

21 February 2023

Submission: Scoping the Establishment of a Federal Judicial Commission

We thank the Attorney-General's Department for the opportunity to comment on its Discussion Paper on Scoping the Establishment of a Federal Judicial Commission.

Introduction

In this submission, we commence by traversing three threshold issues that are intricately linked to the design questions: the purposes of a Judicial Commission, the broader landscape of a Judicial Commission, and the importance of designing a future fit and best practice model, looking at constitutional and comparative issues and experiences. Then we turn to the specific questions raised in the Discussion Paper, before concluding with two additional design questions relating to consequences and resourcing.

Threshold Issue 1: Purposes of a Judicial Commission

Clarity about the purposes of a Judicial Commission, and for the purpose to shapes its design, is critical. To start our submission, we offer a way of understanding the multiple, and cascading, set of purposes for a Judicial Commission.

Public confidence and judicial legitimacy: The primary purpose, at its highest level of generality, is to promote and protect public confidence in the judicial arm of government. That is, it is about ensuring the ongoing legitimacy of the federal judicial branch. This higher-level objective reminds us that judicial commissions are not simply institutional responses to complaints made against judges (that is, about discipline and individual accountability), but that they operate as part of a wider set of institutional-level supports to assist judges in performing their role in ways that promote public confidence. This broader purpose will in turn guide every aspect of the design and operation of the Judicial Commission.

Judicial values: Legitimacy of the judicial branch is then associated, at the next level of abstraction, with promoting values expected of the judiciary, and especially independence, accountability, competence, impartiality, transparency, efficiency and representativeness.

Judicial independence: A well-designed judicial commission strengthens judicial independence. This is because a judiciary that is seen as unaccountable for unacceptable transgressions is vulnerable to calls for intervention, including by the other branches of government.

Judicial accountability: This is the value most strongly associated with a judicial commission, as a judicial commission provides an avenue of accountability for judicial misconduct. From a public perspective, a judicial commission is likely to be primarily considered as an accountability mechanism, as providing a way by which judicial officers can be seen to be subject to appropriate standards of behaviour. This raises questions about accountability that must be addressed in the Commission's design: *accountability for what? To whom? How? With what consequences?*

Competence: A Commission can (and should) make clear that the judiciary values and responds systemically to competence concerns, including those relating to cultural competency. In doing so the judicial branch demonstrates respect for the individual litigants that come before it and acknowledges the power that reposes with judicial officers.

Judicial impartiality: The Australian Law Reform Commission's recent inquiry into judicial impartiality made the strong case that an independent judicial commission could provide an important institutional response to improve judicial impartiality and perceptions of it. This is because the avenues of response that are currently available to questions about bias are seen by many in the legal profession, the judiciary and the public as inadequate.¹

Judicial transparency: A judicial commission can promote transparency about how the judicial system operates by increasing public understanding of the standards of conduct expected of judicial officers; how a complaint can be made; how the disciplinary process works; and the likely consequences of judicial misconduct. Of course, as we discuss later, the value of transparency must be carefully balanced against concerns about appropriate confidentiality for the individuals, including the judicial officer, involved.

¹ Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138 2021) 310-337.

Judicial efficiency: Judicial misconduct can result in failures of procedural fairness in court, and delay in the delivery of judgments. A judicial commission designed to provide individual as well as more systemic solutions to these actions can increase judicial efficiency – and effectiveness in the delivery of justice.

Judicial wellness: Experience tells us that judicial misconduct can often be a manifestation of judicial stress, overwork and poor mental health. A judicial commission should be designed to improve individual and institutional support available to judicial officers confronting these issues, as well as to inform the design and availability of institutional initiatives and support mechanisms that could alleviate persistent and systemic issues.²

Judicial representativeness: Judicial misconduct has often been experienced, by lawyers, litigants, witnesses and members of the public, as discriminatory behaviour, including racist and sexist behaviour. A judicial commission will provide individual and institutional responses to this type of behaviour. In addition, the Judicial Commission should be designed in a way that reflects the diversity of Australian society, so that the Commission in turn increases public confidence in the representativeness and diversity-responsiveness of the justice system.

Accessibility: The Discussion Paper importantly picks up accessibility as a value closely connected to a judicial commission. A judicial commission can improve the public perception of accessibility of the judicial system more generally, and should be an important principle to keep in mind in designing the complaints system itself.

Practical Purposes: Moving from more abstract conceptions of the Commission's purpose, the next level to consider are the practical purposes of the Commission. These practical purposes might be considered by reference to primary and ancillary purposes, although, as will be apparent, the ancillary purposes are of independent importance and should not be overlooked in the design and operation of a Commission.

Judicial misconduct: The primary purpose of creating the Judicial Commission is the establishment of a dedicated, independent, body to receive and deal with complaints relating to judicial misconduct in a way that promotes the judicial values we set out above. This is often associated with the *disciplinary* purpose of judicial commissions, but is also, as the Discussion Paper notes, about protecting the public, and public confidence, from these transgressions.

² See further Alysia Blackham and Andrew Lynch, 'Reforming Responses to the Challenges of Judicial Incapacity' (2020) 48 (2) *Federal Law Review* 214.

Articulating standards of judicial conduct: With its experience in receiving complaints about judicial misconduct – whether made out or not – a judicial commission is well placed to make recommendations about the articulation of standards of judicial conduct that can inform both members of the judiciary and the public.

Judicial education: The Judicial Commission is likely to be best placed to understand the needs of judicial officers for ongoing education – particularly in relation to court craft and social context training. The Judicial Commission should have as one of its purposes either providing judicial education, targeted at the specific federal jurisdictions with respect to which it has particular insight, or working with the existing Australian judicial education providers to tailor and coordinate education programs (and resources, such as benchbooks) for the federal courts, and even remedial education programs for individual officers. An important dimension of the Commission’s work will be making informed recommendations about providing judicial education with appropriate resourcing, and judges with the necessary time, to attend programs.

Public education: A judicial commission will receive many complaints in relation to conduct that fall outside of its jurisdiction. This is inevitable in all public complaint bodies. These might be vexatious, but more often will be the result of a complainant’s misunderstanding about the judicial system and the function of the Judicial Commission versus, for instance, the appeal process. It is also true that there will be many meritorious complaints that are simply never made, or continued, because of a lack of sufficient public evidence of the judge’s conduct, lack of understanding or lack of confidence in the complaints process or fear of retribution from the judge or the courts. A judicial commission will be in an important position to provide public education about the role and operation of the courts, and the place of the judicial commission and other institutions in that context.

Providing advice and recommendations in relation to institutional judicial wellbeing support and litigant support: A judicial commission is uniquely placed to identify systemic issues in relation to judicial wellbeing and litigant support, particularly for self-represented litigants, that can inform broader institutional responses to these important challenges.

Research: The data generated by the work of the Commission will be an important source for future research on the operation of the judicial branch, and the experience of justice by members of the public. The nature of complaints that are made, those that are summarily dismissed, those that are investigated, those that are made out, and the systemic issues in relation to judicial conduct these reveal,

will all be important for future research and reform of the judiciary as an institution, and the support offered to judges and members of the public engaging with the courts.

Threshold Issue 2: The Landscape of a Judicial Commission

With an appreciation of these multiple purposes of a judicial commission, from the higher level to the practical, there is a need to have clarity about the intersection of a commission with other mechanisms already at play in relation to the judiciary. A commission will not exist in isolation. It would be articulated into an existing regulatory space within which there are already a variety of measures that share the objectives to promote public confidence in the judicial system.

These include existing judicial accountability measures, such as the law of bias, the appeal process and the open court principle. A judicial commission will need to ensure that its work is to address complaints about misconduct that cannot be dealt with through these mechanisms. As our own research reveals, and the work of the ALRC on impartiality argues strongly, there are many such gaps. These mechanisms do not cover the field for misconduct matters. For example, the appeal process is well designed to address matters of honest error or difficult questions of law, and ensure a judicial officer is accountable for their practice of the method of the law. It is less well suited to addressing matters of misconduct that might give rise to an appeal both because of the expense and delay associated with an appeal process, but also because of the very limited responses available through an appeal process.³

The landscape in which a judicial commission will operate also includes other regulatory mechanisms such as the judicial appointments and removal process, the provision of judicial education and the support of ethical practice and judicial wellbeing. Questions about the standards of behaviour of a judicial officer, the consequences for judicial officers, and institutional support for systemic issues, show how a judicial commission's work will intersect fruitfully with each of these other mechanisms and processes. For example, we have expanded above on how a commission's work could usefully inform and shape education offerings.

While none of these measures currently fulfils the role of a commission or invalidates the powerful arguments in favour of a commission, it is important that they are considered as part of the landscape within which the Commission will operate, and the Commission should be designed to intersect with and support their operation.

³ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 7-8.

Threshold Issue 3: Designing a future-fit and best practice model

In designing a federal judicial commission, the question of whether it will be consistent with the constitutional requirements for maintaining the integrity of the judicial branch is of utmost importance: this will ensure it is 'future-fit' and furthers, rather than detracts, from foundational constitutional principles. Given what is at stake, it is likely that a federal commission will be subject to a future constitutional challenge,⁴ and it will need to be designed with constitutional requirements at front of mind. However, the Australian Constitution, and specifically Chapter III and the High Court's interpretation of the requirements of that Chapter, has relatively little to say directly about the process for dealing with judicial misconduct. What we do know, and the likely impact on the design of a federal judicial commission, can be summarised as follows:

- *Head of power:* The basis for the enactment of the judicial commission will be sourced in the incidental legislative power in s 51(xxxix), to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Federal Judicature'. This provides an important connection between the judicial commission, and the judicial values that mean the federal judiciary is able to exercise its powers with public confidence and legitimacy.
- *Removal:* Section 72 sets out the institution responsible for removal of judges (the Governor-General on request of both Houses of Parliament) and the grounds of removal (proved misbehaviour or incapacity). Any judicial commission must support, but not usurp, the Parliament's role under section 72. There is already provision for the Parliament to establish a committee to assist it in its deliberations regarding removal of a judge.⁵ A judicial commission with the power to refer matters of such seriousness that they may warrant removal to Parliament would support, and not detract, from this function.
- *Reduction in remuneration:* Section 72 also provides that the remuneration of a federal judge cannot be diminished during their continuation in office. The possible consequences for a substantiated finding of misconduct against a judge cannot transgress this constitutional requirement.
- *Persona Designata:* The Judicial Commission will be established by legislation as an administrative, that is, executive body. The powers it exercises will likely be administrative in nature. While under the implied limits from Chapter III of the

⁴ A constitutional challenge has been mounted, unsuccessfully, against the judicial commissioner in South Australia: See, *A Judicial Officer v the Conduct Commissioner and the Judicial Conduct Panel* [2022] SASCA 42.

⁵ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

Constitution established in *Boilermakers Case*,⁶ a federal court cannot exercise non-judicial functions, individual judges can exercise non-judicial functions *persona designata* provided those functions are not incompatible with their exercise of federal judicial power.⁷ We know that the High Court will be informed in determining valid *persona designata* conferrals by the historical functions exercised by judges. Given the historical/traditional function of the Chief Justice in receiving, investigating and responding to complaints against judicial officers, it is likely that giving Chief Justices a role on a judicial commission would fall within the acceptable *persona designata* functions.

- *Maintaining integrity of federal courts: judicial independence and impartiality:* The High Court's Chapter III jurisprudence is ultimately concerned with maintaining the integrity of Chapter III (including federal) courts, and, in particular, maintaining their judicial independence and impartiality.⁸ As we set out above, a well-designed judicial commission will not necessarily undermine these values, and indeed, as President Livesey of the South Australian Court of Appeal noted: 'Judicial independence is secured by a combination of institutional arrangements and safeguards, including procedures for dealing with complaints against judicial officers'.⁹ But these principles do raise questions in relation to a number of the features of a commission where there may be concerns about the intrusion into judicial independence. In particular, we note the following:
 - (a) *The composition of the Judicial Commission:* The composition of the Judicial Commission must not be controlled by the Executive or Parliament. Indeed, this was seen as critical to the constitutional validity to the South Australian body.¹⁰ As we argue below, the Commission should be comprised of the Chief Justices of the federal courts, as well as lay representation, appointed by agreement between the Attorney-General and the Chief Justices. This would give the Chief Justices a veto over any potential lay representative, and thus judicial control over the composition of the body.
 - (b) *The powers of a Judicial Commission:* While there may be sensitivities around whether a judicial commission should have the power to, for instance, order a judicial officer to appear and give evidence before it, or order the production of documents, we believe that provided the Commission is composed of members that are approved by the judiciary through the Chief Justices, the Commission (or its panels) should be conferred with appropriate powers to

⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 ('*Boilermakers' Case*').

⁷ See *Grollo v Palmer* (1995) 184 CLR 348.

⁸ See further *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [27] (French CJ and Gageler J).

⁹ *A Judicial Officer v the Conduct Commissioner and the Judicial Conduct Panel* [2022] SASCA 42 [236].

¹⁰ *Ibid* [256] (Livesey P).

undertake its investigations, while according procedural fairness to the complainant and the judicial officer involved.

(c) *The consequences of a finding of misconduct by the Judicial Commission:*

Some have argued that the Judicial Commission should not be able to impose any consequences where a finding of misconduct is substantiated against a judicial officer. Rather, as is the case in relation to the State and Territory commissions, the commission should refer the matter back to the head of jurisdiction, perhaps with recommendations for action.

We do not agree that there is necessarily a constitutional impediment to a judicial commission having the power to impose consequences – including public findings, or requiring individualised remedial education or other support. Indeed, returning findings of misconduct back to the head of jurisdiction has a number of problems, including undermining the public perception of the independence and robustness of the process, the limited powers of the head of jurisdiction to impose consequences (as opposed to make recommendations and alleviate/change the work of a judicial officer through administrative arrangements), and the potential conflict of the head of jurisdiction in relation to the conduct, given their responsibility for the administration of the court which might have contributed to the conduct. Rather, we recommend that there be a range of consequences that the Commission itself is able to impose short of removal.

This may give rise to concerns about impugning the integrity of the federal courts. However, this overlooks the current landscape, in which allegations of misconduct can be (and are) raised in open court, and published in judicial reasons, but are not able to be dealt with in terms of directed consequences for that action. Indeed, in a number of such instances involving federal courts in recent years, the head of jurisdiction has felt compelled to publish their response (recommending education and mentoring, for instance), to combat public perceptions of the lack of appropriate consequence. The status quo, in our opinion, is far more likely to raise concerns about the integrity of the judiciary, than a system that has an independent commission able to impose proportionate and transparent consequences in the rare occasion that misconduct is made out.

In terms of compliance, we can see that there may be constitutional impediments to the ‘enforcement’ of these consequences against a judicial officer, but these challenges are not insurmountable. For instance, a judicial officer who refuses to comply with the Commission’s consequences, may be the subject of a further, and more serious complaint, to the Commission.

Repeated and serious transgressions could potentially found a recommendation to Parliament for removal.

While it is imperative that these constitutional considerations are taken into account in design, we would also offer a word of warning against designing a commission in a constitutionally conservative way, particularly in relation to powers and consequences. The danger of this is that the resulting commission will not meet the public and profession's expectations of a judicial commission, and thus we will create a body that fails in its core objective.

Finally, we are also aware that legislation creating judicial commissions may also not be refreshed frequently. For example, Canada created its Canadian Judicial Council in 1971 and contemplated amendments in 2021, with the Council having to develop a series of 'work arounds' in the interim period. The 2021 Bill presents reforms that enhance transparency in relation to the grounds for dismissal of complaints, defines the rights of impugned judges, proposes increasing lay participation, and provides for greater scrutiny of complaints relating to discrimination and sexual harassment.¹¹ Similarly, in Australia, there were decades between the first state commission in NSW (in 1986) and the next initiative in 2012.¹²

The design adopted for a federal judicial commission must be future-fit and best practice, rather than a minimal compromise. Not only will a model of minimal compromise fail to meet the higher order objectives of promoting public confidence and legitimacy, and, rather, reinforce perceptions that 'the fox is guarding the henhouse', there is also potential for the model to be an acknowledgment of the maturity of Australian democracy and an expression of the qualities and values associated with the Australian judiciary as a fundamental institution of governance. In this respect, Australia should be informed by the practice, experience and proposed reforms of more well-established regimes.

Responses to questions in Discussion Paper

Having set out these three threshold points, we now turn to consider the questions posed in the Discussion Paper.

Composition and decision-making

¹¹ Bill C9, *An Act to Amend the Judges Act 2021* (Canada).

¹² See further discussion of these developments in Suzanne Le Mire, 'Regulation of Judicial Misconduct in Australia: Why, How and Where Next?' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar 2021) 24.

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 membership of a federal judicial commission raises a sub-issue in relation to the intended work of the judicial commission, including whether it will be supplemented/assisted by an officer that initially sorts complaints, and investigatory panels. If the latter, who should fill those roles?

It is our view that a federal judicial commission is best designed to achieve objectives of independence (including navigating constitutional requirements of judicial independence under Chapter III), efficiency, accessibility and representativeness through the following model:

(a) A **Commission** that is made up of (i) each of the heads of jurisdiction of the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court; and (ii) three appointed lay (that is, non-judicial) members (see further below in relation to Q2 regarding their relevant qualifications). More information on our recommendations in relation to lay representation is below. The core focus of the Commission (in relation to complaints) would be to:

- set the standards against which complaints to the Commission are to be sorted by complaints handling officers;
- receive any complaints, communicate with complainants and determine how those complaints should be handled;
- for those complaints that meet the relevant threshold for investigation, determine the conduct of that investigation, including the establishment of an ad hoc investigative panel; and,
- receive the reports on findings of fact from an ad hoc investigative panel and determine if misconduct has occurred, and the appropriate consequences that flow from that determination.

(b) A small set of officers with expertise in complaints handling, who perform the role of applying the criteria in sorting complaints set by the Commission. These officers should be appointed by the Commission for this expertise and experience.

(c) Ad hoc investigative panels that can be convened by the Commission (and members appointed by the Commission) to undertake investigation of complaints referred by the Commission, and to report to the Commission findings of fact relating to the complaint (see below answer to question 19).

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?

As we set out above, it is our view that the Commission should be constituted by:

- (a) each of the heads of jurisdiction of the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court, performing this role as persona designate, consistent with their traditional role in receiving and dealing with complaints against judicial officers; and,
- (b) three appointed independent (that is, non-public service) lay (that is, non-judicial) members, with expertise and experience in relevant legal, medical (including psychological sciences) and professional discipline fields.

The composition of the Commission must reflect the representativeness principle we set out above.

Lay participation in a Commission would support the overarching purpose of public confidence whilst also supporting the values of independence, accountability, representativeness, efficiency, transparency, competence, and integrity. It addresses the possibility that the Commission will be dismissed as ‘Caesar judging Caesar’ and perceived as prioritising one group of stakeholders (judges) over another (complainants), but also enables the Commission to be informed by a diversity of views and experiences.¹³

In addition to the importance of lay representation, we strongly recommend that there is not a judicial *majority* on the Commission. This is to combat public perceptions of a lack of independence of the Commission in performing its accountability function. However, to address concerns that might arise about judicial independence, we recommend that the three appointed lay members are appointed by agreement between the Attorney-General, and the three federal heads of jurisdiction.

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

If our recommendation that there is not a judicial majority on the Commissions is accepted, we recommend that decisions should be made by majority. To

¹³ Richard Devlin and Sheila Wildeman, ‘Introduction: Disciplining Judges—Exercising Statecraft’, in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar 2021) 17; Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System that Enhances Institutional Integrity’ (2014) 38(1) *Melbourne University Law Review* 1, 47-49.

support transparency and the development of our understanding of standards of judicial conduct, there should be a requirement for reasons to be provided, including an opportunity for dissenting views to be put.

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?

It is, in our view, critical that members of the apex court in Australia be subject to the same accountability measures and expectations of integrity as other judicial officers. This is particularly so in light of the findings of sexual harassment against former High Court Justice Dyson Heydon in 2020, and the allegations of misconduct against former High Court Justice Lionel Murphy in the 1980s. A system that does not apply to the High Court would immediately be perceived as incomplete and would fail to respond to very public concerns about the conduct of former members of the High Court.

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

Misconduct that relates to former judicial officers can emerge in a variety of ways, and may require a nuanced approach that takes account of the circumstances.

Here, we consider two types of conduct of former judicial officers:

- (1) Where the judicial officer retires in the face of misconduct proceedings, or a judicial officer has left the bench, but the conduct relates to their time on the bench.

There are a number of examples of retirement in the face of proceedings, including prominent examples in New Zealand, where the disciplinary regime is not able to continue to investigate retired judges.¹⁴ Recent findings of sexual harassment by former judicial officers also demonstrate the issue of conduct undertaken while on the bench, which emerges after a judge has retired.¹⁵

Our view is that, if the overarching purpose of a judicial commission to maintain public confidence in the judicial system is remembered, as well as its

¹⁴ B V Harris, 'New Zealand: Supreme Court Judge Resigns — Saga Raises Questions about Recently Enacted Judicial Complaints Legislation' [2011] *Public Law* 436, 438.

¹⁵ 'Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia', (22 June 2020) <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>.

other objectives in relation to identifying systemic issues that might be able to be addressed through institutional education and support programs, it is critical that the Commission is able to investigate, and make findings, about the conduct of former judicial officers. It may be that there will not be a full suite of consequences that are available for former judicial officers, but it might result in vindication for the complainant, and institutional reforms where the conduct raises systemic issues.

- (2) Where the misconduct relates to conduct that occurs after a judicial officer has left the bench.

While the conduct of a former judicial officer, which occurs after leaving the bench, should not be within the jurisdiction of a judicial commission, we note that it still has the capacity to impact on the public confidence of the judiciary, and note the other ways in which the conduct of former judges can be regulated, including in relation to return to practice, and the extension of soft law regulation.¹⁶

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?**

Yes. With the higher-level objective of maintaining public confidence in the judiciary, as well as the objectives of accountability of the judiciary for maintaining expected standards of conduct, and promoting the effectiveness of the judiciary, it is necessary to extend the Commission's remit to cover matters beyond those which might warrant removal. Conduct of a lower order still has the capacity to undermine public experience of the courts, and the lack of an institutional

¹⁶ See further Gabrielle Appleby & Alysia Blackham, 'The Shadow of the Court: The Growing Imperative to Reform Ethical Regulation of Former Judges' (2018) 67(3) *International & Comparative Law Quarterly* 505.

mechanism to respond to such complaints will be seen to undermine public confidence in the judicial system. Further, it is important that the judicial commission has the capacity to investigate complaints about conduct that might not, when taken on their own, raise concerns about the performance of a judicial officer, but when considered more systemically might raise concerns about the reputation of the Court. The result of such an examination could extend to consequences that do not relate to the individual judge involved, but, rather, to institutional responses, such as education offerings.

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?

No. If the judicial commission's suite of responses is sufficiently broad to include references of the individual officer to appropriate educational and mental health support, the Commission should be able to examine all complaints that meet the above criteria, and provide a tailored response.

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?

No, but we would note (as we set out above) that the question of whether a complaint meets the criteria of affecting the reputation of the court might extend to the investigation of complaints that might appear individually to be under the threshold, but when appreciated together with other complaints or the Commission's other work, reveal a systemic issue that warrants investigation.

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?

To address each of these suggestions in turn:

(a) Complaints about a matter arising after the resignation of a judicial officer:

See the above answer in relation to Question 5. We recommend in such an instance the Commission should retain jurisdiction to investigate and report in such circumstances, but a more limited set of consequences and responses might flow should the complaint be made out. These could still, however, include, publication of the determination, and recommendations for institutional and systemic change.

- (b) Complaints about conduct alleged to have occurred before the appointment of a judicial officer to judicial office or before the commencement of any enabling legislation:

In this circumstance, the conduct prior to appointment or before the commencement of enabling legislation, if not considered at the time of appointment, should be the subject of a possible complaint, given the likelihood that it might affect public confidence in the judiciary. However, this should be subject to a public interest test, which might include consideration of whether the conduct was publicly known and/or concealed at the time of appointment, or whether it has emerged subsequently, and the impact of the complaint on the reputation of the Court.

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?

The issue of anonymous complaints is a difficult one, due to the risk that the complaint might be ill-founded, the difficulties of investigation and defence but also the reality that complainants may be vulnerable to adverse consequences should their identity become known. In a case where the complainant is seeking anonymity, the complaint should be subjected to an additional test, that it be in the public interest to proceed, bearing in mind any difficulties with obtaining, investigating and testing evidence. Additionally, the Commission should be able to proceed on its own motion, should an anonymous complaint or other evidence of misconduct meet a threshold standard (see answer to question 14 below).

It should be noted that anonymous complaints should be treated differently to confidential complaints, which we address in Q12.

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

Keeping in mind that the purpose of a judicial commission is not *only* to provide redress to an individual, but to promote public confidence and provide a broader accountability mechanism for judicial misconduct, it should be open for any individual or organisation to make a complaint, where that person or individual has sufficient evidence to support the grounds of the complaint.

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?

Yes, it would be appropriate to provide for a complainant's identity and for identifying details to remain confidential, where the Commission is satisfied that it is in the public interest. This would have the potential to reassure vulnerable complainants, such as junior members of the legal profession or registry staff.

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

- 1. consider multiple complaints together, and**
- 2. 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?

Yes, the efficiency of the process is critical for both complainants and members of the judiciary, provided appropriate procedural fairness is provided to the individuals involved. Such an approach also has the potential to lead to more proportional outcomes. The aggregation of complaints should be available where it is in the public interest.

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?

Yes. Own motion investigation, subject to meeting the relevant threshold standard of behaviour, is appropriate, given the Commission may be informed of possible misconduct through multiple channels. For example, where public commentary or criticism in an appeal judgment emerge there may be significant concerns about a conduct, and potential for the reputation of the Court to be undermined, without the matter giving rise to a complaint.

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

Vexatious litigants consider all the levers at their disposal. Robust but fair processes should be in place to prevent a vexatious complainant from unduly impacting the proper work of the Commission. The Commission should be empowered to issue a declaration, but any declaration should be preceded by a formal warning, and should be able to be challenged through a judicial review.

Vexatious litigants, and complainants that are misdirected to the Commission (predominantly because they raise matters that ought to be addressed solely on appeal) or unsubstantiated, are likely to be a significant proportion of the complaints received by Commission. They should be carefully considered in the design through the provision for 'triage' or screening, and declarations as appropriate.

Importantly, we believe that an important process of the screening of complaints that might be vexatious, misdirected or unsubstantiated is the provision of reasons, against clear criteria, as to why the complaint has not been further investigated. Otherwise, there is a real risk of a public perception of the Commission becoming a 'black box' for complaints, and a potential point of further point of dissention and distrust of the judiciary.

These types of complaints can also act as a catalyst for appropriate public education and, where they reveal gaps and infelicities, for judicial education. Their presence would, no doubt, be a matter in common with many complaint bodies. The presence of non-substantial complaints should not, however, discourage the impetus for the Commission. Providing an avenue for both serious and non-serious complaints to be surfaced is important and a worthy endeavour.

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?**

Yes. See above response to question 6.

- 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?**

Yes, where complaints have led to a finding of misconduct, and any appeal mechanism has been exhausted, this should be made public, unless it is in the public interest for it to be kept private. This transparency is critical to the overarching purpose of the Commission of public confidence.

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?

Please see our answer to question 1 in relation to the role that such a panel should play within the Commission. In terms of membership, we recommend that these panels should be comprised of three members, appointed by the Commission, that represent a diversity of experience, and should include: a retired federal court judge of at least the level of the judicial officer under investigation, and two lay-members, with relevant experience in legal, medical or professional 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?

In terms of efficiency, it would seem appropriate that the roles of the commission and panel are kept distinct and separate, with the panel conducting investigations and findings of fact, and the Commission making determinations based on the findings in relation to whether misconduct has been engaged in, and consequences.

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?

Currently there is no federal jurisdiction specific education body. The National Judicial College of Australia and the Australasian Institute of Judicial Administration are national bodies, providing services across the Australian jurisdictions. Additionally, there are good examples of commissions that have additional responsibilities for education, such as the New South Wales Judicial

Commission. By making the Commission also a body responsible for the coordination and provision of education offerings for the federal judiciary, there is potential to tailor education to address any education needs proactively. Alternatively, the model could place responsibility on the Commission to work with one or more education providers to develop tailored education and resource this effectively.

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 potential for the integrity of the Commission to be undermined by collateral processes should be carefully considered when the legislation is drafted. Matters that are confidential to the Commission should remain so. Avenues of appeal and judicial review should be available, to the extent that they are fair and reasonable, but should not be tools for delay or obfuscation.

There are two remaining matters we would flag.

Outcomes: First, it is critical that the Commission have at its disposal, a range of proportional outcomes that respond to the diversity of cases of merit that may come to it for attention. As we set out above, these outcomes should be able to be imposed by the Commission itself, for the reasons we have already canvassed. As we have previously argued, these should include private advisory letters, public reprimands, referral for education or counselling, requirement to apologise, and ongoing monitoring.¹⁷ The possibility of a suspension of a judicial officer is more complex, but warrants consideration, within the constitutional limitations regarding remuneration. While some of these outcomes would be public, and might raise concerns that they might undermine confidence in the individual judicial officer, perceptions that misconduct, which may well itself be public knowledge (for instance, as we outline above through the appeal process), is not acknowledged and addressed, is in our view the greater risk.

Resourcing: Finally, it is critical for all involved that the Commission, as well as associated mechanisms, that the Commission will intersect with, such as judicial education providers, be efficient and appropriately resourced. Long delays between complaint and outcome are invidious for both judicial officers and complainants alike and can lead to a perception that the reform is merely window-dressing, rather than a serious attempt to craft a responsive, effective and just Commission.

Gabrielle Appleby

Suzanne Le Mire

¹⁷ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 56-59.