THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/D&I:JWvk210621

21 June 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
DX 5719 CANBERRA

By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Tidball,

ALRC Judicial Impartiality Consultation Paper

Thank you for your memorandum seeking contribution to the Law Council's submission to the Australian Law Reform Commission's (ALRC) Judicial Impartiality Consultation Paper (Paper).

The Law Society's Public Law and Diversity and Inclusion Committees have contributed to this submission.

At the outset, we wish to commend the ALRC for its very thoughtful and comprehensive consultation paper. We support the thrust of the Paper, and agree with the principles set out on page 8 of the Paper, and with the problems identified.

1. Systemic matters

1.1. Judicial appointment process

In our view, the issues raised in respect of the Law Council's earlier call for comments in respect of a transparent process for judicial appointments, with a view to promoting greater judicial diversity, is an essential part of supporting judicial impartiality and public and litigant confidence in the administration of justice. For your convenience, we attach our previous submission to the Law Council dated 28 April 2021, and reiterate our views in respect of reinstating a process for judicial appointments similar or the same as that which existed federally in 2008. In this regard, we support proposals 14 and 15 set out in the Paper, and suggest additionally that statistical collection include data on disability. We also note again that there are systemic resourcing issues for courts, including the Federal Circuit Court, that create onerous and arguably untenable pressures on judicial officers. This has likely resulted in flow on effects that may damage the administration of justice and public confidence in those jurisdictions.

1.2. Diversity in the legal profession

The Law Society is supportive of measures to increase diversity in the legal profession, noting that diversity should encompass not only gender, but also cultural and ethnic background, disability, sexual orientation, socio-economic background, and professional experience.

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In our view, the candidate pool for judicial appointments should be broadened to include a variety of legal professional experience, as drawing primarily from the rank of Senior/Queens Counsel entrenches diversity issues from the Bar.[1] Consideration should be given to diversity of legal professional experience, and judicial officers could equally be drawn from lawyers who are recognised specialists in their fields, legal academics and the Bar.

Increasing diversity in the legal profession is assisted by encouraging wide recruiting and developing an inclusive culture. Studies suggest that workplaces that have diverse and inclusive work cultures, policies and practices attract more people and are able to draw from a larger recruitment pool.[2] Similarly, employees who feel valued and respected by their organisation, as a result of fostering an inclusive culture, are likely to remain for a longer period of time.

In response to question 16, we further suggest the following measures:

- Early encouragement of undertaking legal studies in schools with students from a range of different cultural and socio-economic backgrounds. Implementation of cadetship or scholarship programs in universities with confirmed placement within law firms at early career stages.
- Creating significant opportunities to progress the careers of culturally diverse people within legal organisations, including access to independent mentoring and professional development.
- Considering diversity quotas.
- Creating internal policies that address bullying, sexual harassment, racism and discrimination.

1.3. Federal judicial commission

In respect of consultation questions 19, 20 and 21, we reiterate the views set out in our attached submissions to the Law Council dated 4 September 2020 and 5 November 2020 in respect of the Law Council's draft principles underpinning a federal judicial commission. We continue to support the establishment of a federal judicial commission (subject to constitutionality), modelled on the Judicial Commission of NSW (consistent with [96], p 31 of the Paper). We support consultation proposals 17 and 18. In our view, it is useful to co-locate the conduct/complaints handling and education functions in one body, as these functions will inform each other. We note that the Judicial Commission of NSW runs extensive informational and educational programs. In particular, it has run for many years the Ngara Yura Program, established in 1992 in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody that judicial officers should receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society.

2. Legal and procedural matters

2.1. Existing law on apprehended bias

We consider that the current test sets a fairly low threshold. Given that not many disqualification applications succeed, in respect of the threshold set, the test appears to be set at an appropriate level. We do query however, whether the "lay observer" test remains appropriate. For instance, we query whether a lay observer would be familiar with the content of general professional ethics, or the requirements of the solicitors conduct rules. In any event,

[1] Senior Counsel gender statistics are available here: https://nswbar.asn.au/the-bar-association/statistics
[2] Jeremy Tipper, 'How to increase diversity through your recruitment practices' (2004) 36(4) *Industrial and Commercial Training* 158, 159-160.

we await the High Court's decision in *Charisteas v Charisteas* [2021] HCATrans 28 (referred to on p 9 of the Paper).

2.2. Procedure for determining applications for disqualification

Referral to a different judge

Proposals 6 and 8, being referral of the application for disqualification to a different judge (or judges) than the judge in question for decision is prima facie attractive as an option to "…enhance[e] both the appearance and actuality of impartial justice." (p 21, Paper). In addition to the benefits already discussed in the Paper, having a duty judge to hear disqualification matters will also likely result in greater consistency in decisions. There will also be the opportunity to offer specialised training to the duty judge.

However, as considered in the Paper, there will likely be, among other issues, associated costs in respect of delay and fees caused by the approach proposed in proposal 6. The Law Society is concerned that disqualification applications may be used as a weapon against judges, noting that there may be reputational and professional consequences for judges associated with these applications. Critically, the Law Society is reluctant to add complexity and cost to litigation processes and is of the view that any procedure should be kept as simple as possible, without undermining the values that underpin the judicial system, including access to justice and procedural fairness.

For these reasons, the Law Society urges caution in deciding whether a reform in this regard is necessary. The issues must be parsed carefully before determining whether the three options presented in respect of proposal 6 will, on balance, better serve the general public interest and the interests of litigants.

In respect of option A (automatic referral), the Law Society queries how the facts will be made available to the duty judge (ie if the judge in question does not have the opportunity to provide a decision).

In respect of option B, it may be useful to consider a lower threshold test, such as if the application is "not without merit" (rather than "reasonably arguable"). This might address the perception that too much discretion is preserved for the impugned judge. The Law Society notes that this option would require a decision from the impugned judge, which provides an avenue for facts to be put before the duty judge.

In respect of multi-member courts, the Law Society would favour the inclusion of the impugned judge in the multi-member decision-making panel, again, in order to ensure that the relevant facts are available.

Single judge court: interlocutory appeal

The Law Society supports the formalisation of the availability of an interlocutory appeal process relating to bias before a single judge court (consultation question 7), on the basis that removing this uncertainty (and clarifying expectations and procedures in a practice note) is likely to expedite review processes of the initial decision. However, we do not support removing the requirement to seek leave to appeal. We consider leave a necessary safeguard in respect of any frivolous or vexatious applications.

In our view, disqualification concerns ought to be dealt with at the earliest stage possible. The timing of making a disqualification application will be important in minimising disruption and inefficiency. Disqualification applications relating to bias arising out of a judge's existing interests may be dealt with reasonably early in proceedings, however the timing of

disqualification applications in respect of bias arising out of conduct are more likely to occur later in proceedings. In any event, the applications still ought to be dealt with before the judge begins preparing reasons.

Contact between judges and lawyers

We note that the ALRC anticipates reviewing the professional rules in respect of contact between judges and lawyers canvassed in proposal 10 after the High Court has considered the issue further in *Charisteas.* The Law Society looks forward to assisting at the appropriate time.

Waiver

Consultation question 13 raises the issue of whether the waiver rule operates unfairly to prevent issues of unacceptable judicial conduct giving rise to apprehended bias being raised on appeal. In the experience of our members, where unacceptable judicial conduct giving rise to apprehended bias occurs, this often has procedural fairness consequences, and an appeal may be based on those procedural fairness aspects.

3. Data collection

While the Law Society supports consultation proposal 22 in principle on the basis that reforms ought to be supported by evidence, we caution that the data collected must be nuanced and sophisticated enough to in fact be useful. Bald numbers might serve to obfuscate the real issues, and the relevant qualitative information may be difficult to obtain. In this regard we refer the Law Council to the following papers:

- Spigelman, James J., Measuring Court Performance (September 16, 2006). Journal of Judicial Administration, Vol. 16, No. 2, p. 69, 2006, Available at SSRN: https://ssrn.com/abstract=1806782; and
- Spigelman, James J., Judicial Accountability and Performance Indicators (May 10, 2001). Civil Justice Quarterly, Vol. 21, p. 18, 2002, Available at SSRN: https://ssrn.com/abstract=1802176

Thank you for the opportunity to provide this submission. Questions may be directed at first instance to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Juliana Warner
President

Encl.

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Our ref: D&I/GSC/PuLC:JWsl280421

28 April 2021

Mr Michael Tidball
Chief Executive Officer
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By email: alexandra.wormald@lawcouncil.asn.au

Dear Mr Tidball,

Review of the Law Council's Policy Statement on the Process of Judicial Appointments

Thank you for the opportunity to contribute to the Law Council's review of its Policy Statement on the Process of Judicial appointments ("Policy Statement"). The Law Society's Diversity and Inclusion, Government Solicitors and Public Law Committees have contributed to this submission.

1. General observations

The Law Society's view is that there is currently insufficient transparency with respect to how judicial appointments are made, particularly compared to the previous process for appointing candidates to the Federal Court, the Family Court and the Federal Magistrates Court (as it was known at the time) put in place by Attorney-General Robert McClelland and operative from 2008-2013 ("McClelland process").

We understand that the rationale for making the 2008 changes was to ensure:

- greater transparency and public confidence;
- that all appointments are based on merit and suitability; and
- that everyone who has the qualities necessary for appointment as a judge or magistrate is fairly and properly considered in order to increase the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.[1]

We understand that the McClelland process differs from the current process in a number of ways:

1. The extensive selection criteria were articulated and publicly available.

[1] Robert McClelland, 'Judicial Appointments Forum' (Speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008), [18]-[20].

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2. Once a decision to appoint a federal judge was made, the Attorney-General sought nominations from a broad range of sources. Calls for expressions of interest were publicly advertised online and in print media.
3. The Attorney-General convened an advisory panel, typically of the Chief Justice of either the Federal Court or Family Court, or Chief Judge of the Federal Magistrates Court (or their nominee), a retired judge or senior member of the federal or state judiciary, and a senior member of the Commonwealth Attorney-General's Department. This panel assessed candidates against the criteria, and provided, essentially, a short-list of candidates "highly suitable for appointment" to the Attorney-General, who then selected a name from that list to forward to Cabinet.
4. We note that the McClelland process also included an element of community consultation.

We would support a return to this process, which is largely consistent with the Policy Statement.

In this regard, we recommend the analysis of the McClelland process by Elizabeth Handsley and Andrew Lynch, titled *Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13.*[2]

Further, we draw your attention to the JUSTICE report titled *Increasing Judicial Diversity*, which sets out 'a series of measures to encourage underrepresented groups to embark upon a judicial career and to give them a fair chance of appointment to the bench.'[3] The Law Society supports consideration of similar recommendations, to the extent that they are compatible with the Australian judicial system.

We also suggest that it may be useful to consider models of judicial appointments adopted in comparable jurisdictions in order to learn from better practices that may further enhance transparency and fairness in the process, as well as judicial diversity without sacrificing merit. For instance, we note the Bingham Centre for the Rule of Law's report *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* ('Compendium')[4] which outlines best practice for the appointment, tenure and removal of judges under Commonwealth principles, and provides data and recommendations on the various systems currently employed.

A Judicial Appointment Commission is established in 81% of the 48 Commonwealth jurisdictions examined in the Compendium. Several reports have been published guiding the potential structure, composition, and processes a commission might follow. Virtually uniform throughout is the need for selection panels to include diverse representatives of the profession as well as lay members with differing expertise, similar to the model followed in England and Wales. We note, however, that the volume of appointments made by the Judicial Appointments Commission of England and Wales is significantly higher than the appointments that would be made by any Commonwealth Commission, and further analysis of the costs and benefits of such a Commission would need to be undertaken.

[2] Handsley, Elizabeth; Lynch, Andrew. "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" [2015] *SydLawRw* 10; (2015) 37(2) Sydney Law Review 187

[3] JUSTICE, *Increasing judicial diversity is vital to a fairer justice system – a JUSTICE working party gives its recommendations,* online: https://justice.org.uk/judicial-diversity-working-party-launch/

[4] J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), https://binghamcentre.biicl.org/documents/38_van_zyl_smit_2015_commonwealth_compendium.pdf

2. Policy Statement

In respect of the matters identified for consideration by the Law Council in its memo dated 25 February 2021, in our view:

- The Policy Statement should extend to Administrative Appeal Tribunal members and members of all Commonwealth Tribunals.
- The Law Society supports the principle that High Court appointments should be subject to a transparent and consultative process. We would welcome further discussion about whether a more refined process should be articulated given its unique position in the national court system.
- While it is desirable for the appointments process to be more transparent, this must be balanced against the risk of the process becoming overly populist.
- We note we have previously raised issues with the Law Council relating to timely filling of judicial vacancies in the Family and Federal Circuit Court. In this context, we note that mandating appointment times would not necessarily address the underlying issue of insufficient funding of appointments.
- If the Attorney-General puts in place a process consistent with the McClelland process and the process set out in the Policy Statement, then we would support a published explanation of whether the successful candidate was drawn from the panel's shortlist, and if not, then an explanation of why.

2.1. Attachment A – Attributes of Candidates for Judicial Officer

Similar to the McClelland process, in NSW, information in respect of the judicial appointment process is publicly available, including information on the selection criteria.[5]

The overriding principle for appointment is merit, and subject to this principle, there is an explicit commitment to promoting diversity in the judiciary. We support expressing this commitment in the federal context. In our view, a carefully crafted set of selection criteria can themselves play a part the appointment of judicial officers of merit and who represent the diversity within the community. Further, we suggest that requiring candidates to satisfactorily demonstrate both professional and personal qualities in respect of explicit criteria may assist with improving diversity.

We recommend consideration of the professional and personal qualities set out in the NSW context. In respect of the list of personal qualities included in Attachment A of the Policy Statement, we suggest the addition of "common sense and good judgment."

We also suggest consideration of the model clause to guide Judicial Appointment Commissions, which was developed jointly by the Commonwealth Lawyers Association, Commonwealth Legal Education Association, and Commonwealth Magistrates' and Judges' Association. If an Australian Judicial Appointment Commission were established, the model clause could be helpful as a starting point. For these purposes, we that that in relation to judicial diversity and selection criteria, the model clause states that:

> The Commission shall select candidates for judicial office, according to published criteria, including: intellectual capacity; integrity and independence; judgement; objectivity; an ability to understand and deal fairly with all persons and communities served by the Courts; authority and communication skills; and efficiency[6]

[5] NSW Department of Communities and Justice, *Judicial careers,* online: http://www.careers.justice.nsw.gov.au/appointments#Select%E2%80%8B%E2%80%8Bi%E2%80%8B%E2%80%8Bon%E2%80%8B%E2%80%8B%E2%80%8Bcriteria

[6] Ibid. p. 5

We suggest that the Law Council consider the inclusion of the criterion of the ability to understand and deal fairly with all persons and communities served by the Courts in its list of desired attributes. In our view, increasing the capacity of courts in this way is one of the reasons why the underlying the aim of achieving greater judicial diversity ought to be pursued.

While there has been welcome attention on gender equity on the bench,[7] the understanding of judicial diversity in the policy should extend beyond gender equity to other forms of lived experience. Diversity should encompass not only gender, but also cultural and ethnic background, disability, sexual orientation, socio-economic background, professional experience and potentially also state of origin.

To make an additional point in respect of diversity of professional experience, we note that the information about NSW appointments also expressly notes that "consideration will be given to all legal experience, including that outside mainstream legal practice".[3] In this regard, the relevant professional quality is "applied experience (through the practice of law or other branches of legal practice)".

We suggest that broadening the candidate pool to include a variety of legal professional experience will also promote diversity. For this reason, in our view, the second point under the heading "Legal Knowledge and Experience" in Attachment A to the Policy Statement should be deleted.

2.2. Attachment B – Office Holders to be Consulted Personally by the Federal Attorney-General

The Law Society is supportive of the consultative element of the Policy Statement, but notes there is no representative from culturally diverse, First Nations or any other specific diversity related representative bodies.

2.3. Attachment C – Processes to be followed by the Federal Attorney-General in Federal Judicial Appointments

As noted above, we support the process set out in the Policy Statement.

The Judicial Appointments Commission of England and Wales has a 'Diversity Strategy' in place to help facilitate and achieve judicial diversity, which has the following features:

Equal Merit Approach
In situations where candidates are deemed to be of equal merit, there are statutory provisions in place which allow the Commission to give priority to the candidate who belongs to an underrepresented group.

Reasonable Adjustments
The Commission has a Reasonable Adjustments Officer and their website outlines their approach to encouraging candidates with physical and mental health disabilities and conditions to apply. This includes examples of what reasonable adjustments are, how to ask for one, and the process for applying.

[7] See https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf

Judicial Diversity Forum
The Judicial Commission is a chair and member of the Judicial Diversity Forum, which brings together various organisations to develop and implement strategies to increase judicial diversity.

If you have any questions in relation to this letter, please contact Stephanie Lee, Policy Lawyer on (02) 9926 0275 or by email, stephanie.lee@lawsociety.com.au

Yours sincerely,

Juliana Warner
President

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Our ref:PuLC/ELC/FLC/RHvk:196691

4 September 2020

Mr Michael Tidball
Chief Executive Officer
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By email: natasha.molt@lawcouncil.asn.au

Dear Mr Tidball,

Draft Principles underpinning a Federal Judicial Commission

Thank you for your memorandum dated 4 August 2020 seeking input in respect of the Law Council's Draft Principles underpinning a Federal Judicial Commission ("Draft Principles").

The Law Society's Public Law, Employment Law and Family Law Committees have contributed to this submission. We adopt the headings used in the Draft Principles in providing these comments.

The need for a Federal Judicial Commission
The Law Society supports the establishment of a Federal Judicial Commission in principle and agrees with the matters set out at principle 1 of the Draft Principles. In our view, the composition of a Federal Judicial Commission should model the Judicial Commission of NSW. For the purposes of our remaining comments, we assume that a Federal Judicial Commission would, if invested with powers with respect to judicial officers, be constitutionally valid.

The role of a Federal Judicial Commission
The Law Society notes that the Draft Principles propose the establishment of a Federal Judicial Commission separately from the existing National Judicial College of Australia. In our view, it would be preferable to establish one body that combines the functions of a Federal Judicial Commission with the professional development and other functions of the National Judicial College of Australia. This would allow a systemic approach to addressing issues that might be cultural or arise as a result of unconscious bias.

If a new Federal Judicial Commission is to be a standalone body, then the Law Society suggests that its work should be formally coordinated with the work of the National Judicial College of Australia. In addition to streamlining the topics suitable for professional development, it will assist to ensure that there are no gaps in accountabilities.

The scope of a Federal Judicial Commission
We note that the scope of the Judicial Commission of NSW does not include registrars. Nevertheless, the Law Society suggests the Law Council consider the position of registrars. Our members note that registrars can play a judicial role, particularly in family law matters.

We note that, in circumstances where the registrars of federal courts are subject to the *Public Service Act 1999* (Cth) and their appointments may be terminated by the relevant Agency Head (for example, Registrars and Deputy Registrars appointed under s 38N, *Family Law Act 1975* (Cth)), a degree of independent oversight exists. It may not be necessary to include such registrars within the scope of a Federal Judicial Commission.

However, there are circumstances where the Governor-General is responsible for terminating the appointments of registrars, for instance, Judicial Registrars of the Family Court of Australia (s 26L, *Family Law Act 1975* (Cth)) and the Chief Executive and Principal Registrar of the High Court of Australia (s 24, *High Court of Australia Act 1979* (Cth)). The conditions for the appointment and termination of these registrars are the same as tribunal members. As such, we suggest that consideration be given to including them within the scope of a Federal Judicial Commission.

The Law Council could, additionally or in the alternative, consider whether the Governor-General might be assisted to provide for a fair and transparent process if a Federal Judicial Commission played an independent review and/or advisory role to the Governor-General in this respect.

Matters within the remit of a Federal Judicial Commission
We note that the proposed remit of the Federal Judicial Commission is where a matter:

- if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office; or
- may affect or may have affected the performance of judicial or official duties by the judicial officer.

We suggest that the second limb be clarified to make it clear that relevant conduct should not just extend to the in-court functions of a judicial officer (ie, decision-making and hearing matters), but to all of their conduct in their capacity as a judicial officer. We suggest that the Federal Judicial Commission's remit should include unbecoming behaviour in chambers (eg discrimination, harassment or bullying of staff and legal practitioners) that may not rise to the level of justifying parliamentary consideration, even if such conduct did not technically affect their performance as a judicial officer in the courtroom.

We suggest also that the Draft Principles clarify whether the proposed Federal Judicial Commission will have jurisdiction in relation to sexual harassment.

We acknowledge that it is possible for sexual harassment claims to be pursued through other avenues, such as the Australian Human Rights Commission (AHRC). However, we also acknowledge that the AHRC is a government agency, and may lack the necessary indicia of independence.

Governance and membership of a Federal Judicial Commission
In respect of appointed members, the Law Society suggests, as far as possible, including a properly representative cross section of the legal profession.

Thank you for the opportunity to provide comments. Any questions may be directed to Vicky Kuek, Principal Policy Lawyer on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Richard Harvey
President

THE LAW SOCIETY
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Our ref: PuLC/D&IC/RHvk:1990440

5 November 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
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By email: natasha.molt@lawcouncil.asn.au

Dear Mr Tidball,

Revised draft principles underpinning a Federal Judicial Commission

Thank you for the opportunity to consider the Law Council's revised draft "Principles underpinning a Federal Judicial Commission" ("Principles").

The Law Society's comments below are informed by its Public Law and Diversity and Inclusion Committees.

Constitutionality

In the first instance, we note that the Principles do not explicitly address the question of what positive constitutional power there might be for the establishment of a Federal Judicial Commission (FJC) at the Commonwealth level. The first sentence under section 2 of the Principles states that "The Commission should be separate to and independent from the Executive." Should this be the intention of an FJC (which the Law Society supports), we suggest that the threshold question of how the FJC would constitutionally exist should be expressly addressed. This is particularly so if the FJC will have powers to investigate former judicial officers; to investigate the private actions of judicial officers unrelated to judicial work (page 4); and to suspend a judicial officer for any length of time (page 6). A power to suspend is arguably a power to discipline, which is not explicitly provided for under the Constitution.

Perhaps at this time, the Law Council could simply acknowledge more prominently in the Principles that the question of the FJC's constitutionality is one that requires further review.

Investigating the conduct of past judicial officers

We note footnote 9 of the Principles that the FJC should have the capacity to conduct investigations into former judicial officers. However, the Principles are not otherwise explicit on this point, and in our view, this issue should be expanded upon. In particular, we suggest that consideration be given to whether some retrospective limitation period should apply to former judicial officers.

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Governance and Membership of a Federal Judicial Commission

In our view, in order for genuine representation within the governance and membership of an FJC to be achieved, a roadmap for implementing this outcome should be explicitly considered at the design stage.

Consideration should be given to how broad representation of the community can be achieved within appointed members and staff. Such consideration should include how to proactively appoint and employ people from significantly underrepresented groups, for example Aboriginal and Torres Strait Islander people or people with disability.

Process for Managing Complaints

We suggest that consideration of the process for managing complaints should include consideration of safe and respectful management of the complainant's privacy and dignity. The complaints management process must include processes that effectively and respectfully manage communications with the complainant.

Thank you for the opportunity to review the revised Principles. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 02 9926 0354.

Yours sincerely,

Richard Harvey
President