Supreme Court (Parliamentary Commission of Inquiry) Bill 2023

Submission to the Tasmanian Government

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We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to comment on this draft legislation. This submission has been drafted primarily by Greg Barns SC, a member of the ALA and a national human rights spokesman for the ALA.

2. We have some concerns about the Bill outlined below.

3. At the outset it is critical to note that the removal of a judicial officer by the legislature is extraordinarily sensitive because of bedrock principles of judicial independence and the separation of powers. This has been the case since the *Act of Settlement* passed in 1701 which established that judges could only be removed upon the address of both houses of parliament. The former Chief Justice of South Australia Len King put the delicacy and gravity of what is at stake in relation to removal of judges this way:

> *"The independence of the judiciary is protected in a number of ways but most important of them is security of tenure. To ensure their independence, judges must be appointed for life or until a stipulated age of retirement and must be removable only upon grounds, clearly stated and proved, which justify removal. A judge who is vulnerable to removal may be subject to influence, resulting from fear of removal, deflecting him or her from the delivery of impartial justice. It is vitally important in the interest of the community, therefore, that judges be protected from influence resulting from the threat of removal.*
>
> *But the interests of the community also require that judges be accountable for their conduct and that the community be capable of ridding itself of judges who have proved themselves unfit to exercise the responsibilities of their high office. Clearly there must be mechanisms for the removal of judges who are unfit for office by reason of character or incapacity. Those mechanisms, however, must ensure justice to judges whose character or capacity is complained of and must protect the community against the danger of improper pressure or influence upon the judges."*[2]

[2] Hon L J King AC QC, *Removal of Judges*, (2003) Flinders Journal of Law Reform, 169 at 170

4. We also refer to what the commissioners (Rt Hon Harry Gibbs, Hon George Lush and Hon Michael Helsham) in the Parliamentary Judges Commission of Inquiry established by the Queensland Parliament in 1988 into the conduct of Justice Angelo Vasta said:

> *"The only ground for the exercise of the power is that the legislature has formed a collective opinion that the judge is not fit to remain in office."*[3]

Sources of power to remove judges in Tasmania

5. We note the removal of judges in Tasmania is grounded in the following:

Section 1 of the *Supreme Court (Judges' Independence) Act* 1857 (the 1857 Act) provides:

> *"It shall not be lawful for the Governor, either with or without the advice of the Executive Council, to suspend, or for the Governor to remove, any judge of the Supreme Court unless upon the address of both Houses of Parliament."*

6. The inquiry, as set out in this Bill, into whether such an address should be formulated is a very broad one and can be contrasted to the position at the Commonwealth level and in some state jurisdictions.

7. The Commonwealth *Constitution* provides at section 72(ii) that a judge cannot be removed:

> *"except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."*

8. In Queensland section 61 of the *Constitution Act* 2001 also uses this concept:

> *(2) A judge may be removed from an office by the Governor in Council, on an address of the Legislative Assembly, for—*
>
> *(a) proved misbehaviour justifying removal from the office; or*

[3] Gibbs, Lush and Helsham, *Parliamentary Judges Commission of Inquiry* (Queensland 1989) para 1.5.13

(b) proved incapacity to perform the duties of the office.

9. A similar process and standard exists in Victoria.[4]

10. In this Bill, there is no requirement to ensure the conduct or behaviour is proven. This is patently dangerous and unfair.

11. We now turn to specific provisions in the Bill:

Clause 10

12. Clause 10(b) (i) of the Bill provides that the Commission of Inquiry must proffer its opinion as to:

    (i) whether the conduct and behaviour of the relevant Judge warrants the suspension, or removal, of the relevant Judge from office as judge of the Supreme Court;

13. In coming to this opinion, the powers of the Commission of Inquiry are extraordinarily broad, so broad in fact they amount to an examination of the life of the Judge.

14. In coming to this view, we note that clause 5 of the Bill provides:

> *"The Commission is established to inquire into, and advise Parliament in respect of, whether the following conduct and behaviour warrants the suspension, or removal, of the relevant Judge from office as judge:*
>
> *(a) the professional, or personal, conduct and behaviour of the relevant Judge since being appointed as a judge of the Supreme Court of Tasmania;*
>
> *(b) any other professional, or personal, conduct or behaviour of the relevant Judge before being so appointed as judge if that conduct or behaviour –*
>
> *(i) is consistent with or relevant to, or shows a pattern of conduct or behaviour that is similar to, conduct or behaviour that the Commission takes into account under paragraph (a); and*
>
> *(ii) may be relevant to whether the relevant Judge is fit to hold office as judge."*

[4] *Constitution Act 1975* (Vic) ss 87AAb(1) and (2), s 87AAA, s 87AAC and s 87 AAD.

15. Further, we note also there is no standard of proof set out in the Bill which would satisfy a finding that conduct and behaviour "warrants the suspension or removal" of the judge, although we would assume, given the gravity of consequences of the findings, the standard of proof would be very high. As Sir Owen Dixon put it in the famous case of *Briginshaw v Briginshaw* :

> *'. . . but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.'*[5]

16. Given the enormity of the responsibility of the Parliament and the Governor in removal of a judge it is troubling that no standard of proof is set out in the Bill and that there is no requirement that the behaviour or conduct be 'proven'.

Human Rights Issues

17. Returning to the breadth of the scope of the inquiry it involves the examination of a life outside of judicial duties (this is not opposed by us given the issue of judicial conduct and behaviour has been said to include examining matters outside of judicial office[6]) and the rules of evidence do not apply. Troublingly however, legal professional privilege and other privileges do not apply to the obtaining by the Commission of Inquiry of documents, records or information; clause 6 (2) of the Bill. These types of powers have been rightly criticised in other contexts, such as criminal intelligence commissions and other evidence gathering inquisitorial bodies.

[5] 1938) 60 CLR 336 at 362

[6] King, 175

18. We also refer to Principle 22 of the United *Nations Basic Principles on the Role of Lawyers*[7] which provides for confidentiality in communications between lawyers and their clients:

> *Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.*

19. Another major difficulty with the Bill is that it undermines the presumption of innocence and would require the Judge to give up his right to silence. The undermining of the presumption of innocence comes in the form of it being clear the Commission of Inquiry has, as its purpose here, to deal with allegations in respect of the Judge currently before the Magistrates Court of Tasmania. At this stage nothing is proven against the Judge and it may be that he is acquitted of the offences with which he is charged.

20. It is patently unfair and unjust that in order to participate in the Commission of Inquiry, the Judge would have to forgo his fundamental right – the right to the presumption of innocence. Such a situation would place this Commission in the realm of a star chamber.

Clause 17

21. This clause provides that the Governor may, at the request of the Minister, suspend a judge, including in circumstances where the judge has been charged with offence punishable by imprisonment of 12 months or more, or charged in another jurisdiction with the same limit.

22. There are serious problems with this clause. Firstly, by providing that a minister, not the Governor on the address of Parliament can suspend it faces a constitutional

[7] *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990.

challenge. It offends the *Act of Settlement* which grounds the removal of judges only by an address of both houses of parliament.

23. As noted above clause 17 permits the Governor to suspend on the advice of a Minister, not parliament. This includes (1) (a) which turns the Commission's report into a source of power for the Executive government, which means that the Commission is no longer just about providing advice to parliament in its discharge of the 1857 Act powers.

24. This clause undermines the constitutional guarantee of the separation of powers set out in the 1857 Act. It would also mean that the Supreme Court of Tasmania would, in so far as it exercises federal jurisdiction, offend Chapter 111 of the Commonwealth Constitution. The Supreme Court of Tasmania can exercise federal jurisdiction; *Judiciary Act* 1903 sections 39 and 68. If a judge can be suspended by the executive this could mean, because the minimum guarantee of the separation of powers under the Commonwealth Constitution is not met, the Supreme Court of Tasmania would not be a federal court for the purposes of Chapter III of the Commonwealth Constitution. That is, it could not exercise federal powers.

25. Further, the reference to a threshold of an offence which carries a minimum of 12 months imprisonment or more could lead to an Attorney-General requesting a Governor to suspend a judicial officer if they, for example, were charged with a minor offence such as possession of an illicit drug such as cannabis.

26. While the rebuttal to this would be this Bill only applies to one judge such provisions have a habit of finding their way into broader legislation dealing with the same subject matter. In this case, legislation for a permanent judicial commission.

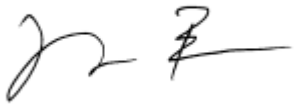
Clause 12

27. This Clause allows one house of parliament to make an address if the other house is dissolved or prorogued. This provision could be abused for political purposes.

28. Further the Act of Settlement and the fundamental importance of the independence of the judiciary should not be weakened for expediency.

Conclusion

1. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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