

**For information**

**Legislative Council  
Panel on Administration of Justice and Legal Services**

**Mechanism for Handling Complaints  
Against Judicial Conduct:  
Information requested by Members**

**PURPOSE**

This paper provides Members with the information requested at the meetings held on 23 July 2013 and 25 February 2014.

**BACKGROUND**

2. At the meeting on 23 July 2013 when the mechanism for handling complaints against judicial conduct (“the Mechanism”) was discussed, Members requested the Judiciary to provide some information relating to the subject. In February 2014, the Judiciary informed the Panel on Administration of Justice and Legal Services (“the Panel”) that the Chief Justice had noted the comments and concerns expressed by Members on the subject, and that having regard to the fact that the existing Mechanism had been working for some time, the Chief Justice had set up an internal working group (“the Working Group”) (involving the Court Leaders) to review the Mechanism to see what improvements could be made. The Judiciary also informed Members that the review was expected to take about one year and a review report would be produced by the end of 2014. Having regard to this development, the Judiciary originally intended to provide the requested information in the overall context of the review report by the Working Group, so that all the related matters could be considered in a holistic manner. However, at the meeting on 25 February 2014, Members requested that such information should be provided in the interim, pending the completion of the review report. At the same meeting, Members also requested the provision of some additional information relating to the subject. The Judiciary has undertaken to try its best to do so as requested.

3. As instructed by the Chief Justice, the Judiciary now provides the requested information which it has obtained or collated so far as at 17 June 2014. The Judiciary would like to point out that as the review is still on-going and that it is still in the process of collecting, collating, studying and processing all the relevant information, it is likely that further update on or summary of or refinement to some information (as it is now included in this paper) would be required when such information is presented in the overall context of the review report to be published by the Working Group at the end of 2014.

## **THE REQUESTED INFORMATION**

### **(A) A breakdown of complaint cases against judicial conduct in the past three years**

#### Caseload and Judicial Manpower Position

4. It is important to view the statistics concerning complaints against judicial conduct in the overall context of the number of cases handled by the Judiciary and the level of judicial manpower deployed to cope with the judicial work arising from those cases. The caseload and the judicial manpower positions for the past three years from 2011 to 2013 are set out as follows –

Table 1: Caseload and Judicial Manpower Position (2011-2013)

Level of Court	2011		2012		2013	
	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>
<b>Court of Final Appeal</b>	<b>155</b>	<b>5</b>	<b>154</b>	<b>5</b>	<b>147</b>	<b>5</b>
• No. of Judges <sup>3</sup>		4		4		4
• Registrar, Court of Final Appeal		1		1		1
<b>High Court</b>	<b>34,611</b>	<b>55</b>	<b>35,835</b>	<b>53</b>	<b>37,980</b>	<b>55</b>
• No. of Judges		45		43		44
• No. of Registrar/ Deputy Registrars		10		10		11
<b>District Court<sup>4</sup></b>	<b>51,949</b>	<b>44</b>	<b>50,884</b>	<b>44</b>	<b>50,253</b>	<b>45</b>
• No. of Judges		36		37		38
• Members, Lands Tribunal		2		2		2
• No. of Registrar/ Deputy Registrars		6		5		5

<sup>1</sup> Caseload of a year refers to the number of cases filed in the year.

<sup>2</sup> The level of judicial manpower included the number of both substantive and deputy Judges and Judicial Officers (“JJOs”) (where appropriate) deployed to sit at the respective level of courts as at 31 December of the year. This figure might vary on different dates throughout the year. The numbers of deputy JJOs are also included as complaints could also be lodged against the deputy JJOs.

<sup>3</sup> There are at present also 18 Non-Permanent Judges in the Court of Final Appeal.

<sup>4</sup> The caseload and judicial manpower deployed also included those regarding the Family Court and the Lands Tribunal.

Level of Court	2011		2012		2013	
	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>	Caseload <sup>1</sup>	Judicial Manpower <sup>2</sup>
Magistrates' Court <sup>5</sup>	390,191	74	436,660	76	415,123	82
<b>Total</b>	<b>476,906</b>	<b>178</b>	<b>523,533</b>	<b>178</b>	<b>503,503</b>	<b>187</b>

Complaints Against Judges and Judicial Officers (“JJOs”)

5. Under the existing Mechanism –

- (a) In accordance with the principle of judicial independence, complaints against judicial decisions cannot and will not be entertained. Anyone who feels aggrieved by a judge’s decision can only appeal (where this is available) through the existing legal provisions;
- (b) For complaints against judicial conduct, they are being handled by the Chief Justice and the respective Court Leaders as follows –

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<sup>5</sup> The caseload and judicial manpower deployed also included those regarding the Coroner’s Court, the Small Claims Tribunal, the Labour Tribunal and the Obscene Articles Tribunal.

<b>JJOs<sup>6</sup> being Complained Against</b>	<b>Handled by</b>
<ul style="list-style-type: none"><li>• Judges of the Court of Final Appeal</li><li>• Registrar of the Court of Final Appeal</li><li>• The three Court Leaders: Chief Judge of the High Court, Chief District Judge and Chief Magistrate</li><li>• President, Lands Tribunal</li></ul>	Chief Justice
<ul style="list-style-type: none"><li>• Judges of the High Court</li><li>• Registrar and Masters of the High Court</li></ul>	Chief Judge of the High Court
<ul style="list-style-type: none"><li>• Judges of the District Court and the Family Court</li><li>• Presiding Officers and Members, Lands Tribunal</li><li>• Registrar and Masters of the District Court</li></ul>	Chief District Judge <sup>7</sup>
<ul style="list-style-type: none"><li>• Principal Magistrates and Permanent Magistrates<sup>8</sup></li><li>• Special Magistrates</li></ul>	Chief Magistrate

6. In practice –

- (a) Although it has been set out clearly in the pamphlet regarding the Mechanism that complaints against judicial decisions will not be entertained, a substantial proportion (slightly more than half) of the complaints received through the Mechanism were related to judicial decisions. These complaints cannot and will not be dealt with under the Mechanism; and

<sup>6</sup> Similar to note 2 above, these also include both substantive and deputy JJOs (where appropriate).

<sup>7</sup> Assisted by Principal Family Court Judge in relation to complaints concerning the Family Court.

<sup>8</sup> These include Principal Magistrates and Magistrates being deployed to work in the Tribunals under the cross-posting policy.

- (b) The remaining complaints were either –
  - (i) Complaints against judicial conduct; or
  - (ii) Complaints against both judicial conduct and judicial decisions.

Under the Mechanism, complaints under (i) above and complaints against the part of the judicial conduct under (ii) (but not the part against judicial decisions) will be dealt with under the Mechanism.

#### Disposal of Complaints Against JJOs

7. The numbers of complaints against JJOs disposed of by the Chief Justice and the respective Court Leaders in the past three years from 2011 to 2013 are set out as follows –

Table 2: Number of Complaints Disposed of by the Chief Justice and the Court Leaders (2011-2013)

Disposed of by	2011			2012			2013		
	JD <sup>9</sup>	JC <sup>10</sup>	JD+ JC <sup>11</sup>	JD <sup>9</sup>	JC <sup>10</sup>	JD+ JC <sup>11</sup>	JD <sup>9</sup>	JC <sup>10</sup>	JD+ JC <sup>11</sup>
Chief Justice	4	13	0	9	0	23	6	0	18
Chief Judge of the High Court	45	0	5	47	0	1	30	4	6
Chief District Judge	7	0	22	13	1	15	10	0	7
Chief Magistrate	3	8	5	4	7	6	28	15	17
<b>Sub-total</b>	59	21	32	73	8	45	74	19	48
<b>Sub-total (relating to judicial conduct)</b>		<b>53</b>			<b>53</b>			<b>67</b>	
<b>Total</b>	<b>112</b>			<b>126</b>			<b>141</b>		

8. From the figures at Tables 1 and 2, it is noted that –
- (a) In 2011, the total caseload of the Judiciary stood at 476,906. 53 complaints relating to judicial conduct were dealt with in that year;
  - (b) In 2012, the total caseload of the Judiciary stood at 523,533. Again, 53 complaints relating to judicial conduct were dealt with in that year; and

<sup>9</sup> “JD” denotes “Judicial Decisions”. These complaints cannot and will not be handled. The complainants were informed by the Chief Justice via his Administrative Assistant and the Court Leaders of the position as set out at paragraph 6(a) above.

<sup>10</sup> “JC” denotes “Judicial Conduct”. These complaints will be dealt with.

<sup>11</sup> “JD+JC” denotes both “Judicial Decisions and Judicial Conduct”. As stated in paragraph 6(b) above, only the part relating to JC will be dealt with.

- (c) In 2013, the total caseload of the Judiciary stood at 503,503. 67 complaints relating to judicial conduct were dealt with in that year.

### Nature of Complaints Against Judicial Conduct

9. The Judiciary is studying how to classify the complaints relating to judicial conduct according to their nature. Our preliminary classifications are as follows –

- (a) Category 1 (“C1”) – Those relating to alleged lack of diligence and poor or undesirable manner of the JJOs being complained against, e.g. being late in court, being rude in manner, etc.;
- (b) Category 2 (“C2”) – Those relating to alleged improper handling/conduct of particular aspects of court proceedings, e.g. too much intervening at the hearing, failure to make declaration to avoid any potential conflict of interests in hearing a case, inappropriate comments made or unreasonable instructions given in conducting the proceedings, collusion with parties or lawyers, etc.;
- (c) Category 3 (“C3”) – Those relating to alleged improper behaviour or conduct which is not directly related to court work; e.g. erecting illegal structures at premises owned by the JJO, etc.; and
- (d) Category 4 (“C4”) – Those lodged by complainants not satisfied with the Court Leaders’ handling and findings of the original complaints.

10. On the basis of such preliminary classifications, a further breakdown on the nature of complaints relating to judicial conduct for the past three years from 2011 to 2013 is as follows –



Table 3: Breakdown of Complaints relating to Judicial Conduct by Major Categories

Year	No. of Complaints relating to Judicial Conduct	Preliminary Classification by Nature				
		C1 (Diligence and Manner)	C2 (Conduct of Proceedings)	C3 (Conduct Outside Court)	C4 (Dissatisfaction with Court Leaders' Handling and Findings)	Mixed (Involving more than one Category)
2011	53	3	32	0	13	4 [C1 + C2] 1 [C3 + C4]
2012	53	2	25	0	22	4 [C1 + C2]
2013	67	7	31	0	18	11 [C1 + C2]

Investigation of Complaints Against JJOs

11. Under the established practice, Court Leaders are responsible for investigating the complaints relating to judicial conduct. A preliminary review of the 173 cases handled during the past three years showed that Court Leaders usually took the following actions in investigating the complaints before reaching their findings –

- (a) Case files were normally called for review;
- (b) Relevant parts of the audio-recording or relevant parts of the transcript of the proceedings were listened to or considered as appropriate;

- (c) Comments from the JJOs being complained against were sought; and
- (d) In appropriate cases, comments from relevant persons who were involved in the matters being considered under the complaint were also sought.

12. In cases where the complainants were dissatisfied with the Court Leaders' handling of their complaints and lodged a complaint against the Court Leaders' handling and/or findings to the Chief Justice –

- (a) The Chief Justice asked for comments from the respective Court Leaders;
- (b) Upon receipt of the Court Leaders' comments, the Chief Justice then reviewed the cases and decided whether any additional action needed to be taken, e.g. seeking additional comments from concerned persons, etc.; and
- (c) The Chief Justice made his findings on the complaints against the Court Leaders' handling and findings of the original complaints.

Numbers of Complaints Found Justified or Partially Justified and Follow-up Action Taken

13. Of the complaints relating to judicial conduct dealt with in the past three years from 2011 to 2013, the numbers of complaints found justified or partially justified are set out as follows –

Table 4: Numbers of Justified/Partially Justified Complaints

JJOs being complained against		2011		2012		2013	
		JC	JD+JC	JC	JD+JC	JC	JD+JC
<b>JJOs of Court of Final Appeal</b>		—	—	—	—	—	—
<b>High Court</b>	<b>Judges</b>	—	—	—	—	1 Justified + 1 Partially Justified	—
	<b>Registrars/ Masters</b>	—	—	—	—	2 Partially Justified	—
<b>District Court</b>		—	—	—	—	—	—
<b>Magistrates' Courts</b>	<b>Court Leader</b>	1 Partially Justified	—	—	—	—	—
	<b>Magistrates</b>	3 Partially Justified	1 Partially Justified	1 Justified + 1 Partially Justified	1 Partially Justified	1 Partially Justified	1 Partially Justified
<b>Total</b>		<b>5 Partially Justified</b>		<b>1 Justified + 2 Partially Justified</b>		<b>1 Justified + 5 Partially Justified</b>	
<b>Total no. of Complaints dealt with</b>		<b>53</b>		<b>53</b>		<b>67</b>	

14. Further information on these justified/partially justified complaints is provided in the following paragraphs.

15. In 2011, of the 53 complaints relating to judicial conduct, five were found to be partially justified –

- (a) One of these was related to a complaint about the handling of an earlier complaint against a Magistrate by the Court Leader. Upon review of the case by the Chief Justice, the original complaint was found partially justified<sup>12</sup>. The Chief Justice interviewed the Magistrate in the presence of the Court Leader. At the Chief Justice's instruction, a reply was sent to the complainant on the findings of the investigation and the follow-up action taken; and

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<sup>12</sup> The complainant made three allegations and cast doubt on the integrity of a Magistrate. One of the three allegations was that the Magistrate had neglected the order from the Lands Department to remove the unauthorized structures of the house of the Magistrate, and the remaining allegations were disputes between the Magistrate and the neighbours. The complainant considered all these constituted misconduct on the part of the Magistrate concerned as a Judicial Officer. The complainant was not satisfied with the reply of the Court Leader and complained to the Chief Justice. In relation to the unauthorized structures, the Magistrate acknowledged the mistake and the Magistrate informed the Chief Justice that the Magistrate had been taking action to remove the unauthorized structures and assured the Chief Justice that such mistake would not recur. The unauthorized structures had been removed. As for the other matters raised, the Chief Justice had nothing further to add to the Court Leader's findings that the allegations were not justified.

- (b) The other four “Partially Justified” complaints were mainly related to the handling and conduct of court proceedings<sup>13</sup>. Upon investigation by the Court Leader, he gave advice to the Judicial Officers concerned and replied to the complainants on the findings of investigation and the follow-up actions taken.

16. In 2012, of the 53 complaints relating to judicial conduct, one was found justified and two were found partially justified –

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<sup>13</sup> Details of the four cases are as follows –

- (a) The complainant complained about the prevalent practice adopted by two listing Magistrates who were alleged to always insist on the defence counsel to disclose their clients’ defence on the grounds of case management. The complainant provided a set of transcripts in a case heard by one Magistrate but did not give any particulars on the complainant’s allegation against the other Magistrate. The Court Leader found that the complaint against the Magistrate with details provided partially justified but could not reach conclusive findings in the other case. The Court Leader had provided advice to the Magistrate concerned, and issued general advice to all the Magistrates on the proper care to be taken in exploring the ambit of agreement that might be reached between the Prosecution and the Defence.
- (b) The complainant complained against the manner of a Magistrate in handling four cases concerning three different defendants. In the first three cases, the complainant was of the view that the Magistrate should have acceded to the complainant’s request to have the case adjourned before pleas were taken. In the fourth case, the complainant was of the view that the Magistrate should not have commented on the strength of the defence which had led the defendant to reverse his plea into a guilty one. While whether the request for adjournment should be acceded to or not is a matter of judicial discretion, the Court Leader found that the Magistrate could have done better in two areas in these cases: (i) As regards oral presentation, it would be advisable for the Magistrate to avoid over-reliance on tacit understanding. Explicit rulings should have been made with brief reasons for refusing the applications to have the cases adjourned; and (ii) Except where the law permits such as consideration of the strength of the prosecution case when considering bail, the Magistrate should have refrained from expressing views on the strength or weakness on the cases of the prosecution and the defence. The conclusion was that there was no injustice in handling the case but there could be room for improvement in the oral presentation and the style of case management.
- (c) The complainant was not happy with the queries made by an Adjudicator of the Small Claims Tribunal on the complainant’s capacity to represent the two defendants. The complainant was also dissatisfied with the Adjudicator’s refusal on the complainant’s application to amend the name of the 2nd Defendant. Lastly, the complainant found it objectionable for the Adjudicator to interrupt the complainant’s submission before the complainant got the chance to finish the same. The Court Leader found that the complaint was justified to the extent that the Adjudicator had interrupted speeches of parties at the proceedings unnecessarily.
- (d) The complainant said that a Presiding Officer of the Labour Tribunal had scolded the claimant, had been scornful on the claimant’s approach on settlement by making very inappropriate comments and had expelled the complainant who accompanied the claimant from the court. The Court Leader found that whilst the Presiding Officer had not scolded the claimant, the Presiding Officer should not have used the inappropriate words as alleged. The Court Leader also found that the Presiding Officer had not expelled the complainant from the court. The Presiding Officer had asked the complainant to sit in the public gallery to enable the claimant to talk to the defendant direct so as to facilitate settlement. The Court Leader was of the view that the Presiding Officer should have explained the purpose of doing so as to reduce any misunderstanding.

- (a) The “Justified” complaint concerned the delay in preparing the Statement of Findings by a Magistrate. Upon investigation by the Court Leader, he found the complaint justified and gave advice to the Magistrate<sup>14</sup>. He replied to the complainant, giving apology and explaining the circumstances leading to the delay; and
  
- (b) The other two “Partially Justified” complaints were mainly related to the handling and conduct of court proceedings<sup>15</sup>. Upon investigation by the Court Leader, he gave advice to the Judicial Officers concerned and replied to the complainants on the findings of investigation and the follow-up actions taken.

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<sup>14</sup> The Court Leader found that the delay in preparing the statement of findings by the Magistrate was inappropriate. He also noted that the delay on the part of the Magistrate was partly caused by the fact that the Magistrate had to prepare statements of findings regarding five appeal cases at the same time.

<sup>15</sup> Details of the two cases are as follows –

- (a) The complainant took notes for study purpose at a court proceeding but the Deputy Special Magistrate told the complainant that the complainant must obtain leave from the court before the complainant could do so. The complainant refused to apply for leave, left the court and made this complaint. The Court Leader subsequently advised the Deputy Special Magistrate that there was no need for persons observing the proceedings to obtain leave to take notes. However, if the court had suspicion that the notes would be used in some manner that might affect the integrity of the hearing, the court had an inherent jurisdiction to stop it. This complaint arose out of a misunderstanding on the part of the Deputy Special Magistrate.
  
- (b) The complainant made two allegations: (i) the Deputy Special Magistrate had prohibited the taking of notes during the proceedings (ii) the Deputy Special Magistrate had on more than one occasion told the complainant that the complainant has no valid defence in a summons case, and that if the complainant maintained a not guilty plea, the complainant would face a serious punishment. The Court Leader found that the Deputy Special Magistrate had not prohibited the taking of notes during the proceedings. Further, the Deputy Special Magistrate only reminded the note takers that they should not communicate with others on the contents of the evidence given during the proceedings. Regarding the second allegation, the Court Leader found that the Deputy Special Magistrate was merely explaining the usual 1/3 discount on a plea of guilty and lesser risk of disqualification of driving licence, but the Deputy Special Magistrate’s remarks should not be given at that late stage.

17. In 2013, of the 67 complaints relating to judicial conduct, one was found justified and five were found partially justified –

- (a) The “Justified” complaint concerned a Judge of the High Court being late for a court hearing<sup>16</sup>. Upon investigation by the Court Leader, he gave advice to the Judge. He also sent a reply to the complainant explaining the circumstances and reasons for the delay and giving apology for the inconvenience caused to the complainant; and

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<sup>16</sup> The complainant complained about a Judge who appeared late for a hearing fixed for 9:30 am. The Judge had in fact attended a formal Farewell Sitting of a retiring judge also fixed for 9:30 am on the same day, and the Judge had tried but failed to contact the complainant (who acted in person) the day before to inform the complainant that the hearing would start late. The Court Leader was of the view that the Judge ought to have contacted the complainant earlier and the daily cause list should have been amended to reflect the change of the hearing time. The Court Leader apologised to the complainant accordingly.

- (b) Of the other five “Partially Justified” complaints, three concerned a Judge and a Master of the High Court and two concerned two Magistrates. They were mainly related to the handling and conduct of court proceedings by the JJOs concerned<sup>17</sup>. Upon

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<sup>17</sup> Details of the five cases are as follows –

- (a) The complainant, a senior counsel, complained that in delivering a reserved judgment, the Judge made some extremely strong and damaging comments about the complainant (who had not appeared before the Judge at the relevant hearing) and the complainant’s junior counsel. Moreover, the comments were made without any prior notice given to the complainant and the junior barrister. The complainant further complained that the Judge had departed from Practice Direction 25.2, para. 2 in that the Judge should only make a direction to release publicly a judgment after a hearing which had been held in chambers (not open to the public), after hearing the parties. However, the judgment had been published before the complainant had an opportunity to make representations to the Judge. The Court Leader was of the view that the Judge ought, before issuing the judgment, to have afforded both counsel an opportunity of providing an answer to the Judge’s proposed criticisms. But the Court Leader also noted that the Judge had since the delivery of judgment given both counsel an opportunity to respond to the criticisms but they chose not to do so. As for Practice Direction 25.2, para. 2, the Court Leader found that there was no departure from the Practice Direction as the Judge had asked the parties’ solicitors for their views on the proposed publication of the judgment before releasing it for publication.
- (b) The complainant was dissatisfied with a Master in handling the complainant’s legal aid appeals. The complainant claimed that the Master proceeded to hear the appeals without disclosing to the complainant the Master’s apparent association with a solicitors’ firm which was the complainant’s previous solicitors. The complainant had made in the complainant’s written submissions accusations against the firm. The complainant therefore considered that the Master could not handle the case fairly. The Court Leader found that at the material time, the Master no longer had any connection with the solicitors’ firm. However, to avoid any possible misunderstanding, the Master should have disclosed the previous involvement of the Master in the solicitors’ firm to the complainant before the hearing, so that if the complainant had any views, they might be considered by the Master accordingly.
- (c) The complainant was dissatisfied that a Master failed to hand down a judgment at the time fixed, and the complainant had to wait in court for 1 hour 45 minutes for the judgment. The complainant also complained about some arithmetic errors in computing damages in the judgment, which had been corrected by the Master by way of a corrigendum issued 10 days later. The Court Leader found that there had been unjustified delay in handing down the judgment and apologised to the complainant accordingly. As for the arithmetic errors, the Court Leader found that the Master had simply made a slip in calculation; once realised, the mistakes had been rectified by the issue of the corrigendum. The Court Leader was of the view that this was of insufficient seriousness as to amount to any judicial misconduct.
- (d) The complainant complained against a Presiding Officer of the Labour Tribunal for failing to allow the complainant to tender a witness statement at the call-over hearing. The complainant also alleged that the Presiding Officer asked the complainant irrelevant matters and wrongly speculated the reason why the complainant failed to inform the complainant’s employer of the complainant’s pregnancy before dismissal. The Court Leader found that it was not inappropriate for the Presiding Officer not to take the witness statement as that was a call-over hearing. The Court Leader was however of the view that the Presiding Officer should have refrained from making speculative comments at the hearing.
- (e) The complainant complained against an Adjudicator of the Small Claims Tribunal for insisting on the complainant to produce written legal advice on some matters before setting down the case. The Court Leader clarified that this was not a prerequisite. Whilst the Adjudicator might invite the complainant to obtain written legal advice in the case involving complicated land documents, the Adjudicator should have gone on to explain the advantages of having such legal advice. The Adjudicator should also have



investigation by the Court Leaders of the respective Courts, the Court Leaders gave advice to the JJOs concerned. They also replied to the complainants on the findings of investigation, the follow-up actions taken, and giving apology, where appropriate.

**(B) The current mechanisms for handling complaints against judicial conduct in other jurisdictions**

18. Under the steer of the Working Group chaired by the Chief Justice, the Judiciary is still in the process of collecting and studying the information gathered on the current mechanisms for handling complaints against judicial conduct in selected overseas jurisdictions, and it is still in the process of trying to obtain additional information. As such, the Judiciary would reserve its comments on this subject at this moment. We would however like to make a few remarks for the time being -

- (a) It is noted that while some factual information on the descriptions of the mechanisms in overseas jurisdictions is accessible via the respective websites, the information as to how and how well the various mechanisms are actually working in practice is less readily accessible;
- (b) It is noted that the mechanisms for handling complaints against judges do not work in isolation in the respective jurisdictions. The Judiciary is mindful of the need to study the working of such mechanisms with the proper perspective in the overall context of the constitutional and the judicial administration frameworks under which such jurisdictions are operating; and
- (c) In any case, in undertaking the review, the Working Group will certainly make appropriate reference to the practices in other overseas jurisdictions, but it is important to note that not all their practices would be applicable to the Hong Kong Judiciary.

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told the complainant that in the absence of such legal advice, the complainant could still continue the litigation.

As at 17 June 2014, the information which the Judiciary has gathered so far for studying is attached at the Annex.

**(C) Whether the Judiciary would consider establishing an independent body to receive and investigate complaints against judicial conduct, or to monitor and review the handling of complaint cases against judicial conduct by the Judiciary**

19. The question of how the existing Mechanism could be improved, including whether an independent body should be established by the Judiciary to receive and investigate complaints against judicial conduct or to monitor and review the handling of such complaint cases, is one of the matters under consideration by the Working Group chaired by the Chief Justice.

20. As the review is still on-going, it is premature for the Judiciary to comment on and respond to this question.

**(D) The number and percentage of Judges and Magistrates who had not practised as lawyers prior to taking up the judicial appointments**

21. It is understood that Members would like to have information on the number of JJOs who have no private practice experience though they are legally qualified and have relevant legal and judicial experiences. As at 1 April 2014, the position is –

- (a) 10 (12%) of the 83 Judges; and
- (b) 8 (11%) of the 71 Judicial Officers<sup>18</sup>,

do not have private practice experience before they joined the Judiciary.

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<sup>18</sup> Excluding the following Judicial Officers –

- (i) 2 Members, Lands Tribunal, as they are appointed with the requirement for professional qualification in land valuation but not professional qualification in law; and
- (ii) 1 Magistrate (first appointed as Special Magistrate) and 2 Special Magistrates, who were appointed before the introduction of the requirement for legal qualification and experience for Special Magistrates in 1999.

22. It is further noted that of these 18 JJOs as referred to in paragraph 21 above, 17 had legal experience in working in the Department of Justice before they joined the Judiciary<sup>19</sup>.

23. Pursuant to Article 92 of the Basic Law, all JJOs are chosen on the basis of their judicial and professional qualities. All JJOs meet the statutory professional qualification and experience required for their judicial offices. The Judiciary is of the view that the information as shown at paragraph 22 above only shows the different professional experiences of the JJOs before joining the Judiciary and is not indicative of anything.

**(E) The number of complaint cases that had been referred to the Judicial Officers Recommendation Commission for attention in the past three years and the subsequent action taken on these cases**

#### Relevant Legal Provisions

24. Before we provide the information as requested under this heading, it would be advisable to set out the relevant legal provisions for background information.

25. The Basic Law makes a distinction between the procedures for and disciplinary actions that may be taken in respect of Judges and in respect of Judicial Officers.

26. For Judges, Articles 89 and 90 of the Basic Law are relevant. The Judicial Officers Recommendation Commission (“JORC”) has no role to play.

27. For Judicial Officers, Article 91 of the Basic Law is relevant. It provides that the HKSAR shall maintain the previous system of appointment and removal of members of the Judiciary other than judges.

28. The Judicial Officers (Tenure of Office) Ordinance (Cap. 433) was enacted in 1993 to provide procedures for the discipline of Judicial Officers of certain courts and tribunals. Cap. 433 remains applicable to such Judicial

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<sup>19</sup> The remaining Judge was first appointed to the Judiciary as a Magistrate. His previous working experience was in the United Kingdom Judiciary.

Officers after July 1997. It remains not applicable to Judges of the Court of Final Appeal, Judges of the High Court and District Judges.

29. Under Cap. 433 –

- (a) If it is represented to the Chief Justice that a Judicial Officer is unable to discharge his duties or has misbehaved, the Chief Justice may notify the Judicial Officer of the particulars of the representations received and call on the officer to state in writing any grounds on which he relies to justify himself. If the Judicial Officer fails to justify himself to the satisfaction of the Chief Justice, the Chief Justice shall appoint a tribunal to investigate the matter (section 3);
- (b) The tribunal appointed by the Chief Justice shall consist of two Judges of the High Court (one of whom the Chief Justice shall appoint as Chairman of the tribunal) and a public officer (section 6);
- (c) On completion of its investigation the tribunal shall submit a report to the JORC (section 7); and
- (d) If, after considering the tribunal's report, the JORC considers that the Judicial Officer is unable to discharge his duties or has misbehaved, the JORC shall recommend to the Chief Executive that no action be taken or that the Judicial Officer –
  - (i) be dismissed;
  - (ii) be compulsorily retired with pension, gratuity or other allowances, or without such benefits or with reduced benefits;
  - (iii) be reduced in rank;
  - (iv) have any future salary increments stopped or deferred; or

(v) be reprimanded or severely reprimanded

(section 8).

### Statistics of Complaint Cases Referred to the JORC

30. The different situations under which complaints cases involving Judicial Officers may be brought before the JORC are set out below.

#### *(a) When a Judicial Officer's Further Employment is Considered*

31. The first situation can be where a Judicial Officer's further employment is considered by the JORC, whether in the form of renewal of agreement or transfer from agreement terms to permanent and pensionable terms.

32. According to the established practice, in such cases, the information prepared for consideration by the JORC includes the details of any justified and partially justified complaints against the Judicial Officers concerned. The JORC would take into account all relevant information concerning the performance of the Judicial Officers concerned, including the substance and the frequency of justified/partially justified complaints in deciding as to whether the further employment of the Judicial Officers concerned should be recommended or not.

33. In the past three years from 2011 to 2013, there has been one case of a partially justified complaint brought to the attention of the JORC in the context of considering the concerned Judicial Officer's further employment on renewal of agreement. All relevant information of the complaint case was brought before the JORC to facilitate it in considering the application. No subsequent follow-up action was required in this specific case.

#### *(b) When a Judicial Officer's Advancement is Considered*

34. The second situation can be when a Judicial Officer is considered for elevation to a higher position. The arrangement in paragraph 32 above may be similarly adopted.

35. In the past three years from 2011 to 2013, there has not been any such case.

(c) When a Tribunal Report is Submitted to the JORC under Section 7 of Cap. 433

36. Where there has been alleged misbehaviour by a Judicial Officer and the Judicial Officer fails to justify himself to the satisfaction of the Chief Justice, the Chief Justice will appoint a tribunal under section 3 of Cap. 433 to investigate the matter.

37. During the past three years from 2011 to 2013, there has been one case in which the Chief Justice exercised his powers under section 3 of Cap. 433 and appointed a tribunal to investigate the representations that had been made to him to the effect that a Judicial Officer had misbehaved. The nature of the alleged misbehaviour was conduct not directly related to court work. In that case, after considering the tribunal's report, the JORC agreed to accept the tribunal's conclusions, i.e. the tribunal did not find the allegation that the Judicial Officer concerned had misbehaved proved; and, in its opinion, the Judicial Officer concerned was able to discharge his duties as a Judicial Officer properly. No further subsequent action was required to be taken by the JORC.

**(F) What constituted "misbehaviour" of a judge as stated in Article 89 of the Basic Law for which the judge might be removed by the Chief Executive in accordance with the relevant procedures prescribed in the Basic Law**

38. It is inappropriate for the Judiciary to comment on this matter in detail as this involves the interpretation of the Basic Law, which may come before the Judiciary in a court case. It is sufficient to say that misbehaviour is of that degree of seriousness which affects the function and office of a judge.

**(G) The right, if any, of complainants to access the audio recording of the court proceedings in connection with their complaints against judges**

39. The Judiciary notes that at present, there are no prescribed procedures to specifically deal with the requests from the complainants for accessing the audio recording of the court proceedings in connection with their complaints. At present, such requests are usually addressed to the Court Leader concerned and are dealt with on a case-by-case basis. In the course of the review, this

matter will also be looked into by the Working Group to see if some workable guidelines and procedures should be drawn up.

**(H) What is the basis for concluding the tribunal under Article 89 of the Basic Law should consist of judges and judges only**

40. This appears to be what that Article in the Basic Law prescribes, although the point has not been adjudicated by the courts.

**(I) Whether the number of judges appointed to the tribunal under Article 89 of the Basic Law for investigating a judge and the Chief Justice could exceed three and five respectively; if not, why not**

41. Article 89 of the Basic Law uses the term “not fewer than”.

**(J) Whether consideration will be given to providing different levels of sanctions, short of removal from office, against judges who were found to have misbehaved after investigating complaints against them**

42. The possible follow-up action which may be taken upon the completion of the investigation of complaints against judicial conduct is one of the subjects under study by the Working Group. The review of the existing Mechanism is still ongoing. It is therefore premature for the Judiciary to respond to this question at this stage.

**(K) Which public officers have been appointed by the Chief Justice to sit on the tribunal under Cap. 433**

43. In accordance with section 6 of Cap. 433, the tribunal appointed by the Chief Justice shall consist of two judges of the High Court, one of whom the Chief Justice shall appoint as Chairman of the tribunal, and a public officer (see paragraph 29 above).

44. For the tribunal appointed by the Chief Justice under Cap. 433 as mentioned in paragraph 37 above, the Chief Justice had appointed

Mr. Justice Wally Yeung, a Vice President of the Court of Appeal of the High Court as the Chairman, Mr. Justice Jeremy Poon, Judge of the Court of First Instance of the High Court and Mr. Raymond Wong, Permanent Secretary for the Civil Service, as members of this tribunal.

**The Judiciary**  
**June 2014**



**The United Kingdom**  
**英國**

**UK's Supreme Court<sup>1</sup>**

**Guide to judicial conduct**

**1 Introduction**

1.1 The President, Deputy President and Justices of the United Kingdom Supreme Court (collectively referred to hereafter as ‘the Justices’) have decided to adopt this Guide to their judicial conduct. Such guides have become commonplace in recent years (1 Eg Canadian Judicial Council, Ethical Principles for Judges (1998), Council of Chief Justices of Australia, Guide to Judicial Conduct (2002). See the seminal study by Mr Justice Thomas, a judge of the Supreme Court of Queensland, Judicial Ethics in Australia (2nd edn, 1997) ) The Justices have drawn upon the principles contained in a revised version of the Guide for Judges in England and Wales which was published in March 2008.

1.2 That Guide refers to the Bangalore Principles of Judicial Conduct, endorsed by the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. The intention of the Principles is to establish standards of ethical conduct for judges, to provide guidance for individual judges and the judiciary in regulating judicial conduct, and also to assist members of the executive and legislature, lawyers and the public, better to understand and support the judiciary. The principles are stated as six “values”:

1. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

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<sup>1</sup> Information extracted from the UK Supreme Court’s official website (see link: <http://www.supremecourt.gov.uk/about/judicial-conduct-and-complaints.html>)

2. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
3. Integrity is essential to the proper discharge of the judicial office.
4. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
5. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
6. Competence and diligence are prerequisites to the due performance of judicial office.

1.3 The Justices believe that those principles are already well understood by the judiciary, executive and legislature in the United Kingdom. The specific guidance given below, much of which might be thought to go without saying, follows the same pattern. There is considerable overlap between the principles.

1.4 The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual Justice. The interests of justice must always be the overriding factor. There is also a range of reasonably held opinions on some points. In cases of doubt, a Justice should seek the advice of the President or Deputy President of the Court.

## **2 Independence**

2.1 The judiciary of the United Kingdom have been independent of the government since at least the early 18th century. The Supreme Court of the United Kingdom was established in order to achieve the physical separation of the country's highest court from the House of Lords and thus to clarify the Justices' independence both of government and of Parliament. Judicial independence is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The Justices will take care that their conduct, official or private, does not undermine their institutional or individual independence or the public appearance of independence.

2.2 The Justices have all sworn the judicial oath, which states:

“I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will.”

In taking that oath, each Justice has acknowledged that he or she is primarily accountable to the law which he or she must administer. This involves putting aside private interests and preferences and being alert to attempts to influence decisions or curry favour.

2.3 The Justices may consult with their colleagues when points of difficulty arise on matters of conduct. But they are solely responsible for the decisions that they take in the performance of their judicial duties.

2.4 The Justices must be immune to the effects of publicity, whether favourable or unfavourable. But that does not mean ignoring the profound effect which their decisions are likely to have, not only on the parties before the Court, but also upon the wider public whose concerns may well be forcibly expressed in the media.

2.5 The Justices accept their responsibility to promote public understanding of their work and of their decisions. But they will show appropriate caution and restraint when explaining or commenting publicly upon their decisions in individual cases.

2.6 If a Justice is misquoted or misrepresented in the media, the matter will be handled by the Court’s communications officer in consultation with the Justice. See also “The Media: a Guide for Judges”, first published by the Lord Chancellor’s Department in July 2000.

### **3 Impartiality**

3.1 Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.

3.2 Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

3.3 Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such a way as to give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice's family might raise concern in a particular case about the judge's own impartiality and detachment from the political process.

3.4 However, the Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court.

3.5 In making such contributions, the Justices will take care to avoid associating themselves with a particular organisation, group or cause in such a way as to give rise to a perception of partiality towards that organisation (including a set of chambers or firm of solicitors), group or cause.

3.6 In their personal relations with individual members of the legal profession, especially those who practise regularly in the Supreme Court, the Justices will avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

### **Bias and the appearance of bias**

3.7 The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. Recent UK cases include *Porter v Magill* [2002] 2 AC 357, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451, *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416.

3.8 Circumstances will vary infinitely and guidelines can do no more than seek to assist the individual Justice in the judgment to be made, which

involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. What follows are merely signposts to some of the questions which may arise.

3.9 A Justice will not sit in a case where:

1. he or she has a close family relationship with a party or with the spouse or domestic partner of a partner;
2. his or her spouse or domestic partner was a judge in a court below;
3. he or she has a close family relationship with an advocate appearing before the Supreme Court.

3.10 Sufficient reasons for not sitting on a case include:

1. personal friendship with, or personal animosity towards, a party; friendship is to be distinguished from acquaintance, which may or may not be a sufficient reason depending upon its nature and extent;
2. current or recent business association with a party; this includes the Justice's own solicitor, accountant, doctor, dentist or other professional adviser; it does not normally include the Justice's insurance company, bank or a local authority to which he or she pays council tax.

3.11 Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:

1. friendship or past professional association with counsel or solicitors acting for a party;
2. the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case;
3. past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was.

3.12 A Justice will not sit in a case in which he or she or, to his or her knowledge, a member of his or her family has any significant financial interest in the outcome of the case. 'Family' for this purpose means spouse, domestic partner or other person in a close personal relationship with the Justice; son, son-in-law, daughter, daughter-in-law; and anyone else who is a

companion or employee living in the Justice's household. It is for the Justice to inform himself or herself about his or her personal financial and fiduciary interests and to take reasonable steps to be informed about the interests of members of his or her family.

3.13 A significant financial interest could arise, not from an interest in the outcome of the particular case, but where the decision on the point of law might have an impact upon the Justice's own financial interests. The Justice will have regard to the nature and extent of his or her interest and the effect of the decision on others with whom he or she has a relationship, actual or foreseeable.

3.14 Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court. This risk will seldom, if ever, arise from what a judge has said in other cases, or from previous findings against a party in other litigation.

3.15 If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.

3.16 Disclosure should be to all parties and, unless the issue has been resolved before the hearing, discussion should be in open court. Even where the parties consent to the Justice sitting, the Justice should refuse himself or herself if, on balance, he or she considers that this is the proper course. Conversely, there are likely to be cases in which the Justice has thought it appropriate to bring the circumstances to the attention of the parties but, having considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

## **4 Integrity**

4.1 As a general proposition, the Justices are entitled to exercise the rights and freedoms available to all citizens. There is a public interest in their participating, insofar as their office permits, in the life and affairs of the

community. The Justices also have private and family lives which are entitled to the same respect as those of other people.

4.2 However, the Justices accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. They are conscious that it is a privilege to serve the community in this capacity. They will try to avoid situations which might reasonably lower respect for their judicial office, or cast doubt upon their impartiality as judges, or expose them to charges of hypocrisy. They will try to conduct themselves in a way which is consistent with the dignity of their office.

4.3 In Court, the Justices will seek to be courteous, patient, tolerant and punctual and to respect the dignity of all. They will strive to ensure that no one in Court is exposed to any display of bias or prejudice on grounds such as race, colour, sex, religion, national origin, disability, age, marital status, sexual orientation, social and economic status and other like causes. Care will be taken that arrangements made for and during a hearing do not put people with a disability at a disadvantage.

4.4 No Justice, or member of a Justice's family, will ask for or accept any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Justice in connection with his or her judicial duties.

## **5 Propriety**

5.1 The Justices will avoid impropriety and the appearance of impropriety in all of their activities. They will not exploit the prestige of their office to obtain personal favours or benefits.

5.2 A Justice may not practise law while in full time office: see Courts and Legal Services Act 1990, s 75 and Schedule 11. Nor may a Justice allow the use of his or her residence by a member of the legal profession to receive clients or other members of the legal profession.

5.3 The Justices will not use or lend the prestige of their office to advance their own private interests, or those of a member of their family or of anyone else, nor will they convey or permit others to convey the impression that anyone is in a special position improperly to influence the Justice in the performance of his or her duties.

5.4 Confidential information acquired by a Justice in his or her judicial capacity will not be used or disclosed by the Justice for any purpose not related to his or her judicial duties.

### **Outside activities**

5.5 Justices may form or join associations of judges or participate in other organisations representing the interests of judges.

5.6 Justices may appear at a public hearing before a Parliamentary committee or official body concerned with matters relating to the law, the legal system, the administration of justice or related matters.

5.8 Justices may engage in other academic, voluntary, charitable or religious activities which do not detract from the dignity of their office or otherwise interfere with the performance of their judicial duties.

5.7 Justices may serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.

5.9 Subject to those constraints, Justices may properly be involved in the management of educational, voluntary, charitable or religious organisations. Care should be taken in allowing their name to be associated with an appeal for funds, even for a charitable organisation, lest it be seen as inappropriate use of judicial prestige in support of the organisation or creating a sense of obligation in donors.

5.10 Justices who hold high office in universities and similar institutions will bear in mind the need to limit their involvement in contentious situations. Moreover, in considering whether to accept office and what role to play, consideration should be given to the trend of some such bodies to be more entrepreneurial and to resemble a business. The greater the move in that direction, the less appropriate judicial participation may be.

### **Commercial activities**

5.11 The requirements of a Justice's office and terms of service place severe restraints upon the permissible scope of his or her involvement with any



commercial enterprise. Some guidance is given in the cases referred to earlier.

5.12 The management of family assets and the estates of deceased close family members, whether as executor or trustee, is unobjectionable, and may be acceptable for other relatives or friends if the administration is not complex, time consuming or contentious. However, the risks, including the risk of litigation, associated with the office of trustee, even of a family trust, should not be overlooked and the factors involved need to be weighed carefully before office is accepted.

5.13 A full-time Justice will not receive any remuneration other than a judicial salary except for fees and royalties earned as an author or editor but may of course receive money from investments or property.

### **Gifts and hospitality**

5.14 Caution should be exercised when considering whether to accept any gift or hospitality. Justices will be wary of accepting any gift or hospitality which might appear to relate in some way to their judicial office and might be construed as an attempt to attract judicial goodwill or favour.

5.15 The acceptance of a gift or hospitality of modest value, as a token of appreciation, may be unobjectionable, depending on the circumstances. For example a Justice who makes a speech or participates in some public or private function should feel free to accept a small token of appreciation; this may include a contribution to charity.

5.16 By way of further example, the acceptance of invitations to lunches and dinners by legal and other professional and public bodies or officials, where attendance can be reasonably seen as the performance of a public or professional duty, carrying no degree of obligation, is entirely acceptable.

5.17 There is a long-standing tradition of association between bench and the bar and the solicitors' profession. This occurs both on formal occasions, such as dinners, and less formal ones. However, Justices will be cautious when invited to take part in what may be legitimate marketing or promotional activities, for example by barristers' chambers or solicitors' firms, or professional associations, where the object of judicial participation may be perceived to be the impressing of clients or potential clients. They

will also take care not to associate with individual members of the profession who are engaged in current or pending cases before the Court in such a way as to give any appearance of partiality.

### **References and social activities**

5.18 Justices may give references for professional competence or character for people who are well known to them. A person should not be deprived of a reference because the person best able to give it is a Justice. Giving character evidence in court or otherwise is not excluded, particularly where it may seem unfair to deprive the person concerned of the benefit of such evidence, but this should be undertaken only exceptionally. Consultation with the President or Deputy President of the Court is advisable before taking a decision to give evidence.

5.19 Justices will assess social and other activities in the light of their duty to maintain the dignity of their office and not to permit associations which may affect adversely their ability to discharge their duties.

### **Competence and Dilligence**

6.1 As Lord Bingham of Cornhill stated in his 1993 lecture to the Society of Public Teachers of Law, entitled Judicial Ethics:

“It is a judge’s professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence.”

Plainly this requires the judge to take reasonable steps to maintain and enhance the judge’s knowledge and skills necessary for the proper performance of judicial duties, to devote the judge’s professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.

6.2 Beyond stating those general propositions, it is not seen as the function of this guide to consider judicial duties and practice with respect, for example, to judgment writing and participation in judicial education. These topics are better dealt with, insofar as they are not prescribed in the rules of the Supreme Court, in Practice Directions or in case law, by guidance from the President or Deputy President of the Court, and in discussion amongst the Justices.

## **Judicial complaints procedure**

[Judicial complaints procedure](#) - PDF version.

1. Any complaint against a member of the Supreme Court, by whomever received, shall in the first instance be passed to the Chief Executive. If the complaint relates only to the effect of a judicial decision or discloses no ground of complaint calling for consideration the Chief Executive if she thinks it appropriate, shall take no action save to inform the complainant (if identifiable) that no action will be taken

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2. In any other case the Chief Executive shall refer the complaint to the President, unless the complaint relates to the President, in which case it shall be referred to the Deputy President, unless the complaint relates also to the Deputy President, in which case it shall be referred to the most senior member of the Court to whom it does not relate.

3. The President or Deputy President or Senior member, as the case may be, (hereafter “the appropriate member”), shall then consult the next senior member of the court to whom the complaint does not relate and, having done so, may:

1. take no action; or
2. bring the complaint to the notice of the member who is the subject of the complaint and resolve the matter informally; or
3. consider taking formal action as defined below.

In the event of either 3(i) or 3(ii) being pursued the reasons for that action being taken should be recorded and filed.

4. Consideration of taking formal action will be appropriate, whether or not any complaint is made, where a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member’s character, integrity or continuing fitness to hold office or

where a member's conduct otherwise appears to be such as to throw serious doubt on that member's continuing fitness to hold office.

5. Where formal action is under consideration the appropriate member shall (1) inform the member whose conduct is in question of that fact and of the matters alleged against him or her, (2) inform the Lord Chancellor of the facts so far as they are known, and (3) consult the Lord Chancellor on the action to be taken.

6. Having taken steps listed in paragraph 5 above, the appropriate member may, if it is considered appropriate to do so, initiate formal action.

7. Formal action shall mean:

1. that a tribunal is established comprising the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland (or, if any of them is disqualified, the next most senior Judge in that jurisdiction) and two independent persons of high standing nominated by the Lord Chancellor, to be chaired by whichever of the three first-named office-holders has longest held his or her office;
2. that the member whose conduct is in question shall be informed of the full details of what is said against him or her;
3. that the tribunal shall investigate the accusation or complaint adopting such procedure as shall be fair and as expeditious as is consistent with fairness;
4. that the tribunal shall make a report summarizing the facts as found by the tribunal so far as relevant and recommending the action, if any, to be taken;
5. that the tribunal shall deliver this report to the appropriate member and provide a copy to the member whose conduct is in question;
6. that the appropriate member shall deliver the report to the Lord Chancellor;
7. that the Lord Chancellor shall decide whether to initiate action to remove from office the member whose conduct is in question and, if he judges it appropriate to do so, shall take such action pursuant to section 33 of the Constitutional Reform Act 2005.

8. Whether or not the Lord Chancellor decides to take action to remove the member from office, he or she may publish the report made by the tribunal.

9. The member against whom a complaint or accusation is made may at any time vacate his or her office voluntarily, without prejudice to any other action which may be taken against him or her, and formal action may be discontinued at any stage.

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## **UKSC complaints procedure (non-Judicial)**

[UKSC complaints procedure \(non-Judicial\)](#) - PDF version.

The Supreme Court of the United Kingdom (UKSC) was established by the Constitutional Reform Act 2005. It is a non-Ministerial department.

The Court hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases.

Additionally, it hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1988 and the Government of Wales Act 2006.

## **Complaints about decisions made by the Supreme Court of the United Kingdom**

The UKSC is the final court of appeal in England, Wales and Northern Ireland. As such its decisions cannot be appealed in the United Kingdom. The complaints procedure detailed below gives information about the handling of complaints against the conduct of the Justices, the Registrar and members of staff, and about the UKSC's administrative procedures.

### **How do I complaint?**

There are separate procedures for complaints about members of staff exercising their administrative functions and about the Justices and Registrar in the performance of their judicial function.

## **Complaints about a member of staff or the UKSC's administrative procedures.**

If you have a complaint about a member of the UKSC staff or about its administrative procedures including its handling of requests for information under the Freedom of Information and Data Protection Acts or about its Publication Scheme you should write giving details of the complaint and your name and address to:

William Arnold  
Director of Corporate Services  
The Supreme Court of the United Kingdom  
Parliament Square  
London  
SW1P 3BD

[Email William Arnold](#)

If you have a complaint about the conduct of one of our consultations you should write giving details of the complaint and your name and address to:

William Arnold – contact details as above.

## **How will my complaint be handled?**

Our policy is to respond to all enquiries promptly and courteously. We treat all complaints seriously and aim to reply to them within 20 working days. If we cannot do that, we will keep you informed of the progress we are making with your complaint. If we decide your complaint is justified we will apologise and explain how we intend to put the situation right.

We record all complaints so that we may learn from them. If we cannot resolve your complaint we will inform you of any steps you can take if you want it investigated further. Please note that we will not respond to rude or abusive letters, emails or telephone calls.

If your complaint is about a member of the UKSC's staff or about its consultation or other administrative procedures the Director of Corporate Services will look into the complaint and provide you with a reply. If you are not satisfied with the response, you may write to the Chief Executive at

Jenny Rowe  
Chief Executive  
The Supreme Court of the United Kingdom  
Parliament Square  
London  
SW1P 3BD

[Email Jenny Rowe](#)

### **If your complaint is about the Chief Executive**

If your complaint is about the Chief Executive, you should write, giving details of the complaint and your name and address to:

The President  
The Supreme Court of the United Kingdom  
Parliament Square  
London  
SW1P 3BD

[Email Jackie Sears](#)

The President will then ask a senior member of staff to investigate your complaint and, after reporting to him, respond to you.

### **Still not satisfied?**

If you are not satisfied with the response you receive from the Chief Executive, or, in the event of a complaint about the Chief Executive, the response you receive from the person appointed by the President to investigate your complaint, you may ask the Parliamentary and Health Service Ombudsman to investigate.

The Ombudsman is completely independent from Government and the Civil Service. They investigate claims that individuals have suffered because a government department, agency or other public body has not acted properly or fairly or has provided a poor service.

You cannot approach the Ombudsman yourself, but may ask a Member of Parliament (MP) to do this for you. You can get a leaflet which explains how

the Ombudsman might be able to help by telephoning their helpline on 0345 015 4033. More details can be found on the [Parliamentary and Health Service Ombudsman website](#).

### **Complaints about a Justice or the Registrar**

If you have a complaint about a Justice or the Registrar you should write giving details of the complaint and your name and address to [Email Jenny Rowe](#), Chief Executive, whose contact details are given above. Your complaint will be dealt with in accordance with the UKSC's Judicial Complaints procedure.

### **Government Policy**

We do not deal with complaints about Government policy. If you have a complaint about Government policy, you should write to your MP or to the relevant Government Department's Minister.

January 2013



## **JUDICIAL COMPLAINTS PROCEDURE: UK SUPREME COURT**

1. Any complaint against a member of the Supreme Court, by whomever received, shall in the first instance be passed to the Chief Executive. If the complaint relates only to the effect of a judicial decision or discloses no ground of complaint calling for consideration the Chief Executive if she thinks it appropriate, shall take no action save to inform the complainant (if identifiable) that no action will be taken.
2. In any other case the Chief Executive shall refer the complaint to the President, unless the complaint relates to the President, in which case it shall be referred to the Deputy President, unless the complaint relates also to the Deputy President, in which case it shall be referred to the most senior member of the Court to whom it does not relate.
3. The President or Deputy President or Senior member, as the case may be, (hereafter “the appropriate member”), shall then consult the next senior member of the court to whom the complaint does not relate and, having done so, may:
  - (i) take no action; or
  - (ii) bring the complaint to the notice of the member who is the subject of the complaint and resolve the matter informally; or
  - (iii) consider taking formal action as defined below.

In the event of either 3(i) or 3(ii) being pursued the reasons for that action being taken should be recorded and filed.

4. Consideration of taking formal action will be appropriate, whether or not any complaint is made, where a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member’s character, integrity or continuing fitness to hold office or where a

member's conduct otherwise appears to be such as to throw serious doubt on that member's continuing fitness to hold office.

5. Where formal action is under consideration the appropriate member shall (1) inform the member whose conduct is in question of that fact and of the matters alleged against him or her, (2) inform the Lord Chancellor of the facts so far as they are known, and (3) consult the Lord Chancellor on the action to be taken.
6. Having taken steps listed in paragraph 5 above, the appropriate member may, if it is considered appropriate to do so, initiate formal action.
7. Formal action shall mean:
  - (i) that a tribunal is established comprising the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland (or, if any of them is disqualified, the next most senior Judge in that jurisdiction) and two independent persons of high standing nominated by the Lord Chancellor, to be chaired by whichever of the three first-named office-holders has longest held his or her office;
  - (ii) that the member whose conduct is in question shall be informed of the full details of what is said against him or her;
  - (iii) that the tribunal shall investigate the accusation or complaint adopting such procedure as shall be fair and as expeditious as is consistent with fairness;
  - (iv) that the tribunal shall make a report summarizing the facts as found by the tribunal so far as relevant and recommending the action, if any, to be taken;
  - (v) that the tribunal shall deliver this report to the appropriate member and provide a copy to the member whose conduct is in question;
  - (vi) that the appropriate member shall deliver the report to the Lord Chancellor;
  - (vii) that the Lord Chancellor shall decide whether to initiate action to remove from office the member whose conduct is in question and, if he judges it

appropriate to do so, shall take such action pursuant to section 33 of the Constitutional Reform Act 2005.

8. Whether or not the Lord Chancellor decides to take action to remove the member from office, he or she may publish the report made by the tribunal.
9. The member against whom a complaint or accusation is made may at any time vacate his or her office voluntarily, without prejudice to any other action which may be taken against him or her, and formal action may be discontinued at any stage.

# UK's Office for Judicial Complaints<sup>1</sup>

## Welcome to the website for the Office for Judicial Complaints

The [Constitutional Reform Act 2005](#) gives the Lord Chancellor and the Lord Chief Justice joint responsibility for the system for considering and determining complaints about the personal conduct of all judicial office holders in England and Wales and some judicial office holders who sit in Tribunals in Scotland and Northern Ireland. The OJC was set up on the 3rd April 2006, to handle these complaints and provide advice and assistance to the Lord Chancellor and Lord Chief Justice in the performance of their joint role.

On this site you will find information about the types of complaints that we can deal with, how the complaints system works, the role of the OJC and what to do if you are considering making a complaint about the personal conduct of a judicial office holder.

This site also contains a number of useful links to other organisations that may be able to help or assist you with your complaint.

We hope that you will find this website both informative and useful.

## Important information

Subject to Parliamentary approval, on 1 October 2013 the Office for Judicial Complaints will become the Judicial Conduct and Investigations Office (JCIO).

Whilst the JCIO's remit will remain broadly the same as that of the OJC, the rules and regulations under which we operate will be changing. The changes are being introduced following a period of public consultation and are designed to improve the process by which complaints about judicial conduct are considered; establishing a speedier and more efficient process.

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<sup>1</sup> Information extracted from the UK's Office for Judicial Complaints' official website (see link: <http://judicialcomplaints.judiciary.gov.uk/>)

The major change that you should be aware of is that from 1 October 2013 all complaints **MUST** be made to the JCIO within three months from the date when the incident occurred rather than the twelve months allowed under the current system. For example, if you wish to make a complaint to the JCIO on 1 October 2013, the event you want to complain about must have occurred no earlier than 1 July 2013.

### **What does this mean for me?**

If you are currently considering making a complaint about the personal conduct of a judicial office holder and it concerns something that happened prior to 1 July 2013, you **MUST** ensure that your complaint reaches the OJC by 30 September 2013. It will then be considered under the current twelve month time limit.

Complaints received on or after 1 October 2013 will be subject to the revised three month time limit and will not be accepted if they relate to events which fall outside of this three month period.

If you are in any doubt about how the changes to these time limits might affect your right to register a complaint about the personal conduct of a judicial office holder, please contact the OJC on 0203 334 0145 and we will be happy to advise you.

### **Update 7 August 2013: HHJ Peters QC**

The OJC has received a number of complaints about the remarks made by HHJ Peters QC during the sentencing of a defendant at Snaresbrook Crown Court on 5 August 2013. The complaints will be considered in accordance with the Judicial Discipline (Prescribed Procedure) Regulations 2006 (as amended).

### **Update 6 February 2013: Coroner Peter Straker**

As part of the OJC's investigation into complaints made against Dr Peter Straker, the Lord Chancellor and Lord Chief Justice have suspended Dr Straker from office pending the conclusion of its investigation.

### **Update 9 October 2012: Judge Constance Briscoe**

The Lord Chief Justice and Lord Chancellor have suspended Constance Briscoe from the judiciary pending the outcome of the police investigation into the allegations against her.

### **Update 13 July 2012: Online complaint form**

Please be aware that our online complaint form will not function properly between the hours of 2:30am and 4:00am

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### **Can the Office for Judicial Complaints help you?**

The Office for Judicial Complaints(OJC) deals with complaints about the personal conduct of judges. Examples of possible personal misconduct might be use of insulting, racist or sexist language in court, or inappropriate behaviour outside the court such as a judge using their judicial title for personal advantage or preferential treatment.

OJC cannot help you if you disagree with a judge’s decision or case management directions, or if you think a judge has made a legal error. If you are unhappy with this sort of decision you may be able to appeal. See the section “[If We Can't Help](#)” for how to obtain advice from a solicitor, local law centre, Citizens Advice Bureau or the Community Legal Service.

### **What types of Judge does OJC deal with?**

This site explains the procedures to be followed if you have a complaint about a judicial office holder's personal conduct. The Office for Judicial Complaints does not deal with complaints about judicial decisions or about case management such as the type of sentence or whether a claim succeeds or not. If your complaint relates to a judicial decision please go to '[If We Can't Help](#)'.

The complaints procedure varies for different types of judicial office-holders. The main types of judicial office-holder are:

#### 1. Judges, including:

Deputy District Judge – Civil/Family  
District Judge – Civil/Family

Deputy District Judge – Magistrates’ Court  
District Judge – Magistrates’ Court  
Master  
Recorder  
Circuit Judge  
High Court Judge  
Lord Justice  
Tribunal Chambers President

2. Magistrates

3. Tribunal Members

4. Coroners

## **Press Releases and Statements**

### **Press Releases**

[OJC News Release - The Judicial Discipline \(Prescribed Procedures\) Regulations 2013 - 3713](#) (PDF 0.02mb, 3 pages)

[OJC Annual Report 2012 - 2013 - News Release - 3313](#) (PDF 0.02mb, 3 pages)

[OJC News Release - Evaluation of Consultation Responses - Review of Rules and Regulations Governing Judicial Discipline - 2412](#) (PDF 0.02mb, 2 pages)

[OJC Annual Report - 2011 - 2012 - News Release - OJC 2012](#) (PDF 0.03mb, 2 pages)

[OJC News Release - Consultation Launched on Judicial Discipline Regulations - 0612](#) (PDF 0.02mb, 2 pages)

[OJC News Release - Review of Judicial Complaints System - 0111](#) (PDF 0.03mb, 2 pages)

[OJC Annual Report - 2009 - 2010 - News Release - OJC 2010](#) (PDF 0.02mb, 1 pages)

[|OJC Annual Report 2009 - 2010 - Statement by the Lord Chancellor](#) (PDF 0.01mb, 1 pages)

[|OJC Annual Report 2008-2009 - News Release - OJC 0310](#) (PDF 0.02mb, 2 pages)

[|OJC Annual Report-2007-2008- News release 0309](#) (PDF 0.03mb, 1 pages)

|Statements

[|Member of the Employment Tribunal \(Scotland\) - Mr Michael McCarthy - OJC Investigation Statement - 4113](#) (PDF 0.02mb, 1 pages)

[|His Honour Judge Roger Keen QC - OJC Investigation Statement - 4013](#) (PDF 0.02mb, 1 pages)

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## **Contact us and complaints about the OJC**

### **If you wish to contact the Office for Judicial Complaints (OJC)**

You can contact the office by post, Email, fax or by using our online complaint form. Contact details are as follows:

Address - The Office for Judicial Complaints,  
3rd Floor, 11 Tothill Street  
London, SW1H 9LH

Email - [inbox@ojc.gsi.gov.uk](mailto:inbox@ojc.gsi.gov.uk)

Enquiry line - 0203 334 0145

Fax - 0203 334 0031

### **Complaints about the OJC**

The OJC seeks to provide both complainant and judicial office holder with a high standard of service throughout the investigation process. However, if you are dissatisfied with the level of service provided by the OJC, the



following information gives details of how you may complain at the different stages of the complaints process.

### **1. Once your complaint has been concluded by the OJC**

If you are unhappy with the way in which your case has been handled once the OJC has finished considering your complaint, you may complain to the **Judicial Appointment and Conduct Ombudsman**.

The Ombudsman cannot comment on the final decision reached in any case but he can consider all aspects of the process followed by the OJC including: delay, rudeness, bias, faulty procedures, offering misleading advice, refusal to answer questions and unfair treatment.

Complaints to the Ombudsman should be made within 28 days of the date that the OJC has notified you that it has finished dealing with your complaint. Exceptionally, the Ombudsman may investigate a complaint made outside this time if he considers it appropriate to do so. This is entirely at his discretion and you will need to give reasons why you believe this is the case.

Detailed information of how to complain to the Ombudsman can be found at: <http://www.judicialombudsman.gov.uk/>

Or, you may contact the Ombudsman's office at the following address:  
Judicial Appointments & Conduct Ombudsman  
9th Floor, The Tower  
102 Petty France London  
SW1H 9AJ

T - 020 3334 2900 F - 020 3334 2913 E - [headoffice@jaco.gsi.gov.uk](mailto:headoffice@jaco.gsi.gov.uk)

### **2. Your complaint is still being considered by the OJC; or your complaint does not relate to an existing or concluded complaint about a judicial office holder.**

#### **How to complain**

If you are unhappy with any aspect of the service you are receiving whilst your complaint about a judicial office holder is still being considered by the

OJC; or, your complaint does not relate to an existing or concluded judicial conduct complaint, please write in the first instance setting out your concerns to the Head of Casework.

The Head of Casework,  
Office for Judicial Complaints,  
3rd Floor, 11 Tothill Street  
London, SW1H 9LH  
T- 020 3334 0145, F-020 3334 0031

The Head of Casework will consider your concerns and reply within 15 working days of receipt of your letter addressing the points you have made and explaining any remedial action that is to be taken.

### **Review**

If you are unhappy with the response from the Head of Casework, you may ask for your complaint to be reviewed by the Head of the Office for Judicial Complaints (the contact details for the Head of Office are the same as those for the Head of Casework).

### **Appeal**

If you are still dissatisfied with the response you have received you may appeal to the **Chief Executive of the Judicial Office**. The Chief Executive will carry out a final review of your complaint about the OJC.

The Chief Executive  
Judicial Office  
9th Floor, Thomas More  
Royal Courts of Justice  
Strand  
London WC2A 2LL

## Australia 澳洲

### Judicial Commission of New South Wales<sup>1</sup>

The Judicial Commission, an independent statutory corporation, is part of the judicial arm of government. It was established by the [Judicial Officers Act 1986](#).

#### Principal functions

The Commission's principal functions are to:

- assist the courts to achieve [consistency in sentencing](#)
- organise and supervise an appropriate scheme of [continuing education](#) and training of judicial officers
- examine [complaints](#) against judicial officers.

The Commission may also:

- give advice to the Attorney General on such matters as the Commission thinks appropriate; and
- liaise with persons and organisations in connection with the performance of any of its functions.

#### Our History

The History of the Judicial Commission of New South Wales

The Judicial Commission was established in 1986 in response to calls for a formal mechanism to review sentences and sentencing practice, and to give effect to judicial accountability.

#### Timeline

September 1986      The Judicial Officers Bill 1986 introduced into

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<sup>1</sup> Information extracted from the Judicial Commission of New South Wales' official website (see link: <http://www.judcom.nsw.gov.au/>)

## Parliament

- 17 September 1986 The Judicial Officers Bill assented to
- 23 January 1987 The first meeting of the Judicial Commission
- April 1987 The Judicial Officers (Amendment) Bill introduced into Parliament
- 1 May 1987 The Judicial Officers (Amendment) Bill assented to. The amending legislation established the Judicial Commission as a statutory corporation independent of Executive Government
- October 1987 The Judicial Commission began its work in the areas of judicial education and the provision of sentencing information

[From controversy to credibility: 20 years of the Judicial Commission of New South Wales](#) (PDF 6.5 MB)

In October 2007, the Judicial Commission celebrated 20 years of achievement in promoting excellence in judicial performance. To commemorate the Commission's 20th anniversary, the Commission published a booklet setting out a brief history of the Commission. Interviews with key figures involved in the Commission's controversial establishment shed light on how the Judicial Commission has gained national and international credibility as an accountability body and a leading provider of continuing judicial education and sentencing information.

## Members

The Judicial Commission consists of six official members, being the heads of jurisdiction of the State's five courts and the President of the Court of Appeal, together with four members appointed by the Governor of New South Wales. Of the appointed members, one is a legal practitioner and the

other three are persons of high standing in the community. The President of the Commission is the Chief Justice of New South Wales.

### **Official Members**

The Honourable Chief Justice Bathurst

was appointed Chief Justice of New South Wales on 1 June 2011, and has occupied the position of President of the Commission from that date.

The Honourable Justice Allsop

was appointed President of the Court of Appeal on 2 June 2008.

The Honourable Justice Boland

was appointed President of the Industrial Relations Commission on 9 April 2008.

The Honourable Justice Preston

was appointed Chief Judge of the Land and Environment Court on 14 November 2005.

The Honourable Justice Blanch AM

was appointed Chief Judge of the District Court on 13 December 1994.

His Honour Judge Henson

was appointed Chief Magistrate on 28 August 2006.

### **Appointed Members**

Dr Judith Cashmore AO

has been a member of the Commission since 1 December 2004 and was reappointed for three years from 7 November 2012.

Mr David Giddy

was appointed a member of the Commission for three years from 7 November 2012.

Mr Nihal Gupta

was appointed a member of the Commission for three years from 19 August 2012.

Professor Brian McCaughan AM

was appointed a member of the Commission for three years from 16 May 2010.

## **Principal Officers**

### **Chief Executive**

#### **Mr Ernest Schmatt PSM Dip Law (BAB)**

Mr Schmatt is responsible for all of the Commission's operations. He has input into all aspects of the Commission's work, from financial management to research, complaints, information systems management and education activities.

Mr Schmatt held senior legal and management positions in the Public Sector before his appointment, in October 1987, as the first Deputy Chief Executive of the Judicial Commission. In March 1989, he was appointed to the position of Chief Executive of the Judicial Commission. He is a solicitor of the Supreme Court of New South Wales and the High Court of Australia. Mr Schmatt was awarded the Public Service Medal in the 1997 Queen's Birthday Honours List for service to Public Sector management and reform, Public Sector industrial relations and judicial education in New South Wales.

### **Education Director**

**Ms Ruth Windeler BSc (University of Toronto, Canada)**

Ms Windeler is responsible for the Commission's judicial education programme. She works closely with the Education Committees of each court to plan and organise all Commission conferences and seminars, and is also responsible for the Commission's publishing programme.

Ms Windeler has held the position of Education Director since May 1996. Her career in professional education and training began in 1975 in Canada and includes appointments in a number of Commonwealth countries. She has been Director of the Canadian Advocates' Society Institute; Co-ordinator and Instructional Design Administrator for the Institute of Professional Legal Studies in New Zealand; Director of Standards and Development for the Law Society of Hong Kong; Secretary to the Advocacy Institute of Hong Kong; and Head of the Department of Continuing Medical Education and Re-certification for the Royal Australasian College of Surgeons.

**Director, Research and Sentencing**

**Mr Hugh Donnelly BA (Melb) LLB (UNSW) LLM (Syd)**

Mr Donnelly was appointed in July 2007 and is responsible for the Commission's research program and for JIRS. He was admitted as a legal practitioner in 1992 and his prior experience includes five years as Principal Research Lawyer and three years as High Court lawyer at the Office of Director of Public Prosecutions (NSW), and three years as Manager of the Commission's Research and Sentencing Division. He is the author of several publications on evidence and sentencing law, including the *Sentencing Bench Book*.

**Director, Information Management and Corporate Services**

**Mr Murali Sagi PSM BEng MBA (CSU) GradCertPSM (UWS) Dip Law (LPAB) MIEAust FACS**

Mr Sagi was appointed in January 2000 and is responsible for information management, corporate services and Lawcodes. He has over 25 years of experience in managing complex projects in both the government and private sectors and has provided technical assistance to many organisations including AusAID, United Nations, Asia Development Bank and the Commonwealth Secretariat, London for capacity building projects in legal sector in Indonesia, West Bank and Gaza, Cambodia, India, Sri Lanka and Papua New Guinea.

Mr Sagi was awarded the Public Service Medal in 2007 Queen's Birthday Honours List for outstanding service to the Judicial Commission, particularly in the provision of information technology. He was also named as the "Chief Information Officer - Government" of the year at the National IT&T awards, 2003 and is a Fellow of the Australian Computer Society.

### **Annual Reports**

Downloadable versions of the Commission's Annual Reports

Our annual report informs those we serve and our partners about the Judicial Commission's performance and programs. The 2011-12 annual report reviews our output and activities during the 2011-12 financial year. It shows our commitment to being accountable to those we serve and work with about our performance and outcomes.

Follow the links below to view the Judicial Commission's annual report online. To obtain a hard copy of one of the Commission's annual reports, please order from [shop.nsw](http://shop.nsw.gov.au).

### **Access to Information**

Access to Information under the Government Information (Public Access) Act 2009

The *Government Information (Public Access) Act 2009* (the GIPA Act) replaced the *Freedom of Information Act 1989* from 1 July 2010.



The Judicial Commission of NSW is an agency for the purpose of the GIPA Act. The Commission holds information relating to its administrative, research, sentencing, education, and complaint handling functions.

Information that relates to the Commission's (including the Conduct Division) complaint handling, investigative and reporting functions is “*excluded information*” under Schedule 2 of the GIPA Act. This means that an access application cannot be made for this information under that Act.

Information in relation to the Commission’s administrative, research, sentencing, and education functions may be made publicly available by the Commission subject to any overriding public interest against disclosure. Access applications for information relating to these functions should be made using the [Access Application Form](#). All such applications will be determined in accordance with Part 4 of the GIPA Act.

Further information in relation to making an access application to the Commission can be obtained by contacting:

Right to Information Officer

Judicial Commission of NSW  
GPO Box 3634  
Sydney NSW 2001

Ph: (02) 9299 4421

Email: [judcom@judcom.nsw.gov.au](mailto:judcom@judcom.nsw.gov.au)

Further information in relation to the operation of the GIPA Act can be obtained from the website of the Office of the Information Commissioner: <http://www.oic.nsw.gov.au/>.

## **Publication guide**

Section 21 of the *Government Information (Public Access) Act 2009* (GIPA ACT) requires an agency to adopt its first publication guide within six

months after the commencement of the section. Section 22 of the GIPA Act requires an agency to notify the Information Commissioner before adopting or amending a publication guide.

### [Judicial Commission of NSW Publication Guide](#)

#### **Documents tabled in Parliament**

Judicial Commission annual reports and Conduct Division reports are tabled in Parliament.

Annual reports can be accessed [here](#).

Conduct Division reports are “*excluded information*” under Schedule 2 of GIPA.

#### **Policy documents**

Section 23 of the *Government Information (Public Access) Act 2009* provides that policy documents are such of the following documents as are used by the agency in connection with the exercise of those functions of the agency that affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject (but does not include a legislative instrument):

- a) a document concerning interpretations, rules, guidelines, statements of policy, practices or precedents,
- b) a document containing particulars of any administrative scheme,
- c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme,
- d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme,

e) any other document of a similar kind.

The Commission's policy documents are:

[Guide for Complainants](#)

[The Complaint Process](#)

[The Judicial Commission's Code of Conduct](#)

### **Disclosure log**

Section 25 of the *Government Information (Public Access) Act 2009* provides that an agency must keep a disclosure log that records information about access applications made to the agency that the agency determines by deciding to provide access (to some or all of the information applied for) if the information is information that the agency considers may be of interest to other members of the public. Section 26 of the Act sets out the type of information required to be recorded in the disclosure log.

The Judicial Commission will disclose here any information about an access application it considers may be of interest to other members of the public.

### **Government contracts register**

Division 5 of the *Government Information (Public Access) Act 2009* requires an agency to keep a register of government contracts that records the information required to be disclosed by that Division.

The Commission is committed to the purchase of all goods, equipment and services through established NSW Government contracts systems where possible and reasonably practical.

The Commission will ensure that all its policies, procedures and practices related to tendering, contracting and the purchase of goods or services are consistent with best practice and the highest standards of ethical conduct. Our business dealings will be transparent and open to public scrutiny wherever possible.

**Current Judicial Commission contracts valued at \$150,000 or more:**

**Lease**

Level 5, 301 George Street, Sydney 2000

Name and business address of the contractor:

The Wynyard Centre Pty Ltd  
Level 13, 301 George Street, Sydney 2000

Effective date of contract: 1 November 2010

Duration of the contract: 5 years

End date of contract: 31 October 2015

Particulars of the contract: Lease level 5 Thakral House, 301 George Street, Sydney (includes cleaning and outgoings expenses):

Estimated amount payable to the contractor under the contract per year:  
\$440,000

Rent review: Market Review Dates 1 November 2012, 1 November 2014

**Non-disclosure record**

Section 6(5) of the *Government Information (Public Access) Act 2009* (the GIPA Act) requires an agency to keep a record of any open access information that it does not make publicly available on the basis of an overriding public interest against disclosure.

Section 6(2) of the GIPA Act provides that open access information is to be made publicly available free-of-charge on a website maintained by the agency and can be made publicly available in any other way that the agency considers appropriate.

Open access information includes information about an agency contained in any document tabled in Parliament by or on behalf of the agency.

Judicial Commission annual reports and Conduct Division reports are tabled in Parliament.

Annual reports can be accessed [here](#).

Conduct Division reports are “*excluded information*” under Schedule 2 of GIPA.

### **List of major assets**

Clause 5(2) of the *Government Information (Public Access) Regulation 2009* includes, as open access information, a list of major assets, other than land holdings, appropriately classified and highlighting major acquisitions during the previous financial year.

The Commission has no major capital assets. For accounting purposes its highest asset is valued at \$19,263 as at 30 June 2010.

### **Property disposal**

Clause 5(2) of the *Government Information (Public Access) Regulation 2009* includes, as open access information, a list of the total number and total value of properties disposed of during the previous financial year.

The Commission has not disposed of any properties.

### **Complaints**

Complaints against judicial officers

The Judicial Commission has power to examine complaints about the ability and behaviour of judicial officers.

The complaint function provides a means for people to have their complaints examined by an independent body. An important role of the Commission is not only to receive and examine complaints made against judicial officers, but to determine which complaints require further action.

- [Guide for Complainants](#)

- Complaint form ([pdf](#)) or ([rtf](#))

## **Guide for Complainants**

A guide to complaints against Judicial Officers

### **The Commission's Function**

The Commission's function is to investigate a complaint, not to discipline a judicial officer. There is no power in the Commission or the Conduct Division, or the head of jurisdiction, to impose any form of punishment on a judicial officer. The Commission is not a disciplinary body and has not been invested with such powers. It cannot punish a judicial officer by imposing fines, demotions or similar penalties.

### **Who is a judicial officer?**

A "judicial officer" under the Judicial Officers Act means a -

- judge or associate judge of the Supreme Court of New South Wales;
- member (including a judicial member) of the Industrial Relations Commission of New South Wales;
- judge of the Land and Environment Court of New South Wales;
- judge of the District Court of New South Wales;
- magistrate; and
- the President of the Administrative Decisions Tribunal.

The definition of "judicial officer" includes acting appointments to a judicial office but does not include arbitrators, registrars, chamber registrars, members of tribunals or legal practitioners.

The Commission has no power to examine complaints against Federal judicial officers or a person who is no longer a judicial officer.

### **Who can make a complaint?**

A complaint may be made to the Commission by any person or may be referred to the Commission by the Attorney General.

### **Legislative requirements**

The Judicial Officers Act requires that a complaint is in writing and that it identifies the complainant and the judicial officer concerned. The Judicial Officers Regulation requires that particulars of a complaint are verified by statutory declaration and that the complaint is lodged with the Chief Executive to the Commission.

### **Assistance to Complainants**

The Commission provides assistance and advice to the public about the complaints process through:

- its website;
- a plain English brochure outlining the complaints process;
- assistance to potential complainants with translation and interpreting services;
- responding to telephone and face-to-face enquiry.

### **Complaints not within the Commission's jurisdiction**

The Commission does not review a case for judicial error, mistake, or other legal ground. Reviews of those matters are the function of appellate courts.

Allegations of corruption against a judicial officer are required to be referred by the Judicial Commission to the Independent Commission Against Corruption for investigation by that body.

### **Acknowledge receipt of complaints**

In most cases complaints submitted to the Commission will be acknowledged in writing within one week of receipt.

### **Investigating a Complaint**

On receiving a complaint, the Commission will conduct a preliminary investigation into the matter. In every case, the judicial officer is advised of the fact that a complaint is made to the Commission and provided with a copy of the documentation.

The Commission conducts a thorough investigation of every complaint received, which often involves an examination of transcripts, sound recordings, judgments and other material relevant to the complaint. If necessary, a response to the complaint is sought from the judicial officer.

### **Confidentiality**

The preliminary examination of a complaint by the Commission will be conducted, as far as practicable, on a confidential basis. The legislative requirement of confidentiality protects the judiciary from unjust criticism and protects those who furnish information to the Commission in the course of its examination of a complaint.

The proceedings of the Commission and all information and materials, written or oral, obtained by the Commission in the course of its preliminary examination are confidential.

### **Time standards for finalisation of investigations**

The Commission aims to finalise the investigation of 90% of complaints within six months of receipt and 100% within 12 months of receipt.

### **Action Following Preliminary Examination**

Following its preliminary examination, the Commission must take one of the following actions:

- summarily dismiss the complaint;
- refer the complaint to the relevant head of jurisdiction; or
- refer the complaint to the Conduct Division.

### **Summary Dismissal**



A complaint must be summarily dismissed if one or more of the following grounds exist:

- the complaint is one that the Commission is required not to deal with;
- the complaint is frivolous, vexatious or not in good faith;
- the subject matter of the complaint is trivial;
- the matter complained about occurred at too remote a time to justify further consideration;
- the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review;
- the person who is the subject of the complaint is no longer a judicial officer; or,
- in all the circumstances further consideration of the complaint is unnecessary or unjustifiable.

Where a complaint is summarily dismissed the Commission will, as soon as practicable after its determination is made, inform the complainant in writing and provide the reasons for dismissing the complaint. This will include a reference to the relevant provisions of the legislation that have been applied in the handling and determination of the complaint. The judicial officer will also be advised in writing of the Commission's determination.

Many of the complaints that are dismissed by the Commission, because they disclose no misconduct, are nonetheless helpful in the improvement of the judicial system. The feedback from the examination of complaints provides valuable information for the further development of judicial education programs conducted by the Commission.

### **Reference to a head of jurisdiction**

Where a complaint has not been dismissed following the preliminary examination by the Commission, but in its opinion it does not justify

reference to the Conduct Division, the Commission may refer the matter to the relevant head of jurisdiction.

The Commission will notify the head of jurisdiction in writing of its decision and will formally refer the matter, including all relevant material, for attention.

In referring a complaint to the head of jurisdiction the Commission may include recommendations as to what steps might be taken to deal with the complaint, such as counselling by the head of jurisdiction.

Where a complaint is referred to the relevant head of jurisdiction the Commission will, as soon as practicable after the decision is made, advise the complainant and judicial officer of the action taken.

In relation to a complaint referred to the head of jurisdiction, the head of jurisdiction may counsel the judicial officer, or make administrative arrangements within his or her court which are designed to avoid a recurrence of a problem.

### **Reference to the Conduct Division**

Where a complaint has not been dismissed following the preliminary examination by the Commission, and has not been referred to the head of jurisdiction, it must be referred to the Conduct Division.

The function of a Conduct Division is to examine and deal with a particular complaint that has been referred to it by the Commission.

The Conduct Division comprises a panel of two judicial officers (one of whom may be a retired judicial officer) and one of the two community representatives nominated by Parliament. The membership of the Conduct Division will be determined by the Commission. The Commission will also appoint one member of the Conduct Division as Chairperson.

Where a complaint is referred to the Conduct Division the Commission will, as soon as practicable after the decision is made, advise the complainant and the judicial officer of the action taken.

## **The Conduct Division of the Commission**

The function of a Conduct Division of the Commission is to examine and deal with a particular complaint that has been referred to it by the Commission. The legislation provides that the Conduct Division may hold hearings in relation to a complaint and that a hearing may be held in public or in private.

The Conduct Division has the functions, protections and immunities conferred by the Royal Commissions Act 1923 on commissioners appointed under that Act. The Royal Commissions Act applies to any witness summoned by or appearing before the Conduct Division.

The ultimate power of a Conduct Division in relation to a complaint is to make a report to the Governor, setting out its findings as to whether the complaint that has been investigated is wholly or partly substantiated, and whether it could justify Parliamentary consideration of the removal of the judicial officer from office. In New South Wales the holder of a judicial office can only be removed by the Governor on an address from both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity<sup>1</sup>.

### **Report to Governor and others**

If the Conduct Division forms an opinion that a complaint could justify parliamentary consideration of the removal of the judicial officer complained about from office, it must present to the Governor a report setting out its findings of fact and that opinion. A copy of the report must also be furnished to the Commission, the Attorney General and to the complainant. The copy to the complainant is provided only after it has been laid before each House of Parliament.

### **Report to the Head of Jurisdiction**

If the Conduct Division forms an opinion that a complaint is wholly or partly substantiated but does not justify parliamentary consideration of the removal of the judicial officer complained about from office, it must send a report to

the relevant head of jurisdiction setting out its conclusions. The report may also include recommendations as to what steps might be taken to deal with the complaint. A copy of this report is also provided to the judicial officer and the Commission.

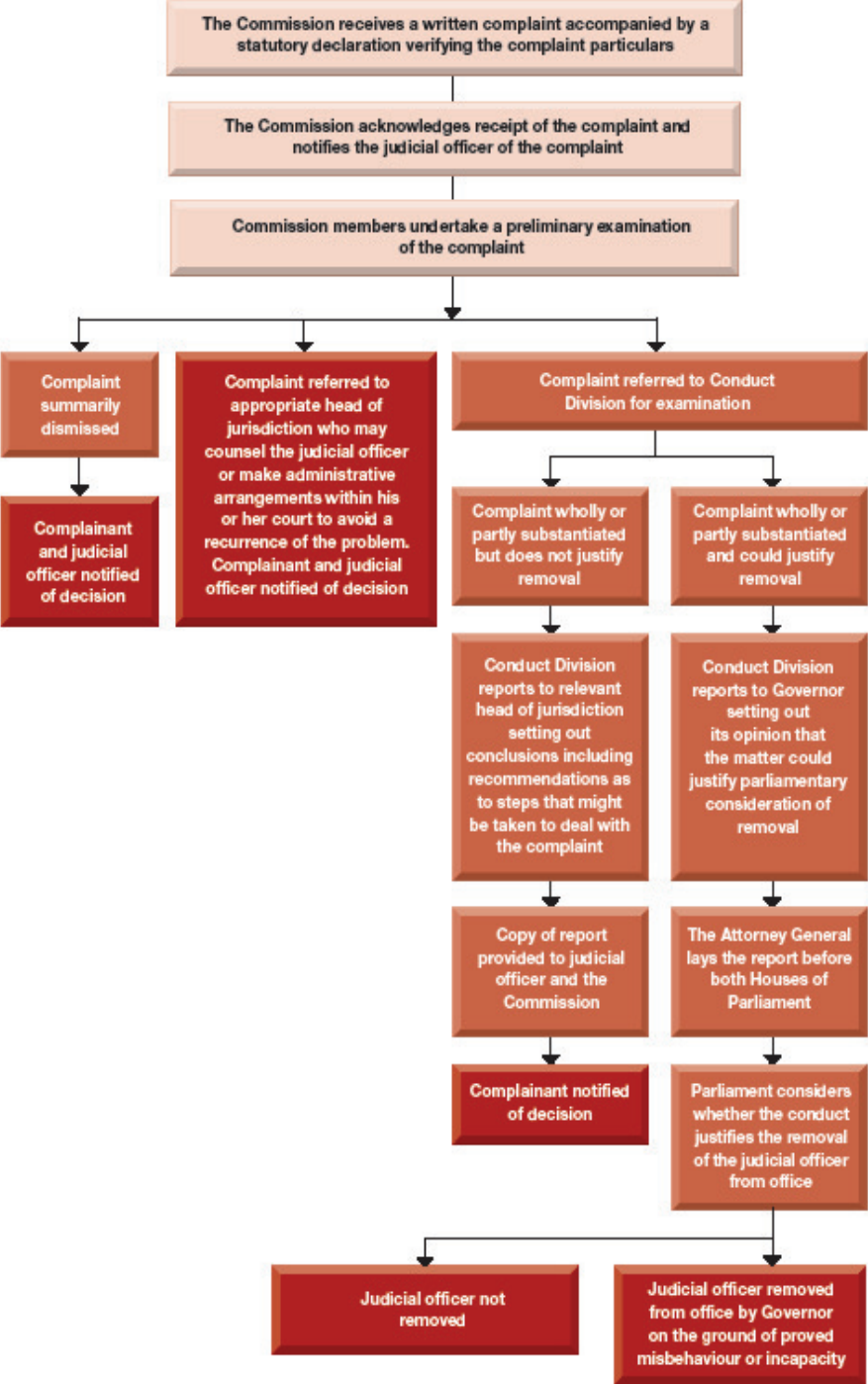
### **Annual Report**

The Judicial Officers Act 1986 requires that certain information, including statistics and information about complaints disposed of during the year, be reported to Parliament. This information appears in the Annual Report of the Commission. The Report is available in hard copy from the Commission or can be found on the website.

### **The complaints process**

[View a flowchart](#) (pdf).

# The complaints process





## JUDICIAL COMMISSION OF NEW SOUTH WALES

Level 5, 301 George Street, Sydney NSW 2000  
GPO Box 3634, Sydney NSW 2001  
DX 886 Sydney  
www.judcom.nsw.gov.au

Telephone: (02) 9299 4421  
Facsimile: (02) 9290 3194  
Email: [complaints@judcom.nsw.gov.au](mailto:complaints@judcom.nsw.gov.au)

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### **Instructions for Lodging a Complaint Against a Judicial Officer**

These are the instructions for lodging a complaint with the Judicial Commission. Use this form or a copy of the form to lodge your complaint. Additional copies are available from the Commission's office and electronic copies can be downloaded from the Commission's website ([www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)).

1. One of the responsibilities of the Commission under its legislative charter is to deal with complaints made against judicial officers.
2. A "judicial officer" under the *Judicial Officers Act 1986* means a —
  - Judge or associate Judge of the Supreme Court
  - member (including a judicial member) of the Industrial Relations Commission
  - Judge of the Land and Environment Court
  - Judge of the District Court
  - the President of the Children's Court
  - Magistrate
  - the President of the Administrative Decisions Tribunal.

The definition of judicial officer includes acting appointments to a judicial office but does not include people such as arbitrators, registrars, chamber registrars, assessors, members of tribunals, legal representatives, retired judicial officers or federal judicial officers.

3. The *Judicial Officers Act* requires that a complaint be in writing and that it name the person who is complaining and the judicial officer. The particulars of a complaint must be verified by statutory declaration.
4. If your complaint falls within the Commission's powers, you may use this form to lodge a complaint against a judicial officer. Complete the form by typing or printing all of the information requested on both pages. Make sure the information provided is complete and accurate.

*Complaint Against A Judicial Officer*

5. Please describe the circumstances that led to your complaint in the “Details of Complaint” section. Clearly set out dates and places of hearing if these are relevant to the complaint. List all events in the order in which they happened. Attach additional sheets and other relevant documentation, as needed, to complete your statement.
6. **Sign the complaint form in the space provided and have your signature witnessed by a Justice of the Peace or other person as authorised by the *Oaths Act 1900*.**
7. It is recommended that you make a copy of the complaint for your records.
8. If you wish to make a complaint about more than one judicial officer please use a separate form for each one.
9. Send the original of the complaint form to the Chief Executive of the Commission at the address below. Please contact the Commission by mail, email or telephone if you need additional forms or have any questions about the procedures.

Chief Executive  
Judicial Commission of NSW  
GPO Box 3634  
Sydney NSW 2001

ph: 9299 4421  
email: [complaints@judcom.nsw.gov.au](mailto:complaints@judcom.nsw.gov.au)  
web: [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)

# Complaint Against a Judicial Officer

To — THE JUDICIAL COMMISSION OF NSW

I, \_\_\_\_\_  
[Your name]

of \_\_\_\_\_  
[Your address]

wish to complain against \_\_\_\_\_ of the \_\_\_\_\_ Court.  
[Judicial officer's name]

My complaint is as follows:

---

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---

---

In support of these allegations I submit the attached Details of Complaint which I solemnly and sincerely declare are true, and request that the complaint be investigated by the Judicial Commission.

I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act* 1900.

Declared at: \_\_\_\_\_ on \_\_\_\_\_  
[place] [date]

\_\_\_\_\_  
[signature of declarant]

in the presence of an authorised witness, who states:

I, \_\_\_\_\_ a \_\_\_\_\_  
[name of authorised witness] [qualification of authorised witness]

certify the following matters concerning the making of this statutory declaration by the person who made it:  
[\* please cross out any text that does not apply]

1. \*I saw the face of the person OR \*I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering, and
2. \*I have known the person for at least 12 months OR \*I have not known the person for at least 12 months, but I have confirmed the person's identity using an identification document and the document I relied on was:

\_\_\_\_\_ [describe identification document relied on]

\_\_\_\_\_  
[signature of authorised witness]

\_\_\_\_\_  
[date]



**Details of Complaint**

Lined area for entering the details of the complaint.

*[Attach additional sheets, as needed]*

Law Reform Commission of Western Australia

# Complaints Against Judiciary

Project 102

Discussion Paper

September 2012



## The Law Reform Commission of Western Australia

### Commissioners

Chair: Mr R Douglas BA (Hons), LLB (Hons) (ANU)  
Former Chair: Ms MA Kenny BJuris, LLB (Hons) (UWA), LLM (Iowa)  
Members: Mr A Sefton BComm LLB (Hon) (ANU)  
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# Acknowledgements

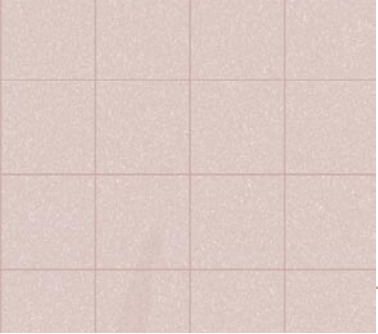
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The Commission expresses its gratitude to the writer for this project, the Hon Neville Owen, formerly the President of the Court of Appeal, Supreme Court of Western Australia.

His Honour's eminence, wide experience and familiarity with courts and judicial officers in a number of jurisdictions contributed greatly to the consideration of the subject matter of this reference.

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Special thanks to Dr Tatum Hands (Legal Editor), Cheryl MacFarlane (Technical Editor) and Sharne Cranston (Executive Assistant) for their invaluable assistance in preparing this Discussion Paper for publication.



# Introduction

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

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

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

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

## BACKGROUND

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

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

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



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

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

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

## COMPLAINTS AGAINST JUDICIARY

### Dealing with complaints

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

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

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

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

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

## Complaint categories

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

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

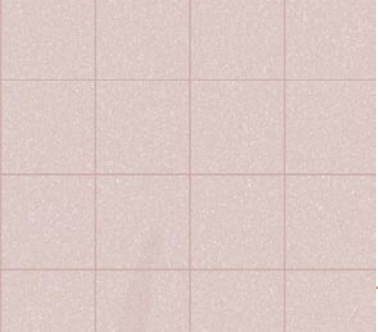
In attempting to identify the nature and incidence of complaints it may be more appropriate to utilise a different method of categorisation, namely:

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

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

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

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

### The incidence of complaints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Perceived problems with the current system

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

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

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

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

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

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

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

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

### *Parliament and the executive*

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

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

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

### *Judges and the courts*

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

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

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



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

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

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

## STRUCTURE OF THIS DISCUSSION PAPER

The terms of reference recognise that a complaints system:

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

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

## Submissions to the Law Reform Commission

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

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

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Submissions due:  
7 December 2012

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

# Chapter 1

## Judicial Accountability and Judicial Independence



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# Judicial accountability

# 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# Judicial independence

# 1

## THE MEANING OF 'JUDICIAL INDEPENDENCE'

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

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

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

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

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

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

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

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

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

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

## HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE

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

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

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

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

## JUDICIAL INDEPENDENCE AND THE RULE OF LAW

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

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

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

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

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

## JUDICIAL INDEPENDENCE AND THE DOCTRINE OF SEPARATION OF POWERS

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

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

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

22. Ibid 3 and following.

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

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



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

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

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

26. *Ibid.*

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

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

# Chapter 2

## Current Complaints System in Western Australia



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# The complaints system in Western Australia

# 2

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

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

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

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

## JUDICIAL OFFICER

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

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

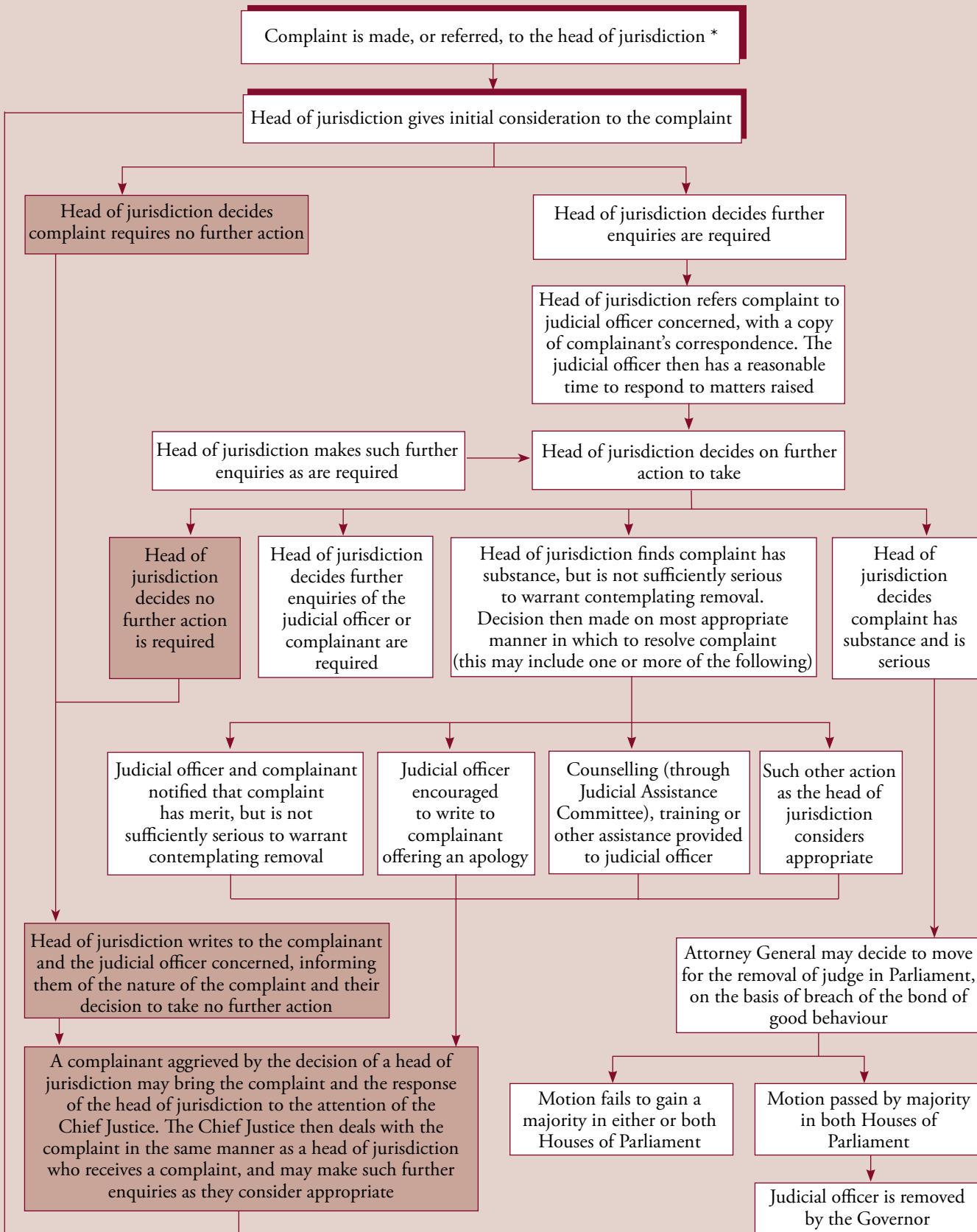
The term ‘holder of judicial office’ is not exhaustively defined in s 121 of the Criminal Code. The section simply states that the term includes an ‘arbitrator or umpire and any member of any board or court of conciliation or arbitration’.<sup>2</sup> However, the text of the Protocol suggests that it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

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

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

## CHART 1

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



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

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

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

## ORDINARY COMPLAINTS

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

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

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

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

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

3. Protocol [18].

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

5. Protocol [1]–[8].

6. Protocol [9].

7. Protocol [12].

8. Protocol [10].

9. Protocol 1.

10. Protocol [10].

11. Protocol [10].

12. Protocol [18].

13. Protocol [18].

14. Protocol [13].

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

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

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

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

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

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

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

15. Protocol [13]–[14].

16. Protocol [15].

17. Protocol [16].

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

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

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

## COMPLAINTS OF CRIMINAL MISCONDUCT

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

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

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

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

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

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

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

20. Protocol [17].

21. Protocol [18].

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

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

## COMPLAINTS ALLEGING UNFITNESS FOR OFFICE

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

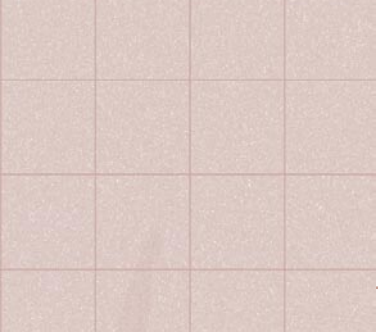
The Chief Justice or nominated judge must make recommendations as to whether the magistrate should be reinstated to his or her duties or suspended pending a consideration of his or her removal under clause 15. The Governor must act in accordance with that recommendation.

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

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





# Chapter 3

## Other Complaints Regimes

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# Australian federal courts

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

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

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

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

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

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

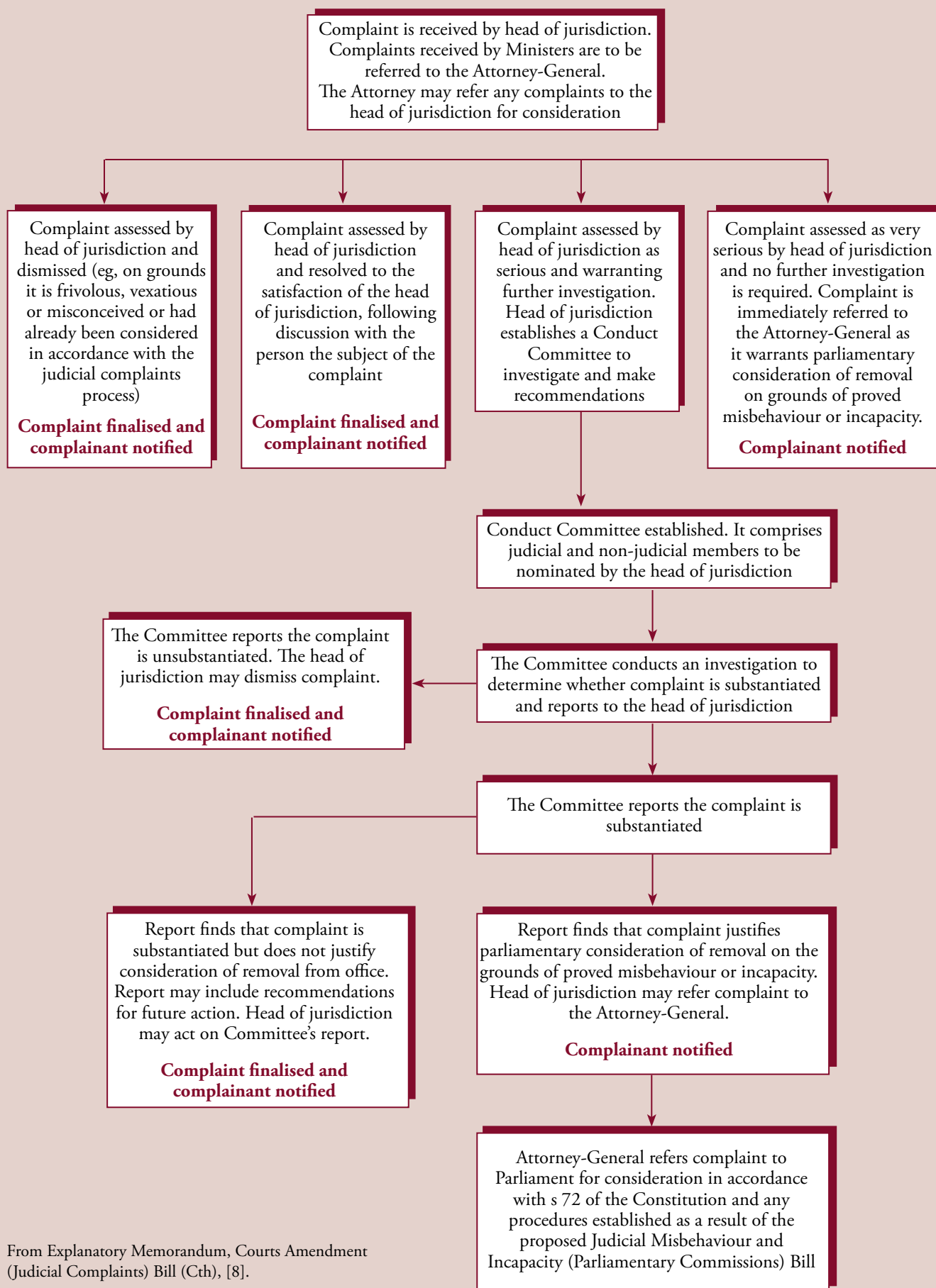
The Bill only covers complaints that could result in removal of a judge from office. In the discussion that follows, the complaints procedures as they currently exist are described.

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

## CHART 2

### New federal complaints process



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

## HIGH COURT OF AUSTRALIA

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

## FEDERAL COURT OF AUSTRALIA

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

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

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

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

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

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

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

4. Ibid [4].

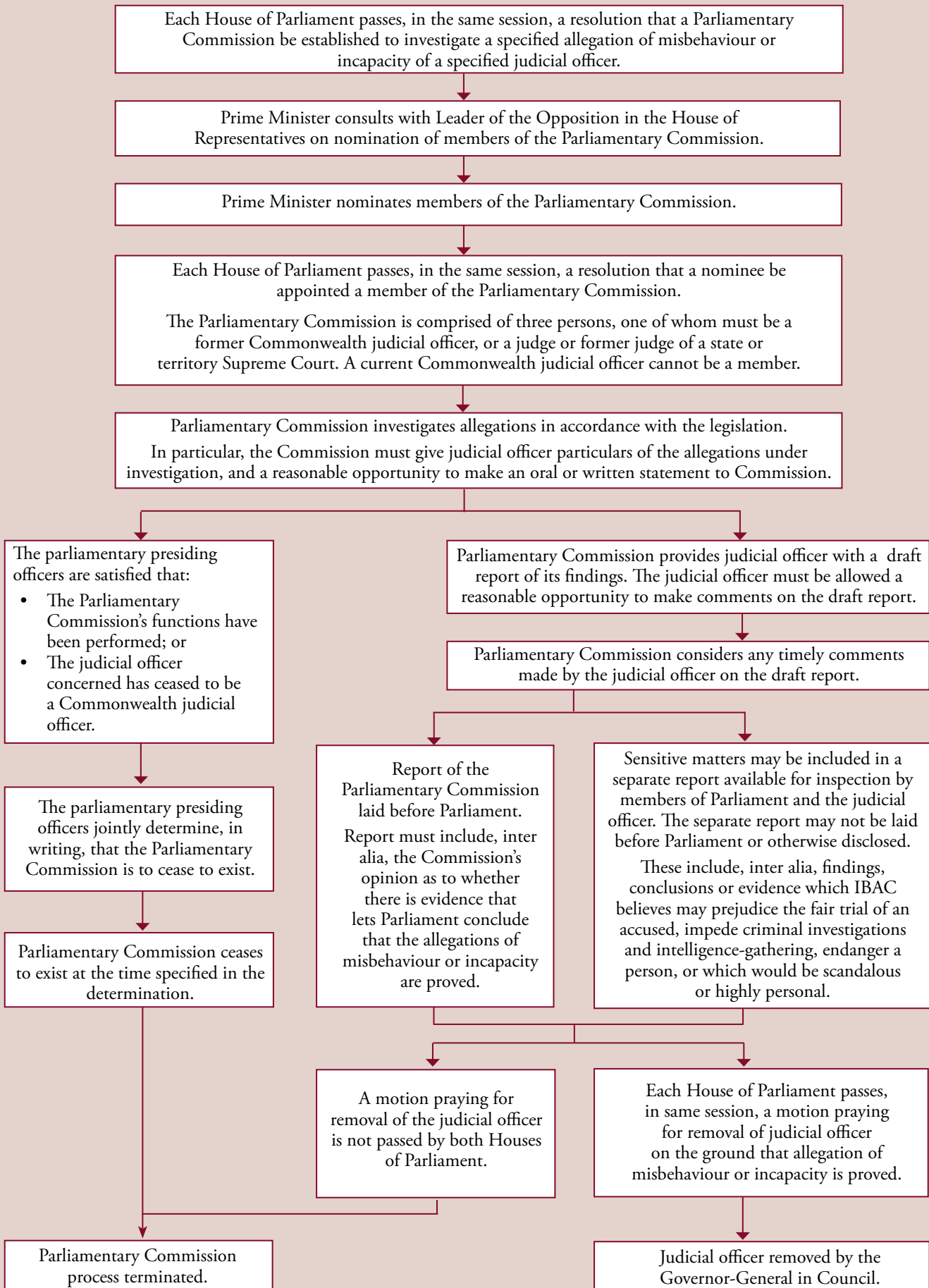
5. Ibid [7].

6. Ibid [9].

7. Ibid [11], [13].

### CHART 3

## Complaints process for Parliamentary Commissions





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

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

## FAMILY COURT OF AUSTRALIA

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

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

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

10. *Ibid* [13].



## Other Australian jurisdictions

### NEW SOUTH WALES

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

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

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

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

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

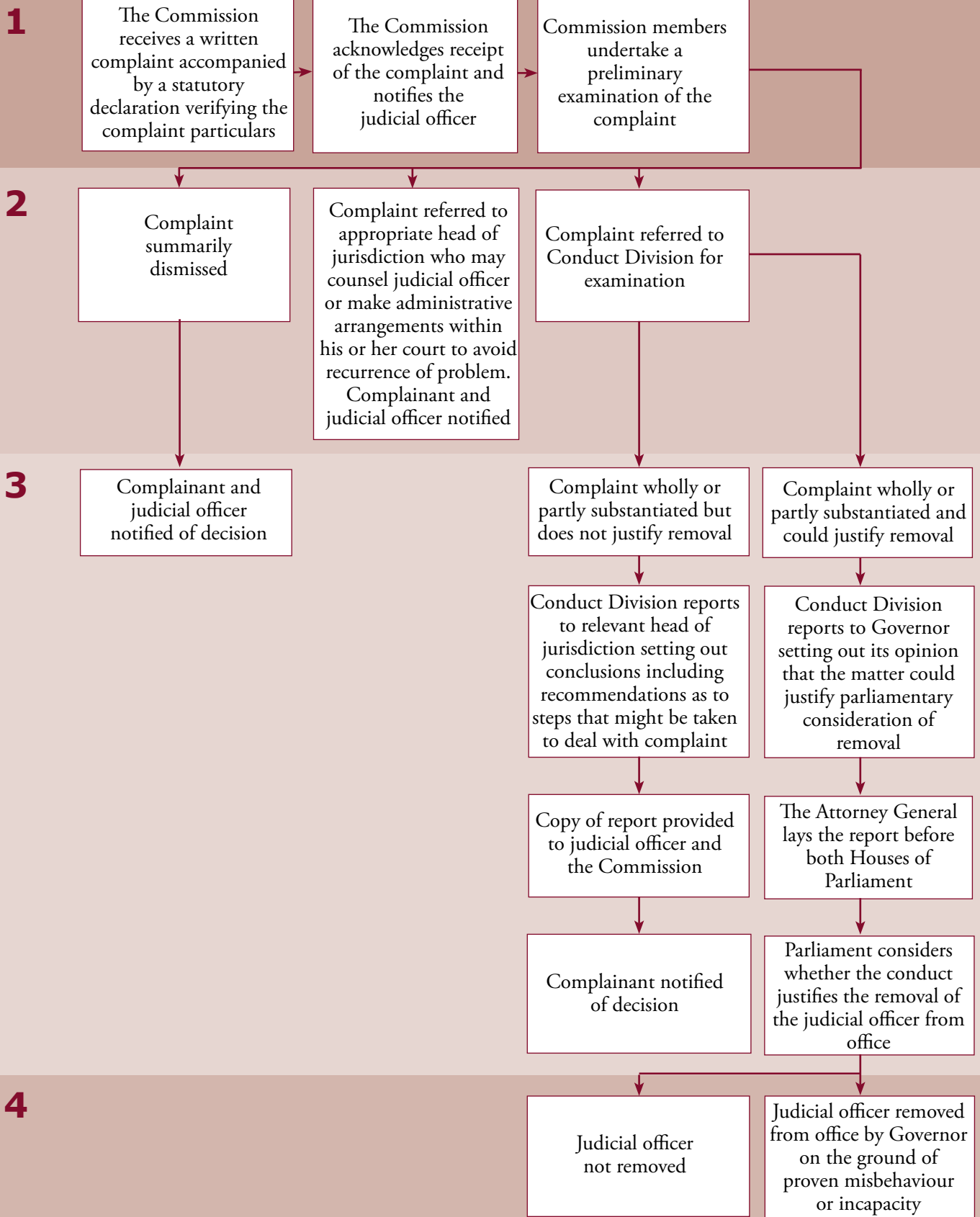
### Incidence of complaints

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

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

CHART 4

New South Wales complaints process



## Judicial officer

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

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

## Jurisdiction of the Judicial Commission

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

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

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

## Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Complaints of criminal misconduct*

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

### *Complaints alleging unfitness for office*

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

## VICTORIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Incidence of complaints

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

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

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

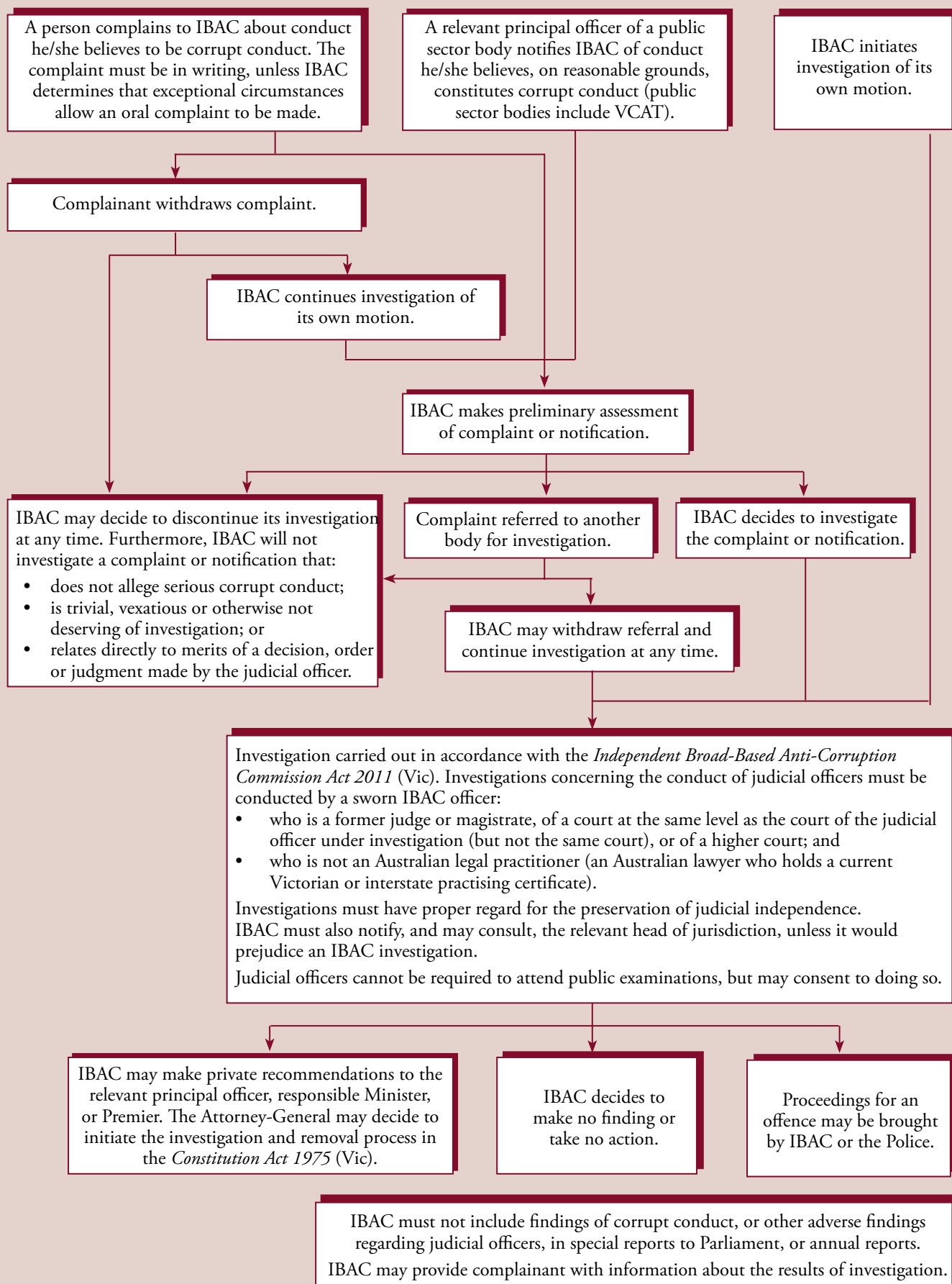
34. *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

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

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

## CHART 5

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





## Ordinary complaints

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

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

## Complaints alleging unfitness for office

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

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

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

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

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

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

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

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



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

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

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

## QUEENSLAND

### Incidence of complaints

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

### Ordinary complaints

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

### Complaints of criminal misconduct

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

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

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

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

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

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

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

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

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

### Complaints alleging unfitness for office

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## SOUTH AUSTRALIA AND TASMANIA

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

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

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

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

## AUSTRALIAN CAPITAL TERRITORY

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

### Incidence of complaints

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

### Judicial officer

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

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

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

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

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

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

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

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

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

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

### Ordinary complaints

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

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

### Complaints alleging unfitness for office

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

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

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

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

66. Complaints Policy, 2.

67. Complaints and Feedback Information Sheet, 1.

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

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

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

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

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

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

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

## NORTHERN TERRITORY

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

### Incidence of complaints

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

### Judicial officer

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

### Ordinary complaints

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

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

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

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

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

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

78. NT Protocol, 1.

79. NT Protocol, 1.

80. NT Protocol, 2.

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

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

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

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

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

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

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

81. NT Protocol, 2.

82. NT Protocol, 2.

83. NT Protocol, 3.

84. NT Protocol, 3.

85. NT Protocol, 4.

86. NT Protocol, 4.

87. NT Protocol, 4.

88. NT Protocol, 4.

### Complaints alleging unfitness for office

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

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

# Overseas jurisdictions

## ENGLAND AND WALES

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

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

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

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

### Judicial officer

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

### Ordinary complaints

#### *Initial stages*

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

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

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

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

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

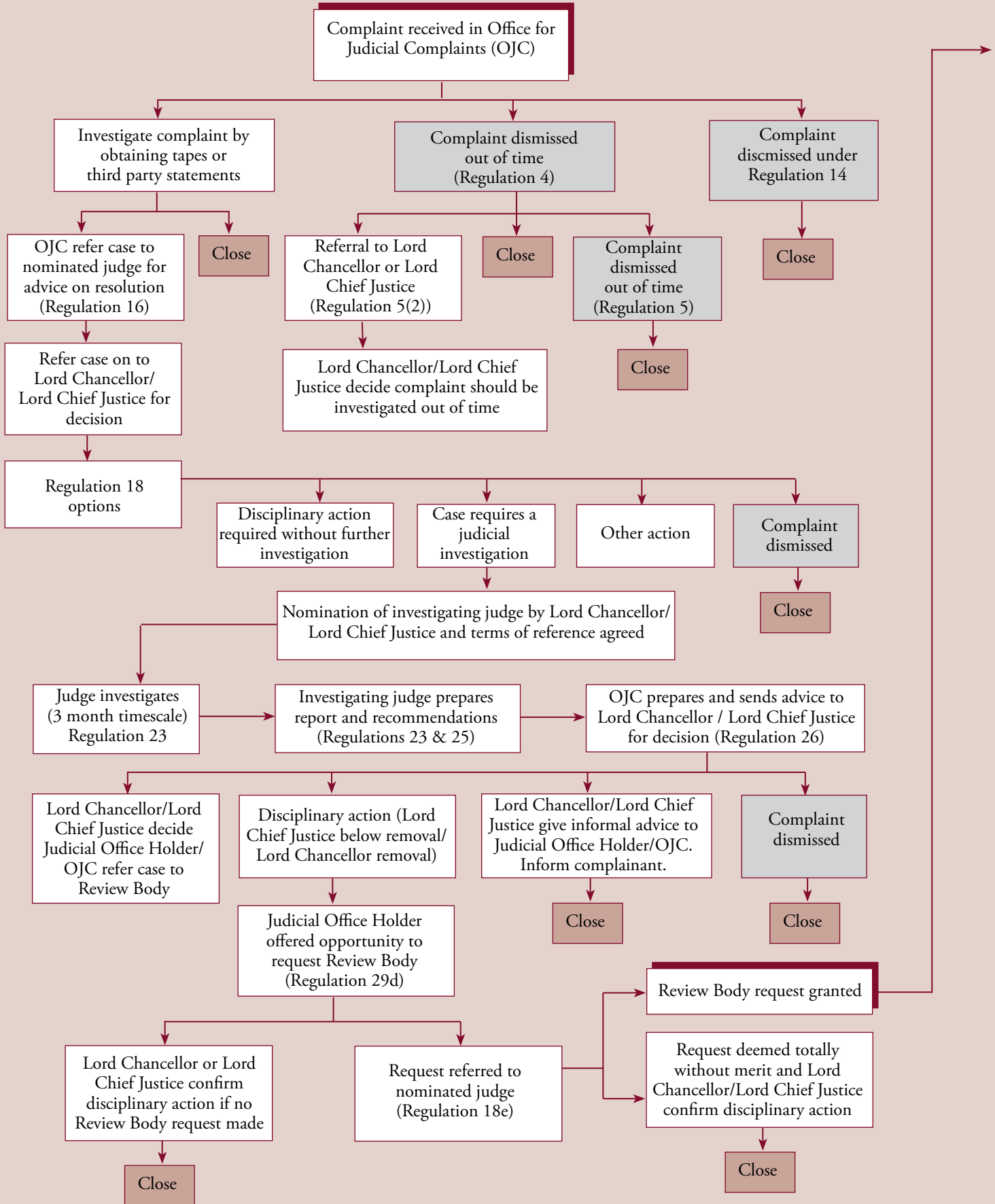
94. *Constitutional Reform Act 2005* (UK) s 100(3).

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



## CHART 6

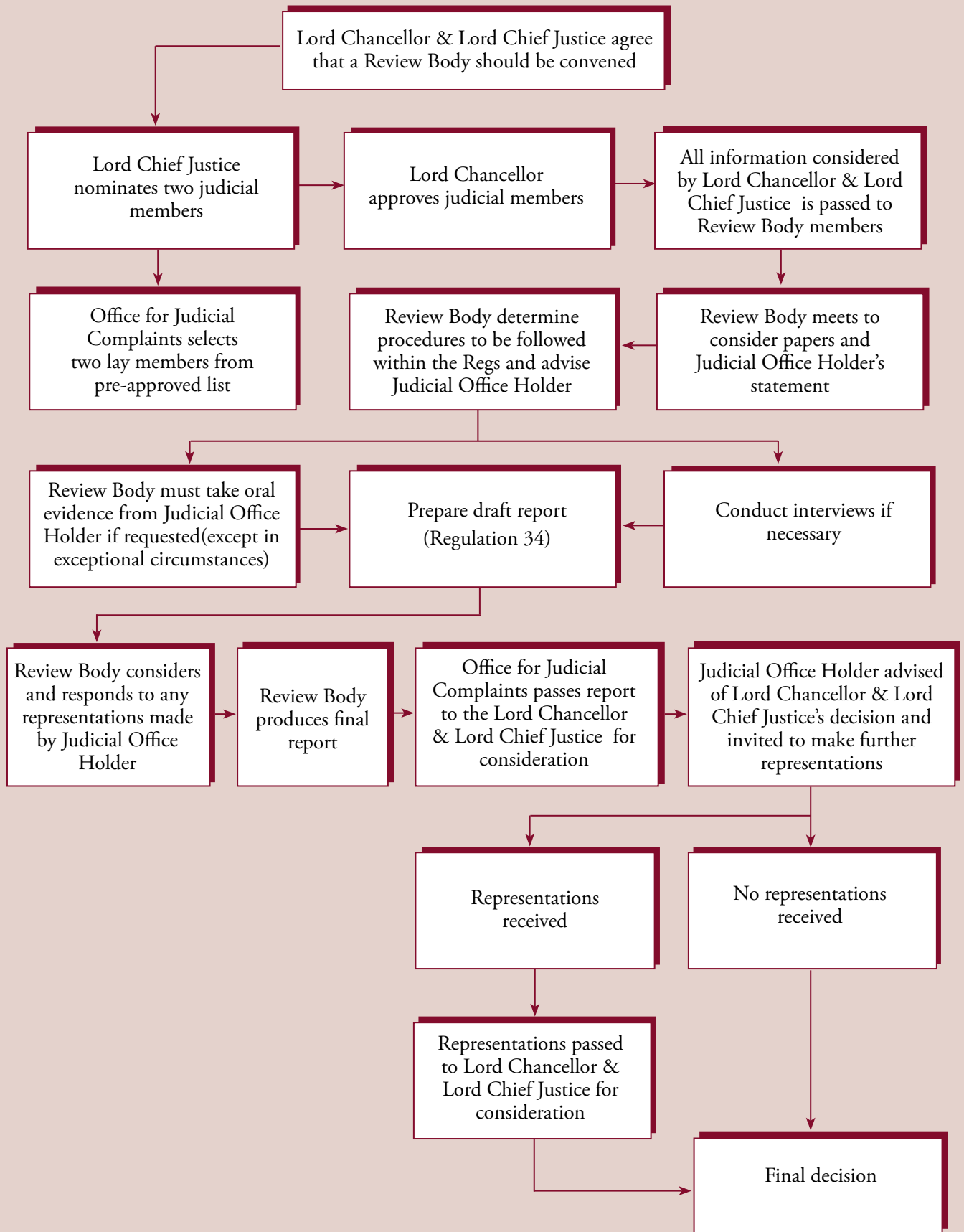
### Mainstream judiciary and coroner complaint process (England and Wales)



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

## CHART 7

### Review Body process (England and Wales)



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

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

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

### *Complaints that need further investigation*

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

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

### *Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Complaints alleging unfitness for office

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

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

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

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

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

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

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

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

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

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

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

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

## SCOTLAND

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

### Judicial officer

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

### Ordinary complaints

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

### Initial stage

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Complaints that need further investigation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Judicial Complaints Reviewer*

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

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

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

### *Complaints alleging unfitness for office*

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

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

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

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

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

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

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

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



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

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

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

## NEW ZEALAND

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

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

## Judges

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

## Complaints process

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

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

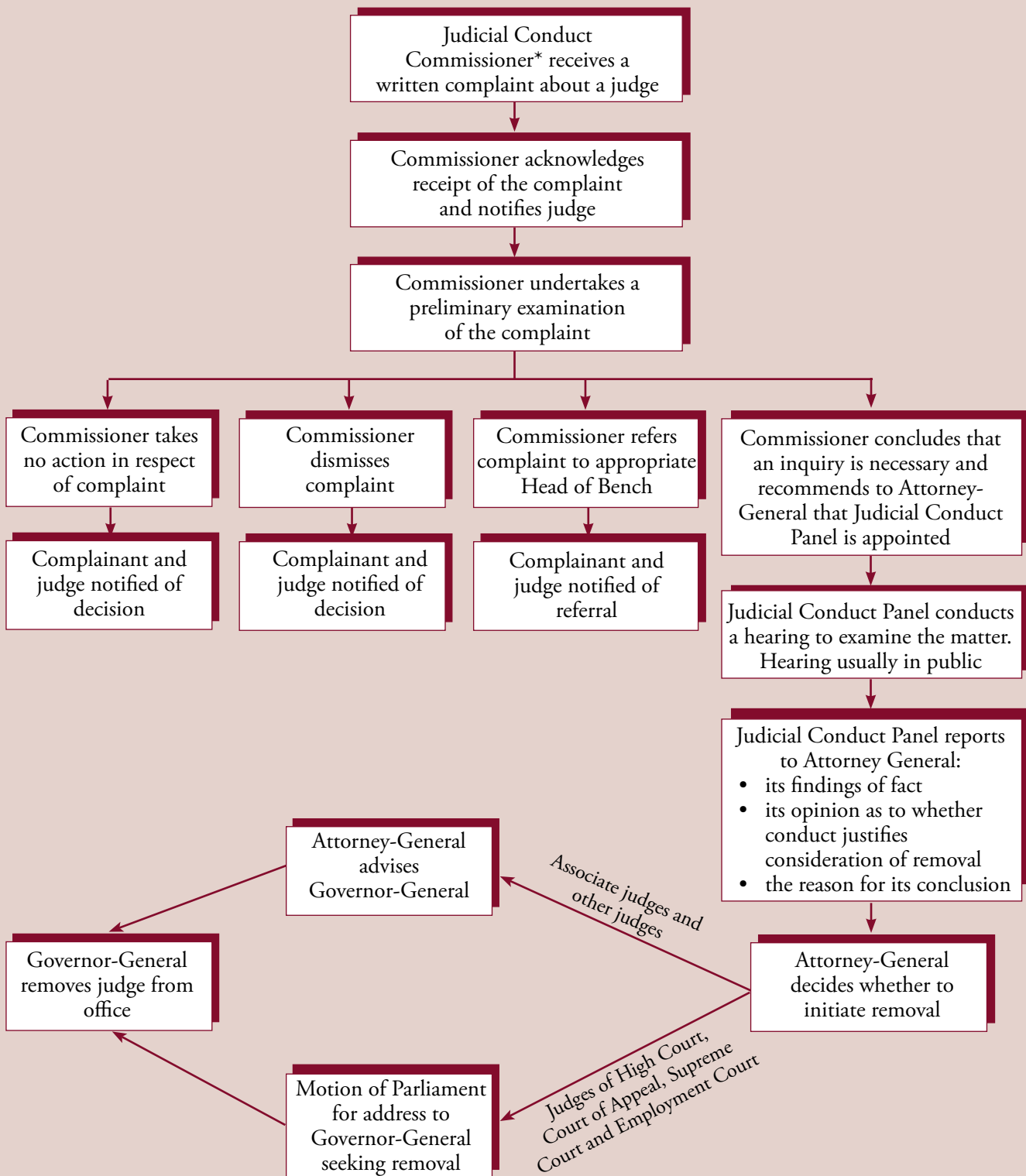
144. *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 13.

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



## CHART 8

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Complaints alleging unfitness for office

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

## UNITED STATES OF AMERICA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

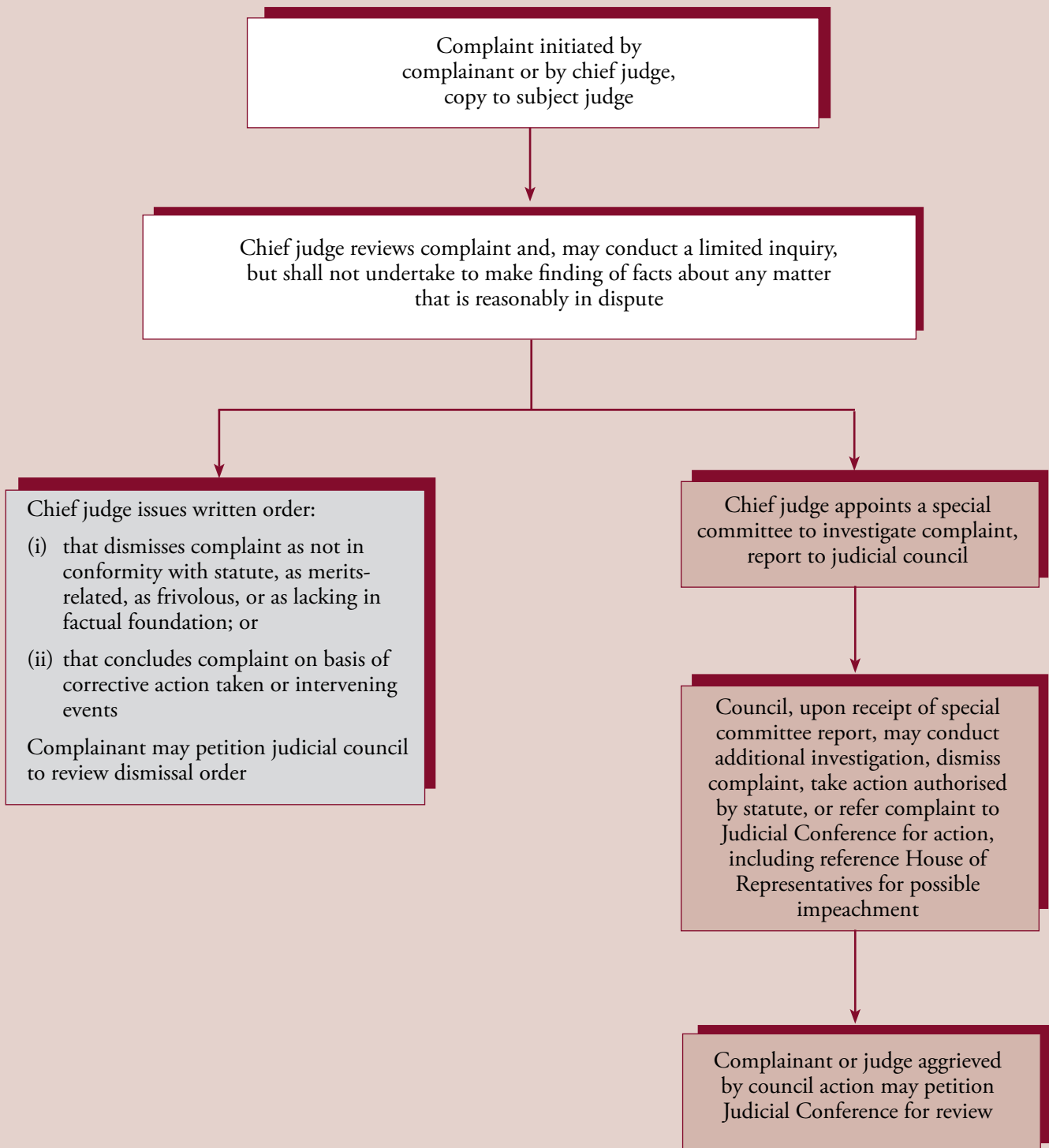
172. *Judicial Conduct and Disability Act of 1980*, 28-16 USC § 353(a)(3) (2006).

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

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

## CHART 9

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



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

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

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

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

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

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

## CANADA

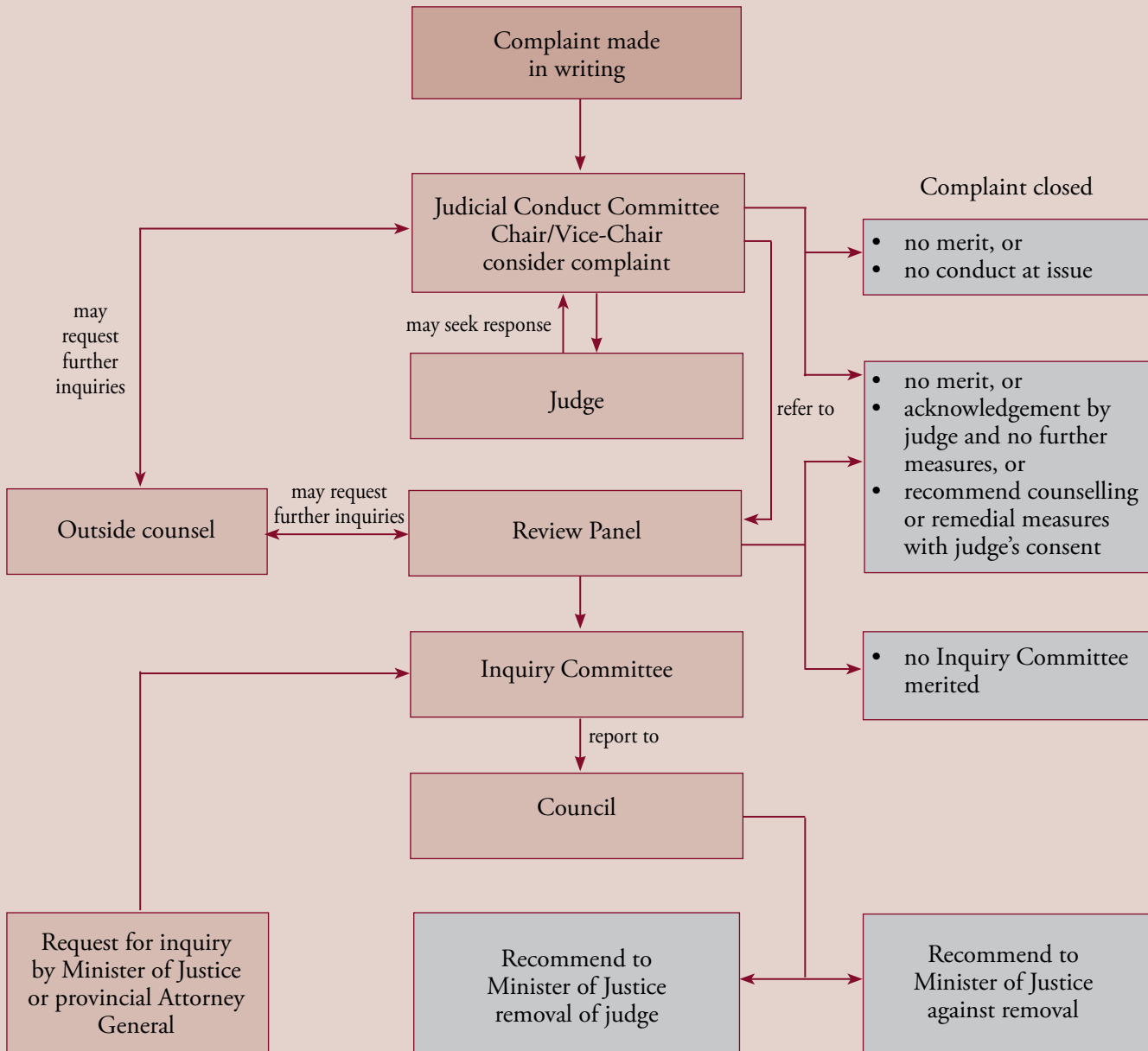
The Canadian Judicial Council (CJC) is a federal body created under the *Judges Act 1985*<sup>183</sup> with the mandate to promote efficiency, uniformity and accountability, and to improve the quality of judicial service in the superior courts of Canada.<sup>184</sup> The CJC is given the power to investigate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

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

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

## CHART 10

### Canadian federal complaints process



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



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

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

The Chairperson will view all information and

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

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

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

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

186. Ibid.

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

188. Ibid 3.2.

189. Ibid 3.5(a).

190. Ibid 3.5(b)–(c).

191. Ibid 5.1.

192. Ibid 8.1.

193. Ibid 9.5.



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

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

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

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194. Ibid 9.6.

195. Ibid 9.7.

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

197. Ibid.

# Chapter 4

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

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# Complaints against judiciary in Western Australia

# 4

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

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

## A FORMAL COMPLAINTS REGIME

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

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

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

## Resources required for a formal complaints regime

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

### PROPOSAL 1

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

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

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

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

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

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

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

### The appropriate form of a complaints handling body

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

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

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

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

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

### The judicial commission model

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

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

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



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

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

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

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

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

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

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

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

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

## A JUDICIAL COMMISSION FOR WESTERN AUSTRALIA?

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

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

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

### Judicial officers

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

#### PROPOSAL 2

##### Establish judicial commission

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

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

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



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

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

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

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

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

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

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

### Standing to make complaints

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

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

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

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

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

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

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

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

### Complaints covered by the proposed regime

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

#### *Unwarranted or trivial complaints*

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

#### *Delay in delivering reserved judgments*

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

#### *Ordinary complaints – disciplinary powers*

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

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

### PROPOSAL 3

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

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

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

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

## QUESTION B

**Sanctions**

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

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

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

### *Complaints of criminal misconduct*

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

### *Complaints alleging unfitness for office*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### PROPOSAL 4

##### Grounds for removal from office

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

#### PROPOSAL 5

##### Powers of Parliament

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

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

### QUESTION C

#### Power to suspend a judicial officer

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

### Suspension from office

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

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

### QUESTION D

#### Role of the Corruption and Crime Commission

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

### Role of the Corruption and Crime Commission

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

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

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

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

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

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

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

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



## Procedural fairness

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

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

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

## Publicity

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

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

## Staff of a judicial commission

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

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

### PROPOSAL 6

#### Procedural fairness

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

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

### QUESTION E

#### Procedural fairness

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

### QUESTION F

#### Publicity of complaints

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

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

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

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

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

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

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

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

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

**Membership of a judicial commission**

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

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

**Composition of any conduct division**

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

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

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

### Additional functions of a judicial commission

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

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

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

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

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

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

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

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

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

#### QUESTION I

##### Membership of a conduct division

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

#### QUESTION J

##### Functions of the proposed judicial commission

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



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

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

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

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

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

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

# Appendices



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# Appendix A: Proposals/Questions

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## Proposals

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

## 6

### Procedural fairness

p 79

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

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

## Questions

### A

#### Jurisdiction of the proposed judicial commission

p 74

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

### B

#### Sanctions

p 76

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

### C

#### Power to suspend a judicial officer

p 78

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

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

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

## **E** Procedural fairness p 79

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

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

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

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

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

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



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

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

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

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

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

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

# Appendix B: Judicial officers

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

As at May 2012

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

### Notes:

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

1. Figures include part-time judicial appointments.



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

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

### Notes:

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

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

# Appendix C: Examples of complaints against judicial officers

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

### Complaints where a formal process was invoked

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Complaints where a formal process was not invoked

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

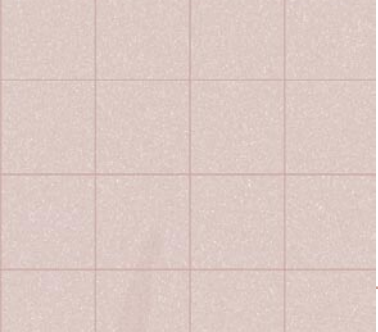
It was further reported that in February 2010 the magistrate indicated that he would plead guilty to charges of unlawful assault and criminal damage, and was later sentenced to a two-year good behaviour bond and fined \$7,500. He resigned from office.

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

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

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





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

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

# Appendix D: Consultations

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## LIST OF PEOPLE CONSULTED

Magistrate Bayly, Magistrates Court of Western Australia

Justice John Chaney, President, State Administrative Tribunal

Chief Justice Ewan Crawford, Supreme Court of Tasmania

Ms Helen DeBrito, Legal Aid Western Australia

Chief Justice P de Jersey AC, Supreme Court of Queensland

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

Chief Justice John Doyle AC, Supreme Court of South Australia

Chief Magistrate Steven Heath, Magistrates Court of Western Australia

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

Commissioner Macknay QC, Corruption and Crime Commission

Chief Justice Wayne Martin, Supreme Court of Western Australia

Chief Judge Peter Martino, District Court of Western Australia

Magistrate Randazzo, Magistrates Court of Western Australia

Mr Mike Silverstone, Executive Director, Corruption and Crime Commission

Ms Jane Stewart, Legal Aid Western Australia

Chief Judge Stephen Thackray, Family Court of Western Australia

Chief Justice Marilyn Warren AC, Supreme Court of Victoria

## LIST OF CORRESPONDENCE AND EMAILS

Aboriginal Family Law Services

Albany Community Legal Centre

Albany Family Violence Prevention Legal Service

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

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

Bunbury Community Legal Centre

CASE for Refugees

Citizens Advice Bureau

Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Services

Fremantle Community Legal Centre

Geraldton Resource Centre Inc

Goldfields Community Legal Centre

Gosnells Community Legal Centre

Kimberley Community Legal Services Inc

President, Law Society of Western Australia

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

Marninwarntikura Family Violence Prevention Legal Service

Mental Health Law Centre WA

Ms Karen Merrin, Chairperson, Community Legal Centres Association

Midland Information, Debt and Legal Advocacy Service

Northern Suburbs Community Legal Centre Inc

Peel Community Legal Services Inc

Pilbara Community Legal Service

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

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Street Law Centre

Mr George Turnbull, Director, Legal Aid Western Australia

Wheatbelt Community Legal Centre

Mr Philip Urquhart, Barrister/President, Criminal Lawyers Association

Ms Gai Walker, Managing Director, SCALES Community Legal Centre

Women's Law Centre Inc

Youth Legal Service

**New Zealand**  
**新西蘭**

**New Zealand's Office of the  
Judicial Conduct Commissioner<sup>1</sup>**

**Welcome**

The Office of the Judicial Conduct Commissioner was established in August 2005 to deal with complaints about the conduct of Judges.

The purpose of the Judicial Conduct Commissioner is to:

- ▶ enhance public confidence in, and
- ▶ protect the impartiality and integrity of the judicial system.

Complaints may be made against Judges of the various Courts set out in Section 5 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, including temporary, associate, and acting Judges but not retired or former Judges.

However, the Judicial Conduct Commissioner cannot challenge the legality or correctness of a Judge's decision in relation to any legal proceedings.

The present Commissioner is Sir David Gascoigne.

**ABOUT THE COMMISSIONER**

**The current Commissioner:**

This is Sir David Gascoigne, KNZM CBE LL.M. He took up the position on 3 August 2009.

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<sup>1</sup> Information extracted from New Zealand's Office of the Judicial Conduct Commissioner's official website (see link: <http://www.jcc.govt.nz/>)

**Sir David Gascoigne,  
KNZM CBE LLM**

His main professional career has been as a corporate lawyer. He was a Chairman of Partners of Rudd Watts & Patterson, then subsequently a National Chairman of Partners of the merged firm now know as Minter Ellison Rudd Watts. He is now a consultant to that firm, and is a member of the firm's Board.

He holds, or has held, a number of Chairmanships and Directorships of companies in both the private and the public sectors. He also holds, or has held, many senior positions in a wide variety of forms of arts administration.

He was, in 2005, the Chairman of the Rugby World Cup 2011 Bid Advisory Committee. And he is now a member of the Minister's 2011 Group.

He is also the Independent Reviewer of the Auditor-General's audit allocation processes.

**Ian Haynes,  
ONZM BA LLB**

**The previous Commissioner:**

The initial Commissioner was Ian Haynes, ONZM BA LLB.

He took office in 2005, when the enabling Act came into force. His term of office came to an end on 12 July 2009.

He is a past President of the New Zealand Law Society and a former President of the Auckland District Law Society.

He is well known and respected in law society circles, both in New Zealand and internationally. He is the architect of a new model for the governance of the legal profession on which the Lawyers and Conveyancers

**COMPLAINT PROCESS**

The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 provides a way for people to complain about the conduct of a Judge and to have those complaints assessed. An independent Judicial Commissioner receives complaints, conducts preliminary investigations and decides what further actions, if any, are to be taken.

The Judicial Conduct Commissioner:

- Receives written complaints
- Conducts a preliminary examination of the complaint
- Takes one of the following steps:
  - Dismisses the complaint;
  - Refers the complaint to the Head of Bench; or
  - Recommends that the Attorney-General appoint a Judicial Conduct Panel to enquire into the matter.

You can read full detail of the Judicial Complaints Process and see a [diagram](#) of how it works.

## **OVERVIEW**

If you would like to make a complaint about the conduct of a Judge you should write to the Judicial Conduct Commissioner. All complaints about the conduct of a Judge are to be sent to the Commissioner in the first instance.

The process is intended to help maintain public confidence in the Judicial system, and to protect its impartiality, integrity and independence.

Anyone can complain about a Judge, but complaints may only be made about the conduct of a Judge, whether inside or outside court. You cannot use this process to complain about a decision a Judge has made. If you do not agree with a Judges decision, in most cases it can be reviewed by another judicial authority or appealed to a higher court.

When considering a Judge's conduct, you should be aware that it is sometimes necessary for Judges to be assertive in their manner. Judges must manage the court so that the proceedings are dealt with efficiently and effectively, without undue delay. If you feel that a Judge has dealt with you too briefly, it may be for this reason.

Complaining about a Judge is a serious matter. While Parliament makes laws, Judges interpret and apply laws to people who appear in court. Judges must be independent of Government. They have protection for anything they do while performing their duties so that they are able to make decisions which are right in law and fairly arrived at, without being influenced by any other factors.

### **Making a complaint**

A complaint has to be made in writing to the Judicial Conduct Commissioner at the following address:

Judicial Conduct Commissioner  
Office of the Judicial Conduct Commissioner  
PO Box 2661  
Wellington

Your written complaint has to:

- identify the Judge you are complaining about;
- identify yourself; and
- state what your complaint is about.

The Commissioner will give reasonable assistance to enable you to complete the above steps.

The Commissioner will have to dismiss your complaint if it does not include all of the above information.



The Commissioner will confirm in writing that he or she has received your complaint. The Judge you are complaining about may also be notified and may receive a copy of your complaint.

Because complaining about the conduct of a Judge is so serious the Commissioner may ask that you complete a statutory declaration about your complaint. Refusal to do so will result in your complaint being dismissed. The Commissioner will give reasonable assistance to enable you to complete a statutory declaration if required.

### **Preliminary examination**

The law requires the Commissioner to conduct a preliminary examination of the complaint. During the examination, and in accordance with the principles of natural justice, the Commissioner may make any enquiries and look at any relevant court documents. At the conclusion of the preliminary examination, the Commissioner must take one of the following steps:

- [dismiss](#) the complaint (section 16);
- [refer](#) the complaint to the Head of Bench (section 17);
- [recommend](#) that the Attorney-General appoint a Judicial Conduct Panel to inquire into any matter concerning the conduct of the Judge concerned (section 18).

In some cases a complaint may be deferred (e.g. if the complaint relates to matters currently being dealt with by a court).

### **DISMISSING A COMPLAINT**

The Commissioner must dismiss a complaint if:

- The complaint is not within the Commissioners jurisdiction;
- The complaint has no bearing on judicial functions or judicial duties;
- The complaint is frivolous, vexatious, or not in good faith;
- The subject matter of the complaint is trivial;

- The complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review;
- The person who is the subject of the complaint is no longer a Judge;
- The subject matter of the complaint was considered before the commencement of the Act by the Head of Bench or the Judicial Complaints Lay Observer; or
- The Commissioner has previously considered the subject matter of the complaint, and there are no grounds to justify referring the complaint to a Head of Bench, or recommending that the Attorney-General establish a Judicial Conduct Panel.

When the Commissioner dismisses a complaint he or she will write to both you and the Judge to explain why.

## **REFERRING A COMPLAINT**

The Commissioner must refer complaints to a Head of Bench if the complaint has not been dismissed or a Judicial Conduct Panel is not recommended. When the Commissioner refers a complaint to a Head of Bench, the Commissioner will advise both you and the Judge. The Commissioner will refer the complaint to the Head of Bench responsible for the court the Judge complained about currently sits on.

The Judiciary in 1999 set up an internal complaints process and this process continues to apply to deal with complaints that would not justify a Judges removal from office.

This is a voluntary process, because each Judge is independent from all other Judges. In general, Judges are accountable through the public nature of their work and the requirement that they give reasons for their decisions. The immunity from direct discipline exists to ensure that justice is administered impartially. Where complaints are about the outcome of a case, someone who is affected and is dissatisfied with the outcome will generally have

rights of appeal or review. A complaint about the outcome of a case cannot be considered under the complaints process.

If any misconduct of the Judge could be addressed on appeal or review, a complaint will not generally be accepted about the Judges conduct until those opportunities have been taken. If the Commissioner refers a complaint to the Head of Bench, the Commissioner will advise you and the Judge who is the subject of the complaint that this has happened.

### **Action on complaint**

For complaints of substance, the Head of Bench will determine how to deal with the matter appropriately. The Head of Bench will consider responses such as asking the Judge to apologise to the complainant, or by offering the Judge appropriate assistance to avoid the inappropriate conduct happening again.

If you are not satisfied with the response from either the Head of Bench or the Judge concerned you may write to the Judicial Complaints Lay Observer. The Lay Observer is an entirely separate office from the Judicial Conduct Commissioner.

### **Judicial Complaints Lay Observer**

The role of the Judicial Complaints Lay Observer is to consider the complaint and the way it was handled by the Judiciary and to then decide whether the matter should be reconsidered by the Head of Bench. The Judicial Complaints Lay Observer has the power to review the complaint, the way it was processed, any response from the Judge and any other matters that may be relevant.

If the Judicial Complaints Lay Observer considers that a decision by the Head of Bench not to pursue the complaint should be reviewed, he or she may request that the Head of Bench reconsider the complaint.

Both the consideration of the complaint, and any request to reconsider, will be in confidence. The Judicial Complaints Lay Observer will inform you

whether or not a request for reconsideration has been made. The Head of Bench may then reconsider whether the complaint has substance.

### **Time limit on seeking a review by the Lay Observer**

All requests for a review of the decision made by a Head of Bench in regard to any complaint against a Judge must be referred to the Judicial Complaints Lay Observer within six months from the date that the Head of Bench decided that a complaint did not have substance.

### **Contacting the Judicial Complaints Lay Observer**

All communications with the Judicial Complaints Lay Observer must be in writing. You can write to the Judicial Complaints Lay Observer at the following address:

The Judicial Complaints Lay Observer  
Office of the Judicial Complaints Lay Observer  
PO Box 2538  
Wellington

### **RECOMMENDING A PANEL**

The Commissioner may recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire further into the complaint. The Commissioner will recommend a Panel be appointed if the conduct complained of may warrant consideration of removal of the Judge. The Panel may recommend that the Judge be removed from office.

The Commissioner has to write to both you and the Judge with reasons for the recommendation that a Panel be convened.

The Attorney-General then consults the Chief Justice about choosing the three members of the Panel, which must include at least one Judge or retired Judge, and one lay person. The Panel may also include a senior barrister or solicitor.

The job of the Panel is to inquire further into the conduct of the Judge. The Panel has the same powers as a Commission of Inquiry and is required to act according to the principles of natural justice.

The Panel will typically hold hearings in public, although part or all of a hearing may be held in private to protect your privacy, the Judges privacy, or the public interest. The Panel also has the power to restrict publication of any documents that are part of the hearing, or any information about the hearing.

The Attorney-General will appoint a special counsel to present the case against the Judge. The Judge being complained about may appear at the hearing and be represented by a lawyer. The Panel may also give permission for other people to appear at the hearing and be represented by a lawyer.

Once the hearing is over, the Panel reports to the Attorney-General on the Panels:

- findings of fact;
- opinion as to whether conduct justifies consideration of removal; and
- reasons for its conclusion.

### **Removing a Judge**

If the Panel recommends removing the Judge, the Attorney-General must decide whether to agree or disagree with the recommendation. If the Attorney-General agrees that the Judge should be removed, then one of two processes occurs, depending on the type of Judge being complained about.

- For Judges of the Supreme Court, Court of Appeal, High Court, and Employment Court, the Attorney-General must address Parliament to propose that it recommend to the Governor-General that the Judge is removed. If Parliament makes that recommendation the Governor-General will then remove the Judge from office.

- For Associate Judges and all other Judges, the Attorney-General advises the Governor-General who can then formally remove the Judge from office.

All of this information is also available in the booklet *Complaints about Judicial Conduct*. You can either download the booklet (PDF 63.4kb) or request a copy from [judicialconduct@jcc.govt.nz](mailto:judicialconduct@jcc.govt.nz) or 0800 800 323.

## **MAKE A COMPLAINT**

If you wish to make a complaint about a Judge's conduct, please use the form in this section.

To make sure that your complaint is handled swiftly, please make sure you have read the [guidelines](#) before filling in and sending the [form](#). The form can be sent by fax: 04 472 6159 or by post to Box 2661, Wellington.

## **GUIDELINES**

### **Guidance Notes for Lodging a Complaint about a Judge**

*Please read these Guidance Notes carefully*

1. Please use the form to lodge your complaint.
2. Under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (Act) a complaint about the conduct of a Judge must be made to the Commissioner.
3. Section 13 of the Act provides that the complaint must:
  - be in writing
  - identify the Judge who is the subject of the complaint
  - identify the complainant
  - state the subject matter of the complaint.

The Commissioner is entitled to require you to complete a statutory declaration concerning the above matters.

4. Please complete this form by typing or writing legibly all of the information requested. Make sure that the information provided is complete and accurate.
5. Please describe the circumstances and judicial conduct that have led to your complaint in the Details of Complaint section. Clearly set out dates and places of hearing if these are relevant to the complaint. List all events in the order in which they occurred. Attach additional sheets or other relevant documents or papers, as needed, to complete your statement.
6. Sign and date the complaint form in the spaces provided.
7. It is recommended that you keep a copy of the complaint for your records.
8. Send the original of the complaint form to the Commissioners office at the address below.
9. If you wish to make complaints about more than one judge, please use a separate form for each one.
10. The Commissioner is able to give reasonable assistance in the completion of this form. If you need assistance, please contact the Commissioners office.
11. Under section 14 of the Act, the Commissioner must notify the Judge concerned of your complaint and may send a copy of the complaint to the Judge.
12. The Act states that it is not a function of the Commissioner to call into question the legality or correctness of any instruction, direction, order, judgment, or other decision of a judge in any legal proceedings. Those matters fall outside the jurisdiction of the Commissioner.

## **FORM**

Please download this form, print it out, and either mail it or fax it to the Office of the Judicial Conduct Commissioner.

[Download Complaint Form](#) File size: 35.5Kb (PDF)

Please be sure you read the [guidelines](#) before you fill in the form.

Fax: 04 472 6159

Mail: Office of the Judicial Conduct Commissioner

PO Box 2661

Wellington

## **REPORTS AND NEWS**

### **News**

[Decision on complaints relating to Justice Wilson \(PDF, 172Kb\)](#)

[Media release on decision relating to Justice Wilson \(PDF, 61Kb\)](#)

The Judicial Conduct Commissioner's decision stands on its own. In accordance with usual practice, he will not be giving interviews or answering questions about it.

### **Annual Reports**

[Annual Report 2011/12 \(PDF, 366Kb\)](#) ([View HTML version](#))

[Annual Report 2010/11 \(PDF, 178Kb\)](#) ([View HTML version](#))

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## Complaint About a Judge

To: The Judicial Conduct Commissioner

I, \_\_\_\_\_  
*(Your full name)*

of \_\_\_\_\_  
*(Your address)*

wish to complain about the conduct of \_\_\_\_\_ of the  
*(Judge's name)*

\_\_\_\_\_ Court.  
*(Name Court)*

My complaint is as follows:

*Here set out the nature or substance of your complaint:*

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Details of complaint:

*Describe the circumstances and judicial conduct that have led to your complaint – see Guideline Note 5:*

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## Judicial Conduct Commissioner

Judicial Conduct Commissioner  
Office of the Judicial Conduct Commissioner  
PO Box 2661  
Wellington

Telephone: 04 472 6158 or 0800 800 323  
Facsimile: 04 472 6159  
Email: [judicialconduct@jcc.govt.nz](mailto:judicialconduct@jcc.govt.nz)

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### Guidance Notes for Lodging a Complaint about a Judge

*Please read these Guidance Notes carefully*

- 1 Please use this form or a copy of this form to lodge your complaint. Additional copies are available from the Commissioner's office.
- 2 Under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 ("Act") a complaint about the conduct of a Judge must be made to the Commissioner.
- 3 Section 13 of the Act provides that the complaint must:
  - be in writing
  - identify the Judge who is the subject of the complaint
  - identify the complainant
  - state the subject matter of the complaint.

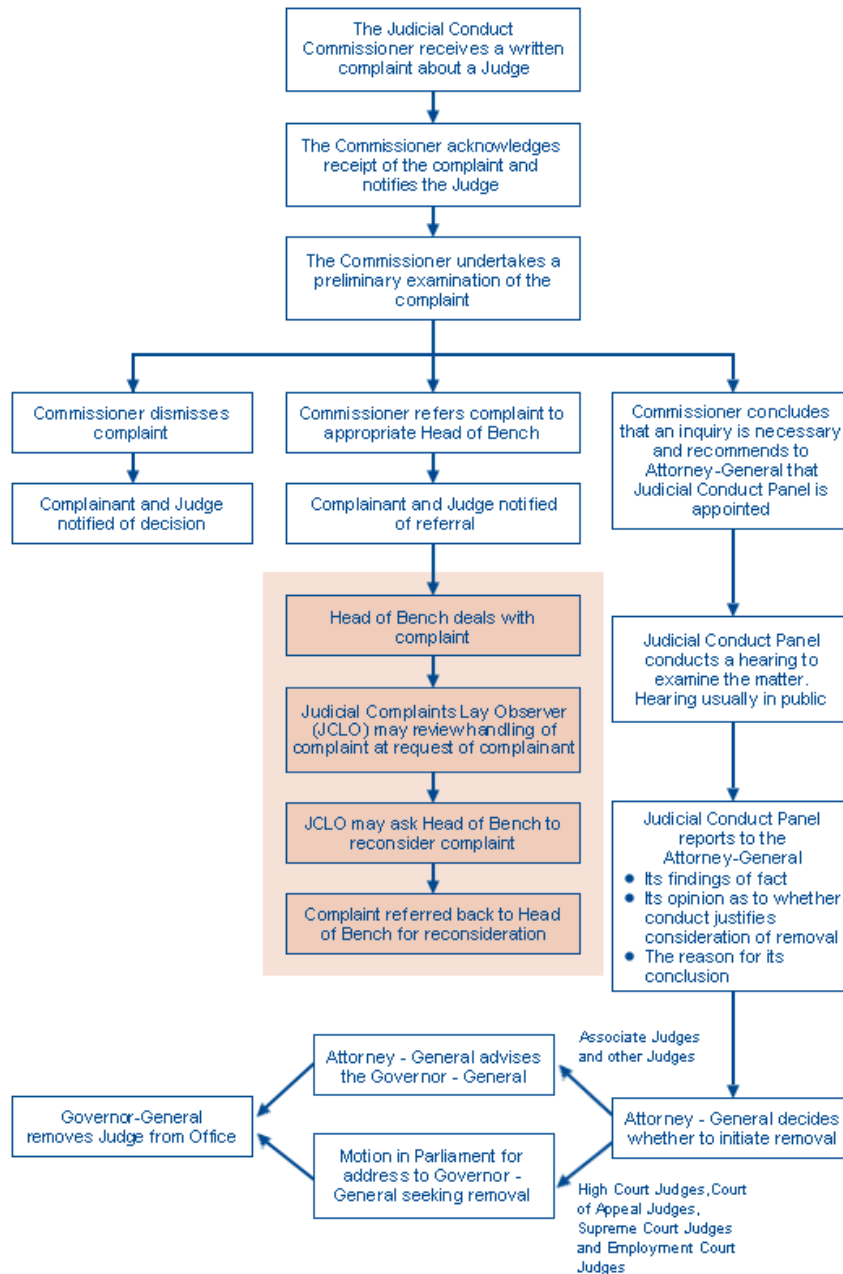
The Commissioner is entitled to require you to complete a statutory declaration concerning the above matters.

- 4 Please complete this form by typing or writing legibly all of the information requested. Make sure that the information provided is complete and accurate.
- 5 Please describe the circumstances and judicial conduct that have led to your complaint in the "Details of Complaint" section. Clearly set out dates and places of hearing if these are relevant to the complaint. List all events in the order in which they occurred. Attach additional sheets or other relevant documents or papers, as needed, to complete your statement.
- 6 Sign and date the complaint form in the spaces provided.
- 7 It is recommended that you keep a copy of the complaint for your records.
- 8 Send the original of the complaint form to the Commissioner's office at the address shown above.
- 9 If you wish to make complaints about more than one judge, please use a separate form for each one.
- 10 The Commissioner is able to give reasonable assistance in the completion of this form. If you need assistance, please contact the Commissioner's office.
- 11 Under section 14 of the Act, the Commissioner must notify the Judge concerned of your complaint and may send a copy of the complaint to the Judge.
- 12 The Act states that it is not a function of the Commissioner to call into question the legality or correctness of any instruction, direction, order, judgment, or other decision of a judge in any legal proceedings. Those matters fall outside the jurisdiction of the Commissioner.



OFFICE OF THE  
**Judicial Conduct Commissioner**

**DIAGRAM OF PROCESS**



**Canada**  
加拿大

**Canadian Judicial Council<sup>1</sup>**

**About the council**

The Canadian Judicial Council is a federal body created under the *Judges Act* with the mandate to *promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada.*

The Council is also mandated to review any complaint or allegation against a superior court judge.

The Council is chaired by the Chief Justice of Canada, currently the Right Honourable Beverley McLachlin. There are 38 other Council members, who are the chief justices and associate chief justices of Canada's superior courts, the senior judges of the territorial courts, and the Chief Justice of the Court Martial Appeal Court of Canada.

**Mandate And Powers**

Parliament created the Canadian Judicial Council in 1971. The objectives of the Council, as mandated by the ***Judges Act***, are to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in all **superior courts** of Canada. The Council has authority over the work of more than 1,100 federally appointed judges.

**How does the Council work?**

The Canadian Judicial Council itself is made up of 39 members and is chaired by the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverley McLachlin. Council membership consists of the chief justices, associate chief justices, and some senior judges from provincial and federal superior courts across the country.

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<sup>1</sup> Information extracted from the Canadian Judicial Council's official website (see link: <http://www.cjc-ccm.gc.ca/>)

The chief justices of each province are responsible for the day-to-day administration of justice within their own jurisdictions across Canada. Full meetings more than twice a year would be impossible, so the Council's committee system allows members to work on a regular basis in smaller groups that focus on the issues that affect Canada's justice system. Some committees are permanent, standing committees; others are formed from time to time to deal with specific issues or projects.

### **What powers does the Council have?**

Canadians rightly demand a high degree of professionalism and good conduct from their judges. They also need judges who are independent and able to give judgments in court without fear of retaliation or punishment. To help achieve this goal, the Canadian Judicial Council was granted power under the ***Judges Act*** to investigate **complaints** made by members of the public and the Attorney General about the conduct (not the decisions) of federally appointed judges. After its investigation of a complaint, the Council can make recommendations, including removing a judge from office.

The Council has authority over the work of more than 1,100 federally appointed judges in Canada. Its main purpose is to set policies and provide tools that help the judicial system remain efficient, uniform, and accountable. The Council's powers are set out in Part II of the Judges Act.

### **CONDUCT OF JUDGES**

We expect the highest standards of conduct from our judges. If a judge's conduct does not meet our expected high standards and is not suitable to be a member of the judiciary, the Canadian Judicial Council has a process for reviewing the alleged inappropriate conduct and, if necessary, for removing the judge from office.

### **What is the Council's role in reviewing judicial conduct?**

Under the ***Judges Act***, the Canadian Judicial Council has the authority to investigate complaints about federally appointed judges

in Canada. These are judges from **federal courts** and **higher levels of provincial courts**.

By directing complaints to the Canadian Judicial Council, Parliament acknowledges that the public must have a way to voice its concerns about judges. At the same time, the system must allow judges to respond to allegations of misconduct in a fair way. The entire process must be efficient, fair, and objective.

The procedure for making a complaint about a judge's conduct is described fully in the **complaints section** of this website. Any member of the public, the Minister of Justice, or provincial Attorneys General, can make a complaint about a federally appointed judge to the Council. Provided the complaint is about a judge's conduct (not a judge's decision in a court case), is in writing, and is about a specific federally appointed judge, the Council will take the complaint and review the matter.

The Council may handle the complaint in a variety of ways, from asking the judge to respond to the complaint, to holding a full inquiry into the matter. In very serious cases, the Council can recommend to Parliament that a judge be removed from office.

The Council cannot investigate general complaints about the justice system, the courts, or the judiciary as a whole. It cannot change judicial decisions in court cases, compensate individuals, grant appeals, or address demands for a new trial.

The Canadian Judicial Council does not have jurisdiction over the lower levels of **provincial courts**, such as those that hear small claims disputes, and some family and criminal matters. If a member of the public wants to make a complaint about a judge in one of those courts, the complaint must be directed to the **judicial council** in that judge's province or territory.

### **Committees**

Council plays an important role in Canada's justice system.

While its role in reviewing complaints about possible judicial misconduct is key to preserving the public's confidence in their judiciary, Council is involved in many other interesting and important initiatives.

Much of the work of Council is carried out through a Committee structure that may include Chiefs Justice, other judges, and even experts and other partners in the legal, private and media sector. These Committees help Council provide leadership and support to the judiciary. Some Committees are permanent, standing committees; others deal with specific issues or particular questions.

The Committees may review policies, make recommendations and set guidelines to help judges and the justice system to be efficient, accessible, and accountable. They may conduct research, author a Council publication, or collaborate on special projects.

Below is a list of Council's key standing Committees and a description of the work that they do:

### **Chairperson's Group & Executive Committee**

#### **Chairperson's Advisory Group**

Acts as a forum for high-level debate and consultation on issues affecting judicial governance.

#### **Executive Committee**

The Executive Committee makes recommendations on what priorities Council should focus on while overseeing the business affairs of Council. This Committee may address issues relating to staffing or operational requirement , while directing or approving the creation of sub, standing or special committees of Council to undertake various activities.

### **Standing Committees**

#### **Judicial Conduct**

Ensuring that the review of complaints is conducted in a manner that is fair to the judges subject to the complaints, sensitive to the complainants, respectful of judicial independence and credible to both the judiciary and to the public is the key purview of Council's Judicial Conduct Committee. In its effort to manage an effective complaints process, the Committee may from time to time amend Council's by-laws, procedures and policies to further improve on the process.



## **Judicial Education**

Canadians expect a judiciary that continually refreshes its knowledge base, particularly with respect to social context issues. The Judicial Education Committee provides advice and leadership to ensure that federally appointed judges have access to high quality, effective, ongoing judicial education and professional development and may recommend which courses, seminars and conferences would be beneficial for the judicial community.

## **Judicial Independence**

The Judicial Independence Committee is engaged in the important work of increasing Canadians' understanding of the need to protect and promote judicial independence. This Committee may also work to identify situations that could be interpreted as adversely affecting judicial independence and propose solutions and activities to prevent any erosion of public confidence.

## **Judicial Salaries and Benefits**

This Committee makes recommendations and assists Council in the preparation of any submissions it wishes to put forward in respect of the salaries and benefits of federally appointed judges.

## **Administration of Justice**

The ongoing exchange of information and the development of policies or practices that promote uniformity and efficiency in the way judicial services are delivered in courts throughout the country is the main function of the Administration of Justice Committee. The Committee may compare the practices of various jurisdictions with a view to identifying inconsistencies in court administration practices and to propose solutions while facilitating the exchange of information on issues of national concern.

## **Nominating**

Makes recommendations with respect to nominations to various Council committees taking into account regional and jurisdictional representation.

## **Appeal Courts**

Exchanges information and recommends solutions to problems unique to appeal courts and their procedures.

### **Trial Courts**

Exchanges information and recommends solutions to challenges unique to trial courts and their procedures.

### **Public Information**

Ensuring that Canadians have timely access to information about the work of Council is an priority of the Public Information Committee. Fostering a constructive and informed relationship between the media and the judiciary is another. By undertaking targeted outreach and public education activities, this Committee aims to encourage a better understanding of judges and the justice system in Canada.

### **Advisory and ad hoc committees**

#### **National Committee on Jury Instructions**

Develops and distributes plain language jury instructions for the use of federally appointed judges.

#### **Study Leave Advisory Committee**

Makes recommendations with respect to the Study Leave Program of Council and the Council of Canadian Law Deans.

#### **Special Committee on International Child Protection**

Act as liaison judges for Canada as part of an international network of liaison judges.

### **Members And Staff**



The Canadian Judicial Council is made up of 39 members who are the chief justices, associate chief justices, and some senior judges from provincial and federal superior courts across Canada. To view the names of Council members by province and territory, click on the table below:

■ Canada	■ Nova Scotia
■ Alberta	■ Nunavut
■ British Columbia	■ Ontario
■ Manitoba	■ Prince Edward Island
■ New Brunswick	■ Quebec
■ Newfoundland and Labrador	■ Saskatchewan
■ Northwest Territories	■ Yukon

A professional **staff**, located in Ottawa, supports the work of the Canadian Judicial Council and its members.

## **Canada**

### **Supreme Court of Canada**

The Right Honourable Beverley **McLachlin**, P.C., C.J.C.  
(Chairperson)

### **Federal Court of Appeal**

The Honourable Pierre **Blais**, P.C., Chief Justice of the Federal Court  
of Appeal

### **Federal Court**

The Honourable Paul S. **Crampton**, Chief Justice of the Federal  
Court

### **Tax Court of Canada**

The Honourable Gerald J. **Rip**, Chief Justice of the Tax Court of  
Canada

The Honourable Eugene P. **Rossiter**, Associate Chief Justice of the  
Tax Court of Canada

### **Court Martial Appeal Court of Canada**

The Honourable Edmond P. **Blanchard**, Chief Justice of the Court  
Martial Appeal Court of Canada

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## **Alberta**

The Honourable Catherine A. **Fraser**, Chief Justice of Alberta

The Honourable Neil C. **Wittmann**, Chief Justice of the Court of  
Queen's Bench of Alberta

The Honourable John D. **Rooke**, Associate Chief Justice of the Court  
of Queen's Bench of Alberta

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## **British Columbia**

The Honourable Lance **Finch**, Chief Justice of British Columbia

The Honourable Robert **Bauman**, Chief Justice of the Supreme Court of British Columbia

The Honourable Austin F. **Cullen**, Associate Chief Justice of the Supreme Court of British Columbia

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### **Manitoba**

The Honourable Richard J. **Chartier**, Chief Justice of Manitoba

The Honourable Glenn **Joyal**, Chief Justice of the Court of Queen's Bench of Manitoba

The Honourable Shane I. **Perlmutter**, Associate Chief Justice of the Court of Queen's Bench of Manitoba

The Honourable Lori **Douglas**, Associate Chief Justice, Family Division, Court of Queen's Bench of Manitoba

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### **New Brunswick**

The Honourable Ernest **Drapeau**, Chief Justice of New Brunswick

The Honourable David D. **Smith**, Chief Justice of the Court of Queen's Bench of New Brunswick

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### **Newfoundland and Labrador**

The Honourable J. Derek **Green**, Chief Justice of Newfoundland and Labrador

The Honourable David B. **Orsborn**, Chief Justice of the Trial Division of the Supreme Court of Newfoundland and Labrador

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### **Northwest Territories**

The Honourable Virginia **Schuler**, Senior Judge of the Supreme Court of the Northwest Territories

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## **Nova Scotia**

The Honourable J. Michael **MacDonald**, Chief Justice of Nova Scotia

The Honourable Joseph P. **Kennedy**, Chief Justice of the Supreme Court of Nova Scotia

The Honourable Deborah K. **Smith**, Associate Chief Justice of the Supreme Court of Nova Scotia

The Honourable Lawrence I. **O'Neil**, Associate Chief Justice of the Supreme Court of Nova Scotia, Family Division

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## **Nunavut**

The Honourable Robert **Kilpatrick**, Senior Judge of the Nunavut Court of Justice

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## **Ontario**

The Honourable Warren K. **Winkler**, Chief Justice of Ontario

The Honourable Heather J. **Smith**, Chief Justice of the Superior Court of Justice (of Ontario)

To be appointed, Associate Chief Justice of Ontario

To be appointed, Associate Chief Justice of the Superior Court of Justice (of Ontario)

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## **Prince Edward Island**

The Honourable David H. **Jenkins**, Chief Justice of Prince Edward Island

The Honourable Jacqueline R. **Matheson**, Chief Justice of the Trial Division, Supreme Court of Prince Edward Island

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## **Qu ébec**

The Honourable Nicole **Duval Hesler**, Chief Justice of Québec

The Honourable F. **Rolland**, Chief Justice of the Superior Court of Québec

The Honourable Robert **Pidgeon**, Senior Associate Chief Justice of the Superior Court of Québec

The Honourable André **Wery**, Associate Chief Justice of the Superior Court of Québec

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## **Saskatchewan**

The Honourable John **Klebuc**, Chief Justice of Saskatchewan

The Honourable Martel D. **Popescul**, Chief Justice of the Court of Queen's Bench for Saskatchewan

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## **Yukon Territory**

The Honourable Ronald **Veale**, Senior Judge of the Supreme Court of the Yukon Territory

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## **Staff and Advisors**

The Council Office, led by the Executive Director and Senior General Counsel, supports Council members in their work.

### **Canadian Judicial Council**

Ottawa, Ontario K1A 0W8

(613) 288-1566, facsimile (613) 288-1575

Josée Cardinal

Committees Management Officer

Caroline Collard  
Director, Committees Management

Odette Dagenais  
Senior Administrative Officer

Josée Gauthier  
Registry Officer

Sylvie Gervais  
Committees Management Officer

Linda G. Laplante  
Registry and Communications Support Officer

Johanna Laporte  
Director, Communications and Registry Services

Mireille Murray  
Leader Administrative Services

Marc-Olivier Proulx  
Programmer – Analyst, Web Site and Systems Management

Norman Sabourin  
Executive Director and Senior General Counsel

## **MAKING A COMPLAINT**

### **Who can make a complaint?**

Any member of the public can make a complaint to the Council provided the complaint is about judicial conduct, is made in writing, and is about a specific federally appointed judge, the Council will review the matter.

Although the Minister of Justice or a provincial Attorney General can initiate a formal inquiry about a federally appointed judge, most complaints come from the general public.

If a provincial Attorney General or the Minister of Justice of Canada



submits a complaint, the Council must appoint an Inquiry Committee to consider whether a recommendation should be made to the Minister of Justice to remove the judge from office. The Inquiry Committee must hold a hearing, normally in public. The Council then considers the report of the Inquiry Committee and makes a recommendation to the Minister of Justice.

In accordance with the complaints process, the Canadian Judicial Council can also initiate an inquiry into a judge's conduct.

### **Who can you make a complaint against?**

The Canadian Judicial Council has the authority to investigate complaints only about federally appointed judges in Canada. These are judges from **federal courts** and **higher levels of courts in each province**.

The Council cannot investigate general complaints about the justice system, the courts, or the judiciary as a whole. It cannot change judicial decisions in court cases, compensate individuals, grant appeals, or address demands for a new trial.

The Canadian Judicial Council does not have jurisdiction over the lower levels of **provincial courts**, such as those that hear small claims disputes, and some family and criminal matters. If you want to make a complaint about a judge in one of those courts, you must direct your complaint to the **judicial council in your province or territory**.

The Canadian Judicial Council does not have the authority to investigate complaints against court staff or lawyers. Complaints about court staff should be made to the court administration office of the courthouse in question. Complaints about lawyers should be made to the **Law Society** in your province or territory.

### **How do I make a complaint?**

The Canadian Judicial Council seeks to ensure a fair process when a complaint is made against a judge. Every complaint is considered seriously and conscientiously.

You do not have to be represented by a lawyer if you want to make a

complaint about a judge. You do not need to use a special form to make a complaint to the Council although one is offered **here** for your convenience. There is no fee charged and no deadline for making a complaint. The Council requires only that a complaint be:

- in writing;
- about a named, federally appointed judge; and
- about the conduct of a judge and not their decision.

You can write a letter to the Canadian Judicial Council, and send it by regular mail (Canadian Judicial Council, Ottawa, Ontario, K1A 0W8) or by **email**. Your letter should include:

- your name and address;
- the name of the judge you are making a complaint against; and
- a description of the judge's conduct that you believe was inappropriate.

### **What happens after I make a complaint?**

The Council is committed to reviewing complaints about the conduct of judges in a way that is sensitive to the person making the complaint, fair to the judge who the complaint was about, and credible to the judiciary and the public. While the public must have a way to voice its concerns about members of the judiciary, the judges must be given an opportunity to respond to the allegation of misconduct. The complaint procedure is set out fully in the **Canadian Judicial Council's Complaint Procedures**.

The Council takes complaints very seriously and deals with them as quickly as possible. Out of the 200 or so complaints received every year, the Council concludes the majority of them within three months.

### **Step 1: review of complaint**

A member of the Council's Judicial Conduct Committee first reviews the complaint. Many complaints are dismissed because they do not meet the criteria for review. For example, some complaints are about a judge's decision in a case, not his or her conduct; others may be about a provincially appointed judge, rather than a federally appointed judge.

## **Step 2: investigation of the complaint**

When the Council further investigates, a copy of the complaint is sent to the judge in question and the chief justice of that judge's province, with a request for comments. The Complainant may also be asked to provide additional comments.

Some complaints contain serious allegations of inappropriate conduct against a judge and must be further investigated by the Council. Such cases may be investigated with the assistance of a lawyer from outside the Council. This person is chosen for their expertise and reputation in the legal community. The lawyer may interview the judge, the complainant, and others who are connected with the situation, and prepare a report.

## **Step 3: the Review Panel**

If the complaint is not immediately resolved, the matter may be handed over to a Review Panel for further study. The Review Panel is composed of up to five members, who are all judges. If the Review Panel concludes that the complaint has merit, but is not serious enough to move to the next stage (formal hearing by the Inquiry Committee), the Review Panel may close the file with an expression of concern, or may recommend counselling for the judge, or other similar remedial actions.

## **Step 4: Inquiry Committee**

If the complaint might be serious enough to warrant the judge's removal from office, the Review Panel can decide that there should be an Inquiry Committee to hear the matter. The Inquiry Committee is composed of Council members and senior lawyers.

If the complaint comes from a provincial Attorney General or the Minister of Justice of Canada, the matter may go directly to an Inquiry Committee.

The Inquiry Committee can conduct its own investigation into the complaint, and hear from the judge, the person who made the complaint, and others. The Inquiry Committee normally holds a public hearing, where the judge and the person who complained can attend and give evidence about the matter that led to the complaint. The Inquiry Committee prepares a report, which goes to the full

Canadian Judicial Council for discussion.

### **Step 5: recommendations**

After considering the Inquiry Committee's report, the Council must decide whether the judge's conduct has rendered the judge "incapacitated or disabled from the due execution of the office of judge."

Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office. Parliament has never had to face such a situation, but sometimes a judge will retire or resign before that step is taken.

### **Step 6: notice of the decision**

When the complaint has been considered and a decision is reached, the Council will advise the person who complained of its decision in writing.

#### Checklist for making a complaint to the Canadian Judicial Council

- no deadline
- no fee
- no need for legal representation
- no special form required
- complaint must:
  - be about a federally appointed judge
  - be about a judge's conduct (not a decision the judge made in court)
  - be in writing
  - be sent by mail or email
  - include your name and address
  - give the judge's name
  - provide the date, court, and circumstances of the judge's conduct in question
  - describe the judge's conduct in question
- You can also use this optional **form** if you prefer.

## INQUIRY COMMITTEE DECISIONS

Under the *Judges Act*, Parliament granted power to the Canadian Judicial Council to investigate and rule on complaints about the conduct – not the decisions – of federally appointed judges. In some cases, the Council will establish an Inquiry Committee to investigate the complaint. The Inquiry Committee prepares a written report of its investigation and those reports are available to the public.

The **complaint process** is described fully in this website, but generally, when the Council receives a complaint about a judge, a member of the Council's Judicial Conduct Committee reviews the complaint and decides how the matter should be handled. Handling the complaint may range from asking the judge in question to respond to the complaint, to holding a full inquiry into the matter. It may result in the Inquiry Committee recommending to the Minister of Justice that the judge be removed from office.

Since its inception in 1971, the Council has referred eight complaints to an Inquiry Committee for formal investigation. The section below provides links to those reports.

Note also that the Council publishes an **Annual Report** every year that summarizes some of the complaints against judges received that year, and how the complaints were resolved.

### **Inquiries**

**Douglas (ongoing) – Proceedings and reports** regarding Associate Chief Justice Lori Douglas of the Court of Queen's Bench of Manitoba.

**Cosgrove (March 2009) – Proceedings and reports** regarding Mr Justice Paul Cosgrove of the Superior Court of Justice of Ontario.

**Matlow (December 2008) – Proceedings and reports** regarding Mr Justice Theodore Matlow of the Ontario Superior Court of Justice.

**Flynn (March 2003) – [PDF] Inquiry Committee's report** to the Minister of Justice regarding Mr Justice Bernard Flynn of the Superior Court of Quebec.

**Boilard (December 2003)** – [PDF] **Inquiry Committee's report** to the Minister of Justice regarding Mr Justice Jean-Guy Boilard of the Superior Court of Quebec.

**Flahiff (April 1999)** – [PDF] **Inquiry Committee's decision** on preliminary issues in the case of Mr Justice Robert Flahiff of the Superior Court of Quebec.

**Bienvenue (June 1996)** – [PDF] **Inquiry Committees' report** to the Minister of Justice regarding Mr Justice Jean Bienvenue of the Superior Court of Quebec.

**Gratton (February 1994)** – [PDF] **Inquiry Committee's decision** regarding its jurisdiction to conduct an inquiry about Mr Justice Gratton of the Ontario Court of Justice.

**Hart, Jones and Macdonald (August 1990)** (the "Marshall" case) – [PDF] **Inquiry Committee's report** at the Attorney General of Nova Scotia's request regarding the removal from office of three judges: Mr Justice Gordon Hart, Mr Justice Malachi Jones, and Mr Justice Angus Macdonald.



# THE CONDUCT OF JUDGES

and the role of the  
Canadian Judicial Council

Canadian Judicial Council  
Ottawa, Ontario  
K1A 0W8

Tel.: (613) 288-1566  
Fax: (613) 288-1575  
[www.cjc-ccm.gc.ca](http://www.cjc-ccm.gc.ca)



## CANADIAN JUDICIAL COUNCIL

The Canadian Judicial Council is made up of 39 members and is chaired by the Chief Justice of Canada. Membership consists of the chief justices, associate chief justices and some senior judges from provincial and federal superior courts across the country. The Council collectively has authority over a body of more than a thousand federally appointed judges. The Council meets twice a year. In the meantime, it is through committees that the Council does much of its work. Some of these are permanent, standing committees; others are formed to deal with specific issues or projects.

*The operation of Canadian justice relies on the existence of a highly trained, professional and independent judiciary.*

Canadians rightly demand a high degree of professionalism and good conduct from their judiciary. They also need a judiciary that is independent and able to render judgments without fear of reprisal. To that end, Parliament created the Canadian Judicial Council in 1971, giving it power under the *Judges Act* to investigate and rule on complaints about the conduct of federally appointed judges.

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## THE CONDUCT OF JUDGES

Every year, federally appointed judges in Canada make thousands of decisions on matters that range from procedural questions to the most fundamental interests of those appearing before them.

Judges can make mistakes. When one side or the other in a legal dispute thinks that a judge has come to the wrong **decision**, our system of justice allows that person to appeal the decision to a higher court. Appeal courts can reverse or vary the decisions made by other judges. The fact that an appeal court has overturned a judge's decision does not mean that the judge's conduct was improper or that grounds exist for removal of the judge from the bench.

Whether judges are correct or incorrect in their decisions, a high standard of personal **conduct** is expected of them. When someone believes that a judge's behaviour is of serious concern, or that a judge is not fit to sit on the bench, here too our system of justice provides for a remedy. In such cases, a complaint may be addressed to the Canadian Judicial Council.

## AN IMPORTANT DIFFERENCE

When issues arise concerning a judge's role in a trial, the distinction between *decision* and *conduct* is fundamental in deciding where you should go for remedy.

<b>Issue</b>	<b>Remedy</b>
A judge's <i>decision</i> is questioned	Appeal – a higher court reviews the decision
A judge's <i>conduct</i> is questioned	Complaint – the Canadian Judicial Council reviews the judge's conduct

The Council's Judicial Conduct Committee is responsible for reviewing judicial conduct in a way that is fair, objective and effective. It must also guarantee a prompt and fair hearing for judges who are accused of misconduct. In all cases, judicial independence – the foundation stone of Canadian justice – is central to the process.

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## The Complaints Process


Canadians can have confidence in their judges. From the tens of thousands of judicial hearings that take place every year in Canada's superior courts comes a very low number of complaints. Although the Minister of Justice or a provincial Attorney General may generate an inquiry, most complaints come from the general public, and around half relate to cases in family law.

- If you wish to make a complaint, you do not need to be represented by a lawyer. Simply make your complaint *in writing* to the Canadian Judicial Council at:

Canadian Judicial Council  
Ottawa, Ontario  
K1A 0W8

Your letter should include:

- Your name and address
- Name of the judge, court, date and circumstances of the conduct in question
- Detailed description of the conduct

- 
- A member of the Canadian Judicial Council's Judicial Conduct Committee examines the complaint and determines whether the judge in question should be contacted. If necessary, an independent counsel may be appointed to make further inquiries. If more than one perspective is needed, a panel made up of Council members and puisne judges (that is, ordinary judges, not chief justices or associate chief justices) may be struck.
  - If the matter is very serious, or if the complaint comes from a provincial Attorney General or the Minister of Justice of Canada, an Inquiry Committee may be appointed to hold a public hearing, after which the matter goes on for discussion by the full Council.
  - After considering the report of an Inquiry Committee, the Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office.

- The Council's only power is to recommend to Parliament that a judge be removed from office. Parliament has never had to face such a situation, although sometimes judges retire or resign before the matter gets that far. Where appropriate, the Council may express concerns about a judge's conduct where the matter is not serious enough to recommend that the judge be removed.
- When your complaint has been considered and determined, the Council will advise you of the decision in writing.

## **Authority of the Canadian Judicial Council**

The Council has authority only over federally appointed judges – that is, those presiding over the courts listed below. A complaint about a provincial or territorial court judge should be directed to the judicial council in your province or territory.

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## **Canada**

Supreme Court of Canada

Federal Court of Appeal

Federal Court

Court Martial Appeal Court of Canada

Tax Court of Canada

## **Newfoundland**

Supreme Court, Court of Appeal

Supreme Court, Trial Division

## **Prince Edward Island**

Supreme Court, Appeal Division

Supreme Court, Trial Division

## **Nova Scotia**

Court of Appeal

Supreme Court

## **New Brunswick**

Court of Appeal

Court of Queen's Bench

## **Quebec**

Court of Appeal

Superior Court

## **Ontario**

Court of Appeal

Superior Court of Justice

## **Manitoba**

Court of Appeal

Court of Queen's Bench



## Saskatchewan

Court of Appeal

Court of Queen's Bench

## Alberta

Court of Appeal

Court of Queen's Bench

## British Columbia

Court of Appeal

Supreme Court

## Yukon


Supreme Court

## Northwest Territories

Supreme Court

## Nunavut

Court of Justice







**Procedures for Dealing with  
Complaints made to the Canadian  
Judicial Council about  
Federally Appointed Judges**

**Procédures relatives à l'examen des  
plaintes déposées au Conseil canadien  
de la magistrature au sujet de  
juges de nomination fédérale**

**Short Title:  
"Complaints Procedures"**

**Titre abrégé :  
« Procédures relatives aux plaintes »**

Approved by the  
Canadian Judicial Council  
  
effective 14 October 2010

Approuvées par le  
Conseil canadien de la magistrature  
  
en vigueur le 14 octobre 2010

**Complaints Procedures**  
of the Canadian Judicial Council

**1. Definitions**

In these Procedures,

“*Act*” means the *Judges Act*;

“complaint” means a complaint or allegation;

“chief justice” is a Council member who is a Chief Justice or Senior Judge;

“Council” means the Canadian Judicial Council established pursuant to section 59 of the *Act*;

“Inquiry Committee” means a Committee constituted under subsection 63(3) of the *Act*;

“Outside Counsel” means a lawyer who is not an employee of the Council;

“Panel” means a Review Panel constituted pursuant to section 1.1 of the *Canadian Judicial Council Inquiries and Investigations By-laws*.

**Procédures relatives aux plaintes**  
du Conseil canadien de la magistrature

**1. Définitions**

Les définitions qui suivent s’appliquent aux présentes procédures.

« avocat externe » Un avocat qui n’est pas un employé du Conseil.

« comité d’enquête » Un comité constitué conformément au paragraphe 63(3) de la *Loi*.

« comité d’examen » Un comité constitué en vertu de l’article 1.1 du *Règlement administratif du Conseil canadien de la magistrature sur les enquêtes*.

« Conseil » Le Conseil canadien de la magistrature constitué en vertu de l’article 59 de la *Loi*.

« juge en chef » Un membre du Conseil qui est juge en chef ou juge principal.

« *Loi* » La *Loi sur les juges*.

« plainte » Une plainte ou une accusation.

## **2. Receipt of Complaint and Opening of File**

2.1 The Executive Director, under the direction of the Chairperson of the Judicial Conduct Committee as defined in section 3.3 below, is responsible for all administrative aspects related to the judicial complaints process.

2.2 The Executive Director shall open a file when a complaint about a named, federally appointed judge made in writing is received in the Council office from any source, including from a member of the Council who is of the view that the conduct of a judge may require the attention of the Council. The Executive Director shall not open a file for complaints which, although naming one or more federally appointed judges, are clearly irrational or an obvious abuse of the complaints process.

2.3 A complaint received from an anonymous source shall be treated to the greatest extent possible in the same manner as any other complaint.

## **2. Réception d'une plainte et ouverture d'un dossier**

2.1 Le directeur exécutif, sous la direction du président du comité sur la conduite des juges, tel qu'il est défini à l'article 3.3, est chargé de tous les aspects administratifs des procédures relatives aux plaintes.

2.2 Sur réception, au bureau du Conseil, d'une plainte formulée par écrit concernant un juge de nomination fédérale, le directeur exécutif ouvre un dossier. Ces plaintes peuvent être formulées par quiconque, y compris par un membre du Conseil qui estime que la conduite d'un juge pourrait exiger l'attention du Conseil. Le directeur exécutif n'ouvre pas de dossier dans le cas des plaintes qui, même si elles concernent un ou plusieurs juges de nomination fédérale, sont nettement irrationnelles ou constituent un abus manifeste de la procédure relative aux plaintes.

2.3 Une plainte provenant d'une source anonyme est, dans la mesure du possible, traitée de la même façon que toute autre plainte.

**3. Review by the Chairperson or Vice-Chairpersons of the Judicial Conduct Committee**

3.1 The Chairperson of the Council does not participate in the consideration of any complaint by the Council.

3.2 The Executive Director shall refer a file to either the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee in accordance with the directions of the Chairperson of the Committee. The Chairperson or a Vice-Chairperson shall not deal with a file involving a judge of their court.

3.3 Throughout the remainder of these procedures “Chairperson” refers to either the Chairperson or one of the Vice-Chairpersons of the Judicial Conduct Committee established by the Council.

3.4 After a file has been opened, and upon receipt of a letter from the complainant asking for the withdrawal of his or her complaint, the Chairperson may:

(a) close the file and categorize it as “withdrawn”; or

(b) proceed with consideration of the complaint on the basis that the public interest and the due administration of justice require it.

**3. Examen de la plainte par le président ou par un vice-président du comité sur la conduite des juges**

3.1 Le président du Conseil ne peut participer à l’examen d’une plainte par le Conseil.

3.2 Le directeur exécutif transmet un dossier au président ou à un vice-président du comité sur la conduite des juges conformément aux directives du président du comité. Ni le président non plus que les vice-présidents ne doivent examiner un dossier mettant en cause un juge qui est membre de la même cour qu’eux.

3.3 Pour l’application des dispositions qui suivent, le terme « président » désigne le président ou l’un des vice-présidents du comité sur la conduite des juges constitué par le Conseil.

3.4 Si, après l’ouverture d’un dossier, le président reçoit une lettre dans laquelle le plaignant demande le retrait de sa plainte, il peut :

a) soit fermer le dossier et le classer dans la catégorie des plaintes « retirées »;

b) soit décider de poursuivre l’examen de la plainte, considérant que l’intérêt public et la bonne administration de la justice l’exigent.

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|---|--|
| <p>3.5 The Chairperson shall review the file and may</p> <p>(a) close the file if he or she is of the view that the complaint is</p> <p style="padding-left: 40px;">(i) trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration, or</p> <p style="padding-left: 40px;">(ii) outside of the jurisdiction of the Council because it does not involve conduct; or</p> <p>(b) seek additional information from the complainant; or</p> <p>(c) seek the judge's comments and those of their chief justice.</p> <p>3.6 When the Chairperson has closed a file under this section, the Executive Director shall provide to the judge and to their chief justice a copy of the complaint and of the letter advising the complainant that the file has been closed.</p> <p><b>4 Request for Comments from Judge / Chief Justice</b></p> <p>4.1 Where the Chairperson has decided to seek comments pursuant to paragraph 3.5(c), the Executive Director shall write to the judge and their chief justice requesting comments.</p> | <p>3.5 Le président examine le dossier et peut, selon le cas :</p> <p>a) fermer le dossier s'il estime :</p> <p style="padding-left: 40px;">(i) que la plainte est frivole ou vexatoire, qu'elle est formulée dans un but injustifié, qu'elle est manifestement dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,</p> <p style="padding-left: 40px;">(ii) que la plainte n'est pas du ressort du Conseil, parce qu'elle ne met pas en cause la conduite d'un juge;</p> <p>b) demander des renseignements supplémentaires au plaignant;</p> <p>c) demander des commentaires au juge et à son juge en chef.</p> <p>3.6 Lorsque le président a fermé un dossier aux termes du présent article, le directeur exécutif remet au juge et à son juge en chef une copie de la plainte de même qu'une copie de la lettre informant le plaignant de la fermeture du dossier.</p> <p><b>4. Demande de commentaires au juge ou à son juge en chef</b></p> <p>4.1 Lorsque le président a décidé de demander des commentaires conformément à l'alinéa 3.5c), le directeur exécutif écrit au juge et à son juge en chef leur demandant de formuler des commentaires.</p> |
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**5. Consideration of Response of the Judge**

5.1 The Chairperson shall review the response from the judge and the judge's chief justice, as well as any other relevant material received in response to the complaint, and may

(a) close the file where:

(i) the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or

(ii) the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint; or

(b) hold the file in abeyance pending pursuit of remedial measures pursuant to section 5.3; or

(c) ask Outside Counsel to make further inquiries and prepare a report, if the Chairperson is of the view that such a report would assist in considering the complaint; or

(d) refer the file to a Panel.

**5. Examen de la réponse du juge**

5.1 Le président examine la réponse du juge et du juge en chef, de même que tout autre document pertinent reçu en réponse à la plainte. Il peut prendre l'une ou l'autre des décisions suivantes :

a) fermer le dossier dans l'un ou l'autre cas suivant :

(i) il conclut que la plainte est dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,

(ii) le juge reconnaît que sa conduite était déplacée et le président est d'avis qu'il n'est pas nécessaire de prendre d'autres mesures en ce qui concerne la plainte;

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

c) demander à un avocat externe de mener une enquête supplémentaire et de rédiger un rapport, si le président est d'avis qu'un tel rapport faciliterait l'examen de la plainte;

d) déférer le dossier à un comité d'examen.

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|---|--|
| <p>5.2 When closing the file pursuant to subparagraph 5.1(a)(ii), the Chairperson may, in writing, provide the judge with an assessment of their conduct and express any concerns the Chairperson may have about the judge's conduct.</p>   | <p>5.2 Lorsqu'il ferme le dossier conformément au sous-alinéa 5.1a)(ii), le président peut écrire au juge pour lui faire part de l'évaluation de sa conduite et lui exprimer ses préoccupations à l'égard de celle-ci.</p>   |
| <p>5.3 In consultation with the judge's chief justice and with the consent of the judge, the Chairperson may</p> <p><i>(a)</i> recommend that any problems identified as a result of the complaint be addressed by way of counselling or other remedial measures, and</p> <p><i>(b)</i> close the file if satisfied that the matter has been appropriately addressed.</p> | <p>5.3 En collaboration avec le juge en chef du juge et avec le consentement du juge, le président peut:</p> <p><i>a)</i> recommander que les problèmes relevés par suite de la plainte soient traités en ayant recours à des services de consultation ou à d'autres mesures correctives;</p> <p><i>b)</i> fermer le dossier s'il est satisfait que les problèmes relevés ont été traités de façon appropriée.</p> |
| <p>5.4 When the Chairperson closes a file, the Executive Director shall provide to the judge and to their chief justice a copy of the letter informing the complainant that the file has been closed.</p>   | <p>5.4 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.</p>  |
| <p><b>6. Complaints involving a Council Member</b></p>  | <p><b>6. Plaintes mettant en cause un membre du Conseil</b></p>  |
| <p>6.1 When proposing to close a file that involves a member of the Council, the Chairperson shall refer the complaint and the proposed reply to Outside Counsel who shall provide their views on the proposed disposition of the complaint.</p>  | <p>6.1 Lorsque le président propose de fermer un dossier mettant en cause un membre du Conseil, il soumet la plainte et la réponse proposée à un avocat externe, qui donne son avis sur la décision qui est proposée relativement à la plainte.</p>  |

## **7. Further Inquiries**

7.1 If the Chairperson asks Outside Counsel to make further inquiries under paragraph 5.1(c), the Executive Director shall so inform the judge and their chief justice.

7.2 Outside Counsel shall provide to the judge sufficient information about the allegations and the material evidence to permit the judge to make a full response and any such response shall be included in the report of Outside Counsel.

## **8. Consideration of Outside Counsel's Report**

8.1 The Chairperson shall review the report of Outside Counsel and may

(a) close the file on any grounds specified in paragraph 5.1(a); or

(b) hold the file in abeyance pending pursuit of remedial measures under section 5.3; or

(c) refer the file to a Panel.

8.2 When the Chairperson closes a file, the Executive Director shall provide to the judge and his or her chief justice a copy of the letter informing the complainant that the file has been closed.

## **7. Enquête supplémentaire**

7.1 Si le président demande à un avocat externe de mener une enquête supplémentaire en vertu de l'alinéa 5.1c), le directeur exécutif en informe le juge et son juge en chef.

7.2 L'avocat externe fournit au juge suffisamment de renseignements sur les allégations formulées et les éléments de preuve qui s'y rapportent pour lui permettre de présenter une réponse complète à leur égard; toute réponse du juge est incorporée au rapport de l'avocat externe.

## **8. Examen du rapport de l'avocat externe**

8.1 Le président examine le rapport de l'avocat externe et peut décider de :

a) fermer le dossier pour l'un des motifs précisés à l'alinéa 5.1a);

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

c) déférer le dossier à un comité d'examen.

8.2 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.



## **9. Consideration by a Panel**

- 9.1 In referring a file to a Panel for consideration, the Chairperson may provide the Panel with such information which, in the Chairperson's opinion, could assist the Panel's consideration of the file.
- 9.2 After referring a file to a Panel, the Chairperson shall not participate in any further consideration of the merits of the complaint by the Council.
- 9.3 The Executive Director shall write to the judge and their chief justice, informing them of the constitution of the Panel.
- 9.4 When a file is referred to a Panel, the judge shall be provided with any information to be considered by the Panel that the judge may not have previously received.
- 9.5 The Panel shall provide the judge with a reasonable opportunity to make written submissions to the Panel, including on whether there should or should not be an investigation under subsection 63(3) of the *Act*.
- 9.6 After reviewing the file and considering any written submissions from the judge, the Panel may:
- (a) direct that further inquiries be made by Outside Counsel in accordance with the provisions of section 7;

## **9. Comité d'examen**

- 9.1 Lorsqu'il défère un dossier à un comité d'examen, le président peut lui fournir tout renseignement qui, à son avis, peut être utile à l'examen du dossier.
- 9.2 Après avoir renvoyé un dossier à un comité d'examen, le président ne peut participer à aucun autre examen du bien-fondé de la plainte par le Conseil.
- 9.3 Le directeur exécutif informe par écrit le juge et son juge en chef de la constitution d'un comité d'examen.
- 9.4 Lorsqu'un dossier est renvoyé à un comité d'examen, on doit fournir au juge tout renseignement qui doit être considéré par le comité d'examen et que le juge n'a pas déjà reçu.
- 9.5 Le comité d'examen doit donner au juge la possibilité raisonnable de lui présenter des observations écrites, notamment sur la question de savoir si une enquête devrait ou ne devrait pas être menée en vertu du paragraphe 63(3) de la *Loi*.
- 9.6 Après avoir examiné le dossier et les observations écrites du juge, le comité d'examen peut :
- a) demander qu'un avocat externe mène une enquête supplémentaire conformément à l'article 7;

(b) close the file if it decides that no Inquiry Committee should be constituted under subsection 63(3) of the *Act* because the matter is not serious enough to warrant removal;

(c) hold the file in abeyance pending pursuit of remedial measures by the Panel in the same manner as may be done by the Chairperson pursuant to section 5.3;

(d) decide that an Inquiry Committee shall be constituted under subsection 63(3) of the *Act* because the matter may be serious enough to warrant removal.

9.7 When closing the file pursuant to paragraph 9.6(b), the Panel may, in writing to the judge, provide an assessment of the judge's conduct and express any concerns the Panel may have about the judge's conduct.

9.8 When the Panel closes a file, the Executive Director shall provide to the judge and to their chief justice a copy of the letter informing the complainant that the file has been closed.

9.9 When the Panel has decided that an Inquiry Committee shall be constituted, the Executive Director shall provide to the judge and their chief justice a copy of the Panel's decision.

b) fermer le dossier s'il décide qu'aucun comité d'enquête ne devrait être constitué conformément au paragraphe 63(3) de la *Loi*, au motif que l'affaire n'est pas suffisamment grave pour justifier la révocation;

c) mettre le dossier en suspens en attendant l'application de mesures correctives par le comité d'examen de la même manière que l'application de celles-ci par le président, conformément à l'article 5.3;

d) décider qu'un comité d'enquête doit être constitué en vertu du paragraphe 63(3) de la *Loi*, au motif que l'affaire peut être suffisamment grave pour justifier la révocation.

9.7 Lorsqu'il ferme le dossier conformément à l'alinéa 9.6 b), le comité d'examen peut adresser au juge une lettre dans laquelle il lui fait part d'une évaluation de sa conduite et lui exprimer ses préoccupations à l'égard de celle-ci.

9.8 Lorsque le comité d'examen ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

9.9 Lorsque le comité d'examen décide qu'un Comité d'enquête doit être constitué, le directeur exécutif remet au juge et à son juge en chef une copie de la décision du Comité d'enquête.

9.10 After a Panel has completed its consideration of a complaint, the members of the Panel shall not participate in any further consideration of the same complaint by the Council.

**10. Notification of Judge When Judge Appears to be Seized of Subject Matter of Complaint**

10.1 If at any time it appears to the Chairperson or the Panel that the judge remains seized with a matter that is the subject of the complaint, they may defer any communication with the judge by:

(a) sending a letter addressed to the judge to the judge's chief justice requesting that he or she provide the letter to the judge when the Chief Justice considers it appropriate to do so; or

(b) delaying writing to the judge until the judge is no longer seized of the matter referred to in the complaint.

**11. Notification of Complainant**

11.1 The Executive Director shall inform the complainant by letter when a complaint file is closed by the Chairperson, a Panel or the Council, and the basis on which the file was closed.

9.10 Lorsque le comité d'examen a terminé son examen de la plainte, ses membres ne peuvent participer à aucun autre examen de cette plainte par le Conseil.

**10. Notification du juge lorsqu'il appert que le juge est saisi d'une affaire visée par la plainte**

10.1 Si, à n'importe quel moment, il appert au président ou au comité d'examen que le juge est saisi d'une affaire visée par la plainte, ils peuvent reporter toute communication avec le juge :

a) soit en envoyant une lettre adressée au juge à son juge en chef, en demandant au juge en chef de la remettre au juge lorsqu'il estimera qu'il est opportun de le faire;

b) soit en attendant, avant d'écrire au juge, qu'il ne soit plus saisi de l'affaire visée par la plainte.

**11. Notification du plaignant**

11.1 Lorsqu'un dossier relatif à une plainte est fermé par le président, par un comité d'examen ou par le Conseil, le directeur exécutif en informe le plaignant par lettre, en précisant les motifs de la fermeture du dossier.

- 11.2 The Executive Director may inform the complainant by letter when a file is held in abeyance under paragraphs 5.1(b), 8.1(b) and 9.6(c).
- 11.3 The Executive Director may inform the complainant by letter when the Chairperson or a Panel refers a file to Outside Counsel for further inquiries under paragraph 5.1(c) or 9.6(a).
- 11.4 The Executive Director may inform the complainant by letter when the Chairperson refers a file to a Panel under paragraph 5.1(d) or 8.1(c).
- 11.5 When a Chairperson or Panel defers any communication with the judge under section 10, communication with the complainant may also be deferred accordingly.
- 11.6 When a Panel has decided that an investigation under subsection 63(2) of the *Act* shall be held, the Executive Director shall inform the complainant by letter.
- 11.7 In the event that an Inquiry Committee has been constituted, the complainant shall be advised by letter when the Inquiry Committee has made a report of its findings and conclusions to the Council and, if the Inquiry Committee conducted its hearings in public, the complainant shall be provided with a copy of the report.
- 11.2 Lorsqu'un dossier est mis en suspens conformément aux alinéas 5.1b), 8.1b), et 9.6c), le directeur exécutif peut en informer le plaignant par lettre.
- 11.3 Lorsque le président ou un sous-comité transmet un dossier à un avocat externe pour qu'il mène une enquête supplémentaire conformément à l'alinéa 5.1c) ou 9.6a), le directeur exécutif peut en informer le plaignant par lettre.
- 11.4 Lorsque le président renvoie un dossier à un comité d'examen conformément à l'alinéa 5.1d) ou 8.1c), le directeur exécutif peut en informer le plaignant par lettre.
- 11.5 Lorsque le président ou un sous-comité reporte toute communication avec le juge conformément à l'article 10, toute communication avec le plaignant peut également être reportée.
- 11.6 Lorsqu'un comité d'examen décide qu'une enquête doit être tenue aux termes du paragraphe 63(2) de la *Loi*, le directeur exécutif en informe le plaignant par lettre.
- 11.7 Lorsqu'un comité d'enquête a été constitué, le plaignant doit être informé par lettre lorsque le comité d'enquête a remis un rapport de ses constatations et de ses conclusions au Conseil et, dans le cas où le comité d'enquête a tenu ses audiences publiquement, une copie du rapport est remise au plaignant.

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**State of California**  
加州

**State of California Commission on Judicial Performance<sup>1</sup>**

The Commission on Judicial Performance, established in 1960, is the independent state agency responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges, pursuant to article VI, section 18 of the [California Constitution](#).

The commission's mandate is to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system. While the majority of California's judges are committed to maintaining the high standards expected of the judiciary, an effective method of disciplining judges who engage in misconduct is essential to the functioning of our judicial system. Commission proceedings provide a fair and appropriate mechanism to preserve the integrity of the judicial process.

The commission's jurisdiction includes all judges of California's superior courts and the justices of the Court of Appeal and Supreme Court. The commission also has jurisdiction over former judges for conduct prior to retirement or resignation. Additionally, the commission shares authority with the superior courts for the oversight of court commissioners and referees. The Director-Chief Counsel of the commission is designated as the Supreme Court's investigator for complaints involving the judges of the State Bar Court. The commission does not have authority over federal judges, judges pro tem or private judges. In addition to its disciplinary function, the commission is responsible for handling judges' applications for disability retirement.

The commission's authority is limited to investigating allegations of judicial misconduct and, if warranted, imposing discipline. Judicial misconduct

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<sup>1</sup> Information extracted from State of California Commission on Judicial Performance's official website (see link: <http://cjp.ca.gov/>)

usually involves conduct in conflict with the standards set forth in the [Code of Judicial Ethics](#). The commission cannot change a decision made by any judicial officer; this is a function of the state's appellate courts. After investigation, and in some cases a public hearing, the commission may impose sanctions ranging from confidential discipline to removal from office.

Anyone may submit a complaint to the commission. See [How to File a Complaint](#) and [The Complaint Process](#).

## **Members & Meetings**

### **Membership of the Commission on Judicial Performance**

Pursuant to the California Constitution, article VI, section 8, the commission is composed of eleven members: one justice of a court of appeal and two judges of superior courts appointed by the Supreme Court; two attorneys appointed by the Governor; and six lay citizens, two appointed by the Governor, two appointed by the Senate Committee on Rules and two appointed by the Speaker of the Assembly. Members are appointed to four-year terms. A member whose term has expired may continue to serve until the vacancy has been filled by the appointing authority; however, no member shall serve for more than a total of ten years. The members of the commission do not receive a salary but are reimbursed for expenses relating to commission business. The commission members elect a chairperson and vice-chairperson annually.

### **Commission Members**

#### **Mr. Lawrence J. Simi, Chairperson**

Public Member

Appointed by the Governor on August 17, 2005

Reappointed on September 13, 2009

Term ends on February 28, 2013

#### **Honorable Erica R. Yew, Vice-Chairperson**

Judge-Superior Court

Appointed by the Supreme Court on December 10, 2010  
Reappointed on March 1, 2011  
Term ends February 28, 2015

**Ms. Mary Lou Aranguren**

Public Member

Appointed by the Senate Rules Committee on September 5, 2011  
Reappointed March 1, 2013  
Term ends on February 28, 2017

**Anthony P. Capozzi, Esq.**

Attorney

Appointed by the Governor on April 6, 2010  
Term ends on February 28, 2013

**Honorable Thomas M. Maddock**

Judge-Superior Court

Appointed by the Supreme Court on April 1, 2013  
Term ends on February 28, 2017

**Nanci E. Nishimura, Esq.**

Attorney

Appointed by the Governor on May 12, 2011  
Term ends on February 28, 2015

**Honorable Ignazio J. Ruvolo**

Justice-Court of Appeal

Appointed by the Supreme Court on May 1, 2013  
Term ends on February 28, 2017

**Mr. Richard Simpson**

Public Member

Appointed by the Speaker of the Assembly on June 17, 2013  
Term ends on February 28, 2017

**Ms. Maya Dillard Smith**

Public Member



Appointed by the Senate Rules Committee on June 27, 2007

Reappointed on March 17, 2011

Term ends on February 28, 2015

**Ms. Sandra Talcott**

Public Member

Appointed by the Speaker of the Assembly on November 15, 2007

Reappointed on July 11, 2011

Term ends on February 28, 2015

**Mr. Adam N. Torres**

Public Member

Appointed by the Governor on May 12, 2011

Term ends on February 28, 2015

**[Commission Meetings](#)**

The commission meets approximately seven times a year at the commission's office in San Francisco. If a public hearing is scheduled, a press release is issued. See [Pending Cases - Press Releases & Documents](#).

**Press Releases**

**MILLS, Bruce C.**

**Contra Costa County Superior Court**

- [07/30/13](#) Commission issues Decision and Order Imposing Public Admonishment. See [ [DISCIPLINE](#) ].
- [05/14/13](#) Commission issues Notice of Hearing.
- [03/04/13](#) Commission issues Notice of Hearing.
- [01/07/13](#) Commission issues Notice of Hearing.
- [11/05/12](#) Commission institutes formal proceedings. See [ [CHARGES](#) ] [ [ANSWER](#) ].

## MISCELLANEOUS

- [05/16/13](#) Commission adopts new and amended rules. See [ [REPORT](#) ] [ [COMMISSION RULES](#) ].
- [04/03/13](#) Commission announces release of Annual Report. See [ [ANNUAL REPORT](#) ].
- [03/04/13](#) Commission announces Biennial Adjustment of Gift Limitation. See [ [CCP SECTION 170.9](#) ].
- [01/15/13](#) Proposed Rule Changes Under Consideration. See [ [PROPOSED RULES](#) ].
- [01/15/13](#) CJP Response to CJA Letter. See [ [CJP RESPONSE](#) ].
- [01/15/13](#) CJA Letter to CJP. See [ [CJA LETTER](#) ].

### **SEEMAN, Paul D.**

#### **Alameda County Superior Court**

- [03/21/13](#) Judge resigns and commission defers proceedings pending resolution of criminal case.

### **Organization & Budget**

#### **Organization of the Commission**

Prior to the 2012-2013 fiscal year, the commission had 27 authorized staff positions. In 2003 and 2008, the commission's budget was reduced by a total of 20%. As a consequence, several positions were kept vacant and others filled part-time as a cost-saving measure. This resulted in an overall staffing reduction of approximately 26% over the past 10 years. During the current fiscal year, the commission's authorized staff positions were reduced to 22 -- 12 attorneys, 9 support staff, and 1 temporary staff position -- to reflect the actual number of filled positions.

The Director-Chief Counsel heads the agency and reports directly to the commission. The Director-Chief Counsel oversees the intake and

investigation of complaints and the commission examiner's handling of formal proceedings. The Director-Chief Counsel is also the primary liaison between the commission and the judiciary, the public, and the media. Victoria B. Henley has served as Director-Chief Counsel since 1991.

The commission's Staff Counsel include intake attorneys who are responsible for reviewing and evaluating new complaints and investigating attorneys who are responsible for conducting staff inquiries and preliminary investigations.

Trial Counsel serves as examiner during formal proceedings, aided by Assistant Trial Counsel. The examiner is responsible for preparing cases for hearing before special masters, including presenting the evidence that supports the charges and briefing. The examiner also presents cases orally and in writing in hearings before the commission and the California Supreme Court.

One member of the commission's legal staff, the Legal Advisor to Commissioners, is solely responsible for assisting the commission in its deliberations during adjudication of contested matters and for the coordination of formal hearings. That attorney does not participate in the investigation or prosecution of cases and reports directly to the commission. Janice M. Brickley was appointed to the position in August 2007.

### [Commission Organizational Chart](#)

## **The Commission's Budget**

### **2013-2014 Budget**

The commission's budget is separate from the budget of any other state agency or court. For the current 2013-2014 fiscal year, the commission's budget is \$4,198,000. In the 2003-2004 fiscal year, and again in the 2008-2009 fiscal year, the commission's budget was reduced by 10%. None of the 20% reduction in funding has been restored.

The commission's constitutional mandate is the investigation of allegations of misconduct and the imposition of discipline. The members of the commission receive no salaries, only reimbursement of expenses related to commission business. Because the performance of the commission's core functions is dependent upon the services of its legal and support staff, the commission's budget is largely allocated to personnel expenses. Reduction in the commission's budget have resulted in staffing reductions.

### **2012-2013 Budget**

The commission's final budget appropriation for the 2012-2013 fiscal year was \$4,198,00. Final expenditures totaled \$4,013,602. Approximately 39% of the commission's budget supported the intake and investigation functions and approximately 15% was used in connection with formal proceedings. The remaining 46% went toward sustaining the general operations of the commission, including facilities, administrative staff, supplies, and security.

[2012-2013 Expenditures Chart](#)

### **Publications**

#### **Annual Report**

The commission's Annual Report is published in the first quarter of the calendar year. The report provides comprehensive information on the commission's authority and procedures and contains statistical data on commission cases and summaries of disciplinary action.

#### **Informational Pamphlet**

The commission's Informational Pamphlet provides a brief overview of the commission's authority and jurisdiction.

#### **Summary of Discipline Statistics 1990-2009**

In 2002, the Commission on Judicial Performance released a summary of discipline statistics for the period 1990 to 1999, which was unprecedented nationally. If you would like to view the 10-year summary, [click here](#).

In June 2012, the commission issued a new report covering twenty years of judicial discipline that is likewise without precedent. Both reports were undertaken by the commission in order to afford the judiciary and the public greater information about the commission's work, much of which is confidential under the California Constitution and the rules governing the commission.

The new report entitled "Summary of Discipline Statistics 1990 - 2009" provides statistical information on the incidence of discipline for California trial court judges as related to factors such as the judge's age, the judge's gender, the number of years of judicial service, the size of the judge's court, the judge's disciplinary history, whether the judge was initially appointed or elected to office, and the type of misconduct for which the judge was disciplined. The report covers all cases in which public or private discipline was imposed on judges during the period from 1990 through 2009. If you would like to view the 20-year summary, [click here](#).

If you would like a copy of the commission's Informational Pamphlet, Annual Report, or Summary of Discipline Statistics, please contact the commission office by telephone at 415-557-1200.

### **Case Statistics**

- [Active & Former Judges](#)
- [Subordinate Judicial Officers](#)

### **2012 Statistics**

In 2012, there were 1,803 judgeships within the commission's jurisdiction. In addition to jurisdiction over active judges, the commission has the authority to impose certain discipline upon former judges for conduct while they were active judges. See [Active and Former Judges](#) for statistics on the commission's handling of complaints about judges in 2012.

The commission's jurisdiction also includes California's 304 court commissioners and referees. See [Subordinate Judicial Officers](#) for statistics

on the commission's handling of complaints about court commissioners and referees in 2012.

The commission office received over 469 complaints in 2012 concerning individuals and matters that did not come under the commission's jurisdiction: federal judges, former judges for matters outside the commission's jurisdiction, judges pro tem (temporary judges), workers' compensation judges, other government officials and miscellaneous individuals. Commission staff responded to each of these complaints and, when appropriate, made referrals.

### **Statistics from Prior Years**

See the commission's [Annual Reports](#) for statistics on cases in prior years.

### **Public Discipline & Decisions 1961 - Present**

Decisions on all of the commission's public disciplinary matters are available on this website.

- [Decisions by Judge's Name](#)
- [Decisions by Type of Discipline](#)
- [Discipline & Decisions Database Search](#)

### **Public Discipline Imposed by the Commission**

Pursuant to amendments to the California Constitution which took effect in March 1995, the commission is authorized to impose all disciplinary sanctions, subject to discretionary review by the Supreme Court. Between 1988 and 1994, the commission was authorized to impose public reprovls with the consent of the judge. Public admonishment replaced the sanction of public reprovl.

### **Discipline by Commission**

10 Removals

29 Public Censures

17 Public Reprovals  
75 Public Admonishments

### **Other Action by Commission**

1 Private Admonishment [available to public pursuant to stipulation and order]

### **Discipline Imposed by the Supreme Court**

Prior to 1995, the Supreme Court had the authority to censure or remove judges from office upon recommendation by the commission.

### **Discipline by Supreme Court**

15 Removals [including 1 contested retirement]  
20 Censures  
1 Uncontested Involuntary Retirement

### **Private Discipline Summaries**

Summaries of private discipline issued by the commission from 1998 through 2012 are available on this website.

### [Summaries of Private Discipline](#)

### **Private Discipline**

The commission may impose private discipline after an investigation and after the judge has had an opportunity to comment on the allegations.

### **Advisory Letters**

If the commission determines that improper conduct occurred, but the misconduct was relatively minor, the commission may issue an advisory letter to the judge. In an advisory letter, the commission advises caution or expresses disapproval of the judge's conduct. As noted by the California Supreme Court in *Oberholzer v. Commission on Judicial Performance* (1999)

20 Cal.4th 371, 393: "Advisory letters may range from a mild suggestion to a severe rebuke." An advisory letter may be issued when the impropriety is isolated or relatively minor, or when the impropriety is more serious but the judge has demonstrated an understanding of the problem and has taken steps to improve. An advisory letter is especially useful when there is an appearance of impropriety. An advisory letter might be appropriate when there is actionable misconduct offset by substantial mitigation.

### **Private Admonishments**

When more serious misconduct is found, the commission may issue a private admonishment. A private admonishment consists of a notice sent to the judge containing a description of the improper conduct and the conclusions reached by the commission. Private admonishments are designed in part to correct problems at an early stage in the hope that the misconduct will not be repeated or escalate, thus serving the commission's larger purpose of maintaining the integrity of the California judiciary.

Private discipline may be considered by the commission in subsequent proceedings, particularly when the judge has repeated the conduct for which the judge was previously disciplined.

See [10-Year Summary of Commission Activity](#) for the number of advisory letters and private admonishments issued by the commission over the last 10 years, as well as for statistics on other actions by the commission.

### **Confidentiality**

Advisory letters and private admonishments are confidential. However, the commission's rules provide that the person who lodged the complaint is to be advised that appropriate corrective action has been taken, the nature of which is not disclosed. The California Constitution also provides that, upon request of the governor of any state, the President of the United States, or the Commission on Judicial Appointments, the commission is to provide the requesting authority with the text of any private admonishment or advisory letter issued to a judge who is under consideration for a judicial appointment.



## **Summaries of Private Discipline**

Private disciplinary action by the commission is summarized, without identifying the judge involved, in the commission's annual reports. In order to maintain confidentiality, certain details of the cases have been omitted or obscured, making the summaries less informative than they otherwise might be, but because these summaries are intended in part to educate judges and the public and to assist judges in avoiding inappropriate conduct, the commission believes it is better to describe the conduct in abbreviated form than to omit the summaries altogether.

Summaries of advisory letters are categorized by the type of misconduct that resulted in discipline. When multiple types of misconduct were involved in a single case, they are listed at the end of the summary of that case. See chart on the [Types of Conduct Resulting in Discipline](#) in 2012, and the [Types of Misconduct](#) chart for a list of the categories of conduct for which judges may be disciplined.

[Summaries of Private Discipline.](#)

## **Mandate & Legislative History**

### **Establishment of the Commission**

The commission was established by legislative constitutional amendment in the November 1960 election. The provisions establishing the commission were part of a package of judicial administration reforms, heralded as "real protection against incompetency, misconduct or non-performance of duty on the Bench." The commission office was established and the commission began its work in 1961.

California was the first state to set up a permanent body to address judicial misconduct. Today there are comparable bodies in all fifty states and in the District of Columbia, many of which were initially modeled after "the California Plan." See [Other State Judicial Conduct Organizations](#).

## **Purpose of the Commission**

The commission is responsible for the investigation of complaints of judicial misconduct and incapacity and for the discipline of judges, former judges, court commissioners and referees. The commission's authority is limited to investigation and discipline of judicial misconduct, which usually involves conduct in conflict with the standards set forth in the [Code of Judicial Ethics](#).

## **Legislative History**

Proposition 10 the "Administration of Justice" amendment was passed by California voters in November 1960. It amended article VI of the California Constitution to provide for, at section 1a, the "Commission on Judicial Qualifications," a nine-member body comprised of five judges, two lawyers and two citizens to investigate allegations of judicial misconduct. Section 10b also was added to provide for the removal of judges from office by the Supreme Court on recommendation by the commission for grounds stated in the Constitution. The amendment specified that proceedings before the commission would be confidential until a recommendation was made by the commission to the Supreme Court for removal of the judge from office.

In November 1966, Proposition 1a was approved by the voters. Based on recommendations by the Constitutional Revision Commission, the amendment "simplified and improved" the language concerning the commission. It also added censure as a sanction that could be imposed by the Supreme Court in addition to removal from office.

In November 1976, California voters passed Proposition 7. The Commission on Judicial Qualifications was renamed the Commission on Judicial Performance. A number of other changes were made, including the addition of provisions for the removal or retirement of a Supreme Court justice. Private admonishment, a sanction to be imposed by the commission rather than the Supreme Court, was added. The reference to "habitual intemperance" as grounds for discipline was clarified by the addition of "in the use of intoxicants or drugs." Another of the enumerated grounds for censure or removal of a judge, "willful and persistent failure to perform

judicial duties," was changed to "persistent failure or inability to perform the judge's duties."

In 1988, voters passed Proposition 92, giving the commission authority to open hearings at the request of the respondent judge or when the charges involved moral turpitude, corruption or dishonesty and when to do so would be in the pursuit of public confidence and in the interests of justice. The amendment also provided for public statements by the commission in certain circumstances. Public reproof was added as an intermediate sanction, between censure by the Supreme Court and private admonishment by the commission. A public reproof could be imposed by the commission with the consent of the judge.

Proposition 190 was passed by the voters in 1994, approving more than a dozen significant changes to the commission. In addition to mandating open hearings in all cases involving formal charges, the amendment conferred the authority for censure and removal determinations upon the commission, rather than the Supreme Court, and transferred the authority for promulgating rules governing the commission from the Judicial Council to the commission. The membership of the commission was increased to eleven members and its composition changed to three judges, two lawyers and six citizens.

In 1998, voters passed Proposition 221, giving the commission shared authority with the superior courts for the investigation and discipline of subordinate judicial officers.

#### Governing Provisions

- [California Constitution](#)
- [Commission Rules](#)
- [Commission Policy Declarations](#)
- [Government Code](#)
- [Code of Civil Procedure](#)

- [Code of Judicial Ethics](#)
- [California Rules of Court](#)

### [California Constitution](#)

The Commission on Judicial Performance was established by legislative constitutional amendment approved by the voters in November 1960. The commission's authority is set forth in article VI, sections 8, 18, 18.1 and 18.5 of the California Constitution. In 1966, 1976, 1988, 1994, 1998 and most recently in 2002, the Constitution was amended to change various aspects of the commission's work.

### [Rules of the Commission on Judicial Performance](#)

Article VI, section 18(i) of the Constitution authorizes the commission to make rules for conducting investigations and formal proceedings. The Rules of the Commission on Judicial Performance, rules 101 through 138, were adopted by the commission on October 24, 1996, and took effect December 1, 1996. The rules have been amended periodically thereafter.

### [Policy Declarations of the Commission on Judicial Performance](#)

The Policy Declarations of the Commission on Judicial Performance detail the commission's internal procedures and existing policies. A Code of Ethics for Commission Members is set forth in Division VI of the Policy Declarations.

### [Government Code](#)

The commission is subject to Government Code sections 68701 through 68756. Additionally, the Government Code controls the commission's handling of judges' disability retirement applications, pursuant to sections 75060 through 75064 and sections 75560 through 75564.

### [Code of Civil Procedure](#)

The commission is responsible for enforcing the restrictions on judges' receipt of gifts and honoraria as set forth in Code of Civil Procedure section

170.9. On January 30, 2013, the commission adopted the gift limitation amount of \$390.00 for purposes of CCP section 170.9.

### [Code of Judicial Ethics](#)

The Code of Judicial Ethics, adopted by the California Supreme Court, establishes standards for ethical conduct for judges on and off the bench and for candidates for judicial office. All members of the judiciary must comply with the Code. As stated in the Preamble to the Code: "Compliance is required to preserve the integrity of the bench and to ensure the confidence of the public."

### [California Rules of Court](#)

Rules 9.60, 9.61, 10.603, 10.703, and 10.1016 of the California Rules of Court pertain to the Commission on Judicial Performance.

## **Recent Changes In The Law**

### **Commission Rules and Policy Declarations**

Pursuant to its rulemaking authority under article VI, section 18, subdivision (i) of the California Constitution, on January 15, 2013, the Commission on Judicial Performance circulated for public comment a set of proposals for additions and changes to its rules. Following consideration of comments received, the commission adopted the proposed rule amendments with some modifications at its meeting on May 8, 2013. Discussion of the changes and text of each addition and amendment is summarized in the commission's [report](#). The final version of the new and amended rules is provided in the above links.

In January 2013, the commission adopted amendments to Policy Declarations 3.6 [Policy Declarations], 5.1 [Disability Applications: Confidentiality], 5.2 [Disability Applications: Medical Consultants], 5.3 [Reexamination of Judges Retired for Disability], 5.4 [Procedure in Disability Retirement Matters], 5.5 [Disability Applications: Burden of

Proof] and 6.1 [Recusal], and adopted new Policy Declaration 2.3.5 [Deposition Transcripts Taken Pursuant to Rule 122(g)].

### **Code of Judicial Ethics**

The Supreme Court of California adopted amendments to the Code of Judicial Ethics, effective January 1, 2013. See above links and Supreme Court's [press release](#).

### **Rules of Court**

No amendments were made to the Rules of Court pertaining to the commission in 2012.

### **Code of Civil Procedure**

In 2012, there were no substantive changes made to the Code of Civil Procedure relating to the work of the commission. However, on January 30, 2013 the commission adopted a new gift limitation amount of \$390, for purposes of CCP section 170

#### How to File a Complaint

- [The Complaint Process](#)
- [Complaint Form](#)

#### **How Do I File a Complaint?**

Complaints must be in writing. You may use the commission's [COMPLAINT FORM](#) or write a letter to the commission. Electronic filing of complaints is not available; complaints must be submitted to the commission office:

**COMMISSION ON JUDICIAL PERFORMANCE**  
**455 Golden Gate Avenue, Suite 14400**  
**San Francisco, California 94102**

If your complaint is about a subordinate judicial officer (an attorney employed by the court to serve as a court commissioner or referee), your complaint must first be directed to the court in which the subordinate judicial officer sits.

### **What Should Be in My Complaint?**

- The name of the judge, court commissioner or referee.
- The court in which the judicial officer sits.
- A detailed description of the action or behavior that you believe is misconduct.\*
- The names and telephone numbers of any witnesses to the events described.
- The date or dates on which the conduct occurred.
- The type of court case involved and your relationship to the case.
- If your complaint is about a court commissioner or referee, provide copies of your correspondence to and from the local court.

\* A complaint should not simply state conclusions, such as "the judge was rude" or "the judge was biased." Instead, the complaint should fully describe what the judicial officer did and said. If a court document or an audio or video tape evidences the misconduct, you may submit a copy (do not send original documents) or mention it in your complaint.

### **What Types of Conduct Does the Commission Investigate?**

Some examples of judicial misconduct are improper demeanor, failure to disqualify when the law requires, receipt of information about a case outside the presence of one party, abuse of contempt or sanctions, and delay in decision-making. Discipline has been categorized by [Types of Misconduct](#).

### **What if I Think the Judge's Ruling Was Wrong?**

An error in a judge's decision or ruling, by itself, is not misconduct. Appeal may be the only remedy for such an error, or there may be no remedy. The commission is not an appellate court. The commission's authority is limited by law to investigating the complaint and, if appropriate, imposing discipline. The commission does not have the authority to change a judge's decision or ruling or to issue orders in any case, including ordering anyone to be released from jail, granting a new trial, disqualifying a judge from hearing a case, assigning a new judge to a case, or granting or changing custody, visitation or child support orders. Neither the commission nor its staff is authorized to give legal advice or respond to requests for assistance with individual legal matters.

### **What Happens After I File My Complaint?**

Each complaint is acknowledged by letter when it is received at the commission office. The commission considers each complaint and determines whether sufficient facts exist to warrant an investigation or whether the complaint is unfounded and should not be pursued. Until the commission has authorized an investigation, staff does not contact the judge or court personnel; however, to assist the commission in its initial review of a complaint, the commission's legal staff will research any legal issues and may obtain additional relevant information from the complainant. The commission's procedures are explained in [The Complaint Process](#).

### **How Long Will It Take the Commission to Reach a Decision on My Complaint?**

It is difficult to predict how long it will take for the commission to reach a final decision regarding a particular complaint. Some complaints can be handled quickly; others are more complex and take more time.

### **Will I Be Told What Action the Commission Has Taken on My Complaint?**

Each person who submits a complaint is notified in writing after the commission has reached a final decision regarding the complaint. Unless public discipline has been issued, the complainant will be advised either that



the commission has closed the matter or that appropriate corrective action has been taken, the nature of which is not disclosed. When public discipline is issued, the notice of such discipline is provided to the complainant.

### **Are Complaints Treated Confidentially?**

The California Constitution and the rules governing the commission provide for confidentiality of complaints and investigations. During the investigation process, considerable effort is made to protect complainants' and witnesses' identities. If the matter is sufficiently serious to warrant the filing of formal charges, the case becomes public and the charges and all subsequently filed documents are made available to the public, and any hearings in the matter are open to the public. A complainant may be called to testify at the hearing.

### **The Complaint Process**

#### **Review and Investigation of Complaints**

To view a chart of Commission Proceedings, click [here](#).

The commission considers complaints about active California judges, former judges for conduct occurring while they were active judges, and subordinate judicial officers (attorneys employed by California's state courts to serve as court commissioners and referees). Complaints about subordinate judicial officers must be made first to the local court. (See below for complaint procedures pertaining specifically to subordinate judicial officers).

The commission reviews each written complaint about a California judge and determines whether sufficient facts exist to warrant investigation or whether the complaint is unfounded and should not be pursued. Until the commission has authorized an investigation, the commission's staff does not contact the judge or any court personnel. However, to assist the commission in its initial review of the complaint, the commission's legal staff will research any legal issues and may obtain additional relevant information from the complainant or the complainant's attorney.

When the commission determines that a complaint warrants investigation, the commission directs legal staff to investigate the matter and report back to the commission. There are two levels of investigation: a staff inquiry and a preliminary investigation. Most cases begin with a staff inquiry. In more serious matters, the commission may commence with a preliminary investigation. Commission investigations may include contacting witnesses, reviewing court records and other documents, observing courtroom proceedings, and conducting such other investigation as the issues may warrant. If the investigation reveals facts that warrant dismissal of the complaint, the complaint may be closed without contacting the judge; otherwise, the judge is asked in a letter to comment on the allegations.

### **Action the Commission Can Take**

- Close (Dismissal)
- Advisory Letter
- Private Admonishment
- Public Admonishment
- Public Censure
- Removal from Office / Involuntary Retirement

### **Close Without Discipline**

Many of the complaints received by the commission do not involve judicial misconduct. For example, a judge's error in a decision or ruling does not ordinarily constitute judicial misconduct. Appeal may be the only remedy for such an error, or there may be no remedy. Cases that on their face do not allege judicial misconduct are closed by the commission after initial review. If, after an investigation, the allegations are found to be untrue or unprovable, the commission will close the case without any disciplinary action against the judge. When cases are closed without discipline, the person who lodged the complaint is notified that the commission has found no basis for action against the judge or has determined not to proceed further in the matter.

## **Confidential Discipline**

After an investigation and an opportunity for comment by the judge, if the commission determines that improper conduct occurred but the misconduct was relatively minor, the commission may issue an advisory letter to the judge. In an advisory letter, the commission advises caution or expresses disapproval of the judge's conduct.

When more serious misconduct is found, the commission may issue a private admonishment. A private admonishment consists of a notice sent to the judge containing a description of the improper conduct and the conclusions reached by the commission.

Advisory letters and private admonishments are confidential. The person who lodged the complaint is advised that appropriate corrective action has been taken, but the nature of the action is not disclosed. The California Constitution also provides that, upon request of the governor of any state, the President of the United States, or the Commission on Judicial Appointments, the commission is to provide the requesting authority with the text of any private admonishment or advisory letter issued to a judge who is under consideration for a judicial appointment.

For summaries of advisory letters and private admonishments issued over the past decade, see [Private Discipline Summaries](#).

## **Public Discipline**

The commission may issue a public admonishment or a public censure in cases where the misconduct warrants a more severe sanction than private discipline or where the judge has repeated conduct for which the judge was previously disciplined. The nature and impact of the misconduct generally determine the level of discipline. Both public admonishment and public censure are notices that describe a judge's improper conduct and state the findings made by the commission. The notice is sent to the judge and made available to the complainant, the press and the general public. A public censure can be issued after a hearing, or without a hearing if the judge consents. In cases in which the conduct of a former judge warrants public

censure, the commission also may bar the judge from receiving assignments from any California state court.

In the most serious cases, the commission may determine, following a hearing, to remove a judge from office. Typically, these cases involve persistent and pervasive misconduct. In cases in which a judge is no longer capable of performing judicial duties, the commission may determine - again, following a hearing - to involuntarily retire the judge from office.

A judge may petition the Supreme Court to review an admonishment, public censure, removal or involuntary retirement determination.

See [Public Discipline & Decisions 1961 - Present](#).

### **Confidentiality**

Under the California Constitution and the commission's rules, complaints to the commission and commission investigations are confidential. The commission ordinarily cannot confirm or deny that a complaint has been received or that an investigation is under way. Persons contacted by the commission during an investigation are advised regarding the confidentiality requirements. After the commission orders formal proceedings, the charges and all subsequently filed documents are made available for public inspection. Any hearing on the charges is also public.

### **Procedures Relating to Subordinate Judicial Officers**

The constitutional provisions governing the commission's role in the oversight and discipline of court commissioners and referees expressly provide that the commission's jurisdiction is discretionary. Each superior court retains initial jurisdiction to discipline subordinate judicial officers or to dismiss them from its employment and also has exclusive authority to respond to complaints about conduct problems outside the commission's constitutional jurisdiction. Since the local court's role is primary, the commission's rules require that complaints about subordinate judicial officers be made first to the local court.

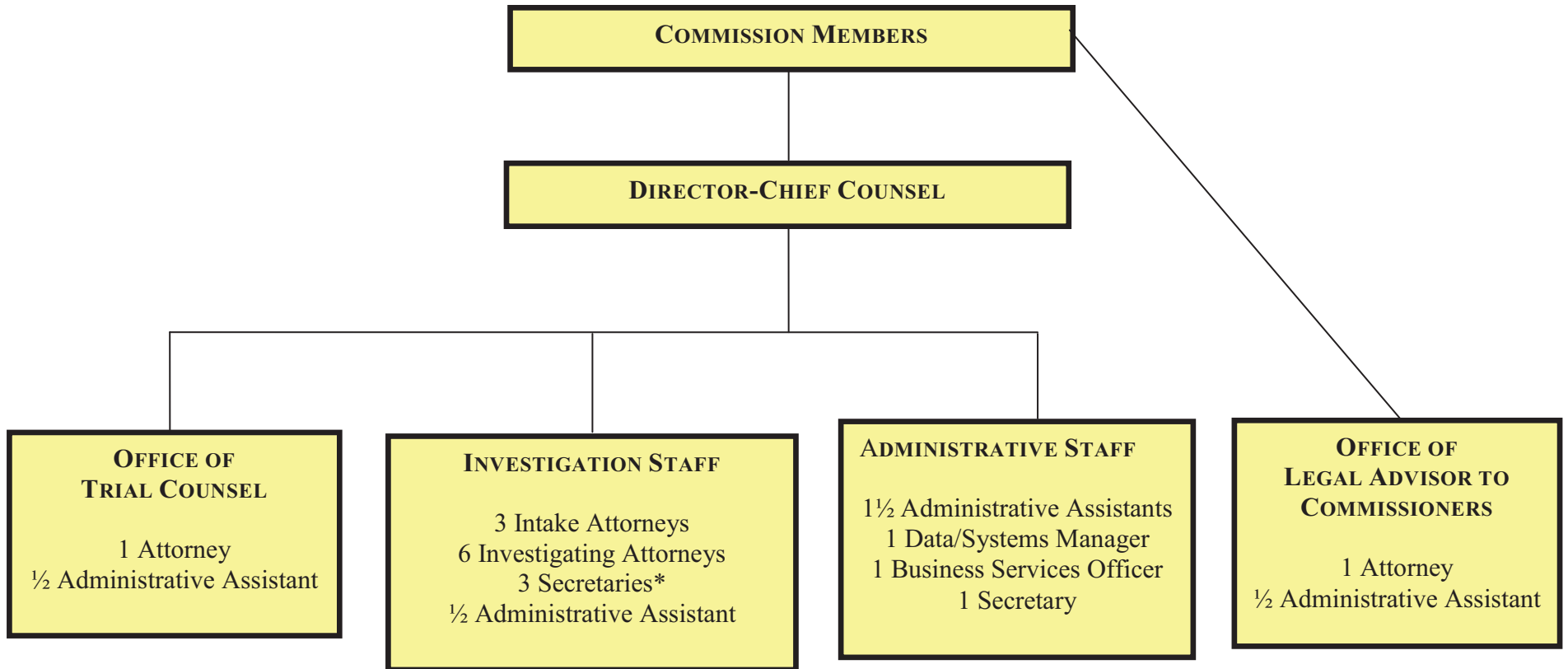
Complaints about subordinate judicial officers come before the commission in a number of ways. First, when a local court completes its disposition of a complaint, the complainant has the right to seek review by the commission. When closing the complaint, the court is required to advise the complainant to seek such review within 30 days. Second, a local court must notify the commission when it disciplines a subordinate judicial officer for conduct that, if alleged against a judge, would be within the jurisdiction of the commission. Third, a local court must notify the commission if a subordinate judicial officer resigns while a preliminary or formal investigation is pending concerning conduct that, if alleged against a judge, would be within the jurisdiction of the commission, or under circumstances that would lead a reasonable person to conclude that the resignation was due, at least in part, to a complaint or allegation of misconduct. Lastly, the commission may investigate or adjudicate a complaint against a subordinate judicial officer at the request of a local court.

When a matter comes to the commission after disposition by a local court, the commission may commence an investigation of the subordinate judicial officer if it appears that the court has abused its discretion by failing to investigate sufficiently, by failing to impose discipline, or by imposing insufficient discipline. When a court commissioner or referee has resigned while an investigation is pending or has been terminated by the local court, the commission may commence an investigation to determine whether to conduct a hearing concerning the individual's fitness to serve as a subordinate judicial officer. To facilitate the commission's review of complaints and discipline involving subordinate judicial officers, the California Rules of Court require superior courts to adopt procedures to ensure that complaints are handled consistently and that adequate records are maintained. Upon request by the commission, the superior court must make its records concerning a complaint available to the commission.

The Constitution requires the commission to exercise its disciplinary authority over subordinate judicial officers using the same standards specified in the Constitution for judges. Thus, the rules and procedures that govern investigations and formal proceedings concerning judges also apply

to matters involving subordinate judicial officers. In addition to other disciplinary sanctions, the Constitution provides that a person found unfit to serve as a subordinate judicial officer after a hearing before the commission shall not be eligible to serve as a subordinate judicial officer. The Constitution also provides for discretionary review of commission determinations upon petition by the subordinate judicial officer to the California Supreme Court.

# ORGANIZATIONAL CHART



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# COMPLAINT ABOUT A CALIFORNIA JUDGE, COURT COMMISSIONER OR REFEREE

*Confidential under California Constitution  
Article VI, Section 18, and Commission Rule 102*

For information about the Commission on Judicial Performance and instructions on filling out  
and submitting this form, please visit our Web site at <http://cjp.ca.gov>.

**Today's date:**

**Your name:**

**Your telephone number:**

**Your address:**

**Your attorney's name:**

**Your attorney's telephone number:**

**Name of judge:**

**OR**

**Name of court commissioner or referee:**

(If your complaint involves a court commissioner or referee, you must first submit your complaint to the local  
court. If you have done so, please attach copies of your correspondence to and from that court.)

**Court:**

**County:**

**Name of case and case number:**

**Please specify what action or behavior of the judge, court commissioner or referee is the basis of your  
complaint. Provide relevant dates and the names of others present. (Use additional pages if necessary.)**

**Return to: Commission on Judicial Performance  
455 Golden Gate Avenue, Suite 14400  
San Francisco, California 94102**

**Telephone: (415) 557-1200**

**Fax: (415) 557-1266**