

10 November 2020

Our ref: MC-LP

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: [REDACTED]

Dear Mr Tidball

Revised principles underpinning a Federal Judicial Commission

Thank you for the opportunity to provide feedback on the "Revised principles underpinning a Federal Judicial Commission" (**revised principles**). The Queensland Law Society (**QLS**) appreciates the opportunity to be involved in this important piece of advocacy.

Our submission of 3 September 2020 in response to the Law Council's first set of principles outlined the reasons why QLS considers a Federal Judicial Commission (**judicial commission**) should be established. Both that submission and this response have been compiled with the assistance of multiple QLS Legal Policy Committees, whose members frequently appear in Federal courts and tribunals.

General comment on the revised principles

QLS supports the Law Council in its advocacy on the establishment of a judicial commission and acknowledge the work undertaken to prepare the initial and revised principles. These principles provide some guidance as to purpose and role of the commission as well as its operation.

QLS considers further consideration should be given to the points listed below. We appreciate the document seeks only to outline 'principles', however it would be of assistance if further detail is included to explain how the commission will:

- *Fairly and impartially investigate and determine complaints by any person in relation to misconduct (including corrupt conduct, misuse of authority and any abuse of power), incompetency and/or incapacity of a judicial officer.*
- *Provide a fair opportunity for judicial officers to explain their actions should they come under scrutiny.*
- *Provide a readily accessible and well-explained complaints mechanism, with information easily available to the public and to members of the judiciary, including online and by phone.*

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It is necessary for the revised principles to demonstrate how the judicial commission will lead to better outcomes than are produced by the current process where matters are dealt with internally by the head of jurisdiction, for example.

The principles should outline how the judicial commission will deal with disgruntled or vexatious litigants. We note that the triage process proposed may capture these claims, but it would provide greater clarity if this issue was specifically addressed

The revised principles provide that the commission may investigate a matter based on a 'tip-off' and suspend a judicial officer while a matter is being investigated. Both actions are significant and may have serious consequences for the judicial officer/s involved. Accordingly, it will need to be demonstrated that there are proper processes in place, including the provision of natural justice and procedural fairness, to ensure that subject judicial officer, the complainant as well as the judiciary, profession and the public have confidence in the process. This necessity should, we consider, be stated.

QLS would welcome the opportunity to consider any further details provided.

Provision of education, training and pastoral support

We welcome the additional role of the judicial commission in the revised principles to:

"Provide training and education to the judiciary based upon advisory guidelines setting out acceptable standards of judicial conduct."

The provision of these resources will improve the overall effectiveness of the judicial commission and ensure that it is proactive, as well as reactive, in responding to issues about judicial conduct and behaviour.

Additionally, QLS believes the judicial commission should have a pastoral mandate and a role in providing a confidential EAP service for judicial officers. As recent experience has tragically highlighted, conduct issues can be symptoms of wellbeing issues and a good judicial commission model is one which addresses both the punitive aspects of conduct, and the basic drivers of the behaviours.

In some cases, for example, like those involving sexual assault and sexual harassment of the nature of the conduct of former Justice Dyson Heydon, the response would be purely punitive. However, in other recent examples of judicial conduct that approach would have been of little assistance. In these cases, there is a need for a careful balance of protective measures for the profession, the public and the judicial officer. A balanced approach, with a significant pastoral mandate is required in any judicial commission.

Applicable matters

We also welcome the addition of a further basis for a judicial commission to examine a complaint against a judicial officer being if:

"the matter ... could, if substantiated, affect public confidence in the administration of justice."

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This addition addresses the difficulty a complainant may have in demonstrating that the conduct/behaviour of the judicial officer will either "justify parliamentary consideration of the removal of the judicial officer from office" or "affect / have affected the performance of judicial or official duties by the judicial officer". As stated in our last submission, we consider sexual harassment by a judicial officer should meet the threshold in both instances, but the additional factor that the matter could affect public confidence is also important and valid.

Judicial officers

The revised principles provide:

"To the extent the term 'judicial officer' is used in the legislation establishing the Commission, it should be defined to encompass all persons invested with and exercising a judicial function pursuant to Commonwealth law, including:

- Judges (and those exercising a judicial function) within the Federal Courts (the Family Court of Australia, the Federal Circuit Court of Australia and the Federal Court of Australia) and the High Court, including Chief Justices; and
- to the extent they are not covered by any Commonwealth Integrity Commission, Members/Presidents of the Federal Tribunals and quasi-judicial Federal bodies, namely the Fair Work Commission, Administrative Appeals Tribunal, Remuneration Tribunal, Australian Competition Tribunal, Copyright Tribunal of Australia, National Native Title Tribunal, Pharmaceutical Benefits Remuneration Tribunal and Defence Force Discipline Appeals Tribunal."

We welcome the judicial commission being extended to any person exercising a judicial function. The legislation establishing the judicial commission will of course need to be cognisant of the federal commissions and tribunals that do not perform judicial functions.

These issues should be considered further.

Former judicial officers

QLS supports the judicial commission being able to investigate complaints made against former judicial officers where this is in the public interest. For example, a complaint about a former judicial officer may highlight a systemic issue or still have some impact on current court users and staff and therefore, should be investigated and addressed.

We also note that a barrier to practitioners reporting inappropriate conduct of judicial officers is the high level of authority, influence and power granted to judicial officers by virtue of their position. Some practitioners may only feel comfortable reporting inappropriate conduct after some time has passed and potentially after the judicial officer is no longer in that same position. QLS believes it is of utmost importance that complaints under these circumstances are appropriately investigated.

QLS would be agreeable to the judicial commission being able to investigate complaints against judicial officers who have retired or otherwise vacated the role after the judicial commission was established.

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A related issue for consideration is how a complaint made while a given judge is in the middle of a case, whether the complaint arises from the active case or an earlier matter, will be dealt with, including what steps should be taken to progress the complaint, afford natural justice and procedural fairness and avoid potentially compromising a proceeding.

Private actions of judicial officers

QLS is broadly supportive of a judicial commission being able to examine complaints related to the private actions of judicial officers. Such a proposal should be carefully considered and, QLS would welcome further time to consider these issues in more detail.

Our preliminary thoughts on this issue are that solicitors, by virtue of rule 5 of the *Australian Solicitors Conduct Rules* are exposed to disciplinary actions as a result of their private actions. As you are aware Rule 5 provides:

5. Dishonest and disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute

It seems reasonable, therefore, that a judicial commission be able examine the private actions of judicial officers if:

- the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office; or
- the matter may affect or may have affected the performance of judicial or official duties by the judicial officer; or
- the matter may not satisfy the above criteria but could, if substantiated, affect public confidence in the administration of justice.

Outcomes

Currently, as noted in the revised principles, the outcomes of complaints and investigations into judicial conduct are inconsistent, unclear/not transparent and often inadequate.

The draft principles, in separate sections, suggest that the judicial commission will:

- provide a separate, stand-alone mechanism to deal with any allegation of lack of competency, serious misconduct or corruption; and
- investigate and determine complaints.
(our emphasis)

Further, under the heading, "Outcomes to be made public" there is a reference to "any outcomes, findings and disciplinary or remedial steps."

There is insufficient particulars about what these outcomes or steps might be. As stated above additional clarity about what action the judicial commission will be able to take upon a finding

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made against a judicial officer would assist. We note from the revised principles that a person can be suspended while the process is being undertaken and that a matter can be referred to parliament or the head of jurisdiction. However, the practice of referring the matter to either parliament or the head of jurisdiction is what we understand the current process to be. In this regard, the revised principles do not outline how the judicial commission will substantially differ from the status quo.

The revised principles provide that if the judicial commission does not find the complaint is sufficiently serious to be referred to the Conduct Panel, it is referred to the head of jurisdiction. Further detail is needed to explain how the judicial commission decides whether a matter sufficiently serious to warrant this referral. The Conduct Panel (if it does not dismiss the complaint) either concludes the conduct justifies parliamentary consideration (which is likely to be rare) or of a nature that justifies being referred to the head of jurisdiction. If the latter occurs, it seems that the transparency issue is likely to remain.

We note that outcomes can be made public, which does differ from current practice. However, it is unclear whether this, together with the potential for further education and training will be sufficient to rectify the issue which was the subject of the complaint.

This appears insufficient as there will be matters that will not meet the threshold for referral to parliament, but require something more than further education and training, as noted above in respect to our comments surrounding pastoral support. If the remedy is removing the judicial officer from hearing matters, then a proper and transparent process will need to be established. Further, while this may "remove a problem" it will certainly create other issues for the effective operation of the courts, as noted in our comments about suspending judicial officers.

Sentencing assistance and monitoring

The revised principles provide that the judicial commission will provide sentencing assistance and monitoring to and for judicial officers, in conjunction with the other relevant stakeholders in this area. We see from the footnote that such a role is performed by the Judicial Commission of New South Wales and has been discussed in other reviews.

QLS would be pleased to receive further details about how this role will be performed and the opportunity to respond further once these details are provided.

Interaction with other legal processes

We agree the judicial commission and its enabling legislation need to consider how a complaint and investigation will be conducted where there are other related legal processes on foot (or the potential for these to be commenced) including criminal matters, but also compensation and employment law claims.

In disciplinary jurisdictions, there are powers given to regulators to refer matters to appropriate bodies, such as tribunals, when they become aware of these matters. We suggest that these processes be examined when legislation is being drafted.

The legislation will need to contemplate information sharing and the derivative use of evidence.

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Suspension of judicial officers

There is some debate about whether it is appropriate for a judicial commission to be able to suspend judicial officers.

As stated above, the process by which a judicial officer can be suspended by a judicial commission will require careful consideration. There should be a certain set of criteria or standards which must be met before the judicial commission can suspend. For example, such immediate actions/steps are only to be taken where "there are no other, less restrictive steps which can reasonably be taken to ensure the public's confidence in the administration of justice or that the public is protected from the conduct or behaviour".

QLS's Occupational Discipline Law Committee would welcome the opportunity to provide any assistance of benefit in the drafting of standards for use in Law Council's advocacy on this issue.

The practical consequences arising from a suspension should also be addressed. The effect could be part-heard matters, a delay in the delivery of judgments and extra burdens on the court. While these issues present problems in other areas where workers are suspended, the role of judicial officers, in our view, makes these issues critical to assess, particularly part-heard matters. For example, could a judge be removed from court lists, but still be able to write judgments, determine matters on the papers and attend to administrative tasks? We would welcome further discussion of these issues and information as to how the jurisdictions with judicial commissions have dealt with these issues.

Interaction with a Commonwealth Integrity Commission



We support a judicial commission remaining separate from any future Commonwealth Integrity Commission. We agree that the judicial commission needs to be focused, and resourced appropriately, to be effective.

As stated in our earlier advocacy, the role of the judicial commission should be comprehensive to ensure that it provides appropriate support, guidance, education and training to judicial officers, has an effective complaints mechanism and is able to respond to emerging issues.

We also agree with the arguments made in respect of maintaining separation of powers. A judicial commission will be of significant importance to the public and the profession and we would not wish to see it politicised.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President