



NSW Legislative Council Hansard

Judicial Officers Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 24 May 2006.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [4.48 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

Last year I announced a review of the Judicial Officers Act 1986 in the lead up to the twentieth anniversary of the introduction of the legislation. The Judicial Officers Amendment Bill 2006 introduces changes arising out of the review of the Act.

The proposed reforms have been developed in consultation between the Heads of Jurisdiction and the Director General of the Attorney General's Department. Submissions to the review from members of the public, the legal community and other interested parties were considered as part of the consultative process. Before proceeding to explain the provisions of the Bill, I would like to briefly remind honourable members of the background to the legislation and the important principles that continue to guide its operation.

The Judicial Officers Act, which establishes the Judicial Commission of New South Wales, remains one of the few pieces of legislation in the world that provides for a separate statutory body to examine complaints about judicial officers. The proposed amendments continue the progressive approach taken by the New South Wales Government in this area.

At the time it was introduced, the Act raised considerable disquiet amongst the judiciary and the legal profession. The legislation was seen as undermining judicial independence so that judicial officers would not be able to conduct their work free from improper pressure by executive government, litigants or other pressure groups.

These concerns have not eventuated. Judicial officers are generally supportive of the role of the Judicial Commission in complaints handling. The Commission's role in judicial education, research and the compilation of statistical and other information on sentencing for the information of the judiciary is greatly valued.

The scheme under the Judicial Officers Act gives participants in the justice system a means of raising concerns about the performance of judicial officers. At the same time the complaints handling provisions of the Act provide some protection for judicial officers against groundless complaints that may unfairly damage their reputation.

The proposed amendments promote greater transparency in the complaints handling process without compromising judicial independence.

The initiatives relating to impaired judicial officers will assist in ensuring that judicial officers are able to exercise efficiently the functions of judicial office. Equally, they may help prevent the loss of the unique experience and expertise accumulated by judicial officers during their years in office.

The proposals relating to impairment will also complement the new Judicial Assistance Program recently introduced by the Government. The Program, which is administered by the Supreme Court, provides a twenty-four hour counselling service for judicial officers and optional annual health assessments.

I will now outline the principal amendments contained in the Bill.

Under the Act, any person may complain to the Judicial Commission about a judicial officer. A complaint may relate to the performance of judicial duties, but may extend to matters bearing upon fitness for office. The Attorney General may also refer a matter to the Commission.

The Judicial Commission makes a preliminary assessment of all complaints that it receives.

The legislation provides that a complaint that is not summarily dismissed by the Commission must be classified

as minor or serious. This distinction is artificial. The classification of a complaint as "minor" diminishes the significance of the concerns raised by the complainant. The Bill will therefore remove the requirement for complaints to be classified in this way.

The Commission may also establish a Conduct Division, which consists of a panel of three persons appointed by the Commission, one of whom is appointed Chairperson. Panel members must be judicial officers, although one may be a retired judicial officer.

The primary function of the Conduct Division is to examine and deal with complaints referred to it by the Judicial Commission. For this purpose the Conduct Division may initiate such investigations as it deems appropriate.

The Division may also exercise the functions conferred by the Royal Commissions Act 1923 in conducting a hearing into a serious complaint.

The Bill updates a number of the provisions relating to complaints handling by both the Commission and the Conduct Division.

The amendments make it clear that, like the Conduct Division, the Judicial Commission may determine that a complaint has been wholly or partly substantiated. This will assist in clarifying the action taken by the Commission regarding a complaint.

The powers of the Judicial Commission will also be aligned with the Conduct Division, by allowing the Commission to expand the scope of an initial complaint to other matters arising in the course of dealing with a complaint. The Commission will also be able to deal with grounds for complaint disclosed against another judicial officer.

Currently, where the Conduct Division decides that a minor complaint is wholly or partly substantiated, it must either inform the judicial officer who is the subject of the complaint, or decide to take no action. Where a serious complaint is substantiated, the Division may form the opinion that the matter could justify parliamentary consideration of the removal of the judicial officer.

However, the Conduct Division does not have the power to refer a complaint to the Head of Jurisdiction. This means that where a complaint is substantiated, but does not warrant parliamentary consideration of the removal of the judicial officer, no significant action is taken regarding the complaint.

The Bill addresses this disparity and will give the Conduct Division the power to refer a matter to the relevant Head of Jurisdiction. The Head of Jurisdiction may either counsel the judicial officer or take such steps as the Head of Jurisdiction considers appropriate regarding the administration of the court for which he or she is responsible.

The Act provides that the Conduct Division must hold hearings concerning a serious complaint in public, unless the Conduct Division directs on certain grounds that the hearing take place in private. Hearings relating to minor complaints must be held in private.

Consequent upon the removal of the minor-serious distinction in the classification of complaints, the Bill provides that the Conduct Division will have a broad discretion to allow any hearing to be heard in public.

The Commission will be able to develop other guidelines to provide guidance for the members of a Conduct Division panel examining complaints and conducting hearings into complaints. Matters about which the Commission may make guidelines include:

_ the manner in which the Conduct Division conducts its examination of complaints generally;

_ the manner in which the Conduct Division conducts its hearings in connection with complaints and the criteria that should be considered when determining whether a hearing should be held in public or in private; and

_ the criteria that the Conduct Division should consider when exercising its power to consent to legal representation for persons appearing at its hearings.

The Judicial Commission will also be able to develop guidelines regarding its own complaints handling procedures. The guidelines will also help clarify the complaints handling process for complainants and other interested persons.

The Conduct Division must provide the Governor with a report regarding its conclusions concerning a serious complaint. Where the Conduct Division finds that the complaint may warrant parliamentary consideration of the removal of the judicial officer, the report must be laid before both Houses of Parliament.

As is appropriate, a copy of the report must be furnished to the judicial officer concerned. However, there is currently no requirement to provide the complainant with a copy of the report. The Bill introduces a statutory obligation for the complainant to be provided with a copy of a report, once it has been tabled.

The proposed legislation introduces a number of groundbreaking provisions that will allow a Head of Jurisdiction to refer a judicial officer who may be suffering an impairment to the Judicial Commission, without the need for a complaint to be lodged.

At present, a judicial officer can only be requested to undergo a medical examination by the Conduct Division. Such a request may only be made in relation to a serious complaint and the members of the Conduct Division are of the opinion that the judicial officer may be physically or mentally unfit to exercise efficiently the functions of judicial office.

Where a Head of Jurisdiction refers a judicial officer who may have an impairment to the Judicial Commission, the Commission will have the power to conduct a preliminary examination. For this purpose, the Bill empowers the Commission to require a judicial officer to undergo a medical or psychological examination.

Where a judicial officer refuses or fails to comply with such a requirement, the Commission may then deal with the matter as a complaint.

Where a psychological or medical report does not indicate a problem, the Commission may summarily dismiss the matter. If the report reveals that the judicial officer has an impairment, the Commission will report to the relevant Head of Jurisdiction or refer the matter to the Conduct Division for further examination, depending upon the seriousness of the matter.

The Conduct Division may conduct a further examination. The Division will also have the power to dismiss the matter, report to the Head of Jurisdiction, or present a report to the Governor setting out their findings and opinion that the judicial officer's impairment may warrant parliamentary consideration of his or her removal from office.

In referring a matter to the Head of Jurisdiction, the Judicial Commission or the Conduct Division may make recommendations regarding steps that might be taken to manage the judicial officer's impairment. As occurs with complaints, the Head of Jurisdiction may either counsel the judicial officer or take such steps as are deemed appropriate regarding the administration of the court for which he or she is responsible.

The Bill contains a number of minor related amendments to the Judge's Pensions Act 1953 and courts legislation relating to leave without pay.

The Magistrates' Leave Determination provides that the Chief Magistrate may grant leave without pay to a Magistrate if good and sufficient reason is shown. Other judicial officers are not currently entitled to leave without pay.

A judicial officer may not have sufficient sick or extended leave entitlements to allow him or her to address emotional, mental health, alcohol or drug dependency, or family problems which may impact upon his or her ability to function in a judicial capacity.

It is therefore proposed to amend the terms and conditions applying to judicial officers to allow them to take leave without pay at the discretion of the relevant Head of Jurisdiction. The amendments in the Bill make it clear that leave without pay does not count for the purposes of the judges' pension entitlements.

Another proposed amendment to the Act will give the Judicial Commission an express power to enter into contractual arrangements for the provision of goods and services that have been developed in the exercise of its functions.

The Commission has been at the forefront of judicial education and research and has developed some innovative programs, such as the Judicial Information Research System, which includes online statistical and reference material designed to assist the judiciary.

The amendments will enable the Judicial Commission to market its accumulated expertise and intellectual property within New South Wales and elsewhere and to recover some of its investment in these programs.

The proposed reforms in the Bill are aimed at providing greater transparency in the handling and outcomes of complaints dealt with by the Judicial Commission. The initiatives aimed at assisting judicial officers who have an impairment will promote public confidence in the judiciary who, for many people, are the embodiment of the judicial system.

The proposed legislation will be commenced once the Judicial Commission has developed guidelines relating to complaints handling.

I commend the Bill to the House.