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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**JUDICIAL MISBEHAVIOUR AND INCAPACITY (PARLIAMENTARY  
COMMISSIONS) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
the Hon Nicola Roxon MP)

# **JUDICIAL MISBEHAVIOUR AND INCAPACITY (PARLIAMENTARY COMMISSIONS) BILL 2012**

## **GENERAL OUTLINE**

1. This Bill, in conjunction with the Courts Legislation Amendment (Judicial Complaints) Bill 2012, is designed to introduce greater transparency and accountability in handling of complaints about judicial officers in the federal courts.
2. On 18 March 2011, the former Attorney-General, the Hon Robert McClelland MP, announced significant reforms to federal judicial complaints handling.
3. Australia is well-served by its judiciary, and that judicial independence and impartiality are vital to the smooth administration of justice. Establishing a transparent, impartial and accountable system of judicial complaints handling is intended to support judicial independence and strengthen public confidence in the federal judiciary.
4. The Bill provides a standard mechanism to assist the Parliament in its consideration of removal of a judge or federal magistrate from office under the Constitution. Paragraph 72(ii) of the Constitution provides that Justices of the High Court and other courts created by the Parliament shall not 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.
5. The establishment of a mechanism to assist the Parliament in considering removal of a judge from office has been the subject of a significant amount of commentary since the inception of the Commonwealth. While instances of removal of judges from office in Australia have been extremely rare, it is important that a clear framework is in place in the event that such a circumstance were to arise. Currently, there is no standard mechanism by which allegations about misbehaviour or incapacity against federal judicial officers would be investigated to assist Parliament's consideration of removal of a federal judicial officer under paragraph 72(ii) of the Constitution.
6. The Bill creates an independent, transparent and accountable framework by enabling the establishment of Parliamentary Commissions to investigate specified allegations about misbehaviour or incapacity in relation to federal judicial officers when required.

### ***Role and nature of a Commission***

7. A Commission, as provided for under the Bill, would be established following a resolution by each House of the Parliament that it be established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer. It would be able to inquire into any federal judicial officer, including a Justice of the High Court of Australia.
8. The role of a Commission under the Bill would be to inquire into allegations and gather information and evidence so the Parliament could be well informed in its consideration of the removal of a judge. The character of a Commission's role would be investigative as it

would not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge. A Commission's focus would be to consider the threshold question of whether there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity and report on these matters to the Houses of Parliament.

9. The Bill supports the Constitutional role of the Houses of the Parliament in determining whether or not allegations of judicial misbehaviour or incapacity are proved.

10. The Bill provides a framework for a Commission to assist the Parliament where necessary in discharging its responsibilities under paragraph 72(ii) of the Constitution. Under the Bill, a Parliamentary Commission would be a joint Parliamentary body with its own legal status.

11. The Bill supports a Commission's role as a Parliamentary body through its governance structure. The Department of the House of Representatives or the Department of the Senate would provide administrative support to a Commission.

12. Many privileges and immunities of the Parliament would apply to a Commission in a similar way as a committee of a House of the Parliament, although the Bill provides specific powers and offences in respect of a Commission. The Parliament would have effective control of the records of a Commission, which ensures protection equivalent to protection provided for Parliamentary records.

### ***Processes of a Commission***

13. The process to be followed for a Parliamentary Commission is set out in the Bill.

14. A Commission would conduct its investigations in an inquisitorial, rather than adversarial, manner. A Commission would have appropriate, modern investigative and inquiry powers, including the power to require witnesses to appear at a Commission hearing, take evidence on oath, conduct hearings in private, require production of documents or things, and issue search warrants.

15. A Commission would be required to act in accordance with the rules of natural justice, with specific procedures included to ensure transparency and procedural fairness for judicial officers who were the subject of an investigation.

16. A Commission would provide a report to the Houses of Parliament through each of the Parliamentary presiding officers. A Commission may provide a separate report for access by only members and Senators and the Commonwealth judicial officer who is the subject of investigation where a Commission believed sensitive material may cause harm if laid before the Houses.

17. The Bill does not include a standard of proof a Commission would consider needed to be met before reporting to the Parliament. Under paragraph 72(ii) of the Constitution, it is for the Houses of Parliament to consider whether conduct of a judicial officer amounted to proved misbehaviour or incapacity. A Commission would report on whether conduct could be capable of being regarded by the Parliament as proved misbehaviour or incapacity.

### ***Ensuring judicial independence***

18. Current and former Commonwealth judicial officers would be exempted from the application of coercive powers of a Commission. This is appropriate to support judicial independence under Chapter III of the Constitution. The framers of section 72 of the Constitution aimed to achieve a high degree of independence of the judiciary from the other branches of government, while providing a mechanism for the removal of unfit judges. It would not be appropriate for the Parliament to require judicial officers to give evidence or be subject to search warrants issued by a Commission.

19. Parliamentary Commissions, as provided for under the Bill, will provide the Parliament with a clear, certain and accountable mechanism to consider the removal from office of a federal judicial officer under the Constitution. In this way, the measures provided under the Bill will strengthen public confidence in the federal judiciary while supporting the separation of powers and independence of the judiciary.

### **FINANCIAL IMPACT STATEMENT**

20. The proposed Bill will not have any significant financial impact on commencement.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012**

21. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

#### **Overview of the Bill**

22. The Bill provides a standard mechanism to assist the Parliament in its consideration of removal of a judge or federal magistrate from office under the Constitution. Paragraph 72(ii) of the Constitution provides that Justices of the High Court and other courts created by the Parliament shall not 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.

23. The purpose of the Bill is to create an independent, transparent and accountable framework by enabling the establishment of Parliamentary Commissions to investigate allegations referred to the Parliament for consideration under paragraph 72(ii) of the Constitution.

24. A Commission, as provided for under the Bill, would be established following a resolution by each House of the Parliament that it be established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer. It would be able to inquire into any federal judicial officer, including a Justice of the High Court of Australia.

25. This Bill operates in conjunction with the Courts Legislation Amendment (Judicial Complaints) Bill, which deals with complaints processes that operate within the federal courts other than the High Court.

#### **Human rights implications**

26. This Bill engages the right to a fair trial and the right to privacy and reputation under Articles 14 and 17 respectively of the International Covenant on Civil and Political Rights ('ICCPR'), and the right not to be unjustly deprived of work under Article 6 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').

##### *Right to a fair hearing and fair trial*

27. Article 14 of the ICCPR protects the right to a fair trial and fair hearing. The main factor when considering 'fairness' is whether both parties have been afforded a reasonable opportunity to present their case, including the presentation of evidence, under conditions that do not put either party at a substantial disadvantage.

28. A Parliamentary Commission is established to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer so that the Parliament can be well informed when considering removal of a judge from office. The

character of a Commission's role would be investigative, rather than adjudicative. A Commission would not determine whether facts are proved or make recommendations to the Parliament about the removal of a judge from office. Under paragraph 72(ii) of the Constitution, it is for the Houses of Parliament to consider whether conduct of a judicial officer amounted to proved misbehaviour or incapacity.

29. The Bill positively advances the right to a fair hearing by a competent, independent and impartial body established by law by applying these principles to a Commission. The Bill provides for public hearings, while allowing a Commission to balance public interests with the privacy and reputation of the federal judicial officer involved on a case by case basis. The Bill also enables a judicial officer who is the subject of an investigation to attend and participate in hearings.

30. The Bill provides for appropriate protections for those who are connected with a Commission (such as members of the Commission, and witnesses and lawyers who appear at a hearing of a Commission) similar to those applying to other Parliamentary committees so that information provided to a Commission would not prejudice a person's right to a fair trial in any subsequent criminal proceedings.

31. In particular, subsection 16(3) of the *Parliamentary Privileges Act 1987* is taken to apply to the proceedings, report and evidence of a Commission. The application of subsection 16(3) of the *Parliamentary Privileges Act 1987* would operate to prevent reliance on any conclusions in a Commission report in any subsequent criminal proceedings. This provides adequate protection for judicial officers who may be liable to prosecution based on the findings in a Commission report. It upholds the right to be presumed innocent until proved guilty according to law.

32. The Bill provides that a person is not excused from producing documents or answering questions relevant to a Commission's investigation on the ground that it might tend to incriminate them. While this might limit rights under Article 14(3)(g) of the ICCPR not to be compelled to testify against himself or herself or to confess guilt, the limitation is reasonable, necessary and proportionate. The Parliament's consideration under paragraph 72(ii) of the Constitution supports public confidence in the independence and impartiality of the federal judiciary. The treatment of self-incrimination is appropriate to facilitate the ability of a Commission to obtain relevant evidence for the investigation, so that they may provide a comprehensive report and assist the Parliament in its consideration of removal of a judge under paragraph 72(ii) of the Constitution. The Bill provides for use and derivative use protections where self-incriminatory information is provided to a Commission. These protections will restrict the use of self-incriminatory information in later court proceedings or to gather evidence against a person who has disclosed self-incriminatory information.

#### *Right to privacy and reputation*

33. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks.

34. While the Bill may limit aspects of these rights in certain circumstances, the limitations are reasonable, necessary and proportionate.

35. A Commission, as provided for under the Bill, may deal with personal or sensitive information for the purposes of investigating specified allegations of misbehaviour or

incapacity of a judicial officer. The right to privacy and reputation is important for two particular classes of people affected by the Bill:

- a) the federal judge who is the subject of a Commission's investigation, and
- b) a person who may give evidence or otherwise be involved in a Commission's investigation.

36. The Bill provides for clear and transparent powers and processes for investigation by a Commission, which enables a Commission to appropriately assess rights to privacy and reputation on a case by case basis, and balance competing public interests in the removal of unfit judicial officers where necessary. Specific protections contained in the Bill include the ability of a Commission to hold hearings in private, offences for unauthorised publication of information, and restrictions on publication of private information in a Commission's report.

37. The Bill empowers a Commission, or authorised member of a Commission, to issue a search warrant in circumstances where:

- a Commission has reasonable grounds for suspecting that there may be, within 24 hours, documents or things connected with the matter a Commission is investigating, and
- that if a notice were given for the documents or things, the documents or things might be concealed, lost, mutilated or destroyed.

38. It is appropriate to confer investigative and administrative functions associated with a Commission on the Commission, rather than serving judges, given the special nature of its role investigating allegations about judicial misbehaviour or incapacity.

39. A Commission's role is limited to investigating an allegation of misbehaviour or incapacity against a Commonwealth judicial officer specified through a resolution of the Parliament. This limits the scope of the issue and execution of search warrants on a person's family or home. Search warrants cannot be issued on the premises of a current or former Commonwealth judicial officer.

40. Taking into account that it is a Commission issuing search warrants, additional safeguards apply. A Commission is required to keep a written record of the reasons for issuing a search warrant. This promotes transparency and accountability in the process of issuing search warrants. These reasons will become part of the records of a Commission, which will be given to a House of the Parliament where no longer needed. This offers additional scrutiny of a Commission's actions.

#### *Right not to be unjustly deprived of work*

41. The UN Committee on Economic Social and Cultural Rights has stated that the right under Article 6(1) of ICESCR encompasses the right not to be unjustly deprived of work, requiring security against unfair dismissal.

42. The Bill does not provide for a Commission to remove or dismiss a judicial officer. Federal judicial officers have security of tenure under the Constitution. Paragraph 72(ii) of the Constitution provides the federal judicial officers shall not 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.

43. A Commission's role is limited to inquiring into allegations specified in a resolution of the Houses of the Parliament and gathering information and evidence so the Parliament

could be well informed in its consideration of the removal of a judge. The Bill would enable this process to occur in accordance with clear and transparent processes.

### **Conclusion**

44. The Bill is compatible with human rights because it advances the protection of human rights, in particular for right to a fair trial, the right to privacy and reputation, and the right not to be unjustly deprived of work. To the extent that it may also limit human rights, those limitations are reasonable and proportionate.



## NOTES ON CLAUSES

### **Part 1 – Preliminary**

#### **Clause 1 – Short Title**

45. This clause provides for the Bill to be cited as the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*.

#### **Clause 2 – Commencement**

46. This clause provides for the commencement of each provision of the Bill.

47. Subclause 2(1) provides that each provision of the Act specified in column 1 of the table set out in the subclause commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

48. Item 1 in the table provides that sections 1 and 2 of the Bill (and anything in the Bill not elsewhere covered by the table) will commence on the day on which the Bill receives the Royal Assent.

49. Item 2 in the table provides that clauses 3 to 70 commence on a single day to be fixed by Proclamation. However, if any of those provisions do not commence within the period of 6 months beginning on the day the Bill receives Royal Assent, they will commence on the day after the end of that period. The delayed commencement of clauses 3 to 70 provides the required time to implement regulations to support the establishment of a Commission.

50. Subclause 2(2) provides that any information in column 3 of the table is not part of the Act. It also clarifies that information may be inserted in column 3, or information in it may be edited, in any published version of the Act.

#### **Clause 3 – Object of this Act**

51. This clause specifies the object of the Act.

52. Subclause 3(1) establishes the object of the Act being to provide for a Commission to be established by the Houses of Parliament to investigate and report on a specified allegation or allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer, so that the Parliament may be well-informed to consider whether to pray for the judge's removal under paragraph 72(ii) of the Constitution.

53. The role of a Commission is to conduct an independent investigation to assist the Parliament's consideration of removal of a judicial officer under paragraph 72(ii) of the Constitution (see General Outline of this Bill). Clause 7 of the Bill enables Commissions to be established when required.

54. Subclause 3(2) is inserted to avoid doubt. It confirms that it is not implied that a separate Act is needed for a Commission to be established, or that a Commission is the only means by which the Parliament can be informed under paragraph 72(ii) of the Constitution. The Parliament may still choose other methods to investigate an allegation of misbehaviour or incapacity of a Commonwealth judicial officer.

#### **Clause 4 – Guide to this Act**

55. This clause inserts a guide to the Bill. The guide will assist readers to understand the purpose and content of the Bill, and to more easily navigate through the Bill to find relevant provisions.

#### **Clause 5 – Extension to external Territories**

56. This clause extends the operation of the Bill to every external Territory.

#### **Clause 6 – This Act binds the Crown**

57. Subclause 6(1) provides that the Crown is bound by the Bill in each of its capacities.

58. Subclause 6(2) provides that the Crown is not liable to be prosecuted for an offence.

#### **Clause 7 – Definitions**

59. This clause defines various terms used in the Bill. The definitions are consistent with other Acts including the *Crimes Act 1914* and the *Parliamentary Service Act 1999*.

60. ‘Acquisition of property’ is defined to have the meaning given by clause 37. Clause 37 provides for compensation for acquisition of property in certain circumstances.

61. ‘Australia’ is defined to include the external Territories when used in a geographical sense. Clause 5 extends the Bill to every external Territory.

62. ‘Australian law’ is defined to mean a law (whether written or unwritten) of the Commonwealth, a State or Territory. This definition would cover both legislation and common law. The term is used in clauses 19, 50, and 66.

63. ‘Commission’ is defined to mean a Commission established by clause 9 of this Bill. Clause 9 enables the establishment of Commissions on an ad hoc basis.

64. ‘Commonwealth judicial officer’ is defined to mean a Justice of the High Court, a judge or justice of a court created by the Parliament (other than the Federal Magistrates Court), and a Federal Magistrate of the Federal Magistrates Court. This definition creates consistent terminology in the Bill and enables a Commission to be established to investigate allegations about any federal judicial officer.

65. ‘Constable’ is defined to have the same meaning as in the *Crimes Act 1914*. ‘Constable’ is defined in section 3 of the *Crimes Act 1914* to mean a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

66. ‘Conveyance’ is defined to have the meaning given by clause 27. Clause 27 provides a mechanism for arrest of a witness failing to appear (see definition of ‘dwelling house’). Under clause 27, ‘conveyance’ includes a vessel, aircraft or vehicle.

67. ‘Damage’ is defined, in relation to data, to include damage by erasure of data or addition of other data. This definition is relevant for clauses 29 and 40 of this Bill, which

refer to damage to electronic equipment. The definition does not limit the ordinary meaning of damage in relation to its other uses in the Bill.

68. 'Dwelling house' is defined to have the meaning given by clause 27. Clause 27 provides a mechanism for arrest of a witness failing to appear, including at dwelling houses. Under clause 27, 'dwelling house' includes a conveyance, and a room in a hotel, motel or boarding house or club, in which people ordinarily retire for the night. 'Conveyance' is also defined in this clause.

69. 'Federal Magistrate' is defined to mean a Federal Magistrate of the Federal Magistrates Court.

70. 'Incapacity' is defined to have (other than in clause 73) the same meaning as in section 72 of the Constitution. It is for the Parliament to determine whether an allegation satisfies the requirements of proved misbehaviour or incapacity for the purposes of paragraph 72(ii) of the Constitution (see also definition of 'misbehaviour'). Clause 73 provides for the termination of members on grounds, including for misbehaviour or incapacity. These terms, as used in clause 73, have their ordinary meaning. This is appropriate because of the different context in which the term is used.

71. 'Just terms' has the meaning given by clause 43. Clause 43 provides for compensation for acquisition of property in certain circumstances.

72. 'Lawyer' is defined to mean a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of the Supreme Court of a State or Territory. This is a broad definition to enable legal representation from a variety of locations.

73. 'Member' is defined to mean a member of a Commission, and includes the presiding member. Clause 13 provides for membership of a Commission. A member is to be appointed in accordance with clause 14.

74. 'Misbehaviour' is defined to have the same meaning as in section 72 of the Constitution. It is for the Parliament to determine whether an allegation satisfies the requirements of proved misbehaviour or incapacity for the purposes of paragraph 72(ii) of the Constitution (see also definition of 'incapacity').

75. 'Official inquiry' is defined to have a meaning affected by clause 19. Subclause 19(5) provides for certain inquiries to be included in the expression. It is distinguished from an 'official investigation'.

76. 'Official investigation' is defined to have a meaning affected by clause 19. Subclause 19(6) provides for certain investigations to be included in the expression. It is distinguished from an 'official inquiry'.

77. 'Parliamentary presiding officer' is defined to mean the President of the Senate or the Speaker of the House of Representatives. Provisions of the Bill enable the Parliamentary presiding officers to act jointly where specified.

78. 'Premises' is defined to include:

- a structure, building, vessel, aircraft or vehicle;
- a place (whether or not enclosed or built on); or
- a part of a structure, building, vessel, aircraft or vehicle or a place (whether or not enclosed or built on).

79. The term 'premises' is broader than the definition.

80. 'Presiding member' is defined to mean a member of a Commission appointed as the presiding member by force of subclause 14(3).

81. 'Proved', in relation to misbehaviour or incapacity, has the same meaning as in section 72 of the Constitution. It is for the Parliament to determine whether an allegation satisfies the requirements of proved misbehaviour or incapacity for the purposes of paragraph 72(ii) of the Constitution.

82. 'Search warrant' is defined to mean a search warrant issued under subclause 28(1). Subclause 28(1) gives power to a Commission to issue a search warrant.

## **Part 2 – Establishment, functions and membership etc. of Commissions**

### **Clause 8 – Guide to this Part**

83. This clause inserts a guide to this Part of the Bill. The guide will assist readers to understand the purpose and content of the Part, and to more easily navigate through the Part to find relevant provisions. This Part includes the establishment, functions, powers and membership of a Commission.

### **Clause 9 – Establishment**

84. Subclause 9(1) provides that a Commission will be established by force of this clause if each House of the Parliament passes in the same session a resolution that a Commission be established to investigate a specified allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer. As a Commission will be established by force of the Act, rather than the resolution of the Houses of Parliament, a Commission will continue in existence where the Parliament is prorogued.

85. Subclause 9(1) enables Commissions to be established when required, following resolution by the Houses of the Parliament, rather than as a permanent Commission. The subclause clearly outlines the scope of a Commission's investigation to specified allegations against a specified Commonwealth judicial officer, which will need to be precisely articulated in the resolution of the Houses of the Parliament. Clause 20 requires particulars of allegations to be given to the Commonwealth judicial officer who is the subject of a Commission's investigation.

86. This enables each House of the Parliament to pass a resolution in the same terms, rather than requiring a resolution to be transmitted between the Houses for concurrence.

87. Note 1 to subclause 9(1) clarifies that a separate Commission is established each time both Houses of Parliament pass a resolution to this effect. Separate Commissions will each have their own legal status, and will not be related to other Commissions.

88. Note 2 to subclause 9(1) confirms the operation of paragraph 23(b) of the *Acts Interpretation Act 1901* that a Commission can be established to investigate more than one allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer. Each allegation must be specified in the resolution by the Houses of the Parliament.

89. Subclause 9(2) is inserted to avoid doubt. The subclause confirms that a Commission may be established to investigate and report in respect of misbehaviour or incapacity that is alleged to have occurred before, on or after the clause commences. This enables a Commission to be established to investigate allegations of past misbehaviour or incapacity.

### **Clause 10 – Functions**

90. This clause establishes that the functions of a Commission are to investigate an allegation referred to in clause 9 and report to the Houses of Parliament its opinion of whether or not there is evidence that would let the Houses of Parliament conclude that alleged misbehaviour or incapacity is proved. Reports are provided to each of the Parliamentary presiding officers for presentation to each respective House of the Parliament in accordance with clause 48 of this Bill.

91. Clause 9 requires a resolution of the Houses of the Parliament to include a specified allegation or specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer that would be investigated by a Commission.

92. The functions of a Commission are limited to investigation and reporting to the Parliament. The Bill retains and supports the role of the Parliament in determining whether or not alleged conduct took place, and whether it amounts to proved misbehaviour or incapacity warranting removal from office.

### **Clause 11 – Powers**

93. This clause provides a broad power for the Commission to do all things necessary or convenient to be done for or in connection with the performance of its functions.

### **Clause 12 – Commission has privileges and immunities of the Crown**

94. This clause establishes the legal status of a Commission as having the privileges and immunities of the Crown.

### **Clause 13– Membership**

95. This clause provides for the membership of a Commission.

96. Subclause 13(1) provides that a Commission will consist of three members. Members will be appointed on the nomination of the Prime Minister.

97. Subclause 13(2) requires the Prime Minister, before nominating a member of a Commission, to consult with the Leader of the Opposition in the House of Representatives.

The requirement to consult on nomination of members of a Commission reflects the structure of a Commission as a joint Parliamentary body and the non-political role a Commission will undertake when executing its function.

98. Subclause 13(2) requires that at least one member must be either a former Commonwealth judicial officer or a judge or former judge of the Supreme Court of a State or Territory. Inclusion of a member with judicial experience is intended to bring relevant experience and expertise to a Commission's conduct of an investigation.

#### **Clause 14 – Appointment of Members**

99. This clause outlines the procedure for appointment of members of a Commission. All appointments are made on nomination under clause 13.

100. Subclause 14(1) provides for the appointment of members by force of this subclause if each House of the Parliament passes, in the same session, a resolution to appoint the member. This provides certainty for the appointment of members, and involves a similar process to that required for establishment of a Commission. The requirement for each House of the Parliament to pass a resolution to appoint a member reflects the structure of a Commission as a joint Parliamentary body and the non-political role a Commission will undertake when executing its function.

101. Subclause 14(2) prevents a person from being appointed if he or she is a Commonwealth judicial officer. This supports independence of the judiciary and prevents any conflict of interest.

102. Subclause 14(3) provides for the appointment of a member as the presiding member of a Commission by force of the clause if:

- the Prime Minister nominates the member to be the presiding member; and
- each House of the Parliament passes, in the same session, a resolution to appoint the member as the presiding member.

103. This provides certainty to the appointment of the presiding member by a similar process to that required for establishment of a Commission. A presiding member will be one of the three members of a Commission (see subclause 13(1)).

104. Subclause 14(4) establishes that members are appointed on a part time basis. This clarifies the status of membership and is consistent with the establishment of Commissions as required.

#### **Clause 15 – Vacancy in membership**

105. This clause establishes the legal position of a Commission where a Commission is not at any given time properly constituted in accordance with the requirements of clause 13 because one or more members have ceased to be a member.

106. Paragraph 15(a) confirms that a Commission continues to exist in these circumstances, even if there are no remaining members. This removes the need to repeat the process for re-establishing a Commission where there are vacancies in membership.

107. Paragraph 15(b) provides that a Commission will consist of remaining members (if any).

108. Paragraph 15(c) provides that the Act will continue to have effect as if a Commission were properly constituted. This enables a Commission to continue its investigation of the specified Commonwealth judicial officer while members are replaced.

109. Paragraph 15(d) requires the Houses of the Parliament to appoint replacement members as soon as practicable in accordance with the requirements set out in clause 13 and 14 of the Bill. Additional appointments will be made under the same procedure as any other appointment.

### **Clause 16 – When a Commission ceases to exist**

110. This clause provides that a Commission will cease to exist upon a joint written determination of the Parliamentary presiding officers, if they are satisfied under paragraphs 16(1)(a) and (b) that either:

- the Commission’s functions have been performed, or
- the person in relation to whom an allegation of misbehaviour or incapacity is being investigated by the Commission has ceased to be a Commonwealth judicial officer.

This creates certainty about when a Commission ceases to exist.

111. A determination, where made, must be in writing.

112. Subclause 16(2) provides that a Commission will cease to exist at a time specified in the determination. The date, which is specified in the determination, will be jointly decided by the Parliamentary presiding officers in order to provide certainty for the protections afforded by the Bill, the date specified is not expected to be a date in the past.

113. Subclause 16(3) provides that a determination made under subclause 16(1) will not be a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

## **Part 3 – Investigations of Commissions**

### **Division 1 – General**

#### **Clause 17 – Guide to this Division**

114. This clause inserts a guide to this Division of the Bill. The guide will assist readers to understand the purpose and content of the Division, and to more easily navigate through the Division to find relevant provisions. This Division contains rules relating to how a Commission conducts its investigation.

## **Clause 18 – Decision of questions**

115. This clause establishes the manner in which a Commission will decide questions before it.

116. Subclause 18(1) provides that questions before a Commission will be determined in accordance with the view of the majority of members.

117. Subclause 18(2) requires that, if the members are not unanimous, the opinion of each member on the question must be recorded.

118. The note to subclause 18(2) clarifies that dissenting views will be included as part of a Commission's report given under clause 48 so that Parliament has access to a record of the views of each member.

## **Clause 19 – How a Commission is informed**

119. Subclause 19(1) establishes that a Commission will not be bound by the rules of evidence and may be informed on any matter in any manner it thinks fit. This enables a Commission to choose the manner of informing itself that it considers is most appropriate in the circumstances, including how formal proceedings need to be. This is consistent with the investigative character of a Commission's role.

120. Subclause 19(2) requires a Commission to consider the outcome of any previous official inquiry or official investigation into the allegation to the extent that the Commission thinks it necessary or desirable to do so. 'Official inquiry' and 'official investigation' are broadly framed.

121. Subclause 19(3) provides that a Commission will not be precluded by any other law or privilege from accessing evidence given at, or findings made as a result of, such an inquiry or investigation. It is appropriate that a Commission have access to as much information as possible to investigate and report to the Parliament about an allegation of misbehaviour or incapacity.

122. Subclause 19(4) clarifies that a Commission's ability to access privileged information under subclause 16(3) will be subject to the operation of section 16 of the *Parliamentary Privileges Act 1987*. Section 16 of the *Parliamentary Privileges Act 1987* relates to Parliamentary privilege in court or tribunal proceedings.

123. Subclause 19(5) includes examples of the type of proceeding that will be an 'official inquiry', including Royal Commissions. The examples provided do not limit the meaning of official inquiry.

124. Subclause 19(6) includes examples of the type of proceeding that will be an 'official investigation'. This will include investigations conducted under the judicial complaints handling process within the Federal Court of Australia, Family Court of Australia or Federal Magistrates Court. This process is supported by the Court Legislation Amendment (Judicial Complaints) Bill 2012. The examples provided do not limit the meaning of official investigation.



## **Clause 20 – Natural justice**

125. Subclause 20(1) requires a Commission to act in accordance with the rules of natural justice.

126. Subclause 20(2) mandates steps that a Commission must take in its investigation in order to afford procedural fairness to a Commonwealth judicial officer who is the subject of a Commission's investigation. Subclause 20(2) confirms that it does not limit the application of the rules of natural justice in the context of a Commission's investigation. The required steps under subclause 20(2) are:

- A Commission must give the Commonwealth judicial officer particulars of the allegation (or allegations) being investigated and offer the Commonwealth judicial officer an opportunity to make an oral or written statement to the Commission. It is appropriate that specific and precise details of each allegation be given to the Commonwealth judicial officer who is the subject of an inquiry.
- A Commission must offer the Commonwealth judicial officer reasonable access to any documents or things received by, produced before, delivered to, or otherwise acquired by a Commission.
- A Commission must not draw inferences adverse to a Commonwealth judicial officer from the fact that a Commonwealth judicial officer does not attend or appear at a hearing of a Commission.
- Before a Commission gives a report under subclause 48(1) or (6) of this Bill, a Commission must give the Commonwealth judicial officer a draft of the report, provide the judicial officer with a reasonable opportunity to give comments to the Commission on the draft report, and consider any timely comments the judicial officer may make to the Commission on the draft report. This obligation requires a Commission to consider the comments of the judicial officer on its draft report, including any separate report it may propose to give, and enables a Commission to provide its report in circumstances including where a judicial officer may choose not to make comments.

## Division 2 – Investigations

### *Subdivision A – Guide to this Division*

#### **Clause 21 – Guide to this Division**

127. This clause inserts a guide to this Division of the Bill. The guide will assist readers to understand the purpose and content of the Division, and to more easily navigate through the Division to find relevant provisions. This Division outlines a Commission’s powers of investigation.

### *Subdivision B – Speed of investigations and openness of hearings*

#### **Clause 22 – Speed of investigations**

128. This clause requires a Commission conduct its investigation as quickly as proper consideration of the matters before the Commission permits. This provides flexibility for a Commission to properly investigate complex allegations while balancing the interest in quick resolution of a Commission’s investigation and reporting to the Parliament.

#### **Clause 23 – Openness of hearings**

129. Subclause 23(1) requires a Commission to hold its hearings in public while providing for certain circumstances where a Commission may direct that part or all of its hearings be heard in private for certain reasons outlined in paragraphs 23(1)(a)(b) and (c). Clause 24 gives power to a Commission to hold a hearing. Other elements of a Commission’s investigation are not required to be held in public.

130. Subclause 23(2) requires a Commission, in considering whether all or part of a hearing should be held in private, to take as the basis of its consideration the principle that it is desirable that proceedings should be held in public; but give due regard to any reasons given to the Commission why a hearing, or part of a hearing, should be held in private. This promotes transparent and accountable deliberations of a Commission.

131. The Bill does not limit the reasons why a Commission may direct that proceedings be conducted in private. However, reasons may include circumstances where highly sensitive information is to be presented, or circumstances in which an appearance by a person in a public hearing may prejudice their safety.

132. Subclause 23(3) requires a Commission to have regard to the effect of holding the hearing in public on the ability of the Commonwealth judicial officer to whom the investigation relates to perform his or her duties as such an officer; and the independence of, or public confidence in, the judiciary and the Commonwealth judicial officer who is the subject of an investigation.

133. A public hearing may carry a risk of giving public currency to unverified allegations to which no response can be made at once. A Commission will be required to consider whether there may be damage to the judicial officer concerned and the institution of which that judicial officer is a member.

134. These matters would be balanced by a Commission in individual cases.

### *Subdivision C – Powers of investigations*

#### **Clause 24 – Hearings**

135. This clause enables a Commission to conduct hearings as part of its investigation, and specifies requirements for a hearing.

136. Subclause 24(1) empowers a Commission to hold a hearing anywhere in Australia as the Commission determines. This allows flexibility for a Commission to hold hearings where it is most appropriate, depending on the location of a Commonwealth judicial officer who is the subject of an investigation. It may include the external Territories under clause 4 of this Bill. This subclause enables the Commission to have convenient access to witnesses, evidence, documents and other things.

137. Subclause 24(2) provides that the procedure at a hearing is as a Commission directs, subject only to explicit limitations in the Bill.

138. Subclause 24(3) requires the presiding member to preside at a hearing. A presiding member is appointed by force of subclause 12(3) of this Bill.

139. Subclause 24(4) enables the Commonwealth judicial officer who is the subject of an investigation of a Commission to attend and participate in the hearing, by making submissions, questioning witnesses or presenting evidence, and be represented by a lawyer at the hearing. This provides the judicial officer with an opportunity to respond to the allegation or allegations if desired. A Commonwealth judicial officer may choose not to attend and participate and may choose not to have legal representation.

140. Subclause 24(5) allows for questioning of witnesses if a Commission determines a matter is relevant to its investigation. Subclause 24(5)(a) to (d) prescribe certain persons who may question a witness.

141. The term ‘question’, as opposed to ‘examine’ or ‘cross-examine’ reflects the non-adversarial nature of proceedings and allows broader investigation into a matter without being limited to the rules of evidence (see clause 19 of this Bill).

142. Subclause 24(6) provides that a current or former Commonwealth judicial officer cannot be compelled to answer questions under subclause 24(5). This is appropriate to support independence of the judiciary under Chapter III of the Constitution (see General Outline of this Bill).

143. Subclause 24(7) only applies where a Commission has directed under clause 18 that part or all of its proceedings be conducted in private. Where such a direction has been made, subclause 24(7) prevents a person from being present at the hearing unless they are within a category specified in the subclause. Subclause 24(7) limits the people who may be present at the hearing to the following:

- a member of a Commission;
- counsel assisting a Commission;

- the Commonwealth judicial officer who is the subject of investigation by a Commission;
- a person authorised by a Commission to be present; or
- a lawyer representing a Commonwealth judicial officer or another person who is authorised by a Commission to be present at the hearing.

144. This allows all relevant parties, and their legal representatives, to be present. Clause 50 makes it an offence for a person to be present at a hearing held by a Commission otherwise than in accordance with subclause 24(7).

### **Clause 25 – Power to summon witnesses, take evidence and obtain documents or things**

145. This clause provides for several powers of investigation for a Commission, including to require witnesses to appear at a hearing, require production of documents or things, and take evidence. The clause exempts judicial officers from coercive powers of a Commission (see General Outline of this Bill).

146. Subclause 25(1) enables a member of a Commission to give notice to:

- require a person to appear before a Commission at hearing to give evidence and/or produce a document at a hearing;
- require a witness to produce a document or other thing to a member of staff of the Commission; or
- require any person to produce a document or other thing to a member of staff of the Commission.

147. Note 1 to subclause 25(1) refers to clause 54 as it relates to self-incrimination. Clause 54 provides that it is not an excuse to refrain from producing a document or thing as required by a notice under clause 25 or answering a relevant question at a hearing of a Commission, on grounds that it might tend to incriminate a person or expose the person to a penalty.

148. Note 2 to subclause 25(1) points to protections in clause 65 and 66 for those who are given a notice under this clause.

149. Subclause 25(2) sets out requirements for a notice. The note to the subclause clarifies that clause 26 sets out additional requirements. Requirements may also be prescribed by regulations.

150. It is an offence for a person to contravene a notice given under subclause 25(1) (see clauses 51 and 52).

151. Subclause 25(3) allows a Commission to take evidence at a hearing on oath or affirmation. Subclause 25(3)(a) enables a member of a Commission to require a person appearing as a witness at the hearing to give evidence to take an oath or make an affirmation in a form approved in writing by the presiding officer. Subclause 25(3)(b) enables a member

of a Commission, or a person authorised in writing by the presiding member, to administer an oath or affirmation to a person appearing as a witness at the hearing.

152. Subclause 25(4) prevents a person from giving evidence to a Commission by a statement that is not verified by oath or affirmation and does not leave discretion to the Commission. Clause 53 makes it an offence if a person who is required to appear before a Commission refuses to be sworn or make an affirmation.

153. Subclause 25(5) excludes current and former Commonwealth judicial officers from the application of subclauses 25(1), (3) and (4). The effect of this subclause is that a current or former judicial officer cannot be given notice requiring them to appear at a hearing and give evidence or produce documents or things, and are not required to give evidence. This is appropriate to support judicial independence under Chapter III of the Constitution (see General Outline of this Bill).

154. Subclause 25(6) is inserted to avoid doubt. It clarifies that a current or former Commonwealth judicial officer may elect to give evidence on oath or affirmation.

#### **Clause 26 – Additional requirements for notices**

155. This clause outlines requirements with which a member must comply when giving a notice requiring appearance or production of documents under clause 25.

156. Subclause 26(1) requires that a member be satisfied that it is reasonable in all the circumstances to give a notice under clause 25. This reflects appropriate limitations to a power that may lead to an offence where a person fails to comply (see clauses 51 and 52).

157. Subclause 26(2) provides that a time specified in a notice under clause 25 must be at least 14 days after the day on which the person receives a notice. A person will be aware of a notice before they are required to comply.

158. Subclause 26(3) sets out requirements of details to be included in the notice. A notice given under paragraph 25(1)(a) requiring a person to appear must state that a person giving evidence may have a representative present, and set out the effect of the following offence provisions in the Bill:

- clause 27, which provides for the arrest of a witness who fails to appear under a notice;
- clause 51, which makes it an offence for a witness failing to attend a hearing under notice; and
- clause 52, which makes it an offence for a witness to fail to produce documents or things under notice.

159. Subclause 26(4) requires a notice requiring a person to give evidence to set out as far as reasonably practicable the general nature of the matters in relation to which a person is to be questioned. This will apply unless the member giving the notice is satisfied that, in the particular circumstances, it would prejudice the effectiveness of the hearing to do so.

160. This would allow a person time to seek legal advice and gather relevant documentation or information relevant to a Commission's investigation.

161. The note to subclause 26(4) clarifies that a current or former Commonwealth judicial officer cannot be given a notice under clause 25. This is consistent with judicial independence under Chapter III of the Constitution (see General Outline of this Bill).

### **Clause 27 – Arrest of witness failing to appear**

162. Subclause 27(1) gives power to the presiding member to issue a warrant for a person's apprehension, where they have not complied with a notice requiring the person to appear at a hearing of a Commission as a witness given under clause 25. Under subclause 25(6), this will not apply to current or former Commonwealth judicial officers. This is appropriate to support judicial independence under Chapter III of the Constitution (see General Outline of this Bill).

163. Under subclause 27(2), the warrant authorises:

- the apprehension of the witness;
- the witness being brought before the Commission; and
- the detention of the witness in custody for that purpose until he or she is released by order of the presiding member.

164. Subclause 27(3) allows the execution of a warrant by a constable, subject to procedures for entering premises, including use of reasonable force and permissible times, provided in subclauses 27(4) and (5). Clause 7 defines the term 'constable'.

165. Subclause 27(6) defines the terms 'conveyance' and 'dwelling house' for the purposes of the section (see also definitions in Clause 7).

### **Clause 28 – Search warrants**

166. Clause 28(1) empowers a Commission, or authorised member of a Commission, to issue a search warrant where:

- a Commission has reasonable grounds for suspecting that there may be, within 24 hours, documents or things connected with the matter a Commission is investigating; and
- that if a notice were given for the documents or things, the documents or things might be concealed, lost, mutilated or destroyed.

167. It is appropriate to confer investigative and administrative functions associated with a Commission on a Commission, rather than serving judges, given the special nature of its role investigating allegations about judicial misbehaviour or incapacity. A Commission's role is limited to investigating an allegation of misbehaviour or incapacity against a Commonwealth judicial officer specified through a resolution of the Parliament. This limits the scope of the issue and execution of search warrants by a Commission.

168. Taking into account that it is a Commission issuing search warrants, special procedures and safeguards apply. Clause 80 requires a Commission to keep a written record of the reasons for issuing a search warrant. This promotes transparency and accountability in

the process of issuing search warrants. These reasons will become part of the records of a Commission. Under clause 82 of the Bill, records of a Commission will be given to a House of the Parliament where no longer needed.

169. A search warrant issued under subclause 28(1) must state the purpose for which it is issued (including a reference to the matter the Commission is investigating), the type of entry that is authorised and the date on which the warrant ceases to have effect. Under clause 34, details of a search warrant will need to be given to an occupier.

170. Under subclause 28(2), a search warrant will authorise a named constable to enter the premises and search and seize documents or things of the relevant kind and deliver them to a Commission. 'Constable' is defined in clause 6 of this Bill.

171. Under subclause 28(3), a search warrant must include a description of the kind of documents or things authorised to be seized.

172. Subclause 28(4) authorises a constable to seize additional documents or things found during the course of execution of a search warrant. This can only occur if the constable believes on reasonable grounds that it is connected with the matter a Commission is investigating and should be seized to prevent concealment, destruction or mutilation.

173. Subclause 28(5) prevents the premises of a current or former Commonwealth judicial officer from being the subject of a search warrant. This is appropriate to support judicial independence under Chapter III of the Constitution.

### **Clause 29 – Operating electronic equipment**

174. This clause enables a constable in execution of a search warrant under clause 28 to exercise certain powers in relation to the operation and seizure of electronic equipment.

175. Subclause 29(1) enables a constable to operate electronic equipment on the premises. As electronic equipment would be a significant source of information for a Commission, this provides for effective powers to obtain such information. A constable will need to have reasonable grounds for suspecting the equipment contains matter connected to an investigation by a Commission.

176. Subclause 29(2) authorises a constable executing a search warrant to:

- seize the electronic equipment if the constable has reasonable grounds for suspecting that the equipment is connected with the matter a Commission is investigating;
- operate electronic equipment on the premises to put the material in documentary form; and
- operate electronic equipment on the premises to transfer the material to a disk, tape or other storage device and remove it from the premises.

177. Subclause 29(1) must be exercised in accordance with the requirements set out in subclause 29(3) and (4).

178. Subclause 29(3) provides that the constable must only operate electronic equipment if a constable believes on reasonable grounds that the operation of the equipment can be carried out without damage. ‘Damage’ is defined in clause 7 of this Bill.

179. Subclause 29(4) further requires a constable to be satisfied it is not possible to transfer the material on the electronic devices or that possession of certain equipment could constitute an offence against a law of the Commonwealth.

180. Special provisions in relation to electronic equipment reflect that documents or things relevant to a Commission’s investigation may be kept in electronic form. This clause is supported by clause 30, which will allow for expert assistance to deal with the electronic equipment, and clause 40, which will allow for compensation for damage to electronic equipment.

181. This clause will not apply to the premises of former or current Commonwealth judicial officers (see clause 28(5)). See clause 7 for the definition of a ‘constable’.

### **Clause 30 – Expert assistance to operate electronic equipment**

182. This clause allows for expert assistance to operate electronic equipment in connection with clauses 28 and 29.

183. Subclause 30(1) outlines the circumstances where this clause applies. It applies where a constable executing a search warrant in relation to premises enters such premises to search for material connected with the matter a Commission is investigating. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

184. Subclause 30(2) allows the constable to secure any electronic equipment that is on the premises if the constable believes on reasonable grounds that:

- there is material connected with the matter a Commission is investigating on the premises;
- the material may be accessible by operating the electronic equipment;
- expert assistance is required to operate the equipment; and
- the material may be destroyed, altered or otherwise interfered with if the constable does not take action under this subclause.

185. Securing equipment under this subclause may include locking it up, placing a guard or other means.

186. Subclause 30(3) requires the constable to give notice to the occupier of the premises, or another person who apparently represents the occupier of:

- the constable’s intention to secure the equipment; and
- the fact that the equipment may be secured for up to 24 hours.



187. Subclause 30(4) allows electronic equipment to be secured until the earlier of the following happens:

- the 24-hour period ends;
- the equipment has been operated by the expert.

188. A Commission has the power under clause 77 of this Bill to engage consultants, who may provide expert assistance in these matters.

189. Where electronic equipment is secured and damage or corruption of the equipment occurs, clause 40 enables the owner or user to seek compensation from the Commonwealth.

190. Subclause 30(5) allows a constable to apply to a Commission, or a member authorised in writing by the Commission, for an extension of the 24-hour period if the constable believes on reasonable grounds that the equipment needs to be secured for more than that period.

191. Before making the application, subclause 30(6) requires a constable to give notice of their intention to apply to the occupier of the premises. This enables the occupier to be heard in relation to that application to a Commission if they choose.

192. Subclause 30(7) provides that a 24-hour period may be extended more than once.

193. 'Constable' is defined under clause 7 of this Bill.

194. A similar process for extensions applies under clause 31.

### **Clause 31 – Securing other things**

195. Subclause 31(1) allows a constable who enters premises under a search warrant to secure a thing for a period not exceeding 24 hours if:

- the thing is found in or on the premises in the course of searching for documents or things of the relevant kind under the warrant;
- the constable believes on reasonable grounds that the thing is relevant to an indictable offence, evidential material or tainted property; and
- the constable believes on reasonable grounds that it is necessary to secure the thing in order to prevent it from being concealed, lost, mutilated or destroyed before a warrant to seize the thing is obtained.

196. As a Commission's role is limited to investigating specified allegations of misbehaviour or incapacity about a judicial officer, this clause does not allow seizure of such material which is not related to a Commission's investigation. This clause will enable a constable to secure an item while a warrant under the *Crimes Act 1914* is sought where it may otherwise be concealed, lost or destroyed.

197. Subclause 31(2) allows a constable to do whatever is necessary to secure the thing, including locking it up, placing a guard or securing the thing by any other means.

198. Subclause 31(3) allows a constable to apply to a Commission, or a member authorised in writing by the Commission, for an extension of the 24-hour period if the constable believes on reasonable grounds that a thing needs to be secured in excess of the 24-hour period prescribed by subclause 31(1).

199. Subclause 31(3) requires a constable to give notice of their intention to apply for an extension of the period to the occupier of the premises, so that they may be heard in relation to that application.

200. Subclause 31(4) provides that a 24-hour period may be extended more than once.

201. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

202. 'Constable' is defined under clause 7 of this Bill.

203. A similar process for extensions applies under clause 30.

### **Clause 32 – Occupier entitled to observe execution of search warrant**

204. Subclause 32(1) entitles an occupier of the premises to which a search warrant relates to observe the execution of the warrant if the occupier is present at the time.

205. Subclause 32(2) provides that the right to observe the execution of the warrant will cease if the occupier impedes the execution.

206. Subclause 32(3) qualifies the right to observe execution of the search warrant so as not to prevent the constable executing the warrant to conduct searches in two or more areas of the premises at the same time. This balances the occupier's right to observe execution of a search warrant with enabling the search warrant to be executed as efficiently as possible.

207. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

208. 'Constable' is defined under clause 7 of this Bill.

### **Clause 33 – Occupier to provide constable with facilities and assistance**

209. This clause requires the occupier of premises to which a search warrant relates to provide all reasonable facilities and assistance for the effective exercise by the constable of his or her powers. The powers of a constable in execution of a search are specified under clause 28, 29, 30 and 31. Failure to comply with this clause will amount to an offence under clause 62.

210. The term 'reasonable facilities and assistance' is used broadly so it can apply in individual circumstances to which the search warrant relates. It would include access to all areas of the premises necessary to execute the search warrant, information necessary for the use of electronic equipment under clause 29 and 30 (for example, provision of passwords and access codes), and access to any additional facilities as required.

211. This obligation on the occupier is required to be included in the content of the search warrant (subclause 28(3) of this Bill).

212. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

213. 'Constable' is defined under clause 7 of this Bill.

#### **Clause 34 – Details of search warrant to be given to occupier, etc.**

214. This clause requires a constable executing a warrant to make available a copy of the search warrant and identify themselves to an occupier of the premises.

215. Subclause 34(b) provides that where a search warrant is executed at a vessel, aircraft or vehicle, the constable must make available a copy of the search warrant to the person/apparent person in control of a vessel, aircraft or vehicle who is present at the time.

216. This clause enables an occupier to obtain information about the authority, purpose and effect of the search warrant.

217. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

218. 'Constable' is defined under clause 7 of this Bill.

#### **Clause 35 – Completing execution of a search warrant after temporary cessation**

219. This clause applies where a constable executing a search warrant has temporarily ceased the execution of the warrant and left the premises.

220. Subclause 35(2) allows the constable to complete the execution of the warrant if it is still in force, provided that the constable is not absent for more than an hour, or not for more than 12 hours if there is an emergency situation. Subclause 35(2)(b)(iii) enables completion of the warrant where the constable has been absent where an occupier gives written consent to an extension of time.

221. Subclause 35(3) allows a constable to apply to the Commission, or a member authorised in writing by the Commission, for an extension of time of the 12 hour period in emergency situations where a constable believes on reasonable grounds that the constable will not be able to return to the premises. Under subclause 35(4) a constable must, if it is practicable to do so before making the application, give notice to the occupier of the premises of the constable's intention to apply for an extension.

222. Subclause 35(4) provides that a Commission, or a member authorised in writing by the Commission, may grant the application if satisfied that there are exceptional circumstances justifying the extension, and the extension would not result in the period ending after the search warrant ceases to be in force. This enables flexibility where unexpected circumstances may arise.

223. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

224. 'Constable' is defined under clause 7 of this Bill.

### **Clause 36 – Completing execution of search warrant stopped by court order**

225. This clause enables a constable to complete the execution of a search warrant that has been stopped by an order of the court where the order is later revoked or reversed on appeal.

226. Clause 36(b) provides the warrant can only be completed if it is still in force when the court order is revoked or reversed. If the warrant has lapsed when the court order is revoked or reversed, a member of a Commission would need to issue a new warrant under clause 28.

227. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

228. 'Constable' is defined under clause 7 of this Bill.

### **Clause 37 – Copies of seized things to be provided**

229. This clause requires a constable executing a search warrant to provide copies of materials seized under the warrant upon the request of an occupier.

230. Subclause 37(1) will apply where a search warrant is being executed in relation to the premises, and this search warrant has resulted in the seizure of items which could be readily copied (including, for example, a document, film, computer file, photograph, a storage device or other materials of this nature).

231. Subclause 37(2) allows an occupier to request the constable executing the warrant to give a copy of the thing or the information to the occupier or other person.

232. Subclause 37(3) requires the constable to comply with the request as soon as practicable after the seizure of the items.

233. Subclause 37(4) qualifies subclause 37(1) and provides that the constable will not be required to comply with the request if possession of the thing or information by the occupier or other person could constitute an offence against a law of the Commonwealth.

234. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

235. 'Constable' is defined under clause 7 of this Bill.

### **Clause 38 – Receipts for seized documents or things**

236. This clause requires a constable executing a search warrant to provide a receipt for any document or thing that is seized in the search.

237. Subclause 38(2) allows for a receipt to cover two or more seized documents or things.

238. This clause has the effect that a constable executing a search warrant will need to maintain an accurate record of all items seized from the occupier's premises.

239. As search warrants cannot be issued and executed in relation to premises occupied by current or former Commonwealth judicial officers under subclause 28(5), this clause will also not apply in relation to current or former Commonwealth judicial officers.

240. 'Constable' is defined under clause 7 of this Bill.

### **Clause 39 – Return of seized things**

241. This clause empowers a Commission to retain any document or thing seized under a search warrant if it is reasonably necessary for the Commission's investigation.

242. Subclause 39(2) requires a Commission to return the document or thing as soon as it is not reasonably necessary for the purposes of the investigation or 60 days after the item was seized – whichever is earlier.

243. This allows a Commission reasonable access to all available materials to investigate and consider the allegations, where it is not longer than 60 days.

### **Clause 40 – Compensation for damage to electronic equipment**

244. This clause provides for compensation for damage caused to electronic equipment, where it has been seized and operated in the course of the execution of a search warrant. Clause 29 and 30 allow the operation of electronic equipment by a constable or expert in the execution of a search warrant.

245. Subclause 40(1) requires the Commonwealth to pay reasonable compensation for damage or corruption to electronic equipment, where it has occurred because of insufficient care in selecting the person to operate the equipment (where expert assistance is provided under clause 30) or insufficient care on the part of the operator. Clause 24 enables a constable to operate electronic equipment.

246. Subclause 40(2) enables the Commonwealth and the owner of the equipment or user of the data to agree on an amount for reasonable compensation.

247. Subclause 40(3) provides that, if no agreement can be reached about the amount, then the owner or user may institute proceedings in the Federal Court of Australia or another court of competent jurisdiction for determination of this issue.

248. This mechanism is similar to other search warrant schemes, and will be a separate process to a Commission's investigation.

### **Clause 41 – Powers of Commission in relation to documents or things**

249. This clause gives power to a Commission, member or a person authorised by the presiding member to be able to inspect, retain or copy documents or things produced before or delivered to the Commission.

250. Similarly to clause 39, subclause 41(2) provides that, if a document or thing retained by the Commission ceases to be reasonably necessary for its investigation, a Commission must return the document or thing on request of a person entitled to it.

251. This clause allows a Commission appropriate access to all available materials to effectively investigate and consider the allegations before it, and balances this access with any rights of an owner/occupier in respect of seized documents or things.

252. Subclause 41(3) expressly provides that subclause 41(2) does not limit the operation of subclause 39(2). Subclause 39(2) requires a Commission to return seized items within a specified time no longer than 60 days.

#### **Clause 42 – Disposal of things**

253. This clause allows the presiding member of a Commission to dispose of the document or thing in an appropriate manner, where a member of staff of a Commission has taken all reasonable steps to return the document or thing to a person and that person is either unable to be located, or refuses possession.

254. This requires that appropriate measures are taken to return property to its owner and empowers a Commission to dispose of the item where an item cannot be returned.

#### **Clause 43 – Compensation for acquisition of property**

255. Subclause 43(1) creates a liability on the Commonwealth to pay a reasonable amount of compensation where a Commission has disposed of a document or thing under clause 36, and the disposal of this document or thing results in an acquisition of property from a person otherwise than on just terms.

256. The Commonwealth and the owner of the equipment or user of the data may agree upon an amount for reasonable compensation under subclause 43(2). If agreement cannot be reached about the amount of compensation, subclause 43(2) provides that the owner or user may institute proceedings in the Federal Court of Australia or another court of competent jurisdiction for determination of this issue.

257. ‘Acquisition of property’ and ‘just terms’ are defined to have the same meaning as in paragraph 51(xxxi) of the Constitution.

258. This mechanism will be a separate process to a Commission’s investigation.

#### **Clause 44 – Commission may direct that certain information not be published**

259. This clause gives discretion to a Commission to make directions that certain matters are not to be published. The material which may be subject to non-publication directions are:

- evidence given before a Commission;
- the contents of a document, or a description or a thing, produced before or delivered to a Commission or seized under a search warrant;

- any information that might enable a person who has given evidence before a Commission to be identified; or
- the fact that any person has given or may be about to give evidence at a hearing of a Commission.

260. Subclause 44(2) requires a Commission to make a non-publication direction if not doing so might prejudice the safety of a person or the fair trial of a person who has been or may be charged with an offence against an Australian law. An Australian law is defined in clause 7 of this Bill to include Commonwealth, State or Territory laws.

261. Clause 23 also enables a Commission to direct that part or all of a hearing be held in private, although hearings will ordinarily be in public.

262. This clause, together with clause 23 of this Bill, allows flexibility for a Commission to balance privacy requirements with other interests in a Commission's proceedings.

263. Under subclause 44(3), a direction of a Commission will cease to apply where a record is later made available for public access under subsection 31(5) of the *Archives Act 1983*, as it applies because of a modification prescribed under subclause 9.6 of the Schedule to the *Archives (Records of Parliament) Regulations 1995*. These modifications apply because clause 82 of this Bill provides that records of a Commission will be Class A Parliamentary records.

264. Clause 63 of the Bill provides that it is an offence for a person to publish materials subject to a non-publication order. If public access is provided under subclause 44(3), this offence will not apply to those who provided public access.

#### *Subdivision D – Costs and expenses of Commonwealth judicial officer and witnesses*

##### **Clause 45 – Costs of legal representation for Commonwealth judicial officer**

265. This clause entitles a Commonwealth judicial officer who is the subject of a Commission's investigation to the reasonable costs of legal representation. This is a liability for the Commonwealth.

##### **Clause 46 – Reimbursement of expenses of witnesses**

266. This clause entitles a witness who is required to appear, or is appearing at a hearing of a Commission (other than the Commonwealth judicial officer who is the subject of a Commission's investigation) to be paid for certain expenses of their attendance. This is a liability for the Commonwealth.

267. Subclause 46(1)(a) and (b) prescribes that the amount to which a witness will be entitled will be either calculated in accordance with the regulations, or, where there are no regulations and a Commission has determined an amount in writing in relation to a particular witness, the amount determined by the Commission.

268. These costs may include travel costs for a witness appearing at a hearing.

269. Subclause 46(2) excludes the Commonwealth judicial officer who is the subject of a Commission's investigation from accessing the entitlement of reimbursement of witness expenses. Clause 45 provides for a separate entitlement to reasonable costs of legal representation for the Commonwealth judicial officer who is the subject of a Commission's investigation.

270. Subclause 46(3) provides that a determination made under paragraph 46(1)(b) is not a legislative instrument. This provision is to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### Division 3 – Report

#### **Clause 47 – Guide to this Division**

271. This clause inserts a guide to this Division of the Bill. The guide will assist readers to understand the purpose and content of the Division, and to more easily navigate through the Division to find relevant provisions. This Division relates to the giving of a Commission's report for presentation to the Parliament.

#### **Clause 48 – Report**

272. Subclause 48(1) requires a Commission to, as soon as practicable following completion of an investigation, give a report to the Parliamentary presiding officers for presentation to the Parliament. Each Parliamentary presiding officer would present the report in their respective Houses of Parliament in accordance with the rules or orders of each House.

273. Subclause 48(2) sets out procedural requirements in the event that the Houses of Parliament have dissolved when the Commission finalises its report.

274. Subclause 48(3) sets out requirements for the content of a Commission's report to ensure that all relevant material is available for the Parliament to consider. The report must:

- describe a Commission's investigation;
- include a full transcript of a Commission's hearings (subject to subclauses (4) and (5));
- state a Commission's opinion of whether or not there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity investigated by a Commission is proved;
- include a record of all evidence before a Commission as it thinks may be relevant for the Houses of Parliament to consider in determining whether the allegation is proved; and
- if the members are not unanimous – state the opinion of each member of a Commission of whether or not there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity investigated by a Commission is proved.



275. A Commission may also choose to include further information in its report if it considers it appropriate. This may include documents or other things relevant to the Commission's investigation.

276. Subclause 48(4) requires a Commission, if it holds all or part of a hearing in private as directed under clause 23, to determine whether any or all evidence given during that private hearing is included under clause 48(3)(b) in the full transcript of a Commission's proceedings.

277. If evidence is personal information within the meaning of the *Privacy Act 1988*, a Commission must, under subclause 48(5), obtain the consent of the person to whom the information relates to include the evidence in the full transcript.

278. Subclause (6) enables a Commission to give a separate report on sensitive matters to the Parliamentary presiding officers in certain circumstances. A Commission will have the power to include material in a separate report if it believes that if findings or conclusions or any evidence before a Commission were to be laid before the Houses of the Parliament, the following would apply:

- a person who has been or may be charged with an offence against a law (whether written or unwritten) of the Commonwealth, a State or a Territory may not receive a fair trial for the offence;
- an investigation of a breach or possible breach, of a law (whether written or unwritten) of the Commonwealth, a State or a Territory may be prejudiced;
- the existence or identity of a confidential source of information in relation to the enforcement or administration of an Australian law (whether written or unwritten) of the Commonwealth, a State or Territory:
  - i. may be disclosed; or
  - ii. a person may be enabled to ascertain the existence or identity of a confidential source of information in relation to the enforcement or administration of an Australian law;
- there may be prejudice to the safety of a person; or
- those findings or conclusions, or that evidence, would be scandalous or highly personal.

279. Australian law is defined in clause 6 of this Bill to include a Commonwealth, State or Territory law.

280. This separate report would include findings or conclusions or any evidence that a Commission believes should be included in such a separate report on the basis of the above consideration. The separate report must be accompanied by a written statement of a Commission's belief.

281. Subclause 48(6) allows sensitive matters considered by a Commission to be protected in an appropriate manner, while enabling a Commission to provide an informed and comprehensive report to the Parliament.

282. Subclause 48(7) applies where the Parliamentary presiding officers are given a separate report under subclause 48(6). The presiding officers must not cause a copy to be laid before either House of the Parliament. The presiding officers must make it available for inspection by Senators, Members of the House of Representatives and the person in relation to whom the allegation was investigated, and cannot produce or disclose the report to any other person.

283. Subclause 48(8) provides that, except where it is necessary to do so for the purposes of giving effect to this Act, a person is not to be required:

- to produce, or disclose, a separate report given under subsection 48(6) to a court or tribunal; or
- to produce, or disclose, a separate report given under subsection 48(6) under any other Australian law.

284. Subclauses 48(6) to (8) have the combined effect of retaining appropriate ongoing protection for certain findings, conclusions or evidentiary matter before a Commission, in order to ensure the integrity of a Commission's investigation.

#### Division 4 – Offences relating to proceedings

##### **Clause 49 – Guide to this Division**

285. This clause inserts a guide to this Division of the Bill. The guide will assist readers to understand the purpose and content of the Division, and to more easily navigate through the Division to find relevant provisions. This Division contains offences relating to a Commission's investigation.

286. The offences prescribed in this Division are in addition to any relevant offences in the *Crimes Act 1914*.

##### **Clause 50 – Unauthorised presence at hearing**

287. This clause establishes an offence where a person is present at a hearing of a Commission in contravention of subclause 24(7). Subclause 24(7) gives a Commission power to direct that only certain persons may attend a private hearing before a Commission.

288. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

##### **Clause 51 – Failure of witness to appear**

289. This clause establishes an offence where a person has been required by a notice given under paragraph 25(1)(a) to appear at a hearing of a Commission, and that person fails to appear as required by the notice or attend from day to day.

290. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

291. Subclause 51(2) establishes a defence where a person has a ‘reasonable excuse’. ‘Reasonable excuse’ may include an emergency situation or unavoidable delay.

292. The note to subclause 51(2) confirms that a person seeking to rely on a defence of ‘reasonable excuse’ will bear the evidential burden in proving to a Commission the existence of an excuse and that it was reasonable in the circumstances. It is appropriate that the defendant bears the evidential burden for these matters, which are within the defendant’s knowledge. Reversal of the onus of proof on the defendant is consistent with the application of subsection 13.3(3) of the *Criminal Code*.

293. Subclause 51(3) establishes a defence to the application of subclause 51(1)(b)(ii) where the person has been excused or released from further attendance by a Commission. Reversal of the onus of proof on the defendant is consistent with the application of subsection 13.3(3) of the *Criminal Code*.

### **Clause 52 – Failure of a witness to produce document or other thing**

294. Subclause 52(1) establishes an offence where a person is required to produce a document or thing at a hearing of a Commission under a notice given under paragraph 25(1)(a), and the person appears at the hearing but fails to produce the document or thing as required.

295. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

296. Subclause 52(2) establishes an offence where a person has been given a notice to produce a document or other thing under paragraph 25(1)(c), and that person refuses, or fails, to produce a document or other thing that the person is required by the notice to produce.

297. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

298. Subclause 52(3) establishes a defence to the offence under subclauses 52(1) and (2) where a person has a ‘reasonable excuse’ or if the document or other thing was not relevant to the matter the Commission was investigating. ‘Reasonable excuse’ may include an emergency situation or unavoidable delay.

299. Note 1 to subclause 52(3) confirms that a person seeking to rely on a defence of ‘reasonable excuse’ will bear the evidential burden in proving to a Commission the existence of an excuse and that it was reasonable in the circumstances. It is appropriate that the defendant bears the evidential burden for these matters, which are within the defendant’s knowledge. Reversal of the onus of proof on the defendant is consistent with the application of subsection 13.3(3) of the *Criminal Code*.

300. Note 2 to subclause 52(3) refers to clause 54, which provides that a person will not be excused from producing a document or thing required by notice on the ground that its production might tend to incriminate the person or expose the person to a penalty.

### **Clause 53 – Refusal to be sworn or to give evidence**

301. This clause establishes an offence where a person who is required to appear, or is appearing, before a Commission as a witness refuses to:

- be sworn or to make an affidavit; or
- refuses to answer a question that is asked at a hearing and is relevant to a Commission’s investigation.

302. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

303. Subclause 53(2) excludes current and former Commonwealth judicial officers from the application of the clause. As current or former Commonwealth judicial officers cannot be required to give evidence under subclause 25(6), this clause will also not apply in relation to current or former Commonwealth judicial officers.

304. The note to subclause 53(2) clarifies that a person seeking to rely on this provision will bear the evidential burden in proving to a Commission that the person is a Commonwealth judicial officer or a former Commonwealth judicial officer. It is appropriate that the defendant bears the evidential burden for these matters, which are within the defendant’s knowledge. Reversal of the onus of proof on the defendant is consistent with the application of subsection 13.3(3) of the *Criminal Code*.

### **Clause 54 – Self-incrimination**

305. This clause provides that a person is not excused from:

- producing a document or thing as required by a notice given under clause 25; or
- answering a question at a hearing of a Commission that is relevant to a Commission’s investigation;

on the ground that the production of the document or thing, or answer to the question, might tend to incriminate the person or expose the person to a penalty.

306. However, subclause 54(2) provides that, in the case of an individual, none of the following:

- the document or thing produced or the answer given;
- producing the document or thing or answering the question;
- any information, document or thing or answering the question;
- any information, document or thing obtained as a direct or indirect consequence of producing the document or thing or the answering of the question;

is admissible in evidence against the individual in civil or criminal proceedings in any court or tribunal of the Commonwealth, a State or a Territory other than proceedings for:

- an offence against this Act, or Division 3 of Part III of the *Crimes Act 1914*;

- an offence against any of the following provisions, being an offence that relates to this Act or Division 3 of Part III of the *Crimes Act 1914*:
  - section 6 of the *Crimes Act 1914* (accessory after the fact);
  - section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of the *Criminal Code*;
  - section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents); or
  - section 149.1 of the *Criminal Code* (obstruction of Commonwealth public officials).

307. The Parliament's consideration under paragraph 72(ii) of the Constitution supports public confidence in the independence and impartiality of the federal judiciary. The treatment of self-incrimination is appropriate to facilitate the ability of a Commission to obtain relevant evidence for the investigation, so that they may provide a comprehensive report and assist the Parliament in its consideration of removal of a judge under paragraph 72(ii) of the Constitution.

308. This clause will provide for use and derivative use protections where self-incriminatory information is provided to a Commission. These protections will restrict the use of self-incriminatory information in later court proceedings or to gather evidence against a person who has disclosed self-incriminatory information. These protections are consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences*.

#### **Clause 55 – Acts or omissions on different days constitute separate offences**

309. This clause provides that, if any person commits an offence by virtue of subclauses 50, 51, 52 or 53, they will be liable for separate offences if each of the same acts or omissions is repeated on another day.

#### **Clause 56 – False or misleading evidence**

310. This clause establishes an offence where a person intentionally gives false or misleading evidence in a relation to a matter material to the Commission's investigation.

311. The penalty for the offence is imprisonment for 2 years. This is consistent with similar offences under other Commonwealth legislation.

#### **Clause 57 – Injury to witness**

312. This clause establishes that it is an offence if a person uses, causes or inflicts any violence, punishment, damage, loss or disadvantage to another person for or on account of that person having produced a document or thing under a notice given under clause 25.

313. The penalty for the offence is imprisonment for 12 months. This is consistent with similar offences under other Commonwealth legislation.

### **Clause 58 – Preventing witnesses from producing document**

314. This clause establishes an offence where one person prevents another person (who is required by notice given under clause 25 to produce a document or other thing) from producing the document or thing as required.

315. The penalty for the offence is imprisonment for 12 months. This is consistent with similar offences under other Commonwealth legislation.

### **Clause 59 – Bribery of witness**

316. This clause establishes that it is an offence for a person to ask for, receive or obtain any property or benefit on the agreement or understanding that a document or thing required to be produced under clause 25, will not be produced.

317. Subclause 59(2) establishes that it is an offence if a person attempts, by any means, to induce another person who is required to produce a document or thing under clause 25 to not produce the document or thing.

318. The penalty for the offence is imprisonment for 5 years. This is consistent with similar offences under other Commonwealth legislation.

### **Clause 60 – Fraud on witness**

319. Subclause 60(1) establishes an offence where a person practices fraud or deceit on another person with the intention that the second person will not produce a document or thing as required under clause 25. Fault elements under section 5.6 of the *Criminal Code Act 1995* will apply to this offence.

320. The penalty for the offence is imprisonment for 2 years. This is consistent with similar offences under other Commonwealth legislation.

321. Subclause 60(2) establishes that it is an offence if a person makes or exhibits any statement, representation, token, or writing to another person with the intention that the second person will not produce the document or thing as required under clause 25.

322. The penalty for the offence is imprisonment for 2 years. This is consistent with similar offences under other Commonwealth legislation.

### **Clause 61 – Obstruction of a Commission**

323. This clause establishes that it is an offence if a person:

- insults or disturbs a Commission;
- interrupts the hearings of a Commission;
- uses an insulting language towards a Commission;
- by writing or speech uses words false and defamatory of a Commission; or

- engages in conduct that is intended, or likely to, amount to an improper interference with the free exercise by a Commission of its authority or functions, or the free performance by a member of the member's duties as a member.

324. Subsection 5.6(1) of the *Criminal Code Act 1995* will apply to an offence of insulting or disturbing so that intention will need to be proved in relation to conduct.

325. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

#### **Clause 62 – Failure to provide facilities and assistance**

326. Clause 62 establishes that it is an offence if a person is subject to clause 33, and the person fails to comply with that section.

327. Clause 33 requires the occupier of premises to provide all reasonable facilities and assistance for the effective execution of the search warrant by the constable.

328. The penalty for the offence is 30 penalty units. This is consistent with similar offences under other Commonwealth legislation. Section 4AA of the *Crimes Act 1914* defines 'penalty unit' to mean \$110.

#### **Clause 63 – Unauthorised publication of material**

329. This clause establishes that it is an offence where a person publishes material which is subject to a direction under subclause 44(1), unless that direction has ceased in operation pursuant to subclause 44(3).

330. The penalty for the offence is imprisonment for 6 months. This is consistent with similar offences under other Commonwealth legislation.

331. Subclause 44(1) of this Bill gives a Commission discretion to direct that materials relating to a Commission's inquiry not be published. Subclause 44(3) provides that a direction of a Commission will cease to apply where a record is later made available for public access under subsection 31(5) of the *Archives Act 1983*, which applies because of modifications prescribed by subclause 9.6 of the Schedule to the *Archives (Records of Parliament) Regulations 1995*.

332. The effect of this clause is to enable enforcement of non-publication directions made by a Commission.

333. An offence under clause 63 has effect in relation to the availability of protections against defamation action for a Commission under the *Parliamentary Privileges Act 1987*. Subclause 67(3) of the Bill deems that clause 63 applies in the same manner as section 13 of the *Parliamentary Privileges Act 1987* for the purposes of applying subsection 10(1) of the *Parliamentary Privileges Act 1987* to a Commission. Section 10 of the *Parliamentary Privileges Act 1987* provides a defence to an action for defamation in relation to reports of proceedings at a meeting of a House or a committee except where matter has been published in contravention of section 13. Where a person has committed an offence under clause 63, protection in relation to defamation action will not apply.

## Division 5 – Protection

### **Clause 64 – Guide to this Division**

334. This clause inserts a guide to this Division of the Bill. The guide will assist readers to understand the purpose and content of the Division, and to more easily navigate through the Division to find relevant provisions. The Division relates to protections provided to those connected with a Commission.

### **Clause 65 – Protection of members, witnesses and lawyers**

335. This clause gives those connected with a Commission the same protections and immunities as equivalents connected with a committee of a House of the Parliament. This enables the same protection of members of, and witnesses and lawyers appearing before, a Commission as a committee of the Parliament. This would include relevant protections afforded in relation to a committee of the Parliament under the *Parliamentary Privileges Act 1987*. This is consistent with a Commission's role as a Parliamentary body.

336. Subclause 65(1) gives a member of a Commission, in the performance of their functions or exercise of powers, the same protection and immunity that a member of a House of Parliament has performing functions or exercising powers as part of a committee of a House of Parliament.

337. Subclause 65(2) gives a person who is required to appear before a Commission or produce a document or other thing under a notice given under clause 25, or is appearing as a witness before a Commission the same protection as a witness appearing before a committee of a House of Parliament, subject to other provisions in the Act. Clause 66 gives additional protections for those who are required to appear or produce documents or things at a Commission's hearing.

338. Subclause 65(3) gives Counsel assisting a Commission or a lawyer representing a person at a hearing, the same protection and immunity as a witness before a committee of a House of Parliament. A Commission may appoint a lawyer to assist the Commission as counsel under clause 78.

### **Clause 66 – Protection in relation to contravention of prohibitions**

339. This clause provides specific protections for a person appearing or producing documents or things from liability for contravention of prohibitions under any other Australian law in doing so. 'Australian law' is defined in clause 6 of this Bill to include laws of the Commonwealth, a State or a Territory.

340. Subclause 66(1) protects a person who is required to appear, or is appearing, before a Commission and answer questions at a hearing. In these circumstances, the person will not be liable for a contravention of a prohibition by or under another Australian law on the answer. This will provide protection where a person provides an answer before a Commission containing information that is precluded from being disclosed under another law (for example, section 70 of the *Crimes Act 1914*). It will not apply where a person gives evidence about a previous criminal offence (clause 54 would be relevant in these circumstances).



341. Subclause 66(2) protects a person who is required to produce, or who produces, to a Commission a document, or other thing. In these circumstances, the person will not be liable for a contravention of a prohibition by or under another Australian law on production of the document or thing. This will provide protection where a person produces a document to a Commission that is precluded from being disclosed under another law (for example, section 70 of the *Crimes Act 1914*). It will not apply where a person gives evidence about a previous criminal offence (clause 54 would be relevant in these circumstances).

#### **Clause 67 – Hearings and evidence of a Commission**

342. Subclause 67(1) deems the proceedings of a Commission, and evidence taken before a Commission, to be taken to be the same as proceedings and evidence taken before a Parliamentary committee for the purposes of section 10 and subsections 16(3),(4) and (6) of the *Parliamentary Privileges Act 1987*. This includes the formulation, making or publication of a report. This has the effect of applying those provisions of the *Parliamentary Privileges Act 1987* to a Commission.

343. As a Commission has its own legal status, these provisions are necessary to apply important aspects of the *Parliamentary Privileges Act 1987* to a Commission.

344. Application of subsections 16(3), (4) and (6) of the *Parliamentary Privileges Act 1987* will prevent the questioning or impeaching of proceedings of a Commission in proceedings of a Commission.

345. Section 10 of the *Parliamentary Privileges Act 1987* provides a defence to an action for defamation in relation to reports of proceedings at a meeting of a House or a committee except where matter has been published in contravention of section 13.

346. Subclause 67(2) of this Bill deems that clause 63 applies in the same manner as section 13 of the *Parliamentary Privileges Act 1987* for the purposes of applying subsection 10(2) of the *Parliamentary Privileges Act 1987* to a Commission. This will have the effect that, where a person has committed an offence under clause 63 of this Bill, protection in relation to defamation action will not apply.

#### **Part 4 – Terms and conditions of membership**

##### **Clause 68 – Guide to this Part**

347. This clause inserts a guide to this Part of the Bill. The guide will assist readers to understand the purpose and content of the Part, and to more easily navigate through the Part to find relevant provisions. This Part sets out terms and conditions of a member, including remuneration, and rules relating to resignation, termination or cessation of appointment.

##### **Clause 69 – Terms and conditions generally**

348. This clause enables the Parliamentary presiding officers to jointly determine terms and conditions (if any) of members that are not covered in this Bill. A determination would be in writing. Parliamentary presiding officer is defined in clause 7 of this Bill to mean the Speaker of the House of Representatives or the President of the Senate.

## **Clause 70 – Other employment**

349. Subclause 70(1) prevents a member of a Commission from engaging in any paid employment that conflicts, or may conflict, with the proper performance of their duties. This clause is included to support the impartiality and independence of members of a Commission during an investigation.

350. Subclause 70(2) confirms that the restriction in subclause 70(1) does not apply to a member who is a judge of the Supreme Court of a State or Territory. Judges of a Supreme Court of a State or Territory will not be paid remuneration as a member of a Commission under clause 71, and are bound by virtue of their judicial office to disqualify themselves if there is any actual or perceived conflict of interest.

## **Clause 71 – Remuneration**

351. This clause outlines the remuneration of members of a Commission.

352. Subclause 71(1) enables remuneration of a member to be determined by the Remuneration Tribunal. Subclause 71(2) outlines a position where no such determination is in operation and provides for a member to be paid remuneration that is prescribed by the regulations.

353. Subclause 71(3) enables allowances to be paid to members as prescribed by regulations.

354. Subclause 71(4) prevents a member of a Commission who is a judge of the Supreme Court of a State or Territory from being paid remuneration under the Bill, where they are receiving salary or annual allowance as a judge.

355. Such remuneration of a member is appropriate where subclause 70(1) prevents a member of a Commission from engaging in any paid employment that conflicts, or may conflict, with the proper performance of their duties.

## **Clause 72 – Resignation**

356. This clause outlines the procedure for a member to resign from their appointment as a member of a Commission.

357. Under subclause 72(1) a member of a Commission may resign by giving a written resignation to a Parliamentary presiding officer for presentation to the Parliament. Resignations may be given to either the Speaker of the House of Representatives or the President of the Senate.

358. Subclause 72(2) specifies that the resignation take effects on the day that it is received by the Parliamentary presiding officer unless a later day is specified in the resignation.

359. Subclause 72(3) requires the Parliamentary presiding officer who receives a written resignation to give a copy of it to the other Parliamentary presiding officer as soon as practicable.

360. This clause gives certainty for the status of a resignation while providing consultation between the Parliamentary presiding officers appropriate in the context of a Commission as joint Parliamentary body.

### **Clause 73 – Termination, or cessation, of appointment**

361. This clause outlines the process for termination or cessation of a member's appointment to a Commission. Particular processes will apply to members of a Commission who are currently Judges of a Supreme Court of a State or Territory, which are distinguished from those applying to ordinary members of a Commission.

362. Subclause 73(1) applies to members other than Judges of a Supreme Court of a State or Territory. In these circumstances, a member's appointment may be terminated on any of the following grounds:

- the member's misbehaviour or physical or mental incapacity;
- the member becomes bankrupt; applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; compounds with his or her creditors; or makes an assignment of his or her remuneration for the benefit of his or her creditors;
- the member engages in paid employment that conflicts or may conflict with the proper performance of his or her duties (see clause 70 of this Bill); or
- the member fails, without reasonable excuse, to disclose certain interests as required under clause 74 of this Bill.

363. Under subclause 73(1) a member's appointment would be terminated by force of this subclause if:

- each House of the Parliament passes, in the same session, a resolution on a ground referred to in subclause 73(1); and
- the ground on which the member's appointment is to be terminated is the same in each resolution of the Houses of the Parliament.

364. The process for termination of a member is consistent with the process for appointment of a member (see clause 14).

365. Under subclause 73(1), misbehaviour and incapacity have their ordinary meanings, rather than their meanings in paragraph 72(ii) of the Constitution, because of the different context in which they apply to termination of members of a Commission (see also definitions of 'misbehaviour' or 'incapacity' in clause 7 of this Bill).

366. Subclause 73(3) excludes members who are Judges of a Supreme Court of a State or Territory from the application of subclauses 73(1) and (2). This has the effect that a Judge of Supreme Court of a State or Territory cannot be terminated as a member of a Commission through the above process, as this may be perceived as impeaching the character and independence of a judicial officer.

367. Subclause 73(4) provides that, if the member ceases to be a Supreme Court judge of a State or Territory, they will automatically cease to be a member of a Commission. Clause 15 provides a process where there are vacancies in membership of a Commission.

368. Under subclause 73(5), if a member (whether or not they are a Supreme Court judge) becomes a Commonwealth judicial officer, they will cease to be a member of a Commission. A current Commonwealth judicial officer is prevented under subclause 13(2) from being appointed as a member of a Commission.

#### **Clause 74 – Disclosure of interests by members**

369. This clause requires a member of a Commission to disclose any interest, pecuniary or otherwise, that could conflict with the proper performance of his or her duties in relation to the Commission's investigation and report. This may be an existing interest or an interest which a member acquires during a Commission's investigation.

370. Paragraph 74(a) requires the disclosure of interest by a member of a Commission to be to all persons and bodies recognised by the Commission as parties to the investigation.

371. Paragraph 74(b) prevents a member who has disclosed interests from taking part in the investigation or preparation of the report except with the written consent of all those persons and bodies under paragraph 74(a).

372. This clause is designed to enhance the independence and impartiality of the Commission's investigations and report to the Parliament.

### **Part 5 – Administrative provisions**

#### **Clause 75 – Guide to this Part**

373. This clause inserts a guide to this Part of the Bill. The guide will assist readers to understand the purpose and content of the Part, and to more easily navigate through the Part to find relevant provisions. The Part provides for staff, consultants and counsel to assist a Commission, disclosure of information of a Commission and rules relating to records of a Commission.

#### **Clause 76 – Staff of a Commission**

374. This clause provides for the staffing of a Commission, so it can be appropriately supported.

375. Subclause 76(1) outlines the meaning of persons who will be staff for the purposes of a Commission. Staff will be persons made available to a Commission by a Parliamentary presiding officer; or persons whose services to a Commission will be made available under an arrangement for the engagement of Australian Public Service (APS) employees under subclause (2).

376. A Parliamentary presiding officer is defined in clause 6 of the Bill to mean the Speaker of the House of Representatives or the President of the Senate.

377. Subclause 76(2) enables the Parliamentary presiding officers to make arrangements with an agency head (under the *Public Service Act 1999*) for the services of staff to be made available to a Commission.

378. Subclause 76(3) confirms the employment and accountability frameworks which apply to an APS employee who is performing services for a Commission under an arrangement with agency heads. An employee will be taken to be engaged under the *Parliamentary Service Act 1999*, and on leave without pay from their employment under the *Public Service Act 1999*. This is similar to ordinary transfer arrangements between Parliamentary service and public service employment.

379. Subclause 76(3)(b) requires an APS employee working for a Commission perform his or her functions and duties in accordance with the directions of the presiding member.

380. Subclause 76(4) clarifies that any direction of the presiding member of a Commission will be subject to the direction of the Secretary of the Department that provides administrative support under clause 79, in relation to the performance of the Secretary's functions and the exercise of the Secretaries powers under the *Financial Management and Accountability Act 1997* and the *Parliamentary Service Act 1999*. This provides for a direction to staff by the presiding member of a Commission to be overridden by a direction given by the Secretary of the Department that provides administrative support under clause 79, in circumstances where a conflict arises.

381. This is consistent with the governance model for a Commission (see clause 79 of this Bill).

#### **Clause 77 – Consultants**

382. A Commission may, acting on behalf of the Commonwealth, engage consultants to assist in the performance of the Commission's functions.

383. A consultant may be engaged to assist the Commission in particular areas of expertise, including in the analysis of evidentiary material.

#### **Clause 78 – Counsel assisting a Commission**

384. A Commission may, acting on behalf of the Commonwealth, appoint a lawyer to assist the Commission as counsel, either generally or in relation to a particular matter or matters.

385. The role of counsel assisting a Commission would be flexible, similar to the role of counsel assisting a Royal Commission.

386. A general appointment of counsel to assist a Commission could be for duration of the Commission's investigation. The clause also enables counsel to be appointed to assist the Commission in relation to a particular matter.

### **Clause 79 – Commission to be part of Department of House of Representatives or Senate**

387. This clause clarifies the status of a Commission for the purposes of the *Financial Management and Accountability Act 1997* and the *Parliamentary Service Act 1999*. A Commission, where established, will be taken to be part of the Department of the House of Representatives or the Department of the Senate, established by the *Parliamentary Service Act 1999*, as agreed by the Parliamentary presiding officers.

388. This would be agreed on establishment of a Commission between the Speaker of the House of Representatives and the President of the Senate. Parliamentary presiding officer is defined in clause 7 of this Bill to mean the Speaker of the House of Representatives or the President of the Senate.

389. Agreement between the Parliamentary presiding officers will make clear which Parliamentary Department has responsibility for a Commission for the purposes of the *Parliamentary Service Act 1999* and the *Financial Management and Accountability Act 1997*.

390. This clause is designed to provide a clear governance structure for a Commission and appropriate framework for the financial management and accountability of a Commission.

### **Clause 80 – Commission must prepare and keep statements of reasons about search warrants**

391. Clause 80 requires a Commission to prepare and keep statements of reasons about each search warrant issued by a Commission or a member of a Commission. A Commission has the power to issue search warrants under clause 28 of this Bill.

392. Subclause 80(2) requires that the statement of reasons set out particular factors considered in the Commission's decision to exercise power to issue a search warrant. These reasons must include:

- the reasons a Commission or member suspects that each document or thing to which the search warrant relates is connected with the matter a Commission is investigating;
- the reasons a Commission or member suspects that each document or thing may be on or in particular premises;
- the reasons a Commission or member believes that, if a notice were issued requiring production for each document or thing, it may be concealed, lost, mutilated or destroyed.

393. This clause is designed to operate as a safeguard and promote transparency and accountability in the process of issuing a search warrant (see also clause 28 of this Bill).

### **Clause 81 – Commission may give information, evidence, documents etc**

394. This clause enables a Commission to give certain information, evidence, documents or things obtained in the course of its investigation to certain authorities. Subclause 81(1) provides that the clause applies subject to subclause 81(6)) to information, evidence, a document or other thing obtained by a Commission in the course of its investigation.

395. Subclause 81(2) enables a Commission to give evidence which may relate to a contravention of a law of a Commonwealth, State or Territory that is punishable by a criminal, civil or administrative penalty (under subclause 81(3)) to certain authorities provided in subparagraphs 81(2)(a) to (e). Whether a Commission gives the information or evidence to one or more of these people or authorities is discretionary.

396. Subclause 81(4) enables a Commission to give information to a Royal Commission within the meaning of the *Royal Commissions Act 1902* or a Royal Commission of a State or Territory. A Commission may provide material in circumstances where it may relate to a Royal Commission's subject of inquiry. Whether a Commission gives the information or evidence to a Royal Commission is discretionary.

397. Subclause 81(5) enables a Commission to give information to Chief Executive Officer of the Australian Crime Commission if a Commission is satisfied that information, evidence, documents or things may be relevant to the performance of the functions of the Australian Crime Commission. Whether a Commission gives the information or evidence to the Australian Crime Commission is discretionary.

398. Subclause 81(6) clarifies that clause 81 is not intended to limit or otherwise affect the operation of section 16 of the *Parliamentary Privileges Act 1987*. In giving information under this clause, a Commission will need to consider the use and derivative use immunity afforded to self-incriminatory evidence under clause 54 of this Bill which applies in all Australian proceedings. Under clause 54, self incriminatory disclosures made by a person to a Commission cannot be used against a person in later court proceedings, and cannot be used indirectly to gather evidence against the person.

## **Clause 82 – Records of a Commission**

399. This clause establishes a process for the handling of records of a Commission.

400. Subclause 82(1) requires a Commission to give possession of all records that are no longer required for the Commission's functions to either House of Parliament. The House which receives the possession of the records will then retain responsibility for a Commission's records.

401. Subclause 82(1) deems any record of a Commission provided to a House of Parliament under subclause 82(1) to be a Class A record for the purposes of the *Archives Act 1983* and any regulations made under, or for the purposes of, that Act. The Bill gives all relevant records of the Commission the same protection as a Class A Parliamentary document. The Parliamentary presiding officers have responsibilities and powers in relation to Class A Parliamentary records under the *Archives Act 1983* and the *Archives (Records of Parliament) Regulations 1995*.

402. Under subclause 44(3) of this Bill, restrictions on public access of certain records of a Commission under subclause 44(1) would cease where a record is made available for public access under the *Archives Act 1983* regime.

## **Part 6 – Miscellaneous**

### **Clause 83 – Regulations**

403. This clause enables the Governor-General to make regulations prescribing matters required or permitted by the Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

404. Matters which can be prescribed under the Bill include matters under clauses 25, 46, and 71.