

23 February 2023

Ashleigh Tilbrook
A/G Assistant Secretary
Judicial Commission Taskforce

By email: ashleigh.tilbrook@ag.gov.au

Dear Ms Tilbrook,

Federal Judicial Commission

1. The Australian Bar Association (**the Association**) welcomes the opportunity to provide a submission to the Attorney-General's Department regarding the *Scoping the establishment of a federal judicial commission discussion paper* (**discussion paper**).
2. The Judicial Commission of New South Wales (**JCNSW**) offers a useful model for consideration for the purpose of discussing what is desirable at a commonwealth level for a federal judicial commission (**FJC**). Given the JCNSW is the most mature of such bodies in the Commonwealth. The JCNSW was established by the *Judicial Officers Act 1986* (NSW) (**JOA 1986**) and has been operating successfully for over 35 years. The Association recognises that other jurisdictions within the Commonwealth have addressed this issue in a variety of ways, which also would repay consideration in formulating the FJC. This submission uses the JCNSW as a template for expressing the Association's views. In doing so, the Association would wish to recognise the significant contribution of the NSW Bar Association in the preparation of this response.

Composition and decision-making

1. ***Should the membership of a federal judicial commission include some or all of the heads of jurisdiction of the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court of Australia?***
3. Yes. The Association considers that membership of the FJC ought to include each head of jurisdiction. This is the case with the JCNSW.¹ This would appropriately locate the FJC at the apex of those jurisdictions and provide credibility and legitimacy to that body.
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?***
4. Yes. The Association proposes that the FJC's membership should include both appointed community members and members of the legal profession.

¹ In NSW these are the Chief Justice of the Supreme Court, the President of the Court of Appeal, the Chief Commissioner of the Industrial Relations Commission, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Magistrate – see s. 5(4) JOA 1986.

5. In NSW, the JCNSW has 10 members: four members appointed by the Governor, on recommendation of the Minister, and six “official” members, being the heads of jurisdiction. One of the four community members is a legal practitioner, and three are persons with high standing in the community.² These members appropriately reflect the judiciary’s “stakeholders”, being the legal profession and the community at large.
6. The Association supports the Law Council’s proposal that consideration be given to proactively appointing and employing people from significantly underrepresented groups in the legal profession, including First Nations people and people with disabilities, amongst others.³
7. The process for appointment of community members could be on the recommendation of the Attorney-General, after consultation with peak legal bodies and each head of jurisdiction.⁴ The process should involve consultation with community, disability and First Nations groups to identify suitable candidates.
3. *How should decisions of a federal judicial commission be made where the members are not able to unanimously agree?*
8. The Association proposes that decisions of the FJC (and decisions of investigatory panels) should be made by simple majority, as is the case with the JCNSW.⁵

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?*
9. Yes. The Association proposes that the FJC should be empowered to examine complaints about all federal judges, including judges of the High Court.
10. The Association notes potential objections put forward against including High Court judges within the scope of the Commission. *First*, this may require the High Court to adjudicate on an issue in relation to one of its own judges (for example, an application for judicial review); and *second*, a High Court judge should not be subject to scrutiny by a judge of lower rank. These potential issues are not without precedent and the Association considers they could be overcome by appointment ad hoc of a retired High Court judge to hear the complaint (with a statutory mechanism for this to occur).
5. *Should a federal judicial commission be empowered to examine complaints about a former judicial officer and, if so, in what circumstances?*
11. Yes. An FJC should be empowered with the ability, but not obligation, to examine complaints about a former judicial officer.
12. The relevant circumstances that would justify such an investigation would centre around:
 - (a) the allegation concerning the former judicial officer’s conduct in connection with the discharge of the judicial office;

² See s. 5(5) and Sch. 1 JOA 1986

³ Law Council’s Principles p7

⁴ Cf. s. 5(5) JOA 1986

⁵ JOA 1986 Sch 2 par 5, Sch 3 par 4

- (b) the subject of the complaint not having been, and unlikely to be, the subject of investigation otherwise.

There would also be the additional safeguard of summary dismissal of such a complaint.

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*
13. Yes. The Association considers that the proposed definition of complaint is appropriate. It is equivalent to the definition of a complaint in the JOA 1986,⁶ as follows:
- (a) *the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office, or*
 - (b) *although the matter, if substantiated, might not justify parliamentary consideration of the removal of the judicial officer from office, the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties by the officer.*
14. The proposed 'complaint' definition also extends the JFC's remit to matters which may affect the reputation of the relevant court, even where the performance of the judicial officer is not at issue. The Association considers this an appropriate extension, in particular because this would include extra-judicial actions that are not so serious that they may result in removal from office, but may still affect the reputation of the relevant court.
7. *Are there any circumstances in which a federal judicial commission should not be empowered to examine a complaint that meets one of the above criteria?*
8. *Are there any circumstances in which a federal judicial commission should be empowered to examine a complaint that does not meet the above criteria?*
- (Responses to both questions 7 and 8 are below)*
15. The Association considers that the FJC should be empowered to examine all complaints which meet the proposed criteria.
16. Rather than deprive the FJC of power to examine any particular category of complaint, the Association considers it would be appropriate to have a mechanism for summary dismissal of complaints and to define the circumstances in which complaints may be summarily dismissed.
17. The JCNSW is empowered to summarily dismiss complaints in the circumstances identified in s.20(1) JOA 1986, namely:
- (a) *the complaint is one that it is not required to deal with,*

⁶ s. 15 JOA 1986

- (b) *the complaint is frivolous, vexatious or not in good faith,*
 - (c) *the subject-matter of the complaint is trivial,*
 - (d) *the matter complained about occurred at too remote a time to justify further consideration,*
 - (e) *in relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint,*
 - (f) *without limiting paragraph (e), the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights,*
 - (g) *the person complained about is no longer a judicial officer, or*
 - (h) *having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable.*
18. This approach allows a “triage” of complaints to be performed, prior to any investigation being commenced. Importantly, this provides a mechanism for dismissing frivolous or vexatious complaints, and those where another process exists to resolve the matter (such as an appeal). The position of former judicial officers is considered at paragraphs 21 to 23 below. Identifying those complaints which may be summarily dismissed aids transparency.
19. The JCNSW is able to refer a complaint to a head of jurisdiction, where a complaint is not summarily dismissed, but where it does not justify the attention of the conduct division.⁷ This allows some flexibility to deal with less serious matters. The Association would support a similar mechanism for the FJC.
20. The JCNSW is also expressly permitted to consider a complaint even though the subject matter may constitute a criminal offence.⁸ The FJC ought to be empowered to consider such complaint, and also to take necessary action to adjourn an investigation and prevent disclosure, to aid avoiding interference with criminal processes.⁹
- 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 happened before the appointment of a judicial officer to judicial office or before the commencement of any enabling legislation?***
21. The Association proposes that the FJC be empowered to examine complaints in each of the situations identified.
22. In NSW, the position regarding retired judicial officers is that the JCNSW may summarily dismiss a complaint if the person complained about is no longer a judicial officer.¹⁰ In contrast, the Law Council’s policy statement entitled *Principles Underpinning a Federal Judicial Commission* propose that complaints about retired judicial officers should be permitted provided they meet a public interest test.¹¹ While the Law Council’s proposition requires an evaluation of the public interest, at a point where there may be limited information available to inform that determination,

⁷ s. 21(2) JOA 1986

⁸ s. 15(5) JOA 1986.

⁹ cf s. 15(7) JOA 1986 – the power to adjourn consideration of matters if it is being dealt with by a court

¹⁰ s. 20(1)(g) JOA 1986

¹¹ *Principles Underpinning a Federal Judicial Commission* p6

it may be preferable to have a broad discretion to summarily dismiss the complaint. Accordingly, the Association is supportive of the Law Council's proposal.

23. The JCNSW may only deal with a complaint about a matter arising before the judicial officer held judicial office, or before the commencement of the JOA 1986, if the matter, if substantiated, could justify parliamentary consideration of removal from office.¹² This in effect prevents the JCNSW from considering less serious complaints in those circumstances. The Association is supportive of a similar approach with the JFC. In the alternative, the same threshold test of public interest could be applied as with retired judicial officers.

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?*
24. No. The Association does not support anonymous complaints. Anonymous complaints are not permitted in NSW, where the complaint must identify the complainant.¹³
25. The Association anticipates that 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 related evidence (such as transcripts or documents) may not be readily available. Permitting an anonymous complaint would also adversely impact the fairness of the process for the judicial officer concerned.
26. Instead, the Association proposes that provisions preventing or limiting disclosure could be used to protect the identity of the complainant, or the details of the complaint. That would be a sufficient safeguard for individual complainants.
27. The Association would also support a mechanism for professional bodies to bring complaints on behalf of their members (considered further at paragraphs 28 to 31 below.)
11. *Should it be open to professional bodies to make complaints to a federal judicial commission? If so, should any limitations apply?*
28. Yes. This is not a mechanism which is explicitly permitted in NSW. Equally, there is nothing which prevents a complaint being made by a person, such as the President or an officer of the Association, regarding conduct against one of its members.
29. The Association considers that significant barriers exist for individual practitioners who may have grounds to complain about a judicial officer. An individual practitioner who makes a complaint about a judicial officer risks damaging their own reputation and standing in the profession. Individual practitioners may find that raising a complaint impacts their ability to continue in practice before the judicial officer or court. This is in contrast to individual litigants or other court users who make complaints against judicial officers, who are less likely to have regular interactions with that judicial officer or court.
30. Professional bodies are well-placed to receive information about the conduct of judicial officers and to advocate for such conduct to be investigated. The Association anticipates that professional bodies would generally make complaints about general issues rather than specific incidents – such as the timing of court processes.

¹² s. 15(3) JOA 1986

¹³ s. 17 JOA 1986

31. The Association does not consider that there should be any limitation on the nature of complaints that may be made by professional bodies. Professional bodies are likely to require cogent evidence before making any complaint, and they are unlikely to make frivolous or vexatious complaints. Further, and critically, complaints initiated by a professional body will almost certainly be the product of review by multiple professionals, typically at least some of whom will be of considerable seniority and repute.
- 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?***
32. Yes. The Association considers that confidentiality provisions would be preferable to allowing anonymous complaints. In NSW, the conduct division of the JCNSW is able to make non-publication directions, and there are restrictions on disclosure of information by the members of the JCNSW.¹⁴ A similar process should be available to the FJC to make directions to prevent publication or disclosure of the identity of complainants, the details of a complaint or evidence given before the investigatory panel.
- 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?*
33. Yes. The Association supports the simultaneous consideration of multiple complaints, either complainants or incidents.
34. Difficulties could arise where there are multiple complainants, in keeping the identities of those complainants or complaints confidential. However, appropriate non-disclosure directions could be made to avoid this.
- 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?***
35. Yes. The JCNSW does not have such power. The Minister may refer a matter for investigation,¹⁵ and the head of jurisdiction may refer a matter, although only relating to the impairment of a judicial officer.¹⁶
36. The Association sees no reason, in principle, why the FJC should not be permitted to refer a matter for investigation of its own motion. Given the jurisdiction is fundamentally protective in nature, the FJC should be empowered to act to protect the public even absent a complaint. The Association considers that the proposed members of the JFC will be well-placed to identify matters that ought to be investigated. This power would also support the role of the FJC in upholding the reputation of the relevant courts.
- 15. *Should consideration be given to providing a federal judicial commission with express powers to declare a person to be a vexatious complainant?***

¹⁴ ss. 36 and 37 JOA 1986

¹⁵ s. 16(1) JOA 1986

¹⁶ s. 29KB JOA 1986

37. Yes. In NSW, there is an express power to declare a complainant vexatious.¹⁷ There is also power to summarily dismiss complaints, for reasons including that they are frivolous, vexatious or not in good faith.¹⁸ A power to summarily dismiss such complaints would generally be sufficient to prevent abuse of the system.
38. An express power to declare a complainant vexatious is appropriate where summary dismissal is inadequate, and where, for example, repeated unfounded complaints are made by an individual. It has benefit in NSW, where a complaint to the JCNSW may not be the subject of an order under the *Vexatious Proceedings Act 2008* (NSW).¹⁹ Although likely to be rarely used, the Association supports the existence of similar power for the FJC.

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?*
39. The Association submits that the latter is preferable. This is the case in NSW.²⁰ Restricting investigations to only those 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 investigation to proceed where appropriate in the circumstances would allow the full facts to be discovered prior to any action being taken.
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?*
40. Transparency ought to be one of the key features of the FJC, although a balance needs to be struck between confidentiality and transparency.
41. At a minimum, a complainant should be advised of the outcome of a complaint and the reasons for that outcome. Confidentiality of the investigation should be preserved until the investigatory panel has delivered its report. A report should be disclosed to the complainant, the judicial officer and the Attorney-General. Where a removal is recommended, it would be tabled in Parliament.
42. The only reports required to be published by the JCNSW are reports of the Conduct Division where it has concluded that the matter could justify Parliamentary consideration of the removal of the judicial officer complained about from office.²¹ By contrast, the Judicial Commission of

¹⁷ s. 38 JOA 1986

¹⁸ s. 20(1)(b) JOA 1986

¹⁹ See s. 4 – defining proceedings to mean those before any court or tribunal

²⁰ See ss. 15 and 21(1) JOA 1986

²¹ s. 29 JOA 1986. Note however that in NSW certain information regarding complaints is required to be provided by the JCNSW to the Attorney-General, unless it is not in the public interest to do so (s. 37A JOA 1986). The examination or investigation of complaints by the Conduct Division must, as far as practicable, take place in private (s. 23 JOA 1986). Hearings of the Conduct Division may be held in public or in private as the Conduct Division may determine (s. 24 JOA 1986). The JCNSW has published Guidelines under s.10

Victoria is expressly empowered to release to the public the contents of complaints where it is in the public interest to do so, subject to disclosure considerations. This may include information about pending investigations.²²

43. Even where a complaint is dismissed, or is instead referred to a head of jurisdiction, the Association proposes that there should be some publication of the outcome. In NSW, use is made of anonymised case studies to illustrate the work of the JCNSW. The Association supports a similar process of anonymised case studies for the FJC, to aid transparency. The Association considers this practice strikes an appropriate balance in enhancing public confidence in the judiciary, whilst protecting the judiciary and individual judicial officers from unjust criticism. The Association notes that publication of a judicial officer's name and the particulars of a complaint where the complaint is dismissed or not found sufficiently serious to warrant further action, has potential to undermine the justice system.
44. In circumstances where a complaint has been upheld, and is therefore by definition not frivolous, vexatious, made in bad faith or trivial,²³ ordinarily, the report should be published.
45. The Association considers that there should be a discretion for the FJC in this regard. In particular, if a judicial officer is subjected in a very public fashion to a complaint, which complaint is ultimately dismissed, it would seem that in fairness, that should be published. This is not the only circumstance, but reflects the fact that a discretion should remain in the FJC as to publication, to be informed by transparency and fairness to the complainant and the judicial officer, as calibrated by the nature of the complaint and its outcome.

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?*
46. In NSW, the JCNSW's conduct division comprises two judicial members (one of whom may be retired) and one community member. The conduct division may be, but need not be, drawn from the membership of the JCNSW.²⁴
47. The Association considers it would be appropriate for the FJC's investigatory panels to have both judicial and non-judicial members. This reflects the need for judicial officers to be investigated both from the perspective of their peers and also from those representing the community at large. This ought to include underrepresented groups, as noted at paragraph 5 above.
48. The Association proposes that the FJC should be empowered to select and appoint investigatory panels as it considers appropriate, either from its own membership or externally. It is expected

of the JOA 1986 as to the factors the Conduct Division will take into account when exercising its discretion whether to hold hearings in public or in private. Factors include the public interest, whether the type of allegation under consideration requires confidential treatment, whether public confidence in the authority of the judiciary would be undermined by a public or private hearing and whether it is necessary to close a hearing to protect the reputation of a judicial officer from untested or unverified evidence: see <https://www.judcom.nsw.gov.au/complaints/conduct-division-guidelines-for-examination-of-complaints/>

²² s. 139, *Judicial Commission of Victoria Act 2016* (Vic). Since 2019 the Victorian Judicial Commission has published media releases concerning complaints about three Magistrates and one Judge which have included the name of the judicial officer concerned and the substance of the complaint. See: <https://www.judicialcommission.vic.gov.au/publications/media>

²³ Assuming the FJC contains provisions of the kind referred to in answers 7 and 8 above

²⁴ s. 22 JOA 1986

that members of investigatory panels would be required to have a background relevant to the subject matter or jurisdiction of the complaint, be independent from the judicial officer concerned, and have sufficient experience to discharge their functions.

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?*
49. The Association considers that the investigatory panel alone should have power to summon and examine witnesses and to write reports in relation to complaints.
50. However, for practical purposes, the FJC should be empowered to exercise some powers of investigation. The FJC should be able to obtain information or documents, to inform the complaint triage process. The FJC 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.

Intersection with other bodies and processes

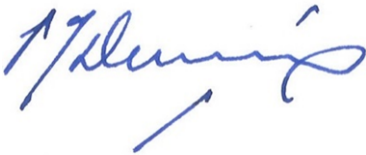
20. *How could a federal judicial commission best complement or support the role of existing judicial education bodies, such as the National Judicial College of Australia and the Australasian Institute of Judicial Administration*
51. The Association notes the important role that bodies such as the JCNSW play in judicial education. This aspect of the JCNSW's role enhances its credibility and legitimacy in this state. The Association notes that the Victorian Judicial Commission's functions are more limited, and do not extend to judicial education.
52. The Association believes the FJC should also have a similar educative role as the JCNSW. Given the existence of the national education bodies, however, the FJC may instead coordinate with those bodies to develop and disseminate education, rather than attempt to supplant them. The Association expects that the FJC will itself develop a particular role in identifying the training and education needs of judicial officers, through the process of considering complaints. As previously noted, this could include developing guidelines on appropriate judicial conduct.
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?*
53. In NSW, the use of evidence resulting from a complaints process may be limited by non-publication directions. However, the use or admission of evidence is otherwise not determined by the JOA 1986.²⁵
54. The Association would support a similar approach being adopted for an FJC. The confidentiality of proceedings before the FJC should generally be preserved through the use of non-publication directions. Where these are varied or at an end, the use of any evidence or material obtained in the investigation may be left to the general law.

Conclusion

²⁵ See s. 36, s. 37(2) JOA 1986

55. The Association thanks the Taskforce for the opportunity to provide further input on the development of an FJC. If you have any questions about this letter, please contact myself at president@austbar.asn.au or Greg Tolhurst, CEO, at ceo@austbar.asn.au

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Peter Dunning', with a long horizontal stroke extending to the right and a diagonal stroke below it.

Peter Dunning KC
President