THE DARKNESS OF SUNLIGHT: JUDICIAL COMPLAINT COMMISSIONS IN AUSTRALIA

JOE MCINTYRE*

This article provides the first in depth analysis of the operation of judicial complaints commissions in Australia through an analysis of empirical data on their operation. In light of a proposed Federal Judicial Commission, this inquiry is particularly pressing. The article argues that such commissions are not unmitigated forces for good and can too easily become forums for disaffected litigants to make irrelevant or unsubstantiated allegations against judicial officers, rather than bodies to investigate substantial allegations of judicial misconduct or misbehaviour. This does not mean that judicial commissions cannot work as vital tools of judicial accountability. But it does mean that great care needs to be taken to ensure that these bodies operate as a net positive for the judicial system.

I INTRODUCTION

> Perhaps claims about a crisis of trust are mainly evidence of an unrealistic hankering for a world in which safety and compliance are total, and breaches of trust are eliminated. Perhaps the culture of accountability that we are relentlessly building for ourselves actually damages trust rather than supporting it. Plants don't flourish when we pull them up too often to check how their roots are growing: political institutional and professional life too may not go well if we constantly uproot them to demonstrate that everything is transparent and trustworthy.[1]

Judicial complaints commissions *seem* like an unmitigated good – they provide an open, transparent and accessible mechanism for people to make complaints about judicial misconduct and misbehaviour. In an age where public confidence in any

* Associate Professor in Law, Justice & Society, University of South Australia. This article evolved out of submissions made in relation to the Attorney-General's Department '*Scoping the Establishment of a Federal Judicial Commission*' Consultation: Joe McIntyre, Submission No 734123776 to Attorney-General's Department, *Scoping the Establishment of a Federal Judicial Commission* (21 February 2023) <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/consultation/view_respondent?uuId=734123776>. It has been prompted by a blog post I wrote for *AUSPUBLAW* and the subsequent suggestion from Dr Nina Boughey that I pursue this article. I wish to thank Nina for both prompting me to write this and for the valuable feedback on the draft article.

1 'Lecture 1: Spreading Suspicion', *Reith Lectures 2002: A Question of Trust* (BBC Radio 4, 3 April 2002) <http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/20020403_reith.pdf>.

public institution cannot be taken for granted, and where scandals such as the Heydon affair continue to ring loud,[2] such models seem unobjectionable and irresistible.

Judicial complaints commissions are, properly conceived, a mechanism of judicial accountability, which itself is often seen as a 'self-evident good'.[3] However, the lack of clear definition and purpose as to the nature and scope of judicial accountability makes it a concept liable to be co-opted and misused.[4] This has led to a sensitivity and hesitancy to embrace accountability and responsibility[5] – a concern that 'judicial accountability' has become an 'overused, under-theorized notion'.[6] This imprecision has particular resonance in the context of new forms of accountability such as judicial commissions.

This article examines the reality of the operation of judicial commissions in Australia to interrogate whether the promise of these bodies has been delivered, or the hesitancy is justified. As I describe below, the last decade has seen a rapid expansion of formal judicial complaints processes in Australia, with new bodies in Victoria, South Australia ('SA') and the Northern Territory ('NT') joining the older bodies in New South Wales ('NSW') and the Australian Capital Territory ('ACT'). With a Federal Judicial Commission potentially on the horizon,[7] it is now particularly pertinent to analyse the recent practices within these bodies. This article undertakes the first empirical analysis of these complaints processes in an attempt to gauge their impact on the Australian legal landscape.[8]

Ultimately, I argue that it is a mistake to treat these bodies as being an unmitigated good. The data suggests that the bodies have had a minimal benefit in investigating legitimate complaints,[9] and rather appear to have created a new complaint avenue that is generating unmeritorious, frivolous and vexatious complaints. Moreover, there is evidence that the complaints process is causing structural harm to the independence and impartiality of the judiciary.[10] This does not mean that we should

---

2 See Susan Kiefel, 'Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia' (Media Release, High Court of Australia, 2020) <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>.

3 Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10(4) *Journal of Judicial Administration* 180, 181.

4 Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56(4) *Case Western Reserve Law Review* 911, 912.

5 Mauro Cappelletti, 'Who Watches the Watchmen?' in Mauro Cappelletti, Paul J Kollmer and Joanne M Olson (eds), *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 57 ('Who Watches the Watchmen?'). The original version of this chapter was published as: Mauro Cappelletti, 'Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility' (1983) 31(1) *American Journal of Comparative Law* 1 <https://doi.org/10.2307/839606>.

6 Susan Bandes, 'Judging, Politics, and Accountability: A Reply to Charles Geyh' (2006) 56(4) *Case Western Reserve Law Review* 947, 947.

7 See 'Scoping the Establishment of a Federal Judicial Commission', *Attorney-General's Department* (Web Page, 2023) <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/>.

8 The whole concept of judicial complaints bodies is significantly understudied. The most significant extant work is Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1.

9 See in particular Parts III(B) and V below.

10 See Part V.

abandon the experiment of judicial commissions, but rather that it may be time to tightly constrain their operation through more effective triage and design.

A A Case Study of How Things May Go Wrong

The potential need for a more circumscribed approach to the use of judicial commissions, and illustration of the potential harms that may be caused by formalising complaints processes, is highlighted by the recent resignation of Justice Lasry of the Supreme Court of Victoria regarding a potential misuse of these complaints processes. In February 2024, Justice Lasry dramatically announced his resignation in open court.[11] His Honour proceeded to tell the courtroom that he had received a letter from the Judicial Commission of Victoria concerning a complaint made against him by the Director of Public Prosecutions ('DPP'), which centred on the Judge's decision to stay a criminal prosecution in March 2023 in the case of *Director of Public Prosecutions (Vic) v Tuteru (Ruling No 3)*.[12] The complaint concerned comments made in court and in a published judgment.[13]

Ultimately, Justice Lasry told the court that while he 'utterly reject[s]' the allegations, he felt he had 'no option but to resign'.[14] The profession was quick to rally behind Justice Lasry.[15] There was, though, no exoneration or condemnation in the case; with his resignation, the complaint investigation ceased. Yet the damage was done. This affair is a signal case study in the potential harm that can occur through the misuse or abuse of judicial complaint processes. The bright light of sunlight that was brought to bear by the Judicial Commission on the conduct of Justice Lasry has had a direct negative impact and it is difficult to see any countervailing accountability benefit.[16]

The complaint against Justice Lasry appeared to go to a core exercise of judicial power; to the question of whether the substance and merits of the primary decision were correct. Such matters should be taboo for executive oversight, yet this investigation proceeded to examine precisely such a space.[17] This affair raised

---

11 As one journalist observed, Justice Lasry walked in and simply stated, 'I will not be able to continue with any further hearings in this case and will soon be resigning from this court': Christine Caulfield, '"And So it Ends": Prominent Judge Quits in Open Court after DPP Complaint', *Lawyerly* (online, 14 February 2024) <https://www.lawyerly.com.au/and-so-it-ends-prominent-judge-quits-in-open-court-after-ddp-complaint/>.

12 (2023) 306 A Crim R 115 (Lasry J). The decision in that case was overturned on appeal: *Director of Public Prosecutions (Vic) v Tuteru* (2023) 105 MVR 125 (Beach, Walker and Taylor JJA). However, the complaint was made prior to the appeal being held, and contained grounds not raised on appeal.

13 'Dismissal of Investigation into Complaint About the Honourable Lex Lasry', *Judicial Commission of Victoria* (Web Page, 4 March 2024) ('Complaint Investigation Outcome') <https://www.judicialcommission.vic.gov.au/statement/content-1/>.

14 Caulfield (n 11).

15 See collation of quotes and materials included in Joe McIntyre, 'What Does the Lasry Resignation Tell Us About Judicial Complaints Commissions?', *AUSPUBLAW* (Blog Post, 26 March 2024) <https://www.auspublaw.org/blog/2024/3/what-does-the-lasry-resignation-tell-us-about-judicial-complaints-commissions?>.

16 For a more detailed discussion of this affair and how it invites reflection on the broader issue of judicial complaints processes, see ibid.

17 Indeed, section 16(3)(b) of the *Judicial Commission of Victoria Act 2016* (Vic) ('*Vic Judicial Commission Act*') requires the dismissal of any application that relates solely to the merits or lawfulness of a decision.

squarely the challenge of delineating the proper degree of oversight of judicial conduct through complaints processes, and the propriety of having an executive body making decisions about the legitimacy and correctness of judicial decisions. While demonstrable accountability is of course critical, it cannot displace the protection of judicial impartiality through structures of judicial independence.

This is not to say that judicial commissions are inherently flawed, or that their use should be resisted. Rather, it highlights that these bodies are not a panacea for the ills of judicial accountability and can potentially cause real institutional harm. This should force us to consider the scope, limit and purpose of these bodies – and how they operate in practice. This is a place where concrete data can be of great help.

B Structure of this Article

This article attempts to provide an assessment of the effectiveness of judicial complaints commissions. It begins, in Part II, by providing a foundation of the theory and practice of disciplining judges both in Australia and the United Kingdom ('UK'), with the aim of providing necessary context to undertake that assessment. It then proceeds, in Part III, to outline existing forms of judicial discipline and accountability in Australia. In Part IV it then examines the recent records of state and territory judicial discipline bodies.

Ultimately, I argue that the evidence of the use of judicial commissions over the last decades shows that, overwhelmingly, these bodies do not deliver in their ambition of providing meaningful accountability of judges. Rather, the evidence highlights that the work of judicial commissions almost exclusively involves the investigation of meritless, inappropriate and unsubstantiated claims. Between 2017 and 2022, across the five Australian jurisdictions with independent complaints authorities, there have been 2,055 formal complaints assessed. Of these, 1,964 (95.6%) have been formally determined, and 1,842 (89.6%) have been dismissed at the earliest stage, without a formal inquiry. In this period, only 54 (2.6%) complaints were referred to the head of jurisdiction ('HoJ') as wholly or partially substantiated and only 10 matters (0.5%) led to a formal investigation.[18] Overwhelmingly, these bodies provide a *mechanism for the receipt of complaints*, and not for the potential disciplining of judges.

This should force us to consider what forms of redesign are needed if these bodies are to live up to their promise. Moreover, as the example of Justice Lasry highlights, there is an unavoidable tension between judicial independence and external mechanisms of accountability that may cause substantive harm to judicial institutions. This suggests that much greater care is needed in the design, and ambition, of these bodies.

Yet on this occasion, the Commission took a narrow reading of that provision and held that '[t]he complaint was not about … the merits or lawfulness of the [d]ecision': 'Complaint Investigation Outcome' (n 13).

18 See Part IV(F) below. This section contains Table 8 which contains the relevant data.

II FOUNDATIONAL CONCEPTS OF JUDICIAL ACCOUNTABILITY AND THE ALLURE OF JUDICIAL COMMISSIONS

These issues are particularly significant right now as the Federal Government grapples with the question of whether to create (and in what form) a new Federal Judicial Commission. In October 2022, Attorney-General Mark Dreyfus announced that the Government would be undertaking an inquiry to consider establishing such a body. In January 2023, his Department published a discussion paper calling for public submissions.[19]

The impetus for the inquiry arose from recommendations made by the Australian Law Reform Commission ('ALRC') in their recent report, '*Without Fear or Favour: Judicial Impartiality and the Law on Bias*'.[20] In that report, the ALRC sets out the main concerns with existing mechanisms (principally, appeals[21] and internal complaints mechanisms)[22] as being issues of apparent bias, workload, informality and lack of permanent structures. The ALRC noted that 'there was very strong support from judges, lawyers, and litigants for the establishment of a federal judicial commission'.[23] Benefits of such a model are said to include increased independence and transparency,[24] and improved accessibility.[25]

However, as I have stated previously, while it is desirable that new forms of support and guidance for courts be developed, we should be reluctant to adopt a process where all paths lead to a Federal Judicial Commission.[26] While the motivation for this process is praiseworthy, a clear-eyed assessment paints a far more complex situation, as it is not immediately clear in what way the existing systems are inadequate or whether the proposed solution will meaningfully identify those concerns.

Before we can turn to the examination of complaints bodies, it is necessary first to highlight two key issues. Firstly, that such bodies are mechanisms of judicial accountability and must operate within the limits and conceptual framework for all

---

19 Attorney-General's Department (Cth), 'Scoping the Establishment of a Federal Judicial Commission: The Merits and Design of a Potential Complaints-Handling Body' (Discussion Paper, January 2023) <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/supporting_documents/discussionpaper.pdf>.

20 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report No 138, December 2021) <https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf> ('*Without Fear or Favour*').

21 Ibid 312–14 [9.34]–[9.36].

22 Ibid 314–17 [9.37]–[9.46].

23 Ibid 320 [9.56].

24 Ibid 325–6 [9.63]–[9.66].

25 Ibid 326–8 [9.67]–[9.74].

26 Joe McIntyre, Submission No 46 to Australian Law Reform Commission, *Review of Judicial Impartiality* (23 July 2021) 25 <https://www.alrc.gov.au/wp-content/uploads/2021/07/46.-Joe-McIntyre.pdf> ('Submission to ALRC Review of Judicial Impartiality').

such mechanisms.[27] Secondly, that there has long been an almost irresistible allure for new accountability mechanisms.[28]

A The Irresistible Allure of Novel Accountability Mechanisms

The attraction of novel modes of judicial accountability is clear: we must maintain public confidence in our courts; we need to demonstrate that our judges are publicly accountable; therefore, we need *new* methods of accountability that reflect contemporary expectations. Writing over 20 years ago, the typically sage James Spigelman observed:

> Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice. *Accountability is something that everyone is 'for' – like democracy or freedom*. As always it is the detail that matters: accountability to whom and for what.[29]

As Spigelman notes, the imperative of accountability is beguiling – accountability *is* something that everyone is for. The challenge in this context, then, is to not let the 'drumbeat of judicial accountability' drown out other judicial values (including judicial independence).[30] Douglas Drummond sounds a careful warning when he advises that this context makes any challenge to accountability appear heretical.[31]

While the accountability imperative is legitimate and necessary, these complexities and challenges cannot be dismissed. Nor should the novelty of new solutions outshine the complexity of countervailing considerations, and the cost and limits of any new mechanism. There are, in this context, no easy solutions. Indeed, as Mauro Cappelletti notes, 'the human problem of judicial responsibility is as old and universal as legal civilization'.[32]

B Judicial Accountability as a Derivative Functional Concept

One of the challenges in understanding 'judicial accountability' is that the term 'accountability' has evolved over time from a simple command-and-control conception, into an 'amorphous concept'[33] that leaves large ambiguities.[34] The term is used in different ways in different contexts. Critically though, 'judicial accountability' cannot be understood in the abstract: its content, standards and processes emerge

---

27 See Part II(A).

28 See Part II(B).

29 JJ Spigelman, 'Judicial Accountability and Performance Indicators' (2002) 21 (January) *Civil Justice Quarterly* 18, 18 (emphasis added).

30 Douglas Drummond, 'Towards a More Compliant Judiciary?: Part I' (2001) 75(5) *Australian Law Journal* 304, 304, quoting David J Saari et al, 'The Modern Court Managers: Who They Are and What They Do in the United States' in Steven W Hays and Cole Blease Graham (eds), *Handbook of Court Administration and Management* (Marcel Dekker, 1993) 151.

31 Drummond (n 30) 304.

32 Cappelletti, 'Who Watches the Watchmen?' (n 5) 60.

33 Ibid.

34 Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1) *Legal Studies* 73, 73 <https://doi.org/10.1111/j.1748-121X.2004.tb00241.x>.

from related aspects of the judicial role. Rather, judicial accountability should be understood as a *derivative functional concept* that operates:

- To promote conformity with the judicial decision-making method; and
- To promote the excellent performance of the judicial function.[35]

As I have previously written, judicial accountability possesses a twofold nature, promoting the judicial function by maintaining both the actuality of, and reputation for, integrity – in essence providing for 'internal' and 'external' elements of accountability.[36]

> Judicial accountability promotes [the objectives of the judicial function] through a combination of 'internal' and 'external' mechanisms. The 'internal' aspect promotes actual judicial integrity, developing in each judge a professional habitus that drives them to a virtuous and habitual compliance with the demands of their office. The 'external' aspect focuses on the appearance of, and confidence in, that institutional integrity. It invites public scrutiny of the judiciary and acts as both a 'deterrent' and a reassurance against deviance. Judicial accountability enlivens the judicial function by motivating judges both to act with authentic integrity and to demonstrate such integrity.[37]

While external mechanisms of accountability may be the most visible, in many regards it is internal mechanisms that are the most functionally significant in terms of their impact on substantive decision-making.[38] As David Pimentel notes, such internalised accountability emboldens the judge to resist the self-interested action, to instead act with commitment to the highest principles of judicial decision-making.[39]

In the context of judicial commissions, this dual aspect – and the alertness as to the potential internal accountability implications – is particularly important. It reminds us of the necessity of fully articulating *how* the processes of such bodies promote judicial integrity and the appearance thereof. That articulation is especially necessitated by the likelihood that the overwhelming majority of complaints will – as discussed below – be unmeritorious, unsubstantiated, irrelevant or vexatious.[40] It is not at all clear that providing an avenue for the non-legitimately disaffected to pursue their complaints will in any way lead to a better internal pursuit of judicial integrity, or the external reputation for such integrity.

Nevertheless, as a general proposition, mechanisms directed at the professional disciplining of judges – such as a judicial complaints commission – are a legitimate and important mechanism of judicial accountability within the broad suite of judicial accountability measures. This form of mechanism falls within the overarching species of accountability for the personal conduct and behaviour of the individual judge,[41] as outlined in the following table:

---

35 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 237–41 <https://doi.org/10.1007/978-981-32-9115-7> ('*Judicial Function*').

36 Ibid 237.

37 Ibid 246 (citations omitted).

38 Ibid 238.

39 David Pimentel, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57(1) *Cleveland State Law Review* 1, 22–3.

40 See below Part IV(F).

41 McIntyre, *Judicial Function* (n 35) 253–5.

Table 1: Species and Mechanisms of Judicial Accountability[42]

	Species of Accountability	**Mechanism of Accountability**
(1)	Personal Conduct and Behaviour of the Individual Judge	Professional Disciplining of Judges
		Civil and Criminal Liability
		Informal Mechanisms and Social Pressures
(2)	Substantive Accountability Performance of the Judicial Role	'Open Justice' – Accountability through Process
		Judicial Reasons – Accountability through Justification
		Judicial Review and Appeal – Consistency, Correctness and Accountability
		Internal Processes – Accountability through Internal Mechanisms
		Criticism and Critique – Testing the Merit of Judicial Determinations
(3)	Institutional Accountability for the Administration and Operation of Courts	Financial and Economic Accountability
		Judicial Management and Performance Standards
		Institutional Reporting Mechanisms

The division in this taxonomy between the mechanism of accountability and the objective of accountability is vital: some forms of accountability, such as the substantive performance of the judicial role and institutional accountability, are collectivised, while others are individualised.

The line is not always easy to draw, and often what may appear to be an individual error – such as being actuated by bias – is properly a collective matter. As the ALRC notes, '[a]ppeals have traditionally been considered the primary corrective mechanism for issues of actual and apprehended bias, and are the primary accountability mechanism in the common law system'.[43] As I have stated previously, appeals

> represent a direct form of 'accountability', actively intervening to promote the quality, acceptability and legitimacy of judicial decisions, minimising both the frequency and consequences of judicial 'error'. This not only ensures functional efficacy, but reassures the public of the integrity and quality of the judicial institution. Additionally, appellate mechanisms can provide an opportunity for senior judges to informally sanction judges for inappropriate and unacceptable conduct.[44]

42 For an overview of these mechanisms of accountability, with relevant references and examples, see ibid ch 14.

43 Australian Law Reform Commission, *Without Fear or Favour* (n 20) 312 [9.34].

44 McIntyre, *Judicial Function* (n 35) 276.

Given this purpose, it is a category error to, for example, seek to achieve any form of substantive accountability through a disciplinary mechanism. Such an error arises from a misunderstanding of the discretionary and evaluative nature of the judicial decision-making process.

Gabrielle Appleby and Suzanne Le Mire, for example, have argued that where a ground of complaint involves a substantive judicial act that involves misconduct (rather than simple error) the appeal process may not be a satisfactory response.[45] They argue that appeals may fail to properly acknowledge misconduct and is unlikely to provide an appropriate sanction.[46] While they recognise that appeals are appropriate in some cases, in other cases

> an appeal is not the answer. Sometimes appeals are not available to the party who has been wronged by the judge's misconduct. Appealing against a decision is expensive and time-consuming. … Where the ground of complaint involves misconduct, it will often be insufficiently dealt with by the appeal process.[47]

A similar critique of the shortcoming of appeals in this context is provided by Shimon Shetreet and Sophie Turenne, who argue that appeals fail to provide 'an official acknowledgement of the misconduct of an identified judge accompanied by a sanction'.[48] For these reasons, Appleby and Le Mire would include within the jurisdiction of a complaints body 'a number of examples of misconduct or misbehaviour that may also be the basis of an appeal where [they] believe the appeal process offers insufficient redress'.[49]

In my view, such an approach is not only misguided as a matter of principle, but is likely to be unconstitutional in an Australian context where the power to deal with judicial matters is to be exercised exclusively by the judiciary.[50] The determination of whether or not circumstances or behaviour create an actual or perceived bias, or any other substantive exercise of judicial power, must remain an exclusive responsibility of the judiciary. To allow a litigant to bypass the appeals process and collaterally challenge a judicial decision *to any degree* through a disciplinary complaints process would import unacceptable threats to impartiality. If there are shortcomings in appeals – such as cost or accessibility – the appropriate response is to confront these head on, and not allow alternative and less regulated pathways.

Judges make evaluative decisions all the time. It is wrong to think that just because two judges disagree on an outcome that one of them must be in 'error'. Instead, such disagreement is the inevitable outcome of the choices inherent in the methodology of judicial decision-making.[51] Appellate structures provide an additional layer of this authoritative decision-making, but this does not mean that other decisions are logically in 'error'. Rather it means that one set of judges

---

45 Appleby and Le Mire (n 8) 7–8.
46 Ibid.
47 Ibid.
48 Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2nd ed, 2013) 13 <https://doi.org/10.1017/CBO9781139005111>.
49 Appleby and Le Mire (n 8) 8.
50 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ).
51 McIntyre, *Judicial Function* (n 35) 152.

disagree with another in the exercise of evaluative choice. For this reason, decisions about substantive merits are collectivised in the judiciary and are not a matter for formal individual accountability.

This has profound implications for the design of judicial commissions and other accountability mechanisms. As the core judicial function involves unavoidable choice, it is properly not the subject of individual professional disciplinary accountability. This does not mean there is no accountability for such measures, but rather that such accountability is collectivised.

C Foundational Concepts in the Professional Disciplining of Judges

As this analysis highlights, the professional disciplining of judges represents a vital and entirely legitimate form of judicial accountability. Such disciplinary processes are a critical part of the multifaceted form of modern judicial accountability and operate to enhance the performance of the judicial function. These mechanisms promote the ends of accountability by motivating the judge by reference to the individual judge's personal interest in maintaining his or her professional position. There is broad consensus regarding the need for some mechanism to terminate the appointment of judges no longer fit for office, even if the empirical evidence suggests that such disciplinary procedures are rarely utilised.[52]

Sanctions directed to the judge's continuing enjoyment of the judicial office can provide a valuable guard against abuse and can promote a genuine and internalised compliance with the demands of method and function.

Even where disciplinary procedures are rarely utilised, these mechanisms may nonetheless be effective and well-adjusted. Actual punishment of deviant behaviour is but one aspect of their operation, together with deterrence,[53] education and reassurance. Indeed, low rates of usage may be evidence of a highly effective accountability mechanism, rather than deficiency. The final assessment of the utility of any given mechanisms of judicial accountability must bear in mind the full range of roles these mechanisms serve. This is as relevant to the assessment of judicial commissions as it is to alternative mechanisms for the professional disciplining of judges.

In understanding any given mechanism of professional accountability, it is necessary to understand the different forms, sanctions and processes they utilise, namely:

1. Ground of discipline: the type of behaviour for which the judge may be held to account;

---

52 For example, Mary Volcansek observes that, in the UK, there have been only 17 attempts in the last 200 years to remove judges on address of both houses of Parliament, and only on one occasion did this attempt succeed: Mary L Volcansek, Maria Elisabetta De Franciscis and Jacqueline Lucienne Lafon, *Judicial Misconduct: A Cross-National Comparison* (University Press of Florida, 1996) 75.

53 As Harris observes, the mere prospect of such accountability procedures 'acts as a deterrent to discourage future courts [and judges] from acting unlawfully': B V Harris, 'Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law Be Tidier?' [2008] (1–4) *New Zealand Law Review* 483, 486.

2. Type of sanction: the form of punishment imposed at the conclusions of a disciplinary procedure; and
3. Procedural form and standard: the procedure and standard utilised to evaluate the conduct.[54]

In assessing the operation of Australia's judicial commissions, it is necessary to carefully reflect on each of these components. Given the countervailing concerns about judicial independence, issues of ground of discipline and the type of sanction available are particularly pertinent in this context.

It is now trite law to state that judicial independence demands a high degree of security of tenure. This has been the case at least since the *Act of Settlement 1701* (UK) made judges independent of the Crown by providing that in the future, judges' commissions would be made during good behaviour.[55] That tenure is protected by a requirement that senior judges can only be removed by an address of both Houses of Parliament.[56] Similar provisions are now contained in all Australian jurisdictions.[57] While the in-depth study of this removal process is beyond the scope of this article, it is important to note that historically, there are only five main categories of behaviour for which judicial officers have traditionally been formally disciplined (or investigated). These include: (1) corruption and abuse of office; (2) criminality; (3) misbehaviour and judicial scandal; (4) incompetence; and (5) incapacity.[58]

Other than incapacity (which has historically been treated in a different manner), such behaviour will only justify removal from office where it involves a sufficient nature and seriousness such that continuance in office would evoke a degree of repugnance. In the UK, this has historically been described as requiring that the allegation of misconduct involves an element of 'moral turpitude' or 'moral delinquency'.[59] Examples of such conduct include actions involving: corruption

---

54 McIntyre, *Judicial Function* (n 35) 255–6.

55 See *Act of Settlement 1701*, 12 & 13 Wm 3 sess 2, c 2, art III, which, as originally enacted, stated: 'That after the said Limitation shall take Effect as aforesaid Judges Commissions be made *Quam diu se bene Gesserint* and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawfull to remove them.'

56 Ibid art III. An Act passed in 1760, (*Commissions and Salaries of Judges Act 1760*, 1 Geo 3, c 23) provided that judges would continue to hold office during good behaviour, notwithstanding the demise of the monarch (at section 1), while reaffirming that a judge could otherwise be removed by an address of both Houses of Parliament (at section 2). That Act also ensured that the salary of all judges would continue to be paid for as long as they hold their commission (at section 3).

57 See *Australian Constitution* s 72; *Judicial Commissions Act 1994* (ACT) s 5(1) ('*ACT Judicial Commissions Act*'); *Constitution Act 1902* (NSW) s 53(2) ('*NSW Constitution Act*'); *Supreme Court Act 1979* (NT) s 40 ('*NT Supreme Court Act*'); *Constitution of Queensland Act 2001* (Qld) s 61(2) ('*Qld Constitution Act*'); *Constitution Act 1934* (SA) s 75 ('*SA Constitution Act*'); *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1 ('*Judges' Independence Act*'); *Constitution Act 1975* (Vic) s 87AAB(1) ('*Vic Constitution Act*'); *Constitution Act 1889* (WA) s 55 ('*WA Constitution Act*').

58 See generally McIntyre, *Judicial Function* (n 35) 255–66.

59 For example, in determining not to progress an inquiry into the conduct of Mr Justice McCardie of the King's Bench Division of the High Court of Justice for a statement reported as having been made during a libel trial, the Prime Minster observed:

> I have come to the conclusion that a discussion on this subject would only add to the harm that has been done in India by the words complained of. However unfortunate the words have been, they clearly *do not constitute the kind of fault amounting to a moral delinquency which constitutionally justifies an Address as proposed.*

or corrupt motives; neglect of duty; partiality; dishonest motives; misconduct in private life; and perversion of justice.[60]

There are a range of other forms of misbehaviour that, while not sufficient as to warrant removal from office, may meaningfully undermine the good administration of justice. In their comprehensive article outlining their case for a federal judicial complaints process, Appleby and Le Mire outline what they see as the six main forms of judicial misbehaviour whilst on the bench:

1. Incivility, rudeness, bullying and offence;[61]
2. Partial and biased conduct;[62]
3. Delay in delivering judgments;[63]
4. Professional misconduct (conduct that would amount to professional misconduct were they still in practice);[64]
5. Administrative misconduct (this has been described as including failing to follow regular procedures for taking vacation, coming to court late, rising from court too early, or failing to attend court at all);[65] and
6. Abuse of judicial power (where power is wielded for private advantage).[66]

Whilst Appleby and Le Mire provide useful examples of each of these forms of misconduct, and make the case that each could be the cause of legitimate *complaint*, what is less clear is the degree to which these could or should be the subject of legitimate *disciplinary action*. For example, a judge who is rude, sharp and unduly forthright in their language may falter achieving the standards of the ideal judge. We can easily imagine a disaffected party complaining to a head of jurisdiction over such matters. But it is hard to conceive of behaviour that is merely rude or uncivil ever supporting – of their own – the justification of formal disciplinary sanctions.

This is one of the great unresolved issues at the core of the operation of judicial complaints processes: to what extent should it be involved in investigating conduct and behaviour that may fall within the forms of misbehaviour described by Appleby and Le Mire, but which fall short of the ground and standards required for removal? Often the relevant legislation of each commission is ambiguous as to this distinction, not least in allowing 'referral to head of jurisdiction' as a terminal remedy.[67] Such a result seems to suggest that an informal sanction is warranted but that nothing in the complaint could result in potential removal. However, this more informal approach continues to sit uneasily with protections of security of tenure.

United Kingdom, *Parliamentary Debates*, House of Commons, 23 June 1924, vol 175, col 7 (Ramsay MacDonald, Prime Minister) (emphasis added) <https://hansard.parliament.uk/Commons/1924-06-23/debates/4779d439-aca5-4ed9-b9c1-16f70531374e/ODwyer-NairCase(MrJusticeMccardie)>.

60 See Shetreet and Turenne (n 48) 340.

61 Appleby and Le Mire (n 8) 13–16.

62 Ibid 17–18.

63 Ibid 18–19.

64 Ibid 19–20.

65 Ibid 20, citing Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland, 1976) 301.

66 Appleby and Le Mire (n 8) 21.

67 See, eg, *Judicial Officers Act 1986* (NSW) s 21(2) ('*NSW Judicial Officers Act*'); *Judicial Conduct Commissioner Act 2015* (SA) s 18; *Vic Judicial Commission Act* (n 17) s 13(4); *ACT Judicial Commissions Act* (n 57) s 35C; *Judicial Commission Act 2020* (NT) s 49 ('*NT Judicial Commission Act*').

This highlights that there remain potentially irresolvable tensions at the heart of all judicial accountability mechanisms – and professional disciplinary sanctions in particular. However, when we understand judicial accountability as a derivative, instrumental concept serving higher order objectives such tension becomes less troubling.

III TRADITIONAL JUDICIAL DISCIPLINARY PROCESSES IN AUSTRALIA

In many respects, the starting point for judicial disciplinary processes is *not* active accountability, but rather secured tenure. In Australia, judicial tenure is protected by a combination of constitutional and statutory provisions. At the federal level, judicial tenure is given constitutional protection by operation of the *Australian Constitution*. This provides that federal judges can only be removed by an address of both Houses of Parliament.[68] There is no statutory or constitutional definition of what constitutes 'proved misbehaviour' or 'incapacity'.

In the case of SA, Western Australia ('WA') and Tasmania, it is simply provided that it is lawful to remove judges of the Supreme Court upon the address of both Houses of Parliament.[69] The grounds of 'proved misbehaviour' or 'incapacity' are expressly specified in NSW,[70] Queensland,[71] Victoria,[72] the NT[73] and the ACT.[74] In no state or territory is there any statutory or constitutional definition of what constitutes 'proved misbehaviour' or 'incapacity', though some states and territories provide some statutory regulation of the process by which removal must take place.[75]

It is against this background that any review of judicial discipline must be considered, as the presumption is that only in the most extreme circumstances will a judge be removed from office.

A Senior Judicial Removals in Australia

Since Federation, there have only been three occasions where a serious attempt has been made to remove a 'senior' judge for proved misbehaviour. On only one of those occasions has such a removal occurred. While removal actions are more common with regards to judicial officers lower down the judicial hierarchy (particularly magistrates and their equivalents), they remain rare.

Perhaps the most infamous instance of judicial misbehaviour in Australia since Federation involved the protracted inquiries into whether Justice Lionel Murphy, a

68 *Australian Constitution* s 72. A standard mechanism for parliamentary consideration of removal of a judge from office under this provision is provided by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

69 *SA Constitution Act* (n 57) s 75; *Judges' Independence Act* (n 57) s 1; *WA Constitution Act* (n 57) s 55.

70 *NSW Constitution Act* (n 57) s 53(2).

71 *Qld Constitution Act* (n 57) s 61(2).

72 *Vic Constitution Act* (n 57) s 87AAB(1).

73 *NT Supreme Court Act* (n 57) s 40.

74 *Judicial Commissions Act 1994* (ACT) (n 57) s 5(1).

75 See, eg, ibid s 5; *Qld Constitution Act* (n 57) s 61.

Justice of the High Court of Australia, should be removed from office. In that case a Senate Select Committee inquiry was convened following release of transcripts of telephone conversations, illegally recorded by police, between a solicitor with links to organised crime (Ryan) and a person believed to be Justice Murphy. During that inquiry, evidence emerged that Justice Murphy had sought to influence the due and ordinary course of justice in relation to committal proceedings against Ryan by exerting pressure on the Chief Stipendiary Magistrate of NSW.[76] The first Senate inquiry was unable to reach a consensus as to what had happened, with the result that a second Senate inquiry was constituted to re-examine the matter. This time, a majority of the Committee concluded that Justice Murphy *had* attempted to influence the course of justice in relation to the proceedings against Ryan and that this amounted to 'misbehaviour' under section 72(ii) of the *Australian Constitution*.[77] Justice Murphy was subsequently convicted in the NSW Supreme Court upon the charge of attempting to pervert the course of justice, though that conviction was subsequently quashed, and a retrial ordered.[78] In April 1986, he was acquitted at the retrial.[79] Nevertheless, the Federal Parliament passed legislation for the setting up of a Parliamentary Commission of Inquiry to examine all outstanding allegations against Justice Murphy and to determine whether there had been 'misbehaviour' on his part that warranted his removal from the High Court. In view of the revelation that Justice Murphy had terminal cancer, the Commission was terminated by an Act of Parliament.[80]

The removal of Justice Angelo Vasta of the Supreme Court of Queensland in 1989 represented the first time, post-federation, that an Australian superior court judge has been removed from office through the Address of Parliament mechanism. His removal by the Queensland Legislative Assembly followed the publication of a report by a Commission of Inquiry established to advise the Parliament, following the earlier Fitzgerald Inquiry. That Inquiry found Justice Vasta had, amongst other conduct, engaged in sham transactions to gain income tax advantages, made false claims for taxation deductions, and facilitated tax evasion.[81] Justice Vasta appeared before the Queensland Parliament to respond to the adverse findings. A seven-hour debate ensued and a motion calling for his removal was carried on the voices.

A third case worth noting were the calls in 1998 for a Parliamentary Inquiry into certain conduct of Justice Callinan of the High Court arising from an adverse finding made by a Federal Court judge. The conduct in question occurred some

76 The relevant Parliamentary papers are available here: 'Records of the Parliamentary Commission of Inquiry', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers/Parliamentary_Commission>. For an accessible overview of the matter see Andrew Lynch, 'The Lionel Murphy Papers Shed More Light on a Controversial Life', *The Conversation* (online, 14 September 2017) <https://theconversation.com/the-lionel-murphy-papers-shed-more-light-on-a-controversial-life-83876>.

77 See Roslyn Atkinson, 'The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis' (Sir Harry Gibbs Law Dinner, Emmanuel College, University of Queensland, 16 May 2008) 3.

78 *R v Murphy* (1985) 4 NSWLR 42 ('*Murphy 1985*').

79 Atkinson (n 77) 8.

80 *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth).

81 Parliamentary Judges Commission of Inquiry, Parliament of Queensland, *First Report of the Parliamentary Judges Commission of Inquiry* (Report, May 1989) 163.

12 years before his judicial appointment. The judge in that case found that Justice Callinan had, in his capacity as a barrister, 'acquiesced' and 'approved' of the delaying tactics adopted by a law firm[82] that amounted to an abuse of process.[83] Following that judgment, the Law Council of Australia called for a Parliamentary Inquiry into Justice Callinan.[84] Those calls were, however, swiftly rejected by Attorney-General Daryl Williams.[85]

B Other Disciplinary Processes

These few instances do not, however, fully paint the picture of judicial removal and discipline in Australia. Historically, many lower tier judicial officers – such as magistrates – did not have the same security of tenure as senior judges and could be dismissed at will. Indeed, the Judicial Commission of NSW was in part created in response to the perceived need for new disciplinary processes following the increased security of tenure for magistrates implemented in reforms in the early 1980s.[86]

Perhaps more significantly, the formal removal process of the Address of Parliament has always been augmented by informal and ad hoc processes. History demonstrates that legitimate complaints are capable of being skilfully and effectively investigated in systems lacking formal judicial commissions. In these ad hoc processes (and in more formal processes) judges will, in many cases, resign following an adverse finding, rather than risk the matter being referred to Parliament.

At the federal level, these investigations are – for the statutory courts – provided for by statute, which provide a legislative basis for heads of jurisdiction to investigate complaints about judicial officers.[87] For example, Judge Joe Harman of the Federal Circuit Court resigned in July 2021 after an ad hoc inquiry found that he had sexually harassed two young women.[88] That inquiry was initiated by the Chief Judge of the Federal Circuit Court after one of the victims sought legal advice. The inquiry was constituted by three former Supreme Court judges and an industrial law barrister.[89]

Such resignations may even occur where a judge is cleared by an investigation. For example, Judge Jonathan Davis, of the Federal Circuit and Family Court of

---

82 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 206–7 (Goldberg J).

83 Ibid 250.

84 Chris Merritt, 'Split over Callinan Moves', *Australian Financial Review* (online, 25 July 1998) <https://www.afr.com/politics/split-over-callinan-moves-19980725-k871b>; 'Right Call on Callinan', *Australian Financial Review* (online, 22 July 1998) <https://www.afr.com/policy/right-call-on-callinan-19980722-k8787>.

85 Daryl R Williams, Attorney-General's Department (Cth), 'Justice Ian Callinan' (Press Release, 26 August 1998), quoted in Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) 85.

86 See the original *Local Courts Act 1982* (NSW) ('*Local Courts Act*') (now repealed); *NSW Judicial Officers Act* (n 67).

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

88 Jacqueline Maley, 'Federal Circuit Court Judge Found to Have Harassed Two Young Women', *Sydney Morning Herald* (online, 7 July 2021) <https://www.smh.com.au/national/federal-circuit-court-judge-found-to-have-harassed-two-young-female-staff-20210707-p587sz.html>.

89 Michael Pelly, 'Judge Resigns over "Sexualised" Conduct', *Australian Financial Review* (online, 8 July 2021) <https://www.afr.com/politics/federal/judge-resigns-over-sexualised-conduct-20210708-p587ve>.

Australia, resigned in 2022 following an investigation into his conduct ordered by Chief Justice William Alstergren.[90] That investigation by an independent solicitor followed an allegation of misconduct made against Judge Davis. Despite the independent report finding there was no evidence to substantiate the allegation, Judge Davis nevertheless resigned despite only being appointed a year earlier.

There are now dedicated complaints policies and procedures in both the Federal Court of Australia,[91] and the Federal Circuit and Family Court of Australia.[92] A range of data on the complaints received by the Federal Circuit and Family Court of Australia is provided in its Annual Reports.

Table 2: Federal Circuit and Family Court of Australia (Division 1) and (Division 2), Complaints by Category, 2021–23[93]

	2021–22			2022–23			Total
	Division 1	*Division 2*	*Annual Total*	*Division 1*	*Division 2*	*Annual Total*	
Legal process and conduct of proceedings	37	84	121	27	86	113	234
Overdue judgment	24	52	76	17	48	65	141
Court Children's Services	2	40	42	6	29	35	77
Registry Services	11	32	43	4	42	46	89
Conduct – Judge	3	16	19	2	12	14	33
Conduct – Registrar	0	7	7	2	17	19	26
Divorce process	–	13	13	–	12	12	25
Other	2	7	9	–	5	5	14
Total	**79**	**251**	**330**	**58**	**251**	**309**	**639**

90 Michael Pelly, 'Federal Judge Quits after Conduct Investigation', *Australian Financial Review* (online, 5 May 2022) <https://www.afr.com/companies/professional-services/federal-judge-quits-after-investigation-20220505-p5aio0>.

91 The Federal Court complaints policies and procedures are available online: 'Judicial Complaints Procedure', *Federal Court of Australia* (Web Page, 3 May 2013) <https://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>.

92 The Federal Circuit and Family Court of Australia complaints policies and procedures are available online: 'Complaints Policy', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/policies-and-procedures/complaints-policy>; Judicial Complaints Procedure', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/policies-and-procedures/judicial-complaints>.

93 Federal Circuit and Family Court of Australia, *Annual Reports 2021–22* (Report, 29 September 2022) 137 <https://www.fcfcoa.gov.au/sites/default/files/2022-10/fcfcoa_annual_report_21-22.pdf> ('*FCFCA 2021–22 Annual Report*'); Federal Circuit and Family Court of Australia, *Annual Reports 2022–23* (Report, 14 September 2023) 129 <https://www.fcfcoa.gov.au/sites/default/files/2023-11/FCFCOA%20Annual%20Report%202022-23.pdf> ('*FCFCA 2022–23 Annual Report*').

As is consistent with the formal complaints processes outlined in Part IV, the largest portion of complaints are with regards to the substantive legal decision-making of judicial officers (234, 37%), which are properly dealt with through existing appeal and review mechanisms.

It is worth noting the prevalence of 'judicial service complaints', being 'complaints about the conduct of judges or delays in the delivery of a judgment'.[94] Between 2021–23, there were 46 judicial services complaints in Division 1 of that Court, from 8,844 applications filed (0.5%) and 2,639 settled judgments delivered (1.7%).[95] Between 2021–23, in Division 2 of that Court there were 128 judicial services complaints, from 200,500 applications filed (0.06%) and 5,817 settled judgments delivered (2.2%).[96]

Of themselves, these figures do not clearly justify the need for, or case against, an independent judicial complaints commission. The rates of complaint are low, but not operationally insignificant. However, these figures do provide a useful baseline in tracking and understanding the impact of any potential commission.

These existing practices and policies are not without their problems. The Australian Bar Association, for example, has suggested that the current federal complaints procedures 'suffer from a lack of transparency, which undermines public confidence in the judiciary'.[97] In particular, it argued that the current procedures are problematic because:

(a) they lack formality and provide too much discretion to the head of jurisdiction;
(b) they may place a head of jurisdiction in an invidious position when dealing with a judge who is also a colleague;
(c) there is uncertainty around how to deal with less serious complaints; and
(d) there is no permanent administration support.[98]

Similar submissions were made by the Law Council of Australia[99] and reflect concerns raised by others. One concern, that resonates as a particularly strong reason justifying a move towards a more formal complaints process, is the heavy burden the current traditional approaches place upon the head of jurisdiction. As Appleby and Heather Roberts note:

> The informality of the traditional process, the limited powers of the chief justice to remedy transgressions, as well as her or his other responsibilities to the court as an institution, have created great difficulties for chief justices wishing to promote accountability of the judicial institution.[100]

---

94 *FCFCA 2021–22 Annual Report* (n 93) 138; *FCFCA 2022–23 Annual Report* (n 93) 129.

95 Ibid.

96 *FCFCA 2021–22 Annual Report* (n 93) 138; *FCFCA 2022–23 Annual Report* (n 93) 130.

97 Australian Bar Association, Submission No 43 to Australian Law Reform Commission, *Review of Judicial Impartiality* (15 July 2021) [17] <https://www.alrc.gov.au/wp-content/uploads/2021/07/43.-Australian-Bar-Association.pdf>.

98 Ibid [16].

99 See Australian Law Reform Commission, *Without Fear or Favour* (n 20) 315.

100 Gabrielle Appleby and Heather Roberts, 'The Chief Justice: Under Relational and Institutional Pressure' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 50, 63 <https://doi.org/10.1017/9781108859332>.

These concerns are legitimate. However, as is illustrated in the following Part, many of these same concerns arise with more formal judicial complaints processes, which continue to rely heavily on the head of jurisdiction, struggle with minor complaints, rely on informal sanctions, and often lack transparency.

IV CONTEMPORARY JUDICIAL COMPLAINTS PROCESSES IN AUSTRALIA: COMMISSIONS, COUNCILS AND COMMISSIONERS

The last decade has seen a rapid expansion of formal judicial complaints processes in several jurisdictions. The first formal judicial complaints handling body, the Judicial Commission of NSW, commenced operation in 1987 as a unique and at times controversial response to a distinct set of concerns.[101] The ACT followed suit in 1994, introducing provision for a Judicial Council.[102] No other bodies were created for over 20 years, until new institutions were created in SA (2016), Victoria (2017) and the NT (2021).

The existence and practices of these various bodies provide a vital set of experiences and track record to inform the design of any potential Federal Judicial Commission, and indeed provide a laser-like focus on some of the difficulties and shortcomings facing *any* new judicial complaints body.

The following section provides an overview of the performance and practices of each of the complaints bodies, before looking at the trends that emerge from that data. The data has been drawn from the Annual Reports of each body, as published on their respective website. So far as possible the presentation of data has been standardised to aid comparison between jurisdictions.

A Judicial Commission of New South Wales

The Judicial Commission of NSW was established by the *Judicial Officers Act 1986* (NSW) in the wake of mounting public concern about the administration of justice generally.[103] Of particular concern was the fact that two prominent members of the judiciary had been tried the preceding year with attempting to pervert the course of justice: High Court Justice Lionel Murphy[104] and former Chief Magistrate Murray Farquhar.[105] Another significant driver was the transition to convert the NSW magistracy into a judicial arm of government, as 'judicial officers' fully

101 For a history of the Judicial Commission of NSW, see Kate Lumley, 'From Controversy to Credibility: 20 Years of the Judicial Commission of New South Wales' (Discussion Paper, Judicial Commission of New South Wales, October 2007) <https://www.judcom.nsw.gov.au/bench-books-resources/selected-articles/controversy-credibility-20-years-judicial-commission-nsw>.

102 See *ACT Judicial Commissions Act* (n 57) pt 2A. The Judicial Council itself was first established in 1997.

103 Lumley (n 101) 1, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1986, 4377 (G Peacocke); J Waterford, 'Reputations of the Actors Diminished by Disputes', *The Sydney Morning Herald* (Sydney, 9 October 1986).

104 See *Murphy 1985* (n 78); *R v Murphy* (1986) 5 NSWLR 18.

105 *R v Farquhar* (New South Wales Court of Criminal Appeal, Hope JA, Lee and Finlay JJ, 29 May 1985).

independent of the executive.[106] Prior to these reforms, magistrates were State public servants, subject to the discipline and tenure requirements of that position.

The introduction of the Judicial Commission was intensely controversial and was initially seen as a direct attack on judicial independence and the separation of powers in NSW.[107] Writing in 1990, then Justice McLelland of the NSW Supreme Court eloquently expressed this concern:

> In the first place, the mere establishment of an official body with the express function of receiving complaints against judges as a first step in an official investigation renders judges vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected. The official quality and institutional trappings of the complaints procedure will almost inevitably ensure that any complaint made to the Judicial Commission will assume a status and significance which it would not otherwise have possessed.[108]

These concerns about the tension between judicial independence and the potential accountability of the complaints process lingered for a long time.[109] The legitimate concern of Justice McLelland about harassment and the elevated status of complaints does not, however, seem to have come to pass – but perhaps not for the reason expected.

Rather than becoming a forum for the serious investigation of substantive complaints, with the mere existence of a complaint exerting a dangerous pressure on judges, the practice has been that the Judicial Commission has been overwhelmed with irrelevant, unsubstantiated and frivolous complaints. The overwhelming majority of complaints are dismissed without reference to the investigation processes of the Conduct Division – indeed these processes have only been used three times in the last six years. Such rarity does not engender the development of expertise. Rather than being a forum for elevating complaints and investigating allegations of misconduct, the record of the complaints process highlights that it has become a mechanism for capturing, and disposing of, frivolous and misguided complaints. Table 3 provides an overview of the complaints process in NSW in the five years from 2017 to 2022.[110]

---

106 This transition commenced with the *Local Courts Act* (n 86), which abolished the Courts of Petty Sessions, and was finalised with the *NSW Judicial Officers Act* (n 67) which defined 'judicial officer' to include a magistrate: at s 3(f).

107 Lumley (n 101) 1.

108 Justice M H McLelland, 'Disciplining Australian Judges' (1990) 64(7) *Australian Law Journal* 388, 390.

109 See Ivan Potas, 'The Judicial Commission of NSW: Treading a Fine Line Between Judicial Independence and Judicial Accountability' (2001) 18(1) *Law in Context* 102.

110 By way of context, in 2021–22 there were 397 judicial officers in NSW who collectively heard around 355,000 court matters: Judicial Commission of New South Wales, *Annual Report 2021–2022* (Report, 2 November 2022) 49 <https://www.judcom.nsw.gov.au/annual-report-2021-2022/> ('*Judicial Commission of NSW 2021–22 Annual Report*').

Table 3: Overview of Complaints in NSW[111]

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Complaints Made							
Number of Complaints	74	63	57	57	43	96	390
Determinations							
Summary/Early Dismissal	55	66	45	72	39	71	348
Referred to HoJ (Wholly or Partially Substantiated)	5	1	3	0	2	3	14
Investigation/ Referred to Conduct Division	2	1	0	0	0	0	3
Withdrawn	3	1	1	0	0	1	6
Total Determinations	**65**	**69**	**49**	**72**	**41**	**75**	**371**
Percentage of Determinations Summarily Dismissed	89%	97%	94%	100%	95%	96%	95%

In this period, of the 390 complaint determinations made, only 14 matters were wholly or partially substantiated (3.6%), and only three matters were referred to the Conduct Division for investigation (0.8%). These figures are consistent with the long-term trends of the Judicial Commission; in 2007 it was noted that in the first two decades of the Commission's operation, the Conduct Division had only been constituted 14 times.[112]

It should be noted that even though complaints do not lead to discipline in the traditional sense, the use of the complaints process to draw attention to substantiated minor concerns can provide an opportunity for beneficial judicial education. In 2007, the Chief Judge of the District Court, Justice Blanch, observed that the referral of substantiated minor matters to the head of jurisdiction has 'enabled the head of jurisdiction to counsel and assist judges and magistrates in circumstances where otherwise the head of jurisdiction would not have been aware of a problem'.[113]

111 All data in this section is drawn from the Annual Reports of the Judicial Commission of New South Wales: 'Annual Reports', *Judicial Commission of New South Wales* (Web Page) <https://www.judcom.nsw.gov.au/annual-reports>.

112 Lumley (n 101) 4.

113 Ibid 5.

These processes have the capacity to enhance internal accountability of judges by assisting them in achieving the excellent performance of their role by providing an opportunity for guidance and support from the head of jurisdiction. Ultimately, however, such informal processes have always been seen as a part of the role of the head of jurisdiction.

The data from the last six years is also useful in showing the type of allegation that is made:[114]

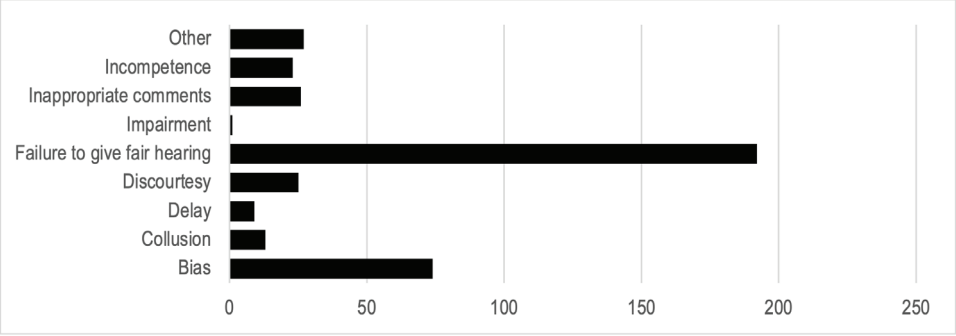

Figure 1: Total common causes of complaint 2017–23.

On their face, these common causes of complaint represent the type of matter that should be of concern to a judiciary seeking to maintain public confidence and social legitimacy. However, it should be noted that these allegations are largely directed to the *manner* of judicial performance, and even if substantiated could not constitute the type of misconduct or misbehaviour sufficient for judicial removal.

Further, no matter how they are initially framed, the majority of all complaints are effectively about the substantive performance of the judicial officer. During the relevant period, 143 matters (41%) were dismissed on the grounds that the complaint related to the exercise of the judicial function, while 167 (48%) were dismissed on the basis that further consideration would be unnecessary or unjustified.[115]

In the majority of cases, the complaints process is effectively operating as an attempted substitution for appeal, with the complainant attempting to re-agitate the primary dispute through an allegation that the judge fell into substantive error. In its *2021–22 Annual Report*, the Judicial Commission noted:

114 See Appendix Table 9.
115 See Appendix Table 10.

> A complaint is often made that a judicial officer made a wrong decision. … Twenty-one (54%) of the 39 dismissed complaints were done so on the basis that the complaint related to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights. A court of appeal is the appropriate avenue for determining whether the judicial officer made an error of law or fact or if there was a miscarriage of justice.[116]

This trend, of complainants misusing complaints processes in an attempt to relitigate substantive matters, is a dominant theme in the review of the practices of all judicial complaints processes. Despite the clear exclusion of these matters from the jurisdiction of the complaints body, complainants overwhelmingly seek to use this (deliberately) accessible and available forum to agitate their most pressing concern – that, for one reason or another, they (in their mind unfairly) lost.

This misuse of the complaints process is no doubt compounded by another growing trend that emerges from the record of the Commission: the overrepresentation of self-represented litigants. In its most recent report, the Judicial Commission noted 'the high proportion of complaints that self-represented people make. This year, the trend increased with 30 self-represented litigants (out of 43 complaints) making 70% of all complaints (last year: 49%)'.[117]

These two trends – that the majority of complainants are using the processes as a substitution for appeal, and the overrepresentation of self-represented litigants in making complaints – should be at the forefront of any design process for all new judicial complaint mechanisms.

B Judicial Council of the Australian Capital Territory

The second formal judicial complaints body, and the last of the first generation, was the ACT Judicial Commission, introduced by the *Judicial Commissions Act 1994* (ACT). In 2015, the governing Act was amended to introduce a Judicial Council to provide a more streamlined and efficient complaints process.[118] That new Judicial Council was established in February 2017.

Though a much smaller jurisdiction, with an order of magnitude fewer complaints, the trends in the ACT in the last five years are consistent with those of NSW. In this period, 43 of 47 matters (91%) determined by the Judicial Council were dismissed, with only four matters referred to the head of jurisdiction as wholly or partially substantiated.

116 *Judicial Commission of NSW 2021–22 Annual Report* (n 110) 52.
117 Ibid.
118 *Judicial Commissions Amendment Act 2015* (ACT).

Table 4: Overview of Complaints in ACT[119]

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Complaints Made							
Number of Complaints	12	12	8	7	6	11	56
Initial Determination							
Summary/Early Dismissal	11	7	6	4	7	8	43
Withdrawn	–	–	–	–	0	2	2
Referred to HoJ (Wholly or Partially Substantiated)	1	2	1	0	0	0	4
Total Determinations	**12**	**9**	**7**	**4**	**7**	**10**	**49**
Percentage of Determinations Summarily Dismissed	92%	78%	86%	100%	100%	100%	91%

While the Judicial Council does not provide direct figures on the basis of allegation, or the grounds for dismissing complaints, it did note that: 'Complaints included allegations of bias, failure to give a fair hearing, discourtesy, incorrect application of the law, bullying, and intimidation. Complaints also included allegations of incorrect decisions'.[120]

These forms of complaints are consistent with the themes identified in NSW. Likewise, the Judicial Council noted that most complaints were received from self-represented litigants facing difficulties navigating court processes: 11 of the 12 complaints received in 2017–18 were made by self-represented litigants, as were all complaints in 2021–22.

In the *2021–22 Annual Report*, the Council also notes the value of managing the enquiry process as a way of providing efficient early triage of potential complaints. The Council noted that:

> Several enquiries related to possible complaints where the person was seeking more information about the process, before deciding not to proceed. Most enquiries related to complaints about aspects of the court process that the Council has no jurisdiction to consider.[121]

119 All data in this section is drawn from the Annual Reports of the ACT Judicial Council: 'Annual Report', *ACT Judicial Council* (Web Page) <https://www.actjudicialcouncil.org.au/annual-report>.

120 ACT Judicial Council, *Annual Report 2021–22* (Report, October 2022) <https://www.actjudicialcouncil.org.au/annual-report/act-judicial-council-annual-report-2021-22/ACT-Judicial-Council-Annual-Report-2021-22.pdf>.

121 Ibid.

It seems clear that careful provision of information through this process is allowing the diversion of concerns that may otherwise have become formal complaints. While the NSW figures do note the number of enquiries (2,142 in the period) it is not clear whether this is being used to triage concerns in the same manner.

C Judicial Conduct Commissioner of South Australia

South Australia introduced a formal judicial complaints process in 2016 with the appointment of its first Judicial Conduct Commissioner, the Hon Bruce Lander QC, appointed under the *Judicial Conduct Commissioner Act 2015* (SA). The Commissioner's function is to receive and deal with complaints about the conduct of judicial officers.

The SA Judicial Conduct Commissioner was the first of the second generation of judicial complaint bodies in Australia, and it retains many distinctive features. Firstly, in contrast to all other bodies, the reforms created an independent statutory office, rather than the more common body constituted by ex officio officers. Secondly, creation of the Office of Judicial Conduct Commissioner was part of a broader suite of reforms to provide better accountability of public officials, including the Independent Commission Against Corruption ('ICAC'),[122] and the Office for Public Integrity,[123] both in 2012. For the first five years, the Judicial Conduct Commissioner also held the Office of ICAC Commissioner. Following significant changes to the *Independent Commissioner Against Corruption Act 2012* (SA) in 2021,[124] then Judicial Conduct Commissioner Vanstone resigned from that post to allow the two statutory officers to be occupied by different persons.[125]

Despite the significant differences in the structure of the SA judicial complaints body, the overall statistics of complaints in the first five years are strikingly consistent with other jurisdictions, as evident in the table below:

122 Introduced by the *Independent Commissioner Against Corruption Act 2012* (SA) ('*ICAC Act 2012*'), as amended by the *Independent Commission Against Corruption Act 2012* (SA). See generally 'The Independent Commission Against Corruption', *Independent Commission Against Corruption South Australia* (Web Page) <https://www.icac.sa.gov.au/>.

123 Introduced by the *ICAC Act 2012* (n 122) pt 3. Responsibilities are outlined in the *ICAC Act 2012* (n 122), the *Police Complaints and Discipline Act 2016* (SA) and the *Public Interest Disclosure Act 2018* (SA). See generally 'We Are the Office for Public Integrity', *Office for Public Integrity South Australia* (Web Page) <https://www.publicintegrity.sa.gov.au/>.

124 *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA).

125 Stephanie Richards, 'ICAC Changes: Acting Integrity Chief and Judicial Conduct Commissioner Named', *InDaily* (online, 7 October 2021) <https://indaily.com.au/news/2021/10/07/icac-changes-acting-integrity-chief-and-judicial-conduct-commissioner-named/>.

Table 5: Overview of Complaints in SA[126]

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Complaints Made							
Number of Complaints	27	40	60	62	79	56	324
Initial Determination							
Summary/Early Dismissal	25	30	60	59	79	49	302
Referred to HoJ (Wholly or Partially Substantiated)	2	1	6	1	0	0	10
Investigation/Judicial Conduct Panel	0	0	0	1	0	0	1
Referred to Parliament	0	0	0	0	0	0	0
Total Determinations	**27**	**31**	**66**	**61**	**79**	**49**	**313**
Percentage of Determinations Summarily Dismissed	93%	97%	91%	97%	100%	100%	96%

The most significant complaint in this period was that made against then Magistrate Simon Milazzo concerning allegations of sexual harassment. Following a decision of the Judicial Conduct Commissioner in mid-2021 to recommend the Attorney-General to appoint a judicial conduct panel, a panel was duly constituted and began an investigation. In November 2021, the magistrate initiated judicial review proceedings in an attempt to halt that investigation. In May 2022, the SA Court of Appeal dismissed the application.[127] In November 2022, the Judicial Conduct Panel tendered their report recommending the magistrate be removed from office.[128] This recommendation was accepted and, in November 2022, a decision was made by the Governor[129] to remove the magistrate from office.[130] This

126 All data in this section is drawn from the Annual Reports of the SA Judicial Conduct Commissioner: 'Publications', *Judicial Conduct Commissioner* (Web Page) <https://www.jcc.sa.gov.au/publications>.

127 *A Judicial Officer v Judicial Conduct Commissioner* [2022] SASCA 42.

128 Judicial Conduct Panel (SA), *Report of the Panel to the Honourable the Attorney-General Pursuant to Section 25 of the Act* (Report, 27 October 2022).

129 Acting pursuant to section 26 of the *Judicial Conduct Commissioner Act 2015* (SA) and section 9(e) of the *Magistrates Act 1983* (SA).

130 The formal removal was publicised in the South Australian Government Gazette: South Australia, *South Australian Government Gazette*, No 80, 17 November 2022, 6682. <https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2022/November/2022_080.docx>. See also Eugene Boisvert and Patrick Martin, 'South Australian Magistrate Simon Milazzo Removed from Office over Sexual

remains the only instance, in the last six years, in which an Australian judicial officer was removed from office.[131]

This issue of sexual harassment increasingly appears to be the one issue of substance where the formal judicial complaints mechanism does seem to be distinguishing itself in contrast to the more traditional, informal methods. This is a theme that emerges for a number of the bodies[132] and is a matter that demands consideration in the design of all new bodies.

This issue aside, the basis of allegation for complaints made to the SA Judicial Conduct Commissioner are remarkably similar to those of other jurisdictions, with the largest issue of concern being the substantive merit of judicial decisions:[133]

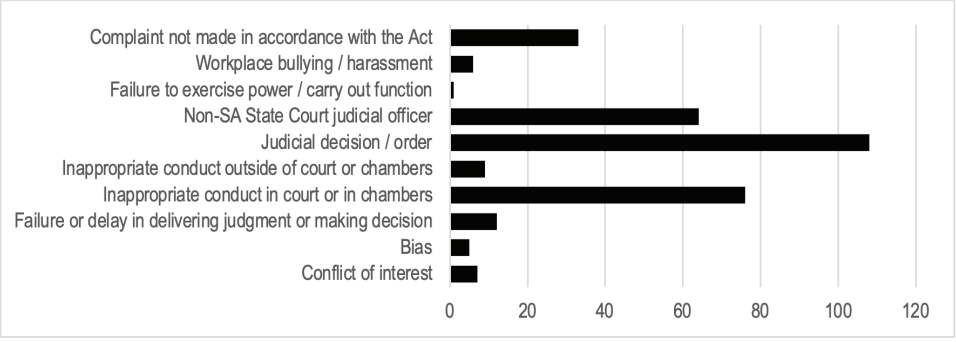

Figure 2: Total common causes of complaint 2017–23.

This problem – that most of the complaints related to judicial decisions, and are therefore not within the Commissioner's jurisdiction – is one recognised as of concern by the Commissioner himself. In his *2021–22 Annual Report*, he observed:

> The role of the Judicial Conduct Commissioner continues to be misunderstood. The majority of matters that were received were in the form of a request for a review of a judicial decision. This is not within the Judicial Conduct Commissioner's jurisdiction. … Many complainants did not understand the distinction between the conduct of a judicial officer and his or her judicial decisions and had mistakenly viewed the role of the Judicial Conduct Commissioner as that of an appeal court.[134]

Harassment', *ABC News* (online, 17 November 2022) <https://www.abc.net.au/news/2022-11-17/sa-magistrate-removed-from-office-over-sexual-harassment/101666950>.

131 It was reported in early 2023 that the Judicial Conduct Commissioner was currently investigating a SA judge for sexual harassment: Meagan Dillon, 'Judicial Conduct Commissioner Investigates SA Judge over Alleged Sexual Harassment', *ABC News* (online, 18 January 2023) <https://www.abc.net.au/news/2023-01-18/sa-judge-investigated-for-alleged-sexual-harassment/101866338>. No further information is available about this investigation.

132 For example, in response to concerns regarding sexual harassment, in 2022 the Judicial Commission of Victoria published the 'Judicial Conduct Guideline: Sexual Harassment', *Judicial Commission of Victoria* (Web Page, 22 February 2022) <https://www.judicialcommission.vic.gov.au/guideline/sexual-harassment/>.

133 See Appendix Table 11.

134 Judicial Conduct Commissioner (SA), *Annual Report 2021–22* (Report, 30 September 2022) 19 <https://www.jcc.sa.gov.au/documents/JCC-Annual-Report-2021-22.pdf>.

Despite the Commissioner now operating for six years (allowing significant time for socialisation of these limits), and with clear instructions on the website, this issue does not seem to be abating. Indeed, the clear trend is towards this issue coming to dominate all complaints.

Another issue that is worth noting is the significant number of complaints about non-SA judicial officers, in respect of whom the Commissioner has no jurisdiction. This is likely to be caused by members of the public not differentiating between SA judicial officers and federal judicial officers situated in SA. This issue is likely to arise in reverse should a Federal Judicial Commission be established, with a significant number of complaints likely to concern the conduct of state and territory judicial officers.

Finally, it is worth noting that despite the presence of the Office of Judicial Conduct Commissioner, the most serious complaints – those of a criminal nature – continue to bypass the statutory complaints process to be dealt with directly by the criminal justice system.

A useful illustration is provided in the case of former magistrate Robert Harrap, who was convicted of offences of deception and conspiracy to commit abuse of public office. The matter began with an ICAC investigation, which was subsequently referred to the DPP. The first charges related to Mr Harrap's conduct in convincing his de facto partner and his clerk to permit him to nominate them as the driver for driving offences committed by him. The second matter related to arrangements Mr Harrap made with a former romantic partner, also a solicitor, to improperly have an appeal listed before him. On pleading guilty, Mr Harrap was sentenced to 18 months' imprisonment,[135] increased to 21 months on appeal.[136] The decision of the Court of Appeal in that case provides a useful overview of the principles of particular relevance and concern in the criminal sentencing of judicial officers.

This case vividly illustrates that a formal judicial complaints process will only ever constitute one part of the broader suite of judicial discipline and accountability mechanisms. Despite the presence of the formal judicial conduct process, the alternate corruption and criminal justice routes were prioritised.

D Judicial Commission of Victoria

The busiest of all the formal judicial complaints body is the Judicial Commission of Victoria, established in 2017 to investigate complaints about judicial officers and members of the Victorian Civil and Administrative Tribunal ('VCAT').[137] In the first five years of operation, the Judicial Commission of Victoria received 1,250 complaints, which was 61% of the total received nationally.[138] This is likely to be a function of the novelty of the process in Victoria; the latest two reporting

135 Transcript of Proceedings, *R v Harrap* (District Court of South Australia, Slattery J, 4 December 2020) <https://www.icac.sa.gov.au/__data/assets/pdf_file/0018/370620/Sentencing_Remarks-Judge_Slattery-Robert_Harrap-4Dec2020.pdf>.

136 *R v Harrap* (2021) 138 SASR 569, 602 [142] (Lovell JA, Livesey JA agreeing at 603 [146]).

137 The Judicial Commission of Victoria was created by operation of *Vic Judicial Commission Act* (n 17), amending the *Vic Constitution Act* (n 57).

138 See Appendix Table 15 for cumulative national figures.

periods saw, respectively, 42% and 58% fewer total complaints compared to the first reporting period. This significantly larger workload means that the complaints processes of the Judicial Commission of Victoria require the largest staffing (10.5 full-time staff equivalent) and the largest budget of any formal complaints process in Australia ($2.658 million in 2021–22).[139] By contrast the complaints budget of the Judicial Commission of NSW was only $0.4 million in 2021–22.[140]

Despite this significant caseload, the Judicial Commission of Victoria has proved highly efficient at processing complaints, with rates of dismissal, referral to heads of jurisdiction and referral to investigation broadly in line with other jurisdictions.

Table 6: Overview of Complaints in Victoria[141]

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Complaints Made							
Number of Complaints and Referrals	264	249	252	214	163	136	1253
Initial Determination							
Summary/Early Dismissal	182	251	196	233	164	104	1130
Referred to HoJ (Wholly or Partially Substantiated)	2	5	3	2	7	5	24
Referred to Investigation Panel	2	1	0	1	0	2	6
Withdrawn	6	12	4	18	9	1	50
Total Determinations	**192**	**269**	**203**	**254**	**180**	**112**	**1210**
Percentage of Determinations Summarily Dismissed	98%	98%	98%	99%	96%	94%	97%

139 Judicial Commission of Victoria, *Annual Report 2021–22* (Report, November 2022) <http://assets.judicialcommission.vic.gov.au/2024-06/Judicial%20Commission%20of%20Victoria%20-%20Annual%20Report%202021-22.pdf> 63, 91 (‘*Vic Judicial Commission Annual Report 2021–22*’).

140 Note that the Judicial Commission of NSW had a total expenditure of $6.414 million in 2021–22 for the total work of the Commission, including education and other functions: *Judicial Commission of NSW 2021–22 Annual Report* (n 110) 96.

141 All data in this section is drawn from the Annual Reports of the Judicial Commission of Victoria: ‘Annual Reports’, *Judicial Commission of Victoria* (Web Page) <https://www.judicialcommission.vic.gov.au/annual-reports/>.

During this period only 24 matters (2%) were referred to the head of jurisdiction, and only six complaints (0.5%) were refered to an Investigation Panel. Of all allegations investigated by an Investigation Panel, only one matter was wholly or partially substantiated. That matter was finalised by a referral to the head of jurisdiction. Of those matters dismissed by an Investigation Panel, in four cases the judicial officer had resigned or was no longer in office (in 2018–19 and 2022–23), in two cases the allegation could not be substantiated (both in 2020–21), and in one case it was decided that further investigation was unnecessary or unjustified (2019–20).

As with other jurisdictions, the largest cause of complaint is an allegation of error in the merits or lawfulness of the decision, arising in 516 of the 1,140 complaints (45%). As with the next most common causes of complaint, failure to give a fair hearing (342, 30%) and bias (199, 17%), this issue is one of substantive/procedural merit that is properly agitated through appeal/judicial review mechanisms. Judicial discipline bodies are rightfully excluded from ever engaging in the review of such allegations.

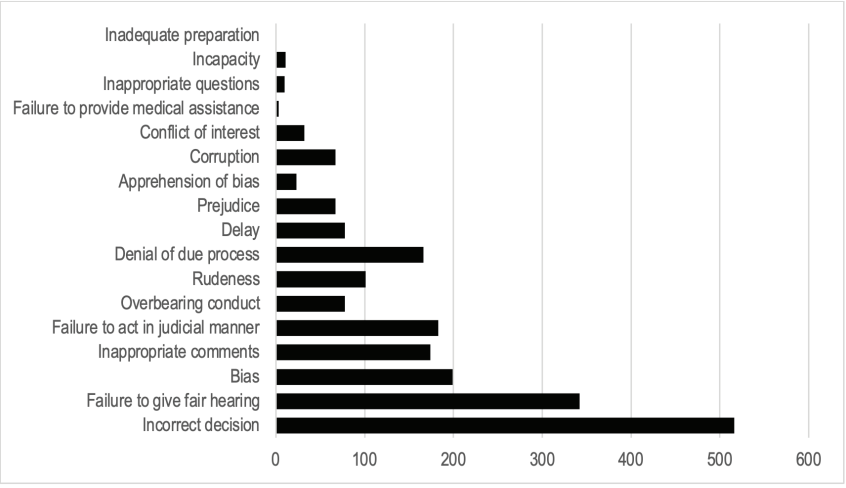

Figure 3: Total common causes of complaint 2017–22.

As with the dominant forms of allegations present in other jurisdictions, even if substantiated, the majority of allegations would not suffice to justify formal disciplinary actions – such as removal from office – being imposed upon the judicial officer. As evidenced by the criteria for dismissing complaints, set out in Appendix Table 13 below, most matters are dismissed without raising any serious question about the conduct of the judicial officer:

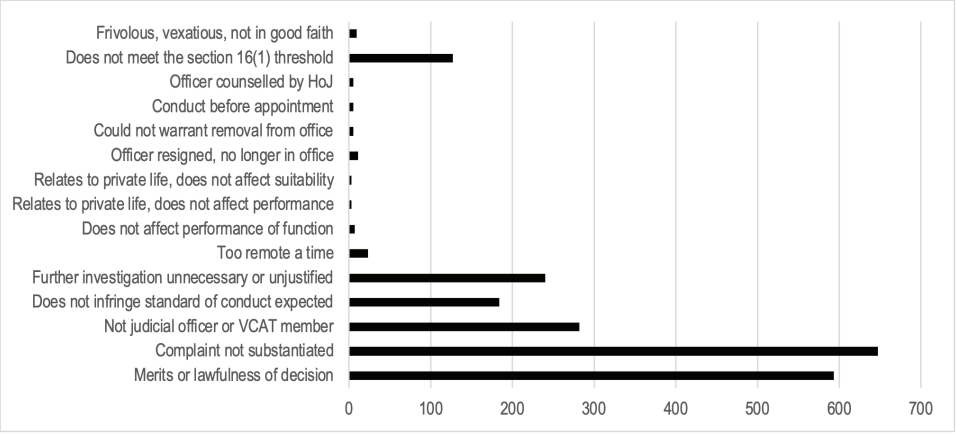

Figure 4: Criteria for dismissing complaints in Victoria.

In addition to the dismissal of a complaint concerning the merits or lawfulness of the decision (593 of 1160, 51%), a large number of allegations could not be substantiated (647, 56%) or did not infringe the standard of conduct expected (184, 16%). As with SA, a very significant number of matters concerned allegations made against a person who was not a judicial officer of Victoria or a VCAT member (282, 24%).

It is worth noting that some complaints are dismissed on multiple grounds, and there appears to be changing conventions between different years as to which particular ground is relied upon or recorded in a given year. This suggests that there is little value in being too prescriptive in setting out the grounds of dismissal, as the overwhelming majority of complaints and allegations are trivial or minor and could be properly dismissed on any number of grounds.

E Northern Territory Judicial Commission

The most recent complaints body is the NT Judicial Commission, which was established in 2021.[142] In its first year of operation, the Commission received 22 enquiries and 12 complaints, as outlined in the table below.

142 See *NT Judicial Commission Act* (n 67).

Table 7: Overview of Complaints[143]

	2021–22	2022–23	Total
Complaints			
Number of Complaints	12	20	32
Initial Determination			
Summary/Early Dismissal	5	14	19
Referred to HoJ (Wholly or Partially Substantiated)	1	1	2
Investigation	–	–	–
Total Determinations	**6**	**15**	**21**
Percentage of Determinations Summarily Dismissed	83%	93%	90%

There is no published data on the nature of the allegations dismissed, though the *2021–22 Annual Report* notes that the most common reasons for dismissal include that the matter should be dealt with through judicial processes (5, 25%) or that in the circumstances further consideration is unnecessary or unjustifiable (12, 60%).[144] The complaints substantiated and referred to a head of jurisdiction were both about unreasonable delay in the delivery of a judgment.

F Analysing the Operation of Formal Complaints Bodies

Taken as a whole, the experience of the five formal judicial complaints bodies in Australia over the last five years paint a very clear and consistent picture as to the work and limits of these bodies. In this period, these bodies have received 2,055 complaints and have made 1,964 determinations. The overwhelming majority (1,842, 89.6%) of all complaints are dismissed at the earliest possible stage, and only 54 (2.7%) matters have been referred to the head of jurisdiction as wholly or partially substantiated. In this period, only 10 (0.5%) matters were found to be sufficiently concerning so as to justify referral to formal investigation. During this period there is remarkable consistency across the jurisdictions, with a greater percentage of non-meritorious complaints the more total disputes there are, and an extraordinarily low occurrence of referrals to investigation panels:

143 All data in this section is drawn from the Annual Reports of the Northern Territory Judicial Commission: 'Resources', *Northern Territory Judicial Commission* (Web Page, 25 October 2024) <https://judicialcommission.nt.gov.au/publications/resources>.

144 Northern Territory Judicial Commission, *Annual Report 2021–2022* (Report, 30 September 2022) 8 <https://judicialcommission.nt.gov.au/__data/assets/pdf_file/0005/1170077/Judicial-Commission-Annual-Report-2021-22.pdf>.

Table 8: Cumulative Figures for All Australian Judicial Commissions by Jurisdiction

	NSW	SA	Victoria	ACT	NT	Total
Complaints Made						
Number of Complaints	390	324	1253	56	32	2055
Determinations						
Summary/Early Dismissal	348	302	1130	43	19	1842
Referred to HoJ (Wholly or Partially Substantiated)	14	10	24	4	2	54
Investigation/Referred to Conduct Division	3	1	6	0	0	10
Withdrawn	6	0	50	2	0	58
Total Determinations	**371**	**313**	**1210**	**49**	**21**	**1964**
Percentage of Determinations Summarily Dismissed	95%	96%	97%	91%	90%	97%

During this period, only a single judicial officer, Magistrate Milazzo in SA, was removed from office following an investigation against them. In addition, two judicial officers, Magistrate Burns[145] and Judge Maiden[146] – both in NSW – resigned after the Conduct Division formed the opinion that the complaint justified Parliamentary consideration of their removal from office.[147] On three other occasions a judicial officer resigned during an investigation, with the result that the investigation ceased dealing with the matter. No inference can be drawn as to whether the allegation would ultimately have been substantiated in those cases.

The data paints an irresistible picture; overwhelmingly, the role of judicial complaints bodies is *not to investigate substantial allegations* of judicial misconduct or misbehaviour, but to *provide a forum for disaffected litigants to make irrelevant or unsubstantiated allegations* against judicial officers:

145 Judicial Commission of New South Wales Conduct Division, *Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in Relation to Magistrate Dominique Burns* (Report, 21 December 2018) <https://www.parliament.nsw.gov.au/tp/files/75292/Judicial%20Commission%20of%20NSW%20Conduct%20Division%20-%20Magistrate%20Dominique%20Burns.pdf>.

146 Judicial Commission of New South Wales Conduct Division, *Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in Relation to Judge Peter Maiden SC* (Report, 26 March 2019) <https://www.parliament.nsw.gov.au/tp/files/75752/Report%20of%20an%20in%20relation%20to%20Judge%20Peter%20Maiden%20SC%20-%20dated%2026%20March%202019.pdf>.

147 See *Judicial Commission of NSW 2021–22 Annual Report* (n 110) 52.

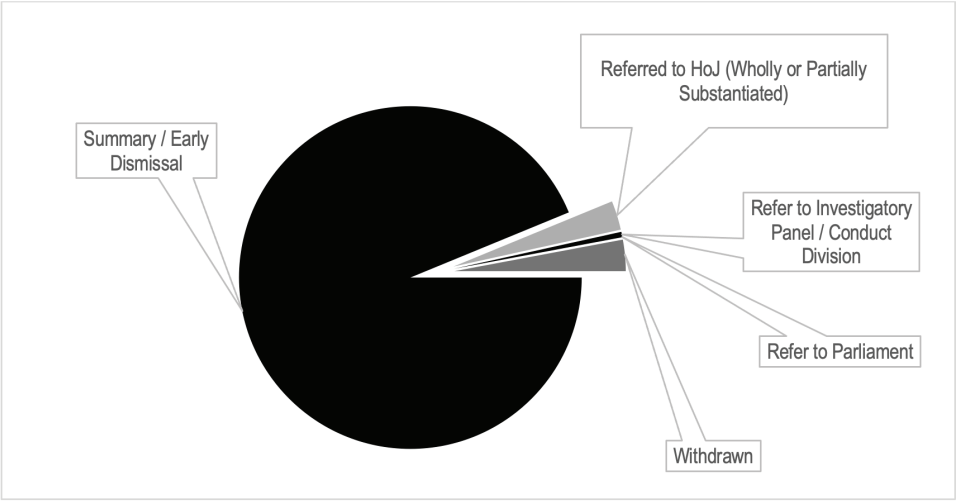

Figure 5: Cumulative forms of dismissal for all Australian judicial commissions/councils/commissioners.

This is not to suggest that all complaints are meritless. Rather, the evidence suggests that the *existence* of the complaints handling process itself *generates* complaints, by providing an accessible and available procedure for concerns that might otherwise have not been acted upon. The majority of the complaints generated are not of the nature or intensity as to warrant any further action and in many cases operate as a substitute to allow litigants to express dissatisfaction with the merits of a decision.

Genuine matters of serious concern continue to be identified and appropriately dealt with; however, these matters remain rare. This raises a number of issues:

1. Firstly, the rarity of investigations means that there is limited capacity for the development of expertise or experience in conducting these investigations. In this regard, the investigations largely mirror the ad hoc nature of the existing investigation processes that rely upon the inherent powers of the court.
2. The effectively ad hoc nature of investigations, and the heavy reliance of referrals to heads of jurisdiction for substantiated minor matters, are almost indistinguishable from existing non-statutory processes. Given that many of the rationales for a public complaints procedure cite the advantages of openness and transparency that comes with such a system, this convergence undermines a core justification.
3. Significant resources are being deployed to investigate complaints that have no real reasonable prospects of advancing further in such a way as to enhance either the external or internal accountability of judges. In a tight fiscal environment, this is problematic.

In addition to these concerns arising from the rarity of substantive complaints is the harm that can arise from the systematic investigation of meritless complaints. The existence of the complaints process is potentially detrimental to the interests of

the complainant, undermining their ability to accept the judicial decision and come to terms with the resolution of the underlying dispute.[148] By seeking to prolong the matter by agitating a complaint against the judge, the unsuccessful litigant – whose principal concern is the merits of the resolution – is delayed in accepting the finality of the decision.

Finally, it is worth noting a number of issues that arise from the data that should be considered in the design process of any proposed new body:

1. Complaints about judicial officers from other jurisdictions: many of the bodies noted that a significant number of complaints were made with respect to judicial officers of other jurisdictions. This issue arose 64 times (20% of complaints) in SA, and 282 times (27% of complaints) in Victoria;[149]
2. Overrepresentation of self-represented litigants: a trend that has been noted in a number of jurisdictions is the increasing frequency of complaints being made by self-represented litigants, coinciding with a misuse of the complaints process as a substitution for appeal;
3. Substitution for appeal: across all jurisdictions, the complaints process is effectively being subverted by complainants as an attempted substitution for appeal. In these cases, the complainant attempts to reagitate the primary dispute through an allegation that the judge fell into substantive error;
4. The complaints process is only a partial answer: the continued significance of informal mechanisms, and the prevalence of resignations highlight that formal judicial complaints processes will only ever constitute one part of the broader suite of judicial discipline and accountability mechanisms (including corruption and criminal justice mechanisms);
5. Resignations are a significant factor: resignations in the context of complaints and investigations remain a significant factor in the operation of all schemes. Given that resignation terminates the process, the effect of such resignations means that the benefits of openness and transparency are often – in the most serious cases – unrealised; and
6. Formal processes are particularly important for sexual harassment and assault matters: the issue of sexual harassment increasingly appears to be the one issue of substance where the formal judicial complaints mechanism does seem to be distinguishing itself in contrast to the more traditional, informal methods. In this context, the ability to break down barriers to investigation offered through these mechanisms appears to be a major structural boon.

Ultimately, none of these matters – nor the underlying data itself – is sufficient to argue either for or against the creation of a new complaints body. However, these factors should be borne in mind in that design process, allowing effective triage and deployment of resources, and potentially supporting the adoption of a broader set of objectives for the commission beyond simply the investigation of functionally meritless complaints. For example, any new judicial commission

148 See McIntyre, *Judicial Function* (n 35) 46.

149 See Appendix Tables 11, 13.

should explicitly exclude any jurisdiction to review issue of procedural fairness, bias and any matter going to the substantive merit of the decision.

V CONCLUSIONS: THE LIMITS AND DANGERS OF SUNSHINE

Broadly conceived, the complaints handling aspects of a judicial commission should operate to ensure that genuine and substantial concerns over judicial (mis) conduct are efficiently and appropriately investigated and, where necessary, disciplinary action is taken. Moreover, such a system should minimise the investigation of meritless concerns. Such a process can be visualised as achieving the following ideal:

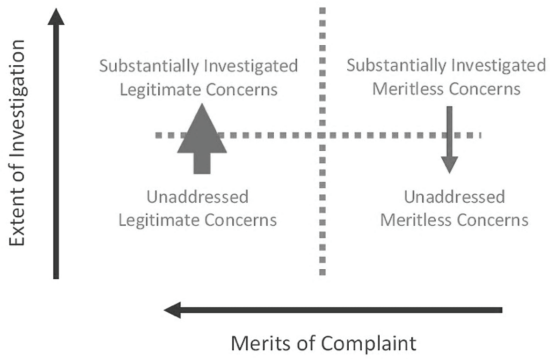

Figure 6: Ideal impact of judicial complaints commissions.

Unfortunately, evidence of the use of judicial commissions over the last decade show that, overwhelmingly, these bodies do not deliver this result. Rather, the evidence highlights that the work of judicial commissions almost exclusively involves the investigation of meritless, inappropriate and unsubstantiated claims. In the last five years, across the six Australian jurisdictions with independent complaints authorities, of the 1,964 complaints to have been formally determined, 1,842 (93.8%) have been dismissed at the earliest stage, and only 54 (2.7%) complaints have been referred to the head of jurisdiction as wholly or partially substantiated. These matters, while substantiated, did not amount to formal disciplinary action as such action would be incompatible with judicial independence. The only formal sanction available is removal, and in the time period of this study only 10 matters (0.5% of all complaints) have led to a formal investigation as potentially warranting removal. Only a single judicial officer was removed through this process.

In this period, the most common cause of complaint regarded the substantive merits of the case (of reported grounds for dismissal, 845 (46%) of all cases concerned the substantive merits).[150] Other common causes for dismissal included

150 Note that this figure of 845 is derived from the values in the Appendix for complaints related to the substantive merit (NSW 143 (at Table 10); Victoria 593 (at Table 13); NT 1 (at Table 14); SA 108 (at

that the complaint could not be substantiated, did not involve a judicial officer in that jurisdiction, did not infringe expected standards or was otherwise unnecessary to investigate. The grounds of complaint are expansive, ranging from bias to behaviour inside court, to delay and bullying.

In short, the processes of judicial commission complaint assessment in Australia are overwhelmingly dominated by unmeritorious, unsubstantiated or legally irrelevant concerns. These processes have been co-opted as a means of processing (if not generating) complaints, not of investigating potential judicial misconduct or supporting judicial discipline and accountability. The protraction of disputes through the complaints process undermines the value of finality that is inherent in the judicial function,[151] to the detriment of the complainant. The complaints process imposes significant financial costs (for example, $2.46 million in Victoria between 2020–21 alone)[152] as well as requiring significant investments of time by Commissioners (often the most senior members of the judiciary).

The very low rates at which complaints led to a formal investigation process, just more than 1.6 matters a year across five jurisdictions, means that there is little capacity to build investigatory expertise. In essence, each investigation largely starts again from scratch, mirroring the same concerns raised about ad hoc investigation processes.

These figures are consistent with those of other jurisdictions globally. For example, in the UK the Judicial Conduct Investigations Office ('JCIO') (formerly the Office for Judicial Complaints) supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. The work of that body is almost entirely focused upon work of the lay magistracy and tribunal members, which operates as a quasi-professional judiciary of a mode entirely foreign to Australia. In 2019–20, of the 1,183 matters dealt with by the JCIO, 683 (57.7%) were not accepted for investigation, 458 (38.7%) were dismissed, and only 42 (3.6%) were upheld.[153] Notably, the JCIO has never undertaken an investigation, or made a finding with regards to, senior judicial officers.

Taken as a whole, the available data provides strong support for the proposition that the impact of formal judicial complaints processes has primarily been addressing and investigating meritless concerns, with minimal impact upon unaddressed legitimate concerns. Rather than the ideal set out in Figure 6, the actual impact of the complaints processes of judicial commissions is better set out in the figure below:

Table 11)) and is assessed against the 1,857 reported determinations for which reason for dismissal is provided (from the 1,964 determinations nationally, excluding withdrawn matters and those from the ACT which does not report reasons).

151 Ibid.

152 *Vic Judicial Commission Annual Report 2021–22* (n 139) 74.

153 Judicial Conduct Investigations Office, *Annual Report 2019–20* (Report, 17 December 2020) 10 <https://www.complaints.judicialconduct.gov.uk/reportsandpublications/>.

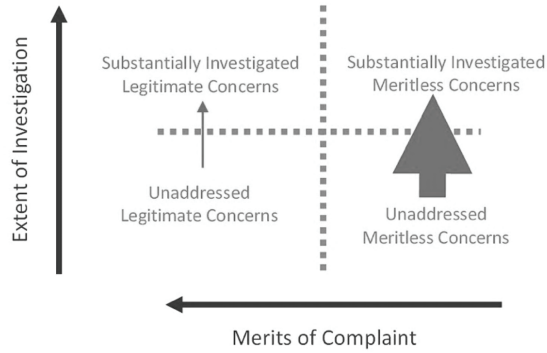

Figure 7: Actual impact of judicial complaints commissions.

That is, it appears that the existence of these formal complaints bodies is operating to create a record of complaints that would not otherwise have been made. Thus, the experience of judicial commissions, both domestically and internationally, overwhelmingly show that the functional operative purpose of such bodies is to provide a *mechanism for the receipt of complaints*, not to provide for the potential disciplining of judges.

Unfortunately, there is no data available as to whether complaints were being made informally in cases prior to the advent of these bodies, or whether there were concerns that may have justified complaint but were not acted against. Some evidence is provided in Part III in the context of the Federal Circuit and Family Court of Australia, but that is in the context of a formalised complaints process and therefore does not provide a direct analogue. Of course, there is also no data about complaints that continue to be made informally, or where concerns are not acted upon.

Nevertheless, the data appears to point unquestionably to the conclusion that the current complaints mechanisms are overwhelmingly dealing with unmeritorious issues. While it is possible that there is an increase in genuine substantive claims (which has been assumed in Figure 7) there is no concrete evidence that this is the case, given that ad hoc processes have always existed.

A Opportunities for Further Reform

The above patterns should cause deep reflection on the design and operation of complaint processes, particularly in the context of a proposed new Federal Judicial Commission. The design of any new body (and indeed reform of existing bodies) must be informed by the evidence of existing complaints bodies, and the irrefutable fact that nearly all complaints are likely to be irrelevant, meritless or misplaced. As Justice Kirby has previously noted:

> It would be desirable that an effective filtering mechanism would be included in any such bodies to exclude irrational, malicious and misconceived complaints against judicial officers.[154]

154 Justice Michael Kirby, 'Discipline of Judicial Officers in Australia' (Speech, Judicial Group on Strengthening Judicial Integrity, 24–26 February 2001) 20 <https://www.michaelkirby.com.au/content/volume-47-2001>.

The data suggests that for both existing and future commissions, consideration should be given to the best means of allowing rigorous initial triaging to permit the fast and efficient dismissal of matters inappropriate for further examination. One option is to allow different processes for different classes of complaints. For example, the evidence from the United States ('US') suggests that complaints made by lawyers are very rare – Pimentel notes that on average, only 1 out of 83,000 lawyers lodge a complaint every year.[155] Given the structural disincentives against such complaints,[156] it may be appropriate to give these complaints greater additional consideration and treat them with a presumption of seriousness. In contrast, provision could be made to allow the expedited dismissal of anonymous complaints, in recognition of the greater potential for such complaints to be frivolous.[157]

Further, structural responses may be necessary to help address some of the structural disincentives against genuine substantive complaints being made by lawyers who legitimately fear the impact of a complaint on their career. Pimentel, for example, highlights the possibility of developing Bar Complaints Committees that can 'serve as intermediaries between individual lawyers and the formal complaint process'.[158] Steps may also be necessary to protect lawyers who will participate in any complaint as a witness.[159]

It may also be desirable to allow different procedures depending upon the perceived seriousness of the underlying conduct. For example, a two-track system could be developed that distinguishes between the most serious and the less serious allegations. Where the alleged conduct was not so serious as to potentially warrant removal, a truncated investigation process not involving a full investigation panel may be appropriate.[160]

This issue highlights the necessity of resolving the latent ambiguity regarding the grounds of complaint addressed above.[161] What is the underlying purpose of complaints commissions? Are they about investigating and providing an evidential basis for formal disciplinary behaviour, or are they about providing a diffuse pressure to improve judicial conduct? This distinction should be fundamental to our design of such bodies. For example, Appleby and Le Mire argue that commissions should be empowered to investigate judicial conduct that is rude or uncivil as:

> Conduct in this category may demonstrate that an individual concerned does not have the appropriate poise and character to engage in the judicial role. It is also likely to damage the confidence of litigants and other members of the public who witness the interactions. In addition to the likely impact on the audience, such

155 David Pimentel, 'The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline' (2009) 76(4) *Tennessee Law Review* 909, 910 ('The Reluctant Tattletale').

156 Ibid 928–36.

157 Ibid 953–4.

158 Ibid 943, quoting Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (Report, September 2006) 119.

159 Pimentel, 'The Reluctant Tattletale' (n 155) 954.

160 Joe McIntyre, Submission No 734123776 to Attorney-General's Department, *Scoping the Establishment of a Federal Judicial Commission* (21 February 2023) 55 <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/consultation/view_respondent?uuId=734123776> ('Federal Judicial Commission Submissions').

161 See Part II(B) above.

> comments raise the issue of the extent to which they betray bias that affects the outcome of the case.[162]

On its own, this is unobjectionable. However, such lack of 'poise and character' will not be sufficient to warrant removal. It is not immediately clear that a judge who is routinely rude and overbearing to all parties, but otherwise discharges their judicial functions with excellence, *could or should* ever be subject to formal disciplinary sanctions. If the sole purpose of a commission was to investigate matters that could warrant such sanctions, such behaviour – though below the standard expected – ought to be excluded. However, if we conceive of a broader role then it may be appropriate to empower a commission to investigate matters beyond those relevant to strict formal disciplinary purposes.[163] Addressing this issue of *grounds*, does however, force us to also consider issues of *sanctions*, and the significant ambiguity in all existing systems as to the status of the 'remedy' of 'referral to head of jurisdiction'. These issues should be made explicit in the design of any judicial commission.

Finally, as the Lasry affair highlights, it is inappropriate for judicial commissions to in any way allow collateral challenge to the substantive merits of the judicial decision. The design of all commissions must include a rigorous triaging process to exclude any complaint that goes to the substantive performance of the judicial function.[164] This exclusion must be broad based, rather than the narrow interpretation that appears to be favoured in the Lasry affair. Judicial commissions perform an executive function, and it is inappropriate – if not outright unconstitutional – for such bodies to challenge the legitimacy and authority of judicial decisions. Appeals must remain the only mechanism for such substantive review.

B Residual Benefits and Qualified Support

None of the above analysis should be taken as arguing that judicial commissions are inappropriate in the Australian context, or that a Federal Judicial Commission would be detrimental. There are likely to be institutional benefits in providing a single streamlined mechanism for the receipt of complaints, and it is possible (if not probable) that the raw data does not adequately capture the benefits of a commission.

There are likely to be a range of benefits that flow even where an investigation is terminated prior to a final determination. For example, commissions may promote judicial resignation during a pending investigation in a way that can be seen as a 'win' for the judicial discipline regime – it would promote the removal of a compromised judge without having to incur the time and expense of a formal removal. While such resignations have always been a feature of informal investigations into judicial conduct, the formality of these processes may promote additional reflection by the judicial officer. Additionally, if we see the objective of these commissions as to promote the internal accountability of judges,

---

162 Appleby and Le Mire (n 8) 16.
163 McIntyre, 'Federal Judicial Commission Submissions' (n 160) 57.
164 Ibid 12.

by encouraging them to act with integrity in the pursuit of excellence (in the knowledge that someone is looking over their shoulder), such benefits may accrue irrespective of formal investigations. Of course, such benefits must be weighed against competing interests in terms of possible impacts on judicial independence and impartiality – including pressures to make 'safe' or 'conservative' decisions.

These structural benefits of any judicial commission are likely to be magnified if that commission has an expanded role that includes functions other than complaints handling. For example, the Judicial Commission of NSW has a significant role in judicial education and support.[165] The high level of support expressed for the establishment of a Federal Judicial Commission as outlined by the ALRC[166] likely reflects the attraction of these broader institutional benefits.[167]

This article should not be seen as an attack on the concept of judicial commissions in Australia. Rather, it is an invitation to reflect on the purpose and scope of such bodies, and to consider how that purpose should influence design. There are clear structural and conceptual benefits to such bodies. However, the data from the practices of existing commissions is compelling. These commissions are currently not operating to principally investigate meritorious claims. That should force us to carefully reflect on the purported accountability benefits, and to weigh that against competing interests (including judicial independence, impartiality, quality of justice, efficiency, accessibility, transparency, integrity, and public confidence in the courts). The data demands careful reflection on the purpose and conceptual foundations of such a commission, and a most restrained calibration of the design. That data also supports a plea to tread carefully, to recognise that the concept of accountability is inherently derivative, limited and situational.[168] All new mechanisms of judicial accountability require careful calibration to ensure that they operate to promote the flourishing of the courts, without undermining other values or imposing undue costs.

Moreover, care needs to be taken to ensure that the creation of a such a body does not further a perception that the judiciary is somehow unaccountable, deficient and in need of oversight. As outlined in Part II, the judiciary is in many respects the most accountable of public decision-makers, and we are blessed in Australia with a judiciary that is overwhelmingly populated by judges of high integrity and competence. The adoption of an institutionalised approach supports a view that there are systematic issues of judicial malpractice, where there is little evidence that this is so. Such a view risks harming public confidence in the judiciary without significant countervailing benefits.

Finally, it is also critical to appreciate that allowing complaints is not without potential risk of itself inflicting harm. The cautionary tale of the resignation of

---

165 See, eg, 'Judicial Education', *Judicial Commission of New South Wales* (Web Page) <https://www.judcom.nsw.gov.au/judicial-education>.

166 Australian Law Reform Commission, *Without Fear or Favour* (n 20) 320.

167 Indeed, this high level of support amongst the judiciary for such a commission has been a significant factor in the transition of my personal view, from general opposition (on the basis that such a commission was unduly divisive and unnecessary: see McIntyre, 'Submission to ALRC Review of Judicial Impartiality' (n 26) to now being of the view that such bodies likely have an appropriate role in the Australian context.

168 See McIntyre, *Judicial Function* (n 35) 233–5.

Justice Lasry illustrates that processes that seek to agitate every complaint (particularly those involving judicial evaluation) can themselves directly lead to the breakdown of relationships and faith in the institution. Sunlight is not always the best medicine. As Onora O'Neill notes, there is a darkness inherent in the over exposure of institutions to public scrutiny in the name of accountability.[169] Sometimes we may be better off not investigating every complaint. Sometimes it may be better that a litigant be left disaffected by an adverse result than we attempt to tear down the institution to ensure that everything was performed ideally.

These are not issues that are easy to quantify or balance but they should not be dismissed. Ultimately, all mechanisms of judicial accountability need to operate for functional purposes to promote the performance of the judicial function. Judicial accountability is not an end of itself. Judicial commissions, particularly those that are involved in judicial education, research and the provision of information about the role of the Australian judiciary, can be a real boon to our judiciary. However, if they are to be more than simply expensive procedures for generating and filtering misplaced complaints, then any design must be informed by the practices and experiences of similar complaints bodies, existing practices and underlying theory.

169 'Spreading Suspicion' (n 1).

APPENDIX: ADDITIONAL DATA

A Judicial Commission of New South Wales

Table 9: Common Causes of Complaint (Basis of Allegation)

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Bias	16	13	9	12	9	15	74
Collusion	2	1	0	1	0	9	13
Delay	3	1	1	1	1	2	7
Discourtesy	5	3	0	6	5	6	25
Failure to give fair hearing	36	32	30	28	21	45	192
Impairment	1	–	–	–	–	–	1
Inappropriate comments	2	5	7	4	0	8	26
Incompetence	4	4	4	1	4	6	23
Other	5	4	6	4	3	5	27

Table 10: Criteria for Dismissing Complaints

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
The complaint is one that it is required not to deal with	1	1	1	1	2	2	8
The subject-matter of the complaint is trivial frivolous, vexatious or not in good faith	2	5	1	1	–	9	18
The matter complained about occurred at too remote a time to justify further consideration	–	–	1	–	–	–	1
In relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint	–	–	–	1	–	4	5
The complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights, and having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable	24	27	18	31	21	22	143
The person complained about is no longer a judicial officer	–	2	–	1	1	2	6
Having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable	28	31	24	37	15	32	167
Total	55	66	45	72	39	71	348

B Judicial Conduct Commissioner of South Australia

Table 11: Common Causes of Complaint (Basis of Allegation by Year)

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Conflict of interest	0	2	1	0	3	1	7
Bias	–	–	–	–	5	0	5
Failure or delay in delivering judgment or making decision	0	2	9	0	1	0	12
Inappropriate conduct in court or in chambers	7	16	17	21	7	8	76
Inappropriate conduct outside of court or chambers	0	2	1	3	2	1	9
Judicial decision/ order	10	12	20	15	33	18	108
Non-SA State Court judicial officer	7	6	11	18	16	6	64
Failure to exercise power/carry out function	0	0	1	0	0	0	1
Workplace bullying/ harassment	–	–	0	5	0	1	6
Complaint not made in accordance with the Act	–	–	–	–	12	21	33
Total	24	40	60	62	79	56	321

C Judicial Commission of Victoria

Table 12: Common Causes of Complaint (Basis of Allegation)[170]

	2017–18	2018–19	2019–20	2020–21	2021–22	Total
Incorrect decision	106	124	119	126	41	516
Failure to give fair hearing	75	73	95	67	32	342
Bias	52	57	47	31	12	199
Inappropriate Comments	41	37	42	31	23	174
Failure to act in judicial manner	32	28	70	29	24	183
Overbearing conduct	28	7	20	11	12	78
Rudeness	21	19	26	19	16	101
Denial of due process	20	31	52	55	8	166
Delay	13	26	12	25	2	78
Prejudice	8	13	27	9	10	67
Apprehension of bias	7	1	6	6	3	23
Corruption	7	13	28	13	6	67
Conflict of interest	4	8	9	7	4	32
Failure to provide medical assistance	2	1	0	0	0	3
Inappropriate questions	1	2	1	6	0	10
Incapacity	1	3	1	3	3	11
Inadequate preparation	0	0	0	0	1	1

170 Note that many complaints contain multiple allegations. Note that these figures were not included in the *2022–23 Annual Report*, so that the data between 2017–22 is provided: Judicial Commission of Victoria, *Annual Report 2022–23* (Report, December 2023).

Table 13: Criteria for Dismissing Complaints

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Merits or lawfulness of decision	125	153	117	149	41	8	593
Complaint not substantiated	122	147	112	129	86	51	647
Not judicial officer or VCAT member	52	71	53	89	17	–	282
Does not infringe standard of conduct expected	41	59	2	82	–	–	184
Further investigation unnecessary or unjustified	34	40	69	0	60	37	240
Too remote a time	10	5	3	5	–	–	23
Does not affect performance of function	2	3	1	1	–	–	7
Relates to private life, doesn't affect performance/ suitability	2	4	–	–	–	–	6
Officer resigned, no longer in office	1	2	3	2	2	1	11
Could not warrant removal from office	–	5	–	–	–	–	5
Conduct before appointment	–	1	1	2	–	1	5
Officer counselled by HoJ	–	–	2	3	–	–	5
Does not meet the section 16(1) threshold	–	–	–	–	49	78	127
Frivolous, vexatious, not in good faith	–	–	–	–	6	3	9

D Northern Territory Judicial Commission

Table 14: Nature of Complaints

	2021–22	2022–23	Total
The complaint properly concerned the legal merits of the matter	1	–	1
There was available another satisfactory means of dealing with the matter	1	–	1
Having regard to all the circumstances, further consideration of the complaint is unnecessary or unjustifiable	3	9	12
The complaint was frivolous, vexatious or not made in good faith	–	1	1
The matter is the subject of legal proceedings and should more properly be the subject of an appeal	–	5	5

E National Figures

Table 15: Cumulative Figures for All Australian Judicial Commissions/Councils/ Commissioners by Year

	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	Total
Complaints							
Number of Complaints	377	364	377	340	303	294	2055
Initial Determination							
Summary/Early Dismissal	273	354	307	368	294	246	1842
Referred to HoJ (Wholly or Partially Substantiated)	10	9	13	3	10	9	54
Referred to Investigation Panel/ Conduct Division	4	2	0	2	0	2	10
Referred to Parliament	0	0	0	0	0	0	0
Withdrawn	9	13	5	18	9	4	58
Total Determinations	**296**	**378**	**325**	**391**	**313**	**261**	**1964**
Percentage of Determinations Summarily Dismissed	95%	97%	96%	99%	97%	96%	97%