Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI4**

JUDICIAL IMPARTIALITY

Conceptions of Judicial Impartiality in Theory and Practice

April 2021

This paper on conceptions of judicial impartiality in theory and practice 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), *Recusal and Self-Disqualification Procedures* (March 2021), and *The Federal Judiciary: The Inquiry in Context* (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.

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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CONTENTS

Introduction

1. Although impartiality has been called the 'supreme judicial virtue',[1] it is often vaguely and unclearly defined, and 'rarely subject to sustained theoretical analysis'.[2] Consequently, our current understanding of judicial impartiality has been described as 'muddled'.[3]

2. This background paper provides an overview of the scholarship and commentary on impartiality, summarising the common conceptual understandings of impartiality and the interactions of these conceptions with the practical exercise of judgecraft in Australia. It forms the basis for understanding some of the underlying tensions raised in a series of background papers that explore current doctrinal and procedural challenges relating to the law on bias in Australia.

3. In the Terms of Reference, the ALRC is asked to consider

> whether the existing law about actual or apprehended bias relating to judicial decision-making remains appropriate and sufficient to maintain public confidence in the administration of justice.[4]

In order to answer this question, it is necessary to understand how theoretical conceptions of impartiality inform the law on bias as it is, and as it might be in the future. The theoretical underpinnings discussed in this background paper will inform the recommendations in the ALRC's Final Report.

Origins and rationale of the duty of impartiality

4. The role of a judge often includes 'fact-finding and fact-weighing, combined with the need to resolve legal uncertainties when they arise' in order to adjudicate disputes between parties.[5] This process will necessarily affect the entitlements and obligations of the parties to the dispute, and, as explained below, the success of that process will in part be determined by whether the judge is perceived to have acted impartially as between the parties.

5. Impartiality of decision-makers has been widely considered fundamental to justice for millennia.[6] Dr McIntyre explains how the

> central importance of 'impartiality' in third party adjudication has been recognised since long before the Judeo Christian era, and can be traced to the ancient Egyptian kingdoms and to the Babylonian code of Hammurabi. The high value placed upon decisional independence and impartiality can be seen in both the Biblical and Roman sources.[7]

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1 Sir Gerard Brennan, 'Why Be a Judge' (1996) 14 *Australian Bar Review* 89, 91.
2 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 161.
3 Charles G Geyh, 'The Dimensions of Judicial Impartiality' (2014) (2) *Florida Law Review* 493, 493.
4 Available at https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/.
5 The Rt Hon Chief Justice Beverley McLachlin, 'Judicial Impartiality: The Impossible Quest?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 17.
6 The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 144. See further John Noonan, 'The Impartiality of God' in Kenneth Winston and John Noonan (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger Publishers, 1993) 3, 3–4.
7 McIntyre (n 2) 162. 'Socrates defined the essential qualities of a judge in the following manner: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."': Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28(3) *Osgoode Hall Law Journal* 507, 508.

Judicial impartiality was also a key value of other ancient legal systems, including those of Mongolia[8] and India.[9]

6. The widespread acceptance of the importance of the concept of judicial impartiality is reflected in international instruments. The Universal Declaration of Human Rights states that everyone

> is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[10]

In addition, the Bangalore Principles on Judicial Conduct provide that impartiality

> is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.[11]

7. In Australia, the concept of judicial impartiality was inherited from the English common law.[12] As Lord Blackstone observed, judicial authority greatly depends on the presumption of impartial justice.[13] Since federation, the foundation of the requirement of judicial impartiality is also rooted in Chapter III of the Constitution.[14] Judicial power is only exercisable by courts with the requisite 'institutional integrity' enshrined in Chapter III,[15] of which impartiality is a 'defining or essential' characteristic.[16] The independence of the judiciary from the other branches of government is also a 'means to ensure the impartiality of judges',[17] a mechanism of particular importance given that we expect judges to resolve disputes between the state and its citizens.

8. The impartiality of judges is considered both a legal and ethical requirement.[18] Its fundamental importance is underlined in the judicial oath, by which judges swear to 'do right to all manner of people according to law without fear or favour, affection or ill will'.[19]

9. Impartiality of judicial officers is considered important for its intrinsic value and for instrumental reasons. In terms of its intrinsic value, honouring principles of natural justice and procedural fairness, including the impartiality of decision-makers, recognises the

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8 Paul Ratghnevsky, 'Jurisdiction, Penal Code, and Cultural Confrontation under Mongol-Yüan Law' (1993) 6(1) *Asia Major* 161, 162–3.

9 The Hon Justice S S Dhavan, 'The Indian Judicial System: A Historical Survey' *Allahabad High Court*.

10 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) Art. 10. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art. 14.

11 *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25-26 November 2002) value 2. The United Nations Social and Economic Council invited member states to encourage their judiciaries to take into account the *Bangalore Principles of Judicial Conduct* in United Nations Social and Economic Council, *Strengthening basic principles of judicial conduct*, UN Doc E/RES/2006/23 [1].

12 As to its origins in the common law, see, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

13 Sir William Blackstone, *Commentaries on the Law of England*, vol 3 (Clarendon Press, 1765) 361.

14 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [116] (Kirby J). See also Ibid [79] (Gaudron J).

15 See *Wainohu v New South Wales* (2011) 243 CLR 181 [44]–[47] (French CJ and Kiefel J).

16 Ibid [44] (French CJ and Kiefel J).

17 McIntyre (n 2) 169.

18 *Yukon Francophone School Board, Education Area #23 v Attorney General of the Yukon Territory* (2015) 2 SCR 282, 296; The Hon Justice Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 676–7. See further *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25-26 November 2002) preamble, which provides that the Bangalore Principles 'are intended to establish standards for ethical conduct of judges'. Contrast to the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) [1.2], which states that it 'purposely avoids using the expression "judicial ethics" or describing conduct as "unethical"'.

19 The Hon Chief Justice Murray Gleeson, *The Right to an Independent Judiciary* (Speech, 14th Commonwealth Law Conference, London, September 2005) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sept05.html>. See further Australasian Institute of Judicial Administration (n 18) [1.1].

dignity of the people affected by the exercise of public power.[20] As Professors Aronson, Groves and Weeks explain, securing impartiality serves

> the non-instrumental values of treating the parties with equal respect and dignity, promoting the public's participation in decision-making processes which affect them individually, and enhancing the institutional legitimacy of government agencies.[21]

10. In addition, judicial impartiality also serves important instrumental goals of

> promoting accuracy of fact finding, and of enhancing the quality of policy formulation and of policy application. People adversely affected by a decision are also more likely to accept it if they do not doubt its maker's impartiality. Impartiality, therefore, helps reduce enforcement costs in the decision-making process.[22]

11. Given the rationales underlying commitment to judicial impartiality, it is crucial not only that a judge is impartial, but is also *seen to be* impartial, because the

> visible performance [of impartiality] fosters the required or desired belief and behaviours in those who are subject to and expected to comply with judicial authority.[23]

This appearance of impartiality is also integral to maintaining public confidence in the judiciary,[24] which is one of the principal objectives of judicial impartiality.[25] As McIntyre observes in relation to the 'social governance aspects of the judicial function', the

> judiciary is fundamentally dependent upon public confidence in its impartiality to be able to perform its underlying function; without a reputation for impartiality 'the system will not be respected and hence will not be followed'.[26]

Understanding impartiality

12. There are a number of difficulties in developing an understanding judicial impartiality. Professor Geyh remarks that as a

> consequence of being undertheorized and haphazardly analyzed, judicial impartiality has stumbled its way into a series of holes, imponderables, and seeming contradictions.

However, by examining several dimensions of judicial impartiality (namely its relationship to neutrality and theoretical conceptions) this paper attempts to provide some clarity.

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20 See, eg, The Hon Chief Justice James Allsop, 'The Foundations of Administrative Law' (Speech, 12th Annual Whitmore Lecture, Federal Court of Australia, 4 April 2019). See also The Hon Justice Debbie Mortimer, 'Whose Apprehension of Bias?' [2016] (84) *AIAL Forum* 45, 46.

21 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 644.

22 Ibid.

23 Sharyn L Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 9.

24 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [81] (Gaudron J); The Hon Chief Justice Murray Gleeson, Public Confidence in the Judiciary (Speech, Judicial Conference of Australia, Launceston, 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_jca.htm#_ftn1>. On the importance of public confidence in the administration of justice generally, see The Hon Sir Anthony Mason, 'The Nature of the Judicial Process and Judicial Decision-Making' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 1, 14.

25 McIntyre (n 2) 174.

26 Ibid 175, citing T David Marshall, *Judicial Conduct and Accountability* (Carswell, 1995) 70.

The relationship between neutrality and impartiality

13. The concepts of neutrality and impartiality[27] are often used interchangeably and 'in ordinary usage at least, [they are] very close relatives'.[28] Many academics writing on the issue of judicial impartiality do not distinguish the concepts,[29] and some go further, arguing that any attempt to distinguish the concepts is 'merely stipulative, inventing a distinction not actually there'.[30] However, for those who do distinguish between the terms, neutrality is generally treated as a 'human impossibility'[31] in the sense that it 'requires the absence of all preconceptions and personal preferences',[32] whereas impartiality is presented as requiring a mind 'open to other perspectives and amenable to persuasion'.[33]

14. The distinction was observed in the Canadian Supreme Court decision of *R v RDS*, where L'Heureux-Dubé and McLachlin JJ suggested that 'it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality'.[34] As the Rt Hon Chief Justice McLachlin PC CC CStJ, as her Honour became, later reflected,

> [i]mpartiality does not, like neutrality, require judges to rise above all values and perspectives. Rather, it requires judges to try, as far as they can, to open themselves to all perspectives.[35]

15. In so observing, the Chief Justice appeared to accept that no one can be utterly neutral because we all reflect the product of our own personal experiences. By contrast, impartiality is something that judges should and can aspire to attain.

16. Australian judges have made comparatively few observations on the distinction. In *Ebner v Official Trustee in Bankruptcy*, Kirby J noted that '[i]mpartiality may not connote exactly the same notion as neutrality', but his Honour took the point no further.[36] Writing around the same time, Ipp J made the observation that '[m]ost judges, I think, would regard the concept of judicial impartiality as being no different from judicial neutrality'.[37]

Conceptions of impartiality

17. Further complicating the discussion of any distinction between neutrality and impartiality is the lack of consensus as to what the concept of impartiality itself requires. Generally, the significance, if any, given to the terms impartiality and neutrality in the

27 Sir Grant Hammond uses the term 'objectivity' instead of 'impartiality': Hammond (n 6) 35, 145–7.
28 William Lucy, 'The Possibility of Impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3, 13.
29 For general intermingling of the two terms, see, eg, Aronson, Groves and Weeks (n 21) 644; Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201, 1207, 1218; Anne Richardson Oakes and Haydn Davies, 'Justice Must Be Seen to Be Done: A Contextual Reappraisal' (2016) 37 *Adelaide Law Review* 461, 483, 485. But see Matt Watson, 'Rethinking Neutrality' (2021) 46(1) *Journal of Legal Philosophy* 1 (on the distinction between neutrality and impartiality generally).
30 Lucy (n 28) 13.
31 Justice Keith Mason (n 18) 678.
32 Chief Justice Beverley McLachlin (n 5) 21.
33 Ibid 22.
34 *R v S (RD)* (1997) 3 SCR 484, 503–4.
35 Chief Justice Beverley McLachlin (n 5) 21.
36 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [145] (Kirby J). In support of this proposition, his Honour cited the comments of L'Heureux-Dubé and McLachlin JJ in *R v S (RD)* (1997) 3 SCR 484, 501, 509 and the comments of Cameron AJ in the Constitutional Court of South Africa's decision of *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* (2000) 3 SA 705 [14].
37 The Hon Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (2000) 19 *Australian Bar Review* 212, 212.

context of judging aligns with the conception of impartiality adopted.[38] While there is not a standard taxonomy, conceptions of impartiality can be grouped into two major schools of thought: formalist and dynamic.

Formalist

18. The conventional view of judicial impartiality, sometimes referred to as the 'formalist'[39] conception, sees it as the duty of judges 'to suppress their preconceptions and leanings of the mind and make decisions based solely on the merits of each individual case'.[40] Justice Ipp observes that this conception was 'universally accepted, until perhaps recently'.[41]

19. The most famous visual representation of this conception is the goddess Themis, who holds the scales and sword of justice blindfolded so as not to be impressed, dismayed, or impacted in any way by the appearance or identity of the litigants who come before her.[42] The goddess represents the ideal of judicial behaviour — a judge who 'receives information only through the filter of the law'[43] and will 'administer objective justice between all parties' accordingly.[44]

20. As then Chief Justice, Sir Gerard Brennan AC KBE GBS, explained, a judge's 'cast of mind' should reflect the principle of equality before the law, and little else; 'unless the basis of prejudice might be material to the merits of the case, the prejudice must be recognised and consciously disregarded'.[45] This conception of impartiality is near to a requirement that the judge 'rise above all values and perspectives' in that the judge should aim to

> divest him/herself of all preconceptions and identifications, to discover and apply the relevant law as s/he finds it, and to treat everyone the same without regard to race, class, gender or whatever.[46]

21. Pursuit of this ideal requires 'that judges exercise control and discipline over their own feelings' throughout the judicial process.[47] This discipline is often evident in reasons given by judges who acknowledge an emotional pull towards one side or another of a case. Consider, for example, Harman J's remarks, where he observes

> I am conscious … that there is a potential for unconscious bias, particularly through one's reaction to information received becoming part of the decision making matrix as

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38 See paragraphs [1.23] and [1.34] below. The distinction (if any) between neutrality and impartiality is also the subject of a similar debate in the context of mediation, see Jonathan Crowe and Rachael Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *Australasian Dispute Resolution Journal* 273.

39 Although Ipp J criticised the use of this term in Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 214, it appears to be the most commonly used label: see, eg, Roach Anleu and Mack (n 23) 9; Sir Anthony Mason (n 24) 9; Chris Finn, 'Extrajudicial Speech and the Prejudgment Rule: A Reply to Bartie and Gava' (2014) 34 *Adelaide Law Review* 267, 268; Richard F Devlin, 'We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.' (1995) 18 *Dalhousie Law Journal* 408, 434–5. The term 'formalist' alludes to the compatibility of this conception of impartiality with a 'formal' understanding of equality: Ibid 434–5. See further Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment' (2008) 15(1–2) *International Journal of the Legal Profession* 73, 77 ('Gender, Race, Bias and Perspective'); Lucy (n 28) 20.

40 Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 213.

41 Ibid.

42 This analogy has been made by others, see, eg: The Hon Justice David Ipp, 'Maintaining the Tradition of Judicial Impartiality' (2008) 12 *Southern Cross University Law Review* 87, 87; Devlin (n 39) 434–5.

43 Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 219.

44 The Hon Justice David Ipp, 'Judges and Judging' [2003] (24) *Australian Bar Review* 23, 24.

45 Brennan (n 1) 92.

46 Devlin (n 39) 435.

47 Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 221. On the relationship between impartiality and empathy see Rebecca Lee, 'Judging Judges: Empathy and the Litmus Test for Impartiality' (2014) 82 *University of Cincinnati Law Review* 145.

> opposed to the information itself. But in all reality, there must be reaction to information, whether it is heard directly or indirectly… I do not accept that it is inappropriate for judges to respond and to feel empathy or sympathy. But they must then be able, within their own mind, to separate objective decision making from such emotions.[48]

22. These assurances, Sir Gerard Brennan acknowledges, are 'easy to say: not always easy to achieve'.[49] The formalist conception would arguably be subject to Thomas Nagel's critique of the possibility of an objective observer adopting 'a view of the world from nowhere within it'.[50] Critics of the formalist conception argue that the commitment to an ideal of impartiality as blind justice runs the risk of ignoring the reality of human behaviour. These arguments are often supported by reference to behavioural psychology research, which shows that judges, despite their training and experience, are subject to the same heuristics and biases in their decision-making as other individuals.[51]

Dynamic

23. Dynamic or 'realist'[52] conceptions of judicial impartiality sit at the other end of the continuum from the formalist approach. These understandings of impartiality acknowledge the human impossibility of stepping outside one's own conception of the world and the environment in which one is situated.[53] Dynamic conceptions recognise that the

> judicial decision-making method demands genuine choices and evaluations of the judge, and involves a broad range of influences, objectives and considerations to which the judge is meaningfully partial. Judicial impartiality strives, therefore, only to make the judge free 'from *improper* … influences on decision-making'.[54]

24. This has implications both for how judges judge, and how institutional structures are designed to support impartiality.[55]

Judging with conscious objectivity

25. For judges, a dynamic conception may mean that the 'essential precondition' to impartiality is fulfilled by the judge engaging in a process of identifying, analysing, and bringing to bear his or her own experiences and understanding of the legal and factual context to the case.[56] It requires them to 'cultivate detachment only in the sense that [judges] must try to always increase [their] awareness of [their] own preconceptions, and to see to it that [their] minds are open to other perspectives and amenable to persuasion'.[57] Rather than Themis as blindfolded, a dynamic conception of impartiality might be represented

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48 *Duffy v Gomes (No 2)* (2015) 299 FLR 108 [114] (Harman J).
49 Brennan (n 1) 92.
50 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1989) 67.
51 See 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, 385–7. See further Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper JI6, 2021).
52 As it is termed in Devlin (n 39) 434–5; although note the criticism in Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 214.
53 Chief Justice Beverley McLachlin (n 5) 22. See also Roach Anleu and Mack (n 23) 9 ('impartiality is neither a result or end-point, nor a quality located or inherent in a particular decisionmaker or decision; rather, it is a "process" [emphasis in original] of "striving towards a[n] …ideal," which operates "interactively and dynamically" in relation to the environment in which decisions are made and the content of the norms or rules being used' citing Touchie n 76 at 30).
54 McIntyre (n 2) 170.
55 Dr McIntyre provides a useful analytic framework to understand the nature and role of structural and dispute-specific threats to impartiality: see Ibid Part IV.
56 *R v S (RD)* (1997) 3 SCR 484, 507. A lack of judicial diversity, for example, is held out as an example of an institutional threat to impartiality: see Sherrilyn A Ifill, 'Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts' (1997) 39 *Boston College Law Review* 95.
57 Chief Justice Beverley McLachlin (n 5) 22.

by an image of Themis peering out from beneath her blindfold — a judge who is mindful of the need to be objective but also alert to lived experiences (both her own and those of others).

26. This type of approach is illustrated in the judgment of L'Heureux-Dubé and McLachlin JJ in *R v RDS*, a case which concerned the alleged bias of a trial judge.[58]

The facts of *R v RDS*, [1997] 3 SCR 484

The trial judge, Judge Sparks, was at the time the only Black female judge in the Province of Nova Scotia. A Black teenager (RDS) was charged with the unlawful assault of a police officer. Both RDS and the police officer in question gave oral evidence.

Judge Sparks dismissed the case on the basis that the prosecution had not proved the charge beyond a reasonable doubt. In the course of her judgment, Judge Sparks stated that the

> Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the Court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is of a young police officer who overreacted. I do accept the evidence of [RDS] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

27. The question before the Supreme Court was whether Judge Sparks' comments (extracted above), gave rise to a reasonable apprehension of bias. Justices L'Heureux-Dubé and McLachlin (with whom La Forest and Gonthier JJ agreed) stated that the

> reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.
>
> …
>
> An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context, from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works.[59] (emphasis added)

28. Ultimately L'Heureux-Dubé and McLachlin JJ found that no reasonable apprehension of bias arose and that in 'alerting herself to the racial dynamic of the case', the judge had

58 Graycar (n 39) 74; Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 213; Justice Keith Mason (n 18) 676–8; Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40(1) *Monash University Law Review* 115, 132.

59 *R v S (RD)* (1997) 3 SCR 484, 505, 507 (L'Heureux-Dubé and McLachlin JJ).

> approached the case with an open mind, [and] used her experience and knowledge of the community to achieve an understanding of the reality of the case.[60]

29. Key to a dynamic understanding of impartiality is the recognition that judges are human beings,[61] whose experiences and preconceptions are 'ineradicable'.[62] In Professor Devlin's view, this recognition eschews the 'high hopes' implicit in a formalist conception of impartiality in favour of a 'much more pragmatic' account of the judicial method.[63] For Professor Minow, a dynamic approach 'asks us to use what we know but to suspend our conclusions long enough to be surprised, to learn'.[64] She observes that we

> want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.[65]

30. The consequence of recognising the inescapability and individuality of judges' lived experiences, McLachlin CJ suggests, is that a judge must learn to practice 'conscious objectivity' in order that 'the judge can ensure that he or she has minimised the dangers of unrecognised prejudice and bias'.[66]

31. How then does a judge classify their perceptions or experiences as illegitimate, such that they should be eliminated, or legitimate, such that they may be considered? Professor Graycar argues that the solution is to 'draw a distinction between negatively stereotyping on the one hand, and constructively recognising differences and disadvantage in a way that is sensitive to discrimination and inequality, on the other'.[67] Similarly, McLachlin CJ distinguishes between 'preconceptions that run counter to the law and fair legal process', such as 'unidentified biases against people of particular races, classes or genders' and those preconceptions which reflect 'values and principles entrenched in our legal system, such as equality or the presumption of innocence'.[68]

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60 Ibid [59]. The conclusions of L'Heureux-Dubé and McLachlin JJ, both in relation to the relevant law and to its application, draw heavily upon their Honours' distinction between neutrality and impartiality.

61 Although seemingly trite, more than one author has felt the need to expressly state this proposition: see, for example, Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 212–3; Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1, 3; The Hon Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 198; Chief Justice Beverley McLachlin (n 5) 15.

62 Devlin (n 39) 435.

63 Ibid.

64 Minow (n 29) 1216–7.

65 Ibid 1217.

66 Chief Justice Beverley McLachlin (n 5) 21. This requires three steps: (1) recognising that one does not bring a neutral, empty mind to the process of judging; (2) identifying one's preconceptions; and (3) attempting to eliminate illegitimate preconceptions from one's reasoning.

67 Graycar (n 39) 82.

68 Chief Justice Beverley McLachlin (n 5) 23. Controversy exists around the extent to which a dynamic conception of impartiality should aspire to identify and address inequalities in society through judging. See, eg, Justice L'Heureux-Dubé CC GOQ QC ('[w]hen judges have the opportunity to recognise inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so): Claire L'Heureux-Dubé, 'Reflections on Judicial Independence, Impartiality and the Foundations of Equality' (1999) 7 *Centre for the Independence of Judges and Lawyers Yearbook* 95, 106. But see Justice Mason's reply (this view 'becomes debatable if it is taken outside of a context, like Canada, where broad equality rights are constitutionally entrenched'): Justice Keith Mason (n 18) 679. See also Aronson, Groves and Weeks (n 21) 645–6; Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 222; Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 6–7; Justice David Ipp, 'Maintaining the Tradition of Judicial Impartiality' (n 42) 95; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 [86] (McHugh J); The Hon Chief Justice Murray Gleeson, *The Role of the Judge and Becoming a Judge* (Speech, Sydney, 16 August 1998).

Constitutive impartiality

32. Dynamic conceptions of impartiality may also consider the role of the judicial system within the state, in what has been termed a 'constitutive' approach. The limits and meaning of impartiality under this 'constitutive' conception depend on the values and framework of the system in which impartiality is sought to be exercised.[69] Professor Parker argues that

> [i]n societies we recognise as having a legal system, most judges are biased at one level. They must be. They are ultimately an arm of government. They must uphold the values of the society as enshrined in its laws.[70]

33. For Professor Lucy, the relationship between impartiality and the legal framework within which it is exercised is not limited to the content of the law, but also includes the values underlying the legal system:

> In a politically or morally respectable legal system … impartiality becomes an important and desirable component which will take its place alongside, and derive much of its value from, other generic rule of law values. The point here is a general one about our values, namely that some are more important than others and those of subsidiary importance derive much weight from their weightier peers. Some values, among which we must include impartiality, 'by season season'd are'.[71]

34. The consequence of this is that the proper exercise of judicial impartiality will inevitably reflect whatever advantages and failings, conscious and unconscious, manifest in the legal system more broadly.[72] Preferably, this results in the rule of law and justice being amplified.[73] However, as Lucy points out, there is 'no guarantee that … rules, standards and values will always be morally and politically respectable'. Instead,

> some legal values could be so objectionable so as to reduce or completely remove whatever moral and political value attitudinal impartiality might have. Openness to, and a lack of pre-judgement upon, particular legal claims, and the general openness to diversity and difference from which this particular attitude might derive, would be of no or only minimal value within, for example, the legal system of the Third Reich.[74]

35. Although any legal system will 'operate to the benefit of some and the detriment of others', within this system 'the perception of impartiality in the individual case' should be maintained.[75] For Dr Touchie, while a constitutive conception of impartiality 'highlight[s] the importance of separating the creation of standards from their application', there must still be an 'attempt to ensure an impartial *application*' of the legal rules and system within which judges operate.[76]

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69 See Lucy (n 28) 5: '[o]ur ordinary understanding of impartiality is unlikely to be conditioned by the concerns of particular theoretical accounts of justice and morality; rather, it will be conditioned by the contexts in which it is employed, or, perhaps more accurately, constituted'.

70 Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press) 62, 71.

71 Lucy (n 28) 30.

72 Ibid 17.

73 Parker (n 70) 68; Chief Justice Beverley McLachlin (n 5) 23.

74 Lucy (n 28) 16–7.

75 Parker (n 70) 71.

76 John Touchie, 'On the Possibility of Impartiality in Decision-Making' (2001) 1 *Macquarie Law Journal* 21, 32. As Roach Anleu and Mack (n 23) 9 point out: 'This conception closely approximates the positivist basis for judicial and legal legitimacy … that legitimacy is established by institutional actors conforming to established rules and procedures'.

Identifying influences as prohibited threats to impartiality

36. Adopting a broad dynamic theory of judicial impartiality, McIntyre develops a framework of 'improper' partiality to assist in defining the limits. According to McIntyre, an influence will be a prohibited threat to judicial impartiality where

> (1) it is capable of influencing the decision making of the judge;
>
> (2) that influence would be in a manner inconsistent with, and deviating from, the proper judicial decision-making processes; and
>
> (3) there are no reasons derived from the overarching judicial function to render it acceptable.[77]

37. As to the latter, this 'allows a degree of tolerance for deviant influences', which 'can be justified either because the impact is sufficiently insignificant to be ignored, or because the influence cannot be acceptably eliminated'.[78] The assessment of acceptability is closely tied to its impact on public confidence, meaning that 'both the actual and perceived impact of the influence relevant to the assessment of acceptability'.[79]

38. Under this framework, McIntyre identifies and categorises both potential dispute-specific, and structural, threats to impartiality. Dispute-specific threats are often, but not exclusively, dealt with through the law on bias, such as where the judge stands to gain personally from a particular resolution, where the judge has some relationship (including issues of shared social identity) with one of the parties, or where the judge has a particular connection with or interest in the specific subject-matter of the dispute.[80] Structural threats, which exist independently of the dispute, even if they may crystallise in a particular case, are often considered under the rubric of 'judicial independence', and 'are most effectively countered through the systemic design of pre-emptive institutional protections'.[81]

Conceptions of impartiality and the bias rule

39. At common law, judicial impartiality is enforced most obviously through the operation of the bias rule — one of the two pillars of natural justice. In *Ebner v Official Trustee in Bankruptcy*, the leading High Court authority on the rule against bias, the majority stated that '[b]ias, whether actual or apprehended, connotes the absence of impartiality'.[82] The operation of the bias rule therefore provides insight into the varying judicial understandings of impartiality. As Mortimer J remarked

> within the application of established principles of apprehended bias, different judges see what would be apprehended about a particular circumstance very differently, reaching … opposite conclusions.[83]

77 McIntyre (n 2) 159, 172.
78 Ibid 173.
79 Ibid 174.
80 Ibid 181–95.
81 Ibid 197. See further 197-223.
82 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ). For further discussion on the law on bias and the test for actual or apprehended bias see Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020).
83 Justice Debbie Mortimer (n 20) 47. This is also evidenced by the regularity with which the High Court overturns lower full courts in bias cases and with which the High Court itself divides.

In her view,

> [t]hat can only be because their own life experiences and identities affect their perceptions of what is required for impartiality and the appearance of impartiality.[84]

An open mind not an empty one

40. In terms of the current state of the law, it is now generally accepted that 'judges are not empty vessels, devoid of life experience'.[85] In Groves' view, '[i]t is probably fair to suggest that most jurists similarly agree that traditional notions of judges as neutral ciphers of the law are another fiction now consigned to history'.[86]

41. In line with this, Australian jurisprudence recognises that it is legitimate for judges to hold predispositions towards certain points of view; for example, judges will properly be partial to an argument supported by judicial authority over an argument unsupported by judicial authority.[87] Similarly, in *Vakauta v Kelly*, Brennan, Deane and Gaudron JJ stated that it is

> inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequent witnesses in his or her court. In some cases and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the evidence of a particular medical expert. That does not, however, mean that the judge is disqualified from hearing the particular action or any other action involving that medical expert as a witness. The requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation.[88]

42. Accordingly, the relevant question under Australian law is whether, in each case, there is the reality and appearance of 'sufficient impartiality'.[89] This is reflected in the idea that what is required is an 'open mind but not an empty one',[90] and that a judge's preconceptions will only amount to prejudgment when the judge's mind can be shown to be 'incapable of alteration'.[91] The law also recognises that judges have a past, and the relevant question is 'whether something in that past would be seen by the reasonable or fair-minded observer as having the potential to divert the judge from deciding the case on its merits'.[92] Likewise, it is generally recognised that a judge's identity alone (along such lines as gender, race, or cultural background) will not (and should not) give rise to a reasonable apprehension of bias.[93]

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84 Ibid.
85 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 1, 10.
86 Groves, 'Clarity and Complexity in the Bias Rule' (n 85).
87 See McIntyre (n 2) 171; Lucy (n 28) 16.
88 *Vakauta v Kelly* (1989) 167 CLR 568, 570. See also *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507 [71].
89 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 61.
90 Aronson, Groves and Weeks (n 21) 645. See further Australian Law Reform Commission (n 82).
91 *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 71–3 (Gleeson CJ and Gummow J). See further Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 949.
92 *Wentworth v Rogers* [2002] NSWSC 1198 [24] (Unreported, Barrett J, 16 December 2002).
93 Justice Keith Mason (n 18) 681. See further *Lindon v Kerr* (1995) 57 FCR 284, where Davies, Sackville and Nicholson JJ rejected an argument that an all male bench gave rise to an apprehension of bias. Indeed, the English Court of Appeal has gone so far as to list the categories for which the Court could not 'conceive of circumstances in which an objection [as to bias] could be soundly based': religion, ethnic or national origin, gender, age, class, means, and sexual orientation: *Locabail (UK) Ltd v Bayfield Properties Ltd* (2000) 1 QB 451 [25]. A table of these factors, including factors 'ordinarily insufficient' and

43. The Australian understanding is also reflected in judicial pronouncements in other jurisdictions. In the United States, Scalia J referred to 'openmindedness' as one of three potential conceptions of impartiality, which 'may well be … desirable in the judiciary' but is not commonly subscribed to.[94]

44. In Canada, Abella J stated that judicial impartiality and neutrality

> do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. …[W]hile judges must strive for impartiality, they are not required to abandon who they are or what they know. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Judges should be encouraged to experience, learn and understand 'life' — their own and those whose lives reflect different realities. The ability to be open-minded is enhanced by such knowledge and understanding. Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions.[95]`

45. Similarly, Cameron J of South Africa's Constitutional Court observed that

> 'absolute neutrality' is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. … Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the judge's own predilections, preconceptions and personal views that is the keystone of a civilised system of adjudication.[96]

46. Difficult questions and differing opinions arise, however, when determining to what extent a judge may draw on their personal preconceptions and experiences, as opposed to those supportable by admissible evidence, and at what point drawing on preconceptions may be 'inappropriate and undue'.[97] Commenting on *R v RDS*,[98] Ipp J noted that the

> proposition that judges are entitled to rely on their 'personal understanding and experience of society', unsupported by evidence from witnesses, may be regarded as novel – certainly as far as Australia is concerned.[99]

47. It is not clear, however, that judging by reference to personal experience is a novel concept in Australian law.[100] Some argue that this is more likely to become obvious when

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'circumstances where a real danger of bias might well be thought to arise' as taken from *Locabail* is set out in Higgins and Levy (n 51) 383.

94 *Republican Party of Minnesota v White* 536 U.S. 765, 778. See further *Liteky v United States* (1994) 510 U.S. 540, 550 where Scalia J stated that bias or prejudice is a 'favorable or unfavorable disposition that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess … or because it is excessive in degree'.

95 *Yukon Francophone School Board, Education Area #23 v Attorney General of the Yukon Territory* (2015) 2 SCR 282, 283-4.

96 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* (2000) 3 SA 705 [14].

97 *Yukon Francophone School Board, Education Area #23 v Attorney General of the Yukon Territory* (2015) 2 SCR 282 283–4. See above at paragraphs [1.30] to [1.31].

98 *R v S (RD)* (1997) 3 SCR 484.

99 Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 217.

100 See, eg, *Brien v Dwyer* (1978) 141 CLR 378, 384 (Barwick CJ relying expressly on his own experience to say that a purchaser and vendor do not usually sign a purchase agreement contemporaneously); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 [66] (Kirby J observing without reference to authority the enormous social changes relevant to women, married

the identity of the decision maker, and their experiences that they bring to bear, fall 'outside' the historical judicial norm.[101] It is possible that we ought to be more troubled by a judge who is unaffected by personal experiences, particularly in relation to those accumulated in previous professional capacities.[102]

48. A number of Australian cases on apprehended bias throw these issues into stark light. In the case of *B v DPP (NSW)* [2014] NSWCA 232, a District Court Judge, when considering on appeal the credibility of a witness, stated that 'no normal woman in her right mind would have unprotected sexual intercourse with a man she knew to be HIV positive'.[103] The Court of Appeal was split on whether this statement gave rise to an apprehension of bias. In the minority, Barret JA found that the words used, 'viewed in their context, indicate no more than a permissible testing, against common experience, of a conclusion independently reached'.[104] In the majority, President Beazley (Tobias AJA concurring) recognised that 'judges do not enter upon their decision-making task as if they had no experience of life'.[105] However, she thought that the preconception held by the Judge was simply wrong.[106] In her view,

> a fair minded lay observer… might reasonably apprehend that his remark revealed a preconception as to how a reasonable woman, not only this complainant, would act if having sexual intercourse with a man she knew to be HIV positive, such that his Honour might not have brought an impartial and unprejudiced mind to the resolution of the appeal.[107]

49. There have been conflicting decisions, too, on whether or not a decision-maker should be disqualified for bias when they have had an experience similar to an issue before them.[108] In one case, the Court of Appeal of Victoria found a reasonable apprehension of bias in a sexual assault case where a judge's daughter had been a victim of a similar crime.[109] In a case concerning sexual abuse of a child, a juror who had experienced childhood sexual abuse was not disqualified.[110]

50. If it is true that judges should not, cannot, and do not check their personal experiences and perceptions at the door when they don their robes, the line between an 'open mind' and prejudgment becomes critical.[111] What makes a statement a generalisation or stereotype as opposed to a recognition of current societal context? Should judging with an eye on one's personal experiences be encouraged, or even permitted? As the split bench in *R v RDS* demonstrates, these questions are not necessarily better or more

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women and domestic relationships more generally). See also Matthew Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (2012) 36 *Criminal Law Journal* 84, 99–102.

101 Constance Backhouse, 'Bias in Canadian Law: A Lopsided Precipice' (1998) 10(1) *Canadian Journal of Women and the Law* 170, 181. See further Graycar (n 39) 74: 'Whiteness or maleness are not viewed as impediments to impartiality precisely because they are not recognised as positions at all, but the treatment of decision-makers who are racialized as "other" (of whom, of course, we have very few in Australia), or the response to decisions that make explicit reference to gender, race or unequal race relations (at least if made by "others"), reveals a very different set of assumptions'.

102 See Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (n 100) 100.

103 *B v DPP (NSW)* [2014] NSWCA 232 [45].

104 Ibid [68] (Barrett JA).

105 Ibid [54] (Beazley P, Tobias AJA concurring).

106 Ibid [58] (Beazley P, Tobias AJA concurring).

107 Ibid [59] (Beazley P, Tobias AJA concurring).

108 See Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (n 100).

109 *LAL v The Queen* [2011] VSCA 111.

110 *R v Goodall* (2007) 15 VR 673; 169 A Crim R 440. An application for special leave to appeal to the High Court was refused: *Goodall v The Queen* [2007] HCA Trans 397. See Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (n 100) 85.

111 *Vakauta v Kelly* (1989) 167 CLR 568 [4] (Brennan, Deane and Gaudron JJ).

consistently answered when addressed by reference to a narrow set of facts and by the highest appellate court in a land.

Performing impartiality

51. Competing and evolving ideas about what impartiality means leads to different views of how judges should act, both inside and outside the courtroom.[112]

52. Generally, proponents of the formalist conception favour a more 'conventional' approach to judging, entailing 'norms of impersonal, unemotional detachment as the necessary performance of impartiality'.[113] In terms of the judge's appearance in the courtroom, the traditional model is that of the 'passive arbiter' who is expressionless and non-interventionist in demeanour.[114] This may manifest as the judge putting on a 'mask' or 'poker-faced' appearance in court,[115] intended to convey impartiality in the formalist sense: 'the mystique of the judge, the separation of judge from public is of significance in supporting the acceptability and authority of the decision'.[116]

53. Under an alternative model of judicial demeanour that supports a dynamic conception of impartiality, a judge 'operates "interactively and dynamically" in relation to the environment in which decisions are made and the content of the norms or rules being used'.[117] This allows for greater 'human judicial interaction with court participants and individual judicial authenticity'.[118] McIntyre observes that judicial impartiality is not a static notion and that what is required will be contextually and culturally specific.[119]

54. Concerns about the performance of impartiality extend beyond the courtroom to take into account extra-judicial conduct. Justice Mason observes that this is part of the 'ongoing debate' regarding whether 'judges should adopt the silence and withdrawal of the Trappist' in the pursuit of impartiality.[120] The *Guide to Judicial Conduct* advises that 'considerable care' be exercised in relation to extra-judicial comment.[121] As Dr Bartie and Associate Professor Gava note, 'the danger stemming from published writing about a legal issue is that the judge is tied to an answer to the legal problem and holds a stake in the intellectual outcome', thereby threatening the perceived impartiality of the judge.[122]

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112 For a discussion of this in relation to the performance of judicial authority in the courtroom, see further Roach Anleu and Mack (n 23) 9–10.

113 Ibid 9.

114 Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007) 16(3) *Social & Legal Studies* 405, 406.

115 See Roach Anleu and Mack (n 23) 113–6 for a discussion of approaches to conveying impartiality through demeanour in Australian magistrates' courts. See further Senior Magistrate David Heilpern, 'Judging - A Contextual Approach' (2008) 12 *Southern Cross University Law Review* 26–7, who describes the necessity of having a 'stony face'.

116 The Honourable Sir Alan Moses, 'The Mask and the Judge' (2008) 12 *Southern Cross University Law Review* 1, 22. Self-represented litigants pose a particular problem for this model of judging because 'they require closer attention which, in turn, requires the judge to shed (or appear to shed) neutrality, for example in helping the litigant in person to frame their case properly': Richard Moorhead and Dave Cowan, 'Judgecraft: An Introduction' (2007) 16(3) *Social & Legal Studies* 315, 318. In such circumstances 'passivity is patently not impartial', at least in its effect: See Moorhead (n 114) 406.

117 Roach Anleu and Mack (n 23) 9, citing Touchie n 76 at 30.

118 Ibid 10.

119 McIntyre (n 2) 177.

120 Justice Keith Mason (n 18) 683.

121 Australasian Institute of Judicial Administration (n 18) 25. For a discussion on the role of the Guide more generally see Australian Law Reform Commission (n 82) [57]–[59].

122 Susan Bartie and John Gava, 'Some Problems with Extrajudicial Writing' (2012) 34 *Sydney Law Review* 637, 637. A similar danger was identified by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affair, Re; Ex parte Epeabaka* (2001) 206 CLR 128 [12].

55. However, as the *Guide to Judicial Conduct* makes clear, judges have the 'same right as other citizens to participate in public debate'.[123] Generally extra-judicial statements are 'expressions of broad general views', whereas, as Finn points out, 'expressions of opinion as to the *facts* of a matter, prior to the reception of all the evidence on that matter that rightly raise concerns as to prejudgment'.[124]

56. Courtroom demeanour and extra-judicial statements are far from the only aspects of judging that call for a performance of impartiality, and other practical elements of judgecraft that may impact on the appearance of impartiality include the layout of the courtroom,[125] judges' use of social media,[126] and the preparation for,[127] and delivery of,[128] judgment.[129]

Implications for judicial diversity

57. Increasing the diversity of the judiciary is promoted as essential to ensuring impartiality in judicial decision making.[130] As Lord Neuberger recognised, 'it is highly desirable to have a genuinely diverse judiciary, because it would result in a greater spectrum of judicial experiences and perspectives, which will enrich the law'.[131] Somewhat paradoxically, however, as judicial diversity increases there may be a perceived tension with impartiality. As Mortimer J observed

> as the broad uniformity of the judiciary (gender, race, background, religious belief) breaks down, so, ironically, the challenges to the appearance of impartiality may be perceived to increase. Differences in experience, background and attitude are apparent for all to see. Will it trouble one part, or the 'fair-minded lay observer', if a Muslim judge sits on a terrorism case with a Muslin accused? … Will it trouble one party, or the 'fair-minded lay observer', if a judge who is a publicly declared atheist determines a claim of religious discrimination?[132]

58. Professor Sossin described this as the 'puzzle of a representative judiciary' — while on the one hand increasing diversity on the bench may enhance judicial decision-making, there might be a concern that increased diversity 'may mean judges will decide based on their identity or community affiliation rather than based on the facts and law before them'.[133] Nevertheless, if it is accepted that judges can and do draw upon their

123 Australasian Institute of Judicial Administration (n 18) 25.
124 Finn (n 39) 279.
125 Linda Mulcahy, 'Architects of Justice: The Politics of Courtroom Design' (2007) 16(3) *Social & Legal Studies* 383, 386.
126 The Hon Justice Steven Rares, 'Social Media — Challenges for Lawyers and the Courts' (2018) 45 *Australian Bar Review* 105, 113–4.
127 Sir Frank Kitto suggests that a written judgment is always preferable, as is a separate judgment in multi-member courts: The Rt Hon Sir Frank Kitto, 'Why Write Judgments?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 69, 70–1. These suggestions have been the subject of some controversy: Justice Stephen Gageler (n 61) 190–3.
128 See, eg, Keyvan Dorostkar, 'Judicial Review of Refugee Determinations: More by Luck than Judgement?' (Macquarie University) 29–30, 53 <https://www.ssrn.com/abstract=3536740> which discusses how the timing and method of judgment delivery can affect the appearance of impartiality.
129 The institutional integrity enshrined in Ch III courts by the Australian Constitution gives rise to an obligation to give reasons, at least for 'final decisions and important interlocutory rulings': *Wainohu v New South Wales* (2011) 243 CLR 181 [44], [54] (French CJ and Kiefel J). For discussion about whether this duty should be absolute, see Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(2) *UNSW Law Journal* 923.
130 See, eg, Sherrilyn A Ifill, 'Through the Lens of Diversity' (2004) 10(1) *Michigan Journal of Race and Law* 55, 57.
131 The Right Hon the Lord Neuberger of Abbotsbury PC, '"Judge Not, That Ye Be Not Judged": Judging Judicial Decision-Making' (2015) 6 *UK Supreme Court Yearbook* 13, 19–20.
132 Justice Debbie Mortimer (n 20) 51.
133 Lorne Sossin, 'Should Canada Have a Representative Supreme Court?' (2009) 7 *Institute of Intergovernmental Relations School of Policy Studies, Queen's University* 1, 7–8. See also Wilson (n 7) 511. See also Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (n 100) 84.

own experiences and perceptions when judging, and that these pre-existing views are unavoidable,

> there is an institutional imperative to promote judicial diversity as a judiciary drawn from a narrow segment of society is likely to have limited or distorted perceptions of everyone else's experiences.[134]

59. All judges, no matter their background, demeanour, or the process by which they were appointed, owe the same 'fundamental duties to be and to appear to be impartial'.[135] In Justice Mortimer's view, the contemporary challenge for the judiciary, and one that requires constant review, is to agree on 'what is involved in maintaining the appearance of impartiality':[136]

> We will never know completely what drives an individual judge to a particular decision. Indeed, the intuitive and internal nature of the reasoning process means that the judge herself or himself may not be able *wholly* to explain why one conclusion, or one argument, seems more appropriate or more persuasive than the competing conclusion or argument. That is why different judges, looking at the same set of facts and the same series of competing legal propositions, can reach quite different conclusions. It is the intuitive and the internal aspects of our reasoning which are most strongly the products of who we are, our background and experiences, and which inevitably influence the conclusions we form. [And]… to a point that is as it should be.
>
> The reassurance we can give litigants, and the community in general, is that judges will be sensitive to perceptions of fairness and impartiality about our internal reasoning processes … that we will try to see it from the perspectives of others as well as our own. After all, that is part of having an open mind.
>
> … [T]hat will develop a concept of impartiality that encourages diversity in the judiciary rather than one which frustrates it.[137]

Conclusion

60. Theoretical conceptions of impartiality, with regard to both substantive and performative dimensions, must grapple with an increasingly pluralistic Australian society and an evolving understanding of behavioural psychology. The concepts discussed in this background paper, along with the submissions received in response to the ALRC's Consultation Paper, will inform any recommendations regarding whether current Australian law on bias is sufficient to maintain public confidence and provide clarity to judges, the broader legal profession, and the community.

134 Higgins and Levy (n 51) 392. Indeed, '[a]ny rule that required judges to shed knowledge accumulated during their former professional life would remove the very qualities that led to their appointment.': Aronson, Groves and Weeks (n 21) 645. This is particularly salient with respect to Australian courts in which experience in the relevant field is a pre-requisite to appointment. See, eg, *Family Law Act 1975* (Cth) s 22(2)(b).

135 *R v S (RD)* (1997) 3 SCR 484, 487.

136 Justice Debbie Mortimer (n 20) 51.

137 Ibid 51–2.