

PARLIAMENTARY (JUDICIAL MISBEHAVIOUR OR INCAPACITY) COMMISSION BILL 2005

OUTLINE

Purpose / Object of the Bill

The purpose of the Bill is to establish an independent Commission to hear and determine matters concerning judicial misbehaviour or incapacity and report its findings and make recommendations to Parliament.

Rationale for the Bill

The Bill is necessary to establish an independent Commission to assist the Parliament in the exercise of its powers to remove a federal judicial officer in circumstances of proved misbehaviour or incapacity pursuant to section 72 of the Constitution. The Commission established by the Bill will provide a mechanism for the independent and impartial hearing of complaints against federal judicial officers and reduce the potential for damaging and unfounded attacks on the federal judiciary.

Précis of principal provisions

The principal provisions of the Bill establish the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission*. The Commission is responsible for hearing matters referred to it concerning alleged judicial misbehaviour or incapacity and is required to report its findings and make recommendations to the Parliament.

The Bill contains administrative provisions relating to staffing and remuneration of members of the Commission, witness expenses, record keeping, legal and financial assistance to the federal judicial officer, and for counsel assisting the Commission.

The Bill details the powers of the Commission to conduct an inquiry when a matter is referred to it involving an allegation of misbehaviour or incapacity in relation to a federal judicial officer. It further details its function to report its findings and provide advice to the Parliament as to whether in its opinion facts amounting to proved misbehaviour or incapacity exist as would warrant the removal of the judicial officer from office under s72 of the Constitution.

The powers and proceedings of the Commission are detailed in the Bill including how hearings in the Commission are to be conducted. The Commission is given power to summon witnesses and take evidence, and issue search warrants and warrants for witnesses who fail to appear. It may also consider previous official inquiries and has the power to obtain evidential materials contained in documents and other materials.

The Bill provides that statements of witnesses and documents produced by witnesses appearing before the Commission will be inadmissible in subsequent court proceedings.

Under the Bill, members of the Commission are afforded the protection and immunities of a Member of Parliament. Witnesses to the Commission have the same protections as witnesses appearing before a Parliamentary committee.

The Bill requires that a matter determined by the Commission be proven to the civil standard of proof, namely on the balance of probabilities. It must be shown on the evidence that it was more probable than not that the allegation against the judicial officer is true.

The Bill creates a number of offences relating to the Commission's proceedings and provides that Chapter 2 of the *Criminal Code* will apply to these offences. Offences under the Bill include unauthorised presence at a hearing or publication of evidence, the failure of witnesses to attend or produce documents, refusing to be sworn or give evidence, providing false or misleading evidence, destroying documents and other things, causing injury to witnesses, dismissing an employee for their involvement at the Commission, preventing witnesses from attending the Commission or producing a document, bribery of a witness, fraud on a witness and contempt of the Commission.

The Bill provides that acts or omissions that occur on different days will constitute separate offences, and the Commission reserves the right to communicate information which it considers to be a breach of the law to the Commonwealth Attorney-General or the Attorney-General of a State or Territory. The Bill provides that the Commission will not accept the excuse of other legislation as being prohibitive to the production of documents or giving evidence.

The Bill empowers the Governor-General to make regulations as necessary to the requirements of the act.

Policy background

The case of Justice Lionel Murphy in the early 1980s highlighted the need for a clear and consistent method for dealing with alleged misconduct by federal judicial officers. Parliament's ability to deal with claims of judicial misconduct has remained unchanged since the Murphy case.

The federal judiciary has expanded significantly in recent years, and now includes a large number of federal judicial officers spanning the High Court, Federal Court, Federal Magistrates Court and Family Court. As a consequence, there is an increased potential that the Parliament may be called on to exercise its constitutional power under section 72 to remove a federal judicial officer for misconduct or incapacity.

There is no constitutional or legislative method for dealing with allegations against federal judicial officers. There is no guidance as to how Parliament is to determine whether alleged misconduct is proven and thereby warrants the removal of a federal judicial officer. The Commission's functions will provide transparency and impartiality to the process of the determination of claim of misconduct or incapacity against a federal judicial officer.

The absence of a formal process for the determination of the substance of allegations against a judicial officer has the potential to undermine public confidence in the judiciary and cause damage to the reputation of the judicial officer. The Commission process will establish a consistent, rule-based method to determine the truth of allegations by an evidence-based process which is transparent, consistent and accountable.

It is timely that an independent and impartial body be established which can investigate and hear matters concerning alleged judicial misconduct and report its findings to the Parliament and make recommendations to Parliament as to whether the removal of a federal judicial officer is warranted.

The role of the Commission is not to make a determination as to whether a federal judicial officer should be removed from office for reason of misconduct or incapacity. The removal of such a judicial officer remains the exclusive responsibility of the Parliament carrying out its duties in accordance with section 72 of the Constitution.

The purpose of the Commission is to provide an independent and impartial body to scrutinise allegations against federal judicial officers and report its findings to the Parliament. The Commission will be available to convene expediently and proceed by way of a formal hearing by taking sworn evidence from witnesses and determining whether the evidence shows that misbehaviour or behaviour amounting to incapacity can be proved on the balance of probabilities.

The findings of the Commission will be reported back to Parliament which will then decide, in accordance with the power invested in it by section 72 of the Constitution, whether a federal judicial officer should be removed from office.

Financial impact statement

The financial impact of this bill will be the establishment and running costs of the commission.

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1: Short title

Clause 1 is a formal provision that specifies the short title of the Bill.

Clause 2: Commencement

Clause 2.1 specifies that select sections of the Act will commence when the Act receives royal assent.

Clause 2.2 provides that the remaining sections of the Act will come into effect at such time as another Act, which allows for remuneration of members of the Commission and other expenses associated with setting up and maintaining the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission*, comes into effect.

Clause 3: Objects of the Act

Clause 3 outlines the object of the Act, namely to establish an independent Commission called the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission*.

Clause 4: This Act binds the Crown

Clause 4 provides that the Act binds the Crown but does not make the Crown liable to be prosecuted for an offence.

Clause 5: Definitions

Clause 5 defines the terms used in the Act:

“**Commission**” is defined to refer to the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission* which is to be established by section 8 of the Act.

“**Document**” is defined to include any book, register or record of information held in any form as a record or that has been stored.

“**Incapacity**” for the purposes of the Act is defined as having the same meaning as applies to Section 72 of the Constitution.

“**Judge**” is defined to refer to a judge of a court that has been established by the Parliament or of the Supreme Court of a State or Territory.

“Justice of a Federal Court” is defined in the Act to refer to a Judge of the High Court or a Judge or Magistrate of a court created by the Parliament that exercises federal jurisdiction.

“Legal practitioner” is defined in the Act to mean a barrister, a solicitor or, in states where there is a fused profession and one person may act as both to include those practitioners, who are admitted to either or both the High Court and the Supreme Court of their State or Territory.

“Member” is defined by the Act to refer to a member of the Commission. Section 9 of the Act details who may be a member of the Commission.

“Misbehaviour” is defined as having the same meaning as applies to Section 72 of the Constitution. The definition encompasses a wide view of the term and specifies that misbehaviour is not limited to conduct that constitutes a criminal offence.

“Presiding Member” refers to the member of the Commission who has been appointed to hold office under subsection 9(4) or 10(3) of the Act, that is, the person who has been jointly appointed by the Speaker and the President to be the Presiding Member.

“Reasonable Excuse” is defined in the context of acts or omissions by witnesses before the Commission. A ‘reasonable excuse’ under the Act is one which would excuse an act or omission of a similar nature by a witness before a court.

“Special Circumstances Scheme” includes any arrangement for payment of legal costs and related expenses in situations where funding is not covered by statutes or other schemes.

Clause 6: Administration

Clause 6 provides that the Attorney-General is responsible for administering the Act.

Part 2 – Establishment of the Commission

Clause 7: Establishment

Clause 7.1 establishes the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission*.

Clause 8: Members

Clause 8.1 details the appointment procedure for members of the Commission. The Commission will be comprised of three members, two of which will be appointed jointly. The first is to be appointed as agreed by the President of the Senate and the Speaker of the House of Representatives who will act on the

recommendation of the Prime Minister. The second is to be appointed in the same way, except that the Speaker of the House of Representatives and the President of the Senate will act on the recommendation of the Leader of the Opposition. The provision to allow both the Prime Minister and the Leader of the Opposition to make recommendations as to appointments overcomes any perceived bias in appointments and ensures that the Commission will be constituted by members who represent the Parliament at the time of appointment.

Clause 8.2 requires one of the members appointed to the Commission to be a retired Judge of a Court of superior jurisdiction as specified in the Act. This ensures that the Commission includes a person with experience in courts and tribunals and the procedures encompassed in such hearings such as taking and assessing evidence. The inclusion of a member of the Judiciary will give the Commission the benefit of the experience of that person in a role which the Commission is charged with overseeing.

Clause 8.3 prohibits a Justice of a Court exercising federal jurisdiction to be a sitting member of the Commission. This provision prevents the situation where a federal judicial officer must preside over a matter concerning the conduct of a peer or colleague. By excluding Judges/Justices and Magistrates who exercise a federal jurisdiction from being a member of the Commission, the Commission is better situated to operate fairly and avoid allegations of both positive and negative bias.

Clause 8.4 provides for the Speaker and the President to nominate and appoint the Presiding Member of the Commission. This is to ensure that the Commission is representative of the Parliament of the day.

Clause 9: Vacancy in membership

Clause 9.1 details the procedures to be followed when a member of the Commission becomes unable to fulfil his or her duties by reason of illness, resignation or death. The Commission is to continue its work as a two member commission until such time as a third member is appointed. This prevents any significant disruption to the work of the Commission in the event that a member becomes unavailable to serve.

Clause 9.2 provides that a replacement member shall be chosen jointly by the Speaker and the President of the Senate and in accordance with the same requirements for appointing an ordinary member. This is to ensure the continuity of membership and appointments to the Commission.

Clause 9.3 provides that if a Presiding Member of the Commission becomes unable to fulfil their duties either by illness, resignation or death, the Speaker and the President of the Senate shall jointly appoint a replacement Presiding Member.

Part 3 – Administrative provisions

Clause 10: Remuneration of members

Clause 10.1 makes provision for the payment of an honorarium to members of the Commission in recognition of their service.

Clause 10.2 allows for a payment to be paid on a daily basis to a member when the Commission is considering a matter. The Commission is deemed to be considering a matter from its first meeting after being referred a case until it submits its report to Parliament. The payment takes into account the extra work required of members during this period.

Clause 10.3 provides that the Remuneration Tribunal will determine the payments to be made to members.

Clause 10.4 provides that members are entitled to prescribed allowances.

Clause 10.5 provides that the payments authorised by this clause are subject to the provisions in the *Remuneration Tribunals Act 1973*.

Clause 11: Staff of the Commission

Clause 11.1 recognises that staff will be required to assist the Commission in its work. The President of the Senate and the Speaker of the House of Representatives are responsible for making the necessary staffing arrangements.

Clause 11.2 allows the President of the Senate and the Speaker of the House of Representatives to make the necessary arrangements for the employment of staff with the Secretary of the Department of the Australian Public Service.

Clause 11.3 provides that a staff member who works under such arrangement for the Commission performs their duties exclusively at the direction of the Presiding Member.

Clause 12: Counsel assisting the Commission

Clause 12 authorises the Commission to appoint a legal practitioner to act as counsel to the Commission to assist it to perform its functions.

Clause 13: Legal and financial assistance to Justice

Clause 13.1 allows the federal judicial officer subject to the Commission's inquiry to make an application to the Attorney-General for financial assistance under the special circumstances scheme in relation to the costs of their legal representation at the inquiry.

Clause 13.2 requires the Attorney-General to comply with an application made by a judicial officer under the special circumstances scheme.

Clause 14: Reimbursement of expenses of witnesses

Clause 14 provides that witnesses be reimbursed for the expenses of their attendance at such amounts determined by the prescribed scale or set by the Commission. This reflects the practices of courts of law where witnesses are compensated for their out-of-pocket expenses for attending court.

Clause 15: Records of the Commission

Clause 15 provides that Parliament is entitled to keep the records produced by the Commission and that these will be considered records of the Parliament for the purposes of the *Archives Act 1983*. A Parliamentary record enables the Parliament to be able to review the procedures of the Commission if necessary when it comes to determine whether a judicial officer is to be removed from office.

Part 4 – Functions and reports of the Commission

Clause 16: Functions

Clause 16.1 specifies that one of the primary functions of the Commission is to report its findings to Parliament particularly when the facts are found to amount to proven misbehaviour or incapacity. The report of the Commission is designed to assist the Parliament in its determination of whether a judicial officer be removed from office in the exercise of its constitutional powers under section 72. The Commission's findings are to be given significant weight by the Parliament by virtue of the fact that it is an independent and impartial body charged with the responsibility of conducting an impartial hearing of claims made against the judicial officer and assessing the credibility of the evidence against him or her.

Clause 16.2 limits the scope of the matters into which the Commission can inquire to the terms of reference provided to it by Parliament and confines the inquiry to the specific allegations concerning the judicial officer. This clause excludes the exercise by the Commission of ad-hoc investigative powers.

Clause 17: Decision of questions

Clause 17.1 requires matters before the Commission to be determined in accordance with the view of the majority of members. The view of the majority will prevail over those with dissenting opinions.

Clause 17.2 provides that the dissenting views of members will be recorded. Parliament is not obliged to accept the view of the majority of the Commission. It is the Parliament alone which has the Constitutional power to decide whether a federal judicial officer is to be removed from office.

Clause 18: Reports

Clause 18.1 requires the Commission to report its findings to the Parliament, specifically, the Speaker of the House of Representatives and the President of the Senate. The recommendation of the Commission will be a significant factor in the Parliament's decision whether to remove a federal judicial officer exercising its powers under section 72 of the Constitution.

Clause 18.2 is a procedural clause that sets out what is to occur if the Commission concludes a report following the dissolution of Parliament. To ensure that the matter is dealt with expediently, the Commission's report is to be furnished directly to the incoming Speaker of the House of Representatives and President of the Senate after the first sitting day of the new Parliament.

Clause 18.3 sets out the detail required of the Commission's report and the items which must be included so as to ensure that the Parliament has available to it the material it requires to exercise its constitutional powers. This is designed to achieve transparency of the Commission's processes and its findings. The inclusion of a full copy of the transcript of the Commission's hearing as well as the reports of each of the Commissioners enables the Parliament to be fully informed about the matters heard by the Commission and about any points of disagreement between the Commissioners should they exist.

Clause 18.4 requires that after the report is received by the President of the Senate and Speaker of the House of Representatives it be laid before the Senate and the House of Representatives. This enables the process of determining judicial misconduct to remain transparent and assists Parliament to make its determination with the best evidence available.

Clause 18.5 allows the Commission to prepare and deliver a separate report to Parliament in circumstances in which it is of the opinion that if any of its findings or evidence given to it at a hearing were made public this could unduly prejudice the rights of a person to a fair trial or the conduct of an investigation, or may disclose a confidential source of information or prejudice the safety of a person.

Clause 18.6 ensures that such a separate report is not made public and is available for inspection only to members of the Parliament and the judicial officer who is the subject of the inquiry.

Part 5 – Powers and proceedings of the Commission

Clause 19: Conduct of proceedings

Clause 19.1 requires that the proceedings of the Commission be conducted in public, unless it is in the interests of the justice for a private hearing to be held.

Clause 19.2 requires that the commission conduct its enquiry expediently but without compromising the proper consideration of the matter.

Clause 20: Power to summon witnesses and take evidence

Clause 20.1 gives power to the Commission to summon a person to give evidence before the Commission or produce documents or other evidence. This gives the Commission the investigative power necessary to ensure it can access the best and all available evidence.

Clause 20.2 gives the Commission's Presiding Member the power to require the production of a document from a person appearing before the Commission.

Clause 20.3 gives the Commission the power to require that evidence be given on oath or affirmation and authorises a member of the Commission or a person authorised by it to administer an oath or affirmation. This ensures the Commission hears truthful evidence and that those appearing before it understand the importance of giving truthful evidence.

Clause 20.4 permits a member of the Commission to serve written notice on a person requiring them to produce a document or thing. Notice must be issued with the relevant detail as to what must be produced and where and when it needs to be produced. This gives the Commission the power to gather the best evidence it deems necessary to make decisions.

Clause 20.5 provides that an authorised person is one who is authorised in writing by the Presiding Member or part of a class so authorised.

Clause 20.6 provides that no unsworn evidence may be given to the Commission, including by a federal judicial officer.

Clause 21: Search warrants

Clause 21.1 empowers the Commission to issue search warrants in circumstances in which it has reasonable grounds to suspect that evidence is at risk of being destroyed or lost if a summons were not issued for its production.

Clause 21.2 enables a person who is authorised by the Commission to issue warrants under this section.

Clause 21.3 details the powers that are given to a member of the AFP, State or Territory Police or other person named in the warrant to enter, search, seize and deliver items relevant to the Commission's inquiry.

Clause 21.4 specifies that a search warrant must include a statement of purpose, including a reference to the Commission's inquiry, the times at which entry is authorised, a description of the items which may be seized and the date at which the warrant expires.

Clause 21.5 authorises the person executing the warrant to seize other items reasonably considered to be connected to an inquiry being conducted by the Commission.

Clause 21.6 provides that where the section refers to a “thing” this also includes a document.

Clause 22: Previous inquiries

Clause 22 requires the Commission in the course of its consideration of an allegation to have regard to findings made or outcomes of previous official inquiries into the allegation and take those into account to the extent it deems it necessary or desirable. The Commission is not to be hindered by any law or the privileges of either House of the Parliament in obtaining the appropriate records of evidence or findings made in such an inquiry.

Clause 23: Hearings

Clause 23.1 allows the Commission to hold hearings for the purposes of its inquiry.

Clause 23.2 allows the Commission to determine the place within Australia that the hearing takes place.

Clause 23.3 requires the “Presiding Member” to preside at hearings before the Commission.

Clause 23.4 gives the federal judicial officer appearing before the Commission the right to appear and be represented by a legal practitioner at any time during the hearing.

Clause 23.5 provides that where proceedings of the Commission are conducted in private the Commission can give directions as to who may be present and whether they may be legally represented.

Clause 23.6 ensures that the legal representative of a person giving evidence is not excluded from the hearing.

Clause 23.7 ensures that during private hearings only approved persons are present.

Clause 23.8 enables witnesses to be examined and cross-examined before the Commission.

Clause 23.9 gives the Commission the power to make procedural directions as necessary for the Commission to function effectively.

Clause 23.10 empowers the Commission to give directions that evidence or a document or thing seized pursuant to a warrant or any other information that may identify a witness not be published if it may prejudice the safety of a person or the right to a fair trial of a person charged with an offence.

Clause 24: Arrest of witness failing to appear

Clause 24.1 gives the Presiding Member the power to issue a warrant for apprehension of a person where a person served with a summons to attend the Commission as a witness fails to attend.

Clause 24.2 provides that the warrant shall authorize apprehension of the witness and their detention in custody until released by order of the Presiding Member.

Clause 24.3 gives the power of execution of the warrant to the Australian Federal Police or the State or Territory Police or the person to whom the summons is addressed. It authorises these persons to break and enter if necessary in order to execute the warrant.

Clause 24.4 provides that a witness shall not be relieved, by virtue of their apprehension by warrant, of their liability for their non-compliance with the summons.

Clause 25: Powers of the Commission in relation to documents and other things

Clause 25.1 permits a member of the Commission or person authorised by it to inspect, retain or copy any documents or things produced before or delivered to the Commission.

Clause 25.2 provides for the return of documents retained by the Commission in instances where the Commission no longer requires their use. This is particularly important where original documents have been provided to the Commission.

Clause 25.3 provides that an authorised person referred to in this section is one who is authorised in writing by the Presiding Member.

Clause 26: Standard of proof, admissibility of evidence and natural justice

Clause 26.1 requires that the Commission be satisfied that the facts necessary for making its decision are proved on the balance of probabilities.

Clause 26.2 requires that in determining whether the standard of proof has been met the Commission take into account the importance of the evidence before it and the gravity of the matters alleged. Whereas the criminal standard of proof does not apply, the standard will be higher where the allegation is more serious.

Clause 26.3 provides that the Commission is not bound by the rules of evidence and may inform itself in whatever manner it deems appropriate to gather material necessary to make its decision.

Clause 26.4 requires the Commission to act in accordance with the rules of natural justice.

Clause 27: Statements made by witness not admissible in evidence against the witness

Clause 27.1 makes statements and disclosures made during the giving of evidence by a witness non-admissible against a person in a State or Territory civil or criminal proceeding.

Clause 27.2 excludes the application of this section to offence proceedings under the Act.

Clause 28: Protection of members, etc

Clause 28.1 provides members of the Commission with the same protection and immunity as a Member of Parliament in the performance of their functions or as the powers of a Parliamentary Committee.

Clause 28.2 affords witnesses the same protection as witnesses before a Parliamentary committee.

Clause 28.3 affords legal practitioners assisting the Commission the same protection and immunities as a legal practitioner before a Parliamentary committee hearing.

Clause 28.4 provides that proceedings in the Commission and evidence before it are to be considered evidence before a Parliamentary committee for the purpose of the *Parliamentary Privileges Act*.

Part 4 – Offences

Clause 29: Application of the *Criminal Code*

Clause 29 provides that chapter 2 of the Criminal Code applies to offences under the Act. The Criminal Code establishes the general principles of criminal responsibility.

Clause 30: Unauthorised presence at hearing or publication of evidence

Clause 30 makes it an offence for unauthorised persons to be present at private hearings. It also makes it an offence to publish evidence in contravention of the Act. Offences against this section are summary offences and subject to a fine not exceeding \$100,000 or up to six months imprisonment.

Clause 31: Failure of witnesses to attend or produce documents

Clause 31.1 imposes a penalty on persons who fail to answer to a summons to attend the Commission and persons who fail to attend from day to day without being excused. The maximum penalty is \$100,000 or a term of six months imprisonment. Non-attendance is a strict liability offence, although it is a defence if a witness has a 'reasonable excuse' for their non-attendance.

Clause 31.2 makes it an offence for a witness to fail to produce a document or thing as required by a summons or by a member of the Commission. A penalty of \$100,000 or six months imprisonment applies. The offence is one of strict liability, but if a reasonable excuse exists there is no offence under this section.

Clause 31.3 specifies a defence to the offence prescribed in 32.2 by providing that if the document would not have been relevant to the proceedings then the person required to have produced it will be excused from not having produced it. The onus of proof in such a case is on the defendant.

Clauses 31.4 provides that if a person fails to produce a document or thing as required by a notice issued in accordance with subsection 20.4 they are subject to penalty. This provision is intended to deter non-compliance with a notice issued under subsection 20.4.

Clause 31.5 provides that a reasonable excuse is a defence to the offending prescribed in 31.4.

Clause 31.6 provides a defence where the document or thing required to be produced was not relevant to the Commission's inquiry.

Clause 32: Penalty for refusing to be sworn or to give evidence

Clause 32.1 makes it an offence for any person appearing as a witness to refuse to answer questions or give evidence on oath or affirmation. Without persons willing to provide evidence on oath or affirmation the Commission is left with unreliable evidence upon which to base its decisions or no evidence at all.

Clause 32.2 prescribes the penalty for this offence to be a fine not exceeding \$100,000 or up to six months imprisonment.

Clause 32.3 provides that the offence is one of strict liability.

Clause 33: Acts or omissions on different days to constitute separate offences

Clause 33 provides that offences committed on different days are to be considered as separate offences. Where an offence is not one of strict liability, the intention (*mens rea*) can be formed on each day of the act or omission.

Clause 34: Self- incrimination

Clause 34.1 stipulates that where someone relies on a "reasonable excuse" for refusing or failing to produce a document, a reasonable excuse cannot be that the document or thing is likely to or will incriminate the person or make them liable to penalty. This makes it clear that persons who are required to produce documents or things to the Commission are obliged to produce the requested document for consideration regardless of the individual consequences.

Clause 34.2 stipulates that a person appearing before the Commission cannot fail to answer a question by the Presiding Member on the basis that the answer would be incriminating to them or make them liable to a penalty.

Clause 35: Excuse of other legislation

Clause 35.1 provides that it is not a reasonable excuse for a person to refuse to answer a question or produce a document if to do so is prohibited by or under any Act. This seeks to enable persons to produce evidence requested by the Commission without limiting the production of evidence in any way, even by other legislation.

Clause 35.2 provides that the failure to answer questions put to a person by the Presiding Member cannot be on the basis that answering the question would be prohibited by another Act.

Clause 35.3 provides that the answering of a question or production of a document or thing when required by the Commission will not be an offence under any Act which prohibits disclosure of information or production of an item.

Clause 36: False or misleading evidence

Clause 36.1 makes it an offence for a person to give evidence to a hearing of the Commission that is to their knowledge false or misleading.

Clause 36.2 makes this an indictable offence punishable by a fine not exceeding \$500,000 or up to five years imprisonment.

Clause 36.3 provides that where the defendant and prosecutor consent an offence under this section may be heard and determined in a court of summary jurisdiction.

Clause 36.4 sets a lower penalty that may be imposed when an offence under this section is heard in a court of summary jurisdiction.

Clause 37: Destroying documents or other things

Clause 37.1 makes it an offence for a document that may be relevant to the Commission's inquiries to be destroyed, concealed or otherwise damaged either knowingly or with reckless indifference.

Clause 37.2 makes this an indictable offence punishable by up to two years imprisonment or a fine not exceeding \$200,000.

Clause 37.3 provides that where the prosecutor and defendant consent, a court of summary jurisdiction may hear and determine an offence under this section. The rationale being that the nature of the offending may not be so serious as to attract the penalties that can only be imposed in the higher jurisdiction.

Clause 37.4 stipulates that where a person is tried in a summary jurisdiction, the maximum penalty imposed cannot exceed a fine of \$100,000 or period of imprisonment of 12 months.

Clause 38: Injury to witnesses

Clause 38.1 provides protection to witnesses appearing before the Commission and persons producing material evidence to the Commission. This clause makes it an indictable offence for a person to inflict violence, punishment, damage, loss, or disadvantage on persons assisting the Commission. The serious nature of the offending is reflected by the classification of this as an indictable offence punishable by a fine of \$100,000 or one year imprisonment.

Clause 38.2 makes it clear that, despite the rest of clause 38, a judicial officer can be dismissed from their appointment based upon their testimony before the commission. Any other reading of clause 38 could defeat the purpose of the Act.

Clause 39: Dismissal by employers of witness

Clause 39.1 imposes penalties upon employers who dismiss or cause prejudice to their employees for their appearance before or assistance to the Commission. Where an employer penalises a person from appearing as a witness at the Commission or who is required to produce a document to the Commission, that employer will be guilty of an indictable offence punishable by a fine of \$100,000 or one year imprisonment.

Clause 39.2 provides that where the reason for the dismissal does not pertain to the employee's involvement in an inquiry by the Commission the employer is not subject to the penalties under this section.

Clause 39.3 makes it clear that, despite the rest of clause 39, a judicial officer can be dismissed from their appointment based upon their testimony before the commission. Any other reading of clause 39 could defeat the purpose of the Act.

Clause 40: Preventing witnesses from attending or producing document

Clause 40.1 makes it an indictable offence punishable by one year's imprisonment for any person to intentionally prevent a person from attending the Commission to give evidence or produce documents as specified in a summons.

Clause 40.2 makes it an indictable offence, punishable by one year's imprisonment for a person to intentionally prevent a person who is required to produce a document or other thing pursuant to a notice under section 20.4 from doing so.

Clause 41: Bribery of witness

Clause 41.1 makes it an indictable offence punishable by five years' imprisonment for a person to bribe a witness to give false evidence or withhold true testimony from the Commission.

Clause 41.2 makes it an indictable offence punishable by five years imprisonment for a person to bribe a person required to produce a document before the Commission.

Clause 42: Fraud on witness

Clause 42.1 makes it an indictable offence punishable by two years' imprisonment for a person to practice fraud or deceit or to make a false statement to a witness with the intention of affecting their testimony before the Commission.

Clause 42.2 makes it an indictable offence punishable by two year's imprisonment for a person to by fraud or deceit seek to make a person fail to comply with a notice to produce a document or thing under section 20.

Clause 43: Commission may communicate information

Clause 43.1 provides that where the Commission becomes aware that there has been conduct that may constitute criminal offending, members of the Commission may pass this information on to the appropriate law enforcement agency.

Clause 43.1A provides that this includes breaches of civil, criminal and administrative law.

Clause 43.2 provides that if the Commission obtains information, evidence or a document or thing which it considers to be relevant to a matter before a Royal Commission it may pass it on to the Royal Commission.

Clause 43.2A enables the Commission to report to the Australian Crime Commission if, in the course of its inquiry, it obtains information or evidence or a relevant document or thing that relates to the performance of the functions of the Australian Crime Commission.

Clause 43.3 is an explanatory clause which explains that where in the preceding sections there has been a reference to a document thing, this includes a reference to the contents of the document or a description of the thing.

Clause 44: Contempt of Commission

Clause 44.1 makes it an offence punishable by a fine of \$10,000 or three months imprisonment for a person to intentionally insult, disturb or disrupt the proceedings of or defame or engage in any intentional contempt of the Commission.

Part 5 - Miscellaneous

Clause 45: Regulations

Clause 45.1 empowers the Governor General to make regulations in relation to the Act.