

Submission

Federal Judicial Commission

To

LAW COUNCIL OF AUSTRALIA

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Federal Judicial Commission

The Law Society comments on the discussion paper from the Attorney General's Department titled 'Scoping the Establishment of a Federal Judicial Commission'.

Introduction

The Law Society of Western Australia (**the Law Society**) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

The Law Council of Australia has requested input regard the Attorney-General's Department discussion paper 'Scoping the Establishment of a Federal Judicial Commission'.

This submission sets out comments for the questions referred to in each key issue and adopts the numbering of those questions for ease of reference. The Law Society's comment is mainly related to issues that have been brought to the attention of the Law Society by members. It is noted that there are divergent views between members and given the substantive nature of the comments both views are set out in the alternative by reference to options (where applicable).

Sanctions

While this topic was not addressed in the discussion paper, the Law Society wishes to make it clear that it does not support the imposition of sanctions on a judicial officer short of removal from office. It is the Law Society's view that imposing sanctions would not be compatible with judicial independence.

Moreover, it is the Law Society's view that the federal judicial commission should not have power to impose sanctions. The *Commonwealth Constitution*, s 72 provides that a federal judge cannot be removed except by the Governor-General in Council, on address from both Houses of Parliament in the same session, requesting such removal on the ground of proved misbehaviour or incapacity. Accordingly, it is for both Houses of Parliament to determine whether there is proved misbehaviour or incapacity that justifies removal.

Instead, it is the Law Society's view that, like the Judicial Commission of New South Wales, the federal judicial commission should have power to investigate complaints and making findings about whether a complaint is wholly or partly substantiated. If the federal judicial commission finds that a complaint is wholly or partly substantiated, it should have power to refer the matter to the relevant minister (such that the matter can be considered by both Houses of Parliament) or to the relevant

head of jurisdiction. A referral to the relevant head of jurisdiction may include recommendations that the judicial officer undertake education or other steps. However, such steps not to be viewed as a 'sanction'.

It is submitted that suspension, fining or other punishments would have the potential to impact the independence of the judiciary.

The Law Society does support provision of voluntary education and other support that empowers judicial officers to improve their conduct. The Law Society considers that relevant education or counselling is an appropriate way of dealing with behaviour falling short of that required for removal from office. Failure on the part of a judicial officer to 'absorb' that education etc or repetition of the conduct in question may indicate a lack of fitness for office in respect of which a further complaint may precipitate removal.

Protections for judicial officers

The Law Society also wishes to make it clear that it considers that the procedural fairness should be observed at each stage of the complaints process. Rights which should be afforded include:

- the right to be heard.
- the right of a judicial officer to know the case against him or her.
- the right to bring evidence.
- the right to representation by counsel; and
- the right to put questions to witnesses.

The federal judicial commission should not be able to compel a judicial officer to attend a hearing or answer a question that is asked or undertake a medical or psychological examination.

The Law Society also does not support such refusal leading to any adverse inference against the judicial officer. However, the Law Society notes that if evidence is brought against a judicial officer and is left unchallenged, the federal judicial commission may make an adverse finding against the judicial officer.

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?*

The Law Society supports the heads of jurisdiction of the Commonwealth courts being ex officio members of a federal judicial commission.

If a head of jurisdiction does not agree to be an ex officio member, this should fall to the next most senior member of that jurisdiction.

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?*

The Law Society considers that it would be inappropriate for the membership of the federal judicial commission to be limited to heads of jurisdiction. There would be a danger of public perception that the federal judicial commission is inherently biased and skewed to the dismissal of complaints.

The membership and governance processes of the federal judicial commission should be set out in legislation, to ensure transparency and public confidence.

The Law Society submits that appropriate membership of the federal judicial commission in addition to the ex officio judicial members should include other appointed members, being:

- judges from the Commonwealth courts and/or retired State judges (if ad hoc investigatory panels are to be drawn from the membership of the federal judicial commission).
- representatives of the legal profession (who are admitted in the High Court of Australia); and
- ‘community members’ who do not currently hold any form of elected office (given that the community is another key stakeholder).

The Law Society considers that like in New South Wales, community members should be appointed by Parliament, which perhaps means that those representatives reflect the interests of both the community and the Parliament (as the third arm of government). The Law Society does not consider it appropriate for the executive to appoint community

members, as such appointments would not go through the scrutiny of the parliamentary process.

As to the number of members of the federal judicial commission, there should be enough for it to be able to exercise its function properly. This will likely require additional judges to be appointed in the Commonwealth courts to accommodate the additional workload of some judges. This is especially so, if the ad hoc investigatory panels are to be drawn from the membership of the federal judicial commission (addressed below).

3. *How should decisions of a federal judicial commission be made where the members are not able to unanimously agree?*

Option 1

Decisions of a federal judicial commission should be able to be made by simple majority. The head of jurisdiction should not be entitled to vote on a matter concerning a judicial officer in his or her jurisdiction.

Alternatively, Option 2

Decisions of a federal judicial commission should be able to be made by simple majority.

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?*

Option 1

This proposal but considers that the powers of a federal judicial commission as regards a High Court judicial officer should only be to refer the matter to the head of jurisdiction.

Given the High Court's role in deciding constitutional issues and matters of legality of governmental actions and decisions, priority should be given to protecting the independence of High Court judicial officers.

However, the federal judicial commission being able to refer matters to the head of jurisdiction will allow the High Court to address complaints and keep its independence.

If the complaint were made against the head of jurisdiction of the High Court (likely the Chief Justice), then the complaint should go to the next most senior member of the High Court.

Alternatively, Option 2

The High Court is 'different'. But in one central respect the need for oversight of High Court judges is even more important. The community must have confidence that even the behaviour of High Court judges can be reviewed. History shows us High Court judges are human and fallible.

While this may result in a judge of a lower Court reviewing the conduct of a High Court judicial officer, the federal judicial commission would only be able to investigate and recommend, whereas the power to remove a judicial officer would remain with Parliament.

Further, the commission will be reviewing conduct of individual High Court judges. To the extent that conduct might occasionally occur in the context of a single judge hearing, such hearings are almost always procedural in nature and subject to review under the High Court Rules anyway. As such oversight by the Commission is not likely to create any risk of impeding the High Court's performance of its constitutional functions.

Alternatively, Option 3

Given the High Court's role in deciding constitutional issues and matters of legality of governmental actions and decisions, priority should be given to protecting the independence of High Court judicial officers. The High Court has the power to do what is necessary or convenient in connection with the administration of its affairs.¹

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

Option 1

The circumstances in which the judicial commission should be empowered to examine complaints about a former judicial officer should be the same as with a currently sitting judicial officer but with an added requirement that the federal judicial commission consider that the complaint relates to conduct connected to the fact the judicial officer is or was a judicial officer and it is in the public interest to do so.

If it is not in the public interest to examine a complaint against a former judicial officer, there is little utility in doing so, as the former judicial officer is no longer part of the judiciary.

¹ High Court of Australia Act 1979 (Cth) s 17(2).
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Alternatively, Option 2

The role of the federal judicial commission should be to make recommendations to address any problems with current judicial officers and, in an appropriate case, make findings that both Houses of Parliament can use to decide whether to remove a judge. If there is a public interest in anything done by a former judicial officer, this can be dealt with by another means.

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?*

The legislation establishing the federal judicial commission must contain an express provision to the effect that under no circumstances is the federal judicial commission to impeach (or be taken to impeach) the correctness of a judicial decision. However it is drafted, it is vitally important that the appeals process is maintained as the sole avenue for challenging the correctness of judicial decisions.

Option 1

Include the proposed scope for complaints subject to there being an exclusion for a complaint regarding the correctness of a decision of a judicial officer.

Alternatively, Option 2

The proposal should not contain paragraph (b)(ii). A complaint that affects the reputation of the Court is too broad and ambiguous.

The reputation of the court could be affected by incorrect or even unpopular decisions. If Parliament sought to have appropriate carve-outs to protect judicial independence, the scope of (b)(ii) would likely not materially extend beyond (a) and (b)(i).

If 6(b)(ii) is included, there should be an exclusion in this limb of the scope of complaints to protect judicial independence where the appellate review process is the appropriate mechanism.

There would likely be overlap in the correctness of a decision and issues of breaches of natural justice that should be the subject of complaints (such as bias, not being given an opportunity to present a case, and other judicial bullying) but such breaches of natural justice would, where appropriate for a complaint, fall under the scope of 6(b)(i).

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?*

Where the federal judicial commission receives a complaint against a judicial officer of a criminal nature, it should be referred to the police in the first instance. Having the complaints process run parallel with a police investigation risk interfering with the criminal process.

Where a complaint investigated by the police does not result in the laying of charges, the police should report the outcomes of the investigations to the federal judicial commission, for consideration as per the normal complaints procedure.

If the complaint does result in the laying of charges, the head of jurisdiction should be notified, and the federal judicial commission should act upon the outcome of such criminal process as it sees fit.

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?*

The Law Society does not support broadening the circumstances in which a complaint can be made.

However, if the circumstances in which a complaint can be made are to be broadened, they should be clearly defined to reduce ambiguity as to the potential scope for complaints.

9. *Would it be appropriate to have any additional limitations on a federal judicial commission's jurisdiction to handle complaints about a matter arising after the resignation of a judicial officer, or concerning conduct alleged to have occurred before the appointment of a judicial officer to judicial office or before the commencement of any enabling legislation?*

As to complaints regarding matters arising after the resignation of a judicial officer, see the Law Society's answer to question 5.

As regards complaints concerning conduct alleged to have occurred before the appointment of a judicial officer or before the commencement of any enabling legislation, the Law Society considers that there should be an additional limitation as in section 15(3) of the *Judicial Officers Act 1986* (NSW), namely the federal judicial commission should not deal with a complaint (otherwise than to summarily dismiss it) about—

- a matter arising before the appointment of the judicial officer to the judicial office then held, or
 - a matter arising before the commencement of the Act,
- unless it appears that the matter, if substantiated, could justify parliamentary consideration of the removal of the officer from office.

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?*

Option 1

To ensure appropriate checks and balances and to prevent vexatious litigants, initial complaints to the federal judicial commission should, unless there is a demonstrated need for anonymity, not be anonymous.

There may be cause for anonymity as between the complainant and the judicial officer, but it is difficult to identify a reason for anonymity as between the complainant and the judicial commission.

Once the federal judicial commission accepts the complaint for investigation, there should be protection of the complainant if the complainant requests protection. This is common in other complaints regimes.

The federal judicial commission's legislation might call for the head of jurisdiction to consider reassigning a case where the complainant has matter before the judge who is the subject of the complaint. This should be a matter exclusively for the head of jurisdiction. The federal judicial commission process must not be open to potential abuse in the nature of forum shopping. It would be most undesirable if a disgruntled litigant could have their case transferred to a new docket judge simply by making a complaint to the federal judicial commission.

Alternatively, Option 2

There ought to be whistle-blower-type protections as to the identity of both the complainant and the person in relation to whom the complaint is made from receipt of the complaint and through the period of the investigation. Not to do so might discourage persons from making complaints. Protections of the nature of those in the *Public Interest Disclosure Act 2013* (Cth) could be considered.

11. *Should it be open to professional bodies to make complaints to a federal judicial commission? If so, should any limitations apply?*

The Law Society does not support professional bodies being able to make complaints to a federal judicial commission.

If there were conduct by a judicial officer that was publicised and should be the subject of a complaint, a President of a professional body (or some other member) could make the complaint if he or she considered it 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?*

Option 1

Refer to the comment for question 10 as regards anonymity of the complainant.

There would be a denial of procedural fairness to the judicial officer if the particulars of the complaint were confidential.

Alternatively, Option 2

Refer to the comment for question 10 as regards anonymity of the complainant.

There would be a denial of procedural fairness to the judicial officer if the particulars of the complaint were confidential. However, such an investigation should avoid the disclosure of identifying information concerning 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 federal judicial commission should be able to hear multiple complaints together when they concern the same or similar conduct.

The federal judicial commission should be able to consider repeat conduct of the same or similar nature in relation to the same judicial officer. One-off conduct may not justify removal on the ground of proved misbehaviour or incapacity, however where such matters are part of a pattern of conduct, this may justify removal.

14. *Should a federal judicial commission have discretion to initiate an investigation on its own motion if it considers a matter would otherwise meet its thresholds for consideration if it were the subject of a complaint?*

Option 1

If a would-be complainant does not want to make a complaint, he or she should not be dragged into the process by reason of the federal judicial commission.

Further, the federal judicial commission initiating its own investigation may give the appearance of pre-judgement as to the subject of the complaint.

Alternatively, Option 2

Where the federal judicial commission becomes aware of an allegation of conduct which would merit an investigation, it is in the public's best interest that it be investigated instead of waiting for a complaint to be lodged.

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

The Law Society supports this proposal. As is the case in New South Wales, the federal judicial commission should have the power to classify a person as a vexatious complainant and disregard a complaint made by that person while a declaration is in force.

Additionally, there should be a strong filtering mechanism supported by statute for the federal judicial commission to summarily remove complaints which are plainly unmeritorious, or which relate to the exercise of judicial discretion, as this is already managed by the head of the relevant jurisdiction.

Actions a commission may take

16. *Should the grounds on which a federal judicial commission may appoint an ad hoc investigatory panel to investigate and report on a complaint be expressly limited to matters that a commission considers could, if substantiated, justify removal from office? Alternatively, would it be appropriate for a federal judicial commission to have a discretion to establish an ad hoc investigatory panel to investigate and report on a complaint if the commission considers such an investigation to be appropriate in the circumstances?*

The federal judicial commission should appoint an ad hoc investigatory panel to investigate complaints that it does not summarily dismiss or refer to a head of jurisdiction.

The Law Society considers that the powers to have an investigatory panel to investigate and report on a complaint should not be limited to complaints that, if substantiated, may justify removal from office.

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?*

Option 1

Details of complaints, the identity of judicial officers, the subject matter of complaints and their disposition should not be made public. The number of baseless complaints may suggest to the public that there are more problems with the judiciary than really exist. Although this reduces transparency, in this instance the public interest favours a lack of transparency. The normal course should be that initial investigations and summary dismissals should be closed and confidential.

Complaints should be made public if the final report makes findings that the complaint is substantiated.

Alternatively, Option 2

It is important for public confidence and transparency in the federal judicial commission that outcomes, findings, and recommendations resulting from the processes be made public where possible. A formal reporting mechanism should be set out in legislation. This includes consulting with implicated stakeholders and considering reasons for non-publication. Publication of a report should not be contingent upon the response it evokes from the Attorney-General or head of jurisdiction, for example.

Notwithstanding the position in Options 1 and 2, 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 federal judicial 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, were a judicial officer is exonerated, de-identified publication of the outcome of an investigation should be a matter for that judicial officer.

Alternatively, Option 3

The identity of judicial officers, the subject matter of complaints, and/or the finding or recommendations made by a federal judicial commission, or an ad hoc investigatory panel should only be made publicly available if the commission considers that the matter may be serious enough to warrant removal of the judicial officer. Members of Parliament may need to be able to consult with their constituents in those circumstances.

In relation to other complaints, the complainant should be notified of the outcome and, where the commission has found that a complaint is wholly or partly substantiated, a summary of the complaint and the outcome should be published in a way that preserves anonymity of the judicial officer and complainant. Otherwise, the details of the complaint should not be made public as the aim of the federal judicial commission should be to avoid a repetition of the conduct. Identifying the judicial officer, especially if the complaint relates to issues that are personal to the judicial officer, may make it more difficult for the judicial officer to correct his or her behaviour and may cause other problems.

Composition of an investigatory panel

18. *How should an ad hoc investigatory panel established by a federal judicial commission be constituted? What criteria and appointment processes should apply?*

The Law Society queries whether the volume of complaints justifies the ad hoc investigatory panels being constituted separately from the federal judicial commission.

In any event, the process for establishing ad hoc investigatory panels, their composition and their powers should be set out in legislation, to ensure transparency and public confidence.

The Law Society suggests that an ad hoc investigatory panel be constituted by three members:

- a judge (who must not be a member of the Court in respect of which the judicial officer under complaint is a member);
- a representative of the legal profession (who is admitted in the High Court of Australia); and
- a community representative (who, as discussed above, does not hold any elected office and has been appointed by Parliament).

The members of the ad hoc investigatory panel should come from a pool of candidates that have already been approved to sit on ad hoc investigatory panels. This pre-approval process will reduce the amount of delay when an ad hoc investigatory panel needs to be constituted. Judicial members should be automatically approved by being appointed as judicial officers.

The cost of establishing such a conduct division must be considered, and appropriate remuneration paid to members if their time commitment is other than low.

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?*

The Law Society does not consider it appropriate for federal judicial commission to have the same powers as an ad hoc investigatory panel. This could result in considerable overlap between their functions.

The likely role of the federal judicial commission will be filtering complaints which are not directed to the conduct of or fitness for office of judicial officers. The filtering process needs to be robust to dispose of unmeritorious complaints immediately (including but not limited to frivolous or vexatious complaints). It should also be able to forward other complaints that may have merit to appropriate authorities where the judicial commission is the wrong forum.

The federal judicial commission should have the power to request further information from the complainant to establish whether it should be summarily dismissed, referred to a head of jurisdiction or be the subject of an investigation by an ad hoc investigatory panel. However, it would be unnecessary for the federal judicial commission to powers as broad as the ad hoc investigatory panel.

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?*

Statistical information from the federal judicial commission as to the type of complaints received should be provided to existing judicial education bodies purpose in a suitably anonymized form, which will assist in the education to assist judicial officers.

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?*

The Law Society does not support complainants being able to rely on the findings or recommendations made by a federal judicial commission in other proceedings. The complaints process is not a court, so it would be inappropriate to be able to “rely” on findings or recommendations as if they were a finding by a court.

As regards evidence resulting from a complaints process, the Law Society considers it would be appropriate for this evidence to be used in other proceedings on the basis that there were adequate protections in the evidence collection of the complaints process including the right against self-incrimination, and protection from the production of privileged material.



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