

Explanatory Statement

Judicial Commission Bill 2020

SERIAL NO. 125

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

EXPLANATORY STATEMENT

GENERAL OUTLINE

The purpose of the Bill is to establish a formal statutory framework to deal with complaints about the capacity or conduct of a judicial officer or an ordinary member of the Northern Territory Civil and Administrative Tribunal, known as NTCAT.

The Bill contains the following features:

- a) it establishes a Judicial Commission whose functions are to receive, examine and report on complaints regarding the behaviour or ability of judicial officers and ordinary (non-judicial) members of NTCAT;
- b) the Judicial Commission is an investigatory body which may dismiss a complaint, refer it to the head of jurisdiction with recommendations for action, or establish an investigation panel to deal with the most serious complaints; and
- c) an investigation panel will investigate complaints that could justify removal from office or termination of appointment. It may dismiss the complaint, refer it to the head of jurisdiction with recommendations for action or, if it forms the opinion that the complaint could justify consideration of removal from office or termination of appointment, report to the Administrator and the Minister.

NOTES ON CLAUSES

Part 1 **Preliminary matters**

Clause 1 **Short title**

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Judicial Commission Act 2020*.

Clause 2 **Commencement**

This is a formal clause which provides when the Act will commence.

The Act will commence on a day fixed by the Administrator by Gazette notice.

Clause 3 Definitions

This clause defines words and terms used in the Bill namely, *community member, complaint, head of jurisdiction, judicial officer, ordinary member of NTCAT* and *principal officer*.

The definitions are largely self-explanatory.

The 'head of jurisdiction' for a Supreme Court Judge and an Associate Judge (of the Supreme Court) is the Chief Justice; for a Local Court judge it is the Chief Judge; and for members of NTCAT it is the President of NTCAT.

A 'judicial officer' means a Supreme Court Judge, an Associate Judge, a Local Court Judge (including a Local Court Judge sitting as a coroner), and the President and a Deputy President of NTCAT.

An 'ordinary member of NTCAT' is a member appointed under section 16 of the *Northern Territory Civil and Administrative Tribunal Act 2014*, namely a non-judicial member.

Clause 4 Application of Criminal Code

This is a standard clause that provides that Part IIAA of the Criminal Code applies to an offence against this Act. Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences and deals with the burden of proof. Part IIAA also defines, or elaborates on, certain concepts commonly used in the creation of criminal offences.

Part 2 Judicial Commission and investigation panels

Division 1 Judicial Commission

Clause 5 Establishment of Judicial Commission

Clause 5 establishes the Judicial Commission.

Clause 6 Functions of Judicial Commission

This clause sets of the functions of the Judicial Commission. It is to receive, investigate, and make determinations of fact regarding complaints about the behaviour or physical or mental capacity of judicial officers and ordinary members of NTCAT. Having made a determination the Judicial Commission may also refer and make recommendation about complaints to heads of jurisdiction (clause 49) and assist and support the investigation of any investigation panel it establishes (see clauses 21 and 50). Importantly, a note to clause 6 informs that the Judicial Commission is an investigatory body. It is not a disciplinary body.

Clause 7 Composition of Judicial Commission

This clause provides that the Judicial Commission consists of the Chief Justice, the Chief Judge, the President of NTCAT, the President of the Law Society Northern Territory and at least one but no more than two community members appointed under section 8.

This clause also makes the Chief Justice the chairperson of the Judicial Commission.

Clause 8 Appointment of community member to Judicial Commission

This clause provides for the appointment of a community member to the Judicial Commission. The community member must be a person of high standing in the community, and must not be a lawyer, judicial officer or former judicial officer or civil and administrative tribunal member from the Territory or any other Australian jurisdiction, a current or former member of the Legislative Assembly.

Clause 8 also provides for the process to appoint a community member. The Minister nominates a community member who the Administrator appoints by Gazette Notice to the Judicial Commission. The Administrator sets the terms and conditions of the appointment. The Minister must consult with the Chief Justice and Chief Judge before making the nomination.

The term of appointment of a community member is five years. This term can be renewed once.

Clause 9 Termination of appointment of community member

Clause 9(1) provides circumstances where the appointment of a community member, including an acting community member, is taken to be terminated, namely if the person ceases to be eligible (for example is appointed as a member of a civil and administrative tribunal) or resigns.

Clause 9(2) sets out the circumstances in which the Administrator must terminate the appointment of a community member, including if the member becomes bankrupt, mentally incapacitated or found guilty of an offence punishable by more than 12 months imprisonment.

Clause 9(3) provides that the Administrator may terminate the appointment of a community member on the grounds of incompetence or misbehavior.

Clause 10 Acting members of Judicial Commission

This clause provides for acting members of the Judicial Commission where a particular member is unable or unavailable to perform their functions or exercise the powers of office.

Clause 10 sets out that:

- the Chief Justice may appoint a Supreme Court Judge;
- the Chief Judge may appoint a Deputy Chief Judge or another Local Court Judge Commission;
- the President of NTCAT may appoint a Deputy President;
- the President of the Council of the Law Society Northern Territory may appoint another member of the Council to act in their place as a member of the Judicial Commission; and
- the Administrator may appoint an person eligible for appointment as a community member on conditions determined by the Administrator.

Clause 10 is cast in general terms and is enabling. The only circumstance in which a member may not perform their functions or exercise the powers of office is dealt with in clause 11.

Clause 11 Member involved in complaint

This clause provides that where a member is a complainant or is the subject of a complaint, that member must not perform any function or exercise any power under the Act. Clause 11 also clarifies that an acting member appointed under clause 10 must perform the functions and exercise the powers of the member until the complaint is fully resolved.

Clause 12 Head of jurisdiction involved in complaint

This clause provides the procedure that must be followed where the head of jurisdiction is the complainant or is the subject of the complaint. The Administrator may exercise the powers of the head of jurisdiction under clause 59, namely to suspend a judicial member of member of NTCAT who is the subject of complaint.

Clause 12(3) – (6) set out who the Judicial Commission can nominate to perform the functions and exercise the powers of the Chief Justice and Chief Judge under clauses 49, 56 and 60. Clause 12(7) provides that the Chief Justice may perform the functions and exercise the powers of the President of NTCAT under those provisions.

Clause 49 provides that the Judicial Commission may refer a complaint to the head of jurisdiction and clause 56 provides that an investigation panel may do so. The referrals may contain recommendations of actions that the head of jurisdiction should take.

Clause 60 sets out what a head of jurisdiction must do on receiving a report under clause 49 or clause 56.

Clause 13 Meetings of Judicial Commission

This clause provides for the procedure of meetings of the Judicial Commission, including how decisions of the Judicial Commission are to be made.

Division 2 Powers of Judicial Commission

Clause 14 General powers

This clause provides that the Judicial Commission has the powers it needs to perform its functions.

Clause 15 Guidelines

This clause allows the Judicial Commission to establish guidelines concerning the functions of an investigation panel or the Judicial Commission. The clause specifies that guidelines may be made with respect to how an investigation panel conducts its examination and hearing of complaints, the criteria an investigation panel should consider when determining whether a hearing is public or private and the criteria for determining whether to consent to legal representation for persons appearing before it. Clause 52(3) provides that an investigation panel is to determine whether a hearing is public or private. Clause 65(3) provides that an investigation panel may consent to the appearance and legal representation of persons, other than the person the subject of the complaint or a witness. Guidelines about these aspects of procedure and decision-making would enhance transparency and certainty, although they would not be legally binding.

Clause 16 Legal assistance

This clause provides that the Judicial Commission may engage a legal practitioner to assist it.

Clause 17 Examination on oath

This clause provides that the chairperson of the Judicial Commission may require a person appearing before it to give evidence on oath. The form and content of an oath are provided for in the *Oaths, Affidavits and Declarations Act 2010*.

Clause 18 Issuing summons

This clause provides that the Judicial Commission may issue a summons to a person to compel that person to attend to give evidence on the terms of the summons, or to produce a document or thing. This clause also provides what must be specified in a summons order and that the summons must be served personally.

Under clause 68, a person is not excused from producing a document or thing on the ground that it might incriminate them.

Clause 19 Inspection and retention of documents

This clause allows the Judicial Commission to inspect documents or things provided to it, retain possession of the thing or document and make copies or take extracts. While the Judicial Commission retains a document, the person entitled to it may inspect or receive a certified true copy of the document. The Judicial Commission must return any retained document or thing once it is no longer required.

This clause also allows the Judicial Commission to refer a document, thing, or copy of a document to an investigation panel and to a head of jurisdiction.

'Document' is defined in section 17 of the *Interpretation Act 1978*.

Clause 20 Medical or psychological examination

This clause empowers the Judicial Commission to request a judicial officer or ordinary member of NTCAT to undergo a medical or psychological examination. The Judicial Commission must first believe on reasonable grounds that the judicial officer or ordinary member might be physically or mentally unfit to perform the functions and exercise the powers of office.

The term 'physically or mentally unfit' is not defined and is intended to be read widely to encompass both permanent and temporary conditions, illnesses, diseases and impairments, as well as mental disorders and addictions.

The examination must only relate to the fitness of the judicial officer or ordinary member to perform the functions or exercise the powers of office. Once the report of examination is completed, it must be given as soon as practicable to the Judicial Commission.

If a judicial officer or ordinary member does not, without a reasonable excuse, comply with a request for psychological or physical examination or fails to provide the report of the examination to the Judicial Commission, the Judicial Commission must note that fact in any report given by it in relation to that judicial officer or ordinary member of NTCAT.

What is a reasonable excuse for not undergoing a physical or psychological examination will depend on the facts of each matter. However, it may include sudden ill health or physical or mental inability to undergo the examination. It would not include unwillingness to attend.

Division 3 Investigation panel

Clause 21 Establishing investigation panel

This clause provides that the Judicial Commission may establish an investigation panel as required under clause 50, namely where the Judicial Commission is satisfied on reasonable grounds the complaint is sufficiently serious to justify removal of the subject of the complaint from office or termination of the person's appointment.

Clause 21(2) clarifies that where there is more than one complaint, the Judicial Commission may establish one or more than one investigation panel to deal with the different complaints.

Clause 22 Pool of persons eligible to be community members

This clause provides that the Minister must nominate a pool of at least three persons who are eligible for appointment as community members of an investigation panel. Each nomination is for five years, and may be extended once for another five years. The nomination of a person is terminated by resignation contained in a written notice provided to the Minister or by becoming ineligible under the same criteria as clause 8(3), for example by becoming a legal practitioner, or if any of the circumstances in clause 9(2) apply.

Clause 23 Functions of investigation panel

This clause sets out the functions of an investigation panel. Those functions are to examine and investigate complaints referred to it by the Judicial Commission, make determinations and findings of fact in relation to those complaints and to report on its investigations and determinations as provided for under Part 3, Divisions 3 and 4 of the Bill.

An investigation panel is only established where the Judicial Commission is satisfied on reasonable grounds that a complaint is sufficiently serious to justify removal of the subject of the complaint from office or termination of the person's appointment. An investigation panel is not a permanent body. Termination of an investigation panel is provided for in clause 54.

Clause 24 Members of investigation panel

This clause provides for the membership of an investigation panel. Under clauses 24(2) and 24(3), the investigation panel is to comprise one person from the pool of eligible persons nominated under clause 22 (a community member) and two members who are current or former judges of the Northern Territory Supreme Court, a superior court of another State or Territory, or any federal court established by the Commonwealth including the High Court of Australia.

To avoid conflicts of interest and any perceived or actual bias, a person must not be appointed to an investigation panel if that person is a member or acting member of the Judicial Commission, or is a judge or former judge of the same court as the person subject to the complaint.

Clause 24(5) provides that the Judicial Commission must designate one of the members of an investigation panel as its chairperson.

Clause 24(6) provides that, where a community member becomes ineligible to be appointed to the investigation panel, the appointment is taken to be terminated.

Clause 25 Meetings of investigation panel

This clause provides that the chairperson of the investigation panel may determine the procedure for the calling of meetings and for the conduct of business of those meetings, subject to any guidelines established by the Judicial Commission under clause 15. This clause also provides for the quorum of an investigation panel and the requirement to keep full and accurate minutes or its meetings and proceedings. The clause also sets out how a panel should proceed if one member becomes unable or unavailable to perform the functions or exercise the powers of a member.

Division 4 Powers of investigation panel

Clause 26 General powers

This clause provides that an investigation panel has the powers it needs to perform its functions. The functions of an investigation panel are set out in clause 23.

Clause 27 Legal assistance

This clause provides that an investigation panel may engage a legal practitioner to assist it in performing its functions, including during hearings and meetings.

Clause 28 Examination on oath

This clause provides that the chairperson of an investigation panel may require a person appearing before it to give evidence on oath. The form and content of an oath are provided for in the *Oaths, Affidavits and Declarations Act 2010*.

Clause 29 Issuing summons

This clause provides that an investigation panel may issue a summons to a person to compel that person to attend to give evidence on the terms of the summons, or to produce a document or thing. Clause 29(3) sets out what is to be specified in a summons and clause 29(4) provides that the summons must be served personally.

Under clause 68, a person is not excused from producing a document or thing on the ground that it might incriminate them.

Clause 30 Arrest warrant

This clause provides how and in what circumstances the chairperson of an investigation panel may issue an arrest warrant.

Where a person fails to attend as required by a summons issued under clause 29, the chairperson of an investigation panel may issue a warrant for the arrest of the person. However, the chairperson of an investigation panel must first be satisfied that the summons was served on the person or a reasonable attempt was made to serve the summons on the person.

An arrest warrant issued under this clause authorises a police officer or a person named in the warrant to arrest the person named in the warrant and to bring the person before the investigation panel, and authorises the detention of the person in custody until released by order of the investigation panel or the Supreme Court.

This clause also provides the procedural requirements for the arrest warrant.

Clause 31 Search warrant

This clause provides that the chairperson of an investigation panel may issue a search warrant, subject to procedural requirements, to ensure the production of a document or thing and provides the procedure for execution of the search warrant. A search warrant issued under clause 31 can only authorise the person executing it to search premises, not to search a person.

Clause 32 Inspection and retention of documents

This clause provides how an investigation panel may deal with documents, including retaining, copying and returning retained documents.

While an investigation panel retains a document, the person entitled to it may inspect or receive a certified true copy of the document. The investigation panel must return any retained document or thing once it is no longer required.

This clause also allows an investigation panel to refer a document, thing, or copy of a document to the Judicial Commission and to a head of jurisdiction.

'Document' is defined in section 17 of the *Interpretation Act 1978*.

Clause 33 Medical or psychological examination

This clause, which mirrors clause 20, provides the procedure for an investigation panel to request a judicial officer or ordinary member of NTCAT to attend a medical or psychological examination.

The investigation panel must first believe on reasonable grounds that the judicial officer or ordinary member might be physically or mentally unfit to perform the functions and exercise the powers of office.

The term 'physically or mentally unfit' is not defined and is intended to be read widely to encompass both permanent and temporary conditions, illnesses, diseases and impairments, as well as mental disorders and addictions.

The examination must only relate to the fitness of the judicial officer or ordinary member to perform the functions or exercise the powers of office. Once the report of examination is completed, it must be given as soon as practicable to the investigation panel.

If a judicial officer or ordinary member does not, without a reasonable excuse, comply with a request for psychological or physical examination or fails to provide the report of the examination to the investigation panel, the investigation panel must note that fact in any report given by it in relation to that judicial officer or ordinary member of NTCAT.

What is a reasonable excuse for not undergoing a physical or psychological examination will depend on the facts of each matter. However, it may include sudden ill health or physical or mental inability to undergo the examination. It would not include unwillingness to attend.

Clause 34 Preventing or restricting release of information

This clause provides that the investigation panel may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest. 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.

Similarly, under clause 34(2), an investigation panel may give directions preventing or restricting the publication of evidence. For example, reporting of certain details during a hearing by an investigation panel could have the effect of generally undermining confidence in the judicial process. If a direction is made under clause 34(2), it is an offence to make a publication in contravention of the direction. The maximum penalty is 100 penalty units or six months imprisonment.

When making a decision to prevent or restrict disclosure, an investigation panel should, among other factors, consider the importance or transparency and of the accountability of judicial officers and ordinary members of NTCAT.

Division 5 Related matters

Clause 35 Independence of all members

This clause provides for the independence of members of the Judicial Commission and investigation panels. Members of the Judicial Commission and investigation panels are not subject to the direction or control of any person. The conditions of office of a member of the Judicial Commission or an investigation panel cannot include conditions regarding the member's performance in office, and cannot be varied during the member's term.

Clause 36 Expenses and remuneration

This clause provides for the expenses and remuneration that members and staff of the Judicial Commission and investigation panels are entitled to.

Members of the Judicial Commission or of an investigation panel are entitled to be reimbursed for reasonable expenses they incur in performing their roles under the Bill.

Clause 36(2) provides that a community member of the Judicial Commission or an investigation panel, or a former judge who is a member of an investigation panel, is entitled to remuneration for performing functions or exercising powers under the Bill. The judicial members of the Judicial Commission and the President of the Law Society Northern Territory are not entitled to remuneration. A serving judicial officer who is a member or the chairperson of an investigation panel is also not entitled to remuneration.

Clause 37 Protocol for complaints against ordinary members of NTCAT

This clause provides that, if recommended by the Judicial Commission, the Minister must issue, by *Gazette* notice, a protocol for dealing with complaints about ordinary members of NTCAT. The Judicial Commission would have to approve the contents of the protocol before this Minister issued it. The process established by such a protocol would be presided over by a suitably qualified person and would supersede, for ordinary members of NTCAT, the processes for complaint handling established under this Act.

Clause 37 is included as a precaution in the event that the Judicial Commission was not able to deal with complaints against ordinary members of NTCAT in a timely and economically viable way.

Clause 38 Delegation by Judicial Commission

This clause allows the Judicial Commission to delegate its powers and functions under this Act to a single member or to the principal officer or staff member. For example, providing information to members of the public about the types of complaints the Judicial Commission can consider and details about the complaints process, would be handled by staff members.

The delegation power could also enable, for example, the principal officer to summarily dismiss complaints that clearly did not merit further attention, thus ensuring a timely response to the complainant.

However, the functions listed under clause 38(2) are not delegable, namely establishing an investigation panel or referring a complaint to a head of jurisdiction.

Clause 39 Staff of Judicial Commission

This clause provides that the Judicial Commission is to be supported in the exercise of its functions by a principal officer and other staff the Judicial Commission considers suitable.

The principal officer will be treated as a 'public officer' within the meaning of the *Assembly Members and Statutory Officers (Remuneration and Other Entitlements) Act 2006*, whose conditions of employment will be determined under that Act.

Other staff members will be public sector employees, to whom the *Public Sector Employment and Management Act 1993* applies. Staff members may be employed for the purposes of the Commission or employed in an Agency and made available to the Judicial Commission by arrangement with the Chief Executive Officer of the relevant Agency.

Part 3 Complaint process

Division 1 Making complaint

Clause 40 Grounds for complaint

This clause provides that any person may make a complaint about the behaviour or physical or mental capacity of a judicial officer or ordinary member of NTCAT. 'Any person' would enable a complaint to originate from another judicial officer or ordinary member of NTCAT. A complaint can only be made about a serving judicial officer or ordinary member of NTCAT. A complaint against a former judicial officer or ordinary member of NTCAT would be dismissed under clause 44.

There will be some overlap between the jurisdiction of the Judicial Commission and the Independent Commissioner Against Corruption (ICAC). Clause 40(2) provides that a complaint about a matter that is within the jurisdiction of the ICAC cannot be made to the Judicial Commission unless the ICAC consents or refers the complaint under the provisions of the *Independent Commissioner Against Corruption Act 2017*. Consequential amendments are made to the *Independent Commissioner Against Corruption Act 2017* at clauses 80 – 84.

Clause 40(4) sets out what information must be included in a complaint and clause 40(3) clarifies that a series of actions can be taken as a course of conduct and be the subject of a single complaint.

Clause 41 Referral to Judicial Commission

This clause provides that the Minister may refer a matter relating to the behaviour or physical or mental conduct of a judicial officer or ordinary member of NTCAT to the Judicial Commission. Such a referral will be taken to be a complaint for the purposes of the Act.

A referral by the ICAC under section 25A of the *Independent Commissioner Against Corruption Act 2017* (see clause 83) is also to be taken to be a complaint for the purposes of the Act.

Division 2 Acting on complaint

Clause 42 Preliminary examination of complaint

This clause requires the Judicial Commission to conduct a preliminary examination of a complaint as efficiently and expeditiously as possible. The statutory framework established by the Act aims to provide a transparent, consistent and timely process for dealing with complaints.

The Judicial Commission may also initiate inquiries into the subject matter of a complaint as it considers appropriate. This is in keeping with the investigatory role of the Judicial Commission.

The preliminary investigation and any inquiries must, as far as practicable, be in private. This is necessary both to protect the judiciary from what may be unfounded criticism and to protect persons who provide information to the Judicial Commission at this preliminary stage.

Clause 43 Matters related to complaint

This clause provides clarification that the Judicial Commission and an investigation panel can consider matters that arise during the course of examining a complaint. They are not limited to the matters originally raised in the complaint. This is in keeping with the investigatory role of the Judicial Commission.

Clause 43(2) provides that if, while dealing with a complaint, a matter arises that would constitute a complaint against another judicial officer or ordinary member of NTCAT, the Judicial Commission can treat this as a complaint against the other judicial officer or ordinary member. Clause 43(2) does not apply to an investigation panel, as it would require a referral from the Judicial Commission.

Clause 44 Grounds to dismiss complaint

This clause provides that the Judicial Commission may dismiss a complaint in whole or in part if it is satisfied on reasonable grounds of any of the grounds listed in clause 44(1). The grounds are designed to give guidance to the Judicial Commission as well as to potential complainants and the general public about the types of complaints within the remit of the Judicial Commission.

Clause 44(3) provides clarification that the Judicial Commission is not obliged to dismiss a complaint if the subject matter of the complaint arose before the commencement of the Act. However, clause 44(1)(f) provides that one of the grounds of dismissal is that the matter happened so far in the past that it does not justify further consideration.

Clause 45 Vexatious complainants

This clause empowers the Judicial Commission to declare a person a 'vexatious complainant', if the person persistently and without reasonable grounds makes complaints about a judicial officer or ordinary member of NTCAT. The Judicial Commission may disregard a complaint made by a vexatious complainant.

The Judicial Commission and an investigation panel also have the power to dismiss a complaint on the ground that it is vexatious (clause 44(1)(a) and clause 53(1) respectively).

Clause 46 Giving notice

This clause sets out what notification is required after the Judicial Commission has completed its preliminary examination of a complaint.

Clause 46(1) and (2) apply where a complaint is dismissed. The Judicial Commission must give written notice of the dismissal to the complainant and to the judicial officer or ordinary member of NTCAT who is the subject of the complaint. This notice is to include a summary of the complaint and the reasons for dismissal. Providing this information provides transparency and will promote consistency of outcomes.

Clause 46(3) provides that if a complaint is not dismissed the Judicial Commission must give the judicial officer or ordinary member of NTCAT who is the subject of the complaint a summary of the complaint and notice of the right to respond to the complaint under clause 47. Clauses 46(3) and 47 ensure the judicial officer or ordinary member of NTCAT who is the subject of the complaint is accorded procedural fairness.

Clause 47 Opportunity to respond to complaint

This clause requires the Judicial Commission give the judicial officer or ordinary member of NTCAT who is the subject of a complaint the opportunity to respond to the complaint before referring it to the head of jurisdiction or establishing an investigation panel. While it is unlikely the Judicial Commission would do anything other than dismiss a complaint without hearing from the subject of the complaint, clause 47 gives statutory recognition to the requirement for procedural fairness.

Clause 48 Options for taking action

This clause clarifies the actions that the Judicial Commission can take after receiving any response under clause 47, namely dismiss the complaint, refer it to the relevant head of jurisdiction or establish an investigation panel.

The principal officer must notify both the complainant and the judicial officer or ordinary member of NTCAT who is the subject of the complaint of what action the Judicial Commission takes.

Clause 49 Referral to head of jurisdiction

This clause sets out when the Judicial Commission may refer a complaint to the head of jurisdiction. It may do so if satisfied on reasonable grounds that the complaint is wholly or partly substantiated and it is not sufficiently serious to justify the establishment of an investigation panel. The Judicial Commission may include recommendations in its referral about what action the head of jurisdiction should take in relation to the complaint. Clause 60 sets out what the head of jurisdiction must do on receiving a referral from the Judicial Commission.

Division 3 Examination and investigation by investigation panel

Clause 50 Establishment of investigation panel

This clause provides for the establishment of an investigation panel. The Judicial Commission must establish an investigation panel to examine and investigate a complaint if it is satisfied on reasonable grounds that, if substantiated, it could justify the subject of the complaint's removal from office or termination of appointment. Clause 21 provides that an investigation panel may examine more than one complaint.

Clause 51 Examination and investigation by investigation panel

This clause provides that an investigation panel must conduct an examination and initiate investigations into the subject matter of the complaint. The examination and investigations must, as far as practicable, take place in private. Under clause 15(2)(a), the Judicial Commission may establish guidelines about the general manner in which an investigation panel should conduct its examination of complaints.

At the end of this stage the investigation panel will determine whether a hearing is required.

Clause 52 Hearing by investigation panel

This clause provides that an investigation panel may conduct a hearing regarding the complaint. It will have to consider whether the hearing should be heard in public or in private. Clause 15(2)(c) provides that the Judicial Commission may establish guidelines about the criteria an investigation panel should consider when making this decision.

If the hearing is to be held in private, the investigation panel may give directions about who may be present.

Clause 52(4) sets out the persons who may examine or cross-examine witnesses at a hearing and clause 52(5) empowers an investigation panel to set limits on examination and cross-examination as it considers appropriate.

Clause 53 Dismissal of complaint by investigation panel

This clause sets out the circumstances in which an investigation panel must dismiss a complaint and the steps that need to be taken after making this decision.

Clause 53(1) provides that an investigation panel is required to dismiss a complaint if it is of the opinion that it should be dismissed under any of the grounds in section 44 or the complaint has not been substantiated.

Clause 53(2) – (4) sets out what notification and information the investigation panel then needs to provide. It must give a written report setting out its determinations to the Judicial Commission and the judicial officer or ordinary member of NTCAT who was the subject of the complaint. It must also give written notice of the dismissal to the complainant, including the reasons for dismissal, and may give the complainant a copy of the report to the Judicial Commission or a summary of it.

Clause 54 Termination of investigation panel

An investigation panel is not a standing body. Clause 54 explains that, once an investigation panel has completed its work by either dismissing a complaint or making a report to the head of jurisdiction under clause 56 or to the Administrator and the Minister under clause 57, it ceases to exist.

Division 4 Substantiation of complaint by investigation panel

Clause 55 Duty to report

Part 3 Division 4 sets out what an investigation panel must do if, after the investigation and any hearing under Part 3 Division 3, it does not dismiss the complaint.

Clause 55 requires an investigation panel, if it does not dismiss a complaint, to give a report under Part 3 Division 4, namely to the head of jurisdiction under clause 56 or to the Administrator and the Minister under clause 57.

Clause 56 Report to head of jurisdiction

This clause requires an investigation panel to provide a report to the head of jurisdiction when it has formed the opinion that the complaint does not justify consideration of removal from office or termination of appointment. In other words, the complaint merits a response but is not so serious as to merit consideration of removal from office or termination of appointment. Clause 12 sets out to whom the investigation panel must report if the subject of the complaint is the head of jurisdiction.

The report must set out the investigation panel's findings of fact and its opinion and may (and most likely will) contain recommendations as to what action the head of jurisdiction should take.

The investigation panel must provide a copy of the report to the Judicial Commission and to the judicial officer or ordinary member of NTCAT who is the subject of the complaint. It may provide a copy to the complainant.

Clause 57 Report to Administrator and Minister

This clause sets out what an investigation panel must do if it forms the opinion that a complaint could justify consideration of removal from office or termination of appointment. It must provide a report setting out its findings of fact and opinion to the Administrator, with a copy to the Minister.

The Minister must give a copy of the report to the head of jurisdiction, the Judicial Commission and the judicial officer or ordinary member of NTCAT who is the subject of the complaint.

Clause 57(5) provides that the judicial officer or ordinary member of NTCAT may give a written response to the report. If a response is given to the Minister, it must be tabled in the Legislative Assembly under clause 58, along with the investigation panel's report.

Clause 58 Tabling report before Legislative Assembly

This clause requires the Minister to table a report received from an investigation panel under clause 57 in the Legislative Assembly within 6 sitting days of receiving it. The Minister must also table any response provided under clause 57(5) by the judicial officer or ordinary member of NTCAT who is the subject of the complaint.

Division 5 Action in response to complaint

Clause 59 Interim suspension

This clause allows the head of jurisdiction to suspend a judicial officer or ordinary member of NTCAT who is the subject of a complaint if an investigation panel is established to examine and investigate the complaint.

The judicial officer or ordinary member of NTCAT will remain entitled to remuneration and allowances during the suspension.

The head of jurisdiction may terminate the suspension. Otherwise it will end if the complaint is dismissed or the investigation panel gives a report to the head of jurisdiction.

Clause 12(2) provides that the Administrator may exercise the power of suspension if the head of jurisdiction is the subject of the complaint.

Clause 60 Action by head of jurisdiction

Clause 60(1) sets out the actions that may be taken by the head of jurisdiction if the Judicial Commission refers a matter to the head of jurisdiction or an investigation panel gives a report. Any combination of actions may be taken.

The head of jurisdiction may give or provide counselling. 'Counselling' is not defined in the Act but suggests a relatively informal action. 'Recommendations' is self-explanatory. The head of jurisdiction may also exercise any other powers available. For example, section 34 of the *Supreme Court Act 1979* provides that the Chief Justice is responsible for 'ensuring the orderly and expeditious discharge of the business of the Court' and may make arrangements about which judges will preside over particular matters or types of matter. Section 20 of the *Local Court Act 2015* provides a similar power to the Chief Judge who 'is responsible for ensuring the orderly and expeditious exercise by the Court of its jurisdiction and powers'. The President of NTCAT has arguably wider powers over the administration of NTCAT and management of members.

Clause 60(2) requires the head of jurisdiction to have regard to the matters and any recommendations in the referral or report.

Clause 60(3) requires the head of jurisdiction to give a written report to the Judicial Commission stating the action taken and the reason for that action. The report could include the steps taken by the judicial officer or ordinary member of NTCAT in response to the action of the head of jurisdiction.

Clause 60(4) requires the Judicial Commission to give a copy of the head of jurisdiction's report to the complainant. Clause 60(5) includes a public interest test; that the Judicial Commission must not disclose information that would be contrary to the public interest. For example, providing detailed information of medical or mental health treatment undertaken by the judicial officer or ordinary member of NTCAT is unlikely to be in the public interest.

If the head of jurisdiction is the subject of the complaint, the powers and responsibilities under clause 60 are to be performed by the person nominated under clause 12(4) or (6) or the Chief Justice if the subject of the complaint is the President of NTCAT.

Clause 61 Removal of Supreme Court Judge from office

This clause clarifies that a report from an investigation panel under clause 57 is an additional and essential requirement before a Supreme Court judge or acting Supreme Court judge can be removed from office. Removal from office remains governed by the *Supreme Court Act 1979*. The Bill does not impinge on the integral protections to judicial independence provided in section 40 of the *Supreme Court Act 1979*.

Section 40(1) of the *Supreme Court Act 1979* provides for the removal from office of a Supreme Court judge and section 40(2) of an acting Supreme Court judge. A Supreme Court judge can only be removed from office by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour. Removal from office of an acting Supreme Court judge must also be on the grounds of proved incapacity or misbehaviour but is done by the Administrator without the requirement of an address from the Legislative Assembly.

Note that clause 92 amends current section 40 of the *Supreme Court Act 1979* to reflect the

Clause 62 Removal of Associate Judge from office

This clause clarifies that a report from an investigation panel under clause 57 is an additional and essential requirement before an Associate Judge of the Supreme Court can be removed from office. Removal from office remains governed by the *Supreme Court Act 1979*. The Bill does not impinge on the integral protections to judicial independence provided in section 41F of the *Supreme Court Act 1979*.

Section 41F of the *Supreme Court Act 1979* provides for the removal from office of an Associate Judge. An Associate Judge, like an acting Supreme Court judge, can only be removed from office by the Administrator on the grounds of proved incapacity or misbehaviour.

Note that clause 93 repeals current section 41F of the *Supreme Court Act 1979* and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for removal from office.

Clause 63 Termination of appointment of Local Court Judge

Clause 63(1) clarifies that a report from an investigation panel under clause 57 is an additional and essential requirement before the appointment of a Local Court judge (except for an acting Local Court judge) can be terminated. Termination of appointment remains governed by the *Local Court Act 2015*. The Bill does not impinge on the integral protections to judicial independence provided in section 57 of the *Local Court Act 2015*.

Section 57 of the *Local Court Act 2015* provides that the appointment of a Local Court judge can only be terminated by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour.

Note that clause 88 repeals current section 57 of the *Local Court Act 2015* and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for termination of appointment.

Clause 63(2) provides that an investigation panel report is not required to terminate the appointment of an acting Local Court judge under section 63(d) of the *Local Court Act 2015*. This is because section 63(d) simply provides that the appointment of an acting Local Court judge can be terminated by the person who made the appointment, namely the Administrator or the Minister as the case may be. There is no requirement of proved incapacity or misbehaviour.

Clause 64 Termination of appointment of member of NTCAT

This clause clarifies that a report from an investigation panel under clause 57 is an additional and essential requirement before the appointment of a member of NTCAT, which includes the President or a Deputy President, can be terminated. Termination of appointment remains governed by the *Northern Territory Civil and Administrative Tribunal Act 2014*.

Section 19 of the *Northern Territory Civil and Administrative Tribunal Act 2014* provides that the appointment of a member of NTCAT can only be terminated by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour.

Note that clause 90 repeals current section 19 of the *Northern Territory Civil and Administrative Tribunal Act 2014* and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for termination of appointment.

Part 4 Miscellaneous matters

Clause 65 Legal representation

Clause 65(1) entitles the judicial officer or ordinary member of NTCAT who is the subject of a complaint to appear and be represented by a lawyer in proceedings under the Act. Clause 70 provides for payment by the territory of reasonable legal expenses incurred.

Clause 65(2) allows witnesses to be represented by a lawyer and clause 65(3) allows the Judicial Commission or an investigation panel to consent to the appearance of any other person or the representation of that person by a lawyer.

Clause 66 Procedure

This clause provides that, in conducting proceedings, the Judicial Commission and an investigation panel are not bound by the rules of evidence and can inform themselves however they consider appropriate. They can do whatever is necessary or expedient to conduct a fair and timely examination or investigation. Procedural safeguards are guaranteed by requirements to give notice and the right to respond to the judicial officer or ordinary member of NTCAT who is the subject of a complaint before any adverse determination is made, and by the entitlement to legal representation.

Clause 67 Contempt

This clause provides that a person commits an offence if the person intentionally does something in the face or within hearing of the Judicial Commission or an investigation panel that would be contempt of court if it were done in a court of record.

The maximum penalty is 100 penalty units or 6 months imprisonment. This mirrors the penalty for contempt in section 47 of the *Local Court Act 2015*.

Clause 68 Self-incrimination

This clause abrogates the common law privilege against self-incrimination. A person is not excused from answering a question, giving information or producing a document or a thing under the Act on the ground that it may incriminate the person.

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).

Clause 69 Reimbursement of witness's expenses

This clause provides that a witness appearing before the Judicial Commission or an investigation panel to give evidence or produce documents or things is entitled to receive payment for expenses incurred. The expenses will be calculated in accordance with the Supreme Court scale of costs.

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

This clause provides that the Territory will pay the reasonable costs of appearance and legal representation in proceedings under this Act for a judicial officer or ordinary member of NTCAT who is the subject of a complaint.

Clause 71 Protection of members

This clause provides for immunity from civil liability for members of the Judicial Commission and an investigation panel.

Clause 72 Protection of staff

This is a standard clause that provides protection from personal liability for persons, namely the principal officer and staff of the Judicial Commission, carrying out official functions under this Act in good faith. Civil claims for compensation for injuries suffered can still be brought against the Territory.

Clause 73 Offence to disclose certain information

This is a standard clause, providing it is an offence for a person to disclose confidential information obtained in the course of performing a function connected with the administration of the Act or exercising a power under the Act.

The maximum penalty is 200 penalty units or 2 years imprisonment.

Clause 74 Misleading information

This is a standard clause across the Northern Territory statute book, making it an offence to provide an 'authorised officer' with false or misleading information. Clause 74(5) defines 'authorised officer' as being a member of the Judicial Commission or an investigation panel, a legal practitioner acting for the Judicial Commission or an investigation panel, or the principal officer or other staff member of the Judicial Commission.

The maximum penalty for providing false and misleading information, including false and misleading information in a document is 200 penalty units or imprisonment for 2 years.

Clause 75 Giving information to Minister

This clause outlines when the Judicial Commission must give information to the Minister and what information it must give.

Clause 75(1) provides that the Judicial Commission must give written notice to the Minister when it establishes an investigation panel and also when the investigation panel completes its work. If an investigation panel forms the opinion that a complaint could justify consideration of removal from officer or termination of appointment, it is required under clause 57 to provide a report to the Minister. The additional requirement in clause 75(1) will ensure that the Minister is appropriately informed of all outcomes of an investigation panel.

Clause 75(2) provides that the Judicial Commission must, at the request of the Minister, provide the Minister with the following information about a particular judicial officer or ordinary member of NTCAT:

- whether a complaint has been made, when it was made, what the subject matter of the complaint is and when that is alleged to have occurred;
- the status of the complaint, for example is it still being dealt;
- the results of any investigation. This is in addition to other reporting requirements, such as under clause 75(1); and
- any action taken as the result of a complaint, for example by the head of jurisdiction under clause 60.

Clause 75(2) enables the Minister to request information about a matter in which the Minister may have a particular interest. Clause 75(3) provides a public interest test, allowing the Judicial Commission to refuse to provide information requested by the Minister unless an investigation panel has been established, if it is not in the public interest to provide that information.

Clause 76 Annual report

This is a standard provision that requires the Judicial Commission to produce an annual report. The clause specifies that the report must include some required quantitative and qualitative information with respect to the Judicial Commission's activities. It is anticipated that the Judicial Commission will include as much information as appropriate to explain the meaning of the quantitative data, without revealing confidential information.

Clause 77 Approved forms

This clause is a standard clause providing that the chairperson of the Judicial Commission may approve forms for the Act. Any such form must be published on the Judicial Commission's website.

Clause 78 Regulations

This clause is a standard clause providing that the Administrator may make regulations under the Act.

Part 5 Consequential amendments

Division 1 *Independent Commissioner Against Corruption Act 2017*

Clause 79 Act amended

This clause identifies that the Act amended by Part 5 Division 1 of the Bill is the *Independent Commissioner Against Corruption Act 2017*.

Clause 80 Section 4 amended (Definitions)

This clause amends the definitions of ***independent entity*** and ***referral entity*** in section 4 of the *Independent Commissioner Against Corruption Act 2017*.

An independent entity is an entity that handles referrals from the ICAC with a greater degree of independence than other referral entities. These bodies are statutory officers or bodies that have a high degree of independence and would usually conduct their functions without oversight, or bodies from other jurisdictions that could not be subject to the ICAC's direction but may be suitable to handle a referral of an allegation of improper conduct. It is appropriate that the Judicial Commission be included on this list, which clause 81 does by the insertion of new paragraph 4(1)(ca) into the *Independent Commissioner Against Corruption Act 2017*.

The definition of referral entity is amended to refer to new section 25A, which deals with referral from the ICAC to the Judicial Commission. The Judicial Commission is being added as a referral entity, replacing the various judicial officers who are referral entities in section 25(2)(b) of the *Independent Commissioner Against Corruption Act 2017*. For clarity and ease of drafting, referral to the Judicial Commission has been placed in new section 25A rather than in section 25, which necessitates the consequential amendment to the definition of referral entity in section 4.

Clause 81 Section 25 amended (Referral to referral entity)

This clause amends section 25 of the *Independent Commissioner Against Corruption Act 2017*, which lists the various referral entities to whom the ICAC may refer a matter. As the Judicial Commission will replace the various judicial officers who are listed as referral entities in section 25(2)(b)(i) – (viii), section 25(2)(b) is omitted and replaced with new section 25(2)(b). New section 25(2)(b) includes only the Territory Coroner as the referral entity for a Deputy Coroner. New section 25(2)(b) is required because complaints against a Deputy Coroner will not fall within the remit of the Judicial Commission. The judicial officers listed in current section 25(2)(b)(i) – (vii) are omitted.

Clause 82 Section 25A inserted

This clause inserts new section 25A into the *Independent Commissioner Against Corruption Act 2017*. New section 25A provides that the ICAC may refer a matter relating to the conduct or physical or mental capacity of a judicial officer or ordinary member of NTCAT to the Judicial Commission.

New section 25A(2) and (3) relate to procedural issues. New section 25A(2) provides that the ICAC must consult with the Judicial Commission before referring a matter to it, unless such consultation is not required under a memorandum of understanding or protocol. New section 25A(3) empowers the ICAC and the Judicial Commission to enter into a memorandum of understanding or a protocol about the practices and procedures of referrals.

Clause 83 Section 28 amended (Directions to referral entity)

This clause amends section 28(3) of the *Independent Commissioner Against Corruption Act 2017* to provide that the Judicial Commission is one of the independent entities that the ICAC cannot give directions on how to deal with a matter. The other independent entities are the Speaker and the Deputy Speaker. The Speaker, the Deputy Speaker and the Judicial Commission are excluded from independent entities that can be directed in order to preserve the principle of separation of powers.

Division 2 *Legal Profession Act 2006*

Clause 84 Act amended

This clause identifies that the Act amended by Part 5 Division 2 of the Bill is the *Legal Profession Act 2006*.

Clause 85 Section 467 amended (Practitioners to whom this Chapter applies)

Chapter 4 of the *Legal Profession Act 2006* sets out the powers and procedures of the Law Society Northern Territory regarding complaints and discipline. Section 467(1) sets out the legal practitioners to whom Chapter 4 applies and section 467(2)(a) sets out that it does not apply to judicial officers. Given that the Judicial Commission will handle complaints about ordinary members of NTCAT that fall within the scope of the Act, section 467(2) of the *Legal Profession Act 2006* is amended by including paragraph 467(2)(ca) to include members of NTCAT among the persons to whom Chapter 4 does not apply.

Division 3 ***Local Court Act 2015***

Clause 86 **Act amended**

This clause identifies that the Act amended by Part 5 Division 3 of the Bill is the *Local Court Act 2015*.

Clause 87 **Section 57 replaced**

Section 57 of the *Local Court Act 2015* provides for the termination of the appointment of a Local Court judge.

Clause 88 repeals current section 57 and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for termination of appointment established under the Act, by clause 63(1), of a report from an investigation panel stating the opinion that the matter could justify termination of appointment.

The appointment of a Local Court judge, other than an acting Local Court Judge, can still only be terminated by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour. The Bill does not impinge upon these integral protections to judicial independence.

Division 4 ***Northern Territory Civil and Administrative Tribunal Act 2014***

Clause 88 **Act amended**

This clause identifies that the Act amended by Part 5 Division 4 of the Bill is the *Northern Territory Civil and Administrative Tribunal Act 2014*.

Clause 89 **Section 19 replaced**

Section 19 of the *Northern Territory Civil and Administrative Tribunal Act 2014* provides for the termination of appointment of a member, including the President and a Deputy President, of NTCAT.

Clause 90 repeals current section 19 and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for termination of appointment established under the Act, by clause 64, of a report from an investigation panel stating the opinion that the matter could justify termination of appointment.

The appointment of a member of NTCAT can still only be terminated by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour.

Division 5 ***Supreme Court Act 1979***

Clause 90 **Act amended**

This clause identifies that the Act amended by Part 5 Division 5 of the Bill is the *Supreme Court Act 1979*.

Clause 91 Section 40 amended (Removal from office)

Section 40(1) of the *Supreme Court Act 1979* provides for the removal from office of a Supreme Court judge and section 40(2) of an acting Supreme Court judge. A Supreme Court judge can only be removed from office by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour. Removal from office of an acting Supreme Court judge must also be on the grounds of proved incapacity or misbehaviour but is done by the Administrator without the requirement of an address from the Legislative Assembly.

Clause 92 inserts new subsection 40(3) into the *Supreme Court Act 1979*, reflecting the additional requirement for removal from office established under the Act, by clause 61, of a report from an investigation panel stating the opinion that the matter could justify removal from office.

A Supreme Court judge can still only be removed from office by the Administrator upon address from the Legislative Assembly on the grounds of proved incapacity or misbehaviour, and an acting Supreme Court judge by the Administrator on the grounds of proved incapacity or misbehaviour. The Bill does not impinge upon these integral protections to judicial independence.

Clause 92 Section 41F replaced

Section 41F of the *Supreme Court Act 1979* provides for the removal from office of an Associate Judge. An Associate Judge, like an acting Supreme Court judge, can only be removed from office by the Administrator on the grounds of proved incapacity or misbehaviour.

Clause 93 repeals current section 41F and replaces it with a new section, drafted in contemporary drafting style and reflecting the additional requirement for removal from office established under the Act, by clause 62, of a report from an investigation panel stating the opinion that the matter could justify termination of appointment.

An Associate Judge can still only be removed from office by the Administrator on the grounds of proved incapacity or misbehaviour. The Bill does not impinge upon these integral protections to judicial independence.

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.