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The Hon. Shannon Fentiman MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the Prevention of Domestic and Family Violence
Department of Justice and Attorney-General

By email: PolicyProjectsODDG@justice.qld.gov.au

To the Honourable Shannon Fentiman MP,

RE: SUBMISSION ON THE DISCUSSION PAPER ENTITLED *SAFEGUARDING INDEPENDENCE: EXPLORING THE NEED FOR A JUDICIAL COMMISSION IN QUEENSLAND*

Thank you for the opportunity to provide comments on the Discussion Paper entitled “Safeguarding Independence: Exploring the Need for a Judicial Commission in Queensland” (**Discussion Paper**). We strongly support the establishment of an Independent Judicial Commission (**IJC**) in Queensland which includes in its mandate the provision of ongoing judicial education including, relevantly, regular cultural competency training for judicial officers, and the handling of complaints against judicial officers. We believe that the establishment of an IJC will assist in providing a coordinated and consistent approach to the delivery of professional development training to judicial officers and will strengthen public confidence in the judiciary.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Comments on the Discussion Paper

Anecdotally, we have heard that our practitioners have experienced, from time to time, instances of inappropriate behaviour by judicial officers such as bullying of practitioners in courtroom proceedings, and sometimes, specific discriminatory conduct. We support the establishment of an IJC in Queensland, similar to the model in New South Wales, which is mandated to transparently and independently investigate complaints about judicial officers and which also has an education function for the provision of continuing professional development of judicial officers.

In this submission, we have sought to address the questions posed in the Discussion Paper which we believe we are able to provide meaningful input on with our specific focus on access to justice for Aboriginal and Torres Strait Islander communities.

Complaints mechanism – existing and potential

We are aware of the following shortcomings in the existing processes for investigating complaints made against judicial officers:

- (a) complaints are not truly independently handled, as they are usually dealt with by the relevant Head of Jurisdiction;
- (b) there is not one consistent and transparent process for the handling of complaints against judicial officers, but rather a collection of internal processes for each jurisdiction;
- (c) complaints are not entirely efficiently handled as Heads of Jurisdiction are required to undertake this function as part of their regular duties and often Heads of Jurisdiction have limited capacity in this regard due to their high workloads;
- (d) complaints processes lack an ability to discipline a judicial officer;
- (e) while the Crime and Corruption Commission is, subject to some exceptions, empowered to investigate allegations of corrupt conduct of judicial officers, this is in limited circumstances where such conduct, if established, would give rise to the judicial officer being removed from office; and

(f) there is a lack of visibility over Crime and Corruption Commission investigation processes¹.

With respect to the composition of the IJC, our recommendation is that members would include the following:

- Heads of Jurisdiction for the Supreme, District and Magistrates courts
- Head of Jurisdiction for the Queensland Civil and Administrative Tribunal (**QCAT**)
- President, or suitable nominee, of the Queensland Law Society
- President, or suitable nominee, of the Bar Association of Queensland
- State Coroner – we feel that the appointment of the State Coroner is essential noting the systemic issues that have been raised and continue to be raised in coronial inquest findings relating to deaths of Aboriginal and Torres Strait Islander persons
- 3 community members of high standing in the community including, relevantly, at least one identified role for a community member of high standing who can represent the Aboriginal and Torres Strait Islander communities' voice (and, ideally, two in total – one from the Aboriginal community and one from the Torres Strait Islander community, given they are separate and distinct communities that have their own unique concerns and needs). In our view, the over-representation of Aboriginal and Torres Strait Islander persons' interaction with the justice system warrants this level of representation and will allow a voice with respect to access to justice for these communities and, in particular, with respect to systemic issues which cause or contribute to the highly inflated numbers of Aboriginal and Torres Strait Islander persons in prison. This representation is particularly important with respect to the education function of an IJC (this will be discussed in further detail later in this submission).

We consider that a two-tiered approach for the investigation for complaints, similar to that which is in the New South Wales model, is practical such that the first tier may operate as a form of clearing house to dismiss complaints relating to matters that are more appropriately dealt with upon appeal or those which are vexatious. However, this should not be an entirely private process. In our view, the numbers of complaints which are dismissed (and the reasons for dismissal by categorisation) should be reported on in the IJC's Annual Report as should be the numbers of complaints which are referred to Tier Two and the outcome of those complaints.

We feel that it is appropriate that the scope of a judicial commission in Queensland should extend to complaints about bullying by judicial officers and sexual harassment.

Professional development, training and ongoing education – existing and potential

In our view, an IJC should have an education function in both coordinating professional development topics for existing bodies and, where appropriate, having direct involvement in the delivery and development of professional development resources. In particular, we see an IJC being able to coordinate regular cultural competency training of judicial officers and ongoing training/resources with respect to specific practice areas where there are particular access to justice issues for Aboriginal and

¹ Schedule 3, section 10(4) of the *Right to Information Act 2009* includes a broad ranging exemption to the release of information relating to a Crime and Corruption Commission investigation.

Torres Strait Islander persons (for example, in child protection, youth justice, issues relating to access to interpreters, in particular, for persons from remote communities, etc.).

The critical importance that cultural competency training of judicial officers plays in the justice system was raised in recommendation 96 of the Report of the Royal Commission into Aboriginal Deaths in Custody, conducted in 1991, which stated:

96. That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding. (3:79)

We would also like to see the IJC coordinate Indigenous immersion programs such as one recently conducted this year in which a group of 26 judges headed bush to learn about the cultural complexities that can lead to miscarriages of justice². We believe that such programs have immense value in fostering better understanding of the complex challenges that are faced by Aboriginal and Torres Strait Islander communities and their interaction with the justice system and result in better outcomes for Aboriginal and Torres Strait Islander persons.

Whether judicial wellbeing of Queensland's judicial officers should form part of a potential judicial commission model

We are very supportive of an IJC including, within its scope, support mechanisms to help improve judicial wellbeing, such as via professional development programs and access to/referral to support services. Judicial officers are subject to very high workloads and associated stress. Furthermore, the nature of the work that judicial officers undertake has the potential to significantly impact their mental health and general well-being.

CONCLUSION

We support the establishment of an IJC in Queensland which contains both a complaints handling function and a professional development/education function. We feel that the establishment of an IJC in Queensland would allow for more transparent handling of complaints against judicial officers and, in particular, that such a body could play a crucial role in coordinating/delivering Aboriginal and Torres Strait Islander cultural competency training and other associated training and resources to judicial officers, including immersion programs, to aid in the continued and ongoing understanding of the complex access to justice issues that Aboriginal and Torres Strait Islander communities face in today's

² Erin Parke, 'Judges go bush to learn about Indigenous culture, with aim to deliver fairer justice in courts', *Abc News*, (online, 14 Sept 2022), < <https://www.abc.net.au/news/2022-09-14/judges-go-bush-in-wa-to-learn-about-indigenous-culture/101414554>>.

society.

We thank you for the opportunity to provide feedback on the Safeguarding Independence: Exploring the Need for a Judicial Commission in Queensland Discussion Paper.

Yours faithfully,

Shane Duffy

Chief Executive Officer