

Law Reform Commission of Western Australia

# Complaints Against Judiciary

Project 102

Discussion Paper

September 2012



## The Law Reform Commission of Western Australia

### Commissioners

Chair: Mr R Douglas BA (Hons), LLB (Hons) (ANU)  
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Dr A Zimmermann LLB, LLM (PUC-Rio), PhD (Monash)

**Executive Officer** Ms HJ Kay, LLB, LLM (Western Australia)

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Law Reform Commission of Western Australia  
Level 3, BGC Centre  
28 The Esplanade  
Perth WA 6000  
Australia

Telephone: 011+61+8+9321 4833

Facsimile: 011+61+8+9321 5833

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# Acknowledgements

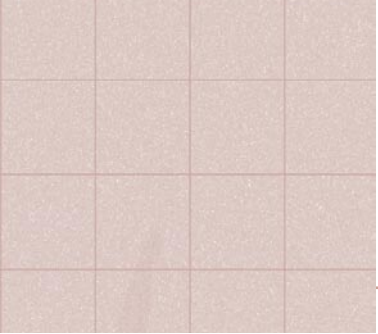
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# Introduction

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

The Law Reform Commission of Western Australia is to examine and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to complaints or allegations of misbehaviour or incapacity against state judicial officers in Western Australia require reform and the responses to any such conduct, and in particular giving close consideration to:

- (i) the need to protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government;
- (ii) the benefits of establishing a system for dealing with such complaints and allegations that is efficient, accessible, transparent and accountable;
- (iii) the need to ensure that any system for dealing with such complaints and allegations is suited to the conditions in Western Australia, having regard to the number of serving state judicial officers and the number of complaints or allegations warranting investigation that may be expected to arise;
- (iv) the need to develop standardised and consistent procedures when dealing with such complaints, thus reducing the potential for allegations of bias to be made in relation to procedures which are developed after the complaint or allegation is made;
- (v) the recent establishment of judicial complaints systems in other jurisdictions both nationally and internationally;

and to report on the adequacy of, and on any desirable changes to, the existing principles, practices and procedures in relation thereto.

## BACKGROUND

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

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

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

aspect of accountability is that persons with concerns about the conduct of judges should have a proper means by which to raise those concerns and to have them addressed. One such mechanism is the appellate process. It is designed to identify and correct legal and factual error in the decision-making process. Another aspect of accountability is that legitimate concerns about the conduct of a judicial officer that are not amenable to the appellate process should also be capable of review in an appropriate case. In Western Australia, judges hold office until they resign or reach a compulsory retirement age of 70 years. Until then, their commissions ‘remain in full force during their good behaviour’.<sup>2</sup> This provision is modelled on England’s *Act of Settlement 1701*,<sup>3</sup> as are the comparable provisions in the Australian Constitution<sup>4</sup> and the constitutions or constitutive legislation for courts in other states.<sup>5</sup> Those provisions limit removal of a judge to instances of ‘proved misbehaviour or incapacity’.<sup>6</sup> It can be assumed that the reference in the Western Australian provision to ‘good behaviour’ is to be construed similarly.

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

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

## COMPLAINTS AGAINST JUDICIARY

### Dealing with complaints

There is no legislation prescribing how complaints against the Western Australian judiciary are to be lodged, investigated or dealt with, save for the removal of a judge from office and some provisions in the *Magistrates Court Act 2004* (WA). Some

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

other jurisdictions either have, or are contemplating, legislation for a more formal complaints system.<sup>7</sup>

The experience of the courts is that complaints cover a broad spectrum, both in relation to subject matter and level of seriousness. Some complaints emerge from a lack of understanding of the legal system and (or) from disappointment that a decision, on its face regular, has gone against the person concerned. Many concerns relate to delay in delivery of reserved decisions. Others allege rudeness or insensitivity to varying degrees by a judicial officer in the course of court proceedings. Some complaints of this nature can be resolved relatively simply by communication between the person concerned and the relevant court or judicial officer.

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

## Complaint categories

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

- (a) delay in delivering reserved decisions;
- (b) complaints alleging non-criminal misconduct; and
- (c) complaints received by the Police Service.

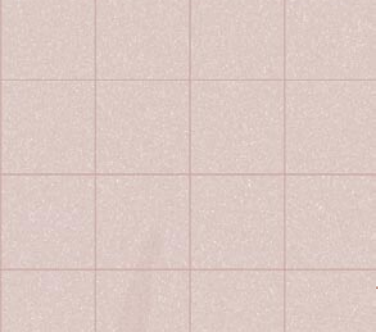
In attempting to identify the nature and incidence of complaints it may be more appropriate to utilise a different method of categorisation, namely:

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

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7. For discussion concerning the federal jurisdictions, New South Wales and Victoria, see below pp 29–42 .

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

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- (i) for which it is difficult to discern a rational basis;
  - (ii) that arise because of a misunderstanding of the legal system;
  - (iii) the subject matter of which could or should have been the subject of an appellate or other review process; and
  - (iv) arising from delays in delivery of reserved judgments or other delays in bringing the matter to finality;
- (b) behavioural issues – that is, complaints of matters such as rudeness, insensitivity, perceptions of unfair treatment or other conduct falling short of the level expected of a judicial officer but which, if established, could not reasonably be regarded as warranting removal from office;
- (c) complaints of criminal misconduct; and
- (d) complaints alleging misbehaviour or incapacity of a level of seriousness that suggests unfitness for office and which may warrant removal from office.

### The incidence of complaints

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

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

The workload of the courts in this state is significant. Given the large number of matters that are dealt with by the judicial system, the incidence of complaints about judicial conduct is low. Complaints that raise a serious prospect of removal of a judge from office are rare. There is no recorded instance of a motion in Parliament for the removal from office of a Western Australian judge. There have been motions of that type in other Australian jurisdictions but they are few and far between.<sup>9</sup> As the system for making complaints against judicial officers in Western Australia is relatively informal

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9. Some of these instances are set out in the case studies collected in Appendix C of this Discussion Paper.

and the circumstances and procedures vary widely, it is not easy to quantify the nature and extent of the issue or the level of community concern about judicial conduct. No formal statistics are available and estimates of the number of complaints that are made can only be gleaned from the correspondence files of the several courts.

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

	Ordinary complaints	Behavioural issues	Criminal misconduct	Misbehaviour or incapacity	Total complaints
2009	40	7	0	0	47
2010	27	6	0	0	33

These figures do not include matters relating to delays in the delivery of reserved decisions, many of which would be characterised as ‘inquiries’ rather than complaints. Nor do they include complaints made direct to heads of jurisdiction other than the Chief Justice.<sup>10</sup> Save for the exception mentioned in the next paragraph, statistics for complaints made direct to other heads of jurisdiction are not available.

Most of these complaints were able to be disposed of without any (or with minimal) formal investigation.

The correspondence files maintained by the Chief Magistrate indicate that in 2011 a total of 115 complaints were received. Of these, 19 concerned behavioural issues and the remainder were ordinary complaints. There were no complaints of criminal misconduct or of misbehaviour or incapacity. In 2010 one complaint falling into the ‘misbehaviour or incapacity’ category was referred by the Chief Magistrate to the Attorney General. After investigation under the relevant provisions of the *Magistrates Court Act 2004* (WA) the Attorney decided that the subject matter of the complaint did not justify taking further action against the judicial officer concerned.

Information provided by the Corruption and Crime Commission (CCC) indicates that since 2005 there have been 34 complaints about judicial officers made to the CCC. Of these:

10. The term ‘head of jurisdiction’ refers to the chief judicial officer of each of the relevant courts or tribunals; that is, the Chief Justice, the Chief Judges of the Family Court of Western Australia and the District Court, the President of the State Administrative Tribunal and the Chief Magistrate.

- 26 did not meet the requirements of s 27 of the Corruption and Crime Commission Act 2003 (WA);
- six involved insufficient evidence or grounds to justify further action by the Commission;
- one was referred to the Department of the Attorney General; and
- one was referred to the Western Australia Police.<sup>11</sup>

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

- (a) the level of complaints is low;
- (b) the complaints fall within three main categories, ordinary complaints, behavioural issues and complaints of criminal misconduct;
- (c) the CCC made no findings of criminal misconduct; and
- (d) the CCC made no findings of misbehaviour or incapacity.

It is not possible to assess whether, and if so to what extent, the low incidence of complaints reflects a lack of knowledge about the avenues for complaint currently open to affected parties. However, it should be noted that in New South Wales (which has had a more formal system since 1985) the number of complaints is small considering the many dealings which members of the public have with the court system.<sup>12</sup>

### Perceived problems with the current system

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

#### *Litigants and members of the public*

It is difficult to gauge the level of awareness that the public has as to the existence of the Protocol or generally of mechanisms for dealing with complaints against the judiciary.<sup>13</sup> There may be, among disappointed litigants and some members of the public, a perception that the system is not transparent, impartial or accountable. This is somewhat understandable because complaints are presently made to, and dealt with by, the head of jurisdiction (himself or herself a judicial officer). A resolution of the

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

12. Ibid. For further discussion, see below p 34.

13. The Protocol is available on the Supreme Court of Western Australia's website (see <[http://www.supremecourt.wa.gov.au/\\_manifest/2007\\_complaints\\_protocol\\_31082007.jmf](http://www.supremecourt.wa.gov.au/_manifest/2007_complaints_protocol_31082007.jmf)>), but there have been no surveys or research to assess the level of public awareness of the system.

dispute unfavourable to the complainant may therefore engender a sense that the result was inevitable and unfair.

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

### *Parliament and the executive*

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

The explanatory memorandum to a Bill currently before the federal Parliament describes the issue in this way (adapted to suit the Western Australian legislation):

While instances of removal of judges from office in Australia have been extremely rare, it is important that a clear framework is in place in the event that such a circumstance were to arise. Currently, there is no standard mechanism by which allegations about misbehaviour or incapacity against ... judicial officers would be investigated to assist Parliament's consideration of removal of a ... judicial officer under [Western Australian legislation].<sup>14</sup>

### *Judges and the courts*

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

Heads of jurisdiction often receive multiple complaints from the same individual who has become disenchanted with the legal system and (or) with the way his or her case has been (or is being) handled. Dealing with complaints of this nature presents peculiar problems, especially when appellate processes are underway. On occasions, the head of jurisdiction has no alternative other than to discontinue correspondence

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14. *Judicial Misbehaviour or Incapacity (Parliamentary Commissions) Bill 2012* (Cth), Explanatory Memorandum, [5].

with the complainant. This is not a satisfactory outcome given the public interest in issues of this nature.

The Commission has also received comments from a body representing the interests of magistrates expressing dissatisfaction at the complaints handling process generally and the relevant provision of the *Magistrates Courts Act* in particular.<sup>15</sup>

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

## STRUCTURE OF THIS DISCUSSION PAPER

The terms of reference recognise that a complaints system:

- (a) must protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government;
- (b) ought to be efficient, accessible, transparent and accountable; and
- (c) should be established having regard to the experience of other jurisdictions.

With that in mind, attention will be directed to the concepts of judicial accountability and judicial independence. This will be followed by an analysis of the current complaints systems in Western Australia, in other jurisdictions in Australia and in some comparable overseas jurisdictions. The Paper will then turn to a discussion of some of the relevant issues and pose questions that might usefully be addressed by readers interested in making submissions.

## Submissions to the Law Reform Commission

The Commission invites interested parties to make submissions on the reforms proposed in this Discussion Paper. Submissions will assist the Commission in formulating its final recommendations for reform of the law in this area. Submissions received by **7 December 2012** will be considered by the Commission in the preparation of its Final Report.

Submissions may be made by telephone, fax, letter or email. Alternatively, those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

Law Reform Commission  
of Western Australia  
Level 3, BGC Centre  
28 The Esplanade  
Perth WA 6000

Ph: (08) 9321 4833  
Fax: (08) 9321 5833  
lrcwa@justice.wa.gov.au

Submissions due:  
7 December 2012

15. *Magistrates Court Act 2004* (WA) sch 1.

# Chapter 1

## Judicial Accountability and Judicial Independence

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# Judicial accountability

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

In recent years, there has been an increased focus on public accountability.<sup>2</sup> There is a natural inclination to look at accountability primarily from the perspective of removal from an office or position. But the peculiar nature of judicial office, and in particular its position in the Australian constitutional system, requires a much broader view of accountability in this context. For example, while judicial officers are public officers they are not ‘employees’ in the sense that the term is generally understood; they are special statutory office holders.

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

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

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

1. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 14.
2. Kirby M, ‘Judicial Accountability in Australia’ (2003) 6 *Legal Ethics* 41, 42; Griffith, *ibid* 14.
3. Kirby, *ibid* 43.
4. *Ibid* 45. Generally speaking, media reports of court proceedings are protected by the law of defamation.
5. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 17.
6. Kirby M, ‘Judicial Accountability in Australia’ (2003) 6 *Legal Ethics* 41, 46.
7. *Ibid* 41.

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

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

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

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8. Ibid 46. See *Supreme Court (Court of Appeal) Rules 2005* (WA).

9. Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998) 17.

10. Clark D, *Principles of Australian Public Law* (Sydney: Lexisnexis Butterworth, 2003) 269.

11. Lane WB & Young S, *Administrative Law in Australia* (Sydney: Lawbook Company, 2007) 35.

12. Doyle J, 'Judicial Independence' (1998) 16 *Australian Bar Review* 212, 219.

13. Rares S, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 133.

# Judicial independence

# 1

## THE MEANING OF 'JUDICIAL INDEPENDENCE'

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

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

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

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

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

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

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

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

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

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

## HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE

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

The *Act of Settlement* was not part of the inherited imperial law on settlement, and colonial judges were treated simply as colonial servants.<sup>19</sup> The British Crown had control over the appointment and removal of judges until federation. The enactment of Chapter III of the Australian Constitution, the various state constitutions and

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

legislation establishing the state courts entrenched the relevant principles in Australian law.

## JUDICIAL INDEPENDENCE AND THE RULE OF LAW

The rule of law is a fundamental part of the Australian legal system. Its implementation depends on the existence of a judiciary that is

seen to be impartial, independent of government and of any other centre of financial and social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism.<sup>20</sup>

There is, therefore, a critical relationship between judicial independence and the rule of law.<sup>21</sup>

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

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

## JUDICIAL INDEPENDENCE AND THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers is considered to have emerged in the second half of the 17th century.<sup>24</sup> The doctrine dictates that each branch of government is to be separate from the others; that is, the legislature, executive and judiciary are all to be distinct institutions. This separation is to ensure that no one branch becomes overpowerful and to allow each branch to act as a check or balance on the others.

20. Brennan G, ‘The State of the Judicature’ (1998) 72 *Australian Law Journal* 33.

21. Bingham T, *The Rule of Law* (Penguin, 2012) 25, 91–2.

22. Ibid 3 and following.

23. Griffith G, *Judicial Accountability*, Background Paper No 1 (NSW Parliamentary Library Research Service, 1998) 14, 17.

24. Clark D, *Principles of Australian Public Law* (Lexisnexis Butterworth, 2003) 85.

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

The separation of powers doctrine is fundamental to the concept of judicial independence because it facilitates the judiciary to be free from the influences of the other branches of government, and allows it to review the laws made by the legislature and the actions of the executive in an impartial manner.

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25. Warren M, ‘Does Judicial Independence Matter?’ (2011) 85 *Australian Law Journal* 481, 484.

26. *Ibid.*

27. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

28. Warren M, ‘Does Judicial Independence Matter?’ (2011) 85 *Australian Law Journal* 481, 485.

# Chapter 2

## Current Complaints System in Western Australia

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# The complaints system in Western Australia

# 2

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

- (a) ordinary complaints – that is, complaints of non-criminal misconduct of a less serious kind;
- (b) behavioural issues;
- (c) complaints of criminal misconduct; and
- (d) complaints alleging misbehaviour or incapacity thus demonstrating unfitness for office and which may warrant removal from office.

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

A diagrammatic representation of the complaints handling system as it presently exists under the Department of the Attorney General (WA) appears in Chart 1 on page 20.

## JUDICIAL OFFICER

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

- (i) a ‘holder of a judicial office’ within the meaning of that phrase in s 121 of the Criminal Code; and
- (ii) a registrar of the Supreme Court, Family Court of Western Australia or District Court when acting judicially.<sup>1</sup>

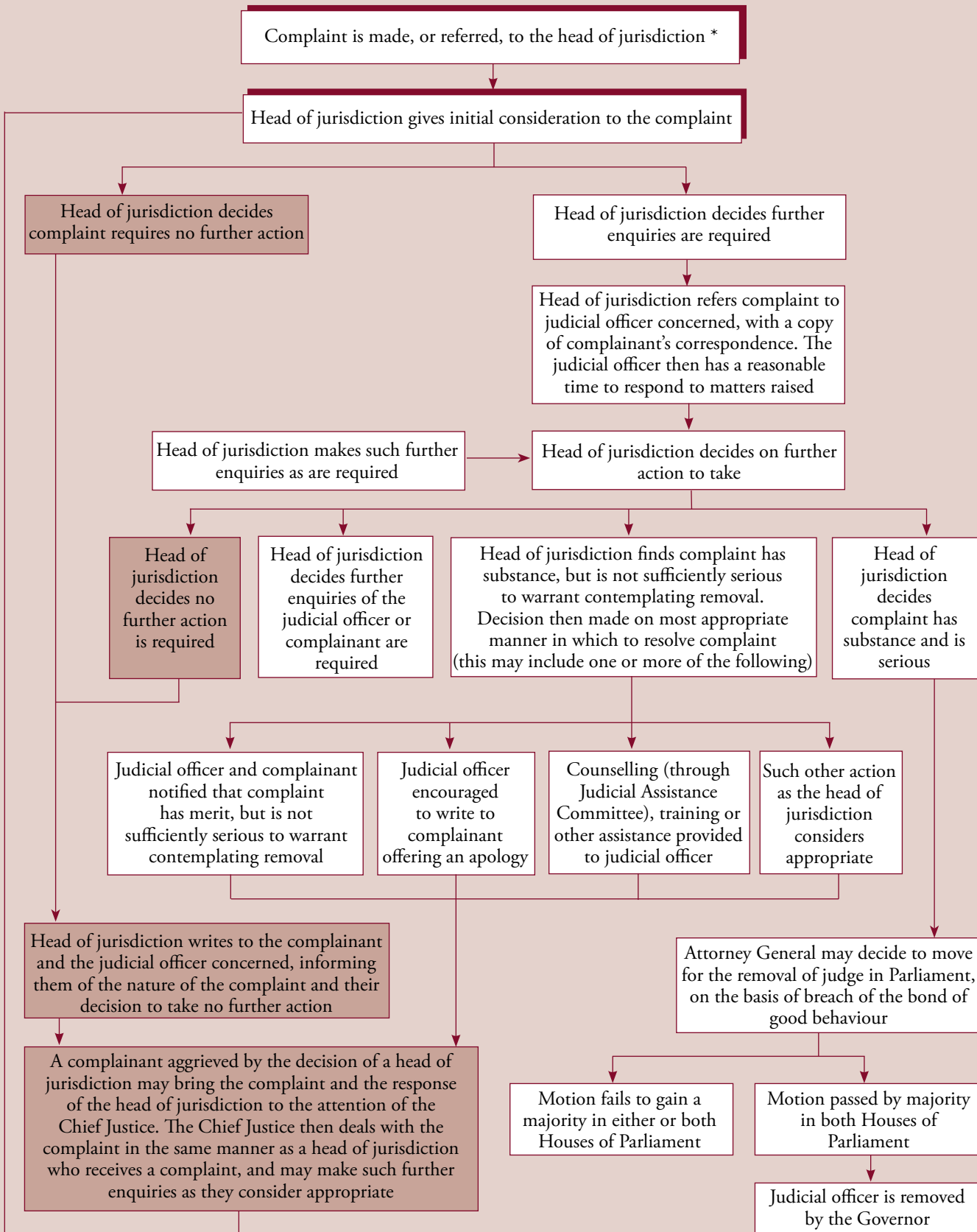
The term ‘holder of judicial office’ is not exhaustively defined in s 121 of the Criminal Code. The section simply states that the term includes an ‘arbitrator or umpire and any member of any board or court of conciliation or arbitration’.<sup>2</sup> However, the text of the Protocol suggests that it is designed primarily to cover complaints against office holders of the Supreme, District, Family, Magistrates and Children’s Courts and the

1. Department of the Attorney General (WA), *Protocol for Complaints against Judicial Officers in Western Australian Courts* (August 2007) (‘Protocol’) 1.

2. *Criminal Code Act Compilation Act 1913* (WA) s 121.

## CHART 1

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



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

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

State Administrative Tribunal.<sup>3</sup> The Protocol does not apply to non-judicial members of the State Administrative Tribunal.<sup>4</sup>

## ORDINARY COMPLAINTS

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

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

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

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

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

3. Protocol [18].

4. Protocol [9]; *State Administrative Tribunal Act 2004* (WA) ss 122, 123.

5. Protocol [1]–[8].

6. Protocol [9].

7. Protocol [12].

8. Protocol [10].

9. Protocol 1.

10. Protocol [10].

11. Protocol [10].

12. Protocol [18].

13. Protocol [18].

14. Protocol [13].

If the head of jurisdiction decides that no further action is required, ‘the judicial officer concerned should be informed of the nature of the complaint and the decision on it’. The complainant should also be informed of the decision.<sup>15</sup>

If further enquiries are made, the head of jurisdiction ‘must refer the matter to the judicial officer who is the subject of the complaint’, and provide the judicial officer with a copy of the complainant’s correspondence. ‘[T]he judicial officer must be given a reasonable time within which to respond to those matters raised by the complainant’.<sup>16</sup> After receiving the judicial officer’s response, the head of jurisdiction may decide that:

- (a) no further action is required and inform the complainant and the judicial officer that the complaint has been dismissed; or
- (b) further enquiries should be made of either the judicial officer or the complainant before a decision can be made; [or]
- (c) the complaint has substance but is not sufficiently serious to contemplate removal; [or]
- (d) the complaint has substance and is serious.<sup>17</sup>

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

- (i) noting that the complaint has merit, both the judicial officer and complainant being notified accordingly; [or]
- (ii) suggesting that the judicial officer concerned write to the complainant offering an apology; [or]
- (iii) [recommending] counselling (through the Judicial Assistance Committee), training or the provision of assistance to the judicial officer concerned.<sup>18</sup>

If the head of jurisdiction decides that the complaint has substance and is serious, the complaint must be dealt with according to procedures that have been established by law.<sup>19</sup>

‘Where a complainant is aggrieved by the decision of a Head of Jurisdiction other than the Chief Justice, the complainant [may] bring the complaint, and the nature of the Head of Jurisdiction’s response, to the attention of the Chief Justice’. In this case, ‘the Chief Justice is under the same obligations ... as any other Head of Jurisdiction

15. Protocol [13]–[14].

16. Protocol [15].

17. Protocol [16].

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

19. Protocol [16]. For further discussion, see ‘Complaints alleging unfitness for office’ below pp 24–5.

in dealing with such a complaint’, and ‘may make any enquiries he or she considers appropriate in resolving [the] complaint’.<sup>20</sup>

## COMPLAINTS OF CRIMINAL MISCONDUCT

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

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

- (a) relates to an offence under s 121 of the Criminal Code (which deals with judicial corruption), including attempt, incitement and conspiracy to commit such an offence; or
- (b) if established, would constitute grounds for removal from judicial office.<sup>22</sup>

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

- (a) proceed having regard to the preservation of judicial independence; and
- (b) act in accordance with conditions and procedures formulated in consultation with the Chief Justice.

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

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

20. Protocol [17].

21. Protocol [18].

22. *Corruption and Crime Commission Act 2003* (WA) s 27(3); Protocol [18].

23. Corruption and Crime Commission (WA), *Reporting Misconduct Process*, ‘Dealing with Your Misconduct Report’ (at <<http://www.ccc.wa.gov.au/Reporting/Process/Pages/default.aspx>>).

## COMPLAINTS ALLEGING UNFITNESS FOR OFFICE

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

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

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

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

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

24. See ‘Ordinary complaints’, above p 21.

25. *Judges Retirement Act 1937* (WA) s 3.

26. *Supreme Court Act 1935* (WA) ss 9. See also ss, 11(3), 11AA(4)(c), 11A(3) and *Constitution Act 1889* (WA) ss 54, 55.

27. Jordan R, *Complaints Against Judges*, Parliamentary Library Client Memorandum (November 2009).

28. *District Court of Western Australia Act 1969* (WA) ss 11(1), 18(4)(b), 18A(4)(b); *Family Court Act 1997* (WA) s 18(3); *State Administrative Tribunal Act 2004* (WA) ss 110, 114.

29. *Magistrates Court Act 2004* (WA) sch 1, cl 11.

30. *Magistrates Court Act 2004* (WA) sch 1, cl 15.

Governor who may either reinstate the magistrate to her or his duties or terminate the magistrate's appointment.<sup>31</sup>

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

- (a) has shown incompetence or neglect in performing his or her functions; or
- (b) has misbehaved or engaged in any conduct that renders him or her unfit to hold office as a magistrate, whether or not the conduct relates to those functions.<sup>32</sup>

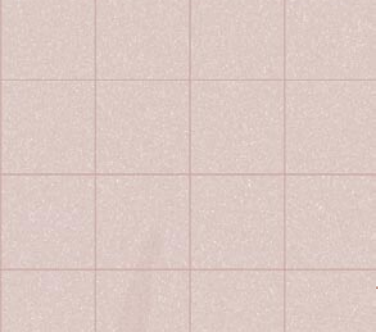
The legislation provides that the Attorney General may give a magistrate notice to show cause why he or she should not be suspended from office. The Attorney, after consulting the Chief Magistrate, must allege that a proper reason exists for suspending the magistrate. A copy of the notice to show cause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

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

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31. *Magistrates Court Act 2004* (WA) sch 1, cl 13.

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



# Chapter 3

## Other Complaints Regimes

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# Australian federal courts

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

A diagrammatic representation of the federal complaints handling system as it presently exists appears in Chart 2 on page 30.

On 14 March 2012 the federal Parliament considered the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012*. Debate on the Bill stands adjourned following the Minister's second reading speech. The Bill provides for the establishment of a commission (as a joint parliamentary body with its own legal status) to assist the Parliament where necessary in discharging its responsibilities under paragraph 72(ii) of the Constitution. The Explanatory Memorandum describes the role and functions of the commission as follows:

A Commission, as provided for under the Bill, would be established following a resolution by each House of the Parliament that it be established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer. It would be able to inquire into any federal judicial officer, including a Justice of the High Court of Australia.

The role of a Commission under the Bill would be to inquire into allegations and gather information and evidence so the Parliament could be well informed in its consideration of the removal of a judge. The character of a Commission's role would be investigative as it would not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge. A Commission's focus would be to consider the threshold question of whether there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity and report on these matters to the Houses of Parliament.

The Bill supports the Constitutional role of the Houses of the Parliament in determining whether or not allegations of judicial misbehaviour or incapacity are proved.<sup>2</sup>

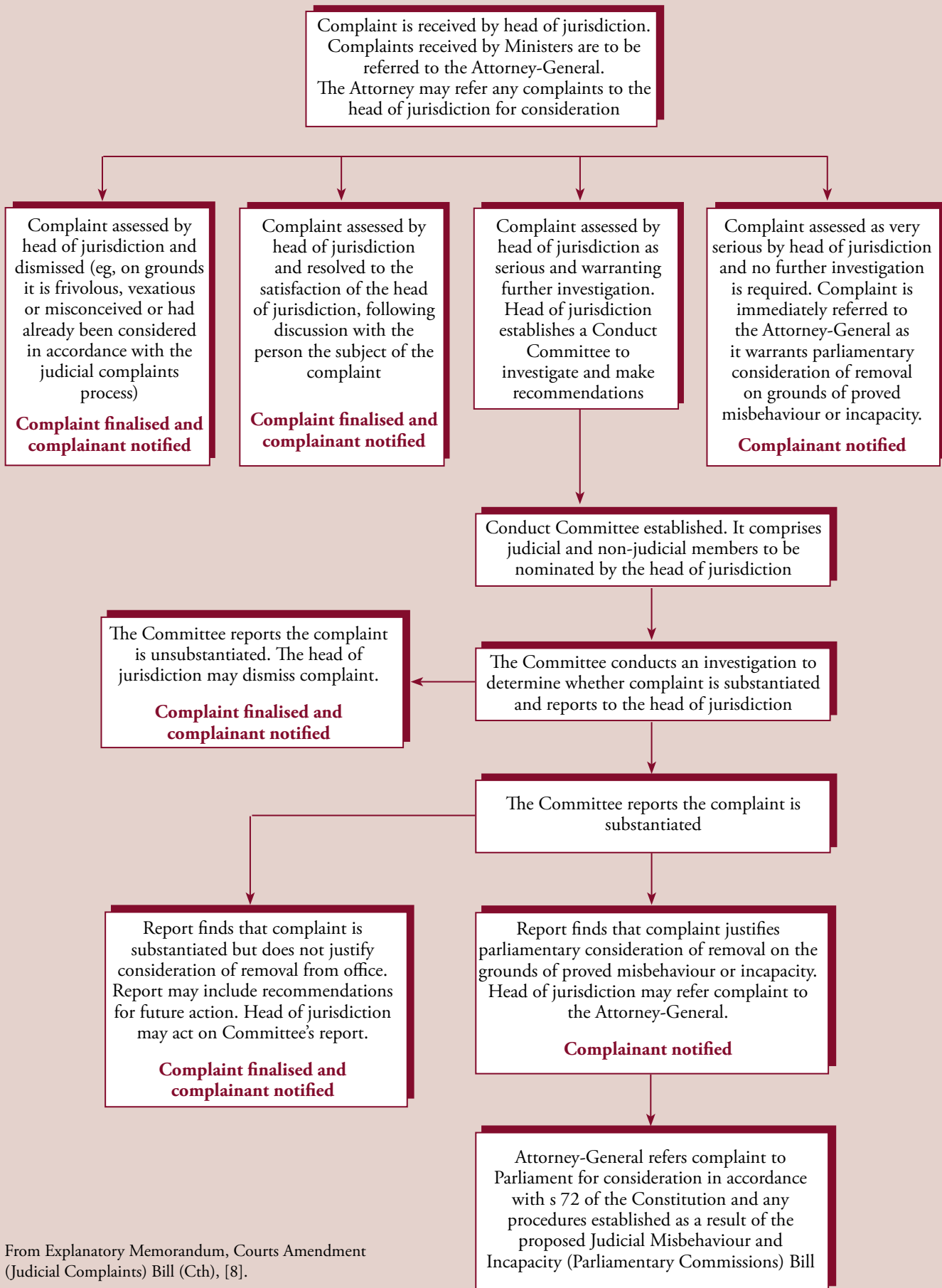
The Bill only covers complaints that could result in removal of a judge from office. In the discussion that follows, the complaints procedures as they currently exist are described.

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1. *Australian Constitution* s 72(ii).  
2. *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* (Cth), Explanatory Memorandum, [7]–[9].

## CHART 2

### New federal complaints process



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

## HIGH COURT OF AUSTRALIA

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

## FEDERAL COURT OF AUSTRALIA

The term ‘judicial officer’ is not defined in the Federal Court’s *Judicial Complaints Procedure* (‘the Procedure’):<sup>3</sup> the Procedure only makes reference to ‘judges’. The Federal Court manages its own ‘judicial complaints procedure’ which is outlined in the Procedure. The Procedure is not a mechanism for disciplining a judge. Rather it provides a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Judge and the judge concerned. It also provides an opportunity for a complaint to be dealt with in an appropriate manner. The participation of a judge in responding to a complaint is entirely voluntary.<sup>4</sup>

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

‘Judicial conduct’ is defined as the ‘conduct of a judge in court or in connection with a case in the Federal Court, or in connection with the performance of a judge’s judicial functions’. Responsibility for determining how best to deal with a complaint lies with the Chief Justice.<sup>5</sup> The method of complaint is by letter addressed to the Chief Justice. The letter ‘must identify the complainant, the judge about whom the complaint is made and the judicial conduct about which the complaint is made’.<sup>6</sup>

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

[T]he complaint will be referred for response to the judge whose conduct is in question... The Chief Justice, or the Registrar on his behalf, will acknowledge a letter of complaint and advise the complainant of the outcome of the complaint...

If the Chief Justice considers that dealing with the complaint might have an adverse affect on the disposition of a matter currently before the Court he [or she] may defer dealing with the complaint until after the determination of that matter.<sup>7</sup>

3. Federal Court of Australia, *Judicial Complaints Procedure*. <[http://www.fedcourt.gov.au/contacts/contacts\\_other\\_complaints.html](http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html)>.

4. Ibid [4].

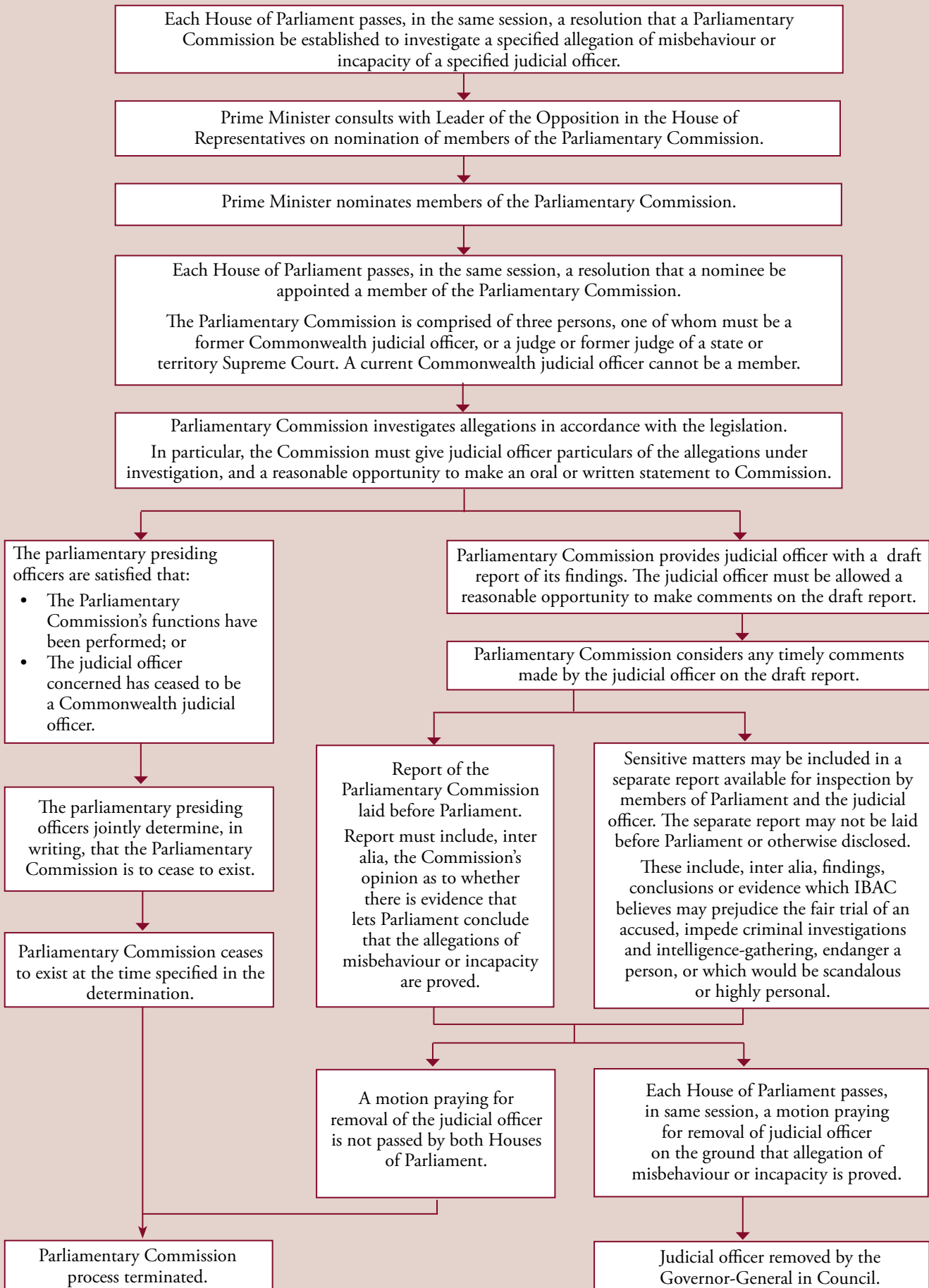
5. Ibid [7].

6. Ibid [9].

7. Ibid [11], [13].

### CHART 3

## Complaints process for Parliamentary Commissions



A judge of the Federal Court may be removed from office by the Governor-General upon a request from both Houses of Parliament, on the grounds of proved misbehaviour or incapacity.<sup>8</sup>

A diagrammatic representation of the complaints handling system as it presently exists for Parliamentary Commissions appears in Chart 3 on page 32.

## FAMILY COURT OF AUSTRALIA

The Family Court manages its own ‘judicial complaints procedure’ which is outlined in the Family Court *Judicial Complaints Procedure*.<sup>9</sup> The procedure is relevantly the same as that applying in the Federal Court, save that primary responsibility for dealing with complaints seems to lie with the Deputy Chief Justice. In discharging this responsibility, the Deputy Chief Justice is assisted by a Judicial Complaints Adviser (a registrar) and a report is made to the Chief Justice.<sup>10</sup>

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8. *Australian Constitution* s 72(ii).

9. Family Court of Australia, *Judicial Complaints Procedure*: <[http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Feedback/FCOA\\_complaints\\_judicial](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Feedback/FCOA_complaints_judicial)>.

10. *Ibid* [13].

## Other Australian jurisdictions

### NEW SOUTH WALES

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

The Judicial Commission is comprised of 10 members: six ‘ex officio’ members (the heads of a number of jurisdictions) and four appointed by the Governor on nomination of a Minister from among legal practitioners and members of the community.<sup>3</sup>

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

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

A diagrammatic representation of the New South Wales complaints handling system as it presently exists appears in Chart 4 on page 35.

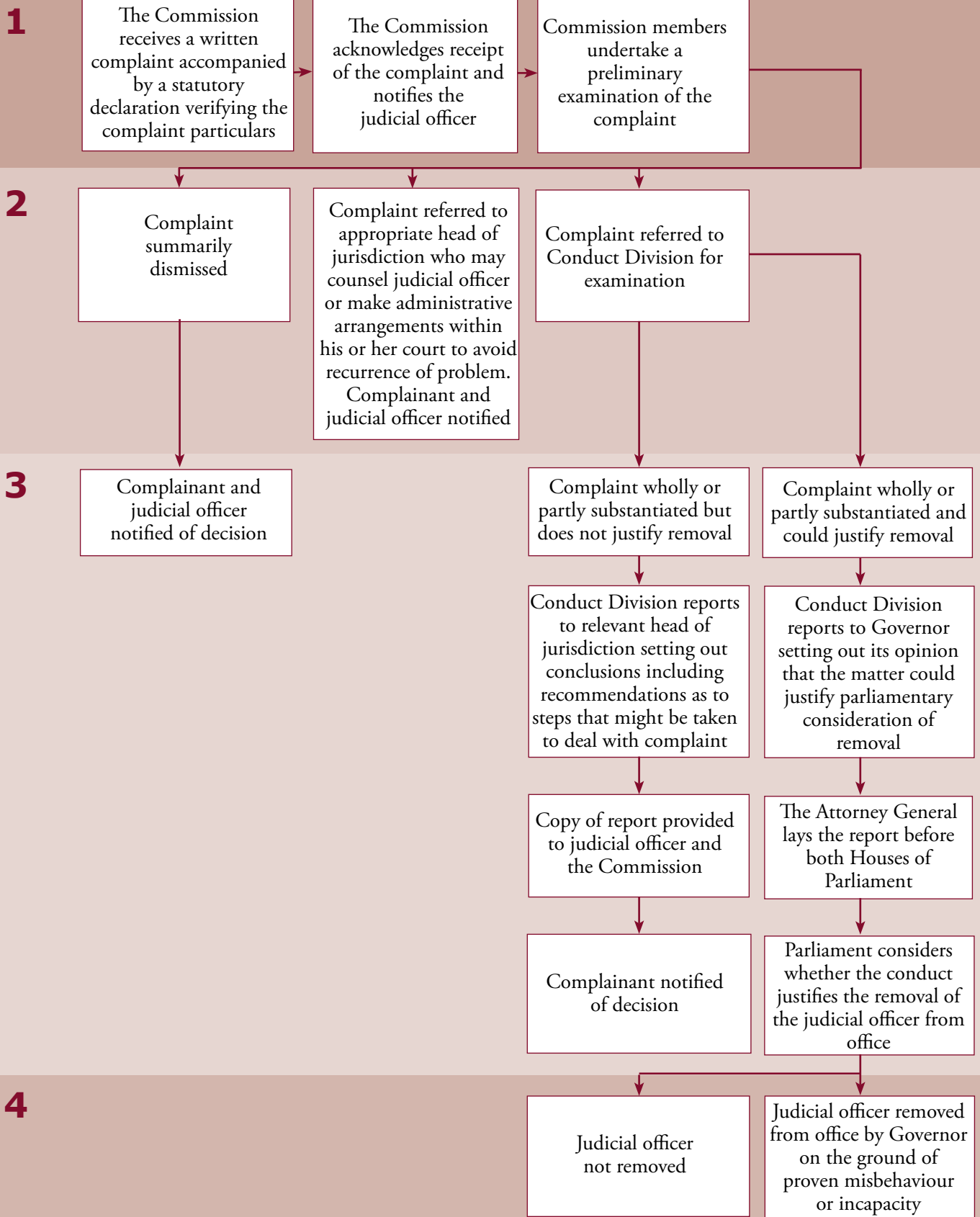
### Incidence of complaints

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

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

CHART 4

New South Wales complaints process



## Judicial officer

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

- (a) a Judge or associate Judge of the Supreme Court;
- (b) a member (including a judicial member) of the Industrial Relations Commission;
- (c) a Judge of the Land and Environment Court;
- (d) a Judge of the District Court;
- (e) the President of the Children’s Court;
- (f) a Magistrate; or
- (g) the President of the Administrative Decisions Tribunal.

## Jurisdiction of the Judicial Commission

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

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

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

## Process

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

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

8. *Judicial Officers Act 1986* (NSW s 15(2)).

9. Judicial Commission of New South Wales, *Annual Report 2009–2010* (2010) 40.

10. *Judicial Officers Act 1986* (NSW) s 15(1).

11. *Judicial Officers Act 1986* (NSW) s 16.

12. *Judicial Officers Act 1986* (NSW) s 17(2).

13. *Judicial Officers Act 1986* (NSW) s 18.

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

### *Summarily dismiss the complaint*<sup>14</sup>

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

### *Refer the complaint to the Conduct Division*<sup>16</sup>

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

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

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

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

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

15. *Judicial Officers Act 1986* (NSW) s 20(1).

16. *Judicial Officers Act 1986* (NSW) s 21(1).

17. *Judicial Officers Act 1986* (NSW) s 21(2).

18. *Judicial Officers Act 1986* (NSW) s 23.

19. *Judicial Officers Act 1986* (NSW) s 29(1).

20. *Judicial Officers Act 1986* (NSW) s 29(3).

21. *Judicial Officers Act 1986* (NSW) s 28(1)(b).

22. Judicial Conference of Australia, *Second Report of the Complaints Against Judicial Officers Committee* (January 2010) 1–3.

### *Refer the complaint to the head of the court*

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

### *Complaints of criminal misconduct*

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

### *Complaints alleging unfitness for office*

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

## VICTORIA

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

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

23. *Judicial Officers Act 1986* (NSW) s 21(2).

24. *Independent Commission Against Corruption Act 1988* (NSW) ss 3(1), 8–10.

25. *Independent Commission Against Corruption Act 1988* (NSW) s 53.

26. *Independent Commission Against Corruption Act 1988* (NSW) s 15(6), 16 (referred by Minister); cf Judicial Commission of New South Wales, *Annual Report 2009–2010* (2010) 36.

27. *Constitution Act 1902* (NSW) s 53(2).

28. *Judicial Officers Act 1986* (NSW) s 41.

29. *Judicial Officers Act 1986* (NSW) ss 40(1), 43.

30. See Sallman PA, *The Judicial Conduct and Complaints System in Victoria*, Discussion Paper (2002) 17.

31. Courts that have protocols are the Magistrates Court, County Court, Supreme Court, VCAT, the Children’s Court and the Coroners Court.

Institute of Judicial Administration for the Council of Chief Justices of Australia and New Zealand.<sup>32</sup>

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

We have already committed to and are preparing legislation to introduce a judicial complaints commission, which will allow ordinary citizens to lodge complaints where there are allegations of poor performance or inappropriate behaviour by judicial officers and to have those complaints investigated and acted upon by an independent body.<sup>33</sup>

In November 2011 the Victorian government passed legislation to establish an Independent Broad-based Anti-corruption Commission (IBAC).<sup>34</sup> The jurisdiction of this new body extends to receiving complaints and investigating allegations of serious corruption by judicial officers. Separate Acts dealing with investigative functions, examinations and confidentiality were passed in March 2012 and May 2012 respectively; however, at the date of writing the relevant parts of these Acts were not operational.<sup>35</sup>

A diagrammatic representation of the proposed complaints handling system under IBAC appears in Chart 5 on page 40. The following discussion describes the current (non-IBAC) process in force in Victoria.

## Incidence of complaints

No statistics are available regarding the prevalence of complaints against members of the judiciary in Victoria. The Chief Justice has commented that ‘a significant proportion of complaints received [by her office] are found to constitute a complaint about the failure of a party’s case rather than judicial conduct’.<sup>36</sup>

32. Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Melbourne: Australian Institute of Judicial Administration, 2nd ed, 2007).

33. Parliament of Victoria, *Parliamentary Debates* (LA), 57th Parliament, First Session (22 November 2011) 5516.

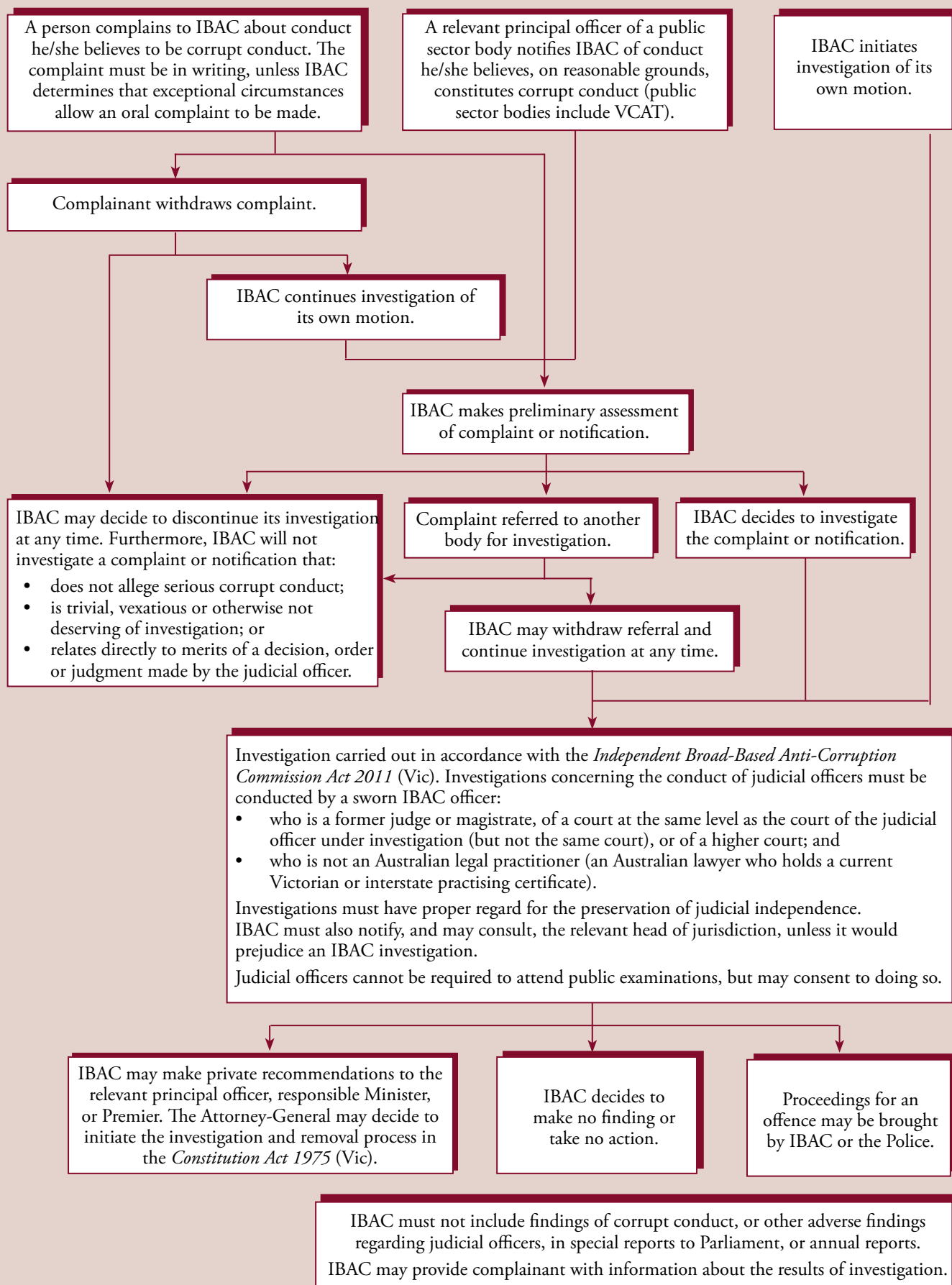
34. *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

35. *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Act 2012* (Vic); *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic).

36. Chambers of Chief Justice of the Supreme Court of Victoria, letter to the Commission (15 May 2012) 3.

## CHART 5

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



## Ordinary complaints

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

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

## Complaints alleging unfitness for office

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

- (a) Judge of the Supreme Court;
- (b) Associate Judge of the Supreme Court;
- (c) judge of the County Court;
- (d) associate judge of the County Court;
- (e) magistrate.<sup>37</sup>

A Victorian judicial officer can be removed from office by the Governor in Council, acting on a request by both Houses of Parliament, on the grounds of proved misbehaviour or incapacity.<sup>38</sup> The removal process can only occur if an investigating committee has found that facts exist which could amount to proved misbehaviour or incapacity such as to warrant the removal of the judicial officer from office.<sup>39</sup> An investigating committee is appointed by the Attorney-General if he or she is satisfied that there are reasonable grounds for carrying out an investigation.<sup>40</sup> No judicial officer can be removed from office on any other grounds or by any other process.<sup>41</sup>

37. *Constitution Act 1975* (Vic) s 87AAA. It is noted that the definition of judicial officer for the purposes of the soon-to-commence IBAC complaints handling process is expanded to include a judicial registrar of the *Supreme Court: Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) s 3.

38. *Constitution Act 1975* (Vic) s 87AAB.

39. *Constitution Act 1975* (Vic) ss 87AAD(1), 87AAE.

40. *Constitution Act 1975* (Vic) s 87AAD(1).

41. *Constitution Act 1975* (Vic) s 87AAB(4).

The investigating committee consists of three members of the Judicial Panel, appointed by the Attorney-General on the recommendation of the most senior member of the panel.<sup>42</sup> The Judicial Panel is comprised of seven retired judges from higher-level, non-Victorian courts.<sup>43</sup> The members of the Judicial Panel have no duties or responsibilities unless they are appointed by the Attorney-General to form an investigating committee.

The investigating committee must prepare a report which sets out its conclusions as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that judicial officer from office.<sup>44</sup> The Attorney-General may then table the report in Parliament.<sup>45</sup>

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

## QUEENSLAND

### Incidence of complaints

No statistics are available as to the prevalence of complaints in Queensland. The Chief Justice has commented that, as a matter of impression, the rate of complaints is low.<sup>46</sup>

### Ordinary complaints

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

### Complaints of criminal misconduct

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

- (a) a judge of, or other person holding judicial office in, a State court; or
- (b) a member of a tribunal that is a court of record.<sup>47</sup>

42. *Constitution Act 1975* (Vic) s 87AAD(2).

43. *Constitution Act 1975* (Vic) ss 87AAA, 87AAB.

44. *Constitution Act 1975* (Vic) s 87AAH(1)–(2).

45. *Constitution Act 1975* (Vic) s 87AAH(3).

46. Chief Justice of Queensland, letter to the Commission (9 May 2012).

47. *Crimes and Misconduct Act 2001* (Qld) s 58(5).

The Queensland Crime and Misconduct Commission (CMC) has jurisdiction over conduct that could lead to removal from office.<sup>48</sup> The CMC has authority to investigate such conduct,<sup>49</sup> but only subject to an agreed process following consultation with the Chief Justice.<sup>50</sup> The CMC is required to hand all relevant material to any investigating tribunal dealing with the same allegation.<sup>51</sup>

### Complaints alleging unfitness for office

The *Constitution of Queensland 2001* (Qld) establishes a procedure for dealing with complaints that could justify removal from office. It is not dissimilar to that applying in Victoria. The term ‘judicial officer’ is not defined in the legislation. The term ‘judge’ is defined to mean a judge of the Supreme Court or District Court.<sup>52</sup> The term ‘office’ is defined to include any of the following offices –

- (a) Chief Justice of Queensland;
- (b) President of the Court of Appeal;
- (c) Senior Judge Administrator;
- (d) Judge of Appeal of the Supreme Court;
- (e) Judge of the Supreme Court;
- (f) Chief Judge of the District Court;
- (g) Judge Administrator;
- (h) Judge of the District Court.<sup>53</sup>

A judge may be removed from ‘an office’ by the Governor in Council, on an address of the Legislative Assembly, on the grounds of ‘proved’ misbehaviour justifying removal or incapacity to perform the duties of judicial office.<sup>54</sup> These grounds can only be proved if the Legislative Assembly accepts a report of an investigatory tribunal concluding that the relevant ground is established on the balance of probabilities.<sup>55</sup>

Investigatory tribunals are established on an ad hoc basis under special legislation.<sup>56</sup> They must consist of at least three members, appointed from among serving or retired judges by resolution of the Legislative Assembly.<sup>57</sup> A judge may not be removed from office by any other method.<sup>58</sup>

48. *Crimes and Misconduct Act 2001* (Qld) ss 49, 58(2), 70(2).

49. *Crimes and Misconduct Act 2001* (Qld) s 58(2).

50. This is premised on a need to maintain judicial independence.

51. *Crimes and Misconduct Act 2001* (Qld) s 70(2).

52. *Constitution of Queensland 2001* (Qld) s 56.

53. *Constitution of Queensland 2001* (Qld) s 56.

54. *Constitution of Queensland 2001* (Qld) s 61(2).

55. *Constitution of Queensland 2001* (Qld) s 61(3)–(4).

56. *Constitution of Queensland 2001* (Qld) s 61(5).

57. *Constitution of Queensland 2001* (Qld) s 61(6)–(10).

58. *Constitution of Queensland 2001* (Qld) s 61(1).

## SOUTH AUSTRALIA AND TASMANIA

There is no legislation in South Australia or Tasmania of the type to be found in New South Wales.<sup>59</sup> The courts in those states have not published protocols dealing with complaints against members of the judiciary.

In South Australia and Tasmania the Governor may remove a judge of the Supreme Court from office, upon the address of both Houses of Parliament.<sup>60</sup> There are no prescribed grounds for removal.

The South Australian Supreme Court does not maintain statistics about the level of complaints. The Chief Justice reported that he had not received anything that could be described as a complaint warranting investigation for the last couple of years.<sup>61</sup>

Statistics available in relation to Tasmania are limited to the experience of the Supreme Court. In 2008 there were no complaints. In 2009 there was one complaint of rudeness to counsel. In 2010 there was one misconceived complaint. In 2011 there were four complaints, all concerning delays in delivering reserved judgments.<sup>62</sup>

## AUSTRALIAN CAPITAL TERRITORY

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

### Incidence of complaints

No statistics are available concerning the level of complaints against judicial officers in courts of this jurisdiction.<sup>64</sup>

### Judicial officer

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

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

59. *Judicial Officers Act 1986* (NSW).

60. *Constitution Act 1934* (SA) s 75; *Supreme Court (Judges’ Independence) Act 1857* (Tas) s 1.

61. Chief Justice of South Australia, letter to the Commission (8 May 2012).

62. Chief Justice of Tasmania, letter to the Commission (14 May 2012).

63. *Complaints and Feedback Policy for ACT Law Courts and Tribunal* (November 2009) (‘Complaints Policy’).

64. Chief Justice of the Australian Capital Territory, letter to the Commission (undated).

- (b) the master of the Supreme Court; or
- (c) a magistrate; or
- (d) a presidential member of the ACAT.<sup>65</sup>

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

### Ordinary complaints

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

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

### Complaints alleging unfitness for office

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

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

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

65. *Judicial Commission Act 1994* (ACT) s 2.

66. Complaints Policy, 2.

67. Complaints and Feedback Information Sheet, 1.

68. *Judicial Commissions Act 1994* (ACT) ss 4, 5(1). The Executive is the Chief Minister and other Ministers appointed by them: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 39; *Judicial Commission Act 1994* (ACT) s 5(2)(b).

69. *Judicial Commission Act 1994* (ACT) s 7.

70. *Judicial Commission Act 1994* (ACT) s 5(3).

71. *Judicial Commission Act 1994* (ACT) s 5(2)–(3).

72. *Judicial Commission Act 1994* (ACT) s 5(2).

The ACT law automatically suspends, with pay, a judicial officer who is the subject of an investigation by a judicial commission.<sup>73</sup> A judicial officer who has not been ‘excused’ may not resume exercising judicial functions until

- (a) the judicial commission has submitted a report to the Attorney-General stating that removal is not warranted;<sup>74</sup> or
- (b) a motion in Parliament calling for removal has been defeated,<sup>75</sup> or does not occur within certain time limits.<sup>76</sup>

## NORTHERN TERRITORY

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

### Incidence of complaints

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

### Judicial officer

The term ‘judicial officer’ is not defined. However, the NT Protocol applies to complaints made against judges, masters and registrars of the Supreme Court.<sup>78</sup>

### Ordinary complaints

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

73. *Judicial Commission Act 1994* (ACT) s 19.

74. *Judicial Commission Act 1994* (ACT) s 19(2)(a).

75. *Judicial Commission Act 1994* (ACT) s 19(2)(c).

76. *Judicial Commission Act 1994* (ACT) s 19(2)(b).

77. Email communication from the Chief Justice of the Northern Territory (9 May 2012).

78. NT Protocol, 1.

79. NT Protocol, 1.

80. NT Protocol, 2.

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

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

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

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

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

If the head of jurisdiction concludes that the complaint has substance but is not sufficiently serious to contemplate removal, he or she will notify both the judicial officer and the complainant accordingly. Appropriate remedial action will be taken and the complainant notified of the action taken.<sup>87</sup>

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

81. NT Protocol, 2.

82. NT Protocol, 2.

83. NT Protocol, 3.

84. NT Protocol, 3.

85. NT Protocol, 4.

86. NT Protocol, 4.

87. NT Protocol, 4.

88. NT Protocol, 4.

### Complaints alleging unfitness for office

*The Supreme Court Act* provides that a judge may be removed from office by the administrator on an address from the Legislative Assembly, on the grounds of proved misbehaviour or incapacity. A judge may not otherwise be removed from office.<sup>89</sup>

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89. *Supreme Court Act 1975* (NT) s 40(1).

# Overseas jurisdictions

## ENGLAND AND WALES

In England and Wales, complaints against judicial officers are dealt with under the *Constitutional Reform Act 2005* ('the Act') and the *Judicial Discipline (Prescribed Procedures) Regulations 2006* ('the Regulations')<sup>90</sup> made under ss 115, 120 and 121 of the Act.

In this jurisdiction, the Lord Chancellor and the Lord Chief Justice are jointly responsible for considering and determining complaints about the conduct of the judiciary, and other cases in which disciplinary action is taken or contemplated.<sup>91</sup> They are supported by the Office for Judicial Complaints ('the Office'), which was established in April 2006 and is an associate office of the Ministry of Justice.<sup>92</sup>

Complaints must be in writing, unless the Office considers that in the circumstances it is reasonable to accept a complaint in a different form.<sup>93</sup> There is a 28-day time limit from the relevant conduct complained of within which complaints must be made.<sup>94</sup>

A diagrammatic representation of the complaints handling system as it presently exists in England and Wales appears in Chart 6 on page 50.

### Judicial officer

'Judicial officer' is defined to include the office of a senior judge, or an office listed in Schedule 14 of the Act.<sup>95</sup> The holder of an office can also be designated by an order under s 118 of the Act. At the risk of oversimplification, 'senior judge' means a judge of the High Court. Complaints about magistrates and tribunal judges and members are dealt with under a different system.

### Ordinary complaints

#### *Initial stages*

The Office receives both serious and less-serious complaints. The Office must dismiss a complaint if it falls into various categories, including that it is untrue, mistaken or misconceived, vexatious, not adequately particularised, or raises no question of

90. As amended by *The Judicial Complaints (Prescribed Procedures) (Amendment) Regulations 2006* (UK).

91. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 3; *Constitutional Reform Act 2005* (UK) s 108(2).

92. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 3(2).

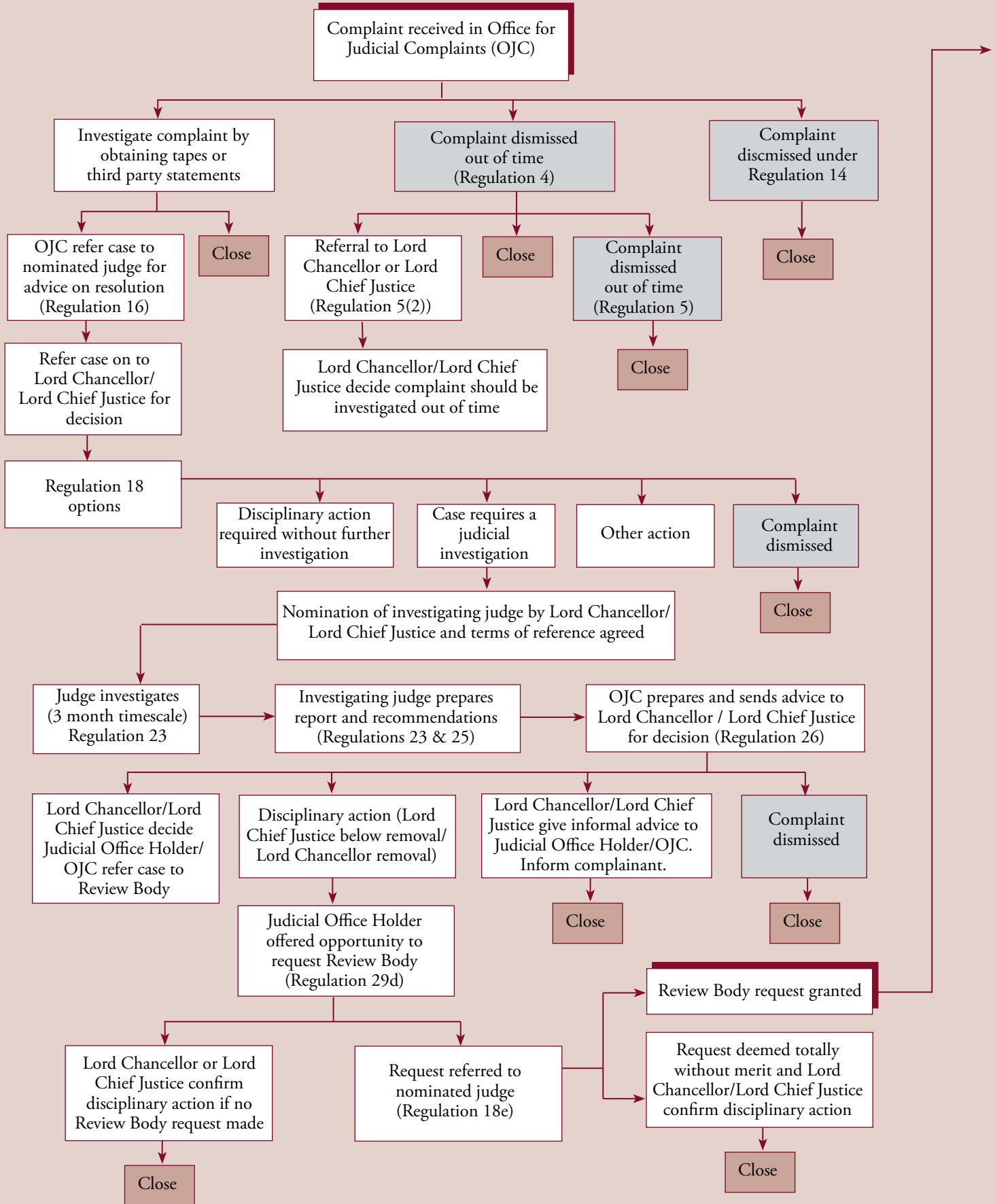
93. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 11.

94. *Constitutional Reform Act 2005* (UK) s 100(3).

95. *Constitutional Reform Act 2005* (UK) s 109(4).

CHART 6

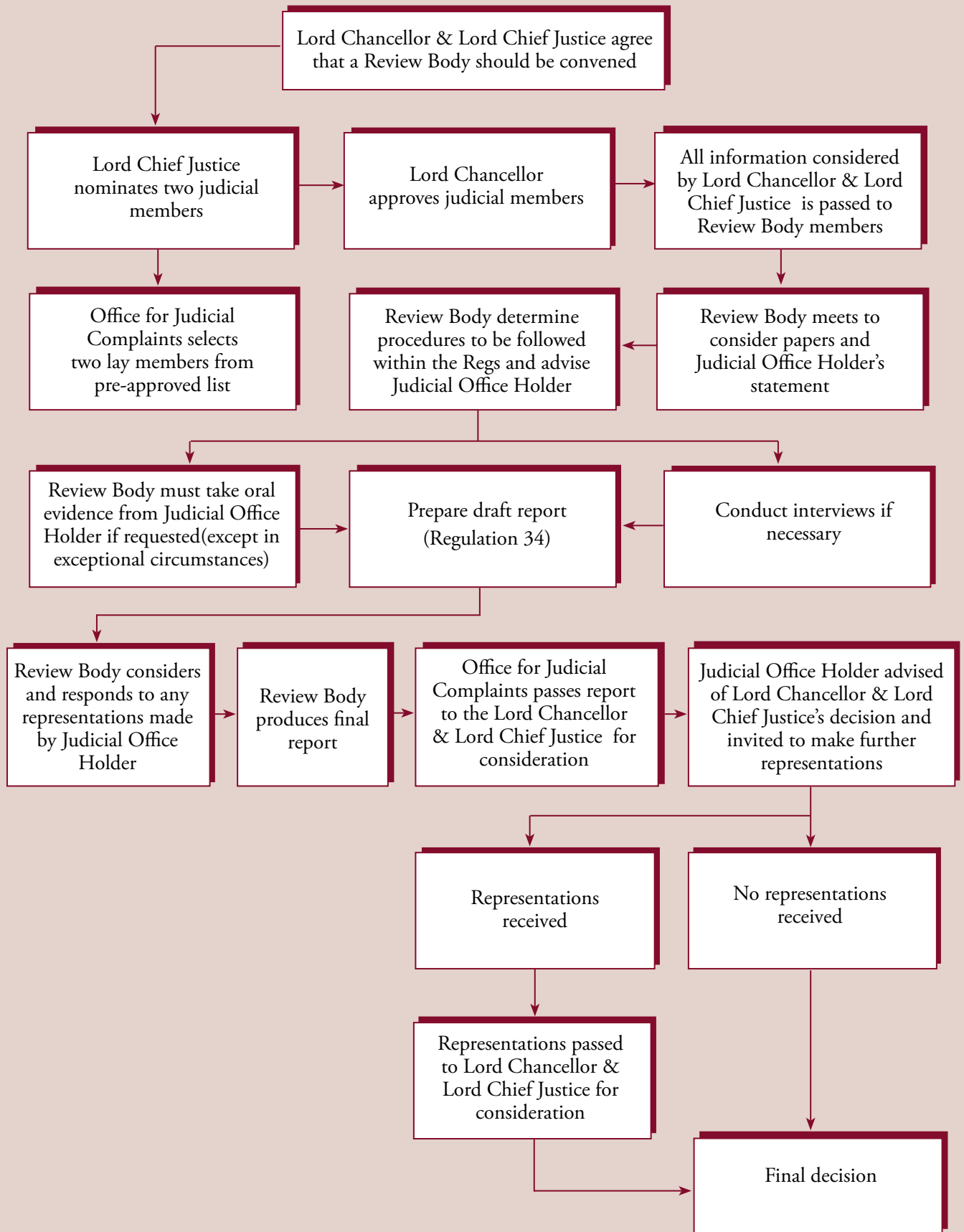
Mainstream judiciary and coroner complaint process (England and Wales)



Adapted from Office for Judicial Complaints, 'Mainstream Judiciary and Coroner Complaint Process', <[http://judicialcomplaints.judiciary.gov.uk/docs/Courts\\_Judiciary\\_and\\_Coroner\\_Complaints\\_Process\\_Flowchart\\_page\\_1.pdf](http://judicialcomplaints.judiciary.gov.uk/docs/Courts_Judiciary_and_Coroner_Complaints_Process_Flowchart_page_1.pdf)> (accessed 27 May 2012).

## CHART 7

### Review Body process (England and Wales)



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

misconduct.<sup>96</sup> However, the Lord Chancellor or the Chief Justice may decide to consider a complaint that has been dismissed by the Office, where they deem that the complaint concerns misconduct that is sufficiently serious to warrant further consideration.<sup>97</sup>

If a complaint is not dismissed after the preliminary investigation, the Lord Chancellor and the Lord Chief Justice, or both, must refer the complaint to a nominated judge who will consider the matter.<sup>98</sup> The function of the nominated judge is to advise the Lord Chancellor and the Lord Chief Justice on a range of matters, such as whether a judicial investigation is required and, if so, how the investigation should be carried out, and whether disciplinary action should be taken.<sup>99</sup>

### *Complaints that need further investigation*

If further investigations are required, the Lord Chancellor or the Lord Chief Justice may appoint an investigating judge.<sup>100</sup> The functions of the investigating judge are to advise the Lord Chancellor and the Lord Chief Justice on matters such as the facts of the case, whether the case is substantiated or not, whether disciplinary action should be taken, and any other matters in the terms of reference.<sup>101</sup>

The investigating judge must report his or her findings to the Lord Chancellor and the Lord Chief Justice, who will decide what, if any, disciplinary action to take.<sup>102</sup> Examples of action that may be taken include the Lord Chief Justice exercising one or more of his disciplinary powers,<sup>103</sup> or the Lord Chancellor exercising his power to remove the judicial officer in question from office.<sup>104</sup>

### *Review*

These procedures and decisions are subject to review by at least two bodies. First, by a review body convened by the Lord Chancellor and the Lord Chief Justice.<sup>105</sup> The review body must comprise of two judges and two lay members, nominated by the Lord Chancellor in agreement with the Lord Chief Justice. Where a matter has been

96. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 14(1).

97. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 15.

98. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 16.

99. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 18.

100. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 19(1).

101. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 22(1).

102. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 25(7).

103. Apart from the power to remove a judicial officer, the Lord Chief Justice may give formal advice, warnings and reprimands, and can suspend a judicial officer who is subject to proceedings for removal or prosecution for an offence. The power to give formal advice, warnings and reprimands does not restrict the ability of the Lord Chief Justice to act informally. See *Constitutional Reform Act 2005* (UK) s 108.

104. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 26(1)(e).

105. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) regs 26(1)(f), 28(1), 29.

referred to the review body, the Lord Chancellor and the Lord Chief Justice must accept any findings of fact made by the review body and cannot impose a sanction on the office holder that is more severe than that recommended by the review body.<sup>106</sup>

Secondly, decisions of the review body can be scrutinised by the Judicial Appointments and Conduct Ombudsman.<sup>107</sup> The function of the Ombudsman is to ensure that the procedures for investigating complaints are carried out fairly. The complainant and the judicial officer concerned may both apply to the Ombudsman for a review of the decision on the grounds that there has been a failure to comply with prescribed procedures, or some other maladministration.<sup>108</sup>

Upon conducting a review, the Ombudsman must establish to what extent the grounds are established, and decide what action to take.<sup>109</sup> The Ombudsman must submit a report of his or her findings to the Lord Chancellor and the Lord Chief Justice.<sup>110</sup> If the Ombudsman finds that the grounds are established to any extent, he or she may make recommendations to the Lord Chancellor and Lord Chief Justice.<sup>111</sup> The Ombudsman may also set aside a determination by investigating authorities if the original investigation is thought to have been unreliable.<sup>112</sup>

A diagrammatic representation of the review body system as it presently exists in the England and Wales appears in Chart 7 on page 51.

### Complaints alleging unfitness for office

A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.<sup>113</sup> The power of the Lord Chancellor to remove a person from office listed in Schedule 14 is exercisable only after the Lord Chancellor has complied with the prescribed procedures (as well as any other requirements to which the power is subject).<sup>114</sup>

The Lord Chief Justice also has disciplinary powers set out in s 108 of the *Constitutional Reform Act 2005* (UK), including the power to suspend a judicial officer from office, but may only exercise them with the agreement of the Lord Chancellor and only after complying with prescribed procedures.<sup>115</sup>

106. *The Judicial Discipline (Prescribed Regulations) Regulations 2006* (UK) reg 26(2).

107. *Constitutional Reform Act 2005* (UK) ss 110–114.

108. *Constitutional Reform Act 2005* (UK) s 110(1).

109. *Constitutional Reform Act 2005* (UK) s 111(1).

110. *Constitutional Reform Act 2005* (UK) s 112(7).

111. *Constitutional Reform Act 2005* (UK) s 11(2).

112. *Constitutional Reform Act 2005* (UK) s 5.

113. *Constitutional Reform Act 2005* (UK) s 33.

114. *Constitutional Reform Act 2005* (UK) s 108(1).

115. *Constitutional Reform Act 2005* (UK) s 108(2).

## SCOTLAND

In Scotland, the Lord President, as the head of the Scottish judiciary, is responsible for considering and determining complaints about the conduct of the judiciary.<sup>116</sup> The Lord President is supported by the Judicial Office, which was established by the Scottish Court Service.<sup>117</sup> Complaints procedures are detailed in the *Constitutional Reform Act 2005* (UK), the *Judiciary and Courts (Scotland) Act 2008* (Scot) ('the Act') and the *Complaints about the Judiciary (Scotland) Rules 2011*, made under s 28 of the Act.

### Judicial officer

Judicial office holders who fall under the responsibility of the Lord President include judges, sheriffs, magistrates and justices of the peace.<sup>118</sup>

### Ordinary complaints

The Act envisages a two-step process, which includes an initial investigation and then a possible review.<sup>119</sup> Complaints must be made in writing,<sup>120</sup> no later than three months after the incident that is the subject of the complaint.<sup>121</sup> The time limit for making a complaint can be extended by the disciplinary judge in exceptional circumstances.<sup>122</sup>

### Initial stage

Upon receiving the complaint, the Judicial Office will send a copy to the judicial office holder concerned.<sup>123</sup> The Judicial Office will carry out an initial assessment of the complaint, and dismiss it if it:

- (a) does not contain sufficient information to allow a proper understanding the complaint to be achieved;
- (b) does not raise an issue of judicial conduct;
- (c) raises matters which have already been dealt with; or
- (d) raises a matter which is for the Judicial Complaints Reviewer.<sup>124</sup>

116. *Judiciary and Courts (Scotland) Act 2008* (Scot) asp 6, ss 2(2)(e), 28.

117. *Complaints about the Judiciary (Scotland) Rules 2011* r 4(1).

118. *Judiciary and Courts (Scotland) Act 2008* (Scot) asp 6, s 43.

119. *Judiciary and Courts (Scotland) Act 2008* (Scot) asp 6, s 28(1)(a), (b).

120. *Complaints about the Judiciary (Scotland) Rules 2011*, r 5.

121. *Complaints about the Judiciary (Scotland) Rules 2011*, r 6.

122. *Complaints about the Judiciary (Scotland) Rules 2011*, r 6(2).

123. *Complaints about the Judiciary (Scotland) Rules 2011*, r 8(2).

124. *Complaints about the Judiciary (Scotland) Rules 2011*, r 9(3), (4)

If the complaint is not dismissed, it is referred to a disciplinary judge, who will review the complaint. The disciplinary judge may decide that the complaint should be further investigated by a nominated judge,<sup>125</sup> or may decide to dismiss it on the grounds that it is vexatious, without substance, insubstantial, or that the judge subject to the complaint has ceased to be a judge.<sup>126</sup>

If the disciplinary judge considers that the complaint is of such a serious nature that the judge's fitness for office might be called into question, the complaint must be referred to the Lord President.<sup>127</sup> The Lord President will then consider whether a tribunal to investigate the judge's fitness for office should be convened.<sup>128</sup>

### *Complaints that need further investigation*

If the disciplinary judge does refer the complaint to a nominated judge, the nominated judge may decide that the matter is capable of resolution without further investigation, in which case he or she may contact the complainant and the judicial office holder to discuss the matter.<sup>129</sup>

If the complaint is not capable of resolution, the nominated judge must investigate and determine the facts of the matter, and whether the allegation is substantiated.<sup>130</sup> If the matter is substantiated, the nominated judge must prepare a report for the judicial office, and recommend whether the Lord President should exercise one of his powers.<sup>131</sup> These powers include the ability to give formal advice, a formal warning or a reprimand.<sup>132</sup>

Once the Judicial Office has received the nominated judge's report, the disciplinary judge will review the determinations.<sup>133</sup> If the disciplinary judge does not require the nominated judge to review any of the determinations,<sup>134</sup> the Judicial Office will refer the report to the Lord President.<sup>135</sup> The Lord President may then decide to take disciplinary action against the judge concerned.<sup>136</sup> The Lord President is under no obligation to publish the outcome of an investigation once it has been concluded, or an account of what disciplinary powers, if any, have been used.

125. *Complaints about the Judiciary (Scotland) Rules 2011*, r 11.

126. *Complaints about the Judiciary (Scotland) Rules 2011*, r 10(4).

127. *Complaints about the Judiciary (Scotland) Rules 2011*, r 10(9).

128. *Complaints about the Judiciary (Scotland) Rules 2011*, r 10(9).

129. *Complaints about the Judiciary (Scotland) Rules 2011*, r 11(6).

130. *Complaints about the Judiciary (Scotland) Rules 2011*, r 12.

131. *Complaints about the Judiciary (Scotland) Rules 2011*, r 12(2)(b).

132. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 29.

133. *Complaints about the Judiciary (Scotland) Rules 2011*, r 14(3).

134. *Complaints about the Judiciary (Scotland) Rules 2011*, r 14(4).

135. *Complaints about the Judiciary (Scotland) Rules 2011*, r 15.

136. *Complaints about the Judiciary (Scotland) Rules 2011*, r 15(4).

### *Judicial Complaints Reviewer*

A Judicial Complaints Reviewer may be appointed to consider whether the procedures for investigating complaints against judicial office holders are operated fairly in respect both of the complainant and of the judicial office holder who is the subject of the complaint.<sup>137</sup> The Judicial Complaints Reviewer is appointed by Scottish Ministers with the consent of the Lord President.<sup>138</sup>

The Judicial Complaints Reviewer is intended to act as an oversight mechanism, in a similar way to an ombudsman. A case can be referred to the Judicial Complaints Reviewer by either the complainant or the judicial office holder against whom the complaint was made.<sup>139</sup>

The role of the Judicial Complaints Reviewer is restricted to considering whether the investigation was conducted fairly – the Reviewer has no powers to review the merits of an investigation, recommendations made by the investigator or the disciplinary powers exercised by the Lord President. If the Judicial Complaints Reviewer decides that the complaint was not handled according to the prescribed rules and procedures, he or she may only refer the complaint back to the Lord President.<sup>140</sup>

### *Complaints alleging unfitness for office*

Where the First Minister thinks fit, and when requested to do so by the Lord President, he or she must convene a tribunal to investigate and report on whether a person holding judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour.<sup>141</sup> The legislation applies to:

- (a) the office of the Lord President,
- (b) the office of the Lord Justice Clerk,
- (c) the office of the judge of the Court of Session,
- (d) the office of the Chairman of the Scottish Land Court, and
- (e) the office of a temporary judge.<sup>142</sup>

137. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 30(1).

138. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 30(1).

139. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 30(2)(a).

140. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 30(2)(b).

141. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 35.

142. *Judiciary and Courts (Scotland) Act 2008* (Scot) s 35(2).

## Difference between the systems in Scotland and England and Wales

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

In England and Wales, as Head of the Judiciary, the Lord Chief Justice is empowered to prescribe regulations on judicial conduct, but only with the agreement of the Lord Chancellor.<sup>143</sup> This means that the procedures require co-operation between the executive and judicial branches of government.

## NEW ZEALAND

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

A diagrammatic representation of the complaints handling system as it presently exists in New Zealand appears in Chart 8 on page 58.

## Judges

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

## Complaints process

Any person may make a complaint about a judge in writing to the Judicial Commissioner.<sup>144</sup> The Judicial Commissioner may also act on his or her own initiative.<sup>145</sup>

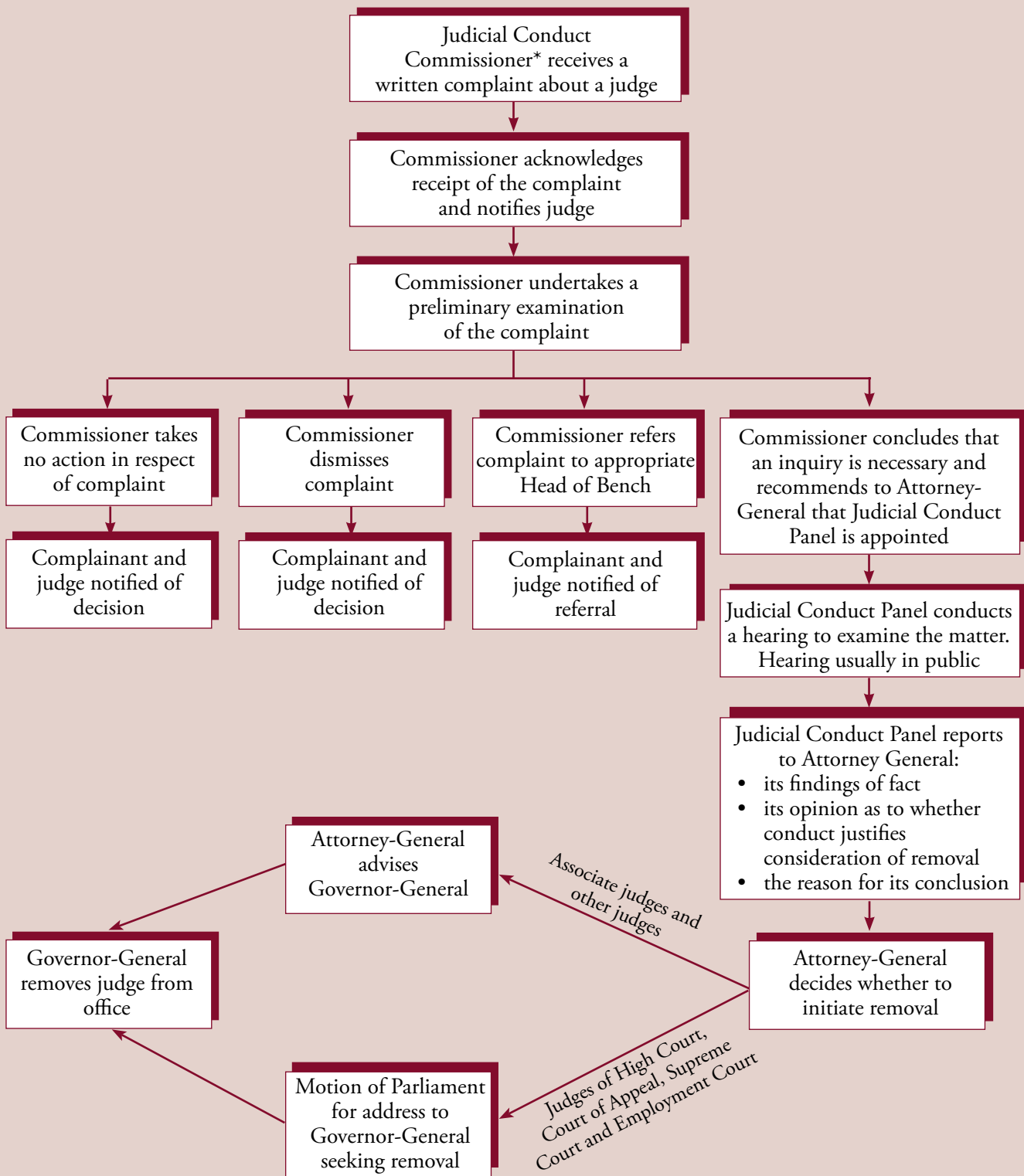
143. *Constitutional Reform Act 2005* (UK) s 115.

144. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 13.

145. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 12.

## CHART 8

### Overview of process for Judicial Conduct Commissioner and Judicial Conduct Panel (NZ)



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

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

When a complaint is made, the Commissioner will conduct a preliminary examination for the purposes of forming an opinion as to whether no further action should be taken; whether the complaint should be dismissed; whether the complaint could warrant referral to the Head of Bench;<sup>146</sup> or whether it could warrant consideration of the removal of the judge from office.<sup>147</sup> In the course of a preliminary examination, the views of the person the subject of the complaint may be sought.<sup>148</sup> The Commissioner may make any inquiries which he or she thinks to be appropriate, obtain any court documents relevant to an inquiry, or consult the Head of Bench.<sup>149</sup>

The Commissioner may take no further action in respect of a complaint if he or she is satisfied that further consideration would be unjustified.<sup>150</sup> It may be unjustified because the complaint has been resolved by an explanation from the judge, if it was based on a misunderstanding, or there is no reasonable prospect of the Commissioner being able to obtain the information necessary to continue the investigation.<sup>151</sup> However, an apology from the subject of the complaint to the complainant does not render further consideration unjustified.<sup>152</sup>

If a complaint does not reach the required threshold, which is possible for a variety of reasons, the complaint shall be dismissed.<sup>153</sup> If the Commissioner decides that further action is warranted, the Commissioner must refer the complaint to the Head of Bench, unless a Judicial Conduct Panel is going to be appointed.<sup>154</sup> The Commissioner has the power to recommend to the Attorney-General that a Judicial Conduct Panel be appointed if the Commissioner is of the opinion that an inquiry into the alleged conduct is necessary or justified and, if established, the conduct may warrant consideration of the removal of the judge.<sup>155</sup>

The Attorney-General may appoint a Judicial Conduct Panel on the opinion of the Commissioner, and must consult with the Chief Justice regarding the membership of the Panel.<sup>156</sup> There are specific requirements regarding the membership of the Panel.<sup>157</sup> The Panel has the power to conduct hearings at which the subject of the inquiry is entitled to appear (with representation if desired) and be heard.<sup>158</sup> A hearing is to

146. The Head of Bench is the judicial officer in charge of the relevant jurisdiction as defined in the *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 5.

147. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(1).

148. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(2).

149. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15(4).

150. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(1).

151. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(2).

152. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A(3).

153. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 16(1).

154. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 17(1).

155. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 18(1).

156. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 21(1).

157. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 22.

158. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 26(1), 27(1).

be held in public unless the Panel considers it proper that the hearing be held in private.<sup>159</sup>

At the conclusion of its inquiry, the Panel reports to the Attorney-General. Its report must set out the Panel's findings of fact, opinion as to whether consideration of removal of the judge is justified and the reasons for such a conclusion.<sup>160</sup> If the Panel is of the opinion that consideration of removal is justified, the Attorney-General has the discretion to determine whether the removal process should be initiated.<sup>161</sup> The Attorney-General cannot take steps to remove a judge unless it has been recommended by the Panel.<sup>162</sup> However, if the judge has been convicted of a serious criminal offence (punishable by imprisonment for two or more years), the Attorney-General can take steps independently to have the judge removed.<sup>163</sup>

### Complaints alleging unfitness for office

A judge of the High Court cannot be removed from office except by the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that judge's misbehaviour or of that judge's incapacity to discharge the functions of office.<sup>164</sup>

## UNITED STATES OF AMERICA

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

In the United States, federal legislation provides for a process by which complaints may be filed against federal judges.<sup>165</sup> Any person may file a complaint constituted by a brief statement with the clerk of the relevant court alleging that a judge has engaged in conduct 'prejudicial to the effective and expeditious administration of the business of the courts' or alleging that a judge is unable to discharge all the duties of office by reason of a mental or physical disability.<sup>166</sup>

The clerk of the court will then transmit the complaint to the chief judge of the relevant court (or the next senior judge if it is the chief judge who is the subject of the

159. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 29.

160. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 32(2).

161. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 33(1).

162. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 33(2).

163. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 34.

164. *Constitution Act 1986* (NZ) s 23.

165. *Judicial Conduct and Disability Act of 1980*, 28-16 USC (2006).

166. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 351(a) (2006).

complaint) and will also give a copy of the complaint to the judge whose conduct/ability is the subject of the complaint.<sup>167</sup>

The chief judge will review the complaint and may then conduct a limited inquiry for the purpose of determining whether appropriate corrective action has or can be taken without conducting a formal investigation, and whether the facts stated in the complaint are either plainly untrue or incapable of being established through investigation.<sup>168</sup> The chief judge may request the judge who is the subject of the complaint to file a written response to the complaint. The limited inquiry may include communication with the complainant, the subject of the complaint and the review of transcripts or other relevant documents.

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

- (a) not in the required form;
- (b) directly related to the merits of a decision or procedural ruling; or
- (c) frivolous, lacking sufficient evidence or containing allegations incapable of being proven through investigation.<sup>169</sup>

The chief judge could also conclude the proceedings if it is found that appropriate corrective action has been taken or that action is no longer necessary due to intervening events.<sup>170</sup>

If the chief judge does not either dismiss the complaint or conclude the proceedings, he or she must appoint a special committee to investigate the complaint.<sup>171</sup> Both the complainant and the subject of the complaint will be notified of the special committee.<sup>172</sup>

This special committee will investigate as extensively as it considers necessary, and then file a comprehensive report with the relevant judicial council, presenting the finding of the investigations and recommendations for actions.<sup>173</sup> The judicial council, upon receipt of the report, can conduct further investigation, dismiss the complaint, or take appropriate action.<sup>174</sup> This action can include ordering that no cases be assigned to the judge for a certain period of time, or reprimanding the judge in private or

167. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 351(c) (2006).

168. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(a) (2006).

169. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(b)(1) (2006).

170. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 352(b)(2) (2006).

171. *Judicial Conduct and Disability Act of 1980*, 28-16 USC (§ 353(a)(1) (2006).

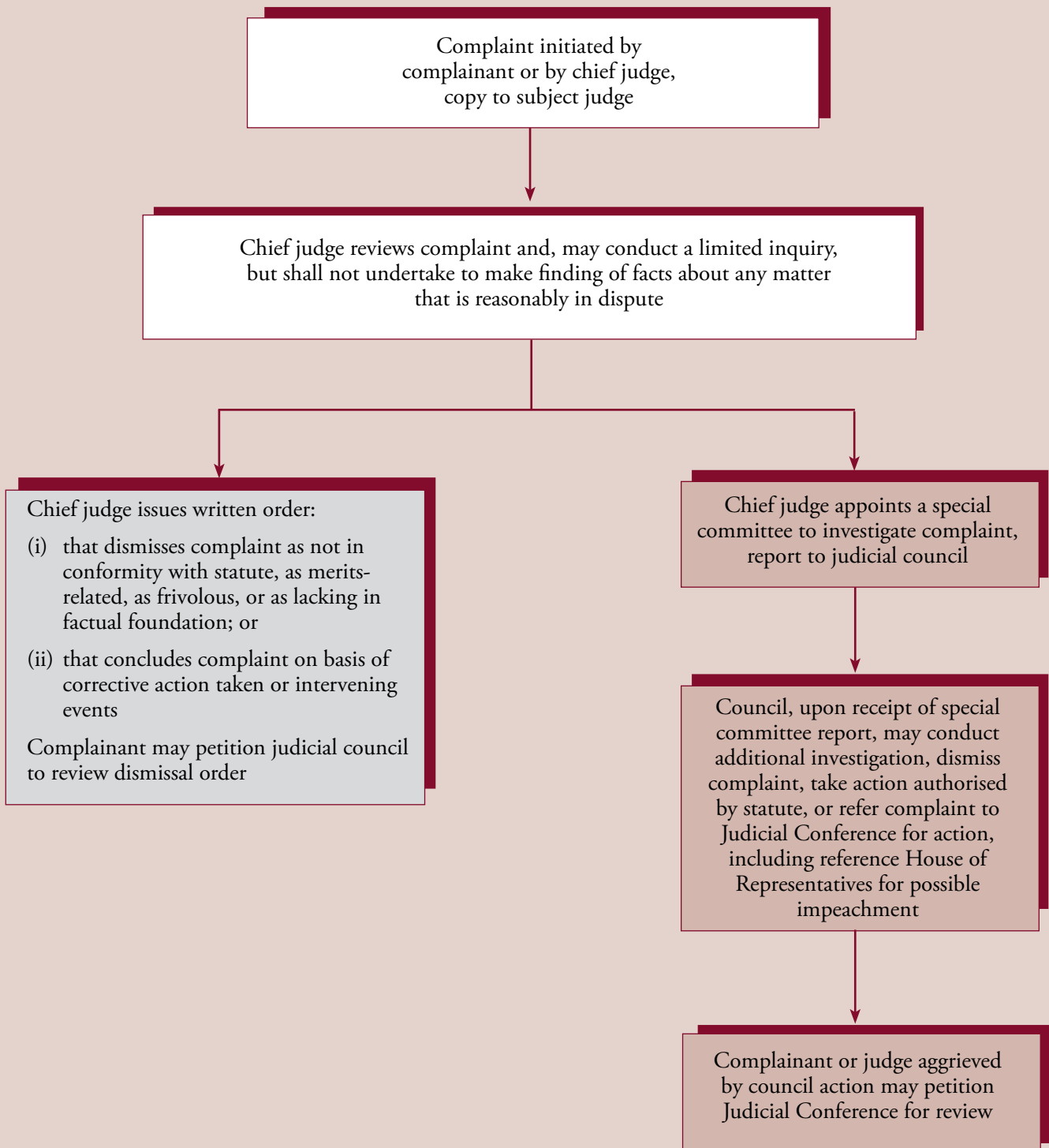
172. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(a)(3) (2006).

173. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(c) (2006).

174. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(1) (2006).

## CHART 9

### Major steps in the United States federal complaints process



Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980* (September 2006) 15.

Adapted from Federal Judicial Center, <[http://www.fjc.gov/public/pdf.nsf/lookup/breyer06.pdf/\\$file/breyer06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/breyer06.pdf/$file/breyer06.pdf)> (accessed 27 May 2012).

public.<sup>175</sup> The judicial council may also certify a disability of a judge and request that the judge voluntarily retire.<sup>176</sup> However, under no circumstances may the judicial council remove an Article III judge from office.<sup>177</sup>

If the judicial council determines that an Article III judge may have engaged in conduct which might constitute grounds of impeachment, or which, in the interests of justice, is not amendable to resolution by the judicial council, it passes it to the Judicial Conference of the United States.<sup>178</sup> If the Judicial Conference of the United States, after considering the prior proceedings and undertaking any further investigation it considers appropriate, determines the consideration of impeachment to be warranted, it transmits that determination to the House of Representatives.<sup>179</sup> This decision is made by majority vote of the Conference.<sup>180</sup> This determination is then made public.

A complainant or judge aggrieved by a decision of the judicial council under s 354 can petition the Judicial Conference of the United States for a review of the decision.<sup>181</sup> However, there is no judicial review available for any order or determination.<sup>182</sup>

A diagrammatic representation of major steps in the complaints handling system as it presently exists in the United States federal system appears in Chart 9 on page 62.

## CANADA

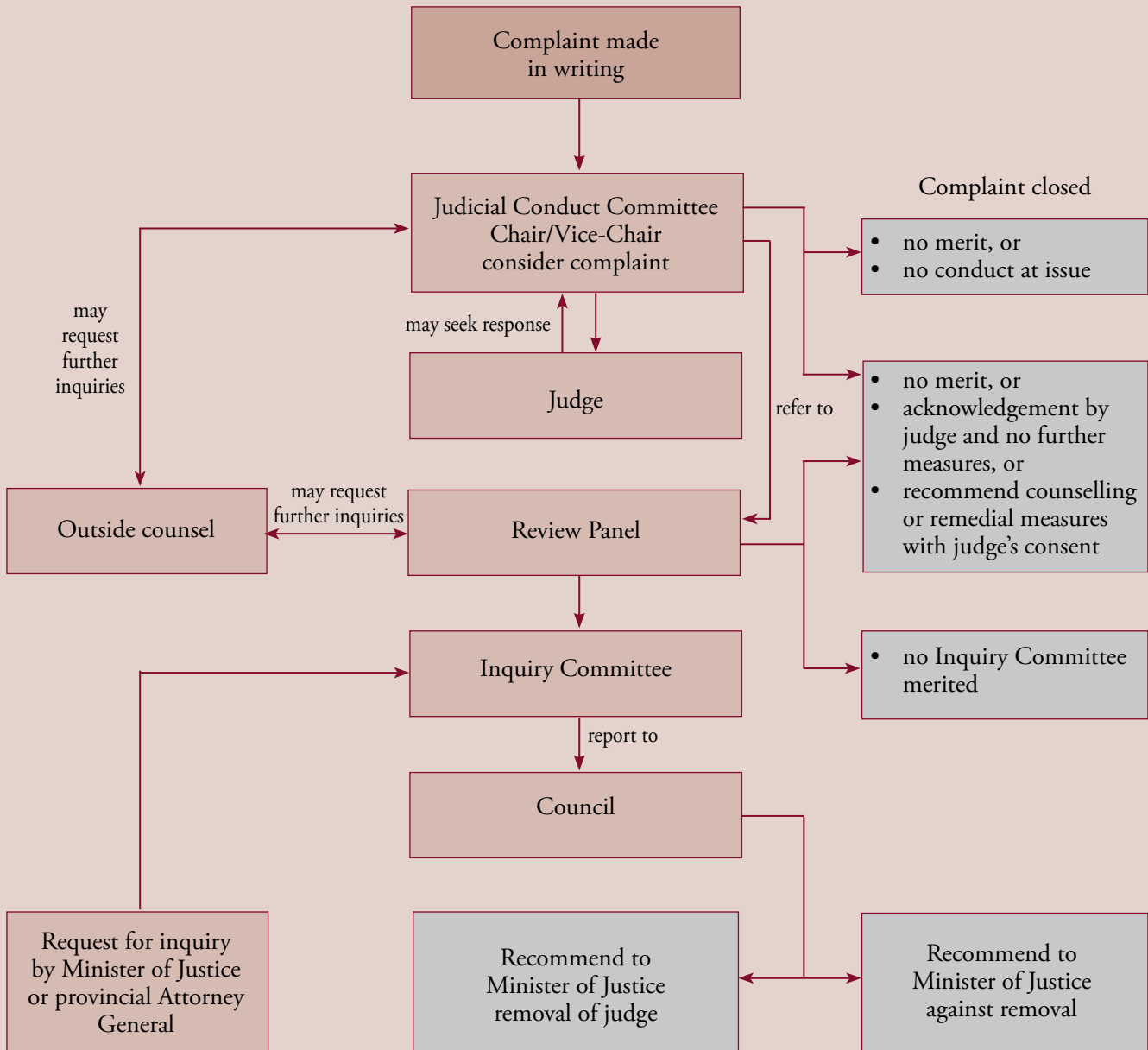
The Canadian Judicial Council (CJC) is a federal body created under the *Judges Act 1985*<sup>183</sup> with the mandate to promote efficiency, uniformity and accountability, and to improve the quality of judicial service in the superior courts of Canada.<sup>184</sup> The CJC is given the power to investigate complaints made by members of the public and the Attorney General about federally appointed judges. After investigation, the CJC can make recommendations, including the recommendation that the judge should be removed from office.<sup>185</sup>

A diagrammatic representation of the federal complaints handling system as it presently exists in Canada appears in Chart 10 on page 64.

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175. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(2) (2006).  
 176. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(2)(B) (2006).  
 177. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(a)(3)(A) (2006).  
 178. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 354(b) (2006).  
 179. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 355(b)(1) (2006).  
 180. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 355(a) (2006).  
 181. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 357(a) (2006).  
 182. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 357(c) (2006).  
 183. *Judges Act*, RSC 1985.  
 184. See <[http://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_main\\_en.asp](http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp)>.  
 185. *Ibid.*

## CHART 10

### Canadian federal complaints process



Canadian Judicial Council, 'Council Complaint Procedure', <[http://www.cjc-ccm.gc.ca/english/lawyers\\_en.asp?selMenu=lawyers\\_complaintprocedure\\_en.asp](http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_complaintprocedure_en.asp)> (accessed 27 May 2012)

Any member of the public can make a complaint to the CJC provided the complaint is about judicial conduct, is made in writing, and is about a specific federally appointed judge.<sup>186</sup> These complaints can be made anonymously.<sup>187</sup> The CJC can also initiate an inquiry.

A complaint will be dealt with by either the Chairperson of the CJC or a Vice-Chairperson ('the Chairperson').<sup>188</sup> The complaint will not proceed if the Chairperson believes it to be trivial, vexatious, made for an improper purpose, or manifestly without substance, nor if it is outside the jurisdiction of the Council.<sup>189</sup> The Chairperson can seek additional information from the complainant, and seek comments from the subject of the complaint and that judge's head of jurisdiction.<sup>190</sup>

The Chairperson will view all information and

- (a) close the file if the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint; or
- (b) hold the file [while remedial action is carried out], or
- (c) ask Outside Counsel to make further inquiries and prepare a report, if the Chairperson is of the view that such a report would assist in considering the complaint, or
- (d) refer the file to a Panel.<sup>191</sup>

If outside counsel become involved, the Chairperson will review the opinion of the outside counsel, and then either close the file, wait while remedial action is carried out, or refer the file to a panel.<sup>192</sup> If the file is referred to a panel, the subject of the complaint is given a reasonable opportunity to make written submissions, including submissions as to whether an investigation should be commenced.<sup>193</sup>

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

- (a) direct outside counsel to make further inquiries;
- (b) close the file if it considers that no Inquiry Committee should be constituted because the matter is not serious enough to warrant removal;

186. Ibid.

187. Canadian Judicial Council, *Procedures for Dealing with Complaints Made to the Canadian Judicial Council about Federally Appointed Judges*, October 2010, < <http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>> 2.3.

188. Ibid 3.2.

189. Ibid 3.5(a).

190. Ibid 3.5(b)–(c).

191. Ibid 5.1.

192. Ibid 8.1.

193. Ibid 9.5.

- (c) hold the file while remedial action is pursued; or
- (d) decide to constitute an Inquiry Committee because the matter may be serious enough to warrant removal.<sup>194</sup>

When closing the file because the matter will not go to an Inquiry Committee, the panel may, in writing to the judge, provide an assessment of the judge's conduct and express any concerns the panel may have about the judge's conduct.<sup>195</sup>

The Inquiry Committee normally holds a public hearing, where the judge and the person who complained can attend and give evidence about the matter that led to the complaint. The Inquiry Committee prepares a report, which goes to the full Canadian Judicial Council for discussion.<sup>196</sup> After considering the Inquiry Committee's report, the Council must decide whether the judge's conduct has rendered the judge incapacitated or disabled from the due execution of the office of judge. Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office.<sup>197</sup>

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194. Ibid 9.6.

195. Ibid 9.7.

196. <[http://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_complaint\\_en.asp#wcmac](http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp#wcmac)>.

197. Ibid.

# Chapter 4

## Complaints Against Judiciary in Western Australia: Issues for Discussion

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# Complaints against judiciary in Western Australia

# 4

As already indicated, complaints of misbehaviour or incapacity that could raise a reasonable prospect of removal from office are rare. There are no reported instances in Western Australia. However, the Western Australian population is increasing and it is reasonable to assume that the demands on the justice system will continue to grow. This is likely to be accompanied by an increment in the number of judicial officers in the state. While there is no reason to suppose that instances of judicial misbehaviour are likely to become more common, there is a risk that more judges will suffer physical or mental infirmities bringing into question their fitness to continue in office. With that in mind, it may be instructive to look at experience in other jurisdictions where similar issues have been encountered.

Appendix C contains some examples of complaints of misbehaviour or incapacity that have occurred in various Australian jurisdictions since the mid-1980s. It does not purport to be a complete list of such occurrences.

## A FORMAL COMPLAINTS REGIME

The first question that arises is whether Western Australia should continue with the existing informal structure or whether a more formal regime should be established by legislation. The former has the advantage of flexibility. But it has all of the disadvantages referred to in the introduction to this paper, namely:

- (a) the perception that complaints are not dealt with in a way that is transparent, impartial and accountable;
- (b) a lack of certainty and guidance to Parliament as to the way in which its responsibilities should be carried out; and
- (c) management and resource implications for the courts in dealing with complaints.

A more formal structure would provide greater certainty and consistency in the handing of complaints across the several jurisdictions that it would cover. It would facilitate the collection of statistics and could result in a more reasoned and informed approach to questions concerning judicial conduct. This Discussion Paper proceeds on the basis that a formal complaints regime should be established.

## Resources required for a formal complaints regime

With the exception of the Corruption and Crime Commission in relation to matters within its jurisdiction, no body has formal powers of investigation concerning complaints against Western Australian judicial officers and resources are not allocated specifically for those tasks.<sup>1</sup> When heads of jurisdiction are called upon to deal with

### PROPOSAL 1

#### **Establish formal complaints system**

The Commission proposes that a formal system for investigating and dealing with complaints against judicial officers in Western Australia be established by legislation.

1. In relation to criminal matters, the WA Police may investigate judges as with any person.

complaints they must find resources from the general court budgets, often to the detriment of other areas within the administration of justice.

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

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

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

### The appropriate form of a complaints handling body

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

- (a) a procedure similar to that applying in England and Wales;
- (b) a judicial conduct commissioner based on the New Zealand model; or
- (c) a judicial commission based on the New South Wales model.

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

The English model is multilayered and would be resource intensive if implemented in Western Australia. In addition, the level of involvement of the Lord Chancellor (a member of the executive government) could create tension with the concepts of separation of powers and judicial independence. Given the small number of complaints in Western Australia and its relatively small judiciary, it would be difficult to justify such a model in this jurisdiction. For these reasons the Commission does not favour this approach.

The New Zealand model of a judicial conduct commissioner may be resource intensive as it would not draw on the contributions of the heads of jurisdiction in the same way as would the Judicial Commission model. Also the role would require to be filled by a suitable candidate irrespective of the number of complaints requiring investigation.<sup>2</sup> It is arguable that the staff and other recurrent costs necessary to support the work of the complaints handling body and to conduct individual (and more intensive) investigations would be the same whether the body was a judicial conduct commissioner or a judicial commission. But the judicial conduct commissioner would be the person making decisions on complaints (save for those reserved to Parliament). Accordingly, the person appointed to that position would have to be of a level of seniority and expertise commensurate with responsibilities of that gravity. Steps would need to be taken to ensure that a judicial conduct commissioner model was fully independent from the executive and legislative arms of government. It would also be necessary to set out in clear terms the relationship between the judicial conduct commissioner, the Chief Justice and the other heads of jurisdiction.

### The judicial commission model

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

- The formal process for handling complaints would ensure complaints are resolved quickly and efficiently, and give the public confidence that their concerns are being documented and taken seriously.
- It avoids any awkwardness associated with a superior judge having to counsel one of his or her colleagues.

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2. New Zealand's Judicial Conduct Commissioner deals with complaints relating to the Supreme Court, Court of Appeal, High Court, District Court, Family Court, Youth Court, Environment Court, Employment Court, Maori Land Court, Courts Martial Appeal Authority and Coroners Court, representing a total of 245 judicial officers: Office of the Judicial Conduct Commissioner, *Annual Report 2010–2011* (15 September 2011) <<http://www.jcc.govt.nz/pdf/annual-report-10-11.pdf>> 5. The current Protocol in Western Australia applies to only 135 judicial officers, although the Commission invites submissions below as to whether this should be extended under a judicial commission model to other officers performing judicial or quasi-judicial functions.

- It may enforce integrity in the judiciary, ensuring unfit judicial officers are weeded out.
- It may give frustrated complainants a better understanding of judicial process and, in so doing, provide those members of the public with greater understanding of and confidence in the judiciary.<sup>3</sup>

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

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

Another commentator raised more-direct concerns about the possible encroachment on judicial independence.

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

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

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

3. Karamicov D, 'Judicial Complaints and the Complaints Procedure: Is it time for an Independent Judicial Commission in Victoria?' (2010) 19 *Journal of Judicial Administration* 232, 242–4.
4. See, eg, Drummond D, 'Do Courts Need a Complaints Department?' (2001) 21 *Australian Bar Review* 11, 22–6.
5. *Ibid* 25.
6. McLelland J, 'Disciplining Australian Judges' (1991) 17 *Commonwealth Law Bulletin* 675, 677.
7. Morabito V, 'The Judicial Officers Act 1986 (NSW): A dangerous precedent or a model to be followed?' (1993) 16 *University of New South Wales Law Journal* 481, 490.

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

## A JUDICIAL COMMISSION FOR WESTERN AUSTRALIA?

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

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

One advantage of the judicial commission model is that it is, by its very nature, independent from the executive and legislative arms of government. In relation to the New South Wales model, it is also noted that the Judicial Commission has responsibilities (such as the collection and dissemination of sentencing statistics and judicial education) in addition to the handling of complaints.<sup>9</sup> It is the Commission’s view that a judicial commission should be established to investigate and deal with complaints against judicial officers in Western Australia, and that it should be generally based on the model operating in New South Wales. The membership, jurisdiction, powers and other potential responsibilities or functions of the proposed judicial commission are discussed further below.

### Judicial officers

It would be necessary to identify the courts, tribunals or officers that ought to be subject to the complaints regime. The general trend in comparable jurisdictions is to limit coverage to bodies that clearly exercise judicial functions, namely courts (as that term would generally be understood) and administrative review tribunals. This avoids

#### PROPOSAL 2

##### Establish judicial commission

The Commission proposes that a judicial commission be established in Western Australia, generally based on the commission operating in New South Wales.

8. Karamicov D, ‘Judicial Complaints and the Complaints Procedure: Is it time for an Independent Judicial Commission in Victoria?’ (2010) 19 *Journal of Judicial Administration* 232, 241–2.

9. For discussion of these responsibilities, see ‘Additional functions of a judicial commission’, below pp 81–2.

**QUESTION A****Jurisdiction of the proposed judicial commission**

Currently, the Protocol covers complaints against judges, masters and registrars of the Supreme Court, the District Court and the Family Court of Western Australia, judicial members of the State Administrative Tribunal and magistrates. Are there any other officers exercising judicial or quasi-judicial functions who should be subject to the jurisdiction of the proposed judicial commission?

the sometimes difficult assessment whether, and if so to what extent, a tribunal or similar body is exercising quasi-judicial functions.

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

If this approach were to be followed in Western Australia, the complaints regime would apply to:

- (a) judges, masters and registrars of the Supreme Court;
- (b) judges and registrars of the District Court;
- (c) judges, registrars and magistrates of the Family Court of Western Australia;
- (d) magistrates in the Magistrates Court and the Children’s Court;
- (e) members of the Coroners Court; and
- (f) judicial members of the State Administrative Tribunal.

Separate questions would arise whether and to what extent the system should apply to acting or auxiliary judges and commissioners of the superior courts and non-judicial members of the State Administrative Tribunal.

### Standing to make complaints

The existing Protocol permits ‘any person affected’ to make a complaint about non-criminal misconduct.<sup>10</sup> The New South Wales legislation provides that any person may complain to the Judicial Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer.<sup>11</sup> It also empowers the Minister to refer any matter relating to a judicial officer to the Judicial Commission.<sup>12</sup> In England and Wales, complaints may be made by a ‘qualifying complainant’ namely, a complainant who claims to have been adversely affected by the maladministration complained of.<sup>13</sup>

A question arises as to whether eligibility to complain should depend on some form of standing test. If there were to be a standing test, it would be necessary to consider whether the Attorney General and (or) the Chief Justice should have an express power

10. Department of the Attorney General (WA), *Protocol for Complaints against Judicial Officers in Western Australian Courts* (August 2007) [9].

11. *Judicial Officers Act 1986* (NSW) s 15.

12. *Judicial Officers Act 1986* (NSW) s 16.

13. *Constitutional Reform Act 2005* (UK) s 99.

to refer matters to the complaints body. However, the Commission proposes that, as in New South Wales, ‘any person’ may complain (including both those officers).

The New South Wales legislation provides that a person who habitually and persistently and mischievously or without reasonable grounds makes complaints may be declared by the Judicial Commission to be a vexatious complainant. The Judicial Commission may disregard a complaint made by a person while a declaration is in force.<sup>14</sup> Consideration should be given to duplicating this provision in the Western Australian regime.

### Complaints covered by the proposed regime

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

#### *Unwarranted or trivial complaints*

There is a need for a mechanism by which unwarranted or trivial complaints can be filtered at an early stage. The need for a filtering process is highlighted by the experience in New South Wales in 2010–2011: 450 complaints were received but only 60 were deemed to require investigation. The New South Wales legislation deals with this issue by detailed provisions about the summary dismissal of complaints. This includes matters that were subject to adequate appeal or review rights.<sup>15</sup> The Commission supports this approach.

#### *Delay in delivering reserved judgments*

It is difficult to divorce considerations relating to delay in delivery of judgments from the allocation of cases within a court and the workload of individual judges. An efficient complaints system may still reserve resolution of issues of that kind to individual courts and judicial officers.

#### *Ordinary complaints – disciplinary powers*

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

A question that arises is what should follow a finding by the complaints body that a complaint has been substantiated and ought not to be dismissed summarily but

### PROPOSAL 3

#### **Standing to make complaints**

The Commission proposes that any person may complain to the proposed judicial commission about the conduct of a judicial officer.

14. *Judicial Officers Act 1986* (NSW) s 38.

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

## QUESTION B

**Sanctions**

Should there be a power to impose formal sanctions short of removal from office (eg, disciplinary measures) and, if so, what sanctions may be imposed and who may exercise that power?

is not so serious as to warrant consideration by Parliament of removal from office. The Protocol refers to ‘training or the provision of assistance to the judicial officer concerned’.<sup>16</sup> Common experience suggests that counselling by the head of jurisdiction and the effect of peer pressure serve a similar function to formal discipline.

The New South Wales legislation allows the Judicial Commission in these circumstances to refer the complaint to the head of jurisdiction with recommendations as to what steps might be taken.<sup>17</sup> The legislation does not specify what those steps might be. In England and Wales there is a specific power enabling the Lord Chief Justice to give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes. A question arises as to the effect that steps such as a formal reprimand or warning, if published, may have on public confidence in the judicial officer concerned.

### *Complaints of criminal misconduct*

It should be noted that both the New South Wales and New Zealand models empower their respective complaints bodies to investigate complaints of criminal misconduct, although these powers seem rarely to be used. This may be explained by the lack of resources and expertise available to the investigating body. In formulating the regime, it will be necessary to address the relationship between the Western Australia Police, the Corruption and Crime Commission<sup>18</sup> and the heads of the relevant jurisdictions. It will also be necessary to consider powers of suspension from office pending resolution of the criminal proceedings.<sup>19</sup>

### *Complaints alleging unfitness for office*

The removal of a judge from office under provisions based on the *Act of Settlement*<sup>20</sup> can only occur for misbehaviour and following an address in Parliament. By convention, this is reserved for exceptional circumstances and for proven misbehaviour. This raises at least three questions. First, what is meant by ‘misbehaviour’? Secondly, ought there to be an express extension to cover incapacity, for example, physical or mental impairment that renders the person unfit for office? Thirdly, should there be preconditions to moving an address?

There is little judicial authority dealing with the *Act of Settlement* and its equivalents and the very few occasions on which the power to remove on address has been exercised.

16. Department of the Attorney General (WA), *Protocol for Complaints against Judicial Officers in Western Australian Courts* (August 2007) [16].

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

18. See further, ‘Role of the Corruption and Crime Commission’, below p 78.

19. See further, ‘Suspension from office’, below p 78.

20. Eg, *Constitution Act 1889* (WA) ss 54–55.

In 1989 a Commission of Inquiry into the conduct of certain judges was held in Queensland. In relation to the term ‘misbehaviour’, the commissioners said:

The Commission therefore expresses its view that before an opinion can be reached that behaviour of a Judge of a Supreme Court warrants his removal from office, the behaviour must be such that, having regard to all the relevant surrounding circumstances, no right thinking member of the community could regard the fact of its having taken place as being consistent with the continued proper performance by the judge of judicial duties, and hence with the holding of judicial office. Put another way, if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary.<sup>21</sup>

In the interests of certainty, it will be necessary to consider whether this is an appropriate definition and whether conduct that is neither criminal nor related to the exercise of judicial functions is a sufficient basis to ground an address.

The second issue is whether incapacity ought to be a ground for an address. The *Magistrates Court Act 2004* (WA) and the *Judicial Officers Act 1986* (NSW) both make provision for intervention where the judicial officer has a physical or mental impairment that affects his or her performance of judicial or official duties. The fact that physical or mental incapacity may result in unfitness for office would seem to be an argument in favour of an extension of this type. The constitutional legislation in each of Victoria, Queensland, the Australian Capital Territory and the Northern Territory refers to ‘incapacity’ as well as misbehaviour.<sup>22</sup>

The Commission proposes that uniform grounds for removal from office of a judicial officer be adopted based on grounds of misbehaviour or incapacity

In New South Wales and Victoria an address cannot be moved in Parliament unless the relevant investigatory body has recommended that this course of action be followed.<sup>23</sup> This is consistent with the concepts of separation of powers and judicial independence.

A judicial commission modelled on that existing in New South Wales would create certainty and provide assistance to Parliament should an occasion arise when Parliament was called upon to consider removal of a judge from office. It would also obviate the problem of procedural fairness for the judge. The judicial commission would inquire into allegations, gather information and evidence and report to Parliament. It may make recommendations whether evidence exists of conduct by a judicial officer that

21. Parliamentary Judges Commission of Inquiry, *First Report* (1989) [1.5.9].

22. *Constitution Act 1975* (Vic) s 87AAB; *Constitution of Queensland 2001* (Qld) s 61(2); *Judicial Commissions Act 1994* (ACT) ss 4, 5(1); *Supreme Court Act 1975* (NT) s 40(1).

23. *Judicial Officers Act 1986* (NSW) s 41; *Constitution Act 1975* (Vic) ss 87AAH.

#### PROPOSAL 4

##### Grounds for removal from office

Presently, a number of Western Australian statutes provide that judicial officers keep office during ‘good behaviour’. The Commission proposes that the Western Australian Constitution Act and the statutes establishing Western Australian courts and tribunals be amended to provide uniformly that the grounds for removal from office of a judicial officer are misbehaviour or incapacity.

#### PROPOSAL 5

##### Powers of Parliament

The Commission proposes that Parliament be the only body capable of removing a judicial officer from office for misbehaviour or incapacity and that removal should only follow an address of both Houses of Parliament.

may be capable of being regarded as misbehaviour or incapacity in the relevant sense. This approach is supported by the Commission.

### QUESTION C

#### Power to suspend a judicial officer

Should there be a power to suspend a judicial officer from the exercise of any power of office following a charge of a serious offence, or while an investigation by the judicial commission is pending. If so, under what circumstances should a suspension be available, and on what terms may suspension be directed? Should each head of jurisdiction be entitled to exercise the power of suspension in respect of judicial officers in his or her jurisdiction?

### Suspension from office

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

Under the New South Wales legislation the head of jurisdiction may suspend the judicial officer in those circumstances.<sup>24</sup> If the officer concerned is a head of jurisdiction, suspension may be ordered by the Governor on the recommendation of the Judicial Commission.<sup>25</sup> In the Commission's opinion this approach is preferable to similar intervention by or on behalf of the executive government, which carries with it serious questions about separation of powers and judicial independence.<sup>26</sup> It would be necessary to specify the terms on which the suspension power could be exercised; for example, whether it would require the continuation of the pay and other entitlements of office during the term of the suspension.

### QUESTION D

#### Role of the Corruption and Crime Commission

Should the Corruption and Crime Commission retain its jurisdiction in relation to complaints against judicial officers if a judicial commission is established? If so, what should the limits of that jurisdiction be and to what extent would it be co-extensive with the jurisdiction of the proposed judicial commission?

### Role of the Corruption and Crime Commission

Chapter Two describes the means by which complaints of criminal misconduct against judicial officers are investigated in Western Australia.<sup>27</sup> It notes that while complaints of this nature are ordinarily investigated by the Western Australia Police, the Corruption and Crime Commission (CCC) also has a limited investigatory role where an allegation relates to an offence of judicial corruption<sup>28</sup> or where the allegation, if established, would constitute grounds for removal from office.<sup>29</sup> The CCC's functions in this regard must be conducted in 'accordance with conditions and procedures formulated in continuing consultation with the Chief Justice'.<sup>30</sup> While the Commission does not see any reason why the CCC's jurisdiction to investigate alleged criminal misconduct of a judicial officer should not operate concurrently with that of the proposed judicial commission, it opens this question for public submissions.

24. *Judicial Officers Act 1986* (NSW) s 40.

25. *Judicial Officers Act 1986* (NSW) s 43.

26. Cf *Magistrate Court Act 2004* (WA) sch 1 cl 13.

27. See above Chapter Two, 'Complaints of Criminal Misconduct'.

28. *Criminal Code* (WA) s 121.

29. *Corruption and Crime Commission Act 2003* (WA) s 27(3).

30. *Corruption and Crime Commission Act 2003* (WA) s 27(5).

## Procedural fairness

All formal processes for dealing with complaints must ensure that the subject of the complaint is afforded procedural fairness at all stages of the process. In the Commission's view, rights and rules of procedural fairness should be express in any legislation establishing the complaints process and must include, at a minimum:

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

The Commission seeks submissions as to whether there are any other standards of procedural fairness that should expressly be observed in the proposed judicial complaints process.

## Publicity

Transparency and accountability require that there be some publicity about complaints and how they are dealt with. Issues that arise in this respect include:

- Should the complaints handling body have a discretion whether or not to publicise complaints, including the name of the judicial officer and the disposition of the complaint?<sup>31</sup>
- If so, at what stage and in what manner should publication occur?
- What confidentiality regime should be implemented to ensure that publication does not occur prematurely and (or) in excess of a level necessary to preserve the integrity of the process?
- Should complainants have a right to confidentiality in relation to complaints they have made?

## Staff of a judicial commission

If a formal complaints process is to fulfil one of its objectives (namely, fostering public confidence by divorcing the complaints process from the court of which the judicial officer is a member), it would seem desirable to have a dedicated office to assist the judicial commission. The office should be separate from the courts and from the

31. In New South Wales powers and duties in relation to the release of information and confidentiality are governed by ss 36, 37 and 37A of the *Judicial Officers Act 1986* (NSW).

### PROPOSAL 6

#### Procedural fairness

The Commission proposes that standards of procedural fairness be observed at each stage of the complaints process. Rights which should be afforded include:

- (a) the right to be heard;
- (b) the right of a judicial officer to know the case against him or her;
- (c) the right to representation by counsel; and
- (d) the right to put questions to witnesses.

### QUESTION E

#### Procedural fairness

Are there any other standards of procedural fairness that should be required in the investigation of any complaint?

### QUESTION F

#### Publicity of complaints

To what extent should the complaints jurisdiction and activities of the proposed judicial commission be a matter of public record? In particular:

- (a) Should details of complaints, the identity of judicial officers, the subject matter of complaints and their disposition be announced publicly?
- (b) If so, at what stage in the complaint process and on what, if any, conditions?
- (c) Should a complainant be able to lodge a complaint with a non-binding request for confidentiality of the complaint, or of the identity of the complainant?
- (d) Should there be special provisions as to publicity of evidence considered during an inquiry into incapacity, for example, medical reports as to the condition of a judicial officer?

**QUESTION G****Sharing of resources**

The proposed judicial commission should be independent of other branches of government administration. Are there any other bodies with compatible activities which may share staff, resources or functions with the proposed judicial commission?

**QUESTION H****Membership of the proposed judicial commission**

The Commission proposes that each head of jurisdiction be an ex officio member of the judicial commission. What other members, if any, should be members of the proposed judicial commission? Should there be representatives of the legal profession and lay members, as is the case in New South Wales, and how should they be selected?

relevant government departments. It should be possible to conduct the work of the office with a relatively small number of staff members. Their primary duties would include:

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

As previously mentioned, the recurrent costs associated with staffing and support services ought not to be significant. But it would be necessary for a Commission to have available to it additional resources for individual investigations. There may also be existing bodies whose functions are compatible with the area of operations and responsibilities of a Judicial Commission and that could provide administrative support.

**Membership of a judicial commission**

The New South Wales Judicial Commission is comprised of ten members: six ‘ex officio members’ (the heads of jurisdiction) and four appointed by the Governor on nomination by the Minister from among legal practitioners and members of the community.<sup>32</sup>

Given the difference in numbers of judicial officers in the two states it may be possible to have a smaller commission in Western Australia. There are five heads of jurisdiction who would become ‘ex officio members’ in a Western Australian judicial commission: the Chief Justice, the President of the State Administrative Tribunal, the chief judges of the District Court and the Family Court of Western Australia, and the Chief Magistrate. It is an open question how many other members should be appointed, by whom and what their qualifications should be.

**Composition of any conduct division**

As discussed in the previous chapter, in New South Wales, a conduct division is appointed by the Judicial Commission to examine and deal with complaints that have not been dismissed following a preliminary examination by the Judicial Commission. The conduct division reports to the Governor if it determines that a ‘complaint is wholly or partly substantiated and forms an opinion that the matter could justify

32. *Judicial Officers Act 1986* (NSW) s 5(5).

parliamentary consideration of the removal of the judicial officer from office'.<sup>33</sup> The conduct division is constituted by a panel of three persons, two of whom are to be judicial officers (one may be a retired judicial officer). The other person making up the panel must be a community representative nominated by Parliament.<sup>34</sup> The legislation provides that such nominees cannot be legally qualified and must not be a member of the Judicial Commission.<sup>35</sup> The Commission seeks submissions as to whether any conduct division of the proposed Western Australian judicial commission should similarly be constituted and appointed.

### Additional functions of a judicial commission

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

At present, the courts are left to fund education of judges from their own budgets with little specific assistance from general revenue. Available programs are necessarily modest and rely on assistance from outside bodies on an ad hoc basis.<sup>36</sup> Most professional bodies now accept that continuing education is a necessity. The Judicial Commission of New South Wales has described its educative function as follows:

Judicial officers are appointed after a successful and lengthy legal career, usually as a barrister or solicitor, sometimes as a legal academic. It is rare for anyone below the age of 40 to be appointed. The new judge or magistrate already has a stock of legal knowledge so that he or she can commence work immediately. The place of judicial education at this stage is to draw out already existing legal skills and assist in the transition from advocate to impartial adjudicator. From then on, our judicial education program focuses on a continuous renewal of professional education and a sharpening of judicial skills. Our mission is to promote the highest standards of behaviour befitting a judicial officer and to foster judicial capacity.<sup>37</sup>

Having a structured and properly resourced education program for judicial officers in this state would also assist heads of jurisdiction in the management of the courts. In the Commission's opinion, the tasks of judicial education and receipt and investigation of complaints are complementary. The entity receiving complaints has detailed knowledge of the subject matter of complaints and so is in a good position to identify training areas to reduce such complaints, either by addressing their source or by assisting judicial officers to anticipate common misunderstandings of the court process that lead to litigant dissatisfaction. A judicial commission with an educative

33. *Judicial Officers Act 1986* (NSW) s 29.

34. *Judicial Officers Act 1986* (NSW) s 22.

35. *Judicial Officers Act 1986* (NSW) sch 2A.

36. For example, programs offered by bodies such as the Institute of Judicial Administration, the National Judicial College of Australia and the Judicial Conference of Australia, all of which have limited resources.

37. Judicial Commission New South Wales, *Annual Report 2010–11* (2011) 16.

#### QUESTION I

##### Membership of a conduct division

How should any conduct division of the proposed judicial commission be constituted and how should members be appointed?

#### QUESTION J

##### Functions of the proposed judicial commission

Should the judicial commission perform any functions other than the investigation and making of recommendations as to complaints as to the conduct of judicial officers and, if so, what should those functions be?

responsibility could have an additional role namely, education of the public in matters relevant to the administration of justice. It is not uncommon for public bodies to carry such responsibilities.<sup>38</sup>

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

Judicial officers need reliable, accessible and up to date information, not only to impose appropriate penalties on individual offenders but also to help ensure that sentences imposed are consistent. Comparisons between sentences can only be made if a relatively standardised description of offences and offenders is collected and made available to sentencers, and others involved in the criminal justice system. For this purpose, an information system, with both quantitative and qualitative components is necessary. The report recommends that a sentencing council be established which provides judicial officers with detailed and comprehensive information, advises government on sentencing programmes, monitors sentencing practices and provides a public information service. An important function of the sentencing council should be to provide sentencing education programmes for judicial officers.<sup>39</sup>

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

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38. See, eg, *Electoral Act 1907* s 5F(1(d)); *Corruption and Crime Commission Act 2003* s 17. This is also the primary function of the Constitutional Centre of Western Australia.

39. Australian Law Reform Commission, *Sentencing* (1988) Summary xxvi.

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# Appendix A: Proposals/Questions

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## Proposals

- 1**      **Establish formal complaints system** p 69  
The Commission proposes that a formal system for investigating and dealing with complaints against judicial officers in Western Australia be established by legislation.
  
- 2**      **Establish judicial commission** p 73  
The Commission proposes that a judicial commission be established in Western Australia, generally based on the commission operating in New South Wales.
  
- 3**      **Standing to make complaints** p 75  
The Commission proposes that any person may complain to the proposed judicial commission about the conduct of a judicial officer.
  
- 4**      **Grounds for removal from office** p 77  
Presently, a number of Western Australian statutes provide that judicial officers keep office during ‘good behaviour’. The Commission proposes that the Western Australian Constitution Act and the statutes establishing Western Australian courts and tribunals be amended to provide uniformly that the grounds for removal from office of a judicial officer are misbehaviour or incapacity.
  
- 5**      **Powers of Parliament** p 77  
The Commission proposes that Parliament be the only body capable of removing a judicial officer from office for misbehaviour or incapacity and that removal should only follow an address of both Houses of Parliament.

## 6

### Procedural fairness

p 79

The Commission proposes that standards of procedural fairness be observed at each stage of the complaints process. Rights which should be afforded include:

- (a) the right to be heard;
- (b) the right of a judicial officer to know the case against him or her;
- (c) the right to representation by counsel; and
- (d) the right to put questions to witnesses.

## Questions

### A

#### Jurisdiction of the proposed judicial commission

p 74

Currently, the Protocol covers complaints against judges, masters and registrars of the Supreme Court, the District Court and the Family Court of Western Australia, judicial members of the State Administrative Tribunal and magistrates. Are there any other officers exercising judicial or quasi-judicial functions who should be subject to the jurisdiction of the proposed judicial commission?

### B

#### Sanctions

p 76

Should there be a power to impose formal sanctions short of removal from office (eg, disciplinary measures) and, if so, what sanctions may be imposed and who may exercise that power?

### C

#### Power to suspend a judicial officer

p 78

Should there be a power to suspend a judicial officer from the exercise of any power of office following a charge of a serious offence, or while an investigation by the judicial commission is pending. If so, under what circumstances should a suspension be available, and on what terms may suspension be directed? Should each head of jurisdiction be entitled to exercise the power of suspension in respect of judicial officers in his or her jurisdiction?

## **D** Role of the Corruption and Crime Commission p 78

Should the Corruption and Crime Commission retain its jurisdiction in relation to complaints against judicial officers if a judicial commission is established? If so, what should the limits of that jurisdiction be and to what extent would it be co-extensive with the jurisdiction of the proposed judicial commission?

## **E** Procedural fairness p 79

Are there any other standards of procedural fairness that should be required in the investigation of any complaint?

## **F** Publicity of complaints p 79

To what extent should the complaints jurisdiction and activities of the proposed judicial commission be a matter of public record? In particular:

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- (c) Should a complainant be able to lodge a complaint with a non-binding request for confidentiality of the complaint, or of the identity of the complainant?
- (d) Should there be special provisions as to publicity of evidence considered during an inquiry into incapacity, for example, medical reports as to the condition of a judicial officer?

## **G** Sharing of resources p 80

The proposed judicial commission should be independent of other branches of government administration. Are there any other bodies with compatible activities which may share staff, resources or functions with the proposed judicial commission?



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## **H** Membership of the proposed judicial commission p 80

The Commission proposes that each head of jurisdiction be an ex officio member of the judicial commission. What other members, if any, should be members of the proposed judicial commission? Should there be representatives of the legal profession and lay members, as is the case in New South Wales, and how should they be selected?

## **I** Membership of a conduct division p 81

How should any conduct division of the proposed judicial commission be constituted and how should members be appointed?

## **J** Functions of the proposed judicial commission p 81

Should the judicial commission perform any functions other than the investigation and making of recommendations as to complaints as to the conduct of judicial officers and, if so, what should those functions be?

# Appendix B: Judicial officers

## JUDICIAL OFFICERS IN WESTERN AUSTRALIAN COURTS AND TRIBUNALS<sup>1</sup>

As at May 2012

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

### Notes:

- (a) This figure includes the President of the State Administrative Tribunal and one Commissioner. It does not include three acting judges currently appointed to the court for the purpose of hearing a specific appeal.
- (b) This figure includes the two Deputy Presidents of the State Administrative Tribunal and the President of the Children's Court.
- (c) The Commission notes that in May 2012 the state government announced funding to enable appointment of a temporary family law magistrate to address delays in de facto property matters. This temporary appointment is not included in these figures.
- (d) The judicial members of the State Administrative Tribunal are counted in the figures for the Supreme Court and District Court according to their appointments. In addition, the Tribunal has 17 Senior or Ordinary Members and 98 Sessional Members who are not subject to the Protocol.
- (e) The figure for the Magistrates Court includes the State Coroner, Deputy State Coroner, Children's Court Magistrates and three acting magistrates.

1. Figures include part-time judicial appointments.

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

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

### Notes:

- (a) These figures are approximate as positions and nomenclature are not standard and direct comparisons are difficult.
- (b) The information concerning New South Wales is derived from the Judicial Commission Annual Report for 2010–2011. The figures for the other jurisdictions were provided by the Chief Justices of the relevant States and Territories in May 2012.
- (c) The figure for judges in the Family Court of Australia includes the judges and registrars of the Family Court of Western Australia.

1. High Court registrars are not included as they do not perform judicial functions.

# Appendix C: Examples of complaints against judicial officers

## EXAMPLES OF COMPLAINTS OF MISBEHAVIOUR OR INCAPACITY OF JUDICIAL OFFICERS IN AUSTRALIAN JURISDICTIONS

### Complaints where a formal process was invoked

#### *A High Court judge: Federal (1984)*

In 1984 a Senate committee was formed to examine allegations that a justice of the High Court had spoken to influence the course of justice regarding the criminal proceedings against an acquaintance. The judge was alleged to have attempted to pervert the course of justice by speaking to judicial officers in lower courts in an attempt to influence those officers to act otherwise than in accordance with their duties in relation to the criminal proceedings. The Senate committee concluded that he had 'probably' done so.

He was convicted of a criminal offence relating to one of those allegations but the conviction was overturned on appeal and he was acquitted on a retrial. Following further allegations, in May 1986 the Federal Parliament enacted the *Parliamentary Commission of Inquiry Act 1986* (Cth) to establish a commission to investigate the allegations excluding those raised in prior criminal proceedings.

However, the Act was repealed and no report was tabled after the judge revealed he had untreatable cancer in July 1986. The judge died later that year.

#### *A Supreme Court judge: Queensland (1988)*

In 1988 a Royal Commission into illegal activities and police misconduct in Queensland raised questions of alleged impropriety against a Supreme Court judge.

Among other things, the veracity of evidence the judge had earlier given in a defamation action brought against a magazine, concerning the level of friendship between him and the Police Commissioner, was questioned.

The Government set up an inquiry panel of three retired judges to investigate the questions concerning the judge's conduct. The Inquiry also examined various aspects of the judge's financial affairs.

The Inquiry's report was released to Parliament in May 1989. The report included no adverse findings about the judge's judicial conduct or capacity or concerning his relationship with the Police Commissioner. However, it found his removal from office warranted on the following five grounds:

- He gave false evidence at a court hearing regarding a defamation action.
- He made and maintained allegations that the Chief Justice, the Attorney-General and the Royal Commissioner had conspired to injure him; although the report did note that the claims of conspiracy may well have been isolated and irrational behaviour brought about by stress.
- He made false statements to the accountant preparing income tax returns for a family-linked company.
- He arranged sham transactions to create income tax advantages.
- He made false claims for tax deductions.

In June 1989 the judge addressed the Legislative Assembly to defend himself and explained why he should not be removed from the bench, but Parliament voted to remove him from office. This appears to be the only instance of a Supreme Court judge being removed from office in any Australian jurisdiction since federation.

### *A Supreme Court judge: New South Wales (1999)*

In 1997 the Conduct Division of the Judicial Commission considered various allegations against a Supreme Court judge. All related to significant delays in the delivery of reserved judgments. In all but one case the judge had apparently failed to deliver judgment by the date outlined in an agreed schedule of delivery.

It was observed in the New South Wales Parliament that the Conduct Division's report noted there was evidence that the judge had suffered from depression between 1995 and 1998, and that 'he had a pre-existing character trait of procrastination'. On this basis, the Conduct Division concluded he had a present inability to perform his judicial duties; an inability that justified the New South Wales Parliament to consider removing the judge from office. There was a dissenting opinion to the effect that the judge's relevant incapacity no longer existed.

In May 1998 the Attorney General tabled the report (including the dissenting opinion and the judge's written response) before the Legislative Council. The judge was summoned to appear at the House to show cause why he should not be removed from office. However, prior to that date he declared to the President of the Legislative Council his intention to challenge the validity of the Conduct Division's report (on various statutory and administrative law grounds), and his appearance before the House was postponed. On 12 June 1998 the New South Wales Court of Appeal dismissed the judge's challenge on all grounds.

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On 16 June 1998 the judge delivered an address to the Legislative Council. On 25 June 1988 the Attorney General moved that the House remove the judge from office on the basis of incapacity to complete his judicial duties but the motion was defeated.

It was subsequently reported that, in February 1999, another complaint was made to the Judicial Commission about the judge's considerable delays in delivering judgments. The judge retired from office on 22 February 1999.

### *A District Court judge: New South Wales (2005)*

In April 2005 a newspaper carried reports that a District Court judge had allegedly fallen asleep during court proceedings:

- in 2002 a corporate fraud trial and a shooting trial;
- in 2003 a rape trial and a drug-smuggling trial; and
- in 2004 a drug-smuggling trial.

By that stage, the judge had already sought medical treatment for his sleepiness and had been diagnosed with obstructive sleep apnoea. He had apparently been treated effectively.

Complaints were made against the judge in 2005, some of which were classified as serious by the Judicial Commission and referred to a Conduct Division on 31 May.

However, the Conduct Division was requested to investigate the complaints made against the judge, and table a report indicating whether the complaints were substantiated and whether Parliament would be justified to consider removing the judge from office. Shortly afterwards the judge took indefinite leave from office.

The judge retired on medical grounds in July 2005, before the Conduct Division could complete its report. According to evidence given by the then Attorney General to a Parliamentary Committee, the judge was granted retirement after failing a non-specified health assessment that he agreed to in early June. A medical assessment found that he was unfit to continue working as a judicial officer. The Attorney General stated the judge's retirement was related to his 'more general medical condition' as opposed to his sleep apnoea. In accordance with the relevant legislation, the inquiry into the judge's behaviour ceased upon his retirement.

A number of appeals followed on account of the judge's alleged inattentiveness during trials. Some were successful.

### *A magistrate: Australian Capital Territory (2009)*

According to statements made by the Attorney-General to the Parliament in the Australian Capital Territory ('ACT') in October 2009, two ACT magistrates complained to him that another magistrate had allegedly disclosed confidential information to a visiting Victorian magistrate. The information allegedly related to a criminal proceeding which the Victorian magistrate was hearing.

The Attorney-General referred the matter to the ACT Director of Public Prosecutions, who in turn referred it to the Australian Federal Police for criminal investigation. In November 2009 the Attorney-General informed the ACT Legislative Assembly that the Government had decided to also establish a Judicial Commission to investigate whether there had been conduct that would warrant Parliament considering the magistrate's removal.

Under the relevant legislation, the magistrate was required to step down from office during the Commission's inquiry. However, the magistrate retired on medical grounds shortly before the Commission began hearings. The criminal investigation continued until September 2010. No charges were laid.

### *A magistrate: Western Australia (2010)*

In August 2010 the Chief Magistrate received a complaint from the Director of Legal Aid concerning a magistrate's alleged conduct. The complaints included the magistrate's interaction with a junior lawyer when the lawyer appeared before the magistrate earlier that year. The junior lawyer had taken her own life a short time later. The Chief Magistrate referred the complaint to the Attorney General under the relevant legislation. The Attorney General sought legal advice before considering what action to take.

In June 2011 it was reported that the Attorney General had decided, after considering the matters the subject of complaint and an audit of the magistrate's conduct, that there was no basis to require the magistrate to show cause why the magistrate should be removed from office. He considered that there was a lack of unequivocal evidence of incompetence, negligence or misbehaviour. The matter was referred back to Chief Magistrate to be dealt with internally.

The alleged conduct of the magistrate attracted significant comment in the Western Australian press and calls for the existing system for reviewing alleged misconduct of judicial officers to be reformed.

### *A magistrate: New South Wales (2010)*

In May 2011 a report of the Conduct Division of the Judicial Commission in relation to a magistrate's conduct was tabled in the New South Wales Parliament. According to the report, the background to its preparation included the following.

On 8 March 2010 the Conduct Division of the Judicial Commission was asked to investigate two complaints made in 2009 against a magistrate. The Conduct Division decided to extend the inquiry to two earlier complaints that had been made against the magistrate (concerning conduct in 2003 and 2007).

The hearings were adjourned to permit the magistrate to undertake medical treatment for severe anxiety, which was to be a focus of the Division's investigation into her behaviour. The magistrate had been taking prescribed anti-depressant medication between 1995 and 2008 but was not taking the medication at the complaints.

The Conduct Division requested a psychiatric report. The psychiatrist stated that the magistrate was, at that time, moderately anxious, moderately depressed and initially withdrawn, and drew a connection between her condition and the impugned behaviour. The allegations against the magistrate included the following alleged conduct:

- Rude and improper treatment of a defendant and use of intemperate language during a hearing for an application to revoke an Apprehended Violence Order.
- Rude and aggressive disposition in a hearing against a defendant.
- Rude conduct and intemperate comments in a hearing relating to the suspension of a provisional driving licence.
- Belligerent and insulting conduct and intemperate comments in a hearing concerning parking infringements.

The Conduct Division's report, which recommended that Parliament consider removing the magistrate from office, was tabled in Parliament in May 2011. The magistrate provided a written submission and addressed the Legislative Council in June 2011. The magistrate, among other things, submitted that her behaviour at the time of the most-serious complaints was influenced by the decision to cease taking anti-depressants and that she was now medically fit for office.

The Legislative Council dismissed the motion to remove the magistrate from office.

## Complaints where a formal process was not invoked

### *A magistrate : New South Wales (1985)*

In 1985 a magistrate was charged and convicted of attempting to pervert the course of justice. He had come to the notice of a Royal Commission for his part in committal proceedings before the New South Wales Local Court. The Commission found that the magistrate, falsely purporting to act on behalf of the Premier, directed another magistrate to have an accused person discharged.

The Commission recommended that the magistrate be prosecuted for attempting to pervert the course of justice. He was charged accordingly and convicted, after which he resigned.

### *A magistrate: Victoria (2000)*

In October 2000 it was reported in the media that various allegations had been made against a magistrate, including allegations of sexual harassment. It was reported that other magistrates were considering moving a vote of no confidence in him.

At the time, the relevant legislation provided that a magistrate could only be removed from office by the Governor if the Supreme Court determined, on an application by the Attorney-General, that proper cause existed for taking that action. Parliament did not need to vote to dismiss the magistrate from office. The Attorney-General announced that reforms were being considered for the manner in which complaints were made against the judiciary. He subsequently advised the Legislative Assembly that at the time he had declined to intervene because he had not received any formal complaints against the magistrate. Although he had previously spoken to the magistrate regarding some comments about other magistrates earlier in the year, the magistrate had satisfactorily explained his actions.

It was reported later in October that a group of magistrates had declared that they had no confidence in the magistrate, with a number also supporting him. The Attorney-General subsequently confirmed to the Legislative Assembly that he had received serious complaints against the magistrate and that a substantial vote of no confidence in the magistrate had been passed by fellow magistrates.

The magistrate resigned from office later that month although he continued to declare his innocence. The complaints against him were taken no further.

Since then the legislation has been changed. Removing a magistrate (or any other judicial officer) from office requires a vote from both Houses of Parliament on the grounds of proved misbehaviour or incapacity.

### *A Supreme Court judge: New South Wales (2004)*

In October 2004 a Supreme Court judge was involved in a motor vehicle accident. He attended hospital for treatment of a facial injury, where blood samples were taken for the purpose of measuring his blood alcohol content. The blood sample unit of the traffic services branch never received the sample intended to be provided to it. This led to an investigation by the Police Integrity Commission in relation to the circumstances surrounding the removal of the blood sample from the hospital.

On 12 November 2004 the judge publicly announced his resignation from judicial office. He later pleaded guilty to negligent driving and driving under the influence of alcohol. After court proceedings in relation to the powers of the Police Integrity Commission were resolved, the Commission reported to Parliament. It recommended that consideration be given to whether the judge should be charged with doing an act with intent to pervert the course of justice. The Director of Public Prosecutions decided not to commence proceedings.

### *A magistrate: Victoria (2006)*

In 2006 and 2009 various media reports contained allegations in relation to a magistrate's alleged conduct which had, among other things, reportedly resulted in the magistrate being counselled by the Chief Magistrate.

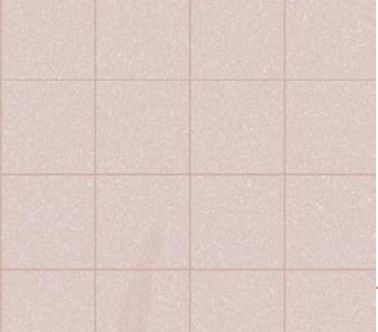
In September 2009 it was reported that the magistrate had stood down from office after being charged with two counts of assault, stemming from an alleged incident earlier that year. It was subsequently reported that the magistrate had been arrested in October 2009 in relation to matters including scratching a vehicle belonging to a witness.

It was further reported that in February 2010 the magistrate indicated that he would plead guilty to charges of unlawful assault and criminal damage, and was later sentenced to a two-year good behaviour bond and fined \$7,500. He resigned from office.

### *A magistrate: Victoria (2009)*

In 2009 a question arose in relation to a magistrate's conduct in allegedly asserting that her father was driving her work vehicle on an occasion in respect of which a speeding fine had been issued, but when he was allegedly out of the country.

In May 2009 the Chief Magistrate reportedly temporarily stood down the magistrate and asked the police service to investigate the alleged irregularity and established a review of her conduct.



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In June 2009 the Victorian Attorney-General announced that, following receipt of an initial report, he had decided to establish a committee to make recommendations as to whether or not the magistrate's behaviour warranted a motion to be brought before the Parliament to have the magistrate removed as a judicial officer. It was also reported that no charges would be laid as a result of the police investigation and that the magistrate had indicated she would resign to protect the integrity of the court and did so.

After this incident the Chief Magistrate called for the establishment of a Judicial Commission in Victoria. In October 2009 the then Attorney-General announced the government's intention to follow that course. A Bill was tabled in 2010, but had not become law by the time Parliament was prorogued.

# Appendix D: Consultations

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## LIST OF PEOPLE CONSULTED

Magistrate Bayly, Magistrates Court of Western Australia

Justice John Chaney, President, State Administrative Tribunal

Chief Justice Ewan Crawford, Supreme Court of Tasmania

Ms Helen DeBrito, Legal Aid Western Australia

Chief Justice P de Jersey AC, Supreme Court of Queensland

Ms Claire Downey, Law Reform and Policy Officer, Supreme Court of Victoria

Chief Justice John Doyle AC, Supreme Court of South Australia

Chief Magistrate Steven Heath, Magistrates Court of Western Australia

Chief Justice Terence Higgins AO, Supreme Court of the Australian Capital Territory

Commissioner Macknay QC, Corruption and Crime Commission

Chief Justice Wayne Martin, Supreme Court of Western Australia

Chief Judge Peter Martino, District Court of Western Australia

Magistrate Randazzo, Magistrates Court of Western Australia

Mr Mike Silverstone, Executive Director, Corruption and Crime Commission

Ms Jane Stewart, Legal Aid Western Australia

Chief Judge Stephen Thackray, Family Court of Western Australia

Chief Justice Marilyn Warren AC, Supreme Court of Victoria



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## LIST OF CORRESPONDENCE AND EMAILS

Aboriginal Family Law Services

Albany Community Legal Centre

Albany Family Violence Prevention Legal Service

Ms Denise Beer, Managing Director, Sussex Streets Community Law Service Inc

Ms Sandra Boulter, Principal Solicitor, Mental Health Law Centre WA

Bunbury Community Legal Centre

CASE for Refugees

Citizens Advice Bureau

Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Services

Fremantle Community Legal Centre

Geraldton Resource Centre Inc

Goldfields Community Legal Centre

Gosnells Community Legal Centre

Kimberley Community Legal Services Inc

President, Law Society of Western Australia

Ms Helen Lawrence, Solicitor, Midland Information, Debt and Legal Advocacy Service

Marninwarntikura Family Violence Prevention Legal Service

Mental Health Law Centre WA

Ms Karen Merrin, Chairperson, Community Legal Centres Association

Midland Information, Debt and Legal Advocacy Service

Northern Suburbs Community Legal Centre Inc

Peel Community Legal Services Inc

Pilbara Community Legal Service

Hon Christian Porter MLA, Office of the Treasurer; Attorney General for Western Australia

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Street Law Centre

Mr George Turnbull, Director, Legal Aid Western Australia

Wheatbelt Community Legal Centre

Mr Philip Urquhart, Barrister/President, Criminal Lawyers Association

Ms Gai Walker, Managing Director, SCALES Community Legal Centre

Women's Law Centre Inc

Youth Legal Service