

INTERNATIONAL ASSOCIATION OF JUDGES 1ST STUDY COMMISSION

“DISCIPLINARY PROCEEDINGS AND JUDICIAL INDEPENDENCE”

SUBMISSIONS FROM AUSTRALIA

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The Australian court system is made up of a federal jurisdiction, and the various State and Territory jurisdictions. The arrangements for the discipline of judges vary in substance between each of the jurisdictions, as do the principles of judicial independence. This response concentrates on the arrangements affecting the federal judiciary.

*The judicial power of the federal courts, presently being the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court of Australia, is vested by Chapter III of the Commonwealth Constitution Act (**Constitution**). The Constitution does not include any detailed provisions that directly deal with the discipline of federal judges. Judicial independence from Parliament and the Executive, however, is a fundamental pillar of law and governance in Australia and is directly dealt with by the Constitution.*

1. Allegations of misconduct

- (a) What kind of allegation can justify disciplinary proceedings against judges in your country? Give some examples.**

The kinds of allegations that may, if substantiated, justify the removal of a federal judge are defined by s.72(ii) of the Constitution be ‘proved misbehaviour and incapacity’. The terms constructively prescribe the standard of conduct expected of all judicial officers.

Misbehaviour – examples: denial of procedural fairness; judicial activism; abuse of judicial power; intemperate or inappropriate conduct; sexual misconduct; judicial bias; personal bias; private communication with parties; and failure to deliver judgments in a reasonable timeframe.

Incapacity – examples: mental incapacity; and physical incapacity.

(b) Can the content of the decisions taken by judges also lead to disciplinary proceedings?

Typically, the content of judicial decisions is capable of being reviewed on appeal to a higher court.¹ The appeals process is the primary means for identifying and correcting judicial error and reviewing judicial performance.² There is otherwise no prescribed procedure of disciplining a federal judge for the content of their decisions.

(c) Can judges be charged criminally for the content of their judicial decisions under any circumstances?

Federal judges cannot be charged criminally for the content of their judicial decisions, however they may be prosecuted for any associated criminal conduct.³

The general principle is that federal judges enjoy judicial immunity for acts done in the course of their judicial work.⁴

2. Body responsible for disciplinary proceedings

(a) Which body is responsible for disciplinary proceedings against judges in your country?

There is no body responsible for disciplinary proceeding against federal judges. There are, however, statutory mechanisms for establishing a Parliamentary Commission on a needs basis and for empowering the heads of jurisdiction to deal with complaints as they consider appropriate.

In 2012, the Federal Parliament introduced two pieces of legislation that deal with complaints concerning federal judicial officers. These are: the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) (**Parliamentary Commission Act**); and the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) (**Judicial Complaints Act**). The former establishes a statutory mechanism exercisable by the Houses of Parliament for forming a Parliamentary Commission to assist Parliament in its consideration of removal of a federal judge under s.72(ii) of the Constitution by investigating alleged misconduct and incapacity.⁵ The latter amends

¹ H. P. Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 216.

² A. M. Gleeson QC, 'Judging the Judges' (1979) 53 *Australian Law Journal* 330, 343.

³ H. P. Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 219.

⁴ R. Ananian-Welsh and G Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2004) 40(3) *Monash University Law Review* 593, 631.

⁵ *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act 2012* (Cth), s.10; *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Bill 2012* (Cth), Explanatory Memorandum, p.1-3.

relevant legislation⁶ to formalise the complaints process about federal judicial officers by providing the relevant heads of jurisdiction⁷ with a statutory basis for dealing with such complaints, including the formation of a Conduct Committee.⁸

The Parliamentary Commissions Act applies to all federal judges.⁹ The Judicial Complaints Act applies to all federal courts other than the High Court of Australia.¹⁰ Save for complaints serious enough to warrant removal, there is no published procedure that deals with complaints of misbehaviour or incapacity by a judge of the High Court of Australia.¹¹

(b) Is the body that carries out the disciplinary procedure the same one that imposes the penalties?

The role of a Parliamentary Commission established under the Parliamentary Commission Act is investigatory and advisory,¹² it will not have the power to impose any penalty on a federal judge. That power is constitutionally assigned to the Houses of Parliament, and ultimately the Governor-General.¹³

Likewise, the heads of jurisdiction do not have the power to formally discipline a federal judge.¹⁴ The Judicial Complaints Act merely empowers the heads of jurisdiction with the statutory means to ‘handle’ a judicial complaint.¹⁵

⁶ *Family Law Act 1975* (Cth), *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth).

⁷ The Chief Justice Federal Court of Australia and the Chief Justice/Chief Judge of the Federal Circuit and Family Court of Australia.

⁸ *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth), Sch.1; *Courts Legislation Amendment (Judicial Complaints) Bill 2012*, Explanatory Memorandum, p.1-3.

⁹ *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act 2012* (Cth), s.4.

¹⁰ *Courts Legislation Amendment (Judicial Complaints) Bill 2012*, Explanatory Memorandum, [17].

¹¹ Law Council of Australia, ‘Principles underpinning a Federal Judicial Commission’ (Policy Statement, 5 December 2020), p.4.

¹² *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Bill 2012* (Cth), Explanatory Memorandum, p.1-2.

¹³ *Commonwealth Constitution Act*, s.72(ii).

¹⁴ *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth), Sch.1; *Courts Legislation Amendment (Judicial Complaints) Bill 2012*, Explanatory Memorandum, [28].

¹⁵ *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth), Sch.1.

- (c) **What is the composition of the body responsible for disciplinary proceedings (as well as the one who must apply penalties to judges, when it is not the same)? Is it composed only by judges, does it have a mixed composition, or is it composed only by professionals outside of the Judiciary Branch? Kindly describe the composition of that body (those bodies).**

A Parliamentary Commission established under the Parliamentary Commissions Act is to be comprised of three (3) members nominated by the Prime Minister in consultation with the Leader of the Opposition in the House of Representatives,¹⁶ and appointed by resolution of the Houses of Parliament in the same session.¹⁷ The consultation requirement reflects the non-political function of a Parliamentary Commission.

In the interest of being consulted by judicial experience and expertise in carrying out its function, at least one (1) member of a Parliamentary Commission must be a *former* federal judicial officer or *former* judge of a State or Territory Supreme Court.¹⁸

3. Disciplinary penalties

- (a) **Which disciplinary penalties can be imposed on judges in your country?**

There are no prescribed disciplinary penalties that may be imposed on federal judges, save for removal under s.72(ii) of the Constitution.

There are some criminal sanctions that may be imposed on federal judges for certain conduct carried out in the course official duties. For example, a federal judge may be criminally prosecuted for offences relating to the administration of justice, such as ‘acting when interested’ by exercising their jurisdiction in relation to a matter which they have a personal interest in.¹⁹

- (b) **Is the disciplinary penalty the removal from office among them?**

Pursuant to s.72(ii) of the Constitution, a federal judge may be removed office on the ground of ‘proved misbehaviour and incapacity’. The procedure for the removal of a federal judge is prescribed by that same section. It provides that federal judges ‘shall

¹⁶ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), ss.13(1) and (2).

¹⁷ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s.14(2); *Courts Legislation Amendment (Judicial Complaints) Bill 2012*, Explanatory Memorandum, [97].

¹⁸ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s.13(3); *Courts Legislation Amendment (Judicial Complaints) Bill 2012*, Explanatory Memorandum, [98].

¹⁹ *Crimes Act 1914* (Cth), s.34.

not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal'.²⁰

(c) Can a judicial conviction for a crime lead to a penalty of removal from office?

The s.72(ii) of the Constitution power of removal is yet to be exercised. That is not to say that a federal judge who is convicted of a crime is immune from removal from office.

In July 1985, Justice Lionel Murphy, a Justice of the High Court of Australia, was convicted by the Supreme Court of New South Wales of attempting to pervert the course of justice by attempting to use his position to influence a committal proceedings against an acquaintance. Notwithstanding Justice Murphy's acquittal at retrial early the next year, the events culminated in the setting up of a Parliamentary Commission to investigate all outstanding allegations of misconduct and determine whether there had been 'misbehaviour' on his part that justified removal from the High Court. The investigation was terminated after it was revealed that Justice Murphy had terminal cancer. This is the closest a federal judge has come to being removed by exercise of s.72(ii) of the Constitution. It exemplifies that it is possible for criminal conviction to warrant consideration of removal from office.

4. Procedural fairness and suspension from office

(a) In the disciplinary proceedings against judges in your country, is a fair trial granted?

A Parliamentary Commission established under the Parliamentary Commission Act is required to act in accordance with principles of natural justice.²¹ Furthermore, the statutory framework includes provisions that are designed to ensure that federal judges who are subject to an investigation by a Parliamentary Commission are afforded transparency and procedural fairness.²²

For example, a Parliamentary Commission must give the federal judge particulars of the relevant allegation(s), provide them with the opportunity to make a statement and reasonable access to any documents or things that are before the Parliamentary Commission.

²⁰ *Commonwealth of Australia Constitution Act*, s.72(ii).

²¹ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s.20(1).

²² *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s.20(2).

(b) Is there an appeal against the decision imposing a disciplinary penalty on judges?

A federal judge may challenge the legality of Parliament's decision to remove them from office under s.72(ii) of the Constitution. The conduct of an extra-parliamentary commission's conduct is amenable to judicial review.²³ However, due to parliamentary privilege, the judgement by the Houses of Parliament that a judge should be removed because of proved misbehaviour or incapacity is not.²⁴ That said, the High Court of Australia is yet to have occasion to rule on the legality of such a decision.²⁵

(c) During the disciplinary proceedings, can the judge be suspended from office?

There are no statutory powers to *suspend* a federal judge from office, however the Chief Justices/Chief Judge of the Federal Court of Australia and the Federal Circuit and Family Court of Australia may 'temporarily restrict a Judge to non-sitting duties' to preserve public confidence in the court.²⁶ It is suggested that it is desirable that judges subjected to removal proceedings seek a leave of absence pending the outcome of the proceedings to protect the integrity and reputation of the court.²⁷

(d) Does the judge who is suspended during disciplinary proceedings continue to earn a salary normally or does the judge suffer any reduction in income?

Pursuant to s.72(iii) of the Constitution, a federal judge's remuneration 'shall not be diminished during their continuance in office'. This principle is replicated in the *Federal Court of Australia Act 1976* (Cth)²⁸ and the *Federal Circuit and Family Court of Australia Act 2021* (Cth).²⁹ In the absence of the power to suspend a federal judge from office, it follows that a federal judge's remuneration cannot be reduced in the event that they are temporarily restricted to non-sitting duties pending the outcome of disciplinary proceedings.

²³ H. P. Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 130.

²⁴ Enid Campbell, 'Judicial Review of Proceedings for Removal of Judges from Office' (1999) 22(2) 325, 326.

²⁵ Enid Campbell, 'Judicial Review of Proceedings for Removal of Judges from Office' (1999) 22(2) 325, 326.

²⁶ *Federal Court of Australia Act 1976* (Cth), ss.15(1AA)(iii) and 15(1AA)(d); *Federal Circuit and Family Court of Australia Act 2021* (Cth), ss.47(2)(iii), 47(2)(e), 144(2)(iii) and 144(2)(e).

²⁷ H. P. Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 126-127.

²⁸ *Federal Court of Australia Act 1976* (Cth), s.9(3).

²⁹ *Federal Circuit and Family Court of Australia Act 2021* (Cth), ss.18 and 116.

5. Recent changes to disciplinary proceedings

- (a) Were there any recent changes regarding disciplinary proceedings that may be considered to infringe upon judicial independence in your country?**

There have been no recent changes to disciplinary proceedings for federal judges. There have been a number of proposals for a standing Federal Judicial Commission to either replace, or support the existing statutory model. Notably, the Law Council of Australia³⁰ has commented that the absence of a Federal Judicial Commission means that there is a lack of options to deal with professional misconduct by federal judges.³¹

The implementation of any proposal would need to be in tune with the constitutional limits and the independence of judicial power in Australia, whilst fulfilling the growing expectation for transparent and proper oversight of the Australian judiciary.³²

- (b) If so, were those changes introduced by legislation, or were existing laws applied differently? Please specify.**

Both Victoria and New South Wales (two of Australia's largest state jurisdictions) have introduced a statutory commission that sits independent of the judicial and executive arms of government. If such a body were introduced at the federal level, it would be similarly introduced through legislation.

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³⁰ Australia's foremost body of the legal profession.

³¹ Michael Pelly, 'Law Council flags inquiry on Judge Vasta', *Financial Review*, (online, 14 March 2019) <<https://www.afr.com/companies/professional-services/law-council-flags-inquiry-on-judge-vasta-20190314-h1cdvf>>.

³² Gabrielle Appleby and Heather Roberts, 'The Chief Justice: Under Relational and Institutional Pressure' in G. Appleby and A. Lynch (eds.), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021), 61.