

Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Judicial Commission Bill 2020

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* (Cth).

Overview of the Bill

The Bill creates a formal, statutory framework for handling complaints against judicial officers and ordinary members of the Northern Territory Civil and Administrative Tribunal (NTCAT).

It establishes a Judicial Commission with powers to receive, investigate, and make recommendations on complaints about the behaviour or physical or mental capacity of judicial officers and ordinary members of NTCAT.

It further provides that the Judicial Commission may refer a substantiated complaint to the head of jurisdiction or, for the most serious complaints, appoint an investigation panel to examine and, when required, hold a hearing into the complaint. If an investigation panel finds that a complaint is substantiated it may refer it to the head of jurisdiction with recommendations about what action should be taken. If, however, the investigation panel forms the opinion that the conduct could justify consideration of removal from office or termination of appointment, it must report accordingly to the Administrator and the Minister. The Minister must table the report in the Legislative Assembly. The process for removal from office or termination of appointment remains governed by the statutes that establish the courts and NTCAT.

The Bill introduces a structured, transparent and accessible process for handling judicial complaints, at the same time maintaining judicial independence.

Human rights implications

The Bill engages a number of rights or freedoms set out in the International Covenant on Civil and Political Rights (ICCPR) as detailed below.

Right to a fair trial – Article 14(1) of the ICCPR

The right to a fair trial is concerned with procedural fairness. It is also concerned with the principle of open justice, that is, the right to a fair and open public hearing.

The Bill engages and limits the right to a fair hearing by providing that the examination of and inquiries into a complaint by the Judicial Commission must, as far as practicable be in private, as must the examination and investigation of a complaint by an investigation panel. If an investigation panel conducts a hearing, this may be in public or private, as determined by the investigation panel.

The limitation on open justice is justified because there is also a competing interest of maintaining the integrity and the independence of the judiciary. The airing of less serious complaints against judicial officers and members of NTCAT in public could act to undermine judicial independence and confidence in the judiciary. There may also, for the same reasons, be circumstances where a hearing or part of a hearing by an investigation panel should also

be held in private. Clause 15(2)(c) of the Bill empowers the Judicial Commission to make guidelines for the criteria an investigation panel are to consider when determining whether a hearing be held in public or private. Guidelines will enhance consistency and transparency in making such a determination.

The limitation on the right to a fair hearing is further mitigated by providing that the judicial officer or member of NTCAT has the opportunity to respond to a complaint before it is referred to the head of jurisdiction or to an investigation panel (clause 47) and the right to legal representation (clause 65(1)), including that the reasonable expenses of such representation will be met by the Territory (clause 70).

The limitation on the right to a fair hearing is reasonable, necessary and proportionate.

Right to freedom from self-incrimination – Article 14(3)(g) of the ICCPR

The privilege against self-incrimination is a well-established common law principle consistent with the right to a fair hearing. It can only be abrogated by statute, which it is in clause 68 of the Bill. Clause 68 provides that a person is not excused from the requirement to answer a question, give information or produce a document or thing on the ground that to do so might tend to incriminate the person or make them liable to a penalty.

To ensure that the limitation placed on the right to be free from self-incrimination is proportionate and reasonable, clause 68(2) provides for direct use immunity, namely that the answer, information, document or thing cannot be used against the person except for offences regarding misleading information or falsity or an offence against Part IV of the Criminal Code (offences against the administration of law and justice and against public authority).

It would be inconsistent with the overall administration of justice and contrary to the public interest if admitted misconduct by a judicial officer or ordinary member of NTCAT could not be, where relevant, used in proceedings for the offences listed in clause 68(2).

The limitation placed on the right to be free from self-incrimination is reasonable, necessary and proportionate for the purposes of the Bill, namely the upholding of judicial accountability and protecting the administration of justice.

Right not to be subjected to arbitrary or unlawful interference with privacy, nor to unlawful attacks on reputation – Article 17(1) of the ICCPR

Private life

A complaint about the conduct or capacity of a judicial officer or ordinary member of NTCAT could relate to the person's private life. However, clause 44(1)(i) empowers the Judicial Commission to dismiss such a complaint if it cannot reasonably be considered to affect or have affected the judicial officer's or ordinary member's suitability to hold office or their performance in the functions or exercise of powers of office.

Accordingly, any interference with the right to privacy is not arbitrary.

Medical examination

Clauses 20 and 33 provide that the Judicial Commission and an investigation panel respectively, may request a judicial officer or member of NTCAT to undergo a medical or psychological examination. This power limits the right to privacy but is necessary for the Judicial Commission or an investigation panel to properly investigate complaints. The purpose of such examination is limited to enquiring into the mental or physical capacity to carry out the function or exercise the powers of office. This limits the interference with the right to privacy and ensures it is not an arbitrary interference.

Release of information

The Bill provides that the Judicial Commission and an investigation panel may release information about a substantiated complaint to a complainant and to the head of jurisdiction.

However, not providing such information would generally be contrary to the public interest of ensuring public confidence in the maintenance of judicial standards. Clause 34(1) does allow the Judicial Commission or an investigation panel to refuse to disclose information to a complainant where it would be against the public interest. This ensures that disclosure is not required in cases where it could actually undermine public confidence in the judiciary and NTCAT members.

In any event, the disclosure of this information is not arbitrary.

Clause 58 provides that the Minister must table an adverse report in the Legislative Assembly. However, the opportunity to respond to a complaint and the right to legal representation ensure that the right to privacy is not arbitrarily infringed. In addition, there is the competing public interest of ensuring the integrity of the judiciary that requires public access to an adverse report.

Right to freedom from discrimination – Articles 2 and 26 of the ICCPR

The right to non-discrimination applies to any form of distinction, exclusion, restriction or preference that has the effect of nullifying or restricting the enjoyment of human rights on a restricted ground. One of the restricted grounds is 'other status', which has been held to include a disability.

The right to non-discrimination is potentially limited in two ways in the Bill.

First, an investigation panel may form the opinion that a complaint against a judicial officer or ordinary member of NTCAT who has a physical or mental disability could justify consideration of removal from office or termination of appointment, and report under clause 57 to the Administrator and the Minister.

Second, clause 9(1)(e) provides that the appointment of a community member is terminated if the person becomes mentally incapacitated or is being treated under the *Mental Health and Related Services Act 1998*. Similarly, the appointment of a community member to an investigation panel will be terminated on the same ground.

A physical or mental disability may or may not impact on the capacity of a judicial officer or ordinary member of NTCAT to perform the functions of office. A mental incapacity on the part of a community member of the Judicial Commission or an investigation panel may or may not arise from a disability.

Even in cases where there is discrimination, the competing public interest of maintaining public trust in the capacity of judicial officers and members of NTCAT to perform the duties of office means that such discrimination is reasonable, necessary and proportionate. Likewise, the gravity of the potential outcome of complaints justifies any discrimination against community members of the Judicial Commission or an investigation panel who may become mentally incapacitated as a result of a disability.

Conclusion

This Bill engages the following human rights and freedoms:

- right to a fair trial, contained in Article 14(1) of the ICCPR;
- right to freedom from self-incrimination, contained in Article 14(3)(g) of the ICCPR;
- right to privacy, contained in Article 17(1) of the ICCPR; and
- right to freedom from discrimination, contained in Articles 2 and 26 of the ICCPR.

However, as outlined in this statement, the Bill is compatible with human rights as any limitations imposed are reasonable, necessary and proportionate.