Legislative Council

Hansard

Tuesday 22 October 2024

The President, Mr Farrell, took the Chair at 11 a.m., acknowledged the Traditional People and read Prayers.

[excerpt…]

JUDICIAL COMMISSIONS BILL 2024 (No. 41)

Second Reading

[12.46 a.m.]

Ms WEBB (Nelson) - I appreciate the Leader's contribution on behalf of the government on this complex and sensitive bill, and I particularly appreciate the efforts to develop this bill, the consultation that went into it and also the briefings that we have been receiving on it.

We have just received further briefings and information to digest and consider. There are a lot of different views on ways forward with this bill, and I know the government feels that it is also important to be progressing it. This Chamber, as we would all appreciate, takes its job seriously and likes to give appropriate consideration to all bills, but particularly to ones that touch on matters around constitutional powers or constitutional sensitivities, which this bill certainly does.

Before proceeding with my contribution in a more substantial way, it is my feeling personally that, given the information we have had to absorb today, given the fact that the version of the bill for us to consider was not even available until this morning and we have barely had a chance to read it, given that members received my potential amendments only today, and given that there is a range of matters that we need to take into consideration, members may join me in feeling a need to have more time to consider those.

I move - That the debate stand adjourned.

I am not sure that I need to speak to the motion other than to say we are all sensitive to the fact that the government would like to progress this bill in an expeditious way. We are sitting this week; we are sitting next week. We do not have to deal with this bill in this moment in order to still be timely and expeditious about dealing with it under the government's parameters.

An adjournment is warranted to provide even just a small period of time for us to all give further consideration to the material we have heard today and to fully read the version of the bill that we are considering, as well as for those of us who wish to get input and advice from other sources on things we have just heard today in briefings to potentially do that. We can come back to this bill. We can come back to it tomorrow. We can come back to it next week or whenever and still pass it in a timely way. We would all be in a position to feel more confident about doing so with a little bit of extra time right now. That is my argument in a nutshell. I think members will understand why I am making that argument, and I hope that they will support the adjournment.

Legislative Council

Hansard

Wednesday 30 October 2024

The President, Mr Farrell, took the Chair at 11 a.m., acknowledged the Traditional People and read Prayers.

[excerpt…]

JUDICIAL COMMISSIONS BILL 2024 (No. 41)

Second Reading

Continued from 22 October 2024.

[11.06 a.m.]

Ms WEBB (Nelson) - Mr President, I rise to continue my contribution on this bill, having moved to adjourn the debate last week when I rose to speak, in order to provide more time for members to consider this bill in its complexity, in light of the range of issues that have been raised with us by stakeholders and in light of possible debate on amendments that may ensue.

Extra time has been beneficial in some ways. It has also allowed time for more discussion and different views and extra information that has to be absorbed and considered. Quite frankly, rather than an extra week of consideration, what this bill needs is consideration by a committee of this place in order to properly test the issues raised, test possible ways forward to adjust or improve this bill and for expert opinion to be considered in a formal, 'on the record' way. That is not available for me to bring now because I cannot adjourn debate again for the purposes of moving for a committee. Other members may choose to do that. Other members may have a mind too that this is what this bill requires. Given its sensitivity in terms of the constitutional consequences and role that it is setting a mechanism to inform, I think it warrants that. But we continue with the debate today.

The Judicial Commissions Bill is an important constitutional reform designed to provide a mechanism for the independent receipt and resolution of complaints against the judiciary to support the Houses of parliament in performing their constitutional functions in determining whether conditions exist to remove a judge while respecting judicial independence. It does this through the establishment of a standing judicial council and ad hoc investigatory judicial commissions.

Oversight and management of judicial officers is currently the responsibility of the Chief Justice and Chief Magistrate. Currently, concerns in relation to conduct of judicial officers are raised with the respective heads of jurisdiction and are dealt with behind closed doors. This has been an unsatisfactory situation, as noted in a number of submissions made to the draft bill. The current process for oversight and management of complaints has no public accountability essentially, no publicly accessible report or summaries of investigations or sanctions applied.

Further to that, the current process has the perception of self-policing and, in a small jurisdiction, it presents many barriers to potential complainants having confidence that raising a complaint is possible, that it will be dealt with in an accountable manner, and that it will result in an accountable outcome or sanction. Unfortunately, this bill does not effectively address

many of the key issues raised in relation to the current process. In that, I regard it as a missed opportunity.

Under the current system, there is also a role for parliament to play in relation to consideration of possible removal of judges. This is a sensitive constitutional power held by the parliament, given the fundamental role that separation of powers plays in our democracy. We have to tread carefully in this area. There are identified questionable situations that we face now with our current statutory arrangements. We all experienced the difficulty in December last year when, in relation to a specific matter, the constitutionality of the existing powers of suspension or removal, and how they may be exercised by parliament, was called into question, and we were left floundering. This was a wholly unsatisfactory situation, to say the least.

The government decided to take steps to address the current uncertainty through the development of a judicial commission mechanism, as is in place in most other jurisdictions, to provide an accountable, fair process and to assist with the parliament's consideration of these matters. Of course, it would have been more preferable to have considered establishing a mechanism proactively, outside of any specific circumstance that has brought its lack into such stark relief. Had we dealt with this in a proactive way, away from a specific situation playing out in the courts, we would have likely taken a broader approach to establishing a system to deal with a wider scope of potential complaints through a robust accountable process - not just such a process for consideration of possible removal focused around that.

Due to the current context, this bill has become almost entirely caught up in specifically solving the issue of suspension and removal of a judicial officer. It leaves virtually unchanged the current mechanisms for dealing with complaints that may relate to a matter of seriousness, but not sufficient to consider suspension or removal.

I note that in 2021, the Tasmanian Women Lawyers group called for the establishment of a permanent judicial commission in Tasmania to investigate complaints against judicial officers. That call was in response to issues being discussed in relation to sexual abuse and harassment in the legal profession across the nation. It highlighted the need for a clear framework and permanent commission for judicial complaints. It is a shame that call was not heeded at the time it was made. What we have here for consideration falls short on delivering on that call and addressing the full scope of issues raised by Tasmanian Women Lawyers and others in relation to the current system.

It cannot be avoided that there is an elephant in the room in relation to the bill that we are debating. A year ago next month, we had a Tasmanian Supreme Court judge issued with a family violence order and then charged with two criminal offences. It is a matter of fact. We saw a flurry of activity last December as, in light of that specific case, the government and this parliament attempted to clarify the existing power to suspend a judge. The resulting debacle in parliament on 12 December last year was only resolved by an undertaking provided to this parliament by the judge in question to the effect that he would not sit or exercise any powers of a Justice of the Supreme Court of Tasmania. Members will recall that undertaking that was given. I am going to read it in now, to refresh our memory and put it on the record for this debate. That undertaking read as follows:

> I, GREGORY PETER GEASON, Judge of the Supreme Court of Tasmania, undertake to the members of the House of Assembly and the Legislative Council of the Parliament of Tasmania that, until the resolution of court proceedings against me on Complaint 11690/23 and the related Application for a Family Violence Order 150507/23, I will adhere to the extant direction on its current terms that I not sit in respect of any matter, whether in court or in chambers, or

> seek to exercise any of the powers of a Judge of the Supreme Court of Tasmania, except to the extent that the Honourable Chief Justice of the said court might request.

Fortunately, it was broadly felt that the undertaking provided for a practical, if not formal, suspension of the judge and allowed time for clarification of the existing powers and the potential consideration of an appropriate mechanism to be developed. Then we had time to get it right.

We should have had this bill, I believe, in the first half of this year. It certainly looks like a more timely consideration of this bill may have been another casualty of the unnecessary early election called by the government in the first half of the year. I doubt the government can claim that the time line of this bill was unaffected by the interruption of an early election and a prorogation period and caretaker period, including the prorogation of parliament for some months and the caretaker period, not to mention that we had a delayed state budget taking up time and energy from departments.

Personally, I now find myself in an unsatisfactory situation where we are being rushed by the government to deal with this bill now, on a very short time frame which, if the government's insistence is followed, does not even allow for us to make amendments to this bill. This is due to the fact that it would delay its passing by a few weeks in order for it to return to the House of Assembly for consideration of those amendments. I find it utterly unacceptable for the government to create a circumstance where members of this Chamber feel pressured to pursue their work in a less-than-rigorous fashion, to comply with the time line the government believes is necessary to deal with a specific circumstance before the courts. This is not the first time such a dynamic has occurred. It is entirely inappropriate to legislate, especially on this matter, which has such constitutional sensitivity in relation to the principle of separation of powers and the powers of parliament.

I do not accept that this bill has to be rushed through this place this week in order to manage the evolving situation of the current judge who is before the courts. In that matter, the judge has been found guilty, and sentencing is scheduled to occur next month, on 14 November.

Given the process of the court case, the findings of fact made, and the verdict delivered already, I believe that under the currently available statutory powers, this parliament is in a position to consider the matter of possible removal of the judge, should it wish to do so. Given the court process and findings, there is no need for this particular matter to be sent to a council and commission process established under this bill. Those processes in this bill are intended to have an appropriate and accountable process with a procedural fairness to investigate complaints and to arrive at a recommendation to make to parliament on whether removal is warranted. In this current matter, the court process, and the findings made by the court, have fulfilled that function. A commission process is not necessary or warranted.

It is my view that the current situation of the judge found guilty and soon to be convicted would continue to play out and potentially be considered by this parliament in due course under the current statutory powers; which points to the rush to pass this bill perhaps being more about the clarity it would provide on the matter of suspension in relation to the current circumstance.

Under this bill, as soon as a matter is determined to reach the threshold of possible removal and a commission to be established, the judge in question is suspended. It would appear that an imminent concern of the government is the need to ensure there is an incontestable power in place to suspend the judge in question in the current matter, post his sentencing hearing and prior to any possible parliamentary process to consider his removal.

It appears there is some concern that the current practical suspension of the judge will expire after sentencing has occurred, and that this would present some risk that the judge could resume his duties. Or perhaps, more realistically, it is a concern that the absence of a formal mechanism in place to suspend him from doing so further undermines public confidence in the judiciary or our justice system.

I do have some sympathy for that last concern. Public confidence is important and has already, no doubt, suffered due to the current situation we find ourselves in in this state. I believe, overall it is a misplaced concern and does not warrant the haste with which this bill is being pushed through our Chamber, and the pressure on members of this place to limit our consideration of the bill so as not to cause any delay in its passage this week.

At the conclusion of sentencing on 14 November in that current case, I believe that a practical suspension of that judge in question will still remain in place until such time as the matter is resolved, which could potentially occur through this parliament considering a motion for removal.

The Chief Justice remains in a position of being in control of whether to assign matters to that judge. After sentencing on 14 November, presumably he would continue to choose not to do so.

There seems to be some concern that after the sentencing date, the expiration of the current undertaking, there may be an issue if the judge starts to attend the court precinct and workplace and interact with colleagues. This would certainly be an incredibly uncomfortable situation if he were to do that. However, a careful reading of the undertaking provided to the parliament and currently in place shows that it does not preclude the judge from attending the court precinct and interacting with colleagues, as it has not for this past year that the undertaking has been in place. It is my contention that the situation after 14 November will in essence be identical to the one that we currently have under the undertaking, which is being managed effectively. In fact, last year, I sought clarification on this specific aspect of the undertaking that is currently in place. I wrote to that justice's lawyers on 11 December 2023 with five questions to clarify aspects of the undertaking.

I received a reply on 12 December, which was sent also to the presiding officers of the parliament and shared with all members with answers to the questions that I posed. One of the questions I asked for clarification was:

> Does the undertaking to not sit in respect of any matter, whether in court or in chambers, or seek to exercise any of the powers of a judge of the Supreme Court of Tasmania include not attending the Supreme Court workplace in the capacity of a judge or any other capacity? Does it include any restriction on Justice Geason interacting with or communicating with colleagues and staff in the workplace?

That was the clarifying question and I received the following answer on 12 December from that justice's lawyers. The answer was:

> The undertakings would not preclude our client from attending the Supreme Court precincts or speaking or corresponding with colleagues and staff. However, we reiterate that, absent a matter, our client does not have a workload save for the finalisation of judgments at the direction of the Chief Justice. Were there any concern about our client's interactions with colleagues and staff in the workplace setting exceeding the bounds of that reasonably necessary for the

completion of his limited workload, that would be a matter able to be addressed within the wide administrative powers of the Chief Justice.

So, perhaps the government can explain more fully the concern that is held in relation to the expiration of the undertaking on 14 November. It appears to me that, for all intents and purposes, the effect of that undertaking will remain in place by virtue of the administrative powers held by the Chief Justice to assign matters and to deal with workplace issues.

I am taking some time here to go through the current circumstances because they appear to be what has given rise to this urgent rush by the government to pass this legislation unamended this week and the considerable pressure that puts on members of this place in the responsible conduct of their role.

We have heard that in a range of ways, with this bill and the establishment of the judicial commission process under it, we are following other jurisdictions in terms of approach and model. In particular, the ACT system has been pointed to as the chosen model to emulate in many aspects in the mechanisms in this bill, and the fact that it is another small jurisdiction like Tasmania is one of the reasons perhaps for us to do so.

In relation to some of the concerns that have been raised or suggestions made for change to our bill, the rationale has been used that no other jurisdiction does that so that we should not do it either.

However, in briefings on at least a couple of occasions, it has also been identified that our bill has in fact included some things that are not drawn from other jurisdictions' models and that will be unique to the Tasmanian model. The reality is, we are creating a model for our state. It needs to work for our state. It needs to have the complete, unequivocal confidence of this Tasmanian parliament.

Of course, we can be informed by other jurisdictions, but we do not need to be limited by them. The model we establish here does not have to be constrained to only elements that are consistently in place elsewhere, just as those jurisdictions themselves - many still in the early stages of having a mechanism to deal with judicial complaints - are likely to review and improve their systems over time. We can contemplate moving beyond the scope of only what is included in other states if we believe that it is in the best interests of our state and our parliament to do so.

On that basis, I do not accept the argument from the government in rejecting proposed amendments or changes on the basis that other jurisdictions do not do it. It is too simplistic and not a substantial objection.

I am not going to spend time outlining the features of the mechanism established under the bill, as that has been done in the government's second reading speech. However, I am going to take the opportunity in my contribution to raise and discuss a number of serious concerns that have been raised in relation to the bill in its current form and, in doing so, we will likely discuss various features as we go.

In the first instance, I want to comment on consultation in relation to this bill. The government's second reading speech described the justice forum it had convened with a range of senior figures in our Tasmanian legal landscape, in order to inform the development of this bill. That is a positive way to have informed the development of the bill and is to be commended. I also note an exposure draft was put out for public consultation in the middle of this year. There was engagement from a range of stakeholders providing feedback and input

on that draft bill. We understand that consideration was given to the feedback received and some changes and adjustments were made to deliver the tabled version of the bill.

The government, in pointing to consultation though, seems to imply that participants have fully endorsed the final bill and by definition somehow rejected other possible amendments or changes. All we have is the government's assertion that, in the words of the Leader last week when we debated the motion to adjourn debate, this bill was 'co-designed by members of the justice forum'. That may well be the case, and they may all describe it thus also, but we cannot test that assertion because we are not hearing directly from members of that forum. We cannot, in this context of a bill being rushed through this Chamber, check with them on the degree to which they are satisfied with the bill or whether they believe there continue to be issues that could be addressed. We cannot, in the context of a bill rushed through this Chamber, gauge from them any specific risks they think there may be from further suggested inclusions or amendments to the bill from other stakeholders. We cannot, in the context of a bill being rushed through this Chamber, ask them whether they would be equally content if specific changes or amendments were made to this bill.

Similarly, when the government tells us it has legal advice that there are particular legal risks or constitutional uncertainties in relation to the current situation we face, we are not in a position to test that thoroughly in this context of a bill being rushed through this Chamber. Of course the government could choose to share that legal advice with us; there is nothing stopping the government from choosing to do that. Certainly for a parliament considering legislation that is focused squarely on the exercise of our own parliamentary power and creating appropriate mechanisms by which the parliament can be effectively advised in the exercise of that power, it would be entirely reasonable to seek its own legal advice on the establishing legislation, which we could well do, for example, if there were a committee process to examine this bill. However, in the context of a bill being rushed through this Chamber, we as a parliament are not in a position to readily choose to do that. We would need to pause here, we would need to create our own mechanism, as I said, a committee, for example, to examine the bill to allow a way for such legal advice for the parliament to be sought.

The government has made all kinds of assertions to us in relation to this bill, about the robustness of the consultation, about the levels of support and agreement from key stakeholders for this specific bill, about some legal risks and constitutional uncertainties of current arrangements. The government is expecting us to take all that on faith, without having the opportunity to test it for ourselves through a formal and on-the-record process, such as a committee - even though, in its key functions, this bill is squarely about us, the parliament, not them, the executive.

I want to speak about the issue of clarifying the source of power to remove judicial officers because this is a key issue. We found ourselves called back to this place on 12 December last year and an embarrassing debacle ensued because there was an apparent constitutional uncertainty over parliament's power and the exercise of that power to suspend or remove a judicial officer. Surely the primary outcome of this legislation that we are considering must be to clarify that parliamentary power and categorically remove any constitutional questions over it. Why would we put ourselves in a situation where we may still risk a constitutional challenge to action taken under the arrangement established by this bill?

I note we have received memos from external expert stakeholders raising this issue and I am going to briefly refer to a memo that all members would have received from Professor Gabrielle Appleby from the University of New South Wales and Anja Hilkemeijer from the University of Tasmania on 21 October, where this issue was raised. I am going to paraphrase

rather than read in long screeds of it, but under a heading about this issue, 'clarifying the source of power to remove judicial officers', they point out the constitutionality of the power to remove a judge under the 1857 act has been brought into question. There is no compelling reason to retain the power of suspension and removal of judicial officers in the various pieces of legislation that are listed in this bill as still being active and relevant. Clarity and coherence is something that would be greatly beneficial and that would be gained through a single source of statutory power, which this bill could have achieved.

They point out that the Houses of parliament should retain a power to remove a judge without prior investigation of a judicial commission. However, such a power could easily be included in the Judicial Commissions Bill itself without the constitutional uncertainty and confusion that is caused by multiple sources of power, which is what we have currently.

The memo also points out that it would be desirable and prudent to make the Judicial Commissions Bill the sole source of the power to suspend and remove judicial officers. I note that in notes provided by the government on this matter they have pointed out that there are other jurisdictions that retain separate statutory sources of power to remove justices as well as having acts that established judicial commissions. That may well be the case, but I would say I do not believe any of those jurisdictions have constitutional questions hanging over those other sources of power, which is the situation we face here. That is why clarity would be deemed to be prudent and desirable in this case.

At a briefing we had on this bill, arguments were put that it was unnecessary for this bill to clarify the parliamentary power to remove judges by consolidating it into the bill. It was put to us that the power to remove is in the royal prerogative - that there is not a lack of clarity and the current situation is still available to be used by this parliament alongside what is being established in this bill potentially.

In fact, the government, I believe, argued against a possible amendment to the bill which would clarify it - I am clarifying to make sure I get this straight and if I do not, I am sure the government will clarify it itself on its contribution. It argues that, on the basis that - and I am quoting this from a set of notes the department provided - 'There was an intention from the government that it would be further reviewed over a longer period to consider whether to clarify/consolidate them' - 'them' being those other sources of power. What that is essentially saying is we are rushing this bill and we can deal with that fundamental issue later. I find that an unsatisfactory answer.

The same notes that we received point to the fact that 'Some other jurisdictions with judicial complaints mechanisms have the actual powers of removal of judges in other jurisdictional statutes', which I have said is not a reason for us not to clarify our powers in the one act. There are not constitutional questions hanging over those other jurisdictions and the powers they have in various statutes.

The departmental notes provided on possible amendments relating to this situation stated the following:

> The department recommends this and related amendments not be made due to the lack of stakeholder consideration of the changes. A future review of the current provisions in other acts could, for example, consider matters such as whether the Magistrates Court Division for vacation of office for bankruptcy should apply equally to judges and TASCAT presidential members. This review could include any necessary procedural fairness provisions for the parliament or governor when not using the council/commission process.

These notes are quite puzzling. This fundamental issue of clarifying those powers of removal over which there are constitutional questions has been present since the outset and was explicitly raised in submissions on the draft bill. 'Was it not raised for consideration by the Justice Forum consultation group?' was the question that sprang into my mind. Lo and behold, we then received further notes from the department about this with further clarifications to say that the department did in fact discuss the joint submission's recommendation to amend existing provisions with their Justice Forum. Taking on board feedback, the decision was made that this was not a priority or necessity at this time. That answer does not clarify that the Justice Forum wholly endorsed leaving out such clarification from this bill, and it certainly does not represent what sounds like were different views on that Justice Forum. So, again, we are in a bit of a murky area here.

There seems to be a suggestion that there is to be a future review of current provisions in other relevant acts, and presumably that would then include this bill, if it passes into law, to give further consideration to this issue of clarifying the power to remove, which is the first we have heard of any suggested review, in these notes we received from the department. We have heard nothing from the government committing to such a review or a time line on which it would be undertaken. In fact, the government is opposed to my amendment, which would insert a 10-year review clause at least into this bill. It would be good to hear more from the government on exactly what subsequent reviews have been discussed with the Justice Forum, for example, and whether they intend to make any commitments to such reviews and any other related legislation that they intend to review in conjunction with this.

Another interesting thing about that departmental note that I read in before, which was in relation to amendments that I was looking at bringing forward, is that sentence at the end which said this review could include any necessary procedural fairness provisions for the parliament or governor when not using the council/commission process. This is the first time we have seen in writing any mention of any possible issue with the governor's role in the current statutory process that is available. We had that raised verbally in a later briefing last week, that there is concern in relation to the current power, specifically over the governor's role as a decision-maker in removing a judge. Apparently, this relates to the potential for action taken under the current statutory powers to remove a judge being opened for review in relation to the final decision of the governor on receiving an address from each House of parliament to remove a judge. This seems puzzling, having it raised in a verbal briefing but not really being able to be clarified, or certainly no tangible legal advice provided to us from the government on the difficulties of that matter or the risks that are involved, or the inherent legal uncertainty.

I sought information from Professor Appleby, who has been engaging with us throughout this process, to provide thoughts and advice from her perspective. I raised that with her and asked if there were any potential issues that she could see with the governor's role in the current process that we have available to us, and whether that was a risk that meant we had to rush this through in order to have a replacement version of a process available to us, to the current. She provided a memo, which I shared with all members, briefly contemplating what, if any, constitutional concerns there might be about the current role of the governor in the current statutory arrangement. This was the reply and I am going to read it in because I want it to be on the record. It is important that if there is a response to this, it can be put on the record, by all means. In what I presume will be the absence of a committee process on this bill, I want this parliamentary record to have at least some information in it that is substantial enough to be picked up on at a later date should there be further consideration or review or the like. The memo from Professor Appleby provided on 22 October 2024 said:

> Without seeing the full legal advice in relation to the concerns, it is difficult to know precisely what the issue the Government perceives with the process for removal by governor in the Supreme Court (Judges' Independence) Act 1857. However, I would make three comments that I hope assist the members.
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> First, if there are constitutional concerns that the governor, as member of the executive, is involved and this undermines separation of powers/judicial independence, these seem misplaced. The involvement of the vice regal representative is the common practice in judicial removal provisions. It exists, for instance, under section 72 of the Commonwealth Constitution or section 53 of the Constitution Act 1902 New South Wales. The governor is obliged to act in accordance with the wishes of parliament. This is not a situation where there are reserve powers or independent discretion.
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> Second, if there are concerns that the governor will need to accord procedural fairness to the judge before removal, I cannot see how this would be necessary. As I referred to in my briefing, the judge should be given an opportunity to address the Houses before they make their decision about removal. This is the point at which procedural fairness is accorded, as the Houses are the substantive decision maker (see point 1).
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> Third, if there is a concern that the involvement of the governor gives rise to a potential for a legal challenge to the removal, I would say two things. First is that if the intention is to avoid legal challenges, the process in the Judicial Commissions Bill opens up a number of avenues for legal challenge for someone seeking to delay/review the removal process. It will not remove this possibility. Indeed, while decisions of the council and commissions are removed from the Judicial Review Act 2020, this does not apply to decisions of the attorney-general or the minister, nor does it preclude Common Law judicial review. An attempt to shield these decisions from judicial review in the exposure draft was removed given the constitutional questions such an ouster clause raises. Second, I think it would be highly unlikely that the court would consider the matter of a governor's removal to be justiciable subject to judicial review. Rather, the intent of the provision and the history of removal is that the matter is for parliament to determine alone.
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> Finally, I would note that if the government believes there are concerns about the validity or otherwise soundness of the power and process in the 1857 act, it has nonetheless retained the process explicitly in the current clause 4 of this bill, rather than resolving and clarifying the matter by replacing it.

That was a long piece to read in. I wanted to put that on the record, and no doubt there will be counter-responses to that. This points to this issue that we have of this bill being rushed through this place this week, and still a lot of uncertainty. It is difficult for us as members to be evaluating advice coming from different perspectives - from the government on one side, from other expert stakeholders on the other - and not to have a formal, on-the-record, accountable way to consider it, for example, through a committee.

Another concern raised in relation to this bill is ensuring that there can be confidence in the independence and qualifications of members of the council and commissions. Currently the bill provides for the minister of the day to select and appoint a non-legal member of the council and six non-judicial members of the pool of those who may sit on commissions. There

is complete discretion in terms of the minister deciding what constitutes appropriate skills and qualifications, and there is no check and balance on the choices made by the minister.

This is essentially an issue of unnecessary and inappropriate power in the hands of the executive, in this case the minister. It is particularly inappropriate in this matter, where there is such a sensitivity on the issues of maintaining the independence of the judiciary and over which there must be no perception of political influence. The bill provides for no avenue to resolve a situation where parliament may not have full confidence in the appointments made by the minister to a body that will be responsible for advising parliament on the exercise of a significant and sensitive power. The whole system being established will fail if there is any suggestion of interference by the executive or a lack of confidence on the part of the Houses of parliament in relation to the ministerial appointments.

Happily, there are straightforward ways to address these issues, and no detriment to their adoption. First, let us look at the matter of qualifications. I refer to an initial memo that we received from Professor Appleby and Anja Hilkemeijer on 21 October, where they discussed this issue. To summarise some of the points made in that memo:

> • The bill provides essentially for the minister's subjective evaluation of appropriateness and suitability for these positions. They maintain that it is undesirable for the executive, in this instance, the minister, to be solely responsible for those appointments with an undirected discretion as to the qualifications or expectations in that area.
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> • There are concerns here of the potential, or the perception, of political interference by the executive branch with the independence of the judiciary, and ministerial appointments may not have the confidence of the Houses of parliament.
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> • Their recommendation was that the qualifications, skills and experience that laypersons must possess could be stipulated by parliament nonexhaustively and should be subject to parliamentary disallowance.
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> • They say that, with respect, this bill concerns highly unusual circumstances in which the constitutional independence of the judiciary is at stake - one of the most fundamental constitutional principles - and that the bill engages the extremely unusual, but constitutionally important, parliamentary responsibility of overseeing the judiciary. In this circumstance, it is not appropriate that the government controls appointments to the council and pool of commissioners.
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> • They strongly recommended that some form of criteria be included for appointment or some sort of indication as to qualifications, and that there be a disallowance mechanism available to deal with instances which may never arise but would be incredibly problematic if they did, where the Houses of parliament believe that such appointments were not appropriate.

With that issue raised, there is no good reason for us not to consider amendments to that effect. The government, I believe, will have objections to that and will likely raise their own arguments. One of them will be that other jurisdictions do not have such a disallowance of power in them. As I have said already in my contribution, I reject that as a substantive or rational reason for us not to consider it in this place.

I fundamentally reject the idea that this parliament will be in a position, under this bill, of having an advisory body, a commission, established to advise us on the exercise of an incredibly sensitive power that may contain people appointed by a minister who this parliament

did not have confidence in. Or that we would have no mechanism to have dealt with that prior to being presented with the situation.

This is fundamental primacy of parliament stuff. Parliament has primacy over the executive. We should have oversight of this appointment because it directly relates to the functions of this parliament. The government is likely to say there are all sorts of other ministerial appointments made under all sorts of other acts to all sorts of other bodies, and those do not have oversight, say, through a tabling and a disallowance mechanism available. That is true; there are all sorts of examples. However, those bodies and those appointments are not necessarily, I believe, in any instances, fundamentally about advising this parliament on the exercise of a sensitive constitutional power. This bill sets up a mechanism which does that. The appointments made by the minister to these bodies are important and must have the full confidence of this parliament, and we should be able to demonstrate that.

Another argument might be that to put a disallowance power into the bill over those appointments may, in some sense, prolong those appointments being made. Given that the government is trying to rush this through for one particular circumstance that is currently underway, I can see why they keep wanting to raise issues about things that might delay it. It is not acceptable, and we all know that there is a simple solution to that. If something is laid on the Table before this parliament over which there is a disallowance mechanism available, in order not to have to wait the full time for that to expire, the government, at any stage, is able to bring on an allowance motion to those appointments; for example, in this instance - an allowance motion that the Chamber could consider and deal with and, if the allowance motion is supported, all done and dusted, we do not have to wait the full sitting day time that the allowance in the bill may provide for.

I believe objections to this are not substantial enough to outweigh the importance of having an oversight through a possible disallowance put into this bill because of the direct correlation between the roles of this council and these commissions and the appointments made to them, and their direct role in advising this place in the exercise of its powers.

The next area I will speak about relates to setting the threshold for investigation and clarifying criteria for removal. The bill currently provides for a commission to be established only when the council is satisfied, on reasonable grounds, that there are reasonable prospects of a complaint being wholly or partly substantiated, and the complaint is of a nature that would justify the removal of the relevant judicial officer from office. This sets a high bar for circumstances in which a full investigation through a commission could occur. It also makes the council the gatekeeper for deciding what may or may not be considered by parliament as grounds for removal of a judicial officer. As highlighted in the briefing paper from Professor Appleby and Anja Hilkemeijer, the full process of a commission investigation should be available to address 'conduct that is not serious enough to warrant removal, but that nonetheless might undermine public confidence in the judiciary if left unaddressed'.

As I mentioned earlier, the Tasmanian Women Lawyers group made a submission on the draft bill and made it very clear that the need for action on this had been identified and called for some years ago. The submission highlighted the need for a clear framework and permanent commission for a judicial complaint. They laid out elements that needed to be there in such a mechanism, such a framework and permanent commission. These were the elements they said had to be there: transparent investigations and disciplinary proceedings for judicial officers; a process that is at arm's length from the existing jurisdictional heads; and a way to address concerns about the conduct of judicial officers that fall short of acceptable standards expected by members of the community which explicitly includes the capacity to investigate

complaints relating to sexual harassment, bullying, intimidation and discrimination, whether or not such complaints, if substantiated, would result in the removal of the judicial officer, but may result in a lesser disciplinary sanction, similar to the State Service Code of Conduct or the Regulation of the Legal Profession by the Legal Profession Board of Tasmania.

Tasmanian Women Lawyers identified that there was a lack of a clear disciplinary outcomes to apply to situations where there is a lesser than 'removal from office' type of complaint and that this was required to be addressed. They pointed out that there were situations of serious conduct issues that should be dealt with through the independent formal process of a commission rather than sent back to the chief officers of the jurisdiction to be dealt with. The current bill sends anything less than a potentially removable complaint back to the chief officer of the jurisdiction, which is only in essence codifying the current situation. That is unsatisfactory, given the issues raised with its limitations and its barriers, so that remains an unsatisfactory gap and a significant missed opportunity.

Presumably, the government will argue that the council can consider matters itself that are less than what might warrant consideration of removal, and that they can have some form of investigation. But it is not the same as the commission process; it cannot make findings of fact in the same way, and it still involves the heads of jurisdiction and then being sent back to the heads of jurisdiction potentially afterwards for consideration of sanctions or outcomes, which is exactly the same situation that exists now that the key members of the legal profession, namely in this case, the example I am using is Tasmanian Women Lawyers, saying that the current process is not satisfactory, does not work and presents barriers.

There is also an issue with the bill in that it does not clarify that the only grounds for removal of a judicial officer are misbehaviour or incapacity. There is uncertainty under the current acts that we have available to us that relate to the removal of judicial officers, which is highly problematic and creates constitutional problems. No other jurisdiction in Australia - if we are going to use that as a justification for things, I am going to mention it here - has a broad and unlimited power for parliament to remove judicial officers and it is constitutionally dubious to provide a broad or uncertain power to do so. It raises concerns that an unlimited discretion undermines the independence of the judiciary. Since the Act of Settlement in 1701 it has been accepted that judges should hold tenure unless removed by parliament on grounds of misbehaviour or incapacity. This bill is an opportunity to clarify this and remove any ambiguity. Appleby et al. argued that the bill must be amended so as to lower the threshold for investigation by the council and also to clarify the grounds on which the judicial officer may be removed so that we remove this constitutional ambiguity and come into line with other jurisdictions.

I have already mentioned the matter of a review clause. I have alluded to it earlier. This bill currently does not have a review clause. Of course, this does not prevent any future government from establishing a review process. However, given that judicial councils and commissions have not been part of our systems here in Australia for very long, and that this will be the first time we have had such a system established in Tasmania, there is a strong case for inserting a review clause. We will possibly discuss this further in relation to an amendment that I have drafted. One thing that I will say here is, given the circumstances and the rush of bringing this bill to this place and the significant concerns that have been raised and not satisfactorily addressed in the development of this bill, there is an even stronger argument for a statutory requirement of a review.

I imagine an argument against this is that the government does not see that this legislation is novel. That is what I have heard put in relation to it. It is novel here in Tasmania,

but it is in place and in practice in other jurisdictions. But we certainly do not only put review clauses into acts that are in some way novel in Tasmania and nationally, we insert review clauses for a range of reasons into a range of acts in this place. In fact, just last week we had the Coroners Act amendments which had a review clause that we placed into them.

The government is also likely to suggest that they have set up provisions for the council that is to be established to make recommendations to government in a regular way on potential legislative changes. That is fine. It is good that is in the bill but it does not substitute for an independent external review. There are a range of other key stakeholders affected by this legislation that could and should have an opportunity to participate in an independent review of this act's operation, should it pass, and identify areas for improvement and change. It should not have to be only mediated through the council that there are opportunities for review, change or improvement. Other stakeholders should and could have an established and formal way in which they know to expect that they can share their input and experience under this bill. No doubt we may talk more about a review if the bill progresses to later stages.

Another area of concern that I will mention is around questions that arose in briefings last week from stakeholders, namely in this case Anja Hilkemeijer from UTAS, on whether the time lines that the bill lays out in two sections that related to processes within parliament were in fact problematic and not compatible. It was an issue that was brought to our attention only last week. It is one that has had some back and forth with information provided by Ms Hilkemeijer, and then information provided from the government and then further information. It is like a tennis match and it is, again, the way in which this sort of matter is very difficult to deal with, considering a bill in a rushed fashion through this Chamber rather than, say, through a committee process. Those sorts of things can be dealt with much more readily through submissions on the public record, through hearings and questioning of experts, through assessing opinions in balanced ways and testing ideas that are being put forward. All of us here have been under pressure trying to do this job in what is not a formal, accountable way across the process of this last week as we assess and seek different information and different sources of advice.

I will not go into the concern raised in detail because we will get ourselves into real complexity on the detail of the bill. It may be that we will talk about it more if the bill gets through to the Committee stage and further questions can be put and clarification provided through questions on particular clauses.

Let me emphasise now, the question of whether there are workability issues with the parliamentary processes outlined in this bill. If the parliamentary processes specified here in this bill cannot be assured to be entirely clear and workable, and without potential to create unintended consequences, we cannot pass this bill in this place. We need to have complete confidence that there is not a possible time line incompatibility between the two sections of the bill that have been raised here as a potential issue. In briefings, it was discussed that we would need to see a time line of actions under those two sections laid out for us so we can visually see exactly how they are compatible with each other and we can examine that. I do not know that we have yet to see that presented entirely by the government, but I have no doubt we will talk about it more in the Committee stage if we get there. Other members may share similar concerns in this area and may speak to it in more detail, but I am going to move on from it.

Further questions were raised around ambiguity of language. Again, it is not an area I will speak to in detail in my contribution here. We may talk about it in the Committee stage, should we get there. The use of certain words has been raised as an issue in this bill, in particular in relation to section 33(1)(c) and the assertion is that it has implications for interpretation of

this bill. This is just another example and there are further examples. I have been receiving correspondence from a range of stakeholders right up until today - from various sources raising this issue or that issue or this concern or that question about this bill. I continued to do so, from probably at least half a dozen different sources, mostly from different places within the legal profession, and that puts me in a difficult position. I am not in a position, particularly over this last week that we have had to be considering this, to be fully and responsibly assessing those issues and whether they genuinely require being resolved, whether the government has given consideration to them, and what the response might be. Again, blatantly, this bill should be going to a committee.

I will leave my contribution in terms of examining those concerns at that point. Others may well raise further concerns or add to the ones that I have already mentioned. Suffice it to say I have serious reservations about this bill. At the very least, I believe it needs amendment to address even just a couple of the significant issues that I have discussed now. The ones that I would prioritise are the need for parliamentary oversight over the ministerial appointments to the council and the pool for commissions, and the addition of a review clause, which would at least give comfort that this is structurally going to be looked at again in a specified period of time in an independent way.

Even if those two things were to be resolved through amendments that I bring, that would still, in my view, leave this bill falling short of what it should be, given it is establishing an important new mechanism in this state to ensure appropriate processes to deal with complaints against the judiciary, which is an incredibly serious topic.

In conclusion, I am firmly of the opinion that it is positive that we are progressing the establishment of a more appropriate mechanism to manage complaints relating to the conduct of judicial officers. I am supportive of that effort. I do not believe there would be any of us here who would not want to see a judicial commissions mechanism established to assist the parliament to undertake its constitutional role appropriately and legally. However, given the gravity of the circumstances in which such a mechanism is to be used, it is entirely inappropriate to have any sense that we are rushing consideration of this matter through the parliament, especially if it is to deal with one particular, current situation. Constitutionally, this is a difficult area. We want to get any bill right. This relates to the exercise of a rare constitutional function, and we need to be as sound on this as possible. I believe there is a need to slow down.

There are issues that are still coming to light on this from external stakeholders and other experts. We have yet to have of all these satisfactorily addressed. We need to take more time and to check the process here. I am particularly averse to the idea that we are rushing this bill through to deal with a particular circumstance. That is a bad way to make laws. It is certainly a bad way to set up, for the first time ever in this state, a very particular and specialised mechanism to deal with a sensitive area that touches that fundamental principle of independence of the judiciary.

I believe that particular, current circumstance can be dealt with under the current arrangements we have available to us. I believe there is not an issue to be dealt with in terms of questions over whether a suspension situation or a practical suspension that is in place would extend past sentencing. I do not believe that there are legitimate, robust concerns about utilising the current power that is there given what has played out in the courts with a finding of guilt and the upcoming sentencing process.

My preference would be, if we are to consider the current situation and feel the need to deal with it, that we do it through the current mechanisms available to us and that we take more

time when we are considering and putting together this mechanism to deal with such things in the future, and that we make it a robust mechanism that has our full confidence and is without questions hanging over it.

It may be the executive that is developing and presenting this bill to us in this place, but the fact of the matter is the executive has no role in the actual removal of judges.

Ms O'Connor - Nor should it.

Ms WEBB - Nor should it. But this parliament does, and it is this parliament that needs to have complete confidence in the mechanisms being established to assist it in undertaking this hopefully rare, but nonetheless constitutionally important and sensitive, role.

I will listen with interest to the contributions of other members, but, at this stage, I cannot say that I support this bill in its current form.