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## **SUBMISSION IN RESPONSE TO DISCUSSION PAPER 'SCOPING THE ESTABLISHMENT OF A FEDERAL JUDICIAL COMMISSION'**

1. Liberty Victoria is grateful for the opportunity to make this submission in relation to the scoping of a proposed federal judicial commission and the extension of time granted in which to do so.
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).
3. This submission is structured as follows:
  - a. Identifying the relevant principles guiding this submission;
  - b. Commenting on the composition of the commission;

- c. Commenting on the scope of complaints the commission should be able to consider;
- d. Commenting on the grounds of complaints the commission should be able to consider; and
- e. Commenting on the avenues for complaints to the commission to be made.

### **Relevant principles guiding this submission**

4. As the discussion paper acknowledges, the judiciary represents an important arm of the Australian constitutional system. Amongst other things, it is responsible for upholding the rule of law and dispensing justice. Predominantly, it achieves this by resolving controversies according to law without fear or favour.
5. In the context of human rights, courts are regularly accessed by individuals seeking to remedy a violation of their rights or interests. Given the executive branch of government is often responsible for rights violations, it is of fundamental importance in a properly functioning liberal democracy that an individual is able to obtain effective relief for rights violations from an independent, competent and impartial arbiter. Further, the judiciary has a vital role in maintaining parliamentary sovereignty. If members of the executive are acting unlawfully, such as beyond the scope of powers conferred by the legislature, then that undermines the separation of powers that founds our democratic system. The judiciary therefore has a vital role in protecting our system of liberal democratic government.
6. As was noted in the Australian Law Reform Commission's report, 'Without Fear or Favour: Judicial Impartiality and the Law on Bias', judicial impartiality is "now broadly accepted as a foundational norm in any legal system aspiring to conform to the rule of law".<sup>1</sup> Without judicial competency and impartiality, there can be no real judicial legitimacy — that is, public confidence in the court system.<sup>2</sup>
7. Many international human rights instruments recognise this important principle. For example, the International Covenant on Civil and Political Rights provides that, in any civil or criminal legal proceeding, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>3</sup>

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<sup>1</sup> Australian Law Reform Commission, 'Without Fear or Favour: Judicial Impartiality and the Law on Bias' (Report 138, December 2021), [2.8].

<sup>2</sup> Justice Stephen Gageler AC, 'Judicial Legitimacy' (2023) 97(1) *Australian Law Journal* 28, 28–29.

<sup>3</sup> Art 14(1) of the International Covenant on Civil and Political Rights.

8. Similarly, several Australian states and territories have adopted a human rights statute which recognise this right. For example, in Victoria, s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by “a competent, independent and impartial court or tribunal after a fair and public hearing”.
9. At this point it is helpful to acknowledge several important concepts associated with the right to an effective remedy.
10. First, the ‘right to an effective remedy’ comprises both a procedural element and a substantive element. To ensure that the right can be realised, access to appropriate remedial mechanisms should be provided (the procedural limb). Moreover, the process should be capable of delivering an effective remedy (the substantive limb).
11. Secondly, for remedies to be effective, they should be accessible, affordable, adequate and timely.
12. Thirdly, those seeking redress should not fear (further) victimisation in the process of seeking remedies. Fear can come in many forms and be caused by many factors. Relevantly, the judicial process itself may represent one of the causes leading to a person experiencing fear. Therefore, a litigant who experiences judicial misconduct may determine that an effective remedy is not available, and be deterred from seeking a remedy through the courts in future.
13. In Liberty Victoria’s view, the concepts of judicial independence, competency and impartiality are not only concerned with the ultimate outcome. It extends to the process in which a determination is reached. That process will generally entail holding a public hearing. The public hearing should be a safe place for not only litigants, but their representatives too.
14. A corollary of public confidence in the judicial system is that there be an effective mechanism in place to address improper judicial conduct that may occur during hearings.
15. These submissions will focus on how Liberty Victoria considers the above principles can be achieved to the greatest extent possible.

## **Composition of the federal judicial commission**

16. Liberty Victoria submits that the proposed federal judicial commission, however constituted, must respect the separation of powers between the judiciary and the executive and legislative branches of government.
17. It is often the case that judges are called upon to decide unpopular cases. Many of these cases involve human rights and civil liberties. Indeed, federal courts are often asked to determine such issues. To name only a few, human rights issues may arise in the following types of cases:
  - a. Judicial review proceedings involving refugees and people seeking asylum, people in immigration detention facing deportation, and/or people seeking access to or receiving services under the social security system and/or the National Disability Insurance Scheme;
  - b. Proceedings involving land rights and other cultural rights of First Nations peoples;
  - c. Proceedings concerning political communication and protest;
  - d. Proceedings relating to environmental and climate change issues;
  - e. Proceedings determining complaints made by people who have experienced discrimination within the community; and
  - f. Proceedings dealing with people seeking redress for a breach of their privacy.
18. These human rights issues can be politically charged. To ensure that individual human rights are protected, and people generally feel they can seek appropriate redress through the courts, it is imperative that such cases are decided without fear or favour, free from political influence.
19. It is also true that judges play an important role within the Australian constitutional system. It is appropriate that there is a minimum level of accountability for judicial behaviour and performance. Where these standards have not been met, there should be an appropriate accountability mechanism in place.
20. The proposed federal judicial commission should seek to balance these two matters. However, there is a risk that any member of the federal judicial commission who might be perceived as politically motivated may compromise the legitimacy of the complaints process. Any actual or perceived political interference would only serve to diminish public trust in the judiciary – something that we have seen in comparable jurisdictions

abroad where judicial officers are seen, rightly or wrongly, as hyper-partisan.<sup>4</sup> As such, accountability should not come at the expense of judicial independence or impartiality — substantive or perceived.

21. For these reasons, Liberty Victoria believes that any ex officio or appointed members of the committee should remain politically neutral. Members should be appointed through an open, transparent and competitive process, and be suitably qualified to deal with complaints relating to the quality of judicial services. Further, the office or appointment of any member should be protected by statute and secured by tenure.
22. In addition, Liberty Victoria believes that determining what is appropriate judicial behaviour and performance is best informed by a diversity of views. A membership without such diversity may fail to understand the impropriety of conduct to certain groups within the Australian community. As such, an aim of the commission's composition reflects views from a variety of backgrounds.<sup>5</sup>

### **Scope of the federal judicial commission**

23. In Liberty Victoria's view, the federal judicial commission should be empowered to examine complaints relating to federal judges, including Justices of the High Court and retired federal judges.
24. To support Liberty Victoria's view that a broad remit is appropriate, we point to the recent case of allegations made against former High Court Justice Dyson Heydon KC. In 2020, allegations were made (and which were denied) that Mr Heydon had sexually harassed some members of his staff. In response, Chief Justice Kiefel commissioned an independent investigation into the allegations. It was also announced that the High Court would revise its sexual harassment policy. Other Australian courts followed suit (including the High Court and Supreme Court of New South Wales<sup>6</sup>).
25. Three observations can be made from this case study.
26. First, the case study demonstrates that improper judicial behaviour or performance can arise in settings other than lower courts in the federal judicial system. As such, there should be a process in place to deal with judicial misconduct at all levels.

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<sup>4</sup> See, eg, Justice Stephen Gageler AC, 'Judicial Legitimacy' (2023) 97 (1) *Australian Law Journal* 28.

<sup>5</sup> Such as from women, First Nations people, culturally and linguistically diverse people, LGBTQIA+ people, and people who are differently abled.

<sup>6</sup> See Anne Davies and Naaman Zhou, 'Dyson Heydon: Australian courts review how they handle sexual harassment in wake of case', *The Guardian* (24 June 2020).

27. Secondly, even though a judge may no longer be sitting, an investigation can identify deficiencies within internal policies at courts and lead to positive changes.
28. Thirdly, the case study identifies a potential deficiency in a court, in its discretion, determining whether a complaint against a judge of that same court should be investigated. The High Court's decision to proactively investigate the allegations against Mr Heydon enhanced public confidence in the Court's ability to address inappropriate judicial behaviour. However, the fact that a court itself determines whether a complaint should be investigated remains problematic – it may at the very least raise an apprehension of bias. Moreover, even assuming a court would investigate a complaint, the victim of misconduct may fear making a complaint to the same court on which the judge sits.
29. An external body, applying objective criteria and complementing internal court policies, would ensure that appropriate cases are investigated as a matter of course. It also provides an avenue for a complainant to seek independent redress. The risk of adverse public perception arising from any inaction to investigate a complaint (even if justified) is minimised if an external body were to be responsible for the complaints management process.

### **Grounds for considering complaints**

30. Liberty Victoria accepts that it may not be appropriate for all complaints against judicial officers to be investigated. Investigations consume time and resources. Some complaints may be vexatious. As such, investigating every minor complaint may not be appropriate.
31. Nevertheless, the grounds for considering a complaint should not be confined only to conduct which would justify a judge's removal from office or may affect a judge's individual performance or the court's reputation. Lesser forms of misconduct, such as bullying, should be capable of being investigated and appropriately responded to.
32. By way of example, incivility or rudeness towards litigants or legal practitioners may not necessarily warrant removal from office or seriously affect the court's reputation in a general sense. In some instances, a judge's behaviour may be dictated by the heated nature of a proceeding and/or the poor behaviour of its participants. Nevertheless, such conduct may still be inappropriate. In the case of litigants, parties may feel that justice has not been done. In the case of practitioners, exposure to uncivil or rude behaviour may render their workplace unsafe.

33. While the response to these types of complaints may not warrant a judge's removal, an investigation can result in the delivery of important education and the development of best practice models of judicial performance.
34. Liberty Victoria endorses the views of the Law Council of Australia that a proposed federal judicial commission should address judicial misconduct, including corrupt conduct, misuse of judicial authority and any abuse of power by members of the judiciary.<sup>7</sup>

### **Avenues for receiving complaints**

35. Liberty Victoria makes two comments in relation to the proposed federal judicial commission's avenues for receiving complaints.
36. First, judicial officers subject to complaints should have the ability to confront their accuser, especially if the consequence of an investigation could lead to their removal or other sanction. This is an important aspect of the presumption of innocence and the right to a fair hearing.
37. However, in cases where the remedy is unlikely to involve significant consequences to the judge, a complainant should be able to maintain their anonymity.
38. In any case, complainants should be able to make complaints through professional or other advocacy bodies. For example, a legal practitioner may feel uncomfortable making a direct complaint for fear of professional repercussions. In such a case, a law society or bar association should be able to make the complaint on their member's behalf.
39. Secondly, any avenue that is made available should be properly accessible. Accordingly, the avenues should accommodate language barriers, be culturally sensitive, and be friendly to differently-abled complainants.
40. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Michael Stanton, President

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<sup>7</sup> Law Council of Australia, 'Commonwealth Integrity Commission: Proposed Reforms' (January 2019), [32]–[37]. Accessed at: <https://www.lawcouncil.asn.au/resources/submissions/commonwealth-integrity-commission-proposed-reforms>

of Liberty Victoria, or Gregory Buchhorn, General Committee Member, or the Liberty Victoria office at [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au).

Liberty Victoria

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