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Dear Madam Secretary

JUDICIAL COMMISSION BILL

Law Society Northern Territory (Society) welcomes the opportunity to provide comment on the *Judicial Commission Bill 2020* (Bill). The Society has been heavily consulted during the drafting stages and supports the introduction of the Bill.

The Society is the peak professional body representing the interests of legal practitioners in the Northern Territory. The Society as a Statutory Body¹ 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.

The Society considers it is appropriate for our judicial system to continue to evolve to meet increasingly sophisticated circumstances and community standards. Preservation of a strong and independent judiciary is essential to maintaining public confidence in the administration of justice and the promotion of the separation of powers. A judicial commission will enhance openness, transparency and independence of the judicial system. The judicial commission will present an opportunity for public education of appropriate judicial conduct and standards to be expected of judicial officers.

Varying standards of judicial behaviour and conduct in the courtroom is a well-documented issue for the legal profession. In a recent survey² conducted by the Victorian Bar 59 percent of respondents reported experiencing bullying in the course of their working lives. A similar survey conducted by the NSW Bar Association³ found 66 percent of respondents said they had experienced judicial bullying. Judicial bullying was reported by barristers at all levels of seniority and experience. Several jurisdictions have been working to address concerns

¹ s 635 of the *Legal Profession Act 2006*

² <https://www.vicbar.com.au/sites/default/files/Wellbeing%20of%20the%20Victorian%20Bar%20report%20final%20Oct%202018.pdf>

³ <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2018/2.pdf>

around judicial behaviour in the courtroom by developing protocols to provide guidance on how to respond when faced with judicial bullying.

Of course, bullying is not the only issue that arises. There is other conduct such as delays in delivering judgments⁴, inappropriate comments⁵ and comments that amount to racism⁷. All of which are unbecoming of persons holding judicial office, and which bring the administration of justice into disrepute.

It is clear from these limited examples that protocols in and of themselves are not enough to address the issue of inappropriate judicial conduct. The Bill is important in that it creates the statutory framework to allow for investigation and handling of complaints against judicial officers. The current procedure does not address cases of misconduct or incapacity which are incapable of justifying removal. The Bill will provide the process to support removal from office or termination of appointments providing for reports to be tabled in the Legislative Assembly. A report in and of itself is not determinative; the decision to remove will still rest with parliament.

Concerns with the Bill

The Society is concerned about 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.

Section 53 (10) (a) provides that the 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 section 44. However, 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 officer or termination of an appointment⁸. 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 NTCAT⁹ seems to negate the initial role of the Judicial Commission.

To facilitate any public education function we would recommend 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.

The Society is pleased to see that that a report (or a summary of the report) at various stages is to be given to the complainant (section 53 and section 56). However, we are not entirely sure what guides the discretion of the Investigation Panel/Judicial Commission in deciding to provide a summary of the report.

The Society has concerns as to the scope of section 34. The Explanatory Statement provides that "Similarly, under clause 34(2), an investigation panel may give directions preventing or restricting the publication of evidence. For example, reporting of certain details

⁴ <http://classic.austlii.edu.au/au/cases/cth/FCAFC/2020/13.html>

⁵ <https://jade.io/article/693768>

⁶ <http://classic.austlii.edu.au/au/cases/cth/FCAFC/2019/231.html>

⁷ <https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300>

⁸ See s. 50

⁹ See s. 44 (1) (h)

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.”

The Society is also 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.

The Council of the Society had divergent views on issue of costs¹⁰, in particular the payment of costs for a judicial officer or ordinary member of NTCAT and whether there should be the ability to recover such costs from the judicial officer or ordinary member of NTCAT where an adverse finding has been made against a judicial officer or ordinary Member of NTCAT.

Should you have any queries in relation to this matter, please do not hesitate to contact me.



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¹⁰ See s. 70 *Judicial Commission Bill 2020*