Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

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Law and Bills Digest Section

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Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

Date introduced: 14 March 2012
House: House of Representatives
Portfolio: Attorney-General

Commencement: Sections 1 and 2 will commence on Royal Assent. Sections 3 to 83 will commence on a day to be fixed by Proclamation, within six months of Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of this Bill is to provide a mechanism to assist the Parliament in its consideration of removal from office of a judge or federal magistrate under the Constitution. Clause 3 outlines the purpose of the Act.

The relevant Constitutional provision is section 72(ii) which states:

The Justices of the High Court and of the other courts created by the Parliament-

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.¹

The Bill will allow for the establishment of a Parliamentary Commission, where a resolution is passed by each House of the Parliament, to investigate a specified allegation about a specified Commonwealth judicial officer (that is, a High Court judge, a judge of the Federal Court of Australia or the Family Court of Australia, or a Federal Magistrate).²

The Commission is to investigate the allegation, and report to the Houses of the Parliament, on whether there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity is proved.

¹. Australian Constitution, section 72.

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If the alleged misbehaviour or incapacity is proved, and both Houses of the Parliament request for the removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution.

This Bill is complemented by the Courts Legislation Amendment (Judicial Complaints) Bill 2012, dealing with the management of complaints within the courts.3

Background

The Senate Legal and Constitutional Affairs References Committee reported in December 2009 on ‘Australia’s Judicial System and the Role of Judges’. Recommendation 16 of that report was that:

the government implement a federal process enabling it to establish an ad hoc tribunal when one is needed to investigate complaints of judicial misconduct or incapacity.4

On 18 March 2011, the former Attorney-General, Robert McClelland announced significant reforms to federal judicial complaints handling.

The question of judicial complaints handling has been considered over the years, in particular whether an independent federal judicial complaints body should be established. The model considered is based on the existing Judicial Commission of New South Wales which has three functions, one of which is to examine complaints about the ability and behaviour of New South Wales judicial officers.5

Comparison with Judicial Commission of New South Wales

The Judicial Commission of New South Wales (JCNSW) is established under the Judicial Officers Act 1986 (NSW). The Law Council notes that the proposed model in this Bill appears to be based, in part, on the JCNSW. The JCNSW is regarded as providing an effective mechanism through which the public can raise concerns about the ability and behaviour of judicial officers.6 The significant difference with the JCNSW and the proposed Parliamentary Commission under this Bill is that the JCNSW is a permanent statutory body, with other functions such as judicial education.7 The Commonwealth Attorney-General’s Department has submitted that the reason the Bill did not seek to create a

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7. Further information on the JCNSW can be found at www.judcom.nsw.gov.au

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permanent commission for judicial complaints is based on the reasons given in the Australian Law Reform Commission's Report *Managing Justice: A Review of the Federal Civil Justice System*, which highlighted the importance of a process within Parliament:

rather than creating a commission as a creature of the executive, because of the terms of section 72(ii) of the Constitution. The ALRC accepted in its report that ‘there are special requirements which arise in Australia under Chapter III of the Constitution with respect to the federal courts’. The ALRC suggested that section 72(ii) envisages that debate and decision making about the removal of a federal judge will be matters to be conducted openly by the people’s elected representatives, rather than by any part of the executive government (as a judicial commission would be).

... In its *Managing Justice: A Review of the Federal Civil Justice System* report in 2000, the ALRC noted that the status of a standing Commission would inevitably be challenged upon its first use, adding complexity and uncertainty to the proceedings rather than facilitating a smooth process. As the aim of the Parliamentary Commission Bill is to create a clear and effective process, this would not be desirable in the rare instance in which a Commission would be required.\(^8\)

The proposed model then, is to have the machinery in place to allow for the quick and effective establishment of a Commission, acknowledging that the likelihood and frequency of enlivening the Commission is low.

**Section 72**

Section 72 of the Constitution provides for the appointment, tenure and remuneration of Judges of the High Court. Specifically, the section provides that the Justice of the High Court and of the other courts created by the Parliament shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.\(^9\)

This section received much scrutiny following the Murphy affair (discussed below). While it appears a straightforward consideration of ‘proved misbehaviour or incapacity’, the criteria and the path for getting to that point is far from clear.

This Bill does not cover parliamentary procedure relating to the presentation of the Commission’s report, whether a joint parliamentary sitting is required and how to resolve any impasse should the Houses of Parliament disagree on whether the Judge should be removed. This will be governed by section 72(ii).

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The ‘Murphy Affair’

Lionel Murphy was a Justice of the High Court of Australia from 10 February 1975 til his death on 21 October 1986. He had been appointed to that position in February 1975, after being Attorney-General in the Whitlam Government and a Labor Senator. Three separate inquiries were commenced in the Parliament’s committee system and criminal proceedings in the Supreme Court of New South Wales were also initiated. The inquiry processes resulted from the newspaper publication in late 1983 and early 1984 of alleged transcripts of recordings of telephone conversations in 1976, which had been illegally intercepted and recovered by members of the New South Wales Police Force, between Lionel Murphy and Morgan Ryan. The conversation discussed the possibility of pursuing a charge of malicious prosecution against Robert Ellicott (who was the Attorney-General in the Fraser Government). Robert Ellicott played a key role in the private prosecution initiated in October 1975 by Danny Sankey against Gough Whitlam, Lionel Murphy, Rex Connor and Jim Cairns. The Sankey case alleged criminal conspiracy on the part of these four individuals for the ‘loans affair’ that was central to the fall of the Whitlam government. The case was dismissed in early 1979.

Senate Select Committee on the Conduct of a Judge

The political response to the publication of the so-called ‘Age tapes’ is described in Odgers’ Australia Senate Practice. The Opposition Liberal-National parties and the Australian Democrats held a majority in the Senate and, against the wishes of the Government, appointed a select committee in March 1984, the Select Committee on the Conduct of a Judge. The 1984 Committee was required to report upon the authenticity of the so-called ‘Age tapes’ and upon whether that material indicated behaviour which could constitute misbehaviour or incapacity under section 72 of the Constitution. Justice Murphy was invited to appear before the Committee but declined to do so. He instead provided a written statement.

The first 1984 Committee concluded that it could not be satisfied of the authenticity of the tapes and transcripts, and that accordingly no facts had been established to prove misbehaviour on the part of the Judge.

Senate Select Committee on Allegations Concerning a Judge

A new allegation against Justice Murphy was raised and another Senate Select Committee was established: The Senate Select Committee On Allegations Concerning a Judge (1984). The allegation was that NSW Chief Magistrate Clarrie Briese had conversations with Justice Murphy that could be interpreted as an attempt on the part of the judge to influence legal proceedings in the Magistrates Court against Morgan Ryan. The question was whether Justice Murphy had attempted to pervert the course of justice, amounting to misbehaviour under section 72 of the Constitution.

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The second 1984 Senate Select Committee concluded, in the majority, that ‘on the balance of probabilities’ there was conduct which could amount to misbehaviour. Legal proceedings were then commenced in the Supreme Court of New South Wales. Justice Murphy was convicted in July 1985 for attempting to pervert the course of justice but this conviction was quashed on appeal.

**Government’s Parliamentary Commission of Inquiry**

Allegations continued to be made against Justice Murphy and the Government established a Parliamentary Commission of Inquiry under the *Parliamentary Commission of Inquiry Act 1986* (later repealed). This Inquiry was to:

consider all outstanding allegations against the judge, to formulate those it considered worthy of investigation in precise terms and conduct a hearing of the evidence in closed session. The Commission was then to report to each House its findings of fact and its advice as to whether the judge had been guilty of misbehaviour within the meaning of the Constitution.  

Justice Murphy challenged the constitutionality of the Commission however the case did not get to hearing. In August 1986, Justice Murphy was diagnosed with cancer and died two months later. The Commission was wound up before it could resolve the questions before it. In the period immediately after, there was extensive academic consideration of the processes that were undertaken to inquire into the High Court Justice’s conduct:

The constitutionality of this final inquiry has always been in doubt, as its terms of reference extended far beyond investigation, being again into unspecified matters, and allowing for a determination by the inquiry itself rather than the parliament as to whether Murphy was guilty of ‘proved misbehaviour’. The three judges [retired judges George Lush, Richard Blackburn and Andrew Wells] soon made it clear that their notion of ‘proved misbehaviour’ was not one confined to criminal behaviour, but included behaviour which was unbefitting of someone holding the office of justice of the High Court.

It has taken more than 20 years for the dust to settle on the Murphy Affair and the Bill before the current Parliament addresses some of the issues raised. As mentioned earlier, following the Senate Legal and Constitutional Affairs References Committee’s report *Australia’s Judicial System and the Role of Judges* in 2009, which recommended a tribunal, when needed, for the investigation of complaints about judicial misconduct or incapacity, the Government considers it timely to introduce this framework for a Parliamentary Commission.

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11.  Ibid.

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Duncan Kerr’s Private Member’s Bill

In 2005, Duncan Kerr, the then Federal Labor Member for Denison, presented a paper to an Administrative Law Forum entitled ‘The Removal of Federal Justices: Qui Custodio Custodis?’. This paper presented the history and background to the need for a complaints commission for federal court justices.

In February 2010, Duncan Kerr introduced, as a Private Member’s Bill, the Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2010. At the time of debate in May 2010, Mr Kerr said ‘if the bill becomes an act it will be incumbent on the House and the Senate to adopt such procedures to ensure that the processes in this bill are not triggered for trivial reasons or without procedural fairness.’

Further, Mr Kerr noted that:

Professor Blackshield observes that section 72 ‘has a double purpose: to ensure that no one but parliament can remove a judge from office, but also to ensure that parliament can.

...Sadly the Murphy affair more than 30 years ago demonstrated how singularly ill-equipped our parliamentary procedures were to discharge that weighty responsibility. We have made no improvements since then. For those who question why we must act when serious allegations against federal judicial office holders are rare and when no immediate allegation against a judge is in prospect there are two answers. The first is that [it is] the time to ensure the balance is right. In ensuring both fairness and rigour, when nothing controversial is on the horizon, we can be dispassionate and uninfluenced by partisan considerations. The second is that the number of federal justices appointed under Chapter 3 has grown exponentially.

The Bill lapsed when the Parliament was dissolved in July 2010. The Judicial Misbehaviour and Incapacity (Parliamentary Commission) Bill 2012 adopts much of Duncan Kerr’s Bill in both form and substance.

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14 The Bill, and its Explanatory Memorandum can be found on the ParlInfo website, viewed 23 May 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4312%22

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Basis of policy commitment

The Government has introduced this legislation in an attempt to provide a clear, accountable and effective system for handling complaints against federal judicial officers. In her second reading speech the Attorney-General Nicola Roxon said:

The Labor Government is determined to ensure that the federal court system delivers accessible, equitable and understandable justice...

The Senate Legal and Constitutional Affairs Committee stated in its 2009 report ‘Australia’s judicial system and the role of Judges’ that: ‘fair and effective complaints handling is a critical component of a judicial system that is both respected and just, and seen to be so.’

...In Australia we must never take our constitutional strengths and system of governance for granted. Confidence in our democracy rests on continued improvement and vigilance.

It is also timely to introduce a complaints handling body as there are almost fifty federal court judges today and because there are no imminent complaints or allegations of misbehaviour that might cloud the Parliament’s consideration of the issue.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 13 July 2012.

The Bill has also been referred to the House of Representatives Social Policy and Legal Affairs Committee for inquiry and report.

Significant submissions to the Senate Committee’s Inquiry

Clerk of the Senate

In her submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into this Bill, the Clerk of the Senate, Dr Rosemary Laing, questions the need for the Bill and whether or not...

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18. Ibid.

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this Bill will necessarily provide a solution to the difficulties that may arise in the future.\textsuperscript{21} The Clerk of the Senate joins others in raising the question as to how the term ‘misbehaviour’ is to be defined. The Clerk also raises the question of not having explicit terms of reference for the Commission.

University of Adelaide Law School

The University of Adelaide Law School’s submission to the Senate Committee’s Inquiry raised a number of issues about the composition of the Commission and made a recommendation that \textbf{clause 13} of the Bill be amended to provide that the Commission be constituted of former Commonwealth judicial officers or former judges of state or territory Supreme Courts. The academics also stated that it is important:

\begin{quote}
.. to note that the process created by the Bill does not replace the task facing the Houses of the Parliament and the Governor-General in Council under section 72, which Quick and Garran said ‘is practically indistinguishable from a strictly judicial duty’. The Parliamentary Commissions Bill thus does not displace the heavy responsibility which falls on the Parliament and Governor-General under section 72, but provides a standing process for the undertaking of independent preliminary investigations of matters before they are addressed by the Houses.\textsuperscript{22}
\end{quote}

Law Council of Australia

The Law Council of Australia submitted to the Senate Committee that it:

considers that the establishment of a formal process to investigate allegations of misbehaviour and incapacity raised against Federal judicial officers will assist in further enhancing the transparency and integrity of the judicial system. The Law Council considers that the proposed models provide a suitable mechanism through which to consider and investigate allegations of misbehaviour and incapacity raised against Federal judicial officers.\textsuperscript{23}

Gilbert & Tobin Centre for Public Law

The Gilbert & Tobin Centre for Public Law emphasised in its submission to the Senate Committee that the Bill:

\begin{quote}
\end{quote}


\textsuperscript{23} Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, 30 April 2012, \url{http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/judicial_complaints/submissions.htm}

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would benefit from inclusion of provisions that are directly tailored to circumstances involving judicial incapacity. In particular we emphasise the importance of ensuring that judges suffering from a disability are not discriminated against as a result of their condition and are treated in a respectful and fair manner.  


26. Ibid., p. 4.

27. Ibid., p. 4.

28. Ibid., p. 6.

Financial implications

The proposed Bill will not have any significant financial impact on commencement.

Statement of Compatibility with Human Rights

The Explanatory Memorandum discusses a number of human rights implications in this Bill. The Bill engages the right to a fair trial and the right to privacy and reputation under Articles 14 and 17 respectively of the International Covenant on Civil and Political Rights (ICCPR) and the right not to be unjustly deprived of work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

On the right to a fair trial:

a Parliamentary Commission is established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer so that the Parliament can be well informed when considering removal of a judge from office.

On the right to privacy and reputation:

The Bill provides for clear and transparent powers and processes for investigation by a Commission, which enable a Commission to appropriately assess rights to privacy and reputation on a case by case basis, and balance competing public interests in the removal of unfit judicial officers where necessary. Specific protections contained in the Bill include the ability of a Commission to hold hearings in private, offences for unauthorised publication of information, and restrictions on publication of private information in a Commission’s report.

On the right not to be unjustly deprived of work:

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The Bill does not provide for a Commission to remove or dismiss a judicial officer. Federal judicial officers have security of tenure under the Constitution.\textsuperscript{29}

The Explanatory Memorandum has justified possible limitations on human rights as reasonable, necessary and proportionate.\textsuperscript{30}

**Main issues**

**Meaning of misbehaviour**

The Bill does not attempt to define the term ‘misbehaviour’, as used in section 72 of the Constitution. During the 1984 Senate inquiries into Justice Murphy’s conduct, two of the Parliamentary Commissioners expressed the view that the High Court could review a removal and quash it where the evidence did not disclose matters which could amount to misbehaviour.\textsuperscript{31} As indicated earlier, the meaning of ‘misbehaviour’ has been the subject of academic rigour in the years following the Murphy affair. Dr Rosemary Laing, Clerk of the Senate, explains that there is no authority in the Constitution for the Parliament to make laws with respect to the grounds for removal of judges so this is not an area where the Bill can provide clarification or assistance. The Bill therefore defines ‘misbehaviour’ by reference to section 72. It will be up to the Commission to determine its scope and the definition of the term.

Similarly with the term ‘proved’, the Commission may grapple with like issues that the 1984 Senate Select Committees raised in its consideration of the Murphy affair. That is, if the Commission is fulfilling an evidence gathering role, an explicit standard of proof should be prescribed. The 1984 Senate Select Committee Report on the Conduct of a Judge discussed that:

> the Committee adopted for the purpose of this stage of its inquiry the civil standard of proof ie.proof upon the balance of probabilities and having due regard to the gravity of the offence (Rejfek v McElry 112 CLR 517). Not all members agreed with this lesser standard of proof ...\textsuperscript{32}

There is however a contrary view to this definitional problem. CW Pincus QC (later Justice Pincus of the Federal Court), who was the legal advisor to the 1984 Senate Select Committee, summarised his opinion:

> As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no “technical”

\textsuperscript{29} Ibid., p. 6.

\textsuperscript{30} Ibid., p. 7.


\textsuperscript{32} Senate Select Committee on the Conduct of a Judge, 14 May 1984, p. 25.

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relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.\footnote{CW Pincus, Appendix to the Report by the Senate Select Committee on the Conduct of a Judge, 14 May 1984, p. 27.}

This leaves the proposed Parliamentary Commission in a similar position to both the Senate Select Committees established during the Murphy affair. The terms ‘misbehaviour’ and ‘proved’ used in the Bill are defined as having ‘the same meaning in section 72 of the Constitution’.\footnote{Judicial Misbehaviour and Incapacity (Parliamentary Commissions Bill) 2012, \textit{clause 7}.}

Meaning of ‘proved’

Similarly, the Bill does not define the term ‘proved’. Indeed, the Bill is drafted in such a way that the phrase ‘proved misbehaviour’ (as it is in section 72) does not appear. Rather, the Bill uses the phrase ‘the alleged misbehaviour or incapacity is proved’.\footnote{See for example, \textit{clause 10} outlining the functions of the Commission.} Nonetheless, an understanding of what ‘proved’ means, requires consideration of what standard of proof needs to be applied in considering the alleged misbehaviour. Harry Evans, former Clerk of the Senate, wrote at the time of the Murphy Affair that it could be argued ‘that the removal of a judge is such a grave step that the most stringent standard of proof should be required’\footnote{H Evans, ‘Parliament and the Judges: The Removal of Federal Judges Under Section 72 of the Constitution’, \textit{Legislative Studies}, vol. 2, no. 2, Spring 1987, p. 24.} (the criminal standard, beyond reasonable doubt). However, on the lesser standard of proof, it ‘may be thought to be irresponsible for the Houses to leave a judge on the bench when it is probable that the judge has engaged in acts constituting grave misbehaviour, simply because proof beyond reasonable doubt is lacking’.\footnote{Ibid., p. 24.}

Former Senator Michael Tate was the chair of the Senate Select Committee on the Conduct of a Judge and made a submission to the current Senate Inquiry into this Bill. In this submission he explains that:

The Senate committee members were directed to indicate whether the proven conduct of the judge was properly characterised as “misbehaviour” either because it constituted an offence under the general law or merely because it was so improper as to be particularly reprehensible in a judge.

The second was the question of standard of proof of the conduct which could amount to misbehaviour. The Senate gave the committee two standards of proof: (i) beyond reasonable doubt and (ii) upon the balance of probabilities. This caused enormous difficulties for the members of the committee, particularly in the attempt to draft a report to the Senate. In the end I, together with Senator Haines (Dem) found the relevant facts (broadly, of intent to pervert the course of justice) proved on the balance of probabilities only. Senator Lewis (Lib) found the intent proved beyond reasonable doubt and Senator Bolkus (Lab) found that on any meaning of misbehaviour and on any standard of proof, the judge was not in jeopardy of any Address under the Constitution. Perhaps more relevantly for your consideration of the Bill is the fact that the Senate required the appointment of two “Commissioners Assisting” who were...
required to submit their conclusions to the Committee using the Committee’s terms of reference. One found that conduct amounting to a criminal offence had been proved beyond reasonable doubt. One found only that a significant impropriety had been committed, though that was proved beyond reasonable doubt.

And then the four Senator members of the select committee reported in the various fashions outlined above! In other words, even if the Parliamentary Commission envisaged by the Bill made a report to the Parliament, it could be as patchwork and even contradictory as that of the Commissioners Assisting as that noted above. And then Senators and Members of the House of Representative will come to their own conclusions both as to the facts and the way to characterise the facts. (Presumably on a free vote, as this function is more akin to the judicial than the legislative.)

I can’t help thinking that there would be very few instances which would justify setting up this huge apparatus with such an inbuilt tendency to be unhelpful. Although being a member of a Select Committee (whether of a particular chamber or jointly) helping the parliament to discharge its function as provided for in section 72 of the Constitution is to be burdened with a most difficult task, it is not beyond the capacity of parliamentarians to fulfil that role which, after all, would remain simply advisory as would be the case with the Parliamentary Commission. But it may be more likely to carry some weight with other members of the Parliament.38

For a detailed and thorough discussion of this issue, see the submission to the Senate Inquiry on this Bill by the Clerk of the Senate.39 Also see Chapter 20 ‘Relations with the Judiciary’ in Odgers’ Australian Senate Practice, twelfth edition.40

Balance of probabilities and the Briginshaw Test

It is also worthwhile to note that with disciplinary and administrative investigations, allegations must be proved “on the balance of probabilities”. This means it must be more probable than not that the allegations are made out. This standard of proof is that found in the often-cited case of Briginshaw v Briginshaw (1938) 60 CLR 336. The Briginshaw test (or Briginshaw standard as it is often called) possesses a measure of flexibility, so that the more serious the allegation the higher the degree of probability required. Latham CJ said ‘The standard of proof required by a cautious and responsible


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tribunal will naturally vary in accordance with the seriousness or importance of the issue’. The yardstick for assessing the evidence is ‘a comfortable satisfaction on the balance of probabilities’. The Briginshaw test therefore sits between the criminal jurisdiction’s high standard of proof, beyond a reasonable doubt, and the civil jurisdiction’s standard of on the balance of probabilities:

Dixon J as he then was, stated that while there was no intermediate standard of proof between the criminal and civil standards; “the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the satisfaction of the tribunal.”

This is an unchartered area and one which the Parliament may wish to consider when and if a Parliamentary Commission is formed. Perhaps it would be specified in the referral’s terms of reference. These dilemmas could be resolved with the Parliamentary Commission not adhering to any stated standard of proof or to formulate a judicially acceptable standard of proof. It may be able to find facts proved or not proved according to the weight of the evidence. However, this path may still conceivably be challenged by the aggrieved judicial officer.

Reviewability

Given the discussion above about agreeing to the scope of the terms ‘misbehaviour’ and ‘proved’ and whether or not a standard of proof needs to be applied (and what standard that is), a Judge might seek to challenge the opinion and findings of the Parliamentary Commission’s inquiries. However, the opinion that the Parliamentary Commission forms on the alleged misbehaviour or incapacity would not be a decision that could be reviewed under the Administrative Decisions (Judicial Review) Act 1977. The judicial officer would need to consider a different course of action, but may also be restricted by the enlivening, under clause 67, of subsections 16(3), (4) and (6) of the Parliamentary Privileges Act 1987, applying Parliamentary privilege to the proceedings, the report and the evidence presented before the Commission.

It may be possible that the judicial officer could appear before the High Court under the Court’s original jurisdiction under section 75(v) of the Constitution. This avenue requires a more complex and specific analysis beyond the scope of this Digest at this time.

The Parliamentary Commission could present its report to the Houses of Parliament and the Parliament not accept the parameters and conclusions of the Commission’s considerations. In this

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41. Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938) 
   http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1938/34.html?stem=0&synonyms=0&query=
42. Ibid.
43. Ibid.
44. A decision under ADJR must be an ultimate, final, or operative determination and not a mere preliminary expression of opinion or statement: Australian Broadcasting Tribunal v Bond [1990] HCA 33, (1990) 170 CLR 321.

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circumstance, the report would be shelved. However, the Parliament could enliven section 72 by calling on the Governor-General in Council to remove the Judge.

Disagreement, impasse or the Governor-General refusing to act.

This Bill does not address the consequences of the Houses of Parliament disagreeing either with the Commission’s report or between themselves as to whether to pray for the removal of the Judge.

Duncan Kerr suggested that the Standing Orders of each House should provide that upon the Presiding Officer tabling a report from the Commission, debate on the motion for an address of removal would immediately commence. Further ‘if the Report did not find facts amounting to proved misbehaviour or incapacity, no further action or debate should be permitted.’ To clarify, section 72 of the Constitution does require both Houses to pray for the removal of the Judge. This would mean that unless both Houses pray for the removal, then nothing will happen.

Further, Kerr proposed that the Standing Orders should guarantee the right of a justice, whose conduct is the subject of the Report, to address each chamber from the Bar of the House. Under the House of Representatives Standing Orders 255(b), a witness before the House is examined at the Bar unless the House otherwise orders. In theory a person may be brought to the Bar of the House to receive thanks, to provide information or documents, to answer charges or to receive punishment. Neither the standing orders nor the practice of the House allow an organisation or a person as of right to be heard at the Bar. In this context, it would be less likely that a judge would be asked to the Bar of the House to answer allegations relating to incapacity, perhaps more so in the case of misbehaviour.

Following receipt and consideration of the Commission’s report, if both Houses of Parliament consider that the alleged misbehaviour or incapacity is proved, the Houses of Parliament need to pass a resolution for the removal of the judicial officer. However, it is foreseeable that the Houses disagree with each other. Section 50(ii) of the Constitution provides that each House may make rules and orders with respect to ‘the order and conduct of its business and proceedings either separately or jointly with the other House. However if the Houses of Parliament disagree, a conference could be requested’. House of Representatives’

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46.  The Bar of the House, between the back rows of Members’ seats at the main entrance to the Chamber, demarks the area of the Chamber reserved to Members, which non-Members may not enter unless invited by the House. It consists of a cylindrical bronze rail which may be placed across the gap between the two sides of the back row. A witness before the House is examined at the Bar unless the House orders otherwise (S.O. 255(b)).

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Standing Order 262 states a Member may move a motion to request a conference to resolve a disagreement between the Houses. Either House can request a conference.47

Finally the question might be raised as to whether the Governor-General must remove a judge following a resolution (prayer) from both Houses under section 72(ii). The fact that the provision provides clearly that the Governor-General is the Governor-General in Council, means that he or she will be acting on the advice of the Government. A further question whether there is no underlying prerogative in the Governor-General to refuse to act is raised, but such a discussion is beyond the scope of this Bills Digest.

Significant technical flaws

Clause 3 of the Bill sets out the object of the Act, which is to:

provide for a commission to be established by the Houses of the Parliament to investigate, and report to them on, alleged misbehaviour or incapacity of a Commonwealth judicial officer, so they [the houses] can be well-informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution.

However, Clause 9 allows both Houses to establish a commission to investigate and subclause 10(b) requires the commission to report the Commission’s opinion of whether or not there is evidence that would allow the Parliament to conclude that the alleged misbehaviour or incapacity is proved. It is a semantic distinction and greater clarity could have been provided in the objects clause to show that while the Commission’s role is to gather evidence and report, it is also to provide an opinion on the alleged misbehaviour or incapacity. Note that the Commission’s opinion will not be that the alleged misbehaviour or incapacity is proved or not, it will be whether there is sufficient evidence for the Houses of Parliament to make that conclusion. The Houses of Parliament will then, if having the opinion that the alleged misbehaviour is proved, seek the removal of the Judge under section 72 of the Constitution.

Key provisions

Part 1 - Preliminary

This Part outlines the preliminary matters relating to the Bill. Section 1 and 2 will commence on Royal Assent. Clauses 3 to 83 will commence on a day to be fixed by Proclamation, within six months of Royal Assent.

Clause 7 is a definitions section and includes the following terms:

Commonwealth judicial officer means:


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(a) Justice of the High Court; or
(b) A judge or justice of a court created by the Parliament (other than the Federal Magistrates Court); or
(c) A Federal Magistrate.

*incapacity* has (other than in section 73 of this Bill) the same meaning as in section 72 of the Constitution

*misbehaviour* has (other than in section 73 of this Bill) the same meaning as in section 72 of the Constitution

*proved* in relation to misbehaviour or incapacity, has the same meaning as in section 72 of the Constitution

**Part 2 Establishment, functions and membership, et cetera, of Commissions**

Clause 9 provides for the establishment of the Commission. A Commission is established by force if each House of the Parliament passes, in the same session, a resolution that a Commission be established by this Act to investigate a specified allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer.

A Commission may be established to investigate more than one allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer. A Commission will be established on a case by case basis. There will not be a “permanent” Commission.

Clauses 10-13 outline the functions, powers and membership of the Commission.

The functions of a Commission, under clause 10, are:

(a) To investigate an allegation referred to in section 9; and
(b) To report to the Houses of the Parliament the Commission’s opinion of whether or not there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity is proved.

The Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its functions (clause 11). The Commission will consist of three members appointed on the nomination of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives (subclauses 13(1) and (2)). At least one member of each Commission must be a former Commonwealth judicial officer; or a judge or former judge, of the Supreme Court of a state or territory (clause 13(3)).

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48. Proposed section 73 deal with the misbehaviour or incapacity of a member of the Parliamentary Commission.
49. Ibid.

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A Commission will cease to exist when the parliamentary presiding officers are satisfied that (a) the Commission’s function has been performed; or (b) the person in relation to whom an allegation of misbehaviour or incapacity is being investigated by the Commission has ceased to be a Commonwealth judicial officer (due to retirement, resignation, death or any other reason) (clause 16).

**Part 3 Investigations of Commissions**

This Part outlines the rules relating to how a Commission is to conduct its investigations.

A Commission is not bound by the rules of evidence. It may be informed on any matter in any manner it thinks fit (clause 19). The Commission must consider the outcome of any previous official inquiry or official investigation into the allegation so far as the Commission thinks it necessary or desirable to do so (subclause 19(2)). The expression official inquiry includes Royal Commissions or a commission of inquiry (including at the state or territory level). An official investigation includes a complaint about a judge or Federal Magistrate within the meaning of their governing Acts.\(^{50}\)

The Commission must act in accordance with the rules of natural justice (clause 20). The Commission must give particulars to the judicial officer and offer the judicial officer a reasonable opportunity to make an oral or written statement to the Commission (paragraphs 20(2)(a)(i) and (ii)). The Commission must not draw any adverse inferences if the judicial officer does not attend or otherwise give evidence to the Commission (paragraph 20(2)(c)). Prior to reporting under clause 48, the Commission must provide a draft of the report to the judicial officer and consider any comments that the judicial officer makes (paragraph 20(2)(d)).

**Speed of investigations and openness of hearings**

Division 2 of this Part outlines the requirements of an investigation. A Commission must conduct its investigation as quickly as proper consideration of the allegation permits. Subclause 23(1) requires a Commission to hold its hearings in public. However, there may be some circumstances where the Commission may consider a private hearing (subclause 23(2)). The Commission must have regard to the effect of holding the hearing in public on:

- the ability of the Commonwealth judicial officer to whom the investigation relates to perform his or her duties as such an officer
- the independence of the judiciary and
- the confidence the public has in the judiciary and the Commonwealth judicial officer (subclause 23(3)).

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\(^{50}\) That is, an investigation into a complaint about a Judge within the meaning of the Federal Court of Australia Act 1976; an investigation into a complaint about a Judge within the meaning of the Family Law Act 1975; and an investigation into a complaint about a Federal Magistrate within the meaning of the Federal Magistrates Act 1999.

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Note that paragraph 23(3)(a) suggests that the judicial officer has not been suspended during the investigation by the Parliamentary Commission. It would be helpful if the Bill made this intention clear. On this aspect, the Gilbert & Tobin Centre for Public Law commented that:

an issue that is not addressed by the Parliamentary Commissions Bill (nor the Judicial Complaints Bill) is that of suspension of a judicial officer at any stage before parliament determines whether he or she is to be removed from office. This is almost certainly a prudent omission despite the Murphy affair illustrating that controversy over whether a Justice should continue to sit while under threat of removal is not a remote hypothetical.

Powers in relation to investigations

For administrative convenience, clause 24 allows a hearing by the Commission to be held anywhere in Australia. The Commission may consider the location of the Commonwealth judicial officer in relation to whom an allegation of misbehaviour or incapacity is being investigated by the Commission. The relevant Commonwealth judicial officer may attend and participate, with legal representation, at the hearing (subclause 24(4)). The judicial officer may question a witness at a hearing before the Commission (subclause 24(5)).

A member of the Commission has the power to summon a witness to appear at a hearing, to give evidence and/or to produce a specified document or thing (subclause 25(1)).

Details of notice requirements are outlined in subclause 25(2) and clause 26.

If a person is given notice to appear at a hearing of a Commission as a witness and fails to appear, a warrant may be issued for the person’s apprehension (clause 27). A warrant may authorise that the witness may be detained.

The Commission will have powers to issue search warrants for documents or things connected with the matter the Commission is investigating (clause 28). Clauses 29-38 outline the requirements for a constable executing a search warrant, including:

- the securing of documents or things (clause 31)
- providing the occupier of the premises with details of the search warrant (clause 34) and
- seeking an extension of time allowed under the search warrant (clause 35).

The Commission will have the power to inspect, retain or copy material in documents or other things presented to the Commission (clause 41). The Commission may direct that certain information not


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be published, considering the safety of a person or the fair trial of a person who has been or may be charged with an offence against an Australian law (clause 44).

**Costs and expenses of Commonwealth judicial officers and witnesses**

The Commonwealth will be responsible for the reasonable costs of legal representation provided to the Commonwealth judicial officer (clause 45).

Clause 46 also requires the Commonwealth to pay for a determined amount of expenses of a witness required to appear at a hearing. This amount may be determined by regulation.

**Report**

The Commission will be required to provide a copy of its report to the parliamentary presiding officers. The Speaker of the House of Representatives and the President of the Senate will present the report to the Parliament (clause 48). Details on the requirements of the report are in clause 48, which also allows a separate report to be presented if the Commission believes that any of its findings or conclusions are sensitive (subclause 48(6)).

**Offences relating to investigations**

Offences relating to investigations conducted by a Commission are outlined in clauses 50-54 and 56-63. Below is a quick reference guide to the offence provisions

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty and section reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorised presence at hearing, in contravention of subclause 24(7)</td>
<td>Imprisonment for 6 months (clause 50)</td>
</tr>
<tr>
<td>Failure of witness to appear; defence of reasonable excuse</td>
<td>Imprisonment for 6 months (clause 51)</td>
</tr>
<tr>
<td>Failure of witness to produce document or thing; defence of reasonable excuse</td>
<td>Imprisonment for 6 months (clause 52)</td>
</tr>
<tr>
<td>Refusal to be sworn or to give evidence; with the exception of a Commonwealth judicial officer (including former Commonwealth judicial officers)</td>
<td>Imprisonment for 6 months (clause 53)</td>
</tr>
<tr>
<td>False or misleading evidence</td>
<td>Imprisonment for 2 years (clause 56)</td>
</tr>
<tr>
<td>Injury to another person who has produced a document or thing required under a</td>
<td>Imprisonment for 12 months (clause 57)</td>
</tr>
</tbody>
</table>

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### proposed clause 25 notice

<table>
<thead>
<tr>
<th>Action</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preventing a person from producing documents or things required under proposed clause 25</td>
<td>Imprisonment for 12 months (clause 58)</td>
</tr>
<tr>
<td>Bribery of a witness</td>
<td>Imprisonment for 5 years (clause 59)</td>
</tr>
<tr>
<td>Fraud of a person who is required to produce a document or thing under a clause 25 notice.</td>
<td>Imprisonment for 2 years (clause 60)</td>
</tr>
<tr>
<td>Obstruction of a commission (through disturbance, insult, interruption, defamation)</td>
<td>Imprisonment for 6 months (clause 61)</td>
</tr>
<tr>
<td>Occupier fails to provide facilities and assistance</td>
<td>30 penalty units (clause 62)</td>
</tr>
<tr>
<td>Unauthorised publication of material</td>
<td>Imprisonment for 6 months (clause 63)</td>
</tr>
</tbody>
</table>

Note also clause 54 on the protection from self-incrimination, applying to individuals who produce a document, information or thing to the Commission (subclause 54(2)).

### Protections

Protections provided to Commission members, witnesses and lawyers are outlined in clauses 65-67.

A person connected with a Commission has the same protections and immunities as those connected with a committee of a House of the Parliament, including those under the Parliamentary Privileges Act 1987 (clause 65). As the Explanatory Memorandum notes, this is consistent with a Commission’s role as a Parliamentary body. 52 Subclause 66(1) protects a person who is require to appear, or is appearing before a Commission. The person will not be liable for a contravention of a prohibition by or under another Australian law on their answer.

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Part 4 Terms and conditions of membership

Clause 70 specifies that a member of the Commission must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties, unless the member is a judge of the Supreme Court of a state or territory.

Members of the Commission are to be paid the remuneration that is determined by the Remuneration Tribunal, or that is prescribed in the regulations. This is subject to the Remuneration Tribunal Act 1973 (Clause 71).

A member of the Commission may resign his or her appointment. A member who is not a Supreme Court judge may be terminated from his appointment for the following reasons under clause 73:

- there is misbehaviour, or physical or mental incapacity (within the ordinary meaning of those words)
- the member becomes bankrupt
- the member engages in paid employment that is a conflict of interest and
- the member fails, without reasonable excuse, to comply with section 74.

Clause 74 requires a member of a Commission to disclose any interests (pecuniary or otherwise) that could conflict with the proper performance of his or her duties in relation to the Commission’s investigation and report.

Part 5 Administrative provisions

This Part contains administrative provisions relating to people assisting the Commission, the disclosure of information, evidence or documents and rules relating to the records of a Commission.

Staff performing services for a Commission are taken to be engaged under the Parliamentary Service Act 1999 and on leave without pay from his or her employment under the Public Service Act 1999 (subclause 76(3)).

Consultants and legal counsel may also be engaged to assist the Commission (clauses 77 and 78).

For the purposes of the Financial Management and Accountability Act 1997 and the Parliamentary Service Act 1999, a Commission is taken to be part of the Department of the House of Representatives or the Department of the Senate, established by the Parliamentary Service Act 1999, as agreed by the parliamentary presiding officers (clause 79).

Clause 80 requires the Commission to prepare and keep a written statement of reasons in relation to each search warrant issued by the Commission or a member of the Commission. Subclause 80(2) specifies the details to be contained in the statement of reasons.

In the course of investigating an allegation, a Commission may give evidence, a document or other thing to law enforcement authorities (including the Australian Crime Commission) and Royal
Commissions without limiting or affecting section 16 of the Parliamentary Privileges Act 1987 (clause 81).

The Commission’s records are taken to be a Class A record for the purposes of the Archives Act 1983 (clause 82).

**Part 6 Regulations**

This Part allows for Regulations to be made once this Bill is enacted. Regulations may be made that are required or permitted, or necessary or convenient, to give effect to the Bill, including matters relating to:

- the power to summon witnesses, take evidence and obtain documents or things (clause 25)
- the reimbursement of expenses to witnesses (clause 46) and
- the remuneration of Commission members (clause 71).

**Concluding comments**

Having a framework in place for the Parliament to act efficiently on the question of judicial misbehaviour or incapacity will assist in promoting a transparent and effective complaints handling mechanism. This Bill achieves this, but is limited in its scope to address more divisive questions regarding section 72 of the Constitution, namely the definition of the terms ‘misbehaviour’ and ‘proved’. This is not something the Bill has the authority to define so it is possible that, were a Judge to be subject to an allegation of misbehaviour or incapacity, similar problems will arise to those experienced during the Murphy affair. Harry Evans wrote in 1984 that ultimately:

> the fact that the Houses are politically responsible bodies which deliberate in public may be regarded as additional safeguards for the proper exercise of the power. [...] The removal of a judge under section 72 probably would be a protracted and difficult process, which would make great impositions upon the operations of the legislature and the executive government. The likely difficulty and length of any proceedings may well be regarded as the best safeguard for the proper use of the power.53

Having received bi-partisan support, this Bill is likely to pass both House of Parliament in 2012, possibly with some amendments arising out of the Senate Legal and Constitutional Affairs Committee’s Inquiry into this Bill.

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