



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legislation Scrutiny Committee

Inquiry into the Judicial Commission Bill 2020

May 2020

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Chair's Preface

This report details the Committee's findings regarding its examination of the Judicial Commission Bill 2020. The primary 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.

The Committee received six submissions to its inquiry. While submitters were generally supportive of the Bill and welcomed its introduction, a number of concerns were raised regarding the drafting and intended operation of various aspects of the Bill. For the most part these concerns were addressed by the advice provided by the Department of the Attorney-General and Justice. Following consideration of the evidence, the Committee has recommended that the Assembly pass the Bill with the proposed amendments set out in recommendations 2 – 7.

To avoid the potential for a conflict of interest to arise, recommendation 2 proposes that, following consultation with the heads of jurisdiction, clause 10 be amended to clarify the procedure to be adopted regarding appointment of an acting member of the Judicial Commission where an ex officio member is the subject of a complaint. Recommendations 3, 4, and 5 seek to address inconsistencies in provisions regarding the requirement to give reasons for the dismissal of complaints, and the power to refuse to disclose information to a complainant if it would be contrary to the public interest.

Recommendation 6 proposes that clause 52 be amended to provide that judicial officers and ordinary members of NTCAT who are the subject of a complaint and elect to represent themselves, may examine or cross-examine a witness in proceedings before an investigation panel. Finally, to ensure that the Bill is unambiguous and drafted in a sufficiently clear and precise manner, recommendation 7 proposes that clause 68(2)(b) be amended to clarify that the exceptions to the non-admissibility of responses in a civil or criminal proceeding is limited to those offences in Part IV of the *Criminal Code* which are directly related to the purposes of the Bill, namely the upholding of judicial accountability and protection of the administration of justice.

On behalf of the Committee I would like to thank all those who made a submission. I also thank Professor Aughterson and the Department of the Attorney-General and Justice for their advice and commentary. Finally, I thank my fellow Committee members for their bi-partisan approach to the legislation review process.



Mr Tony Sievers MLA

Chair

Committee Members

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	Sessional:	Legislation Scrutiny Committee
	Chair:	Legislation Scrutiny Committee
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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions and advice to this inquiry.

Terms of Reference

Sessional Order 13

Establishment of Legislation Scrutiny Committee

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints a Legislation Scrutiny Committee.
- (3) The ordinary membership of the scrutiny committee will comprise three Government Members, one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

The Committee's membership will be supplemented by alternate members who may be nominated to participate at meetings and undertake a role on the committee in the place of ordinary committee members. The nomination of alternate committee members will be in writing by the ordinary member to the committee chair.

Alternate Committee members must be from the same category of Members of the Assembly as the ordinary member nominating them such as the same political party or a non-party aligned Member.

- (4) The functions of the scrutiny committee shall be to inquire and report on:
 - (a) any matter referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

- (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) The Committee will provide an annual report on its activities to the Assembly.

Adopted 27 November 2019

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Judicial Commission Bill 2020 with the proposed amendments set out in recommendations 2 to 7.

Recommendation 2

The Committee recommends that, following consultation with the heads of jurisdiction, clause 10 be amended to clarify the procedure to be adopted regarding appointment of an acting member of the Judicial Commission where an ex officio member is the subject of a complaint.

Recommendation 3

The Committee recommends that clause 46(2) be amended to provide that the Judicial Commission may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest.

Recommendation 4

The Committee recommends that clause 56(6) be amended to clarify that the Judicial Commission may give a copy of the report, or a summary of the report, to the complainant unless the investigation panel has notified the Judicial Commission in writing that this should not occur.

Recommendation 5

The Committee recommends that clause 48 be amended to provide that:

- a) The Judicial Commission must, in addition to giving notice of the decision to the complainant, also give a summary of the complaint and the reasons for its dismissal; and
- b) The Judicial Commission may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest.

Recommendation 6

The Committee recommends that clause 52(4) 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.

Recommendation 7

The Committee recommends that clause 68(2)(b) be amended to clarify that the exceptions to the non-admissibility of responses in a civil or criminal proceeding is limited to those offences in Part IV of the *Criminal Code* which are directly related to the purposes of the Bill, namely the upholding of judicial accountability and protection of the administration of justice.

1 Introduction

Introduction of the Bill

1.1 The Judicial Commission Bill 2020 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 13 February 2020. The Assembly subsequently referred the Bill to the Legislation Scrutiny Committee for inquiry and report by 5 May 2020.¹

Conduct of the Inquiry

1.2 On 14 February 2020 the Committee called for submissions by 11 March 2020. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations. As noted in Appendix 1, the Committee received six submissions to its inquiry.

1.3 The Bill, associated *Explanatory Statement*, and *Statement of Compatibility with Human Rights* was also forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c).

Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 to 7.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Judicial Commission Bill 2020 with the proposed amendments set out in recommendations 2 to 7.

¹ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Daily Hansard Day 3 – 13 February 2020*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/756093>, pp.1-4

Report Structure

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 In presenting the Bill, the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, advised the Assembly that the Bill seeks to overcome the absence of structured, transparent and accessible processes to deal with complaints about the conduct or capacity of judicial officers and ordinary (non-judicial) members of the Northern Territory Civil and Administrative Tribunal (NTCAT).²

2.2 Modelled on similar statutory mechanisms in other Australian jurisdictions, in particular New South Wales, the Attorney-General noted that:

the impetus for establishing a Judicial Commission has come not from politicians but from the judiciary and the legal profession. In September 2018, the Honourable Chief Justice Michael Grant, former Chief Judge Dr John Lowndes and the President of the Law Society presented me with a draft proposal for a Judicial Commission.

The Bill I present today has been developed in consultation with heads of jurisdiction, including: His Honour Judge Richard Bruxner – President of NTCAT; the Law Society of the Northern Territory; and the Northern Territory Bar Association.³

Purpose of the Bill

2.3 As noted above, the primary 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 NTCAT. As highlighted in the Explanatory Statement, 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.⁴

² Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Daily Hansard Day 3 – 13 February 2020*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/756093>, pp.1-4

³ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Daily Hansard Day 3 – 13 February 2020*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/756093>, pp.1-2

⁴ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.1

3 Examination of the Bill

Introduction

- 3.1 While submitters were generally supportive of the Bill and welcomed its introduction, a number of issues were raised regarding the drafting and intended operation of various aspects of the Bill. The following discussion considers the main issues raised in submissions together with the legal advice provided by Professor Aughterson regarding the extent to which the Bill has sufficient regard to the rights and liberties of individuals and the institution of Parliament, and subsequent advice received from the Department of the Attorney-General and Justice (the Department).

Part 2: Judicial Commission and Investigation Panels

- 3.2 As discussed below, a range of concerns were raised regarding the composition of the Judicial Commission with submitters suggesting several ways in which the proposed model might be improved. In addition, clarification was sought regarding a number of inconsistencies between the proposed powers of the Judicial Commission and Investigation Panels.

Clause 7: Composition of Judicial Commission

- 3.3 Clause 7(1) provides that the Judicial Commission is to consist of the following members: the Chief Justice; the Chief Judge; the President of the Northern Territory Civil and Administrative Tribunal (NTCAT); the President of the Council of the Law Society of the Northern Territory (LSNT); and at least one but not more than 2 community members appointed by the Administrator pursuant to clause 8. Clause 7(2) then provides that the Judicial Commission is to be chaired by the Chief Justice.
- 3.4 Given the small size of the legal profession in the Northern Territory, Civil Liberties Australia (CLA) and the NT Women Lawyers Association Inc. (NTWLA) suggested that an independent complaints model similar to that operating in South Australia might be preferable.⁵ As CLA pointed out:

The Northern Territory has a relatively small legal fraternity and those in charge are all colleagues and often friends of the person(s) who is (are) the subject of the complaints, a problem which is particularly acute in a small jurisdiction.⁶

- 3.5 NTWLA also noted that:

the proposed model ... requires judicial officers to make decisions against their peers, which is less than ideal, particularly in a small profession in a small jurisdiction.⁷

- 3.6 The Committee subsequently sought advice from the Department as to what consideration was given to alternate models, including an independent complaints

⁵ Civil Liberties Australia, Submission 3, pp.1-2; NT Women Lawyers Association Inc., Submission 5, p.1

⁶ Civil Liberties Australia, Submission 3, p.1

⁷ NT Women Lawyers Association Inc., Submission 5, p.1

model, in the development of the Bill. In response, the Department advised the Committee that:

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 provided 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.⁸

3.7 Regarding the suggestion from CLA and NTWLA that an independent complaints model might be preferable, the Department further advised that:

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 to be fraught, as a deep understanding of the Territory's judicial and justice systems would be prerequisite to undertaking the role of a judicial commissioner.⁹

⁸ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.1

⁹ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.2

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 of the Territory. ...

The type of judicial commission envisaged by CLA is a novel model. As precedents for successful models exist, AGD [Department of the Attorney-General and Justice] 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. ... there would 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.¹⁰

3.8 CLA also questioned why there was no requirement for the membership of the Judicial Commission to include representation from the Indigenous community:

In spite of the over-representation of Indigenous Territorians in the courts, there is no requirement that one or more members be Indigenous. It is essential that Indigenous representation on the Commission better reflects their proportion of the population. ***We therefore recommend that*** at least two members of the Commission be mandated to be Indigenous Territorians, whether their positions arise under the legal or community representative options.¹¹

3.9 However, as the Department pointed out:

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 p.15, 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.’

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

¹⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.2-3

¹¹ Civil Liberties Australia, Submission 3, p.2

would result in frustration of the proposed statutory scheme, leaving only the current unsatisfactory ad hoc processes for addressing judicial complaints.¹²

- 3.10 NTWLA expressed concern that given the hierarchical nature of the legal profession and the barriers female lawyers already experience, the proposed model may limit their willingness to lodge a complaint, and noted that:

an issue of critical import in respect of the Bill is gender composition, where the NTWLA recommends that the Judicial Commission comprise a fair representation of women. The proposed positions to make up the Judicial Commission include roles currently occupied by women [Chief Judge and President of the Council of the Law Society of the Northern Territory], however, these positions can and will change over time. It is preferred that the Bill provides for fair representation of women as far as practicable, including as a minimum, but preferably more, one female member in the make-up of the Judicial Commission where the complainant is a female, if no roles at that time are occupied by women. This is achievable by legislating that the community member appointed must be female in the event a female occupies no other Judicial Commission position. The Bill however should provide for greater representation than one female where practicable, to avoid tokenism.¹³

- 3.11 As indicated previously, it is expected that community members will be appointed in accordance with government policy on board membership appointment as set out in the *Northern Territory Government Boards Handbook*.¹⁴ The Department further advised that:

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 9.¹⁵

- 3.12 Given that the note to clause 6, 'Functions of Judicial Commission', states that the Judicial Commission is an investigatory body, not a disciplinary body, CLA questioned why there was no requirement in clause 7 that membership of the Judicial Commission include at least one trained and experienced investigator.¹⁶ However, as the Department pointed out, such a requirement is unnecessary as:

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.

¹² Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.2-3; see also: Department of the Chief Minister, *Northern Territory Government Boards Handbook*, Northern Territory Government, Darwin, October 2019, https://dcm.nt.gov.au/_data/assets/pdf_file/0015/440205/ntg-boards-handbook.pdf

¹³ NT Women Lawyers Association Inc., pp.1-2

¹⁴ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.4

¹⁵ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.4

¹⁶ Civil Liberties Australia, Submission 3, p.2

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.¹⁷

- 3.13 Consistent with the *Judicial Appointments Protocol*, which requires that the Presidents of both the Law Society of the Northern Territory (LSNT) and the Northern Territory Bar Association (NTBA) be consulted as part of the judicial appointments process¹⁸, NTBA expressed the view that they should also have a role in the establishment of the Judicial Commission:

The NTBA is a professional body speaking for those members of the legal profession who have chosen to act solely as barristers. As such, its members regularly appear before judicial officers and are thereby directly affected by the capacity and conduct of such officers. The status of the NTBA is recognised, for example, by the *Judicial Appointments Protocol*, which requires the Presidents of both the LSNT and the NTBA be consulted as part of the judicial appointments process.

It is therefore submitted the NTBA should have a role in establishment of the Commission. To avoid the Commission becoming unwieldy in size, it is suggested that Clause 7(1)(d) of the Bill which currently provides for a member of the Commission to be

(d) *the President of the Council of the Law Society of the Northern Territory*

be amended to read

(d) *a member appointed by the President of the Law Society of the Northern Territory following consultation with the President of the Northern Territory Bar Association.*¹⁹

- 3.14 Noting that this matter was the subject of considerable consultation with both the Law Society NT (LSNT) and the NT Bar Association (NTBA), the Department advised the Committee that:

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.

AGD [Department of the Attorney-General and Justice] 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 provide for in subclause 7(1) of the Bill or

¹⁷ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.4

¹⁸ Northern Territory of Australia, *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, <https://localcourt.nt.gov.au/sites/default/files/reviewoftheprocessesfortheappointmentofjudicialofficersinthenorthernterritory-report.pdf>, p.3

¹⁹ Northern Territory Bar Association, Submission 4, pp.1-2

should be appointed by the Administrator, like a community member. An 'appointment' by the President of the LSNT is not supported.²⁰

3.15 As highlighted in the submission from LSNT, the Committee also notes that:

The Society is the peak professional body representing the interests of legal practitioners in the Northern Territory. The Society as a Statutory Body is tasked with representing and regulating approximately 620 lawyers including barristers, government and private lawyers. As such it is appropriate for the President of the Council of the Society to be a member of the Judicial Commission.²¹

Committee's Comments

3.16 While acknowledging the comments and suggestions put forward by CLA, NTWLA and NTBA, the Committee is satisfied with the Department's responses to the issues raised. As highlighted by the Attorney-General in presenting the Bill:

The impetus for establishing a Judicial Commission has come not from politicians but from the judiciary and the legal profession.²²

Based on the draft proposal presented to the Attorney-General in September 2018 by the Hon Chief Justice Michael Grant, former Chief Judge Dr John Lowndes and the President of the Law Society, the Committee further notes that the proposed model established in the Bill has been the subject of considerable consultation with key stakeholders.²³ As indicated in the preceding discussion, development of the Bill also took into consideration judicial complaints models operating elsewhere in Australia.

3.17 In support of the model proposed in the Bill, the Criminal Lawyers Association NT (CLANT) expressed the view that:

The Bill strikes an appropriate balance between the need to provide an effective complaint system, and the need to protect judicial independence.²⁴

Similarly, the Northern Territory Legal Aid Commission acknowledged that:

The Bill is modelled on similar schemes in other Australian jurisdictions, where Judicial Commissions have operated successfully for many years. In the view of NTLAC, the Bill strikes an appropriate balance between protecting the independence of the judiciary, a cornerstone of the Northern Territory legal system, and providing a clear, transparent, independent and accessible process for dealing with complaints against judicial officers and tribunal members. NTLAC particularly supports the participation of non-lawyer community members in the administration of the scheme, through their membership of both the Commission itself and investigation panels. There are no easy answers to the question "who judges the judges?", but the involvement of people from outside the legal profession should increase community confidence in the work of the Commission.²⁵

²⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.5-6

²¹ Law Society NT, Submission 6, p.1; see also *Legal Profession Act 2006* (NT), s 635

²² Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Daily Hansard Day 3 – 13 February 2020*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/756093>, p.1

²³ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Daily Hansard Day 3 – 13 February 2020*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/756093>, pp. 1-2

²⁴ Criminal Lawyers Association of the Northern Territory, Submission 1, p.2

²⁵ Northern Territory Legal Aid Commission, Submission 2, pp.1-2

Clause 10: Acting Members of Judicial Commission

3.18 Subject to clause 11, clause 10 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 and provides that:

- the Chief Justice may appoint a Supreme Court Judge;
- the Chief Judge may appoint a Deputy Chief Judge or another Local Court Judge;
- 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 a person eligible for appointment as a community member on conditions determined by the Administrator.²⁶

3.19 The Explanatory Statement notes that this clause is “cast in general terms and is enabling.”²⁷ However, Professor Aughterson highlighted the potential for conflicts of interest to arise noting that:

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

By clause 10, other than in relation to community members, the relevant member of the Commission appoints their own replacement, including it would seem where the member must step aside because of clause 11. In those circumstances, the effect of clauses 10 and 11 is that the member may appoint one of the members of the Commission that will consider their complaint or sit in judgement of them. While clause 12 deals with certain matters where the member is the complainant or the subject of the complaint, it does not deal with the question of the appointment of an acting member under clause 10. In circumstances where the member is the complainant or the subject of the complaint, it might be appropriate for the Administrator to exercise relevant powers under s10.²⁸

3.20 While the Department acknowledged that it was an oversight that the Bill does not directly and clearly address the issue raised by Professor Aughterson²⁹, they noted that:

There is a difference between a judicial officer being the complainant and being the subject of a complaint. AGD [Department of the Attorney-General and Justice] 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

²⁶ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.3

²⁷ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.3

²⁸ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.1

²⁹ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.6

a matter. However, it is agreed that another process is required if the judicial member is the subject of complaint.³⁰

- 3.21 The Department also agreed that, in such circumstances, appointment of an acting member by the Administrator is one option. This approach is consistent with the procedure set out in section 46 of the *Judicial Officers Act 1986* (NSW).³¹ However, the Department also noted that:

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 complaint. No other person takes their place.³²

The Department further advised that if the Committee considered an amendment was necessary to provide for a specific procedure, other than that already set out in clause 10, where a judicial or legal member is the subject of a complaint, further consultation would be required with the heads of jurisdiction.³³

Committee's Comments

- 3.22 As acknowledged by the Department, it is an oversight that the Bill does not address the potential for a conflict of interest to arise where an ex officio member of the Judicial Commission is the subject of a complaint. While the Committee is of the view that clause 10 should be amended to provide for a specific procedure regarding appointment of an acting member of the Judicial Commission in these circumstances, it agrees with the Department that this should be subject to consultation with the heads of jurisdiction, and has framed its recommendation accordingly.

Recommendation 2

The Committee recommends that, following consultation with the heads of jurisdiction, clause 10 be amended to clarify the procedure to be adopted regarding appointment of an acting member of the Judicial Commission where an ex officio member is the subject of a complaint.

Clause 15: Guidelines

- 3.23 Clause 15(1) provides that 'the Judicial Commission may establish guidelines to assist both it and any investigation panel in the performance of their functions.' Under clause 15(2) such guidelines may include provisions with respect to the general manner in which an investigation panel should conduct its examination of and hearings regarding complaints; the criteria an investigation panel should consider

³⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.7

³¹ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.7

³² Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.7

³³ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.7

when determining whether a hearing should be held in public or private; and the criteria that an investigation panel should consider when exercising its power to consent to legal representation for persons appearing at its hearings.

- 3.24 To facilitate any educative function that may accompany the introduction and implementation of the proposed legislation, LSNT recommended that:

the Judicial Commission, pursuant to the general power under section 15(1), 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.³⁴

- 3.25 Given the nature of the Bill, the Committee sought clarification from the Department as to whether any consideration had been given to providing that the Judicial Commission may make guidelines in this regard. The Department subsequently advised that:

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)*.³⁵

Committee's Comments

- 3.26 The Committee is satisfied with the Department's response. Given that the *Guide to Judicial Conduct (Third Edition)*, which is endorsed by the Council of Chief Justices of Australia and New Zealand³⁶ and is widely accepted as the 'industry standard', the Committee considers that clause 15, as currently drafted, is sufficient in scope.

Clause 18: Issuing Summons

- 3.27 Clause 18 provides that the chairperson of the Judicial Commission may issue a summons to order a person to attend to give evidence or to produce any document or thing as directed by the summons. While a similar power is provided to an investigation panel under clause 29, Professor Aughterson questioned why there is different approach where a summons is issued by the Judicial Commission, on the one hand, and a summons issued by an investigation panel.
- 3.28 While the latter may issue an arrest warrant where there is a failure to attend as required by the summons (clause 30), or a search warrant (clause 31) if it is

³⁴ Law Society of the Northern Territory, Submission 6, p.2

³⁵ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.7-8

³⁶ Australasian Institute of Judicial Administration Inc., *Guide to Judicial Conduct (Third Edition)*, <https://aija.org.au/wp-content/uploads/2017/12/GUIDE-TO-JUDICIAL-CONDUCT-3rd-Edition.pdf>, p.ix

considered necessary to ensure production of a document or thing that might otherwise be concealed, lost, mutilated, destroyed or disposed of, Professor Aughterson noted that “no such equivalent power exists on the part of the Judicial Commission.”³⁷

3.29 However, as clarified by the Department:

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 the 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, 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 or appear or produce a document or thing (clause 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.³⁸

Committee’s Comments

3.30 The Committee is satisfied with the Department’s clarification of the two-tiered complaints process and the respective role and power of the Judicial Commission and an investigation panel.

Clauses 19 and 32: Inspection and retention of documents

3.31 Clauses 19 and 32 provide for the way in which the Judicial Commission and an investigatory panel may deal with documents, including retaining, copying, referring and returning retained documents. However, LSNT expressed concern regarding the:

lack of procedure in sections 19 and 32 with respect to the inspection and retention of documents. The Bill does not deal with the circumstances where a claim of privilege is made in relation to the documents obtained.³⁹

³⁷ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.2

³⁸ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.8-9

³⁹ Law Society of the Northern Territory, Submission 6, p.2

- 3.32 Noting that this was not raised as an issue of concern by stakeholders, including LSNT, during the consultation on the development of the Bill,⁴⁰ the Department advised the Committee that:

Clauses 19 and 32 are modelled on section 34 of the *Judicial Commissions Act 1994* (ACT), which does 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 investigatory 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.⁴¹

Committee's Comments

- 3.33 The Committee is satisfied with the Department's advice.

Clause 25: Meetings of investigation panel

- 3.34 Clause 25(2) provides that 'the quorum for a meeting of an investigation panel is all 3 members of the panel.' Subsection (4) then provides 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. Given this, Professor Aughterson suggested that:

for completeness, subclause 25(2) might be expressed as being subject to subclause 4.⁴²

- 3.35 While the Department did not consider that such an amendment was necessary, it noted that there would be no adverse impact on the operation of the proposed legislation if clause 25(2) was amended as suggested by Professor Aughterson.
- 3.36 Professor Aughterson also sought clarification regarding the drafting of subclause 25(5) which 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. As Professor Aughterson pointed out:

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 in relation to decisions of

⁴⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.10

⁴¹ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.9

⁴² Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.1

the Judicial Commission it is expressly provided that decisions are to be by a majority vote: see clause 13(4).⁴³

3.37 In response, the Department clarified that:

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 25.⁴⁴

Committee's Comments

3.38 With regards to clause 25(2), the Committee agrees with the Department that the proposed amendment that this clause be expressed as being subject to subclause 25(4) is unnecessary. The Committee is also satisfied with the Department's clarification regarding the drafting and intended operation of clause 25(5).

Clause 34: Preventing or restricting release of information

3.39 As indicated previously, the Bill provides that both the Judicial Commission and an investigatory panel may obtain material or information, whether through a summons or otherwise. While clause 34 provides that 'an investigation panel may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest', Professor Aughterson raised concern that:

no such power exists on the part of the Commission [Judicial Commission]. The Explanatory Statement in relation to clause 34 notes that, for example, there may be details of a person's private life or medical history that would not be in the public interest to disclose to the complainant. It is not clear why a power to withhold information does not also vest in the Commission – given the obligation of the Commission under clause 46(2) to provide to the complainant reasons for the dismissal of any complaint and, also, the power in clause 56(6) to give a copy of an investigation panel's report, or a summary of the report, to the complainant (relevant information might not have been withheld in the investigation panel's report).⁴⁵

3.40 In responding to Professor Aughterson's concern, the Department acknowledged that:

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.⁴⁶

3.41 In relation to clause 56(6), the Department clarified that:

⁴³ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, pp.1-2

⁴⁴ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.10

⁴⁵ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.2

⁴⁶ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.11

Clause 56 relates to reports of an 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.’⁴⁷

Committee’s Comments

- 3.1 Given the Department’s advice, the Committee has recommended that to ensure the Bill has sufficient regard to the rights and liberties of individuals, clauses 46(2) and 56(6) be amended accordingly.

Recommendation 3

The Committee recommends that clause 46(2) be amended to provide that the Judicial Commission may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest.

Recommendation 4

The Committee recommends that clause 56(6) be amended to clarify that the Judicial Commission may give a copy of the report, or a summary of the report, to the complainant unless the investigation panel has notified the Judicial Commission in writing that this should not occur.

Part 3: Complaint Process

- 3.2 As outlined below, submitters sought clarification regarding the intended operation of a number of clauses associated with the proposed complaints process as set out in Part 3, clauses 40 to 64.

Clause 47: Opportunity to respond to complaint

- 3.3 As noted in the Explanatory Statement:

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 27 gives statutory recognition to the requirement for procedural fairness.⁴⁸

⁴⁷ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.12

⁴⁸ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.12

3.4 Accordingly, clause 47(2) provides that a person who is the subject of a complaint 'may' respond in writing to the complaint. However, Professor Aughterson questioned whether it should be:

framed as providing that 'any' response (if made) *must* be in writing, or does it leave open the possibility of an oral response?⁴⁹

3.5 Noting that clause 47(2) is not intended to provide for the possibility of an oral response, the Department pointed out that:

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.

To change the wording of subclause 47(2) to provide that 'any' response 'must' be made in writing is unnecessary ... Such a change is not supported by either AGD [Department of the Attorney-General and Justice] or the Office of the Parliamentary Counsel.⁵⁰

Committee's Comments

3.6 The Committee is satisfied with the Department's response.

Clause 48: Options for taking action

3.7 Pursuant to clause 46, if a complaint is dismissed after its preliminary examination under section 42, the Judicial Commission must give written notice of the dismissal to the complainant. The written notice must include a summary of the complaint and the reasons for the dismissal. However, where a complaint is dismissed under clause 48 (Options for taking action) following consideration of any response given under clause 47 (Opportunity to respond to complaint), Professor Aughterson questioned why there was not a similar requirement to provide reasons for the dismissal in these instances.⁵¹

3.8 The Department acknowledged that:

It appears to be 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).

AGD [Department of the Attorney-General and Justice] 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 reasons for its dismissal.⁵²

3.9 Consistent with the proposed amendment to clause 46(2) at recommendation 3 above, the Department further noted that it:

⁴⁹ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.2

⁵⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.13

⁵¹ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.2

⁵² Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.12-13

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.⁵³

Committee's Comments

3.10 In light of the Department's response, the Committee has recommended that clause 48 be amended to provide that, in addition to giving notice of its decision to the complainant, the Judicial Commission must also give a summary of the complaint and the reasons for its dismissal, and may refuse to disclose information to the complainant where it would not be in the public interest to do so.

Recommendation 5

The Committee recommends that clause 48 be amended to provide that:

- a) The Judicial Commission must, in addition to giving notice of the decision to the complainant, also give a summary of the complaint and the reasons for its dismissal; and**
- b) The Judicial Commission may refuse to disclose information to a complainant if the disclosure would be contrary to the public interest.**

Clause 52: Hearing by investigation panel

3.11 Clause 52(4) provides that at a hearing conducted by an investigation panel, witnesses may be examined or cross-examined by: (a) a legal practitioner assisting the investigation panel, (b) any person authorised by the investigation panel to appear before it at the hearing, or (c) any legal practitioner representing a person at the hearing under clause 65. With regards to the latter, clause 65(1) 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 pointed out by Professor Aughterson:

Clause 52(4)(c) seems to anticipate that a person the subject of a complaint will always appear through a legal practitioner and makes no provision for when the person seeks to represent themselves.⁵⁴

3.12 The Department subsequently acknowledged that:

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 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.⁵⁵

⁵³ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.13

⁵⁴ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.3

⁵⁵ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.14

Committee's Comments

- 3.13 As noted by the Department, the Committee acknowledges that a person who is the subject of a complaint would likely appear before the Judicial Commission or an investigation panel through a legal practitioner. However, in the interests of natural justice, the Committee considers that the Bill should provide for instances where such persons seek to represent themselves.
- 3.14 As suggested by the Department, to “put the matter beyond doubt” and ensure that the Bill has sufficient regard for the rights and liberties of individuals, the Committee has recommended that clause 52 be amended accordingly.

Recommendation 6

The Committee recommends that clause 52(4) 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

- 3.15 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 ('Grounds to dismiss complaint'). LSNT sought clarification as to the intended operation of this clause given that:

prior to referring the complaint to the Investigation Panel, the Judicial Commission has already considered the matters in section 44 and has satisfied itself on reasonable grounds that the complaint is sufficiently serious such that, if substantiated, could justify removal from office or termination of an appointment. Providing that the 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, seems to negate the initial role of the Judicial Commission.⁵⁶

- 3.16 By way of clarification, the Department advised that:

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 ... 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

⁵⁶ Law Society of the Northern Territory, Submission 6, p.2

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.⁵⁷

- 3.17 Pursuant to clause 53(2), where an investigation panel dismisses a complaint, it must give a written report setting out its determinations to both the Judicial Commission and the judicial officer or ordinary member of NTCAT who is the subject of the complaint. Clause 53(4) further provides that ‘an investigation panel may give a copy of the report required under subsection (2), or a summary of the report, to the complainant.’ Similarly, clause 56(6) provides that the Judicial Commission may give a copy of an investigation panel’s report to the head of jurisdiction, or a summary of the report, to the complainant.
- 3.18 While welcoming the fact that the Bill provides for a report or summary of the report to be given to the complainant at various stages of the complaint’s process, LSNT noted that they were, nevertheless:

not entirely sure what guides the discretion of the Investigation Panel/Judicial Commission in deciding to provide a summary of the report.⁵⁸

- 3.19 The Committee sought clarification from the Department as to the types of matters the Judicial Commission or an investigation panel 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, and was advised as follows:

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. ...the same policy intention applies regarding the Judicial Commission.⁵⁹

Committee’s Comments

- 3.20 The Committee is satisfied with the Department’s clarification regarding the intended operation of clause 53.

Clause 60: Action by head of jurisdiction

- 3.21 Pursuant to clause 60(1), following receipt of a referral under section 49 or a report under section 56, the head of jurisdiction may take one or more of the following

⁵⁷ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.15

⁵⁸ Law Society of the Northern Territory, Submission 6, p.2

⁵⁹ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.15

actions in respect of the judicial officer or ordinary member of NTCAT who is the subject of the complaint:

- a) give or provide counselling;
- b) make recommendations regarding future conduct;
- c) exercise any other powers available to the head of jurisdiction.

Example for subsection (1)(c)

Direct the judicial officer or ordinary member of NTCAT to participate in professional development or training.

3.22 By way of clarification, the Explanatory Statement notes that:

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 the NTCAT has arguably wider powers over the administration of NTCAT and management of members.⁶⁰

3.23 However, while acknowledging that section 14 of the *Northern Territory Civil and Administrative Tribunal Act 2014* gives its President wide administrative power over the members of the Tribunal, NTBA submitted that:

neither the *Supreme Court Act 1979* nor the *Local Court Act 2015* give similar powers to the Chief Justice or the Chief Judge respectively. ... It is by no means clear that either provision confers any disciplinary power over members of jurisdiction. Indeed, Chief Judge Morris in a letter to the Criminal Lawyers Association of the NT dated 26 November 2019 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.*"

For there to be any utility to the provision of recommendations, 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.⁶¹

3.24 The Department subsequently advised the Committee that:

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.

⁶⁰ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.15

⁶¹ Northern Territory Bar Association, Submission 4, pp.2-3

Chief Judge Morris' comments in a letter dated 26 November 2019 to the Criminal Lawyers Association of the NT ... 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 been made by Conduct Divisions [equivalent to proposed investigation panels] 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 [Department of the Attorney-General and Justice] also consulted the Judicial Commission of NSW and the ACT Ombudsman's office [which provides operational support for the ACT Judicial Council] 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.⁶²

Committee's Comments

3.25 The Committee is satisfied with the Department's clarification and notes that in relation to the functions of the Judicial Commission, as set out in clause 6, the Explanatory Statement points out that:

Importantly, a note to clause 6 informs that the Judicial Commission is an investigatory body. It is not a disciplinary body.⁶³

3.26 As indicated in the preceding discussion, the Committee also notes that the approach taken in the Bill is consistent with both the principle of judicial independence, and judicial complaint schemes established in NSW, the ACT, Victoria and South Australia.

⁶² Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.16-17

⁶³ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.2

Clauses 61-64: Removal from Office of Supreme Court Judge or Associate Judge, Termination of Appointment of Local Court Judge or member of NTCAT

3.27 Pursuant to sections 40 and 41F of the *Supreme Court Act 1979*, a Supreme Court Judge or Associate Judge can only be removed from office by the Administrator on the address of the Legislative Assembly on the grounds of proved incapacity or misbehaviour. Similarly, section 57 of the *Local Court Act 2015* and section 19 of the *Northern Territory Civil and Administrative Tribunal Act 2014* provide for the termination of appointment of a Local Court Judge or member of NTCAT by the Administrator on the address of the Legislative Assembly on the same grounds.

3.28 While removal from office and termination of appointment remain governed by the existing legislation,⁶⁴ clauses 61-64 clarify that a report from an investigation panel under clause 57 is an additional and essential requirement for such. The Bill also makes consequential amendments to the governing legislation to contemporise the drafting style and reflect the additional requirement. In respect of the proposed amendments to the *Supreme Court Act 1979* and the *Local Court Act 2015*, the Explanatory Statement points out that the Bill does not impinge on the integral protections to judicial independence currently provided for in the legislation.⁶⁵

3.29 Nevertheless, LSNT noted that they were:

concerned to ensure the Bill is not limiting the ability for judicial officers to be removed from office. The language in sections 61-64 provides that removal can only occur through the process provided by this Bill. However, there may be times where the behaviour is so egregious it warrants immediate removal from office. The Society is of the opinion that parliament's power to call for removal, in these circumstances, should not be fettered in this way.⁶⁶

3.30 In response, the Department explained that:

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

⁶⁴ *Supreme Court Act 1979* (NT), ss 40 & 41F; *Local Court Act 2015* (NT), s 57; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 19

⁶⁵ Explanatory Statement, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.15-16

⁶⁶ Law Society of the Northern Territory, Submission 6, p.3

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.⁶⁷

Committee's Comments

3.31 The Committee is satisfied with the Department's explanation.

Part 4: Miscellaneous Matters

3.32 As detailed below, in relation to the matters covered in Part 4 of the Bill, Professor Aughterson raised concern regarding the drafting of clause 68 which deals with self-incrimination. LSNT also questioned whether the provisions in relation to the payment of costs and expenses of a judicial officer or ordinary member of NTCAT who is the subject of a complaint as set out in clause 70 were sufficient.

Clause 68: Self-incrimination

3.33 Clause 68 abrogates the privilege against self-incrimination by providing that a person is not excused from the requirement to answer a question, provide 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. Acknowledging that the privilege against self-incrimination is a well-established common law principle, the *Statement of Compatibility with Human Rights* accompanying the Bill notes that:

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).

⁶⁷ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, pp.17-18

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.⁶⁸

3.34 However, Professor Aughterson questioned the extent to which the limitation on the right to be free from self-incrimination is reasonable, necessary and proportionate given the nature of some of the offences included in Part IV of the *Criminal Code Act 1983* (NT). While noting that similar provisions exist in equivalent legislation in Victoria and the ACT, Professor Aughterson pointed out that the exceptions to the non-admissibility of responses in other proceedings proposed in the Bill are more extensive than those provided for elsewhere:

by s 90 of the Victorian Act the exceptions (to the non-admissibility of responses in other proceedings) are confined to matters that go more directly to the judicial function, such as perjury or giving false information, offences arising under anti-corruption legislation or the *Public Interest Disclosure Act*, and disciplinary proceedings. Part IV of the NT 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. The rationale for extending the exception to non-admissibility of responses in relation to charges for such offences is not clear. It is noted that the ACT *Judicial Commission Act*, at s 32, also lists as exceptions offences against Chapter 7 of its *Criminal Code* – ‘Administration of Justice Offences’. However, that chapter is confined to matters such as perjury, falsifying evidence, protecting people involved in legal proceedings, perverting the course of justice, or offences relating to the conduct of legal proceedings.⁶⁹

3.35 In light of Professor Aughterson’s comments, the Committee sought clarification from the Department and was advised as follows:

Clause 68 is modelled on section 32(3) of the *Judicial Commission 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 Party IIAA and, in general, 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 or 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.

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

⁶⁸ Statement of Compatibility with Human Rights, *Judicial Commission Bill 2020* (Serial 125), <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.3

⁶⁹ Aughterson, N., *Legal Advice on the Judicial Commission Bill 2020*, (unpublished), 10 March 2020, p.3

recommended that the wording of any proposed amendment be left to the Office of the Parliamentary Counsel.⁷⁰

Committee's Comments

- 3.36 The Committee does not accept the Department's rationale for extending the exception to the non-admissibility of responses to charges for offences which are not directly related to the upholding of judicial accountability and protection of the administration of justice. As currently drafted, the Committee also questions the assertion in the Statement of Compatibility with Human Rights that the limitation placed on the right to be free from self-incrimination is, in fact, reasonable, necessary and proportionate for the purposes of the Bill.⁷¹
- 3.37 While it is acknowledged that the inclusion of irrelevant offences is unlikely to have any adverse or unintended effect on the operation of clause 68, the Committee is of the view that to ensure the Bill is unambiguous and drafted in a sufficiently clear and precise manner, clause 68(2)(b) should be amended to clarify that it only applies to those offences in Part IV of the Criminal Code which are directly related to the purposes of the Bill.

Recommendation 7

The Committee recommends that clause 68(2)(b) be amended to clarify that the exceptions to the non-admissibility of responses in a civil or criminal proceeding is limited to those offences in Part IV of the *Criminal Code* which are directly related to the purposes of the Bill, namely the upholding of judicial accountability and protection of the administration of justice.

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

- 3.38 Clause 70 provides that 'the reasonable costs and reasonable 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 this Act are to be paid by the Territory.'
- 3.39 While acknowledging that the Council of the LSNT held divergent views regarding the issue of costs, LSNT nevertheless questioned whether the Bill should include:
- the ability to recover such costs from the judicial officer or ordinary member of NTCAT where an adverse finding has been made against a judicial officer or ordinary member of NTCAT.⁷²
- 3.40 Noting that the question of how best to address this issue was considered during the development of the Bill, the Department advised that:

⁷⁰ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.19

⁷¹ Statement of Compatibility with Human Rights, *Judicial Commission Bill 2020 (Serial 125)*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.2

⁷² Law Society of the Northern Territory, Submission 6, p.3

the main objection to the [LSNT] 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.⁷³

Committee's Comments

3.41 The Committee is satisfied with the Department's response and notes that the approach taken in the Bill is consistent with equivalent legislation and practice elsewhere.

⁷³ Department of the Attorney-General and Justice, *Responses to Written Questions – 15 April 2020*, <https://parliament.nt.gov.au/committees/LSC/125-2020>, p.20

Appendix 1: Submissions Received

Submissions Received

1. Criminal Lawyers Association of the Northern Territory
2. Northern Territory Legal Aid Commission
3. Civil Liberties Australia NT
4. Northern Territory Bar Association
5. Northern Territory Women Lawyers Association
6. Law Society of the Northern Territory

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/LSC/125-2020>

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Supreme Court Rules 1987 (NT)