

The Senate

Legal and Constitutional Affairs
References Committee

Australia's Judicial System and the Role of Judges

December 2009

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RECOMMENDATIONS

Recommendation 1

2.9 The committee recommends that the High Court of Australia adopt a written complaint handling policy and makes it publicly available, including on its website, within 1 month of the tabling of this report.

Recommendation 2

2.19 The committee recommends that, following consultation about the best way to achieve this, all federal courts publish quarterly complaint handling summary status reports on their websites recording the number of complaints received and, in relation to each complaint, the date it was received, the nature of the complaint, the date on which it was resolved and a summary of any action taken in response to the complaint.

2.20 The committee recommends that no personal details of either the complainant or judicial officer be identifiable from these reports.

Recommendation 3

3.23 The committee recommends that when the appointment of a federal judicial officer is announced the Attorney-General should make public the number of nominations and applications received for each vacancy.

3.24 If the government or department prepared a short-list of candidates for any appointment, the number of people on the list should also be made public.

Recommendation 4

3.72 The committee recommends that the process for appointments to the High Court should be principled and transparent. The committee recommends that the Attorney-General should adopt a process that includes advertising vacancies widely and should confirm that selection is based on merit and should detail the selection criteria that constitute merit for appointment to the High Court.

Recommendation 5

4.27 The committee recommends that all jurisdictions set a nationally consistent compulsory retirement age for judicial officers and encourages each jurisdiction to implement it within the next 4 years.

Recommendation 6

4.28 The committee recommends that at the next Commonwealth referendum section 72 of the Constitution should be amended in relation to the compulsory retirement age for judges to provide that federal judicial officers are appointed until an age fixed by Parliament.

Recommendation 7

4.64 The committee recommends that the *High Court of Australia Act 1969* (Cth) prohibition on federal judges holding another office of profit be retained.

Recommendation 8

4.70 The committee recommends that by 30 June 2010 the Attorney-General develop and implement a protocol that provides guidelines to federal courts for the appropriate use of short and long term part-time working arrangements for judicial officers.

Recommendation 9

4.71 The committee recommends that the Attorney-General present the protocol to the Standing Committee of Attorneys-General for consideration at the first meeting after 30 June 2010.

Recommendation 10

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

Recommendation 11

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

Recommendation 12

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

Recommendation 13

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

Recommendation 14

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

Recommendation 15

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

Recommendation 16

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

- implement a federal process enabling it to establish an *ad hoc* tribunal when one is needed to investigate complaints of judicial misconduct or incapacity;

- **establish guidelines for the investigation of less serious misconduct or incapacity issues; and**
- **implement the Family Court and Federal Magistrates Court proposal for an oversight committee.**

CHAPTER 1

Introduction

1.1 On 19 March 2009, the Senate referred an inquiry into *Australia's Judicial System, the Role of Judges and Access to Justice* to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 17 August 2009.

1.2 This reference was withdrawn on 19 March 2009 and in its place, the Senate referred two separate inquiries: one into Australia's Judicial System and the Role of Judges; and one into Access to Justice.

1.3 The terms of reference for the new inquiry into Australia's Judicial System and the Role of Judges require the committee to have particular reference to:

- a. procedures for appointment and method of termination of judges;
- b. term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;
- c. jurisdictional issues, for example, the interface between the federal and state judicial system; and
- d. the judicial complaints handling system.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 11 and 25 February and 8 and 22 April 2009. Details of the inquiry and associated documents were placed on the committee's website. The committee also wrote to a total of 59 organisations and individuals inviting submissions by 31 July 2009.

1.5 The committee received 39 submissions directly to this inquiry, and 5 submissions made to the earlier joint inquiry were relevant to these terms of reference. All 44 submissions are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public. The committee also received significant *additional information* which also is listed at Appendix 1 and is available through the committee's website.

1.6 The committee held public hearings in Sydney on 11 June 2009, Melbourne on 12 June, Perth on 13 July 2009 and Canberra on 17 November 2009. A list of witnesses who appeared at the hearings is at Appendix 2, and copies of the Hansard transcript are available through the internet at <http://www.aph.gov.au/hansard>.

Scope of the report

1.7 The structure of the report is as follows:

- Chapter 2 provides an outline of the context for the inquiry and an introduction to the issues;
- Chapter 3 discusses methods of judicial appointment and selection criteria, including whether there is a need in Australia for a judicial appointments commission;
- Chapter 4 addresses judicial terms of appointment, including tenure and age of retirement, and the use of acting and part-time appointments;
- Chapter 5 considers jurisdictional issues and the interface between the federal and state judicial systems, such as judicial exchange, the possibility of a national judiciary, and the cross-vesting of cases;
- Chapter 6 discusses termination of a judicial appointment (other than through retirement or reaching the compulsory retirement age) before dealing with existing complaint handling procedures and some concerns about the current arrangements; and
- Chapter 7 explores options for more sophisticated judicial complaints handling: primarily the possibility of establishing a judicial complaints commission and whether an intermediate process is needed in the interim.

1.8 Of relevance to reading this report is consideration of what is meant by the term *judicial officer*. In New South Wales, the *Judicial Officers Act* defines *judicial officer* to mean:

- a judge or associate judge of the Supreme Court of New South Wales;
- a member (including a judicial member) of the Industrial Relations Commission of New South Wales;
- a judge of the Land and Environment Court of New South Wales;
- a judge of the District Court of New South Wales;
- a magistrate; and
- the President of the Administrative Decisions Tribunal.

The definition of "judicial officer" does not include people such as Arbitrators, Registrars, Chamber Registrars or legal practitioners.¹

1.9 The committee also notes that the Association of Australian Magistrates argues that 'there is no longer any reason to distinguish "magistrates" from "judges", as the obligations of the judicial role do not differ.'²

1 Section 3(1) *Judicial Officers Act 1986*, referred to in *Complaints Against Judicial Officers* by Mr Ernest Schmatt, Chief Executive of the Judicial Commission of New South Wales, p. 1 tabled with the committee on 11 June 2009.

2 *Submission 4*, p. 1.

1.10 This report does not specifically define the terms *judge*, *judicial officer*, or *judicial commission* on each occasion that they are used. However, for the purposes of this report the committee has adopted the New South Wales approach insofar as the term 'judicial officer' applies to officers of a range of courts, including magistrates. It will be a matter of future detail to determine the precise meaning of the term *judicial officer* in any particular circumstance.

Acknowledgement

1.11 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.12 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

Background

Terms of Reference

2.1 As outlined in the previous chapter, the terms of reference for this inquiry cover 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 system. There is much written about these topics already. It is the purpose of this report to undertake a snapshot analysis of the current health of our federal judicial system rather than to analyse the entire system in detail.

2.2 This chapter will provide background for the first 3 of these areas, and touch on the fourth, prior to their examination in turn over the remainder of the report. It begins by examining current arrangements.

Current arrangements for Federal courts – appointments and complaint handling

2.3 There are four principal federal courts in Australia – the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court. The Attorney-General's Department has summarised the arrangements for judicial appointments to these courts as follows:

Federal judges and magistrates are appointed by the government of the day.

The Australian Constitution does not set out specific qualifications required by federal judges and magistrates. However, laws made by the Commonwealth Parliament provide that, to be appointed as a federal judge, a person must have been a legal practitioner for at least five years or be a judge of another court. To be appointed as a federal magistrate, a person must have been a legal practitioner for at least five years. To be appointed as a judge of the Family Court of Australia, a person must also be suitable to deal with family law matters by reason of training, experience and personality.

All federal judges and magistrates are appointed to the age of 70. The Australian Constitution provides that a federal judge or magistrate can only be removed from office on the ground of proved misbehaviour or incapacity, on an address from both the House of Representatives and the Senate in the same session. The Australian Constitution provides that the remuneration of a federal judge or magistrate cannot be reduced while the person holds office. These guarantees of tenure and remuneration assist in securing judicial independence.

The independence of the courts, and their separation from the legislative and executive arms of government, is regarded as of great importance in Australia and it is taken for granted that judges, in interpreting and applying the law, act independently of the Government.¹

2.4 In early 2008 the Attorney-General introduced new processes for appointing judges and magistrates to federal courts, including:

- broad consultation to identify persons who are suitable for appointment;
- notices in national and regional media seeking expressions of interest and nominations;
- notification of appointment criteria; and
- appointing advisory panels to assess expressions of interest and nominations against the appointment criteria to develop a shortlist of highly suitable candidates.²

2.5 Specific detail in relation to each court is outlined below.

High Court

2.6 Under section 72 of the Constitution, Justices of the High Court:

- are appointed by the Governor-General in Council;
- cannot be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity;
- receive such remuneration as the Parliament may fix, but the remuneration shall not be diminished during their continuance in office; and
- must retire on attaining the age of 70 years.³

2.7 Part II of the *High Court of Australia Act 1979* contains further provisions concerning the court and the justices, including:

- the Attorney-General shall, before an appointment is made to a vacant office, consult with the attorneys-general of the states in relation to the appointment;
- a person shall not be appointed as a justice unless:

1 Attorney-General's website, *The Courts* page, accessed 3 April 2009: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts.

2 Attorney-General's Department website *Court Appointments* page, accessed 3 April 2009: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_CourtAppointments.

3 High Court of Australia, *Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 25.

- he or she has been a judge of a court created by the parliament or of a court of a State or Territory; or
- he or she has been enrolled as a barrister or solicitor or as a legal practitioner of the High Court or of a Supreme Court of a State or Territory for not less than five years;
- a Justice is not capable of accepting or holding any other office of profit within Australia; and
- the Chief Justice and the other Justices shall receive a salary and other allowances at such rates as are fixed from time to time by Parliament.⁴

2.8 There is no published complaints procedure for the High Court available on the High Court of Australia website and the committee understands that there is no written procedure for handling complaints against judicial officers.⁵ In its 2007 *Commonwealth courts and tribunals* publication the Commonwealth Ombudsman notes that the High Court handles complaints received on a case-by-case basis by a senior executive, usually the Principal Registrar of the court.⁶

Recommendation 1

2.9 The committee recommends that the High Court of Australia adopt a written complaint handling policy and makes it publicly available, including on its website, within 1 month of the tabling of this report.

*Federal Court of Australia*⁷

2.10 The *Federal Court of Australia Act 1976* provides that the court consists of a chief justice, and such other judges as are appointed. The chief justice is the senior judge of the court and is responsible for ensuring the orderly and expeditious discharge of the business of the court.

2.11 Judges of the court are appointed by the Governor-General, by commission. Like the judges of the High Court, judges may not be removed except by the Governor-General on an address from both Houses of Parliament, in the same session, praying for the judge's removal on the ground of proved misbehaviour or incapacity. The requirement is contained in section 72 of the *Commonwealth of Australia Constitution Act 1901* and Part II of the *Federal Court of Australia Act*.

4 High Court of Australia, *Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 25.

5 *Additional information*, Parliamentary Library Client Memorandum *Complaints Against Judges*, 6 November 2009, pp 9 and 10.

6 Commonwealth Ombudsman, *Report 12, 2007 Commonwealth courts and tribunals: complaint-handling processes and the ombudsman's jurisdiction*, August 2007, pp 13 to 15.

7 Unless otherwise attributed, information for this section was obtained from the Federal Court of Australia website <http://www.fedcourt.gov.au/aboutct/jj.html> accessed 7 May 2009 and *Additional Information*, Parliamentary Library Client Memorandum *Judicial appointment, termination and retirement age in like countries*, 9 April 2009.

2.12 Until 1977 judges were appointed for life. As a consequence of the constitutional referendum in that year, all judges appointed after 1977 must retire at the age of 70.

2.13 Judges other than the Chief Justice may hold more than one judicial office at the one time. Most judges have other commissions and appointments.

2.14 The Federal Court manages its own 'judicial complaints procedure'. The court asserts that to protect judicial independence judges '...cannot be subject to direct discipline by anyone else, except in the extreme cases of proved misbehaviour or incapacity. In those circumstances, and in those only, a judge may be removed from office by the Governor-General upon a request from both Houses of Parliament.'

2.15 The complaints procedure does not (and, constitutionally, cannot) provide a mechanism for disciplining a judge. This means that the only action the head of jurisdiction can take, if any is needed, is informal. The types of complaints that the procedure mentions are delay, cases that could be dealt with on appeal or by prerogative writ and judicial conduct.⁸

Family Court of Australia

2.16 Judges of the Family Court are appointed by the Governor-General, usually from the ranks of the legal profession. Appointments to the Family Court have also included academics with special expertise in family law.⁹

2.17 The Chief Justice of the Family Court and the Chief Federal Magistrate of the Federal Magistrates Court are responsible for overseeing the management of complaints about the judicial work of those Courts. A complaint can be made to the Chief Justice or the Chief Federal Magistrate about the conduct of a judicial officer during the course of, or after, a hearing or about an unreasonable delay in the delivery of a judgment. The Family Court website provides complainants with the details needed to write to the Chief Justice of the Family Court.¹⁰

Federal Magistrates Court

2.18 The Attorney-General announced this year that as a result of the Semple Review, the Federal Magistrates Court will be abolished and its functions

8 Federal Court of Australia website accessed April 2009:
http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html.

9 Family Court of Australia website accessed 7 May 2009:
http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Organisation/Judges/FCOA_co_Judges.

10 Family Court publication *Complaints Fact Sheet* accessed on 8 May 2009:
http://www.familycourt.gov.au/wps/wcm/resources/file/ebc64b455b4961c/Complaints_feedback.htm.

amalgamated with the Federal Court and the Family Court. A timeframe for this has yet to be established.¹¹

Recommendation 2

2.19 The committee recommends that, following consultation about the best way to achieve this, all federal courts publish quarterly complaint handling summary status reports on their websites recording the number of complaints received and, in relation to each complaint, the date it was received, the nature of the complaint, the date on which it was resolved and a summary of any action taken in response to the complaint.

2.20 The committee recommends that no personal details of either the complainant or judicial officer be identifiable from these reports.

International obligations

2.21 Australia ratified the *International Covenant on Civil and Political Rights* and it came into effect for Australia on 13 November 1980. Article 14 of the covenant relevantly states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...[emphasis added]¹²

2.22 The United Nations Human Rights Committee, in its *General Comment No 32*, states that, 'The requirement of competence, independence and impartiality of the judiciary is an absolute right that is not subject to any exception.'¹³ A *General Comment* is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.¹⁴

2.23 The Human Rights Law Resource Centre notes in its submission that 'the importance of competence, independence and impartiality of the judiciary has also been emphasised by the United Nations Basic Principles on the Independence of the Judiciary.' They state further that:

The Basic Principles are persuasive, useful interpretative guides and provide detailed minimum standards concerning the elements of

11 The Attorney-General, the Hon. Robert McClelland MP, media release, *Rudd Government to Reform Federal Courts*, 5 May 2009.

12 A copy of Article 14 of the *International Covenant on Civil and Political Rights*, an extract from the United National Human Rights Committee, *General Comment No 32*, and the United Nations *Basic Principles on the Independence of the Judiciary* appear at Appendix 3 to this report.

13 Human Rights Law Resource Centre, *Submission j1*, p. 27.

14 Human Rights Law Resource Centre, *Submission j1*, p. 12.

independence, impartiality and competence contained in the right to a fair hearing.

On the elements of independence and impartiality, the Basic Principles provide that:

- a) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.¹⁵

...

2.24 On the element of competence, the Basic Principles provide that:

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person...except a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.¹⁶

2.25 *General Comment 32* expands and elaborates on the guidance in the Basic Principles on the element of independence and states:

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.¹⁷

International experiences

2.26 An outline of the major judicial organisations established to support the appointments and complaints processes for some overseas jurisdictions is at Appendix 4.

15 Human Rights Law Resource Centre, *Submission j1*, p 27.

16 As quoted in the Human Rights Law Resource Centre, *Submission j1*, p. 27.

17 As quoted in the Human Rights Law Resource Centre, *Submission j1*, pp 27 and 28.

CHAPTER 3

Judicial appointment

3.1 This chapter considers in detail the method of appointment of federal judges. In relation to appointment it includes discussion of:

- particulars of the process of appointment;
- the concept of merit;
- whether judicial vacancies should be advertised and nominations for judicial appointment invited;
- the issue of the diversity of judicial appointments;
- whether a separate process for appointments to the High Court are justified; and
- whether an appointments advisory commission is warranted.

Background

3.2 As the International Commission of Jurists –Victoria (ICJ-Victoria) observed, 'the procedure for appointment and the method of termination of judges goes to the heart of the constitutional principle of judicial independence.'¹ To emphasise its point, the ICJ-Victoria goes on to quote former Chief Justice Gleeson who outlined the principle as follows:

What is at stake is not some personal or corporate privilege of judicial officers; it is the right of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.²

3.3 The Association of Australian Magistrates agreed that the methods of appointment and termination are important processes that can be implemented in a way that contributes to the quality of judicial appointments and even to establishing judicial independence:

The need to secure judicial independence is one of the fundamental principles underpinning a system of judicial appointments. To that end the appointment process should be open and transparent, and judicial appointments should only be made on the basis of merit.³

1 *Submission J2*, p 2.

2 *Submission J2*, p. 2 quoting Murray Gleeson, *Embracing Independence* (Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008) at p. 3.

3 *Submission 4, Supplementary Submission*, p.1.

3.4 This inquiry does not question the importance of an independent judiciary. However, there is a variety of ways in which appropriate procedures for appointment and termination can be formulated while still meeting the essential conditions of independence. Nor has there been particular criticism of recent appointees. Despite arguing for 'a new model' for appointing Australian judges, Simon Evans and John Williams have explained:

...we do not suggest that the appointment process to date has entirely failed. Measured in historical and international terms the Australian judiciary is acknowledged to be of outstanding quality and has enjoyed the public's confidence.⁴

...

Rather, the current process systematically overlooks others who *do* have the required qualities.⁵

3.5 The committee's consideration of these issues was not underpinned by a view that there have been numerous flawed federal judicial appointments over the years. The purpose of the committee's inquiry was to explore whether the current processes sufficiently meet the standards required or whether they should be altered or supplemented to support and enhance the principle of judicial independence.

Appointment

Current appointment process

3.6 The Attorney-General's Department has described in detail the existing approach to federal appointments. As these processes are central to this aspect of the inquiry, the full detail is repeated in the following section.⁶

Appointments to the High Court and the Chief Justice of the Federal Court

3.7 The Attorney-General invites nominations from a broad range of individuals and organisations including the heads of federal courts, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

4 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 295.

5 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 301.

6 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, pp 2 and 3.

3.8 Letters inviting nominations are also sent to State Attorneys-General (for High Court appointments this is required under section 6 of the *High Court of Australia Act 1979*), Justices of the High Court, State and Territory Chief Justices.

3.9 Candidates must meet the relevant qualifications set out in section 7 of the *High Court Act 1979* or section 6(2) of the *Federal Court Act 1976*.

3.10 The Attorney-General considers the candidates nominated and, for each position available, identifies the person whom he considers most suitable, and then recommends this appointment to the Cabinet.

3.11 Appointments are made by the Governor-General in Council.

Appointments to the Federal Court (other than the Chief Justice), Family Court and Federal Magistrates' Court

3.12 The Attorney-General invites nominations from a broad range of individuals and organisations including the Chief Justices of the Federal Court and Family Court, the Chief Federal Magistrate, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

3.13 Information regarding expressions of interest and nominations for appointment is also published in Public Notices in national and local newspapers and on the Attorney-General's Department's website.

3.14 Candidates must meet the relevant qualifications set out in section 6(2) of the *Federal Court Act 1976*, section 22 of the *Family Law Act 1975* or Schedule 1, Part 1 of the *Federal Magistrates Act 1999*.

3.15 Candidates for appointment to the Federal Court and Family Court must also demonstrate the following qualities to the highest degree:

- legal expertise;
- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;
- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and

- the capacity to inspire respect and confidence.

3.16 Candidates for appointment to the Federal Magistrates Court must also demonstrate the same qualities to a high degree.

3.17 An Advisory Panel which includes the Chief Justice (or Chief Federal Magistrate) or their nominee, a retired judge or senior member of the Federal or State judiciary and a senior member of the Attorney-General's Department considers the nominations and provides a report to the Attorney-General recommending appropriate candidates for appointment. To assist in preparing its report, the Advisory Panel may conduct interviews of candidates.

3.18 The Attorney-General considers the Advisory Panel's report and, for each position available, identifies the person whom he or she considers most suitable. The Attorney-General then recommends this appointment to the Cabinet.

3.19 Appointments are made by the Governor-General in Council.

Committee comment

3.20 The reference in this appointment process to the Attorney-General considering the Advisory Panel's report and then identifying 'the person whom he considers most suitable' is unfortunate. If the Attorney-General identifies the most suitable person based on their assessment against the selection criteria then it is desirable for this to be articulated. On the other hand, if the Attorney-General is not willing to state that selection is directly based on the selection criteria then this should also be articulated.

3.21 It is appropriate for the Attorney to retain the final decision making authority, but this point goes to the transparency of the process and, if the Attorney is making appointments other than based on an assessment against selection criteria, it also goes to the integrity of the process.

3.22 The committee also considers that the transparency of all federal judicial appointments would be improved by the Attorney-General making public the number of nominations and applications received for each vacancy and, if a short-list of candidates is part of the process, to make public the number of people on the short-list. The committee does not consider that personal details of a candidate, or any information that could identify him or her should be made public unless that person is appointed as a judicial officer and it is appropriate to do so.

Recommendation 3

3.23 The committee recommends that when the appointment of a federal judicial officer is announced the Attorney-General should make public the number of nominations and applications received for each vacancy.

3.24 If the government or department prepared a short-list of candidates for any appointment, the number of people on the list should also be made public.

3.25 In relation to the High Court, the current process is significantly more flexible (and less transparent). Beyond meeting statutory requirements and consulting widely, appointments are selected after the 'Attorney-General considers the candidates nominated and...identifies the person whom he considers most suitable'.⁷ There are mixed views about whether or not it is appropriate to have a different process for the High Court, and these are discussed below.

The appointment process and the concept of merit - evidence to the committee

3.26 The concept of merit and what is meant by it was raised with the committee by a number of submitters. The overwhelming view put to the committee is that merit should be the fundamental criterion for the selection of judicial appointments.⁸ In particular the Law Council of Australia states that its own policy:

...recognises that the open, consultative and transparent process adopted by the current Commonwealth Government is an improvement on what has occurred in the recent past. The Law Council's Policy was amended to generally reflect its approval of the Government's process in light of the changes to the previous federal judicial appointments process that occurred with the election of the current Government.⁹

3.27 The Judicial Conference of Australia, representing judges and magistrates from all jurisdictions and levels of the Australian court system, in its submission undertook some discussion of the meaning of merit. In the Judicial Conference's view:

At the risk of speaking at too high a generalisation, it is clearly essential that all judges be selected on merit. However, as debate in recent years has highlighted, the concept of merit has a different meaning to different people. In the federal sphere, with which this inquiry is concerned, the system the Attorney-General has adopted - of advertising for appointments to the federal judiciary and identifying the core attributes for application - has well defined in a neutral manner what the Judicial Conference believes would be accepted by its members as indicative of the merits a judicial officer requires – namely, legal expertise, conceptual, analytical and organisational skills; decision-making skills; the ability, or the capacity quickly to develop the ability, to deliver clear and concise judgments; the capacity to work effectively under pressure; a commitment to professional development; interpersonal and communication skills; integrity, impartiality, tact and courtesy; and the capacity to inspire respect and confidence.¹⁰

7 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

8 See for example, Law Society of New South Wales, *Submission 7*, p. 1, and Association of Australian Magistrates, *Submission 4, Supplementary Submission*, p. 5.

9 *Submission 11*, p. 5.

10 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

3.28 In a significant acknowledgement of the Attorney-General's current approach to appointments, the Judicial Conference considered that the current process is recognised as having 'well defined in a neutral manner what the Judicial Conference believes would be accepted by its members as indicative of the merits a judicial officer requires'.¹¹

3.29 The Flinders University Judicial Research Project (the Project), which is run by Professor Kathy Mack (law) and Professor Sharon Roach Anleu (sociology) has involved a program of empirical research which commenced in 2001 and includes national surveys sent to all magistrates and judges in Australia. Having access to this information through the Project's submission was very valuable to the committee and this information was also supplemented by Professor Roach Anleu's appearance at a public hearing. The joint submission highlights the importance of appointment based on merit and notes the difficulties in reaching agreement about what constitutes merit for appointment to judicial office.¹² The project provides a rare opportunity to obtain direct insight into the skills of importance as identified by judiciary itself.

Legal values and legal skills

3.30 The Project survey has identified legal values (specified as impartiality, integrity/high ethical standards and a sense of fairness) as 'by far the most important type of quality to all judicial officers...'¹³ In relation to this Professors Mack and Roach Anleu observed that:

These survey findings are similar to the lists of qualities which are usually identified as necessary for merit in judicial appointment, which consistently stress qualities of character and integrity.¹⁴

3.31 After legal values, the next most important groups of skills identified by the judiciary in the project survey are legal skills (legal knowledge, legal analysis, fact-finding and problem solving) and then interpersonal skills (communication, courtesy and being a good listener).¹⁵

3.32 However, the Law Society of New South Wales makes the point that in making judicial appointments 'undue prominence' has been given to selecting the judiciary from the Bar.¹⁶ The Society argues that:

The skills and qualities of the other branches of the legal profession have been undervalued and this imbalance must be rectified. Solicitors and academic lawyers must be included in the selection process.¹⁷

11 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

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

13 Flinders University Judicial Research Project, *Submission J4*, p. 3.

14 Flinders University Judicial Research Project, *Submission J4*, p. 3.

15 Flinders University Judicial Research Project, *Submission J4*, p. 4.

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

3.33 This view is not supported by the ICJ-Australia, which asserts that 'the conduct of trials is based on procedure and evidence, experience of which is acquired over a period of practice in the Courts'¹⁸ and that '...academics do not tend to fulfil the sub-criteria of being able to handle a courtroom, as they do not have the insight and experience of a trial lawyer'.¹⁹ However, they do note that this form of judicial suitability is 'not as relevant for appellate Courts, where the conduct of an appeal requires less advocacy skill and does not require the experience of, for instance, a complex criminal trial or civil jury matter'.²⁰

Comparison with best practice judicial appointment policies

3.34 The preferred selection process for judicial appointments adopted by the Law Council in 2008, largely mirrors the process in place since the current government implemented changes shortly after taking office in 2007. In particular, the consultation and evaluation processes are very similar. The two primary points of distinction are that the Law Council:

- proposes to publish a formal Judicial Appointments Protocol to be followed when going about making an appointment; and
- suggest a significantly more detailed list of necessary qualities for a candidate being considered for appointment.²¹

3.35 A copy of the Law Council of Australia's approved *Attributes of candidates for judicial office* and *Office holders to be consulted personally by the Attorney-General of Australia* policies (Attachments A and B to the Council's submission) are at Appendix 5.

3.36 Similarly, the Law Society of New South Wales also provided the committee with a copy of its policy document on the *Selection Process for the Judiciary*, a copy of which is at Appendix 6.²² The policy endorses an approach to selection that is very similar to the process followed by the federal Attorney-General, although the wording differs. The Law Society particularly promotes consultation between the Attorney-General and the New South Wales Bar Association, as well as with the Law Council itself.²³

3.37 From an international law perspective, the Attorney-General's overall approach is considered to be consistent with the key international human rights

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

18 International Commission of Jurists, Australia, *Submission 5*, p. 3.

19 International Commission of Jurists, Australia, *Submission 5*, p. 4.

20 International Commission of Jurists, Australia, *Submission 5*, p. 3.

21 Law Council of Australia, *Submission 11*, Attachment A, p. 1.

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

23 Law Society of New South Wales, *Submission 7*, attached *Selection Process for the Judiciary Policy Document*, p. 2.

principles regarding judicial appointment. The Human Rights Law Resource Centre outlined a relevant principle for the committee:

... irrespective of the method of selection of judges, candidates' professional qualifications, their experience and their personal integrity must constitute the sole criteria for their selection.²⁴

3.38 The Gilbert + Tobin Centre of Public Law also commented that 'the criteria which [have] been used [are] commendable for [their] detail and relevance to the nature of judicial work'.²⁵

3.39 Despite the fact that the process for federal judicial appointment is at the whim of the Attorney-General of the day, the Law Council of Australia makes the point that there is no apparent necessity for the requisite qualities for appointment outlined by the Attorney-General 'to be given the force of law'.²⁶

Judicial comment

3.40 Importantly, the Federal Court has welcomed the new arrangements and observed that they 'appear to be working well'²⁷ and the Family Court and Federal Magistrates Court also 'welcomed the Attorney-General's newly instituted process' and noted that it has already been utilised for both courts.²⁸

Committee view

3.41 The committee agrees that the basis for the selection of judicial appointments must be merit. A candidate's merit must be measured by assessing characteristics relevant to the position, such as those outlined by the Attorney-General's Department. The committee has considered whether the Attorney-General's approach, as described by the Attorney-General's Department, meets this critical requirement. It was obvious to the committee that there is widespread endorsement from some of the most eminent legal organisations and bodies, including those directly representing federal courts, for the current approach. The committee believes that, while there will always be argument at the margins about the precise approach to be taken, the Attorney-General's approach is not inconsistent with a selection process based on merit.

24 Mr Schokman, *Committee Hansard*, 12 June 2009, p. 95.

25 *Submission 1*, p. 2.

26 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 27.

27 Federal Court of Australia, *Submission 3*, p. 1.

28 *Submission 8*, p. 5. See also the evidence of Chief Justice Bryant to the committee: *Committee Hansard*, 12 June 2009, p. 65. Further support is found generally in *Submission 4, Supplementary Submission*, provided by the Association of Australian Magistrates.

Inviting applications for appointment

3.42 Much has been said, including in submissions to this inquiry, about the need to advertise judicial vacancies to ensure that the widest range of candidates is available from which to select appointees.²⁹ There was some related discussion before the committee about whether or not it is appropriate to require potential judicial candidates to self-nominate for appointment.

3.43 The work of the Flinders University Judicial Research Project once again provided a very useful perspective to the committee. In particular, evidence from Professor Roach Anleu on the motivations behind a judicial officer's decision to join the bench was pertinent:

The surveys revealed that very few judges or magistrates planned to undertake a judicial career, but for most judges a personal approach by someone in court or government is very important in their decision to become a judge or magistrate.³⁰

3.44 This indicates to the committee that it is important to take a comprehensive approach to judicial appointments to ensure that as many as possible meritorious candidates participate in the process. It appears that to rely solely on one approach - either only advertising or only privately canvassing people - could exclude worthy applicants.

3.45 The ICJ-Victoria has noted that, in its view, both approaches are acceptable:

The system of inviting or permitting people to apply for appointment to judicial office does not adversely impact upon the achievement of independence.³¹

Committee view

3.46 The approach taken by the Attorney-General, which includes a combination of broad consultation and advertising nationally and locally, seems well suited to maximising the range of possible appointees from which the Attorney-General can draw.

3.47 Because of the unique perspective it provides policy makers, the committee takes the opportunity to commend the work of the Judicial Research Project to the government for consideration in developing policy relating to the judiciary.

29 See for example, *Submission 4, Supplementary Submission*, p. 3 and Law Council of Australia, *Submission 11*, p. 4.

30 *Committee Hansard*, 12 June 2009, p. 32.

31 *Submission J2*, p. 4.

Diversification

3.48 The question of the desirability of diversity of the judiciary – that is the extent to which the characteristics of each judge, such as gender and cultural background, are (dis)similar to those of other judges, particularly judges in the same court – elicited strong views. The key issue of concern is whether an approach to selection that encourages diversity is consistent with selection based on merit.

3.49 The Gilbert + Tobin Centre of Public Law contended that:

There is consensus that Australian judges should be appointed based on merit and also that the public should have faith in the independence and impartiality of the judiciary. There is also broad support, in addition to those two objectives, for the diversification of professional and life experience amongst those who sit on the bench.³²

3.50 The argument is that '...when you make judicial appointments, it is not simply a matter of appointing very good people but also a matter of how they fit within the larger body of people who are appointed.'³³ In pointed support of broader diversity of appointments, Professors Roach Anleu and Mack have observed that 'there is no reason to think that merit resides predominantly in the narrow group that has historically dominated the Australia judiciary.'³⁴

3.51 Mr Stephen Gaegler SC, the current Commonwealth Solicitor-General, has observed that 'at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice'. Once these people have been identified, 'wider considerations can, and ought legitimately to be, brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance.'³⁵

3.52 On the other hand, the Association of Australian Magistrates emphasises that merit needs to be the focus of appointments and does not agree that any steps need to be taken to increase diversity as it will evolve as a matter of course:

We have not said a lot about cultural diversity but I think that one of the problems up until now in judicial appointments has been the paucity of diversity of people with the qualifications in the available pool. That is now rapidly changing. We have many people who have the requisite academic qualifications, the requisite experience in practice and the number of years in practice to be able to be selected from a wider pool. That could mean that the pool that is represented for selection is automatically wide enough that

32 *Submission 1*, p. 1.

33 Professor Williams, *Committee Hansard*, 11 June 2009, p. 22.

34 As quoted in Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 299.

35 S Gaegler, *Judicial Appointment* (2008) 30 Sydney Law Review 159.

you will get a fairly fast change in the demographic of who are considered to be the best candidates.³⁶

3.53 Offering a different perspective, the Gilbert + Tobin Centre notes that diversity remains a controversial consideration in the appointment of judges but it is not clear why this is so as 'Diversity is not inconsistent with merit...'.³⁷ The Centre argues cogently in support of Mr Gaegler's view:

There are two specific arguments in favour of recognising diversity as a desirable factor in judicial appointments. First, a judiciary which is broadly representative of the make-up of the Australian community has been found to enhance public confidence in the courts and respect for their decisions. Second, the whole point of multi-member benches is to expose legal arguments to a number of decision-makers able to bring differing perspectives on the issues in question. Homogeneity is certainly not an objective of judicial appointment, and so an appointments process should explicitly recognise that, all other things being equal, candidates for selection may be prioritised according to a variety of other considerations which distinguish meaningfully between them as individuals.³⁸

3.54 The International Commission of Jurists Australia (ICJ-Australia) supports the view that in addition to the individual suitability of a candidate, 'the best judicial appointment [also] turns on how it contributes to the make-up of the judicature in terms of impartiality and a reflection of society'.³⁹ The ICJ-Australia endorsed the view expressed by then High Court Justice Michael McHugh that 'when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution'.⁴⁰ Support for 'the principles of equal opportunity' was also expressed by the Law Society of New South Wales.⁴¹

3.55 In its judicial appointment policy, the Law Council of Australia has recommended for a number of years that the President of Australian Women Lawyers be one of the office holders the Attorney-General of Australia should personally consult before making an appointment; and a desirable personal quality is 'social awareness including gender and cultural awareness'.⁴² This approach was reinforced in evidence to the committee that '...there is a view that diversity is a desirable outcome of the process...while merit and professional attainments are undoubtedly among the

36 Ms Kok, *Committee Hansard*, 12 June 2009, p. 71.

37 *Submission 1*, p. 7.

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

39 *Submission 5*, p. 1.

40 Michael McHugh, *Women Justices for the High Court*, Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004, quoted in the International Commission of Jurists Australia submission to this inquiry, *Submission 5*, p.2.

41 *Submission 7*, p. 1 and Policy Document, p. 1.

42 *Submission 11*, pp 19 and 20.

most powerful factors, there are others that are relevant in creating a judiciary which works for the various societies that it has to serve.⁴³ The Department advised the committee that it is now part of the appointment process that the Attorney-General does consult Australian Women Lawyers.

3.56 In recommending a judicial appointments commission (discussed further below), Evans and Williams propose a model that promotes diversity, but not at the expense of merit. They suggest adopting selection criteria that reflects the approach taken in the *Constitution Reform Act 2005* (UK):

1. Selection must be solely on merit.
2. A person must not be selected unless the selecting body is satisfied that he or she is of good character.
3. In performing its functions, the Commission must have regard to the need to encourage diversity in the range of persons available for selection for appointments.⁴⁴

3.57 The criteria for appointment outlined by the Attorney-General's Department makes no reference to whether diversity is taken into account in the appointment process. It is not known whether this means that it is, or is not, actively considered as part of the selection process. However, the committee notes that a broad range of organisations, including women lawyers, are consulted in the selection process.⁴⁵

Committee view

3.58 The committee has received extensive evidence about the importance of appointment based on merit and strongly supports this approach. Of course, the committee has also received considerable evidence, also discussed above, that appropriately encouraging diversity in judicial appointments is not inconsistent with the principle of merit selection.

3.59 Of the submitters who commented on the relationship between merit and diversity, the only view expressed that an active policy of increasing diversity is not necessary was made by the Association of Australian Magistrates.⁴⁶ Perhaps the association's view is explained by the significant differences in membership between the local courts and the superior courts – the significantly larger numbers of magistrates may allow diversity to occur naturally as part of the existing process.

43 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 25.

44 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 313.

45 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

46 Ms Kok, *Committee Hansard*, 12 June 2009, pp 71 and 72 and *Submission 4, Supplementary Submission*, p 7.

3.60 On balance the committee considers that an approach consistent with the United Kingdom *Constitution Reform Act 2005*, which emphasises merit and promotes diversity, is worthy of consideration.

The High Court process

3.61 The information the Attorney-General's Department provided to the committee about processes for federal judicial appointments notes that candidates for appointment to the High Court '...must meet the relevant qualifications set out in section 7 of the *High Court Act 1979*...'.⁴⁷ Namely, that the candidate has 5 years or more experience as a legal practitioner (s 7(b)) or has been a federal or State or Territory judge (s 7(a)).

3.62 The department explained in relation to High Court appointments that:

The High Court, as the apex of Australia's judicial system, enjoys a different status from the other courts. Expressions of interest are not invited. As the candidates for appointment to the High Court are likely to be serving judges, and known to Government, face-to-face meetings with candidates are not considered appropriate.⁴⁸

3.63 This approach is supported by the Law Council of Australia. The Law Council has detailed policies relating to the process of judicial appointments,⁴⁹ but believes that these should not be applied to appointments to the High Court. In relation to its policy the Law Council explained that:

This Policy applies to the Federal Courts and to all levels of judicial office in that jurisdiction except for judges of the High Court of Australia. The High Court is in a unique position as the ultimate appellate court for Australia, and judicial appointments to the High Court are already subject to a statutory requirement for consultation prior to appointment (section 6 of the *High Court of Australia Act 1979*).⁵⁰

3.64 The Judicial Conference of Australia also points out that '...those who are in the pool from which appointment at the High Court might be considered would not expect to have to self-nominate'.⁵¹

3.65 Despite this support for a different selection process for the High Court, the committee also received evidence of significant concern about this approach. For

47 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 2.

48 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 3.

49 The policy documents were discussed in more detail earlier in the chapter. A copy of them is at Appendix 5 to this report.

50 *Submission 11*, Annexure A: *Law Council of Australia Policy on the Process of Judicial Appointments*, p. 17.

51 Justice McColl, *Committee Hansard*, 11 June 2009, p. 5.

example, Professors Mack and Roach Anleu argued against the Attorney-General's justification for the current process:

Promotion from one judicial office to a position on a higher court has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian legal system. A number of survey respondents expressed this view. A judicial officer seeking promotion may appear to be tempted to decide cases in a way which will please the executive government...

...

Actual practices regarding appointments of judicial officers in Australia suggest that promotion from within the judiciary is more frequent than might be contemplated by the principles of judicial independence articulated above...it is a matter of public record that all current members of the High Court of Australia were previously judges in other courts.⁵²

3.66 In distinguishing the current High Court process from other federal appointments, the Gilbert + Tobin Centre of Public Law observed that the High Court had had limited reform to its appointment process. The Centre criticised this and is of the view that 'excluding the highest court from any enhanced appointment system may be said to risk actively undermining public confidence in that institution and the quality and independence of its members. The arrangements should be uniform amongst all federal courts.'⁵³

3.67 Although it is of concern to the committee that the Commonwealth approach to appointments to its highest court of review can be regarded as 'inconsistent with the principles of judicial independence', consideration of this issue does give rise to the question: what are the alternatives? If appointments to the High Court cannot be made from existing judges, the main alternative is for appointments to be made only from legal practitioners with no judicial experience.

3.68 Acting Chief Justice Murray of the Supreme Court of Western Australia provided some analysis that assisted the committee greatly. His view is that in principle there is no reason why the High Court should be treated differently, but in effect there is little to be gained from pursuing an identical process. As Acting Chief Justice Murray explained:

... I think what needs to be borne in mind is that you are really seeking to search out a candidate of merit and the pool that you are working from is so small. The things that make the candidate a candidate of merit are things that are only ascertainable by knowing about the person and about the person's career history and things of that sort.

52 Flinders University Judicial Research Project, *Submission J4*, p. 7.

53 *Submission 1*, p. 3.

So far as the High Court is concerned...very often they are people who are appointed from other courts where they have had the opportunity or the requirement to display their qualities as a serving judicial officer.⁵⁴

Committee view

3.69 The committee acknowledges the views expressed in favour of an appointments procedure that is consistent for all federal courts and supports the principle that all appointment procedures need to be principled and transparent. Nonetheless, the committee is not persuaded that a model identical to that of the other federal courts is necessary to maintain confidence in judicial appointments to the High Court.

3.70 However, the committee considers that there is scope to increase transparency in the existing process. Although an 'advisory panel' is not considered necessary, it is desirable for the Attorney-General to adopt the other procedures for appointments to federal courts. These should include to advertise vacancies widely, confirm that selection is based on merit and to detail the selection criteria that constitute merit for appointment to the High Court.

3.71 In addition, it is intended that Recommendation 3 above would also apply to appointments to the High Court so that the Attorney-General will make public the number (not the names) of candidates considered for appointment (whether they were nominated by another person, self-nominated or suggested by government).

Recommendation 4

3.72 The committee recommends that the process for appointments to the High Court should be principled and transparent. The committee recommends that the Attorney-General should adopt a process that includes advertising vacancies widely and should confirm that selection is based on merit and should detail the selection criteria that constitute merit for appointment to the High Court.

3.73 The committee notes that sound and transparent selection processes for all levels of appointment (though not necessarily identical processes) is an important factor in maintaining public confidence in the judiciary, but it is one component of an effective independent judicial system that needs to be supported by other features such appropriate judicial complaints handling and termination processes.

Appointments Advisory Commission

3.74 A small number of submitters argued strongly that the establishment of an independent judicial advisory commission (JAC) is desirable. The Gilbert + Tobin Centre of Public Law expressed the view that "Although Australia has been very well-served by its judicial officers, recognition of...' the priorities of appointment

54 *Committee Hansard*, 13 July 2009, pp 2 and 3.

based on merit, the independence and impartiality of the judiciary and support for the diversification of professional and life experience '...has rendered untenable the continuation of pure executive discretion as the means by which judges are appointed.'⁵⁵

3.75 The Centre asserts that the 'significant reforms' to the appointment process introduced by the current Attorney-General occurred 'in apparent recognition of this,'⁵⁶ but that 'reform should not stop here...[and] these new processes need to be secured through creation of a Judicial Appointments Commission (JAC) independent of the Attorney-General's Department.'⁵⁷

3.76 The establishment of a JAC is also supported by the Human Rights Law Resource Centre. The Director of the Centre, Mr Philip Lynch, advised the committee that it is the Centre's recommendation that:

Australia should adopt an independent judicial appointment commission to make recommendations to the Attorney-General regarding suitable candidates for judicial positions.⁵⁸

3.77 The model recommended by the Gilbert + Tobin Centre is advisory only as 'it is desirable that the elected government makes the final decision and is held accountable for its selection by the Parliament.'⁵⁹ The role envisaged by the Centre is to provide the Attorney-General with a short-list of potential appointees and 'the government should retain the power to appoint a person not on a commission short-list. However, where the government does so, it should be required to disclose this in a statement to Parliament.'⁶⁰

3.78 The three principles identified by Professor George Williams, Foundation Director of the Gilbert and Tobin Centre as central to the establishment of a best-practice JAC process are that:

- any decision to appoint a judge should remain solely with the executive;
- more needs to be done to ensure that the process is more transparent; and

55 *Submission 1*, p. 1. Professor George Williams, who is the Anthony Mason Professor of Law at the University of New South Wales, and Foundation Director of the Gilbert + Tobin Centre of Public Law, has also expressed this view elsewhere, including in the Sydney Morning Herald of July 14, 2009 at <http://www.smh.com.au/action/printArticle?id=630830>.

56 *Submission 1*, p. 1.

57 *Submission 1*, p. 2. See also *Committee Hansard*, 11 June 2009, p. 21. This is similar to the view expressed by Mr Schokman and Mr Lynch of the Human Rights Law Reform Centre, *Committee Hansard*, 12 June 2009, p. 98.

58 *Committee Hansard*, 12 June 2009, p. 96.

59 *Submission 1*, p. 2.

60 *Submission 1*, p. 3.

- more needs to be done to improve community confidence that the process is a fair and appropriate one.⁶¹

3.79 Professor Williams also believes that more community involvement in the selection of appointees for judicial positions is warranted and that a JAC is one way 'to build laypeople into the process to a far greater degree than currently occurs' and that:

... non-lawyers should play a leading role in the process of appointment of judges. I think it is too easy for lawyers and judges, generally, to get a bit caught up in a system that is meant to serve the community. It is not meant to be self-serving. An important way of avoiding that is to involve the community directly in the judicial appointments process.⁶²

3.80 Professor Williams points to the United Kingdom JAC as a good example of the international experience showing that this process does work.⁶³

3.81 Simon Evans and John Williams in a 2008 article undertook a comprehensive analysis of the process of judicial appointments in Australia and also proposed a modified version of the system operating in England and Wales.⁶⁴ They identified four key guiding principles for the appointment of judges as follows:

These principles are matters of constitutional significance: appointments should be made solely on the basis of merit, properly understood; an appointments process should ensure judicial independence; an appointments process should ensure equality of opportunity, and hence diversity, in appointments in the interests of a judiciary that reflects the society from which it is drawn; and an appointments process should include appropriate accountability mechanisms.⁶⁵

3.82 The Evans and Williams model does not give rise to constitutional concerns because it proposes a 'recommending body, not an appointing body'.⁶⁶ In summary, the proposed role of any Evans and Williams type JAC would be to:

- define subsidiary selection criteria tailored to the specific needs of each court that give effect to the primary statutory criterion that judicial appointments are made on merit;

61 *Committee Hansard*, 11 June 2009, p. 22.

62 *Committee Hansard*, 11 June 2009, p. 22.

63 *Committee Hansard*, 11 June 2009, p. 23. For background, see the material Appendix 4, p. 1.

64 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008].

65 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 297.

66 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008] p. 304. See also the constitutional discussion at p. 322.

- advertise and conduct outreach activities for any appointment to identify possible candidates;
- receive applications for appointment that address the selection criteria;
- call for references from referees nominated by eligible applicants;
- call for references from the Commission's nominated referees (a published list of relevant office-holders);
- assess evidence of qualifications from all relevant sources of information against the selection criteria (including interviewing shortlisted candidates); and
- recommend three suitably qualified candidates to the Attorney-General for appointment.⁶⁷

3.83 While supporting a JAC, the Gilbert + Tobin Centre express the view that a single national JAC is not feasible.⁶⁸ Evans and Williams also acknowledge the practical constraints arising from Australia's federal structure and take into account that each jurisdiction is likely to prefer to have its own JAC rather than have a national body. They do not see these constraints as rendering the proposal unworkable, but suggest shared expert secretariat resources for smaller states (or any other jurisdictions that wish to be involved).⁶⁹

3.84 The ICJ-Australia offered the observation that it is not possible for the federal Attorney-General and his representatives to have the knowledge of trial advocates and the legal profession generally to the extent that it is possible in a particular state or territory.⁷⁰ They therefore recommend that a function of a judicial commission could include the examination and vetting of persons suitable for appointment to the bench to assist the executive in its appointment process.⁷¹

3.85 In contrast to these arguments, the Law Society of New South Wales does not agree that a body with an official function is needed to assist in the selection process:

67 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], pp 311 and 312.

68 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3.

69 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 326.

70 *Submission 5*, p. 4.

71 International Commission of Jurists, Australia, *Submission 5*, pp. 4 and 5.

The creation of an official selection body is opposed for the reason that many eminently suitable persons would be reluctant to go through a public process of selection.⁷²

3.86 The Law Council of Australia endorses an appointments process that includes a selection panel to develop a shortlist of candidates (and for the Attorney-General to make a selection from the shortlist),⁷³ but has not called for the establishment of any sort of appointments advisory commission.

Committee view

3.87 The committee agrees that the minimum conditions for judicial independence, including judicial tenure and appointment based on merit are essential and these conditions are currently being met. The question is whether or not the committee would suggest meeting these conditions in a way that is different to the current approach.

3.88 In arguing for the establishment of a JAC, Evans and Williams observed that 'Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitute merit'⁷⁴ and that there should be '...a principle-based approach to judicial appointments.'⁷⁵

3.89 The committee agrees with these principles (and the others outlined in favour of the establishment of a JAC), but is not convinced that a JAC is the only way to implement effective and appropriate selection processes. Despite apparently being internationally 'an exception in not having a body of this kind'⁷⁶, the committee is not persuaded that the cost of establishing a separate judicial appointments advisory commission is currently warranted.

3.90 However, the committee is mindful of the circumstances surrounding the appointment of a magistrate in 2007 in Tasmania that demonstrated that even when

72 *Submission 7*, p. 1. While not agreeing that a Judicial Appointments Commission (JAC) is needed in Australia, the committee does not share the view of the Law Society of New South Wales that a public process is a necessary part of selection involving a JAC. Although it is likely that the general selection criteria and process of a JAC would be circulated widely, it is not an inherent requirement of a JAC that *individual* appointments processes need to be undertaken publicly.

73 Mr Staude, *Committee Hansard*, 13 July 2009, p. 10.

74 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 299.

75 Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, Sydney Law Review [Vol 30:295 2008], p. 311.

76 Quoting Professor Williams' view, *Committee Hansard*, 11 June 2009, p. 29.

appropriate policies are in place, processes can be abused.⁷⁷ The establishment of a JAC would make the abuse of process extremely difficult, and it is therefore an issue that deserves to be monitored.

77 See the Parliament of Tasmania, Legislative Council Select Committee interim report on *Public Sector Executive Appointments*, April 2009, accessed at:
<http://www.parliament.tas.gov.au/ctee/Council/Reports/PSE.rep.090402.InterimReport%20Body.ch.008.pdf>

CHAPTER 4

Terms of appointment

4.1 A transparent and principled appointment process is a critical feature of a strong judicial system with the ability to act independently to uphold and promote the rule of law. It is also a necessary feature of a robust judicial framework that the terms of any judicial appointment include provisions that ensure appropriate tenure, protection and remuneration of judges and that the judiciary receives resources sufficient to discharge its functions properly.

4.2 This chapter explores:

- the desirability of a compulsory retirement age;
- the merit of utilising judicial officers on an acting basis;
- whether part-time judicial appointments are appropriate; and
- other aspects about terms of appointment raised with the committee.

Tenure and the age of retirement

4.3 Currently, all federal judicial appointments are for a term that continues until the judicial officer reaches the age of 70. This is a constitutional requirement under section 72 which states in part that '...the maximum age for Justices of any court created by the Parliament is 70 years.' Retirement as a federal judicial officer occurs at this age unless a judge voluntarily resigns before then or is removed under the 'misconduct or incapacity' provision of The Constitution.¹

4.4 In the States and Territories compulsory retirement ages vary from 65 for magistrates and 70 to 75 for judges. Judicial resources in some jurisdictions can be retained for longer using statutory provisions that allow for judges to continue undertaking a judicial function for further periods of time.

4.5 Until 1977 judges of the High Court were appointed for life. The Senate Standing Committee on Constitutional and Legal Affairs reported in October 1976 on the retirement age for Commonwealth judges.² The report recommended that the maximum retiring age for judges of the High Court be set at 70.³

1 See section 72 of the The Constitution.

2 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976.

3 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976, p. 14.

4.6 This recommendation led to the 1977 referendum that saw the carriage of the introduction of a compulsory retiring age for federal judges in section 72 of the Constitution. It was the third most popular constitutional amendment since federation with some 80% of voters in support.⁴

4.7 In concluding that a compulsory retirement age for judges should be established - a change from the approach at that time of being appointed for life - the committee observed that:

In the view of the Committee there are a number of [compelling] reasons for introducing a compulsory retiring age for all federal judges:

- (a) It is necessary to maintain vigorous and dynamic courts, which require the input of new and younger judges who will bring to the bench new ideas and fresh social attitudes...
- (b) The relatively high average age of federal judges does, to some extent, limit the opportunity for able legal practitioners to serve on the bench while at the peak of their professional abilities and before suffering the limitations of declining health.
- (c) In Australia and to a growing degree in comparable countries, there is an acceptance of the need for a compulsory retiring age for judges. In most Australian States and the mainland territories this age is 70 years.
- (d) The introduction of a compulsory retiring age may result in the automatic removal of judges still capable of some years of service, but it will avoid the unfortunate necessity of removing a judge who, by reasons of declining health, ought not to continue in office, but who is unwilling to resign.⁵

4.8 The arguments made in favour of answering the referendum question in the affirmative still have relevance today, and the use of a compulsory retirement age was the subject of discussion with the committee.

Evidence to the committee

4.9 While not specifically arguing against a compulsory retirement age, the Law Council of Australia notes that there are reasons to consider alternative approaches:

The primary argument opposing a mandatory retirement age for justices is its inflexibility, in addition to the difficulty of setting an appropriate age. A judge's effectiveness and ability to keep abreast of new developments in the

4 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976, p. 3.

5 Senate Standing Committee on Constitutional and Legal Affairs, *Parliamentary Paper No. 414/1976*, p. 11.

law is not a function of age. A mandatory retirement age could also potentially be considered a form of age discrimination.⁶

4.10 These are real considerations, but no-one has expressed a view to the committee that they outweigh the arguments in favour of a compulsory retirement age. As Mr Colbran QC, chairman of the National Judicial Issues Working Group, Law Council of Australia observed:

The Law Council accepts that, on balance, the imposition of a mandatory retirement age serves a number of important public policy objectives. On balance, we support a mandatory retiring age. It prevents the situation of a judge who is unable to continue with his or her duties but unwilling to resign. As Justice Gleeson observed, you will find in our submission that it avoids the unfairness and inappropriateness of a judge being required to decide, in his or her own case, whether or not it is appropriate to continue.⁷

4.11 Indeed, the use of a compulsory retirement age remains the accepted approach in all jurisdictions in Australia to determining the maximum term of all permanent judicial appointments. The ICJ-Victoria is of the opinion that 'the term of a judicial appointment should never be fixed other than requiring a compulsory retirement age.'⁸

4.12 During this inquiry, no major concern was raised about either the existence of a compulsory retirement age in the federal judiciary, nor the age at which retirement is set. The general view put to the committee is that a compulsory retirement age is appropriate.⁹ In fact, the Law Council of Australia noted that 'the question of security of tenure until the maximum retirement age appears uncontroversial, as it is a fundamental aspect of the separation of powers doctrine and Australia's constitutional structure, and is an essential underpinning of judicial independence'¹⁰ and that 'anything less than those arrangements has the effect of compromising judicial independence.'¹¹

4.13 As to an appropriate retirement age, divergent views were expressed, but the range of difference was small. No submitters argued that the federal retirement age is too high. However, some submitters and witnesses sought to persuade the committee that the retirement age is too low. Mr Alexander W Street SC, argued that:

6 Law Council of Australia, *Submission 11*, p. 6.

7 *Committee Hansard*, 12 June 2009, p. 17.

8 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

9 For example, see the Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 6, Law Council of Australia, *Submission 11*, pp 5 and 6, and the Human Rights Law Resource Centre, *Submission j1*, p. 31. The committee did receive some evidence to the contrary: see Hon Dr Bob Such MP, *Submission 2*, p. 2.

10 Law Council of Australia, *Submission 11*, p. 5.

11 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

It is now more than 30 years since [the 1977 retirement age referendum] and it is clear that the age of retirement is too young, creates a significant loss of most valuable judicial resources and was an overreaction to the octogenarians serving out life appointments.¹²

4.14 The Gilbert + Tobin Centre's view of establishing in the Constitution a retirement age of 70 years is that in retrospect the age of 70 seems too young. The Centre proposes that the issue is one of 'raising rather than removing' the 70 year limit.¹³ However, despite its view that the retirement age could be increased, the Centre notes that a number of practical considerations apply, including that 'it would be difficult to establish community consensus on what age retirement should be mandated beyond the existing limit' and that even if a referendum to revisit the issue was successful it would only increase the period of judicial service by a few years.¹⁴ The Centre therefore goes on to take a pragmatic approach to the costs and problems associated with implementing this constitutional reform:

However, we submit that alteration of this rule should not be pursued. A reversion to granting federal judges tenure for life is undesirable...Apart from seeking to minimise problems of infirmity and poor capacity, a compulsory retirement age is valuable for ensuring timely renewal of the ranks of the judiciary. This contributes positively to the law's development and the ability of judges to appreciate changes in social mores and technology.¹⁵

4.15 While supporting a fixed retirement age the ICJ-Australia argues that an appropriate retiring age is 72 as 'many judges are fully capable of carrying out functions to more advanced years and there is a danger of loss of valuable experience'.¹⁶ Mr Street and others propose that 75 is an appropriate retirement age.¹⁷

4.16 The Chief Justice of Victoria also supports a compulsory retirement age, and raised practical reasons for considering increasing the retirement age from 70 to a higher limit:

The existence of a compulsory retirement age has been accepted for a number of years as the means for determining the outer limit of the judicial career. What that outer limit should be has been the subject of further consideration in recent times. This is in part a result of broader social trends of increased life expectancy and later retirement. In Victoria it has also been prompted by the experience in the Supreme Court which is facing the loss

12 Mr Alexander Street SC, *Submission 14*, p. 1.

13 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

14 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

15 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

16 International Commission of Jurists, Australia, *Submission 5*, pp 5 and 6.

17 Mr Alexander Street SC, *Submission 14*, p. 1. See also the evidence of Chief Federal Magistrate Pascoe, *Committee Hansard*, 11 June 2009, p. 50.

of a number of experienced judges in a short period of time, posing challenges at an organisational level. When it became clear a number of judges reaching retirement age would happily continue, the Court was prompted to consider whether reinstatement of the 72 age of compulsory retirement would be appropriate given the organisational benefits.¹⁸

4.17 However, some eminent people have expressed support for retaining the present age of retirement. The Hon Michael Kirby AC CMG said late last year that 'change and turnover, fresh ideas and a reflection of the values of different generations, is a vital aspect of a dynamic and open-minded final national court.'¹⁹ Chief Justice Bryant of the Family Court and Chief Federal Magistrate Pascoe of the Federal Magistrates Court endorse this view for federal courts generally and believe that the compulsory maximum retirement age 'should remain as it presently is' under The Constitution.²⁰

4.18 The ICJ-Victoria agrees that notwithstanding that many judicial officers continue to be capable beyond the age of 70,²¹ there is merit in a retirement age of 70 on the basis that 'turnover in judicial office and the introduction of younger judges (albeit at least of the age of 50) is desirable.'²²

4.19 Relative to other statutory retirement ages, the outer limit for judges is at the high end. This is not to imply that judges therefore lack capacity – the point is that many judges may feel ready to retire and engage with their communities in other ways. Evidence from Professors Roach Anleu and Mack in relation to the compulsory retirement age was that:

While the plans of some judicial officers might be affected by abolishing or changing compulsory retirement ages, it appears that, for most in the judiciary, decisions about retirement are more strongly driven by factors such as finance, health, and job satisfaction.²³

4.20 In the project's 2007 survey of the judiciary, apparently only 18% of judges identified statutory age as a factor influencing planned retirement age.²⁴

18 Chief Justice Marilyn Warren of the Supreme Court of Victoria, *Submission j3*, pp 3 and 4.

19 Former Justice Michael Kirby, *Neville Wran – A Lawyer Politician – Reflections on Law Reforms and the High Court of Australia*, Inaugural Neville Wran Lecture, The Parliament of New South Wales, Thursday 13 November 2008, p. 39.

20 Family Court and Federal Magistrates Court, *Submission 8*, p. 7.

21 Justice Lasry, *Committee Hansard*, 12 June 2009, p. 2.

22 International Commission of Jurists Victoria, *Submission J2*, p. 4.

23 Flinders University Judicial Research Project, *Submission J4*, p. 16.

24 Flinders University Judicial Research Project, *Submission J4*, p. 18.

Committee view

4.21 The committee is of the view that there are strong arguments for increasing the compulsory age of retirement to at least 72 and possibly to 75. The concern about losing valuable experienced and effective judicial resources prematurely is an important consideration.

4.22 However, the committee is mindful of the inherent difficulty and cost of achieving constitutional change at a federal level. Evidence from the Judicial Research Project about judges' views on planning their retirement was also very useful, in particular, that the statutory retirement age is only one factor in a judicial officer's decision to retire and often it is not even the most important.²⁵

4.23 As Acting Chief Justice Murray says, it seems that '70 is as good an age as any... The point that I think is important is that it provides a convenient mechanism to end an appointment which is of good behaviour or during good behaviour.'²⁶

4.24 In light of the cost of seeking to alter the Constitution, this is not an issue that the committee believes currently warrants further action. It is possible that with further increases in life expectancy and advances in technology and support the question will again arise. That will be a matter for parliaments in the future, and possibly the not-too-distant future. In determining an appropriate compulsory retirement age, the committee encourages jurisdictions to consider the merit of achieving national consistency.

4.25 While Professor Williams of the Gilbert + Tobin Centre cautions that this is not an issue that should be at the 'forefront' of constitutional reform,²⁷ he has made a very useful suggestion that the committee considers should be adopted when the time comes to amend the compulsory retirement age for federal judges set by section 72 of The Constitution:

I think the flaw in the Constitution is that it fixes 70 as the retirement age. I think a better outcome would have been to say that the retirement age must be fixed by parliament to enable it to change over time. I think there clearly should be a retirement age; it is just that leaving it at 70 will over time become more anomalous. It would be better to have more flexibility there. Of course, any changes to the retirement age should not affect any sitting judges; it should only operate prospectively.²⁸

4.26 If the federal compulsory retirement age is changed (either by directly increasing the age referred to in the Constitution or by constitutionally providing an alternative legislative process for establishing the compulsory retirement age for

25 Flinders University Judicial Research Project, *Submission J4*, p. 18.

26 *Committee Hansard*, 13 July 2009, p. 3.

27 *Committee Hansard*, 11 June 2009, p. 37.

28 *Committee Hansard*, 11 June 2009, p. 37.

judicial officers such as suggested by Professor Williams) the committee agrees that the operation of any amendment should be prospective.

Recommendation 5

4.27 The committee recommends that all jurisdictions set a nationally consistent compulsory retirement age for judicial officers and encourages each jurisdiction to implement it within the next 4 years.

Recommendation 6

4.28 The committee recommends that at the next Commonwealth referendum section 72 of the Constitution should be amended in relation to the compulsory retirement age for judges to provide that federal judicial officers are appointed until an age fixed by Parliament.

Acting appointments

4.29 There may be appropriate ways to use retired or former judges who remain capable and interested in judicial or related work beyond their compulsory retirement age. For example, retired judges can be appointed as royal commissioners, or many states and territories have the ability to appoint acting judges. A question for the committee in relation to federal courts is: are acting appointments inconsistent with the independence of the judiciary, or a practical and appropriate solution to a difficult problem?

4.30 One solution for governments when their courts are faced with resource shortages from time to time is to consider the use of acting appointments. The States and Territories are able to supplement their judicial resources through the use of acting judicial appointments, but the federal courts are currently constrained in this regard. As the Family Court and Federal Magistrates Court explain:

There cannot be an acting appointment to a federal court due to the prohibition in the *Constitution* against the diminution of judicial remuneration during office. It is further noted that changes to enable acting appointments would require alteration to s 72 of the *Constitution*.²⁹

4.31 Most evidence to the committee was that it is inappropriate for judges to be appointed on an acting basis, based primarily on concern that it seriously damages the independence of the judiciary. The ICJ-Victoria has a firm view against the use of acting appointments:

There is simply no question in our opinion that to appoint a judge in an 'acting' capacity either actually, or in perception, compromises that judge's independence particularly where the State appoints judges and is also a regular litigant in the Courts to which an acting judge might be appointed. Cost is not a justification and, indeed, we suspect that if all the evidence

29 Family Court and Federal Magistrates Court, *Submission 8*, p. 8.

were assembled it would be discovered that the actual cost of appointment full-time judges, bearing in mind their workload, is highly cost effective.³⁰

4.32 Another eminent organisation that is strongly opposed to acting appointments is the Law Council of Australia. As the Council explains:

A conflict of interest arises where a judge's continued appointment becomes subject to a decision of the Executive Government, which may either influence or appear to influence the exercise of the judge's public duties and functions. Judicial officers need to be able to make decisions without fear of having their ongoing employment prejudiced by that decision, and must have the confidence of the public that they are in a position to apply the law impartially.³¹

4.33 The Law Council also encouraged governments to limit their use of acting judicial appointments:

The use of acting...judges has traditionally been seen as a measure to temporarily replace permanent judges when they retire or are on extended leave. Relying on short term judicial appointments as a method to overcome chronic court delays is not a viable option...

...Governments should not be tempted to make acting or part-time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.³²

4.34 Others who strongly opposed acting appointments on the basis that they undermine the principle of the independence of the judiciary include the Judicial Conference of Australia, the ICJ-Victoria and the Law Council of Australia.³³

4.35 As noted above, the States and Territories are able to make acting appointments. However, there are significant variations between the approaches in some jurisdictions. The differences have been described as being both 'in the legislation itself and the practical constraints that affect the way in which the legislation is administered.'³⁴ An example of a legislative constraint is limiting the maximum term of appointment. Practical constraints include, for example,

30 International Commission of Jurists, Victoria, *Submission J2*, p. 5.

31 Law Council of Australia, *Submission 11*, p. 7.

32 Law Council of Australia, *Submission 11*, p. 9.

33 For example, see Justice McColl, *Committee Hansard*, 11 June 2009, p. 4, International Commission of Jurists, Victoria, *Submission j2*, p. 5 and Law Council of Australia, *Submission 11*, p. 7.

34 *Additional Information*, Justice Ronald Sackville, letter as chair of the Judicial Conference of Australia to Attorney-General of Victoria dated 1 November 2004, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009, p. 1.

administering the appropriate legislation cautiously such as utilising only retired judges.³⁵

4.36 The Law Council of Australia uses the Victorian model to highlight some of its concerns about the use of acting judicial officers. In Victoria legislation was passed that permits the appointment of legal practitioners as acting judges for 5 years or until attaining the age of 70 years if this is sooner.³⁶ The Law Council's evidence to the committee is that:

...if the Victorian model of acting judges is used as an example, it is likely that the acting judge will only receive remuneration for whatever periods of full-time or session work the Attorney-General may subsequently assign to them. It may be the case that the acting judge will hope that if they can win the Attorney-General's favour they may secure more frequent commissions, eventually leading to permanent tenure.³⁷

4.37 This problem is said to be potentially exacerbated by the fact that in Victoria an acting judge has no pension entitlements, "but if he or she is later appointed as a permanent judge their service as an acting judge can count for pension purposes."³⁸ The Victorian approach also provides added incentive for an acting judge to seek permanent appointment. As Victorian Justice Ronald Sackville has observed:

This means that an acting Judge coming to the end of his or her five year term of appointment has a double incentive to be appointed a Judge of the Court. Appointment will not only mean a secure tenured position, but the Judge will receive credit for five years service as an acting Judge for pension purposes. This amounts to a notional sign-on bonus that could be worth hundreds of thousands of dollars. What if an acting Judge is hearing a case in which the government is a party when a permanent vacancy in the Court is about to be filled? If the government wins and the acting Judge is later appointed as a permanent Judge, will the losing party accept that that two events were unrelated?³⁹

4.38 The committee can appreciate that this can leave a judge and the legal system in an unhappy position because either the judge is influenced by his or her circumstances of employment and does not decide a case independently, or the judge is not influenced by the prevailing situation but may be open to the criticism that the decision was made under the influence of the vacant judicial position.

35 See generally *Additional Information*, Justice Ronald Sackville, letter as chair of the Judicial Conference of Australia to Attorney-General of Victoria dated 1 November 2004, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

36 For example, see section 11, *County Court Act 1958* (Vic), *Appointment of acting judges*.

37 Law Council of Australia, *Submission 11*, p. 8.

38 Law Council of Australia, *Submission 11*, p. 8.

39 Justice Ronald Sackville, *Acting Judges and Judicial Independence*, opinion article published by *The Age*, 28 February 2005, as quoted in Law Council of Australia, *Submission 11*, p. 8.

4.39 There are also arrangements in Western Australia that allow for the appointment of acting judges from the ranks of legal practitioners. Mr John Staude representing the Western Australia Law Society advised that these positions are known as 'commissioners' of the Supreme Court and the District Court in that jurisdiction. He described more fully the process for these appointments:

We do have in Western Australia a system which permits the appointment of commissioners of the Supreme Court and of the District Court. I have in fact served as a commissioner of the District Court- that is in the nature of a temporary appointment, and it might be for a month or two or three. The appointments are made according to the need of the jurisdiction, so the way in which the appointments would come about would generally be that the head of the jurisdiction would notify the Attorney-General of a need to clear a backlog of cases, to provide extra resources to the court for whatever reason – absence of judges on leave or whatever. Traditionally in Western Australia such positions have been filled in the Supreme Court by barristers of the rank of Queen's Counsel or senior counsel, and in the District Court, either by senior counsel or senior juniors.

...The work of the commissioners is limited to civil work. I do not think that restriction is put in place by the legislation but it is a matter of practice. ...I do not think there is any sort of formal opposition expressed on behalf of the society to that system. It has worked for many years. It is regarded as a necessary process to support the court on certain occasions but generally I think both my colleagues would agree with what Justice Murray said about the undesirability of people in practice being called upon to meet that need... it is not difficult to then preside in a contest between your colleagues, but it may give rise to perceptions and it may be perceived as a process in which the traditional protections of judicial offices are not as obviously enforced. So it is probably viewed as a necessary evil and not an ideal means of remedying the problem of having an under-resourced court from time to time.⁴⁰

4.40 In evidence to the committee there was only extremely limited support of acting appointments. While noting that 'temporary appointments interfere with the doctrine of the separation of powers',⁴¹ the Public Interest Advocacy Centre could identify limited circumstances in which temporary judges could be appointed:

...Judges should only be appointed on a temporary or acting basis to deal with particular listing difficulties or a temporary backlog of judicial work. Even then, such appointments should be for a short period, for example six to twelve months. It should be to overcome a temporary difficulty, not to create a large and continuing pool of acting judges from which selections could be made from time to time.⁴²

40 Mr Staude, *Committee Hansard*, 13 July 2009, p. 11.

41 Public Interest Advocacy Group, *Submission 10*, p. 2.

42 Public Interest Advocacy Group, *Submission 10*, p. 3.

Committee view

4.41 The use of acting appointments could raise genuine concerns about the independence and impartiality of the judiciary. In relation to the use of acting appointments a number of submitters referred to the view expressed by Sir Ninian Stephen in 1989 that:

It is fundamental to judicial independence that Judges enjoy security of tenure until they attain retirement age. The reason is obvious. If Judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the Government of the day in order to obtain reappointment for another term.⁴³

4.42 The committee is also mindful of the international standards applicable and the Human Rights Law Resource Centre's injunction in this regard. As Mr Lynch explained:

We consider that any such appointments should be very carefully considered and subject to stringent safeguards which ensure compliance with the obligations and standards required by article 14 of the International Covenant on Civil and Political Rights.⁴⁴

4.43 An outline of the relevant international law obligations is in chapter 2 above. In addition, Article 14 of the *International Covenant on Civil and Political Rights*, an extract from the United National Human Rights Committee, *General Comment No 32* and the United Nations *Basic Principles on the Independence of the Judiciary* at Appendix 3 to this report.

4.44 While noting the practical considerations that play a role in a jurisdiction making acting appointments, the committee is persuaded that acting appointments, by their nature, are inconsistent with the appropriate independence of the judiciary. Consequently, the committee believes that no change should be made to the present constitutional arrangements that prohibit the use of acting federal judicial officers.

4.45 For the purpose of clarity, the committee notes that there is some overlap in the use of terminology in relation to acting appointments – for example in New South Wales judges who would otherwise have had to retire at 72 can be appointed to continue as an 'acting judge' up until the age of 77 and that appointment can be full-time or part-time.⁴⁵ Although a person undertaking this type of appointment is referred to as an 'acting judge', in the committee's view the use of a retired judicial officer is very different from the temporary appointment of a legal practitioner who will return to that role at the end of the judicial appointment.

43 For example, see the Law Council of Australia, *Submission 11*, p. 7.

44 *Committee Hansard*, 12 June 2009, p. 96.

45 Justice McColl, *Committee Hansard*, 11 June 2009, p. 18.

4.46 The committee suggests that to avoid confusion a term other than 'acting judge' be used to refer to additional arrangements for retired or former judges. For example, in Western Australia a retired judge can be appointed as an 'auxiliary judge' for a period of up to a year, with a further option to extend the term if needed and if this is suitable to the court and the judge. As Acting Chief Justice Murray of the Western Australia Supreme Court explained to the committee:

...it gives you the opportunity to keep on-stream the experience of a judge who is regarded as still having a capacity for service at that point but gives you the ability to end the relationship without embarrassment on either side when the use-by date arrives.⁴⁶

Part-time appointment

4.47 Part-time appointments as understood for the purposes of this discussion are fundamentally different from acting appointments because the tenure of the position is the same as for full-time appointments: that is, to the compulsory age of retirement. The difference between them lies only in the pattern of work for part-time judicial officers compared to full-time appointees.

4.48 Part II of the *High Court of Australia Act 1979* (Cth) is seen by some to prevent part-time appointments to the court because it provides that a Justice of the High Court is not capable of accepting or holding any other office of profit within Australia.

4.49 The ICJ-Victoria agrees with this approach and 'is opposed to part-time appointments on the basis that they have a similar consequence of compromising judicial independence.'⁴⁷ The Law Council of Australia also objects to part-time (and acting) appointments and expressed the view that:

Governments should not be tempted to make acting or part time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.⁴⁸

4.50 The assumption (and concern) that appears to underlie these comments is that it is likely that the person undertaking the part-time work would seek to supplement the position with other paid work to fill the person's employment capacity to a full-time equivalent.

4.51 However, this is not necessarily the case, and in fact the committee's understanding accords with submitters who approach this issue primarily on the basis that part-time appointments are likely to be sought by people who only wish to be in paid employment on a part-time basis. This is implicit in the evidence of the Chief Justice of the Supreme Court of Victoria who explained that:

46 *Committee Hansard*, 13 July 2009, p. 2.

47 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

48 Law Council of Australia, *Submission 11*, p. 9.

Flexible work arrangements for judicial officers are also a matter of interest to Victorian Courts. In 2004 provisions were introduced to allow Magistrates to work on a part time basis. Other courts have been considering the means by which more flexible working arrangements could be provided with the aim of:

- retaining experienced judges for longer;
- removing provisions which may act as barriers to aspiring to, or accepting, judicial appointment for sections of the community including women; and
- creating a simple, effective and flexible system of additional judicial resources.

The nature of work in the higher courts requires a different approach to traditional part-time work, but is an option which Victorian Courts consider it is important to pursue.⁴⁹

4.52 The Gilbert + Tobin Centre offers qualified support for part-time appointments at a federal level to only the Federal Magistrates Court and only if anyone undertaking part-time work does not also undertake any other work.⁵⁰ On this as basis part-time appointments 'may be seen as a means of diversifying the pool of potential judges but there are inevitable limitations to such a move.'⁵¹ In particular:

...part-time judicial work would seem a possibility only for lower level courts given the speed with which they may deal with many of the matters which come before them. In some Australian states magistrates are able to work part-time, but it would be difficult to see how at any higher level a part-time judiciary would not impede the progress of litigation and inconvenience the parties.⁵²

4.53 Acting Chief Justice Murray's view is that it is most desirable that any part-time appointment is made from the ranks of retired judges to avoid the difficulties of being in legal practice and having to go back into the profession. He also noted that he would support these appointments only if they were part-time in the sense 'that they would serve for a particular period of months during a year.' His concerns about part-time working arrangements are practical:

I find it very difficult to envisage, but perhaps that is because I come from a relatively small court. I find it very difficult to envisage how the court would be well served by a judicial officer who is working, say, two or three days a week...I just do not see how you could possibly manage it. It has to

49 Chief Justice Warren, Supreme Court of Victoria, *Submission J3*, p. 4.

50 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

51 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

52 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

be for an extended period. While you are on deck, it seems to me that the appointment should be full-time.⁵³

4.54 The Judicial Conference of Australia had a slightly broader view of support for part-time arrangements because it '...is a good option of keeping skilled practitioners unable to undertake full-time judicial duties.'⁵⁴

4.55 This idea is built upon in evidence of Professors Mack and Roach Anleu of the Judicial Research Project, who extend the concept by pointing out that a 'zero tolerance' approach to part-time appointments may undermine the principle of appointment based on merit:

If we go back to the idea of merit—the judiciary stands to lose meritorious applicants if there is not some accommodation or flexibility or recognition that different people have different kinds of needs, obligations and relationships to the workplace.⁵⁵

4.56 However, as the Judicial Conference recognises, for the use of part-time judges to be effective there are of course practical factors that need to be considered:

It would be necessary, however, to devise a system of appointing permanent but part-time judicial officers which does not impose excess burdens on the other judicial officers in the relevant court. The Judicial Conference is aware that the system of part-time magistrates in the New South Wales Local Court appears to work well.⁵⁶

4.57 Arrangements for part-time judges are already in place in some courts in New South Wales. Even in the New South Wales Court of Appeal part-time arrangements have been made for a judge working in an 'auxiliary' capacity. Justice McColl of that court observed in relation to these circumstances: '...It is already happening and a judge working part-time in this capacity was noted as being 'a substantial contributor to the court's work.'⁵⁷

4.58 A related, but somewhat different, proposal is being developed by the Family Court. Of considerable interest to the committee was the suggestion brought to its attention by Chief Justice Bryant to introduce the concept of a *Senior Judge*:

In recent years, the Family Court has proposed that a Judge of the Family Court who has retired after more than ten years of service may be appointed, by means of a new commission, to part-time judicial office in the Family Court as a "Senior Judge" until the age of 70 years. The title

53 *Committee Hansard*, 13 July 2009, p. 3.

54 Justice McColl, *Committee Hansard*, 11 June 2009, p. 4.

55 Professor Roach Anleu, *Committee Hansard*, 12 June 2009, p. 39.

56 Justice McColl, *Committee Hansard*, 11 June 2009, p. 4.

57 *Committee Hansard*, 11 June 2009, p. 18.

"Senior Judge" would reflect the senior status and judicial experience of the Judges provided with the new commission.

The Senior Judges would be assigned up to one third of a normal judicial workload and be paid in proportion. Pay could be either by means of a fixed amount for part-time office, or on a sessional rate for work undertaken, depending on legal advice as to the impact of the Constitution.⁵⁸

4.59 This innovative idea is one that could warrant further exploration. There are, as usual, practical matters to consider such as whether this approach could be established in a way that meets the constitutional requirements. As the Family Court explained:

This proposal has the benefit of enabling suitably qualified Judges to provide flexibility in the management of dockets and be responsive to the needs of the Court in particular registries as those needs arise. The proposal would, however, require examination from a constitutional perspective such as whether or not there is a requirement that judicial office is, by its nature, full-time, and whether or not the proposal would likely offend the constitutional prohibition on diminishing remuneration during office. There is scope for part-time appointments under the Constitution, by virtue of the fact that multiple commissions may be held by a Judge and by the obvious practical reality that each commission cannot be exercised in a full-time capacity.⁵⁹

4.60 In addition to the possible constitutional constraints, it would be unfortunate if implementing this arrangement had the effect of leading to a significant number of judges retiring earlier than they otherwise would have done. However, the evidence of Professors Mack and Roach Anleu (outlined above in relation to the retirement age discussion) that often considerations other than the maximum retirement age prevail in reaching a decision to retire from judicial office indicates that this is an idea that could, overall, result in retaining experienced judicial officers for longer.

4.61 Some jurisdictions already have in place a similar arrangement whereby there is a capacity to renew the appointment of a retired judge, although not necessarily on a part-time basis. For example, as discussed in the 'acting appointments' section above, in Western Australia a retired judge can be appointed for a period of up to a year as an 'auxiliary judge', with a further option to extend the term if needed and if this is suitable to the court and the judge.

4.62 A key difference between these options is that the proposed Family Court model still uses the compulsory retirement age to determine the outer limit of the extra use of a judge. On the other hand, the Western Australian model, though in practice it

58 Family Court and Federal Magistrates Court, *Submission 8*, p. 7.

59 Family Court and Federal Magistrates Court, *Submission 8*, pp 7 and 8. The submission further noted that there is statutory provision for 'appointments to the FMC [to] be made on a part-time basis where that is specified in the commission' and that 'the office of the Chief Federal Magistrate is held on a full-time basis': *Submission 8*, p. 8.

is no doubt appropriately managed and effective, does impinge on the notion of judicial independence to the extent that there could be the perception that a judge is deciding cases in a particular way in order to have his or her 'auxiliary' term extended.

Committee view

4.63 The committee agrees that part-time appointments where a judicial officer supplemented this position with other employment would be wholly inappropriate.

Recommendation 7

4.64 The committee recommends that the *High Court of Australia Act 1969* (Cth) prohibition on federal judges holding another office of profit be retained.

4.65 However, the committee suggests that it is important for a jurisdiction to understand why the use of part-time judges is being considered and to consider the exact nature of the terms of appointment. For example, if judges are appointed:

- with appropriate tenure (i.e. to the compulsory retirement age);
- but part-time arrangements are in place in order to provide more flexible employment circumstances; and
- the judge is not supplementing this role with additional employment

this does not seem to inherently undermine judicial independence. A consideration of importance for any jurisdiction offering this employment arrangement would be appropriately managing the work of the court. This give rise to matters of internal case management, but it does not trigger an issue of principle.

4.66 The committee agrees with the Human Rights Law Resource Centre's perspective on the use of part-time appointments that they should not be established in such a way as to give rise to impartiality and independence concerns, but could be managed in such a way as benefit the judiciary:

This is something which we would support, particularly so far as it may diversify the pool of candidates available for appointment, including, particularly, women. But one must also be mindful of ensuring that the principles of independence and impartiality are strictly maintained. In our view, a judge who is a part-time judge and who maintains a part-time role in the legal profession would raise serious issues.⁶⁰

4.67 Another arrangement where part-time judicial officers could be appropriate is the use of retired or former judges ('auxiliary judges'), particularly to relieve excessive workloads or where the judicial officers involved wished to work part-time and could be accommodated to do so. The Gilbert + Tobin Centre has offered qualified support for part-time arrangements in lower level courts, but is concerned about increased reliance on the use of part-time judges. As Dr Lynch explained in evidence:

60 Mr Lynch, *Committee Hansard*, 12 June 2009, pp 96 and 97.

I think the initial case for use of part-time judges was really as a supplement than as a mainstay of the system, and I think we now may have moved, unfortunately, to the latter. I do not think that is terribly desirable.⁶¹

4.68 The use of 'auxiliary judges' over the age of 70 would require constitutional amendment, but the committee did not examine in detail whether other federal options for part-time employment (such as is described above) are currently limited by constitutional constraints. However, the committee notes Chief Justice Bryant's view that, subject to receiving formal advice from constitutional experts, part-time appointments for people under the age of 70 can be made.⁶²

4.69 The committee considers that the appropriate use of judicial officers with part-time working arrangements will be an issue of increasing importance in attracting and retaining many talented appointees. Therefore, the committee is of the view that a model protocol to guide arrangements for judicial officers to work part-time should be developed. The process should be led by the Attorney-General in consultation with the federal courts and the Judicial Conference of Australia. It should include appropriate safeguards to protect the independence of the judiciary and should encourage the appropriate use of short and long term part-time working arrangements. The protocol should be implemented in all federal courts and presented to SCAG for consideration.

Recommendation 8

4.70 The committee recommends that by 30 June 2010 the Attorney-General develop and implement a protocol that provides guidelines to federal courts for the appropriate use of short and long term part-time working arrangements for judicial officers.

Recommendation 9

4.71 The committee recommends that the Attorney-General present the protocol to the Standing Committee of Attorneys-General for consideration at the first meeting after 30 June 2010.

Other possible arrangements and issues

Continued judicial involvement for 6 months

4.72 An interesting suggestion was made to facilitate a further efficiency of the federal courts by Mr Alexander Street SC. Mr Street made a recommendation for the committee's consideration 'to permit written participation in the delivery of reasons for judgments and written participation in the making of orders on full courts, heard prior [to] reaching the retirement age, within 6 months after reach retirement age'.⁶³ This is

61 *Committee Hansard*, 11 June 2009, p. 36.

62 *Committee Hansard*, 13 June 2009, p. 52.

63 Mr Alexander Street SC, *Submission 14*, p. 1.

somewhat related to suggestions outlined above for the use of 'auxiliary' and 'senior' judges and could be included in any government consideration of the arrangements for appointments. Such an amendment would require constitutional amendment to permit this activity.

Family Law Act 1975 (Cth)

4.73 In broadly considering the terms of this inquiry and improvements to Australia's judicial system, the Family Court saw benefit in the *Family Law Act 1975* being streamlined on the basis that 'it is a voluminous statute that is difficult to navigate, particularly for people without legal training.'⁶⁴ One suggestion made to achieve this is to place the provisions concerning the establishment of the Family Court and its powers and functions into a separate act.⁶⁵

4.74 Although this matter is somewhat tangential to the main areas of inquiry, the committee commends this suggestion to government for consideration.

A brief comment about remuneration, resources and a national approach

4.75 Other arrangements mentioned in this report that relate to terms of appointment include judicial exchange. This is discussed in more detail in the following chapter relating to the interface between the federal and state judicial systems. However, the committee does note that a move to a national judiciary could provide an opportunity to strengthen the independence of the judiciary in some jurisdictions if the federal model which vests a court's administrative decision making power in the role of its chief judicial officer is adopted nationally,⁶⁶ and this has implications for the terms of judicial appointments. In fact, all of the matters discussed in this chapter could be standardised by the development of a national judiciary, or in the interim, by the development of a national approach to these issues. As the Chief Justice of the Supreme Court of Victoria noted:

A national approach to issues of judicial terms of appointment, retirement and conditions is a matter which the Supreme Court has pursued for some time. The current discrepancies between jurisdictions are unwarranted and inconsistent with the trend towards greater integration of Australia's legal system.⁶⁷

4.76 The importance of remuneration as one aspect of securing the independence of the judiciary was highlighted in this inquiry by the Public Interest Advocacy Centre, which said:

64 Family Court and Federal Magistrates Court, *Submission 8*, p. 6.

65 Family Court and Federal Magistrates Court, *Submission 8*, p. 6.

66 The issue of concern about models where fiscal responsibility is split between a court and an executive government department was raised by the Chief Justice of the Supreme Court of Victoria, *Submission J3*, p. 2.

67 Chief Justice of the Supreme Court of Victoria, *Submission J3*, p. 3.

The appointment of judges for life or until a fixed retirement age, and with guarantees of their pay and pension entitlements, is central to the independence of the judiciary and both the reality and appearance of impartiality in adjudication.⁶⁸

4.77 Remuneration for Commonwealth judges is expressly protected from reduction by constitutional or legislative provisions. Although in some cases it would be technically possible that these could be amended or repealed, in the committee's view this is unlikely and not presently a cause for concern. The committee notes that in Australia the federal institutional independence of the judiciary is provided for in Chapter III of The Constitution. As the ICJ-Victoria explains:

Funding of the High Court and courts established pursuant to Chapter III is provided for in s 81 of the Constitution:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution. (emphasis added)

The federal courts, including the High Court, fall within the words "charges and liabilities imposed by this Constitution" found in s 81 of the Constitution. The federal courts are a charge and a liability imposed by the Constitution.⁶⁹

4.78 The Law Council of Australia has also pointed to anomalies between the remuneration of judges in different jurisdictions as an issue of concern.⁷⁰ This can lead to forum shopping for judges to ensure that they retire in a way that maximises their superannuation and pensions. The Law Council endorses the view of Blow J of the Supreme Court of Tasmania that 'Judicial independence will not be promoted if a judge needs to have any eye on his or her next career move.'⁷¹

68 Public Interest Advocacy Group, *Submission 10*, p. 2.

69 International Commission of Jurists, Victoria, *Submission J2*, pp 3 and 4.

70 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 29.

71 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 29.

CHAPTER 5

Jurisdictional issues – the interface between the federal and state judicial systems

What are the issues?

5.1 This part of the terms of reference for the inquiry gave rise in submissions to the discussion of two main topics, which have overlapping themes:

- is a national judicial system desirable? If so, what are the practical and constitutional impediments? Alternatively, is an improved system of vertical and horizontal judicial exchange feasible?
- is it possible, and desirable, to establish a constitutional arrangement for the horizontal and vertical transfer of cases (overcoming the constitutional difficulties previously identified with the cross vesting of cases)?

5.2 In this chapter, these issues are discussed in detail, as are some additional issues raised with the committee.

National judiciary

5.3 A number of submitters identified the topic of a national judicial framework as being a key item relating to the interface between the federal and state judicial systems. As Mr Glen McGowan, Chairman of the International Commission of Jurists, Victoria, explained, there are a number of reasons it could be useful, but there is a caveat about the practical challenges that would be encountered:

We would be spared jurisdictional issues in crime and contract, change of venue applications—all sorts of problems are solved. But how you do it in our complicated federal system is going to be difficult.¹

5.4 The Standing Committee of Attorneys-General (SCAG) has undertaken some work relating to a national judiciary. The objectives of a national judicial framework identified by SCAG are to:

- enhance the administration of law and justice at a national level;
- facilitate nationally consistent standards of judicial decision-making and efficiency;
- provide opportunities for career enhancement for individual judicial officers; and
- promote a more flexible, responsive and engaged judiciary.

1 *Committee Hansard*, 12 June 2009, p. 12.

5.5 The existing legislation limits the scope to implement a national judiciary because State and Territory judges are prohibited by The Constitution from acting in a federal capacity. As the Federal Court has observed, 'there are many instances of Federal Court judges holding commissions as members of the Supreme Courts of the Territories and, occasionally, as acting judges of State courts', but that a reciprocal arrangement cannot happen under present constitutional arrangements.²

5.6 The ICJ-Victoria expressed the view that 'a national judiciary is desirable'.³ Indeed, the Attorney-General's Department has advised the committee that at its July 2008 meeting SCAG 'agreed to establish a working group to examine the feasibility of establishing a national judiciary'.⁴ The most recent SCAG activity in this area was described by the Attorney-General's Department:

In August 2009, the SCAG working group put a proposal to SCAG that it determine the feasibility of implementing a national judicial framework in three phases: Phase 1 – a national judicial complaints system and a judicial exchange program (being progressed separately by a SCAG working group); Phases 2 and 3 – possible development of common federal, State and Territory legislation relating to the pre-requisites for judicial appointment, tenure and retirement ages and development of more uniform judicial remuneration structures, and judicial remuneration packages and terms and conditions of office.

The judicial exchange and national complaints scheme currently being progressed by SCAG working groups would form part of the framework.

SCAG has referred the national judicial framework item to the National Justice CEOs (NJCEOs) Group to determine the feasibility of progressing proposals in Phases 2 and 3.⁵

5.7 The Department has noted that 'The issue of removal from office is not being considered as part of the national judicial framework project'.⁶ The national complaints project will be discussed further later in this report.

5.8 The development of a national judicial structure is not necessarily the same as the development of a national court structure. As the Law Council of Australia explained:

The development of a national court structure would not be possible without significant constitutional reform. However, the development of a national judicial framework would potentially be more achievable.⁷

2 Registrar and Chief Executive Officer, Federal Court of Australia, *Submission 3*, p. 2.

3 International Commission of Jurists, Victoria, *Submission J2*, p. 8.

4 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

5 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

6 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

7 Law Council of Australia, *Submission 11*, p. 9.

5.9 In relation to the structure and purpose of a national judiciary, the Law Council has given the matter detailed consideration and has identified a number of important aspects requiring further thought. For example, will a more widespread scheme of judicial exchange 'undermine the specialist jurisdiction of Federal courts and State courts'?⁸ The Law Council believes that 'judicial exchange, unless done in a way that is mindful of the relevant expertise of a court, has the potential to undermine confidence in the specialist expertise of a Court.'⁹

5.10 The Law Council also highlights that it is important for any formal judicial exchange program 'to demonstrate that any benefits to litigants are not merely illusory'.¹⁰ Other aspects of concern raised by the Law Council are that:

A general comment is that it is not clear what 'greater consistency and uniformity in the provision of judicial services' is meant to mean – or that such consistency is necessarily desirable as an end in itself. Different kinds of cases merit using different approaches.

The realisable benefits of the proposal with regard to these broader objectives of enhancing the administration of law and justice may be seen as uncertain without elaboration of how the scheme would work.

We agree that there is merit in exposing judges to different types of case management systems...

Although it is contended that judicial exchange would have the potential for dealing with resourcing issues, careful consideration will need to be given to how exchanges will be funded, along with other practical issues such as the arrangements for determining when an exchange may be appropriate and who is selected.¹¹

5.11 Nonetheless, the Law Council expressed the view that there can be real benefits in terms of an education process for the judges themselves.¹²

5.12 The Judicial Conference of Australia is in favour of horizontal and vertical judicial exchange.¹³ Justice McColl articulated the benefits for the committee:

Just dealing with the substantive legal position, one's experience is always enhanced by the infusion of ideas from other jurisdictions, and so just the

8 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

9 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

10 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

11 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, pp 25 and 26.

12 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 22.

13 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

fact of sitting on various different courts would bring a benefit to the public in a form of indirect legal education. For the courts, the obvious advantage to which I referred earlier is the immediate filling of holes when there is a shortage of judges and the like and, if there was an objective of ultimately having a national judiciary that would work towards that object as well, providing a testing ground for that ultimate concept.¹⁴

5.13 A Head of Jurisdiction model protocol for judicial exchange was provided to the committee by Justice McColl, who noted that it was developed 'with a view to providing a framework for arrangements to be made for the short term exchange of judges between those Courts.'¹⁵ The model developed outlines detailed objectives of judicial exchange (such as to promote best practice and the effective allocation of judicial resources) with the exchange to take place only with the agreement of the Attorney-General of the relevant jurisdictions and head of jurisdiction of the courts involved. The protocol also has some provisions dealing with costs, duration and administrative arrangements.¹⁶

5.14 The model protocol is a useful starting point for the further work needed to develop a national judiciary or a national approach to judicial exchange. Another contribution to this area is a detailed paper delivered in 2005 by the current Chief Justice of the High Court titled *Judicial Exchange – Debalkanising the Court* when he was a judge of the Federal Court of Australia.¹⁷ The purpose of the paper was to:

...propose the development of a comprehensive system of horizontal and vertical judicial exchanges throughout Australia with a view to advancing:

1. Individual judicial performance.
2. The performance of the courts as institutions.
3. Allocation of national judicial resources to areas of local need including the need for specific expertise.

14 *Committee Hansard*, 11 June 2009, p.14.

15 The model protocol was raised with the committee and tabled by Justice McColl, see *Committee Hansard*, 11 June 2009, p. 4 and following. Justice McColl explained that the model protocol 'was developed following the delivery of a paper to the 2005 Judicial Conference annual conference on judicial exchange by Justice Robert French, then a judge of the Federal Court of Australia. The model was approved by the Judicial Conference and the Council of Chief Justices. I understand it was distributed to the members of the Standing Committee of Attorneys-General in May 2009 and some but not all states and territories have approved it. It is still a current matter with the standing committee.' The object of the protocol as quoted in the body of this report is outlined at Clause 1, *Model Protocol between heads of Jurisdiction for Short Term Judicial Exchange*, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

16 See generally, *Model Protocol between heads of Jurisdiction for Short Term Judicial Exchange*, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

17 Justice French, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005.

4. The attractiveness of judicial appointments in all jurisdictions.
5. Consistent Australia-wide approaches to the administration of justice while maintaining healthy institutional pluralism.
6. National collegiality between Australian judges.¹⁸

5.15 The paper extensively examines the historical context and constitutional framework and develops options for effective judicial exchange, including considerations for horizontal and vertical exchange programs. Importantly, the author's view is that 'exchange can be done for the most part administratively although statutory amendments may facilitate it,'¹⁹ though constitutional amendment will be needed if exchanges to the Federal Court or Family Court are contemplated with judges from other jurisdictions.²⁰

5.16 Challenges are inherent in a project of this complexity. Even the preliminary step of increased and formalised vertical and horizontal judicial exchange is not straightforward. As Justice McColl pointed out:

... it may be possible for federal judges to sit on state courts but, as I say, not vice versa and that would have to be addressed...It does require legislation in each state and territory...to enable judges from other jurisdictions to sit in other states and obviously follow up on administrative arrangements.²¹

5.17 In addition to the constitutional reform needed for state judges to work in the federal jurisdiction, there are other complications. As the ICJ-Victoria commented:

... such a step would not be straightforward. The history of each of the Australian States has resulted in the development of six or more similar but separate systems. In some cases those systems have been tailored to cope with the particular needs or requirements of particular jurisdictions. Ultimately, however, the ICJ supports a national judicial system and supports a trend in that direction.²²

5.18 And as a further cautionary note the ICJ-Victoria added:

...the principle of separation of legislative, executive and judicial powers reflected in the Australian Constitution has not been taken to apply with the same strictness at the State level.²³

18 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, pp 3 and 4.

19 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 5.

20 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 26.

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

22 International Commission of Jurists, Victoria, *Submission J2*, p. 8.

23 International Commission of Jurists, Victoria, *Submission J2*, p.8.

Committee view

5.19 The committee notes that even support for the development of a national judicial framework (as opposed to the even more vexing establishment of a national court structure) is constrained by the likelihood of it facing significant challenges: the assessment that a national framework is 'potentially more achievable' than a national court structure demonstrates little confidence in its speedy development. The committee is cautious about what can be achieved through a national judiciary. Although not as pessimistic as the Law Council, the committee agrees with the council that it is important to ensure that:

- in any scheme advantages of the approach need to be practically directed to material and worthwhile changes to the way that justice is administered, as well as delivering benefits to judges;
- the practical issues of a judicial exchange scheme will need to be very carefully considered to ensure that any system is effective and efficient; and
- while there are potential benefits to litigants and to the administration of justice 'arising from a carefully designed protocol for judicial exchange the dangers of weakening the system and undermining confidence in the judiciary are real.'²⁴

5.20 The Law Council suggests this process should 'start slowly and at appellate level, with agreement between particular courts to ensure that visiting judges are likely to be able to contribute to cross-fertilisation.'²⁵

5.21 Despite the challenges, the committee view is informed by (now) Chief Justice French's view that:

In my opinion a judicial exchange system has much to offer both the judiciary and the Australian community. Formulating, promoting and implementing it will be a significant task. It is, however, a necessary aspect of the maturing of the Australian judiciary which is in itself an important element of our nation building.²⁶

5.22 Therefore the committee supports the Attorney-General's Department and SCAG consideration of progressing arrangements for improved judicial exchange and, eventually, the establishment of a national judiciary.

24 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 30.

25 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 30.

26 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 31.

Cross-vesting

5.23 Another aspect of the interface between the federal and state judicial systems that was the subject of comment to the committee was the federal-state cooperative arrangements that were rendered impossible by the High Court's 1999 decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. That decision held that The Constitution establishes that disputes arising under State law could not be determined in the Federal Court, but can only be determined in the separate courts of each State. This meant that aspects of schemes such as the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) were unconstitutional. As described by Justice McColl of the Judicial Conference of Australia:

the real, practical effect of the cross-vesting system was to facilitate the ease of transfer of cases both horizontally and vertically. Unfortunately, there were constitutional obstacles identified in *Wakim* which prevented that, at least insofar as cross-vesting matters from state to federal courts was concerned.²⁷

5.24 Therefore, the result of the *Wakim* case is 'that except in an incidental fashion where Federal courts exercise accrued jurisdiction, it is not possible for state jurisdiction to be vested in federal courts.'²⁸

5.25 As has been well documented elsewhere, the High Court decision the following year of *R v Hughes* (2000) 202 CLR 535 was a further set-back for cooperative Commonwealth-State relations: it meant that a national enforcement agency might only be able to enforce an offence where the offence could have been legislated independently by the Commonwealth under one of its constitutional heads of power. As the Gilbert + Tobin Centre noted:

Of course, if the Commonwealth already had the power to enact the scheme there would not have been the need for a cooperative arrangement underpinning the [law] in the first place.

5.26 These issues have a link to the idea of a national judicial framework to the extent that it would complement an arrangement where judges could move from jurisdiction to jurisdiction. As the Law Council noted:

The goals of judicial integration and a single court system in Australia have been debated extensively over the years. In the absence of constitutional amendment, these were sought to be effected by the cross-vesting scheme, but this effectively collapsed in 1999. The full potential of judicial exchange would be best served if it was able to be married to effective jurisdictional exchange.²⁹

27 *Committee Hansard*, 11 June 2009, p. 12.

28 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 24.

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

5.27 Direct solutions to these difficulties are limited. The options apparent to the Gilbert + Tobin Centre are either a change of approach by the High Court or removing the flaw in the Constitution that prohibits the Federal Court from resolving disputes under state law.³⁰ The Centre notes that in technical terms the amendment would be straightforward and would not need to grant or transfer power to the Commonwealth: it would simply entrench the legal propositions that (1) the States may consent to federal courts determining matters arising under their law; and (2) the States may consent to federal agencies administering their law.³¹

5.28 Not everyone is of the view that there is a problem that needs solving. For the States, the issues are more limited, or non-existent. For example, Chief Justice Warren of the Supreme Court of Victoria does not identify any concerns, and notes that 'Australia is fortunate to have a system in which federal jurisdiction is vested in State courts avoiding the difficulties experienced in federations with entirely separate State and Federal jurisdictions and court systems.'³²

5.29 Particularly in relation to criminal matters there is a view that the current system in which the state Supreme and District Courts have the capacity to exercise the jurisdiction of the Commonwealth in criminal matters operates effectively. As Acting Chief Justice Murray of the Supreme Court of Western Australia observed:

I cannot see why one would want to depart from that system and create a separate criminal jurisdiction within, presumably, the Federal Court to run in parallel with the handling of federal criminal matters by state courts.

5.30 While noting that amendment to The Constitution, which requires a referendum, is notoriously costly and difficult the issue of 'cross-vesting' remains a matter of significant concern to some. For example, the 1988 Constitutional Commission recommended amending the Constitution and more recently the Business Council of Australia listed, in November 2006, as one of its official 'action points':

ACTION 8 The Commonwealth and state governments should work together to initiate and support an amendment to the Constitution to include an express provision that the states may choose to allow Commonwealth courts to determine matters under state laws and to allow Commonwealth agencies to administer state laws.³³

5.31 The Gilbert + Tobin Centre argues that despite the costs associated with constitutional amendment, it is unsatisfactory for The Constitution to remain outdated in this way:

On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure

30 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

31 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

32 Chief Justice Supreme Court of Victoria, *Submission J3*, p. 4.

33 As quoted in Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 10.

on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes because cooperative schemes based upon a referral of power are not politically achievable.³⁴

5.32 The Attorney-General's Department has advised the committee that it '...has given careful consideration to the High Court's decision in *Re Wakim; ex parte McNally* (1999) 198 CLR 511. There is no proposal to amend the Constitution.'³⁵

Committee view

5.33 Despite the fact that there continues to be some grumbling about the failure of the cross-vesting and similar legislation, the committee is not persuaded that this is an issue that should be at the forefront of constitutional reform. The committee agrees that the arrangements are not optimal, but is of the view that it is incumbent upon those who are significantly adversely affected by the impact of the *Re Wakim* and *R v Hughes* decisions to fully articulate the case for reform.

Jurisdictional overlap

5.34 The Federal Court has noted that the jurisdictional overlap provides a choice between federal and state judicial systems, but that there is a degree of inconsistency. For example, to ensure the consistency of jurisprudence in intellectual property matters there is an appeal from the Supreme Courts of the states to the full Federal Court. However, this system is not applied in all areas of the law. The Federal Court suggests that:

It might be thought appropriate, on the basis of developing a consistent rational and principled approach to the question of conferring Commonwealth jurisdiction on Commonwealth and/or State and Territory courts that, the similar approach be taken in other federal areas, such as admiralty.³⁶

5.35 The Family Court also highlights the need for national uniformity and consistency in de facto property matters. As the court explains:

Changes to the *Family Law Act 1975* (Cth) in this area are a result of referrals from the majority of the States to the Commonwealth of power to legislate in this area of the law. The Family Law Courts only have jurisdiction over de facto property matters in participating jurisdictions, being all States and Territories except for South Australia and Western Australia – the only two States not to refer their power in this area.

34 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

35 *Additional Information*, Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

36 Registrar and Chief Executive, Federal Court of Australia, *Submission 3*, p. 1.

As a consequence of non-referral, persons in a de facto relationship who are ordinarily resident in South Australia will not be able to apply to the Family Law Courts for relief. Western Australia, having its own Family Court with federal jurisdiction, has jurisdiction over de facto property matters. However, the Family Court of Western Australia cannot make a superannuation splitting order in these matters, and that is a significant problem. These examples demonstrate how de facto couples in both jurisdictions may be at a disadvantage by virtue of the failure to refer power.³⁷

5.36 A similar concern also relates to another area of the jurisdictional interface between the federal and state judicial systems in family law cases. The constitutional division of responsibilities between the Commonwealth and the States are said to:

...have served to inhibit the ability of the Family Law Courts to deal effectively with some matters such as child welfare and child protection in an appropriately holistic way. Jurisdictional issues in these areas are not new or groundbreaking but create inefficiencies for litigants, the Courts, relevant government agencies, taxpayers and the public at large. Further, the inability to resolve such jurisdictional issues serves only to generate hostility towards organisations like the Family Law Courts, which, in turn has far reaching consequences for an accessible justice system. These issues require serious consideration by appropriate bodies such as the Council of Australian Governments and the Standing Committee of Attorneys-General.³⁸

5.37 The Family Court has made a number of suggestions about how this can be improved, and recognises that 'as child protection is a traditional legislative area of the States, it is acknowledged that there would be constitutional impediments to be overcome in order for any additional powers regarding child protection to be conferred on the Family Law Courts.'³⁹

Extent of the Federal Court jurisdiction

5.38 The Federal Court has also brought to the committee's attention an issue in relation to the breadth of its jurisdiction. The court explains that section 39B of the *Judiciary Act 1903* confers much, but not all, of the jurisdiction in sections 75 and 76 of the Constitution.⁴⁰ The court is seeking 'a clear and comprehensive conferral' such as in section 39(2) of the *Judiciary Act* which gives State courts jurisdiction over matters listed in sections 75 and 76. In the court's view this approach:

...would make the jurisdictional foundation of the Court clear and coherent. It would make the civil jurisdiction of the Court fully coordinate with the

37 Family Court and Federal Magistrates Court, *Submission 8*, p. 12.

38 Family Court and Federal Magistrates Court, *Submission 8*, p. 9.

39 Family Court and Federal Magistrates Court, *Submission 8*, p. 9.

40 Registrar and Chief Executive officer, Federal Court of Australia, *Submission 3*, p. 2.

federal civil jurisdiction exercisable by the State and Territory courts under ss 75 and 76 of the Constitution. It would remove the anomalous situation that currently exists whereby the Federal Court has less federal civil jurisdiction than that of the State and Territory courts.⁴¹

5.39 The committee is concerned about the issues raised and encourages the government to review them as soon as possible.

41 Family Court and Federal Magistrates Court, *Submission 3*, p. 2. Section 75 of The Constitution gives the High Court original jurisdiction in all matters:

- (i) Arising under any treaty;
- (ii) Affecting consuls or other representatives of other countries;
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) Between States, or between residents of different States, or between a State and a resident of another State;
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 76 of the Constitution provides that, 'The Parliament may make laws conferring original jurisdiction on the High Court in any matter-

- (i) Arising under this Constitution, or involving its interpretation;
- (ii) Arising under any laws made by the Parliament;
- (iii) Of Admiralty and maritime jurisdiction;
- (iv) Relating to the same subject-matter claimed under the laws of different States.

Section 39B of the *Judiciary Act 1903* (Cth) is reproduced at Appendix 7 to this report.

CHAPTER 6

Judicial Complaints Handling

6.1 The terms of reference for the inquiry include consideration of judicial complaint handling system and the method of termination of judicial appointment. Arrangements for judicial complaint handling are of particular importance to the committee and also for a number of submitters.

6.2 Aside from compulsory retirement, which is discussed in chapter 3, the only method of termination is for a judge to be removed on the statutory grounds of misconduct or incapacity. (It is, of course, always open to a judicial officer to voluntarily resign or retire from his or her judicial position at any time.)

6.3 This chapter commences discussion of the termination of judicial appointments arising from a complaint about judicial conduct. This chapter deals with:

- some basic principles underpinning appropriate termination;
- an outline of the current arrangements for judicial complaint handling; and
- a critique of their adequacy.

Termination

Introduction

6.4 Fair and effective complaints handling is a critical component of a judicial system that is both respected and just, and seen to be so. To assess whether a model is adequate, it is relevant for the committee to consider questions such as: does the complaints handling model reflect the importance of judicial independence? And is this also balanced by the ability to ensure that behaviour ranging from undesirable to unacceptable can be dealt with appropriately?

6.5 The importance of a comprehensive judicial system was concisely explained by the Flinders Judicial Research Project:

Guarantee of judicial tenure during good behaviour, with removal requiring executive and legislative action, is the core protection for security of tenure, which underpins judicial independence and impartiality. Methods of termination and handling of complaints each raise issues of security of tenure.¹

6.6 Some key principles that should underpin arrangements for termination were articulated to the committee by the ICJ-Victoria which noted that:

1 Flinders University Judicial Research Project, *Submission J4*, p. 9.

...judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches of government. Removal of judges from office must be limited to fair and transparent proceedings for serious misconduct within judicial office, criminal offence, or such incapacity that renders a judge unable to discharge his or her functions. The system prevalent throughout Australia of removal being made by the Governor-General or the Governor following an address of parliament should continue. No lesser system is appropriate; nor could it guarantee the same independence from political interference which the Australian judiciary presently enjoys.²

6.7 The committee agrees with the ICJ-Victoria that the severe step of revoking a judicial appointment should follow the requirements described and should be limited to very serious misconduct or incapacity. This is consistent with the current federal arrangements. However, this system does not establish a procedure for determining when removal is justified, nor does it address what should occur when judicial conduct (both inside and outside court) is less serious, but still undesirable.

Current statutory arrangements

6.8 There are two grounds on which federal judges can be removed for inappropriate behaviour: proved misconduct or incapacity. Relevantly, section 72 of the Australian Constitution provides that:

The Justices of the High Court and of the other courts created by the Parliament – (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

6.9 The Gilbert + Tobin Centre has observed in relation to section 72 that:

...while s 72 has secured the integrity of the federal judiciary, its apparent simplicity is nevertheless troubling. Parliament is able to remove a judge only for 'proved misbehaviour or incapacity'. The most ambiguous word in that phrase is 'proved' which clearly suggests both a standard and a process. But on these the Constitution is unhelpfully silent.³

6.10 There is no settled process for the application of section 72. A current Member of Parliament, the Hon Duncan Kerr SC MP, has articulated the need for reform in this area for many years. His concerns include that a clear mechanism needs to be in place for the operation of s 72 before it is needed otherwise:

...any ad hoc procedure put in place after a specific allegation of judicial misconduct or incapacity has been brought to light can, and almost certainly

2 International Commission of Jurists, Victoria, *Submission J2*, p.3.

3 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3.

will, be criticised as lacking at least some of the institutional attributes appropriate for a fair hearing and respect for the rule of law.⁴

6.11 In Victoria, Part IIIAA of the *Constitution Act 1975* sets out a process for the independent investigation of allegations of misbehaviour or incapacity and the procedure for removal. The Chief Justice of Victoria's view of this arrangement is that, 'While the test for removal remains consistent with other Australian jurisdictions, the procedure provides transparency and certainty should there be a need to invoke it, rather than relying on an ad hoc arrangement.'⁵

6.12 The Gilbert + Tobin Centre has undertaken helpful analysis of some of the problems presented by the formulation of s 72 in relation to 'incapacity'. It is worth setting out the Centre's consideration:

Greater attention should also be given to the particular problems of proving 'incapacity' which has traditionally been obscured by a focus on the controversial ground of 'misbehaviour'. This is odd since uncertainties over standards, rights and procedures must be even greater in a case of incapacity given that the criminal justice process would not provide a suitably analogous model for resolution of the problem. Additionally, with over 150 members of the federal judiciary, it seems that physical or mental impairment is far more likely to arise than inappropriate behaviour. In light of recent incidents involving State judges, the incidence of mental or psychological incapacity, far less immediately detectable than a physical impairment and yet likely to be a much greater impediment to fulfilment of judicial duties, demands particular attention and care.

At present it appears there are only two alternatives when a member of the federal judiciary becomes incapacitated by mental illness. There is the constitutional response – removal by both houses – which is likely to encompass some kind of ad hoc investigatory body attended by many of the doubts which Mr Kerr has highlighted. Or there is the possibility of an informal approach made by the individual's colleagues.

We submit that the Committee should closely examine the approach to incapacity enabled by the powers and procedures of the Judicial Commission of New South Wales.⁶

6.13 The problems associated with the investigation of incapacity issues are similar to those affecting the ability to respond to inappropriate behaviour by judges. The section 72 problem emphasised by the Hon Duncan Kerr MP applies both to misconduct and incapacity issues. In addition, there is neither a process nor official judicial authority to deal with 'misconduct' or 'incapacity' if the conduct is undesirable

4 The Hon Duncan Kerr SC MP, *The removal of federal justices: qui custodio custodis?*, 2005 Australian Institute of Administrative Law, Administrative Law Forum, Canberra, 30 June 2005, p. 9.

5 Chief Justice of the Supreme Court of Victoria, *Submission J3*, p.3.

6 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 4.

but not serious enough to form the basis for removal. In these cases the only option is, as discussed above, an informal approach made by the individual's colleagues, usually the head of the jurisdiction.

Current approaches to complaint handling

6.14 The Federal Court, Family Court and Federal Magistrates Court have all adopted similar complaints handling protocols, which were mentioned in chapter 2.⁷ It has been noted that, 'All the federal complaints procedures are slightly different in their wording, but indicate that the complaint will be dealt with by the chief judge of each court.'⁸

6.15 These have similarities with the protocols adopted in the states and territories, which 'come originally from a draft approved by the Council of Chief Justices of Australia and New Zealand.'⁹ However, the grounds upon which judges of inferior courts and magistrates may be removed from office can be broader than those for other judges. Grounds vary from jurisdiction to jurisdiction, and examples include that a magistrate can be removed 'following a Supreme Court determination that "proper cause" exists.'¹⁰

6.16 For the purpose of this discussion of federal arrangements, the committee considered in detail the Family Court complaint handling process. The Family Court judicial complaints handling policy is readily available on the Family Court website or upon request to individuals. The Family Court detailed its approach to complaint handling in its submission to the committee. As this detail is of particular interest to the committee in considering the adequacy of judicial complaint handling it has been repeated in full in the box below.¹¹

Family Court Complaint Handling Protocol

6.17 The Family Court takes seriously complaints about judicial officers or about the administration of the Court and the conduct of its staff. The policy does acknowledge the importance of the public providing feedback about judicial conduct so that the Chief Justice and the judge concerned may deal with the complaint appropriately.

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

8 For example Queensland *Magistrates Act 1991* (Qld), ss 43-46 and South Australia *Magistrates Act 1983* (SA), ss 10-12 have this provision: *The Laws of Australia* (Thomson), para [19.4.430] quoted in *Additional Information*, Parliamentary Library, Client Memorandum, *Complaints Against Judges*, 6 November 2009, p. 10.

9 Justice McColl, *Committee Hansard*, 13 July 2009, p. 2.

10 *Additional Information*, Parliamentary Library, Client Memorandum, *Complaints Against Judges*, 6 November 2009, p. 8.

11 The following information is taken from Family Court and Federal Magistrates Court, *Submission 8*, pp 12 to 15.

6.18 Family law, by its very nature, generates unhappiness and discontent amongst those who are involved in the processes. Certainly not all litigants feel satisfied with the outcome of proceedings. Because of the highly personal and emotional nature of family law litigation the parties are not necessarily able to satisfactorily comprehend the way in which the processes have worked and frequently their ability to make rational decisions is impeded. This situation is aggravated where the litigant is self-represented.

6.19 The Deputy Chief Justice, on behalf of the Chief Justice, has primary responsibility for the management of complaints against judicial officers and is assisted in the consideration and investigation of the complaints by a Judicial Complaints Adviser (a legally qualified Registrar of the Family Court). The first step in the process is for an assessment to be made of the complaint to ensure that it is about the conduct of the judicial officer, rather than the result of a judicial decision or a matter in proceedings which might be raised as a ground of appeal. Care is taken to ensure that if the complaint is primarily about the result of a judicial decision the complainant is advised immediately about his or her rights of appeal.

6.20 Many complainants wrongly believe that the Chief Justice can interfere and overturn the decision of a Trial Judge independently of the appeal system. Such instances need to be identified quickly and the complainant advised of his or her appeal rights under the *Family Law Act 1975* (Cth).

6.21 Once the nature of the complaint has been identified, an appropriate initial response acknowledging the complaint is provided as soon as practicable. If the complaint pertains to conduct of a judicial officer, a detailed consideration of the proceedings may be undertaken. This may involve an examination of the transcript or a review of the available audio of the proceedings.

6.22 A detailed and comprehensive reply is then prepared by the Judicial Complaints Adviser, and is reviewed and settled by the Deputy Chief Justice. In certain circumstances, the judge concerned will be sent a copy of the complaint by the Deputy Chief Justice and invited to respond should the Judge wish.

6.23 Depending on the focus of the complaint, the response may also provide explanation about such matters like:

- the manner in which judicial appointments are made;
- the doctrine of the separation of powers and the role of the Judiciary in that context;
- the oath or affirmation a Judge is required to take before the Chief Justice of the Family Court (or another Judge);
- the professional training or experience of Judges of the Court;
- the power of the Court to make decisions when an application is made to the Court, based on findings of fact pertaining to relevant evidence presented to

the Court; or

- the ability of individuals to request Judges disqualify themselves (through the filing of an appropriate application) because of a real possibility of biased or prejudiced mindset being brought by the Judge to the determination of an application, or that there might be a conflict of interest.

6.24 Complaints about perceived administrative deficiencies may be made through the Family Court's complaint process and will be investigated and dealt with accordingly. Complaints about the delay in the delivery of judgments, by protocol, are made through the relevant State or Territory Law Society or Bar Association. This ensures that anonymity for the person enquiring is maintained and that any perception there might be prejudice against that person in the construction and delivery of the judgment is obviated.

6.25 Importantly, if a complaint might have an adverse effect on the disposition of the matter which is currently before the Court, a response to the complaint may be deferred until after the final determination of the matter. The complainant would ordinarily be advised of this course of action.

6.26 The Family Court also has a general feedback complaints policy which explains what action an individual may take in relation to perceived administrative failures. It provides that 'complainants who are dissatisfied with the Family Court's response in relation to administrative issues may seek an internal review within the Family Court.'¹²

6.27 The Federal Magistrates Court has advised that it has similar complaint handling policies for both judicial and administrative complaints.¹³

6.28 The committee commends these courts for their continuing commitment to transparent and effective complaint handling.

6.29 The Family Court protocol is reproduced above, and the Federal Court protocol and the Federal Magistrates Court *Judicial Complaints Procedure* are attached at Appendix 8. A copy of each of the policies is also available on the website of the respective court. As noted in chapter 2 of this report, the High Court does not have a written complaint handling policy.¹⁴

12 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

13 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

14 *Additional information*, Parliamentary Library Client Memorandum *Complaints Against Judges*, 6 November 2009, pp 9 and 10.

Evidence to the committee

6.30 The Law Council of Australia is of the view that the current system of judicial complaint handling established by section 72 of the Constitution supplemented by complaint handling policies is working well. The Council has stated:

The Federal Courts have each established effective informal complaints handling mechanisms with usually the head of the jurisdiction being ultimately responsible for deciding the response to a complaint. The Law Council believes that these existing mechanisms of dealing with complaints have operated successfully.¹⁵

6.31 The Law Council notes that the protocols recognise 'the constitutional limitations and safeguards' for dealing with complaints against the judiciary so they cannot provide a mechanism for disciplining a judge. However, the Chief Justice is nonetheless able to 'advise, warn, and take appropriate administrative steps' in relation to alleged misconduct.¹⁶

6.32 The courts themselves are not as sanguine about the current system. While of the view that the existing protocols have promoted judicial accountability, they are open to improving the current system while also ensuring judicial independence.

6.33 Senior judges have pointed to a lack of options for dealing with complaints against members of their courts. For example, Chief Justice Wayne Martin of the Supreme Court of Western Australia's experience is:

I receive approximately two complaints per week relating to Judges and Magistrates in various Western Australian courts. I lack any facility or capacity to appropriately investigate or respond to those complaints, although obviously if they were of a kind which suggested significant misconduct, I would refer them to the appropriate Head of Jurisdiction for investigation. However, neither I nor any other Head of Jurisdiction has appropriate facilities or mechanisms for the conduct of such investigations, and there may well be situations in which it may be alleged by either the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such an investigation.¹⁷

6.34 The Chief Justice of the Family Court addressed the issue directly with the committee when asked if she is entirely comfortable about the responsibility of the head of jurisdiction in complaint handling or whether there is an argument for going outside the court system:

I am not entirely comfortable. I think if you asked any of the heads of jurisdiction of any of the jurisdictions they would say they were not. I think

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

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

17 *Additional Information*, Chief Justice Wayne Martin, letter to the then WA Attorney-General the Hon Jim McGinty MLA, dated 10 November 2006, p. 2.

the Judicial Commission of New South Wales works extremely well because the responsibility is removed from the Chief Justice. If we could have some sort of a commission then I would be in favour of it.

...

I am aware of the discussions that are going on at the Standing Committee of Attorneys-General and between the Council of Chief Justices and the Attorney-General's Department about a commission. I just think it is a long way off—desirable, but a long way off.¹⁸

6.35 Interestingly, Chief Justice Bryant and Chief Federal Magistrate Pascoe have 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.¹⁹

6.36 The suggestion for a new approach to complaint handling apparently arose from a desire to adopt some elements of the New South Wales Judicial Commission approach by providing some independent scrutiny of complaints. Federal Chief Magistrate Pascoe explained that the proposed 'oversight committee' model would provide the opportunity to incorporate, for example, a very experienced retired judge and perhaps [a person with] other qualifications such as psychology.²⁰

6.37 In addition to allowing complainants to 'feel that they were being heard by an external party who would have a completely independent view'²¹ it is anticipated that the panel would also 'build up some expertise in the sorts of complaints that occur in family law and maybe help [the Family Court and Federal Magistrates Court] 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.'²²

6.38 The preliminary idea has been given careful thought by the Chief Justice and the Chief Federal Magistrate and has been developed to quite a level of detail. The Chief Justice explained:

I have in mind that the committee might have on it the Ombudsman—I am not sure as to the Constitution but it probably would not have me. In a sense that committee could then review. They would have to be careful about the wording because they would not have any disciplinary powers either. But it could review the first letter and, if they want, they could make recommendations that something further be done—another letter be written, an apology be made or even an ex gratia payment or something could be

18 Chief Justice Bryant, *Committee Hansard*, 12 June 2009, p. 58.

19 Family Court and Federal Magistrates Court, *Submission 8*, p. 15.

20 *Committee Hansard*, 11 June 2009, p. 43.

21 Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 43.

22 Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 46.

made in cases like that. This would just add a bit more transparency to the process for the public.²³

Other submissions

6.39 A significant number of submissions to the committee sought to put forward detailed case histories, and most recalled circumstances that would lend themselves to at least a chance of resolution if a judicial commission were available. While the committee does not suggest that the majority, or even many, submitters would be likely to meet with success through a judicial commission process as discussed in the preceding section, it is likely that a significant number would find solace from at least having their complaints reviewed through an independent process.

6.40 Many submitters relating personal experiences were received in camera, and cannot be quoted, but they commonly displayed disaffection with the judicial process and frequently with individual judges. Submission 32 to the inquiry alleges that a judge failed to recuse himself in spite of a personal relationship with a respondent to a matter in which the author, the applicant, was unsuccessful. While acknowledging that unsuccessful litigants are often frustrated by decisions going against them, the author contends that there is a possibility that the judge was biased by virtue of his personal relationship, and considered that:

If a judicial commission were available to review the conduct of judicial officers, this uncertainty could be clarified and litigants would know whether they had received a decision from an impartial judge.²⁴

6.41 Some other examples provided to the committee were by a member of the committee, Senator Heffernan. Some of the types of matters of concern to Senator Heffernan were outlined by him during the public hearing process in the following terms:

For instance, in a hypothetical situation, where there is police information and surveillance et cetera coming in, where police gain information of a judge who may have assisted in the writing of a submission to a court and that judge eventually sat in judgment of that submission when it appeared in court. If that sort of information came to the police, there is nothing in the present system the police can do about it.²⁵

23 Chief Justice Bryant, *Committee Hansard*, 12 June 2009, p. 57.

24 *Submission 32*, p. 2.

25 *Committee Hansard*, 12 June 2009, p. 90. The committee notes that a number of witnesses expressed the view that there are remedies available in the matter of a judge assisting with writing a submission and then sitting in judgment on the case. For example, see the evidence of Justice Lasry and Mr McGowan of the International Commission of Jurists, Victoria, *Committee Hansard*, 12 June 2009, pp 10 and 11.

6.42 Mr Ernest Schmatt, Chief Executive of the Judicial Commission of New South Wales, gave evidence on the role of the Commission in relation to interviewing potential complainants:

If those people make an appointment and see me, I will spend time with them. I will listen to their grievance. I have been in practice for a long time and I am very familiar with all the court processes, so I can usually determine from what they are saying what their real grievance is about. Many of them are complaining about their solicitor or their barrister and, if that is the case, I can refer them to the appropriate authorities. Some of them have a complaint about other people who are really not even involved, so I can point them in the direction. I obviously do not give any legal advice. Many people are just looking for an appeal. Again I would not give them legal advice but what I would say to them is that they should seek some independent advice as to what appeal rights may be available to them. Most of those people go away happy. They have had somewhere where they can air their grievance that has not been a formal complaint but it has been dealt with, in my opinion, effectively. I sometimes do that by telephone calls as well.²⁶

6.43 Mr Schmatt also pointed out that the Commission benefited both the complainant and the judicial officer. He said the Commission:

[P]rovides people who have a grievance with a place where they can take their grievance and it will be properly investigated by an independent body. It also protects judges from scurrilous complaints because, during that preliminary investigation stage, everything is dealt with in private so there is no harm done to the reputation of the judicial officer.²⁷

Committee view

6.44 It is of particular interest to the committee that not only did individuals relate experiences with the justice system which left them feeling strongly that current avenues of complaint are seriously inadequate, but also that courts themselves are seeking to establish more sophisticated processes for dealing with complaints. It seems to the committee that courts find themselves dealing with a range of complaints and that processes currently available to them are inadequate in many ways.

6.45 Even when a court has detailed its thorough approach to complaint handling (such as the Family Court procedure discussed above) this still does not address the concern that it is the judges who are judging the judges.²⁸ In addition, even when a process exists, it is questionable whether a system with a limited statutory framework and a constrained ability to deal with complaints is adequate.

26 *Committee Hansard*, 11 June 2009, p. 62.

27 *Committee Hansard*, 11 June 2009, p. 63.

28 For example, see the evidence of Mr Pascoe, *Committee Hansard*, 11 June 2009, p. 43 that, 'Sometimes the view is expressed that the court receives the complaint about the court and does not deal with it in the same way that a truly external party would do.'

6.46 In the committee's view it is important to ensure that there is a complete statutory framework for termination that is principled and comprehensive. Along with thorough and appropriately transparent appointment processes and terms of appointment, the committee's vision is for an updated system from which to continue to build an impressive judicial model that brings with it the benefit of a national approach but properly preserves the unique aspects each jurisdiction wishes to retain.

6.47 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.

6.48 The committee is persuaded that because of the simplicity of the conduct requirements in section 72 there are legislative gaps in the existing arrangements. In the first place the section does not address the process required for any inquiry into serious misconduct or incapacity. Secondly, there are no statutory arrangements for dealing with less serious complaints of judicial misconduct. Courts are left to adopt informal mechanisms and have no specific investigative or complaint handling resources or expertise.

6.49 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. The committee is also mindful of the opportunity to build on the strong foundations of our existing judicial system to equip judicial officers with best practice arrangements for the next 100 years.

6.50 In the committee's view the Family Court and Federal Magistrates Court suggestion to develop a more sophisticated approach to complaint handling by introducing an 'oversight committee' is commendable. However, it seems to the committee that there is still a question about whether permanent alternative arrangements, such as an established judicial commission, would be preferable. This is discussed in detail in the next chapter.

CHAPTER 7

A Judicial Complaints Commission?

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

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

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

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

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

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

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

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

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

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

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

Judicial complaint handling options

7.7 The main options for federal judicial complaint handling are:

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

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

Should a federal or national complaints handling body be established?

Existing and proposed models

Judicial Commission of New South Wales

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.18 The detail of the preliminary examination process outlined by Mr Schmatt in evidence included the following points¹⁵:

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

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

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

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

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

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

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

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

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

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

7.21 JIRS includes a number of impressive components:

- sentencing statistics
- case summaries
- judgments
- sentencing principles and practice
- services directory (rehabilitation facilities that may be relevant to an offender facing sentencing)
- advances notes (case summaries)
- electronic bench books; and
- legislation¹⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Western Australia proposal

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

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

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

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

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

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

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

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

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

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

Victorian consideration of ways to address less serious complaints

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

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

7.32 The government has sought submissions by 18 December 2009.

A federal judicial commission?

Support for a federal judicial commission

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

It provides people who have a grievance with a place where they can take their grievance and it will be properly investigated by an independent body. It also protects judges from scurrilous complaints because, during that preliminary investigation stage, everything is dealt with in private so there is no harm done to the reputation of the judicial officer. It is only if the matter is ever before a conduct division that it will ever be a public hearing. I also think that the education programs of the commission—and I would add in the sentencing function there as well, because that is education; if you are getting better sentencing results and greater consistency in approach to sentencing there is a huge benefit to the community of New South Wales.³¹

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

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

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

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

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

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

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

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

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

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

I believe there should be a Federal Judicial Commission.

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Opposition to a federal judicial commission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- waste of judicial time;
- that a judicial officer could have a complaint determined by a judge of lower rank; and
- that public confidence could be undermined by a process of investigation⁵⁶

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

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

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

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

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

Possible role and functions of a Federal Judicial Commission

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

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

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

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

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

7.59 The Centre goes on to discredit these arguments:

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

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

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

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

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

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

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

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

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

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

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

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

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

Constitutional issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

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

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

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

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

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

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

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

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

...if the judges do not voluntarily participate in the shaping of an appropriate regime of regulation, they could end up at some time in the future, in a very unfavourable climate, with a scheme thrust upon them which contains inadequate safeguards⁷⁷

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

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

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

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

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

Recommendation 10

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

Recommendation 11

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

Recommendation 12

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

Recommendation 13

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

Recommendation 14

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

Recommendation 15

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

Is an intermediate process needed?

7.88 Notwithstanding the committee view strongly in favour of the establishment of a federal, and eventually a national, judicial commission there is also benefit in considering whether establishing an interim process in the short term would be valuable. This issue arises from the concern that there is no settled process for the application of section 72 of the Constitution. For example, a number of commentators over the years, including in evidence to this committee, pointed out that the circumstances surrounding the Justice Murphy complaints identified that there are uncertainties about how a federal complaint could be investigated⁷⁸ and these have not been resolved. As Justice McColl explained to the committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 16

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

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

**Senator Guy Barnett
Chair**

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

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

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Gilbert and Tobin Centre of Public Law
2	The Hon Bob Such MP
3	Registrar and Chief Executive Officer, Federal Court of Australia
4	Association of Australian Magistrates
5	International Commission of Jurists
6	National Judicial College of Australia
7	Law Society of NSW
8	Family Court of Australia and the Federal Magistrates Court of Australia
9	Australian Patriot Movement
10	Public Interest Advocacy Group
11	Law Council of Australia
12	Mr Peter Faris QC
13	Lt Col Charles Mollison
14	Mr Alexander Street SC
15	Mr Charles Pham – Name published, submission received In Camera
16	Dr Evan Jones - Name published, submission received In Camera
17	Ms Rose Diamond - Name published, submission received In Camera
18	Mr Daming He - Name published, submission received In Camera
19	Dr John Wilson - Name published, submission received In Camera
20	Mr Bill Healey - Name published, submission received In Camera

- 21 Mr Shane Dowling - Name published, submission received In Camera
- 22 Mr Peter Gargan - Name published, submission received In Camera
- 23 Mr Brian Jones - Name published, submission received In Camera
- 24 Mr Ray Lovett - Name published, submission received In Camera
- 25 Dr Alireza Kazempour - Name published, submission received In Camera
- 26 Mr Gerrit Schorel-Hlavka - Name published, submission received In Camera
- 27 Mr Tim Fowler - Name published, submission received In Camera
- 28 Mr Michael Lockhart - Name published, submission received In Camera
- 29 Mr John Flanagan - Name published, submission received In Camera
- 30 Name Withheld
- 31 Name Withheld
- 32 Name Withheld
- 33 Mr Stephen Page
- 34 Name Withheld
- 35 Mr John Flanagan
- 36 Name Withheld
- 37 Mr Evan Whitton
- 38 Attorney-General's Department
- 39 Mr Kevin Linderberg – Name published, submission received In Camera

Submissions addressing both of the committee's inquiries ie: inquiry into Australia's Judicial System and the Role of Judges; and the inquiry into Access to Justice

Submission Number	Submitter
j1	Human Rights Law Resource Centre
j2	International Commission of Jurists VIC
j3	The Chief Justice of the Supreme Court
j4	Flinders University Judicial Research Project
j5	Mr Charles H Griffith

ADDITIONAL INFORMATION RECEIVED

1. Briefing Paper on the Judicial Commission of NSW – Mr Ernest Schmatt, received Wednesday 10 June 2009.
2. Model Protocol between heads of Jurisdiction for Short Term Judicial Exchange, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.
3. 2005 Colloquium Papers, Judicial Exchange – Debalkanising the Courts, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.
4. Letter to Attorney-General of Victoria, tabled at public hearing by Judicial Conference of Australia, Thursday 11 June 2009.
5. Complaints Against Judicial Officers by Mr Ernest Schmatt PSM, tabled at public hearing by the Judicial Commission of NSW, Thursday 11 June 2009.
6. Basic Principles on the Independence of the Judiciary, tabled at public hearing by the Human Rights Law Resource Centre, Friday 12 June 2009.
7. Extracts from III. Fair and Public Hearing by a Competent, Independent and Impartial Tribunal, tabled at public hearing by the Human Rights Law Resource Centre, Friday 12 June 2009.
8. Answers to Questions on Notice - Provided by the Federal Magistrates Court of Australia Tuesday 4 August 2009.
9. Answers to Questions on Notice - Provided by the Attorney-General's Department Monday 28 September 2009.

10. Correspondence from Chief Justice Wayne Martin to the then WA Attorney-General re A Judicial Commission for Western Australia.
11. Client Memorandum - Judicial appointment, termination and retirement age in like countries – Provided by the Parliamentary Library Thursday 9 April 2009.
12. Client Memorandum - Complaints against judges – Provided by the Parliamentary Library Monday 30 November 2009.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Thursday 11 June 2009

McCOLL, the Hon. Justice Ruth, AO, President
Judicial Conference of Australia

PASCOE, Mr John Henry, AO, Chief Federal Magistrate
Federal Magistrates Court of Australia

SCHMATT, Mr Ernest, Chief Executive
Judicial Commission of New South Wales

WILLIAMS, Professor George, Foundation Director
Gilbert and Tobin Centre of Public Law

Melbourne, Friday 12 June 2009

BRYANT, the Hon. Chief Justice Diana, Chief Justice
Family Court of Australia

COLBRAN, Mr Michael, QC, Chairman, National Judicial Issues Working Group
Law Council of Australia

EDWARDS, Mr Peter, Policy Lawyer
Law Council of Australia

FARIS, Mr Peter, QC
Private Capacity

KOK, Ms Daphne, Immediate Past President
Association of Australian Magistrates

LASRY, the Hon. Justice Lex, Council Member
International Commission of Jurists Victoria

LEVINE, Mr Gregory, Vice-President
Association of Australian Magistrates

LOWNDES, Dr John, President
Association of Australian Magistrates

LYNCH, Mr Phillip, Director
Human Rights Law Resource Centre

McGOWAN, Mr Glenn, Chairman
International Commission of Jurists Victoria

ROACH ANLEU, Professor Sharon
Private Capacity

SCHOKMAN, Mr Benjamin, Senior Lawyer
Human Rights Law Resource Centre

Perth, Monday 13 July 2009

MURRAY, Justice Michael, Acting Chief Justice
Supreme Court of Western Australia

STAUDE, Mr John, Member of the Law Society Council and Deputy Convenor of the
Courts Committee
Law Society of Australia

Canberra, Tuesday 17 November 2009

MARTIN, the Hon. Wayne Stewart, Chief Justice of Western Australia and Chair of
Council
National Judicial College of Australia

APPENDIX 3

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – ARTICLE 14

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

APPENDIX 4

OUTLINE OF OVERSEAS JUDICIAL COMPLAINT HANDLING AND APPOINTMENTS BODIES

England and Wales

1.2 England and Wales have had 3 major bodies established to deal with aspects of the judiciary including appointments and complaints. They are the Judicial Appointments Commission, the Office for Judicial Complaints and the Judicial Appointments and Conduct Ombudsman.

1.3 Interestingly, there also appears to be an established role for the judiciary to publicly comment on government proposals affecting the judiciary. These comments are accessible on the Judiciary of England and Wales' website *Judicial views and responses* page which notes that 'From time to time, judges will wish to respond to government proposals on issues which have a direct impact on the running of the courts'.¹

Judicial Appointments Commission

1.4 The overall aim of the Commission is to select and recommend persons for judicial appointment on merit. With the Lord Chancellor and Lord Chief Justice, the Commission aims to increase the diversity of the judiciary in courts and tribunals at all levels, and to ensure the widest possible choice of candidates and fair and open processes for selection.²

1.5 The Commission is an independent body set up by the *Constitutional Reform Act 2005* to select judicial office holders. The Commission selects candidates for judicial office based on merit, through fair and open competition, from the widest range of eligible candidates drawn from a diverse range of backgrounds. The Commission asserts that it was set up in order to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable.³

¹ http://www.judiciary.gov.uk/publications_media/judicial_views_responses/index.htm.

² England and Wales Judicial Appointments Commission website accessed on 7 May 2009
<http://www.judicialappointments.gov.uk/about/about.htm>.

³ England and Wales Judicial Appointments Commission website accessed on 7 May 2009
<http://www.judicialappointments.gov.uk/about/about.htm>.

Office for Judicial Complaints

1.6 The Office for Judicial Complaints (Complaints Office) supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for the system of judicial complaints and discipline. It aims to ensure that all judicial disciplinary issues are dealt with consistently, fairly and efficiently.

1.7 The Complaints Office is an associated office of the Ministry of Justice (MoJ). Its status, governance and operational objectives are set out in a Memorandum of Understanding between the Department of Courts Administration, the Judicial Office for England and Wales and the Complaints Office.⁴

1.8 The Complaints Office will look into any complaint about the personal conduct of a judge, member of a small tribunal or coroner. Examples of personal misconduct would be the use of insulting, racist or sexist language.⁵

1.9 While the Complaints Office website claims that judges can be dismissed, the most senior judges – the Heads of Division, Law Lords, Lords Justices of Appeal and High Court Judges - can only be removed by The Queen after an address from both Houses of Parliament, and this has never happened.⁶

1.10 Other judicial office-holders can be removed by the Lord Chief Justice for incapacity or misbehaviour. This is very rare, and the case of a full-time serving judge needing to be removed, has happened just once, in 1983, when a Circuit Judge was removed from office after pleading guilty to several charges of smuggling.⁷

1.11 Fee-paid, or part-time, office-holders, who are usually appointed for at least five years, may not have their contracts renewed on the following grounds: misbehaviour; incapacity; persistent failure to comply with sitting requirements (without good reason); failure to comply with training requirements; sustained failure to observe the standards reasonably expected from a holder of such office; part of a reduction in numbers because of changes in operational requirements; and part of a structural change to enable recruitment of new appointees.⁸

⁴ England and Wales Office of Judicial Complaints website:
<http://www.judicialcomplaints.gov.uk/about/about.htm> accessed 7 May 2009.

⁵ England and Wales Office for Judicial Complaints website:
http://www.judicialcomplaints.gov.uk/complaints/complaints_what.htm accessed 7 May 2009.

⁶ Judiciary of England and Wales website:
http://www.judiciary.gov.uk/learning_resources/quiz_myth/quiz_myth.htm accessed 7 May 2009.

⁷ Judiciary of England and Wales website: http://www.judiciary.gov.uk/faqs/faqs_conduct.htm accessed 7 May 2009.

⁸ Judiciary of England and Wales website:
http://www.judiciary.gov.uk/learning_resources/quiz_myth/quiz_myth.htm accessed 7 May 2009.

1.12 Advice to the public through the Complaints Office website outlines its complaint handling process as follows:⁹

- if your complaint is for us, we will consider the issues raised and the quality of the evidence provided. If satisfied that the complaint requires further investigation, we will then send the judge a copy of your complaint and ask for his or her comments. We may ask you or others who may have witnessed the event complained of for further evidence, and may also listen to the tape recording of the hearing and/or obtain information from other people who were present;
- in some cases it may be necessary to ask a senior judge to carry out an investigation into what has happened;
- at all stages we will keep you fully informed of progress;
- if the Lord Chancellor and the Lord Chief Justice uphold your complaint, they will consider what action, if any, is appropriate. The Lord Chancellor and the Lord Chief Justice have the power to agree to advise, warn or remove a judge for misconduct;
- the Lord Chancellor and Lord Chief Justice will not normally pay compensation for losses arising from actions by judges. They may consider making an ex gratia payment, but only in the most exceptional cases;
- we aim to deal with your complaint and provide you with a full response, including any disciplinary action, which may have been taken, within 3 months. However if a judicial investigation is needed the process may take several months longer; and
- in some cases where the Lord Chancellor and the Lord Chief Justice decide to take formal disciplinary action against a judicial office holder, the judicial office holder has a right to request that his or her case be referred to a 'review body'. Where a case has been referred to a review body, the Lord Chancellor and the Lord Chief Justice must accept any findings of fact made by the review body and cannot impose a sanction on the judicial office holder that is more severe than that recommended by the review body. Each review body consists of 4 members, 2 judicial office holders and 2 lay.

⁹ England and Wales Office for Judicial Complaints website:
<http://www.judicialcomplaints.gov.uk/complaints/complaints.htm> accessed 7 May 2009.

*Judicial Appointments and Conduct Ombudsman*¹⁰

1.13 The Judicial Appointments and Conduct Ombudsman investigates the *handling* of complaints concerning the judicial appointments process and matters involving judicial discipline or conduct.

1.14 There are two distinct aspects to his work:

- To seek redress in the event of maladministration. 'Maladministration' includes (among other things) delay, rudeness, bias, faulty procedures, offering misleading advice, refusal to answer questions and unfair treatment; and
- Through recommendations and constructive feedback, to improve standards and practices in the authorities or departments concerned.

1.15 The Ombudsman assumed his responsibilities on 3 April 2006 under the Provisions of the *Constitutional Reform Act 2005* and is completely independent of Government and the judiciary.

1.16 The Ombudsman can:

- set aside a decision made by the Office for Judicial Complaints, Tribunal President or Magistrates' Advisory Committee and direct that they look at a complaint again;
- recommend that an investigation or determination should be reviewed by a Review Body;
- ask the Office for Judicial Complaints, Tribunal President or Magistrates' Advisory Committee to write to you and apologise for what went wrong;
- recommend that changes are made in the way the Office for Judicial Complaints, tribunal Presidents or Advisory Committees work in future to prevent the same things happening again; and/or
- suggest payment of compensation for loss which appears to the Ombudsman to have been suffered as a direct result of the poor handling of your complaint.

1.17 The Ombudsman cannot:

- reprimand a judge;
- re-open a case;

¹⁰ Material from this section was obtained from the England and Wales Judicial Appointments and Conduct Ombudsman website <http://www.judicialombudsman.gov.uk/index.htm> accessed on 7 May 2009.

- remove a judge from office; or
- enforce payment of compensation.¹¹

Canada

1.18 At the federal level in Canada there are two key judicial organisations: the Office of the Commissioner for Federal Judicial Affairs (which oversees judicial advisory committees) and the Canadian Judicial Council (which has a mandate to promote judicial efficiency, uniformity, and accountability and that includes a complaint handling function).

Office of the Commissioner for Federal Judicial Affairs

1.19 Independent judicial advisory committees constitute the heart of the judicial appointments process in Canada. The committees are responsible for assessing the qualifications for appointment of the lawyers who apply. There is at least one committee in each province and territory. Each committee consists of eight members representing the bench, the bar, the law enforcement community and the general public, and 1 ex-officio non-voting member: either the Commissioner for Federal Judicial Affairs or the Executive Director, Judicial Appointments.¹²

1.20 The role of the Office is to safeguard the independence of the judiciary and put federally appointed judges at arm's length from the Department of Justice. Its mandate extends to promoting better administration of justice and providing support for the federal judiciary.¹³

1.21 The Supreme Court consists of the Chief Justice of Canada and eight Judges appointed by the Governor in Council from among superior court judges or from among barristers of at least ten years' standing at the Bar of a province or territory. A Judge holds office during good behaviour, until he or she retires or attains the age of 75 years, but is removable for incapacity or misconduct in office before that time by the Governor General on address of the Senate and House of Commons. Of the nine judges making up the Supreme Court, the *Supreme Court Act* requires that three be appointed from Quebec. Traditionally, the federal government appoints three Judges from Ontario, two from the West, and one from Atlantic Canada.¹⁴

¹¹ England and Wales Judicial Appointments and Conduct Ombudsman, *Conduct booklet*, p. 9.

¹² Canadian Office of the Commissioner for Federal Judicial Affairs website: <http://www.fja.gc.ca/fja-cmf/ja-am/com/mem-eng.html> accessed 6 May 2009.

¹³ Canadian Office of the Commissioner for Federal Judicial Affairs, various website information accessed via: <http://www.fja.gc.ca/fja-cmf/ja-am/com/mem-eng.html> on 6 May 2009.

¹⁴ Supreme Court of Canada website accessed 6 May 2009: <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp#f13> .

Canadian Judicial Council

1.22 Parliament created the Canadian Judicial Council in 1971. The objectives of the Council, as mandated by the Judges Act, are to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in all superior courts of Canada.¹⁵ The Council has authority over the work of more than 1,070 federally appointed judges.

1.23 The Council's main purpose is to set policies and provide tools that help the judicial system remain efficient, uniform, and accountable. The Council's powers are set out in Part II of the Judges Act.

1.24 The Council asserts that Canadians 'need judges who are independent and able to give judgments in court without fear of retaliation or punishment.' To help achieve this goal, the Canadian Judicial Council was granted power under the *Judges Act* to investigate complaints made by members of the public and the Attorney General about the conduct (as opposed to the decisions) of federally appointed judges. After its investigation of a complaint, the Council can make recommendations, including removing a judge from office. If necessary, an Inquiry Committee may be appointed to hold a public hearing, after which the matter goes on for discussion by the full Council. After considering the report of an Inquiry Committee, the Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office. The Council's only power is to recommend to Parliament that a judge be removed from office. Where appropriate, the Council may express concerns about a judge's conduct where the matter is not serious enough to recommend that the judge be removed.¹⁶

1.25 According to the Council's website, since its inception in 1971, the Council has referred eight complaints to an Inquiry Committee for formal investigation. The Council asserts that judicial independence is central to its processes and it does not believe that its role undermines the objective of judicial independence.¹⁷

1.26 As part of its functions, the Council has issued a publication outlining *Ethical Principles for Judges*. It includes guidance under the headings judicial independence, integrity, diligence, equality and impartiality.¹⁸

¹⁵ Canadian Judicial Council website accessed on 6 May 2009: www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mp_judgesact_en.asp. See also www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_courtsystem_en.asp#ptc.

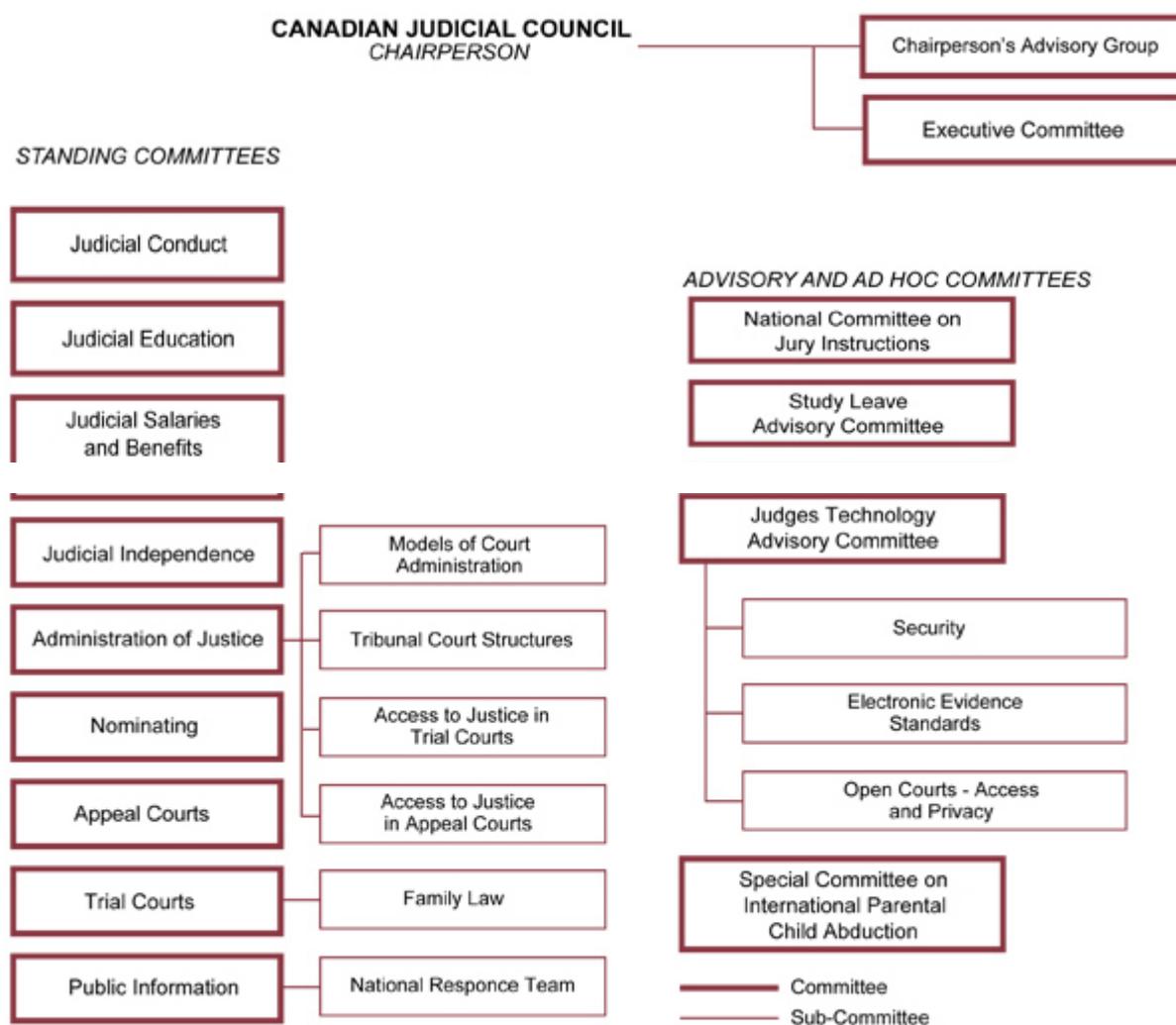
¹⁶ Canadian Judicial Council website accessed on 6 May 2009: http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mandate_en.asp and http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp#wkcc.

¹⁷ Canadian Judicial Council website accessed on 6 May 2009: http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp.

¹⁸ Canadian Judicial Council, publications, 1998 accessible at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf.

1.27 The Council undertakes its work through a committee system. Most committees conduct research and deliver tools for enhancing the quality, uniformity, and efficiency of the Canadian judicial system. They often work in consultation with experts and partners in the legal, private, and media sectors. The result of their research is presented to the Council at its two annual meetings for consideration and approval, and often takes the form of studies, guidelines, model policy, and other key documents that are distributed to the wider justice community and, in most cases, to the general public.¹⁹

1.28 The structure of the Council's committees are set out in a chart:²⁰



¹⁹ Canadian Judicial Council website accessed on 6 May 2009: http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_committees_en.asp.

²⁰ Canadian Judicial Council website accessed on 6 May 2009: http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_committees_en.asp.

United States of America

1.29 Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate, as stated in the Constitution. The names of potential nominees often are recommended by senators or sometimes members of the House who are of the President's political party. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee. Article III of the Constitution states that these judicial officers are appointed for a life term. The federal Judiciary, the Judicial Conference of the United States, and the Administrative Office of the U.S. Courts play no role in the nomination and confirmation process.²¹

1.30 The Constitution sets forth no specific requirements for qualifications for becoming a judge. However, members of Congress, who typically recommend potential nominees, and the Department of Justice, which reviews nominees' qualifications, have developed their own informal criteria.

1.31 The complaint process (created by Congress) is not intended to address complaints related to the merits of a case or a court's decision. Any person alleging that a judge of the United States has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or that such officer cannot discharge all the duties of the office because of physical or mental disability, may file a complaint with the clerk of the court of appeals for that circuit or applicable national court. The statute governing this complaint mechanism is set out at Title 28, U.S. Code, Section 351(a).

New Zealand²²

1.32 New Zealand has a Judicial Conduct Commissioner, but does not have a judicial appointments body. Appointments to most of the judicial positions are made by the Governor-General on the recommendation of the Attorney-General. Present exceptions are Environment Court Judges and Community Magistrates. Until amendments to legislation are made, these appointments will continue to be made on the recommendation of the Minister of Justice. In making appointments to the Environment Court, the Minister of Justice must consult with the Minister for the Environment and the Minister of Māori Affairs. Appointments to the Māori Land Court and the Māori Appellate Court are made by the Governor-General on the recommendation of the Minister of Māori Affairs.

1.33 In the case of appointments to the Court of Appeal and the High Court (Judges and Masters), the administrative process is carried out under the direction of

²¹ The material for this section was obtained from the United States of America Courts website: <http://www.uscourts.gov/faq.html> accessed 7 May 2009.

²² The material for this section was obtained from the New Zealand Ministry of Justice website accessed 7 May 2009: <http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html>.

the Solicitor-General. For appointments to the District Court, Family Court, Environment Court and Employment Court, the process is carried out under the direction of the Secretary for Justice.

1.34 With the objective of ensuring greater transparency in the process, advertising for expressions of interest in judicial positions is carried out at all levels except the Court of Appeal.

The appointment process for New Zealand High Court Judges

1.35 Section 6 of the *Judicature Act 1908* specifies that no person shall be appointed a High Court Judge unless he or she has held a practising certificate as a barrister or solicitor for at least seven years.

1.36 The New Zealand Ministry of Justice states that the constitutional importance of the judicial role, and the fact that Judges have to make decisions which significantly affect the liberties and rights of citizens, make it vital that those who become judges are suitable to hold that office. The suitability of prospective candidates is assessed by reference to a range of clearly defined, transparent and publicly announced criteria:²³

- *Legal Ability*: Legal ability includes a sound knowledge of the law and experience of its application. Requisite applied experience is often derived from practice of law before the courts which is experience of direct relevance to being a Judge. However, application of legal knowledge in other branches of legal practice, such as in an academic environment, public service or as a member of a legal tribunal may all qualify. At appellate level, legal ability includes the capacity to discern general principles of law and in doing so to weigh competing policies and values. More important than where legal knowledge and experience in application is derived from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation.
- *Qualities of character*: Personal qualities of character include personal honesty and integrity, open mindedness and impartiality, courtesy, patience and social sensitivity, good judgement and common sense, the ability to work hard, to listen and concentrate, collegiality, breadth of vision, independence, and acceptance of public scrutiny.
- *Personal technical skills*: There are certain personal skills that are important, including skills of effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and to maintain charge and control of a court.

²³ The material from this section was drawn from publications discussing the appointment process for the Office of High Court Judges, Office of Associate Judges of the High Court and Office of District Court Judges, all accessible from the website accessed on 7 May 2009:
<http://www.justice.govt.nz/publications/justice-system/judicial-appointments>.

- *Reflection of society*: This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness.

1.37 The steps in the appointment process for New Zealand High Court Judges are as follows:²⁴

1. Expressions of interest are called for by public advertisement. While each vacancy is not advertised, general advertisements for High Court Judges appear from time to time.
2. Prospective candidates respond to the request for expressions of interest. Alternatively, as a result of the consultation process described below, prospective candidates may be nominated, invited to express their interest and to enter the process. All prospective candidates are provided with an Expression of Interest form for completion.
3. The names of those who meet the statutory criterion for appointment are held on a confidential register maintained by the Attorney-General's Appointments Unit (the Appointments Unit). Persons expressing interest are advised when their names have been registered.
4. As and when required, the Appointments Unit uses the register to identify all those who have indicated an interest in appointment to the High Court. The Solicitor-General reviews the names and consults the Attorney-General, the President of the Court of Appeal, the Minister of Justice, the Minister of Women's Affairs, the Minister of Māori Affairs, the Chief Justice and the Secretary for Justice. The purpose of this consultation is to ascertain whether additional names should be considered and added to the list.
5. The Solicitor-General seeks comments about those on the list from a range of key people and organisations. The consultation process is described below.
6. The Solicitor-General asks the Chief Justice and the President of the Court of Appeal to give all prospective candidates a rating. The outcome of this process is an indication of those considered suitable for immediate appointment, those possibly suitable in two to three years, and those in neither category (the longlist).
7. The Solicitor-General presents the longlist to the Attorney-General. The Solicitor-General's advice includes the results of his or her consultation process.
8. The Attorney-General, after such consultation as he or she believes necessary, decides who should be on the shortlist for appointment and who heads it. The shortlist may contain 12 to 15 names. The Attorney-General may decide to seek an interview

²⁴ The material from this section was drawn from publications discussing the appointment process for the Office of High Court Judges, Office of Associate Judges of the High Court and Office of District Court Judges, all accessible from the website accessed on 7 May 2009: <http://www.justice.govt.nz/publications/justice-system/judicial-appointments>.

with, or arrange for an interview by the Solicitor-General of, a person interested in appointment to the High Court.

9. The Solicitor-General undertakes checks on the personal reputation of those on the shortlist. The Solicitor-General also asks prospective candidates to complete a questionnaire intended to confirm that there are no matters in their background of a sort that might cause difficulties after appointment. The response to the questionnaire is signed, along with an undertaking that, if appointed, the prospective candidate will not resume practice before the courts on retirement or earlier termination of his or her appointment.

10. Once the Attorney-General is satisfied as to the suitability of the preferred candidate, and his or her willingness to accept the appointment the Attorney-General mentions the appointment in Cabinet. Finally the Attorney tenders formal advice to the Governor-General to make the appointment.

1.38 A range of groups and people are contacted at various stages in the appointment process. The Attorney-General regards the knowledge, experience and judgement of the professional legal community as a very good source of informed opinion on the relative merits of prospective candidates.

1.39 At the nomination stage, the list of parties who may be contacted includes the Chief Justice, the President of the Court of Appeal, the Secretary for Justice, the President of the Law Commission, the New Zealand Bar Association, the President of the New Zealand Law Society and other organisations or groups representative of lawyers who the Attorney-General believes can contribute names of suitable persons. Such groups may include the Women's Consultative Group of the New Zealand Law Society, the District Law Societies, the New Zealand Bar Association, the Criminal Bar Association, the Māori Law Society and women lawyers' associations. Nominations may also be sought from the Minister of Justice, the Chair of the Justice and Law Reform Select Committee and the Opposition Spokespersons for the Attorney-General portfolio.

1.40 In seeking comment on prospective candidates, the Solicitor-General will consult the Chief Justice, the President of the Court of Appeal, the New Zealand Law Society, the New Zealand Bar Association and others as appropriate.

*Office of the Judicial Conduct Commissioner*²⁵

1.41 The Office of the Judicial Conduct Commissioner was established in August 2005 to deal with complaints about the conduct of Judges. An independent Judicial Commissioner receives complaints, conducts preliminary investigations and decides what further actions, if any, are to be taken. The Judicial Conduct Commissioner:

- receives written complaints;

²⁵ Office of the Judicial Conduct Commissioner, New Zealand, website accessed 7 May 2009: http://www.jcc.govt.nz/template.asp?folder=COMPLAINT_PROCESS.

- conducts a preliminary examination of the complaint; and
- takes one of the following steps:
 - dismisses the complaint;
 - refers the complaint to the Head of Bench; or
 - recommends that the Attorney-General appoint a Judicial Conduct Panel to enquire into the matter.

1.42 The Commissioner may recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire further into the complaint. The Commissioner will recommend a Panel be appointed if the conduct complained of may warrant consideration of removal of the Judge. The Panel may recommend that the Judge be removed from office.

1.43 The Commissioner has to write to the complainant and the Judge with reasons for the recommendation that a Panel be convened.

1.44 The Attorney-General then consults the Chief Justice about choosing the three members of the Panel, which must include at least one Judge or retired Judge, and one lay person. The Panel may also include a senior barrister or solicitor.

1.45 The job of the Panel is to inquire further into the conduct of the Judge. The Panel has the same powers as a Commission of Inquiry and is required to act according to the principles of natural justice.

1.46 The Panel will typically hold hearings in public, although part or all of a hearing may be held in private to protect the privacy of the complainant, or Judge, or if it is in the public interest to do so. The Panel also has the power to restrict publication of any documents that are part of the hearing, or any information about the hearing.

1.47 The Attorney-General will appoint a special counsel to present the case against the Judge. The Judge being complained about may appear at the hearing and be represented by a lawyer. The Panel may also give permission for other people to appear at the hearing and be represented by a lawyer.

1.48 Once the hearing is over, the Panel reports to the Attorney-General on the Panel's:

- findings of fact;
- opinion as to whether conduct justifies consideration of removal; and
- reasons for its conclusion.

1.49 Should the Panel recommend removal of the Judge, the Attorney-General must decide whether to agree or disagree with the recommendation. If the Attorney-General agrees that the Judge should be removed, then one of two processes occurs, depending on the type of Judge being complained about:

- For Judges of the Supreme Court, Court of Appeal, High Court, and Employment Court, the Attorney-General must address Parliament to propose that it recommend to the Governor-General that the Judge is removed. If Parliament makes that recommendation the Governor-General will then remove the Judge from office.
- For Associate Judges and all other Judges, the Attorney-General advises the Governor-General who can then formally remove the Judge from office.²⁶

²⁶ Office of the Judicial Complaints Commission, New Zealand, website accessed 7 May 2009: http://www.jcc.govt.nz/template.asp?folder=RECOMMENDING_A_PANEL&lev1=4&lev2=1&no=4.

APPENDIX 5

LAW COUNCIL OF AUSTRALIA – EXTRACT FROM SUBMISSION 11

Attachment A

Attributes of Candidates for Judicial Office

Legal Knowledge and Experience

1. It is necessary that successful candidates:

a) will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in professional practice; and

b) will possess either:

(i) Sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or

(ii) In the case of candidates with more specialised professional experience, the ability to acquire quickly an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience.

2. It is desirable that successful candidates have court or litigation experience.

Professional Qualities

3. It is desirable that successful candidates possess the following professional qualities:

a) intellectual and analytical ability;

b) sound judgment;

c) decisiveness and the ability to discharge judicial duties promptly;

d) written and verbal communication skills;

e) authority – the ability to command respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly;

f) capacity and willingness for sustained hard work;

g) management skills, including case management skills;

h) familiarity with, and ability to use, modern information technology or the capacity to attain the same; and

i) willingness to participate in ongoing judicial education.

Personal Qualities

4. It is desirable that successful candidates possess the following personal qualities:

- a) integrity, good character and reputation;
- b) fairness;
- c) independence and impartiality;
- d) maturity and sound temperament;
- e) courtesy and humanity; and
- f) social awareness including gender and cultural awareness.

Attachment B

Office Holders to be Consulted Personally by the Attorney-General of Australia

Prior to the appointment of a Federal judge or magistrate (including a Chief Justice or Chief Magistrate), the Attorney-General of Australia should personally consult the following office holders:

- a) the current Chief Justice (or equivalent) of the Court or jurisdiction to which the appointment is to be made;
- b) the Presidents of the Law Council of Australia and the Australian Bar Association;
- c) the President of the Bar Association (or equivalent) of the State or Territory where the appointee will be assigned, or predominantly assigned, upon appointment;
- d) the President of the Law Society (or equivalent) of the State and Territory where the appointee will be assigned, or predominantly assigned, upon appointment;
- e) representatives of the Bar Associations and Law Societies of the other states and territories;
- f) the Council of Australian Law Deans;
- f) the President of Australian Women Lawyers;
- g) the Chair, National Legal Aid; and
- h) the Director, National Association of Community Legal Centres.

APPENDIX 6

LAW SOCIETY OF NEW SOUTH WALES – EXTRACT FROM SUBMISSION 7

Selection Process for the Judiciary

Policy Document

(Adopted by Council at its meetings on 26 March 1997 and, as amended, on 19 June 2008) The Australian Judiciary, both State and Federal, has maintained the highest traditions of independence and fearlessness. Any new selection process must ensure that these fundamentals are not diluted. Independence implies freedom from sectional, political and other affiliations.

One of the frequent criticisms levelled at the judiciary is that it is "unrepresentative" of the community. The Law Society believes that the fundamental criterion for selection must be merit and merit alone. The best candidate must be chosen no matter who he or she is and where he or she is from. No other consideration should be allowed to interfere with this paramount criterion if the Australian judiciary is to continue to maintain its eminence.

The following represents the Law Society's position on the selection of judges, State and Federal.

CRITERIA FOR SELECTION

Merit

Merit is the fundamental criterion and the only means of ensuring that the best candidate is selected. Gender, political leanings or any other consideration should not influence selections.

The qualities which constitute merit include particularly:-

- legal skills;
- personal qualities

The principles of equal opportunity should be borne in mind when selecting between two candidates who are in all respects of equal merit, e.g. if the candidates are of different gender, the female candidate should be chosen.

Legal Skills

Legal skills required include:

- thorough knowledge of the law and long experience in the practice of law;

- oral and written skills;
- thorough understanding of the rule of law, the role of the courts and our system of government;
- ability to digest large quantities of information and identify the legal issues arising from them;
- thorough knowledge of the law of evidence and procedure;
- litigation experience, including advocacy experience, though the latter should not be given primacy.

Personal Qualities

Personal qualities required include:-

- integrity;
- independence;
- impartiality;
- self-discipline;
- capability to uphold the rule of law and act independently;
- organisational and management skills;
- ability to reach verdict and judgment in a timely manner;
- ability to discharge his/her duties with courtesy.

The Selection Process

At the present time most judicial appointments come from a single branch of the legal profession, the Bar. Traditionally, advocacy skills have been regarded as singularly the most important attribute in judicial appointment. The Law Society believes it is merely one of a range of skills and should not be given undue prominence. The selection process must cover all lawyers, barristers, solicitors and academic lawyers, providing they have the requisite qualifications. The skills and qualities of the other branches of the legal profession have been undervalued in the appointment of judges and this imbalance should be corrected. The sole criterion is merit; the best candidate for the position, irrespective of whether the candidate is a barrister, solicitor or academic lawyer, should be appointed.

The Law Society supports the continued existence of an informal selection process. However, it believes that the consultation must be wider and on a more formal basis and must include consultation with the NSW Bar Association and the Law Society of NSW. The establishment of an official body or committee for the selection of judges is not supported. Many eminently suitable candidates would be reluctant to go through a public process of selection. However, there can be no objection to calling for expressions of interest on a confidential basis.

For example, where an appointment to the High Court of Australia is to be made, apart from the statutory obligation to consult with the States' Attorneys General, there should be wider consultation with the judiciary, leaders of the legal profession and former Chief Justices.

APPENDIX 7



Judiciary Act 1903

Act No. 6 of 1903 as amended

This compilation was prepared on 11 November 2009 taking into account amendments up to Act No. 106 of 2009

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra

Extract:

39B Original jurisdiction of Federal Court of Australia

Scope of original jurisdiction

- (1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.
- (1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
 - (a) in which the Commonwealth is seeking an injunction or a declaration; or
 - (b) arising under the Constitution, or involving its interpretation; or
 - (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Jurisdiction for certain writs that relate to criminal prosecutions etc.

- (1B) If a decision to prosecute a person for an offence against a law of the Commonwealth, a State or a Territory has been made by an officer or officers of the Commonwealth and the prosecution is proposed to be commenced in a court of a State or Territory:

- (a) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against the officer or officers in relation to that decision; and
 - (b) the Supreme Court of the State or Territory in which the prosecution is proposed to be commenced is invested with, or has conferred on it, jurisdiction with respect to any such matter.
- (1C) Subject to subsection (1D), at any time when:
- (a) a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before a court of a State or Territory; or
 - (b) an appeal arising out of such a prosecution is before a court of a State or Territory;
- the following apply:
- (c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related criminal justice process decision;
 - (d) the Supreme Court of the State or Territory in which the prosecution or appeal is before a court is invested with, or has conferred on it, jurisdiction with respect to any such matter.
- (1D) Subsection (1C) does not apply where a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.
- (1E) Where subsection (1D) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection, and the court may grant such a stay if the court determines that:
- (a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and
 - (b) a stay of proceedings will not substantially prejudice the person.

Jurisdiction for certain writs that relate to civil proceedings

- (1EA) If:
- (a) a civil proceeding is before the Family Court of Australia, the Federal Magistrates Court or a court of a State or Territory; or
 - (b) an appeal arising out of such a proceeding is before the Family Court of Australia or a court of a State or Territory;
- the following apply:
- (c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision;
 - (d) the following court is invested with, or has conferred on it, jurisdiction with respect to any such matter:
 - (i) if the civil proceeding or appeal is before the Family Court of Australia—that court; or
 - (ii) if the civil proceeding is before the Federal Magistrates Court—that court; or
 - (iii) if the civil proceeding or appeal is before a court of a State or Territory—the Supreme Court of the State or Territory.

Jurisdictional rules to apply despite any other law

- (1F) Subsections (1B), (1C), (1D), (1E) and (1EA) have effect despite anything in any other law. In particular:
- (a) neither the *Jurisdiction of Courts (Cross-vesting) Act 1987*, nor any other law, has the effect of giving the Federal Court of Australia jurisdiction contrary to subsection (1B), (1C) or (1EA); and
 - (b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that Court by subsection (1B), (1C) or (1EA).

References to officer or officers of the Commonwealth

- (2) The reference in subsection (1), (1B), (1C) or (1D) to an officer or officers of the Commonwealth does not include a reference to a Judge or Judges of the Family Court of Australia.

Definitions

- (3) In this section:

civil proceeding has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

related civil proceeding decision, in relation to a civil proceeding, means:

- (a) a decision of the Attorney-General to give:
 - (i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding;
 or
- (b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:
 - (i) notice under section 6A of that Act in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

related criminal justice process decision, in relation to an offence, means:

- (a) a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:
 - (i) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and
 - (ii) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and
 - (iii) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and
 - (iv) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and
 - (v) a decision in connection with an appeal arising out of the prosecution; or
- (b) a decision of the Attorney-General to give a certificate under section 26 or 28 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before or during a federal criminal proceeding (within the meaning of that Act) in relation to the offence.

APPENDIX 8

FEDERAL COURT OF AUSTRALIA JUDICIAL COMPLAINTS PROCEDURE

Judges, like all other citizens, are subject to the law, but the need to protect judicial independence in the interests of the whole community means that, in respect of their judicial conduct, they cannot be subject to direct discipline by anyone else, except in the extreme cases of proved misbehaviour or incapacity. In those circumstances, and in those only, a judge may be removed from office by the Governor-General upon a request from both Houses of the Parliament.

Judges are accountable through the public nature of their work, the requirement that they give reasons for their decisions and the scrutiny of their decisions on appeal. (With rare exceptions, all court hearings are open to the public and can be reported in the news media and nearly all judgments of the Court are available to the public through the internet.)

This complaints procedure does not, and cannot, provide a mechanism for disciplining a judge. It does, however, offer a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Justice and the judge concerned and it provides an opportunity for a complaint to be dealt with in an appropriate manner.

For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its judges and opportunities to explain the nature of its work, correct misunderstandings where they have occurred and, if it should fall short of judicial standards, to improve the performance of the Court.

Complaints about delay

A party may express concerns or complaints about delay in the delivery of a judgment. In such a case a party can send a letter to the president of the bar association or the law society in the State or Territory in which the case was heard and request that the president take up the matter with the Chief Justice. The president will then convey the concern or complaint to the Chief Justice without identifying which party complained. The Chief Justice will look into the matter and, if appropriate, take it up with the judge concerned. Complaints of this nature can also be made directly by letter addressed to the Chief Justice.

The Court aims to deliver all judgments promptly and has set a target of three months from the date the case is last heard or the last submission is received. Most judgments are delivered in much less than three months, but sometimes they take longer, particularly in complex cases. Longer target dates apply in native title cases, most of which are very complex.

Complaints about cases that could be dealt with on appeal or by prerogative writ

Parties who are concerned about the result of a case or about any other matter in connection with the case that is capable of being raised in an appeal should consider whether or not to appeal to the Full Court of the Federal Court. There are time limits for appeals and parties need to act promptly. In general, only a Full Court of three judges (or occasionally five) can set aside or change a decision made by a single judge. The Chief Justice has no power to interfere with any decision made by a single judge and complaints about the result of a case are generally outside the scope of the complaints procedure. A similar situation exists in respect of any matter that is or was capable of being raised by a prerogative writ under s 75(v) of the Constitution.

If a complaint is received about matters that are, or were, capable of being dealt with by an appeal to a Full Court or by a prerogative writ, the Chief Justice will write to the person who has made the complaint advising that person that the matter cannot be dealt with under the complaints procedure.

Complaints about judicial conduct

A complaint about judicial conduct must be made by letter addressed to the Chief Justice. It must identify the complainant, the judge about whom the complaint is made and the judicial conduct about which the complaint is made. Judicial conduct, for the purposes of this procedure, means conduct of a judge in court or in connection with a case in the Federal Court, or in connection with the performance of a judge's judicial functions.

If the Chief Justice receives such a complaint he will first make sure that the complaint is about judicial conduct. He will make sure that the complaint is not about the result of the case or about something else that was capable of being raised in an appeal to the Full Court or by prerogative writ and therefore outside the scope of the complaints procedure. If the Chief Justice considers that the complaint is about judicial conduct, he will then determine whether, on its face, the complaint has substance. If it appears that it might have substance, the complaint will be referred for a response to the judge whose conduct is in question. The Chief Justice may also make further enquiries to determine the seriousness of the complaint.

The role of the Chief Justice in relation to a complaint is to determine how to deal with a complaint appropriately.

The Chief Justice, or the Registrar on his behalf, will acknowledge a letter of complaint and advise the complainant of the outcome of the complaint. If the Chief Justice considers that dealing with the complaint might have an adverse affect on the disposition of a matter currently before the Court he may defer dealing with the complaint until after the determination of that matter.

In the event that the Chief Justice is unavailable to deal with a complaint or it is inappropriate for him to do so, the procedure will apply with the next most senior available judge acting in place of the Chief Justice.

FEDERAL MAGISTRATES COURT OF AUSTRALIA JUDICIAL COMPLAINTS PROCEDURE

Federal Magistrates, like all other citizens, are subject to the law, but the need to protect judicial independence in the interests of the whole community means that, in respect of their judicial conduct, they cannot be subject to direct discipline by anyone else, except in the extreme cases of proven misbehaviour or incapacity. In those circumstances, and in those only, a Federal Magistrate may be removed from office by the Governor-General upon a request from both Houses of the Parliament

Federal Magistrates are accountable through the public nature of their work, the requirement that they give reasons for their decisions and the scrutiny of their decisions on appeal. With rare exceptions, all court hearings are open to the public and can be reported in the news media. However, there are statutory limitations on the reporting of certain proceedings. For example, the identification of parties or witnesses to family law proceedings is not permitted (see section 121 of the Family Law Act 1975 (Cth)) and the names of applicants in protection visa related migration proceedings are not permitted to be published (see section 91X of the Migration Act 1958 (Cth)). A substantial number of judgments of the Court are available to the public through the internet. In relation to family law and migration decisions, they are anonymised to comply with the statutory requirements.

This complaints procedure does not, and cannot, provide a mechanism for disciplining a Federal Magistrate. It does, however, offer a process by which complaints about judicial conduct can be brought to the attention of the Chief Federal Magistrate and, if appropriate, the Federal Magistrate concerned, and it provides an opportunity for complaints to be dealt with in an appropriate manner.

For constitutional reasons, the participation of a Federal Magistrate in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its Federal Magistrates and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred, and, where appropriate, to improve the performance of the Court.

Complaints about delay

A party may express concerns or make complaints about delay in the delivery of a judgment. In such a case a party can send a letter to the president of the bar association or the law society in the State or Territory in which the case was heard and request that the president take up the matter with the Chief Federal Magistrate. The president will then convey the concern or complaint to the Chief Federal Magistrate without identifying which party complained. The Chief Federal Magistrate will look into the matter and, if appropriate, take it up with the Federal Magistrate concerned. Complaints of this nature can also be made directly by letter addressed to the Chief

Federal Magistrate and where a party is not represented that is the procedure to be followed.

The Court aims to deliver all judgments promptly and has set a target of three months from the date the case is last heard or the last submission is received. Most judgments are delivered in much less than three months, but sometimes they take longer, particularly in complex cases.

Complaints about cases that could be dealt with on appeal

Parties who are concerned about the result of a case, or about any other matter in connection with the case that is capable of being raised in an appeal, should consider whether or not to appeal to the Federal Court or the Family Court of Australia (depending on the matter which is being appealed). There are time limits for appeals and parties need to act promptly. The Chief Federal Magistrate has no power to interfere with any decision made by a Federal Magistrate and complaints about the result of a case are generally outside the scope of the complaints procedure.

If a complaint is received about matters that are, or were, capable of being dealt with by an appeal, a letter will be sent to the complainant indicating that the matter cannot be dealt with under the complaints procedure.

Complaints about judicial conduct

A complaint about judicial conduct must be made by letter addressed to the Chief Federal Magistrate. It must identify the complainant, the Federal Magistrate about whom the complaint is made, and the judicial conduct about which the complaint is made. Judicial conduct, for the purposes of this procedure, means conduct of a Federal Magistrate in court or in connection with a case in the Federal Magistrates Court, or in connection with the performance of a Federal Magistrate's judicial functions.

If the Chief Federal Magistrate receives such a complaint he will first make sure that the complaint is about judicial conduct. He will make sure that the complaint is not about the result of the case or about something else that was capable of being raised in an appeal and therefore outside the scope of the complaints procedure.

If the Chief Federal Magistrate considers that the complaint is about judicial conduct, he will then determine whether, on its face, the complaint has substance.

If the Chief Federal Magistrate considers that dealing with the complaint might have an adverse effect on the disposition of a matter currently before the Court he may defer dealing with the complaint until the determination of the matter. If so, the Federal Magistrate, dealing with the matter would not normally be advised of the complaint to avoid any possible perception of bias, and the complainant would be informed of this.

All complaints generally receive a letter of acknowledgement prior to a substantive reply. The Chief Federal Magistrate is assisted by the Principal Registrar in dealing

with complaints. Because the process cannot provide a mechanism for disciplining Federal Magistrates, the Court's response will not address anything other than the substance of the complaint. However, as indicated, it provides an opportunity for the Chief Federal Magistrate to improve the performance of the Court if behaviour falls short of expected judicial standards.

If the matter warranted it, the Chief Federal Magistrate would bring the conduct complained of to the attention of the Attorney-General.

The role of the Chief Federal Magistrate in relation to a complaint is to determine how to deal with that complaint appropriately.