

CLAUSE NOTES

Judicial Commissions Bill 2024

PART 1 – PRELIMINARY

- Clause 1 **Short title**
The short title will be the *Judicial Commissions Act 2024*
- Clause 2 **Commencement**
The Act will commence on proclamation.
- Clause 3 **Interpretation**
This clause includes definitions for a range of terms used within the Bill to aid interpretation.
- Clause 4 **Tenure of the judicial office**
This clause outlines the various legislative provisions providing a power to suspend or removal a judicial officer. There are different heads of power for different types of judicial officer.
- Clause 5 **Application of Act**
This clause provides that conduct that occurred prior to the Act commencing can still be considered by the council or a commission as part of the examination of a complaint.

PART 2 – JUDICIAL ENTITIES

Division 1 – Judicial council

Clause 6 Establishment of council

This clause establishes a four person council. The council consists of the Chief Justice and Chief Magistrate as well as two non-judicial representatives.

One of these representatives is a joint nominee of the Tasmanian Bar and the Law Society of Tasmania and must be an Australian lawyer.

The second is a person that the Minister considers has appropriate skills and qualifications to assist the council. However this person cannot have practiced as a legal practitioner in the previous 5 years and cannot be a current or former Member of Parliament in Australia.

Prior to appointing the two non-judicial representatives, the Minister must consult with the Chief Justice and the Chief Magistrate.

This section provides that the Chief Justice is the head of the council. In the event that the Chief Justice is not available the Chief Magistrate is the acting head, otherwise the delegate of the Chief Justice is the acting head.

Clause 7 Functions and powers of council

Clause 7 provides that the council has all the powers required to undertake its functions under the Act.

The clause sets out a range of functions under the Act, these include functions relating to complaint handling from receipt to finalization as well as an educative function and the ability to make recommendations to heads of jurisdictions regarding professional development, education and training for judicial officers.

The council also has the capacity to issue guidelines in relation to a range of matters. These guidelines, if made, must be at least published online and remain published while ever they are in effect.

Clause 8 Council members not to perform functions or exercise powers in certain circumstances

Clause 8 prevents a council member from sitting on the council if they are either the complainant or the subject of a complaint. The clause also enables the majority of the council to determine that the other council member has a known or perceived bias in relation to a complainant or the subject of a complaint and should not sit on the council to consider that complaint

- Clause 9 **Staff and facilities of council**
- This clause enables the council to be supported by staff and to have access to resources. These staff are to be provided by the Secretary of the Department of Justice. These staff may undertake work to assist the council in conjunction with their State Service employment.
- Clause 10 **Delegation by certain council members**
- This clause provides the judicial members of the council with the ability to have a delegation in place for someone to act in their stead if, for whatever reason, they are unable to undertake their duties on the council.
- A delegate can only exercise these duties where the delegator is unable to do so.
- Clause 11 **Delegation by council**
- This clause enables the council to delegate, other than certain powers of dismissal, referral or the appointing of a commission.
- Clause 12 **Attorney-General may request certain information from council**
- This clause enables the Attorney-General to request limited information of the council in relation to the existence and progress of a complaint.
- The council retains the discretion not to provide the information requested if they do not think it is in the public interest to provide it.
- Clause 13 **Annual reports of council**
- This clause sets down a requirement for the council to provide an annual report.
- This annual report must contain various statistics relating to numbers of complaints, the result of the complaint and also enables the council to include various observations in relation to types of complaints and trends.
- The council is not to include the name of the subject of any complaint unless that judicial officer's name is already in the public domain in relation to the complaint.
- The Minister must table this annual report as soon as practicable after receiving it.

Division 2 – Judicial commissions

Clause 14 Potential membership of judicial commissions

This clause establishes two pools from which members can be drawn if a commission is to be established.

One pool is to consist of current or former judicial officers who are appropriately qualified to be a member of a commission. No current or former members of an Australian Parliament can be included in this pool.

The other pool must consist of people who are not, and have never been either judicial officers or members of an Australian Parliament. Nominees for this pool must, in the opinion of the Minister, have appropriate skills and qualifications to be a member of a commission.

Clause 15 Membership of judicial commissions

This clause provides that the judicial council appoints three members to form the commission. These three must include two members from the judicial pool and one from the non-judicial pool. The council appoints one of these members to be the presiding member of the commission.

The clause also sets out what the council needs to do where a member of a commission can no longer be part of the commission. The council retains the discretion not to appoint a replacement third member. This may be appropriate where the commission has almost concluded its work and therefore the appointment of a third member would unnecessarily delay the finalising of the matter.

Clause 16 Proceedings of commission

This clause provides that decisions of the commission should be by majority. It also provides that any dissenting views must be recorded in the report of the commission.

Clause 17 Staff and facilities of commissions

This clause provides that the council is responsible for ensuring that any commission has the staff and resources necessary to perform their role. The council has the capacity to source these under clause 9.

Clause 18 Cessation of commissions

This clause identifies how a commission comes to an end. This ensures that commissions cannot be arbitrarily wound up and that members of the commission cannot be unduly removed.

Division 3 – Powers and procedures of council and commission

Clause 19 **Procedural rules for council or commissions**

This clause provides that a commission is not bound by the rules of evidence and has discretion to manage its own proceedings.

Clause 20 **Inspection and retention of documents**

This clause outlines the rights and obligations of council and commission members in relation to inspecting and retaining documents and things provided to the council or a commission. This includes provision for the copying or return of documents or things.

Clause 21 **Medical examinations of judicial officers**

This clause enables the council to request a judicial officer undergo a medical examination. To make this request, the council or commission must first reasonably believe the relevant judicial officer may be physically or mentally unable, or unfit, to perform the functions of the relevant judicial office.

A failure to comply with a request under this clause is to be noted in any report of the council or commission in relation to the judicial officer.

Clause 22 **Search warrants**

This clause outlines the requirements in relation to search warrants. A search warrant can be issued by the presiding member of a commission.

Clause 23 **Persons may appear by audio or audio visual links**

This clause facilitates the use of audio and visual links to facilitate individuals appearing at a hearing. This clause provides that provisions within Part 2 of the *Evidence (Audio and Audio Visual Links) Act 1999* form part of this Act.

Clause 24 **Council or commissions may disclose certain allegations**

This provision enables the council or a commission to disclose allegations of criminal behaviour that arise during their examination to the relevant Minister or Commissioner of Police of this State or another Australian jurisdiction.

Clause 25 **Council or commission may determine costs in certain circumstances**

This clause provides the council or a commission with some discretion in relation to awarding costs.

The clause provides that any award must accord with any guidelines made on this subject.

Costs may be awarded to a relevant judicial officer only where a complaint is dismissed (other than where the complaint is dismissed due to the subject of the complaint no longer being a judicial officer), the complaint is referred to the Head of Jurisdiction under clause 39 or where the council or the commission consider it reasonable.

Costs may also be awarded to a witness who appears before the council or commission. This is to reimburse any costs incurred by the witness in order to appear.

Any costs awarded are paid by the Crown utilising funding under clause 27.

The taxing officer of the Supreme Court is responsible for a costs assessment of any costs awarded under this section.

Clause 26 **Costs and Expenses of council and commissions**

This clause ensures the funding of the council and any commissions are reserved by law. This means that they are not reliant on being provided for by an appropriation under the State Budget.

PART 3 – COMPLAINTS AGAINST JUDICIAL OFFICERS

Division 1 – Types of complaints

Clause 27 **Complaints generally**

This clause sets out the basic elements of a complaint under the Act. It states that the complaint must relate to the behaviour or physical or mental capacity of a judicial officer. A complaint based solely on dissatisfaction with the outcome of a judicial proceeding is not a valid complaint under the Act.

A complaint needs to be in writing and should contain as much relevant detail as possible however a complaint can be made anonymously. A complaint need not be from a natural person.

There is the capacity for regulation to prescribe further information be included in the complaint.

Clause 28 **Parliamentary resolutions for commissions to be appointed**

This clause empowers the Parliament to act to require a commission be established by the council without the need for a preliminary or substantive investigation to be undertaken. For this to occur, both Houses of Parliament must pass a resolution to this effect.

The resolution is then the “complaint” for the purpose of the commissions investigation.

Clause 29 **Complaints automatically dismissed in certain circumstances**

A complaint is automatically dismissed if the relevant judicial officer ceases to be a judicial officer. If this occurs, the complaint is automatically dismissed regardless of where the matter is at in the investigatory process.

If the relevant judicial officer leaves office in order to move into another role as a judicial officer role this clause is not activated. It is noted that the definition of “judicial officer” in this Act does not cover any judicial positions in other jurisdictions.

Division 2 – Effect of making of complaints

Clause 30 **Council to examine complaints &c.**

The council must examine any complaint as soon as practicable.

Clause 31 **Council to appoint judicial commissions in respect of complaints**

This clause sets out the threshold test that must be met for a council to establish a commission.

The council need not make any findings in order to reach this threshold. Rather, the council must be satisfied on reasonable grounds of two things;

- that there are reasonable prospects of a complaint being wholly or partly substantiated; and
- that the complaint is of a nature that might justify removal.

Subclause (2) provides a non-exhaustive list of sources that the council may take into account when determining whether a complaint might justify removal. This recognises the range of sources available and the fact that such common law, codes of conduct and analysis evolve over time.

This clause also requires the council to give written notice of the intention to appoint a judicial commission to the relevant parties.

In appointing a judicial commission, the clause requires the council to specify the time period for which a report is to be submitted and provide the commission with all relevant material in respect of the complaint.

This clause also requires the judicial commission appointed to hold an inquiry into the complaint in accordance with Part 5.

Clause 32 **Judicial officer excused if judicial commission appointed**

This clause provides for the automatic excusal of the relevant judicial officer when a commission is established.

The clause also provides when an excused judicial officer can return to their position.

Division 3 – Result of examination of complaint

Clause 33 **Judicial officer removed from office in certain circumstances**

This clause sets out how a judicial officer can be removed from office under this Act.

For this to occur a report from a commission in relation to a complaint must be tabled in both Houses of Parliament and a resolution must pass both Houses confirming the removal.

The clause also provides that a judicial officer needs to have been given the opportunity to provide a written statement as well as the opportunity to address each House in accordance with the relevant standing orders.

PART 4 – EXAMINATION OF COMPLAINTS BY COUNCIL

Clause 34 **Proceedings of council**

This clause provides for the basis of proceedings of the council, including that decisions are made by majority with the head of the council having the casting vote and dissenting views to be recorded where requested.

Hearings of the council are to be in private by default with the capacity for the hearing to be public if decided under clause 39.

Clause 35 **Preliminary examinations of complaints**

This clause outlines the processes for conducting a preliminary examination of a complaint. The clause sets out a limited range of grounds for dismissing a complaint at this stage.

If a complaint is not dismissed after this preliminary examination, the council should then advise the relevant judicial officer of the complaint (unless it is reasonable in the circumstances not to).

If the complaint is dismissed following the preliminary examination, the complainant must be advised.

Clause 36 **Examination of complaint by council**

If the complaint is not dismissed at the preliminary examination stage, it must either move to the substantive examination stage, or alternatively it may be referred to the head of jurisdiction (unless the subject of the complaint is the head of jurisdiction) in accordance with clause 37.

The purpose of the substantive examination is to determine whether the threshold for establishing a commission under clause 31 is met.

The clause provides that the Attorney-General must be advised when the council commences a substantive examination.

- Clause 37 **Complaints to be referred to head of jurisdiction in certain circumstances**
- This clause outlines when it is appropriate for the council to refer a complaint to the head of jurisdiction.
- It also notes that a referral to the head of jurisdiction may be accompanied by recommendations as to actions that should be taken.
- Clause 38 **Power of council to extend or partially dismiss complaint**
- This clause clarifies that the council may consider additional matters in relation to a judicial officer beyond what was identified in the initial complaint.
- It also clarifies that if additional matters arise in the course of their examination that relate to a different judicial officer, the council can consider that as a separate complaint against that judicial officer.
- Clause 39 **Hearing of complaint by council**
- This clause outlines the basic requirements in relation to a hearing of the council. The council can determine that a hearing should be held in public where they believe on reasonable grounds it is in the public interest. Otherwise, hearings are to be held in private.
- This clause also sets out who can be present at hearings, were they are conducted in private.
- Clause 40 **Powers in relation to witnesses, &c., at hearings**
- This clause provides the head of the council (or authorised person) with the ability to subpoena a person.
- The clause also provides certain grounds for certain people to examine or cross-examine a witness at a hearing.
- If a person fails to comply with a subpoena, the council can take this into account as they see fit.
- Clause 41 **Council may dismiss complaints**
- This clause sets out the grounds for dismissing a complaint following a substantive examination.
- If the council dismisses a complaint at this point, it must prepare a written report containing its findings and reasons. This report must then be provided to the relevant judicial officer, the supervisory entity and the complainant (if known).
- Clause 42 **Council to report on certain actions**
- This clause sets out other reports that must be prepared by the council. These include when a commission is established and when a complaint is referred to the supervisory entity under clause 37.
- This clause sets out the requirements for these reports and who they must be provided to.

PART 5 – INQUIRY INTO COMPLAINTS BY COMMISSION

Clause 43

Inquiry into complaint by commission

This clause sets out the basic requirements and process of a commission.

It gives the commission the capacity to consider matters outside the specific particulars of the complaint and also enables the commission to consider matters prior to the appointment of the relevant judicial officer where this is relevant to the question of whether the judicial officer is fit and able to perform the functions of the office.

Under the clause the commission has the ability to conduct its inquiries as it sees fit.

Clause 44

Hearings of complaints by commission

This clause sets out the power of the commission to hold hearings. The commission has the discretion as to how a hearing is conducted however, by default, these hearings should be public.

At a hearing, the relevant judicial officer and their legal representative are entitled to be present.

The commission has the capacity to refer any potential complaint relating to a different judicial officer to the council as a separate complaint.

Clause 45

Vexatious complaints may be dismissed

The commission has the ability to discontinue an inquiry where it considers the complaint has been made vexatiously, frivolously or without reasonable grounds.

A commission is then still required to fulfil the reporting requirements under clause 49 and 50.

Clause 46

Commission may direct certain matters not to be made public

This clause gives the commission the power to prevent certain hearings, parts of hearings, evidence or documents being made public.

The clause also sets down the requirement that the commission balance the interests of openness and the specific reasons put forward for the need for the restriction.

Clause 47

Powers relating to witnesses, &c., at hearing of commission

This clause provides the presiding member (or authorised person) with the ability to subpoena a person.

The clause also provides certain grounds for certain people to examine or cross-examine a witness at a hearing.

Clause 48

Witnesses who fail to appear at hearings may be apprehended

This section sets down the powers of the commission in relation to witnesses who fail to attend a hearing.

Clause 49

Reports of commission

This clause sets down the reporting requirements of the commission.

When an inquiry is complete, the commission must submit a report to the Attorney-General outlining its findings, the basis for those findings and the recommendation of the commission as to whether the behaviour or physical or mental capacity of the judicial officer warrants their removal from office.

The clause also enables the commission to make a recommendation that material within this report be redacted prior to tabling in Parliament.

The Attorney-General is obliged to comply with any recommendation in relation to redaction unless they are satisfied that there are compelling reasons of public interest why the unredacted report should be tabled.

Clause 50

Commission reports to be tabled in Parliament

Under this clause the Attorney-General is required to table the report of the commission as soon as practicable after receiving it.

If the Attorney-General is complying with a recommendation to redact elements of the report, this redaction needs to be clearly marked. Both the full and redacted version of the report are to be provided to the Clerks. The redacted report is to be tabled and the full report is to be available to Members of Parliament but cannot be copied or shared.

As soon as practicable after tabling, the Attorney-General is to provide a copy of the unredacted report to the relevant judicial officer and the head of jurisdiction.

Clause 51

Statements by judicial officers

This clause provides the relevant judicial officer with the right to provide a written statement in relation to the allegations that form the complaint and the findings of the commission.

The judicial officer has 14 days from the receipt of the commission's report to provide any written statement to the Attorney-General (unless a House of Parliament has passed a resolution providing additional time).

The Attorney-General must then table a copy of the statement in each House of Parliament as soon as practicable.

Clause 52

Outstanding matters of commission

This clause provides the commission with the capacity to finalise any outstanding matters before notifying the Attorney-General of their completion and the committing of all documents and things to the council.

PART 6 – MISCELLANEOUS

Clause 53 **Immediate suspension of judicial officers in certain circumstances**

This clause provides the supervisory entity of a judicial officer (this is usually the head of jurisdiction), with the power to suspend a judicial officer in certain circumstances.

This power of suspension can only be exercised where the relevant judicial officer has been charged or convicted with offences of a certain seriousness or where the supervisory entity is satisfied that the judicial officer is so physically or mentally unfit or unable to perform the functions of the office that immediate suspension is required.

The clause also provides for the automatic lifting of this suspension when certain criteria are met, such as no complaint is made in relation to the officer, no commission has been established or the judicial officer no longer holds the office.

This clause is in addition to any power to suspend a judicial officer under this or any other Act.

Clause 54 **Effect of disclosure of certain information**

This clause abrogates the privilege against self-incrimination.

This clause also provides that any evidence that a person is compelled to provide under this Act cannot be used against them in any proceedings other than a proceeding relating to the false and misleading nature of the document, thing, answer or information or for an offence under Chapter X of the Criminal Code (crimes relating to the administration of justice).

Clause 55 **Protection of members &c**

This clause provides various protections to council members, commission members, witnesses and a legal practitioner assisting the council or commission.

Clause 56 **Protection from liability**

This clause goes on to exempt anyone acting in good faith while performing a function, complying with a requirement or request under this Act from criminal or civil liability.

Clause 57 **Application of *Criminal Code***

This clause provides that council and commission proceedings are judicial proceedings for the purpose of Chapter X of the Criminal Code (crimes relating to the administration of justice).

Clause 58 **Application of *Defamation Act 2005* to certain reports**

This clause sets out how council and commission proceedings interact with the *Defamation Act 2005*.

- Clause 59 **Disclosure of information by members &c.**
This clause restricts the use or dissemination of any information by council or commission members or any staff assisting either the council or a commission.
This is an offence provision.
- Clause 60 **False or misleading information**
This clause makes it an offence to give false or misleading information to the council or commission.
- Clause 61 **Offences**
This clause provides for two more offences. Firstly it is an offence to hinder or obstruct someone performing a function or exercising a power under this Act.
Secondly, actions that would constitute a contempt if done before a court, also are an offence if done before the council or a commission.
- Clause 62 **Regulations**
This clause provides a head of power for making regulations.
- Clause 63 **Administration of Act**
This clause provides that, unless provided for otherwise in an administrative arrangements order, the administration of this Act is assigned to the Minister of Justice and the department responsible is the Department of Justice.
- Clause 64 **Consequential Amendments**
Amendments consequential to this Act are set out in Schedule 2
- Schedule 1 **Provisions With Respect To Membership Of Council And Commissions**
This clause sets out a range of standard provisions relating to the council commissions. This includes terms of appointment, method of suspension or removal, leave of absences and provisions relating to acting members of the council.
- Schedule 2 **Consequential Amendments**
Consequential amendments are made to three acts by this schedule;
The *Judicial Review Act 2000* is amended to provide that decisions of the council and a commission are not subject to judicial review.
The *Right to Information Act 2009* is amended to provide that that Act does not apply to materials in the possession of the council or a commission.
The *Supreme Court Act 1887* is amended to provide that the Chief

Justice has a responsibility for the promotion of training, education and professional development of the judges of the Supreme Court.