

**SUBMISSIONS ON THE ALRC'S
JUDICIAL IMPARTIALITY: CONSULTATION PAPER'S CONSULTATION
QUESTIONS AND PROPOSALS**

Introduction

The Law Reform Subcommittee of the Family Law Practitioners' Association of Western Australia (Inc.) (**FLPA**) has considered the 25 Consultation Questions and Proposals on which the Australian Law Reform Commission seeks submissions in its *Review of Judicial Impartiality*. On these questions and proposals, the FLPA, through its Subcommittee, makes the following comments and recommendations.

Questions 2, 3 & 4

The FLPA has considered Proposals 2 and 3, and Question 4 together as these are inter-related. The FLPA is of the view that there should be a clear guideline made available to the public at large of what constitutes actual or apprehended judicial bias.

The FLPA is especially concerned that as many family law litigants appear in court in person, they may not appreciate the true meaning of judicial bias, and in particular that it is not dependent simply on personal feelings. Mere dissatisfaction with, for example, the demeanour of the judge, a judge deciding a case or an issue against the litigant, comments critical of a litigant, or actions or statements which simply incur the displeasure of the litigant are usually not sufficient to establish bias.

To emphasise that an allegation of bias or apprehended bias is a serious step to take, the FLPA is of the view that this should always form the subject of a formal

Application for the disqualification of the judge on the ground of bias, and that this be supported by an affidavit setting out the grounds alleging bias.

An Application alleging bias or apprehended bias should then be dealt with promptly. The court should ensure that such an Application is not used for some ulterior purpose, for example to have a matter determined by another judge or as a delaying tactic.

Caution should be taken to ensure that any measures taken to promote transparency does not inadvertently encourage unmeritorious applications.

A separate, but related, subject is the extent to which members of the judiciary and members of the legal profession may socialise without incurring a claim of apprehended bias. The forthcoming High Court appeal in the matter of *Charisteas v. Charisteas* (P6/2021) is directly concerned with this subject and will doubtlessly indicate the extent to which social contact between the judiciary and the members of the legal profession is inappropriate, especially during the course of proceedings. There should be clear guidelines set so that there will be little doubt about the extent to which inter-socialising is permissible, and which is inappropriate as being conducive to the possibility of a claim of apprehended bias.

Proposal 5

The FLPA supports Proposal 5 concerning the publication on websites concerning the impartiality and independence of judges.

Proposal 6

The FLPA is of the view that an application for disqualification of a judge should ordinarily be determined by another judge however, only in circumstances where such

a process will not unduly delay or frustrate proceedings or place additional strain on under-resourced Courts or invite “judge shopping”.

This is not simply to ensure an independent and impartial decision on the matter but also to avoid the discomfiture that judges doubtless often experience in adjudicating upon their own impartiality.

There may of course be cases where bias or apprehended bias is so obvious that the matter may properly be determined by the judge concerned.

The FLPA is alert to the problems that might arise from having disqualification matters determined by another judge. This will doubtless impose a further burden upon limited judicial resources and involve delay in the proceedings that have been adjourned. The FLPA has no obvious solution to these problems, but if an application for the disqualification of a judge is determined summarily, the effect of the problems just outlined above should be minimised.

Proposal 14

The FLPA support a transparent system of judicial appointments in the manner described in Proposal 14.


Proposals 15, 17, 20

The FLPA does not oppose Proposals 15, 17, 18 and 20 and has no useful comments to make on them.

Proposals and Questions 1, 7, 8, 9, 10, 11, 12, 13, 16, 19, 24, 25

The FLPA has no useful comments to make on Proposals and Questions 1, 7, 8, 9, 10, 11, 12, 13, 16, 19, 25 and 25.

Dated: 28 June 2021.

A handwritten signature in dark ink, appearing to read 'Linda Richardson', written in a cursive style.

Linda Richardson
President