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Lawyers**

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Patron, The Honourable Chief Justice Susan M Kiefel AC

21 February 2023

Dear Attorney-General's Department

Re: Submission to the Attorney-General's Department Scoping the Establishment of a Federal Judicial Commission

I refer to the above matter and write in my capacity as the President of Australian Women Lawyers (**AWL**) to endorse the submission of Victorian Women Lawyers made in this matter.

AWL is the peak body representing Women Lawyer Associations throughout Australia and the interests of women legal practitioners nationally. AWL is concerned with issues relating to the practice and advancement of women in the legal profession and has a strong focus on eliminating discrimination against women in the legal system and in the administration of justice. AWL's objects include furthering the understanding of, and support for, the legal rights of all women in society and identifying, highlighting and eradicating discrimination against women inherent in the community and society generally.

AWL has had the opportunity to review the submission made by Victorian Women Lawyers and fully endorses all recommendations made.

In addition to this endorsement we note that AWL, as part of its role as peak body for Women Lawyers Associations, is available and willing to provide further comments, details or analysis in response to any question asked by the Attorney-General's Department.

Australian Women Lawyers represents:



Should you have any questions regarding this reference, please do not hesitate to contact me at austwomenlawyerspresident@gmail.com.

Yours faithfully

Astrid Haban-Beer
AWL President



VICTORIAN
WOMEN
LAWYERS

**SUBMISSION TO THE AUSTRALIAN ATTORNEY-GENERAL'S
DEPARTMENT'S SCOPING THE ESTABLISHMENT OF A
FEDERAL JUDICIAL COMMISSION**

Submitted by:	Victorian Women Lawyers Association Inc
Submitted:	via upload of submission at https://consultations.ag.gov.au/legal-system/federal-judicial-commission/
Contact:	Sophie Lefebvre, President, VWL Email: vwl@vwl.asn.au
Written by:	Sophie Lefebvre (President) and members of the VWL Law Reform Committee including: Sophie Lloyd (Co-Chair (Cth)), Andrée Pianta and Louisa Ashton
With thanks to the following contributors:	Fiona McLeod AO SC and Leah Marrone (Past President, Australian Women Lawyers)

Submission

About Victorian Women Lawyers

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 800 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community for women lawyers.

Since 1996, VWL has advocated for the equal representation of women at all levels of the legal profession and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating gender-based and sex-based discrimination to achieve justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au.

Introduction

VWL supports the Attorney-General (**AG**)'s Department's considered approach to advising the Australian Government on the merits and policy design of a federal judicial commission.

VWL acknowledges that while the judiciary is composed of some of Australia's most brilliant minds, it is not infallible and where the actions of individual members of the judiciary breach workplace laws and standards, those individuals must be held to account. Research indicates sexual harassment is prevalent within the judicial system, including by judicial officers.¹ VWL considers the establishment of a federal judicial commission as an essential step to mitigate the risk of institutional sexism and other forms of discrimination, harassment and bullying in order to retain women working within the law and judiciary around Australia. In Victoria, women account for around 71% of the Court Services Victoria workforce.²

VWL was impressed with the independent investigation that Her Honour Chief Justice Susan Kiefel organised in relation to allegations of sexual harassment by former Justice Dyson Heydon. As discussed below, many lessons can be learnt from that investigation, such as adopting a trauma-informed approach and appointing an independent lead investigator, which is a deviation from the norm of appointing a former justice.

¹ Law Council of Australia, *National Attrition and Re-engagement Study* (2014); Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012); International Bar Association, *Us Too? Bullying and Harassment in the Legal Profession* (2019); Victorian Legal Services Commissioner, *Sexual Harassment in the Victorian Legal Sector 2019 study of legal professional and legal entities* (2020).

² Dr Helen Szoke AO, *Review of Sexual Harassment in Victorian Courts: Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (March 2021).

Scope of submission

This submission responds to all questions posed in the AG's Department's discussion paper titled *Scoping the Establishment of a Federal Judicial Commission*. Our submission is from the perspective of lawyers who identify as women, with an emphasis on Victorian law and governance.

We note that due to time constraints, some of our responses are brief. VWL is available and willing to provide further details to any question, as requested by the AG's Department.

Please feel free to contact Sophie Lefebvre, VWL President, at vwl@vwl.asn.au for further details.

Composition and decision-making

Q1. 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?

Yes. VWL recommends membership of the federal judicial commission include all heads of relevant jurisdictions. The heads of the High Court of Australia, the Federal Court of Australia, and the Federal Circuit and Family Court of Australia play a role in establishing culture and standards amongst their fellow jurisdictional workforce. Involving them in the federal judicial commission will assist to ensure there is widespread and effective compliance with the commission's non-binding recommendations.

Including all the heads of jurisdictions as members of the federal judicial commission will assist to mitigate actual, potential and perceived conflicts of interest during investigations as there will be options for ensuring an investigator is from a different jurisdiction (such as a different court and state). For example, if a complaint is received against a Federal Court Judge in Queensland, the investigator should be from a state other than Queensland and, preferably, holding a position within a court other than the Federal Court.

Q2. 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?

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q3. How should decisions of a federal judicial commission be made where the members are not able to unanimously agree?

VWL suggests the federal judicial commission be established in a manner that does not facilitate situations in which there is dissent among outcomes. To that end, VWL recommends that each investigation involve a lead investigator whose responsibility it is to consider all differing views and make one final determination on findings and recommendations.

VWL suggests the federal judicial commission's investigative powers should involve an internal review process whereby affected parties can request:

- internal review of decisions not to investigate all or elements of complaints, as well as other decisions regarding complaints and investigations; and
- external review of decisions regarding investigation outcomes and internal review outcomes.

VWL suggests there should be opportunities for external review or appeal of outcomes. In Victoria, the Victorian Inspectorate can receive complaints about non-binding investigation outcomes by the Victorian Ombudsman. A similar structure could be established for external review of the federal judicial commission's decisions and internal review outcomes so there is recourse where a complainant, victim or respondent is dissatisfied with an outcome. If the AG's Department requests, VWL is available to provide more detailed information on this point.

Scope: judicial officers

Q4. Should a federal judicial commission be empowered to examine complaints about a justice of the High Court in addition to other federal judges?

Yes. VWL cannot see any reason why the High Court would not be included in the federal judicial commission's remit. Justices of the High Court should not be considered above reproach. As clearly demonstrated in the allegations made against Justice Heydon, a former barrister and Justice of the High Court, justices of the High Court are not immune to misconduct that is actually and/or perceived to be inappropriate and unlawful.

Furthermore, it is appropriate for investigations into complaints about High Court justices to be conducted independently, such as by a federal judicial commission or its appointees, rather than current and/or former justices, who are likely to have actual, potential or perceived conflicts of interest.

VWL also suggests consideration should be given to empowering the federal judicial commission to receive and investigate complaints about tribunal members at the Australian Administrative Tribunal. In Victoria, the Victorian Judicial Commission is empowered to investigate judicial officers within all Victorian courts as well as members of the Victorian Civil and Administrative Tribunal.

Q5. Should a federal judicial commission be empowered to examine complaints about a former judicial officer and, if so, in what circumstances?

Yes. VWL emphasises the importance of the federal judicial commission being empowered to examine complaints about alleged misconduct of former judicial officers while they were holding office, in the same circumstances as any acting judicial officer, *and* about alleged misconduct occurring *after* the former judicial officer held office, in slightly different circumstances where the alleged misconduct is of a serious nature.

We know from the Royal Commission into Institutional Responses to Child Sexual Abuse that the average time for disclosing child sexual abuse in those institutions was 23.9 years. It is possible that victim survivors of misconduct (of an assault or harassment nature) by a justice or justices of the High Court may not come forward at the time to make a complaint for a range of reasons, such as mental health, fear of losing their job, and fear of losing their career. We saw this in the investigation into Justice Heydon, where allegations dated back to around 10 years. Therefore, for the federal judicial commission's powers to be trauma-informed, the ability to receive complaints about past conduct is essential to support victim survivors.

Furthermore, this power would prevent judicial officers from retiring from the bench to avoid conduct investigations. Were such a limitation to exist, justices could retire to avoid conduct investigations, only to return to legal practice subsequent to retirement, where they may engage in similar behaviour again. If this occurred, further people may be harmed and victim survivors may feel the need to make complaints again to relevant regulatory bodies with the possibility of re-traumatisation. Victim survivors should be at the centre of design of the federal judicial commission, and ensuring it has the power to investigate conduct of retired justices is essential to this end.

Additionally, it is not uncommon for justices to accept positions on company boards, lead public inquiries, or return to legal practice at the bar or elsewhere post retirement from the bench. These roles have requisite standards of professional conduct, and past misconduct as a judicial officer may be a relevant factor for their ability to perform such roles. Justices should not be able to leave the bench to avoid an investigation by the federal judicial commission, take some months or years off, and then return to practice or positions of leadership, power and control.

VWL's recommendation is that the establishment of this commission be aimed at facilitating trauma-informed complaint handling and investigations, as well as ensuring members of the judiciary (including retired members) have the benefit of fair, independent investigation of any allegations against them.

Alleged conduct during a retired judicial officer's work within office

VWL emphasises the importance of the federal judicial commission being able to investigate complaints about alleged misconduct by a retired judicial officer while they were in office. It would be an oversight to allow judicial officers to retire in order to avoid investigation by the federal judicial commission, only to return to legal practice or another role months or years later. This creates an unsafe environment for victim survivors as they may have to re-lodge complaints years later, as well as increasing the chance of future victim survivors. For this reason, the federal judicial commission needs power to continue to look at conduct of retired judicial officers and to, at least, make findings. It is the opinion of VWL that such findings should be able (at the discretion of the commission) to be shared with relevant regulators of industries which retired justices may work, such as legal practice regulators and the Australian Securities and Investments Commission (**ASIC**).

VWL notes that to investigate allegations of bullying while in office by a retired judge, the federal judicial commission is likely to require a broader definition of bullying than in the *Fair Work Act 2009* (Cth). Under s 789FD(1) of the *Fair Work Act 2009* (Cth), bullying requires that the conduct 'creates a risk to health and safety', which may be interpreted to require a current or ongoing risk and may not apply to past employees of retired justices. VWL notes that this may give rise to issues investigating past conduct of bullying by a former justice. Therefore, 'bullying' should be defined in a broader manner that allows for complaints about past conduct of bullying where appropriate.

VWL supports the definition used by Dr Helen Szoke AO in the *Review of Sexual Harassment in Victorian Courts: Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT*, being:

Bullying is the systematic abuse of power through repeatedly and deliberately harming others with the express purpose of intimidating or gaining control. There is often a power imbalance between the bully and their target(s). Bullying and harassment can, in some cases, be a gendered experience for both women and men and be related to sex discrimination.

VWL is available to make further submissions on this, at the AG's Department's request.

Alleged conduct after the retired judicial office held office

With respect to complaints about the alleged misconduct of a former judicial officer *after* they were holding office, VWL suggests the federal judicial commission should be empowered to consider those complaints if the conduct is of a nature that raises concerns about fitness and propriety such that the person should not be in receipt of a public pension or such that the alleged conduct, if confirmed, would undermine public confidence in the Court. VWL considers the jurisdiction of the federal judicial commission to consider complaints involving conduct *after* the individual has held judicial office should be limited and possibly only inclusive of criminal or corrupt conduct, such as 'improper conduct' as described by s 4(1) of the *Public Interest Disclosures Act 2012* (Vic). For example:

- a. corrupt conduct; or
- b. conduct of a former judicial officer that constitutes:
 - i. a criminal offence;
 - ii. serious professional misconduct;
 - iii. dishonest performance of public functions;
 - iv. an intentional or reckless breach of public trust;
 - v. an intentional or reckless misuse of information or material acquired in the course of the performance of the functions of the public officer or public body;or
 - vi. a substantial mismanagement of public resources; or
 - vii. a substantial risk to the health or safety of one or more persons; or
 - viii. a substantial risk to the environment; or

VWL suggests this should be narrowed to:

- criminal conduct or conduct so serious as to bear upon fitness and/or propriety; and

- any misconduct occurring in the course of legal practice or in the course of holding any other public office.

If the federal judicial commission does not have power or uses its discretion not to investigate a complaint about a retired justice's conduct after holding office, the commission should still be able to refer a complaint to other bodies as appropriate. For example, if the commission does not consider the conduct warrants investigation by the commission but may be relevant to the individual's board membership, it should be empowered to refer the complaint to ASIC.

Grounds for considering complaints

Q6. 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?

Yes. VWL agrees that the federal judicial commission should be empowered to examine a complaint related to any matter that, if substantiated, the commission may be satisfied of (a) and/or (b) above.

VWL notes that it is essential that the federal judicial commission be able to investigate a range of issues without being too narrow. To that end, VWL suggests terms such as 'performance' and 'reputation of the court' be defined broadly, and that the federal judicial commission adopt a wider definition of bullying than in the *Fair Work Act 2009* (Cth), as outlined in question 5 above.

VWL is available to elaborate on this point, if the AG's Department wishes.

Q7. 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?

VWL does not see the value in limiting the functions of the federal judicial commission, unless it comes into conflict with other oversight entities. However, as noted before, VWL emphasises the need to place victim survivors at the centre of the federal judicial commission's work with regards to misconduct of an assault or harassment nature, to facilitate a trauma-informed approach. This may involve the federal judicial commission not investigating complaints about victim survivors who do not want the investigation to progress. There should be alternative ways the federal judicial commission can investigate issues without specifically investigating a situation that the victim survivor does not want investigated, such as the commission having own-motion investigatory powers for serious or systemic issues.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q8. Are there any circumstances in which a federal judicial commission should be empowered to examine a complaint that does not meet the above criteria?

VWL considers the above criteria to be sufficiently broad to allow for investigation of most complaints. VWL suggests that the federal judicial commission should have own-motion investigatory powers to be used in accordance with its functions and role. VWL suggests that this power would allow the commission to stay up-to-date with community expectations by investigating issues where there have been no or few complaints.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q9. 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?

Our response regarding complaints of alleged conduct after the resignation of a judicial officer is outlined under question 5 above.

VWL's perspective regarding complaints of alleged conduct occurring prior to appointment of a judicial officer is effectively the same as our answer to question 5; we consider there should be a much higher bar for the federal judicial commission to consider and investigate complaints relating to conduct prior to appointment as a judicial officer. However, we consider that there would be some categories of conduct that are still relevant, such as:

- criminal conduct or conduct so serious as to bear upon fitness / propriety; and
- any misconduct occurring in the course of legal practice or in the course of holding any other public office

Avenues for receiving complaints

Q10. Should a person be able to make a complaint to a federal judicial commission anonymously, and in what circumstances would this be appropriate?

Yes. VWL supports the federal judicial commission's ability to receive anonymous complaints. Many people (perhaps most) may not feel comfortable making a complaint where their career may be placed in jeopardy. There is likely a significant power imbalance between the complainant and the subject of their complaint, such as associates complaining about judges. This situation may be exacerbated by intersectionality, such as where the associate is a woman, is gender diverse, is queer, is living with a disability, or is from a culturally diverse background, among other traits. Establishing a complaint system that supports people to stay in the law is essential for maintaining and attracting more diversity within the law. VWL's position is that the ability to choose to make a complaint anonymously or openly is essential to a trauma-informed approach.

VWL acknowledges there are naturally limitations on the extent to which an investigation can be conducted and a finding can be substantiated on the basis of an anonymous complaint, particularly in light of *Briginshaw v Briginshaw* (1938) 60 CLR 336. VWL recommends that if there is going to be provision for anonymous complaints, there needs to be a process or system which allows two-way communication between the commission and the anonymous complainant to allow the collection of information, to allow communication about ramifications of maintaining anonymity where appropriate or necessary, and to communicate about whether other complainants have come forward, among other things. This will allow the complainant to make informed decisions about whether to maintain anonymity. This approach is on the one hand trauma-informed by support victim survivors or complainants to remain anonymous, and also complements Gabrielle Appleby's emphasis on the importance of transparency as it allows the federal judicial commission's engagement with the complainant about the values of transparency and limitations of anonymity or confidentiality so that the complainant can make an informed decision:³

The default position should be in favour of transparency across the whole process — informing complainants of the progress of the matter, and reporting on the resolution of the matter and the reasoning behind it. There may well be individual cases where the need for confidentiality overrides the public interest in transparency ... but even in such cases confidentiality should be as limited as possible.

³ Gabrielle Appleby, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' *Melbourne University Law Review* (2014)

It may be that the commission must anonymise the complainant's name, but identify the victim survivor in the allegations and throughout its investigation. To manage this, the commission could have the power to require individuals involved in any investigation to maintain a high level of confidentiality over anything in relation to the investigation. This technique is used in most workplace investigatory practices throughout Australia, though may pose some challenges within the judicial appointment system.

VWL is available to provide further detail on this point, as requested by the AG's Department.

Q11. Should it be open to professional bodies to make complaints to a federal judicial commission? If so, should any limitations apply?

Yes, the federal judicial commission should be empowered to receive complaints from professional bodies, such as VWL, who may receive information regarding misconduct within the judiciary.

Specific limitations on complaints from professional bodies could include a complaint where the alleged victim survivor has expressly instructed the commission that they do not want the matter investigated. A trauma-informed approach involves facilitating the agency and consent of the victim survivor involved. That said, the federal judicial commission should still be empowered to consider a complaint even where the alleged victim survivor does not want to be involved, such as own-motion investigations into serious or systemic issues.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q12. 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?

Anyone should have the power to make a confidential or anonymous complaint. As discussed in response to question 10 above, VWL recommends that there is a way for the federal judicial commission to maintain communication with the complainant of an anonymous complaint to request further information or clarification as well as to ensure the complainant is making informed decisions about what particulars to keep confidential and the impact of this on the investigation.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q13. 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?

Yes. VWL supports the commission having discretion to consider multiple complaints together. VWL also supports the commission being able to take repeat conduct in relation to the same judicial officer

into account (including any conduct prior to appointment to the bench). VWL emphasises the need for this approach to be within the bounds of procedural fairness, having regard to the nature of the alleged conduct and the degree of similarity. If the conduct is not similar, the commission should investigate those complaints separately.

Q14. 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?

Yes. VWL supports the federal judicial commission being empowered to conduct own-motion investigations into possible systemic issues. This approach would support the commission to investigate issues arising outside formal complaint investigations. This may be an efficient way to address any systemic issues by investigating and making recommendations for system-wide improvements. This is an approach used by most oversight entities.

Q15. Should consideration be given to providing a federal judicial commission with express powers to declare a person to be a vexatious complainant?

The commission should not have express powers to 'declare a person' to be a vexatious complainant. Instead, the commission should be empowered to refuse to consider or investigate a complaint on the basis that it is vexatious, such as is found under s 15A(1)(b) of the *Ombudsman Act 1973*(Vic), among other, more diplomatic, reasons. For example, the Victorian Ombudsman is empowered to refuse to consider complaints under s 15A(2) of the *Ombudsman Act 1973* (Vic) on the following bases:

- (a) the subject-matter of the complaint is trivial; or
- (b) the complaint is frivolous or vexatious or is not made in good faith; or
- (c) the complaint lacks substance or credibility; or
- (ca) that dealing, or continuing to deal with the complaint is unnecessary or unjustifiable, having regard to all the circumstances of the case; or
- (d) the subject-matter of the complaint has already been investigated or otherwise dealt with ...

It is desirable that the federal judicial commission have an option for refusing to investigate a complaint on the basis that dealing with the complaint is unnecessary or unjustified as this is more diplomatic approach than declaring a complaint or complainant to be vexatious.

We note that while the Victorian Ombudsman has the power to refuse to deal with a complaint on the basis they consider 'the complaint is frivolous or vexatious or is not made in good faith' under s 15A(1)(b) of the *Ombudsman Act 1973*, this power it rarely relied on. Instead, the Victorian Ombudsman refuses to deal with complaints under s 15A(1)(ca), 'that dealing, or continuing to deal with the complaint is unnecessary or unjustifiable, having regard to all the circumstances of the case'. The VWL notes that

this is a much more diplomatic way for an integrity body to approach refusing to deal with a complaint, and should be an option for the commission in future.

The reputation of the commission is essential for individuals to feel they can trust the commission to investigate their complaint(s) and complaints against them fairly, and in turn for the commission to function effectively. Therefore, the commission should not make any declaration that an individual is vexatious as it may deter people from making complaints in future. Instead, the commission should refuse to consider or investigate a complaint on various bases.

Actions a commission may take

Q16. 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?

As discussed above in response to question 6, VWL does not consider the federal judicial commission's investigatory powers should be limited to matters that could justify removal from office. Instead, the commission should be empowered to investigate a broader range of misconduct. For example, it should be empowered to consider issues of bullying and biased conduct, which in some circumstances may not justify removal from office. We know that while reports of judicial bullying are high and the impacts can be serious, actual complaints are currently low. Empowering the federal judicial commission to receive complaints about and investigate 'smaller' issues such as bullying will be beneficial to protecting individual freedoms, maintaining public confidence in the court and in the integrity of the judiciary.

VWL considers it appropriate for the federal judicial commission to have a *discretionary* power to establish an investigation where the commission considers such an investigation is appropriate. This should not be a mandatory power as VWL acknowledges there are various scenarios in which it would not be appropriate to establish an investigation, such as where a complaint does not want an investigation into conduct.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Q17. 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?

VWL supports transparency of investigation outcomes, findings and complaint information. However, this information should only be made available in a de-identified manner unless the information is within the public domain or the parties have consented to the information being publicly available, and only where it will not unreasonably harm the reputation of the court.

Further, this information should only be available *after* the investigation has concluded. Complaint-based investigations should always be conducted confidentially in order to maintain the reliability of evidence throughout the investigation. VWL suggests that if it is an own-motion investigation then some information, such as the terms of reference, could be made publicly available at the commencement of the investigation.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Composition of an investigatory panel

Q18. How should an ad hoc investigatory panel established by a federal judicial commission be constituted? What criteria and appointment processes should apply?

VWL wishes to see diversity of membership depending on the substance of a complaint. For example, there should be members from a different state than the state of origin of the justice complained about. There should always be at least two investigators with a balanced gender mix. This is reflected in the judicial commission of NSW, which is composed of six judicial members, four non-judicial members, one legal practitioner and three community representatives.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.

Powers of the commission and an investigatory panel

Q19. 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?

VWL considers it appropriate that the federal judicial commission have the same powers as an ad hoc investigatory panel, including coercive powers to issue summonses and examine witnesses, if it has the power to conduct an internal investigation without establishing an ad hoc investigatory panel. This aligns with current models for oversight investigatory mechanisms.

VWL does not consider that an ad hoc investigatory panel need be established to respond to every complaint that warrants investigation. In some instances, establishing an ad hoc investigatory panel will

require unnecessary amounts of time and public resources, when an internal investigation by the federal judicial commission would suffice. Further, if the federal judicial commission has powers to conduct own-motion investigations into systemic issues, this will presumably be done without establishing ad hoc investigatory panels and will be supported by the commission having internal coercive powers to issue summonses and examine witnesses. This will require the federal judicial commission being adequately resourced to consider and investigate complaints without establishing an ad hoc investigatory panel.

VWL is available to provide further details on when it considers the federal judicial commission should be empowered to investigate a complaint without establishing an ad hoc investigatory panel, if the AG's Department requests this further information.

Intersection with other bodies and processes

Q20. 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?

As Gabrielle Appleby points out in *Judicial Conduct: Crafting a System that Enhances Institutional Integrity*, the judicial oversight bodies in Canada and New South Wales have a dual function of receiving and investigating complaints as well as conducting judicial education.

The federal judicial commission could have its own educational function regarding workplace conduct. Alternatively, it could be empowered:

- to collaborate with existing education bodies to ensure their material is meeting the standards expected of judicial officers with respect to the remit of the federal judicial commission;
- to make recommendations for additional training by existing judicial education bodies; and/or
- to recommend subjects of investigations attend specific training.

Q21. 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?

VWL does not consider there should be an explicit restriction on using investigation outcomes as evidence in other proceedings. The evidence collected by the federal judicial commission throughout investigations, however, should be kept confidential. VWL recommends including an explicit provision in the legislation to this effect.

Due to time constraints, VWL was unable to consider this question in detail. VWL is available to provide further information on this question, as requested by the AG's Department.