RESPONSE OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO THE LEGISLATION SCRUTINY COMMITTEE
Written Questions for the Department of the Attorney-General and Justice

Inquiry into the Judicial Commission Bill 2020

Clause 7: Composition of Judicial Commission

1. **Civil Liberties Australia (CLA) and the NT Women Lawyers Association Inc. (NTWLA) expressed the view that, given the small size of the jurisdiction, an independent complaints model would be preferable.**

   a. ***In developing the Bill, what consideration was given to alternate models including an independent complaints model?***

Response

The Judicial Commission Bill 2020 (the Bill) has been developed in consultation with the heads of jurisdiction, the President of the Law Society Northern Territory (LSNT) and the President of the Northern Territory Bar Association (NTBA). The Department of the Attorney-General and Justice (AGD) has also consulted with the Judicial Commission of New South Wales (NSW) and with the Australian Capital Territory (ACT) Ombudsman's office, which provides operational support for the ACT Judicial Council.

The Bill is modelled on the Judicial Commission of NSW, established under the *Judicial Officers Act 1986* (NSW). The Judicial Commission of NSW has been successfully operating in NSW for over 30 years. Initial fears that it would undermine judicial independence proved unfounded and the NSW model has been exported to other jurisdictions in Australia and elsewhere. The ACT in 2015 and Victoria in 2016 have established similar bodies. In 2013, the Law Reform Commission of Western Australia in its report titled *'Complaints Against Judiciary'* (the LRCWA Report) recommended the establishment of a judicial commission in Western Australia. At a national level, there have been, on a number of occasions, calls for a federal judicial commission.

South Australia is the only Australian jurisdiction that has introduced a statutory model for handling judicial complaints that departs from the NSW model. Under the *Judicial Conduct Commissioner Act 2015* (SA), a single Judicial Commissioner performs the functions undertaken by a judicial commission in other jurisdictions. The South Australian Judicial Conduct Commissioner is the Hon Bruce Lander QC. He is also the South Australian Independent Commissioner Against Corruption.

The LRCWA Report summed up the deficiencies of a single commissioner model as follows:

> '... it may be more resource intensive as it would not draw on the contributions of the heads of jurisdiction in the same way as would the judicial commission model. Also the role would have to be filled by a suitably qualified candidate irrespective of the number of complaints requiring investigation. ... [Because] the judicial commissioner would be the person making decisions on complaints ... the person appointed would have to be of a level of seniority and expertise commensurate with responsibilities of that gravity.' (at p76).

These same deficiencies were raised during the development of the Bill and the single commissioner model was rejected.

It is understood that, by an 'independent complaint model', the NTWLA envisaged an externally-sourced commissioner located outside of the Northern Territory. The argument against a single commissioner is articulated in the extract from the LRCWA Report. Logistically, a commissioner residing outside of the jurisdiction is impractical, as support staff would be located in the Territory. Sourcing a suitable person is also likely be to fraught, as a deep understanding of the Territory's judicial and justice systems would be prerequisite to undertaking the role of a judicial commissioner.

The model proposed by CLA is considered in the response to Question 2(a) and 2(b).

2. **CLA suggested that the Northern Territory should adopt the principle as provided for under section 7(3)(b) of the *Judicial Conduct Commissioner Act 2015* (SA) which expressly states that the Judicial Conduct Commissioner cannot be a judicial officer. CLA subsequently recommended that at least one judicial officer appointed to the Judicial Commission, or to any subsidiary panel under the Judicial Commission, should be drawn from outside of the Northern Territory, have no significant connection to the legal profession in the Territory, and that person should be the chair.**

    a. ***In developing the Bill, was any consideration given to providing that the chairperson of the Judicial Commission must not be a judicial officer? If not, why not?***

    b. ***Was any consideration given to providing that at least one member of the Judicial Commission must be drawn from outside of the Northern Territory? If not, why not?***

Response

The following response addresses both parts of Question 2, as the CLA proposal is that the chairperson be drawn from outside the Territory.

The deficiencies of the South Australian model are considered in the response to Question 1. The model proposed by CLA initially seems to support the South Australian model of a non-judicial commissioner (paragraph 6 of the CLA submission) but in paragraph 7 suggests a commission, with a judicial officer from outside of the Territory as the chairperson. Later, in paragraph 10, the suggestion for the chairperson is either a judicial officer or a legal representative from outside the Territory. Further comments on the composition of a judicial commission as proposed by CLA are made in response to Question 3.

The type of judicial commission envisaged by CLA is a novel model. As precedents for successful models exist, AGD considers the risks of a novel approach for the Territory are not justified. The purpose of the Bill is to establish a structured, transparent and accessible process for handling judicial complaints in a fiscally responsible framework. As noted in the response to Question 1, there would be logistical issues of a chairperson being situated outside the Territory and difficulties in sourcing a suitable person. If that person had to be a judicial officer from outside the Territory, there is the added complication of the likely reluctance to exercise a supervisory jurisdiction over judicial officers in the Territory. Appointing a non-judicial commissioner from outside the Territory would inevitably incur considerably higher costs than the model proposed in the Bill.

The model for judicial complaints handling must not only promote public trust in the judiciary but also have the gravitas and authority to be accepted by judicial officers. The model proposed in the Bill, which follows the mechanisms established in NSW, Victoria and the ACT, acknowledges the important role of the heads of jurisdiction in a judicial commission both in maintaining judicial independence and in utilising resources in a fiscally responsible way. From AGD's consultation during the development of the Bill, it is clear that a non-judicial chairperson would not be acceptable to the judiciary or, with the exception of NTWLA, to the legal profession.

Question 2(b) does not reflect the content of the CLA's submission as it seems to ask whether consideration was given for any member, not only the chairperson, to be drawn from outside the Territory. In any event, the answer is no. The problems associated with having a non-Territorian judicial officer on the Judicial Commission are discussed above. It is unclear what advantage there would be in having a non-Territorian lawyer or community member on the Judicial Commission of the Northern Territory.

3. **Given the over-representation of Indigenous Territorians in the justice system, CLA raised concern that the Bill does not require that one or more members of the Judicial Commission be Indigenous.**

    a. ***In developing the Bill, was any consideration given to requiring that the membership of the Judicial Commission incorporate at least one representative from the Indigenous community? If not, why not?***

Response

Consideration was not given to requiring that the membership of the Judicial Commission incorporate at least one representative from the Indigenous community. However, it may be expected that the community member(s) would be appointed in accordance with the Northern Territory Government policy on board membership appointment. The *Northern Territory Government Boards Handbook* provides, at p15, that in the selection process for board members:

> 'Membership is to reflect the Territory community including diversity in gender, age, culture and language, as far as possible.'

    b. ***How would it impact on the operation of the proposed legislation, if the Bill was amended to provide that at least one member of the Judicial Commission must be Indigenous?***

Response

It would not be appropriate to require that one member of the Judicial Commission must be Indigenous. If none of the ex officio members were Indigenous and no Indigenous person expressed an interest in appointment as a community member, a community member would not be able to be appointed. This would mean that the Judicial Commission would not be established and would result in frustration of the proposed statutory scheme, leaving only the current unsatisfactory ad hoc processes for addressing judicial complaints.

4. **The note for clause 6 'Functions of Judicial Commission' states that the Judicial Commission is an investigatory body, not a disciplinary body. CLA suggested that as a consequence, there should be a requirement in clause 7 that membership of the Judicial Commission include at least one trained and experienced investigator.**

    a. ***Was any consideration given to requiring that at least one member of the Judicial Commission is a trained and experienced investigator? If not, why not?***

Response

The Judicial Commission proposed in the Bill will be supported in the exercise of its functions by staff, as set out in clause 39. A similar structure exists in NSW, Victoria and the ACT. The Judicial Commissions in NSW and Victoria and the Judicial Council in the ACT function well.

While it will be a matter for the Judicial Commission to establish its own procedures, it is likely that the 'investigation' will be conducted by the principal officer and her/his staff or by a consultant engaged to investigate a more complex matter, as occurs in NSW, Victoria and the ACT.

5. **Given the hierarchical nature of the legal profession and the barriers female lawyers already experience, NTWLA expressed concern that the proposed model may limit female practitioners' willingness to lodge a complaint. NTWLA suggested that where the complainant is a female, if no roles on the Judicial Commission at that time are occupied by women, the community member appointed should be female.**

    a. ***In developing the Bill, was any consideration given ensuring that the membership of the Judicial Commission include at least one female? If not, why not?***

Response

The current Chief Judge of the Local Court and the President of the LSNT are women. However, it is acknowledged that, by the time the Judicial Commission is established or at some future time this might not be the case. No specific consideration was given to ensuring that the membership of the Judicial Commission include at least one woman. However, it may be expected that the community member(s) would be appointed in accordance with the Northern Territory Government policy on board membership appointment. The *Northern Territory Government Boards Handbook* provides, at p15, that in the selection process for board members:

> 'Membership is to reflect the Territory community including diversity in gender, age, culture and language, as far as possible.'

b. ***How would it impact on the operation of the proposed legislation, if the Bill was amended to provide that at least one member of the Judicial Commission must be female?***

Response

There may be some practical difficulties in drafting a provision to ensure that the membership of the Judicial Commission included at least one female. This is because four members are ex officio, so no appointment is made. Membership is attached to the office. The community member(s) can be appointed under subclause 8(5) for a period of up to five years. For example, a male community member may be appointed for a five year term at a time when two of the ex officio members are female. During the five year appointment of the community member, those ex officio members cease to hold office and are replaced by two men. The male community member could not be removed from his position, other than as set out in clause 9.

6. **Consistent with the *Judicial Appointments Protocol* which requires that the Presidents of both the Law Society NT (LSNT) and the NT Bar Association (NTBA) be consulted as part of the judicial appointments process, NTBA expressed the view that they should also have a role in the establishment of the Judicial Commission. NTBA suggested that clause 7(1)(d) of the Bill be amended to provide for a member to be appointed by the President of the Council of the Law Society of the Northern Territory following consultation with the President of the Northern Territory Bar Association.**

   a. ***Can you explain why the Bill does not provide for the NTBA to have a role in the establishment of the Judicial Commission?***

Response

This was a matter on which there was considerable consultation with both the LSNT and the NTBA during the development of the Bill. The LSNT strongly supports its President being an ex officio member of the Judicial Commission. The NTBA, as evidenced by its submission, is not supportive.

The proposed composition of the Judicial Commission is similar to that in NSW, Victoria and the ACT, with the exception that, in the Bill, the President of the LSNT is an ex officio member. There is no legal member in Victoria. In NSW and the ACT, the legal member is appointed on the joint nomination of the presidents or councils of the law society and bar association.

The different approach under the Bill has been taken because the LSNT is the only statutory body representing lawyers in the Territory. It represents all lawyers, including members of the NTBA. The President of the LSNT is elected and endorsed by the profession. The NTBA has no statutory foundation, unlike the bar associations in NSW and the ACT, and represents only about 40 lawyers.

b. How would it impact on the operation of the proposed legislation if clause 7(1)(d) of the Bill was amended as suggested by the NTBA?

Response

AGD is of the view that the amendment suggested by the NTBA is not appropriate. The legal member should either be an ex officio member, as provided for in subclause 7(1) of the Bill or should be appointed by the Administrator, like a community member. An 'appointment' by the President of the LSNT is not supported.

During consultation, the position of NTBA appeared to be that the Bill should follow the NSW and ACT procedure. This would mean, in the context of the Bill, that the presidents or councils of the LSNT and the NTBA would jointly make a recommendation to the Minister, who would in turn nominate that person to the Administrator. In other words, the process for the appointment of the legal member would be the same as the appointment of the community member(s).

Clause 10: Acting members of Judicial Commission and Clause 11: Member involved in complaint

7. **Clause 11(1) deals with circumstances where a member of the Judicial Commission is involved in a complaint (either as the complainant or as the subject of the complaint) and provides that the member must have no involvement as a member of the Judicial Commission in relation to the complaint. Clause 11(2) provides that in such circumstances the person appointed as the acting member under clause 10 must perform the function of that member until the matter is finally resolved.**

   However, by clause 10, other than community members, the relevant member of the Judicial Commission appoints their own replacement including, it would seem, where the member must step aside because of clause 11. As Professor Aughterson pointed out, the effect of clauses 10 and 11 is that the affected member may appoint one of the members of the Judicial Commission that will consider their complaint or sit in the judgement on them. In circumstances where the member is the complainant or the subject of the complaint, Professor Aughterson suggested that it might be more appropriate for the Administrator to exercise relevant powers under clause 10.

   a. What consideration, if any, was given to the conflict of interest that may arise in the circumstances outlined above?

Response

Consideration was given to what arrangements were appropriate if a member of the Judicial Commission was unable to exercise a function under the Act. That is the purpose of clauses 10, 11 and 12. On reflection, the issue raised by Professor Aughterson is one that should have been addressed directly and clearly in the Bill. It is an oversight that it was not.

b. ***How would it impact on the operation of the proposed legislation if the Bill was amended to provide that the Administrator must make the appointment of the replacement member where a member of the Judicial Commission is the complainant or subject of the complaint as suggested by Professor Aughterson?***

Response

There is a difference between a judicial officer being the complainant and being the subject of a complaint. AGD considers there is no conflict of interest if an acting member appointed under clause 10 exercises the functions of a judicial member who is the complainant in a matter. However, it is agreed that another process is required if the judicial member is the subject of a complaint.

Appointment of an acting member by the Administrator is one option. This is the procedure adopted in section 46 of the *Judicial Officers Act 1986* (NSW). Another option could be to adopt the procedure set out in sections 125 and 126 of the *Judicial Commission of Victoria Act 2016* (Vic). Under the Victorian procedure, if the Chief Justice is the subject of a complaint, the next most senior judge of the Supreme Court may attend and vote at the meeting where the complaint is considered. If the subject of the complaint is another judicial member, that member simply cannot participate in any deliberations regarding the complaint. No other person takes their place.

If the Legislation Scrutiny Committee were minded to recommend amendment of the Bill to provide for a specific procedure, other than that set out in clause 10, if a judicial member is the subject of a complaint, further consultation with the heads of jurisdiction would be required before AGD could provide advice to the government on whether or not the government should accept such a recommendation.

Clause 15: Guidelines

8. **LSNT suggested that, pursuant to the general power under clause 15, to facilitate any public education function the Judicial Commission ought to make guidelines about ethical standards, professional conduct and practices that should be adopted by judicial officers and ordinary members of NTCAT in the performance of their functions and duties.**

   a. ***Given the nature of the Bill, was any consideration given to providing that the Judicial Commission may make guidelines about ethical standards, professional conduct and practices that should be adopted by judicial officers and ordinary members of NTCAT in the performance of their functions and duties? If not, why not?***

Response

Clause 15 is modelled on section 10 of the *Judicial Officers Act 1986* (NSW) and, during the consultation process, was considered sufficient in scope.

It is arguably unnecessary to empower and require the Judicial Commission to make guidelines about ethical standards and professional conduct and practices. Rather, the *Guide to Judicial Conduct (Third Edition)* published by the Australasian Institute of Judicial Administration Incorporated (or any subsequent edition), could be relied upon. In NSW, it is simply uploaded on the Judicial Commission of NSW's website. In Victoria, the *Guide to Judicial Conduct (Third Edition)* has been adopted as guidelines under section 134 of the *Judicial Commission of Victoria Act 2016*. Whether an explicit power to make guidelines about ethical standards and professional conduct and practices is included in the Bill or not, the likely outcome would be reliance on the *Guide to Judicial Conduct (Third Edition).*

b. How would it impact on the operation of the proposed legislation if clause 15 of the Bill was amended to provide that the Judicial Commission may make guidelines in this regard?

Response

As noted in the response to Question 8(a), it is arguably unnecessary to empower and require the Judicial Commission to make guidelines about ethical standards and professional conduct and practices. Whether an explicit power to make guidelines about ethical standards and professional conduct and practices is included in the Bill or not, the likely outcome would be reliance on the *Guide to Judicial Conduct (Third Edition).*

Clauses 18 and 29: Issuing summons

9. **Professor Aughterson noted that it was unclear why there is a different approach where a summons is issued by the Judicial Commission (clause 18), on the one hand, and a summons issued by an investigation panel (clause 29). While the latter may issue an arrest warrant where there is a failure to attend as required by the summons (clause 30), or search warrant (clause 31) if it is considered necessary to ensure production of a document or thing that might otherwise be concerned, lost, mutilated, destroyed or disposed of, no such equivalent power exists on the part of the Judicial Commission.**

a. Can you explain why this is the case?

Response

The framework in the Bill will establish a two-tiered process for the investigation of complaints against judicial officers and ordinary members of NTCAT. The role of the Judicial Commission is to investigate and determine less serious complaints, either by dismissing them or referring them to the head of jurisdiction, with recommendations for action. The most serious complaints, namely those which could lead to removal from office or termination of appointment, will be referred to an investigation panel. It is expected that, as has been the experience in NSW, Victoria and the ACT, such referrals will be rare. The investigation that would be carried out by an investigation panel is analogous to an inquiry under the *Inquiries Act 1945*.

The same model of a two-tiered process exists in NSW, Victoria and the ACT. In each of those jurisdictions the coercive powers of the body equivalent to the proposed Judicial Commission in the Territory are very limited or non-existent. On the other hand, the bodies equivalent to the proposed investigation panel in the Territory have the coercive powers they require to conduct a full inquisitorial hearing into the conduct or capacity of a judicial officer.

Both the Judicial Commission and an investigation panel can issue a summons to appear or produce a document or thing (clauses 18 and 29 respectively). The chair of an investigation panel has the additional power to issue an arrest warrant, if a person summoned fails to appear or to produce documents or things (clause 30), and a search warrant (clause 31). These additional powers reflect the function of an investigation panel in conducting hearings into serious complaints that could lead to the removal from office of a judicial officer or ordinary member of NTCAT.

b. How would it impact on the operation of the proposed legislation if the Bill was amended to:

i. provide that the Judicial Commission may issue an arrest warrant where there is a failure to attend as required by the summons similar to clause 30;

ii. provide that the Judicial Commission may issue a search warrant where it considers it is necessary to ensure the production of a document or thing similar to clause 31?

Response

The different functions of the Judicial Commission and an investigation panel are explained in the response to Question 9(a). The coercive powers in clauses 30 and 31 are not appropriate for an investigation by the Judicial Commission.

Clauses 19 and 32: Inspection and retention of documents

10. LSNT raised concern about the lack of procedure in clauses 19 and 32, noting that the Bill does not deal with circumstances where a claim of privilege is made in relation to documents obtained by the Judicial Commission or an investigation panel.

a. In developing the Bill, was any consideration given to the inclusion of provisions to deal with circumstances where a claim of privilege is made in relation to documents obtained by the Judicial Commission or an investigation panel? If not, why not?

Response

Clauses 19 and 32 are modelled on section 34 of the *Judicial Commissions Act 1994* (ACT), which do not set out a procedure for dealing with claims of privilege. There are no such provisions in the *Judicial Officers Act 1986* (NSW). A conduct division in NSW has the functions, protections and immunities conferred by the *Royal Commissions Act 1923* (NSW), which abrogates the right to claim privilege.

On the other hand, sections 92-96 of the *Judicial Commission of Victoria Act 2016* (Vic) do set out a detailed procedure for dealing with such claims. It is, however, unclear how a claim of privilege would arise in relation to complaints about judicial conduct or capacity either as legal professional privilege or as public interest immunity privilege. The Judicial Commission and an investigation panel are not courts. Claims of privilege are dealt with by the Supreme Court. In the unlikely event that a claim of privilege was raised, it would be dealt with by the Supreme Court under the Supreme Court Rules. There is no need to set out a process for dealing with claims of privilege in the Bill.

In any event, during the consultation on the development of the Bill, no concerns were raised by stakeholders, including LSNT, about a detailed procedure for dealing with claims of privilege not being included in the Bill. LSNT's submission gives no context as to why, now, it has this concern.

If the Legislation Scrutiny Committee were minded to recommend amendment of the Bill to abrogate the right to claim privilege, further consultation with the heads of jurisdiction and the Presidents of the LSNT and NTBA would be required before AGD could provide advice to the government on whether or not the government should accept such a recommendation. This is not a matter that has been the subject of any consultation to date.

Clause 25: Meetings of investigation panel

11. **Clause 25(2) provides that 'the quorum for a meeting of an investigation panel is all 3 members of the panel'. Subsection (4) then notes that 'if a member of the investigation panel is unable or unavailable to perform the functions or exercise the powers of a member, or the member's appointment is terminated under section 24(6), the remaining members of the panel may either continue as a panel of 2 members or request the Judicial Commission to appoint a replacement member. Professor Aughterson suggested that, for completeness, subclause 25(2) might be better expressed as being subject to subclause 25(4).**

    a. ***How would it impact on the operation of the proposed legislation if clause 25(2) of the Bill was amended as suggested by Professor Aughterson?***

Response

Although the suggested amendment is unnecessary, there would be no impact on the operation of the proposed legislation if subclause 25(2) were amended so that it is expressed as being subject to subclause 25(4).

12. **Professor Aughterson further noted that clause 25(5) provides that if an investigation panel continues as a panel of two members rather than as a panel of three, the decisions of the panel must be unanimous. While it might thereby be implicit that there may be a majority decision where there are three members on the panel, it is noted that, pursuant to clause 13(4) in relation to decisions of the Judicial Commission, it is expressly provided that decisions are to be by a majority vote.**

    a. ***Can you explain why clause 25 does not expressly provide that where all 3 members of an investigation panel are present decisions are to be by majority vote, as is the case for the Judicial Commission under clause 13(4)?***

Response

Subclause 13(4) serves a different purpose from subclause 25(2). Meetings of the Judicial Commission may be conducted where there is a quorum of fewer than all the members. Subclause 13(4) is required to make it clear that decisions are to be made by a majority of members present at a meeting at which a quorum is present and not by a majority of the total number of members. For meetings of an investigation panel, other than when subclauses 25(4) and 25(5) apply, there is no difference between the number of members and the quorum required for a meeting. Accordingly, a provision equivalent to subclause 13(4) is not required in clause 25.

b. How would it impact on the operation of the proposed legislation if clause 25 was amended to require that where all 3 members of an investigation panel are present decisions are to be by majority vote?

Response

As explained in the response to Question 12(a), an amendment to clause 25 to require that, where all three members of an investigation panel are present, decisions are to be by majority vote is unnecessary. However, such an amendment would have no impact on the operation of the proposed legislation.

Clause 34: Preventing or restricting release of Information.

13. The Bill provides that both the Judicial Commission and an investigatory (sic) panel may obtain material or information, whether through a summons or otherwise. While clause 34 gives power to an investigation panel to refuse to disclose information to a complainant where to do so would not be in the public interest, Professor Aughterson noted that no such power exists on the part of the Judicial Commission.

a. Can you explain why a power to withhold information is not also vested in the Judicial Commission given its obligation under clause 48(2) to provide to the complainant reasons for the dismissal of any complaint, and the power in clause 56(6) to give a copy of an investigation panel's report, or summary of the report, to the complainant given that relevant information might not have been withheld in the investigation panel's report?

Response

It is noted that the obligation for the Judicial Commission to provide the complainant the reasons for dismissal of a complaint following a preliminary examination under clause 42 is contained in subclause 46(2), not subclause 48(2).

The Judicial Commission is obliged to give notice of decisions to a complainant under several clauses of the Bill.

As noted above, there is an obligation under subclause 46(2) to give notice of and reasons for dismissal following a preliminary examination. There is no power to withhold information on the ground of public interest. There should be. This is an oversight and should be rectified by amendment.

The Judicial Commission is also obliged, under subclause 48(2), to give notice to a complainant if it refers a matter to a head of jurisdiction under clause 49 or establishes an investigation panel under clause 50. There is no obligation to give reasons for these decisions at this stage, so there is no need for a power to withhold information on the ground of public interest. The obligation of the Judicial Commission under subclause 48(2) to give notice of dismissal of a complaint following the processes in clause 47 and subclause 48(1) is considered in the response to Question 14(a) and 14(b).

Where a matter has been referred to a head of jurisdiction under clause 49, the head of jurisdiction must give a written report under subclause 60(3) of the action taken under subclause 60(1) and the reasons for that action. Under subclause 60(4), the Judicial Commission must give a copy of the head of jurisdiction's report to the complainant. However, subclause 60(5) provides that the Judicial Commission must not provide any information under subclause 60(4) that would be contrary to the public interest. For example, the report of the head of jurisdiction may contain details of an illness or disability that the judicial officer or ordinary member of NTCAT the subject of the report is suffering from and details of treatment. It may not be in the public interest to disclose such details in their entirety.

Clause 56 relates to reports of an investigation panel that are provided to a head of jurisdiction. It is the report of the investigation panel, not of the Judicial Commission. The Judicial Commission in such an instance is acting more as the conduit for release of the report than independently. It is for the investigation panel to determine whether or not the report, or a summary, should be given to the complainant. It may be preferable to clarify this by amendment to subclause 56(6) in a way similar to section 28(6) of the *Judicial Officers Act 1986* (NSW), which provides:

> 'The [Judicial] Commission [of New South Wales] may give a copy of the report (or a summary of the report) to the complainant unless the Conduct Division has notified the Commission in writing that this should not occur.'

The exact wording would be, of course, a drafting issue for the Office of the Parliamentary Counsel to determine.

b. How would it impact on the operation of the legislation if the Bill was amended to provide the Judicial Commission the power to refuse to disclose information to a complainant where to do so would not be in the public interest?

Response

As detailed in the response to Question 13(a), AGD would support an amendment to clause 46 to give the Judicial Commission power to refuse to disclose information to a complainant where to do so would not be in the public interest.

AGD would also support an amendment to clause 56 to clarify the role of the Judicial Commission in giving a copy or summary of a report of an investigation panel, made under clause 56, to a complainant.

Clause 46: Giving notice and Clause 48: Options for taking action

14. As highlighted by Professor Aughterson, it is unclear why, under clause 46(2), the Judicial Commission must give to the complainant reasons for the early dismissal of any complaint, whereas reasons do not have to be given where the complaint is dismissed under clause 48, following consideration of any response given under clause 47(2).

a. Can you explain why this is the case?

Response

It appears to have been an oversight not to require the Judicial Commission to give reasons as well as notice to a complainant where it dismisses a complaint following the processes in clause 47 and subclause 48(1).

b. How would it impact on the operation of the proposed legislation if the Bill was amended to provide that reasons must be given to the complainant where the complaint is dismissed under clause 48?

Response

AGD supports an amendment to clause 48 to provide that, where a complaint is dismissed following the processes in clause 47 and subclause 48(1), the Judicial Commission must, in addition to giving notice of this decision to the complainant under subclause 48(2), also give a summary of the complaint and the reasons for its dismissal. As with the suggested amendment to subclause 46(2) considered in the response to Question 13(a) and 13(b), AGD would support any amendment to clause 48 regarding the giving of reasons to also give the Judicial Commission power to refuse to disclose information where to do so would not be in the public interest.

Clause 47: Opportunity to respond to complaint

15. Clause 47(2) provides that a person who is the subject of the complaint 'may' respond in writing to the complaint. Professor Aughterson questioned whether it should be framed as providing that 'any' response (if made) *must* be in writing, or whether it leaves it open to the possibility of an oral response.

a. Can you clarify whether clause 47(2) is intended to provide for the possibility of an oral response?

Response

Subclause 47(2) is not intended to provide for the possibility of an oral response and it does not. The word 'may' in subclause 47(2) does not allow other options of responding. It means that, if a judicial officer or ordinary member of NTCAT who is the subject of a complaint wants to provide a response to that complaint, the response must be in writing. The drafting of subclause 47(2) is clear and is in accordance with current drafting practices of the Office of the Parliamentary Counsel.

b. If it is not intended that the clause provide for the possibility of an oral response, how would it impact on the operation of the proposed legislation if clause 47(2) was amended to provide that 'any' response, if made, 'must' be in writing?

Response

To change the wording of subclause 47(2) to provide that 'any' response 'must' be made in writing is unnecessary and contrary to current drafting practices of the Office of the Parliamentary Counsel. Such a change is not supported by either AGD or the Office of the Parliamentary Counsel.

Clause 52: Hearing by investigation panel

16. Clause 52(4) provides that at a hearing conducted by an investigation panel, witnesses may be examined or cross examined by a legal practitioner assisting the investigation panel, any person authorised by the investigation panel to appear before it at the hearing, or any legal practitioner representing a person at the hearing under clause 65. Clause 65(1) then provides that a person who is the subject of a complaint is entitled to appear and to be represented by a legal practitioner during proceedings under the Act.

However, as noted by Professor Aughterson, clause 52(4) seems to anticipate that the person who is the subject of a complaint will always appear through a legal practitioner and makes no provision for where the person seeks to represent themselves.

a. ***Why doesn't the Bill make provision for instances where the person who is the subject of a complaint may wish to represent themselves?***

Response

It is an oversight in the Bill that no provision is made for the event that a person who is the subject of a complaint may wish to represent themselves. Given the risks inherent in self-representation and the provision, in clause 70, for payment by the Territory of the reasonable costs and expenses of for appearance and legal representation, it is unlikely that a person the subject of a complaint would choose to represent themselves. However, to put the matter beyond doubt, subclause 52(4) should be amended to include the judicial officer or ordinary member of NTCAT who is the subject of a complaint as persons who may examine or cross-examine a witness in proceedings before an investigation panel.

b. ***How would it impact on the operation of the proposed legislation if clause 52(4) was amended to provide for a situation where the person who is the subject of the complaint wishes to represent themselves?***

Response

As noted in the response to Question 16(a), subclause 52(4) should be amended to include the judicial officer or ordinary member of NTCAT who is the subject of a complaint as persons who may examine or cross-examine a witness in proceedings before an investigation panel.

Clause 53: Dismissal of complaint by investigation panel and Clause 56: Report to head of jurisdiction

17. **Clause 53(1)(a) provides that an investigation panel must dismiss a complaint if it is of the opinion that the complaint should be dismissed on any of the grounds specified in clause 44. However, prior to referring the complaint to an investigation panel, the Judicial Commission is required to have considered the matters in clause 44 and be satisfied on reasonable grounds that the complaint is sufficiently serious such that, if substantiated, could justify the removal from office or termination of an appointment of the judicial officer or ordinary member. LSNT raised concerns that providing that an investigation panel must dismiss a serious matter that has been referred to it, for example, because the person is no longer a judicial officer or ordinary member of NTCAT, would seem to negate the initial role of the Judicial Commission.**

    a. ***Can you clarify the intended operation of clause 53 given the requirement for the Judicial Commission to have considered the matters in clause 44 and, pursuant to clause 50, be satisfied on reasonable grounds that the complaint is sufficiently serious that, if substantiated, it could justify the removal from office or termination of appointment of the judicial officer or ordinary member prior to establishing an investigation panel under clause 21 to examine and investigate a complaint?***

Response

The concern of LSNT seems to be based on a misunderstanding of the two-tiered process of investigation. The role of the Judicial Commission is to undertake a preliminary inquiry and to make decisions regarding less serious complaints. As noted in the response to Question 9(a), the Judicial Commission has fewer coercive powers than an investigation panel, reflecting the different roles of the two bodies. On the information available to the Judicial Commission, it may form the view that a complaint is too serious to be dismissed or referred to a head of jurisdiction and, therefore, it must establish an investigation panel.

The role of an investigation panel is to examine and investigate the complaint ab initio. When it conducts its examination and investigation, an investigation panel will not necessarily have only the information that was available to the Judicial Commission. Not only does it have greater coercive powers than the Judicial Commission but also more information may become available, or the situation could change from the time when the Judicial Commission considered the complaint. That is why an investigation panel needs the power under clause 53 to dismiss a complaint. The same holds true for the power to refer a complaint to a head of jurisdiction. The intention of clause 53 is to ensure an investigation panel is not fettered regarding what decision it makes following its examination and investigation of a complaint.

18. **Pursuant to clauses 53 and 56, a report or summary of the report is to be given to the complainant at various stages of the complaints process. However, LSNT noted that it was not entirely clear what guides the discretion of an investigation panel or the Judicial Commission in deciding to provide a report or a summary of the report to the complainant.**

    a. ***Can you clarify the types of matters an investigation panel or the Judicial Commission is expected to take into account when determining whether or not to provide a copy of the report or summary of the report to the complainant?***

Response

The object of the Bill is to establish a formal and transparent statutory process for handling complaints against judicial officers and ordinary members of NTCAT. That process requires that clear information be given to complainants about decisions made and the reasons for those decisions, except where it would be contrary to the public interest to provide certain information. For example, there might be details of a person's private life or medical history that would not be in the public interest to disclose to a complainant.

The power given to an investigation panel under clause 34 to refuse to disclose information to a complainant or, more generally, to make directions to prevent or restrict the publication of evidence, will be guided by consideration of the importance of transparency and of judicial accountability. However, the policy intention underpinning the Bill is not to be prescriptive about what factors are to be taken into account in guiding the discretionary exercise of this power.

Subject to the comments made in the responses to Questions 13 and 14 about clarifying the power to refuse to disclose information to a complainant where to do so would not be in the public interest, the same policy intention applies regarding the Judicial Commission.

Division 5: Action in response to complaint

19. **Clause 60 provides for action by the head of jurisdiction following receipt of a referral under clause 49 or a report under section 56. However, NTBA suggested that it was unclear what powers the head of jurisdiction have to act upon any recommendations or otherwise take action. While section 14 of the *Northern Territory Civil and Administrative Tribunal Act 2014* arguably gives its President wide administrative powers over the members of the Tribunal, NTBA noted that neither the *Supreme Court Act 1979* nor the *Local Court Act 2015* give similar powers to the Chief Justice or Chief Judge.**

    Despite the references in the Explanatory Statement to section 34 of the *Supreme Court Act 1979* and section 20 of the *Local Court Act 2015,* the NTBA noted that, in November 2019, Chief Judge Morris expressed the view that "under the current processes and statutory framework, the Chief Judge has no power to impose any sanction in relation to a complaint." NTBA suggested that for there to be any utility to the provision of recommendations for the action in response to a complaint, governing legislation of the various jurisdictions should be amended to make clear the nature and extent of the disciplinary powers of the heads of jurisdiction.

    a. ***In light of NTBA's concerns and Chief Judge Morris' comments, can you explain why it was not considered necessary to make consequential amendments to the governing legislation of the various jurisdictions to clarify the powers the heads of jurisdictions have to act upon any recommendations or otherwise take action in respect of a complaint?***

Response

Clause 60 has been the subject of considerable consultation with the heads of jurisdiction, LSNT and the President of the NTBA. To the extent that the NTBA may be asking for the heads of jurisdiction to be given disciplinary powers, this is not consistent with the principle of judicial independence. It is also not consistent with the schemes established in NSW, Victoria, the ACT or South Australia.

Clause 60 was developed specifically to address concerns raised by the NTBA during the development of the Bill. It is modelled on sections 115-117 and 119 of the *Judicial Commission of Victoria Act 2016* (Vic) and is designed to offer explicit guidance about what a head of jurisdiction should do if the Judicial Commission refers a complaint with recommendations.

Chief Judge Morris' comments in a letter dated 26 November 2019 to the Criminal Lawyers Association of the NT, quoted in the preamble to Question 19, are correct. The Chief Judge does not have the power to 'impose a sanction'. To impose a sanction would be inconsistent with the principle of judicial independence. In the continuation of the quote from the letter, Chief Judge Morris writes:

> Judges are appointed by the executive government, and retain that appointment until retirement unless removed on the address of the Legislative Assembly on the grounds of incapacity or misbehaviour. Parliaments have rarely done so, and a parliament would only do so in circumstances of flagrant and serious misconduct. Lapses in judicial demeanour and conduct falling short of the ideal do not qualify as judicial misconduct warranting removal.

The Bill does not propose to establish a scheme for disciplining judicial officers. The Judicial Commission and investigation panels are investigatory bodies, not disciplinary ones. That the role is not disciplinary is a point that has been made by Conduct Divisions of the Judicial Commission of NSW. For example, the Conduct Division in *'Report of Inquiry, Judicial Commission of NSW Conduct Division in relation to Magistrate Dominique Burns'* (21 December 2018) said, at paragraph 26:

> 'The power conferred upon the Parliament to remove a judicial officer on the relevant grounds is in no way punitive. The proceedings in the Conduct Division are not disciplinary. The jurisdiction is entirely protective. This means that the proceedings are designed to protect both the public from judicial officers who are guilty of misbehaving rendering them unfit for office, or suffering from incapacity to discharge the duties of office and the judiciary from unwarranted intrusions into judicial independence.'

During the development of the Bill, the *Judicial Officers Act 1986* (NSW), the *Judicial Commissions Act 1994* (ACT) and the *Judicial Commission of Victoria Act 2016* (Vic) as well as the legislation governing the courts in those jurisdictions were examined. AGD also consulted the Judicial Commission of NSW and the ACT Ombudsman's office regarding operational issues. It did not appear that the governing legislation of the three Territory jurisdictions needed to be amended to give effect to the scheme in the Bill.

If the Legislation Scrutiny Committee were minded to recommend amendment of any of the governing legislation, further consultation with the heads of jurisdiction would be required before AGD could provide advice to the government on whether or not the government should accept such a recommendation.

20. **Clauses 61-64 provide that the removal from office of a Supreme Court Judge or Associate Judge, or the termination of appointment of a Local Court Judge or a member of NTCAT, can only occur through the process provided in the Bill. However, LSNT noted that there may be times where the behaviour is so egregious it warrants immediate removal from the office, and expressed the view that parliament's power to call for removal in these circumstances should not be fettered in this way.**

    a. ***In developing the Bill, was any consideration given to maintaining a capacity for the Administrator, on an address from the Legislative Assembly, to remove from office a Supreme Court Judge, Associate Judge, Local Court Judge or a member of NTCAT? If not, why not?***

Response

The suggestion by LSNT, that there could be circumstances where the conduct of a judicial officer is so egregious that it warrants immediate removal from office, seems to imply that there could be such a thing as summary removal from office. There cannot be. The independence of the judiciary is already safe-guarded in the governing legislation of the three Territory jurisdictions. With the exception of acting Local Court judges (refer section 63(d) *Local Court Act 2015*), judicial officers and members of NTCAT can only be removed from office on the grounds of *proved* incapacity or misbehaviour (emphasis added).

One of the purposes of the Bill is to establish the process preceding the point at which the Legislative Assembly would address the Administrator seeking removal of a judicial officer or member of NTCAT from office. That there needs to be a process cannot be disputed. The process established in the Bill addresses the absence of clarity about how the Legislative Assembly or the Administrator would have the necessary information to consider this grave issue.

There has only ever been one inquiry in the Territory investigating whether the conduct of a judicial officer could justify consideration of removal from office. That inquiry (which did not furnish a report, as the judicial officer resigned before the investigation was completed) was conducted under the *Inquiries Act 1945*. The limitation of establishing an ad hoc commission of inquiry is the risk of the perception of interference with judicial independence.

The requirement of a report from an investigation panel does not fetter the Legislative Assembly or the Administrator. The grounds for removal and the roles of the Legislative Assembly and the Administrator are not changed by the Bill. The requirement of a report will protect judicial independence and enhance confidence in the judicial and political systems. This is because there will not be any opportunity for the involvement of political considerations in determining if there should be an investigation about whether the conduct or capacity of a judicial officer or ordinary member of NTCAT may merit consideration of removal from office.

It is noted that a report from a Conduct Division in NSW, an investigating panel in Victoria and the Judicial Commission in the ACT is required before any parliamentary consideration of removal from office in those jurisdictions.

Clause 68: Self-incrimination

21. **Clause 68 abrogates the privilege against self-incrimination. Clause 68(2) then provides that any response is not admissible in evidence against the person in a criminal or civil proceeding except for an offence in which the falsity of the response is relevant, or for an offence under Part IV of the *Criminal Code* 'Offences against the administration of law and justice and against public authority'. The Statement of Compatibility on Human Rights accompanying the Bill further notes that the limitation placed on the privilege is reasonable, necessary and proportionate for the purposes of the Bill, namely upholding of judicial accountability and protecting the administration of justice.**

    While similar provisions exist in equivalent legislation in Victoria and the ACT, the exceptions to the non-admissibility of responses in other proceedings are confined to matters relating to the judicial function, such as perjury, falsifying evidence, protecting people involved in legal proceedings, perverting the course of justice, and offences relating to the conduct of legal proceedings. However, as pointed out by Professor Aughterson, Part IV of the NT *Criminal Code* is more wide ranging and includes offences such as resisting public officers, neglect to act in suppressing a riot, and neglect to aid in arresting offenders.

a. ***What is the rationale for extending the exception to the non-admissibility of responses in relation to charges for offences such as resisting public officers, neglect to act in suppressing a riot, and neglect to aid in arresting offenders, and other offences in Part IV of the Criminal Code which do not relate to the upholding of judicial accountability and protection of the administration of justice?***

Response

Clause 68 is modelled on section 32(3) of the *Judicial Commissions Act 1994* (ACT). It is acknowledged that Chapter 7 of the ACT Criminal Code, referred to in section 32(3)(b), is narrower in scope than Part IV of the NT Criminal Code. Chapter 7 of the ACT Criminal Code adopts the Model Criminal Code recommendations for offences against the administration of justice. Part IV of the NT Criminal Code has not yet been modernised as part of the project to convert the Criminal Code offences to comply with the criminal responsibility provisions in Part IIAA and, in general, to adopt the offences recommended by the Model Criminal Code Officers Committee.

The reason for subclause 68(2)(b) being drafted to cover all of Part IV of the Criminal Code was to avoid referring to sections by number, and thereby inadvertently omitting a relevant offence. It also mitigates the risk of overlooking consequential amendments should offences in Part IV of the Criminal Code be repealed and re-enacted with different section numbers. From a practical perspective, the inclusion of irrelevant offences such as neglect to act in suppression of a riot is unlikely to have any adverse or unintended effect on the operation of clause 68.

b. ***How would it impact on the operation of the proposed legislation if the Bill was amended to limit the exceptions to charges for offences which specifically relate to the upholding of judicial accountability and protection of the administration of justice?***

Response

Provided any suggested amendment adequately covered the offences intended to be covered by subclause 68(2)(b), there would be no impact on the operation of the proposed legislation. The offences that need to be included are sections 76-78, 80-81 and 118-119 and Part IV Division 5 of the Criminal Code. It is recommended that the wording of any proposed amendment be left to the Office of the Parliamentary Counsel.

Clause 70: Payment of costs and expenses of judicial officer or ordinary member of NTCAT

22. **Clause 70 provides that reasonable costs and expenses incurred by a judicial officer or ordinary member of NTCAT, who is the subject of a complaint, for appearance and legal representation in respect of proceedings under the Act are to be paid by the Territory. LSNT questioned whether there should be the ability to recover such costs from the judicial officer or ordinary member of NTCAT where an adverse finding has been made against them.**

a. ***In developing the Bill, was any consideration given to the inclusion of a provision whereby the Territory may recover costs from a judicial officer or ordinary member of NTCAT where an adverse finding has been made against them? If not, why not?***

Response

Consideration was given to how best to address the payment of the reasonable costs and expenses of a judicial officer or ordinary member of NTCAT who is the subject of a complaint.

It is noted that the Council of the LSNT had divergent views about costs, so the suggestion in Question 22 does not represent the view of the entire Council. In any event, the main objection to the suggestion is the risk of undermining judicial independence. There is a risk, for example, that a judicial officer could be effectively forced to resign rather than defend a complaint. Clause 70 was included following consultation with the Judicial Commission of NSW. Such a provision is not included in the *Judicial Officers Act 1986* (NSW). However, by convention, the costs are met by the NSW government, generally via funding to the Judicial Commission of NSW.

Clause 70 represents the statutory position in the ACT and Victoria combined with the convention in NSW.