

Model Law on Judicial Service Commissions



The Commonwealth

Office of Civil and
Criminal Justice Reform

Model Law on Judicial Service Commissions



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Introduction

How judicial officers are appointed, disciplined and removed from office is at the heart of judicial independence. Commonwealth jurisdictions vary in their traditions and procedures for appointing, disciplining and removing judges, but all share a commitment to the separation of powers and an understanding of the importance of an independent judiciary. This commitment is encapsulated in the Commonwealth (Latimer House) Principles on the Three Branches of Government. In order to promote good practice consistent with the Latimer House Principles, the Commonwealth Secretariat has produced this Model Law.

The Model Law includes provisions related to the establishment and operations of a Judicial Service Commission. Parts 2 and 3 include provisions related to the powers, functions and procedures of the Commission. Part 4 contains provisions relating to Commission funding and reporting requirements. Provisions of particular significance include: Composition of the Commission (Section 3); Functions of the Commission (Section 8); Selection for judicial office (Section 9); Disciplinary function of the Commission (Section 10); The Commission's power to investigate (Sections 11 and 13); Powers of the Commission in disciplinary cases (Section 12); and Procedure of a disciplinary tribunal (Schedule 4).

The provisions are accompanied by Explanatory Notes, which follow the text of the Model Law.

Background

The Model Law is the result of recommendations made at four regional consultative meetings attended by chief justices and senior judges between September 2014 and December 2015.

The first consultative meeting was held in September 2014 in Livingstone, Zambia. This meeting was attended by chief justices and senior judges from the Southern Africa region. The participants had before them various materials relating to judicial appointments, including the model constitutional clause for the establishment of judicial appointments commissions drafted by the Secretariat's three legal partners: the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates' and Judges' Association.

In June 2015, the first draft was submitted to chief justices and senior judges from Commonwealth Asian jurisdictions for their consideration at a meeting in Kuala Lumpur, Malaysia. The recommendations made at this meeting resulted in the production of a second draft.

In September 2015, in Wellington, New Zealand, chief justices from the Commonwealth Pacific region considered the second draft. A third draft was the result of their recommendations.

In December 2015, the final consultative meeting was held in Grand Cayman. On this occasion, chief justices and senior judges from Commonwealth Caribbean jurisdictions examined the third draft. Following the consideration and incorporation of their feedback and comments, the proposed Model Law was considered by Senior Officials at their meeting their meeting in October 2016, held at Marlborough House, London.

The Model Law was considered and endorsed by Commonwealth Law Ministers at their meeting of 16-19 October 2017, held in Nassau, The Bahamas.

At that meeting, Law Ministers commended the Model Law and noted its usefulness. Law Ministers agreed that the Model Law might usefully be adapted by member countries, taking into account their unique constitutional circumstances.

Judicial Service Commission Act 20__

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Judicial Service Commission Act 20__

An Act to establish a Judicial Service Commission, to provide for its functions, its powers of appointment and discipline, and for related matters

[Commencement _____]

ENACTED BY THE PARLIAMENT OF

Part 1 – Preliminary

Short title and commencement

- 1(1) This Act may be cited as the Judicial Service Commission Act 20__.
- (2) This Act comes into force on a date to be appointed by the Minister by notice in the *Gazette*, and different dates may be appointed for different provisions of it.

Interpretation

2 In this Act:

“Chairperson” means the person so appointed under section 3(2)(a);

“Commission” means the Judicial Service Commission established by section 3;

“Commissioner” means a person so appointed under section 3(2);

“disciplinary tribunal” means a tribunal established under section 12(1) or 13(1);

“function” includes a power, duty or responsibility;

“judicial Commissioner” means a Commissioner appointed under section 3(2)(a) to (d);

“judicial officer” means a senior judicial officer or a magistrate, coroner or justice of the peace, and includes a person acting in any such capacity;

“selection panel” means a panel appointed under section 9(3);

“senior judicial officer” means the Chief Justice, the President of the Court of Appeal, a judge of the Court of Appeal, a puisne judge or a judge of equivalent status to a puisne judge, and includes a person acting in any such capacity.

Part 2 – The Judicial Service Commission

Establishment of Commission

- 3(1) The Judicial Service Commission is established.
- (2) The members of the Commission, to be known as Commissioners, are:
 - (a) the Chief Justice, or a senior judicial officer designated by the Chief Justice, as Chairperson;
 - (b) the President of the Court of Appeal, or a member of that Court designated by the President of the Court of Appeal;
 - (c) two other senior judicial officers designated by the Chief Justice;
 - (d) the Chief Magistrate, or a magistrate designated by the Chief Magistrate;
 - (e) two practising members of the legal profession nominated by [*the relevant professional governing body*];
 - (f) a teacher of law nominated by [*the relevant body representing universities or law teachers in universities*];
 - (g) five lay members who are not members of [*the Executive or Parliament*] nominated by [*the relevant body representing civil societies*].
- (3) Commissioners referred to in subsection (2)(e), (f) and (g) are to:
 - (a) be nominated by reference to their knowledge, expertise and independence; and
 - (b) broadly reflect the diversity of the community in terms of gender, ethnicity, religion and regional or social groupings.
- (4) A Commissioner must on first appointment take the oath or make the affirmation in the form prescribed in Schedule 1.

Tenure of office of Commissioners

- 4(1) Subject to this section, save for the Chief Justice, the President of the Court of Appeal and the Chief Magistrate who, if Commissioners, hold their offices as such co-extensively with their own offices, a Commissioner holds office for four years.
- (2) A Commissioner may resign his or her office in writing to the Chairperson.
- (3) A Commissioner who has served for a period of four years is eligible for service as a Commissioner for one further period of four years.
- (4) A Commissioner is liable to be removed from office if found to have come within the grounds for discipline or removal of a judicial officer under section 10(3); and for the purposes of this subsection a Commissioner appointed under any of paragraphs (e) to (g) of section 3(2) is to be treated as though he or she were a judicial officer.
- (5) Where the conduct of a Commissioner under subsection (4) requires investigation:

- (a) the matter is to be inquired into by a retired senior judicial officer; and
- (b) if a case is found to answer, investigated by a tribunal consisting of between one and three other retired senior judicial officers,

each of whom is to be appointed by the [*Head of State*].

- (6) Sections 11 and 12, and Schedule 4, apply with the necessary changes to an inquiry and investigation under subsection (5).

Vacancies in membership of the Commission

- 5(1) If the office of Chairperson is vacant or the officeholder is for any reason unable to perform the functions of the office, then until:

- (a) a person has been appointed to and assumed those functions; or
- (b) the Chairperson has resumed those functions,

as the case may be, they are to be performed by an interim Chairperson elected by the Commissioners from among their number.

- (2) If the office of a Commissioner becomes vacant:
 - (a) in the case of a vacancy under any of paragraphs (a) to (d) of section 3(2), the office must be filled, following the procedures for appointment or designation under that subsection, within thirty days of the vacancy;
 - (b) in the case of a vacancy under any of paragraphs (e) to (g) of that subsection, the vacancy must be notified in the *Gazette* and the office filled, following the procedures for appointment under that subsection, within ninety days of the notification.
- (3) A Commissioner appointed to fill a vacancy under subsection (2)(b) holds office, subject to section 4, for a period of four years from the date of his or her appointment.
- (4) A decision of the Commission is not affected by reason of a vacancy in its membership.

Terms and conditions of service of Commissioners

- 6 The terms and conditions of service of Commissioners are to be determined by an independent Board appointed by the [*Head of State*].

Secretary and staff

- 7(1) The Commission may appoint a secretary and such staff as are necessary for the discharge of its functions, and in particular for:
 - (a) arranging for advertising for and formal appointment of Commissioners and judicial officers;
 - (b) summoning and organising meetings of the Commission;
 - (c) receiving complaints against judicial officers;
 - (d) providing administration for selection panels and disciplinary tribunals;
 - (e) drafting of the annual report;
 - (f) transacting other business of the Commission.
- (2) The Commission is to be responsible for the direction, control and discipline of its staff.

Part 3 – Functions and Procedure of Commission

Functions and procedure of Commission

- 8(1) The Commission has the following functions:
 - (a) to select applicants for appointment to judicial office in accordance with section 9, and advise the [*Head of State*] accordingly;
 - (b) to discipline judicial officers under sections 10 to 13 and where relevant to advise the [*Head of State*] as to their suspension or removal from office;
 - (c) to advise the [*Executive*] on matters relating to the improvement and efficiency of the administration of justice; and
 - (d) any other function given to the Commission by the Constitution or another Act.
- (2) The [*Head of State*], acting in accordance with the advice of the Commission, is to appoint, suspend or remove judicial officers.
- (3) In the exercise of any of its functions under this section the Commission is not subject to the direction or control of any person.
- (4) Schedule 2 applies with regard to the procedure of the Commission.

Selection for judicial office

- 9(1) In selecting applicants for judicial office the Commission is to have regard to:
 - (a) professional qualification and experience;
 - (b) intellectual capacity;
 - (c) integrity;
 - (d) independence;
 - (e) objectivity;
 - (f) authority;
 - (g) communication skills;
 - (h) efficiency; and
 - (i) ability to understand and deal fairly with all persons and communities served by the courts.
- (2) In addition to the qualities referred to in subsection (1) the Commission is to give consideration to the desirability that judicial officers should broadly reflect the diversity of the community in terms of gender, ethnicity, religion and regional or social groupings.
- (3) The Commission is to appoint selection panels to consider the appointment of judicial officers and make recommendations to the Commission.
- (4) A selection panel is to consist:

- (a) in the case of senior judicial officers, of no fewer than five Commissioners;
- (b) in the case of other judicial officers, of no fewer than three nor more than five Commissioners,

and panels are to be appointed having regard to the diversity referred to in subsection (2).

- (5) Schedule 3 applies with regard to the procedure for the selection of applicants for judicial office.

Disciplinary function of Commission

- 10(1) In exercising its function to discipline or advise on the suspension or removal of a judicial officer under section 8(1)(b), the Commission is to consider a matter either as a result of a complaint made to it or of its own motion.
- (2) A complaint may be made by any person to the Commission and must be in writing specifying the facts relied on and the relevant ground of complaint under subsection (3).
- (3) The grounds for disciplining, or advising removal of, a judicial officer are that the officer:
 - (a) has acted or behaved in a way which is incompatible with his or her office;
 - (b) has failed without reasonable excuse to discharge the functions of the office for a continuous period of at least three months;
 - (c) has been convicted of an offence of moral turpitude;
 - (d) is otherwise unfit to hold office or unable properly to discharge the functions of that office.

Preliminary consideration and power to investigate

- 11(1) A matter concerning the conduct or fitness for office of a judicial officer that is the subject of a complaint is to be referred to two judicial Commissioners.
- (2) The Commissioners must consider, by undertaking such informal investigation as they consider necessary, whether the matter discloses a ground for discipline or removal under section 10(3) and if so whether there is a case to answer.
- (3) The Commissioners may summarily dismiss the matter without further investigation where they consider that:
 - (a) no ground for discipline or removal from office is disclosed;
 - (b) it is frivolous, vexatious or not made in good faith;
 - (c) it relates solely or essentially to the merits of a judgment or order;
 - (d) the subject-matter is trivial;
 - (e) the matter complained about occurred at too remote a time to justify further consideration;
 - (f) the person complained of had ceased to be a judicial officer at the time of the complaint; or
 - (g) having regard to all the circumstances of the case, further consideration of the complaint would be unnecessary or unjustifiable.
- (4) Where the Commissioners dismiss the matter under subsection (3):

- (a) the Commission must inform the judicial officer concerned and the complainant;
 - (b) the complainant may appeal to a full disciplinary tribunal.
- (5) If the Commissioners determine that a matter requires investigation, the Commission must inform the judicial officer concerned of the nature or cause of the alleged misconduct or unfitness for office and give the officer an opportunity to make oral or written representations as to whether the matter gives rise to a case to answer.

Disciplinary proceedings following a complaint

12(1) Where a case to answer is established under section 11, the Commission:

- (a) may advise the [*Head of State*] to order the suspension from office of the judicial officer concerned pending the outcome of proceedings; and
 - (b) must as soon as reasonably practicable constitute a disciplinary tribunal to investigate the case.
- (2) A disciplinary tribunal is to consist of three judicial Commissioners other than the Commissioners who undertook the preliminary inquiry; and at least one of the Commissioners must be senior in rank to the judicial officer being investigated.
- (3) Schedule 4 applies with regard to the procedure of a disciplinary tribunal.
- (4) Where a disciplinary tribunal finds a case proved against a judicial officer it may recommend that the Commission apply the following measures:
- (a) to advise the [*Head of State*] that the judicial officer should be removed from office; or
 - (b) to remit the case to the Chief Justice with a recommendation that one or more of the following measures be implemented in respect of the judicial officer:
 - (i) a warning or reprimand should be issued;
 - (ii) a direction should be given that he or she should not receive a salary increment or promotion in the way specified;
 - (iii) he or she should be required to apologise to the complainant in the manner specified.
- (5) If the judicial officer concerned is the Chief Justice, the recommendation under subsection (4)(b) is to be made to the next senior judge.

Disciplinary proceedings instituted directly by the Commission

13(1) Where the Commission decides to institute proceedings of its own motion it must:

- (a) inform the judicial officer concerned of the nature or cause of the alleged misconduct or unfitness for office, and give the officer an opportunity to make oral or written representations as to whether the matter gives rise to a case to answer; and

- (b) if it decides to proceed with the investigation, as soon as reasonably practicable appoint a disciplinary tribunal consisting of three judicial officers who are not Commissioners, at least one of whom is senior in rank to the judicial officer being investigated.
- (2) The Commission may advise the [*Head of State*] to order the suspension from office of the judicial officer concerned pending the outcome of proceedings under this section.
- (3) Section 12(3) to (5) apply to the procedure of a disciplinary tribunal constituted under this section.

Part 4 – Financial Accounts and Report

Funding of Commission

- 14(1) Subject to subsection (2), the expenses of the Commission in the execution of its functions under this Act are to be charged on and issued out of the Consolidated Fund.
- (2) Before the issue from the Consolidated Fund, in each financial year the Commission must prepare estimates of its expenditure for the following year and submit them to *[Parliament]* for approval.

Accounts of Commission

- 15(1) The Commission must ensure that proper books and records of accounts of its operations are kept and maintained.
- (2) Within three months after the end of each financial year, the Commission must submit to the Auditor-General the accounts of the Commission for that year.
- (3) The accounts of the Commission must be audited annually in accordance with *[legislation on public audits]*.

Annual report

- 16(1) The Commission is to prepare an annual report for each financial year.
- (2) The report must contain, in respect to the year to which it relates, the financial statements of the Commission and a description of the activities undertaken by the Commission, including a summary of the steps taken during the year in the identification, selection and appointment of Commissioners, judicial officers and staff and any decisions taken by a disciplinary tribunal.
- (3) The Commission must send a copy of the report to the *[Clerk of Parliament]*

Part 5 – Miscellaneous

Power to summon a person before a disciplinary tribunal

- 17 A disciplinary tribunal may summon a public officer or other person to appear before it, or to produce a document or thing, or supply information, that the tribunal considers may be relevant to its functions; and the public officer or person so summoned must co-operate with the tribunal.

Confidentiality

- 18(1) A Commissioner, a member of staff of the Commission or a person acting under the authority of the Commission must not without the consent in writing of the Commission publish or disclose to any person otherwise than in the course of that person's duty the contents of any document, communication, or information which relates to, and which has come to his or her knowledge in the course of, his or her duties under this Act.
- (2) The limitation in subsection (1) does not prevent disclosure:
- (a) to the relevant authorities of suspected criminal activity by any person; or
 - (b) in compliance with a court order.

Conflict of interest

- 19(1) If a Commissioner is present at a meeting of the Commission or a disciplinary tribunal at which a matter is the subject of consideration in which the Commissioner or his or her associates or family members are directly or indirectly interested in a private capacity, the Commissioner must as soon as is practicable after the beginning of the meeting declare that interest and must not take part in any consideration or discussion of, or vote on any question touching, that matter.
- (2) A disclosure of interest made under subsection (1) must be recorded in the minutes of the meeting at which it is made.

Protection from personal liability

- 20 A Commissioner, a member of staff of the Commission or a person acting under the authority of the Commission is not liable to a civil action or suit for any matter or thing done or omitted to be done in good faith in the course of his or her duties under this Act.

Offences and penalties

- 21 A person commits an offence if he or she:
- (a) in connection with an application by that person or by another person for employment or appointment by the Commission, or with a matter on which it is the duty of the Commission to inquire, wilfully gives to the Commission or to a member of the Commission information which is false or misleading in a material particular;

- (b) publishes or discloses to an unauthorised person, or otherwise than in the course of duty, the contents or part of the contents of a document or information which has come to his or her knowledge in the course of carrying out duties under this Act;
- (c) otherwise than in the course of duty, directly or indirectly by him or herself or by another person influences or attempts to influence a decision of the Commission or of a Commissioner; or
- (d) fails without lawful excuse:
 - (i) to answer a question put to him or her while testifying before a disciplinary tribunal; or
 - (ii) to comply with an order made by a disciplinary tribunal for attendance or for production of a document or thing, or disclosure of information,

and is liable to imprisonment for [*maximum term*] and to a fine of [*maximum monetary penalty*].

Regulations

- 22 The Commission may make regulations for the better carrying out of the administration of the business of the Commission in undertaking its functions, and in particular for:
- (a) the declaring and advertising of vacancies;
 - (b) procedures to supplement those in Schedule 3 relating to appointment of judicial officers, in particular with reference to information and references required of applicants;
 - (c) the appointing of selection panels and disciplinary tribunals;
 - (d) the procedures for complaints to be made to the Commission and appeals from summary dismissal of complaints under section 10;
 - (e) procedures to supplement those in Schedule 4 relating to hearings before disciplinary tribunals;
 - (f) financial procedures of the Commission.

Transitional provisions

- 23(1) An appointment may be made under this Act after it has been passed but before it comes into force, but only to the extent appropriate for constituting the Commission as a body capable of undertaking its functions immediately the Act comes into force.
- (2) The term of office of a person appointed pursuant to this section is to be treated as beginning on the date of the coming into force of this Act.

Schedule 1

Section 3(4)

Oath of Office

I swear [affirm] that I will undertake my duties as Commissioner under the Judicial Service Commission Act 20_ impartially without fear or favour, and to the best of my ability.

Schedule 2

Section 8(4)

Procedure of the Commission

1. The Commission is to meet at least three times each year, and in any event within 30 days of the occurrence of a vacancy in a judicial office.
2. Seven clear days' notice must be given for a meeting of the Commission.
3. The Chairperson may of his or her own volition at any time convene a special meeting of the Commission, and must do so within seven days of receiving a written request to that effect signed by at least three Commissioners.
4. A quorum of the Commission is seven Commissioners, of whom at least three must be those appointed under section 3(a) to (d).
5. The Commission may invite a person whose presence is in its opinion desirable to attend and participate in the deliberations of the meeting of the Commission, but that person may not participate in any vote.
6. In the absence of consensus, decisions of the Commission are to be determined by a majority of the Commissioners present and voting, and in the event of a tie the Chairperson has a casting vote.
7. The Chairperson may, where he or she considers it necessary, order that a vote be taken by secret ballot.
8. The Commission must keep a full record of its meetings.
9. Subject to this Schedule, and to any regulations made under section 22, the Commission may regulate its own proceedings.

Schedule 3

Section 9(5)

Procedure for Appointment of Judicial Officers

Notice of vacancy

- 1(1) A vacancy in a judicial post is to be declared by the Commission by notice in the *Gazette*.
- (2) Where a vacancy has been declared, the Commission must within fourteen days place an advertisement in the national news media that:
 - (a) describes the judicial vacancy;
 - (b) states any constitutional and statutory requirements for the position;
 - (c) invites all qualified persons to apply;
 - (d) informs interested persons how to obtain application forms; and
 - (e) sets the deadline for submission of applications, which must not be less than 30 days after the date of the advertisement.

Submission of applications

- 2(1) An applicant seeking consideration for appointment to a judicial office must complete and file the prescribed application form and comply with the requirements stated in it.
- (2) The application form is to require an applicant to provide prescribed information and references.
- (3) Deviation from a form that does not materially affect the substance of the information given or is not likely to mislead does not affect its validity.

Short-listing and consultation by the Commission

- 3(1) After the expiry of the period set for applications, the Commission must short-list those it considers to be the most suitable applicants.
- (2) The Commission may consult with judicial officers, the [*relevant lawyers' professional governing body*] and any other body that it considers appropriate as to the suitability of an applicant.
- (3) Information supplied under subparagraph (2) is to be kept confidential.

Consideration by selection panel

- 4(1) A selection panel of the Commission appointed under section 9(3) is to interview the short-listed applicants and within seven days of the conclusion of interviews, deliberate and recommend to the Commission that it appoint the applicant or applicants the panel considers to be the most qualified taking into account the diversity referred to in section 9(2) and any further prescribed criteria.
- (2) In recommending an applicant a member of the selection panel must vote according to his or her personal assessment of the applicant's qualifications under the criteria set out in section 9(1).

Extension of time

- 5 The Commission may, for sufficient cause shown, extend a time prescribed by this Schedule on any conditions that appear to it to be just and expedient.

General power of the Commission

- 6(1) Subject to this Schedule, and to any regulations made under section 22, the Commission may regulate its own procedure.
- (2) Nothing in this Schedule limits or otherwise affects the inherent power of the Commission to make any decisions that may be necessary for the ends of justice or to prevent abuse of the process of the Commission.

Schedule 4

Section 12(3)

Procedure of a disciplinary tribunal

Service of notice

- 1 The Commission must serve on a judicial officer whose conduct is the subject of an investigation, at least fourteen days before the date of the hearing:
 - (a) a notice of the hearing;
 - (b) a list of the allegations against the judicial officer, together with a summary of the evidence in support of the allegations; and
 - (c) copies of any documentary evidence to be adduced.

Hearings to be private

- 2 A hearing of the tribunal is to be held in private unless the judicial officer whose conduct is the subject of the investigation elects to have the hearing in public.

Right to be present and be represented by counsel

- 3(1) A judicial officer whose conduct is subject of the investigation is entitled:
 - (a) to be present throughout the proceedings that relate to him or her; and
 - (b) to be represented by counsel appointed and paid for by the Commission.
- (2) The Commission may appoint counsel to assist the tribunal in its investigation.

Right not to attend

- 4 A judicial officer duly served may elect not to attend in person or by counsel, in which event the tribunal may consider the evidence available and make a decision and appropriate recommendations.

Form of evidence

- 5 Evidence before the tribunal may be presented wholly or partly in the form of a memorandum, affidavit or other documentation and the tribunal may use the contents of that documentation in forming its opinion.

Right to cross-examine witnesses and call evidence

- 6 A judicial officer whose conduct is the subject of the investigation is entitled:
 - (a) to cross-examine any witness during the hearing; and
 - (b) to call evidence to rebut allegations made against him or her.

Rules of evidence and standard of proof

- 7 The tribunal:
 - (a) is not bound by rules of evidence, but is to be guided by the rules of natural justice and relevancy; and
 - (b) must apply a criminal standard of proof in its findings.

Submissions

- 8 At the close of the hearing of all evidence before the tribunal, any counsel assisting the tribunal and the judicial officer whose conduct is the subject of investigation or his or her counsel are entitled to make oral or written submissions.

Delivery of the decision

- 9(1) A decision of the tribunal must be in writing and contain a concise statement of the investigation, the points for determination, the decision and the reasons for the decision on each separate issue.
- (2) The decision of the tribunal is to be delivered in public on a date fixed for that purpose but not later than fourteen days after conclusion of the proceedings.
- (3) The tribunal must redact the decision:
 - (a) to any extent necessary in the interests of national security;
 - (b) where it has dismissed the case, to include only the allegations and a summary of its findings.
- (4) The Commission must after delivery of the decision under subparagraph (2) cause it to be published in the *Gazette*.

Recording of proceedings

- 10 The tribunal is to cause the record of any proceedings before it be taken by shorthand notes, tape-recorded or electronically recorded.

Extension of time

- 11 The tribunal may, for sufficient cause shown, extend the time prescribed by this Schedule for doing any act or taking any proceedings on any conditions that appear to it to be just and expedient.

General power of the tribunal

- 12(1) Subject to this Schedule, and to any regulations made under section 22, the tribunal may regulate its own procedure.
- (2) Nothing in this Schedule limits or otherwise affects the inherent power of the tribunal, either on its own motion or on the application of a party, to make any order that may be necessary for the ends of justice or to prevent abuse of the process of the tribunal.

Explanatory Notes

This model Act incorporates the recommendations of and takes note of the comments made at the Commonwealth Secretariat Regional Consultative Meetings on the JSC Model Act that took place in September 2014 in Livingstone, Zambia, in June 2015 in Kuala Lumpur, Malaysia, in September 2015 in Wellington, New Zealand and in December 2015 in Grand Cayman.

All the meetings involved senior judicial officers from the majority of jurisdictions from each region. References below to discussions are references to deliberations that took place at these meetings.

The model Act also, in Part 2, follows essentially the recommendations of Dr Karen Brewer (Commonwealth Magistrates' and Judges' Association), James Dingemans QC (now Mr Justice Dingemans) (Commonwealth Lawyers' Association), and Dr Peter Slinn (Commonwealth Legal Education Association), in their joint model clause for a Judicial Appointments Commission (May 2013). The model clause upholds the Commonwealth (Latimer House) Principles on the Three Branches of Government adopted in 2003 by Commonwealth Heads of Government.

Most of the provisions in the Act are hopefully self-explanatory. The notes below consider points about which there might need to be explanation or amplification.

A note about drafting style of the model Act: in common with modern drafting practice the present tense is used to explain provisions, and the auxiliary "must" is used in preference to "shall" where an obligation is being imposed. Where, however, the object of a provision is not so much directly to impose an obligation as to explain a duty or function, the form used is "is/are to".

Part 1

Section 1(2)

The provision for delay would probably be necessary in practice to allow for the *first* Commission to be constituted after passing of the Act but before it comes into force (see the transitional provisions in section 23).

It could well be that different dates might be required for the commencement of provisions dealing with appointment and those dealing with discipline.

The term "Minister" is not defined in this model Act, as it is normally conveniently defined in an Interpretation Act or similar legislation as "the Minister responsible for the matter in question".

Section 2

The term "judicial Commissioner" might cause confusion in jurisdictions where it is used for part-time judges. If so, then it would clearly be more convenient to substitute for it "judicial member" or "judicial member of the Commission".

In the scheme of this Act some distinctions are made between procedures for judicial officers generally and senior judicial officers as defined below (see e.g. section 9(4)).

In the definition of "senior judicial officer" a judge of equivalent status to a puisne judge might include a judge of a Commercial or Industrial Relations Court. In some jurisdictions there are other designations such as circuit or district judges, and

in these cases either this definition, or the previous definition of “judicial officer” (depending upon whether or not these judges were to be designated as senior judicial officers), would clearly need to be amended accordingly.

Part 2

Section 3(1)

Under this Act it is not envisaged that the Commission would need to be a body corporate. If it were, relevant provisions would be needed as to its establishment as such a body and its technical powers to enable it to so operate.

Section 3(2)

There was some discussion during regional deliberations on the draft as to whether the Chief Justice should be a Commissioner, but the consensus was that he or she should. This would of course mean that the Chief Justice would participate in the selection of his or her own successor.

The appointment in paragraph (b) would obviously not be appropriate for small jurisdictions that have only an occasional Court of Appeal.

Alternatively to paragraph (c) the Commissioners could be representatives from a body such as a Judges' Council.

There was a strong feeling in all deliberations that the Commissioners appointed under paragraphs (e) to (g) should be seen to be independent and thus not be appointed by the Commission itself; hence the provision for nomination by the relevant authorities. No provision is made for election of such a person prior to nomination, and it would be for the nominating organisations to determine how they would select their nominees (in the case of those under paragraph (g) it could for example be after advertisement in the national press). In jurisdictions where there is no organisation equivalent to the one referred to that paragraph it would be for that jurisdiction to insert provisions for nomination by an appropriate body or person to ensure that nominees were not persons who (quite apart from the exclusion of those from the executive or parliament) might have personal interests in how the courts operate (e.g. big business or those commonly involved in litigation).

Section 4

The question was raised in deliberations as to the desirability of the terms of office of “lay” Commissioners not all terminating at the same time. However, as there would most likely be a natural wastage due to death or resignation (and see section 5(3) for the commencement of the term for a new Commissioner) the necessarily complicated provisions to provide for staggered termination by or under this Act have not been included.

Section 4(4)

The same provision is made for removal from office of a Commissioner (whether judicial or lay) as apply to a judicial officer.

Section 4(5)

It is recognised that it might be difficult in some jurisdictions to fulfil the requirement as to a retired senior judicial officer. If so the paragraphs might need to be expanded to include serving senior judicial officers, or possibly serving or retired senior judicial

officers from neighbouring or other Commonwealth jurisdictions. The question remains as to whether the relevant appointments (both here and in section 6) should be on the advice of a particular official, such as the Prime Minister, or left to the discretion of the Head of State as to with whom to consult.

Section 5(2)

There is a requirement to notify a vacancy of a lay Commissioner in the Gazette. Besides giving the necessary general notice of the fact, the provision provided for a point at which time starts to run.

Section 6

The first draft of this model Act gave this function to the Commission, but it was thought during deliberations that this would be better done by an independent *ad hoc* body. "Terms and conditions", which of course would vary from jurisdiction to jurisdiction, do not necessarily imply that Commissioners have to be paid a salary.

Section 7(2)

This function is now included in order to clarify that Commission staff are not in the same position as public servants generally (i.e. subject to the control of the Public Service Commission or the Minister).

Part 3

Section 8(1)(a)

"Judicial officer" is defined under section 2 as including senior judicial officers, and thus the power of the Commission would include appointment of e.g. magistrates and judges at all levels. No specific mention is made of *promotion* in posts as it is assumed that this will come within the process of appointment.

Section 8(1)(c)

It is recognised that this function might be undertaken by a different body and that individual jurisdictions would of course be free to delete it and/or add other functions.

Section 8(2)

There would not be power in the Head of State to overrule the decision of the Commission.

Section 9(3)

It would be the Commission itself rather than the panels that would formally make the appointments.

Section 10

There may well be a procedure under the Constitution for the disciplining, suspension or removal of senior judicial officers, for example by an impeachment process before the legislature or by the setting up of a special *ad hoc* tribunal composed of persons who have held senior judicial office. In such a case this Act could obviously provide only for magistrates, etc., and the definition of "judicial officer" would need to be amended accordingly. This Act provides, however, for the disciplining of judicial officers at all levels.

Section 10(3)(a)

No specific mention is made of bankruptcy, which could be considered under this head.

Section 10(3)(c)

This is preferred to a reference to an offence carrying a specified maximum penalty.

Section 10(3)(d)

Under this head would come matters such as incompetence or physical or mental unfitness to continue in office.

Section 11

This section applies to consideration of matters that are originated by complaint. Where the Commission decides to proceed of its own motion, the matter is to be dealt with under section 13.

Section 11(1)

There was a strong opinion in discussions that *all* investigations needed to be undertaken in this way so that there would be unlikely to be any suspicion that complaints might be dealt with arbitrarily.

Bearing in mind that in practice most complaints are likely to be made against magistrates (if only because there are more of them), and that many if not most of these are likely to be summarily dismissed under subsection (4), particularly paragraph (c) (complaints relating to the merits of a judgement or order), a possible alternative policy might be for two Commissioners to consider only complaints against senior judicial officers. See also the note under section 11(4).

A two-judicial Commissioner panel would necessarily cause the involvement of every one of the five judicial Commissioners appointed under section 3(2) each time a matter proceeded to a (three-judicial Commissioner) disciplinary tribunal, but hopefully the need for such tribunals would not be a common occurrence.

Section 11(3)(f)

The Commissioners would still have a discretion to pursue an investigation, even though the judicial officer had ceased to be in office, where the matter was considered sufficiently serious. But such a course would in practice need to be exceptional.

Section 11(4)(b)

There was some discussion about whether this right should remain, especially in view of the consideration of the complaint by two judicial Commissioners. If it does then the process would require regulations to be made as to time limits for appeal, right of appearance and procedure generally (see section 22(d)).

Section 12(1)(a)

The use of this discretionary power would clearly depend on the gravity of the complaint. A suspension would normally leave the judicial officer on full pay but (assuming this is in fact the policy) if there is thought to be a potential doubt then

express mention of the fact could be made either in paragraph (a) or in a separate subsection of this section. The suspension would of course be at the instigation of the Commission, the Head of State performing a merely formal function.

Section 12(1)(b)

There was some discussion as to whether a specific time limit should be set here. The problem with this relates to the legal position if it is not adhered to, and as to whether the judicial officer concerned could then claim that the investigation of his or her case would then be time-barred. Power could be given to the Commission to extend a specified time, but this would in effect largely nullify the effect of the time limit. The vaguer form of words used makes a time-bar challenge much more difficult.

Section 12(4)

In discussions on the draft it was considered that, short of advising the Head of State to remove the officer concerned, lesser penalties should not be matters for the Commission to have the power to deal with directly, but should rather take the form of a recommendation to the Chief Justice as here.

The question arose during discussions as to whether an appeal procedure should be provided for in respect of a finding of the Commission against a judicial officer. It was however noted that:

- (a) the judicial review remedy would anyway be available on a matter of law;
- (b) there is a filtering process in section 11; and
- (c) the status of members of a disciplinary tribunal would constitute it as a particularly weighty one.

In consequence no such procedure is in fact provided for.

There was also the question as to whether suspension from office for a specified period, or until the happening of a specified event, should be an additional disciplinary power under paragraph (a) of this subsection, i.e. not, as in this model Act as drafted, merely a temporary measure under subsection (1)(a) of this section. It has not been included, although individual jurisdictions might consider drafting paragraph (a) as follows:

- "(a) to advise the [*Head of State*] that the judicial officer should be removed from office, or suspended from office either for a fixed period or until the happening of a specified event;"

Section 13

This provides for where the Commission decides to institute proceedings of its own motion (e.g. because no-one is willing or available to make a complaint). The same right of a judicial officer to make representations as to whether there is a case to answer is however given as in section 11(5)

Part 4

Section 21

The style of drafting the penal provision will vary from jurisdiction to jurisdiction. The formula at the end of this section makes the assumption that (as is authorised by many Interpretation Acts) the use of the word "and" between respective penalties indicates that they may be imposed either cumulatively or in the alternative.

Section 22

Although power is here given directly to the Commission, it is recognised that in some jurisdictions regulations would conventionally be made by e.g. the Head of State, or a Minister, on the advice of the Commission.

Section 23

This section (which follows a background rule contained in many Interpretation Acts) is designed to allow all necessary appointments to have been made by the time the Act comes into force.

Schedule 2

Paragraph 4

In smaller jurisdictions where the Commission might be limited to fewer Commissioners, the quorum might need to be reduced accordingly.

Schedule 3

Paragraph 3(1)

This provision originally contained a requirement for the Commission to short-list suitable candidates and publish their names in the Gazette, on the basis that public confidence in the selection process for the judiciary needs to be maintained. However, there was strong objection to this procedure during discussions, as it was thought that it might deter suitable candidates from applying, and it has been omitted.

Schedule 4

Paragraph 3(1)

The insertion of the provision in paragraph (b) was thought in discussions to be necessary especially in the cases of junior judicial officers who might well be unable to afford legal representation. It would be up to the Commission to determine the level of representation it provided.

Paragraph 7(b)

It was considered in discussions that disciplinary tribunal proceedings were finely balanced between a requirement to do justice to the individual complained about and that to prevent as far as possible the bringing of the judiciary into disrepute by the continuation in post of a judicial officer against whom there was suspicion of incompetence, or of inappropriate, anti-social or even criminal behaviour. However, there was a strong preponderance of view that it should be only the criminal standard of proof that should be applied



The Commonwealth