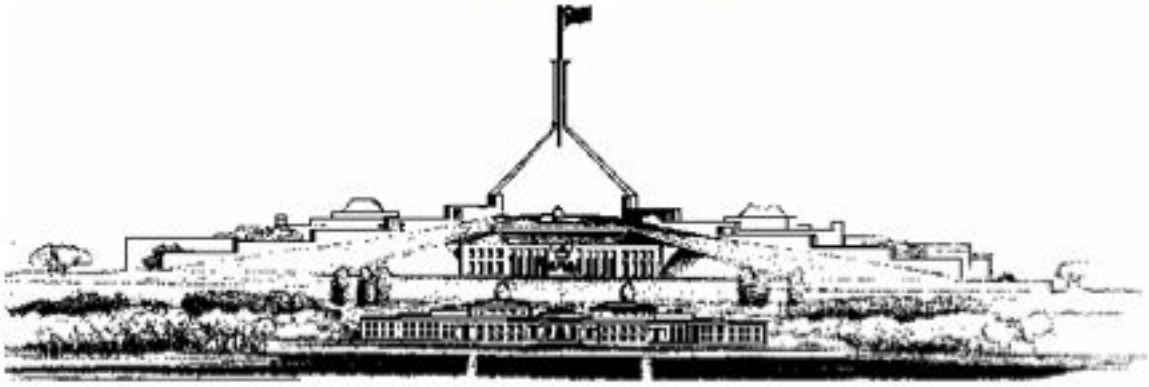
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

BILLS

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

Second Reading

SPEECH

Thursday, 28 June 2012

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date	Thursday, 28 June 2012	**Source**	House
Page	8363	**Proof**	No
Questioner		**Responder**	
Speaker	Neumann, Shayne, MP	**Question No.**	

Mr NEUMANN (Blair) (12:27): Our system of government is a combination of the system of the United Kingdom and the system of the United States. This extends even to the terminology of the parliament. Like the Americans, we do have not a House of Commons but a House of Representatives and not a House of Lords but a Senate. One way in which we have not followed our American friends is in the idea of the popular election of judges. In Australia governors-general are appointed by the government of the day, and eminent jurists, barristers and solicitors, and people in academia are appointed to positions of note. They usually have to have qualifications and to have been a solicitor or barrister of at least five years good standing. They often take recommendations from bar associations, law societies and other institutions, and we vet them very carefully.

This does not mean that the High Court of Australia, for instance, has not vexed governments from the time of the engineers' case through the uniform taxation legislation and the bank nationalisation cases, the Communist Party dissolution legislation case and the Franklin dam decision to the Mabo decision. So High Court decisions have sometimes encouraged governments, sometimes caused them grief and at other times resulted in further legislation having to be passed through this place or through the other chamber to make sure that the laws of this country are in the line with the Constitution. I pay tribute to our founding fathers, who put section 72 in the Constitution. Section 72(ii) of the Constitution says:

The Justices of the High Court and of the other courts—

and that includes the Federal Court and the Federal Magistrates Court—

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;

It is right and proper that the executive and the legislature should be separated from the judiciary. So we need fearless, frank and honest judges in our courts, and they should be able to go about their decisions without fear or favour, without corruption and with integrity.

It is important that, despite the fact that they might cause trouble, confusion or angst for government, we respect them for their position. They are appointed under the Constitution until 70 years of age in the case of federal judicial appointments. I pay tribute to the former member for Denison, the Hon. Duncan Kerr, for his advocacy in relation to addressing a mechanism that concerns section 72 of the Constitution. There is no mechanism in place about how this happens. As the previous speaker said, in the case of New South Wales and Queensland, on a couple of occasions we have seen the removal or purported removal of jurists. In circumstances like that it is very clear that if we get it done it needs to be done correctly and in line with proper process.

The first of these two bills, the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012, deals with a standard mechanism for the Commonwealth parliament to consider the removal of a judge under section 72 of the Constitution. It is proposed under this legislation that a commission be established and that three members be appointed by the houses of parliament, one being a retired judge—and I think it is appropriate that we have someone who has had experience in the judiciary and who understands what has gone on. The members are to be nominated by the Prime Minister—which happens in many appointments, from the appointment of the Governor-General through to judiciary appointments—in consultation with the Leader of the Opposition.

One reason I think that is important is that we do not want a strong government to overbear and we do not want there to be political interference in relation to this matter. So there needs to be a bipartisan approach on this issue. It is necessary, I think, for any commission recommendation to be supported by the opposition, whether that be Labor or Liberal. In the last 40 years we have had both sides of the political spectrum on this side of the chamber for equal time, so it is important that we do this in a cooperative manner.

As I have said before, parliament can always consider judicial behaviour. This is not simply a decision that is made because the government of the day does not like the decision made by the court—whether it is a federal court or the High Court of Australia. It needs to be for misbehaviour under the Constitution. It is very important that all political parties and people in the general community understand what is going on.

The second bill, the Courts Legislation Amendment (Judicial Complaints) Bill 2012, amends the Family Law Act 1975, the Federal Court of Australia Act 1976, the Federal Magistrates Act 1999 and the Freedom of Information Act to put in place an apparatus or framework to assist the chief justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints referred to them about judicial conduct within the courts. This non-statutory framework to be put in place, as proposed by this legislation, will improve the complaints processes and the way things have been handled.

It has been my experience in more than 20 years as a lawyer that, if you were unhappy with a judge, a federal magistrate, a state magistrate or whoever, you often wrote to the Law Society, the Bar Association or took further steps. For example, if you were involved in what we used to call a custody case and it was fairly urgent, and the federal magistrate or the Family Court judge had not handed down his or her decision for quite a considerable period of time, the parties were left in limbo and you complained, often the Chief Magistrate or the Chief Justice—perhaps when they were on circuit in, say, Brisbane, or they would make a fly-in trip up there—would have a quiet word with that particular judge and have a look at what was going on in relation to that particular complaint. These things were done behind the scenes—often very successfully, I must say.

Having complained on occasion during my legal career, I have to say that we put the Chief Magistrate or indeed the Chief Justice of the Family Court in those jurisdictions in a really difficult position. The reason for that is that you cannot find a more contentious jurisdiction than the family law jurisdiction, where people's property and parenting arrangements are so contentious on occasions. It was very easy for people to complain about the way one federal magistrate or Family Court judge might have dealt with the case, but you put the judicial officer at the apex of that court in a very difficult position. So putting in place a non-statutory framework for a complaints process is a worthy thing to do. It is likely to reduce the time a chief justice or chief federal magistrate needs to take in relation to this issue and put a bit of arm's length in the process.

These bills were looked at by a number of different parliamentary committees. This legislation was looked at in 2009 by the Senate Legal and Constitutional Affairs Committee, which held an inquiry into the Australian judicial system and the role of judges. There were about 16 recommendations made, the Australian government reported a response in 2010 and said that they would work through the Standing Committee of Attorneys-General in relation to those processes to look at some kind of national mechanism or framework for judicial complaints handling.

This matter has come before a couple of committees in this place. It came before the Senate Scrutiny of Bills Committee and also the House of Representatives Standing Committee on Social Policy and Legal Affairs, of which I am a member. We looked at these two pieces of legislation to see how they would operate. We noted a number of things. We were very concerned about any trespass on the rights and liberties of anyone about whom complaints were being made. The Senate Scrutiny of Bills Committee looked at a number of aspects of judicial complaints procedure and we talked about that in our report. The committee looked at the capacity of a judicial complaints commission to issue search warrants in relation to limited circumstances and on reasonable grounds and it looked at the commission being able to hold private meetings. It looked at the need for a person to be protected against self-incrimination and against producing documents or answering questions for fear of self-incrimination. Lastly, it looked at what sort of reasonable excuse a person should have if they do not want to appear as a witness, provide a document or thing or give evidence. These are all important things; they are not just esoteric things. If one of these things comes up it is the national headlines of the *Australian* or the *Financial Review* and it would be on every news channel. If this comes up it is really serious stuff.

Our committee conducted a public hearing on 10 May this year. I know that the Senate committee also conducted a public hearing and there is information on our committee website about it. A number of people gave evidence. The Attorney-General's Department gave evidence; we heard from the Federal Court of Australia and the Judicial Conference of Australia. A number of organisations gave evidence as did scholars from the Adelaide Law School and Civil Liberties Australia. Pretty high-profile organisations and individuals gave evidence. The committee report states at 1.33 in relation to the judicial complaints bill:

The Attorney-General's Department provides a distinction between the internal complaints process as described in the Judicial Complaints Bill and the parliamentary process of the Parliamentary Commission. They indicate that:

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

I think it is important that the person who has a complaint made against them has access to good legal representation and assistance in relation to costs. That is my personal view. But a number of people, including the Clerk of the Senate, raised issues in relation to the separation of powers. The committee concluded, and I concur with the conclusion, that the system we have had in this country has worked pretty well over a long time. That does not mean that we cannot put mechanisms in place to handle judicial complaints better and have that in place in case something comes up. Often we find that it is only when complaints are made that we realise we have not got the structures and the pathways in place. I am concerned, as the committee was, in relation to the prospect of potential political interference by a majority government that may feel they are not happy with a particular judge. But I think on balance the committee believed that the common sense of the Australian parliament and the reputation of the judiciary were such that these things would not happen. We note that the heads of jurisdiction are supportive of the policy and have been involved in the development of it, so the stakeholders have been consulted. The committee found, and I agree, that there are merits in these bills. I do not come to this and cast my vote without some reservations, but I think that, on balance, both bills should be supported. It is important that we do this right and properly, and if it ever comes up again we are to be criticised if we do not put in place the pathways, mechanisms and frameworks which are necessary to make sure that justice is done. The process needs to be accountable and transparent, and the people involved must have all the rights that all Australians would expect them to have.