

Law Council of Australia

Principles underpinning a Federal Judicial Commission

Policy Statement

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Law Council
OF AUSTRALIA

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1. The need for a Federal Judicial Commission

It is essential to the promotion of the rule of law and the Australian constitutional system that there be a strong, independent, and transparent judiciary. Consistent with this aspiration, a means of fairly and punctually addressing complaints directed to the judiciary in an independent, structured manner is essential.

A Federal Judicial Commission (**Commission**) would assist to provide a clear and structured framework for responding to such complaints, and if established appropriately, will serve to promote public trust and integrity in the complaint-handling process. It will be essential for the Commission to be underpinned by four key features, namely independence, coherence, accessibility and transparency.

It is envisaged that a Commission will address many of the perceived difficulties with current mechanisms in place for complaints made in relation to federal judicial officers. These perceived difficulties include:

- The existing complaints mechanisms may be overly discretionary and informal. Complaints are generally first referred to the relevant head of jurisdiction, typically a colleague of the subject of the complaint, to be dealt with largely according to their discretion. For example, a head of jurisdiction may decide without following a formal process that a complaint should not be dealt with.¹ While there must always be some level of discretion and flexibility as to the manner in which complaints are dealt with, such discretion ought be vested in an independent body.
- There is a lack of clarity around how a complaint relating to misbehaviour or incapacity of judicial officers in the federal system should be resolved where it is not sufficiently serious to be referred to Parliament for consideration of the removal of the judicial officer.² There is no disciplining mechanism, and participation by judges in the complaints handling process is voluntary.³
- The existing legislative framework for managing complaints about the judiciary⁴ is not supported by permanent administrative structures. Rather, complaints are addressed on a discretionary basis through the existing internal structures and

¹ See, *Courts Legislation Amendment (Judicial Complaints) Act 2012 (Cth)*; section 15 and 6(1) of the *Federal Court of Australia Act 1976 (Cth)*; section 12, of the *Federal Circuit Court of Australia Act 1999 (Cth)*; and section 21B of the *Family Law Act 1975 (Cth)*. See, also, Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth). This states that the complaints management framework is intended to be 'largely non-legislative...broad and flexible'.

² See, *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)* ss 3, 9. See, also, Federal Court of Australia, '[Judicial Complaints Procedure](#)' (3 May 2013); Federal Circuit Court of Australia, '[Judicial Complaints Procedures](#)'; and Family Court of Australia, '[Judicial Complaints Procedure](#)'. Note, the Judicial Complaints Procedure states that it 'does not, and cannot, provide a mechanism for disciplining a judge...For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its [judges] and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred, and, where appropriate, to improve the performance of the Court.'

³ Ibid.

⁴ See, the *Courts Legislation Amendment (Judicial Complaints) Act 2012 (Cth)* and the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)*, under which a head of jurisdiction and the Parliament can, variously, establish a Conduct Committee or Parliamentary Commission to deal with complaints. Such a body is only established under these Acts on an ad hoc basis after resolutions have been passed by both Houses of the Parliament in relation to a specific allegation. This is an unrealistic option in, for example, the resolution of complaints concerning matters of sexual harassment or bullying by judicial officers towards other persons.

resources of the relevant court.⁵ The existence of permanent, more visible structures would enhance public confidence in the independence of the judiciary.

- There is no formal or written informal mechanism for addressing complaints about misbehaviour or misconduct by a judge of the High Court of Australia (**High Court**), beyond those which may be serious enough to warrant removal.
- There is no framework for handling otherwise relevant complaints in relation to the past conduct of people when they held a judicial office.

To respond to the above perceptions, a Commission should be established by an Act of Parliament, separately to any Commonwealth Integrity Commission, and in close consultation with (and with the endorsement of) the federal judiciary. For both prospective institutions, it is imperative that adequate resourcing be provided to ensure they can carry out their respective functions appropriately.

The Commission would provide a separate, stand-alone mechanism to deal with any allegation of lack of competency, serious misconduct or corruption in the High Court, federal courts and possibly, tribunals. It would maintain for the two Houses of Parliament the power to investigate and decide whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate, a power sanctified by section 72(ii) of the Constitution. Recognising this, the question of constitutionality may warrant further review, given the proposed scope of the Commission (as set out below) arguably extends to discipline.⁶

2. The role of a Federal Judicial Commission

The Commission should be separate to and independent from the Executive. The role of the Commission should be to:

- Fairly and impartially investigate and determine complaints by any person, including a member of the legal profession or judicial officer, in relation to misconduct (including corrupt conduct, misuse of authority and any abuse of power), incompetency and/or incapacity of a judicial officer, in the manner set out at Section 6 below.
- Provide a fair opportunity for judicial officers to explain their actions should they come under scrutiny.
- Provide a readily accessible and well-explained complaints mechanism, with information easily available to the public and to members of the judiciary, including online and by phone.

⁵ This can be contrasted with existing State and Territory models involving a permanent administrative structure, such as the Judicial Commission of New South Wales.

⁶ Note, some perceived constitutional concerns have been raised in opposition to a Federal Judicial Commission. One concern is that in reserving to the Legislature the power to remove judges on the basis of proved misbehaviour or incapacity, section 72(ii) of the Constitution is inconsistent with a power to deal otherwise with complaints, thereby preventing the establishment of any other regime. However, section 72(ii) deals only with the removal of judges and does not prescribe a detailed process for complaint handling, or address complaints which do not warrant removal. There is reason to doubt that the Constitution prevents the establishment of a body which does not have power to remove or discipline judges, such as that proposed. Nonetheless, a challenge to the constitutional validity of a Federal Judicial Commission may be inevitable.

- Provide sentencing assistance and monitoring to and for judicial officers, in conjunction with the other relevant stakeholders in this area.⁷
- Provide training, support and education to the judiciary, including based upon advisory guidelines setting out acceptable standards of judicial conduct.⁸ This should recognise that that in some cases, conduct issues may be symptomatic of wellbeing issues. The drivers of these behaviours must be addressed, where appropriate, from a protective as well as punitive perspective.
- Protect the judiciary from unwarranted intrusions into their judicial independence.

3. The scope of a Federal Judicial Commission

Which ‘judicial officers’ are covered?

To the extent the term ‘judicial officer’ is used in the legislation establishing the Commission, it should be defined to encompass all persons invested with and exercising a judicial function pursuant to Commonwealth law, including:⁹

- Judges (and those exercising a judicial function) within the Federal Courts (the Family Court of Australia, the Federal Circuit Court of Australia and the Federal Court of Australia) and the High Court, including Chief Justices; and
- to the extent they are not covered by any Commonwealth Integrity Commission, Members/Presidents of the Federal Tribunals and quasi-judicial Federal bodies, namely the Fair Work Commission, Administrative Appeals Tribunal, Remuneration Tribunal, Australian Competition Tribunal, Copyright Tribunal of Australia, National Native Title Tribunal, Pharmaceutical Benefits Remuneration Tribunal and Defence Force Discipline Appeals Tribunal.

The Law Council recognises there may be objections to including High Court judicial officers within the scope of the Commission, given the prospect of the High Court being required to adjudicate on an issue in relation to one of its own judges (for example, an application for judicial review of a decision of the Commission).¹⁰ This is not an

⁷ For the statutory basis of the equivalent role for the Judicial Commission of New South Wales, see, *Judicial Officers Act 1986* (NSW) s 8. The Law Council understands that equivalent role as undertaken by the Judicial Commission of New South Wales has clearly contributed to its acceptance by and credibility within the judiciary in NSW. See, the survey of judicial officers in G Appleby, S Le Mire, ‘Judicial Conduct: Crafting a system that enhances institutional integrity’ [2014] *MelbULawRev* 9, [IV]; the Senate Legal and Constitutional Affairs Committee, *Inquiry into Australia’s judicial system and the role of judges* (Report, 2009) [7.13], [7.27]; and remarks of Spigelman CJ in *From controversy to credibility: 20 years of the Judicial Commission of New South Wales* (2008).

⁸ These could be modelled upon guidelines issued pursuant to section 10 of the *Judicial Officers Act 1986* (NSW), which have been held to be merely advisory (and not to constitute mandatory considerations which, if not addressed, will result in error of law). This is because the section refers to the formulation of guidelines “to assist” in the exercise of Commission’s functions. See, *AB v Judicial Commission of NSW*, supra, at [49].

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¹⁰ As occurred in *Bruce v Cole* (1998) 45 NSWLR 163; *Maloney v The Honourable Michael Campbell QC & Ors* [2011] NSWSC 470; and *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264; see generally, Prof. Enid Campbell, ‘Judicial Review of Proceedings for Removal of Judges from Office’ [1999] *UNSWLawJl* 1.

unprecedented situation,¹¹ and it is anticipated that the High Court would be capable of managing it in practice.

Another issue that may be raised against the coverage of High Court judicial officers is that their conduct should not be subject to scrutiny by a judge of a lower court. However, the Commission's role would be to investigate and recommend, whereas the powers to discipline or remove a judicial officer would remain with the head of jurisdiction and Parliament, respectively.

Finally, in the instances where there is a public interest in doing so, the Commission should have the ability to conduct investigations into the conduct of past judicial officers in relation to their time serving in that capacity (with further consideration to be given as to whether some retrospective limitation period should apply).

What conduct is covered?

The jurisdiction of the Commission should explicitly extend to the private actions of judicial officers where these give rise to a matter otherwise within the Commission's remit (set out at Principle 4 below). In other words, the conduct in question need not relate to judicial work.

4. Matters within the remit of a Federal Judicial Commission

Applicable matters

The Commission should be legislatively enabled to handle complaints made about a judicial officer by any person or referred to the Commission by a person or body (e.g., the Attorney-General), or to handle matters on its own motion or following an informal 'tip off', in circumstances where it appears that:

- the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office; or
- the matter may affect or may have affected the performance of judicial or official duties by the judicial officer;¹² or
- the matter may not satisfy the above criteria but could, if substantiated, reasonably be expected to affect public confidence in the administration of justice.¹³

¹¹ See, for example, *Murphy v Lush* [1986] HCA 37; 60 ALJR 523, when the High Court considered an interlocutory injunction brought by Murray J against the Parliamentary Committee investigating his conduct; or *In re Pinochet; Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] UKHL 1; [2000] 1 AC 119, when the House of Lords was required to reconsider its own decision on the basis that there was an apprehension of bias by one its members, Lord Hoffman.

¹² For the statutory basis of the equivalent role for the NSW JC, see, *Judicial Officers Act 1986* (NSW) s 15(2)(b).

¹³ Note, for example, that there may be an argument that a certain allegation of a single instance of sexual harassment may not, depending on the circumstances, necessarily justify parliamentary consideration of the removal of the judicial officer from office. Similarly, it may be argued that such conduct does not affect the performance of judicial duties. However, conduct of that nature may still affect public confidence in the administration of justice and therefore necessitates an investigation and, if substantiated, a response. Other examples of such conduct are: alleged offensive, insulting or rude conduct of the judicial officer in court, or inordinate or undue delay in delivering a decision, or conduct, in or out of court, calculated to give an apprehension of bias for or against a litigant appearing before the judicial officer.

Interaction with other legal processes

The Commission should be empowered to investigate a matter even though the matter constitutes or may constitute a criminal offence. Its investigation must, however, avoid interfering with the criminal process and at the same time maintain the Commission's protective function.

Where an investigation reveals that criminal conduct may have occurred, the matter must be referred to the appropriate law enforcement body. Close consideration must be given to the timing and process of such referral, noting that where further investigation by the Commission would interfere with the criminal process, it may in some instances be appropriate to suspend the Commission's investigation pending the outcome of the law enforcement body's investigation. Consideration must also be given to situations where the matter has been referred to a forum by the relevant regulator, or where the judicial officer is involved in related compensation and employment law claims. This includes in relation to information sharing and the derivative use of evidence.

Care must also be taken that the ambit of the Commission avoids interference with existing court processes, in particular appeals. For example, any complaints requiring review of a case of judicial error, mistake or other legal ground would fall under the ambit of the appellate courts.

There may be instances where a complaint about a matter which is (or could be) subject to appeal in a court process also falls properly within the above scope of applicable matters within the Commission's remit. This includes where a judicial officer has entirely disregarded arguments presented to him or her, or where there has been undue delay in delivering a decision. The Commission should deal with such matters in accordance with these Principles, provided there are steps available to avoid interference with existing court processes, and it takes these steps.

5. Governance and membership of a Federal Judicial Commission

The membership and governance processes of the Commission should be set out in legislation, to ensure transparency and public confidence. It 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.¹⁴

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.

To achieve genuine representation within the governance and membership of the Commission, consideration should be given as to proactively appointing and employing people from significantly underrepresented groups. This should include First Nations people and people with disability, amongst others.

The Commission should appoint a Conduct Panel to investigate complaints that it does not summarily dismiss or refer to a head of jurisdiction. The Conduct Panel should be comprised of two judicial officers and one non-judicial community member of high standing.

¹⁴ Note, the majority of non-judicial members is necessary as public confidence is best promoted by assessment to public standards.

To preserve independence, a member of the Commission and/or Conduct Panel should be precluded from any involvement with a complaint concerning a member of their Court.

6. Process for managing complaints

The Commission should observe a complaints management process that is robust, fair and transparent, as set out below. The process should prioritise safe and respectful management of the complainant's privacy and dignity, including processes that effectively and sensitively manage all communications with the complainant. All identifying matters the subject of the complaint and enquiries about it should be kept strictly confidential, subject to the below section, 'Outcomes to be made public'.

The Commission should use its investigative powers in a targeted fashion, including, where applicable, by making inquiries with other judicial officers or the head of jurisdiction in the relevant court or tribunal regarding the particular jurisdiction (for example, what constituted an 'undue' delay in the experience of a person working in that court or tribunal).

Critical to the success of the Commission will be the ability to demonstrate that it upholds natural justice and procedural fairness throughout the entire complaints management process, from triage to resolution. This is vital to ensure that all parties (including the public) have confidence in the process. The use of a clear and transparent agreed process will also result in outcomes which are more consistent and fairer than those which a head of jurisdiction might reach in a discretionary and secret assessment of any complaint.

Consideration is needed as to the appropriate standard of proof where facts are disputed. This should recognise the seriousness of complaints about judicial conduct in terms of the personal and professional impact on the judicial officer on the one hand, as well as the need for public confidence in the administration of justice on the other.

Triage

Upon receiving a complaint, the Commission should conduct a preliminary examination as far as practicable in private. It should initiate such factual inquiries as it thinks appropriate to determine whether the complaint falls within the scope of matters the Commission can handle, including by assessing whether the complaint is vexatious, and (where appropriate) by giving the judicial officer the subject of the complaint an opportunity to address the allegations made in a confidential setting.

Whilst conducting the preliminary examination, the Commission may suspend the judicial officer for any length of time if this is considered necessary. Recognising the gravity of this step, consideration should be given to preparing a set of guiding factors for when suspension will be appropriate. These factors may include consideration of whether there are no other, less restrictive steps which can reasonably be taken to ensure the public's confidence in the administration of justice and/or that the public is protected from the conduct or behaviour; and the practical consequences of suspension, as well as how they may be mitigated.

Where a complaint is made against a judicial officer who is currently presiding over a case, the Commission must also take steps to avoid potentially compromising the proceeding.

The Commission's powers to inquire and investigate (and those of the Conduct Panel, if applicable) should include the ability to subpoena people and documents.¹⁵

Following the preliminary examination, the Commission should summarily dismiss the complaint unless:

- the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office, including by Parliament; or
- the matter warrants further examination on the ground that it may affect or may have affected the performance of judicial or official duties by the officer; or
- the matter, if substantiated, could reasonably be expected to affect public confidence in the administration of justice.

Referral to head of jurisdiction

If the Commission has not summarily dismissed the complaint but forms the view that the complaint is not sufficiently serious to justify the Conduct Panel's attention, it should refer the complaint to the relevant head of jurisdiction to be addressed at their discretion, with reference to guidelines the Commission will publish on this subject.

Referral to Conduct Panel

If the Commission has not summarily dismissed a complaint and it considers that the matter justifies the attention of the Conduct Panel, the Commission should refer the complaint to the Conduct Panel and the following process should be followed:

- the Conduct Panel should investigate complaints that have been referred to it in line with legislated processes based on those set out at section 24 of the *Judicial Officers Act 1986* (NSW), as well as any guidelines that the Commission may formulate on the manner in which the Conduct Panel should conduct its investigation; and
- the Commission should provide the Conduct Panel's report to the Attorney-General.

If the Conduct Panel's report concludes that:

- the behaviour or physical or mental capacity of a current judicial officer justifies parliamentary consideration of their removal from office, the Attorney-General should present a copy of the report to both Houses of Parliament, or to the appropriate body (noting not all judicial officers are subject to the sanction or parliamentary removal);
- the above does not apply but the behaviour or physical or mental capacity of the judicial officer (or past judicial officer) falls below a professional standard or has the potential to bring the judiciary into disrepute, the Attorney-General should provide the report to the relevant head of jurisdiction for the complaint to be addressed at his or her discretion. The head of jurisdiction should refer to the guidelines which the Commission will publish on this subject (as set out above), as well as to recommendations by the Conduct Panel as to steps that might be taken to deal with the complaint. Consideration should be given to developing a non-exhaustive list of

¹⁵ Note, the rationale behind this principle is that it provide more incentive for witnesses and/or victims to tell their story without fear of consequences for their career. That is, some witnesses will be encouraged to speak by the ability to say they were subpoenaed to do so.

factors (such as the gravity, duration and any repetition of the conduct, whether punishment or protection is required, the extent of the judicial officer's cooperation in the investigation and acknowledgement of any wrongdoing, etc) that may guide the Conduct Panel in deciding what steps to recommend; or

- no further action is required, the complaint should be dismissed.

Outcomes to be made public

It is essential for public confidence in the Commission, and for the practice (as well as appearance) of transparency, that any outcomes, findings and recommendations resulting from the above processes be made public where possible. A formal reporting mechanism should be set out in legislation. This includes, first, consulting with implicated stakeholders and considering any submissions they make on publication. Secondly, subject to whether these submissions engage the caveats set out in the below paragraph, it involves publishing all completed reports (for example by the Conduct Panel) as soon as possible after they are finalised. Publication of a report should not be contingent upon the response it evokes from the Attorney-General or head of jurisdiction, for example.

However, there may be some circumstances where confidentiality considerations or the potential for unintended consequences weigh against publication. In such instances the outcome of a case should be published in de-identified form, in an anonymous case study database to be managed by the Commission. Further, where a complaint about a judicial officer has been dismissed, publication of that dismissal may inadvertently damage the judicial officer's reputation. As such, where a judicial officer is exonerated, de-identified publication of the outcome of an investigation should be a matter for that judicial officer.