



Australian Government
Attorney-General's Department

Scoping the establishment of a federal judicial commission

JANUARY 2023

THE MERITS AND DESIGN OF A POTENTIAL COMPLAINTS-HANDLING BODY

We acknowledge the traditional custodians of Australia and their continuing connection to land, sea and community.

We pay our respects to the people, the cultures and their Elders, past and present, and thank them for their ongoing contributions to the culture and prosperity of our great nation.

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1. Making a submission

Responses can be provided via an online survey or in a written submission addressing the questions raised in this discussion paper.

Online submissions can be made on the Attorney-General's Department website by following the link: <https://consultations.ag.gov.au/legal-system/federal-judicial-commission> and clicking 'Make a submission'.

Written submissions can be uploaded through the Attorney-General's Department using the following link: <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/consultation/intro/> and clicking through to 'Upload a written submission'. Alternatively, written submissions can be sent by email to submissions.federaljudicialcommission@ag.gov.au.

You do not need to answer every question. You are welcome to only respond to those questions that are relevant to you or your organisation.

Submissions should be provided by **21 February 2023**. You are encouraged to include your name and contact details for the department to be able to contact you to discuss your submission should there be a need to do so. The Attorney-General's Department may utilise this process to identify interested individuals and organisations for further consultation in relation to the development of any model for a federal judicial commission.

The Attorney-General's Department cannot investigate any complaint made about a judicial officer in a submission. Any complaints of this nature should be appropriately directed to the relevant court.

Submissions may be made publicly available, although the Attorney-General's Department reserves the right to leave unpublished any submission, or part thereof. Please indicate if you would like your submission to be kept confidential. Submissions may be subject to freedom of information requests, or requests from the Parliament. Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988*. For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy.

2. Introduction: purpose and scope of this paper

The Australian Government is considering the potential scope and design of a federal judicial commission that can independently examine complaints made to it about federal judges and refer its findings for appropriate action. This was announced by the Attorney-General, the Hon Mark Dreyfus KC MP, on 25 October 2022 in the context of the 2022-23 Budget, and reflects the Attorney-General's longstanding support for a federal judicial commission.

On 29 September 2022, the Government published its response to the Australian Law Reform Commission's (ALRC) 2021 report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report), agreeing in-principle with the ALRC's recommendation that the 'Australian Government should establish a federal judicial commission'.¹ The ALRC acknowledged that establishing a federal judicial commission would be a significant reform, requiring its own policy development process, including further broad consultation.²

The establishment of a federal judicial commission would follow the creation of similar bodies in five of Australia's states and territories,³ and would build on the Australian Government's strong commitment to integrity, fairness and accountability across all areas of government, including by complementing the National Anti-Corruption Commission which will commence operation in 2023.

This paper seeks views from stakeholders and interested members of the public on the model and key features of a federal judicial commission. This paper does not consider reforms to complaints-handling mechanisms for non-judicial officers or state and territory judges, nor does it canvass the implementation of other recommendations from the ALRC Report.

The Australian Government has not yet made any decisions on the merits and policy design of a federal judicial commission.

Responses to this discussion paper will be considered by the Attorney-General's Department to inform advice to Government in relation to the merits and design of a model for a federal judicial commission. Any proposed model for a federal judicial commission must respect the independence of the courts and judiciary in accordance with the Constitution, which is fundamental to the rule of law and democracy in Australia. The decision to establish a federal judicial commission will be a matter for the Australian Government.

1 Australian Law Reform Commission, [Without Fear or Favour: Judicial Impartiality and the Law on Bias](#) (ALRC Report 138, December 2021) 32 (Recommendation 5).

2 Australian Law Reform Commission, [Without Fear or Favour: Judicial Impartiality and the Law on Bias](#) (ALRC Report 138, December 2021) 310 [9.26].

3 Independent judicial complaints bodies have been established in New South Wales, Victoria, South Australia, the Northern Territory and the Australian Capital Territory. In September 2022, it was announced that Western Australia would also establish a judicial commission: Peter Law, [McGowan Government to create new Judicial Commission to probe conduct of WA judges](#), *The West Australian* [online, 6 September 2022]. In October 2022, it was reported that the Queensland Government would examine what form a commission in Queensland might take: Michael Pelly, [Dreyfus to consult courts on complaints body](#), *The Australian Financial Review* [online, 6 October 2022].

3. Complete list of questions for consideration

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

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

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?
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?
9. Would it be appropriate to have any additional limitations on a federal judicial commission's jurisdiction to handle complaints about a matter arising after the resignation of a judicial officer, or concerning conduct alleged to have occurred before the appointment of a judicial officer to judicial office or before the commencement of any enabling legislation?

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?
11. Should it be open to professional bodies to make complaints to a federal judicial commission? If so, should any limitations apply?
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?
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?
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?
15. Should consideration be given to providing a federal judicial commission with express powers to declare a person to be a vexatious complainant?

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?
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?

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?

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?

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?
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?

4. Background: Momentum for reform

The judiciary represents one of the three arms of government in Australia's constitutional system, along with the legislature and the executive. Australia is well served by its judiciary, which plays a pivotal role in administering justice to individual litigants according to law, and to the public more broadly.

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, strengthening public confidence and dispensing justice.⁴ The independence of the judiciary is regarded as one of the foundational values of Australian public law and ensures that the community can have confidence that the judiciary will apply the law in a fair and impartial manner, and will hold the other branches of government to account where necessary.⁵

The ALRC Report noted that, in general, the Australian public has a high level of confidence in Australian judges and courts.⁶ While problematic conduct by judges is relatively rare, it has been recognised that a failure 'to acknowledge and address it can damage the integrity of the courts and undermine their ability to fulfil the judicial function'.⁷

The potential to strengthen mechanisms for handling complaints about federal judges has been considered by a number of inquiries:

- In its 2000 review of the civil justice system, the ALRC did not recommend the establishment of a federal judicial commission⁸ but made two recommendations related to developing more transparent procedures for complaint handling within the federal courts, and the investigation of serious complaints that, if substantiated, could warrant the removal of a judge from office.⁹ Legislation was passed in 2012 to support the implementation of these recommendations.¹⁰
- In 2009, the Senate Standing Committee on Legal and Constitutional Affairs recommended the establishment of a federal judicial commission modelled on the Judicial Commission of New South Wales.¹¹

4 [Commonwealth \(Latimer House\) Principles on the Three Branches of Government](#), Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association (April 2004).

5 The Hon Chief Justice TF Bathurst AC, ['Who Judges the Judges, and How Should They Be Judged?'](#) (2019) 14 *The Judicial Review* 19, 27.

6 Australian Law Reform Commission, [Without Fear or Favour: Judicial Impartiality and the Law on Bias](#) (ALRC Report 138, December 2021) 31 [1.31].

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

8 Australian Law Reform Commission, [Managing Justice: A Review of the Federal Civil Justice System](#) (ALRC Report 89, February 2000) 241 [2.297].

9 Australian Law Reform Commission, [Managing Justice: A Review of the Federal Civil Justice System](#) (ALRC Report 89, February 2000) (Recommendations 11 and 12).

10 *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth); *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

11 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, [Australia's Judicial System and the Role of Judges](#) (Report, December 2009) 95 [7.82] (Recommendation 10).

- The ALRC suggested that a federal judicial commission warranted further consideration by the Australian Government in its 2019 report on the family law system.¹²
- The ALRC subsequently recommended the establishment of a commission in its 2021 report on judicial impartiality and the law on bias (referred to as the ALRC Report throughout this paper). This recommendation *'responds to significant stakeholder concerns'* that the existing mechanisms for raising allegations of actual or apprehended bias are not sufficient to maintain public confidence in the administration of justice.¹³

Proponents of an independent complaints body have argued that it would promote judicial accountability by providing a more accessible, structured and transparent procedure for complaints to be raised and dealt with.¹⁴ In its submission to the 2021 ALRC inquiry, the Australian Bar Association expressed the view that, *'[a]bsent a federal judicial commission, there is no readily available, independent of the court recourse for improper behaviour on the part of the federal judiciary'*.¹⁵

¹² Australian Law Reform Commission, [Family for the Future: An Inquiry into the Family Law System](#) (ALRC Report 135, March 2019) 403 [13.63].

¹³ Australian Law Reform Commission, [Without Fear or Favour: Judicial Impartiality and the Law on Bias](#) (ALRC Report 138, December 2021) 310 [9.25].

¹⁴ See Gabrielle Appleby, [Nothing to fear and much to be gained from a federal judicial commission](#), *Australian Public Law* (online, 19 August 2022); Law Council of Australia [Government moving in the right direction on Federal Judicial Commission](#) (Media Release, 12 February 2021).

¹⁵ Australian Bar Association, Submission No 43 to Australian Law Reform Commission, [Review of Judicial Impartiality](#) (15 July 2021).

5. Existing frameworks

Appointment of federal judges

In accordance with section 72 of the Constitution, judges of the High Court of Australia (High Court), Federal Court of Australia (Federal Court) and Federal Circuit and Family Court of Australia (Federal Court and Family Court) (the federal courts) are appointed by the Governor-General in Council, and are subject to the mandatory retirement age of 70. Appointments are made on the recommendation of the Attorney-General as the First Law Officer of the Commonwealth. Minimum eligibility requirements for appointment as a judge are contained in the enabling legislation of each federal court.¹⁶

Removal of federal judges

Security of tenure is an important safeguard of judicial independence, which is vital to upholding the rule of law as it allows judges the *'freedom to decide cases according to law, without fearing reprisal'*.¹⁷ Section 72 of the Constitution provides that the only means by which a federal judge may be removed from office is *'by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.'*

This high threshold for removal from office is to ensure that judges are free from political interference. No federal court judge has been removed from office under the Constitution, nor has the High Court been called upon to interpret the conditions for removal. The process for parliamentary consideration of removal of a federal judge has only been initiated once, in relation to former High Court justice the Hon Lionel Murphy in the 1980s, and on that occasion the process was not concluded after it was revealed that Justice Murphy was suffering from terminal cancer. Few other complaints have been subject to investigation and consideration of whether the behaviour might engage section 72 of the Constitution.

Judicial Misbehaviour and Incapacity Act

The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* [Cth] (Judicial Misbehaviour and Incapacity Act) provides a process for the Parliament to establish independent parliamentary commissions to investigate allegations of misbehaviour or incapacity of a federal judge, including a head of jurisdiction or a justice of the High Court. This process is designed to support the Parliament in considering the removal of a judge, but the Parliament is not required to establish a commission before making an address praying for a judge's removal.¹⁸

The functions of a commission under the Judicial Misbehaviour and Incapacity Act are to investigate a specified allegation and report to the Parliament on the commission's opinion of whether or not there is evidence that would enable the Houses of the Parliament to conclude that the alleged misbehaviour or incapacity is proved. A parliamentary commission may not compel a member of the judiciary to give evidence or provide documents. However, it may hold hearings, obtain documents and require the attendance of other individuals.¹⁹

A commission does not make recommendations or indicate to the Parliament what standard of proof should be applied. It is properly a matter for the Parliament to conclude whether misbehaviour or incapacity has been proved.

¹⁶ *Federal Court of Australia Act 1976* [Cth] s 6; *Federal Circuit and Family Court of Australia Act 2021* [Cth] ss 11 and 111; *High Court of Australia Act 1979* [Cth] s 7.

¹⁷ Brian Opeskin, ['Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges'](#) (2015) 35(4) *Oxford Journal of Legal Studies* 627, 627.

¹⁸ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* [Cth] ss 3 and 7 ('Commonwealth judicial officer').

¹⁹ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* [Cth] ss 10 and 25.

Management of the business of the federal courts

Chapter III of the Constitution vests in the judiciary the power to determine justiciable disputes, subject only to an appeal. This requires the courts to be free to administer justice without government influence or interference, and the assurance that judges may carry out their judicial functions independently.

The enabling legislation of the Federal Court and Federal Circuit and Family Court provides that the heads of jurisdiction are responsible for ensuring the ‘*effective, orderly and expeditious*’ discharge of the business of their respective court. In doing so, they may assign caseloads, classes of cases or functions to particular judges, and they may take any measures they believe to be reasonably necessary to maintain public confidence in the court including, but not limited to, temporarily restricting another judge to non-sitting duties. Within this context, any measures taken by a head of jurisdiction in response to a complaint are protective, rather than disciplinary. Heads of jurisdiction must also ensure that arrangements are in place to provide judges with appropriate access to, or reimbursement for the cost of, annual health assessments, short-term counselling services and judicial education.²⁰

Judicial education

While judicial education is voluntary in Australia, there is wide acceptance of the need for, and benefits of, ongoing professional development for judicial officers. The professional development of federal judges is supported by the National Judicial College of Australia (NJCA) and the Australasian Institute of Judicial Administration (AIJA). In addition to receiving membership and/or registration fees, NJCA and AIJA receive annual funding from the Australian and state and territory governments. New Zealand also contributes funding to AIJA.

National Judicial College of Australia

NJCA provides professional development programs to judicial officers in Australia to enhance their skills, knowledge and performance. These programs are judge-led and have a national focus, which creates opportunities for participants to share their experiences and insights with peers from other jurisdictions. The National Judicial Orientation Program and National Magistrates Orientation Program are NJCA’s flagship programs for newly appointed judicial officers.²¹ These orientation programs are offered in line with the *National Standard for Professional Development for Australian Judicial Officers* (the National Standard).²²

Australasian Institute of Judicial Administration

AIJA focuses on research into judicial administration and the development and delivery of educational programs for judicial officers, court administrators and members of the legal profession in Australia, New Zealand and the Pacific region. AIJA has been involved in developing courses in specialised areas including gender awareness, cultural awareness, court technology and case management. AIJA has published widely in matters of judicial administration and associated subjects, such as cultural awareness and judicial ethics. Resources developed and published by AIJA include bench books on specific issues and areas of law and the *Guide to Judicial Conduct*, which provides principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances.²³

²⁰ *Federal Court of Australia Act 1976* (Cth) s 15; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 47 and 144.

²¹ National Judicial College of Australia (NJCA), [Program Development](#) (webpage, accessed 13 December 2022).

²² NJCA adopted the National Standard in 2006. The text of the National Standard is reproduced in the report of NJCA’s most recent review: Christopher Roper AM, [Review of the National Standard for Professional Development for Australian Judicial Officers](#), *National Judicial College of Australia* (December 2010) 1.

²³ Australasian Institute of Judicial Administration, [Annual Report 2021-22](#), 3; Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, November 2020).

Processes for handling complaints about federal judges

The federal courts are currently each responsible for responding to complaints about the conduct of serving judges.

The Federal Court and Federal Circuit and Family Court have developed frameworks for addressing complaints about the behaviour or capacity of a judge, supported by legislative reforms made in 2012 to assist the heads of jurisdiction of those courts to manage complaints.

In 2021-22, the Federal Circuit and Family Court received 19 complaints about the conduct of judges and 76 complaints about delays in the delivery of a judgment.²⁴

The federal courts also receive complaints about the legal process and conduct of proceedings, including judicial decisions.²⁵ However, the independence of judges in exercising judicial power means that the only avenue for addressing complaints about the correctness of a judge's ruling on the merits is through the appeals process.

Federal Court of Australia and Federal Circuit and Family Court of Australia

Statutory framework

The enabling legislation of the Federal Court and the Federal Circuit and Family Court provides the head of jurisdiction with the express power to deal with a complaint about another judge's performance of their judicial or official duties, or to arrange for any other complaint handler to deal with the complaint. The head of jurisdiction or complaint handler may handle a complaint, other than by summarily dismissing it, if they believe that circumstances giving rise to a complaint may, if substantiated:

- justify consideration of removal of a judge in accordance with section 72(ii) of the Constitution
- adversely affect the performance of judicial or official duties by a judge, or
- have the capacity to adversely affect the reputation of the court.²⁶

Internal procedures

Under the judicial complaints procedures of the Federal Court and the Federal Circuit and Family Court, the head of jurisdiction has a range of options in dealing with a complaint, including dismissing the complaint, dealing with the complaint in consultation with the judge concerned, or referring the complaint to the Attorney-General if satisfied that the matter to which the complaint relates occurred and may warrant parliamentary consideration of removal from office.

The complaints procedures also include the option for the head of jurisdiction to establish a Conduct Committee to investigate and report on a complaint, for example if the head of jurisdiction believes it warrants further inquiries or sees value in receiving independent advice on the matter.²⁷

²⁴ Federal Circuit and Family Court of Australia, [Annual Report 2021-22](#), 137-8.

²⁵ Federal Circuit and Family Court of Australia, [Annual Report 2021-22](#), 137-8.

²⁶ *Federal Court of Australia Act 1976* (Cth) ss 4 ('relevant belief') and 15; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 7 ('relevant belief'), 48 and 145; Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill (Cth) 2012.

²⁷ Federal Court of Australia, [Judicial Complaints Procedure](#) (online, accessed 13 December 2022); Federal Circuit and Family Court of Australia, [Judicial Complaints Procedure](#) (online, accessed 13 December 2022); Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth).

A Conduct Committee will consist of three members nominated by the head of jurisdiction, and procedural fairness will be afforded to a judge who is the subject of an investigation. No adverse inference can be drawn by a Conduct Committee should a judge choose not to attend a hearing, decline to answer questions, or refuse to comply with a request to undergo a medical or psychological examination.²⁸

A Conduct Committee would ultimately provide a report to the head of jurisdiction outlining what action should be taken about a complaint, including but not limited to:

- whether the complaint should be dismissed
- whether the complaint warrants parliamentary consideration of removal from office, or
- whether the complaint should be dealt with by the head of jurisdiction in exercising their responsibility for the management of the court.

High Court of Australia

The *High Court of Australia Act 1979* (Cth) (High Court of Australia Act) provides that the High Court has the power to do what is necessary or convenient in connection with the administration of its affairs.²⁹

The High Court of Australia Act does not make express provision for handling complaints about justices of the High Court.

The High Court has previously initiated its own investigation in response to highly publicised allegations made against former High Court justice, the Hon Dyson Heydon KC. The investigation, conducted by Dr Vivienne Thom AM, found the complaints to be substantiated and made recommendations to the High Court. All recommendations were adopted and acted upon.³⁰

In March 2022, the High Court published its *Justices' Policy on Workplace Conduct*,³¹ which concerns conduct by a justice in relation to persons working in the court. This policy sets out how concerns about workplace conduct can be raised and addressed. It does not provide a process for the handling of complaints about the justices' performance of judicial or official duties more generally.

28 Federal Court of Australia, [Judicial Complaints Procedure](#) (online, accessed 13 December 2022); Federal Circuit and Family Court of Australia, [Judicial Complaints Procedure](#) (online, accessed 13 December 2022).

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

30 High Court of Australia, [Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia](#) (2020).

31 High Court of Australia, [Justices' Policy on Workplace Conduct](#) (March 2022, accessed 14 December 2022).

6. Judicial complaints-handling by an independent body

While there is generally a high degree of public confidence in the Australian judiciary,³² the ALRC Report notes concerns that current complaints-handling mechanisms are not independent from the judicial hierarchy, and lack transparency in the processes for considering and addressing complaints.³³ A survey of lawyers found that more effective procedures for complaints concerning judges was considered the most important reform needed in the federal courts to maintain public confidence in judicial impartiality.³⁴ An independent body could enhance public confidence in how complaints are handled and the broader administration of justice, while protecting the institutional integrity of the courts.

State and territory bodies

Five of Australia's states and territories have an independent statutory mechanism to receive and manage complaints about judicial officers.³⁵ Further information in relation to these bodies is available on their respective websites as follows:

- New South Wales: www.judcom.nsw.gov.au
- Victoria: www.judicialcommission.vic.gov.au
- South Australia: www.jcc.sa.gov.au
- Australian Capital Territory: www.actjudicialcouncil.org.au
- Northern Territory: <https://judicialcommission.nt.gov.au>

With the exception of South Australia, which has a single commissioner, the complaints bodies in the other four jurisdictions take the form of a commission or council and are each composed of heads of jurisdiction of the various courts of each jurisdiction along with non-judicial members.³⁶ The complaints bodies receive complaints related to a wide range of behaviour, such as bias, rudeness, bullying, intimidation, or inappropriate questions or comments.³⁷

None of the five judicial complaints bodies are empowered to investigate complaints about former judicial officers. Complaints about conduct that occurred prior to a judicial officer's appointment may be considered by the judicial commissions in NSW, Victoria and the Northern Territory where, if substantiated, the conduct could warrant consideration of removal from office.³⁸

32 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138, December 2021) 147 [5.35]–[5.36], 148 [Figure 5.3].

33 See Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138, December 2021) 314–16 [9.37]–[9.41].

34 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138, December 2021) 320 [9.56].

35 The Judicial Commission of New South Wales (NSW) was established in 1986, the South Australia Judicial Conduct Commissioner was established in 2016, the Australian Capital Territory (ACT) Judicial Council and the Judicial Commission of Victoria were established in 2017, and the Northern Territory Judicial Commission was established in 2021. See *Judicial Officers Act 1986* (NSW), *Judicial Conduct Commissioner Act 2015* (SA), *Judicial Commissions Act 1994* (ACT), *Judicial Commission of Victoria Act 2016* (Vic) [see also, *Constitution Act 1975* (Vic) pt IIIAA divs 3–6] and *Judicial Commission Act 2020* (NT).

36 *Judicial Commissions Act 1994* (ACT) ss 5B and 5C; *Judicial Officers Act 1986* (NSW) ss 5(3)–(5); *Judicial Commission Act 2020* (NT) ss 7 and 8; *Constitution Act 1975* (Vic) ss 87AAN–87AAO.

37 ACT Judicial Council, *Annual Report 2020–21*, 5; Judicial Commission of New South Wales, *Annual Report 2020–21*, 50–1; South Australian Judicial Conduct Commissioner, *Annual Report 2021–22*, 15; Judicial Commission of Victoria, *Annual Report 2020–21*, 33.

38 *Judicial Officers Act 1986* (NSW) s 15(3); *Judicial Commission Act 2020* (NT) s 44(g); *Judicial Commission of Victoria Act 2016* (Vic) s 16(3)(a).

Following initial examination, all of the complaints bodies may either dismiss the complaint, refer it to the relevant head of jurisdiction, or establish (or recommend the establishment of) an ad hoc investigatory panel to investigate the complaint and report on its findings.³⁹

Additional functions

In addition to examining complaints about judicial officers' ability or behaviour, the Judicial Commission of New South Wales provides a continuing education and training program for NSW judicial officers, and publishes information about the criminal law to assist the courts to achieve consistency in imposing sentences and more generally in the conduct of criminal proceedings.⁴⁰ The judicial commissions in Victoria and the Northern Territory also handle complaints about non-judicial tribunal members,⁴¹ and the Judicial Commission of Victoria has a statutory power to make guidelines about standards of ethical and professional conduct expected of judicial officers and the practices that should be adopted by judicial officers in relation to the performance of their functions.⁴²

International models

Bodies that receive complaints against members of the judiciary have been established in a number of common law jurisdictions. Complaints-handling bodies and legislative schemes introduced in comparative jurisdictions include:

- Californian Commission on Judicial Performance (1960)⁴³
- Canadian Judicial Council (1971)⁴⁴
- *Judicial Conduct and Disability Act of 1980*, providing a scheme for handling complaints against judges of United States federal courts⁴⁵
- Office of the Judicial Conduct Commissioner in New Zealand (2004),⁴⁶ and
- Judicial Conduct Investigations Office in England and Wales (2006).⁴⁷

39 Judicial Commission of Victoria, '[Complaints Process Explained](#)' (online, accessed 22 September 2022). See also Judicial Commission of New South Wales, '[Guide for Complainants](#)' (online, accessed 19 September 2022); Northern Territory Judicial Commission, '[Flowchart of complaint process](#)' (online, 9 November 2021); South Australian Judicial Conduct Commissioner, '[Complaints process](#)' (online, accessed 4 October 2022); Australian Capital Territory Judicial Commission, '[Complaints about ACT judges or magistrates](#)' (online, accessed 4 October 2022).

40 Judicial Commission of New South Wales, '[About Us](#)' (webpage, accessed 14 December 2022).

41 *Judicial Commission of Victoria Act 2016* (Vic) s 5; *Judicial Commission Act 2020* (NT) s 6(a).

42 *Judicial Commission of Victoria Act 2016* (Vic) s 134.

43 The Californian Commission on Judicial Performance is a constitutionally mandated independent judicial disciplinary agency: see State of California, '[Commission on Judicial Performance](#)' (webpage, accessed 14 December 2022).

44 *Judges Act 1985* (Canada) Part II. See [Canadian Judicial Council](#) (webpage, accessed 14 December 2022).

45 Circuit Judicial Councils govern complaints made against federal judges under the *Judicial Conduct and Disability Act of 1980*, 28 USC §§ 351–64. See United States Courts, '[Judicial Conduct & Disability](#)' (webpage, accessed 14 December 2022).

46 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ). See Office of the Judicial Conduct Commissioner, '[Office of the Judicial Conduct Commissioner](#)' (webpage, accessed 14 December 2022).

47 *Judicial Discipline (Prescribed Procedures) Regulations 2006* made under the *Constitutional Reform Act 2004* (UK). See '[Judicial Conduct Investigations Office](#)' (webpage, accessed 14 December 2022).

Most jurisdictions feature a two-tiered system in which complaints are initially received and considered by a commission, council, or commissioner, with more serious or complex complaints referred to a committee or panel for further investigation.⁴⁸ Some of these bodies have additional responsibilities beyond the handling of complaints, including for example, judicial education.

Some distinguishing features of these international models include the sanctions available short of removal in response to substantiated complaints of misconduct⁴⁹ and the extent to which the system is controlled by the judiciary or the executive,⁵⁰ informed by any applicable constitutional constraints.

⁴⁸ See, eg, *Judges Act 1985* (Canada) s 63.

⁴⁹ For example, the express powers of the Canadian Judicial Council extend only to making recommendations for removal of a judge where complaints are substantiated: see *Judges Act 1985* (Canada) ss 63, 65 and 70 and *Constitution Acts, 1867 to 1982* (Canada) s 99. In England and Wales, the Lord Chancellor and Lord Chief Justice may impose sanctions short of removal, including formal advice, formal warning or reprimand: see *Constitutional Reform Act 2005* (UK) ss 108(2)–(3).

⁵⁰ The United States Federal Circuit Judicial Councils are wholly comprised of judicial members: see *Judicial Conduct and Disability Act of 1980* (US), 28 USC §§ 351–64. In New Zealand, complaints are received and investigated by the Judicial Conduct Commissioner who is a non-judicial statutory office-holder appointed by the Governor-General on the recommendation of the Parliament, following consultation by the Attorney-General with the Chief Justice: see *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 7.

7. Features of a federal judicial commission

The Australian Government is considering the establishment of a federal judicial commission to handle complaints about federal judicial officers. To serve the goals of efficiency, accessibility, transparency and accountability, if a federal judicial commission were created, it would need to be permanently established with sufficient resources to carry out the responsibilities assigned to it. Responses to the questions set out in this discussion paper are invited to inform the development of any model for a federal judicial commission. Decisions relating to the policy design of a federal judicial commission will ultimately be a matter for the Australian Government.

Role

If established, a federal judicial commission would be empowered to receive, investigate and respond to complaints about the conduct or capacity of a federal judicial officer. The commission's purpose would be to preserve and support the institutional integrity of the federal courts by providing an independent and transparent complaints process, thereby promoting public confidence in the judicial system. Within this context, it would be a protective, rather than a disciplinary, model.

Composition and decision-making

In its 2020 Policy Statement *'Principles Underpinning a Federal Judicial Commission'*, the Law Council of Australia (Law Council) called for a federal judicial commission *'comprised of the heads of jurisdiction, in addition to a majority of (non-judicial) community members of high standing who should be appointed by the Governor-General on nomination by the Attorney-General'*.⁵¹ The Law Council suggested that *'the majority of non-judicial members is necessary as public confidence is best promoted by assessment to public standards'*. The Law Council also noted that *'consideration should be given as to proactively appointing and employing people from significantly underrepresented groups'*.⁵²

There are currently three heads of jurisdiction in the federal context: the Chief Justice of the High Court, the Chief Justice of the Federal Court, and the Chief Justice/Chief Judge of the Federal Circuit and Family Court.⁵³ A federal judicial commission constituted by some or all of the heads of jurisdiction of the federal courts, and a number of non-judicial members, would be broadly consistent with the complaints bodies in four states and territories (NSW, Victoria, the ACT and the Northern Territory) that include the relevant heads of jurisdiction and additional members.⁵⁴ The Judicial Commission of New South Wales is comprised of ten members: six ex officio members (the heads of jurisdiction) and four appointed by the Governor on nomination by the Minister, including one legal practitioner and three community members of high standing.⁵⁵ It has been said that this model promotes community confidence in the complaints-handling mechanism through the involvement of people from outside the legal profession, while protecting judicial independence.⁵⁶

51 Law Council of Australia, ['Principles Underpinning a Federal Judicial Commission'](#) (Policy Statement, 5 December 2020) 7.

52 Law Council of Australia, ['Principles Underpinning a Federal Judicial Commission'](#) (Policy Statement, 5 December 2020) 7.

53 The Chief Justice of the Federal Circuit and Family Court of Australia (Division 1), the Hon William Alstergren AO, is also the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2), although the legislation does provide scope for the roles to be held by two different people: see s 21 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

54 Judicial Commission of Victoria, [Annual Report 2020-21](#), 39; Judicial Commission of New South Wales, [Annual Report 2020-21](#), 80. See also *Judicial Commissions Act 1994* (ACT) s 5B(1) and *Judicial Commission Act 2020* (NT) s 7(1).

55 *Judicial Officers Act 1986* (NSW) s 5.

56 Legislative Assembly of the Northern Territory, Legislation Scrutiny Committee, [Inquiry into the Judicial Commission Bill 2020](#) (May 2020).

If a federal judicial commission were to be comprised of multiple members, it would be necessary to consider its decision-making processes. One example of an existing model is the Judicial Commission of New South Wales, where meetings require a quorum of seven members, of whom at least one must be an appointed member. Decisions shall be determined by a majority vote, with the President of the Commission holding a deliberative vote only.⁵⁷ A parliamentary commission established under the Judicial Misbehaviour and Incapacity Act also adopts a majority approach. However, if members were not in unanimous agreement, each member's opinion on the question would be recorded and included in a report prepared for presentation to the Parliament.⁵⁸

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

Scope: judicial officers

A federal judicial commission could potentially be authorised to consider complaints about current serving judges of the High Court, the Federal Court and the Federal Circuit and Family Court. The commission would not be responsible for considering complaints about state and territory judicial officers, or about quasi-judicial officers such as registrars.

The Law Council has advocated for a federal judicial commission with the ability to investigate complaints about High Court justices, and complaints about the conduct of past judicial officers during their time serving as a judicial officer in instances where there is a public interest in doing so.⁵⁹ This might include an investigation to determine whether an institutional response by the relevant court is required to prevent the occurrence of similar conduct in the future and to protect public confidence in the court.

The Law Council has noted that objections to including justices of the High Court within the scope of a federal judicial commission may be raised. In particular, this may arise due to the potential for the High Court to adjudicate a matter related to one of its justices (such as an application for judicial review of a decision of the commission) or due to concerns about the potential for judges of a lower court to scrutinise the conduct of a High Court justice.⁶⁰

⁵⁷ *Judicial Officers Act 1986* (NSW) sch 2 items 3–5.

⁵⁸ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 18.

⁵⁹ Law Council of Australia, '[Principles Underpinning a Federal Judicial Commission](#)' (Policy Statement, 5 December 2020).

⁶⁰ Law Council of Australia, '[Principles Underpinning a Federal Judicial Commission](#)' (Policy Statement, 5 December 2020).

4. Should a federal judicial commission be empowered to examine complaints about a justice of the High Court in addition to other federal judges?
5. Should a federal judicial commission be empowered to examine complaints about a former judicial officer and, if so, in what circumstances?

Grounds for considering complaints

The Constitution vests in the judiciary the power to determine justiciable disputes, subject only to an appeal. As such, a federal judicial commission's examination of a complaint cannot be directed toward assessing the correctness of a judge's ruling on the merits. A commission should be able to examine a complaint about a judicial officer's conduct or capacity without compromising the officer's judicial independence, including to determine if the matter could, if substantiated, potentially justify parliamentary consideration of removal of the judicial officer from office on the ground of proved misbehaviour or incapacity.

A complaint about conduct that is unlikely to amount to misbehaviour or incapacity may nonetheless warrant the attention of a federal judicial commission if the conduct might affect the reputation of the relevant court. This could include complaints about a judicial officer's conduct in a judicial or official capacity, including significant incivility, rudeness or bullying behaviour in court. The commission's scope could also encompass receiving complaints about discriminatory or inappropriate workplace behaviours, including harassment. Complaints may also relate to a judicial officer's conduct in a non-official capacity or prior to their appointment, such as in circumstances where the matter may adversely affect public confidence in the suitability of the judicial officer to hold office or the reputation of the court.

State and territory judicial complaints bodies are empowered to deal with a complaint if they consider that the matter, if substantiated, might justify removal of the judicial officer from office, or could affect or have affected the performance of the officer's functions or duties. The Judicial Commission of Victoria is also empowered to deal with a complaint where the alleged conduct '*may have infringed the standards of conduct generally expected of judicial officers*'.⁶¹ The Law Council has argued that a federal judicial commission should be able to deal with a matter that could, '*if substantiated, reasonably be expected to affect public confidence in the administration of justice*'.⁶² The enabling legislation of the Federal Court and the Federal Circuit and Family Court provides for the heads of jurisdiction to deal with a complaint about a judicial officer's performance of their duties where they have a belief that, if substantiated, the circumstances giving rise to the complaint may '*have the capacity to adversely affect, or have adversely affected, the reputation*' of the court.⁶³

⁶¹ *Judicial Commission of Victoria Act 2016* (Vic) s 16.

⁶² Law Council of Australia, '[Principles Underpinning a Federal Judicial Commission](#)' (Policy Statement, 5 December 2020).

⁶³ *Federal Court of Australia Act 1976* (Cth) ss 4 ('relevant belief') and 15; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 48 and 145.

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?
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?
9. Would it be appropriate to have any additional limitations on a federal judicial commission's jurisdiction to handle complaints about a matter arising after the resignation of a judicial officer, or concerning conduct alleged to have occurred before the appointment of a judicial officer to judicial office or before the commencement of any enabling legislation?

Avenues for receiving complaints

Any person may make a complaint about a judicial officer's conduct or capacity to the state and territory bodies, including individual litigants, members of the public or the legal profession, court staff and other judicial officers. In Victoria, the Law Institute or the Victorian Bar may make a complaint to judicial commission on behalf of one of their members, without disclosing the individual's identity.⁶⁴

Matters may also be referred to the complaints bodies by the Attorney-General in each jurisdiction, or by a head of jurisdiction pursuant to an express power in some jurisdictions.⁶⁵ Providing heads of jurisdiction with the discretion to refer a complaint or matter to a federal judicial commission may complement the courts' internal procedures for handling complaints.

In some states and territories, it is open to the complaints bodies and/or ad hoc investigatory panels to generally consider any matter related to the conduct or capacity of a judicial officer that comes to their attention in the course of dealing with a complaint. This may include extending the scope of an investigation, dealing with multiple complaints together, or considering a matter raised during an investigation as though it were a separate complaint.

The state and territory complaints bodies have powers to disregard or dismiss vexatious complaints.⁶⁶ There are express powers in NSW, Victoria and the Northern Territory for the judicial commission to declare a person to be a vexatious complainant. The threshold in Victoria and the Northern Territory to make a declaration is whether the person persistently and without reasonable grounds makes complaints against one or more judicial officers.

⁶⁴ *Judicial Commission of Victoria Act 2016* (Vic) s 6.

⁶⁵ See, eg, *Judicial Commission of Victoria Act 2016* (Vic) ss 7–8.

⁶⁶ *Judicial Commissions Act 1994* (ACT) s 57; *Judicial Officers Act 1986* (NSW) s 38; *Judicial Commission Act 2020* (NT) s 45; *Judicial Conduct Commissioner Act 2015* (SA) s 17(1)(c)(i); *Judicial Commission of Victoria Act 2016* (Vic) ss 16(3)(d) and 140.

10. Should a person be able to make a complaint to a federal judicial commission anonymously, and in what circumstances would this be appropriate?
11. Should it be open to professional bodies to make complaints to a federal judicial commission? If so, should any limitations apply?
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?
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?
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?
15. Should consideration be given to providing a federal judicial commission with express powers to declare a person to be a vexatious complainant?

Actions a commission may take

Consistent with state and territory judicial complaint mechanisms, a federal judicial commission could be empowered to examine a complaint, which may involve making inquiries, requesting relevant information, and conducting a preliminary investigation into the matter. Following examination of a complaint, options available to a commission may be to:

- dismiss the complaint, if it is not substantiated or if the commission considers no further action is warranted in the circumstances
- refer the matter to the head of jurisdiction with any recommendations (if appropriate), if the complaint is substantiated but not serious enough to raise grounds for removal. Such recommendations could support the judicial officer involved in performing their judicial or official duties, a head of jurisdiction in managing the business of the court, or a court to address any issues that could affect its institutional integrity
- establish an ad hoc investigatory panel to investigate and report on the matter, or
- refer the matter to any entity or person considered appropriate. This could include, for example, a commission directly referring a complaint to the Parliament or the Attorney-General if it is serious enough to be considered as grounds for removal without further investigation being required. Referrals could also be made to another entity, such as the Australian Federal Police.

By way of example, in Victoria and the Northern Territory the power of the complaints body to refer a complaint to an ad hoc investigatory panel is expressly limited to circumstances where the body is satisfied that, if substantiated, the complaint could justify consideration of removal of the judicial officer from office.⁶⁷ Criteria for the establishment of an investigatory panel are less circumscribed in NSW, where the judicial commission can refer a complaint to the Conduct Division if it is not summarily dismissed.⁶⁸

⁶⁷ *Judicial Commission Act 2020* (NT) s 50; *Judicial Commission of Victoria Act 2016* (Vic) ss 13(3) and 33.

⁶⁸ *Judicial Officers Act 1986* (NSW) s 21.

The options available to an ad hoc investigatory panel, following its investigation of a matter, could include either dismissing the complaint, referring the matter to the relevant head of jurisdiction with a report on its findings and any recommendations, or providing a report to the Parliament or the Attorney-General if it has formed the opinion that the matter is substantiated and serious enough to justify consideration of removal from office.

This would be consistent with the options available to an ad hoc investigatory panel in NSW, Victoria and the Northern Territory. In these jurisdictions, an investigatory panel may dismiss a complaint on the same or similar grounds for which the complaints body proper may dismiss a complaint or if the complaint is not substantiated. If the complaint has been substantiated and the matter could justify consideration of removal of the judicial officer, the investigatory panel's report must be provided to the relevant Governor and/or Attorney-General. The investigatory panel may also refer a matter to the relevant head of jurisdiction if its inquiries do not reveal potential grounds for removal. The report of the investigatory panel must also be provided to the complaints body and the judicial officer concerned, and may be provided to the complainant if appropriate.⁶⁹ In the ACT and South Australia, in all cases where an ad hoc investigatory panel is established on the recommendation of the complaints body, a report must be provided to the Attorney-General of those jurisdictions.⁷⁰

Transparency and accountability may require that there be some information made publicly available about complaints and how they are dealt with.

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?
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?

Composition of an investigatory panel

The Law Council has proposed that a federal judicial commission should appoint a panel to 'investigate complaints that it does not summarily dismiss or refer to a head of jurisdiction' and that this ad hoc investigatory panel 'should be comprised of two judicial officers and one non-judicial community member of high standing'.⁷¹ This aligns with the state and territory judicial complaint models, where an ad hoc investigatory panel is generally composed of two (current or former) judicial officers and one non-judicial member, apart from in the ACT where it is to be composed of three current or former judicial officers.⁷² In NSW, the non-judicial member is appointed from a pool of community members selected by a parliamentary committee, whereas in other states non-judicial members are selected by (or from a pool nominated by) the executive.⁷³

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

⁶⁹ *Judicial Officers Act 1986* (NSW) ss 26–29; *Judicial Commission Act 2020* (NT) ss 53–57; *Judicial Commission of Victoria Act 2016* (Vic) ss 34–35, 39, 41, 43 and 46.

⁷⁰ *Judicial Commission Act 1994* (ACT) s 22; *Judicial Conduct Commissioner Act 2015* (SA) s 25.

⁷¹ Law Council of Australia, 'Principles Underpinning a Federal Judicial Commission' (Policy Statement, 5 December 2020).

⁷² *Judicial Commissions Act 1994* (ACT) s 7.

⁷³ *Judicial Officers Act 1986* (NSW) sch 2A; *Judicial Commission Act 2020* (NT) s 22; *Judicial Conduct Commissioner Act 2015* (SA) s 21(3)(b); *Constitution Act 1975* (Vic) ss 87AAS and 87AAW.

Powers of the commission and an investigatory panel

The state and territory judicial complaints bodies all have the ability to investigate complaints, including by requesting information and obtaining court documents, transcripts, audio or video recordings of proceedings.⁷⁴ The ad hoc investigatory panels, and the complaints body proper in some jurisdictions, have broader powers including the ability to compel a person to provide evidence or other documents,⁷⁵ summon or subpoena witnesses,⁷⁶ hold hearings,⁷⁷ and request that a judicial officer undergo a medical or psychological examination in certain circumstances.⁷⁸

A federal judicial commission, and ad hoc investigatory panels established by a commission, would require powers of inquiry and investigation. However, to protect judicial independence under Chapter III of the Constitution, and consistent with the Judicial Misbehaviour and Incapacity Act, judicial officers would be exempted from the coercive powers of a federal judicial commission and ad hoc investigatory panel.⁷⁹ For example, neither the commission nor an investigatory panel would be able to require a judicial officer to give evidence or be subject to a search warrant.

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?

Intersection with other bodies and processes

Judicial education bodies

By identifying patterns or trends in matters complained about, a federal judicial commission could assist in preventing the recurrence of, and addressing systemic, issues at both an individual and institutional level. The ALRC Report notes that complaints examined by a commission, including those that are not substantiated or not sufficiently serious to justify removal of the judge, may provide feedback on issues impacting perceptions of fairness and impartiality within the courts. The integration of such feedback into judicial training and development programs may contribute to systemic improvement and support public confidence in the judiciary.

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?

⁷⁴ *Judicial Officers Act 1986* (NSW) s 18(2); *Judicial Conduct Commissioner Act 2015* (SA) s 6(5)(a); *Judicial Commission of Victoria Act 2016* (Vic) s 28(1). See also Judicial Commission of New South Wales, [Annual Report 2020-21](#), 51; Judicial Commission of Victoria, [Annual Report 2020-21](#), 19.

⁷⁵ *Judicial Commissions Act 1994* (ACT) s 35H, *Judicial Officers Act 1986* (NSW) s 25; *Judicial Commission Act 2020* (NT) ss 18, 29; *Judicial Conduct Commissioner Act 2015* (SA) ss 6(4)–(5); *Judicial Commission of Victoria Act 2016* (Vic) s 69.

⁷⁶ *Judicial Commissions Act 1994* (ACT) s 35H; *Judicial Officers Act 1986* (NSW) s 25(b), referring to *Royal Commissions Act 1923* (NSW) s 8; *Judicial Commission Act 2020* (NT) s 18; *Judicial Conduct Commissioner Act 2015* (SA) s 24(1), referring to *Royal Commissions Act 1917* (SA) s 11; *Judicial Commission of Victoria Act 2016* (Vic) s 70.

⁷⁷ *Judicial Commissions Act 1994* (ACT) ss 35E and 37; *Judicial Officers Act 1986* (NSW) s 24; *Judicial Commission Act 2020* (NT) s 52; *Judicial Conduct Commissioner Act 2015* (SA) s 24; *Judicial Commission of Victoria Act 2016* (Vic) s 55.

⁷⁸ *Judicial Commissions Act 1994* (ACT) s 35; *Judicial Officers Act 1986* (NSW) s 34; *Judicial Commission Act 2020* (NT) s 20; *Judicial Conduct Commissioner Act 2015* (SA) s 24(2); *Judicial Commission of Victoria Act 2016* (Vic) ss 29 and 57.

⁷⁹ *Judicial Misbehaviour and Incapacity Act 2012* (Cth) s 25; Explanatory Memorandum, *Judicial Misbehaviour and Incapacity* (Parliamentary Commissions) Bill 2012 (Cth).

Investigatory and other bodies

A federal judicial commission may receive complaints relating to matters that have been, or should be, dealt with by another agency. It would be necessary for a commission to be able to share information with another body where appropriate, such as in circumstances where the nature of the conduct alleged or suspected to have occurred could constitute a criminal offence. A federal judicial commission may also need to seek information from a court or another agency to inform its consideration of a complaint, including whether the complaint relates to a matter that is being, or has been, dealt with by that other agency. For example, some complaints made to a federal judicial commission may relate to matters that could also be the subject of a complaint to another investigatory body, such as a complaint to the Australian Human Rights Commission or the Fair Work Commission about workplace discrimination or harassment.

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?

