



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:CBvk150223

15 February 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natalie.cooper@lawcouncil.asn.au

Dear Dr Popple,

Federal Judicial Commission

Thank you for the invitation to contribute to the Law Council's submission to the Attorney-General's Department regarding its 'Scoping the establishment of a federal judicial commission' discussion paper (**Discussion Paper**). The Law Society's Public Law Committee has contributed to this submission. We attach two previous submissions, dated 4 September 2020 and 5 November 2020, made to the Law Council in respect of the Law Council's consultation on its principles underpinning a Federal Judicial Commission and reiterate those comments. In addition, we provide the following comments in respect of selected consultation questions.

Composition and decision-making

- 1. Should the membership of a federal judicial commission include some or all of the heads of jurisdiction of the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court of Australia?**
- 2. Should a federal judicial commission have any other ex officio or appointed members? If so, how many members should constitute the commission, and what criteria and appointment processes should apply?**

We note that the Discussion Paper quotes from the Law Council's Policy Statement, which argues that the Commission:

[...] should be comprised of the heads of jurisdictions, in addition to a majority of (non-judicial) community members of high standing who should be appointed by the Governor-General on nomination by the Attorney-General... the majority of non-judicial members is necessary as public confidence is best promoted by assessment to public standards.

Appointed members should include representatives from the legal profession, and community members of high standing who do not currently hold and have not held any form of elected office.

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With respect, the Law Society supports the NSW model, where the Judicial Commission of NSW¹ has:

- Six official members - The heads of the State's four courts and the Industrial Relations Commission as well as the President of the Court of Appeal of NSW are official members. The Chief Justice of NSW is the Judicial Commission's President.
- Four appointed members - The Attorney General of NSW nominates four people for appointment by the Governor who have high standing in the community. One is a legal practitioner appointed following consultations between the Attorney General and the Presidents of the Law Society of NSW and the Bar Association of NSW.

We suggest that the heads of jurisdiction should form the majority of members and should be complemented by nominated members who meet specified criteria, including having relevant qualifications and experience, such as representatives from the legal profession and academia. We suggest that this composition adequately balances the need for expertise and public confidence.

The proposed Federal Judicial Commission (**Commission**) should be expressly able to draw on, in an advisory capacity, the expertise of nominated representatives from specific communities and sectors, such as First Nations representatives, disability advocates, human rights advocates and the medical and other professions, in matters where the Commission determines their input would be relevant and helpful.

The selection of community members should be merits based and publicly advertised by the Attorney-General. This may assist to minimise the risk of politicisation or "stacking" of the membership. Further, it is likely to support greater efficiency of complaints examination, encouraging relevant qualifications and experience, with formalised access to relevant community views and specialised expertise from an advisory panel as needed. We suggest that members should be excluded from involvement in a complaint in the event of any potential conflict of interest.

With respect, we further suggest that the exclusion of elected representatives may preclude well qualified people from being nominated to be members. We are not persuaded that a majority comprising "community members of high standing" would prevent politicisation of the membership.

The Judicial Commission of NSW has a two step approach to complaints handling, which we support. If this model is also adopted at the federal level, membership of both levels will need to be considered. If the Judicial Commission of NSW does not summarily dismiss a complaint, or refer it to the relevant head of jurisdiction, it must refer the complaint to its Conduct Division to be examined by a panel of three (comprising two judicial or retired and one community representative).²

¹ See for example the Judicial Commission of NSW, *Annual Report 2020-21*, at 18, 22 online https://www.judcom.nsw.gov.au/wp-content/uploads/2021/11/Judicial_Commission_Annual_Report_2020-21.pdf.

² Section 22, *Judicial Officers Act 1986* (NSW).

Scope: judicial officers

4. Should a federal judicial commission be empowered to examine complaints about a justice of the High Court in addition to other federal judges?

On balance, we suggest that from the perspective of public confidence, the Commission should be able to examine complaints about a justice of the High Court.

We acknowledge the concerns that the High Court may be required to adjudicate on a matter related to one of its justices, or that a judicial officer of a lower court will be required to scrutinise the conduct of a High Court justice. However, it is arguably not improper to include High Court justices within the Commission's remit, given that the purpose of the Commission is to sit outside of the judicial hierarchy, and be an independent body that is focused on receiving and responding to complaints about the conduct of judicial officers, rather than assessing the correctness of their decisions.

5. Should a federal judicial commission be empowered to examine complaints about a former judicial officer and, if so, in what circumstances?

The Law Society attaches its submission dated 19 July 2021 to the NSW Department of Communities and Justice relevant to this issue at a state level, supporting the establishment of such a mechanism. We continue to support the principles set out in that letter. We suggest also that some consideration be given to whether some retrospective limitation period should apply to former judicial officers.

Grounds for considering complaints

6. Should a federal judicial commission be empowered to examine a complaint related to any matter that, if substantiated, the commission is satisfied:

- a. may justify removal by the Governor-General in Council on an address from both Houses of the Parliament on the ground of proved misbehaviour or incapacity, or
- b. warrants further consideration on the ground that it may affect or may have affected:
 - i. the performance of judicial or official duties by the officer, or
 - ii. the reputation of the court of which the judge is or was a member?

7. Are there any circumstances in which a federal judicial commission should not be empowered to examine a complaint that meets one of the above criteria?

8. Are there any circumstances in which a federal judicial commission should be empowered to examine a complaint that does not meet the above criteria?

We reiterate our comments made in the submission to the Law Council dated 4 September 2020 (attached) that the Commission should cover a judicial officer's conduct in their capacity as a judicial officer. This should include inappropriate behaviour in chambers, such as discrimination, harassment, bullying of staff and legal practitioners. As such, in response to questions 6,7 and 8 it is our view the Commission should consider all complaints in the first instance, and determine whether the complaint amounts to misconduct.

Avenues for receiving complaints

10. Should a person be able to make a complaint to a federal judicial commission anonymously, and in what circumstances would this be appropriate?

12. Should any person be able to make a complaint to a federal judicial commission with a request for confidentiality regarding the particulars of the complaint, or the identity of the complainant?

The Law Society acknowledges that there may be benefits to enabling people to make complaints anonymously. However, it will be difficult for the Commission to make the necessary inquiries to obtain information needed to make a considered decision, particularly if the Commission is not given investigatory powers such as to issue notices to produce. On balance, we are of the view that complaints should identify the complainant and the judicial officer in question, and provide particulars of the complaint.

However a person who makes a complaint should have the option to keep their identity confidential and there should be sufficient protections in place for the complainant, including the option of non-disclosure of the complainant's name in any published final report.

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.

13. Should a federal judicial commission have the discretion to:

- a. consider multiple complaints together, and**
- b. take into account repeat conduct of the same or similar nature in relation to the same judicial officer,**

and if so, should any limitations apply?

The Commission should have discretion to consider multiple complaints together if it is of the view that it is necessary or would provide useful insight relevant to the complaint. For example, if multiple complaints are made about a particular judicial officer, this may be an appropriate circumstance for considering multiple complaints together. Alternatively, in the instance where there may be multiple complaints made by one complainant against a number of judicial officers, considering these complaints together may provide greater insight into the complaints. This approach may assist to ensure that matters are not dealt with twice, reduces any potential stress for the judicial officer(s) subject to the complaints and may help to identify systemic issues.

15. Should consideration be given to providing a federal judicial commission with express powers to declare a person to be a vexatious complainant?

As noted earlier, we suggest that each complaint should be considered on its face. It will be open to the Commission to determine if a complaint does not have merit or is vexatious, or for some other reason can be summarily determined.

Actions a commission may take

17. Should the identity of judicial officers, the subject matter of complaints, and/or the findings or recommendations made by a federal judicial commission or ad hoc investigatory panel be made publicly available? If so, at what stage in the complaints process and on what, if any, conditions?

In our view, the decision to make complaints, investigations or recommendations publicly available should be taken only once a complaint has been substantiated and there is a finding that a judicial officer has engaged in misconduct.

We would caution against making the information publicly available prior to that point, given the stress and/or reputational damage it can cause. Those involved in the complaint, including the relevant court and judicial officer should also be consulted and notified prior to any disclosures. In this regard we note the importance of preserving trust in the validity of judicial decisions and avoiding unnecessary and potentially futile attempts challenge to judicial decisions during the period in which complaints are being assessed. We suggest this would apply at both the initial Commission examination and panel examination stages, including (consistently with the final National Anti-Corruption Commission position) any hearings.

Once a complaint has been substantiated, making the identities of judicial officers and the particulars of the complaint publicly available promotes accountability and transparency of both the judicial officers and the Commission. Depending on the type of sanctions (if any) that the Commission can impose, publicly disclosing judicial officers may be a way to deter and sanction judicial officers for their misconduct.

Powers of the commission and an investigatory panel

19. Would it be appropriate for a federal judicial commission to have the same powers as an ad hoc investigatory panel established by the commission, including the ability to issue summonses and examine witnesses? If not, how and why should the powers of the commission differ from the powers of an investigatory panel?

We support the graduated investigation model, as adopted by the Judicial Commission of NSW and recommend it for consideration.³

Intersection with other bodies and processes

20. How could a federal judicial commission best complement or support the role of existing judicial education bodies, such as the National Judicial College of Australia and the Australasian Institute of Judicial Administration?

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.

³ Judicial Commission of NSW, *Guide for complainants*, online <https://www.judcom.nsw.gov.au/complaints/guide-for-complainants/>.

21. Should complainants be able to rely on evidence resulting from a complaints process, or the findings or recommendations made by a federal judicial commission, in other proceedings?

In our view, complainants should be able to rely on evidence resulting from a complaints process in other proceedings to the extent that it may provide context and be persuasive but should not be, for example, a basis to overturn a decision made in another jurisdiction.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on 02 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The signature is written in a cursive, flowing style.

Cassandra Banks
President

Encl.



THE LAW SOCIETY
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Our ref:PuLC/ELC/FLC/RHvk:196691

4 September 2020

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

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.

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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
DX 5719 CANBERRA

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



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Our ref: PuLC:JWvk190721

19 July 2021

Policy, Reform and Legislation
Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

By mail: policy@justice.nsw.gov.au

Dear Sir/Madam,

Investigation of former judicial officers – options paper

Thank you for the opportunity to provide comments in respect of this options paper. The Law Society's submission is informed by its Public Law Committee.

We have been asked at this point in the process to particularly consider the threshold question of whether a mechanism to make and investigate complaints about former judicial officers should be established. Our comments are as follows.

1. In our view, such a mechanism should be established. An avenue to investigate and address complaints in respect of former judicial officers is relevant not only to access to justice for the parties involved, but also to the integrity of the courts. We suggest that a guiding principle for the operation of the mechanism is whether the issue has the potential to impact upon the court, including the perception of the court, and on its ongoing operations.
2. We consider that the Judicial Commission of NSW should be tasked with this function. Our members who have experience with the complaint processes in respect of sitting judges are of the view that the Judicial Commission is the best placed to carry out these investigations, and to come to a view as to the appropriate outcomes. It has the advantage of being separate from the courts and is also perceived to be independent. Further, in the experience of our members, the Judicial Commission's existing conduct processes are very sound and adhere to the requirements of procedural fairness. In practice, it appears that the existing processes could be applied relatively easily, with any necessary modifications, to investigations into the conduct of former judicial officers. Of course, the Judicial Commission, if tasked with this additional function, should be resourced appropriately to do so.
3. In our view, the Judicial Commission should be solely responsible for carrying out investigations, including preliminary investigations. If complaints are first made to, for example, Heads of Jurisdiction, we suggest that these complaints be referred to the Judicial Commission. We note in recent examples in federal jurisdictions that the courts in question referred investigations to external investigators, either an individual or a conduct committee. In our view, these investigations appear to have been carried out appropriately,

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with appropriate outcomes reached. However, if a federal judicial commission existed, there may not have been a need to refer the investigations in these ways. Further, 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.

4. The options paper queries what the appropriate threshold for the making and investigation of complaints might be. In our view, this issue is dealt with if there is a clear and fair complaints-making process that requires there to be a proper complaint that outlines the facts that go to some improper conduct, and the subject of the complaint should have the right to respond. At the preliminary stages of investigation, the Judicial Commission should be equipped to determine if a complaint is frivolous, vexatious, not in good faith, trivial, or about a judicial function that is subject to adequate appeal or review rights (unless a limitation period applies to preclude this). Our members noted that if the conduct in question occurred a long time ago, it might be difficult to conduct an investigation as, for example, evidence might be compromised and witnesses no longer available. However, noting that it can take complainants a long time to make a complaint in respect of, for example, sexual misconduct, our members were reluctant to suggest that a relevant limitation period apply.
5. We suggest that if improper conduct is found at the end of an investigation, the Judicial Commission should be able to publish its findings, with the option of keeping the complainant's identity anonymous. The Judicial Commission should also be able to make recommendations in respect of further actions that should be taken. We note that, as a consequence of misconduct findings, it might become apparent that a miscarriage of justice has occurred in some judicial decisions. In these circumstances the Judicial Commission should be able to make recommendations in respect of appropriate redress.

Clearly, both the ability to investigate such matters, and make appropriate findings and recommendations, would entail a significant reform to and expansion of the Judicial Commission's statutory powers and functions. For the reasons above, we are of the view that this is worthy of further consideration. We would welcome the opportunity to continue to be involved in this process.

We thank you again for the opportunity to put forward this submission. Questions may be directed at first instance to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JRW', followed by a horizontal line extending to the right.

Juliana Warner
President