

Committee Secretary
NT Legislation Scrutiny Committee

By email: LSC@nt.gov.au

CLA submission on the Judicial Commission Bill 2020 (NT)

1. Civil Liberties Australia (CLA) congratulates the Northern Territory Government for taking steps to establish a Judicial Commission “to receive, examine and report on complaints regarding the behaviour or ability of judicial officers and ordinary (non-judicial) members of the Northern Territory Civil and Administrative Tribunal, known as NTCAT.”¹ CLA considers – and we believe this view is widely accepted – that the existing informal systems are ineffective and a proper, formal institution to deal with complaints about judicial officers is required.
2. In our view, the principal reason why the existing system is deficient is that those in charge lack – or may be perceived as lacking – independence. 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.
3. With this in mind, **CLA believes that the Judicial Commission Bill 2020 (the Bill) as presently drafted is unlikely to achieve its objectives.** The major problem with the Bill is that the Commission of six includes the Chief Justice, the Chief Judge and the President of NTCAT (that is, the three heads of jurisdiction) and is chaired by the Chief Justice: see s.7. A fourth member is the President of the Council of the Law Society, a person who is likely to enjoy close relations with the judiciary and whose career may depend on the good opinion of its members.
4. Accordingly, CLA believes that the practical effect of the proposals in the Bill is merely to formalise the existing, deficient, informal arrangements. Those existing informal arrangements are conducted now by the three heads of jurisdiction and President of the Council of the Law Society.
5. This selection of members of the Commission appears to be based on the *Judicial Officers Act 1986* (NSW). That selection of members may have been appropriate in 1986 and for a jurisdiction as large as New South Wales. It is not appropriate for a small jurisdiction like the Northern Territory in 2020.
6. In a small jurisdiction like the Northern Territory, the Commission must have a real degree of independence from the judiciary. We note that in South Australia, the *Judicial Conduct Commissioner Act 2015* (SA) expressly states that the Judicial Conduct Commissioner cannot be a judicial officer: s.7(3)(b). **We strongly recommend** that this principle be adopted in the Northern Territory as well.

¹ Explanatory Statement, page 1

7. Whilst a judicial officer, or even two or three, should be on the Commission, **we recommend that** they should comprise a minority only and that a judicial officer should not chair the commission or any subsidiary panel. Further, care should also be taken to ensure that lawyers appointed are free to express robust views about the conduct of the judiciary. The President of the Council of the Law Society of the NT may not be able to fulfill that function given other interests and duties. A better proposal would be that the legal representatives be appointed by agreement between the Attorney-General and the President of the Council of the Law Society. It is also essential that the establishment and work of the Commission should be such as to ensure independence from local considerations. **We therefore recommend that** at least one judicial officer appointed to the Commission, or to any subsidiary panel under the proposed Judicial Commission, should be drawn from outside the Northern Territory, and have no significant connection to the legal profession in the Territory. **We recommend that** person be the Chair.
8. Further, under the Bill, only a maximum of two community members may be appointed. In spite of the over-representation of Indigenous Territorians in the courts, there is no requirement that one or more of these 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.
9. The Commission as proposed under the draft Bill also appears to overlook the key “functions of the Judicial Commission” as outlined in the Explanatory Statement². In relation to clause 6, the Explanatory Statement says: *“Importantly, a note to clause 6 informs that the Judicial Commission is an investigatory body. It is not a disciplinary body.”* (underline for emphasis). A body that is investigatory should have at least one trained and experienced investigator on it (a) for when it is sitting without the benefit of prior investigation by a panel, and (b) so as to help assess/interpret investigatory panel reports.
10. In line with the above points, **CLA recommends that** a more balanced and independent Judicial Commission would comprise:
 - A senior* judge of the Northern Territory, or senior judicial/quasi-judicial officer of NTCAT;
 - A senior* representative of the Bar Association of the NT;
 - A senior* representative of the Law Society of the NT;
 - Two independent ‘civilian’ representatives not from the legal community of the NT, at least one of whom (but possibly both) from the Indigenous community;
 - An independent judge OR senior bar/law association/society representative from outside the NT jurisdiction – who would be the Chairperson; and
 - A person with investigatory experience in either policing or medical/psychology fields in an Australian jurisdiction not including the NT.

Note: CLA believes it is extremely important that the chair be a person independent of the NT.

² Explanatory Statement Clause 6, page 2.

11. Further, in considering the composition of the Commission as proposed in the Bill, ***we recommend that*** – before making a final decision – the Legislation Scrutiny Committee should examine how those put forward have discharged the same proposed functions in the past in the informal system. CLA can see no reason why Territorians should have any confidence that complaints would be dealt with any differently by the same people/office holders if this Bill becomes law.
12. ***We also recommend that*** the Legislation Scrutiny Committee inquire into how the Commission as proposed would or could have any success in reducing the present incidence of extraordinary delay in the delivery of judgments in the Supreme Court of one, two and – on occasion – three years. This has been the subject of repeated complaints by the legal profession and citizens/clients over some years via the informal system without any apparent improvement.

Yours truly

Dr Kristine Klugman OAM
President

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* As the head of the jurisdiction is likely to be involved in any disciplinary action following the Judicial Commission's investigatory action, it does not seem appropriate to appoint the head of jurisdiction to the investigatory body.

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