



Law Council
OF AUSTRALIA

Scoping the establishment of a federal judicial commission

Attorney-General's Department

8 March 2023

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
Acknowledgements	4
Introduction	5
Responses to Discussion Paper	7
Composition and decision-making.....	7
Appointment of other members.....	7
Scope: Judicial officers.....	10
Post-judicial activities.....	12
Grounds for considering complaints	13
Avenues for receiving complaints	17
Actions the Commission may take.....	21
Composition of an investigatory panel.....	22
Powers of the commission and an investigatory panel	23
Intersection with other bodies and processes	23
Further considerations	25
The Commission’s educative function	25
Constitutionality of the Commission’s establishment	26

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council thanks the following Constituent Bodies for their contributions in the preparation of this submission:

- The Bar Association of the Australian Capital Territory
- The Law Society of New South Wales
- The Law Society of South Australia
- The Law Society of Western Australia
- The New South Wales Bar Association

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Attorney-General's Department (**Department**) in relation to its January 2023 discussion paper, *Scoping the establishment of a federal judicial commission (Discussion Paper)*.
2. 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. It is therefore critical that there is a well-understood means of fairly and punctually addressing complaints directed to the federal judiciary in an independent and structured manner. At the same time, tailored resources, support and education must be provided to the federal judiciary in conjunction with such processes. For these reasons, the Law Council is pleased that the Australian Government is considering the potential scope and design of a federal judicial commission (**Commission**).
3. The Law Council has been advocating for a standalone Commission since 2006.¹ It notes that the establishment of a Commission was a key recommendation of the Australian Law Reform Commission (**ALRC**) in its 2021 Report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias (Judicial Impartiality Report)*,² and it welcomed the Government's in-principle support for this recommendation in September 2022.³
4. While acknowledging that the decision to establish a Commission will ultimately be a matter for the Government, the Law Council welcomes the Department's current consideration of this reform and notes that, if progressed, the Commission will complement the establishment of the National Anti-Corruption Commission (**NACC**), which is expected to commence operation in mid-2023.⁴
5. The Law Council has long held the view that a Commission would provide a clearer and more structured framework for responding to complaints directed to the federal judiciary, and, if established appropriately, will serve to promote public trust and integrity in the complaint-handling process. This is of particular importance, considering that there are many perceived difficulties with current mechanisms in place for receiving and addressing complaints made in relation to federal judicial officers, including that current mechanisms are overly discretionary, informal and opaque.⁵ As the ALRC observed in its Judicial Impartiality Report, a Commission would play an important role in protecting the integrity of the institution of the judiciary, protecting litigants and introducing a greater aspect of procedural fairness for complainants.⁶

¹ Law Council of Australia, Federal judicial commission a welcome step closer (Media Release, 17 January 2023) <<https://www.lawcouncil.asn.au/media/media-releases/federal-judicial-commission-a-welcome-step-closer>>.

² Australian Law Reform Commission ('ALRC'), *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report, December 2021) <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> 310-337, recommendation 5.

³ Australian Government, Government Response to ALRC Report 138: *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (29 September 2022) <<https://www.ag.gov.au/sites/default/files/2022-09/government-response-australian-law-reform-commission-report-on-judicial-impartiality-and-the-law-on-bias.PDF>>.

⁴ Attorney-General's Department, *Scoping the establishment of a federal judicial commission (Discussion Paper, January 2023)* 3.

⁵ Law Council of Australia, *Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020)* 3-4.

⁶ ALRC, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report, December 2021) <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> 328.

6. In addition, the Commission's potential educative function must not be overlooked. The Law Council maintains the strong view that the role of the Commission should extend to providing resources, support and education to the judiciary, including providing guidance on acceptable standards of judicial conduct.⁷ As the ALRC observed, trends in the issues that are raised across complaints, including those that are summarily dismissed, can be monitored to inform the development of judicial education and training programs.⁸ This element of the Commission's work should also recognise that, in some cases, judicial conduct issues may be symptomatic of wellbeing issues. It is therefore essential that the drivers of these behaviours be addressed, where appropriate, from both protective as well as a remedial and, if appropriate, punitive perspective.
7. In December 2020, the Law Council published its policy statement on *Principles underpinning a Federal Judicial Commission (Policy Statement)*, developed through several rounds of comprehensive consultation with its Constituent Bodies, Sections and expert advisory committees, and endorsed by its Board of Directors.⁹ The Law Council notes that its Policy Statement is referred to throughout the Discussion Paper and thanks the Department for its proactive engagement with this document to date.
8. The Law Council agrees with the intended purpose for the Commission, as outlined in the Discussion Paper:

*... to preserve and support the institutional integrity of the federal courts by providing an independent and transparent complaints process, thereby promoting public confidence in the judicial system.*¹⁰

9. The Law Council continues to recommend that the Commission be underpinned by the key features of independence, coherence, accessibility and transparency,¹¹ and provided with adequate resourcing to ensure it can carry out its functions appropriately.¹² In the Law Council's view, the Commission should be established in the 2023–24 Financial Year. Accordingly, in its 2023–24 Pre-Budget submission, the Law Council recommended that the Australian Government include funding to establish and adequately resource a Commission in its upcoming Federal Budget.¹³
10. Where applicable, this submission will refer to the Law Council's established positions, as set out in its Policy Statement. In relation to additional matters, the Law Council has consulted in recent weeks with its Constituent Bodies, Sections and Advisory Committees to inform its positions. There is unanimous support for the establishment of a commission, however, reasonable minds across the legal profession differ in relation to some of the detailed structural elements of a commission. The Department's consultation timeframe has meant there has been insufficient opportunity for the Law Council and its Constituent Bodies to engage at a detailed

⁷ Law Council of Australia, *Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020)* 5.

⁸ ALRC, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report, December 2021) <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> 328.

⁹ Law Council of Australia, *Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020)*, < <https://www.lawcouncil.asn.au/publicassets/96b2f0e1-de70-eb11-9439-005056be13b5/Principles%20underpinning%20a%20Federal%20Judicial%20Commission.pdf>>.

¹⁰ Attorney-General's Department, *Scoping the establishment of a federal judicial commission (Discussion Paper, January 2023)* 15.

¹¹ Law Council of Australia, *Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020)* 3.

¹² *Ibid* 4.

¹³ Law Council of Australia, *2023-24 Pre-Budget Submission (Submission to the Treasury, 3 February 2023)* <<https://www.lawcouncil.asn.au/publicassets/ab6bba63-bea5-ed11-9479-005056be13b5/2023%2002%2003%20-%20S%20-%20Pre-Budget%20Submission%20%202023-24.pdf>> 12-13.

level with the Discussion Paper and finalise new consensus positions in response to some of the questions posed. Accordingly, any Law Council positions that are not identified in the footnotes as originating from its Policy Statement are preliminary.

11. The Law Council looks forward to continuing to engage with the Department and the Australian Government as consideration of this significant and important reform progresses.

Responses to Discussion Paper

Composition and decision-making

Question 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?

12. The Law Council is of the view that the membership of the Commission should include all of the heads of jurisdiction in the federal context.¹⁴ This would appropriately locate the Commission at the apex of those jurisdictions and provide credibility and legitimacy to such a body.
13. It follows that the Chief Justice of the High Court of Australia (**High Court**), the Chief Justice of the Federal Court of Australia (**Federal Court**), the Chief Justice of the Federal Circuit and Family Court of Australia (**FCFCOA**) (Division 1) and the Chief Judge of the FCFCOA (Division 2) should be included within such membership, noting that the Hon Will Alstergren AO currently holds both positions within the FCFCOA, as permitted (but not required) under its enabling legislation.¹⁵
14. Consideration should be given to arrangements in circumstances where a head of jurisdiction does not agree to be an ex officio member, including whether this role should fall to the next most senior member of that jurisdiction.

Question 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?

Appointment of other members

15. The Law Council considers that ideally the Commission will be diverse in its composition, not only in terms of gender, but also background and experience. In addition to the heads of jurisdiction, the Law Council supports the Commission having non-judicial members as public confidence in the Commission will be best promoted by assessment to public standards.¹⁶
16. The inclusion of non-judicial members within the Commission will increase public perceptions of an unbiased and accountable framework that reflects the interests and expectations of the broader community.

¹⁴ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

¹⁵ *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 21.

¹⁶ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

17. Non-judicial members should include representatives from the legal profession in addition to community members of high standing.¹⁷ Non-judicial members would appropriately reflect the judiciary’s ‘stakeholders’, being the legal profession and the community at large, and their involvement would instil public confidence in the Commission’s processes and findings. As outlined in the table below, similar members have been appointed to most state and territory judicial commissions.

Body	Heads of jurisdiction	Legal representative	Non-legal community representative	Total members
Australian Capital Territory Judicial Council ¹⁸	2	1	1	4
Judicial Commission of New South Wales ¹⁹	6	1	3	10
Judicial Commission of Victoria (Board) ²⁰	6	-	3	9
Judicial Conduct Commissioner South Australia ²¹	Judicial Conduct Commissioner must be a legal practitioner and must not be a judicial officer or member of an Australian Parliament.			1
Northern Territory Judicial Commission ²²	3	1 (President of the Law Society NT)	1	5

18. The Law Council is also cognisant of possible Constitutional constraints in this regard,²³ including the need to avoid Executive interference with judicial independence and integrity through the appointment of non-judicial members to the Commission.

19. The ALRC has relevantly noted in its Judicial Impartiality Report that:

If a body with guarantees of its own independence were to be established to receive and investigate complaints, without the power to remove or discipline judges, there is a strong argument that this would not impermissibly infringe upon judicial independence, particularly if the body (and any conduct panel, or equivalent) includes a significant proportion of judicial members.²⁴

20. One matter which will, therefore, require close consideration is the total membership of the Commission, including the proportion of judicial members compared to non-judicial members.

¹⁷ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

¹⁸ *Judicial Commissions Act 1994* (ACT) ss 5B, 5C.

¹⁹ *Judicial Officers Act 1986* (NSW) s 5(5); sch 1.

²⁰ *Constitution Act 1975* (Vic) ss 87AAM – 87AAO.

²¹ *Judicial Conduct Commissioner Act 2015* (SA) s 7.

²² *Judicial Commission Act 2020* (NT) ss 7, 8.

²³ As noted in the Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020), 4.

²⁴ ALRC, Without Fear or Favour: Judicial Impartiality and the Law on Bias (Final Report, December 2021) <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> 334.

21. The Law Council's Policy Statement expresses support for the Commission to have a majority of non-judicial members, based on the policy arguments made above.²⁵ However, as indicated in the Policy Statement, the positions expressed are subject to further constitutional review where required²⁶ and the Government is encouraged to obtain constitutional law advice on these matters prior to progressing.
22. In particular, notes of caution have been raised with the Law Council regarding the recent experience of certain overseas jurisdictions such as Hungary, in which rule of law concerns have been raised by civil society organisations concerning Executive interference with the judiciary. In particular, the National Office for the Judiciary (the central administrative body of the Hungarian courts) has a President who is a political appointee and has extensive powers with few safeguards. That Office has been criticised for 'putting too much power into the hands of the Executive'.²⁷
23. Similarly, the European Court of Justice has recently determined that the Polish Disciplinary Chamber of the Supreme Court lacks guarantees of independence and impartiality, is not protected from the direct or indirect influence of the Polish legislature and Executive, and its disciplinary regime could be used to exert pressure on judges.²⁸
24. Judicial complaint bodies have operated successfully in multiple other overseas jurisdictions, and the above examples are not representative.²⁹ The Law Council considers there is clear policy merit in including a number of non-judicial members on the Commission. The issue is how many non-judicial members. Following constitutional advice, the Australian Government may consider it prudent to have a majority of judicial members on the Commission to avoid potential concerns of Executive interference with judicial independence and integrity. The Law Council would support that position if adopted.
25. It may also wish to consider appropriate selection and appointment processes. In particular, the Law Council considers that non-judicial members should not hold, and have never held, any form of elected office.³⁰ Further, they should not be, or have been, public servants. While acknowledging that the exclusion of elected representatives and public servants may preclude well-qualified people from being nominated, the Law Council's view is that this criterion is necessary to preserve the Commission's independence and minimise the perception and risk of politicisation or 'stacking' of the membership.

²⁵ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

²⁶ *Ibid*, 4.

²⁷ Flora Garamvolgyi and Jennifer Rankin 'Viktor Orbán's grip on Hungary's courts threatens rule of law, warns judge', *The Guardian* (online), 14 August 2022.

²⁸ See, Court of Justice of the European Union, 'The disciplinary regime for judges in Poland is not compatible with EU law' (Press Release No 130/21, 15 July 2021) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210130en.pdf>>; Lili Bayer and Hans Von Der Burchard, Polish legal showdown escalates as top EU court issues new reprimand', *Politico* (online), 15 July 2021.

²⁹ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' [2014] 38:1 *Melbourne University Law Review* 1, 41-45.

³⁰ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

26. There are various options regarding processes to appoint non-judicial members of the Commission. One option is members be appointed by the Governor-General, by written instrument, upon nomination by the Attorney-General.³¹ However, if this is considered to pose challenges to preserving the institutional integrity of the judiciary, an alternative is the Governor-General consider appointing members nominated by the heads of jurisdiction,³² or nominated by the heads of jurisdiction *and* with the agreement of the Attorney-General.
27. To achieve genuine representation, consideration may be given to seeking representatives from significantly underrepresented groups including First Nations people and people with disability, among others.³³ It may also be appropriate for the Commission to draw upon, in an advisory capacity, the expertise of nominated representatives from specific communities and sectors, such as First Nations representatives, disability advocates, human rights advocates and the medical and other professions, in matters where the Commission determines their input would be relevant and useful.

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

28. The Law Council considers that, where the members of the Commission are not able to agree unanimously, decisions should be made by a simple majority. This is the case for the Judicial Commission of New South Wales (**NSW Judicial Commission**).³⁴
29. Consideration should also be given to whether a head of jurisdiction should be entitled to vote on a matter concerning a judicial officer in their own jurisdiction.

Scope: Judicial officers

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

30. The Law Council is of the view that the term ‘judicial officer’ should be defined to encompass all persons invested with and exercising the judicial power of the Commonwealth, including judges of the federal courts and the High Court.³⁵ Oversight of High Court judges is essential to public confidence in the Court; the community must have confidence that the behaviour of even High Court judges can be reviewed.
31. The Law Council acknowledges potential concerns regarding the prospect of the High Court being required to adjudicate on an issue in relation to one of its own justices, as raised in the Discussion Paper.³⁶

³¹ Ibid.

³² For example, see the appointment process for the Chief Executive and Principal Registrar of the High Court under the *High Court of Australia Act 1979* (Cth), s 18.

³³ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

³⁴ *Judicial Officers Act 1986* (NSW) sch 2 para 5; sch 3 para 4.

³⁵ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 5.

³⁶ Attorney-General’s Department, Scoping the establishment of a federal judicial commission (Discussion Paper, January 2023) 16.

32. However, the Law Council anticipates that the High Court would be capable of managing these sensitivities in practice.³⁷ For example, the NSW Bar suggests that a retired High Court judge could be appointed *ad hoc* to hear a complaint about a High Court judge, with a statutory mechanism for this to occur.
33. Further, these circumstances would not be unprecedented. For example:
- In *Murphy v Lush*,³⁸ the High Court considered an interlocutory injunction brought by one of its judges, Murphy J, against the Parliamentary Committee investigating his conduct; and
 - In *Re Pinochet; Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)*,³⁹ the United Kingdom House of Lords was required to reconsider its own decision on the basis that there was an apprehension of bias by one of its members, Lord Hoffman.
34. The Law Council acknowledges the potential issue that the conduct of High Court judicial officers should not be subject to scrutiny by a judge of a lower court.⁴⁰ However, the purpose of the Commission is to sit outside of the judicial hierarchy and be an independent body that is 'protective, rather than disciplinary',⁴¹ focused on receiving and responding to complaints about the conduct of judicial officers, rather than assessing the correctness of their decisions. Given this, the powers to discipline or remove a judicial officer would, appropriately, remain with the head of jurisdiction and the Australian Parliament, respectively.
35. If it is not considered appropriate to include High Court judges within the Commission's remit, then the Commission should be able to refer matters without investigation to the relevant head of jurisdiction. This will allow the High Court to address complaints and maintain its independence, given that the High Court has the power to do what is necessary and convenient in connection with the administration of its affairs.⁴² If the complaint were made against the Chief Justice of the High Court, then the complaint should be referred to the next most senior member of the High Court.
36. If it is not considered appropriate to include High Court judges within the Commission's remit, the Law Council is of the view that the Chief Justice of the High Court (the head of the Australian judiciary) should, nonetheless, be an *ex officio* member of the Commission.

³⁷ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 5-6.

³⁸ [1986] HCA 37; 60 ALJR 523.

³⁹ [1999] UKHL 1; [2000] 1 AC 119.

⁴⁰ Attorney-General's Department, Scoping the establishment of a federal judicial commission (Discussion Paper, January 2023) 16.

⁴¹ *Ibid* 15.

⁴² *High Court of Australia Act 1979* (Cth) s 17(2).

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

37. The Law Council considers that the Commission should be empowered to examine complaints about a former judicial officer only in relation to their conduct during the time that they served in that capacity.⁴³ However, this should only occur in instances where there is a strong public interest in doing so (such as where the allegations relate to bullying, discrimination or harassment of staff and legal practitioners) and consideration should be given as to whether some retrospective limitation period should apply.⁴⁴
38. The Law Council notes that the jurisdiction of several state-based judicial commissions (including New South Wales,⁴⁵ South Australia,⁴⁶ and Victoria⁴⁷) does not extend to former judicial officers. It also acknowledges the argument that the primary role of the Commission should be to make recommendations to address problems with current judicial officers and, in an appropriate case, make findings that both Houses of Parliament can rely upon to guide decision making on whether to remove a judge.
39. However, the Law Council considers that the inclusion of an avenue to investigate and address complaints in respect of the conduct of a former judicial officer during their time in office is relevant not only to access to justice for the parties involved, but also to public confidence in the integrity of the judiciary and in the administration of justice. Further, investigation of previous actions can inform systematic change and procedural reform to prevent future similar misconduct within the judiciary, irrespective of whether the subject of the complaint is still a judge.

Post-judicial activities

40. Complaints relating to a former judicial officer's post-judicial work or activities (legal or otherwise) should not fall within the remit of the Commission.
41. Where a former judicial officer has returned to the practising legal profession, the applicable standards set out in legal profession rules and legal profession legislation will apply.
42. Further, the Law Council draws the Department's awareness to the *Guide to Legal Conduct (Guide)* published by the Australasian Institute of Judicial Administration (AIJA),⁴⁸ particularly Chapter 7, which has recently been revised and expanded in its guidance on a very broad range of legal work and other commercial, political and community post-judicial activities of former judges.

⁴³ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 6.

⁴⁴ Ibid.

⁴⁵ Judicial Commission of New South Wales, Guide for complainants (Web Page, 2019) <<https://www.judcom.nsw.gov.au/complaints/guide-for-complainants/>> 'The Judicial Commission has no power to examine complaints against a retired New South Wales judicial officer...'

⁴⁶ Judicial Conduct Commissioner South Australia, Complaint process (Web Page, 2022) <<https://www.jcc.sa.gov.au/process>>. 'The Commissioner must dismiss a complaint in certain circumstances, such as where the complaint ... is about a person who is no longer a judicial officer.'

⁴⁷ Judicial Commission of Victoria, Frequently Asked Questions, (Web Page, 2023) <<https://www.judicialcommission.vic.gov.au/complaints-frequently-asked-questions>>. 'The Commission can't investigate certain matters including ... persons who are no longer judicial officers or VCAT members.'

⁴⁸ The Australian Institute of Judicial Administration Incorporated, Guide to Judicial Conduct (3rd ed., December 2022) <<https://aija.org.au/wp-content/uploads/2023/02/Guide-to-Judicial-Conduct-Third-Edition-revised-Feb-2023.pdf>>.

43. There are specific professional conduct rules setting out minimum standards about appearances by former judges before their former court, or a court or tribunal from which appeals may lie to the former judge's court.⁴⁹ These, together with other professional conduct rules, reflect the general principle that a legal practitioner who was formerly associated with judicial office must not engage in conduct that would give rise to concerns, such as apprehended bias, arising from their former position.
44. The revised Chapter 7 of the Guide covers a very broad range of legal work, other work, and other activities that a judge may become involved in after leaving judicial office. The Law Council considers that, in the case of a former judicial officer who has returned to the practising legal profession, there is sufficient guidance on, and avenues for addressing concerns about, the conduct and activities of a former judicial officer after leaving judicial office.
45. An important related matter is how the Commission should respond in circumstances where a substantiated complaint relates to a former judicial officer's conduct during their term in office, particularly if that person has since resumed legal practice. Even if conduct or incapacity which would have justified removal from office were proven, it would not be open to the Commission to recommend removal from judicial office because the subject of the complaint is no longer a judicial officer.
46. However, an adverse finding against a former judicial officer who has returned to legal practice might raise questions about whether or not that person should be regarded as a fit and proper person to engage in legal practice.

Grounds for considering complaints

Question 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 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?**

47. The Law Council has previously proposed criteria equivalent to (a) and (b)(i) above,⁵⁰ in which the Commission should be empowered to examine a complaint 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.

⁴⁹ Law Council of Australia, Australian Solicitors Conduct Rules (24 August 2015) <https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf> r 38; See, for example, Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 101A.

⁵⁰ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 6.

48. These considerations are reflective of the approach adopted by the NSW Judicial Commission.⁵¹ The Law Council has, however, previously suggested that a further criterion be added to cover circumstances where the matter could, if substantiated, reasonably be expected to affect public confidence in the administration of justice.
49. The Department's proposed criterion b(ii) (about the reputation of the court) is modelled on the complaints provisions in the enabling legislation for the FCFCOA.⁵² However, this reputational consideration is not a feature of state-based judicial commissions.
50. The Law Council is broadly supportive of the reputational criterion, noting that this would include extra-judicial actions that are not so serious that they may result in removal from office, but may still be sufficiently serious to affect the reputation of the relevant court. This arguably extends to considerations such as public confidence in the administration of justice.
51. However, the Law Council notes that proposed subparagraph (b)(ii) could be potentially viewed as overly broad and ambiguous, and acknowledges that the reputation of the court could be affected by unpopular decisions, or decisions from which there are valid grounds for appeal. Accordingly, if (b)(ii) is included, consideration should be given to providing an exclusion to protect judicial independence where the appellate review process is the appropriate mechanism.
52. Alternatively, consideration could be given to the Law Council's earlier views that complaints could extend to circumstances where the matter could, if substantiated, reasonably be expected to affect public confidence in the administration of justice.⁵³

Question 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?

53. The Law Council does not consider there to be any circumstances in which the Commission should not be empowered to examine a complaint that meets one of the above criteria. Rather than deprive the Commission of power to examine any particular category of complaint, it would be appropriate to have a mechanism for summary dismissal of complaints.⁵⁴ This process would allow a 'triage' of complaints to be performed, prior to any investigation being commenced. This also provides a mechanism for dismissing frivolous or vexatious complaints, and complaints relating to the merits of a decision. This mechanism should, however, exist alongside a concerted effort to educate the public regarding the role of the Commission.
54. The Law Council is also of the view that the jurisdiction of the Commission should explicitly extend to the private actions of judicial officers where these engage the above criteria. In other words, the conduct in question need not relate to judicial work.⁵⁵
55. Care must also be taken to ensure that the ambit of the Commission avoids interference with any other processes, particularly appeals and criminal

⁵¹ *Judicial Officers Act 1986* (NSW) s 15(2).

⁵² *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 48, 145.

⁵³ *Ibid.*

⁵⁴ Law Council of Australia, *Principles underpinning a Federal Judicial Commission* (Policy Statement, December 2020) 9.

⁵⁵ *Ibid.* 6.

investigations.⁵⁶ For example, there may be instances where a complaint about a matter which is (or could be) subject to appeal in a court process also falls within the Commission's remit, in accordance with the criteria above. This could include where a judicial officer has entirely disregarded arguments presented to them, or where adequate reasons for a decision have not been provided.⁵⁷ The Law Council considers that the Commission should not be precluded from dealing with such matters, provided there are steps available to avoid interference with existing court processes, and that the Commission adequately takes these steps.⁵⁸

56. The Law Council has also previously contemplated circumstances where the matter that is the subject of the complaint constitutes, or may constitute, a criminal offence. If this matter is captured by any of the criteria proposed above, it is appropriate for the Commission to remain empowered to investigate it. The Law Council notes that the NSW Judicial Commission is expressly permitted to consider a complaint even though the subject matter may constitute a criminal offence.⁵⁹ However, the Commission's investigation must maintain its protective function while avoiding interfering with the criminal process.⁶⁰
57. Where an investigation reveals that criminal conduct may have occurred, the matter must be referred by the Commission to the appropriate law enforcement body. The Law Council considers that close consideration must be given to the timing and process of such referral, noting that, where further investigation by the Commission could interfere with the criminal process, it may, in some cases, be appropriate to suspend the Commission's investigation pending the outcome of the law enforcement body's investigation.⁶¹
58. Where a complaint investigated by law enforcement does not result in the laying of charges, the outcomes of the investigation should be reported to the 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 Commission should act upon the outcome of such criminal process as it sees fit.

Question 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?

59. The Law Council considers it appropriate for the Commission to be empowered to examine a complaint where it appears that the matter may not satisfy the above criteria but could, if substantiated, reasonably be expected to affect public confidence in the administration of justice.⁶² However, it acknowledges that there may be overlap between this proposed criterion and the 'reputation' criterion proposed in the Discussion Paper.
60. Examples of such matters could include:
 - want of overall legal competence;
 - inability to operate judicially in a specialised jurisdiction;

⁵⁶ Ibid 7.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ *Judicial Officers Act 1986* (NSW) s 15(5).

⁶⁰ Law Council of Australia, *Principles underpinning a Federal Judicial Commission* (Policy Statement, December 2020) 7.

⁶¹ Ibid.

⁶² Ibid 6.

- failure to deliver determinations on a timely basis, particularly in family law matters; and
 - conduct, in or out of court, calculated to give an apprehension of bias for or against a litigant appearing before the judicial officer.⁶³
61. If the circumstances in which a complaint can be made are to be broadened in accordance with the above suggestions or any others, the Law Council recommends they be clearly defined to reduce ambiguity as to the potential scope for complaints. Furthermore, an appropriate threshold should be established, to ensure coverage only of conduct that is sufficiently serious as to warrant investigation.

Question 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?

62. The Law Council refers to its response to Question 5 above in relation to former judicial officers, and to its recommendation that the Commission only handle complaints in instances where there is a public interest in doing so. Consideration should also be given to whether some retrospective limitation period should apply.⁶⁴
63. In relation to providing additional limitations on the Commission’s complaint jurisdiction concerning conduct alleged to have occurred before the appointment of a sitting judicial officer to judicial office, or before the commencement of any enabling legislation, the Law Council does not have a settled view on this point and its Constituent Bodies have expressed a range of views.
64. The Law Society of South Australia (**LSSA**) is of the view that there should not be any additional limitations, but the Commission should be provided discretion not to proceed with an investigation. On the other hand, the NSW Bar Association and the Law Society of Western Australia (**LSWA**) support a limitation similar to subsection 15(3) of the *Judicial Officers Act 1986* (NSW), which provides that the NSW Judicial Commission shall not deal with a complaint (other than to summarily dismiss it under section 20) 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 *Judicial Officers Act 1986* (NSW);
- unless it appears to the NSW Judicial Commission that the matter, if substantiated, could justify parliamentary consideration of the removal of the officer from office.
65. This limitation, in effect, prevents the NSW Judicial Commission from considering less serious complaints in those circumstances. In the alternative, the same threshold test of public interest could be applied, as with former judicial officers.

⁶³ Ibid.

⁶⁴ Ibid.

Avenues for receiving complaints

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

66. The Law Council recommends that the Commission should actively encourage complaints and publicly reassure complainants that such matters will be examined without any adverse consequences for them, although the complaint may be dismissed for being vexatious.⁶⁵
67. In relation to whether a person should be able to make an anonymous complaint to the Commission, an appropriate balance will need to be struck between ensuring the Commission's settings are sufficient to deter vexatious complainants and the need to ensure that genuine complainants are not deterred from making legitimate complaints.
68. Existing state and territory judicial commissions do not currently allow anonymous complaints. For instance, the Australian Capital Territory Judicial Council (**ACT Judicial Council**) requires that the complaint be in writing and that it include:
- the complainant's name;
 - the complainant's address;
 - the name of the judicial officer or tribunal member; and
 - full particulars of the complaint—for example, the court date and matter reference (if applicable) and a detailed description of the issue.⁶⁶
- Equivalent requirements exist for the NSW Judicial Commission,⁶⁷ the Northern Territory Judicial Commission (**NT Judicial Commission**)⁶⁸ and the South Australian Judicial Conduct Commissioner (**SA Commissioner**).⁶⁹
69. The Law Council considers that a person should not be able to make a complaint to the Commission anonymously, and anticipates there would be undesirable consequences if anonymous complaints were permitted. In particular, it would be difficult to properly investigate an anonymous complaint, given the circumstances of the incident and any supporting documentation, such as transcripts, may not be readily identifiable. It also raises questions of whether procedural fairness requirements can be met in such circumstances.
70. While anonymity is not desirable, there is scope for confidentiality to be applied in some circumstances to ensure that information relating to the complainant, and the subject of the complaint, are managed appropriately. These protections are discussed further below in answer to question 12.

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

71. The Law Council notes that the Law Institute of Victoria (**LIV**) and the Victorian Bar may make a complaint to the Judicial Commission of Victoria on behalf of a member,

⁶⁵ Ibid 8; see Question 15, regarding whether the Commission ought to have an express power to declare a person to be a vexatious complainant.

⁶⁶ *Judicial Commissions Act 1994* (ACT) s 14(3).

⁶⁷ *Judicial Officers Act 1986* (NSW) s 17.

⁶⁸ *Judicial Commission Act 2020* (NT) s 40(4).

⁶⁹ *Judicial Conduct Commissioner Act 2015* (SA) s 12(5).

and neither body is required to disclose the identity of the person on whose behalf a complaint is made⁷⁰—rather, the LIV or Victorian Bar is taken to be the complainant.⁷¹

72. The Law Council further notes that, while this is not a mechanism which is explicitly permitted in other jurisdictions, there is nothing in those other jurisdictions that prevents a complaint being made by a person, such as the President or an officer of the professional body, regarding conduct experienced by one of its members, provided the body has been provided with all relevant information and documentation to support the complaint.
73. The Law Council acknowledges that professional bodies may, particularly at the state and territory level, be well-placed to receive information about the conduct of judicial officers from their members and to advocate for such conduct to be investigated.
74. The Law Council also recognises that barriers exist for individual practitioners who may have grounds to complain about a judicial officer. For example, an individual practitioner may feel that making a complaint about a judicial officer could adversely impact their own reputation and standing in the profession, including their ability to continue in practice before the judicial officer or their court. This perception could lead to a reluctance to submit complaints directly to the Commission. This is in contrast to individual litigants or other court users who are less likely to hold these concerns, given that they would have less regular interaction with that specific judicial officer or court.
75. Accordingly, the complaints that professional bodies could receive ought to be limited to grievances from their members—the legal profession—rather than litigants or other parties, who should submit their complaints directly to the Commission.
76. The Law Council recognises that, if professional bodies were allowed to make complaints to the Commission, they would be expected to apply appropriate vetting to ensure that the complaint is legitimate and not motivated by other factors. This would be particularly the case if, as in Victoria, it were envisaged that professional bodies might make complaints in which an individual’s identity would not be disclosed. As such, there would likely be resourcing implications for a professional body being the intermediary between a complainant and the Commission.
77. The Law Council does not have a settled view on whether an express provision should be made for state and territory professional bodies to make complaints to the Commission, noting that the larger bodies may be better placed than others to undertake this intermediary role. At this stage, the Law Council considers it unlikely that it would take up this role itself, given the likely resourcing implications involved and the practical difficulties in liaising between individual members of the legal profession (who may have stronger personal connections with their state/territory Constituent Body) and the Commission. It would be happy to facilitate further Departmental dialogue with its Constituent Bodies as to the desirability of any such proposal, noting that it has prompted mixed views to date.
78. Should an intermediary role be pursued, it may be useful for the Commission to provide targeted educational resources to professional bodies to assist them to adequately fulfil this function on behalf of their membership.

⁷⁰ *Judicial Commission of Victoria Act 2016* (Vic) s 6.

⁷¹ *Ibid.*

Question 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?

79. The Law Council is of the view that the Commission's complaints 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.⁷²
80. All identifying matters the subject of the complaint and enquiries about it should be kept strictly confidential and not made public, subject to comments made below in answer to Question 17.
81. However, for internal purposes, the details of the particulars of the complaint, or the identity of the complainant would generally be disclosed to the subject of the complaint to ensure procedural fairness, unless public interest factors weighed against such disclosure in limited circumstances (e.g., a genuine risk to a complainant's safety existed).

Question 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?

82. The Law Council is of the view that the Commission should have the discretion to consider multiple complaints together, and to take into account repeat conduct of the same or similar nature in relation to the same judicial officer.
83. This approach may assist to ensure that matters are not dealt with twice, may reduce any potential stress for the judicial officer(s) subject to the complaints, and may help to identify systemic issues. Further, one-off conduct may not justify removal on the ground of proved misbehaviour or incapacity. However, where such matters form part of a pattern of conduct, that may justify removal.
84. The Law Council does not consider that any limitations should apply, as long as each instance of conduct is the subject of sufficient evidence to warrant further investigation.
85. Difficulties could arise where there are multiple complainants, in keeping the identities of those complainants or complaints confidential where necessary. However, appropriate non-disclosure directions could be made to avoid this, as outlined above in answer to Question 12.

Question 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?

86. The Law Council recommends that the Commission should be enabled to initiate an investigation on its own motion in circumstances where it considers that the thresholds

⁷² Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 8.

for consideration have been otherwise met.⁷³ The rationale for this is that, where the Commission becomes aware of an allegation of conduct that 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.

87. However, this is a matter where reasonable minds differ and where further consideration ought to be given. Through the Law Council's recent consultation period, the NSW Bar Association supported the Law Council's view that, given its jurisdiction is fundamentally protective in nature, the Commission should be empowered to act to protect the public, even without a complaint. This power would support the role of the Commission in upholding the reputation of the relevant courts.
88. Conversely, the LSSA did not support such discretion, noting this is a matter for each federal jurisdiction and suggesting that if, upon investigation, the relevant head of jurisdiction considers it appropriate, they can initiate a complaint with the Commission. The LSWA also did not support such a discretion, arguing that, if a would-be complainant does not seek to make a complaint, they should not be forced into the process by the Commission. Further, the Commission initiating its own investigation may give the appearance of pre-judgement as to the subject of the complaint.
89. On balance, the Law Council maintains the Commission should be enabled to initiate an investigation on its own motion in circumstances where it considers that the thresholds for consideration have been otherwise met.

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

90. The Law Council is of the view that, upon receiving a complaint, the Commission should conduct a preliminary examination, including assessing whether the complaint is vexatious.⁷⁴
91. The NSW Judicial Commission, the NT Judicial Commission and the Judicial Commission of Victoria have express powers to declare a person to be a vexatious complainant.⁷⁵ The NSW Judicial Commission and NT Judicial Commission have discretion to disregard any complaint made by a person it has declared to be a vexatious complainant.⁷⁶ However, the Judicial Commission of Victoria, including an investigating panel, must formally dismiss any complaint or referral made by a vexatious complainant.⁷⁷
92. The Law Council considers the Commission should have express powers to declare a person a vexatious litigant. It is important to ensure that individuals are deterred from persistently or habitually engaging with the Commission without any reasonable grounds to do so, while balancing the need to ensure that individuals with genuine complaints are not deterred from engaging.
93. Additionally, as recommended above in answer to Question 7, there should be a strong filtering mechanism supported by statute for the Commission to summarily

⁷³ Ibid 6.

⁷⁴ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 8.

⁷⁵ *Judicial Officers Act 1986* (NSW) s 38(1); *Judicial Commission Act 2000* (NT) s 45(1); *Judicial Commission of Victoria Act 2016* (Vic) s 140.

⁷⁶ *Judicial Officers Act 1986* (NSW) s 38(2); *Judicial Commission Act 2000* (NT) s 45(2).

⁷⁷ *Judicial Commission of Victoria Act 2016* (Vic) paras 16(2)(a) and 35(1)(a).

dismiss complaints where they are plainly unmeritorious, or which relate to the legitimate exercise of judicial discretion, as this is already managed by the head of the relevant jurisdiction.

Actions the Commission may take

Question 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?

94. The Law Council supports the alternative approach, which would provide the Commission with discretion to appoint an ad hoc investigatory panel (or 'Conduct Panel') if it considers such an investigation is appropriate in the circumstances. Such circumstances ought to be when the Commission does not consider it appropriate to summarily dismiss the complaint or to refer it to the head of jurisdiction.⁷⁸
95. The Law Council is of the view that restricting establishment of an investigatory panel to only those matters which would justify removal from office is undesirable because a determination would need to be made at an early stage, prior to the investigation, when the full circumstances of the complaint may not yet be known. An investigation may demonstrate that the conduct is more (or less) concerning than initially appeared. Permitting the panel to investigate where appropriate in the circumstances would allow the full facts to be discovered prior to any action being taken.

Question 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?

96. The Law Council identifies transparency as one of the key features that should underpin the Commission.⁷⁹ However, an appropriate balance must be struck in enhancing public confidence in the judiciary, whilst protecting the judiciary and individual judicial officers from unjust criticism.
97. During the complaint process, all identifying matters and details should be kept strictly confidential and therefore not available publicly.⁸⁰ However, once an investigation has concluded, 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 Commission's handling of a substantiated complaint be made public where possible.⁸¹
98. The Law Council recommends that a formal reporting mechanism should be set out in the Commission's enabling legislation, which includes consulting with implicated

⁷⁸ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 9.

⁷⁹ Ibid 3.

⁸⁰ Ibid 9.

⁸¹ Ibid 10.

stakeholders and considering reasons for non-publication.⁸² Where there has been an adverse finding against a judicial officer, the Law Council recognises there would be an expectation that the outcome be made public and that the judicial officer is identified in order to promote accountability and transparency of judicial officers, as well as the Commission itself. Further, the prospect of public identification may have a deterrent effect for other judicial officers.

99. However, the Law Council acknowledges that there may be some exceptional circumstances where confidentiality considerations, or the potential for unintended consequences, will weigh against publication. In such instances, to aid transparency, the outcome of a case should be published in a de-identified form as part of an anonymous case study database to be managed by the Commission.⁸³
100. Where a complaint to the Commission about a judicial officer has been investigated but not substantiated, the publication of these details, should the identity of the judicial officer be provided, may inadvertently damage the judicial officer's reputation, cause stress and undermine the justice system. Accordingly, if the Commission does not make an adverse finding in relation to a judicial officer, then it should be a matter for the Commission whether the de-identified outcome should be published.⁸⁴

Composition of an investigatory panel

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

101. The Law Council's Policy Statement supports the Commission appointing a Conduct Panel (or ad hoc investigatory panel) of three members—two judicial officers and one non-judicial community member of high standing.⁸⁵ This composition is consistent with that of the 'Conduct Division' for the NSW Judicial Commission.⁸⁶ Beyond this, the Law Council does not have a view on what selection and appointment process should apply for this kind of panel, but recognises the desirability of minimising the potential for external interference, given the scope of powers that this investigatory panel will likely have.
102. The Law Council notes that, in New South Wales, the Commission is empowered to select and appoint investigatory panels as it considers appropriate, from its own membership or externally.⁸⁷ An alternative approach in this regard may be for members of the investigatory panel to be selected by the Commission from a pool of pre-approved candidates.
103. Members of such panels should be required to have a background relevant to the subject matter of the jurisdiction of the complaint, be independent from the judicial officer concerned, and have sufficient experience to discharge their functions. Further,

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 7.

⁸⁶ *Judicial Officers Act 1986* (NSW) s 22.

⁸⁷ *Judicial Officers Act 1986* (NSW) s 22.

to preserve independence, any judicial officers on the Conduct Panel should not be members of the court to which the complaint relates.⁸⁸

Powers of the commission and an investigatory panel

Question 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?

104. The Law Council notes that, for Constitutional reasons, the participation of a judge in responding to a complaint is voluntary.⁸⁹
105. Beyond this, the Law Council supports the ‘graduated’ investigation model, as adopted by the NSW Judicial Commission, in which the Commission should appoint a Conduct Panel to investigate complaints that it does not summarily dismiss or refer to a head of jurisdiction.⁹⁰
106. While acknowledging this is a matter where some of its Constituent Bodies have expressed a different view, the Law Council suggests that the investigatory panel alone should have the power to summon and examine witnesses and to write reports in relation to complaints.
107. However, for practical purposes, the Commission should be empowered to exercise some powers of investigation. The Commission should be able to subpoena people and documents,⁹¹ to inform the complaint triage process, which will likely be its main role. The Commission should also have power to make or amend non-disclosure directions, as there may be practical difficulties in reconvening an investigatory panel to alter previous directions. Nonetheless, it would likely be unnecessary for the Commission to have powers as broad as the ad hoc investigatory panel, as this could result in considerable overlap between their respective functions.
108. Relatedly, consideration should be given to the appropriate applicable standard of proof where facts are disputed. This recognises the seriousness of complaints about judicial conduct in terms of the personal and professional impact on the judicial officer on one hand, as well as the need for public confidence in the administration of justice on the other.⁹²

Intersection with other bodies and processes

Question 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?

⁸⁸ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 8.

⁸⁹ Ibid 3.

⁹⁰ Ibid 7.

⁹¹ Ibid 9.

⁹² Ibid 8.

109. The Law Council is of the strong view that one of the roles of the Commission should be to provide resources, support and education to the judiciary.⁹³
110. It understands in this context that targeted resources available to the federal judiciary are lacking, compared to, for instance, the bench books and other resources developed for the judiciary in certain state jurisdictions (e.g., NSW). The Law Council is of the view that there could be value in the Commission taking a targeted approach to the needs of the federal judiciary in terms of resources, support and education, drawing on the information gleaned from federal complaints received. The National Judicial College of Australia and Australasian Institute of Judicial Administration, in contrast, have a broader remit than the federal judiciary.
111. In relation to how the Commission could best complement the role of existing judicial education bodies, the Law Council's Constituent Bodies have proposed various approaches for consideration in this regard:
- One body could be established that combines the functions of the Commission with the professional development and other functions of the National Judicial College of Australia. This would allow a systemic approach to addressing issues that might be cultural or arise as a result of unconscious bias.
 - The Commission may instead formally coordinate with the national judicial education bodies to develop and disseminate education, rather than attempt to replace them. In addition to streamlining the topics suitable for professional development, this will assist to ensure that there are no gaps in accountabilities.
 - The Commission should provide feedback, such as by periodic seminars sharing trends and learnings from investigations, in cooperation with existing judicial education institutions.
 - Statistical information from the Commission as to the type of complaints received should be provided to existing judicial education bodies in a suitably anonymised form, which will assist in the education of judicial officers.
 - The Commission will likely develop a particular role in identifying the training and education needs of judicial officers, through the process of considering complaints. This should include developing guidelines on appropriate judicial conduct.

Question 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?

112. The Law Council notes that, in respect of the NSW Judicial Commission, the use of evidence relating from a complaints process may be limited by non-publication directions, but the use of, or admission, of evidence is otherwise not determined by the legislation.⁹⁴
113. The Law Council reserves its position on the derivative use of evidence in respect of the Commission and requests further information from the Department about what is proposed in order to sufficiently inform its consideration of this potentially complex issue. The reliance on information produced in the course of an investigation in other

⁹³ Ibid 5.

⁹⁴ See *Judicial Officers Act 1986* (NSW) ss 36, 37(2).

proceedings raises a number of considerations, including whether information was obtained through coercive means. Any use or sharing of information outside of the purposes of an investigation by the Commission must have appropriate regard to established principles of legal professional privilege and privilege against self-incrimination.

Further considerations

The Commission's educative function

114. In the Law Council's view, the functions of handling conduct and complaints and administering education are mutually informative. Education is a particularly valuable component of existing judicial commissions in Australia and, should the establishment of the Commission be progressed at a federal level, it must be given equal prominence and resourcing, if not more, as the complaints process.

115. In this respect, the Law Council highlights the ALRC's observation in its Judicial Impartiality Report that:⁹⁵

Australian standards on complaint handling emphasise the importance of building in a 'loop' that permits the organisation to learn from complaints, and to effect improvements in processes (including education and training as a result.

116. By combining educative and complaints-handling functions, feedback gleaned from complaints (even from those that are not substantiated, or that are substantiated but do not result in removal of the judicial officer) can be integrated into future training resources and development programs.⁹⁶

117. As raised above in answer to Question 20, the Law Council acknowledges that several jurisdictions have developed bench books and other written manuals to provide guidance on procedure and help equip judicial officers with the necessary knowledge and skills to adequately perform their functions. These resources have also been of significant benefit in achieving greater consistency in decision making by judicial officers. An example of this function is the NSW Judicial Commission's development of a variety of bench books and handbooks,⁹⁷ and regular convening of conferences, seminars and webinars to inform judicial officers of current developments and emerging trends.⁹⁸

118. While the resources available at a state and territory level are valuable, these types of tailored resources, and corresponding training, are lacking at a federal level. This is a significant gap that the Commission ought to fill, which can support not only the federal judiciary, but legal practitioners and court users. Consequently, its educative role ought to include renewing judicial skills, identifying trends and providing information about changes to the law, court procedure and community values. This can be done by drawing upon the complaint 'feedback loop', as described above.

⁹⁵ Australian Law Reform Commission ('ALRC'), *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report, December 2021) <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> 335-336.

⁹⁶ *Ibid* 336.

⁹⁷ Judicial Commission of New South Wales, *Bench Books and Hand Books* (Web Page, 2022) <<https://www.judcom.nsw.gov.au/category/publications/bench-books/>>.

⁹⁸ Judicial Commission of New South Wales, *Judicial Education* (Web Page, 2022) <<https://www.judcom.nsw.gov.au/education/>>.

Constitutionality of the Commission's establishment

119. In its Policy Statement, and as raised within this submission, the Law Council notes that some potential constitutional concerns have been raised in opposition to the establishment of the Commission.⁹⁹ One concern is that, in reserving the legislature's power to remove federal judges due to proven misbehaviour or incapacity, section 72(ii) of the Constitution is inconsistent with a power to deal otherwise with complaints, which could prevent the establishment of any other regime.¹⁰⁰
120. The Law Council considers it doubtful that the Constitution would prevent the establishment of a body that does not have the power to discipline or remove a judicial officer.¹⁰¹ It notes that section 72(ii) of the Constitution deals only with the removal of judges and does not prescribe a detailed process for complaint handling or addressing complaints that do not warrant removal from office.
121. As indicated above, another question arises with respect to the safeguards that are needed to protect the independence and integrity of the judiciary from Executive interference.
122. While continuing to strongly support the Federal Judicial Commission being implemented, the Law Council's Policy has acknowledged that a challenge to the constitutional validity of the Commission may be inevitable.¹⁰² As flagged above, it therefore recommends that the Department seek advice on various constitutional issues posed by the Commission's establishment, as discussed throughout this submission.¹⁰³

⁹⁹ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 4.

¹⁰⁰ *Australian Constitution* s 72(ii).

¹⁰¹ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, December 2020) 4.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*