

7. The courts

- 7.1. When the Australian Capital Territory (Self-Government) Bill 1988 was introduced into the House of Representatives, the bill did not propose to transfer responsibility for the court system to the Territory. Clause 22(1)(b) of the bill provided that the Assembly had no power to make laws with respect to the establishment of courts.¹ Amendments initiated in the Senate provided that the clause ceased to have effect from 1 July 1990 (in its application to magistrates' courts and coroner's courts) and the whole proviso from 1 July 1992 unless sooner omitted by regulations.²
- 7.2. Following a request from the Assembly in 1992,³ the Commonwealth Parliament enacted the *A.C.T. Supreme Court (Transfer) Act 1992*,⁴ an Act relating to the transfer of responsibility for the Supreme Court of the Australian Capital Territory from the Commonwealth to the Territory. As a consequence, Part VA, 'The Judiciary' (ss 48A to 48D), was inserted in the Self-Government Act.
- 7.3. Part VA sets out the jurisdiction and powers of the Supreme Court and the effect of any enactment relating to the retirement ages of the Chief Justice, judges (other than additional judges) and the Master of the Supreme Court. It also sets out the requirements for any enactment relating to the establishment of a judicial commission for the Territory, and the removal of a judicial officer from office.⁵

1 It was proposed to transfer this and other responsibilities after a settling-in period. House of Representatives Debates, 19 October 1988, p 1924.

2 Senate Debates, 24 November 1988, pp 2731-2733; House of Representatives Debates, 29 November 1988, p 3455.

3 MoP, No 3, 8 April 1992, pp 17-18; MoP, No 4, 9 April 1992, pp 22-23; Assembly Debates, 8 April 1992, pp 122-126; Assembly Debates, 9 April 1992, pp 152-158. The resolution of the Assembly (sent to the President of the Senate and the Speaker of the House of Representatives) sought legislative action by the Commonwealth Parliament to provide, among other things, for:

- the existence of the Supreme Court of the ACT having all original and appellate jurisdiction that is necessary to administer justice in the ACT;
- provision for the removal from office of a judicial officer or a member of a tribunal by the ACT Executive, but only at the request, by resolution, of the Legislative Assembly acting in accordance with a report by a judicial commission which had found that the officer's behaviour or physical or mental capacity could be proved as misbehaviour or incapacity such as to warrant removal from office; and
- provisions for the determination of judicial remuneration and retiring ages of judicial officers.

4 The Act amended the Self-Government Act, the *A.C.T. Self-Government (Consequential Provisions) Act 1988*, the *A.C.T. Supreme Court Act 1933* and the *Federal Court of Australia Act 1976*.

5 Section 3 of the Self-Government Act defines the term 'judicial officer' to mean: the Chief Justice of the Supreme Court; a judge (other than an additional judge) of the Supreme Court; the Master of the Supreme Court; the Chief Magistrate; a magistrate; or any other judicial office holder or member of a tribunal specified in an enactment relating to the establishment of a judicial commission for the Territory.

- 7.4. Among other matters, Part VA effectively entrenches:
- the Supreme Court, in that it is to have all original and appellate jurisdiction necessary for the administration of justice in the Territory; and⁶
 - the composition and core functions of a judicial commission and the procedures for the removal from office of a judicial officer.⁷
- 7.5. The enactment of the *Supreme Court Amendment Act 2001*, together with the enactment of complementary legislation by the Commonwealth Parliament⁸ to amend the *Federal Court of Australia Act 1976* and the *Judiciary Act 1903*, established the Court of Appeal of the ACT Supreme Court, and removed the jurisdiction of the Federal Court in relation to appeals from the ACT Supreme Court.⁹

Appointment of judicial officers

- 7.6. The appointments of the Chief Justice, justices and the Master¹⁰ of the Supreme Court are made by the ACT Executive, as are the appointments of the Chief Magistrate and magistrates.¹¹ These appointments are not subject to the consultation or disallowance provisions set out in Division 19.3.3 of the Legislation Act.¹²

Complaints about judicial officers

- 7.7. The process for dealing with complaints against judicial officers in the Legislative Assembly is intended to protect the judiciary from interference either by the executive or by the legislature.¹³ The Self-Government Act entrenches provisions

6 In addition, further jurisdiction may be conferred by any Act, enactment (law made by the Assembly) or ordinance or any law made under any Act, enactment or ordinance (Self-Government Act, s 48A(2)). See Chapter 12: Legislation, under the heading 'Introduction—the Territory's laws' for an explanation of the term 'ordinance'.

7 Insofar as they directly relate to Assembly procedures, s 48D of the Self-Government Act stipulates that an enactment relating to the removal from office of a judicial officer must provide that the Assembly has determined that the facts found by a judicial commission amount to misbehaviour or physical or mental incapacity identified by the commission and has passed a motion requiring the executive to remove the officer on the ground of that behaviour or incapacity.

8 *The Jurisdiction of Courts Legislation Amendment Act 2002* (Cth).

9 The court operates as a division of the Supreme Court and comprises all ACT Supreme Court judges. However, a judge cannot hear a matter on appeal from a decision they gave in the Supreme Court.

10 The Master is to be known as the Associate Judge: *Supreme Court Act 1933*, s 45.

11 *Supreme Court Act 1933*, ss 4, 4A, 4B and 40; *Magistrates Court Act 1930*, s 7(2).

12 Pursuant to the Legislation Act, certain statutory appointments are disallowable instruments and require prior consultation with an Assembly committee nominated by the Speaker. Division 19.3.3 'applies if a Minister has the power under an Act to appoint a person to a statutory position' (Legislation Act, s 227(1)), whereas judicial appointments are made by the ACT Executive. See Chapter 12: Legislation, under the heading 'Subordinate legislation' for discussion on Assembly scrutiny and disallowance provisions.

13 Noting that judicial officers may be investigated in relation to corrupt conduct pursuant to the Integrity Commission Act, subject to the matters in s 102(1) of that Act.

for any enactment establishing a judicial commission to investigate complaints concerning the conduct or the physical or mental capacity of a judicial officer, and any enactment relating to the removal of a judicial officer from office.¹⁴

- 7.8. Legislation to examine complaints against judicial officers and to provide for their removal from office in certain circumstances was considered and agreed to by the Second Assembly.¹⁵ The *Judicial Commissions Act 1994* sets out the procedure for making complaints against judicial officers,¹⁶ the constitution and appointment of a judicial commission, the proceedings of commissions and the removal of judicial officers (following an appropriate Assembly resolution). The Act was amended by the *Judicial Commissions Amendment Act 2015*, which provided for the establishment of a part-time judicial council with powers to receive, investigate and report any complaints against judicial officers to heads of jurisdiction or the Attorney-General.¹⁷
- 7.9. Part 4 of the Judicial Commissions Act provides for complaints to be made against a judicial officer. It also sets out the steps that must be followed when the Judicial Council or the Attorney-General receives a complaint, and provisions by which the executive may establish a judicial commission to consider the removal of a judicial officer by the Assembly. The provisions have a particular impact on members and Assembly procedures, detailing procedures to be followed by a member when raising a matter in the Assembly that relates to the behaviour or capacity of a judicial officer.¹⁸
- 7.10. Key provisions of the legislation are as follows:
- A person may complain to the Judicial Council or the Attorney-General about a matter that relates or may relate to the behaviour or physical or mental capacity of a judicial officer. A complaint about a presidential member of the ACAT may be made to the Attorney-General.¹⁹
 - Complaints must be in writing and contain full particulars of the matter the subject of the complaint. The complainant must also state their name and address.²⁰

14 Self-Government Act, ss 48C and 48D.

15 MoP, No 91, 16 December 1993, pp 519-520; MoP, No 95, 1 March 1994, p 539; Assembly Debates, 16 December 1993, pp 4695-4698; Assembly Debates, 1 March 1994, pp 342-354. Exposure drafts of the legislation were presented earlier in the Second Assembly, MoP, No 22, 20 August 1992, p 125; Assembly Debates, 20 August 1992, pp 1917-1919.

16 The dictionary to the Judicial Commissions Act defines 'judicial officer' as: (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; (b) the associate judge of the Supreme Court; (c) a magistrate (including coroner); or (d) a presidential member of the ACAT.

17 Judicial officers are also 'public officials' for the purposes of the Integrity Commission Act (see s 12(1)(b)(iii)) and subject to the investigative remit of the commission.

18 These restrictions are not a requirement of ss 48C and 48D of the Self-Government Act.

19 Judicial Commissions Act, s 14(1)-(2).

20 Judicial Commissions Act, s 14(3).

- The function of the Judicial Council is to receive and examine complaints, to refer complaints to the executive or head of jurisdiction, and to give information about the process for complaints.²¹
- The Judicial Council consists of the Chief Justice, the Chief Magistrate and two members appointed by the executive. The Chief Justice is the head of the council.²²
- The executive shall appoint a judicial commission when recommended by the Judicial Council,²³ or where the Assembly resolves that a complaint against a judicial officer shall be examined.²⁴
- Judicial officers who are the subject of a complaint being examined by a judicial commission are excused from exercising functions associated with judicial office.²⁵
- Members must not raise a matter in the Assembly that relates or may relate to the behaviour or physical or mental capacity of a judicial officer except by way of a motion to have a specific allegation examined by a judicial commission. The member must give at least six sitting days notice of the motion to the Attorney-General.²⁶

Judicial commission examination and report

- 7.11. Following appointment, a judicial commission must conduct its examination into a complaint as soon as practicable.
- 7.12. Section 60 of the Judicial Commissions Act provides that no proceedings for an injunction, declaration or prerogative order may be brought in relation to, among other things:
 - a decision of a member of the Assembly to propose a motion to have a specific allegation made in precise terms in respect of a judicial officer examined by a judicial commission in accordance with s 14(4)(a) of the Act or to give notice of the motion to the Attorney-General in accordance with s 14(4)(b) of the Act; or
 - a resolution for the examination of a complaint in relation to a judicial officer by a judicial commission passed by the Legislative Assembly.

21 Judicial Commissions Act, s 5F.

22 Judicial Commissions Act, s 5B.

23 Judicial Commissions Act, s 17(3).

24 Judicial Commissions Act, s 18.

25 Judicial Commissions Act, s 19.

26 Judicial Commissions Act, s 14(4).

- 7.13. Once examination of a complaint has been completed, a judicial commission is required to submit a report of its findings to the Attorney-General,²⁷ who is required to lay a copy of the report before the Assembly as soon as possible.²⁸ On doing so, the Attorney-General must give a copy to the judicial officer who is the subject of the complaint and, if the judicial officer is not a head of jurisdiction, the relevant head of jurisdiction.²⁹
- 7.14. The Judicial Commissions Act also makes provision for a separate report, if the commission is of the opinion that any of its findings or evidence could prejudice a person (other than the judicial officer the subject of the complaint) in proceedings, or the conduct of an investigation, or the existence or identity of confidential sources.
- 7.15. These findings or evidence may be provided in a separate report, with a recommendation that it not be laid before the Assembly. The Attorney-General must accept this recommendation unless the Attorney-General is satisfied that there are compelling reasons of public policy for the relevant report to be laid before the Assembly.³⁰
- 7.16. Where the judicial officer delivers to the Attorney-General a written statement containing particulars of any matter relating to the commission's findings, the Attorney-General must lay a copy of the statement before the Assembly as soon as practicable after receiving it.³¹

Removal of a judicial officer

- 7.17. If the Assembly 'passes, in the appropriate manner, a resolution requiring the executive to remove a judicial officer from office on the ground of misbehaviour or physical or mental incapacity, the executive must, by instrument, remove the judicial officer from the office'.³² The Judicial Commissions Act sets out conditions for a resolution of the Assembly to be passed 'in the appropriate manner,' which includes the requirement of 'a formal process' that involves the Assembly granting the judicial officer, or a legal practitioner acting on the judicial officer's behalf, a reasonable opportunity to address the Assembly.³³

27 Judicial Commissions Act, s 22(1)(b). Section 22(2) of the Act also makes provision for what must be included in the report.

28 Judicial Commissions Act, s 23(1). There are certain circumstances where the Attorney-General is not required to present a report; see s 22(3)(f) and s 22(5).

29 Judicial Commissions Act, s 23(2).

30 Judicial Commissions Act, s 22(5). A copy of such a report may be given to the judicial officer the subject of the complaint (s 23(3)).

31 Judicial Commissions Act, s 24. The statement cannot contain references to persons or things inconsistent with the commission's reasons for submitting a separate report (if any) and must be delivered to the Attorney-General within 14 days after the Attorney-General has presented the report to the Assembly or, where the Assembly has by resolution fixed a longer period, within that period; Judicial Commissions Act, s 24(2)-(3).

32 Judicial Commissions Act, s 5(1).

33 Judicial Commissions Act, s 5(3)(c).

- 7.18. The Assembly shall be taken to have passed the resolution in the appropriate manner if it is passed pursuant to a motion of which notice has been given after completion of the formal process. The motion must be passed by a majority of the Assembly members present and voting within 15 sitting days of the Attorney-General tabling the report of the commission appointed to examine the complaint in respect of the judicial officer.³⁴
- 7.19. The formal process shall be taken to have been completed if:
- the commission has submitted to the Attorney-General in accordance with s 22 a report of its examination of the complaint in which it concludes that the behaviour or physical or mental capacity of the judicial officer concerned could amount to proved misbehaviour or incapacity such as to warrant removal from office and the Attorney-General has presented a copy of the report to the Legislative Assembly in accordance with s 23;
 - following the submission of the report, the judicial officer has delivered to the Attorney-General in accordance with s 24(1) and (3) a statement relating to the report and the Attorney-General has presented the statement to the Legislative Assembly in accordance with s 24(4); or the period for delivering such a statement has expired and no such statement has been delivered by the judicial officer to the Attorney-General;
 - the judicial officer has been given a reasonable opportunity by the Legislative Assembly to address the Assembly (whether in person or by a lawyer on the judicial officer's behalf) in relation to any matter relating to the commission's findings or conclusion; and
 - the Assembly 'has determined that the findings by the commission amount to misbehaviour or physical or mental incapacity identified by the commission'.³⁵

Complaint made against the Chief Magistrate

- 7.20. On 10 November 2009, the Attorney-General indicated to the Assembly that a judicial commission would be established to investigate a complaint against the ACT Chief Magistrate. The Assembly has the power to remove from office a judicial officer if the report of a judicial commission makes certain findings. Following the subsequent resignation of the Chief Magistrate on 17 November 2009, the Attorney-General advised the Assembly that the judicial commission would not proceed.

34 Judicial Commissions Act, s 5(2).

35 Judicial Commissions Act, s 5(3).

- 7.21. The Attorney-General made a statement to the Assembly concerning the complaint raised in 2009 and tabled a copy of the emails and briefing material which had precipitated the original complaint against the Chief Magistrate.³⁶
- 7.22. A complaint raised in late 2012 in relation to a judicial officer was dismissed by the Attorney-General in 2013 and no further action was taken.³⁷

Disputed elections

- 7.23. The Supreme Court of the ACT also acts as the Court of Disputed Elections for the ACT.
- 7.24. Following the 2016 election, an application seeking to challenge the results of the election was lodged with the Court of Disputed Elections on the grounds that the Electoral Commissioner had incorrectly determined the applicant was ineligible to stand for election. In March 2017, the applicant sought to withdraw the application prior to the matter being heard. The application to withdraw was granted by the court. This is the only time such an application has been lodged with the Court of Disputed Elections.
- 7.25. The role of the court is discussed in Chapter 3: Elections and the electoral system.

Integrity Commission Act

- 7.26. With the commencement of the *Integrity Commission Act 2018* in 2019, judicial officers³⁸ became subject to the powers and functions of the Integrity Commission and could be investigated in relation to complaints about corrupt conduct. However, the commission is required to dismiss a complaint about the conduct of a judicial officer if it directly relates to the merits of a decision made by the judicial officer; an order made by the judicial officer; or a judgment given by the judicial officer.³⁹

36 MoP, No 78, 19 October 2010, p 916.

37 The *Canberra Times*, 'Judge gets time out to catch up', 19 January 2013.

38 'Judicial officer' means : the Chief Justice, a judge or associate judge; the Chief Magistrate, a magistrate or any office that must be occupied by a magistrate; and a registrar of the Supreme Court or the Magistrates Court (s 13 of the Integrity Commission Act).

39 Section 71(1) of the Integrity Commission Act.

7.27. Section 102(1) of that Act states that:

In investigating a judicial officer, the commission—

- (a) must have proper regard for the preservation of the independence of judicial officers; and
- (b) for a judicial officer other than the Chief Justice or Chief Magistrate—must notify, and may consult, the head of jurisdiction⁴⁰ unless doing so would prejudice an investigation.

⁴⁰ 'Head of jurisdiction' means, for a judge, associate judge or registrar of the Supreme Court—the Chief Justice; or, for a magistrate, an office that must be occupied by a magistrate or a registrar of the Magistrates Court—the Chief Magistrate (s 102(2) of the Integrity Commission Act).