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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COURTS LEGISLATION AMENDMENT (JUDICIAL COMPLAINTS) BILL 2012

EXPLANATORY MEMORANDUM

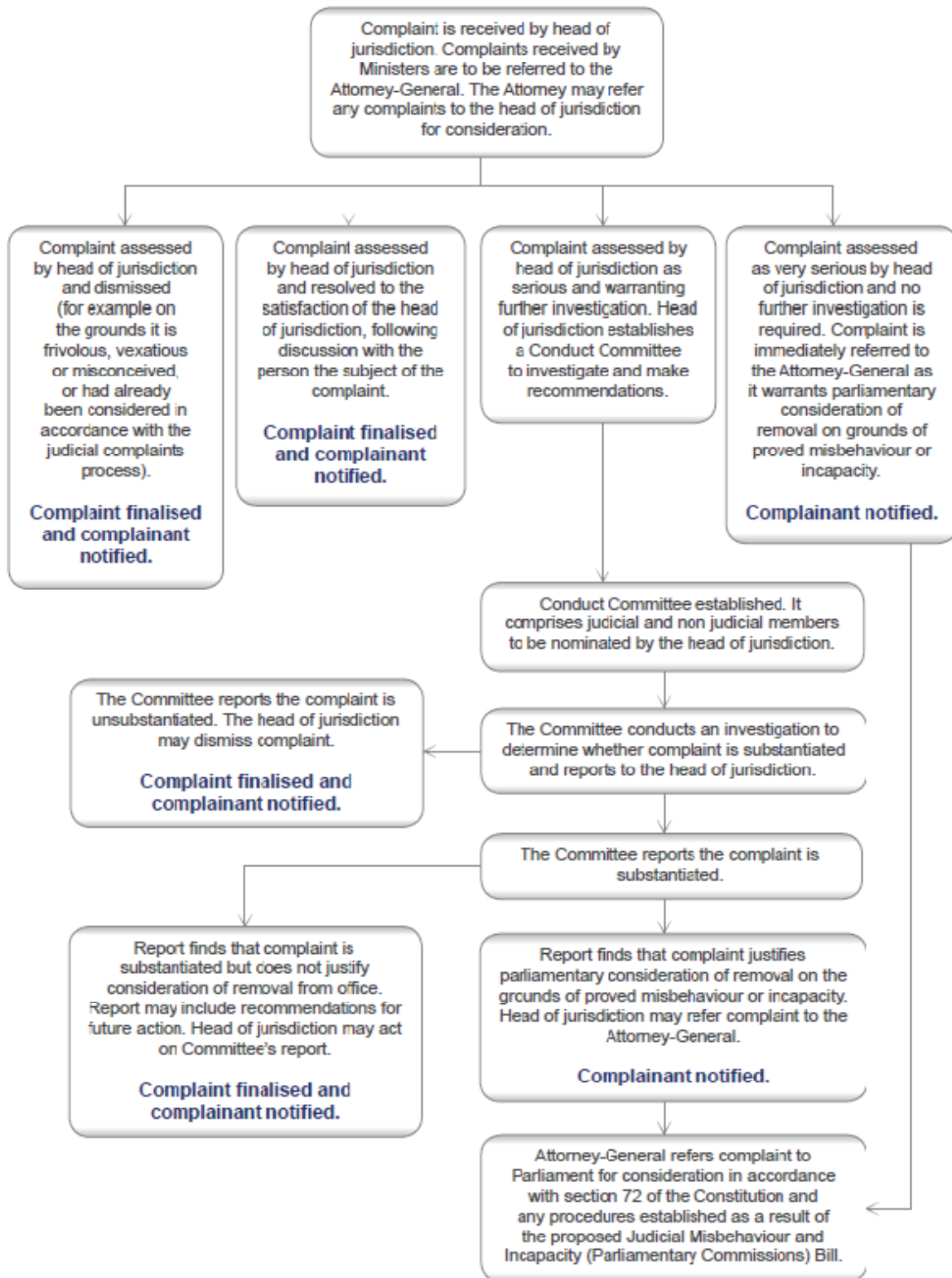
(Circulated by authority of the Attorney-General,
the Hon Nicola Roxon MP)

COURTS LEGISLATION AMENDMENT (JUDICIAL COMPLAINTS) BILL 2012

GENERAL OUTLINE

1. This Bill, in conjunction with the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012, is designed to introduce greater transparency and accountability in handling of complaints about judicial officers in the federal courts other than the High Court of Australia.
2. On 18 March 2011, the former Attorney-General, the Hon Robert McClelland MP, announced significant reforms to federal judicial complaints handling.
3. Australia is well-served by its judiciary, and that judicial independence and impartiality are vital to the smooth administration of justice. Establishing a transparent, impartial and accountable system of judicial complaints handling is intended to support judicial independence and strengthen public confidence in the federal judiciary.
4. This Bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* and the *Freedom of Information Act 1982* to:
 - provide a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers
 - provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints handling process, and
 - exclude from the operation of the *Freedom of Information Act 1982* documents arising in the context of consideration and handling of a complaint about a judicial officer.
5. The Bill extends powers to deal with complaints and immunity from suit to apply whether or not the complaint was made before, on or after commencement of the legislation.
6. The Bill also outlines the measures a head of jurisdiction may take in relation to a judicial officer should the head of jurisdiction believe it reasonably necessary in order to maintain public confidence in the Court. Measures include temporarily restricting the judicial officer to non-sitting duties. These measures may be applied in appropriate circumstances even where no complaint has been made about the judicial officer.
7. These amendments are designed to support a largely non-legislative framework to assist the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints that are referred to them. The framework will provide a broad and flexible model that augments complaints procedures that currently operate within the federal courts. The seriousness and nature of a complaint may vary widely. The framework outlines, in general terms, the different options a head of jurisdiction may pursue when dealing with a complaint where they consider it appropriate. It is anticipated that the vast majority of complaints would be dealt with through this internal mechanism. Parliamentary consideration of removal of a judge from office under paragraph 72(ii) of the Constitution would only be triggered in the rarest of circumstances

8. A diagram of the proposed non-statutory process for judicial complaints is below.



9. The non-statutory framework supported by the Bill will enhance options for court-based complaints handling processes. In particular, a head of jurisdiction would have

the option to establish a Conduct Committee to investigate a complaint that has been referred to them. This may occur when a head of jurisdiction believes that a complaint warrants further inquiries or they see value in receiving independent advice about a complaint.

10. A Conduct Committee would be composed of three members and include two judicial nominees and one non-judicial nominee. Generally, judicial nominees would be the equivalent or of higher seniority to the judicial officer who is the subject of a complaint. Following a referral by a head of jurisdiction, the Conduct Committee could investigate the complaint to determine whether it was substantiated.

11. A Conduct Committee would ultimately provide a report to the head of jurisdiction outlining what action should be taken about a complaint, including but not limited to:

- whether the complaint should be dismissed;
- whether the complaint warrants Parliamentary consideration of removal from office; or
- whether the matter should be dealt with by the head of jurisdiction in exercising their responsibility for the management of the court.

12. Under the proposed reforms to federal judicial complaints handling, a head of jurisdiction would refer a complaint to the Attorney-General for Parliamentary consideration in the event:

- they have assessed a complaint as very serious on its face and not requiring further investigation; or
- they have considered a report by a Conduct Committee and have assessed the complaint as very serious.

13. The measures in the Bill promote access to justice by ensuring Australia continues to be well-served by a high quality, independent and accountable judiciary.

14. This Bill is part of a package of reforms to federal judicial complaints handling. The Bill does not limit the ability of a complaint which may warrant removal of a judge from office under paragraph 72(ii) of the Constitution to be considered by the Parliament at any time. The package also includes the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 to provide for a clear, accountable and objective framework to assist Parliamentary consideration of complaints which may warrant removal of a judge under paragraph 72(ii) of the Constitution.

FINANCIAL IMPACT STATEMENT

15. The proposed Bill will not have any significant financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Courts Legislation Amendment (Judicial Complaints) Bill 2012

16. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

17. The Bill is designed to introduce greater transparency and accountability in handling of complaints about judicial officers in the federal courts other than the High Court of Australia. It provides legislative support to a largely non-statutory framework to assist the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to manage complaints that are referred to them.

18. The Bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* and the *Freedom of Information Act 1982* to:

- provide a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers
- provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints handling process, and
- exclude from the operation of the *Freedom of Information Act 1982* documents arising in the consideration and handling of a complaint about a judicial officer.

19. The Bill extends powers to deal with complaints and immunity from suit to apply whether or not the complaint was made before, on or after commencement of the legislation.

20. The Bill also outlines the measures a head of jurisdiction may take in relation to a judicial officer should the head of jurisdiction believe it reasonably necessary in order to maintain public confidence in the Court. Measures include temporarily restricting the judicial officer to non-sitting duties. These measures may be applied in appropriate circumstances even where no complaint has been made about the judicial officer.

21. This Bill deals with complaints processes that operate within the federal courts other than the High Court. This Bill operates in conjunction with the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill. The Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill provides a standard mechanism to assist the Parliament in its consideration of removal of a judge or federal magistrate from office under the Constitution.

Human rights implications

22. This Bill engages the right to privacy and reputation and the right to a fair hearing under Articles 17 and 14 of the *International Covenant on Civil and Political Rights*

(‘ICCPR’), and the right not to be unjustly deprived of work under Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’).

Right to privacy and reputation

23. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence, and protects a person’s honour and reputation from unlawful attacks.

24. The amendments of the *Freedom of Information Act 1982* (‘FOI Act’) exclude from the operation of the FOI Act documents of a court that relate to the consideration and handling of a complaint under the *Family Law Act 1975*, the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999*.

25. The consideration and handling of complaints about judicial officers may give rise to sensitive or personal reports or other documents about a judicial officer or another person. These documents require a degree of confidentiality to avoid improper interference in the complaints handling process and the possibility of the damage to the reputation of a judge and the operation of the court before the investigation has been completed. The potential to disclose sensitive information concerning a judge’s performance of their judicial duties may undermine judicial independence and impact on future performance and discharge of the judicial function itself.

26. In excluding these documents from the FOI Act, the Bill advances human rights by protecting the privacy and reputation of those involved in internal handling of complaints about judicial officers within the courts.

Right to a fair hearing

27. Article 14 of the ICCPR protects the right to a fair hearing.

28. The Bill does not provide for a head of jurisdiction to dismiss or formally discipline a judicial officer. The power to remove a federal judicial officer lies only with the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for removal on the ground of proved misbehaviour or incapacity.

29. This Bill provides legislative support for a largely non-statutory framework for handling complaints about judicial officers within the courts. The seriousness and nature of a complaint may vary widely. The framework will provide a broad and flexible model that augments complaints procedures that currently operate within the federal courts.

30. Participation in complaints handling processes is voluntary, and there are no sanctions for those who do not participate. The Bill provides for immunities for those who choose to participate in a complaints handling process, specifically heads of jurisdiction, complaint handlers, witnesses, and lawyers.

31. The process for gathering information in relation to a complaint occurs within the courts’ own internal complaints processes. Under these processes, it would be expected that procedural fairness protocols are adopted and applied.

Right not to be unjustly deprived of work

32. The UN Committee on Economic Social and Cultural Rights has stated that the right under Article 6(1) of ICESCR encompasses the right not to be unjustly deprived of work, requiring security against unfair dismissal.

33. Federal judicial officers have security of tenure under the Constitution. Paragraph 72(ii) of the Constitution provides the federal judicial officers shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

34. The largely non-statutory model supported by the Bill enhances options for court-based complaints handling processes. In particular, a head of jurisdiction would have the option to establish a Conduct Committee to investigate a complaint that has been referred to them. If a head of jurisdiction assesses a complaint as very serious on its face or following the report of a Conduct Committee, he or she would refer a complaint to the Attorney-General for Parliamentary consideration.

35. The Bill does not enable formal disciplinary action to be taken against a judicial officer. It supports the powers of a head of jurisdiction to take measures where a head of jurisdiction believes it reasonably necessary in order to maintain public confidence in the Court. The type of measure that might be taken would be consistent with the Chief Judge's responsibilities for ensuring the effective discharge of the business of the Court.

Conclusion

36. The Bill is compatible with human rights because it advances the protection of human rights, in particular the right to privacy and reputation, the right to fair hearing, and the right not to be unjustly deprived of work, and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

NOTES ON CLAUSES

Clause 1 – Short Title

37. This clause provides for the Bill to be cited as the *Courts Legislation Amendment (Judicial Complaints) Act 2012*.

Clause 2 – Commencement

38. This clause provides for the commencement of the Act.

39. Subclause 2(1) provides that each provision of the Act specified in column 1 of the table set out in the subclause commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

40. Clauses 1 to 3, and anything in the Bill not covered in the table, will commence the day on which the Act receives the Royal Assent.

41. The items in Schedule 1 of the Bill will commence a single day to be fixed by proclamation. If the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. The same commencement provisions apply to the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012.

42. The note at the end of the table explains that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments of the Act.

43. Subclause 2(2) provides that any information in column 3 of the table is not part of the Act. It also clarifies that information may be inserted in column 3, or information in it may be edited, in any published version of the Act.

Clause 3 – Schedule(s)

44. This clause provides that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

SCHEDULE 1 – AMENDMENTS

Family Law Act 1975

Item 1 – Subsection 4(1) (*definition of complaint*)

45. This item inserts into subsection 4(1) of the *Family Law Act 1975* a new definition of ‘complaint’. Subsection 4(1) of the *Family Law Act 1975* provides for definitions used in the Act. A ‘complaint’ for the purposes of the *Family Law Act 1975* will mean a complaint mentioned in paragraph 21B(1A)(c) (see Item 5 of Schedule 1 to this Bill).

Item 2 – Subsection 4 (1) (*definition of complaint handler*)

46. This item inserts into subsection 4(1) of the *Family Law Act 1975* a new definition of ‘complaint handler’. Subsection 4(1) of the *Family Law Act 1975* provides for definitions used in the Act. The amendment will mean that a ‘complaint handler’ for the purposes of the *Family Law Act 1975* is the Chief Judge, a person authorised by the Chief Judge under subclause 21B(3A), or a person who is a member of a body authorised by the Chief Judge under subclause 21B(3A) (see Item 9 of Schedule 1 to this Bill).

47. For example, a complaint handler would include a Conduct Committee authorised by the Chief Judge to investigate a complaint and report to the Chief Judge (see General Outline of this Bill).

Item 3 - Subsection 4(1) (*definition of ‘handle’ a complaint*)

48. This item inserts into subsection 4(1) of the *Family Law Act 1975* a definition of ‘handle’ a complaint. Subsection 4(1) of the *Family Law Act 1975* provides for definitions used in the Act. The term ‘handle’ in relation to a complaint is used in a number of locations in the amendments contained in this Bill to both the *Family Law Act 1975* and *Freedom of Information Act 1982*. For example, proposed new subclause 21B(1B) of the *Family Law Act 1975* provides the Chief Judge with power to handle a complaint about another judge in certain circumstances (see Item 6 of Schedule 1 to this Bill).

49. Section 20 of the *Family Law Act 1975* defines ‘judge’ to mean a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

50. Under the proposed new definition, ‘handle’ a complaint will mean to do one or more of the following:

- considering the complaint
- investigating the complaint
- reporting on an investigation of the complaint
- dealing with a report of an investigation of the complaint

- disposing of the complaint
- referring the complaint on to another person or body.

51. This broad definition gives a person who may be handling a complaint a high degree of flexibility in taking action appropriate to an individual complaint. For example, it would enable the Chief Judge to refer a complaint to a Conduct Committee and enable the Conduct Committee to investigate the complaint and provide a report to a Chief Judge for further consideration.

52. Disposing of a complaint may include dismissing the complaint. Proposed subsection 21B(1B) enables the Chief Judge, or a complaint handler, to deal with a complaint by dismissing the complaint. The ability of a person to dismiss a complaint summarily does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where it is not substantiated on further investigation.

53. A definition of ‘complaint handler’ is inserted by Item 2 of Schedule 1 to this Bill.

Item 4 – Subsection 4(1)

54. This item inserts into subsection 4(1) of the *Family Law Act 1975* a definition of ‘relevant belief’. Subsection 4(1) of the *Family Law Act 1975* provides for definitions used in the Act. This term is used in proposed subsection 21B(1B) (see Item 6 of Schedule 1 to this Bill). The definition applies where a person has a relevant belief in relation to a complaint about a Judge. A person has such a belief if:

- the person believes that circumstances giving rise to a complaint may, if substantiated, justify consideration of removal of a judge in accordance with paragraph 72(ii) of the Constitution, or
- the person believes that circumstances giving rise to a complaint may, if substantiated, adversely affect performance of judicial or official duties by the other judge, or have capacity to adversely affect the reputation of the Court of which the judge is a member

55. Having a relevant belief enables a Chief Judge or complaint handler to take certain actions, such as handling a complaint (see new paragraphs 21B(1B)(a)(ii) and (b)(ii) inserted by Item 6 of Schedule 1 to this Bill).

Item 5 – At the end of subsection 21B(1A)

56. This item inserts two additional paragraphs relating to the power of the Chief Judge to deal with a complaint about another judge’s performance of his or her judicial or official duties. Subsection 21B(1A) of the Act includes specific powers of the Chief Judge in discharging their broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court under subsection 21B(1).

57. Proposed new paragraph 21B(1A)(c) extends the Chief Judge’s specific powers to include a power to deal with a complaint about the performance by another judge of his or

her judicial or official duties. The paragraph requires the Chief Judge to deal with such a complaint in accordance with the process set out in new subclause 21B(1B) (inserted by Item 6 of Schedule 1 to this Bill).

58. A complaint about performance by another judge of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Judge or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

59. The performance of official duties would extend the circumstances in which a complaint may be dealt with. An example would include where a judge is representing the Court in an official capacity or where the judge is undertaking certain official functions in their personal capacity.

60. Proposed new paragraph 21B(1A)(d) gives the Chief Judge power to take any measures that he or she believes are reasonably necessary to maintain public confidence in the Court. This includes the ability to temporarily restrict another judge to non-sitting duties. This power operates whether or not there has been a complaint about the judge.

61. This paragraph enables a Chief Judge to take timely action that he or she believes is reasonably necessary to maintain public confidence in the Court. The Chief Judge would need to establish a clear basis for his or her belief that measures are reasonably necessary. Measures are characterised in terms of facilitating the smooth operation of the Court, rather than disciplinary action directed at a judge. The type of measure that might be taken would be consistent with the Chief Judge's responsibilities for ensuring the effective discharge of the business of the Court.

62. Proposed new paragraphs 21B(1A)(c) and (d) do not limit action that the Chief Judge may take in discharging his or her general obligation to ensure the effective, orderly and expeditious discharge of the business of the Court. The paragraphs support the existing powers of the Chief Judge by providing express mechanism by which complaints arising in a wide variety of circumstances may be dealt with.

63. Section 24 of the *Family Law Act 1975* will enable the Deputy Chief Judge to exercise these powers where the Chief Judge is absent from Australia or from duty or there is a vacancy in the office of Chief Judge.

64. Section 20 of the *Family Law Act 1975* defines 'judge' to mean a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

Item 6 – After subsection 21B(1A)

65. This item inserts new subclause 21B(1B) into the *Family Law Act 1975* to outline the process to be followed by the Chief Judge in dealing with a complaint about the performance by another judge of his or her judicial or official duties. New paragraph 21B(1A)(c) requires the Chief Judge to deal with such a complaint pursuant to the process set out in the new subclause 21B(1B).

66. Where a complaint is made about another judge, new subclause 21B(1B) enables the Chief Judge to deal with the complaint as outlined in the subclause. The Chief Judge may do either or both of the options under new paragraphs 21B(1B)(a) and (b).

67. Under new paragraph 21B(1B)(a), the Chief Judge may decide whether or not to handle the complaint. The Chief Judge may then take one of the following actions:

- dismiss the complaint (paragraph 21B(1B)(a)(i))
- handle the complaint if the Chief Judge has a relevant belief in relation to the complaint about the other judge (paragraph 21B(1B)(a)(ii)). A definition of ‘relevant belief’ is inserted by Item 4 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 3 of Schedule 1 to this Bill.
- arrange for any other complaint handlers to handle, or assist to handle, the complaint if the Chief Judge has a relevant belief in relation to the complaint about the other judge (paragraph 21B(1B)(a)(iii)). A definition of ‘relevant belief’ is inserted by Item 4 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 3 of Schedule 1 to this Bill.

68. Under new paragraph 21B(1B)(b), the Chief Judge may arrange for any other complaint handlers to decide whether or not to handle the complaint, and then take one of the following actions:

- dismiss the complaint (paragraph 21B(1B)(b)(i))
- handle the complaint if the complaint handler has a relevant belief in relation to the complaint about the other judge (paragraph 21B(1B)(b)(ii)). A definition of ‘relevant belief’ is inserted by Item 4 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 3 of Schedule 1 to this Bill.

69. The powers of another complaint handler under new paragraph 21B(1B)(b) are similar to those of the Chief Judge under new paragraph 21B(1B)(a). This subclause enables a Chief Judge to arrange with a complaint handler to deal with complaint without needing to conduct preliminary investigations about a complaint. Authorisations may be made on a standing basis (see new subclause 21B(3A) inserted by Item 9 of Schedule 1 to this Bill).

70. The note to subclause 21B(1B) clarifies that a complaint handler (other than the Chief Judge) may handle a complaint by referring it to the Chief Judge. The Chief Judge may then do either or both of the things referred to in paragraphs (a) or (b) in respect of the complaint.

71. By providing for options for a Chief Judge that are not mutually exclusive, this subclause gives the Chief Judge a high degree of flexibility to deal with complaints as they consider appropriate, including to manage complaints on a case by case basis. It supports the ability of the Chief Judge to exercise the option of establishing a Conduct Committee if required (see General Outline of this Bill).

72. A complaint about performance by another Judge of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Judge or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

73. These powers do not limit the ability of a Chief Judge to refer a matter to the Parliament for consideration of removal of a judge under paragraph 72(ii) of the Constitution if they consider this justified at any time (see General Outline of this Bill).

74. The actions a Chief Judge or a complaint handler may take to ‘handle’ a complaint include investigating a complaint, referring the complaint to another person, or disposing of a complaint (see definition inserted by Item 3 of Schedule 1 to this Bill). The ability of the Chief Judge or a complaint handler to dismiss a complaint summarily under proposed subclause 21B(1B)(a)(i) and (b)(i) does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where the complaint has not been substantiated on further investigation of the complaint.

75. A ‘complaint handler’ includes a person or member of a body authorised by the Chief Judge to handle a complaint under subclause 21B(3A) (see Item 2 and 9 of Schedule 1 to this Bill).

Item 7 – At the end of subsection 21B(2)

76. This item amends subsection 21B(2) of the *Family Law Act 1975* to exclude paragraph (1A)(c) or (d) from the operation of the subsection. Subsection 21B(2) provides for the Deputy Chief Judge to assist the Chief Judge in the exercise of the functions conferred on the Chief Judge by section 21B of the *Family Law Act 1975*.

77. This amendment will have the effect of preventing the Deputy Chief Judge from automatically assisting the Chief Judge by virtue of subsection 21B(2) in dealing with complaints under paragraph 21B(1A)(c) and taking measures considered reasonably necessary to maintain public confidence in the Court under paragraph 21B(1A)(d). It would be inappropriate for the Deputy Chief Judge to deal with a complaint about himself or herself.

78. The Deputy Chief Judge will be able to be a ‘complaint handler’ with which the Chief Judge can arrange to decide whether or not to handle a complaint, handle complaints, dismiss complaints, or assist to handle complaints (see Items 2 and 9 of Schedule 1 to this Bill). These arrangements can be made on an ongoing basis. Immunities and exclusion from the *Freedom of Information Act 1982* relating to complaints handling inserted by this Bill will apply to a Deputy Chief Judge in this role.

79. The power under paragraph 21B(1A)(d) to take measures that the Chief Judge considers reasonably necessary to maintain public confidence in the Court can only be exercised by the Chief Judge. This is consistent with the Chief Judge's responsibilities for ensuring the effective discharge of the business of the Court.

Item 8 – Subsection 21B(3)

80. This item amends subsection 21B(3) of the *Family Law Act 1975* to exclude paragraph (1A)(c) or (d) from the operation of the subsection. Subsection 21B(3) provides for a Judge Administrator to assist the Chief Judge and the Deputy Chief Judge in the exercise of the functions conferred on the Chief Judge by section 21B of the *Family Law Act 1975* as assigned from time to time.

81. This amendment will have the effect of preventing Judge Administrators from automatically assisting the Chief Judge by virtue of subsection 21B(3) in dealing with complaints under paragraph 21B(1A)(c) and taking measures considered reasonably necessary to maintain public confidence in the Court under paragraph 21B(1A)(d). It would be inappropriate for a Judge Administrator to deal with a complaint about himself or herself.

82. However, a Judge Administrator will be able to be a 'complaint handler' with which the Chief Judge can arrange to decide whether or not to handle a complaint, handle complaints, dismiss complaints, or assist to handle complaints (see Items 2 and 9 of Schedule 1 to this Bill). These arrangements can be made on an ongoing basis. Immunities and exclusion from the *Freedom of Information Act 1982* relating to complaints handling inserted by this Bill will apply to a Judge Administrator in this role.

83. The power under paragraph 21B(1A)(d) to take measures that the Chief Judge considers reasonably necessary to maintain public confidence in the Court can only be exercised by the Chief Judge. This is consistent with the Chief Judge's responsibilities for ensuring the effective discharge of the business of the Court.

Item 9 – After subsection 21B(3)

84. This item inserts two additional subclauses following subsection 21B(3) of the *Family Law Act 1975* to give power to the Chief Judge to authorise a person or body in relation to his or her complaints handling role.

85. Subclause 21B(3A) enables the Chief Judge to authorise a person or body to assist the Chief Judge to handle complaints, decide whether or not to handle complaints, dismiss complaints or handle complaints. Authorisations may be made either generally or in relation to a specified complaint. An authorisation must be in writing.

86. Subclause 21B(3A) gives discretion to the Chief Judge as to the categories of person or body which may be authorised to handle a complaint. This is necessary to ensure a high degree of flexibility for the Chief Judge in complaints handling processes, which may involve a wide variety of circumstances.

87. An authorisation in writing provides certainty for the person or body involved in dealing with complaints, including for a member of any Conduct Committee established by the Chief Judge.

88. It is expected that a person authorised to handle a complaint would not be a current judge of the same court as the judge who is the subject of the complaint, and that the person would be of appropriate seniority to handle a complaint. For example, where a person authorised to handle a complaint is a sitting or retired judge, it is expected that they would be of equivalent or higher seniority to the judge who is the subject of an investigation.

89. Subclause 21B(3B) is inserted to avoid doubt and clarifies that a Chief Judge may authorise under subclause 21B(3A) the Deputy Chief Judge or a Judge Administrator, or a body that includes the Deputy Chief Judge or a Judge Administrator. This confirms the discretion of the Chief Judge to authorise the Deputy Chief Judge or Judge Administrator to undertake functions relating to complaints handling. Items 7 and 8 of Schedule 1 to this Bill amend subsection 21B(2) and (3) to prevent the Deputy Chief Judge or a Judge Administrator from assisting the Chief Judge in relation to these functions under those existing powers.

90. Section 20 of the *Family Law Act 1975* defines ‘judge’ to mean a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

Item 10 – At the end of subsection 21B(4)

91. This item inserts a note at the end of subsection 21B(4) of the *Family Law Act 1975* to refer to proposed new clause 38Y. Subsection 21B(4) affords certain protection and immunity to the Chief Judge and the Deputy Chief Judge in the exercise, or assisting in the exercise, of the functions or powers mentioned in paragraph (1A)(a) of the *Family Law Act 1975*.

92. New clause 38Y is inserted by Item 12 of the Bill and affords certain protections to persons involved in considering or handling complaints about judges. The protections under new clause 38Y are in addition to existing protections and immunities of the Chief Judge and Deputy Chief Judge.

93. Section 20 of the *Family Law Act 1975* defines ‘judge’ to mean a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

Item 11 – At the end of subsection 21B(5)

94. This item includes new subclauses 21B(1B) or (3A) within the scope of subsection 21B(5). Subsection 21B(5) excludes the jurisdiction of the Federal Court of Australia with respect to a matter relating to the exercise by the Chief Judge of, or relating to the Deputy Chief Judge assisting in the exercise of, the functions or powers mentioned in subsection (1A).

95. New subclauses 21B(1B) and (3A), together, enable the Chief Judge to deal with complaints about the performance by judges of his or her judicial or official duties, including authorising a person or body to decide whether or not to handle a complaint, handle a complaint, dismiss a complaint, or assist with the handling of complaints (see Items 6 and 9 of Schedule 1 to this Bill).

96. This amendment has the effect that the Federal Court of Australia will not have jurisdiction with respect to a matter relating to the exercise by the Chief Judge or Deputy Chief Judge of his or her functions and powers relating to the handling or dismissal of complaints about judges under new subclauses 21B(1B) and (3A).

Item 12 – At the end of Division 4 of Part IVA

97. This item inserts a new clause 38Y at the end of Division 4 of Part IVA of the *Family Law Act 1975* to outline broad protections afforded to participants in the process of dealing with complaints about judges. Division 4 of Part IVA of the *Family Law Act 1975* deals with miscellaneous administrative matters in the management of the Court.

98. This clause is designed to promote effectiveness of the judicial complaints process by enabling appropriate people to participate in the process to the extent possible without fear of prosecution or liability on behalf of those assisting the complaint handler.

99. Subclause 38Y(1) affords broad protection and immunity to a complaint handler, in exercising powers or performing functions under new paragraph 21B(1A)(c) and subclause 21B(1B), or assisting in exercising those powers or performing those functions. The level of protection and immunity under subclause 38Y(1) is the same as a Justice of the High Court. A definition of complaint handler is inserted into the *Family Law Act 1975* by Item 2 of Schedule 1 to this Bill.

100. Subclause 38Y(2) affords broad protection and immunity to the Chief Judge in authorising a person or body under subclause 21B(3A). The level of protection and immunity under subclause 38Y(2) is the same as a Justice of the High Court. These protections are in addition to existing protections and immunities of the Chief Judge and Deputy Chief Judge under the *Family Law Act 1975*.

101. Subclause 38Y(3) affords broad protection and immunity for a witness requested to attend, or appearing, before a complaint handler handling a complaint. A witness has the same protection, and is subject to the same liabilities, as a witness in a case before the High Court. As processes may vary in formality depending on the circumstances, a witness will include a person who provides information to a complaint handler in the course of the handling of a complaint.

102. Subclause 38Y(4) affords broad protection and immunity for a lawyer assisting the complaint handler, or representing a person appearing before a complaint handler. The level of protection and immunity is the same as a barrister appearing for a party in proceedings in the High Court.

103. The protections and immunities in this clause are in addition to, and do not limit, other protections and immunities which may apply in the circumstances.

Item 13 – Application of items 1 to 12

104. This item provides for the application of the amendments made by items 1 to 12 of Schedule 1 to this Bill. Items 1 to 12 provide powers, protections and immunities in relation to complaints about judges within the Family Court.

105. The amendments will apply on or after commencement of this item in relation to a complaint, regardless of whether a complaint was made before, on or after commencement, and regardless of whether the circumstances that gave rise to the complaint occurred before, on or after that commencement.

106. This item enables the new judicial complaints handling process to be used where a complaint relates to behaviour or conduct that was engaged in prior to commencement of this item.

107. This item commences as specified in clause 2 of this Bill.

Federal Court of Australia Act 1976

Item 14 – Section 4 (*definition of complaint*)

108. This item inserts into section 4 of the *Federal Court of Australia Act 1976* a new definition of ‘complaint’. Section 4 of the *Federal Court of Australia Act 1976* provides for definitions used in the Act. A ‘complaint’ for the purposes of the *Federal Court of Australia Act 1976* will mean a complaint mentioned in paragraph 15(1AA)(c) (see Item 18 of Schedule 1 to this Bill).

Item 15 – Section 4 (*definition of complaint handler*)

109. This item inserts into section 4 of the *Federal Court of Australia Act 1976* a new definition of ‘complaint handler’. Section 4 of the *Federal Court of Australia Act 1976* provides for definitions used in the Act. The amendment will mean that a ‘complaint handler’ for the purposes of the *Federal Court of Australia Act 1976* is the Chief Justice, a person authorised by the Chief Justice under subclause 15(1AAB), or a person who is a member of a body authorised by the Chief Justice under subclause 15(1AAB) (see Item 19 of Schedule 1 to this Bill).

110. For example, a complaint handler would include a Conduct Committee authorised by the Chief Justice to investigate a complaint and report to the Chief Justice (see General Outline of this Bill).

Item 16 – Section 4 (*definition of ‘handle’ a complaint*)

111. This item inserts into section 4 of the *Federal Court of Australia Act 1976* a definition of ‘handle’ a complaint. Section 4 of the *Federal Court of Australia Act 1976* provides for definitions used in the Act. The term ‘handle’ in relation to a complaint is used in a number of locations in the amendments contained in this Bill to both the *Federal Court of Australia Act 1976* and the *Freedom of Information Act 1982*. For example, proposed new subclause 15(1AAA) of the *Federal Court of Australia Act 1976* provides the Chief Justice with power to ‘handle a complaint’ about another judge in certain circumstances (see Item 19 of Schedule 1 to this Bill).

112. Section 4 of the *Federal Court of Australia Act 1976* defines ‘judge’ to mean a Judge of the Court (including the Chief Justice).

113. Under the proposed new definition, ‘handle’ a complaint will mean to do one or more of the following:

- considering the complaint
- investigating the complaint
- reporting on an investigation of the complaint
- dealing with a report of an investigation of the complaint
- disposing of the complaint
- referring the complaint on to another person or body.

114. This broad definition gives a person, who may be handling a complaint, a high degree of flexibility in taking action appropriate to an individual complaint. For example, it would enable the Chief Justice to refer a complaint to a Conduct Committee and enable the Conduct Committee to investigate the complaint and provide a report to the Chief Justice for further consideration.

115. Disposing of a complaint may include dismissing the complaint. Proposed subclause 15(1AAA) enables the Chief Justice, or a complaint handler, to deal with a complaint by dismissing the complaint. The ability of a person to dismiss a complaint summarily does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where it is not substantiated on further investigation.

116. A definition of ‘complaint handler’ is inserted by Item 15 of Schedule 1 to this Bill.

Item 17 – Section 4

117. This item inserts into section 4 of the *Federal Court of Australia Act 1976* a definition of ‘relevant belief’. Section 4 of the *Federal Court of Australia Act 1976* provides for definitions used in the Act. This term is used in proposed subclause 15(1AAA) (see Item 19 of Schedule 1 to this Bill). The definition applies where a person has a relevant belief in relation to a complaint about a judge. A person has such a belief if:

- the person believes that circumstances giving rise to a complaint may, if substantiated, justify consideration of removal of a judge in accordance with paragraph 72(ii) of the Constitution, or
- the person believes that circumstances giving rise to a complaint may, if substantiated, adversely affect performance of judicial or official duties by the other judge, or have capacity to adversely affect the reputation of the Court of which the judge is a member

118. Having a relevant belief enables a Chief Judge or complaint handler to take certain actions, such as handling a complaint (see new paragraphs 15(1AAA)(a)(ii) and (b)(ii) inserted by Item 19 of Schedule 1 to this Bill).

Item 18 – At the end of subsection 15(1AA)

119. This item inserts two additional paragraphs relating to the power of the Chief Justice to deal with a complaint about performance by another judge of his or her judicial or official duties. Subsection 15(1AA) of the *Federal Court of Australia Act 1976* includes specific powers of the Chief Justice in discharging his or her broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court under subsection 15(1).

120. Proposed new paragraph 15(1AA)(c) extends the Chief Justice’s specific powers to include a power to deal with a complaint about the performance by another judge of his or her judicial or official duties. The paragraph requires the Chief Justice to deal with such a complaint in accordance with the process set out in new subclause 15(1AAA) (inserted by Item 19 of Schedule 1 to this Bill).

121. A complaint about performance by another judge of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Justice (or other complaint handler) to consider whether the complaint relates to a matter capable of being raised on appeal.

122. The performance of official duties would extend the circumstances in which a complaint may be dealt with. An example would include where a judge is representing the Court in an official capacity or where the judge is undertaking certain official functions in their personal capacity.

123. Proposed new paragraph 15(1AA)(d) gives the Chief Justice power to take any measures that he or she believes are reasonably necessary to maintain public confidence in the Court. This includes the ability to temporarily restrict another judge to non-sitting duties. This power operates whether or not there has been a complaint about the judicial officer.

124. This paragraph enables a Chief Justice to take timely action that he or she believes is reasonably necessary to maintain public confidence in the Court. The Chief Justice would need to establish a clear basis for his or her belief that measures are reasonably necessary to maintain public confidence in the Court. Measures are characterised in terms of facilitating the smooth operation of the Court, rather than disciplinary action directed at a judge. The type of measure that might be taken would be consistent with the Chief Justice’s responsibilities for ensuring the effective discharge of the business of the court.

125. Proposed new paragraphs 15(1AA)(c) and (d) do not limit action that the Chief Justice may take in discharging his or her general obligation to ensure the effective, orderly and expeditious discharge of the business of the Court. The paragraphs support the existing powers of the Chief Justice by providing express mechanism by which complaints arising in a wide variety of circumstances may be dealt with.

126. Section 7 of the *Federal Court of Australia Act 1976* will enable the next most senior Federal Court Judge who is in Australia and willing and able to do so to exercise these powers where the Chief Justice is absent from Australia or from duty or there is a vacancy in the office of Chief Justice.

127. Section 4 of the *Federal Court of Australia Act 1976* defines ‘judge’ to mean a Judge of the Court (including the Chief Justice).

Item 19 – After subsection 15(1AA)

128. This item inserts new subclauses 15(1AAA) and (1AAB) into the *Federal Court of Australia Act 1976* to outline the process to be followed by the Chief Justice in dealing with a complaint about the performance by another judge of his or her performance of their judicial or official duties. New paragraph 15(1AA)(c) requires the Chief Justice to deal with such a complaint pursuant to the process set out in the new subclauses 15(1AAA).

129. Where a complaint is made about another judge, new subclause 15(1AAA) enables the Chief Justice to deal with the complaint as outlined in the subclause. The Chief Justice may do either or both of the options under new paragraphs 15(1AAA)(a) and (b).

130. Under new paragraph 15(1AAA)(a), the Chief Justice may decide whether or not to handle the complaint. The Chief Justice may then take one of the following actions:

- dismiss the complaint (paragraph 15(1AAA)(a)(i)).
- handle the complaint if the Chief Justice has a relevant belief in relation to the complaint about the other judge (paragraph 15(1AAA)(a)(ii)). A definition of ‘relevant belief’ is inserted into the *Federal Court of Australia Act 1976* by Item 17 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 16 of Schedule 1 to this Bill.
- arrange for any other complaint handlers to handle, or assist to handle, the complaint if the Chief Justice has a relevant belief in relation to the complaint about the other judge (paragraph 15(1AAA)(a)(iii)). A definition of ‘relevant belief’ is inserted into the *Federal Court of Australia Act 1976* by Item 17 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 16 of Schedule 1 to this Bill.

131. Under new paragraph 15(1AAA)(b), the Chief Justice may arrange for any other complaint handlers to decide whether or not to handle the complaint, and then take one of the following actions:

- dismiss the complaint (paragraph 15(1AAA)(b) (i))
- handle the complaint if the complaint handler has a relevant belief in relation to the complaint about the other judge (15(1AAA)(b)(ii)). A definition of ‘relevant belief’ is inserted into the *Federal Court of Australia Act 1976* by Item 17 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 16 of Schedule 1 to this Bill.

132. The powers of another complaint handler under new paragraph 15(1AAA)(b) are similar to those of the Chief Justice under new paragraph 15(1AAA)(a). This subclause enables the Chief Justice to arrange with a complaint handler to deal with a complaint without needing to conduct preliminary investigations in a complaint. Authorisations may be made on a standing basis (see new subclause 15(1AAB) inserted by this item).

133. The note to subclause 15(1AAA) clarifies that a complaint handler (other than the Chief Justice) may handle a complaint by referring it to the Chief Justice. The Chief Justice may then do either or both of the things referred to in paragraphs (a) or (b) in respect of the complaint.

134. By providing for options for a Chief Justice that are not mutually exclusive, this subclause gives the Chief Justice a high degree of flexibility to deal with complaints as they consider appropriate, including to manage complaints on a case by case basis. It supports the ability of the Chief Justice to exercise the option of establishing a Conduct Committee if required (see General Outline of this Bill).

135. A complaint about performance by another Judge of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Justice or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

136. These powers do not limit the ability of a Chief Justice to refer a matter to the Parliament for consideration of removal of a judge under paragraph 72(ii) of the Constitution if they consider this justified at any time.

137. The actions the Chief Justice or complaint handler may take to 'handle' a complaint include investigating a complaint, referring the complaint to another person, or disposing of a complaint (see definition of 'handle' a complaint inserted by Item 16 of Schedule 1 to this Bill). The ability of the Chief Justice or a complaint handler to dismiss a complaint summarily under proposed paragraphs 15(1AAA)(a)(i) and (b)(i) does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where the complaint has not been substantiated following investigation of the complaint.

138. A 'complaint handler' includes a person or member of a body authorised by the Chief Justice to handle a complaint under subclause 15(1AAB) (see below and Item 15 of Schedule 1 to this Bill).

139. Subclause 15(1AAB) give power to the Chief Justice to authorise a person or body to assist the Chief Justice to handle complaints, decide whether or not to handle complaints, dismiss complaints or handle complaints. Authorisations may be made either generally or in relation to a specified complaint. An authorisation must be in writing.

140. Subclause 15(1AAC) gives discretion to the Chief Justice as to the person or body which may be authorised to consider and handle a complaint. This is necessary to ensure a high degree of flexibility for the Chief Justice in complaints handling processes, which may involve a wide variety of circumstances.

141. An authorisation in writing provides certainty for the person or body involved in dealing with complaints, including for a member of any Conduct Committee established by the Chief Justice.

142. It is expected that a person authorised to handle a complaint would not be a current judge of the same court as the judge who is the subject of the complaint, and that the person would be of appropriate seniority to handle a complaint. For example, where a person authorised to consider or handle a complaint is a sitting or retired judge, it is expected that they would be of equivalent or higher seniority to the judge who is the subject of an investigation.

143. Section 4 of the *Federal Court of Australia Act 1976* defines ‘judge’ to mean a Judge of the Court (including the Chief Justice).

Item 20 – At the end of subsection 15(1AB)

144. This item inserts a note at the end of subsection 15(1AB) to refer to proposed new clause 18XA inserted into the *Federal Court of Australia Act 1976* by this Bill. Subsection 15(1AB) affords certain protection and immunity to the Chief Justice in the exercise of the functions or powers mentioned in paragraph 15(1AA)(a) of the *Federal Court of Australia Act 1976*.

145. New clause 18XA is inserted by item 22 of the Bill and affords certain protections to persons involved in dealing with complaints about judges. The protections under new clause 18XA are in addition to existing protections and immunities of the Chief Justice.

Item 21 – At the end of subsection 15(1AC)

146. This item includes new subclauses 15(1AAA) or (1AAB) within the scope of subsection 15(1AC). Subsection 15(1AC) excludes the jurisdiction of the Federal Court of Australia with respect to a matter relating to the exercise by the Chief Justice of the functions or powers mentioned in subsection (1AA).

147. New subclauses 15(1AAA) and (1AAB), together, enable the Chief Justice to deal with complaints about the performance by another judge of his or her judicial or official duties, including authorising a person or body to consider, handle or assist with the handling of complaints (see Item 19 of Schedule 1 to this Bill).

148. This amendment has the effect that the Federal Court of Australia will not have jurisdiction with respect to a matter relating to the exercise by the Chief Justice of his or her functions and powers relating to the handling of complaints about judicial officers under new subclauses 15(1AAA) and (1AAB).

149. Section 4 of the *Federal Court of Australia Act 1976* defines ‘judge’ to mean a Judge of the Court (including the Chief Justice).

Item 22 – After section 18X

150. This item inserts a new clause 18XA after section 18X of the *Federal Court of Australia Act 1976* at the end of Division 4 of Part IIA to outline broad protections afforded

to participants in the process of dealing with complaints about judges. Division 4 of Part IIA deals with miscellaneous administrative matters in the management of the Court.

151. This clause is designed to promote effectiveness of the judicial complaints process by enabling appropriate people to participate in the process to the extent possible without fear of prosecution or liability on behalf of those assisting the complaint handler.

152. Subclause 18XA(1) affords broad protection and immunity to a complaint handler, in exercising powers or performing functions under paragraph 15(1AA)(c) and subclause 15(1AAA) or assisting in exercising those powers or performing those functions. The level of protection and immunity under subclause 18XA(1) is the same as a Justice of the High Court. A definition of complaint handler is inserted into the *Federal Court of Australia Act 1976* by Item 15 of Schedule 1 to this Bill.

153. Subclause 18XA(2) affords broad protection and immunity to the Chief Justice in authorising a person or body under new subclause 15(1AAB). The level of protection and immunity under subclause 18XA(2) is the same as a Justice of the High Court. These protections are in addition to existing protections and immunities of the Chief Justice under the *Federal Court of Australia Act 1976*.

154. Subclause 18XA(3) affords broad protection and immunity for a witness requested to attend, or appearing, before a complaint handler handling a complaint. A witness has the same protection, and is subject to the same liabilities, as a witness in a case tried by the High Court. As processes may vary in formality depending on the circumstances, a witness will include a person who provides information to a complaints handler in the course of the handling of a complaint.

155. Subclause 18XA(4) affords broad protection and immunity for a lawyer assisting the complaint handler, or representing a person appearing before a complaint handler. The level of protection and immunity is the same as a barrister appearing for a party in proceedings in the High Court.

156. Definitions of ‘complaint’, ‘complaint handler’ and ‘handle’ a complaint are inserted into section 4 of the *Federal Court of Australia Act 1976* by Items 14, 15 and 16 of Schedule 1 to this Bill.

157. The protections and immunities in this clause are in addition to, and do not limit, other protections and immunities which may apply in the circumstances.

158. Section 4 of the *Federal Court of Australia Act 1976* defines ‘judge’ to mean a Judge of the Court (including the Chief Justice).

Item 23 – Application of items 14 to 22

159. This item provides for the application of the amendments made by items 14 to 22 of Schedule 1 to this Bill. Items 14 to 22 provide powers, protections and immunities in relation to complaints about judges within the Federal Court.

160. The amendments will apply on or after commencement of this item in relation to a complaint, regardless of whether a complaint was made before, on or after commencement,

and regardless of whether the circumstances that gave rise to the complaint occurred before, on or after that commencement.

161. This item enables the new judicial complaints handling process to be used where a complaint relates to behaviour or conduct that was engaged in prior to commencement of this item.

162. This item commences as specified in clause 2 of this Bill.

Federal Magistrates Act 1999

Item 24 – Section 5 (*definition of complaint*)

163. This item inserts into section 5 of the *Federal Magistrates Act 1999* a new definition of ‘complaint’. Section 5 of the *Federal Magistrates Act 1999* provides for definitions used in the Act. A ‘complaint’ for the purposes of the *Federal Magistrates Act 1999* will mean a complaint mentioned in paragraph 12(3)(c) (see Item 28 of Schedule 1 to this Bill).

Item 25 – Section 5 (*definition of complaint handler*)

164. This item inserts into section 5 of the *Federal Magistrates Act 1999* a new definition of ‘complaint handler’. Section 5 of the *Federal Magistrates Act 1999* provides for definitions used in the Act. The amendment will mean that a ‘complaint handler’ for the purposes of the *Federal Magistrates Act 1999* is the Chief Federal Magistrate, a person authorised by the Chief Federal Magistrate under subclause 12(3AB), or a person who is a member of a body authorised by the Chief Federal Magistrate under subclause 12(3AB) (see Item 29 of Schedule 1 to this Bill).

165. For example, a complaint handler would include a Conduct Committee authorised by the Chief Justice to investigate a complaint and report to the Chief Federal Magistrate (see General Outline of this Bill).

Item 26 – Section 5 (*definition of ‘handle’ a complaint*)

166. This item inserts into section 5 of the *Federal Magistrates Act 1999* a definition of ‘handle’ a complaint. Section 5 of the *Federal Magistrates Act 1999* provides for definitions used in the Act. The term ‘handle’ in relation to a complaint is used in a number of locations in the amendments contained in this Bill to both the *Federal Magistrates Act 1999* and the *Freedom of Information Act 1982*. For example, proposed new subclause 12(3AA) of the *Federal Magistrates Act 1999* provides the Chief Federal Magistrate with power to ‘handle a complaint’ about another Federal Magistrate (see Item 29 of Schedule 1 to this Bill).

167. Under the proposed new definition, ‘handle’ a complaint will mean to do one or more of the following:

- considering the complaint
- investigating the complaint
- reporting on an investigation of the complaint

- dealing with a report of an investigation of the complaint
- disposing of the complaint
- referring the complaint on to another person or body.

168. This broad definition gives a person, who may be handling a complaint, a high degree of flexibility in taking action appropriate to an individual complaint. For example, it would enable the Chief Federal Magistrate to refer a complaint to a Conduct Committee and enable the Conduct Committee to investigate the complaint and provide a report to the Chief Federal Magistrate for further consideration.

169. Disposing of a complaint may include dismissing the complaint. Proposed subclause 12(3AA) enables the Chief Federal Magistrate, or a complaint handler, to deal with a complaint by dismissing the complaint. The ability of a person to dismiss a complaint summarily does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where it is not substantiated on further investigation.

170. A definition of ‘complaint handler’ is inserted by Item 25 of Schedule 1 to this Bill.

171. Section 5 of the *Federal Magistrates Act 1999* defines ‘Federal Magistrate’ to mean a Federal Magistrate (including the Chief Federal Magistrate) who holds office under the *Federal Magistrates Act 1999*.

Item 27 – Section 5

172. This item inserts into section 5 of the *Federal Magistrates Act 1999* a definition of ‘relevant belief’. Section 5 of the *Federal Magistrates Act 1999* provides for definitions used in the Act. This term is used in proposed subclause 12(3AA) (see Item 29 of Schedule 1 to this Bill). The definition applies where a person has a relevant belief in relation to a complaint about a Federal Magistrate. A person has such a belief if:

- the person believes that circumstances giving rise to a complaint may, if substantiated, justify consideration of removal of a Federal Magistrate in accordance with paragraph 72(ii) of the Constitution, or
- the person believes that circumstances giving rise to a complaint may, if substantiated, adversely affect performance of judicial or official duties by the other Federal Magistrate, or have capacity to adversely affect the reputation of the Court of which the Federal Magistrate is a member

173. Having a relevant belief enables the Chief Federal Magistrate or complaint handler to take certain actions, such as handling a complaint (see new paragraphs 12(3AA) (a)(ii) and (b)(ii) inserted by Item 29 of Schedule 1 to this Bill).

Item 28 – At the end of subsection 12(3)

174. This item inserts two additional paragraphs relating to the power of the Chief Federal Magistrate to deal with a complaint about performance by another Federal Magistrate of his

or her judicial or official duties. Subsection 12(3) of the *Federal Magistrates Act 1999* includes specific powers of the Chief Federal Magistrate in discharging his or her broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court under subsection 15(1).

175. Proposed new paragraph 12(3)(c) extends the Chief Federal Magistrate's specific powers to include a power to deal with a complaint about the performance by another Federal Magistrate of his or her judicial or official duties. The paragraph requires the Chief Federal Magistrate to deal with such a complaint in accordance with the process set out in new subclause 12(3AA) (inserted by Item 29 of Schedule 1 to this Bill).

176. A complaint about performance by another Federal Magistrate of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Federal Magistrate or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

177. The performance of official duties would extend the circumstances in which a complaint may be dealt with. An example would include where a Federal Magistrate is representing the Court in an official capacity or where the Federal Magistrate is undertaking certain official functions in their personal capacity.

178. Proposed new paragraph 12(3)(d) gives the Chief Federal Magistrate power to take any measures that he or she believes are reasonably necessary to maintain public confidence in the Court. This includes the ability to temporarily restrict another Federal Magistrate to non-sitting duties. This power operates whether or not there has been a complaint about the Federal Magistrate.

179. This paragraph enables a Chief Federal Magistrate to take timely action that he or she believes is reasonably necessary to maintain public confidence in the Court. The Chief Federal Magistrate would need to establish a clear basis for his or her belief that measures are reasonably necessary to maintain public confidence in the Court. Measures are characterised in terms of facilitating the smooth operation of the Court, rather than disciplinary action directed at a judicial officer. The type of measure that might be taken would be consistent with the Chief Federal Magistrate's responsibilities for ensuring the effective discharge of the business of the court.

180. Proposed new paragraphs 12(3)(c) and (d) do not limit action that the Chief Federal Magistrate may take in discharging his or her general obligation to ensure the effective, orderly and expeditious discharge of the business of the Court. The paragraphs support the existing powers of the Chief Federal Magistrate by providing express mechanism by which complaints arising in a wide variety of circumstances may be dealt with.

181. Section 10 of Schedule 1 to the *Federal Magistrates Act 1999* enables the Minister to appoint an acting Chief Federal Magistrate where the Chief Federal Magistrate is absent from Australia or from duty or there is a vacancy in the office of Chief Federal Magistrate. An Acting Chief Federal Magistrate will be able to exercise these powers.

182. Section 5 of the *Federal Magistrates Act 1999* defines ‘Federal Magistrate’ to mean a Federal Magistrate (including the Chief Federal Magistrate) who holds office under the *Federal Magistrates Act 1999*.

Item 29 – After subsection 12(3)

183. This item inserts new subclauses 12(3AA) and (3AB) into the *Federal Magistrates Act 1999* to outline the process to be followed by the Chief Federal Magistrate in dealing with a complaint about the performance by another Federal Magistrate of his or her judicial or official duties. New paragraph 12(3)(c) requires the Chief Federal Magistrate to deal with such a complaint pursuant to the process set out in the new subclauses 12(3AA).

184. Where a complaint is made about another Federal Magistrate, new subclause 12(3AA) enables the Chief Federal Magistrate to deal with the complaint as outlined in the subclause. The Chief Judge may do either or both of the options under new paragraphs 12(3AA)(a) and (b).

185. Under new paragraph 12(3AA)(a), the Chief Federal Magistrate may decide whether or not to handle the complaint. The Chief Federal Magistrate may then take one of the following actions:

- dismiss the complaint (paragraph 12(3AA)(a)(i)).
- handle the complaint if the Chief Federal Magistrate has a relevant belief in relation to the complaint about the other Federal Magistrate (paragraph 12(3AA)(a)(ii)). A definition of ‘relevant belief’ is inserted into the *Federal Magistrates Act 1999* by Item 27 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 26 of Schedule 1 to this Bill.
- arrange for any other complaint handlers to handle, or assist to handle, the complaint if the Chief Federal Magistrate has a relevant belief in relation to the complaint about the other Federal Magistrate (paragraph 12(3AA)(a)(iii)). A definition of ‘relevant belief’ is inserted into the *Federal Magistrates Act 1999* by Item 27 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 26 of Schedule 1 to this Bill.

186. Under new paragraph 12(3AA)(b), the Chief Federal Magistrate may arrange for any other complaint handlers to decide whether or not to handle the complaint, and then take one of the following actions:

- dismiss the complaint (paragraph 12(3AA)(b) (i))
- handle the complaint if the complaint handler has a relevant belief in relation to the complaint about the other Federal Magistrate (paragraph 12(3AA)(b)(ii)). A definition of ‘relevant belief’ is inserted into the *Federal Magistrates Act 1999* by Item 27 of Schedule 1 to this Bill. A definition of ‘handle a complaint’ is inserted by Item 26 of Schedule 1 to this Bill.

187. The powers of another complaint handler under new paragraph 12(3AA)(b) are similar to those of the Chief Federal Magistrate under new paragraphs 12(3AA)(a) . This subclause enables the Chief Federal Magistrate to arrange with a complaint handler to deal with complaint without needing to conduct preliminary investigations in a complaint. Authorisations may be made on a standing basis (see new subclause 12(3AB) inserted by this item).

188. The note to subclause 12(3AA) clarifies that a complaint handler (other than the Chief Federal Magistrate) may handle a complaint by referring it to the Chief Federal Magistrate. The Chief Federal Magistrate may then do either or both of the things referred to in paragraphs (a) or (b) in respect of the complaint.

189. By providing for options for a Chief Judge that are not mutually exclusive, this subclause gives the Chief Federal Magistrate a high degree of flexibility to deal with complaints as they consider appropriate, including to manage complaints on a case by case basis. It supports the ability of the Chief Federal Magistrate to exercise the option of establishing a Conduct Committee if required (see General Outline of this Bill).

190. A complaint about performance by another Federal Magistrate of his or her judicial or official duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for judicial determination. It may be necessary for the Chief Federal Magistrate or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

191. These powers do not limit the ability of a Chief Federal Magistrate to refer a matter to the Parliament for consideration of removal of a Federal Magistrate under paragraph 72(ii) of the Constitution if they consider this justified at any time (see General Outline of this Bill).

192. The actions the Chief Federal Magistrate or complaint handler may take to ‘handle’ a complaint include investigating a complaint, referring the complaint to another person, or disposing of a complaint (see definition inserted by Item 26 of Schedule 1 to this Bill). The ability of the Chief Federal Magistrate or a complaint handler to dismiss a complaint summarily under proposed paragraphs 12(3AA)(a)(i) and (b)(i) does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where the complaint has not been substantiated following investigation of the complaint.

193. A ‘complaint handler’ includes a person or member of a body authorised by the Chief Federal Magistrate to handle a complaint under subclause 12(3AB) (see below and Item 25 of Schedule 1 to this Bill).

194. This item also inserts subclause 12(3AB) into the *Federal Magistrates Act 1999*. Subclause 12(3AB) gives power to the Chief Federal Magistrate to authorise a person or body to assist the Chief Federal Magistrate to handle complaints, decide whether or not to handle complaints, dismiss complaints or handle complaints. Authorisations may be made either generally or in relation to a specified complaint. An authorisation must be in writing.

195. Subclause 12(3AB) gives discretion to the Chief Federal Magistrate as to the person or body which may be authorised to consider and handle a complaint. This is necessary to ensure a high degree of flexibility for the Chief Federal Magistrate in complaints handling processes, which may involve a wide variety of circumstances.

196. An authorisation in writing provides certainty for the person or body involved in dealing with complaints, including for a member of any Conduct Committee established by the Chief Federal Magistrate.

197. It is expected that a person authorised to handle a complaint would not be a current Federal Magistrate of the same court as the Federal Magistrate who is the subject of the complaint, and that the person would be of appropriate seniority to handle a complaint. For example, where a person authorised to consider or handle a complaint is a sitting or retired Federal Magistrate, it is expected that they would be of equivalent or higher seniority to the Federal Magistrate who is the subject of an investigation.

198. Section 5 of the *Federal Magistrates Act 1999* defines ‘Federal Magistrate’ to mean a Federal Magistrate (including the Chief Federal Magistrate) who holds office under this Act.

Item 30 – At the end of subsection 12(6A)

199. This item inserts a note at the end of subsection 12(6A) to refer to new clause 118A inserted into the *Federal Magistrates Act 1999* by this Bill. Subsection 12(6A) affords certain protection and immunity to the Chief Federal Magistrate in the exercise of the functions or powers mentioned in paragraph 12(3)(a) of the *Federal Magistrates Act 1999*.

200. Clause 118A is inserted by Item 32 of Schedule 1 to this Bill and affords certain protections to persons involved in dealing with complaints about Federal Magistrates. The protections under new clause 118A are in addition to existing protections and immunities of the Chief Federal Magistrate.

Item 31 – Subsection 12(6B)

201. This item includes new subclauses 12(3AA) and (3AB) within the scope of subsection 12(6B). Subsection 12(6B) excludes the jurisdiction of the Federal Court of Australia with respect to a matter relating to the exercise by the Chief Federal Magistrate of the functions or powers mentioned in subsection 12(3) or (4).

202. New subclauses 12(3AA) and (3AB), together, enable the Chief Federal Magistrate to deal with complaints about Federal Magistrates, including authorising a person or body to decide whether or not to handle complaints dismiss, handle or assist with the handling of complaints (see Item 29 of Schedule 1 to this Bill).

203. This amendment has the effect that the Federal Court of Australia will not have jurisdiction with respect to a matter relating to the exercise by the Chief Federal Magistrate of his or her functions and powers relating to the handling of complaints about Federal Magistrates under new subclauses 12(3AA) and (3AB).

Item 32 – At the end of Division 5 of Part 7

204. This item inserts a new clause 118A at the end of Division 5 of Part 7 of the *Federal Magistrates Act 1999* to outline broad protections afforded to participants in the process of dealing with complaints about Federal Magistrates. Division 5 of Part 7 deals with miscellaneous administrative matters in the management of the Court.

205. This clause is designed to promote effectiveness of the judicial complaints process by enabling appropriate people to participate in the process to the extent possible without fear of prosecution or liability on behalf of those assisting the complaint handler.

206. Subclause 118A(1) affords broad protection and immunity to a complaint handler, in exercising powers or performing functions under paragraph 12(3)(c) and subclause 12(3AA) or assisting in exercising those powers or performing those functions. The level of protection and immunity under subclause 118A(1) is the same as a Justice of the High Court.

207. Subclause 118A(2) affords broad protection and immunity to the Chief Federal Magistrate in authorising a person or body under new subclause 12(3AB). The level of protection and immunity under subclause 118A(2) is the same as a Justice of the High Court. These protections are in addition to existing protections and immunities of the Chief Federal Magistrate under the *Federal Magistrates Act 1999*.

208. Subclause 118A(3) affords broad protection and immunity for a witness requested to attend, or appearing, before a complaint handler handling a complaint. A witness has the same protection, and is subject to the same liabilities, as a witness in a case tried by the High Court. As processes may vary in formality depending on the circumstances, a witness will include a person who provides information to a complaints handler in the course of the handling of a complaint.

209. Subclause 118A(4) affords broad protection and immunity for a lawyer assisting the complaint handler, or representing a person appearing before a complaint handler. The level of protection and immunity is the same as a barrister appearing for a party in proceedings in the High Court.

210. Definitions of ‘complaint’, ‘complaint handler’ and ‘handle’ a complaint are inserted into section 5 of the *Federal Magistrates Act 1999* by Items 24, 25 and 26 of Schedule 1 to this Bill.

211. The protections and immunities in this clause are in addition to, and do not limit, other protections and immunities which may apply in the circumstances.

212. Section 5 of the *Federal Magistrates Act 1999* defines ‘Federal Magistrate’ to mean a Federal Magistrate (including the Chief Federal Magistrate) who holds office under the *Federal Magistrates Act 1999*.

Item 33 – Application of items 24 to 32

213. This item provides for the application of the amendments made by items 24 to 32 of Schedule 1 to this Bill. Items 24 to 32 provide powers, and protections and immunities, in relation to complaints about Federal Magistrates within the Federal Magistrate Court.

214. The amendments will apply on or after commencement of this item in relation to a complaint, regardless of whether a complaint was made before, on or after commencement, and regardless of whether the circumstances that gave rise to the complaint occurred before, on or after that commencement.

215. This item enables the new judicial complaints handling process to be used where a complaint relates to behaviour or conduct that was engaged in prior to commencement of this item.

216. This item commences as specified in clause 2 of this Bill.

Freedom of Information Act 1982

Item 34 – Before subsection 5(1)

217. This item inserts a heading for subsection 5(1). The heading will be ‘courts other than courts of Norfolk Island—general’.

Item 35 – After subsection 5(1)

218. This item inserts three additional subclauses into the section 5 of the *Freedom of Information Act 1982* to provide broad exclusions from the operation of the Act for documents of a court that relate to complaints handling processes within the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court.

219. New subclause 5(1A) provides that the Act does not apply to any request for access to a document of a court (other than a court of Norfolk Island) that relates to complaint handler (or a body consisting of complaint handlers) exercising powers or performing functions under paragraph 15(1AA)(c) and subclause 15(1AAA) of the *Federal Court of Australia Act 1976* or assisting in exercising those powers or performing those functions. Any documents of a court will be covered by the exclusion, including where a complaint has been transferred between courts due to the complaint being misdirected.

220. Subclause 5(1A) also provides that the term ‘complaint handler’ has the meaning given by the *Federal Court of Australia Act 1976*. This definition is inserted by Item 15 of Schedule 1 to this Bill.

221. New subclause 5(1B) provides that the Act does not apply to any request for access to a document of a court (other than a court of Norfolk Island) exercising powers or performing functions under paragraph 21B(1A)(c) and subclause 21B(1B) of the *Family Law Act 1975* or assisting in exercising those powers or performing those functions. Any documents of a court will be covered by the exclusion, including where a complaint has been transferred between courts due to the complaint being misdirected.

222. Subclause 5(1B) also provides that the term ‘complaint handler’ has the meaning given by the *Family Law Act 1975*. This definition is inserted by Item 2 of Schedule 1 to this Bill.

223. New subclause 5(1C) provides that the Act does not apply to any request for access to a document of a court (other than a court of Norfolk Island) that relates to complaint handler (or a body consisting of complaint handlers) exercising powers or performing functions under paragraph 12(3)(c) and subclause 12(3AA) of the *Federal Magistrates Act 1999* or assisting in exercising those powers or performing those functions. Any documents of a court will be covered by the exclusion, including where a complaint has been transferred between courts due to the complaint being misdirected.

224. The subclause also provides that the term ‘complaint handler’ has the meaning given by the *Federal Magistrates Act 1999*. This definition is inserted by Item 25 of Schedule 1 to this Bill.

225. The exclusion of documents that relate to complaints handling processes within the courts from the operation of the FOI Act will protect potentially sensitive documents that arise in the course of a head of jurisdiction (or complaint handler) dealing with a complaint about a judicial officer. This would include any documents arising in the course of a Conduct Committee’s investigation of a complaint (see General Outline of this Bill).