NEW SOUTH WALES SOCIETY OF
LABOR LAWYERS

E: info@nswlaborlawyers.com
W: www.nswlaborlawyers.com

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Review of Judicial Impartiality
Australian Law Reform Commission
PO Box 12953
Queensland 4003

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Dear Commission,

Submission to the Review of Judicial Impartiality

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the Australian Law Reform Commission ('the Commission') Review of Judicial Impartiality.

By way of background, the Society, originally established in 1977, aims to promote changes in the substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. The Society provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community. The Society's membership and supporters include barristers, solicitors and trade union industrial officers.

Judicial Bias: A Procedural Problem

In the Society's view, the problem with the law of judicial bias in Australia is a procedural, not substantive, problem. This is because the law encompasses apprehended bias, which as the Commission has already identified, requires consideration of the hypothetical "fair-minded lay observer" and whether that observer could "entertain a reasonable apprehension" that the judge "might not bring an impartial and unprejudiced mind to the resolution of the question"[1]. This test is broad and, in our view, all-encompassing. Expanding the test is not likely to lead to any material change in the number of applications being brought in Commonwealth courts.

If there exists a class of applications seeking disqualification, which are meritorious but (for one reason or another) are not presently being brought in Commonwealth courts, they are likely not being brought for the procedural reasons identified in the Commission's Consultation Papers JI2 (referred to colloquially as a having a "chilling effect" on applications[2]) rather than any failing of the current legal tests. This submission therefore proceeds on the basis that the current legal tests are appropriate or irrelevant to the question of whether meritorious claims are being brought in Commonwealth courts.

The question that is relevant is how the procedures concerning judicial bias applications can be amended such that a presently unquantifiable class of meritorious claims (if they do exist) can be:

1. firstly, identified by the parties involved in the litigation; and

[1] Background Paper JI7-4; see also *Webb v The Queen* (1994) 181 CLR 4, 67 (Deane J) and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[2] Australian Law Reform Commission, *Judicial Impartiality: Consultation Paper* (CP 1, 2021) (**Consultation Paper**), p9.

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2. secondly, brought by the parties in such a way that the application will be determined impartially and on merit?

The remainder of this submission considers proposals to address these related questions.

Issue One: Identification of Claims

The parties to a proceeding do not have available any information regarding the direct or indirect financial interests of a judicial officer in the outcome of a decision. Given this, it is not possible for the parties to identify, without a judicial officer volunteering the information[3], any conflicts of interest in relation to pecuniary interests.

This problem is amplified by the fact that a party raising an application for recusal on the ground of judicial bias can have no recourse to evidentiary production in the form of discovery, a subpoena, or a notice to produce, or to the benefits of cross-examination against a judge[4].

While the Commission has identified that evidence-gathering powers exist for judicial commissions throughout the states and territories[5], the evidence-gathering powers do not extend to the parties to litigation who are blind to the particular circumstances of the judge. We do not propose that such evidence-gathering powers be extended to the parties, however it is clear from the above that there is a deficit of information available to parties on the interests of judges.

We recommend that each Commonwealth court introduce a register of pecuniary interests for judges, it being the only means, in our view, by which the information gap between a judge and the parties can be bridged. This reform option was raised by the Commission at JI2-11. It was not given extensive consideration, other than the Commission noting that registers exist in various jurisdictions in the United States, the concept was rejected by the New Zealand Law Commission in 2012, and in Australia, a consideration is that the judiciary would likely need to introduce such a register[6]. In our view, this is insufficient consideration given the potential merits of such a register.

In 2012 the New Zealand Law Commission rejected the register proposal because:

1. Firstly, its view was that public confidence in the judiciary was high which weighed against a register[7]. While the same can be said in Australia, the question before the Commission is whether Australia's judicial bias procedures are appropriate. In our view, they are not appropriate because parties do not have enough information to identify conflicts of interest.
2. Secondly, its view was that conflicts of interest in proceedings were more likely to involve interpersonal relationships between the judge and legal representatives, or a party to the proceedings, than financial interests[8]. In our view, it is likely the case that because information on financial interests is unavailable, such application do not generally arise. The Commission should be mindful that if there is a class of meritorious applications not being brought in Commonwealth courts, it may be because there is a dearth of information on which to base an application for judicial bias because financial interests are not adequately disclosed.

[3] The Commission has noted it is the ethical obligation of a judicial officer to disclose "facts which might reasonably give rise to a perception of bias or conflict of interest": see Background Paper JI1-14.
[4] This was the position of Commissioner Heydon at the Trade Union Royal Commission, Reasons for Ruling on Disqualification Application, [186]-[188] citing *Locobail (UK) Ltd v Bayfield Properties* [2000] QB 451 at [19]; *Helow v Home Secretary* [2008] 1 WLR 2146 at 2426 [39]; *Makucha v Sydney Water Corporation* [2011] NSWCA 234 at [9], and M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013) at p621.
[5] Including the power to hold a hearing and issue subpoenas: *Judicial Commission of Victoria Act 2016* (Vic) ss 51, 61–8; *Judicial Officers Act 1986* (NSW) ss 24–5; *Judicial Conduct Commissioner Act 2015* (SA) s 24; *Judicial Commissions Act 1994* (ACT) ss 37–44; *Judicial Commission Act 2020* (NT) s 52; and the power to issue summons and examine witnesses: *Judicial Commissions Act 1994* (ACT) ss 35, 35D–35H; *Judicial Commission Act 2020* (NT) ss 17–18.
[6] Background Paper JI2-11.
[7] New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act*, Report 126, at [6.55] (**NZLC Report**).
[8] NZLC Report, at [6.56].

3. Thirdly, its view was that such a register would need to be more detailed than a parliamentarian's register to function effectively, and that more detail could place an undue burden on the privacy of the judge[9]. In our view, these concerns are warranted, but can be alleviated by making the register only available to legal representatives of the parties to a proceeding (a proposal we discuss in more detail below).

While such registers for judges are not common in Commonwealth jurisdictions, they are used extensively in the United States of America following passage of the Ethics in Government Act of 1978 which mandated public disclosure of financial history by public officials, including federal judges.

Similar registers have been in place in the Parliament of Australia for many years, requiring parliamentarians to disclose interests at a high level of generality, including shareholdings, real estate, directorships, liabilities, gifts, sponsorships and other matters which could reasonably give rise to a conflict of interest[10]. These registers provide a model for registers in Commonwealth courts.

The introduction of a register would also assist the court registry to identify and resolve potential conflicts of interest before a judge is allocated to a matter.

In our view, a register is the only means (other than voluntary disclosure by a judge) by which a party to a proceeding could be apprised of the information necessary to identify the need for a judicial bias application in relation to pecuniary interests.

The Commission, following review of publicly available material, identified only small numbers of judicial bias applications being brought under the Interest issue area[11]. This is likely due to a lack of information on pecuniary interests, which as noted earlier is subject to voluntary disclosure by the judge hearing the matter.

A publicly available register may have unforeseen consequences. This includes the possibility that minor pecuniary interests may be scrutinised out of proportion to the severity of the interest, leading to reduced public confidence in the judicial system. To avoid trivial disputes, the register should be clear on the threshold over which a pecuniary interest becomes material. In more extreme scenarios, disclosure of such interests may also give rise to security concerns for the personal safety of the judge. For this reason, a register should only be made available for inspection to the legal representatives of parties to a proceeding and in the event that they undertake to the court not to disclose the register to third parties. In this way, information will be made available to the parties but not at the cost of undermining the public standing or security of the judge in question.

In our view, there is no need for the Commission to await a scandal of such proportions to justify the introduction of a register. The Commission should take pro-active steps to recommend a register as a means of increasing public confidence in the judiciary as well as assisting parties with the identification and assessment of meritorious claims.

Issue 2: Bringing of Meritorious Claims

The Commission has proposed that the Federal Circuit Court of Australia, the Federal Court of Australia, and the Family Court of Australia amend their rules to require a judge sitting alone to transfer disqualification applications to a duty judge for determination[12].

The Society in principle supports the transfer of disqualification applications away from the judge the subject of the application. However, the Commission has declined to propose a purely automatic transfer, opting instead for a hybrid transfer option (Option A) and options that still retain some judicial discretion (Options B and C)[13].

[9] NZLC Report, at [6.58].
[10] See for example the House of Representatives Register of Members' Interests.
[11] Background Paper JI3-7.
[12] Consultation Paper, p18.
[13] Consultation Paper, p19.

The hybrid procedure proposed in Option A would be, with respect, difficult to implement in practice because it would require a one-size-fits-all definition of the "specific circumstances" in which an application is referred to the duty judge. The Commission may find it difficult to stipulate these specific circumstances given it has identified a lack of data on the scale and content of judicial bias applications[14]. While the Commission, following review of the available decisions, has identified a larger group of applications clustered in the Conduct, Prejudgment and Extraneous Information issue areas, it does not necessarily follow that these are the areas of most significant concern given there is limited qualitative data on the applications in this data set. Further, as we noted earlier in this submission, the Interest issue area is likely downplayed because information is not available to the parties on the pecuniary interests of judges.

Options B and C suffer from the same problems as the current procedure; that is, that the procedure is difficult for litigants and the public to accept, incompatible with scientific research, and may have a chilling effect on meritorious applications[15]. Fundamentally these options are still reliant on the judge with carriage finding that their own conduct is of sufficient severity to refer to another judge.

The best course, in our view, is to introduce an automatic procedure as considered in paragraph [52] of the Commission's report which would ensure that all disqualification matters are heard by a different judge.

If the Commission were to adopt any of Options A to C, we recommend that a further procedure be put in place allowing a party to write to the Chambers of the Chief Justice, bringing the issue to his or her attention and requesting that the question of disqualification be referred to another judge on the court. The Chief Justice could then exercise discretion as to the proper procedure, accounting for the particular circumstances of the case. A similar procedure is in place in the Federal Court of Australia for referrals of "sufficiently important" matters to the Full Court by the Chief Justice[16]. In this way, the Chambers of the Chief Justice could provide a safeguard in instances where a clear conflict is identified but the judge in question fails to take steps to refer the matter to a duty judge.

Other Matters

Federal Judicial Commission

Consultation Question 20 asks whether more structured systems of ethical and other types of support should be provided to assist judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues effecting their capacity to fulfil their judicial function. The Commission has, in particular, requested feedback on the role a Federal Judicial Commission (**FJC**) could play in this regard[17].

The Society strongly supports the introduction of a statutory FJC. It should not, however, be used as a substitute for meaningful and effective changes to the procedural law concerning judicial bias in Commonwealth courts.

We note that an FJC was a proposal of the Commission in its 1999 discussion paper, *Review of the Federal Civil Justice System*[18] but was later removed as a proposal from its final report, presumably due to constitutional concerns that it would impede the independence of the judiciary. These concerns were likely misplaced as an FJC that does not intrude impermissibly on the independence of the federal judiciary is not likely to find itself at odds with this doctrine.

In our view, an FJC would go some way to meeting the problems identified by the Commission in its Consultation Paper. In particular, an FJC should be tasked with:

[14] Background Paper JI3-15.
[15] Consultation Paper, p10.
[16] *Federal Court of Australia Act 1978* (Cth), s 20(1A).
[17] Consultation paper, p31.
[18] Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Disc Paper 62, 1999).

(a) receiving, and making rulings in relation to, complaints about judges, either by reference from the Attorney-General or a head of jurisdiction, or by application from a member of the general public;

(b) referring any adverse rulings to the Attorney-General and Governor-General of Australia for consideration of a reference for removal under s 72 of the Australian Constitution;

(c) providing education services to judges, including but not limited to courses and publications regarding conflict management, treatment of unrepresented litigants, use of interpreter services, and avoidance of subliminal bias;

(d) collecting data on the judiciary, including on data deficiencies identified by the Commission in its Background Papers on the number of judicial bias applications in Commonwealth courts; and

(e) offering guidance to judges, in the event the judge has a question in relation to their compliance with ethical obligations that cannot otherwise be dealt with by the Commonwealth court's administrative functions.

The Society also notes, in light of allegations of sexual harassment in 2020 against former High Court Justice the Hon Justice Dyson Heydon AC, QC, and more recent allegations made against a Federal Circuit Court Judge, that an FJC could be a platform for the confidential and independent handling of such complaints against sitting judges.

Diversity on the Bench

Consultation Question 16 asks what should be done to increase diversity in the legal profession and to support lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession. The Society recently directed platform amendments to the NSW Labor State Conference requesting that steps be taken in NSW to formalise a process requiring the NSW Attorney-General to consult with bodies representing legal professionals from diverse or minority backgrounds during the selection process for judicial officers[19]. Given there are now a range of bodies representing particular multicultural groups in the legal profession[20], guidelines should be introduced at a Commonwealth level requiring the Federal Attorney-General to consult with these groups, among others, prior to appointments to Commonwealth courts.

In conclusion, we thank the Commission for their consideration of this submission. Please contact the undersigned at info@nswlaborlawyers.com if you require any further information.

Yours faithfully,

NSW Labor Lawyers

NSW Society of Labor Lawyers
President: Lewis Hamilton **Vice President:** Blake Osmond **Treasurer:** Claire Pullen **Secretary:** David Pink **Ordinary Committee Members:** Kirk McKenzie, Jamila Gherjestani, Ellyse Harding, Penelope Parker, Nikhil Mishra, and Connor Wherrett.

The Society is not affiliated to the Australian Labor Party. The views expressed in this submission are not those of the Australian Labor Party, its members or the Federal Parliamentary Labor Party.

[19] Copies of the platform amendments are available on the Society's website [link].
[20] Including, amongst others, the Asian Australian Lawyers Association, the Muslim Legal Network, the African Australian Legal Network, the Jewish Australian Lawyers' Association, the Australian Italian Lawyers Association.

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