



Removal of judicial officers: an update

by Gareth Griffith

1 Introduction

The removal of judicial officers has been the subject of debate over a number of years. In NSW, parliamentary procedures for removal were activated on two occasions in 2011, in the cases of Magistrates Jennifer Betts and Brian Maloney. These procedures had only been used on one previous occasion, in 1998, in the case of Justice Vince Bruce. In a further development, on 28 March 2012 the NSW Attorney General, Greg Smith, introduced the [Judicial Officers Amendment Bill 2012](#) (the 2012 Bill). In the [Agreement in Principle Speech](#), Mr Smith said that the Bill:

will amend the Judicial Officers Act 1986 to enable the Attorney General to be provided with certain information about the existence, nature, progress and outcome of complaints before the Judicial Commission.

Specifically, s 37 of the *Judicial Officers Act 1986* prohibits the disclosure of any information relating to a complaint against a judicial officer except in certain limited circumstances. This is discussed in more detail later in this e-brief. For the moment it is enough to say that the 2012 Bill would insert new s 37A into the Act to permit the provision of

information about a complaint to the Attorney General.

This e-brief, which is a companion to Briefing Paper No 3/2012 on [Judicial Appointments](#), starts with an historical note on the removal of judges in NSW, followed by an account of the current law under the *Constitution Act 1902* and the *Judicial Officers Act 1986*. Recent cases are then considered, before an overview of the 2012 Bill is presented. Developments at the Commonwealth level are also noted, with the introduction of two relevant Bills over the past few weeks.

2 Historical note

The removal of judges in Australia is rare. The first instance in NSW occurred in June 1843 when Justice Willis of the Supreme Court and, since February 1841, the resident judge for the district of Port Philip, was removed from office by Governor Gipps on the ground that it was the "only means of restoring peace and tranquillity" to the district. However, Willis appealed successfully to the Privy Council which found that, while there were sufficient grounds for removal, Willis should have been given a proper hearing.¹ On that occasion the Privy Council held that the *Colonial Leave of Absence Act 1782*, an Act of the Imperial Parliament commonly known as *Burke's Act*,

applied to the removal of colonial judges²

Under that Act, colonial judges were liable to removal, or to what was termed "amoval", by the Governor in Council, on the ground of either wilful absence, neglect of duty or misbehaviour. That contrasted with the situation in Britain where, under the *Act of Settlement* of 1700 superior court judges were appointed during "good behaviour" and could only be removed on an "address of both Houses of Parliament". The *Act of Settlement* was not received as part of the law when the Australian colonies were established. Rather, the *New South Wales Act* of 1823 provided that Supreme Court judges could be appointed and removed by His Majesty, with no reason required.

According to Twomey, following the establishment of responsible government in 1856, theoretically at least two avenues for the removal of judges of the Supreme Court were available. First, s 39 of the *Constitution Act* 1855 provided that it was lawful for "Her Majesty Her Heirs or Successors to remove any such Judge or Judges upon the Address of both Houses of the Legislature of this Colony", a provision which did not include an express requirement for the articulation of the grounds, if any, to support the removal. On the other hand, s 38 of the 1855 Act provided that the commissions of Supreme Court judges were subject to "good behaviour", in relation to which the *Colonial Leave of Absence Act 1782* and the need to provide grounds for removal would still apply. Indeed, Twomey suggests that the 1782 Act, although repealed in respect to the UK in 1964, continued to provide an alternative means for the removal of

judges until the enactment of the *Judicial Officers Act 1986* (NSW).³

In 1900 the provisions relating to the removal of judges of the higher courts were inserted in s 10 of the *Supreme Court and Circuit Courts Act*, which provided:

(1)The commission of every Judge shall be, continue, and remain in force during his good behaviour, notwithstanding the demise of Her Majesty, whom may God long preserve.

(2) Provided that Her Majesty may remove any Judge upon the address of both Houses of the legislature.

Subsequently, the matter was dealt with under s 27 of the *Supreme Court Act 1970* which in sub-section (1) again included reference to the commission of judges remaining in force "during his good behaviour". By s 27(2) it was further provided that:

The Governor may remove the Chief Justice, the President of the Court of Appeal, any other Judge of Appeal or any other Judge upon the address of both Houses of Parliament.

3 Part 9 of the NSW Constitution Act 1902

As discussed in the next section of this e-brief, in 1986 statutory provision was made for the removal of judges under s 41 of the *Judicial Officers Act*. As amended, that provision now reads in addition to Part 9 of the *NSW Constitution Act 1902*, which sets out the requirements for the removal of any holder of a "judicial office".

Part 9 was enacted in 1992 and in 1995 it was constitutionally entrenched under s 7B of the *Constitution Act*, with

the result that it cannot be amended until the proposal has been approved by the electors at a referendum. As Spigelman CJ commented in *Bruce v Cole*, "Section 53, as so entrenched, reflects the central significance of judicial independence in our system of government". He also observed that:

The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence. For a period of almost 300 years, from the passage of the *Act of Settlement* 1700 (Eng), it has been accepted that judicial officers cannot be removed except by exceptional measures involving action by both the executive and the legislature.⁴

Section 53 of the Constitution Act, which is headed "Removal from Judicial Office", protects the tenure of a wide range of judicial officers, from judges of the Supreme Court to magistrates. The judicial officers are listed in s 52(1), as follows:

(1) In this Part:

judicial office means the office of any of the following:

- (a) Chief Justice, President of the Court of Appeal, Judge of Appeal, Judge, Associate Judge or Master of the Supreme Court,
- (b) Chief Judge, Deputy Chief Judge or Judge of the Industrial Court or member of the Industrial Relations Commission in Court Session,
- (c) Chief Judge or Judge of the Land and Environment Court,
- (d) Chief Judge or Judge of the District Court or President of the Children's Court,
- (e) Chief Judge or Judge of the Compensation Court,
- (f) Chief Magistrate, Deputy Chief Magistrate or Magistrate of the Local Courts; Chief Magistrate,

Deputy Chief Magistrate or Magistrate of the Local Court; Senior Children's Magistrate or Children's Magistrate of the Children's Court; Chief Industrial Magistrate or Industrial Magistrate; Chairman, Deputy Chairman or Licensing Magistrate of the Licensing Court.

Section 53 of the Constitution Act currently provides:

(1) No holder of a judicial office can be removed from the office, except as provided by this Part.

(2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

(3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office.

(4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.

(5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.

In relation to subsection (3), it is the case that s 53 operates in conjunction with the provisions of the *Judicial Officers Act 1986*.

Note that the phrase "proved misbehaviour or incapacity" in s 53(2) was adopted from the Commonwealth Constitution, specifically s 72(ii). As Twomey comments, "Despite adopting this common terminology, uncertainty remains as to what is meant by "misbehaviour" and "incapacity", and

how (and by whom) it is to be "proved".⁵

4 The Judicial Officers Act 1986

4.1 Background to the Act

As discussed in [Background Paper No 1/1998](#),⁶ the 1986 Act was introduced amidst considerable controversy and it was later described as a "revolutionary" piece of legislation, in that it established a formalised system of judicial accountability, the first of its kind in Australia.⁷ The background to the Act was one of public controversy founded on a number of inquiries into the conduct of judges. In summary, during 1985 and 1986 Justice Murphy of the High Court was acquitted on two charges of attempting to pervert the course of justice. Similarly, in October 1985 Justice Foord of the NSW District Court was acquitted on two charges of attempting to pervert the course of justice.

On the other hand, in March 1985, a former NSW Chief Stipendiary Magistrate, Murray Farquhar, was convicted of attempting to pervert the course of justice and served a prison sentence. There was, in addition, the controversy in NSW surrounding the decision not to "reappoint" five magistrates, based apparently on allegations of "unfitness", when the Court of Petty Sessions was abolished and the magistrates' courts were reconstituted as the Local Court. In 1987 the NSW Court of Appeal held that the decision was voided by procedural unfairness.⁸

Fuelling the debate on judicial accountability still further, in September 1986 Professor Vinson released his report dealing with the sentencing of drug cases in the District Court between 1980 and 1982, which purported to find that a particular judge

had exercised leniency in dealing with clients of a particular solicitor. It was revealed later that Justice Foord was the judge in question. More generally, the Vinson report concluded that the system of justice in NSW was "neither systematic nor just".⁹ Responding to these issues, the then Attorney-General, Terry Sheahan, said:

it is the soundness of the integrity of the judicial system itself that the community is uneasy about. Whether the community concern is blameless or not is now immaterial. Reassurances must be provided and justice must not only be done but be seen to be done.¹⁰

In the immediate event the debate concerning the Judicial Officers Bill of 1986 added to the controversy. The judges of the Supreme Court were unanimous in their opposition to it in its original form, under which a "Conduct Division" of the proposed Judicial Commission would have had the power to recommend to the Governor that judicial officers be removed without recourse to Parliament. Following unprecedented protests from members of the judiciary, Parliament's role in the dismissal process was reinstated before the Bill itself was introduced. As originally enacted, s 41 of the *Judicial Officers Act* provided:

If a report of the Conduct Division presented to the Governor sets out the Division's opinion that a matter could justify parliamentary consideration of the removal of a judicial officer from public office, the Governor may remove the officer on the address of both Houses of Parliament.

Whereas prior to 1986 the statutory provisions relating to the removal of judges were confined to the superior courts, now it was expanded to include all levels of the NSW judiciary,

including magistrates. The same applies under Part 9 of the NSW Constitution Act, which, as noted, has been in force since 1992 and requires both Houses of Parliament to make a finding in respect to a "ground of proved misbehaviour or incapacity". The further point to make is that s 53 of the Constitution Act operates in conjunction with the relevant provisions of the *Judicial Officers Act 1986*, so that s 41 of that Act now reads:

- (1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.
- (2) The provisions of this section are additional to those of section 53 of the *Constitution Act 1902*.

4.2 Key provisions of the Judicial Officers Act

Established under the Act is the Judicial Commission which has a number of functions, including the provision of statistical information relating to sentencing (s 8), the organisation and supervision of judicial training and education (s 9) and dealing with complaints made against judicial officers (Part 6). By Part 5 of the Act, a Conduct Division of the Commission is established, comprising of three members, two of which must be judicial officers (one of whom may be retired) and one community representative nominated by Parliament in accordance with Schedule 2A (s 22). By s 14, the functions of the Conduct Division are to:

- examine and deal with

complaints under Part 6 of the Act, which can include references from the Attorney General (s 16),

- but also under Part 6A to examine *requests* made by heads of jurisdictions where they suspect that judicial officers have an impairment that affects their performance of judicial or official duties.

4.3 Complaints under Part 6

The procedures for the making of complaints are set out under Part 6. In summary, after a preliminary examination by the Judicial Commission (s 18) a complaint can be dealt with in one of three ways: it can be summarily dismissed (s 20); it can be referred to the Conduct Division (s 21(1)); or, if the complaint appears to be wholly or substantially substantiated but nonetheless does not justify the attention of the Conduct Division, it can be referred to the relevant head of jurisdiction.

If a complaint is referred to the Conduct Division, three options are then open to it:

- to dismiss the complaint (s 26)
- if it decides that the complaint is wholly or partially substantiated, the Conduct Division may form an opinion that the matter could justify parliamentary consideration (s 28(1)(a)), in which case a report must be provided to the Governor setting out the Division's findings of fact and opinion, which is also to be laid by the Minister before both Houses of Parliament (s 29)
- if the Conduct Division decides that the complaint is wholly or partially substantiated but does not justify parliamentary consideration, it may refer the

matter back to the head of jurisdiction (s 28(1)(b)).

Where concerns arise about the mental or physical capacity of a judicial officer, the Conduct Division is empowered to request that the officer undergo a medical or psychological examination. If the request is refused, or the officer otherwise fails to undergo the examination, and if the Conduct Division considers the matter to be sufficiently serious, it may form an opinion that the matter could justify parliamentary consideration of the removal of the officer from judicial office (s 34).

The examination of a complaint by the Conduct Division ends where a judicial officer ceases to hold office for any reason (s 32(1)), be it through death or retirement.¹¹

4.4 Requests under Part 6A

Under Part 6A, where it is suspected that a judicial officer has an impairment that affects their performance of judicial or official duties, the head of a jurisdiction can formally request that the Judicial Commission investigate the matter. In its preliminary examination, the Commission may require the judicial officer to undergo a medical or psychological examination. Where the request is refused, the Commission may deal with the matter as if the judicial officer were the subject of a complaint.

Following its preliminary examination, by s 39E the Commission has three available options:

- to summarily dismiss the request
- if it has formed the opinion that the judicial officer may have an impairment that affects his

duties, to refer the matter to the relevant head of jurisdiction, or

- in the same circumstances, to refer the matter to the Conduct Division.

If the last option is decided upon, the Conduct Division must conduct an examination of its own, treating the matter as if it were a complaint (s 39F). On completing the examination, two courses of action are open to it:

- if it is of the opinion that the judicial officer is physically or mentally unfit to exercise efficiently the functions of a judicial office, it must report its conclusions to the Governor, in which case, by the operation of s 29, the report will also be laid before the Houses of Parliament.
- if it is of the opinion that the judicial officer is fit to exercise efficiently the functions of a judicial office, it must report its conclusions to the head of jurisdiction (s 39G).

4.5 Relevant case law

Further to both Parts 6 and 6A of the Judicial Officers Act, for a judicial officer to be removed from office, the Conduct Division must first have reported to the Governor its "opinion" that "the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity" (s 41). Commenting on this statutory test, in *Bruce v Cole*, Spigelman CJ observed that:

the statute imposes a very low threshold for the formation of the "opinion". It need only be that Parliament *could consider* removal. Not that it *should* remove.¹²

It was found in that case that the administrative decisions of the Conduct Division are subject to judicial review, not on their merits, but only on grounds of error of administrative law.¹³ It was further held that "decisions" of the Conduct Division, including its report to the Governor, need not be unanimous, but that "A decision supported by a majority of the votes cast at a meeting of the Conduct Division shall be the decision of the Division" (Sch 3(cl 4)). In *Bruce v Cole* Spigelman also observed that:

One of the functions of the report is to inform Parliament. In my view that function is better performed if reasons for dissent...are made available as part of the report.

The statutory opinion turns on whether the matter "*could*" justify consideration of removal. This indicates that the process of deliberation is only beginning. The Parliament should receive as much assistance as possible in exercising its weighty task of deciding whether to address the Governor.¹⁴

Several of these issues were revisited in [Maloney v The Honourable Michael Campbell QC](#) where the main question before Hoeben J was whether there was sufficient "probative evidence" for the Conduct Division to form the opinion that the matter could justify parliamentary consideration.¹⁵

4.6 A protective jurisdiction

Both the Parliament's role and the jurisdiction of the Conduct Division in the removal of judges can be described as "protective" in nature. In its report on Magistrate Betts (see below), the Conduct Division explained:

The power conferred upon the Parliament to remove a judicial officer on the relevant grounds is in no way punitive, and the proceedings in the Conduct Division are not to be regarded as disciplinary. The jurisdiction is entirely protective. It is designed to protect both the public (from judicial officers who are guilty of misbehaviour rendering them unfit for office, or suffering from incapacity to discharge the duties of office), and of the judiciary (from unwarranted intrusions into judicial independence).¹⁶

4.7 Parliamentary consideration

The history and procedures relating to the parliamentary removal of judicial officers are considered in detail in *The Constitution of New South Wales* by Anne Twomey and *New South Wales Legislative Council Practice* by Lynn Lovelock and John Evans. This last source considered the following cases:

- Magistrate Barry Woolridge from 1993, where the Conduct Division reported that the matters referred to could justify the magistrate's removal on the ground of incapacity. In the event, Magistrate Woolridge retired and the matter was not considered by Parliament.
- Magistrate Ian McDougall from 1998, also retired prior to parliamentary consideration of the Conduct Division's report.
- Justice Vince Bruce from 1998, in which case parliamentary proceedings were initiated. On 16 June 1998 Justice Bruce addressed the Legislative Council. A motion for an Address to the Governor for the removal of Justice Bruce on the ground of incapacity was subsequently defeated. Eight

months later Justice Bruce announced his resignation.

show cause why Parliament should not request the Governor to remove her from office.

5 Two recent cases

In 2011 two further cases were the subject of Parliamentary consideration, those of Magistrate Jennifer Betts and Magistrate Brian Maloney.

5.1 Magistrate Jennifer Betts

On 26 May 2011 a report of the Conduct Division concerning Magistrate Betts was tabled in both Houses along with a response from Magistrate Betts.¹⁷ In a [ministerial statement](#) on the issue, the Attorney General explained:

The Conduct Division considered four complaints against Magistrate Betts involving the conduct of the magistrate in the hearing of matters before her. The complaints were made between 2003 and 2009. Three of the complaints related to conduct that calls into question the impartiality of the magistrate and her capacity to discharge the functions of a member of the judiciary to afford a fair, dispassionate and impartial hearing to litigants. Medical evidence indicates that the magistrate had, as a result of treatment, gained insight into her unsatisfactory behaviour and that there was a low likelihood of such behaviour recurring. However, the Conduct Division report indicates that the magistrate's oral evidence in response to the complaints demonstrated a failure to understand quite basic concepts of judicial behaviour.¹⁸

Mr Smith continued:

I intend to facilitate the House's consideration of the Conduct Division's report concerning Magistrate Betts by shortly giving notice of a motion to invite Ms Betts to appear at the bar of the House to

In fact, a motion to this effect was moved by the Leader of the Government, Michael Gallacher, in the Legislative Council on 4 June 2011, following which Magistrate Betts addressed the Upper House on 15 June 2011. In her address to the House, Magistrate Betts said that since 1995 she had been on medication for depression, a condition which was now "being effectively managed".¹⁹

The next day Mr Gallacher moved an Address to the Governor for the removal of Magistrate Betts on the "ground of incapacity". Speaking to the motion, Mr Gallacher emphasised the independence of the Judicial Commission process from both Parliament and the Executive, stating:

There has been no involvement by anyone in this Parliament on both sides of the House with any aspect of the Judicial Commission process. The Government's only function is to ensure that the report of the Conduct Division of the Judicial Commission is tabled and the matter is given serious attention by all members of Parliament.²⁰

All MLCs were allowed a conscience vote and, after a wide ranging debate, the motion was negatived on the voices. In his concluding comments, the Leader of the Opposition in the Legislative Council, Luke Foley, said:

I believe a judicial officer who suffers from a depressive illness and who is receiving the appropriate treatment to deal with that illness can function effectively and properly as a judicial officer.²¹

5.2 Magistrate Brian Maloney

On 4 June 2011 a report of the Conduct Division concerning Magistrate Maloney was tabled in both Houses, along with a copy of the judgment in [Maloney v The Honourable Michael Campbell QC & Ors](#) and a submission on behalf of Magistrate Maloney responding to the Conduct Division's report. In a ministerial statement on the issue, the Attorney General explained:

The report of the Conduct Division, dated 6 May 2011, found a number of complaints against Magistrate Maloney to be partially substantiated, and also found that he had breached an undertaking given by him in 1999, but that the breaches were substantially caused by his Bipolar II disorder. The Conduct Division found that Magistrate Maloney is and will remain incapacitated for the performance of judicial duties by his Bipolar II disorder and that the matters referred to in its report could justify parliamentary consideration of his removal from office on the grounds of proved incapacity.

As in the case of Magistrate Betts, all further proceedings took place in the Legislative Council, where, on 21 June 2011 Magistrate Maloney attended at the Bar of the House and delivered an address as to why he should not be removed from office.

The next day Mr Gallacher moved an Address to the Governor for the removal of Magistrate Maloney on the "ground of incapacity". He also drew attention to statements made in Magistrate Maloney's response to the Conduct Division's report, to the effect that no new complaints had been made against him since February 2010 when he had started treatment with Dr Nielssen. Mr Gallacher went on to say

that the Attorney General had sought to verify this claim, writing on 14 June 2011 to the Chief Justice of the NSW Supreme Court (in his capacity as President of Judicial Commission) and on 17 June 2011 to the Chief Executive of the Judicial Commission. The latter advised:

that since 20 May, 2011 the Commission has received three complaints about Magistrate Maloney. The complaints relate to the following periods: 22 October 2008 & 31 March 2009; 14-18 December 2009; and February/March 2011. The Commission notes that two of these complaints relate to incidents before Magistrate Maloney commenced his medical treatment. The Commission also notes that at this point it has only commenced a preliminary examination of the complaints and has given no consideration to the merits of the complaints.²²

Mr Gallacher again emphasised the independence of the Judicial Commission process from both Parliament and the Executive.

Magistrate Maloney was given the opportunity to address this new evidence, which he did in correspondence from his legal representative, tabled on 23 August 2011. Additional correspondence was tabled on 13 October 2011, at which time debate resumed on the motion for an Address to the Governor for the removal of Magistrate Maloney on the "ground of incapacity".

Again, all MLCs were given a conscience vote and the debate that ensued reflected the seriousness and difficulty of the matter at hand. Among the subjects addressed were the health issues involved, and with some contributions discussing whether Magistrate Maloney had previously

misled the House.²³ Some comment was also made about the appropriateness of the parliamentary process for the removal of judicial officers. The NSW Greens MLC David Shoebridge suggested that the available evidence should first be considered by a "multi-partisan committee" which might then provide a recommendation to the House.²⁴

In the event, the motion for an Address to the Governor was defeated, 22 votes to 15.

6 The Judicial Officers Amendment Bill 2012

6.1 Section 37

As noted, currently s 37 of the *Judicial Officers Act 1986* prohibits the disclosure of any information relating to a complaint against a judicial officer except in certain limited circumstances, including:

- with the consent of the person from whom the information was obtained;
- in connection with the administration of the Act; and
- for the purposes of any legal proceedings arising out of the Act.

By s 37(3), unlawful disclosure of information is an offence, attracting a fine or up to a year's imprisonment.

6.2 Proposed s 37A

The 2012 Bill proposes to insert s 37A in to the Act which would require, upon request, for the Judicial Commission to provide the Attorney General with information disclosing the following in relation to a particular judicial officer:

- (a) whether a complaint has been made, when a complaint was made and when the matter about which a

- complaint was made is alleged to have occurred,
- (b) the subject-matter of the complaint,
- (c) the stage of the procedure for dealing with a complaint that the complaint has reached,
- (d) for a complaint that has been disposed of, the manner in which the complaint was disposed of.

An exception to this disclosure requirement is provided by s 37A(2), in those cases where the Commission "considers it is not in the public interest to provide the information".

By s 37A(3), irrespective of whether a request has been made, the Commission must in all cases inform the Attorney General when a complaint has been referred to the Conduct Division and when and the manner in which it was disposed of.

By s 37A(4), when providing information to the Minister under ss 37A(1) and (3), the Commission may provide any additional information that it "considers relevant".

By new Schedule 6, Part 7 of the Act, the disclosure requirements in proposed s 37A are to operate retrospectively.

6.3 What the Attorney General said

In the [Agreement in Principle Speech](#) the Attorney General explained:

The Act currently prohibits a member or officer of the Judicial Commission from disclosing any information in relation to a complaint before the commission, except in some limited circumstances. The Attorney General is generally unable to obtain any information about the existence of a complaint about a judicial officer before the commission. The amendment aims to ensure that certain limited

information can be provided to the Attorney General. It will also ensure that the Attorney is aware of any complaints serious enough to have been referred to the Conduct Division of the Judicial Commission.²⁵

Defining the role of the Judicial Commission, Mr Smith said:

Judicial independence and the separation of legislative, Executive and judicial power are important components of the justice system and the rule of law. It is important that the Judicial Commission in its role of receiving and considering complaints about judicial officers is completely independent. It was for this reason that it was established as a statutory corporation with its own independent staff.

Explaining the intention of the 2012 Bill, the Attorney General then said:

Of concern is the inability of the Attorney General to obtain information about complaints before the commission when the existence of a complaint about a judicial officer is already in the public domain. Complainants can inform the media that they have made a complaint about a judicial officer and provide information about the substance of the complaint. Particular incidents involving judicial officers may be reported in the media by court reporters. As the Attorney General is unable to obtain any information from the commission, the Attorney General cannot advise if a complaint is being considered or has been determined by the commission. The Attorney General cannot provide any clarification if there is a misrepresentation. Under the Act the commission itself also cannot respond to such media reports and cannot confirm whether a matter or complaint was received and whether it was resolved. This lack of

transparency can undermine public confidence in the Judicial Commission.

Mr Smith went on to say:

This amendment is intended to enable the Attorney General to have access to information in order to advise if a complaint is being considered by the commission or has been determined by the commission, particularly when a report of a complaint about a judicial officer is already in the public domain.

He added:

The proposed amendment does not impinge on the independence of the commission, and its ability to deal with complaints according to the Act will not be limited or affected in any way. The proposed amendment preserves the independence of the judiciary and the commission while allowing the Attorney General access to basic information about the existence of complaints to the commission, their progress and outcomes.

6.4 What the Shadow Attorney General said

In the [Agreement in Principle debate](#) on 4 April 2012, the Shadow Attorney General Paul Lynch presented a root and branch critique of the 2012 Bill, saying "It is wrong in principle and will be bad in practice". In Mr Lynch's view, the 2012 Bill is constitutionally flawed, as it undermines the independence of the Judicial Commission from the Executive. He said:

Giving the Attorney General or, as in the terms of this bill, the Minister, the power to demand information from the Judicial Commission is entirely inconsistent with that body's independence.

Mr Lynch contrasted the arrangements proposed under the Bill with those in place for comparable complaint handling or investigative bodies in NSW, stating:

The legislation governing the Independent Commission Against Corruption, the Police Integrity Commission and the Office of the Ombudsman is instructive. None of these schemes has legislative provisions comparable to the one proposed in this bill. No Minister has the power to demand information about particular complaints from the Independent Commission Against Corruption, the Police Integrity Commission or the Ombudsman.

For each of those bodies there is a parliamentary oversight committee, something which does not apply in respect to the Judicial Commission owing, in Mr Lynch's view, to the "absolute primacy of the principle of the independence of the judiciary and, thus, the necessary independence of complaint handling procedures into judicial officers".

According to Mr Lynch, the Bill is also wrong in practice, as it "would result in very curious and undesirable outcomes". He added:

Of course, what is missing from the bill is any indication of what it is the Attorney General can do with the information he obtains. His speech, however, made clear that this bill is designed to allow the Attorney General to become the spokesperson for the Judicial Commission. That is like making the Premier the spokesperson for the Independent Commission Against Corruption or the Minister for Police the spokesperson for the Police Integrity Commission—and it is about as appropriate.

The Shadow Attorney General went on to quote a comment he had received from a member of the Bar, stating:

It seems quite a dangerous development. It clearly will allow for a political witch-hunt to be organised against particular judicial officers. It seems to me to water down the independence of the Judicial Commission.

In an article in *The Australian* from 13 April 2012, Mr Lynch is reported to have said that the proposed changes to the Judicial Commission "were the biggest structural issue in the Attorney General's portfolio since the change of government".²⁶

6.5 Legislation Review Committee report

Reporting on the 2012 Bill, the [Legislation Review Committee](#) noted that the "the rule of law requires compliance with the separation of powers principle". The report then commented:

Requiring the Judicial Commission to provide information to the Attorney General concerning complaints made against judicial officers may be regarded as the Executive interfering with the independence of the Commission and thereby the judicial arm of government.

However, the Committee is of the view that the scope of the information required to be provided to the Attorney General is limited and does not prevent the Judicial Commission from discharging its functions under the Act independently.²⁷

7 Commonwealth developments

On 18 March 2011, the former federal Attorney General, Robert McClelland, announced reforms to federal judicial

complaints handling, in addition to the introduction of a Parliamentary Commission mechanism to investigate the removal of judges.²⁸ Currently, there is no process to deal with allegations against Federal justices.

On 14 March 2012 two Bills, to be read in conjunction, were introduced by the current federal Attorney General, Nicola Roxon. These were the [Courts Legislation Amendment \(Judicial Complaints\) Bill 2012](#) (the Judicial Complaints Bill) and the [Judicial Misbehaviour and Incapacity \(Parliamentary Commissions\) Bill 2012](#) (the Parliamentary Commissions Bill).²⁹

In summary, the Judicial Complaints Bill applies to all judicial officers in the federal courts, other than the High Court of Australia (which may have to determine the validity of any structure established to handle complaints). It would provide a statutory basis for the Chief Justices of the Federal Court and the Family Court, and the Chief Federal Magistrate to deal with complaints about judicial officers. What is proposed is a flexible system, still largely non-statutory in nature, under which considerable discretion remains with the heads of jurisdiction.

As outlined in the [explanatory memorandum](#), where a complaint is assessed to be serious it can be investigated by an ad hoc Conduct Committee, which can in turn recommend parliamentary consideration for removal; where a complaint is assessed to be very serious and no further investigation required, the complaint can be referred directly to the Attorney General for parliamentary consideration.

The Parliamentary Commissions Bill 2012 relates to the parliamentary stage of any complaint.³⁰ It proposes

that the Houses of the Commonwealth Parliament may each pass a resolution, in the same session, establishing a Commission to investigate an allegation of misbehaviour or incapacity of a Commonwealth judicial officer. In this case High Court judges are included in the scheme. The Commission is to investigate the allegation, and report to the Houses of the Parliament. Note that a Commission will in fact be established by force of the Act, rather than the resolution of the Houses, which means that a Commission will continue in existence where the Parliament is prorogued (s 9).

The Bill does not envisage establishing a permanent body but, rather a temporary creation for the purpose of investigating one or more specific allegations against a Commonwealth judicial officer. It would operate to assist the Houses in carrying out their functions under s 72 of the Commonwealth Constitution. As the federal Attorney General, Nicola Roxon, said on 14 March 2012 in the [Second Reading speech](#) for the Bill, "It is up to the parliament to decide whether and when a commission is needed".³¹ Administrative support for a Commission would be provided by staff of the House of Representatives and the Senate (s 76)

Under the Bill, a Commission will comprise three members appointed on the nomination of the Prime Minister after consultation with the Leader of the Opposition (s 13). A Commission would have extensive powers of investigation, including the issuing of search warrants and the power to require the production of documents. Unless the Commission believes it is in the interests of justice or because of the confidential nature of the evidence

involved, Commission hearings would be held in public (s 23).

Both Bills have been referred to the House Standing Committee on Social Policy and Legal Affairs and the Senate Legal and Constitutional Affairs Legislation Committee for inquiry, with the latter due to report on 18 June 2012. Professor George Williams has commented that:

Both bills are well constructed, and it would be surprising to see either attract significant opposition.³²

8 Conclusion

In relation to developments in NSW, the Judicial Officers Amendment Bill 2012 can be viewed from a number of perspectives. There is, for example, the Attorney General's traditional role in defending the courts. Another perspective is offered by the events relating to Magistrate Brian Maloney, in which the Legislative Council was not made aware in the first instance of the full range of complaints against the Magistrate. In that case, as in the case of Magistrate Betts, the independence of the Judicial Commission process from the Executive in particular was emphasised. If proposed s 37A were passed, it may be that the same argument could not be made in quite such categorical terms.

The key question identified by the Legislation Review Committee was whether, as a result of the Judicial Officers Amendment Bill 2012, the intrusion by the Executive into the independent processes of the Judicial Commission would be such as to adversely affect the principle of the separation of powers. In the Committee's opinion that would not be the case. However, as the contribution of the Shadow Attorney General to the Second Reading debate shows, that

opinion is by no means universally held.

What is not in any doubt, in the words of Spigelman CJ, is "the central significance of judicial independence in our system of government". It is almost 30 years since the judicial system in NSW was under a serious cloud and it was this that led to the radical decision, at the time, to establish the Judicial Commission. No doubt, the integrity of the judicial system, along with the processes in place to protect it, is an area of the constitution that should always be the subject of careful and vigorous analysis and debate.

Proposed at the Commonwealth level is the introduction of a Parliamentary Commission to assist the Houses in deciding whether a judicial officer should be removed on "the ground of proved misbehaviour or incapacity". This would operate in conjunction with a scheme for the initial investigation of complaints against federal judicial officers which is less formal and more discretionary in nature than that in place in NSW.

Whatever mechanisms are established, in any particular case the difficulties involved in deciding on the question of "proved misbehaviour or incapacity" are likely to remain. In the final analysis, the constitutional duty is placed squarely on the members of the Houses of Parliament, State or federal.

¹ Gleeson CJ, [175th Anniversary of the Supreme Court of NSW](#), 17 May 1999. The relevant case is *Willis v Gipps* [1846] Eng R 803; [1849] 6 Moo PC 489; 13 ER 773.

² Act 22 Geo III, c 75, confirmed and amended by Act 54 Geo III, c 61 – E Campbell, "Judicial review of proceedings for removal of judges from office" (1999) 22(2) [UNSW Law Journal](#) 325.

³ A Twomey, *The Constitution of NSW*, The Federation Press 2004, pp 730-733.

⁴ (1998) 45 NSWLR 163 at 166.

⁵ Twomey, p 736.

⁶ G Griffith, [Judicial Accountability](#), NSW Parliamentary Library Research Service, Background Paper 1/1998.

⁷ V Moabito, "The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed" (1993) 16 *UNSW Law Journal* 481 at 482.

⁸ *Macrae v Attorney General for NSW* (1987) 9 NSWLR 268.

⁹ T Vinson et al, *Accountability and the Legal System: Drug Cases Terminating in the District Court 1980-82*, Report to the Criminology Research Council 1986.

¹⁰ *NSWPD*, 24 September 1986, p 3874.

¹¹ By s 32(3) this does not preclude the referral of, or the making of a report about, a complaint.

¹² (1998) 45 NSWLR 163 at 184 (Spigelman CJ); affirmed in [Maloney v The Honourable Michael Campbell QC & Ors](#) [2011] NSWSC 470.

¹³ (1998) 45 NSWLR 163 at 183 (Spigelman CJ) and 207 (Priestley JA).

¹⁴ (1998) 45 NSWLR 163 at 174 (Spigelman CJ).

¹⁵ [2011] NSWSC 470. The "probative evidence" had also to satisfy the test of "comfortable satisfaction" required by *Briginshaw v Briginshaw* (1938) 60 CLR 336. The court held that the errors of law identified by Magistrate Maloney had not been made out and the summons seeking a declaration of invalidity in respect to the decision of the Conduct Division was dismissed.

¹⁶ Quoted in [NSWPD](#), 16 June 2011, p 2479

¹⁷ On 30 May 2011 an amended response from Magistrate Betts was tabled in both Houses.

¹⁸ *NSWPD*, 26 May 2011, p 1173.

¹⁹ *NSWPD*, 15 June 2011, p 2305.

²⁰ [NSWPD](#), 16 June 2011, p 2479.

²¹ [NSWPD](#), 16 June 2011, p 2479.

²² [NSWPD](#), 22 June 2011, p 3068.

²³ [NSWPD](#), 13 October 2011, p 6149; Adam Searle argued that this was an "issue of misbehavior and not of incapacity".

²⁴ [NSWPD](#), 13 October 2011, p 6149; Duncan Gay said that "In general terms I do not believe this is a

²⁵ *NSWPD*, 28 March 2012.

²⁶ C Merritt, "State risks politicizing complaints process", *The Australian*, 13 April 2012, p 29.

²⁷ NSW Parliament, Legislation Review Committee, [Legislation Review Digest No 14/55 – 2 April 2012](#), p 10.

²⁸ Hon R McClelland, Federal Attorney General, Reforms to federal judicial complaints handling, *Media Release*, 18 March 2011; "Overhaul of judicial complaints process", [Lawyers Weekly](#), 20 March 2011.

²⁹ Note that on 22 February 2010, [Duncan Kerr](#), then Member for Denison, introduced a Private Members Bill into the Federal Parliament, the [Parliamentary \(Judicial Misbehaviour or Incapacity\) Commission Bill 2010](#). If enacted, the Bill would have established an independent commission to assist the Parliament in the exercise of its powers to remove a Federal justice, in circumstances of proved misbehaviour or incapacity, under section 72 of the Constitution.

³⁰ For comments on the Bill see – N Berkovic, "Heffernan declares judicial complaints system toothless tiger", [The Australian](#), 20 April 2012, p 29; A Boxsell, "Judges seek taxpayer aid", *Australian Financial Review*, 27 April 2012, p 44.

³¹ [CPD \(House of Representatives\)](#), 14 March 2012, p 2785.

³² G Williams, 'Judge her on merits: Roxon's proposed reforms well constructed', [SMH](#), 24 April 2012, p 11.

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