

Submission to the Australian Law Reform Commission inquiry into Judicial Impartiality

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NSW Young Lawyers Submission

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The NSW Young Lawyers Public Law and Government Committee ('the Committee') make the following submission in response to the Australian Law Reform Commission Consultation Paper in the Judicial Impartiality Inquiry.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Public Law and Government Committee comprises over 1,000 members who include a range of practicing lawyers from the public and private sectors, barristers and law students. The Public Law and Government Committee aims to educate members of the legal profession, and the wider community, about developments in public law and to provide a social environment for young lawyers to develop their skills. The Public Law and Government Committee's areas of interest include, but are not limited to, administrative and constitutional law and the work of government lawyers.

Question 3

1. The Committee considers that the publication of a guide setting out the procedures and requirements for disqualification in Plain English (**Disqualification Guide**) to be accessed by members of the public would benefit vulnerable litigants especially self-represented litigants (**SRLs**) who seek to assert their legal rights in Commonwealth courts when unable to reach a private resolution.¹ The Disqualification Guide must be accessible and easy to understand for SRLs who do not qualify for legal aid or cannot afford a private solicitor and seek to resolve their dispute through a formal mechanism.² The Disqualification Guide would enable courts to assist SRLs with contested 'mixed cases',³ which would facilitate more efficient case processing and improve accessibility to justice for SRLs.⁴
2. The Committee considers that the legal test, largely outlined in case law, governing disqualification by determining reasonable apprehension provides limited practical guidance for judicial assistance with SRLs. Clear standards must be developed to determine when judicial assistance is permissible or impermissible when assisting SRLs.⁵ This is even more important as claims of inadequate or excessive judicial assistance of SRLs may give rise to circumstances of apprehended bias.⁶
3. The Committee notes that the phenomenon of SRLs exercising their fundamental right to appear in court in person is no longer unusual before the courts.⁷ The normalisation of this trend is placing burdens on the legal system with increased costs, disruptions, and delays.⁸ For example, SRLs who do not supply the necessary evidence and legal argument at the appropriate juncture can result in both litigants and the judge experiencing dissatisfaction with the litigation process, which in turn can create a more time-consuming process overall.⁹ This poses difficulties for the courts and respondents to claims brought by SRLs, with 'difficult' or 'querulous' complainants giving rise to unwarranted apprehended bias claims.¹⁰

¹ Productivity Commission, *Access to Justice Arrangements: Overview* (Inquiry Report No. 72, 2014) 5–6.

² *Ibid* 6.

³ Jona Goldschmidt, 'Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience' (2008) 17(3) *Michigan State Journal of International Law* 601, 607. Goldschmidt defines 'mixed cases' as cases involving one party who is represented by professional counsel and one party who is self-represented.

⁴ *Ibid* 602.

⁵ *Ibid*.

⁶ *Ibid* 616.

⁷ *Cachia v Hanes* (1994) 179 CLR 403, 415.

⁸ Chief Justice Gleeson, Speech to the Australian Legal Convention in Canberra on 10 October 1999 <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_sta10oct.htm>. See also, Judicial Commission of New South Wales, *Equality before the Law Bench Book* (September 2019) <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section10.html#ftn.d5e15940>> section 10.

⁹ Richard W White, 'Advocacy and Ethics: The Self-Represented Litigant' (18 October 2014) 21 <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/White/white_20141018.pdf>.

¹⁰ *Ibid* 20–21.

4. As an example, when judges ask questions or express tentative views in exchanges with counsel that reflect a certain tendency of mind they are not on that account alone to be taken to indicate prejudgment.¹¹ However, judicial displays of “excessive, prolonged or particularly harsh interventions” during hearings involving SRLs may give rise to a reasonable apprehension of bias.¹² Therefore, the test for apprehended bias needs an explicit balancing exercise to help address the increasing subjectivity and unpredictability of its application,¹³ particularly when dealing with SRLs characterised as ‘chronic grumblers’.¹⁴
5. Our legal system has not yet completely adapted itself to cope with SRLs, creating arguably an alienating environment for them.¹⁵ The legal system assumes a level of professionalism which often disadvantages SRLs due to their lack of experience or training in contextual features of the legal system such as court procedures, rules of court, language of the law, and conventions on how cases are presented in court.¹⁶ However, these disadvantages suffered by SRLs should not confer a licence to disregard procedural requirements imposed by the rules.¹⁷ An indication of generally accepted circumstances that will always or most likely give rise to apprehended bias, as well as circumstances that will never or infrequently lead to this result, would help guide litigants.¹⁸

Recommendation 1

A national collaborative court initiative that consolidates procedures, informed by appropriate rules and law should be published in an easily accessible and plain English manner for members of the public, especially vulnerable litigants to understand.

¹¹ *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343, 351 [31], quoting *Johnson v Johnson* (2000) 201 CLR 488, 492–493 [11]–[13].

¹² Australian Law Reform Commission, *The Law on Judicial Bias: A primer* (Background Paper JI1, 2020) 9 (‘ALRC BP JI1’).

¹³ Australian Law Reform Commission, *The Fair-Minded Observer and its critics* (Background Paper JI7, 2021) 14–15 (‘ALRC BP JI7’).

¹⁴ *White* (n 9) 21.

¹⁵ *Ibid*, citing Duncan Webb, ‘The right not to have a lawyer’ (2007) 16 *Journal of Judicial Administration* 172.

¹⁶ *Ibid*.

¹⁷ *Ibid* quoting *SZNFR v Minister for Immigration and Citizenship* [2009] FCA 8511 (Flick J).

¹⁸ ALRC BP JI1 (n 12) 13–14.

Question 4

6. The Committee considers that judicial impartiality requires the management and avoidance of bias which prevents fair trials for SRLs. Bias is the antithesis of the proper exercise of judicial function.¹⁹ Yet absolute impartiality is most likely unattainable,²⁰ as even though judges act in good faith in determining a dispute, they are still unconsciously affected by bias.²¹ Impartiality refers to a state of mind or attitude,²² where 'bias blind spots' are mitigated by awareness.²³ Bias blind spots are where errors in judgment are made due to egocentric bias.²⁴ One method judges may use to identify these unconscious 'bias blind spots' is through statistical quantified self-analysis.²⁵
7. A study by the Australian Law Reform Commission (**ALRC**) suggested that cognitive social bias could be moderated by personal, interpersonal, and institutional strategies. It is the Committee's view that the moderation of social bias could reduce instances where apprehended bias has affected SRLs.²⁶ However, the Committee notes that any strategies adopted to moderate social bias should exclude implicit social bias intrinsically linked to a judge's identity as such measures could rule out a large proportion of judges from hearing a large proportion of cases.²⁷ This would also deprive the judicial body of the intrinsic and idiosyncratic differences which exist due to a variety of social factors (e.g. personality, preference for tone of voice, demeanor, etc) and could undermine efforts in other areas such as the movement for a judiciary which is more reflective of the demographics in Australian society.
8. The Committee also notes that any pecuniary interest which poses a judicial conflict of interest should always be disclosed. Where a pecuniary interest exists where it has not been disclosed by the presiding judicial officer is an example of apprehended bias warranting disqualification.²⁸ Furthermore, if it is clear that overt judicial bias in favour of one of the litigant parties is present and that it is 'likely to influence the mind' of the judicial officer, the officer must be disqualified to ensure a fair trial for SRLs.²⁹

¹⁹ *Bahai v Rashidian* [1985] 3 All ER 385, [391] (Balcombe LJ).

²⁰ Benjamin N Cardozo, 'The Nature of the Judicial Process', *Yale University Press* (1921) 12.

²¹ Richard E Flamm, 'Disqualification of Judges for Bias' (16 Jan 2018) 7 <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf>.

²² Michael Kirby, 'Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence' (2015) 4 *British Journal of American Legal Studies* 1, 16.

²³ Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper J16, 2021) 18–19.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid* 19.

²⁷ *Ibid* 16.

²⁸ Flamm (n 21) 9–11.

²⁹ *Ibid* 12.

Recommendation 2

A judicial officer-led project identifying sets of common circumstances of proven apprehended bias would guide SRLs assessing the viability of their apprehended bias claims as well as provide guidelines for judicial officers.

Question 5

9. The Committee agrees that the proposed collaborative efforts of Commonwealth courts to provide a range of additional legal resources on their respective websites would improve community knowledge and minimise adverse effects on SRLs.³⁰ Indicative empirical data recorded 563 SRLs commencing proceedings nationally.³¹ The growing number of SRLs impact on legal service providers and the administration of justice,³² especially because these SRLs are generally more likely to lose their case.³³
10. The Committee also notes that reductions in government funding for legal aid has led to an increase in SRLs.³⁴ Therefore, alternative initiatives are required to assist these vulnerable litigants. The Committee views the following guiding principles as important in fashioning any alternative initiatives:
- a. The Court has a duty to give SRLs a fair hearing. In certain circumstances, it may be appropriate for a judicial officer to give some assistance in fulfilment of that duty.³⁵ Judicial assistance with SRLs should be limited, be astute, and not extend its auxiliary role so as to confer a positive advantage over a represented opponent.³⁶
 - b. The court has an obligation to do justice. The obligation incorporates a duty to enable fair access to justice via provision of accessible resources, which would act as a source of guidance for SRLs to navigate court processes with less disadvantage.³⁷

³⁰ Senate Legal and Constitutional References Committee, 'Inquiry into Legal Aid and Access to Justice' (8 June 2004) <https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2002-04/legalaidjustice/report/ch10> chapter 10.

³¹ Federal Court of Australia, *Federal Court of Australia Annual Report 2015–2016* (2016) 37.

³² Senate Legal and Constitutional References Committee (n 30).

³³ Raquel Dos Santos, 'Self-represented litigants in the Australian civil justice system 10 years of the Self Representation Service in Australia', *Pro Bono Centre Organisation* (23 March 2017) <<https://www.probonocentre.org.au/wp-content/uploads/2017/06/Raquel-Dos-Santos-QPILCH-Self-Represented-Litigants.pdf>> 1, 5. See also, Elizabeth Richardson, Tania Sourdin and Neirda Wallace, 'Self-Represented Litigants: gathering useful information' (Final Report, June 2012, Australian Centre for Justice Innovation, Monash University) 11.

³⁴ *Ibid.*

³⁵ Judicial Commission of New South Wales, n 8.

³⁶ White (n 10). See especially, *Reisner v Bratt* [2004] NSWCA 22, [4]–[6]; *Malouf v Malouf* (2006) 65 NSWLR 449, [94]. See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 5 ('Australian Guide to Judicial Conduct').

³⁷ The Committee notes different courts and jurisdictions produce a variety of resources of SRLs to varying degrees of detail. See, eg, Judicial Commission of New South Wales, n 8, [10.3]; Supreme Court of NSW, *Representing Yourself In Civil Proceedings In The Supreme Court Of New South Wales* (March 2015)

- c. Judges should undertake professional development programs to improve their skills and respond to changes in society.³⁸

11. While the Committee considers that there is much work required to be done by the Courts to assist SRLs, courts must also ensure judicial independence is not influenced or is perceived as compromising its ability to judge cases fairly and impartially.³⁹ The impartial judgment of cases also means that judicial officers must not judge partially in favour of SRLs. Otherwise, the reputation, independence, and public perception of the courts and the justice system could be negatively impacted.⁴⁰ The Committee considers the following measures could be adopted to provide safeguards against judicial partiality:

- a. Wider accountability mechanisms for judicial officers including appropriate external complaint mechanisms where SRLs may have their concerns heard.⁴¹
- b. Guidelines in the form of the Disqualification Guide suggested above for a judicial audience which is reviewed regularly for changes in civil procedures, especially those affecting SRLs, not too dissimilar from the NSW Judicial Commission's Benchbook and the provision of professional training concerning this issue to court and judicial officers.⁴²

Recommendation 3

A national collaborative court initiative, publishing the processes and structures for Judicial Guidelines (e.g. Guide to Disqualification, Judicial Conduct, professional protocols for inappropriate judicial conduct and mechanisms for complaints, such as how to access and appeal judicial impartiality) would enhance judicial independence and impartiality promoting public confidence in judicial accountability.

<https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_facilitiesupport/Representing-yourself-in-civil-proceedings.aspx>.

³⁸ Ibid 28.

³⁹ Kirby (n 22) 10.

⁴⁰ Australian Guide to Judicial Conduct (n 36) 7.

⁴¹ Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (Background Paper J15) 5.

⁴² Productivity Commission (n 1) 509.

Question 16

Increasing diversity in the legal profession

12. The Committee notes that there is a need for increasing diversity in the legal profession generally. We note the following concerning findings from a survey undertaken by Australia's 11 largest law firms:⁴³

- representation of First Nations people in the law firms was significantly underrepresented;
- while about 25% of lawyers belonged to Asian backgrounds, only 8% of them were partners in these law practices;
- data on representation of LGBTQI+ was lacking.

13. The Law Council of Australia rightly points out that in order to achieve 'the overarching objective of providing a productive, inclusive and sustainable legal profession', employers must provide a workplace 'free from harassment and discrimination based on attributes including gender, sexual orientation and family responsibilities'.⁴⁴

14. It has also been noted that diversity in workplaces would benefit employers through the utilisation of the ability of people with culturally diverse experiences who are creative, better problem solvers and are likely to create business opportunities.⁴⁵

Supporting lawyers from unrepresented communities

15. The Government as well as the private sector can each play their part in fostering support for lawyers who are identified as those belonging to the underrepresented community.

16. Such support would eventually mean that the underlying principle of equality before law would be achieved in practice. Furthermore, it also facilitates access to justice to a wider group of underrepresented and diverse communities of people residing in Australia. Such an achievement will ultimately be instrumental to promote broader diversity across the entire legal profession, society, and culture.

Recommendation 4

1. The adoption of an Inclusiveness Statement by law practices setting out their diversity goals and the measures they will adopt to reach those goals could facilitate the measures taken by the profession to better reflect the diversity of Australian society.

⁴³ Sam McKeith, 'Building diversity in the legal profession' on *LSJ Online* (4 May 2019) <<https://lsj.com.au/articles/building-diversity-in-the-legal-profession/>>.

⁴⁴ Law Council of Australia, *Building a more diverse and inclusive legal profession* (2017) <<https://www.lawcouncil.asn.au/media/media-releases/building-a-more-diverse-and-inclusive-legal-profession>>

⁴⁵ The Law Society of NSW, *Diversity and Inclusion in the Legal Profession: The Business Case* (2018) 5.

2. The redaction of individual attributes during recruitment processes could avoid employer bias while still permitting recruitment selection criteria to focus on candidate merit, competence, and quality.
3. Government funding in the form of grants could be considered for employers who create roles specifically targeting the recruitment of lawyers from diverse and underrepresented communities.

Concluding Comments

NSW Young Lawyers as well as the Public Law and Government Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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