

**Women Lawyers Association of NSW Incorporated**  
**Submission to ALRC Review of Judicial Impartiality 2021**

**Submitted electronically to the Australian Law Reform Commission**

**Contact: Renee Bianchi, President**

**Contributors: Renee Bianchi and Louise Mallon**

**About the Women Lawyers Association of New South Wales**

The Women Lawyers Association of New South Wales Incorporated (**WLANSW**) is the peak professional body representing women lawyers in NSW. We have been committed to improving the status and working conditions of women lawyers since 1952. Today we have a diverse membership of over 9000 ranging from the female pioneers of the legal profession, senior legal leaders and the emerging next generation. We have female, male and corporate members including students, non-practising lawyers, solicitors, barristers, judicial officers, corporate counsel and academics. Our patron is the Honourable Virginia Bell AC.

WLANSW provides a network for social interaction and continuing education and reform within the legal profession and broader community. WLANSW has undertaken research, into work practices affecting women in the legal profession and contributes submissions to inquiries into issues affecting our members. Most recently, WLANSW contributed to stakeholder engagements and a written submission to the Australian Human Rights Commission National Inquiry into Sexual Harassment in the Australian Workplace.

**Introduction**

WLANSW thanks the Australian Law Reform Commission for the opportunity to make a submission to the Review of Judicial Impartiality.

This submission is prepared by the Law Reform Committee of WLANSW, and does not necessarily reflect the views of all members of WLANSW.

This submission focuses on the need for diversity in the judiciary, transparency of judicial appointments, and societal and cultural influences on unconscious bias.

WLANSW submits that there are a number of statistics that are relevant to the examination of the prevalence and effects of judicial bias.

In terms of demographics of the legal profession in NSW, according to the Practising Solicitor Statistics as at 31 December 2020 published by the Law Society of NSW,<sup>1</sup> there were 36,400 solicitors with a practising certificate. Of these, 19,241 (or 53%) are female. According to the

---

<sup>1</sup> 'Practising Solicitor Statistics' 31 December 2020 *Law Society of NSW*, available online: <https://www.lawsociety.com.au/sites/default/files/2021-03/202012%20Practising%20Solicitor%20Statistics%20-%20Dec%202020.pdf>

NSW Bar Association,<sup>2</sup> at the date of this submission there were 2,455 practising barristers. Of these, 595 (or 24%) are female. Of the 393 senior counsel, 49 (or 12.5%) are female.

In terms of demographics of the Commonwealth judiciary, of the seven High Court justices, three (or 43%) are female. There are currently 52 justices of the Federal Court.<sup>3</sup> Of these, 14 (or 27%) are female. There are currently 66 judges of the Federal Circuit Court.<sup>4</sup> Of these 28 (or 42%) are female. There are currently 37 justices of the Family court.<sup>5</sup> Of these 17 (or 46%) are female.

In terms of demographics of incarceration in Australia, Aboriginal and Torres Strait Islander women have the highest rate of incarceration (34% of the total female prison population).<sup>6</sup> In this submission, WLANSW includes comments in relation to the representation of First Nations peoples, in particular First Nations women, in the federal judiciary because we consider it is part of our role as lawyers to advocate for the human and legal rights of First Nations peoples. In this we support the advocacy of our First Nations colleagues in the law.

## **Submission on selected consultation questions and proposals**

### ***Transparency of process and law***

#### ***Consultation question 1 – Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?***

WLANSW agrees that Principles 1 to 5 inclusive provide an appropriate framework for reform.

In relation to Principle 6, that judicial independence requires reforms to be judge-led, WLANSW makes the following observations:

1. There are examples of Commonwealth legislation and court rules which codify the powers of judges, even when the judge is exercising their discretion;<sup>7</sup>
2. Transparency of decision-making by judges may be enhanced by clear directions from the Parliament as to matters to be taken into account; and
3. The Executive Government which appoints Commonwealth judges has the most important role to play in reform of procedures for appointments in order to achieve transparency and public confidence in Commonwealth judicial appointments.

### ***Supporting judicial impartiality***

#### ***Consultation proposal 14 – the Australian Government should commit to a more transparent process for appointing Federal judicial officers that involves a call for expressions of interest, publication for criteria for appointment, and explicitly aims for a suitably qualified pool of candidates who reflect the diversity of the community.***

---

<sup>2</sup> Undated (accessed 30 June 2021), Bar Association Statistics, available online: <https://nswbar.asn.au/the-bar-association/statistics>

<sup>3</sup> <https://www.fedcourt.gov.au/about/judges/current-judges-appointment> (accessed 23 June 2021)

<sup>4</sup> <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/judges-senior-staff/judges> (accessed 23 June 2021). Note the statement “*The Federal Circuit Court of Australia Act 1999 makes provision for the appointment of part-time judges although it is not envisaged that such appointments will be made in the foreseeable future.*”

<sup>5</sup> <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/judges-senior-staff/judges-appeal-division/> (accessed 29 June 2021)

<sup>6</sup> ALRC Report 133 *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Island Peoples*, available online: [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)

<sup>7</sup> See for example s33Z of the *Federal Court Act 1976* which sets out the powers of the Court in relation to judgments in representative proceedings.

WLANSW supports this consultation proposal and would make the following additional comments:

1. WLANSW notes its disappointment that more transparent processes for appointment to the federal judiciary were not implemented following the publication of ALRC Report 69 Part 2: *Equality before the Law – Women’s Equality*.<sup>8</sup> The current female/male split in judicial appointments in the Federal Court and the Federal Circuit Court in particular are not representative of the Australian population or the Australian legal population. There has never been a female Chief Justice of the Federal Court. These statistics indicate that the current methods of appointing federal judicial officers in these Courts is failing the majority of the Australian population.
2. Without transparency in the system of federal judicial appointments it is open to the community in general, and members of the legal profession, to make assumptions that the apparent secrecy is because there may be a political element to appointments, or that appointments are made by invitation to privileged professionals, in particular senior barristers, who are predominantly men, who are known professional or socially to the decision makers or to those people who make recommendations to the decision makers. Secrecy and mystery in the process only fosters distrust in those who are not in the pool of potential appointees, and the community in general.
3. Transparency in the appointment process, and a system which allows for applications to be made by any qualified individuals, will open up the pool of candidates to individuals who have not been identified by the Government.
4. The appointment process needs to be fair and transparent in order to satisfy the interests of justice, and to ensure that there is greater representation of females and First Nations Australians in the federal judiciary.

***Consultation proposal 15 – the Attorney-General should report annually on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background.***

WLANSW supports this consultation proposal.

***Consultation question 16 – 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?***

For at least three decades the female/male split in newly admitted lawyers has either been equal or in favour of females. However, the lack of progression of females to senior roles within the legal profession has been recognised in the data collected by the Law Council,<sup>9</sup> and the annual data collected by WLANSW.<sup>10</sup>

If appointments to the federal judiciary are made by invitation primarily to stereotypical senior counsel then females will continue to be underrepresented. The same can be said for underrepresentation of First Nations peoples. The first, and simplest, step that can be taken to alleviate these distortions is to open up the appointment process to all qualified individuals, including solicitors and legal academics.

---

<sup>8</sup> ALRC Consultation Paper *Judicial Impartiality*, at [80]

<sup>9</sup> Law Council of Australia (2012) *National Attrition and Re-engagement Study (NARS) Report*

<sup>10</sup> Accessed at <https://womenlawyersnsw.org.au/>

If the federal judiciary reflects the Australian community generally, and the existing diversity in the legal profession, then there will be more opportunities for female advocates and others from diverse backgrounds to appear in federal courts without the concern that they are not known to, or come from the same background as, the person on the bench. As more experience is gained then more of these advocates will thrive and feel that they can apply for judicial appointments, federal or otherwise.

Consideration should be given to the appointment of part-time judges so that qualified individuals who choose to, or must, work part-time are also eligible.

***Consultation question 21 – What further steps, if any, should be taken by the Commonwealth Courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?***

WLANSW submits that a concerted effort to ensure increased representation of females, First Nations peoples and people from diverse backgrounds will reduce the social biases and lack of cultural competency. In the expectation that there will continue to be delays in achieving adequate representation, the mitigation measures listed by the ALRC are supported.

#### ***Collection, analysis and reporting of data***

***Consultation proposal 23 – Commonwealth Courts should introduce methodologically sound processes to seek structured feedback from court users, including litigants and practitioners, about their satisfaction with the court process, in a way that allows any concerns about experiences of a lack of judicial impartiality to be raised.***

WLANSW supports this proposal with the caveats included, that is, the data and feedback should be anonymised and aggregated so that no one judge is singled out.