



21 February 2023

Attorney-General's Department  
3-5, National Circuit, Barton, Australian Capital Territory 2600  
By email: [submissions.federaljudicialcommission@ag.gov.au](mailto:submissions.federaljudicialcommission@ag.gov.au)

Dear Sir/Madam,

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## **Scoping the Establishment of a Federal Judicial Commission – The Merits and Design of a Potential Complaints-Handling Body Discussion Paper**

### **Who we are**

Governance Institute of Australia is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

In preparing this submission, Governance Institute consulted our standing Public Sector Governance Committee comprised of members currently and previously employed in governance roles at all levels of government.

## General Comments

Our members support the Australian Law Reform Commission report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138) and welcome this important consultation. They consider the proposed reforms necessary to increase and ensure ongoing public trust in Australia's Federal judicial system.

As has been observed by many commentators and advocates, the addition of a Federal Judicial Commission (The Commission) is about strengthening an already good system.

Noting the recent broad support for the creation of a National Anti-Corruption Commission, it's clear that the general public has high expectations of accountability of public officials.

[Governance Institute's 2022 Ethics Index](#) found that the ethical behaviour score of judges was a net 41 out of 100, down from 48 in 2021.<sup>1</sup> This suggests that the public perception of judge's ethical behaviour has declined. The lack of an independent body to oversee and, if necessary, investigate the conduct of Federal judicial officers, is not consistent with the public's perception of the need for judicial officers to have high ethical standards.

Our members, therefore, support a Federal Judicial Commission as the mechanism for raising allegations of poor conduct and/or bias of Federal judicial officers. They believe the design of the Commission should have the core judicial values front of mind, namely impartiality, transparency, equality, integrity, fairness and accountability.

A Commission will also bring the federal judicial system into line with most state jurisdictions, thereby reinforcing the integrity and independence of Australia's legal system.

It is critical to the implementation of the Commission that its nature is protective, rather than disciplinary, and seeks to preserve and support the institutional integrity of the Federal courts, rather than act as a proactive enforcement body.<sup>2</sup>

Our members also support The Law Council of Australia's statement in its 2020 Policy Statement *Principles Underpinning a Federal Judicial Commission*:

*To achieve genuine representation within the governance and membership of the Commission, consideration should be given as to proactively appointing and employing people from significantly underrepresented groups. This should include First Nations people and people with disability, amongst others.*

*The Attorney-General should then collect and report annually on the statistics regarding the diversity of the federal judiciary.*<sup>3</sup>

Our members have approached this consultation from the perspective that greater transparency and accountability is always important for public officials. Our judicial system is

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<sup>1</sup> Governance Institute of Australia: [Ethics Index](#)

<sup>2</sup> Australian Law Reform Commission (2021): [Without Fear or Favour: Judicial Impartiality and the Law on Bias \(ALRC Report 138\)](#)

<sup>3</sup> The Law Council of Australia, (2020): *Principles Underpinning a Federal Judicial Commission*, [Policy Statement - Principles Underpinning a Federal Judicial Commission - Law Council of Australia](#)

only strong when it has the complete trust of the public. Thus, they consider these reforms a significant step towards protecting and improving public trust in the system.

### **Specific comments on consultation questions**

Our members request the Commission be established with as few restrictions as possible in terms of its investigative powers and the scope of its inquiries. It is necessary therefore, that the Commission can receive complaints and investigate a justice of the High Court in addition to other Federal judges. This is because no court should be above the scrutiny of the Commission, as it will provide the most appropriate forum to assess these issues.

Our members advocate that complainants should be able to remain anonymous where appropriate.

The Commission's scope, however, should only relate to conduct occurring during the term of federal judicial office. Conduct that occurred prior to an appointment or after leaving the role should be exempt from the scope of the Commission, as there are adequate existing processes in place to deal with these situations.

During the term of a judicial officer, any issue that threatens the integrity of a Federal judicial officer should be taken with the utmost seriousness. If the Commission deems an ad hoc investigation panel to be appropriate to ensure a matter is dealt with expeditiously the Commission should have this power.

Our members support the Law Council's view that the Commission should consist of the most senior leaders of the various Federal courts and non-judicial members appointed by the Governor General following consultation with the Attorney General, similar to the make-up of state judicial commissions. All appointments should be made based on merit and via a transparent process.

Our members also consider value in the Commission having an education function that provides expertise and support to existing judicial education bodies. The Commission's education function should be regarded as a leader in judicial education.

If you have any questions in connection with the letter, please contact Catherine Maxwell (Catherine.Maxwell@governanceinstitute.com.au).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M Motto', written in a cursive style.

Megan Motto

CEO