Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI2**

JUDICIAL IMPARTIALITY

Recusal and Self-Disqualification

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This paper on recusal and self-disqualification procedures is the second 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. A primer on the law on judicial bias (December 2020) was the first in this series. Further background papers will be released addressing issues including the federal judiciary, 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.

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. This background paper is focused on the practical matter of how courts manage claims (and the potential for claims) by litigants that the judicial officer deciding their matter is actually or apparently biased.

2. First, the paper will examine the existing procedures relating to judicial recusal,[1] starting at the initial stages of a case with the assignment of a judicial officer or panel. The paper follows the procedural issues from this initial allocation stage to judicial disclosure and the determination of applications for disqualification, and then, ultimately through to the procedures for appeal and review of disqualification determinations. It will then consider criticisms of the procedures, and their perceived benefits. Finally, the paper considers proposals for reform, including by looking to other jurisdictions for alternative procedures.

3. As set out in the Australian Law Reform Commission's first Background Paper, a judge will be disqualified from hearing a case if it can be shown either that they are *actually* biased or that there *might* be a reasonable apprehension that they *might* be biased.[2] For the latter, the legal test in Australia governing recusal and disqualification decisions is

> whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[3]

4. In Australia, as in many common law jurisdictions, the primary judge, the one in relation to whom the allegation of bias is raised, determines whether the relevant test for bias has been satisfied.[4] This is traditionally justified on the basis that the challenged judge is 'best apprised of the facts, and is in the best position to determine any such application'.[5] It also has the benefit of being time and cost efficient, and protects against tactical manoeuvring, through which parties might seek to delay proceedings or have their case heard by a judge they perceive as being more sympathetic to their case.

5. Commentators and judges have acknowledged that the procedure may be perceived as 'strange' and 'awkward',[6] and its universal suitability has recently been questioned by the Full Court of the Federal Court of Australia ('Federal Court').[7] Sir Grant Hammond KNZM, former judge of the Court of Appeal of New Zealand, writes that if

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1 The terms 'recusal' and 'disqualification' are often used interchangeably. In this paper, 'recusal' is generally used to mean removal from a case on the judge's own initiative, and 'disqualification' to mean removal due to an application for disqualification. As to terminology, see, eg, Lee J in *Webb v GetSwift Limited (No 6)* [2020] FCA 1292 [1].

2 Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020).

3 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See further *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [33] (Gleeson CJ, McHugh, Gummow and Hayne JJ). For further details see Australian Law Reform Commission (n 2) [6]–[12].

4 Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 90.

5 The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 83.

6 Jula Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53(3) *Osgoode Hall Law Journal* 853, 894; HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 167.

7 *GetSwift Limited v Webb* [2021] FCAFC 26 [4] (Middleton, McKerracher and Jagot JJ).

> we assume an intergalactic jurist on a fact-finding mission around our galaxy, it is difficult to see how such a jurist would not feel bound to report this feature of recusal jurisprudence as being strange to the point of perversity.[8]

6. In addition to criticisms of how the process is perceived, there are challenges in having a judge adjudicate bias in herself or himself. As Dr Olijnyk notes, self-disqualification 'demands of the decision-maker an almost inhuman level of impartiality'.[9] Furthermore, there are tensions inherent in this approach, as judges strive to balance their oath of impartiality with their duty to hear cases.

State of Australian procedure

7. The procedural mechanisms for recusal and self-disqualification in Australia derive from common law, ethical obligations, and court practice. They are also informed by the *Guide to Judicial Conduct* (the *Guide*), which is published by the Australasian Institute of Judicial Administration with the support of the Council of Chief Justices of Australia.[10] The processes are built on the common law's strong assumption of judicial impartiality, which historically relied on procedural safeguards such as impeachment and appeal mechanisms to protect against any bias that might arise.[11]

Scenarios: How is the issue of bias addressed through court processes?

1 Registrars identify possible conflicts at the allocation stage and assign cases pragmatically to judges so as to avoid issues of bias

2 A judge (or party) identifies an issue of bias at the time the case is assigned and asks the head of jurisdiction or the registrar to reassign the case to another judge.

3 A judge discovers a potential issue after case management has begun and either

A) recuses of her or his own motion; or

B) discloses the conflict and invites submissions from parties.

4 Parties bring the issue to the judge's attention, either informally or through an application for disqualification.

8 Hammond (n 5) 144.

9 Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <auspublaw.org/2015/09/apprehended-bias/>.

10 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017). For further discussion of the role of the *Guide* see Australian Law Reform Commission (n 2) [57]–[59].

11 Charles G Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 678–9. In contrast, under the Justinian Code, litigants could simply recuse a judge in order for proceedings to take place without suspicion. This continues to inform recusal procedures in civil law countries today. Ibid 677–8.

Precautionary practices at the allocation stage

8. To minimise the risk of a bias concern arising, most courts have developed precautionary administrative practices in allocation arrangements. If potential issues of bias are identified before a judge is seised of the matter, the need for recusal is eliminated through the pragmatic selection of judges.[12]

9. In the Federal Court, this procedure involves screening matters for any related litigation presided over by judges of the court before cases are allocated.[13] Once court assignments are circulated, judges are also able to approach the head of jurisdiction or registry to be removed from the case if they identify possible bias concerns.[14] These practices are in many cases long-standing, if informal. Writing about the New South Wales Court of Appeal in 1998, Kirby P explained that if

> a judge has had any connection, even indirect, with litigation that comes before the court, he or she will so indicate when the list of sitting arrangements is distributed. A substitution will then be arranged.[15]

A party is also able to draw possible issues of bias to the attention of the registrar, who may choose to reassign the case where appropriate.[16]

10. However, often a judge and the parties will not be able to identify possible concerns of bias until after the first case management hearing has commenced when further information about the case becomes available. In these cases, a more formal recusal or disqualification process takes place.

Judicial disclosure

11. If, at any point after a matter is allocated to a judge, the judge becomes aware of circumstances that she or he considers justify recusal, the judge should recuse herself or himself and the case will be reallocated.[17]

12. In cases where issues of potential bias arise after a case has been allocated to a judge[18] but it is not clear that recusal is required, the judge is advised to disclose 'facts which might reasonably give rise to a perception of bias or conflict of interest' to the parties.[19] This should take place at the earliest possible opportunity.[20] It is often done informally, such as through a letter to the parties, or in court.[21]

13. Professors Campbell and Lee noted in 2012 that while there is no code of judicial conduct for interests that warrant disclosure by a judge, the *Guide* is instructive for judges and was generally regarded as working well.[22] Chapter 3 of the *Guide* sets out a non-exhaustive list of associations, activities, potential conflicts of interest, and other

12 Appleby and McDonald (n 4) 92.
13 As a practical matter, a more wide-ranging screening is undertaken for appellate cases as more is known about the matter.
14 See Australasian Institute of Judicial Administration (n 10) 17.
15 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369.
16 The Hon Justice John Sackar, 'Disqualification of Judges for Bias' (Speech, Faculty of Law, Oxford, 16 January 2018) 34.
17 Australasian Institute of Judicial Administration (n 10) 17.
18 For example, after a matter has formally been placed on their 'docket' by the registry.
19 Australasian Institute of Judicial Administration (n 10) 12. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Appleby and McDonald (n 4) 90.
20 Australasian Institute of Judicial Administration (n 10) 17.
21 Ibid; Appleby and McDonald (n 4) 90.
22 Lee and Campbell (n 6) 173.

circumstances that serve as 'warning signs' to alert judges of possible challenges to their impartiality.[23] The *Guide* goes on to state that the 'parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest'.[24]

14. The *Guide* encourages a precautionary approach whereby it counsels that even

> if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.[25]

However, as English jurist Lord Woolf CJ cautioned, over-disclosure might 'unnecessarily undermine the litigant's confidence in the judge'.[26]

15. It is also possible for parties to bring potential issues of bias to the judge's attention. This may occur in situations where a judge is not aware of the potential bias concern or where a judge has overlooked an issue the parties feel is salient. A judge can then consider whether to recuse of her or his own volition.[27]

Application

16. Following disclosure, parties may decide to make an application for disqualification or consent to the judge sitting.[28] Applications are often made orally rather than by written application. In some jurisdictions, there is a preference for the issue of bias to be raised informally.[29] However, there is a line of cases in the Federal Court that suggests a preference for more formal interlocutory applications seeking orders for recusal.[30]

Decision and review

17. If an application for disqualification is brought and a judge is uncertain as to whether to grant the application, she or he is encouraged to discuss the matter with colleagues, and, where necessary, the head of jurisdiction, person in charge of allocation, and the parties.[31] However, the decision as to whether or not it is appropriate to sit ultimately rests, in the first instance, with the judge concerned.[32] This is true of both courts of first instance and multi-member courts, where it is the impugned judge who determines the issue rather than the full court as constituted.[33] In making this decision, judges are advised not to disqualify themselves too readily.[34]

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23 Australasian Institute of Judicial Administration (n 10) 11.
24 Ibid 12.
25 Ibid 18.
26 *Taylor v Lawrence* [2003] QB 528 [64].
27 See, eg, Gabrielle Appleby and Stephen McDonald, 'Disqualification of Judges and Pre-Judicial Advice' (2015) 43 *Federal Law Review* 201, 203, discussing Gageler J's decision not to sit in *Unions NSW v New South Wales* (2013) 252 CLR 530.
28 Australasian Institute of Judicial Administration (n 10) 18; Appleby and McDonald (n 4) 90.
29 This includes in New South Wales. 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.
30 Ibid; *Comcare v John Holland Rail Pty Ltd (No 3)* [2011] FCA 164 [79]; *Margarula v Northern Territory* (2009) 175 FCR 333 [32]–[38]; *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [18]–[23].
31 Australasian Institute of Judicial Administration (n 10) 17.
32 Ibid 18. This practice is a matter of convention rather than law. See, eg, Callinan J in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185].
33 Appleby and McDonald (n 4) 90.
34 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; Australasian Institute of Judicial Administration (n 10) 12.

18. Once the judge has made a decision, the *Guide* states that reasons should be given in open court.[35] If the judge decides that she or he should decline to sit, a substitute will be arranged.[36] If the judge determines there is no actual or apparent bias, then the hearing resumes.

19. In the Commonwealth courts — including the Federal Court, Federal Circuit Court of Australia ('Federal Circuit Court') and Family Court of Australia ('Family Court') — if a judge decides not to disqualify herself or himself, a party who disagrees with the decision has two options. Most commonly, the party will raise the issue on appeal — either of an interlocutory order or final judgment. While traditionally a judge's decision on the question of bias was not understood to be an order (and therefore no direct appeal would lie), recent case law has held otherwise,[37] and the Commonwealth courts have in any event tended to treat this restriction narrowly.[38]

20. The second option available to dissatisfied parties in the Commonwealth courts is to bring an application for judicial review, as decisions of courts of limited jurisdiction (including the Federal Court, Family Court, and Federal Circuit Court) may be challenged by a writ of prohibition to prevent the court hearing and determining the case.[39] Where an application for judicial review is successful, the matter will generally be remitted to the relevant court to be heard by a different judge.[40] If a party does not exercise their option to seek appeal or judicial review in a timely manner, they may be found to have waived their claim of bias.[41]

21. It is not entirely clear that the High Court of Australia ('High Court'), as a final court of appeal, has jurisdiction to review a decision of one of its own members not to disqualify herself or himself.[42] The issue was raised by the case of *Kartinyeri v Commonwealth*, where Callinan J initially rejected the plaintiff's motion that he disqualify himself.[43] No review decision was rendered, however, as Callinan J ultimately stepped aside. In the commentary that followed, some opined that jurisdiction for such review can be found in either section 31 of the *Judiciary Act 1903* (Cth) or in the inherent jurisdiction of the court to uphold the principles of natural justice, protect its processes, or uphold the Constitution.[44]

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35 Australasian Institute of Judicial Administration (n 7) 18.

36 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369.

37 *Polsen v Harrison* [2021] NSWCA 23 [40], citing *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [80].

38 See, eg, *Brooks v Upjohn Co* (1998) 85 FCR 469. See also Melissa Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, Australian Institute of Judicial Administration, 2001) 27–8; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 727–8.

39 Appleby and McDonald (n 4) 91 citing *R v Watson; Ex Parte Armstong* (1976) 136 CLR 248; Aronson, Groves and Weeks (n 38) 727, citing *Chow v DPP* (1992) 28 NSWLR 593; Enid Campbell, 'Review of Decisions on A Judge's Qualification to Sit' (1999) 15 *QUT Law Journal* 1, 1–2. It is not clear, however, whether the Full Court of the Federal Court could grant a prerogative writ against a decision of the Federal Court: Campbell (n 39) 2; Perry (n 38) 38.

40 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 266 (Barwick CJ, Gibbs, Stephen and Mason JJ). Note that in superior courts of original jurisdiction judicial review is not available and there is some uncertainty as to whether decisions not to recuse are immediately appealable. A party may therefore have to wait for an interlocutory or final order to be made and then bring a collateral appeal for bias on the basis that the subsequent order should not have been made: Appleby and McDonald (n 4) 91; Aronson, Groves and Weeks (n 38) 727–9; Campbell (n 39) 2–5; Perry (n 38) 42–4.

41 Appleby and McDonald (n 4) 101; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 451.

42 Appleby and McDonald (n 4) 110. Note that final courts of appeal in the United Kingdom and New Zealand have reviewed their own judgments for alleged apprehended bias of one of their members, based on their inherent jurisdiction: at 110–11.

43 *Kartinyeri v Commonwealth* (1998) 156 ALR 300.

44 Campbell (n 39) 5–6; Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1999) 73 *Australian Law Journal* 72, 78; Sir Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 *Constitutional Law and Policy Review* 21, 26–7.

Criticisms

22. Professor Geyh describes the tension of having judges decide their own disqualification motions as being akin to having the fox guard the henhouse.[45] Part of why having judges decide on their own disqualification seems problematic is explained by research insights from behavioural psychology that indicate that all individuals have a bias blind spot.[46] In his article entitled 'I'm Ok, You're Biased', Professor Gilbert describes the bias blind spot as a situation in which 'the brain cannot see itself fooling itself'.[47] Research tells us judges are equally — if not more — affected by this egocentric bias that makes it difficult for one to recognise bias in oneself.[48]

23. This is particularly problematic in the case of judges, whose professional identity is entwined with notions of impartiality.[49] Indeed, the common law has at times treated judicial recusal as antithetical to the oath of office of a judge, who was 'sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'.[50] While the common law has moved away from this stark position, there remains a strong presumption that judges approach matters impartially and do not readily stand aside.[51] Bringing an application for disqualification may therefore still be perceived as a 'slight on the judicial character of the judge concerned'.[52] Indeed, Sir Grant Hammond notes that '[a]t least some judges appear to be very sensitive on this score, and take such applications as a professional slur on their objectivity.'[53]

24. Tied to this, an additional source of tension in self-disqualification arises from the imperative that judges hear the cases they are assigned.[54] Under the 'duty to sit', which is described as 'equally as strong as the duty to not sit where disqualified', a judge must only step down in cases in which the judge is obliged to do so as a strict matter of law.[55] To step aside otherwise is seen as inappropriate, and perhaps even a dereliction of duty.[56]

25. Part of the rationale for this circumscribed approach toward disqualification is a desire to protect against judge-shopping. As Mason J stated in *Re JRL; Ex parte CJL*:

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45 Geyh (n 11) 720.

46 See Joyce Ehrlinger, Thomas Gilovich and Lee Ross, 'Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others' (2005) 31(5) *Personality and Social Psychology Bulletin* 680. See also Australian Law Reform Commission, *Implicit biases and judicial impartiality* (Background Paper JI6, 2021).

47 Daniel Gilbert, 'Opinion: I'm O.K., You're Biased', *The New York Times* (online, 16 April 2006) <www.nytimes.com/2006/04/16/opinion/im-ok-youre-biased.html>.

48 Brian Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021) 24–5; Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376, 390; Melinda Marbes, 'Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform' (2013) 32(2) *Saint Louis University Public Law Review* 235, 252.

49 Geyh (n 11) 677–9.

50 Ibid 679, quoting William Blackstone, *III Commentaries on the Laws of England* (1768), 361. See further Australian Law Reform Commission, *The fair-minded observer and its critics* (Background Paper JI7, 2021).

51 Aronson, Groves and Weeks (n 38) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

52 Appleby and McDonald (n 4) 97.

53 Hammond (n 5) 148.

54 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

55 Abimbola Olowofoyeku, 'Inappropriate Recusals' (2016) 132 *Law Quarterly Review* 318, 319 quoting Rehnquist J in *Laird v Tatum*, 409 US 824, 837 (1972).

56 Philip Bryden and Jula Hughes, 'The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification' (2011) 48(3) *Alberta Law Review* 569, 604–5. Inappropriate recusals have been described as '"an abdication of judicial function", "irresponsible", and "being untruthful to one's oath to do right by all manner of persons"… It goes to the heart of whether judicial officers are failing to perform their duty.': Olowofoyeku (n 55) 320.

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[57]

A judge must therefore balance the risk of cost, delay, reputational damage, and inconvenience of an appellate court taking a different view against a 'strong presumption that judges will approach a matter with an impartial mind and not stand aside without good reason'.[58]

26. In addition to the practical psychological difficulties of a judge trying to recognise her or his own bias and balancing the sometimes conflicting imperatives of maintaining impartiality and the duty to sit, there are also clear difficulties with the perception of self-disqualification. Having a judge decide on their own disqualification runs counter to the well-established fundamental principle of procedural fairness that no person should be a judge in their own cause.[59]

27. Problems with how the procedure is perceived exist for both litigants (who, by raising the issue, already have concerns with respect to the judge's neutrality) and the general public when cases are brought into the media spotlight. Surveys conducted in both the United Kingdom and Australia indicate that a plurality of members of the public believe the issue of disqualification should be decided by a different, independent judge.[60] Even without familiarity with the behavioural sciences literature, there is a general perception that a judge will not be neutral and detached when sitting in adjudication of her or his own perceived bias.[61] This is particularly important because social science research on 'procedural justice' has demonstrated that

> the public at large including litigants do not, like judges, see fairness as inherently linked to outcome, but rather consider that fairness is inextricably linked to the process that produces those outcomes.[62]

28. Self-disqualification also raises challenges for counsel in bringing an application. Consultations suggest that while it is not often that counsel find themselves faced with issues that may amount to apprehended bias, it is a very rare situation in which counsel make an application for disqualification. Sir Grant Hammond recognised the difficulty posed by the procedure, remarking that counsel

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57 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

58 Aronson, Groves and Weeks (n 38) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

59 Russell Wheeler and Malia Reddick, 'Judicial Recusal Procedures: A Report on the IAALS Convening' (Institute for the Advancement of the American Legal System, June 2017) 5.

60 Andrew Higgins and Inbar Levy, 'What the Fair-Minded Observer Really Thinks and Judicial Impartiality' [2021] *Modern Law Review* (forthcoming).

61 See Greg Barns, 'It's Not a Good Look When Judges Are Seen as Judging Themselves', *The Drum, ABC News* (20 August 2015) <www.abc.net.au/news/2015-08-20/barns-when-judges-are-seen-as-judging-themselves/6711574>; Gabrielle Appleby, 'After Heydon and Carmody, Does Australia Need a New Test for Judicial Recusal?', *The Conversation* (3 September 2015) <theconversation.com/after-heydon-and-carmody-does-australia-need-a-new-test-for-judicial-recusal-46939>.

62 Hammond (n 5) 72, citing JM Greacen, 'Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts' (2008) 47 *Judges Journal* 41. Procedural justice has been explored extensively in the literature, with influential work including John Thibault and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum, 1975); and Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990). See further Diane Sivasubramaniam and Larry Heuer, 'Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness' (2008) 44 *Court Review* 62. For discussion of some of the limits of procedural justice as a concept see Sharyn L Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 170.

> should be able to raise whatever objections are appropriate in a fearless manner, without fear of repercussions. Yet this practice puts counsel in an invidious position where they may entertain respectably well-grounded fears that the judge may become alienated against them.[63]

One practitioner in consultations described it as 'excruciating' to bring such an application.[64]

29. Considered at the most fundamental level, former Chief Justice of the High Court, Sir Anthony Mason, questioned whether the procedures to determine claims of bias have kept pace with the changing scope of the law. In his view, the current practice of self-disqualification was justified when the only question was whether a judge was actually biased, as the judge concerned is best placed to determine that question. However, this justification no longer holds now that the bias rule is concerned equally with appearances, and disqualification is also required in cases where a reasonable apprehension of bias exists.[65]

Reforms

30. A number of reforms have been suggested in response to criticisms of current procedures for determining issues of bias. It has been argued that well-crafted procedural reforms could assist in achieving greater public confidence in the administration of justice. A number of these proposed reforms are set out below — some could stand alone while others lend themselves to possible combination.

Minimising the need for recusal and disqualification

31. Options for reform at the early stage of the court process seek to eliminate situations in which the issue of judicial disqualification might arise. In some jurisdictions, this involves judicial officers informing court personnel in advance that cases involving certain parties or lawyers should not be assigned to them.[66] Algorithms can also be used to assign cases to help reduce instances in which concerns relating to bias might arise.[67]

32. In some parts of the United States — including at the federal level — a register of judges' financial interests helps not only to pre-emptively avoid conflicts at the time judges are allocated to a case, but also identifies these issues upfront for litigants.[68] When it considered the issue in 2012, the New Zealand Law Commission ultimately decided against recommending a financial register for judges. In reaching its decision, the Commission noted already high levels of public confidence in the judiciary and concerns relating to the efficacy of such a register.[69] It bears noting that in Australia, for such a register to be constitutionally compliant it would likely need to be initiated by the judiciary.[70]

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63 Hammond (n 5) 83.
64 See also Appleby and McDonald (n 4) 97.
65 Mason (n 44) 24.
66 See, eg, in relation to 'automatic recusal systems' in Hawaii, 'Survey of Hawaii Judges Explores Disqualification and Recusal Issues' (2008) 92 *Judicature* 34, 35.
67 On the use of algorithms in judicial decision making generally, see Andrew Higgins, Inbar Levy and Thibaut Lienart, 'The Bright but Modest Potential of Algorithms in the Courtroom' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice* (Oxford University Press) 113, 127–30.
68 New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, 2012) 63–9.
69 Ibid 69–70.
70 Lee and Campbell (n 6) 173.

33. In other jurisdictions, automatic judicial reassignment — or peremptory judicial challenges — are another procedural mechanism that can have the effect of reducing challenges for bias. Through this process parties are 'given the right to reject an assigned trial judge … when litigants or counsel believe the case would be better served by reassignment to another judge' without having to advance a claim of bias.[71] Such a system effectively embraces judge-shopping, which is largely regarded as undesirable and unethical in the Australian context.[72]

Referral of the decision on bias to another judge

34. A commonly proposed reform advocates for assigning a different judge (or committee of judges) to decide disqualification applications.[73] The possible benefit of referral in some cases was recently noted by the Full Court of the Federal Court in the case of *GetSwift Limited v Webb*. In that case, the court said that an appeal before it from a decision not to disqualify for apprehended bias showed why

> it may be more prudent for an independent mind (or minds) to consider disqualification applications on some occasions. This approach may assist to promote confidence in the legal system, which after all is a key rationale for the apprehended bias rule.[74]

35. Among the proponents of this reform are two former High Court judges. In *Ebner*, although his colleagues on the High Court held otherwise, Callinan J suggested that having a different judge decide applications for disqualification 'would better serve the general public interest and the litigants in both the appearance and actuality of impartial justice'.[75] Having only two years before himself been faced with deciding a contested disqualification motion, His Honour noted that the current practice 'place[s] a judge in … an invidious position'.[76]

36. Despite the potential embarrassment of adjudicating on a colleague's perceived ability to hear the case in an unbiased manner, Sir Anthony Mason argued that given the standard to be applied is an objective one, 'it can be said with some force that the other members of such a court are in a better position to apply the standard impartially than the judge who is the target of the objection'.[77] Moreover, referral might help to cement the issue as a question of law, as opposed to a perceived attack on the character of a judge.

37. Referring the decision to another judge may help to alleviate tension between competing imperatives faced by the judge who is seised of the matter. On the one hand, the judge is encouraged to embrace a precautionary approach toward disqualification (or as some refer to it 'if in doubt, out').[78] At the same time, however, the judge is also faced with the countervailing duty to sit. This latter obligation would not weigh as heavily on a different, independent judge in deciding whether a case should be reassigned.

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71 Jeffrey W Stempel, 'Judicial Peremptory Challenges as Access Enhancers' 86(5) *Fordham Law Review* 2263, 2265. Australian Law Reform Commission, *The fair-minded observer and its critics* (Background Paper JI7, 2021).

72 See Appleby and McDonald (n 4) 105; Aronson, Groves and Weeks (n 38) 686.

73 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185] (Callinan J); Mason (n 44) 27; Hammond (n 5) 148–9, Appendix E; Hughes and Bryden (n 6) 894; Appleby and McDonald (n 4) 101–5. Interestingly, the Province of Quebec has recently moved in the other direction by taking recusal decisions out of the hands of a disinterested judge and putting them into the hands of the judge who is the focus of the application: *Quebec Code of Civil Procedure,* Q 2014, c C–25.01, s 205.

74 *GetSwift Limited v Webb* [2021] FCAFC 26 [4].

75 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185].

76 Ibid 397. See *Kartinyeri v Commonwealth* (1998) 156 ALR 300.

77 Mason (n 44) 26.

78 Hammond (n 5) 80.

38. A process involving referral need not be automatically triggered every time an issue relating to impartiality is raised. Hybrid processes would enable judges to refer an application for disqualification to another decision maker at their discretion or under prescribed circumstances. There are several forms such a process could take.

39. Professors Hughes and Bryden (writing in the Canadian context) propose a procedure by which judges are given the explicit authority to refer disqualification applications to a panel, but are not compelled to do so.[79] Professor Appleby has suggested a similar but more extensive approach to referrals whereby a judge initially considers the application for their own disqualification, but if she or he determines there is an arguable case for disqualification the decision is then transferred to another judge.[80] Appleby couples this threshold approach to disqualification with a prescribed list of specific circumstances that would also require a transfer, such as where a question arises as to whether the judge has made full disclosure of information in relation to the application, or has to make a judgment about the credibility of the facts that the judge has revealed about her or his own conduct.[81] Further circumstances requiring referral could include, for example, where issues are raised with regard to the judge's conduct or remarks in the course of a hearing.

40. While not a referral process per se, Sir Grant Hammond suggests an intermediate option of review at the court of first instance. Rather than requiring a litigant to appeal (or seek judicial review of) a judge's decision not to disqualify herself or himself, Hammond envisions a review process within the trial court structure. This could be before either another judge assigned to hear the review or before a standing review panel.[82]

41. There is a lack of consensus as to whether legislative change is needed to ground the jurisdiction of the court to implement a referral process. As discussed above, the Federal Court website already contemplates a referral process involving the duty judge. However, the majority of the High Court in *Ebner* left unresolved the question of whether existing powers would enable a Federal Court judge to decide a question of another judge's disqualification for bias on referral.[83] Appleby and Stephen McDonald QC contend that as the changes pertain to court practices and procedure, it might be possible to make any necessary modifications through rules of court — a form of delegated legislation made by judges.[84] Alternatively they argue that given existing practices reflect the common law procedures, it could also be that recusal procedure could instead by modified by a final court.[85] The Hon Justice M Perry suggests that implementing a referral process would require legislative action.[86]

42. While intuitive in many respects, a referral procedure is not without drawbacks. Referral to another judge or committee could become a tactical tool for parties looking to create delay or engage in judge-shopping.[87] Moreover, there are particular concerns relating to efficiency. There is both an increase of time and cost involved in having to

79 Hughes and Bryden (n 6) 894; Jula Hughes and Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36(1) *Dalhousie Law Journal* 171, 191.
80 Appleby (n 61).
81 Ibid. On referral of the application for disqualification where the facts alleged to found the bias claim are contested or in doubt, including how the question of evidence might be dealt with, see further Appleby and McDonald (n 4) 101–5.
82 Hammond (n 5) 148–9, Appendix E.
83 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 361.
84 Appleby and McDonald (n 4) 114.
85 Ibid.
86 Perry (n 38) xii.
87 Hughes and Bryden (n 6) 893.

bring in another judge to decide the application for disqualification. Automatic referral is particularly inefficient in situations where a concern in relation to impartiality arises over the course of the proceedings (in other words, not due to any oversight in the judge's initial disclosure) or is first brought to the judge's attention by the parties.[88] In such circumstances, it would seem prudent to first allow the judge seised of the matter to consider her or his own recusal.

43. Some of the concerns relating to the inefficiency of a referral process might be addressed by removing the decision to the duty judge, who is already available to decide short, urgent matters. The Federal Court explicitly allows for such a process, though in practice the duty judge is seldom called on to decide bias applications.[89] However, in the already overcrowded dockets in the Federal Circuit Court, and where a duty judge deals only with general federal law matters, not family law matters, such a process is likely to increase costs and worsen the significant delays already faced by family law litigants.

44. These concerns may be exacerbated in rural areas or smaller regions where other judges are not readily available to decide referrals. However, as court systems increasingly embrace technology — and specifically remote hearings — it is not clear that geography would pose much of a barrier. Moreover, as a judge cannot be called on to provide evidence, these types of applications could likely also be done on the papers.[90]

45. Aside from the potential inefficiency of having another judge decide the application for disqualification, referring the decision may paradoxically not go as far as one might think toward increasing public confidence. An impression of bias may persist where a case is referred through the implication that the target judge cannot be trusted to rule impartially.[91] And hybrid models with a threshold or discretion for referral may remove Geyh's fox from guarding the henhouse, but she is still lingering at the front gate.

46. Referral to another judicial officer also fails to wholly alleviate the concerns relating to the bias blind spot. As Higgins and Levy note, the inability to recognise bias in oneself also manifests as in-group bias — or 'the phenomenon where people tend to positively evaluate actions of the in-group relative to the out-group'.[92] This bias would most likely be amplified in the context of the referral of a judicial bias application as in-group bias tends to be exacerbated in exclusive groups.[93] The result would be a trend toward non-disqualification decisions.

47. A final concern in relation to a procedure involving referral relates to the evidentiary burden. Under the existing procedure, an application does not need to be supported by affidavit evidence as the judge seised of the matter almost invariably has the information required to make the determination. If a different, independent judge decides the application for disqualification, then information from the judge who is the subject of the application

88 See Scenarios 3 and 4 above.

89 Federal Court of Australia, 'Urgent (Duty) Matters — How to Apply' (17 May 2019) <www.fedcourt.gov.au/contact/urgent-duty-matters>. The Court website advises that if 'the Docket Judge is unavailable or should not hear the application because of the nature of the application (e.g. certain legal privilege-related applications or bias applications), then depending which national practice area (NPA) the urgent matter relates to, the appropriate Duty Judge … will hear the matter.' (emphasis added)

90 This would not address any delay incurred as a result of an ultimate need to reassign the case. However, this problem does not arise as a result of any deficiency in disqualification processes but rather pertains to the overarching problem of court resourcing.

91 Geyh (n 11) 728.

92 Higgins and Levy (n 48) 390.

93 Ibid.

may be unavailable unless it is reflected in the record. This concern is mitigated by the fact that appellate courts already effectively determine bias applications under similar circumstances where an issue of potential bias is first raised on appeal after judgment has been delivered.[94]

Appeal processes

48. As discussed above, there has previously been some confusion as to whether a decision on bias is an interlocutory order that can be appealed. In addition to increasing clarity and transparency, formalising the availability of interlocutory relief would also assist to ensure timely access to review. The *Family Law Act* addresses the issue, stating that an appeal is available where a judge rejects an application for disqualification.[95] Further clarification could be provided by inserting similar clauses in the constitutive legislation for other Commonwealth courts.

49. Alternatively, courts could provide clarity by setting out how an application should be framed so as to attract an interlocutory order related to disqualification that can be appealed.[96] The ongoing litigation in *Webb v GetSwift Limited (No 6)* provides an example of how the issue might be structured.[97] In that case, the parties sought an interlocutory order that the 'proceeding be referred to the National Operations Registrar for reallocation to a judge in the Commercial and Corporations National Practice Area'. This then attracted an order that the parties were able to appeal (with leave).

50. Interlocutory appeals could have the unintended negative consequence of fragmenting proceedings, leading to an increase in the time and cost required to resolve a matter. However, Appleby and McDonald suggest that the requirement to seek leave may help to mitigate these concerns through the exercise of judicial discretion.[98]

51. If the judge whose impartiality is impugned remains the decision maker, then an alternative proposal is to subject these decisions to *de novo* review on appeal.[99] Similar to the concerns related to removing the decision from the judge in the first instance, affording no deference to the trial judge's assessment of her or his own fitness may implicitly convey to the public that the impugned judge cannot be trusted to rule impartially.[100] Moreover, appeals are costly and not all parties will be able to afford this avenue of recourse.

Reasons for recusal

52. Another proposal for reform is to require judges to provide reasons for recusal and disqualification decisions.[101] While judges in Australia will provide reasons if they conclude there is no reasonable apprehension of bias and remain seised of the matter, reasons are not always provided where a judge decides to remove themselves from the case. This is almost invariably the situation where judges recuse themselves at the

94 See, eg, *Charisteas v Charisteas* (2020) 60 Fam LR 483.
95 *Family Law Act 1975* (Cth) ss 94(1AA) and 94AAA(1)(b).
96 Appleby and McDonald (n 4) 101.
97 *Webb v GetSwift Limited (No 6)* [2020] FCA 1292.
98 Appleby and McDonald (n 4) 100.
99 Geyh (n 11) 718; Hammond (n 5) 150. A *de novo* appeal allows the reviewing judge to approach the question at issue with fresh eyes, that is, without any deference to the decision of the judge of first instance.
100 In addition, the in-group dynamic may operate to create an unstated deferential standard, which does little for ensuring a better outcome and serves to reduce transparency: Geyh (n 11) 728.
101 Note that in 2014 the Quebec Code of Civil Procedure was updated to remove s 236 of the 2002 version of the Code, which had required reasons where a judge initiated recusal.

allocation stage or at the outset of case management proceedings. The resulting dearth of reasons contributes to a slant in the reported case law toward cases where judges did not disqualify themselves. As Hughes and Bryden note, 'the jurisprudence is slanted towards explaining why a judge should sit while most decisions to recuse are invisible'.[102]

53. In a legal system based on precedent, this may appear problematic from a litigant's perspective. When considering whether or not to make an application for disqualification and in making such applications, it is helpful to have jurisprudence on the reasons why judges do recuse themselves, as opposed to simply the jurisprudence on why they do not.

54. On the other hand, the extent to which the one-sided case law impacts on a judge's decision to recuse is unclear. The *Guide* advises that judges should consult their colleagues in making recusal and disqualification decisions and early consultations with judicial officers seem to indicate that this was a widely adopted practice. Therefore, even if judges do not benefit from the written reasons of their colleagues on early-stage recusals, they do benefit from their counsel behind closed doors. In addition, consultations with registries and judges — as well as academic commentary — suggest that many judges take a very precautionary approach toward bias in any case.[103]

55. Setting aside the impact on future disqualification decisions, requiring reasons for recusal and disqualification would serve to create a more transparent process. Depending on the level of detail, however, it may not achieve the objective of increasing public confidence in the administration of justice if judges are required to disclose details regarding their actual or perceived bias. Moreover, it has the potential to be embarrassing for judges or affect privacy in relation to matters of a personal nature, and it would not be fanciful to imagine that this professional embarrassment could have negative repercussions on a judge's decision whether or not to recuse.

56. An alternative could be for courts to provide aggregated data that identifies the frequency of and grounds for recusals that occur in the early stages of a case. Increased transparency would help to address public cynicism that may arise when high profile cases spill over into the media. It could also assist registries in developing effective screening tools in the initial allocation of cases to judges to minimise the potential for bias.

Bias applications before appellate courts

57. While similar concerns exist in appellate courts, there is an additional rationale in favour of moving away from judges deciding on their own recusal. As Sir Anthony Mason argued, a full court has

> a responsibility to ensure that it is constituted in accordance with the provisions of the law governing the judicial process, the exercise of judicial power and natural justice. The court should not retreat from that responsibility by either delegating that responsibility to one of its number or declining to review his decision on the objection.[104]

102 Hughes and Bryden (n 6) 896.
103 See, eg, Appleby and McDonald (n 4) 98.
104 Mason (n 44) 26. See also The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 113.

58. Removing the central role of the judge whose impartiality is challenged from the decision-making process has the benefit of being easier to implement with multi-member panels, as there are already additional judges seised of the matter who could consider an application for disqualification. On the other hand, a potential concern in assigning the decision to the full bench arises in situations where a minority of the court finds that a judge ought to be disqualified. This may reduce public confidence in the impartiality of the court as constituted and may negatively impact on the perceived legitimacy of the ultimate decision.

59. Procedural reforms in appellate courts could take one of several forms. The first would be to have all members of the court as constituted decide, including the target judge.[105] This is also the method preferred by Hughes and Bryden — though they would include the right for a judge to recuse herself or himself from the decision on the application.[106] Like Sir Anthony Mason, Appleby and McDonald suggest that the power of the court to decide as a whole follows as an incident of the exercise of jurisdiction.[107] They liken this to other legal determinations by a multi-member court (as opposed to a specific order against a judge not to sit).[108] Moreover, this process has effectively been adopted in a number of decisions.[109] If the court already does already have this power, then a change to the conventional method of deciding disqualification applications before appellate courts could be achieved through a Practice Direction or Practice Note. Alternatively, such a change could be achieved by amending the rules of court. This may require a grant of legislative authority to clarify the jurisdiction of the court to establish such procedures.[110]

60. Alternative models may face jurisdictional challenges without legislative support. For example, in some jurisdictions the existing practice is paired with a right of review to the other panel members.[111] A further alternative is the typical German practice whereby only the other members of the panel decide the motion — in other words the judge whose recusal is sought is excluded.[112]

Conclusion

61. Judicial recusal and disqualification procedures require scrutiny to ensure that they remain in line with the evolution of the bias rule and its emphasis on the maintenance of public confidence in the administration of justice. A process that sees judges rule on their own impartiality is seen by many as falling short of meeting this objective.[113]

105 Hammond (n 5) 149. This practice was adopted by the South African Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* [1999] 4 SA 147. It is also the general practice of the New Zealand Court of Appeal: Court of Appeal of New Zealand, 'Recusal Guidelines' (August 2017) [11].

106 Hughes and Bryden (n 6) 895.

107 But see Geoffrey S Lester, 'Disqualifying Judges for Bias and Reasonable Apprehension of Bias' (2001) 24(3) *Advocates' Quarterly* 326, 341.

108 Appleby and McDonald (n 4) 106–7.

109 See, eg, *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212, 16; *Neil v Legal Profession Complaints Committee (No 2)* [2012] WASCA 150; *Livesey v NSW Bar Association* (1983) 151 CLR 288.

110 Appleby and McDonald (n 4) 113–14; Perry (n 38) 94.

111 Hughes and Bryden (n 6) 895. Such a procedure would seem to be available in the Western Australia where the Court of Appeal can review any decision made by a single judge of appeal: *Supreme Court (Court of Appeal) Rules (WA) 2005* Part 2, Div 3. This is effectively the process in the Supreme Court of New Zealand, where — if there is an objection to the initial decision of the impugned judge not to recuse — the remaining judges will revisit the claim: Supreme Court of New Zealand, 'Recusal Guidelines' (9 July 2020) [7].

112 Hughes and Bryden (n 6) 895.

113 See Barns (n 61).

62. The most widely called for reform is to have a different judge involved in the disqualification decision. There are several shapes such a reform could take at both the trial and appellate levels of court. The proposals require varying degrees of additional resourcing and may introduce degrees of delay in the underlying proceedings. These matters are currently being discussed in the Commission's preliminary consultation meetings, and will be addressed further in our Consultation Paper to be released in April 2021.