the Committee respectfully agrees. But the majority also takes the view that a formal process for complaining about judges is desirable for the very reason that a person with a *justified* complaint can thereby have the satisfaction of feeling that the complaint has been listened to, and that the judge has *not* got away with it, and that an independent body has at least requested that the judge give an explanation for that which has given offence. There is a timeless truth in the words of John Milton, written 365 years ago and quoted last March by Ronald Sackville J, a former chair of the JCA: "[W]hen

complaints are freely heard, deeply considered and speedily referred, then is the utmost bound of liberty attained that wise men look for."[3]

18. There is an argument that the creation of a complaints body would inevitably generate complaints, and that this would be a bad thing. In the opinion of the majority of the Committee, this is unconvincing. If complaints have substance, they should be aired rather than left to fester. Moreover, beneficial lessons will be learned from at least some of them. Many of those that lack substance can readily be dismissed. And the number of complaints will not necessarily escalate into a complaint-dominated future. McClellan J dealt with these aspects in his commentary on the Sallmann paper at the 2005 JCA Colloquium:

> "Of particular interest may be the understanding I have gained from discussion with the Chief Executive of the [NSW] Commission that over the 19 years of its operation the changes in the number and, more particularly, the nature of complaints suggests that the Judicial Commission's complaint processes have been significant in influencing the quality of judicial conduct. In relative terms the number of complaints has been reducing and the nature of them indicates an increased sensitivity by judicial officers of the need to maintain the confidence of litigants in the court process."

19. The Committee considered a number of options. One, already discounted, was that nothing be done. Under this option, New South Wales would continue with its Judicial Commission, and the other jurisdictions would continue with whatever mechanisms were in place to deal with complaints which, if made good, might warrant dismissal. Less serious, though warranted, complaints would continue to be handled as they are now.

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[3] John Milton *Areopagitica*. First published 23 November 1644, quoted by R Sackville in *Let Truth and Falsehood grapple: Milton as a dubious guide to some questions about free speech* – keynote address to the Freedom of Speech Conference, Sydney, 24 March 2009.

20. The Committee is of the unanimous view that all jurisdictions which have not already done so should establish a standing means of dealing with serious[4] complaints against their judicial officers. Such complaints, if not clearly without foundation, will necessarily generate much interest in the media and elsewhere. It is in the Committee's view very important that any controversy not be magnified by an argument about how best to ensure, on the one hand, both the independence of the judiciary and the rights of the individual judge against whom the complaint is made; and, on the other, public recognition that the particular complaint is being or has been properly investigated. Yet controversy is precisely what might well result if ad hoc procedures are adopted. The legality of those procedures would for that very reason be exposed to challenge.

21. New South Wales, of course, has a procedure in place to deal with complaints which, if made good, might warrant the dismissal of the judicial officer concerned. Neither Victoria, Queensland nor the Australian Capital Territory has adopted the New South Wales model, although each has a different, but settled, system for managing complaints of serious misconduct. In Victoria, the *Constitution Act 1975* provides in s.87AAD that an investigating committee is to be appointed if the Attorney-General is satisfied that there are reasonable grounds for the carrying out of an investigation into whether facts exist that could amount to proved misbehaviour or incapacity on the part of the holder of a judicial office such as to warrant the removal of that office holder from office. The investigating committee is drawn from a panel of seven persons established under

[4] By "serious" in this context the Committee means complaints which are not obviously without merit and concern conduct which, if proven, might warrant dismissal.

s.87AAC. A resolution of a House of Parliament praying for the removal of a judicial officer is void if an investigating committee has not concluded that facts exist that could amount to proved misbehaviour or incapacity such as to warrant removal.

22. In Queensland, s.61 of the Constitution of that State provides that a judge may not be removed from office other than under that section; and the section goes on to provide that a judge may be removed from office by the Governor in Council on the address of the Legislative Assembly for proved misbehaviour justifying removal, or for proved incapacity. Misbehaviour justifying removal is proved only if the Legislative Assembly accepts the finding of a tribunal that, on the balance of probabilities, the judge has misbehaved in a way that justifies removal. The members of the tribunal (there must be at least three) are appointed by Parliament.

23. In the ACT, complaints against judicial officers may be made to the Attorney-General.[5] There is no provision in that legislation for a head of jurisdiction to be a recipient. The Attorney may decline to take any action if (among other things) there are no reasonable grounds for the complaint, or "even if the matter complained of were proved, it could not amount to misbehaviour or incapacity such as to warrant removal of the judicial officer".[6] But if the Attorney is satisfied that removal might be warranted, he or she must request the executive to appoint a judicial commission to examine the complaint; and the executive must comply with the request.[7]

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5 *Judicial Commissions Act 1994*, s.14(1).
6 Ibid, s.17(1)(c).
7 Ibid, s.16(1) and (3).

Membership of the commission is restricted to persons who are or who have been judges.[8]

24. Whether the New South Wales, the Victorian, the Queensland, the ACT or some comparable position is adopted is, in the view of the Committee, of no great importance. For the reasons set out above, however, the Committee believes that, if nothing else is to result from the present evaluation of the handling of complaints against the judiciary, there is one reform which should be implemented in those jurisdictions which presently lack a settled means of dealing with serious complaints. In the Committee's opinion, such a means should be put in place in all jurisdictions.

25. Another option considered by the Committee was the establishment of a judicial commission, along the lines of that of New South Wales, in those jurisdictions in which appropriate funding is available, and in which the volume of business would warrant the necessary expenditure. Subject to these qualifications, this is an option favoured by a majority of the Committee.

26. Because some jurisdictions may not be large enough to warrant adoption of the New South Wales model, the Committee considered alternative options. These are described in more detail below. It is sufficient at this point to say that one such option is to establish a national, or cross-jurisdictional, body to handle complaints against judicial officers. This would cover all jurisdictions, whether Federal, State or Territory, that acceded to its charter. It would be modeled on the New South Wales Judicial Commission. The other alternative would confine the handling of complaints to the jurisdiction

[8] Ibid, s.7(1).

in which they arose, while avoiding the problems from which, according to a majority of the committee, the present arrangements suffer. If this alternative were adopted, some jurisdictions might seek to establish a commission of the New South Wales kind; others, for reasons of economy or demand (need) or both, might create a more modest mechanism of the kind described in paragraphs 30 and 31 below.

27. The Committee did not give detailed attention to the composition or structure of such national body as might be created. One reason for not taking that step is that detailed planning should doubtless await the decision to move in that direction. In any event, it has been assumed by the Committee that the Judicial Commission of New South Wales would serve as a model, with such adaptations as were necessary and appropriate for a cross-jurisdictional institution. One member of the Committee did, however, consider – and distribute to the Committee – some elements of the possible composition of a national body. The Committee has been assisted by his work, which will form the platform for subsequent consideration should the "national" option be adopted.

28. The prospect of a national complaints-handling body was not greeted with enthusiasm by some members of the Committee. They felt that, unless such a body had an office in each jurisdiction, it could not offer or facilitate an appropriate degree of direct, personal contact between complainants and the complaints body. Assuming that a mix of membership be appropriate, (something the Committee has not discussed, even tentatively) finding the right mix might also be difficult, given the diversity of size and other characteristics as between the jurisdictions.

29. On the other hand, there was also a view within the Committee that a national complaints body would best enable both large and small jurisdictions to obtain the benefits of a system such as that established in New South Wales. These benefits might otherwise be entirely or substantially unavailable in the smaller jurisdictions.

30. The final option assumes (as is presently the case in Victoria, Queensland and the ACT) that there is in the relevant jurisdiction a system in place to deal with serious (i.e. "warranting removal") complaints, but no body with the functions of the Judicial Commission of New South Wales. In these circumstances, one possible means of dealing with complaints against judicial officers would have all such complaints go first to an independent person or body, where they would be sorted into one or other of the three categories. Those in the second category (misconduct not warranting removal) would only then be referred to the relevant head of jurisdiction, who would be obliged to raise the complaint with the judicial officer against whom it is made, and at his or her discretion put to that judicial officer any point that the independent person/body thinks should be raised in this way. No form of punishment could be imposed, but the judicial officer could be asked to apologise, or attend counseling. The head of jurisdiction would be obliged to report to the independent person/body, who in turn would report to the complainant. After receipt of the report of the head of jurisdiction, and whether before or after reporting to the complainant (or both before and after) the independent person/body would have the right to take the matter back to the head of jurisdiction with a request for further action. The head of jurisdiction would be obliged to take this additional approach into account

when deciding whether or not, in his or her discretion, to take the matter further.

31. A somewhat more elaborate means of relieving individual heads of jurisdiction of the burden of complaint-handling, and of increasing transparency, would be to establish a tribunal or commission along the lines of the New South Wales tribunal known as the Conflicts of Interest Tribunal for Local Government. This would involve the employment of a small staff (possibly of only one part-time person, that person being desirably a retired judicial officer) with the capacity to engage additional (casual) staff if, or as, occasion required. One possible source of the occasional additional staff might be whatever body in the relevant jurisdiction has responsibility for continuing judicial education. Complaints would be received by the "tribunal", which after processing them would refer to a committee of the heads of jurisdiction (or their nominees or alternates) those complaints which were not either obviously unmeritorious or very serious.

32. Summary. The options considered by the Committee were:

(i) That there be no change to the present position. No member of the Committee was in favour of this option, which does not even have the virtue of uniformity.

(ii) A minimalist reform: ensuring that, at the least, each jurisdiction has in place procedures for dealing with complaints which, if made out, would warrant consideration by Parliament of the question whether it should ask that the judge be dismissed from office.

(iii) The establishment of a central body to deal with complaints about any judicial officer sitting in a jurisdiction that accepts the central body as

the repository of complaints, and as providing the mechanism for dealing with them. Some members of the Committee favoured this option.

(iv) The establishment of a judicial commission of some kind in at least the larger jurisdictions (or those – large or small - in which appropriate funding is available). This was an option supported by a majority of the Committee.

(v) A system of handling complaints which, if sustained, are indicative of judicial behavior that, while inappropriate and to be deprecated, does not warrant removal from office. This was an option supported by a majority of the Committee given that option (iv) was not available (but assuming that option (ii) was adopted).

33. This report attempts to distill the deliberations of the Committee in a way which reflects the opinion of the Committee generally, but without committing any individual member of the Committee to any particular portion of the report. The Chair of the Committee has taken the position that every member of it should, by reason of his or her appointment as a member, and the work put in by that member following appointment, feel free to put to the Governing Council his or her own views, unfettered by the contents of the report. Those views may or may not co-incide with the views of the Committee, or of the court of which that judicial officer is a member.

34. The membership of the Committee was as follows:

Chief Magistrate Ron Cahill
Justice Richard Chesterman
Justice Alan Blow
Chief Magistrate Ian Gray
Justice David Harper (Chair)

Chief Justice Wayne Martin
Justice Peter McClellan
Judge Geoff Muecke
Chief Federal Magistrate John Pascoe
Justice Trevor Riley.

22 April 2009.

1 DECEMBER 2009 (Revised 22 January 2010)

JUDICIAL CONFERENCE OF AUSTRALIA

SECOND REPORT OF THE COMPLAINTS AGAINST JUDICIAL OFFICERS COMMITTEE

1 At its meeting on 13 June this year, the Governing Council of the Judicial Conference of Australia received the report, dated 22 April 2009, of the Complaints Against Judicial Officers Committee. That report raised two significant issues. The second of these, in the Council's view, warranted further consideration.

2 The first of the two significant issues was the Committee's recommendation that the JCA support the establishment, in every Australian jurisdiction, of a system for dealing with serious complaints[1] against judicial officers: that is, those complaints which, if proved, would warrant consideration by parliament of the question whether it should request that the Queen's representative in the relevant jurisdiction dismiss the judicial officer about whom complaint had been made. At present, only NSW, the ACT, Victoria and Queensland have such a system in place, and only NSW has a Judicial Commission.

3 There is an important element in the distinction between the structure in NSW and that in place in the other three jurisdictions. It should be noted. In NSW, complaints which are not summarily dismissed by the Commission are referred either to the relevant head of jurisdiction, or to a Conduct Division of the Commission. But that referral is not made by the Attorney-General. It is made by the Commission. It is therefore apolitical. Nowhere in the process is there any role for the executive government. This is to be contrasted with the position in Victoria, Queensland and the ACT. In Victoria and the ACT, it is the

1 The Committee here uses the expression "complaints" to include not only complaints alleging misconduct, but also complaints to the effect that the relevant judicial officer suffers from any physical or mental impairment which renders him or her incapable of discharging the duties of the judicial office.

Attorney-General who has responsibility for the initial substantive step following the receipt of a complaint which, if made out, might warrant dismissal.[3] That Minister decides whether the matter will go no further, or whether it will be referred to an independent body for investigation. Indeed, in the ACT it is the Attorney-General to whom all complaints must be directed.[4] In Queensland, the investigation of misbehaviour justifying removal or incapacity to perform the duties of judicial office must be conducted by a tribunal "established under an Act".[5] The decision about whether or not there will be an investigation is therefore made by the Queensland Parliament, although in a practical sense it will probably be initiated by the executive. Thus, in each of those three jurisdictions, there is incorporated into the process an element of executive involvement.

4 This, in the opinion of the Committee, is undesirable. The NSW position is to be preferred. There is an obvious threat to judicial independence if an Attorney-General has the power to determine which matters should be investigated. The initiation of a formal investigation is a very significant step, and in the ACT it will result in automatic suspension. This is not so in either Queensland or Victoria, but in either jurisdiction the result of executive involvement might well be the resignation of the judicial officer whose conduct is thus impugned. It is accordingly possible that a politically-inspired reference will result in the suspension or perhaps resignation of a judicial officer whose conduct is in fact unimpeachable – even to the point of upholding the finest traditions of an independent judiciary. The problem is exacerbated if (as in Victoria) the membership of the investigating body (in Victoria referred to as "the investigating committee")[6] is drawn from a panel appointed by the Attorney (although the Attorney is not involved in the choice of those members of the panel who will hear the complaint). In the ACT the difficulty is replicated,

3 *Constitution Act 1975* (Vic), s.87AAD; *Judicial Commissions Act 1994* (ACT), s.16.
4 *Judicial Commissions Act 1994*, s.14.
5 *Constitution of Queensland 2001*, s.61.
6 *Constitution Act 1975*, ss.87AAA and 87AAD.

because there it is the Executive Government which, at the request of the Attorney, appoints a judicial commission to examine the complaint.[7]

5 The problem might even arise in reverse. It is possible that an Attorney-General might for political reasons refuse to initiate an investigation although it is clearly desirable that an investigation take place.

6 The second of the two significant issues was the proposal that there be established in each jurisdiction (though the Federal Constitution may prevent this in the Federal sphere) a system of handling complaints which, even if sustained, would not warrant removal from office. It was this proposal which the Council referred to the Committee for further, and detailed, consideration and report. The full terms of the resolution were *that the Complaints against Judicial Officers Committee be asked to reconvene and look in detail at the possibility of some jurisdictions adopting a system similar to that in NSW, and to prepare a detailed appraisal of how such a system might work in larger jurisdictions, as well as what might be feasible and cost-effective for smaller jurisdictions*. This report is the result.

7 Certain fundamental assumptions underpinned the Committee's subsequent deliberations. It is appropriate that these be made explicit. The first such assumption is that the preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct or incapacity. The rule of law requires that laws be administered fairly, rationally, predictably, consistently and impartially. Judicial misconduct and judicial incapacity are incompatible with each of these objectives.[8]

8 The second fundamental assumption is that the rule of law requires an independent judiciary. This itself has a number of interlocking aspects. Judicial officers must be independent of the other two arms of government (the executive

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7 *Judicial Commissions Act 1994* (ACT), s.16.

8 The Committee is indebted here to the Chief Justice of New South Wales, the Hon J J Spigelman AC who in a paper entitled *Dealing with Judicial Misconduct* delivered to the 5th World Wide Common Law Judiciary Conference in Sydney on 8 April 2003 referred to the benefit of considering, from a rule of law perspective, issues of judicial misconduct and incapacity.

and the legislature) while respecting the role of each. They must also be independent of any influence on their judicial work save the law and their conscience. They must in addition enjoy structural independence – that is, independence from each other, including more senior judicial officers.

9 The third fundamental assumption is that formal, public, disciplinary sanctions short of dismissal should wherever possible be avoided. The NSW experience is that such sanctions are unnecessary. In any event, the Committee is of the firm opinion that there is an unacceptable incongruity in a judicial officer, who is known to have been disciplined for misconduct, sitting in judgment on others, especially when there is an unacceptable risk that the media or disaffected litigants will exploit that incongruity so as to maximize the loss of public confidence which in any event is likely. The committee respectfully agrees with the observation of Sopinka J of the Supreme of Canada that "a reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be fixed with a loss of confidence on the part of the public and litigants".[9] The Hon Murray Gleeson AC, when Chief Justice of Australia, made the same point in an interview with the Judicial Commission of NSW on 20 August 2007. The Chief Justice noted that "there is something very awkward about the concept of having a judicial officer exercising judicial authority who is known to have a black mark against him or her. This would compromise their ability to administer justice and to punish people".[10] The problem would be acute were such a judge to preside over a trial in which a powerful litigant such as a senior politician were to be the subject of an adverse but entirely justifiable finding. The response from the politician's camp might have most unfortunate consequences for the administration of justice.[11]

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9 *Ruffo v Conseil de la Magistrature* (1995) 130 DLR 1 at 53; (1995) 4 SCR 267 at 341 quoted in Drummond J *Do courts need a complaints department?* (2001) 21 Australian Bar Review 11 at 26.

10 Quoted in *From controversy to credibility: 20 years of the Judicial Commission of New South Wales* (Judicial Commission of NSW, 2008) at p.5

11 The Committee acknowledges the considerable assistance it has derived from Drummond J's analysis of this problem.

10 The final basic assumption underpinning the work of the Committee is that there is an inevitable tension between the requirements of judicial independence and any mechanism for dealing with judicial misconduct or incapacity. Such a mechanism must be transparent. That requirement, however, will necessarily impinge upon independence. The importance of both must be recognised. This will involve a degree of adjustment between competing imperatives. In making that adjustment, it is appropriate to proceed on the basis that, while judicial independence is too valuable to be put in jeopardy by overblown claims being made in its name, in the end the primacy of independence must be recognised. It is in this context particularly important to emphasise a related point. It is that any system for dealing with complaints against judicial officers must not enable complainants corruptly to influence the judicial process. The motive to exercise improper influence will be present from time to time. The temptation to exploit a complaints system for improper ends will likewise sometimes arise. Any mechanism for dealing with complaints will be seriously flawed unless it incorporates safeguards against this.

11 In accordance with the wishes of Governing Council, the Committee has examined in detail the Judicial Commission of New South Wales. It has been greatly assisted in this exercise by the Chief Executive of the Commission, Mr Ernest Schmatt, PSM, and wishes to record here its indebtedness to him.

12 The Judicial Commission commenced operations in October 1987. Its establishment had been preceded by considerable controversy, driven particularly by a concern that, as originally drafted, the legislation would impermissibly allow the executive government to impinge upon judicial independence. In particular, the original plan envisaged the executive having power to discipline and remove judges who had been found either to be guilty of misconduct, or unfit for office. The conflict between this and the principles which, since the *Act of Settlement* of 1701 had been taken as settled, was stark. The NSW Government acknowledged the difficulty, and when the *Judicial*

Officers Bill was introduced into the Parliament on 24 September 1986, the legislature's constitutional role in the dismissal process was preserved. It is nevertheless now accepted that the legislation which was subsequently enacted remained open to considerable criticism; but its defects were at least in large part removed when on 1 May 1987 the *Judicial Officers Act* was amended by the *Judicial Officers (Amendment) Act 1987.* This legislation, among other things, established the Commission as an independent statutory corporation. It is part of the judicial arm of government, and its employees are not public servants in the usual sense but are employed under the *Judicial Officers Act.*

13 In the unanimous opinion of the Committee, any complaints authority should enjoy at least this degree of independence.

14 The Commission has three principal functions. The first is to provide continuing education and training for judicial officers. The second is to monitor sentencing in New South Wales, and provide appropriate sentencing information to the courts. The third is to examine complaints about the ability and behaviour of "judicial officers" (a term which is defined in s.3 of the *Judicial Officers Act*, and covers both judges and magistrates).

15 The discharge of the third function is effected, in part, by the Conduct Division of the Commission, which is established by s.13 of the Act. The Conduct Division examines and deals with complaints referred to it under Part 6 of the Act (headed *Complaints against judicial officers*) as well as formal requests referred to it under Part 6A (*Suspected impairment of judicial officers*).[12] By s. 22(1), "[t]he Commission shall appoint a panel of three persons to be members of the Conduct Division for the purpose of exercising the functions of the Division in relation to a complaint referred to the Division." Two of these persons shall be judicial officers (one of whom may be retired). The third shall be one of two community representatives nominated by the NSW Parliament as of high

12 *Judicial Officers Act*, s.14.

standing. The particular membership of a Division is determined by the Commission, which would also appoint the Chair.

16 The Commission itself has 10 members.[13] Six of these are judicial officers: the heads of jurisdiction of the five NSW courts, together with the President of the Court of Appeal.[14] All of the remaining four are appointed by the Governor on the nomination of the Attorney-General. One of these four must be either a barrister or a solicitor, chosen after consultation by the Attorney with the President of the Bar and the President of the Law Society. The other three are, in the Attorney's opinion, of high standing in the community, and are nominated after consultation with the Chief Justice.[15]

17 The existence of a clear majority of judicial officers on the Commission is, in the view of the Committee, an important structural component of the system. It should be replicated in any body established to consider complaints against judicial officers. The mix of lay and professional representation is also a characteristic which, in the Committee's opinion, is desirable.

18 The Commission's current budget provides for expenditure of $5.1 million p.a.. It has a staff of 38.[16]

19 The *Judicial Officers Act* provides, by s.15, that any person (which, as the Committee understands it, includes a head of jurisdiction) may complain to the Commission about a judicial officer. In addition, the Attorney-General "may refer any matter relating to a judicial officer to the Commission."[17] It follows that, by this means, the Commission may be called upon to consider anything which bears upon fitness for judicial office, whether or not it relates directly to the performance of judicial duties.

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13 *Judicial Officers Act*, s.5(3).
14 *Judicial Officers Act*, s.5(4).
15 *Judicial Officers Act*, s.5(5).
16 Evidence given by Mr Ernest Schmatt to the Senate Legal & Constitutional Affairs References Committee, Sydney, 11 June 2009.
17 *Judicial Officers Act*, s.16.

20 The legislation does not include any definition of either "misbehaviour" or "misconduct". In evidence given on 11 June this year to the Legal and Constitutional References Committee of the Australian Senate, Mr Schmatt said that, in his opinion, such definitions were unnecessary. The Committee shares this view. Indeed, an attempt to define by legislation the expressions in question might inappropriately restrict the range of complaints which the Commission could investigate. The Committee notes that such definitions might also raise difficult issues of construction, and – with that – undesirable controversy. In the Committee's opinion, the categorisation of conduct as - or as not - worthy of deprecation is a matter best left to a body such as the Commission to work out on a case by case basis (and, therefore, with regard to the particular circumstances).

21 The Commission provides advice to the public about the complaint process by a number of means: through its website, by a brochure (written in plain English), by the provision of translation and interpreting services, by responding to telephone and face to face inquiries, and by speaking to interested groups about the complaint process.

22 A complaint must be in writing, and must identify the complainant and the judicial officer about whom complaint is made.[18] Particulars of the complaint must be verified by statutory declaration, and the complaint must be lodged with the Commission's Chief Executive. All complaints submitted to the Commission in proper form are acknowledged in writing within one week of receipt.

23 On receiving a complaint, the Commission will conduct a preliminary examination of it.[19] Before this takes place, the judicial officer will be advised of the fact of the complaint, and will be provided with the relevant documentation. The Chief Executive will then decide how the complaint should best be

18 *Judicial Officers Act*, s.17(2).
19 *Judicial Officers Act*, s.18(1).

investigated. If it arises from a court hearing, he would generally call for a copy of the court record (either a sound recording or a transcript) or for the court file, and for whatever other written information might assist the investigation. The Chief Executive might also interview witnesses or potential witnesses and take statements. The resultant package of information would then be provided to the members of the Commission, who at a formal meeting will determine how the preliminary examination should proceed. The legislation provides that, in conducting that examination, the Commission may initiate such inquiries into the subject-matter of the complaint as it thinks appropriate.[20]

24 The Commission meets each month. The quorum for a meeting of the Commission is seven, of whom at least one must be an appointed member. The Commission cannot delegate the preliminary examination of a complaint except to a committee which must consist entirely of Commission members, and must include at least one appointed member.[21]

25 The preliminary examination of a complaint will, as far as practicable, take place in private.[22] Similarly, all information and material, written or oral, obtained by the Commission in the course of its preliminary examination remains confidential. The Commission aims to finalise the investigation of 90% of complaints within six months of receipt, and all within 12 months. A judicial member of the Commission will not participate in any discussion or decision involving a complaint against him or her.

26 Following its preliminary examination, the Commission must decide between one of three possible courses. If the complaint falls within any one or more of the criteria described in s.20(1), it must be summarily dismissed. Thus a complaint must be summarily dismissed if:

- it is one with which the Commission is not permitted to deal;

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20 *Judicial Officers Act*, s.18(2).

21 See the paper entitled *Complaints against Judicial Officers* by Mr Ernest Schmatt, PSM, at pp.1-2.

22 *Judicial Officers Act*, s.18(3).

- it is frivolous, vexatious or not in good faith;
- its subject matter is trivial;
- it is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review;
- the matter complained about occurred at too remote a time to justify further consideration;
- the person who is the subject of the complaint is no longer a judicial officer; or
- in all the circumstances, further consideration of it is unnecessary or unjustifiable.[23]

27 If a complaint is summarily dismissed, the Commission will, as soon as practicable after its determination, inform the complainant in writing of that fact and provide reasons for the Commission's decision. This will include a reference to the relevant provisions of the *Judicial Officers Act*. The judicial officer concerned will also be advised of the outcome.[24]

28 In every other case, the complaint must be referred to the Conduct Division (the second possible course) unless the Commission thinks that, although the complaint appears to be wholly or partially substantiated, such a reference is not warranted. In the latter case, the matter may be referred to the relevant head of jurisdiction (the third possible course).[25] Following notification, the head will receive all relevant material for his or her attention. In making that reference, the Commission may include recommendations about steps, such as counselling, which might be taken.[26] Again, the complainant and the judicial officer will be informed as soon as practicable after the decision to refer to the head of jurisdiction has been made.

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23 *Judicial Officers Act*, s.20.
24 See the paper entitled *Complaints against Judicial Officers* by Mr Ernest Schmatt, PSM, at p.3.
25 *Judicial Officers Act*, s.21.
26 *Judicial Officers Act*, s.21(3).

29 The Conduct Division must conduct an examination of each complaint referred to it. This, the initial stage of its work, shall as far as practicable take place in private.[27] The complainant and other potential witnesses will be interviewed, statements will be taken, relevant documents and other material will be assembled, and a brief of evidence will be prepared. These tasks are undertaken by counsel assisting the Division, and under its direction. If the Division is of the opinion that a judicial officer about whom a complaint has been made should be physically or mentally examined, it may make a request of the judicial officer accordingly.[28] Failure to accede to such a request may result in the Division forming the opinion that the matter could justify parliamentary consideration of the removal of the officer from office.[29]

30 Following its initial examination, the Division may hold hearings in connection with the complaint.[30] These may be in public or in private.[31] The judicial officer about whom complaint is made may be represented by a legal practitioner, as may any other person if in special circumstance the Division so decides.[32] In the discharge of its responsibilities, the Division has the powers and immunities conferred by the *Royal Commissions Act 1923* on commissioners appointed under that Act.[33]

31 The Division will either dismiss a complaint or find that it is wholly or partially substantiated. Dismissal must follow: (a) if the Division is of the opinion that the complaint has not been substantiated; or (b) if it falls within any of the categories set out in paragraph 26 above, whether or not it appears to have been substantiated.[34] In all other cases, the Division may form the opinion that the matter could justify parliamentary consideration of the removal from office of

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27 *Judicial Officers Act*, s.23(3).
28 *Judicial Officers Act*, s.34(1).
29 *Judicial Officers Act*, s.34(2).
30 *Judicial Officers Act*, s.24(1).
31 *Judicial Officers Act*, s.24(2).
32 *Judicial Officers Act*, s.24(7).
33 *Judicial Officers Act*, s.25(1).
34 *Judicial Officers Act*, s.26.

the judicial officer about whom the complaint has been made. Alternatively, it may be of the view that the matter does not warrant such consideration. If the latter is the conclusion to which the Division comes, then it must make a reference back to the relevant head of jurisdiction, with a report setting out its conclusions. The report may include recommendations about the steps that might be taken to deal with the complaint.[35]

32 Since the Commission was established 22 years ago, 24 complaints have been referred to 14 Conduct Divisions[36] (the explanation for the apparent discrepancy being that some matters involved multiple complaints against the same judge). This has resulted in three reports to the NSW Parliament recommending consideration of dismissal. Two of the three judges resigned before that consideration began. The third addressed Parliament, which voted against his removal.

33 In the 2007/2008 financial year, 59 individual complainants made 65 complaints against 51 judicial officers. The proportion of complaints to all matters heard across the entire jurisdiction of the State was therefore miniscule (in 2007/2008, approximately 300 NSW judicial officers dealt with more than 500,000 matters).[37] Of the finalised complaints, 92% were dismissed summarily, generally because either an appeal was the appropriate remedy, or further consideration of the complaint was, in all the circumstances, unnecessary or unjustifiable. Two categories of complaint (bias and failure to give a fair hearing) constituted 65% of the whole. A third category, that the judicial officer made inappropriate remarks, comprised 11% of complaints. Five matters were referred to the relevant head of jurisdiction. None were referred to the Conduct Division.[38]

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35 *Judicial Officers Act*, s.28.

36 Evidence given on 11 June 2009 by Mr Ernest Schmatt PSM to the Senate's Legal and Constitutional Affairs Committee.

37 See the paper entitled *Complaints against Judicial Officers* by Mr Ernest Schmatt PSM, at p.5.

38 Judicial Commission of NSW *Annual Report, 2007-8*.

34 An examination of the five most recent of the Commission's annual reports shows that more complaints (95) were received in 2004/2005 than in any other of the five years in question. Four of these complaints were referred to the Conduct Division, and 13 to the relevant head of jurisdiction. In the year 2006/2007 only 50 complaints were received (the least in any of the five years). One was referred to the Conduct Division; another five, to the relevant head of jurisdiction. It follows that the remainder were dismissed.

35 Neither the Commission, nor the Conduct Division, nor a head of jurisdiction, has any power to punish. A head of jurisdiction may, however, privately counsel a judicial officer to whom he or she has been referred, or may adopt administrative arrangements designed to avoid repetition of the offending behaviour. Subject to what follows, beginning in paragraph 36 below, the Committee is of the opinion that these arrangements reflect an appropriate balance between the undesirability of sanctions and a mechanism that is toothless. The Committee adopts, with respect, the words of Spigelman CJ in his address to the 5th World Wide Common Law Judiciary Conference in April 2003. Speaking of the effect of an approach to an errant judicial officer by his or her head of jurisdiction following a Commission or Conduct Division reference, his Honour said:

> The principal reinforcement of any such expression of view by a head of jurisdiction is not, in my opinion, the exercise of hierarchical authority. Rather, it is the manifestation, through the head of jurisdiction, of the collective opinion of all the colleagues of a judge who has performed inadequately or improperly. So long as we have courts, as the courts of New South Wales still do, which manifest a high level of collegiality, it is the embarrassment occasioned by how a judge will be regarded by his or her peers that is the most effective sanction.

36 Collegiality, however, has limited effect if the colleagues of the errant judicial officer – other than the members of the Commission - do not know about the offence. The Committee also notes that some forms of judicial misconduct may be very disruptive of relations within the court, or may persist despite their being brought to the attention of that officer.

37 The issue is of some importance because persistent misconduct (even if it is not otherwise damaging to collegiality) may well create problems for either or both the head of jurisdiction and a commission, and may indicate that the relevant judicial officer is not fit to hold office. Egregious failure to deliver judgments within a reasonable time is an example. For its part, disruptive misconduct may have serious implications for the morale of the court. Nothing, for example, causes more resentment than the belief that a colleague has not, over a long period, accepted a fair share of the work, with the result that the other members of the court must shoulder an additional and unfair burden. The Committee has therefore given some thought to whether a system of dealing with complaints against judicial officers should include a mechanism for solving this problem.

38 In the end, however, the Committee has concluded that the range of appropriate responses by a head of jurisdiction to circumstances such as those outlined above are too diverse to allow for any prescriptive or quasi-prescriptive measures, especially those with disciplinary overtones. Issues of health, and of family difficulties and the like, will need to be placed in the scales together with the personalities of the judicial officer and his or her head of jurisdiction – and of course, questions of judicial independence. Carefully calibrated responses will often be required, and the shadow of a stick might be unhelpful. In any event, the structures in place in NSW make provision for the head of jurisdiction to lodge either a complaint pursuant to s.15 of the Act, or a formal request (as to which see below) with the Judicial Commission. The latter step has been taken, but only once. The Committee understands that the NSW experience indicates that no further mechanism is required. The Committee supports the NSW position.

39 In NSW the *Judicial Officers Act* was amended in 2006 with the inclusion of Part 6A, which is headed *Suspected impairment of judicial officers*. Section 39B provides that, if a head of jurisdiction is of the opinion that a colleague may have an impairment that affects his or her performance of judicial or official duties, the

head of jurisdiction may request the Commission to investigate. Such a request is defined as a "formal request", but is not a complaint. Following its receipt, the Commission must conduct a preliminary investigation into it, which must so far as possible take place in private.[39] As part of this process, the Commission may require the judicial officer to undergo a medical or psychological examination.[40] Refusal will give the Commission power to deal with the matter as if it were a complaint.[41] In those circumstances, it is open to the Commission to refer the matter to the Conduct Division or the relevant head of jurisdiction if it is of the opinion that, having regard to the results of the examination, the judge or magistrate may have an impairment that affects his or her performance of judicial or official duties.[42] By these means the matter might find its way to the NSW Parliament.

40 If the decision is a reference back to the head of jurisdiction, the Commission may include recommendations about the steps that might be taken to deal with any impairment which the process has brought to light.[43] If the matter is referred to the Conduct Division, the latter must conduct its own examination. In doing so, it has the same functions as it has in relation to the examination of a complaint.[44] It may come to the conclusion that the judicial officer is physically or medically unfit to exercise efficiently the functions of judicial office. If that is the Division's opinion, it must report to the Governor and the relevant head of jurisdiction accordingly.[45]

41 Provision is made in Part 7 of the *Judicial Officers Act* for the suspension of a judicial officer. This may occur following a complaint. It may also result from a NSW judicial officer being charged in NSW, or convicted anywhere, of an

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39 *Judicial Officers Act* s.39C.
40 *Judicial Officers Act* s.39D(1).
41 *Judicial Officers Act* s.39D(2).
42 *Judicial Officers Act* s.39E(1).
43 *Judicial Officers Act* s.39E(3).
44 *Judicial Officers Act* s.39F.
45 *Judicial Officers Act* s.39G.

offence punishable by imprisonment for 12 months or more.[46] The power of suspension is given to the relevant head of jurisdiction, or – if the officer in question is a member of the Commission or the President of the Administrative Decisions Tribunal – the Governor acting on the recommendation of the Commission.[47]

42 This, then, is the position in NSW. In New Zealand, the relevant legislation is the *Judicial Conduct Commissioner and Judicial Conduct Panel Act* 2004. By it, the office of the Judicial Conduct Commissioner is established in August 2005. The holder of the office is appointed by the Governor-General on the recommendation of the House of Representatives after the Attorney-General has consulted with the Chief Justice.[48] The functions of the Commissioner are to receive complaints about judicial officers, and to deal with them in the manner required by the Act. This includes conducting preliminary examinations of complaints and, if the conduct the subject of the complaint may warrant consideration of the removal of the judicial officer, recommending that a Judicial Conduct Panel be appointed to inquire into that conduct. It is, however, not the function of the Commissioner to challenge or call into question the legality or correctness of any judicial decision.[49] In performing the duties of the office, the Commissioner must act independently.[50]

43 In conducting a preliminary examination, the Commissioner must act in accordance with the principles of natural justice, but may make any enquiry into the complaint that he or she thinks appropriate.[51] Having completed the preliminary examination and formed the requisite opinion, the Commissioner must either dismiss the complaint, refer it to the relevant head of jurisdiction, or recommend that the Attorney-General appoint a Judicial Conduct Panel to

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46 *Judicial Officers Act* s.40.
47 *Judicial Officers Act* s.43.
48 *Judicial Conduct Commissioner and Judicial Conduct Panel Act.*
49 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.8.
50 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.9.
51 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.15.

enquire into it.[52] The Commissioner must dismiss the complaint if in his or her opinion it fails to meet the criteria set out in s.16. These are comparable with those to be found in s.20 of the NSW legislation.

44 A Judicial Conduct Panel consists of a lay member and two other members. The latter must be judges, or a judge and a retired judge, or a judge (or retired judge) and a senior member of the practising profession.[53]

45 In addition to receiving complaints from the public, the Judicial Conduct Commissioner can receive a referral from the Attorney-General or, of his or her own accord, treat as a complaint any matter concerning the conduct of a judicial officer.[54] The Commissioner cannot himself or herself convene a Judicial Conduct Panel, but may recommend to the Attorney-General that a Panel be convened. Should the panel recommend removal of the judicial officer, the Attorney must decide to agree or disagree with that recommendation. If he or she agrees, and the subject of the complaint, not being an Associate Judge, is a member of the Supreme Court, the Court of Appeal, the High Court or the Employment Court, the Attorney must place the matter before Parliament. If the judicial officer in question is not a member of one of the courts referred to above, or is an Associate Judge, the Attorney advises the Governor-General accordingly, who will act upon that advice.

46 As with New Zealand, the federal Canadian system for dealing with judicial complaints has significant points of similarity with that of New South Wales. The Canadian Judicial Council, which is made up of judicial members, has a general mandate to promote efficiency, uniformity and accountability and to improve the quality of judicial service in the superior courts of Canada. The Council therefore has, within its mandate, authority over more than 1,000

52 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.15(5).
53 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.22.
54 *Judicial Conduct Commissioner and Judicial Conduct Panel Act*, s.12(3).

federally appointed judges. Council members form a variety of committees, one of which is the Judicial Conduct Committee.

47 That Committee performs the initial examination of all complaints, and may dismiss them on similar grounds to those set out in the New South Wales and New Zealand legislation. Although the Committee has no disciplinary powers, it has several options for dealing with a complaint that has not been dismissed at an early stage. These are as follows:

- The Committee may seek comment from the judge. On reviewing the response, the Committee may close the complaint file if it concludes that the complaint is without merit or does not warrant further consideration. The file may likewise be closed if the judge acknowledges that his or her conduct was inappropriate and if the Committee is of the view that no further action should be taken.

- The Committee may refer the complaint to a Panel of three or five members appointed by the Chairperson of the Committee. The Panel may include one or two judges from a roster established for this purpose. It may conduct further investigations and report back to the Committee.

- The Committee may write to the judge, giving an assessment of his or her behaviour and expressing concern.

- In consultation with the Chief Justice and with the consent of the judge, the Committee may recommend counselling or other remedial measures. The complaint file may be held open while these remedial measures are being carried out.

- The Committee may refer more serious complaints to an Inquiry Committee, which consists of members of the Council, together with lawyers of 10 years' experience.

48 If convened, a Panel or an Inquiry Committee will report to the Council, which may recommend to Parliament (through the Minister of Justice) that the judge be removed. Any members of the Council who were also members of the Committee or the Panel are not permitted to take any further part in the consideration of the merits of the complaint.

49 A judge may only be removed after an address from both Houses of Parliament, and only on grounds of proved misbehaviour.[55]

50 In the United Kingdom, the Lord Chancellor and the Lord Chief Justice are jointly responsible for considering and determining complaints. They are supported by the Office for Judicial Complaints, which is an associated office of the Ministry of Justice.

51 The Office receives complaints about both serious and less serious matters. It may dismiss a complaint on a number of grounds, including on the basis that it is untrue, mistaken, misconceived, not adequately particularised, or raises no question of misconduct. If a complaint is not dismissed after a preliminary examination, the Lord Chancellor and the Lord Chief Justice may nominate a judge to further consider the matter. The function of the nominated judge is to advise those by whom he or she is appointed. In particular, the advice may recommend that the complaint be further investigated and, if so, how that investigation might be conducted. It might also recommend disciplinary action without further investigation.

52 These procedures and decisions may be reviewed by a review body. It is made up of two judges and two lay members, and its findings must be accepted by the Lord Chancellor and the Lord Chief Justice.

53 The Judicial Appointments and Conduct Ombudsman can set aside a decision made by the Office for Judicial Complaints and direct that the subject complaint

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55 "Misbehaviour" extends to permanent incapacity: *Gratton v Judicial Council of Canada* [1994] 2 FC 769.

be re-examined. The Ombudsman may also recommend that an investigation or determination be reviewed by a review body, and may ask that the Office for Judicial Complaints write to a complainant with an apology for any judicial misconduct that has been established. In addition, the Ombudsman may suggest payment of compensation for loss which appears to him or her to have been suffered by a complainant as a direct result of the inappropriate handling of a complaint.

54 In Sweden, matters of judicial conduct are regulated by a Justice Ombudsman elected by Parliament. The Ombudsman receives complaints about government agencies and the courts. She or he may visit, and observe the workings of, a court and may initiate "own motion" investigations. The Ombudsman may also authorise prosecutions against judicial officers who have been charged with "failing to carry out the obligations of the office". This role, however, has diminished over time and the Ombudsman's role is now generally confined to making public comment about the matters which she or he investigates.[56]

55 Following its consideration of the several complaint mechanisms described above, the Committee is of the opinion that each Australian jurisdiction (with the possible exception of s.72 courts) should adopt a structure for dealing with complaints against judicial officers. It will, and should, be a matter for each jurisdiction to determine whether to adopt the New South Wales model or establish an independent body with like powers, procedures and independence.

56 The choice may depend upon whether a particular jurisdiction wishes to confine that body's role to complaints against judicial officers, or extend its responsibilities to such areas as sentencing and judicial education. If confined to dealing with complaints, the cost of establishing and maintaining such a body

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[56] The Committee is indebted, for the above account of the complaints systems in jurisdictions outside Australia, to the authors of the draft discussion paper entitled *Investigating complaints and concerns regarding judicial conduct* prepared for the Victorian Department of Justice (October 2009) and to the *Report* of the Senate Legal and Constitutional Affairs References Committee (December 2009).

should not, even in the smaller jurisdictions, be prohibitive. For example, a body exercising the complaints function according to the New South Wales model need not require any full time staff. The vast majority of complaints would be substantially dealt with by the collective action of the heads of jurisdiction. Nor would the complaints body require premises more extensive than, for example, a room in a court building. The model is therefore readily adaptable to smaller jurisdictions. It is also to be noted, in this context, that the work of a body dealing with complaints against judicial officers only involves significant expense where the complaint is sufficiently serious to warrant a possible reference to parliament for a decision about whether or not the judicial officer in question should be dismissed. In such cases, a panel or division or the like would be required to examine the matter and decide whether parliamentary involvement was appropriate.

57 In New South Wales, the Independent Commission Against Corruption (ICAC) is empowered to investigate the allegedly corrupt conduct of a public official, a term which is defined to include a judge or magistrate. The work of the ICAC, however, is not limited or otherwise affected by the exercise of the powers of the Judicial Commission. Accordingly, the adoption of the New South Wales model would not intrude upon the work of, for example, the Crime and Misconduct Commission of Queensland.

58 The Committee notes that, despite the controversy which marked its creation, the Judicial Commission of New South Wales now appears to have the undivided support of the judiciary and the general public in that jurisdiction. This may be the product, in part, of the Commission's work in continuing judicial education and in relation to sentencing; and the incorporation into the duties of similar bodies elsewhere of functions of this kind may well be appropriate. Even were this not so, however, the Committee would remain of the opinion that complaints against judicial officers should be dealt with by mechanisms analogous to those adopted in New South Wales.

59 In reaching its conclusions, the Committee has accepted that the advantages of such mechanisms extend to issues of judicial collegiality and, beyond that, to important questions about the role of a head of jurisdiction. The Committee has not attempted to obtain the views of each of the chief judicial officers of each jurisdiction, but believes that, for the heads of the larger courts in jurisdictions other than NSW, the burden of dealing with complaints against members of their own courts is already substantial, or could become so were an unstructured means of dealing with complaints to remain. At present, the head of jurisdiction has no alternative but to apply his or her own judgment to the conduct about which complaint is made, and to do so without the benefit of that conduct being reviewed by any of the head's colleagues, still less by those colleagues and a wise, knowledgeable and sensible member of the public. In those circumstances, the head must be acutely aware that the complainant is likely to view his or her decision as biased, or at least as perhaps being so. And this at the end of a process that in all likelihood has made a very significant call upon the head of jurisdiction's inadequate resources.

60 Such problems of perception are, in the Committee's opinion, real. The community's expectation is that every governmental authority should be accountable; and that expectation is at the same time both increasing and becoming more mature. In these circumstances, the Committee believes that an exclusively internal and unstructured mechanism for handling complaints against judicial officers will soon be unacceptable, even if it is not already.

61 There are in the opinion of the Committee other potential problems with an "in house" complaints system. On occasions, a head of jurisdiction will conclude that a complaint has sufficient foundation to justify his or her intervention. The judicial officer about whom the complaint has been made may have a different, perhaps a very different, view. A significant body of that officer's colleagues may agree with the officer, and disagree with the head. The potential for this difference of opinion to spill into a severe problem for the collegiality of the

court is real, and it is or may be highly destructive. That danger is much less in NSW, where the appropriateness of the conduct in question has been evaluated by a relevantly experienced and respected body that is external to the court.

62 The Committee has also been mindful of another difficulty presented by the currently unstructured arrangements in all jurisdictions other than New South Wales. It is one of resources - not only of time, but also of means. It may be that a complainant will make an assertion of fact which is disputed by the judge concerned, and which ought to be properly and impartially investigated before the complaint is resolved. The lack of any mechanism for any such investigation provides another source of dissatisfaction to complainants – and also to those judicial officers who are the subject of such complaints. The latter, if blameless, do not have the support of an independent and impartial vindication.

63 For these reasons, the Committee *recommends* that the Judicial Conference of Australia support and promote a structured system of dealing with complaints against judicial officers, such system being based on that of the NSW Judicial Commission with such modifications as are appropriate for each Australian jurisdiction, given differences in size and financial circumstances.

64 The members of the Committee at the time of presentation of this report are:

Justice Alan Blow
Chief Magistrate Ian Gray
Justice David Harper (Chair)
Chief Justice Wayne Martin
Justice Peter McClellan
Justice Philip McMurdo
Judge Geoff Muecke
Justice Margaret Stone
Chief Federal Magistrate John Pascoe
Justice Trevor Riley
Justice Michael Walton
Judge Jon Williams

22 January 2010

JUDICIAL CONFERENCE OF AUSTRALIA

ADDENDUM TO THE SECOND REPORT OF THE COMPLAINTS AGAINST JUDICIAL OFFICERS COMMITTEE

1. Following the completion on 1 December last year of the second report of the Complaints against Judicial Officers Committee, the Legal and Constitutional Affairs References Committee of the Australian Senate published (in December 2009) a report entitled *Australia's Judicial System and the Role of Judges*. The terms of reference of the Committee covered what its report describes as "four primary areas, namely procedures for appointment and method of termination of judges; terms of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements; the judicial complaints handling system; and jurisdictional issues, for example, the interface between the federal and state judicial systems."

2. The topic referred to by the Committee as "the judicial complaints handling system" is considered in chapters 6 ("*Judicial Complaints Handling"*) and 7 (*A Judicial Complaints Commission?*) of its *Report*. It has obvious relevance to the JCA's consideration of the issue. Accordingly, this addendum to the second report of the Complaints Against Officers Committee has been prepared in the hope that it will give members of the Governing Council of the JCA an accurate summary of the salient points made by the Senate Committee in that Committee's December 2009 *Report*.

3. The six-person membership of the Senate Committee included three Liberals (one of whom, Senator Guy Barnett of Tasmania, was the Chair), two ALP Senators, and one member of the Greens. Senators Brandis and Heffernan, both Liberals, were included under the separate and somewhat mysterious heading of "Participating Members". There is no dissenting report. The Committee is "strongly in favour of the establishment of a federal, and eventually a national, judicial commission".[1] Recommendation 10 is that "… the Commonwealth government establish a federal judicial

[1] *Report,* para. 7.88

commission modelled on the Judicial Commission of New South Wales."[2]

4. Paragraph 7.81 of the *Report* includes a request that "any judicial officers who are concerned that the establishment of a judicial commission would undermine the independence of the judiciary … investigate the experience in New South Wales, and … consider Chief Justice [Wayne] Martin's view that 'perhaps counter-intuitively, the creation of the judicial commission in New South Wales has actually strengthened the position of the judiciary in that state …'." In the same paragraph, the *Report* quotes the statement made by Sir Anthony Mason to the May 2000 Dublin conference on Judicial Accountability, Conduct and Ethics that if "judges do not voluntarily participate in the shaping of an appropriate regime of regulation, they could end up at some time in the future, in a very unfavourable climate, with a scheme thrust upon them which contains inadequate safeguards".

5. The *Report* begins its examination of the handling of complaints against judicial officers with the proposition that fair and effective complaints handling is a critical component of a judicial system that is both respected and just, and seen to be so. The Committee is particularly concerned about the absence of any federal system of dealing with judges accused of serious misconduct or who may no longer have the physical or mental capacity to fulfil judicial office. This latter circumstance (the loss of capacity) is one which, the Committee anticipates, will sooner rather than later be a real problem, given that "with over 150 members of the federal judiciary, it seems that physical or mental impairment is far more likely to arise than inappropriate behaviour."[3] For this reason, the Committee "strongly supports the view that there should be a more comprehensive complaints handling system in place before any allegation of serious judicial misconduct or incapacity arises."[4] It therefore recommends "that as soon as possible, and no later than 30 June 2010, the [federal] government:

- implement a federal process enabling it to establish an *ad hoc* tribunal when one is needed to investigate complaints of judicial misconduct or incapacity;
- establish guidelines for the investigation of less serious misconduct or incapacity issues; and
- implement the Family Court and Federal Magistrates Court proposal for an oversight committee."[5]

6. The reference to the Family Court and Federal Magistrates Court proposal is enlarged upon in paragraph 6.35 of the *Report,* which states that "Interestingly, Chief Justice Bryant and Chief Federal Magistrate Pascoe have

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[2] *Report*, p 95.
[3] *Report,* para, 6.12, quoting the submission to the Committee of the Gilbert + Tobin Centre of Public Law.
[4] *Report,* para. 7.94.
[5] Recommendation 7.96

proposed developing a joint complaints oversight committee between the two courts. The purpose of the oversight committee is to provide a second tier of review for complaints made against judicial officers." As explained to the Committee by the Chief Federal Magistrate, the proposed oversight body "would provide the opportunity to incorporate, for example, a very experienced retired judge and perhaps [a person with] other qualifications such as psychology." It would provide complainants with an independent platform upon which to lay their complaints, and would "build up some expertise in the sorts of complaints that occur in family law and maybe help … to develop some further protocols on, if necessary, changing court procedures or making judicial officers aware that some things may be done unwittingly which can offend or upset some litigants."[6]

7. Of "particular interest" to the Committee was the complaints handling process of the Family Court. The reason for this level of interest is not explained in the *Report,* but it may be that the Family Court's arrangements are more detailed than those of any other jurisdiction save that of NSW. It seems, however, that other jurisdictions nevertheless replicate – although with less rather than more exactitude – some of that which is done in the Family Court. There, the Deputy Chief Justice, on behalf of the Chief Justice, has primary responsibility for the management of complaints against judicial officers. He or she is assisted by a legally qualified registrar known also as the Judicial Complaints Adviser. An acknowledgement of receipt of the complaint is given as soon as possible, and if it is about the conduct of a judicial officer, a detailed consideration of the relevant proceedings may be undertaken.

8. A comprehensive response is then prepared by the Judicial Complaints Advisor, and is reviewed and settled by the Deputy Chief Justice. The Family Court protocol goes on to record that "[i]n certain circumstances the judge concerned will be sent a copy of the complaint … and invited to respond". Although the *Report* does not say so, doubtless the judge would, at least on any occasion on which the complaint appeared to have any substance, be informed, and the invitation to reply be extended. The *Report* is also silent on what action is envisaged by the Senate Committee as being appropriate thereafter, although it quotes Chief Justice Bryant as suggesting that an apology or even an ex-gratia payment might be made.

9. In its second report, the Complaints Against Judicial Officers Committee referred, especially at paragraph 59, to a problem affecting, in particular, large trial and other first instance courts which deal with a very large volume of cases. Where the head of jurisdiction must deal personally with complaints made about members of such a court, there will as a result be a substantial and potentially unsustainable drain upon the resources available to that head

[6] *Report* para. 6.37, quoting from the evidence given by his Honour to the Committee on 11 June 2009.

in discharging that task. Although an important consideration in assessing the current means of dealing with complaints against judicial officers, the Senate Committee's *Report* gives little attention to it. The issue is touched upon at paragraphs 6.33 and 6.34, where the views of Chief Justice Wayne Martin and Chief Justice Bryant are noted. Governing Council may think that great importance should be attached to those views. The *Report* quotes from a letter dated 10 November 2006 from Martin CJ to the Hon Jim McGinty, then the Attorney-General of Western Australia in which the Chief Justice spoke of his "lack [of] any facility or capacity to appropriately investigate or respond to" the approximately two complaints he received per week relating to judicial officers in various Western Australian courts. For her part, Bryant CJ told the Committee during its Melbourne meeting on 12 June 2009 that she was "not entirely comfortable" with the necessity of dealing with complaints against judges of her Court, and added that she thought "the Judicial Commission of NSW works extremely well because the responsibility is removed from the Chief Justice."

10. The Senate Committee in its report[7] notes that "[f]air and effective complaints handling is a critical component of a judicial system that is both respected and just, and seen to be so." The JCA's Complaints Against Judicial Officers Committee agrees. The *Report* of the Senate Committee goes on to express that Committee's opinion that it "is not enough to have a judicial system that only deals with misbehaviour at the level of serious misconduct or incapacity. Any robust complaint handling mechanisms need to be able to deal appropriately with conduct that falls short of these levels of conduct, but which is nonetheless undesirable or inappropriate. Of course, an appropriate complaint handling system is one that is balanced with safeguards for judicial independence."[8]

11. Again, the Complaints Against Judicial Officers Committee agrees. At paragraph 6.49 of its *Report,* however, the Senate Committee notes that although "to date there appears to have been no disastrous outcomes from the existing arrangements, it is apparent that there is the potential for this to occur." That too might be so, at least in jurisdictions which have no arrangements for dealing with serious misconduct or incapacity – conduct, in other words, that warrants removal. But, in considering this aspect of the question, it is necessary to maintain a sense of proportion. As is pointed out in the second report of the Complaints Against Judicial Conduct Committee,[9] in the 2007/2008 financial year, in New South Wales, 59 individual complainants made 65 complaints against 51 judicial officers. The proportion of complaints to all matters heard across the entire jurisdiction of the State was therefore miniscule (in 2007/2008, approximately 300 NSW judicial

[7] At para. 6.4.

[8] *Report,* at para. 6.47.

[9] Second report of the Complaints Against Judicial Officers Committee, para. 33.

officers dealt with more than 500,000 matters).[10] Of the finalised complaints, 92% were dismissed summarily, generally because either an appeal was the appropriate remedy, or further consideration of the complaint was, in all the circumstances, unnecessary or unjustifiable. Only five matters were referred to the relevant head of jurisdiction. None were referred to the Conduct Division.[11] It follows that, in relation at least to non-serious complaints, the potential for "disastrous outcomes from the existing arrangements" in jurisdictions other than that of New South Wales, is very limited.

12 That is not to say that complacency is warranted. It is nevertheless pertinent to bear in mind that, if the NSW experience were replicated in Victoria, an entirely new system for dealing with less serious complaints would be established to deal with an average of approximately five justified complaints per annum.

13. Shortly before the publication last month of the *Report* of the Senate Committee, the Victorian Department of Justice has issued a discussion paper entitled *Investigating Complaints and Concerns regarding Judicial Conduct.* It sought submissions by 18 December. These are to be the subject of a meeting on 4 February of the Judicial Conduct Working Group, of which Judge Michael McInerney and I are members. Under the heading "*Rights of judges*" it notes at p.46 a criticism of the NSW complaints system voiced by Vince Morabito in an article published in 1993 in the *University of New South Wales Law Journal.* The author points out that the *Judicial Officers Act* fails to specify the rights (if any) of the judge who is the subject of a complaint. The right to see a copy of the complaint, to know precisely what it is, and to be heard in response, are mentioned. Other rights which might be thought appropriate or, depending on the circumstances, absolute, are the right to legal representation, the right to the payment of costs, and the right to address Parliament. Governing Council might think it appropriate to support the inclusion in any complaints system of rights such as these.

14. The discussion paper described at some length the systems for dealing with complaints in jurisdictions outside Australia. I have taken it upon myself to incorporate in the latest version of the report of the Complaints Against Judicial Officers Committee some additional detail based upon this source. I have at the same time made certain changes of style but not, I hope, substance, to the report. Given the time of year, I have done this without the involvement of the Committee. Each member of the Committee will receive at the same time as, or perhaps shortly before, members of the JCA Executive, a copy of this addendum and of the revised second report. I will welcome their comments and criticisms.

15. This addendum having been prepared over January, members of the

[10] See the paper entitled *Complaints against Judicial Officers* by Mr Ernest Schmatt PSM, at p.5.
[11] Judicial Commission of NSW *Annual Report, 2007-8.*

Committee have not had the opportunity to consider it before it is to be put before the Executive Committee of the JCA. Following the Committee's consideration, a revised version, or alternatively an amended report, may go to the Governing Council.

16. I of course cannot speak for the Complaints Against Judicial Officers Committee about something which the Committee has not discussed. It is however likely that, should the Governing Council so wish, the Committee would be happy to consider what recommendations, if any, should be made by the JCA to its members, or to the several jurisdictions (perhaps through the Council of Chief Justices) on the implementation of a complaints system in those jurisdictions. It is doubtless very important that each court have the opportunity to evaluate for itself the likely impact of such a system, and the arguments for and against its implementation. The precise structure of any system, if the decision to adopt is made, would likewise be a matter about which individual courts and their members should be closely consulted by the executive government.

D L HARPER