

DRAFT SECOND READING SPEECH

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Judicial Commissions Bill 2024

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Honourable Speaker, I move that the Bill now be read a second time.

At the State election earlier this year, the Government committed to establish an independent oversight body that will manage judicial complaints and support a consistent, contemporary and accountable judicial system. This is to ensure Tasmanians have confidence that judicial officers are accountable to expectations of judicial behaviour.

This Bill fulfils this commitment. It establishes the Judicial Council, a judicial conduct body in Tasmania to receive and consider complaints against judicial officers, and the ability for commissions to be established for serious complaints.

As Attorney-General, and therefore First Law Officer, I wholeheartedly respect the central role that the separation of powers plays in our democracy. There are established legislative and common law provisions as well as conventions that ensure the judiciary is free from political interference. This Bill has been drafted so as not to undermine or jeopardise that in any way.

Tasmania, and indeed Australia, are blessed with a legal system that is stable, professional and fair. This is reinforced by the inclusion of a robust and transparent complaints handling process.

Such processes have been established in most Australian jurisdictions, each varying in approach, but most with common features. The bill before you today has considered all the models currently in place in Australia and tailored an approach that suits the Tasmanian context, and is quite similar to that in smaller jurisdictions such as the Australian Capital Territory and the Northern Territory.

The Bill was released for public consultation on 20 June 2024, on the day that it was also tabled as a paper in this place. The public consultation period closed on 26 July 2024.

The Department of Justice received a number of submissions on the Bill, with 8 submissions available on the Department of Justice website in accordance with the Government's publication policy.

The Bill has also benefited from close consideration by the Justice Forum, a group of key legal stakeholders that I convened, including;

- The Chief Justice
- The Chief Magistrate
- The President of TASCAT
- The Solicitor-General
- The State Litigator
- The Director of Public Prosecutions
- A representative from the Tasmanian Bar
- A representative from the Law Society of Tasmania
- The Director of Tasmanian Legal Aid

- The Registrar of the Supreme Court
- The Administrator of the Magistrates Court
- The Secretary of the Department of Justice

Both the submissions made to the consultation process, as well as the discussions with the Justice Forum have proven invaluable in ensuring this Bill has been thoroughly considered and refined.

The framework in this Bill will operate in addition to, not instead of, existing avenues for the suspension or removal of judicial officers. Fundamentally, this Bill is about establishing a fair, efficient and transparent process for gathering information and appropriately handling complaints in relation to judicial officers in Tasmania.

It applies to 'judicial officers', defined as being judges, magistrates, and presidential members of the Tasmanian Civil and Administrative Tribunal. Presidential members of TASCAT are defined as the President and Deputy Presidents, as other members of the Tribunal are appointed for fixed periods and have appropriately clear pathways for removal from office. For example, a senior or ordinary member of TASCAT is appointed for up to 5 years, and their appointment may be revoked by the Governor for reasons such as the President's recommendation that the member has breached a code of conduct. The President can also already suspend such a member.

Under the Bill, complaints can be made in relation to a judicial officer's behaviour or physical or mental capacity.

In investigating and assessing a complaint, the behaviour of the relevant judicial officer will be considered in light of accepted standards of judicial behaviour. These standards are

established in common law and also in key codes of conduct, such as the *Guide to Judicial Conduct* as published by the Australian Institute of Judicial Administration.

I acknowledge that the judiciary across Australia and common law jurisdictions, have collaborated extensively to identify and articulate appropriate judicial conduct.

I believe it is worth reading into Hansard the Guiding Principles included in Chapter 2 of the *Guide to Judicial Conduct*:

The principles applicable to judicial conduct have three main objectives:

- *To uphold public confidence in the administration of justice;*
- *To enhance public respect for the institution of the judiciary; and*
- *To protect the reputation of individual judicial officers and of the judiciary.*

Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided.

There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives.

These are:

- *Impartiality;*
- *Judicial independence; and*
- *Integrity and personal behaviour.*

These objectives and principles provide a guide to conduct by a judge in private life and in the discharge of the judge's functions. If conduct by a judge is likely to affect adversely the ability of a judge to comply with these principles, that conduct is likely to be inappropriate.

The Judicial Council ('the Council'), established under the Bill, has the important function of receiving, examining and referring complaints about judicial officers. Under the Bill, the council consists of four people:

- The Chief Justice of the Supreme Court (who is the head of the Council);
- The Chief Magistrate of the Magistrates Court;
- An Australian lawyer appointed by the Minister for Justice on the joint nomination of the Law Society of Tasmania and the Tasmanian Bar; and
- A member appointed by the Minister for Justice who is not an Australian legal practitioner; has never been, a member of any Australian parliament; and has the qualifications and experience to assist the Council.

I note here that the Bill refers to Minister for Justice in relation to functions that are appropriate for another Minister to exercise if the Minister for Justice is unavailable. However, key functions of the Bill are reserved for the Attorney-General. The effect of this is that only the Minister authorised to act as Attorney-General can exercise those functions.

On receiving a complaint, the Council is required to conduct a 'preliminary examination' of the complaint, during which the Council may dismiss complaints that, for example, are not

within the jurisdiction of the Council, raise trivial matters or are lacking in substance, or otherwise do not warrant further consideration.

Given complaints can only be made about behaviour or incapacity, complaints are not able to be made simply because someone disagrees with the decision of a judicial officer. For this reason, the Bill clarifies, for the avoidance of doubt, that complaints cannot be made based solely because a person is unhappy with the decision of a judicial officer in relation to a judicial proceeding. Of course, if the behaviour of the judicial officer in the course of that proceeding departed from judicial standards, a complaint could be made.

A complaint is also automatically dismissed if the judicial officer dies, retires or resigns from office, or is otherwise no longer a judicial officer. This is in line with all other Australian jurisdictions. The reason for this is that the purpose of the Bill is to address the conduct or capacity of the judicial officer, such as counselling for minor matters or Parliamentary removal of the officer for serious matters. If the person is no longer a judicial officer, there is no purpose in continuing with the complaint.

That said, if the matter has raised broader issues that need addressing, TASCAT or the relevant Court can certainly still address those matters. An excellent example of a Court taking appropriate action after the retirement of a judge is the High Court's response to the conduct of former Justice Heydon, where a full administrative inquiry was launched to ensure appropriate action long after the Justice's retirement.

If the complaint is not dismissed, the Council must then proceed with a 'full examination' of the complaint. If necessary,

the Council may hold hearings as part of this process and is not limited to the matters raised in the initial complaint. Generally, these hearings must be held in private.

Conduct prior to the appointment of a judicial officer can be considered where it is relevant to whether the judicial officer is unable or unfit to perform the functions of the relevant judicial office.

In conducting this examination, the Council must determine, firstly, whether there are reasonable prospects of the complaint being wholly or partly substantiated. If the complaint is not substantiated (or should be dismissed because of one of the grounds specified in clause 36), the Council must dismiss the complaint, and prepare a written report of its examination.

The Council is able to refer a complaint to the head of the jurisdiction relevant to the judicial officer if the complaint, while substantiated, does not justify the removal of the judicial officer from office, and the head of jurisdiction is the appropriate entity to take further action in respect of the complaint. The Council must provide a report to the Attorney-General outlining the relevant evidence and reasons for the decision to make such a referral.

The Bill provides that the Judicial Council appoints a judicial commission to examine a complaint in two scenarios:

- if the Council is satisfied on reasonable grounds that there are reasonable prospects of a complaint being substantiated, and the complaint is of a nature that would justify the removal of the judicial officer; or

- if both Houses of Parliament pass a resolution for the examination of a complaint in relation to a judicial officer by a judicial commission.

In either case, the Council must, in appointing a judicial commission, specify the period within which the commission is to provide a report on the complaint.

Upon a judicial commission being appointed, the judicial officer who is the subject of the complaint is excused from office (and may not perform any functions or exercise powers unless otherwise authorised).

A judicial commission will consist of three members, two of whom are appointed from a pool of potential members established by the Council, and one from a pool of potential members established by the Minister for Justice. The Council is required to nominate one of the members as the presiding member.

The people within the Council's pool must be, or have previously been, judicial officers (or an equivalent office in another jurisdiction), and in the opinion of the Council, hold the appropriate skills or qualifications to enable them to be a member of a judicial commission.

The people within the Minister's pool must not be, or have ever been, a judicial officer or a member of any Parliament, and must have, in the opinion of the Minister, appropriate skills or qualifications to enable them to be a member of a judicial commission.

As soon as practicable after being appointed, a commission must conduct an inquiry into the complaint, which may involve holding hearings. Subject to certain exceptions, a hearing of a

judicial commission must be held in public. Clause 46 provides that a commission may make directions as to whether a hearing should take place in private, and prohibit or restrict the publication of evidence and of documents lodged with the commission. The Bill provides that it is desirable, where appropriate, for hearings to be held in public and for evidence to be made available to the public.

After completing an examination of a complaint, a commission must prepare a report of its examination, and submit it to the Attorney-General. The Attorney-General is required to table the report in Parliament and provide the report to the relevant judicial officer. The relevant judicial officer is then able to provide a written statement in response to the report. This written statement is also tabled in Parliament.

Both Houses of Parliament can use this report and any written statement to inform themselves as to whether the judicial officer should be removed from office. The work of the commission is complete upon submission of its report to the Attorney-General.

It should be reiterated that the power to remove a judicial officer continues to rest with the Parliament. The Parliament can consider the report of a Commission, which may or may not recommend removal. It can also consider any statement made by the relevant judicial officer. Parliament then has the role of determining whether the judicial officer should be removed from their position.

Clause 33 of the bill, sets out the process for removal under the bill. It provides a judicial officer is removed from judicial office if:

- a complaint has been made, under this Act, in respect of the judicial officer; and

- a report of a commission, in respect of the complaint, has been tabled in both Houses of Parliament under clause 50; and
- a resolution is passed in both Houses of Parliament, confirming the removal of the judicial officer from judicial office, in accordance with the clause.

It is noted that, like some other jurisdictions, this transparent process makes the decision entirely a matter for the Parliament. No action is required from the Governor.

The clause confirms that the judicial officer must be given the opportunity to make a written statement and also must have the opportunity to address a House of Parliament in accordance with the standing orders of that House.

The Bill acknowledges the need for an appropriate level of transparency. The Bill provides for various information in relation to complaints to be made public. The Council is required to publish an annual report that contains data as to the number of complaints, the outcome of those complaints as well as descriptive information which may include patterns in types of complaints. The subjects of complaints will not be identified in this reporting unless the judicial officer has already been identified in the public domain.

The Bill also recognises the importance of natural justice and procedural fairness in the handling of complaints. Therefore, the Bill:

- ensures that the relevant judicial officer is advised of the complaint as soon as a preliminary investigation is conducted and the Council decides not to dismiss the complaint.

- The relevant judicial officer is entitled to appear at any hearing conducted by either the Council or a commission.
- The relevant judicial officer may be legally represented at any hearing of the Council or a commission.
- The relevant judicial officer, or their legal representative, may examine or cross-examine witnesses at any hearing.
- If the Council dismisses the complaint, the relevant judicial officer receives a copy of the written report on the substantive examination.
- If the Council is required to prepare a report under clause 44, the relevant judicial officer receives a copy of this report.
- And finally, where a commission is held, the relevant judicial officer must be provided with a copy of its report as soon as practicable after it is tabled in Parliament. The judicial officer is then able to provide a written response and is also to be provided with an opportunity to appear before both Houses in accordance with their standing orders.

Finally, I am pleased that TASCAT, Magistrates Court and Supreme Court are already committed to professional development for judicial officers. The newer TASCAT and Magistrates Court legislation confirms their head of jurisdiction have responsibility for promoting such training, and the Chief Justice also takes on this responsibility in practice.

In respect of training, this Bill implements the legislative recommendation in Commission of Inquiry Recommendation 16.16. That is, the COI recommended consideration of legislative change, and the responsibility of the Chief Justice for

professional development is now formalised in the *Supreme Court Act 1887*.

Further, the Council's functions were updated after consultation and include providing recommendations in respect of professional development, education or training for judicial officers. For example, the Council might observe that a particular officer would benefit from training, or a pattern of complaints might identify areas where training would assist.

Honourable Speaker, on first being appointed Attorney-General, one of my first priorities was to discuss with the Department a need for a judicial complaints body. As subsequent events even more clearly demonstrated, such a body is needed in Tasmania. I am pleased to say that this Bill quite rightly allows for complaints about conduct of judicial officers, whether or not the conduct occurred after the Bill commences.

Thankfully, the experience of judicial complaints handling bodies in Australia reflects that our judiciary is, on the whole professional, impartial and fair. Complaints requiring commission-style investigations are few and far between across Australia. Our hope and expectation are that this will be the case in Tasmania.

However, having a robust system in place provides all participants in the legal system with the opportunity to raise any concerns and with the confidence that there is an established and transparent process for these concerns to be considered. This can only serve to strengthen confidence in the integrity of the justice system in Tasmania.

I would like to again thank all those organisations and individuals who took the time to make a submission on the bill

as well as the members of the Justice Forum for their generous contribution. Many changes to the Bill were made as a result, to get the balance right.

The Bill commences on proclamation.

I commend the Bill to the House.