



Australian Government  
Australian Law Reform Commission

BACKGROUND PAPER JI3

# JUDICIAL IMPARTIALITY

## The Federal Judiciary – the Inquiry in Context

March 2021



This paper on the federal judiciary is one in a series of background papers being released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality ('the Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. Other background papers in this series include *The Law on Judicial Bias: A Primer* (December 2020) and *Recusal and Self-Disqualification Procedures* (March 2021). Further background papers will be released addressing issues including critiques of the test for apprehended bias, implicit bias in judicial decision-making, and ethical infrastructure for judicial officers.

In April 2021, the ALRC will publish a Consultation Paper containing questions and draft proposals for public comment. A formal call for submissions will be made on its release. In addition, feedback on the background papers is welcome at any time by email to [impartiality@alrc.gov.au](mailto:impartiality@alrc.gov.au).

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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## Introduction

1. The Terms of Reference for this Inquiry ask the ALRC to consider ‘whether, and if so what, reforms to the laws relating to impartiality and bias as they apply to the federal judiciary, are necessary, or desirable.’ The ALRC does not interpret the Terms of Reference as suggesting that the principles or standards of conduct appropriate to the judicial office vary as between members of the federal judiciary and those who comprise the judiciaries of the states and territories. Nevertheless, the focus of this Inquiry is limited to an analysis of how the existing laws relating to impartiality and bias have been understood and applied within those courts that comprise the federal judiciary within the Commonwealth of Australia.

2. This background paper provides an overview of the composition of the federal judiciary, the jurisdiction of the Commonwealth courts, the workload of those courts, and the frequency of complaints against judicial officers (noting that such complaints may not necessarily be in relation to an allegation of impartiality or bias). This data has been sourced from the Annual Reports of each of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia, and is current as at 30 June 2020 unless otherwise stated.

3. This background paper also provides an empirical analysis of available information as to the frequency with which applications are made to federal judicial officers for those officers to recuse themselves from a matter on the ground of actual or apprehended bias. The paper seeks to inform an understanding of the extent to which issues of actual and apprehended bias are raised by parties within the context of the overall workload of the federal judiciary, the rate at which such applications are granted, and the sources of bias most commonly recorded.

## Composition of the federal judiciary

4. Chapter III of the *Australian Constitution* establishes the High Court of Australia and empowers parliament to create other Commonwealth courts and to vest federal judicial power in state and territory courts.

5. There are four Commonwealth courts and these four courts are the focus of this Inquiry: the High Court of Australia (‘High Court’), the Federal Court of Australia (‘Federal Court’), the Family Court of Australia (‘Family Court’), and the Federal Circuit Court of Australia (‘Circuit Court’). The latter two Courts will be merged to become the Federal Circuit and Family Court of Australia consequent upon the passage of the Federal Circuit and Family Court of Australia Bill 2019 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 by both Houses on 18 February 2021.

6. The High Court consists of seven Justices, each appointed until the age of 70. Full Court Sittings (two or more Justices) are mostly held in Canberra, the seat of the Court, but can be at any place, on any day, as fixed by a rule of Court if warranted by the amount of business. It is common for Constitutional Cases to be heard by all seven Justices, and for appeals to be heard by five or seven Justices. The Court must grant leave or special

leave to appeal before an appeal is heard.<sup>1</sup> Special leave applications are examined by a panel of Justices, usually two, and can be granted or refused with or without oral argument.<sup>2</sup>

7. The Federal Court is currently constituted by 53 judges, three of whom hold positions as members of other courts or tribunals which occupy all, or most, of their time. In addition, officers of the Court are appointed by the Chief Executive Officer and Principal Registrar under s 18N of the *Federal Court of Australia Act 1976* (Cth). These officers include a District Registrar for each District Registry, Registrars and Deputy District Registrars as necessary, a Sheriff and Deputy Sheriffs as necessary, and Marshals under the *Admiralty Act 1988* (Cth). Registrars perform statutory functions pursuant to various Commonwealth statutes and also exercise various powers delegated by judges under the *Federal Court of Australia Act*, *Bankruptcy Act 1966* (Cth), *Corporations Act 2001* (Cth), and *Native Title Act 1993* (Cth). There are currently 44 Registrars of the Court.

8. The Family Court is currently constituted by 33 judges, including the Chief Justice and Deputy Chief Justice. Of those 33, 10 are assigned to the Appeal Division. In addition, there are 42 Registrars who provide support to both the Family Court and the Circuit Court.

9. The Circuit Court is currently constituted by 68 judges, including the Chief Judge (who is also the Chief Justice of the Family Court).

## Jurisdiction of the Commonwealth courts

### The High Court of Australia

10. Section 71 of the *Australian Constitution* vests the judicial power of the Commonwealth in the High Court, in such other Commonwealth courts as the Parliament creates, and in such other courts as it vests with federal jurisdiction.

11. The High Court has original jurisdiction in matters defined by s 75 of the *Constitution* and original jurisdiction conferred by laws made by the Parliament under s 76 of the *Constitution*, including in any matter:

- arising under the *Constitution* or involving its interpretation;
- arising under any laws made by the Parliament;
- of Admiralty and maritime jurisdiction;
- relating to the same subject-matter claimed under the laws of different States.

12. The High Court also has jurisdiction to hear electoral disputes as the Court of Disputed Returns under s 354 of the *Commonwealth Electoral Act 1918* (Cth).

### The Federal Court of Australia

13. The Federal Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary and indictable criminal matters.

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1 See, eg, *Judiciary Act 1903* (Cth) Pt V; *Federal Court of Australia Act 1976* (Cth) s 33.

2 High Court of Australia, *Annual Report 2019–20*, 12.

14. The Federal Court has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Federal Court, from the Circuit Court in non-family law matters, and from other courts exercising certain federal jurisdiction. In recent years, a significant component of its appellate work has involved appeals from the Circuit Court concerning decisions under the *Migration Act 1958* (Cth). The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island.<sup>3</sup>

15. The Federal Court has jurisdiction to hear and determine:

- any matter arising under the *Australian Constitution* through the operation of s 39B of the *Judiciary Act 1903* (Cth);
- cases arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*');
- appeals on questions of law from the Administrative Appeals Tribunal ('AAT');
- appeals in taxation matters from the AAT and first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation;
- matters in relation to intellectual property (copyright, patents, trademarks, designs and circuit layouts) including all appeals in such matters from the state and territory Supreme Courts;
- native title determination applications (and their mediation) under the *Native Title Act 1993* (Cth), including revised native title determination applications, compensation applications, claim registration applications, applications to remove agreements from the Register of Indigenous Land Use Agreements and applications about the transfer of records;
- appeals from the National Native Title Tribunal and matters filed under the *ADJR Act* involving native title;
- maritime claims, and related matters, arising under the *Admiralty Act 1988* (Cth);
- matters arising under the *Fair Work Act 2009* (Cth), *Fair Work (Registered Organisations) Act 2009* (Cth) and related industrial legislation;
- matters arising under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), including the appointment of registered liquidators, the winding up of companies, applications for orders in relation to fundraising, corporate management and claims relating to misconduct by company officers;
- matters arising under the *Bankruptcy Act 1966* (Cth), including exercising power to make sequestration (bankruptcy) orders against persons who have committed acts of bankruptcy, to grant bankruptcy discharges and annulments and to deal with matters arising from the administration of bankrupt estates; and
- cases arising under Part IV (restrictive trade practices) and Schedule 2 (the Australian Consumer Law) of the *Competition and Consumer Act 2010* (Cth), including jurisdiction in relation to indictable offences for serious cartel conduct.

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<sup>3</sup> *Supreme Court Act 1960* (NI), ss 32–33.

## The Family Court of Australia

16. The Family Court exercises original and appellate jurisdiction in family law, including in a number of highly specialised areas. At first instance, it deals with the most complex and difficult family law cases.<sup>4</sup> It provides national coverage as the appellate court in family law matters, including hearing appeals from decisions of single judges of the Court, from judges of the Circuit Court in family law matters, and from the Family Court of Western Australia.

17. At first instance, the Family Court:

- determines cases with the most complex law, facts and parties, and hears cases arising under the regulations implementing the *Hague Convention on the Civil Aspects of International Child Abduction* ('the *Hague Convention*');
- has jurisdiction under all aspects of the *Family Law Act 1975* (Cth), including:
  - parenting cases involving:
    - a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child;
    - family violence and/or mental health issues with other complexities;
    - multiple parties;
    - cases where orders sought would have the effect of preventing a parent from communicating with or spending time with a child;
    - multiple expert witnesses;
    - complex questions of law and/or special jurisdictional issues;
    - international child abduction under the *Hague Convention*;
    - special medical procedures; or
    - international relocation;
  - financial cases involving:
    - multiple parties;
    - valuation of complex interests in trust or corporate structures, including minority interests;
    - multiple expert witnesses;
    - complex questions of law and/or jurisdictional issues; or
    - complex issues concerning superannuation.

18. The Family Court also has original jurisdiction under certain Commonwealth Acts, including:

- *Marriage Act 1961* (Cth);
- *Child Support (Registration and Collection) Act 1988* (Cth);
- *Child Support (Assessment) Act 1989* (Cth); and
- *Bankruptcy Act 1966* (Cth).

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<sup>4</sup> Family Court of Australia, *Annual Report 2019–2020*, 17.



## The Federal Circuit Court of Australia

19. The jurisdiction of the Circuit Court includes family law, migration law, and the following areas of general federal law: administrative law, admiralty law, bankruptcy, consumer law (formerly trade practices), human rights, industrial, intellectual property and privacy.

20. The Circuit Court exercises all aspects of jurisdiction under the *Family Law Act 1975* (Cth) with the exception of adoption and applications for nullity or validity of marriage. The Court has the same jurisdiction as the Family Court in relation to child support. The Circuit Court's jurisdiction includes:

- applications for parenting orders, including those providing for where a child lives, with whom a child spends time and communicates, and maintenance or specific issues under Part VII of the *Family Law Act*;
- applications in relation to property and applications for spousal maintenance or maintenance under Part VIII and Part VIIIAB of the *Family Law Act*;
- applications in relation to financial agreements and superannuation under Part VIIIA and Part VIIIB of the *Family Law Act*;
- applications for divorce under Part VI of the *Family Law Act*;
- applications alleging contraventions of orders made under the *Family Law Act*;
- enforcement of orders made by either the Circuit Court or the Family Court under Part XIII of the *Family Law Act*;
- location and recovery orders as well as warrants for the apprehension or detention of a child;
- determination of parentage, under Part VII Division 12, and recovery of child-bearing expenses pursuant to Part VII Division 8 of the *Family Law Act*.

21. Under the *Migration Act 1958* (Cth), the Circuit Court:

- can review some decisions, including decisions made by the Minister for Home Affairs, the AAT and the Immigration Assessment Authority;
- can review the refusal of student visa and cancellations, as well as skilled work visas and business visas;
- hears urgent applications brought to prevent deportation/removal of persons from Australia.

22. Matters of general federal law which are within the jurisdiction of the Circuit Court include the following:

- Administrative law:
  - applications under the *ADJR Act*;
  - judicial review of 'child support first reviews' under s 44AA of the *Administrative Appeals Tribunal Act 1975* (Cth); and
  - appeals from the AAT remitted from the Federal Court.
- Admiralty law:
  - under ss 9, 27 and 28 of the *Admiralty Act 1988* (Cth) and any matters referred to it by the Federal Court.



- Bankruptcy law:
  - concurrent jurisdiction with the Federal Court under the *Bankruptcy Act 1966* (Cth), except those requiring jury trials;
  - general powers in bankruptcy pursuant to s 30 of the *Bankruptcy Act* to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part VIII, Part X or Part XI coming within the power of the Court; and
  - power to make such orders (including declaratory orders or granting injunctions or other equitable remedies) as the Court considers necessary for the purpose of carrying out or giving effect to the *Bankruptcy Act*.
- Consumer law:
  - jurisdiction for claims under the following provisions of the *Competition and Consumer Act 2010* (Cth):
    - Section 46 (Misuse of Market Power);
    - Section IVB (Industry Codes);
    - Part IVD (Consumer Data Right);
    - Part XI (Application of the Australian Consumer Law as a law of the Commonwealth); and
    - Schedule 2 (Australian Consumer Law); and
  - civil jurisdiction with respect to claims under the *National Consumer Credit Protection Act 2009* (Cth).
- Human rights law:
  - civil matters arising under Part IIB or IIC of the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'); and
  - federal unlawful discrimination matters under the *AHRC Act* relating to complaints under the:
    - *Age Discrimination Act 2004* (Cth);
    - *Disability Discrimination Act 1992* (Cth);
    - *Racial Discrimination Act 1975* (Cth); and
    - *Sex Discrimination Act 1984* (Cth).
- Industrial law:
  - small claims jurisdiction under the *Fair Work Act 2009* (Cth) if the compensation is not more than \$20,000;
  - certain matters under the *Independent Contractors Act 2006* (Cth), the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);
  - matters under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the *Workplace Relations Act 1996* (Cth) (in so far as it continues to apply).
- Intellectual property law:
  - civil disputes concerning copyright, designs, and trade marks, including:
    - *copyright* – civil claims and matters under Parts V, VAA, IX and s 248J of the *Copyright Act 1968* (Cth), such as claims for injunctions and damages for breach of copyright;

- *trade marks* – the following matters under the *Trade Marks Act 1995* (Cth):
  - appeals from decisions of the Registrar of Trade Marks – ss 35, 56, 67, 83(2), 83A(8), 84A–84D and 104;
  - infringement actions – ss 120–130;
  - revocation of registration under ss 88 and 89;
  - decision on whether a person has used a trade mark under s 7;
  - determining whether trade mark has become generic – ss 24, 87 and 89;
  - amendment or cancellation of registration under ss 85 and 86;
  - application for an order to remove a trade mark registration for non-use – s 92(3);
  - application for rectification of register by order of court under s 181; and
  - variation of rules governing use of certification trade mark under s 182;
- *designs* – the following matters under the *Designs Act 2003* (Cth):
  - appeals from decisions of the Registrar of Designs – ss 28(5), 67(4), 68(6), 50(6), 52(7) and 54(4);
  - determinations of entitled persons under s 53;
  - infringement actions under ss 71–76;
  - applications for relief from unjustified threats under ss 77–81;
  - applications for compulsory licences under ss 90–92;
  - revocation of registration under s 93;
  - for Crown use provisions, determinations of the term of use of a design under s 98;
  - applications for a declaration of any Crown use under s 101;
  - applications for the cessation of Crown use of a design under s 102; and
  - rectification of register under s 120D.
- Privacy law:
  - enforcing determinations of the Privacy Commissioner and private sector adjudicators under the *Privacy Act 1988* (Cth).

## Workload of the federal judiciary

### The High Court of Australia

23. The High Court is the apex Court within Australia. Consequently, its workload reflects the Court's functions as the final appellate and constitutional court. It has dealt recently with a wide variety of subject matters, including cases concerned with statutory interpretation, legal professional privilege, insurance, limitation of actions, criminal law and procedure, restitution, corporations law, immigration, taxation, administrative law, practice and procedure, costs, bankruptcy, evidence, customs and excise, native title, stamp duty, damages and tort. In its original jurisdiction, the Court has decided cases involving the implied freedom of communication on political and government matters, the aliens power, elections, and Chapter III of the *Australian Constitution*.

**Table 1 Matters before the High Court of Australia by type and year<sup>5</sup>**

Matter types	2015/16	2016/17	2017/18	2018/19	2019/20
Special Leave Applications	536	498	523	565	455
Appeals filed	51	68	77	41	57
Original jurisdiction <sup>6</sup>	208	129	166	182	187

### Statutory Commonwealth courts – excluding family law

24. In the last financial year, 4,469 cases were commenced in, or transferred to, the Federal Court's original and appellate jurisdictions. In that same period, 4,871 matters were completed. The total number of current matters as at 30 June 2020 was 3,425.<sup>7</sup>

**Table 2 Filings in the Federal Court of Australia and Federal Circuit Court of Australia (excluding family law) by year**

Filings	2015/16	2016/17	2017/18	2018/19	2019/20
Federal Court <sup>8</sup>	6,001	5,715	5,925	6,034	4,469
Federal Circuit Court	8,655 <sup>9</sup>	9,704 <sup>10</sup>	9,971 <sup>11</sup>	10,110 <sup>12</sup>	10,333 <sup>13</sup>

25. The Federal Court resolved 65 native title applications and there were an additional 17 applications managed by the native title practice area that were also finalised. In the period, 42 new applications were filed.<sup>14</sup>

5 Table compiled using data published in High Court of Australia, *Annual Report 2019–20*, 20–22.

6 Includes Writs of summons; Constitutional writs; Electoral; Removals, Cause removed; Other matters.

7 Federal Court of Australia, *Annual Report 2019–20*, 21.

8 Federal Court of Australia, *Annual Report 2019–20*, Table A5.1.

9 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.3.

10 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 3.1.

11 Federal Circuit Court of Australia, *Annual Report 2017–18*, Table 3.1.

12 Federal Circuit Court of Australia, *Annual Report 2018–19*, Table 3.1.

13 Federal Circuit Court of Australia, *Annual Report 2019–20*, Table 3.2.

14 Federal Court of Australia, *Annual Report 2019–20*, 24.

26. There were 10,333 cases commenced in the Circuit Court’s original jurisdiction, which comprised 6,555 migration matters and 3,778 matters of general federal law. In that same period, 7779 matters were completed.<sup>15</sup>

**Table 3 Federal Circuit Court of Australia matters filed and finalised by type of law and year**

Case Type	2015/16 <sup>16</sup>		2016/17 <sup>17</sup>		2017/18 <sup>18</sup>		2018/19 <sup>19</sup>		2019/20 <sup>20</sup>	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Migration	3,544	3,070	4,981	3,003	5,312	3,680	5,597	3,691	6,555	4,045
Bankruptcy	3,879	3,850	3,280	3,408	3,072	3,015	2,890	2,879	1,872	2,105
Fair Work	972	1,011	1,189	1,028	1,298	1,189	1,295	1,262	1,563	1,329
Other	266	N/A	258	N/A	285	N/A	329	N/A	343	300
Total	8,649		9,704		9,971		10,096		10,333	7,779

27. The Federal Court received 1,263 filings in appellate proceedings. In that same year, 1,168 appeals and related actions were finalised. Of these, 335 matters were filed and finalised. There are 834 appeals currently before the Federal Court, of which 571 are migration appeals.

15 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13), Table 3.2.

16 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.5.

17 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 3.3.

18 Federal Circuit Court of Australia, *Annual Report 2017–18*, Table 3.3.

19 Federal Circuit Court of Australia, *Annual Report 2018–19*, Table 3.3.

20 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) Table 3.2.

## Statutory Commonwealth courts – family law

28. Table 4 below sets out the number of applications filed and finalised in the Family Court of Australia.

**Table 4 Family Court of Australia matters by application type and year**

Application Type	2015/16 <sup>21</sup>		2016/17 <sup>22</sup>		2017/18 <sup>23</sup>		2018/19 <sup>24</sup>		2019/20 <sup>25</sup>	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Consent orders	13,458	13,357	14,182	13,919	14,295	13,962	13,872	14,081	14,908	14,946
Applications in a case (interim)	3,616	3,521	3,469	3,265	3,400	3,524	3,236	3,211	3,500	3,216
Final orders applications	3,017	2,979	2,748	2,742	2,427	2,534	2,225	2,395	2,382	2,394
Other applications	327	342	342	321	314	357	255	271	264	231
Total	20,418	20,199	20,741	20,247	20,436	20,377	19,588	19,985	21,054	20,787

29. In the Circuit Court, family law constitutes the largest proportion of the overall workload of the Court.<sup>26</sup> In addition, the Circuit Court's family law case load represents 87 per cent of all family law work filed at the federal level, including 92 per cent of all parenting applications filed across both the Family and Circuit Courts.<sup>27</sup>

21 Family Court of Australia, *Annual Report 2015–16*, Figure 3.2.

22 Family Court of Australia, *Annual Report 2016–17*, Figure 3.1.

23 Family Court of Australia, *Annual Report 2017–18*, Figure 3.1.

24 Family Court of Australia, *Annual Report 2018–19*, Figure 3.1.

25 Family Court of Australia, *Annual Report 2019–20*, Table 3.2.

26 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) 27.

27 Ibid.

**Table 5 Federal Circuit Court of Australia family law matters by application type and year**

Application Type	2015/16 <sup>28</sup>		2016/17 <sup>29</sup>		2017/18 <sup>30</sup>		2018/19 <sup>31</sup>		2019/20 <sup>32</sup>	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Divorce applications	44,098	43,445	43,846	42,630	45,190	46,051	44,342	44,545	45,886	44,963
Applications in a case (interim)	21,521	20,367	22,050	21,182	21,710	21,182	22,115	20,758	21,775	20,715
Final orders applications	17,523	16,379	17,791	17,239	17,241	17,978	17,070	16,683	16,455	15,769
Other applications	1,778	Not reported	1,790	Not reported	1,604	Not reported	1,707	Not reported	1,447	1,440
Total	84,920		85,477		85,745		85,234		85,563	82,887

30. The Appeal Division of the Family Court hears appeals from decisions of both federal and state courts.<sup>33</sup> In the last financial year in that Division, 445 appeals were filed and 304 judgments were delivered. A total of 448 appeals were finalised, of which 130 were allowed, 145 were dismissed, 63 were abandoned, and 110 were withdrawn. At the end of the relevant reporting period, there were 29 appeal judgments outstanding and 213 pending matters.<sup>34</sup>

## Complaints about the federal judiciary

31. In the year 2019–20, neither the High Court nor the Federal Court reported any complaints about current judicial conduct in their annual reports.

32. In the same period, the Family Court received 4 complaints about judicial conduct, excluding complaints about delay in delivery of a judgment.<sup>35</sup>

33. The Circuit Court reported 112 complaints relating directly to judicial officers. That represents complaints in less than 0.5 per cent of all final order applications filed during the same period in family law, migration and other general federal law applications, excluding bankruptcy.<sup>36</sup>

28 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.4, Figures 3.4, 3.5, 3.7.

29 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 1.1, Figures 3.4, 3.5, 3.7.

30 Federal Circuit Court of Australia, *Annual Report 2017–18*, Figures 3.4, 3.5, 3.7.

31 Federal Circuit Court of Australia, *Annual Report 2018–19*, Figures 3.4, 3.5, 3.7.

32 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) Table 3.2.

33 Family Court of Australia, *Annual Report 2019–20*, (n 25) 36.

34 Ibid 37.

35 Ibid 29.

36 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) 55.

## Data on applications for disqualification

34. The Commonwealth courts do not collect data on a number of issues relevant to the process of recusal and disqualification on bias grounds. For example, although there are some records of the number of times that a case has been reallocated to a different judge before the parties are notified of the listing, those records do not identify the extent to which this is done to avoid potential risk of a bias claim, rather than for some other reason. Similarly, the courts do not collect data on the number of applications for disqualification made in the courts.

35. In light of this, the ALRC has carried out a review of judgments from the Commonwealth courts from the past five years to gain a preliminary (if limited) picture of applications for disqualification in the Commonwealth courts on the grounds of bias. By searching publicly available judgments, the ALRC has identified judgments that make reference to applications for disqualification in the period 1 January 2015 – 31 December 2020. This includes both interlocutory judgments deciding the application for disqualification and (more frequently) final judgments and appeal judgments that make reference to previous applications for disqualification when recounting the procedural history of the case. For notes on the data, including further detail about how it was collected, see Appendix A. Some of the results are in Table 6 below.

36. This data is necessarily limited. In the Commonwealth courts, issues of actual or apprehended bias are generally expected to be raised by way of formal application and are generally made as an interlocutory application seeking orders for disqualification.<sup>37</sup> However, anecdotal reports from consultations suggest that the issue of bias is often first raised informally in court and where this leads to a formal application for disqualification, most are made orally. Though judges are expected to sit in open court and to give reasons for a decision to continue to sit or not, there is no requirement to give written reasons.<sup>38</sup> It is understood that many, if not most, orders determining applications for self-disqualification are delivered *ex tempore* (that is, orally), and may never be published in writing. This may explain why the ALRC was able to find more references to past applications for disqualification in the procedural history of judgments, and less judgments actually determining applications for disqualification. This means a review of published judgments is likely to reveal only a subset of the applications that are made.

37. Nevertheless, the set of applications recorded in judgments is useful in that it gives a preliminary indication that applications for disqualification are rare and do not occupy much of the courts' time, given that the numbers are so small in the context of the courts' overall workload (see Table 6 below). The preliminary data also suggests that self-represented litigants are no more likely to bring applications for disqualification than legal representatives. This is consistent with preliminary feedback from consultations.

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37 See Andrew Morrison, Kylie Weston-Scheuber and Tim Goodwin, 'Apprehended Bias: To Recuse or Not to Recuse?' (Commbar Civil Procedure Committee CPD, 22 November 2018) 22–3; see also *Comcare v John Holland Rail Pty Ltd (No 3)* [2011] FCA 164 at [79]; *Margarula v Northern Territory* (2009) 175 FCR 333 at [35]–[38]; *Kirby v Centro Properties Ltd (No 2)* (2008) 252 ALR 557 at [18]–[23].

38 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 17–18.



38. The most data was available from cases where reference to the application for disqualification was identified in a judgment of the court to which the application related.<sup>39</sup>

**Table 6 Disqualification applications for bias by court and outcome 2015 – 2020**

	<b>Number of applications for disqualification identified in judgments of target court</b>	<b>Number of applications successful</b>	<b>Rate of successful applications (as %)</b>
Circuit Court	117	21	18
Family Court	124	36	29
Federal Court	54	9	17
Family Court Full Court	12	0	0
Federal Court Full Court	4	0	0

39. Applications for disqualification on the grounds of apprehended bias can be said to fall into cases which obviously require recusal, those that do not obviously give rise an apprehension of bias, and those in the middle which require more consideration. If it can be accepted that judges are more likely to give written reasons for those applications in the middle, then tracking the judgments gives a sense of the scope of the “contested ground”. It also picks up a set of the less controversial cases, which are given passing reference in the final judgment.

40. The review also gives insight into the types of issues applicants raise when making a bias application. Table 7 below shows the frequency with which different sources of bias were raised in relation to each court (as identified in the judgments of the target court, and excluding cases only identified on appeal). It should be noted that in each case more than one source of bias could be alleged, and the source of the bias alleged was not recorded in relation to all applications identified.

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39 A relatively small number of further references to applications for disqualification and/or appeals on the grounds of bias in first instance courts were identified in appeal judgments. Due to the complexity of reconciling these references with the first instance case, these are excluded.

**Table 7 Disaggregation of disqualification for bias application by bias type, court and outcome**

	Interest		Association		Conduct		Prejudgment		Extraneous Information	
	Raised	Successful	Raised	Successful	Raised	Successful	Raised	Successful	Raised	Successful
Circuit Court	7	2	10	2	36	2	28	2	9	3
Family Court	0	0	6	2	34	3	44	7	18	8
Federal Court	1	0	8	1	21	0	22	6	9	5
Family Court Full Court	0	0	2	0	22	2	14	0	9	1
Federal Court Full Court	2	0	1	0	3	1	3	0	3	0

41. The ALRC is in the process of carrying out a survey of judges to gain greater insight into the frequency with which judges recuse themselves from cases and the extent to which issues of actual or apprehended bias are raised in proceedings. It is also carrying out further analysis of the information available through the Commonwealth Courts Portal to gain greater insight into applications and orders that are not recorded in judgments. Data obtained from these activities will inform the recommendations made in the Inquiry’s final report.

### Notes on Data

42. The ALRC has carried out a review of judgments from the Commonwealth courts from the past five years to gain a preliminary (if limited) picture of applications for disqualification in the Commonwealth courts on the grounds of bias.

#### Identification of relevant cases

43. Cases were identified by running a search on Commonwealth court judgments in Austlii using the search terms “recus! OR “disqualify !self” OR “application w/5 disqualification”.<sup>40</sup> Cases were recorded as relevant where a review identified reference to an application for disqualification of a judge made at any stage of the proceedings, or where an appeal raised issues of alleged apprehended bias.

44. Multiple references to the same application across different judgments, whether at first instance or on appeal, have been excluded so that each application is only counted once. If there was a second disqualification application in the same matter, it is only then recorded twice.

45. Cases making reference to an application to disqualify an individual other than an Australian federal judicial officer were excluded, including those relating to tribunal members, lawyers, State judicial officers, and foreign courts.

#### Review of relevant cases

46. Each case identified as relevant was then reviewed to obtain further information including: the case name, the date of application (if available), the date of decision (if available), the court in which the application was made,<sup>41</sup> whether the application was made by a self-represented litigant, the source of bias alleged (interest, association, conduct, prejudgment, and extraneous information) and whether the application was successful.

47. Categorisation of the source of bias alleged is subjective, and in some cases not clearly argued, but an assessment was made of the most closely aligned source.

48. In some judgments (in particular appeal judgments) the application was only mentioned in passing, so this information was not available in all cases. For this reason, data is reported separately on (i) applications identified in the court against which the application was made, and (ii) total applications and appeals identified by reference to the court to which they relate.

#### Limitations of the dataset

49. The data does not include applications which are not referenced in a written judgment, including where the reasons were delivered orally only.

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40 These search terms were chosen after refining broader searches and were verified as picking up all the applications identified in a sample of the broader searches.

41 Or where the issue of bias is raised for the first time on appeal, the court in relation to which the allegation of bias was made.