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The Parliament of the Commonwealth of Australia

# Advisory report:

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

House of Representatives  
Standing Committee on Social Policy and Legal Affairs

June 2012  
Canberra

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## Membership of the Committee

Chair                    Mr Graham Perrett MP

Deputy Chair        Hon. Judi Moylan MP

Members             Mr Shayne Neumann MP  
                             Ms Laura Smyth MP  
                             Hon. Dr Sharman Stone MP  
                             Mr Mike Symon MP  
                             Mr Ross Vasta MP

Supplementary     Hon. Philip Ruddock MP  
Member

## Committee Secretariat

Secretary

Dr Anna Dacre

Inquiry Secretary

Ms Pauline Cullen



## Inquiry information

On Thursday 15 March 2012, the Selection Committee asked the Committee to inquire into and report on Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 and Courts Legislation Amendment (Judicial Complaints) Bill 2012.





## List of recommendations

### Recommendation 1

The Committee recommends that the Courts Legislation Amendment (Judicial Complaints) Bill 2012 is passed by the House of Representatives without amendment.

### Recommendation 2

The Committee recommends that the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 is passed by the House of Representatives without amendment.



## Introduction

- 1.1 The Courts Legislation Amendment (Judicial Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 were introduced to the House of Representatives by the Australian Government on 14 March 2012.

### **Judicial Complaints Bill 2012**

- 1.2 The Courts Legislation Amendment (Judicial Complaints) Bill 2012 (hereafter referred to as the Judicial Complaints Bill) amends the *Family Law Act 1975*, *Federal Court of Australia Act 1976* and *Federal Magistrates Act 1999* to establish a framework to enable the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints that are referred to them. It also amends the *Freedom of Information Act 1982* to exclude documents created through the complaints handling scheme from the operation of that Act.
- 1.3 The amendments set out in this Bill are designed to support a largely non-legislative framework to assist the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints that are referred to them. It is anticipated that the vast majority of complaints would be dealt with through this internal mechanism.

## Parliamentary Commissions Bill 2012

- 1.4 Introduced with the Judicial Complaints Bill, the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (hereafter referred to as the Parliamentary Commissions Bill) enables parliamentary commissions to be established following a resolution by each House of the Parliament to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer (including a Justice of the High Court of Australia).
- 1.5 While section 72 of the Constitution confers to the Parliament the power to remove a federal judicial officer, there is currently no standard mechanism by which allegations about misbehaviour or incapacity against federal judicial officers would be investigated. Although instances of the removal of judges from office in Australia may be extremely rare, in order to support judicial independence and retain public confidence in the federal judiciary, it is important that a clear framework for removal is in place for such an event.

## Earlier Senate inquiry

- 1.6 The reforms proposed in the Bills respond in part to recommendations put forward in the 2009 Senate Legal and Constitutional Affairs Committee report into Australia's Judicial System and the Role of Judges.<sup>1</sup>
- 1.7 That report made 16 recommendations, including the establishment of a federal commission for judicial complaints handling.
- 1.8 The Australian Government provided a response to the report in 2010. The response noted that the Australian Government was:
- working within SCAG (Standing Committee of Attorneys-General) to consider possible models for a national mechanism for judicial complaints handling.<sup>2</sup>
- 1.9 The response also noted section 72 of the Constitution regarding the removal of Justices of the High Court, and the current lack of 'statutory or

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1 Senate Legal and Constitutional Affairs Committee, *Inquiry into Australia's Judicial System and the Role of Judges*, tabled 7 December 2009.

2 Government response to *Inquiry into Australia's Judicial System and the Role of Judges*, p. 4.

other basis for establishing any procedure for ‘handling complaints’ against Justices of the Court’.<sup>3</sup>

## Referral of the Bills

- 1.10 On 15 March 2012 the Selection Committee referred the Parliamentary Commissions Bill and Judicial Complaints Bill to the Standing Committee on Social Policy and Legal Affairs for inquiry and report.

### Reason for referral

- 1.11 No reason was given by the Selection Committee for the referral of these bills.
- 1.12 The Committee notes that subsequent to this referral, the Selection Committee has initiated the practice of providing reasons for referrals. The Committee considers this a valuable improvement that will enhance the bill scrutiny process.

## Concurrent Senate inquiry

- 1.13 These two bills have also been referred to the Senate Committee on Legal and Constitutional Affairs for inquiry and report.<sup>4</sup> The Senate Committee issued a call for submissions, and conducted a public hearing on Friday 11 May. The Senate Committee is due to present its report on 13 July 2012.
- 1.14 In the past there have been several instances where Senate and House committees have been referred concurrent inquiries. In those instances, this Committee has endeavoured not to duplicate inquiries and not to burden stakeholders with multiple requests for submissions on the same bill.
- 1.15 In this instance the Committee wishes to note that it is entirely appropriate for both Houses to be conducting inquiries into these bills. The measures proposed in the Parliamentary Commissions Bill go to the exercise of power of both Houses under the Constitution. Accordingly, it is

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3 Government response to *Inquiry into Australia’s Judicial System and the Role of Judges*, p. 4.

4 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees)

appropriate that these bills undergo autonomous committee scrutiny from both Houses prior to their debate in each House.

## **Senate Scrutiny of Bills Committee**

- 1.16 The Senate Scrutiny of Bills Committee hereafter referred to as the Scrutiny Committee reports on clauses of bills that may infringe on personal rights and liberties, or may result in an unchecked exercise of power.<sup>5</sup> The Scrutiny Committee made comment on both bills.

## **Parliamentary Commissions Bill**

- 1.17 The Scrutiny Committee notes that although the bill provides a statutory basis for the heads of jurisdiction to deal with complaints against judicial officers, the complaint handling process remains non-statutory.<sup>6</sup> The Scrutiny Committee has requested advice from the Attorney-General to ensure that procedural fairness obligations apply to the non-statutory aspects of the complaints process.
- 1.18 The Scrutiny Committee notes concern that the Chief Judge's power to deal with judicial complaints may be too broad and not subject to sufficient accountability. They raise the concern that excluding complaints-handling documents from Freedom of Information laws may also trespass on personal rights.

## **Judicial Complaints Bill**

- 1.19 The Scrutiny Committee highlights four aspects of the Judicial Complaints Bill, in that they may trespass on personal rights and liberties.
- 1.20 Firstly, the Commission will be able to issue search warrants in limited circumstances and on reasonable grounds. There are safeguards, as a written copy of the warrant must be kept and be given to Parliament.
- 1.21 Secondly, the Commission will be able to hold private hearings. However, the Commission must not publish any material that could prejudice the safety of a person or the fair trial of a person. The current provisions may be too broad to sufficiently balance the relevant interests. The Scrutiny

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5 Senate Standing Order 24(1)(a) sets out the Terms of Reference for the Scrutiny of Bills Committee.

6 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 4 of 2012, 21 March 2012, p.2.

Committee considers that this aspect of the bill may also infringe personal privacy.

- 1.22 Thirdly, a person will not be able to refuse to provide documents or answer questions for fear of self-incrimination. However, restrictions exist on the use of information obtained in this way. The Explanatory Memorandum explains that this will assist the Parliament if it exercises its power under section 72(ii) of the Constitution.
- 1.23 Lastly, if a person does not wish to appear as a witness, provide a document/thing or give evidence, they must prove that they have a 'reasonable excuse'. This reverses the onus of proof. This practice complies with *The Guide to the Framing of Commonwealth Offences* and adequate explanation is provided in the Explanatory Memorandum. Hence, the Scrutiny Committee chose not to make further comment.

## Conduct of the inquiry

- 1.24 While Senate and House committee deliberations and reports are autonomous, it is recognised that both committees would be seeking evidence from similar stakeholders. Consequently, it was agreed by this Committee to make use of the submissions received as evidence to the Senate inquiry, rather than issue a separate call for submissions to the same stakeholders.
- 1.25 This report references the submissions received by the Senate Committee. These submissions can be accessed at the Senate inquiry website.<sup>7</sup>
- 1.26 This Committee conducted a public hearing on Thursday 10 May 2012. Appearing at the hearing were representatives from the Attorney-General's Department and the Law Council of Australia. The transcript of this hearing can be accessed via the Committee's website.<sup>8</sup> The Committee has also drawn on other information from research papers and submissions to earlier inquiries.
- 1.27 The Senate Committee also conducted a public hearing and the transcript of that hearing can be accessed at the Senate inquiry website.<sup>9</sup> When

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7 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees)

8 <http://www.aph.gov.au/spla>

9 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees)

tabled, the Senate final report can also be accessed at the Senate inquiry website.<sup>10</sup>

## Issues raised – Judicial Complaints Bill

- 1.28 The Judicial Complaints Bill provides for an internal framework for complaints handling. The Explanatory Memorandum states that the majority of complaints would be dealt with via this internal framework and that Parliamentary consideration of removal of a judge from office under paragraph 72(ii) of the Constitution would only be triggered in the rarest of circumstances.<sup>11</sup>
- 1.29 The following concerns were raised regarding the proposed operation of the Judicial Complaints Bill. The Committee has chosen not to report all issues raised but has concentrated on those they consider to be of significance.

## Need for legislation

- 1.30 The Law Council of Australia questioned the need for this legislation in a submission to the Senate inquiry into the Australia's Judicial System and the Role of Judges, submitting that:

The Federal courts have each established effective formal 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.<sup>12</sup>

- 1.31 Indeed, in 2001, the Judicial Conference of Australia wrote that Drummond J had noted that 'a complaints system would be likely to encourage complaints where no judicial misconduct had occurred', stating that:

... it verges on the irresponsible to urge the establishment of formal mechanisms for receiving and dealing with complaints

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10 [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees)

11 Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012, p.1.

12 Law Council of Australia, Submission no. 11 to the Senate Legal and Constitutional Affairs Committee inquiry into Australia's Judicial System and the Role of Judges, p. 10.

about judges: the establishment of such mechanisms in an attempt to force the courts into the currently fashionable business model, when there is no justifiable need for such processes, can only help foster the false impression that there is something rotten in the judiciary.<sup>13</sup>

## Payment of legal representation

- 1.32 The Federal Court of Australia and the Judicial Conference of Australia both raise concerns about the bill's lack of provision for legal representation for the judicial officer, in contrast to that of the Parliamentary Commissions Bill.
- 1.33 The submission from the Federal Court raises the issue that the participation of the judicial officer is not compulsory and suggests that voluntary engagement in the internal complaints process will be encouraged and facilitated on the payment of reasonable legal costs.<sup>14</sup>
- 1.34 The Judicial Conference of Australia agrees with the Federal Court, maintaining that a provision to provide legal representation would encourage judicial officers to participate fully and voluntarily in the handling of the complaint. They consider that judicial officers may choose not to participate for fear of the burden of the cost of necessary legal representation.<sup>15</sup> The Judicial Conference of Australia also considers payment of legal representation similar to that of the Parliamentary Commission Bill provides fairness to the judicial officer.
- 1.35 The Attorney-General's Department provides a distinction between the internal complaints process as described in the Judicial Complaints Bill and the parliamentary process of the Parliamentary Commission. They indicate that:

...provision was made for the costs of legal representation when a judicial officer is being investigated by a Parliamentary Commission in recognition that a judicial officer is subject to a parliamentary process by virtue of their constitutional standing as a Chapter III judge.<sup>16</sup>

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13 Judicial Conference of Australia, 'Report of the Complaints against Judicial Officers Committee', p. 7 <[http://www.jca.asn.au/publications/First\\_Report.pdf](http://www.jca.asn.au/publications/First_Report.pdf)> viewed 2 April 2012.

14 Federal Court of Australia, *submission 1*, p. 1.

15 The Judicial Conference of Australia, *submission 4*, p. 2.

16 Attorney-General's Department, *Answers to questions on notice*, p. 5.

- 1.36 The Attorney-General's Department also indicates that as federal courts are each responsible for their own operation and management, a head of jurisdiction may consider it appropriate in the circumstances to offer reimbursement of legal representation costs.<sup>17</sup>
- 1.37 Civil Liberties Australia contends that there are very few situations in Australia where employees could expect their employer to pay their reasonable legal costs when they were subject to a workplace investigation, even where dismissal and loss of employment were a real possibility.<sup>18</sup> They did not support amending the Judicial Complaints Bill for this purpose.

## Incapacity

- 1.38 Some submissions raise concerns that incapacity is not specifically addressed in the Bill. The Attorney-General's Department considers that there are provisions in the Judicial Complaints bill which provide flexibility for a head of jurisdiction in selecting the person or body who may handle a complaint and allow for the sensitive handling of complaints of a personal nature.
- 1.39 Additionally their submission states that the exemption to accessing complaint related documents under the *Freedom of Information Act 1986* provides specific protection for complaint related evidence within the courts.<sup>19</sup>

## High Court

- 1.40 In the second reading speech the Attorney-General states that:
- This bill will not apply to the High Court. That is because the High Court's position at the apex of the Australian judicial system means that it could be called upon to determine the validity of any structure established to handle judicial complaints.<sup>20</sup>
- 1.41 The submission from scholars of the University of Adelaide Law School raises the concern that the provisions of the bill do not apply to the High Court. They contend that the High Court has in the past had to consider

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17 Attorney-General's Department, *Answers to questions on notice*, p. 5.

18 Civil Liberties Australia, *Submission 5*, p. 3.

19 Attorney-General's Department, *Answers to questions on notice*, p. 8.

20 Second Reading Speech, Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012, (The Hon Nicola Roxon MP, Attorney General), House of Representatives Hansard, 14 March 2012.

legislation that directly touched upon the judiciary and did so without fear or favour.<sup>21</sup>

## Heads of Jurisdiction

- 1.42 Scholars of the University of Adelaide Law School raise the concern that the Judicial Complaints Bill does not provide for the investigation of complaints against the head of the jurisdiction. They consider therefore that the bill does not provide complete coverage.
- 1.43 They qualify that there could be an issue if the bill were amended in this way, that it would be important to put a provision in the bill that prevented a complainant from abusing the process.<sup>22</sup>
- 1.44 The Attorney-General's Department counters this view with the point that heads of jurisdiction are subject to section 72(ii) of the Constitution and would be covered by the Parliamentary Commissions Bill. They clarify that serious concern about the conduct of a head of jurisdiction that may warrant removal from office could be referred for the Parliament to consider under paragraph 72(ii) of the Constitution. There is nothing in the Judicial Complaints Bill which would prevent this from occurring.<sup>23</sup>

## Sanctions

- 1.45 Professor Sharyn Roach Anleu and Professor Kathy Mack raise the concern that limited measures are available to a head of jurisdiction in cases of justified complaints against a judicial officer. They consider that the bill and the EM are silent on which responses or sanctions might be available if a complaint is found to be justified.<sup>24</sup>
- 1.46 In contrast, the Gilbert + Tobin Centre of Public Law state that the creation of a body that has the aim of 'proving' misbehaviour or incapacity or the capacity to sanction or remove serving judicial officers would constitute a usurpation of the Commonwealth Parliament's constitutional responsibilities under section 72.<sup>25</sup>

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21 Scholars from the University of Adelaide Law School, *submission 7*, p. 3.

22 Scholars from the University of Adelaide Law School, *submission 7*, p. 4.

23 Attorney-General's Department, *Answers to questions on notice*, p. 2.

24 Professor Sharyn Roach Anleu and Professor Kathy Mack, *submission 6*, p. 5.

25 Gilbert + Tobin Centre of Public Law, *submission 2*, p. 2.

## Issues raised – Parliamentary Commissions Bill

- 1.47 The Parliamentary Commissions Bill provides a mechanism to investigate allegations about misbehaviour or incapacity against federal judicial officers. This bill provides a standard investigative framework to inform the Parliament should the Parliament then choose to exercise its power under section 72(ii) of the Constitution and seek to remove a Justice of the High Court.
- 1.48 Section 72(ii) of the Constitution states that:
- The Justices of the High Court and of 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 the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity<sup>26</sup>
- 1.49 The following concerns were raised regarding the proposed operation of the Parliamentary Commissions Bill. As with the Judicial Complaints Bill, the Committee has chosen not to report all issues raised but has concentrated on those they consider to be of significance.

## Incapacity

- 1.50 The Gilbert and Tobin Centre of Public Law considers that there should be more detail around the processes that are specifically directed towards the investigation and resolution of complaints based on incapacity.<sup>27</sup>
- 1.51 Their submission gives the example of the new provisions in the *Judicial Officers Act 1986 (NSW)* which introduce a means by which health and capacity matters may be formally investigated without having to wait until litigants bring forward a formal complaint against a judge's behaviour.<sup>28</sup>
- 1.52 In contrast the Attorney-General's Department highlights the provisions contained in the Parliamentary Commission bill that they consider support judges who are the subject of complaints of incapacity in a way that also protects the privacy of information about a judge's personal

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26 Australian Constitution s 72(ii).

27 Gilbert + Tobin Centre of Public Law, *submission 2*, p. 2.

28 Gilbert + Tobin Centre of Public Law, *submission 2*, p. 2.

health.<sup>29</sup> For example, they consider that the provisions around evidence<sup>30</sup>, privacy<sup>31</sup> and reporting<sup>32</sup> enable the Commission to accommodate the particular sensitivities of a complaint or a condition affecting a judicial officer.

## Former Judicial Officers

- 1.53 Civil Liberties Australia is concerned that under the bill former judicial officers are being given the same protections as current judicial officers. They disagree with the grounds given for the protections and consider that former judicial officers are simply ordinary people.<sup>33</sup>

## Limits on powers of Parliamentary Commissions

- 1.54 The Clerk of the Senate raises the issue that a Commission would have limited inquiry powers in respect of Commonwealth judicial officers and former judicial officers. The limitations are considered to be appropriate to support judicial independence under Chapter III of the Constitution.<sup>34</sup>
- 1.55 The Clerk of the Senate notes that the Houses of Parliament remain free to appoint their own committees of inquiry.<sup>35</sup>
- 1.56 The Clerk also states that the doctrine of the separation of powers as interpreted in the bill was confused, as the limitation on the powers of a commission meant that the separate and independent component of the doctrine is acknowledged, it does not account for the checks and balances aspect of the doctrine.<sup>36</sup>

Section 72 of the Constitution and the accountability of judges to both parliament and the executive on questions of fitness of office is one of those checks and balances but the limitations adopted in the bill inhibit its effective operation in the preliminary investigative phase by a Commission.<sup>37</sup>

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29 Attorney-General's Department, *Answers to questions on notice*, p.7-8.

30 Proposed new section 19(1) Judicial Complaints Bill.

31 Proposed new sections 23, 24(7) of the Judicial Complaints Bill.

32 Proposed new section 48(6) of the Judicial Complaints Bill.

33 Civil Liberties Australia, *Submission 5*, p. 2.

34 Clerk of the Senate, *Submission 2*, p. 3.

35 Clerk of the Senate, *Submission 2*, p. 3.

36 Clerk of the Senate, *Supplementary submission*, p. 1.

37 Clerk of the Senate, *Supplementary submission*, p. 1.

- 1.57 The Attorney-General's Department considers that provisions in the Parliamentary Commissions Bill are framed in such a way that participation of a federal judge is voluntary but that this does not preclude the Commission from undertaking an investigation or completing a report for the Parliament.<sup>38</sup>

## Appointment of members to a commission

- 1.58 The Clerk of the Senate contends that the need to have nominations from the Prime Minister and consultation with the Opposition leader in the House of Representatives is an unnecessary intrusion by the executive.<sup>39</sup>
- 1.59 The Clerk also queries how a commission could be seen to be a joint parliamentary body when there is no role for the Senate in this prior consultation.<sup>40</sup> The Clerk considers that this feature of the bill will mean that commissions will only be practical when there is consensus on the need for one.<sup>41</sup>
- 1.60 The Attorney-General's Department considers that the consultation by the Prime Minister with the Leader of the Opposition about proposed nominees reflects the non-partisan nature of a commission's function and that the entire Parliament must agree to the nominations before appointment of members and establishment of a Commission.<sup>42</sup>

## Committee comment

- 1.61 The Committee considers that the present framework for addressing judicial complaints, misbehaviour and incapacity has served well, and questions the need for this legislation.
- 1.62 The Attorney-General's Department advised the Committee that 'the heads of jurisdiction are supportive of this policy and have been involved in the development of it'.<sup>43</sup> However, the Committee notes that the heads

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38 Attorney-General's Department, *Answers to questions on notice*, p. 9.

39 Explanatory Memorandum, Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012, pp. 12-3.

40 Clerk of the Senate, *Supplementary submission*, p. 2.

41 Clerk of the Senate, *Supplementary submission*, p. 2.

42 Attorney-General's Department, *Answers to questions on notice*, p. 10

43 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, Canberra, 10 May 2012, p. 6.

of jurisdiction, while considering this legislation the most appropriate model, did not seek or suggest such legislation.

- 1.63 The Committee is concerned that the reputation of the judiciary may be compromised by establishing a framework for a parliamentary commission to investigate possible misbehaviour or incapacity. An adverse finding against a single judge may leave the entire judiciary more vulnerable to criticism. A finding of incapacity may also have implications for previous rulings by that judge.
- 1.64 Another concern is potential political interference with the judiciary. The Committee understands that the establishment of a parliamentary commission requires a resolution from both houses of Parliament and the appointment of commission members is made by the Prime Minister in consultation with the Leader of the Opposition. Nonetheless, there remains the possibility of political interference by a strong government in the event of undesirable judicial decisions.
- 1.65 Despite these concerns regarding the need for these bills and potential unintended consequences, the Committee is tasked with assessing the merits of the bills. In doing so, the Committee has considered the issues raised in consultation via its own inquiry and through that of the Senate Legal and Constitutional Affairs Committee and does not find that the bills warrant any amendments, and considers that they achieve their respective objectives.

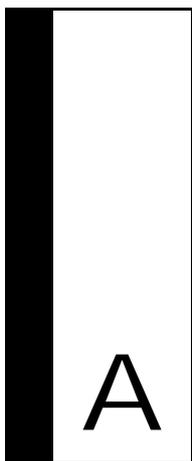
### **Recommendation 1**

- 1.66 **The Committee recommends that the Courts Legislation Amendment (Judicial Complaints) Bill 2012 is passed by the House of Representatives without amendment.**

### **Recommendation 2**

- 1.67 **The Committee recommends that the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 is passed by the House of Representatives without amendment.**

Mr Graham Perrett  
Chair



## Appendix A - List of witnesses appearing at public hearing

**Thursday, 10 May 2012 - Canberra**

**Attorney-General's Department**

Ms Katrina Fairburn, Principal Legal Officer, Judiciary and Court Structure Section

Ms Louise Glanville, First Assistant Secretary, Access to Justice Division

Dr Albin Smrdel, Assistant Secretary, Federal Courts Branch

**Law Council of Australia**

Mr Michael Colbran QC, Treasurer

Ms Stasia Tan, Policy Lawyer, Civil Justice Division

