

21 December 2022

Our ref: YHF/MD:JCWG
[REDACTED]

Shannon Fentiman MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the
Prevention of Domestic and Family Violence
1 William Street
Brisbane QLD 4000

By email: [REDACTED]
[REDACTED]

Dear Attorney

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

Thank you for your letter dated 28 September 2022 inviting the Queensland Law Society (**QLS/Society**) to provide submissions in response to the discussion paper, *Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland (Discussion Paper)*. The Society appreciates being consulted on this important issue.

This submission has been compiled with the assistance of the Society's Judicial Commission Working Group (**Working Group**), whose members have substantial expertise across a range of relevant practice areas, including criminal law, occupational discipline and alternative dispute resolution. The Working Group is chaired by Mr Dan Rogers and includes a retired senior judicial member being Ms Ann Lyons.

We have structured our submission around the consultation questions and enclosed in **Appendix 1** a proposed model for a Queensland Judicial Commission.

Preliminary comments

The Queensland Law Society supports the establishment of a Queensland Judicial Commission that performs the dual functions of managing judicial complaints and judicial education, similar

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

to the Judicial Commission of New South Wales, which has operated with success for over 30 years.

We echo the sentiments expressed in the Women's Safety and Justice Taskforce (**Taskforce**) report, *Hear her voice*.¹

Although there is an appeal process for judicial decisions, there needs to be a safe and transparent process for dealing with complaints about the conduct of judicial officers. These processes exist in other Australian jurisdictions in the form of judicial commissions. The New South Wales judicial commission has operated for over 30 years. Properly constituted judicial commissions do not pose any threat to the independence of the judiciary.

The Taskforce recommended that a Queensland Judicial Commission, based generally on the Judicial Commission of New South Wales model, should be established both to provide education and training to judicial officers and deal with complaints.² In making its recommendation, the Taskforce acknowledged that a Queensland Judicial Commission is an important reform that should be prioritised and progressed in this term of government.³ We support the views expressed in the *Hear her voice* report as they relate to the recommendation to establish a Queensland Judicial Commission.

Since the release of the *Hear her voice* report, Queensland Government has indicated that they are supportive or supportive 'in principle' of all of the 89 recommendations from the *Hear Her Voice* report and have committed to consulting with the Chief Justice, the Society and the Bar Association of Queensland on the issue of whether there is a need for an independent statutory judicial commission in Queensland. We commend Queensland Government for this timely review and acknowledge the work that has been completed to date.

As noted above, the Queensland Law Society supports a Queensland Judicial Commission whose core functions are to:

- Prepare and implement programmes for the continuing education and training of judicial officers; and,
- Receive complaints against, investigate and recommend action against judicial officers.

In our view, the over-riding considerations in the structure of the Queensland Judicial Commission should:

- Respect the separation of powers;

¹ Women's Safety and Justice Taskforce, *Hear her voice (Report one)* (2021) xix <https://www.womenstaskforce.qld.gov.au/data/assets/pdf_file/0013/700600/volume-1-exectutive-summary-and-introduction.pdf>.

² Ibid xxix.

³ Ibid xxix.

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

- Maintain the independence of the judiciary;
- Ensure public confidence in Queensland courts and tribunals;
- Ensure the integrity of the judicial branch of government; and,
- Maintain the effective discharge of justice and spending of public moneys.

We have provided our comments to the consultation questions below for your consideration.

Consultation questions

1A. What are your views on the current complaint handling processes?

In our view, the current complaints handling processes for judicial officer's lack transparency and consistency across the various Queensland courts and tribunals; are overly discretionary and informal; and, fail to adequately capture the wide range of judicial conduct that may warrant a complaint, but not removal from office. They do not instil public confidence in the administration of justice in Queensland.

1B. What elements of current complaints handling processes work well?

Our members were unable to identify elements of current complaints handling processes that work well.

Our members have observed that practitioners are unable or unwilling to complain about a judicial officer using the current complaints handling processes. In part, this can be attributed to the current processes being inconsistent and informal, in which case a practitioner may not know they have the option to complain, or alternatively, the practitioner may be concerned that a complaint will have adverse outcomes for their clients or themselves. It is the experience of our members that practitioners are unwilling to make a complaint against a judicial officer using the current complaints handling processes due to the possibility that the judicial officer will identify the complainant, potentially resulting in adverse outcomes for the practitioner. This outcome is heightened in rural, regional and remote areas, where there are fewer practitioners, making it easier for the judicial officer to infer who the complainant is. It is our expectation that judicial complaints initiated under the current complaints handling processes do not accurately depict the number of potential complaints stemming from possible inappropriate judicial conduct.

In our view, an independent statutory body, which establishes a formalised process for handling judicial complaints, will go some way in addressing the issues flagged above by our members.

1C. What elements of the current complaint handling processes can be improved?

We reiterate our comments above in **1A** and **1B** that the current complaints handling process is largely discretionary, informal and inconsistent across Queensland courts and tribunals. In our

view, a robust and well-resourced Queensland Judicial Commission would address the deficiencies associated with the current complaints handling processes by making the processes transparent, independent and formal.

1D. What, if any, elements of complaint handling processes in other jurisdictions would not work in Queensland?

The Judicial Commission of New South Wales performs the statutory function of monitoring sentences imposed by courts. The Queensland Law Society does not support the inclusion of this function in the Queensland context, as sentence monitoring is currently undertaken by the Queensland Sentencing Advisory Council.

1E. What would be the preferred membership of a Queensland Judicial Commission and why?

We envisage the Queensland Judicial Commission comprising 10 members, broadly similar to the Judicial Commission of New South Wales, including:

- A retired judge acting as Chair;
- The Chief Justice or nominee of the Supreme Court;
- The President or nominee of the Court of Appeal;
- The Chief Judge or nominee of the District Court;
- The Chief Magistrate or nominee Magistrate;
- The President or nominee of the Queensland Civil and Administrative Tribunal;
- The President or nominee of the Queensland Law Society;
- The President or nominee of the Bar Association of Queensland; and,
- Two community representatives with high standing in the community appointed by the Governor-in-Council on the recommendation of the Attorney-General.

To safeguard the independence of the judiciary, it is essential that any Queensland Judicial Commission be composed primarily of members of the judiciary. For this reason, the preferred membership of a Queensland Judicial Commission would be the heads of jurisdiction of Queensland's courts and tribunals.

Further, our members have expressed the concern that a Queensland Judicial Commission comprised entirely of the heads of jurisdiction may be perceived by the public as lacking true independence. To improve the perceived independence of the Queensland Judicial Commission, our members have suggested that the role of Chair be occupied by a retired judge, alongside four non-judicial members from the Society, Bar Association of Queensland and the community.

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

1F. Rather than establishment of an external body, would the issue be addressed if Queensland courts published more information outlining the current internal processes and statistics of how many complaints are received?

No. In our view, an independent statutory body is the only and best mechanism for receiving and resolving judicial complaints. Publishing more information outlining the current internal processes and statistics is unlikely to promote the public's confidence in the judiciary and the legal profession in the same way that a Queensland Judicial Commission would.

1G. If a judicial commission is considered appropriate, what should be the scope of complaints dealt with, for example, should bullying and sexual harassment be included?

Our proposed model in **Appendix 1** discusses this in more detail; however, in summary, the Queensland Judicial Commission may receive complaints about the conduct or capacity of a current judicial officer, or the conduct of a former judicial officer during their time in office.

The Queensland Judicial Commission may not receive or handle complaints about:

- Judicial error, mistake, or other legal ground, which is a function of the appellate courts;
- Allegations of corruption, which should be referred to the Crime and Corruption Commission; or,
- Allegations of criminal conduct, which should be referred to the Queensland Police Service, in agreement with the complainant.

In relation to suspected criminal conduct, it may be appropriate for an investigation by the Queensland Judicial Commission to be suspended while a police investigation is on foot. However, the absence of a police report should not prevent the Queensland Judicial Commission from investigating a judicial officer or a complainant from making a complaint.

In this context, conduct includes inappropriate behaviour of a judicial officer, such as bullying and harassing behaviour, which occurs in a professional or personal capacity. Capacity refers to a judicial officer's physical and mental capacity necessary to discharge the functions of judicial office.

A broad definition of judicial officer should be included in any legislation establishing a Queensland Judicial Commission. Specifically, judicial officer should be defined to mean judicial and non-judicial members, including:

- A Judge or Associate Judge of the Supreme Court of Queensland;
- The President or a Member of the Queensland Industrial Relations Commission;
- The President or a Member of the Land Court of Queensland;
- A Judge of the Planning and Environment Court;

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

- A Judge of the District Court of Queensland;
- A Registrar acting in a judicial capacity;
- A Magistrate;
- The President or a Member of the Queensland Civil and Administrative Tribunal; or,
- President and Deputy President of the Mental Health Review Tribunal.

1H. What would a Queensland Judicial Commission investigatory process look like, and should it have multiple tiers?

We draw your attention to the proposed model enclosed in **Appendix 1**, which adopts a multi-tiered process.

1I. Should a Queensland Judicial Commission include the non-judicial officers at QCAT?

Yes, a Queensland Judicial Commission should have the power to receive complaints about non-judicial members of the Queensland Civil and Administrative Tribunal (**QCAT**). Tribunals play a critical role in promoting access to justice for self-represented persons. Our members highlight that non-judicial members of QCAT often make significant decisions that affect the rights of those appearing in QCAT. We also note that parties before QCAT are often self-represented litigants, and as such, are unlikely to appreciate the difference between a legal and non-legal member of QCAT. This approach would also be consistent with the approach taken by the Northern Territory Judicial Commission and the Judicial Commission of Victoria. For these reasons, a Queensland Judicial Commission should include the non-judicial members of QCAT.

1J. Detail any other benefits or disadvantages of a judicial commission that deals with complaints handling?

Our members advise that implementing the current complaints handling processes falls primarily on the heads of jurisdiction of the relevant court or tribunal. Although we expect there to be a small number of complaints each year (see for example the published figures for the Judicial Commission of New South Wales⁴), the complaints that are received occupy the limited time and resources of the heads of jurisdiction and the court or tribunal. It is our expectation that a Queensland Judicial Commission would alleviate some of the pressure associated with implementing the current informal complaints handling processes. The current process means it is also incumbent on the heads of jurisdiction to investigate and discipline their own colleagues, which may include spouses, partners, and friends, and would understandably add complexity to the perception of independence.

⁴ Judicial Commission of New South Wales, *Complaints statistics* (2014 – 19) Available at: <https://www.judcom.nsw.gov.au/complaints/complaint-statistics/>.

2A. Should the judicial commission have a role in coordinating professional development topics for existing bodies or have direct involvement in the delivery and development of professional development resources?

The Society supports a Queensland Judicial Commission that performs the statutory function of preparing and implementing programmes for the continuing education and training of judicial officers, broadly consistent with the approach taken by the Judicial Commission of New South Wales.

In our view, any education and training program offered by the Queensland Judicial Commission would ideally utilise pre-existing resources and service providers (for example, the National Judicial College of Australia already provides education and training for judges which is of high quality and well-utilised). As such, it is envisaged that the educative branch of the Queensland Judicial Commission would leverage off existing resources and service providers, which are then tailored to the specific and unique service demands of the Queensland judiciary.

Further, our members have observed that the availability and provision of judicial training is inconsistent across Queensland courts and tribunals, and offered in a piecemeal fashion. It may be necessary for the Queensland Judicial Commission to identify service gaps in terms of judicial education and training currently offered to Queensland's judiciary, with a view of developing tailored education programs to address those gaps.

2B. How could the judicial commission work alongside existing national and state-based bodies currently providing professional development resources?

We reiterate our comments in **2A** that any education and training program offered by the Queensland Judicial Commission would ideally utilise pre-existing resources and service providers (for example, the National Judicial College of Australia already provides education and training for judges which is of high quality and well-utilised). As such, it is envisaged that the educative branch of the Queensland Judicial Commission would leverage off existing resources and service providers, which are then tailored to the specific and unique service demands of the Queensland judiciary.

2C. What, if any, reporting requirements about the nature, quality and frequency of judicial professional development would be appropriate?

As a minimum, the Queensland Judicial Commission should report the nature, quality and frequency of judicial development in their annual reports, similar to the reporting standards of the Judicial Commission of New South Wales.⁵ In our view, reporting judicial development in any annual reports produced by the Queensland Judicial Commission is an important aspect of promoting transparency and public confidence in the judiciary.

⁵ Judicial Commission of New South Wales, *Judicial Commission of NSW – Annual Report (2020 - 2021)* <https://www.judcom.nsw.gov.au/wp-content/uploads/2021/11/Judicial_Commission_Annual_Report_2020-21.pdf>.

Safeguarding Independence, Ensuring Accountability - Exploring the Need for a Judicial Commission in Queensland

Further, our members highlight that providing educational resources on the Queensland Judicial Commission's website is an opportunity to inform the public about the role and function of the judiciary. We note the Queensland Sentencing Advisory Council offers educational resources to the public in terms of sentencing and the Legal Services Commission offers educational resources to the public regarding the legal profession. Consistent with these services, the Queensland Judicial Commission should provide educational resources (e.g. information sheets and guides) on their website about the role and function of the judiciary. Informing and engaging with Queenslanders on the role of the judiciary, through this medium, would strengthen Queensland's democratic institutions.

2D. Is there anything else that needs to be considered in relation to judicial professional development?

It is envisaged that the Queensland Judicial Commission would offer training and education similar to what is currently offered by the Judicial Commission of New South Wales, but tailored to the Queensland context. In particular, a Queensland Judicial Commission would offer professional development in relation to:

- Induction for all new judicial officers, providing jurisdiction specific training;
- Interactions with culturally and linguistically diverse people and other vulnerable cohorts, such as older persons, persons with cognitive impairment, and LGBTQIA+ persons. This would build on the programs about better engagement with Aboriginal and Torres Strait Islander Peoples;
- For appropriate jurisdictions, education on scientific understanding and concepts (e.g. uncertainty analysis or model calibration) to assist judicial officers that engage with scientific concepts and experts as part of their judicial role;
- General wellbeing programs for judicial officers, especially those in rural, regional and remote areas; and,
- Professionalism in the courtroom.

3A. Do you think there is a relationship between judicial wellbeing, complaints and professional development?

Yes. The Society and our members acknowledge the complex and demanding nature of judicial office, and the high levels of pressure and public scrutiny that judicial roles attract. These characteristics of judicial office inevitably impact on judicial wellbeing. In our view, education and training of judicial officers will support and enhance the wellbeing of judicial officers, which we anticipate will result in fewer complaints about judicial officers.

3B. What are your views on the issue of wellbeing being included in the scope and function of a potential judicial commission approach?

For the reasons stated in **3A**, we support a Queensland Judicial Commission that offers services to promote judicial wellbeing, especially judicial officers in rural, regional and remote areas.

Our members envisage a confidential service offered by the Queensland Judicial Commission that emulates the LawCare service offered by the Queensland Law Society, but tailored to the needs of the judiciary. Like LawCare, the well-being service offered by the Queensland Judicial Commission should maintain the confidentiality of the judicial officer involved and could potentially rely on a third party provider to deliver the service.

3C. Should judicial wellbeing be prioritised as part of existing professional development resources?

Yes, for the reasons stated in **3A**. Our members have suggested one compulsory seminar on judicial wellbeing each year as a way of prioritising judicial wellbeing.

3D. Is there anything else that should be considered in relation to judicial wellbeing?

Our members have emphasised the importance of incorporating trauma informed practice into any judicial wellbeing services offered by the Queensland Judicial Commission.

4A. What is your view about whether there is a need for a judicial commission in Queensland? Why or why not?

In our view, there is a clear and compelling need for a Queensland Judicial Commission.

As stated above, the current complaints handling processes for judicial officers lack transparency and consistency across the various Queensland courts and tribunals; are overly discretionary and informal; and, fail to adequately capture the wide range of judicial conduct that may warrant a complaint, but not removal from office.

In our view, a robust and well-resourced Queensland Judicial Commission would address the deficiencies associated with the current handling processes, by making the processes transparent, independent and formal.

Further, as discussed above, there is a relationship between judicial wellbeing, complaints and professional development. An effective and well-resourced Queensland Judicial Commission would assist in promoting the wellbeing of judicial officers, while reducing complaints about judicial misconduct.

4B. If you think there is a need for a commission, what functions of the models discussed (such as complaints management, professional development and wellbeing) would be preferred for Queensland?

The Queensland Law Society supports the establishment of a Queensland Judicial Commission that performs the dual functions of handling judicial complaints and providing judicial education.

The Queensland Law Society supports a Queensland Judicial Commission that performs the statutory function of preparing and implementing programmes for the continuing education and training of judicial officers, broadly consistent with the approach taken by the Judicial Commission of New South Wales.

The Queensland Law Society supports a Queensland Judicial Commission that performs the statutory function of receiving and handling complaints about judicial officers, broadly consistent with the approach taken by the Judicial Commission of New South Wales.

4C. Do the benefits of a judicial commission justify the potential cost of establishing a judicial commission? Why or why not?

We acknowledge that establishing and maintaining a well-resourced Queensland Judicial Commission will incur significant costs for the State. Nonetheless, in our view, the costs associated with establishing and maintaining a Queensland Judicial Commission will be justified on the basis that such an entity, which performs the dual functions of providing judicial education and receiving complaints, will:

- Improve judicial proceedings and judicial decision making;
- Lead to improved community confidence in the judicial system;
- Support and enhance the wellbeing of judicial officers and those who engage with the judiciary, including legal professionals and the public more broadly; and,
- Reduce complaints against judicial officers.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED].

Yours faithfully

[REDACTED]

Kara Thomson
President

Appendix 1

Queensland Law Society proposed model for a Queensland Judicial Commission

1. Overview

The Queensland Law Society supports the establishment of a Queensland Judicial Commission that performs the dual functions of managing judicial complaints and judicial education, similar to the Judicial Commission of New South Wales.

In this regard, the Queensland Law Society supports a Queensland Judicial Commission whose core functions are to:

- Prepare and implement programmes for the continuing education and training of judicial officers; and,
- Receive complaints against, investigate and recommend action against judicial officers.

We note the Judicial Commission of New South Wales also performs the statutory function of monitoring sentences imposed by courts. The Queensland Law Society does not support the inclusion of this function in the Queensland context, as sentence monitoring is currently undertaken by the Queensland Sentencing Advisory Council.¹

The over-riding considerations in the structure of the Queensland Judicial Commission should:

- Respect the separation of powers;
- Maintain the independence of the judiciary;
- Ensure the integrity of the judicial branch of government; and,
- Maintain the effective discharge of justice and spending of public moneys.

2. Composition

We envisage the Queensland Judicial Commission comprising 10 members, broadly similar to the Judicial Commission of New South Wales, including:

- A retired judge acting as Chair;
- The Chief Justice or nominee of the Supreme Court;
- The President or nominee of the Court of Appeal;
- The Chief Judge or nominee of the District Court;

¹ Queensland Sentencing Advisory Council, *About us* (2 November 2021) Available at: <https://www.sentencingcouncil.qld.gov.au/about-us>.

- The Chief Magistrate or nominee Magistrate;
- The President or nominee of the Queensland Civil and Administrative Tribunal;
- The President or nominee of the Queensland Law Society;
- The President or nominee of the Bar Association of Queensland; and,
- Two community representatives with high standing in the community appointed by the Governor-in-Council on the recommendation of the Attorney-General.

To safeguard the independence of the judiciary, it is essential that any Queensland Judicial Commission be composed primarily of members of the judiciary.

However, our members have expressed the concern that a Queensland Judicial Commission comprised entirely of the heads of jurisdiction may be perceived by the public as lacking true independence. To improve the perceived independence of the Queensland Judicial Commission, our members have suggested that the role of Chair be occupied by a retired judge, alongside four non-judicial members from the Society, Bar Association of Queensland and the community.

With regards to staffing, it is envisaged that the Queensland Judicial Commission would be led by a suitably qualified Director who oversees a Secretariat that is tasked with discharging the statutory responsibilities of the Queensland Judicial Commission. Specifically, the Queensland Judicial Commission would adopt, at a minimum, the following staffing arrangements (minimum 15 staff members):

- Director
The Director would be responsible for overseeing the Queensland Judicial Commission's operations, including the educative and complaints function, as well as its financial management.
- Executive Officer
The Executive Officer would work alongside the Director and assist with overseeing the Queensland Judicial Commission's operations, including the educative and complaints function, as well as its financial management.
- Internal Investigations Team
 - Manager
The Manager of the Internal Investigations Team would be responsible for overseeing the administration of the complaints function of the Queensland Judicial Commission. Our members emphasise that this position is to be filled by a suitably qualified and experienced legal professional.
 - Investigations Lawyers
The Investigations Lawyers would be responsible for the day-to-day administration of the complaints function of the Queensland Judicial Commission. It is our expectation that the Investigations Lawyers would supervise complaints and conduct the investigation and compile evidence, which they then report back to the

Manager of the Internal Investigations Team. Like the Manager role, our members emphasise that this position is to be filled by a suitably qualified and experienced legal professional.

- Where appropriate, investigatory resources seconded from the Crime and Corruption Commission or Queensland Police Service to assist the internal investigations team
- Education Team
 - Manager

The Manager of the Education Team would be responsible for overseeing the performance of the Queensland Judicial Commissioner's judicial education program. This would involve working closely with Queensland courts and tribunals to set and organise ongoing judicial education programs.
 - Events Coordinators

Event Coordinators would be responsible for organising and coordinating the ongoing judicial education programs.
- A Policy and Communications Officer
 - A Policy and Communications Officer would coordinate internal documentation and reporting obligations, such as annual reporting, and prepare external communication from the Queensland Judicial Commission to the broader public.
- Research Staff

Our members strongly support the inclusion of research staff within the staffing structure of a Queensland Judicial Commission. The research staff would assist the Internal Investigations Team and the Education Team by conducting research and analysis to inform how those teams can effectively administer their respective roles. Our members report significant benefits with employing research staff in separate organisations and would welcome their inclusion in the context of a Queensland Judicial Commission.
- Administrative and IT Staff

The purpose of these roles is to support the professional officers across the Queensland Judicial Commission.

As a reference, the Judicial Commission of New South Wales, for the 2020-21 period, employed 32 people (29.8 full-time equivalent) across judicial education, legal research, complaints, information technology and administrative roles.² We note the Judicial Commission of Victoria, which performs the exclusive function of investigating judicial complaints, employs 10 staff.³ As the Queensland Judicial Commission is expected to perform fewer functions than the Judicial Commission of New South Wales, it is expected that fewer staff will be required to perform the dual functions of the Queensland Judicial Commission (i.e. minimum 15 staff members).

² Judicial Commission of New South Wales, *Annual Report 2020 – 21* (October 2021) 4.

³ Judicial Commission of Victoria, *Annual Report 2020 – 2021* (October 2021) 39.

Further, we note Queensland has fewer judicial officers than New South Wales. It is our expectation that the Queensland Judicial Commissioner will require fewer resources and less funding than the Judicial Commission of New South Wales to perform its statutory functions, due to the smaller cohort of judicial officers.

For example, as at June 2022, there were 288 judicial officers in New South Wales; whereas, in Queensland, there were 177 judicial officers, which represents approximately 61% of New South Wales's judicial cohort.⁴

Given Queensland's smaller cohort of judicial officers, we expect the Queensland Judicial Commission will receive fewer complaints, meaning fewer resources and less funding is required to discharge its statutory obligations. By way of example, for the 2020 – 21 reporting period, there were 57 complaints about 46 judicial officers in New South Wales, representing 16% of the state's judiciary.⁵ Considering the proportion of complaints in New South Wales (i.e. 16%) and the number of judicial officers in Queensland (i.e. 177), we might expect complaints against approximately 28 Queensland judicial officers in any given period.

Hence, given the smaller cohort of judicial officers in Queensland, it is our expectation that the Queensland Judicial Commission will require fewer resources and less funding than the Judicial Commission of New South Wales to perform its dual statutory functions.

3. Educative function

The Queensland Law Society supports a Queensland Judicial Commission that performs the statutory function of preparing and implementing programmes for the continuing education and training of judicial officers, broadly consistent with the approach taken by the Judicial Commission of New South Wales.

Overall Principles and Objectives

Our members have developed the following overarching principles and objectives for the Queensland Judicial Commission to consider when organising judicial education and training:

1. The independence of the judiciary is critical.
2. Education and training of judicial officers will improve judicial proceedings and judicial decision making.
3. Education and training of judicial officers will lead to improved community confidence in the judicial system.
4. Education and training of judicial officers will support and enhance the wellbeing of judicial officers.

⁴ The Australasian Institute of Judicial Administration, *AIIA Judicial Gender Statistics* (June 2022) Available at: <https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-2022-09-14.pdf>.

⁵ Judicial Commission of New South Wales, *Annual Report 2020 – 21* (October 2021) 49.

5. Education and training of judicial officers will reduce complaints against judicial officers.
6. Any education and training is to be developed by the Court in consultation with key stakeholders including the community.
7. Any education and training program would ideally utilise pre-existing resources and service providers (for example, the National Judicial College of Australia already provides education and training for judges which is of high quality and well-utilised).
8. The Queensland Judicial Commission would ideally identify any 'gap' areas for education and training.
9. Training and education programs should be regularly reviewed including to identify any common complaint areas which might require education and training.
10. Service providers and speakers should be suitably qualified and remunerated.
11. The Queensland Judicial Commission would preferably be led by a suitably qualified Director who oversees a Secretariat who are tasked to discharge the statutory responsibilities for the Queensland Judicial Commission (consider Queensland Sentencing Advisory Council model and note importance of a research function and policy advisors).
12. Any education and training program needs to be tailored to the specific Queensland court or tribunal having regard to different workloads, legal skills, practise areas and jurisdiction.
13. Induction training for new judicial officers is most important and should be mandatory.
14. Education and training must be properly funded.
15. Judicial officers should not be required to self-fund their education or training and/or take personal leave for it.

What can the Queensland Judicial Commission do?

Based on section 9 of the *Judicial Officers Act 1986* (NSW), the Queensland Judicial Commission may:

- (1) Organise and supervise an appropriate scheme for the continuing education and training of judicial officers.
- (2) In organising such a scheme, the Queensland Judicial Commission shall –
 - (a) endeavour to ensure that the scheme is appropriate for the judicial system of the State, having regard to the status and experience of judicial officers,
 - (b) invite suggestions from and consult with judicial officers as to the nature and extent of an appropriate scheme, trans
 - (c) have regard to the differing needs of different classes of judicial officers and give particular attention to the training of newly appointed judicial officers, and
 - (d) have regard to such other matters as appear to the Queensland Judicial Commission to be relevant.

Types of education programs delivered by the Queensland Judicial Commission

The judiciary's views are fundamental to the development of any programs and seminars provided by the Queensland Judicial Commission. In our view, the educational programs offered by the Queensland Judicial Commission would ideally be developed and implemented in collaboration with the relevant heads of jurisdiction of the various Queensland courts and tribunals.

Consistent with the Judicial Commission of New South Wales, the purpose of continuing professional development for judicial officers is to (amongst others):

- enhance their professional expertise;
- facilitate development of their judicial knowledge and skills;
- support and enhance their wellbeing; and,
- promote the pursuit of juristic excellence.

We note the Judicial Commission of New South Wales offers a range of programs for judicial officers, including:⁶

- inducting new appointees with comprehensive training and orientation;
- updating all judicial officers on important recent changes in law, procedure and practice;
- producing bench books for each court, with a process for regular updating;
- publishing the *Judicial Officers' Bulletin* on a regular basis to inform judicial officers of current law and to promote the consideration of important judicial issues;
- facilitating continuing judicial education through the exchange of experience and discussion of topical issues, convening meetings and discussion groups, and publishing articles and other papers;
- providing refresher services to meet the needs of judicial officers;
- providing special education services to meet the needs of isolated judicial officers both in the suburbs and country, and on circuit/rotation;
- providing an extended range of education services for the assistance of judicial officers, including interdisciplinary and extra-legal courses, where appropriate. The delivery of this scheme should integrate conference, publication and computer support services, in order to facilitate the access to and the use of education services in an effective and convenient manner for judicial officers;
- promoting and conducting the research and development of educational practices to enhance the effectiveness of continuing judicial education; and,
- Ngará Yura Program - aims to increase awareness among judicial officers about contemporary Aboriginal social and cultural issues, and their effect on Aboriginal

⁶ Judicial Commission of New South Wales, *Continuing Judicial Education Policy* (September 2019) Available at: <https://www.judcom.nsw.gov.au/education/continuing-judicial-education-policy/>.

people in the justice system. The Ngara Yura Program is delivered through three main strategies:

- judicial visits to Aboriginal communities in NSW;
- conferences, workshops and seminars; and,
- publications.

We generally support similar programs being offered in the Queensland context, although these programs would be tailored to the specific demands of the Queensland judiciary.

Our members have identified the following topics as potential programs and seminars offered by the Queensland Judicial Commission:

- A training and induction program for recently appointed magistrates;
- On-going training for judicial officers about the nature and impacts of domestic and family violence, including coercive control, consistent with the recommendations in the *Hear her voice* report;
- Broader training on interactions with culturally and linguistically diverse people and other vulnerable cohorts, such as older persons, persons with cognitive impairment, and LGBTQIA+ persons. This would build on the programs referred to above about better engagement with Aboriginal and Torres Strait Islander Peoples;
- For appropriate jurisdictions, education on scientific understanding and concepts (e.g. uncertainty analysis or model calibration) to assist judicial officers that engage with scientific concepts and experts as part of their judicial role.
- General wellbeing programs for judicial officers, especially those in rural, regional and remote areas; and,
- Professionalism in the courtroom.

Although these programs and resources will be tailored to the needs of a specific court or tribunal, we recommend that they be made available to judicial officers outside the targeted cohort, such as the Mental Health Review Tribunal (subject to availability and where appropriate).

How can the Queensland Judicial Commission address judicial well-being?

In terms of judicial well-being, our members envisage a confidential service offered by the Queensland Judicial Commission that emulates the LawCare service offered by the Queensland Law Society, but tailored to the needs of the judiciary.

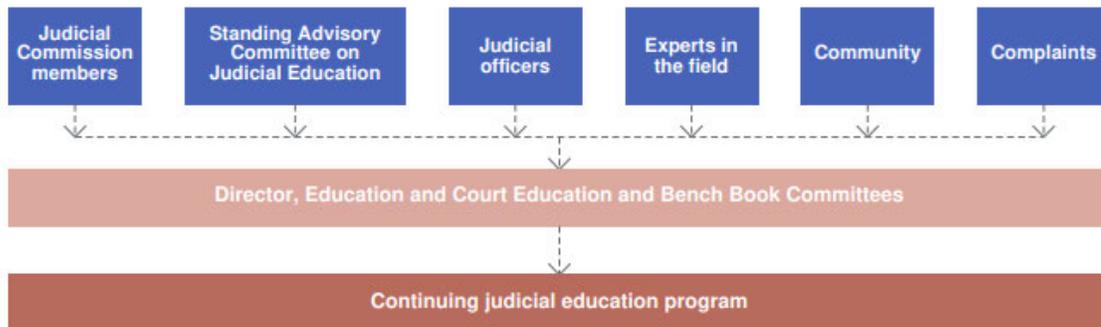
Like LawCare, the well-being service offered by the Queensland Judicial Commission should maintain the confidentiality of the judicial officer involved and could potentially rely on a third party provider to deliver the service.

Who is responsible for developing judicial education programs?

Consistent with the Judicial Commission of New South Wales, the Queensland Judicial Commission will have ultimate responsibility to define its policy and strategies in relation to the provision of the abovementioned services and to determine the direction and the priority of its activities.

We note the Judicial Commission of New South Wales has established a Standing Advisory Committee on Judicial Education (which comprises the chairpersons of the Education Committees of each of the State’s courts, or their representatives), who advises the Judicial Commission of New South Wales on matters of continuing judicial education, to implement policy and strategy and, where appropriate and as requested, to coordinate the activities of the respective Education Committees of each court, see diagram below.

We would support a similar educational model being implemented in the Queensland context (see image below for context).⁷



4. Complaints function

The Queensland Law Society supports a Queensland Judicial Commission that performs the statutory function of receiving and handling complaints about judicial officers, broadly consistent with the approach taken by the Judicial Commission of New South Wales.

The proposed complaints function of the Queensland Judicial Commission will allow the body to independently investigate complaints; it will not allow the body to discipline or punish judicial officers.

A complaints flowchart for a Queensland Judicial Commission is provided below in **Figure 1** (pp. 19 - 20). The key steps in the proposed complaints model are elaborated upon in further detail below.

⁷ Judicial Commission of New South Wales, *Annual Report 2020 – 21* (October 2021) 31.

Step 1: Queensland Judicial Commission receives a valid, written complaint, which provides sufficient details of the complaint

Who can make a complaint?

The Queensland Judicial Commission may receive valid complaints from any person, including the Attorney-General or the head of jurisdiction.

The Queensland Judicial Commission should also be empowered to initiate its own investigations where it has a serious concern about the conduct or capacity of a judicial officer. It is our expectation that where this power is suitably drafted it will only be invoked in limited circumstances, when the conduct or capacity of a judicial officer is sufficiently serious to warrant its application.

What can the complaint be about?

The Queensland Judicial Commission may receive complaints about the conduct or capacity of a current judicial officer, or the conduct of a former judicial officer during their time in office.

The Queensland Judicial Commission may not receive or handle complaints about:

- Judicial error, mistake, or other legal ground, which is a function of the appellate courts;
- Allegations of corruption, which should be referred to the Crime and Corruption Commission; or,
- Allegations of criminal conduct, which should be referred to the Queensland Police Service, in agreement with the complainant.

In relation to suspected criminal conduct, it may be appropriate for an investigation by the Queensland Judicial Commission to be suspended while a police investigation is on foot. However, the absence of a police report should not prevent the Queensland Judicial Commission from investigating a judicial officer or a complainant from making a complaint.

What is conduct or capacity of a judicial officer?

In this context, conduct includes inappropriate behaviour of a judicial officer, such as bullying and harassing behaviour, which occurs in a professional or personal capacity. Capacity refers to a judicial officer's physical and mental capacity necessary to discharge the functions of judicial office.

Our members highlight that judicial officers often engage in robust discussion with legal representatives, particularly in the context of litigation; such discussions would not fall within the meaning of inappropriate behaviour of a judicial officer or the jurisdiction of the Queensland Judicial Commission, unless the behaviour is bullying or harassing in nature.

Who is a judicial officer?

A broad definition of judicial officer should be included in any legislation establishing a Queensland Judicial Commission. Specifically, judicial officer should be defined to mean judicial and specified non-judicial members, including:

- A Judge or Associate Judge of the Supreme Court of Queensland;
- The President or a Member of the Queensland Industrial Relations Commission;
- The President or a Member of the Land Court of Queensland;
- A Judge of the Planning and Environment Court;
- A Judge of the District Court of Queensland;
- A Registrar acting in a judicial capacity;
- A Magistrate;
- The President or a Member of the Queensland Civil and Administrative Tribunal; or,
- President and Deputy President of the Mental Health Review Tribunal.

In this context, judicial officer would also include those in an acting role, such as an acting magistrate of the Magistrates Court of Queensland, and those who were formerly in a judicial role.

Judicial officer would *not* include:

- An arbitrator;
- A Registrar acting in an administrative capacity;
- An assessor;
- A legal representative; or,
- A federal judicial officer.

How is a valid complaint made?

The legislation establishing a Queensland Judicial Commission should provide the criteria for a valid complaint. In this regard, we broadly support the criteria used by the Judicial Commission of New South Wales, including that a complaint must:⁸

- Be in writing;
- Identify the complainant;
- Identify the judicial officer; and
- Be accompanied by sufficient details to substantiate the complaint.

⁸ *Judicial Officers Act 1986 No 100 (NSW) s 17.*

It would be an offence for a person to wilfully make a complaint that the person knows to be false or misleading.

The Judicial Commission of New South Wales requires the particulars founding the complaint to be verified by statutory declaration.⁹ The Queensland Law Society does not support the requirement that a complaint be verified by statutory declaration before it is accepted by the Queensland Judicial Commission. We have taken this position on the basis that mandating statutory declarations before a complaint is accepted presents a number of access to justice issues, particularly for vulnerable cohorts who may have a meritorious claim, but do not pursue a complaint simply because they lack the means or knowledge to have the complaint verified. Also, we understand that analogous entities, such as the Crime and Corruption Commission, have removed the requirement for complaints to be verified by statutory declaration, recognising that this process can deter complaints and make the complaints process less accessible for disadvantaged persons. To ensure consistency across analogous entities, we would recommend that there be no requirement to verify a complaint by statutory declaration before it is accepted by the Queensland Judicial Commission.

Nonetheless, the Queensland Judicial Commission could encourage complainants to have their complaints initially verified by statutory declaration to enhance its evidentiary value. Also, given the potentially serious ramifications for the subject of the complaint, our members submit that a complaint should be verified by statutory declaration before a determination is made (i.e. by the conclusion of the matter).

Further, to promote the accessibility of the complaints mechanism, the Queensland Judicial Commission should provide in-person and online assistance and advice to the public about the complaints process, including translation and interpreting services.

What is the threshold for accepting a complaint about a judicial officer?

Similar to the Judicial Commission of New South Wales, the Queensland Judicial Commission should not deal with a complaint unless it appears that:¹⁰

- The matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office;
- 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; or,
- The matter, if substantiated, is in the opinion of the Queensland Judicial Commission of a sufficiently serious nature to warrant investigation.

⁹ *Judicial Officers Regulation 2022* (NSW) s 4.

¹⁰ *Judicial Officers Act 1986 No 100* (NSW) s 15(2).

How should the Queensland Judicial Commission handle vexatious complainants?

The Queensland Judicial Commission should have the power to declare a complainant a vexatious complainant, if the person habitually and persistently, and mischievously or without any reasonable grounds, makes complaints. Once a person is declared a vexatious complainant, the Queensland Judicial Commission is then authorised to disregard all complaints lodged by that person.

Step 2: Queensland Judicial Commission acknowledges receipt of the complaint within 1 week of receiving the complaint

The Queensland Judicial Commission must acknowledge receipt of the complaint in writing, preferably within one week of receiving the complaint. In the acknowledgement, the Queensland Judicial Commission should note the relevant appeal timeframes and recommend that the complainant seek legal advice about their appeal rights.

Step 3: Complaint screened by Queensland Judicial Commission's Internal Investigations Team

The Internal Investigations Team will initially screen the complaint to determine if it is within the jurisdiction of the Queensland Judicial Commission. The screening process will be conducted on a confidential basis, where reasonable and possible to do so.

Out of scope complaints are referred to the appropriate body, such as the Crime and Corruption Commission or Queensland Police Service, in agreement with the complainant.

At this stage, complaints by vexatious complainants are disregarded.

Valid complaints are progressed by the Internal Investigations Team to preliminary examination. Alternatively, the investigations team may refer a complaint to the head of jurisdiction where it is appropriate to do so and after satisfying itself that the complaint does not require further investigation.

If the complaint is progressed, the Queensland Judicial Commission then advises the judicial officer that a complaint has been made against them and provides them with an anonymised version of the complaint documents.

Complainant informed of the Internal Investigations Team's decision.

Step 4: Queensland Judicial Commission's Internal Investigations Team undertakes a preliminary examination of the complaint and prepares a report

After the complaint is screened, the Internal Investigations Team should conduct a preliminary examination of the complaint. The preliminary examination will be conducted on a confidential basis, where reasonable and possible to do so.

In examining the complaint, the Internal Investigations Team should be authorised to initiate such inquiries into the subject-matter of the complaint as it thinks appropriate. The preliminary

examination will likely involve an inspection of transcripts, audio recordings, judgments, court files and other relevant material. Of these, we expect audio recordings to most accurately capture the nature of any exchange between the bench and a legal practitioner or litigant. Given the usefulness of audio recordings in assisting a preliminary examination, any legislation establishing a Queensland Judicial Commission should provide urgent access to (at a minimum) the audio recordings that capture the exchange relevant to the complaint. Also, at this stage, further information may be sought from the complainant.

Importantly, the Queensland Judicial Commission should provide the judicial officer with an opportunity to respond to the complaint and provide further information, consistent with the principles of natural justice. If the judicial officer chooses to participate in the investigation, the privilege against self-incrimination should be maintained, and any legislation establishing the Queensland Judicial Commission should not abrogate or limit the privilege against self-incrimination. For clarity, the privilege against self-incrimination for a judicial officer should be maintained throughout the entire investigatory process.

After the preliminary examination is conducted, the Internal Investigations Team will prepare a report for the Queensland Judicial Commission to consider, which details their findings and includes recommendations to do one of the following:

- Summarily dismiss the complaint (see **Step 5.1**);
- Refer the complaint to the head of jurisdiction (see **Step 5.2**); or,
- Refer the complaint to an investigatory panel (see **Step 5.3**).

The Queensland Judicial Commission will consider the contents of the report and make a determination.

Alternatively, some of our members have suggested that, as a form of streamlining, the heads of jurisdiction forming the Queensland Judicial Commission could only be referred substantive complaints, rather than all complaints, some of which will inevitably be summarily dismissed. However, given the educational function of the Queensland Judicial Commission, complaints even if not substantive, may give the heads of jurisdiction insights into possible education areas.

Step 5.1: Queensland Judicial Commission summarily dismisses complaint based on one of the grounds outlined below

On what basis can a complaint be dismissed?

The Queensland Judicial Commission may summarily dismiss a complaint based on one or more of the following grounds:

- The complaint is one that it is required not to deal with;
- The complaint is frivolous, vexatious or not in good faith;
- The subject-matter of the complaint is trivial;

- The matter complained about occurred at too remote a time to justify further consideration;
- 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;
- The complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights; or,
- Having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable.

Who is notified of the decision, and how?

After the Queensland Judicial Commission has resolved to summarily dismiss the complaint, the complainant and judicial officer are notified of the decision as soon as practicable.

The complainant and judicial officer are also provided with the written reasons for the Queensland Judicial Commission's decision, including reference to the relevant provisions of the legislation that have been applied in the determination of the complaint.

Given the large number of complaints that are dismissed at this stage in other jurisdictions, it is proposed that the head of jurisdiction will not be notified of the Queensland Judicial Commission's decision to summarily dismiss the complaint.

Step 5.2: Queensland Judicial Commission refers the complaint to the head of jurisdiction

What is the threshold for referring the complaint to the head of jurisdiction?

Similar to the Judicial Commission of New South Wales, where a complaint has not been dismissed following the preliminary examination, but in the opinion of the Queensland Judicial Commission it does not justify reference to the investigatory panel, the complaint may be referred to the relevant head of jurisdiction.¹¹

When making a decision to refer a complaint to the head of jurisdiction, the Queensland Judicial Commission should require the relevant head of jurisdiction who would eventually receive the complaint to remove themselves from deliberations to ensure the decision is independent. If a head of jurisdiction is conflicted, a representative from their court or tribunal could replace their position.

What recommendations can the Queensland Judicial Commission make?

Where a complaint is referred to the head of jurisdiction, the Queensland Judicial Commission may include their findings and recommendations as to what steps might be taken to deal with the complaint, such as:

¹¹ *Judicial Officers Act 1986 No 100 (NSW) s 21(2).*

- Counselling the judicial officer; and,
- Making such other steps as the relevant head of jurisdiction considers appropriate in relation to the administration of the court or courts for which they are responsible.

Who is notified of the decision, and how?

The Queensland Judicial Commission must notify the complainant, judicial officer and the head of jurisdiction in writing, including reference to the relevant provisions of the legislation that have been applied in the determination of the complaint. The Queensland Judicial Commission will also provide the head of jurisdiction with all the relevant material for their review.

Step 5.3: Queensland Judicial Commission establishes an investigatory panel to investigate the complaint

What is the threshold for referring a complaint to the investigatory panel?

Similar to the Judicial Commission of New South Wales, where a complaint has not been dismissed by the Queensland Judicial Commission following the preliminary examination, and it has not been referred to the head of jurisdiction, it must be referred to an investigatory panel.

Also, for completeness, as the complaint has been accepted by the Queensland Judicial Commission, it must have satisfied the threshold test identified above in **Step 1**, which broadly reflects the test in section 15(2) of the *Judicial Officers Act 1986 No 100* (NSW).

Who is notified of the decision, and how?

The Queensland Judicial Commission must notify the complainant, judicial officer and the head of jurisdiction in writing, including reference to the relevant provisions of the legislation that have been applied in the determination of the complaint.

How should the investigatory panel be constituted?

The investigatory panel is to be constituted by two current or former judicial officers and one community representative. Where appropriate, the investigatory panel could be constituted by inter-state and retired judicial officers. The constitution of the panel is to be decided by the Queensland Judicial Commission, but should avoid any current judicial colleagues of the subject of the complaint.

What powers should the investigatory panel have?

Once an investigatory panel has been established by the Judicial Commission of New South Wales, it has the functions, protections and immunities conferred by the *Royal Commissions Act 1923* (NSW).¹²

¹² *Judicial Officers Act 1986 No 100* (NSW) s 25.

Unlike the Judicial Commission of New South Wales, the Northern Territory Judicial Commission and the Judicial Commission of Victoria provide the relevant powers in the act itself, as opposed to importing powers from a secondary act.

The Queensland Law Society supports the inclusion of all the relevant powers available to the investigatory panel in the primary act, similar to the Northern Territory and Victoria.

In particular, the investigatory panel should have broad powers to:

- Initiate such inquiries into the subject-matter of the complaint as it thinks appropriate;
- Engage legal representation to assist the investigatory panel;
- Request a person to provide further information or documents;
- Hold a hearing;
- Require a person to attend and give evidence; and
- Any other power necessary to perform its functions.

Step 6: The investigatory panel reports to the Queensland Judicial Commission

Once the investigatory panel has conducted its investigation, it will prepare a report for the Queensland Judicial Commission, which sets out its findings, conclusions and recommendations. Ultimately, the investigatory panel will form the view that the matter:

- Could justify parliamentary consideration of the removal of the judicial officer, in which case, the report should be provided to the Attorney-General and tabled in Parliament; or
- Does not justify parliamentary consideration of the removal of the judicial officer, in which case, the complaint is either dismissed pursuant to one or more of the grounds identified in **Step 5.1**, it is referred to the head of jurisdiction similar to **Step 5.2**, or the Queensland Judicial Commission directs a judicial officer to undertake specific actions (e.g. undertake specified judicial education or training).

The Queensland Judicial Commission will consider the investigatory panel's report and make a determination to:

- Refer the report to the Attorney-General to be tabled in Parliament;
- Refer the complaint to the head of jurisdiction, similar to **Step 5.2**, who may counsel the judicial officer or make administrative arrangements within their court to avoid recurrence of problem;
- Undertake specific actions that address the issues resulting in the complaint. For example, the Queensland Judicial Commission could direct a judicial officer to undertake cultural competency training where the complaint resulted from, or evidences, a lack of cultural awareness.
- Summarily dismiss the complaint on one or more of the grounds identified in **Step 5.1**

The Queensland Judicial Commission must notify the complainant, judicial officer and the head of jurisdiction in writing, including reference to the relevant provisions of the legislation that have been applied in the determination of the complaint.

Reporting requirements for referrals

The Queensland Law Society supports the inclusion of additional legislative mechanisms to follow up with a referral of a complaint to a head of jurisdiction.

We note the Northern Territory Judicial Commission is empowered to refer a complaint to a head of jurisdiction, similar to **Step 5.2** and **Step 5.3**.¹³ In circumstances where a complaint is referred to a head of jurisdiction, the Northern Territory Judicial Commission requires the head of jurisdiction to prepare a written report stating the action taken in responding to the complaint and the reasons for that action.¹⁴

The Queensland Law Society views this as an important mechanism to enhance transparency and accountability after a complaint is referred pursuant to **Step 5.2** or **Step 5.3**, and would support a similar process being adopted in the Queensland context

Annual reports

The Queensland Judicial Commission must prepare an annual report that provides information about the complaints that were received in the relevant period and how they were progressed and ultimately decided.

In this regard, the Queensland Law Society generally endorses the approach taken by the Judicial Commission of New South Wales, which is required to report on the following:¹⁵

- Particulars of the number of complaints made during the year, complaints summarily dismissed during the year, complaints disposed of during the year, and the manner in which they were disposed;
- In respect of the complaints summarily dismissed during the year, how many were dismissed in accordance with each of the criteria;
- A description, which may include statistics, of any patterns in the nature and scope of complaints made or disposed of during the year; and,
- Any recommendations for changes in the laws of the State, or for administrative action, that, as a result of the exercise of the functions of the Queensland Judicial Commission or investigatory panel, the Queensland Judicial Commission considers should be made.

In addition to the above, the Queensland Law Society considers that the Queensland Judicial Commission should be required to record the recommendations made by the commission and

¹³ *Judicial Commission Act 2020* (NT) s 60.

¹⁴ *Ibid.*

¹⁵ *Judicial Officers Act 1986 No 100* (NSW) s 49(2).

the investigatory panel in their annual reports. In our view, recording the number and nature of recommendations made by the Queensland Judicial Commission and the investigatory panel will ensure the body remains transparent and the judiciary remains accountable.

Figure 1. Complaints model flowchart for a Queensland Judicial Commission (QJC)

