



Australian Government
Australian Law Reform Commission

BACKGROUND PAPER JI5

JUDICIAL IMPARTIALITY

**Ethics, Professional Development,
and Accountability**

April 2021



This paper on ethics, professional development, and accountability for judicial officers 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), *The Federal Judiciary* (March 2021), and *Conceptions of Judicial Impartiality in Theory and Practice* (April 2021). Further background papers will be released addressing critiques of the test for apprehended bias and implicit biases in judicial decision-making.

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).

The office of the ALRC is at Level 4, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane QLD 4000.

Postal Address:

PO Box 12953,
George Street QLD 4003

Telephone: within Australia (07) 3248 1224

International: +61 7 3248 1224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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Introduction

1. This background paper briefly examines the relationship between judicial ethics, professional development, impartiality, and accountability. It then provides a survey of existing ethical infrastructure, professional development standards, and mechanisms to respond to judicial misconduct and incapacity relating to the federal judiciary.

2. These issues are considered in light of the Inquiry's Terms of Reference, which ask the ALRC to consider in particular whether the law on bias remains 'appropriate and sufficient to maintain public confidence in the administration of justice' and whether it provides sufficient clarity to decision-makers and others about how to manage potential conflicts. Preliminary consultations suggest that the law on bias is neither designed, nor appropriate, to achieve these aims on its own, particularly in relation to systemic and ongoing issues impacting on judicial impartiality. It has been suggested that the rule on bias must be complemented by institutional structures supporting judicial impartiality and confidence in it, such as those examined in this paper.

3. In addition, the Terms of Reference asks the ALRC to consider whether 'current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate'. The final section looks at complaints procedures in relation to the federal judiciary, which — in addition to being important to public confidence — may be considered a potential additional mechanism through which issues of bias can be raised and considered.

Impartiality, ethics, education, and accountability

4. The traditional assumption in Australia has been that, when a judge is appointed, she or he has the necessary integrity, education, and training to undertake that role. Like many other Commonwealth countries following the British model, judges are traditionally 'found' rather than 'made'.¹ Once 'found' they are subject to constitutionally-protected judicial independence and security of tenure, seen as necessary to ensure impartial decision-making.² In that context, ethical decisions and professional development have historically been seen as a matter for the individual judge, complemented primarily by informal mechanisms of support. Accountability for proper conduct in the role is provided through a dynamic mix of institutional structures (including the public nature of judges' work, the requirement that they give reasons for their decisions, and the scrutiny of their decisions on appeal), social pressures and expectations, and parliamentary removal procedures for proven misconduct or incapacity.

5. At the federal level, and in most other Australian jurisdictions, there are no mandated standards of ethical behaviour or capacity, and no mandated training imposed at law by any jurisdiction. However, in recent years Australian judges have placed an increased emphasis on public standard setting and training, and more attention has been paid to processes for providing advice, counselling, and mentoring where needed. There has been increased recognition of the importance of structured, ongoing, judicial education, and a number of bodies have been established to provide this. Some jurisdictions in

1 On this see further Jessica Kerr, 'Turning Lawyers into Judges Is a Public Responsibility', *AUSPUBLAW* (26 August 2020) <<https://auspublaw.org>>.

2 See Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 1st ed, 2021) 65.

Australia have also established bodies that are independent from the judiciary to receive and investigate complaints about behaviour that is unethical or falls below expected standards for judicial officers, as well as training. Other jurisdictions, including the federal jurisdiction, have systems internal to the courts for making complaints and considering issues relating to a judicial officer.

A dynamic relationship

6. Judicial independence has often been portrayed as coming into conflict with ideas about judicial accountability, the creation of structured ethical systems for judges, and the provision of structured judicial education.³ Professor Appleby and Professor Le Mire have explained how the

fragility and importance of judicial independence is often used to elevate the status of the judiciary to a position beyond reproach.⁴

7. Connected to this, judicial independence has been seen as threatened by formal judicial education programs, which it was thought might allow improper government influence over what judges are required to know, or ‘indoctrination’ of judges⁵ in ‘attitudes reflecting the prevailing enthusiasm of the day’.⁶ In the same vein, the imposition of binding ethical standards or structured systems of ethical support have been seen as having the potential to introduce improper influences both from outside the judiciary and within it.⁷

8. On the other hand, there is increasing recognition of the important and dynamic relationship between judicial independence and impartiality, judicial ethics, judicial education, and judicial accountability.⁸ Increasingly, ethical guidance and support, judicial education, and wider accountability mechanisms are seen as important aspects of enhancing judicial impartiality. Rather than threatening judicial independence, such education has come to be seen as a means of ensuring judicial impartiality and promoting confidence in it.⁹ Similarly, much of the ethical guidance now provided to judges is aimed at ensuring that they are supported to act impartially and to appear impartial. More broadly, accountability mechanisms — including where appropriate external complaints mechanisms such as judicial commissions — can be seen as safeguards for ensuring that the standards and structures upholding judicial impartiality are working appropriately.¹⁰

3 As to the suggested conflict in relation to judicial accountability see Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (2014) 38 *Melbourne University Law Review* 1, 3. See further Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 242. In relation to judicial education see, eg, Livingston Armytage, ‘Judicial Education on Equality’ (1995) 58(2) *The Modern Law Review* 160, 162–3. Concerning ethical support see Gabrielle Appleby and Suzanne Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (2019) 47(3) *Federal Law Review* 335, 335–6.

4 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 3.

5 Armytage (n 3) 163, quoting the Hon Chief Justice Sir Anthony Mason AC KBE GBM.

6 The Hon Chief Justice Murray Gleeson, ‘Judicial Selection and Training: Two Sides of the One Coin’ (Speech, Judicial Conference of Australia Colloquium, Darwin, 31 May 2003).

7 Appleby and Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (n 3) 336.

8 See, eg, *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25–26 November 2002), Preamble (‘a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law’, and ‘public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society’).

9 See further below paragraph [52].

10 McIntyre (n 3) 243.

9. Countries in the Commonwealth, including Australia, have traditionally held judges accountable in their role by relying on a blend of internal and external mechanisms,¹¹ including:

- through how the role is performed (open justice, the requirement to give reasons, the availability of appeals);
- social pressures (including the conscience of the judge bound by the judicial oath, judicial culture, and public scrutiny);
- internal disciplinary processes (through the head of jurisdiction, ie the Chief Justice or Chief Judge); and
- external disciplinary procedures (such as removal by parliament for proven incapacity or misconduct).¹²

10. In this way, an ethical framework and judicial education are also part of the accountability framework.¹³ When conceived of like this, judicial accountability is therefore a ‘multifaceted and dynamic blend of responsibility, integrity, professionalism, ethics and excellence’.¹⁴ Rather than simply providing a constraint on the judge — if implemented carefully — accountability can also be ‘a key support, spreading the heavy burden of judicial decision-making over a greater range of shoulders’.¹⁵ Accountability mechanisms can therefore both enhance the ways in which judicial impartiality is protected, and ensure that the other protective support structures remain effective.¹⁶

11. Nevertheless, there can be tension between the different manifestations of the two, as accountability mechanisms have the potential to introduce outside influences and distort impartial judicial decision-making.¹⁷ This requires ‘a careful balance to be struck’.¹⁸ Debates around ethical infrastructures, judicial education, and external complaints procedures briefly highlighted in this paper can be seen as examples of contemporary ways in which these potential tensions are being resolved.

Ethical infrastructure

12. Judicial impartiality is supported by a number of institutions, standards, and practices that have been described as an ‘ethical infrastructure’ within the judiciary — self-imposed and adopted systems that ‘constitute the ethical values and norms of the judiciary and seek to promote good judging’.¹⁹

13. Traditionally, ethical conduct has been seen as guided by the judicial oath, and a matter for individual judges to determine for themselves, justified ‘as an important dimension of the protection of the independence of the judiciary’.²⁰ Appleby and Le Mire explain how under this model, “professional osmosis”, that is, the “example and influence

11 Ibid 237.

12 For a summary of taxonomies for characterising judicial accountability mechanisms see *ibid* 250–88.

13 As to the relationship between judicial education and judicial accountability see further Armytage (n 3) 161.

14 McIntyre (n 3) 244.

15 Ibid 245.

16 Ibid 243.

17 Ibid 243–4.

18 Ibid 244.

19 Roach Anleu and Mack (n 2) 157, fn 3. The term ‘ethical infrastructures’ was coined by Ted Schyner in the context of law firms implementing systems and policies to embed ethical decision making and practices: Ted Schyner, ‘Professional Discipline for Law Firms?’ (1991) 77 *Cornell Law Review* 1. It has since been used by others in the context of the judiciary, see further Roach Anleu and Mack (n 2) 157, fn 3.

20 Appleby and Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (n 3) 336.

of respected peers”, assisted judges.²¹ However, this position has been changing over time, with increasing emphasis on agreed guides or codes of conduct, and calls for more structured systems of support.

14. The following section sets out a number of key aspects of the ethical infrastructure in place for the federal judiciary, with references to comparative state, territory and international jurisdictions.

Oath of Office

15. Upon appointment, a judicial officer must take an oath or affirmation of office, promising to ‘do right to all manner of people according to law without fear or favour, affection or ill will’.²² This promise of office refers to judicial impartiality as a key standard. This public pledge is an important act to declare a commitment to perform the role according to certain objectives and standards. The *Guide to Judicial Conduct* (see further below) begins by reminding judges of the judicial oath, where each judicial officer swears to be ‘primarily accountable to the law, which he or she must administer’.²³

16. Professor Sharyn Roach Anleu and Emerita Professor Kathy Mack have conducted extensive research on Australian judicial officers. They have noted that, when asked to define impartiality in lay terms, it was not uncommon for judicial officers to refer to or quote the judicial oath.²⁴ They also note how, as a strategy to manage their emotions in court, judges may remind themselves of their oath and the judicial function, as a form of ‘self-talk’.²⁵

Guides or codes for judicial officers

17. Although ethics were traditionally considered a matter for each individual judge, since the mid-1990s, common law jurisdictions have seen the development of principles that articulate broad standards for appropriate judicial behaviour. At the international level, the *Bangalore Principles of Judicial Conduct* (2002), developed by the Judicial Integrity Group (consisting of heads of jurisdiction or senior judges around the world), articulate six key principles of independence, integrity, impartiality, propriety, equality, and competence and diligence.²⁶ This document has been widely influential since endorsement by the United Nations.²⁷

18. The principles and accompanying commentary consider actual and apprehended bias,²⁸ how bias can manifest (including through stereotypes),²⁹ and indicate types of influences that may not amount to bias.³⁰ They principles and commentary also set out the types of conduct that should be avoided by judges,³¹ and particular circumstances

21 Ibid, citing The Hon Sir Gerard Brennan AC KBE, ‘Foreword to the Second Edition’ in James Thomas (ed) *Judicial Ethics in Australia* (LexisNexis, 3rd ed, 2009) vii.

22 *Federal Court of Australia Act 1976* (Cth) s 11 and the Schedule.

23 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 1.

24 Roach Anleu and Mack (n 2) 64.

25 Ibid 191.

26 *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25-26 November 2002).

27 For example, by the UN Economic and Social Council: UN Economic and Social Council (ECOSOC), *Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, UN Doc E/RES/2006/23 (27 July 2006).

28 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) [56].

29 Ibid [58].

30 Ibid [60], [89].

31 Ibid [61]–[76].

in which a judge should recuse herself or himself.³² Under the principle of ‘equality’, the commentary also requires judges to avoid stereotyping and to be aware of, and understand, diversity in society.³³

19. In Australia, the Council of Chief Justices of Australia and New Zealand has agreed on a set of guidelines about the standards of ethical and professional conduct expected of judicial officers in the *Guide to Judicial Conduct* (‘Guide’).³⁴ The first edition of the Guide, published in 2002, was based on a survey of judicial attitudes to issues of judicial conduct.³⁵ The third and current edition was published in 2017.³⁶

20. The Guide provides

principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances.³⁷

21. The Guide emphasises the central role and importance of judicial impartiality (notably without defining it), alongside independence and integrity.³⁸ A great deal of the Guide provides suggestions on how issues around impartiality and bias may arise and be addressed — including in a judge’s private life and by conduct in court.³⁹

22. Although published under the auspices of considerable collective authority, the Guide is expressly stated to be generally non-binding.⁴⁰ It emphasises that in difficult or uncertain situations, the primary responsibility of deciding which course of action to take rests with an individual judge. However, it ‘strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction’.⁴¹

23. The Hon Justice Ronald Sackville AO, writing extra-judicially, has noted that, over time, non-binding standards of expected judicial behaviour can transform into binding principles of law.⁴² In Victoria, the Judicial Complaints Commission has adopted the Guide as its guidelines for standards of ethical and professional conduct expected of judicial officers.⁴³ In this way, this document appears to have potential disciplinary consequences for its breach or, at least, comprise concrete standards to be observed. The Guide has also been referred to in at least two reports from the New South Wales Judicial Commission.⁴⁴

24. In other common law countries, codes of conduct for judicial officers are common. For instance, the American Bar Association’s 2007 *Model Code of Judicial Conduct* has guided the development and implementation of such codes across the United States. These codes typically provide set standards for judicial conduct and a basis for

32 Ibid [90]–[99].

33 Ibid [184]–[186].

34 Australasian Institute of Judicial Administration (n 23). See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper J11, 2020) [1.57]–[1.58].

35 Australasian Institute of Judicial Administration (n 23) vii. It also followed the publication of the first text on judicial ethics in Australia in 1988: The Hon Justice James Thomas, *Judicial Ethics in Australia* (Law Book Co, 1988).

36 Australasian Institute of Judicial Administration (n 23) vii.

37 Ibid 1.

38 Ibid 5.

39 Ibid. See in particular Chapters 3 and 4.

40 Australasian Institute of Judicial Administration (n 23) 1.

41 Ibid 2.

42 The Hon Justice Ronald Sackville, ‘Judicial Ethics and Misbehaviour: Two Sides of the One Coin’ (2009) 3 *Public Space* 6, 10.

43 Judicial Commission of Victoria, ‘Guidelines’ <judicialcommission.vic.gov.au/publications/guidelines>.

44 Roach Anleu and Mack (n 2) 164.

regulating conduct through disciplinary agencies.⁴⁵ In contrast, the *Guide to Judicial Conduct* in England and Wales adopts a similar approach to the Australian Guide where there is no obligation on a regulator⁴⁶ to follow its provisions. However, there is a clear acknowledgement that where a regulator is exercising its disciplinary powers, it ‘may choose to have regard to this Guide’.⁴⁷

Bench books

25. A number of courts and judicial education institutions also publish bench books to assist judges on specific issues or areas of law that may be relevant to ethical obligations, including judicial impartiality. These are designed to be read in full, in part, or to be consulted as needed (including while sitting in court).

26. One example particularly relevant to this Inquiry is the Judicial Commission of New South Wales’ *Equality before the Law Bench Book*. First published in 2006, it provides an introduction to the diversity of the population of New South Wales, the importance of perception of fair treatment to public confidence, and an overview of issues of implicit bias and stereotyping and how they should be avoided to ensure equality before the law. The bench book then provides specific information in relation to community and individual differences and examples of how to take account of those differences in relation to specific groups of people (while recognising that the groups can be overlapping). It provides specific information in relation to Aboriginal and Torres Strait Islander people; people from culturally and linguistically diverse backgrounds; people with a particular religious affiliation; people with disabilities; children and young people; women; lesbians, gay men, and bisexuals; sex and gender diverse people; self-represented parties; and older people.

27. Other relevant bench books in Australia include:

- *National Domestic and Family Violence Bench Book* (AIJA, 2020)
- *Equal Justice Bench Book* (Supreme Court of Western Australia, 2016)
- *Equal Treatment Bench Book* (Supreme Court of Queensland, 2016)
- *Disability Access Bench Book* (Judicial College of Victoria, 2016)
- *Solution-Focused Judging Bench Book* (AIJA, 2009)

Other types of ethical support

28. Traditionally, if a judge needed support in making ethical decisions, she or he would discuss the matter with colleagues or the head of jurisdiction. A 2016 survey of 142 Australian judicial officers (the ‘2016 Survey’) found that this is still the most common form of ethical support sought by, and provided to, judges.⁴⁸ The survey demonstrated

a range of views about the existing levels of support but also indicate that some judicial officers would welcome a more formal approach to ethical support.⁴⁹

45 See, eg, District of Columbia Courts, *Code of Judicial Conduct* (2018).

46 See Appendix Two.

47 Courts and Tribunals Judiciary UK, *Guide to Judicial Conduct* (2020) 5.

48 Gabrielle Appleby et al, ‘Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption’ (2019) 42 *Melbourne University Law Review* 299, 337. Note however that only 6% of those surveyed were from the federal judiciary (see page 308).

49 Appleby and Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (n 3) 345.

29. It has been suggested that the need for more structured support may arise partly from the increasing diversity of the bench in terms of personal and professional experience, as well as its increasing size. This increasing diversity — while a positive development more generally — might undermine an assumed sense of long-standing collegiality between professionals coming to the bench and thus the context for ethical discussion.⁵⁰

30. Mechanisms for additional support suggested by judicial officers in the 2016 survey include designating a retired judge to assist with ethical questions in each court; more education; and more structured mentoring.⁵¹ There are a number of additional potential support structures that could be included. For example, advisory committees, such as those in Canada and a number of US states,⁵² allow judicial officers to seek advisory opinions on ethical questions (which may or may not be made public). A further option is ethics assistance lines, like those available to legal professionals in some jurisdictions.⁵³ Judicial performance evaluation is another potential support mechanism that, while not prevalent in Australia and often considered very controversial, is not unheard of in forms such as peer observation of courtroom work and voluntary 360 degree review processes.⁵⁴

31. Apart from guidance on ethics, the provision of counselling and psychological support may also be an important aspect of ethical support. Judging is a high-pressure job, with often ‘oppressive’ workloads and exposure to highly traumatic material, conducted in isolation and under intense scrutiny.⁵⁵ A 2019 study of the psychological impact of judicial work in Australia found that judges and magistrates report higher levels of psychological distress than the general population, and that symptoms of burnout and secondary trauma are prominent in prominent features of stress experienced by judges.⁵⁶ The study’s authors suggest that:

Given the impact of judicial decisions on people’s lives, and the pivotal role they play in our democratic system, courts arguably have a duty, not only to individual judges, but to the community more generally, to investigate and promote judicial wellbeing.⁵⁷

32. Stress, mental illness, or other significant personal strain can pose a significant risk to good ethical decision-making for judicial officers and can affect behaviour in court, impacting on perceptions of impartiality. ‘The most frequently... [identified]... cause of incapacity-based complaints against judges has been ongoing, but treatable, mental illness’.⁵⁸ In recognition of the importance of these issues, the Judicial College of Victoria

50 Ibid 336–7.

51 Ibid 344. Note in relation to mentoring that the National Judicial College of Australia (NJCA) has recently worked with the AIJA to develop mentoring guidelines, which the NJCA reports include ‘standards with respect to the amount of mentoring newly appointed judicial officers should receive’. This document is not currently publicly available, but it is reportedly intended to contribute to development of a structured mentoring program: Lillian Lesueur, Submission No 399 to Joint Select Committee on Australia’s Family Law System, Parliament of Australia (18 December 2019) 12.

52 Appleby and Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (n 3) 348–9.

53 Ibid 350.

54 Roach Anleu and Mack (n 2) 172–3. Note judicial ‘performance monitoring’ is also discussed in a 2014 review of the Federal Court, Family Court, and Federal Circuit Court prepared for the Attorney-General’s Department, but relates only to ‘efficiency’ metrics such as finalisations, clearance rates, transfer times, and pending matters: KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (2014) 52–4.

55 Carly Schrever, Carol Hulbert and Tania Sourdin, ‘The Psychological Impact of Judicial Work: Australia’s First Empirical Research Measuring Judicial Stress and Wellbeing’ (2019) 28 *Journal of Judicial Administration* 141, 142.

56 Schrever, Hulbert and Sourdin (n 55).

57 Ibid 142.

58 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 10; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (December 2009) 65 [6.12], quoting Gilbert+Tobin Centre of Public Law, Submission No 1 to the Senate Standing Committee on Legal and Constitutional Affairs, *Australia’s Judicial System and the Role of Judges* (2009) 4; HP Lee and Enid Campbell,

provides resources for judges to assist their professional and personal functioning, including a Judicial Officer's Assistance Program that offers a 24-hour confidential counselling service. In other jurisdictions, there are similar assistance programs, such as the Canadian Judges Counselling Program, a service offered by the Office of the Commissioner for Federal Judicial Affairs Canada and the Offices of the Chief Provincial Court Judges in each province and territory.⁵⁹

33. There can also be an interplay between external accountability processes, such as complaints procedures and judicial commissions (see further from paragraph 59), and the provision of ethical support. In some cases, following a complaint, the head of jurisdiction may ask for undertakings from the judicial officer that she or he will seek medical assistance and counselling. The Victorian Judicial Commission's public case studies indicate that as part of the resolution of a complaint, the Commission might make recommendations to a judge to change certain behaviours and undertake training on how to effectively communicate within the court or be counselled by the head of jurisdiction.⁶⁰ This body might even give effect to systemic changes that affect judicial behaviours or provide further guidance for them. For instance, in one case, the Commission reported that, 'as a result of the complaint, the Head of Jurisdiction reviewed the court processes concerning disclosure of conflicts of interest'.⁶¹

Professional development

34. Professional development activities for judges contribute to and reinforce ethical infrastructure for judges.⁶² The Guide emphasises the importance of professional development and training to support judges to fulfil their role and uphold their ethical obligations. It states that:

Judicial officers will be better able to maintain the high standards expected of them if they are provided with good quality professional development programs. These will help them maintain and improve their skills, respond to changes in society, maintain their health, and retain their enthusiasm for the administration of justice.

Judges should be provided with, and should take part in, appropriate programs of professional development, such as those provided by the National Judicial College of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria. Programs and conferences that involve judges from other courts and places, and which provide an opportunity for the wider discussion of common issues, may be particularly valuable.

Whilst judges have an individual responsibility to pursue opportunities for professional development, they are entitled to expect that their court will support them by providing reasonable time out of court and appropriate funding.⁶³

The Australian Judiciary (Cambridge University Press, 2nd ed, 2013) 124–5.

59 Judges Counselling Program, 'Welcome to the Judges Counselling Program' <jcp.ca>.

60 Judicial Commission of Victoria, 'Recent Decisions' </www.judicialcommission.vic.gov.au/complaints/recent-decisions>.

61 Ibid Case study 3.

62 Note that Appleby and Le Mire consider judicial education to fall 'within a broad definition of ethical infrastructure': Appleby and Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (n 3) 338.

63 Australasian Institute of Judicial Administration (n 23) 28.

Formal judicial education in Australia

35. Formal and structured judicial education has gained increasing importance and acceptance in common law countries, including Australia, and has now become ‘part of the landscape’.⁶⁴ Traditionally, judicial education was provided by committees of judges, however the delivery of education has increasingly been coordinated and structured through national and state institutions. These now include the National Judicial College of Australia (NJCA), the Australasian Institute for Judicial Administration (AIJA), the Judicial Commission of NSW, the Judicial College of Victoria, and the Australian Judicial Officers Association (formerly the Judicial Conference of Australia). As the ALRC noted in 2000:

Much of the impetus to secure judicial education has come from judges and magistrates themselves ... in response to the changing roles and responsibilities of judges and decision-makers, and the increased public demands, expectations, and scrutiny of the justice system.⁶⁵

36. Despite the increasing emphasis on judicial education, the 2016 Survey found that judicial education was still seen as a challenge by a majority of those surveyed.⁶⁶

National standards

37. In 2006, the NJCA adopted a *National Standard for Professional Development for Australian Judicial Officers* (the ‘National Standard’). The National Standard was endorsed by the Council of Chief Justices of Australia, Chief Judges, Chief Magistrates, the Judicial Conference of Australia, the Association of Australian Magistrates, the AIJA and judicial education bodies. It provides that:

- each judicial officer should be able to spend at least five days each calendar year participating in professional development activities relating to the judicial officer’s responsibilities;
- on appointment, each judicial officer should be offered, by the court to which he or she is appointed, an orientation program; and
- within 18 months of appointment, a judicial officer should have the opportunity to attend a national orientation program, involving judicial officers from different courts and jurisdictions. The program should be a residential program of about five days’ duration.⁶⁷

38. The National Standard was reviewed in 2010,⁶⁸ and, following that review, the Federal Court of Australia (‘Federal Court’) agreed to publish in its Annual Report whether the standard was met, and the professional development activities undertaken by judges.⁶⁹ The same information is not specifically reported in the Annual Reports of the Family Court of Australia (‘Family Court’) and the Federal Circuit Court of Australia (‘Federal

64 Appleby et al (n 48) 334, quoting a response to a survey question on the topic by a judicial officer.

65 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [2.150].

66 In response to the proposition that the education of judicial officers was a challenge, 54% of respondents agreed or strongly agreed, 23% were neutral, and 24% disagreed or strongly disagreed: Appleby et al (n 48) 334. Note that only 6% of those surveyed were from the federal judiciary (see page 308).

67 The text of the National Standard is reproduced in the report of the review conducted in 2010: Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (National Judicial College of Australia, 2010) 1.

68 Roper (n 67).

69 See, eg, Federal Court of Australia, *Annual Report 2019–20* 36.

Circuit Court'), although information about the professional development activities offered by the court and undertaken by judges is reported. Each of the three courts has a Judicial Education Committee to advise the head of jurisdiction on matters relating to continuing judicial education.

Orientation for judges

39. In line with the National Standard, the NJCA offers a five-day residential National Orientation Program for new judges across all Australian jurisdictions a number of times each year. Attendance within the first 18 months of appointment is not compulsory, and rates of attendance broken down by court are not reported in a consolidated format.⁷⁰ Court-specific orientation programs are provided in some of the Commonwealth courts, however information from initial consultations suggests that these are not consistently provided to all new judges in all Commonwealth courts, and do not necessarily always follow a structured program.

Curriculum

40. A *National Curriculum for Professional Development for Australian Judicial Officers* was developed by the NJCA in 2007,⁷¹ although this was intended to provide guidance to courts to set priorities rather than to be prescriptive, and is no longer published on the NJCA's website.⁷² In November 2019, the NJCA published a document on 'Attaining Judicial Excellence', which describes knowledge, skills, and qualities of judicial officers considered to be facilitative of judicial excellence in order 'to assist in designing professional development programs for Australian judicial officers'.⁷³ These include many skills and qualities particularly relevant to this Inquiry, set out in Figure 1.

41. Building on this, the ALRC understands that the NJCA is currently in the process of developing a suggested professional development pathway for judicial officers, highlighting key courses that it suggests all judicial officers attend at specific stages of their judicial career.

42. This can be contrasted to the position in some other comparable jurisdictions, where more formal requirements for judicial education are established, particularly for new judges. For example, in Canada, for the first five years following their appointment to the bench, newly appointed judges are required to follow educational and training programs set out in a professional development plan. This includes 'national training modules designed for new judges along with any other professional development training programs consigned by their Chief Justice or designate'.⁷⁴ The Judicial Council's

70 Although individual judges' attendance is likely to be reported separately in the relevant court's annual report. The National Judicial College of Australia also reports numbers of overall attendance in its annual reports. National Judicial College of Australia, *Annual Report 2019–20* 11 (60 Attendees); National Judicial College of Australia, *Annual Report 2018–19* 12 (61 Attendees).

71 Christopher Roper, 'A Curriculum for Professional Development for Australian Judicial Officers' (National Judicial College of Australia, January 2007).

72 As to the role of the National Curriculum see National Judicial College, *Judicial Education in Australia* (2012) 5 <<https://njca.com.au/>>.

73 National Judicial College of Australia, *Attaining Judicial Excellence: A Guide for the NJCA* (2019). In developing the Guide, the NJCA consulted with 80 judicial officers from around Australia and internationally. The Guide expressly draws on the National Center for State Courts, *Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges* (2017).

74 Canadian Judicial Council, 'Training That Keeps Moving Forward' <<https://cjc-ccm.ca/en/what-we-do/professional-development>>. See further Canadian Judicial Council, *Professional Development Policies and Guidelines* (2018).

professional development policies and guidelines are made public on its website, and each year the Council publishes details of the courses offered.

**Figure 1: Extracts from ‘Attaining Judicial Excellence: A Guide for the NJCA’
Summary of key skills and qualities relevant to judicial impartiality**

- **Ethics and Integrity** (including ‘[u]nderstanding and applying the values and ethical standards specific to judicial officers, including the concept of judicial independence in decision-making, and the need to be impartial and fair in their dealings and conduct’ and ‘[b]eing knowledgeable about established processes for receiving and properly responding to, or answering complaints about, judicial conduct’);
- **Engagement** (including ‘[s]eeking feedback on their individual performance and guidance on ways to improve’, ‘[e]mbracing the use of performance feedback processes’, and ‘[a]ccessing professional judicial development opportunities without neglecting their essential duties’);
- **Wellbeing** (including using ‘self-care practices and wellbeing programs to manage stress and maintain their physical and psychological health to ensure they remain fit, motivated and effective in their working lives’);
- **Critical Thinking** (including ‘[t]aking time before giving decisions to reflect on how the decision was reached, and examining whether the process was methodical and free from conscious or unconscious bias’);
- **Self-Knowledge and Self-Control** (including ‘[e]ngaging in thoughtful self-reflection to help identify and assess potential risks to impartiality, such as their own personal views, experiences, conscious and unconscious bias, and emotions’ and ‘[r]eflecting on the perspectives of others in the courtroom by thinking about how others may see and interpret the judicial officer’s words and actions’); and
- **Building Respect and Understanding** (including ‘[b]eing aware of the range of interpersonal dynamics that may occur during a hearing, understanding the influence of social and cultural norms on behaviour, and anticipating how others may emotionally respond to events’).

Content of ongoing judicial education programs

43. The AIJA is currently undertaking a study of the existing practice of judicial education in Australia, which should provide important insight into the way such education is currently delivered and its subject matter.⁷⁵ However, preliminary consultations and an informal survey of institutions’ websites show that a wide range of topics are addressed.

75 Australasian Institute of Judicial Education, *Annual Report for the Year Ended June 2020* (2020) 14.

44. Of particular relevance to this Inquiry, for example, the NJCA's national orientation program (see above at paragraph 39) covers: judicial conduct and ethics; managing resources and priorities; psychological and physical health; court craft; unconscious judicial prejudice; lifestyle, resilience, and health; assessing the credibility of witnesses; judgment writing; court proceedings and control; cultural barriers and interpreters; self-represented litigants; and sentencing.⁷⁶ The NJCA also runs half-day to two-day courses for judicial officers across Australia on topics including courtroom leadership and reflections on the judicial function (which covers 'current thinking in brain theory, communications skills and reflective practice'⁷⁷).

45. The NJCA has also developed a one-day program on 'Family Violence in the Courtroom', funded by the Australian Government, which is to be delivered to all new Family Court and Federal Circuit Court judges, and other interested judges, along with accompanying online training.⁷⁸ Also of note to this Inquiry, in 2019, the NJCA hosted a conference 'Judges: Angry, Biased, Burned Out', dealing with emotion, implicit bias, and burnout in the courtroom.⁷⁹

46. Until 2019–20, the NJCA also had specific government funding to provide programs to raise Aboriginal and Torres Strait Islander cultural awareness among judicial officers, and ran some conferences and programs for judicial officers including cultural awareness programs, a cultural intelligence workshop, and cultural site visits.⁸⁰ However, a review of Annual Reports from the past five years suggests that such programs have been predominantly provided for judicial officers from state and territory courts, rather than the federal judiciary, at least in recent years.⁸¹ By way of comparison, the Judicial Commission of New South Wales runs a specific program for judicial officers from the New South Wales court, the *Ngara Yura Program*, to

increase awareness among judicial officers about contemporary Aboriginal social and cultural issues, and their effect on Aboriginal people within the justice system.⁸²

This program is delivered through judicial visits to Aboriginal communities in New South Wales, conferences, workshops and seminars, and publications.⁸³

47. Other programs concerning different types of cultural competency may be delivered through online programs developed by institutions or specific courts for example, the New South Wales Judicial Commission has developed a cultural diversity e-training course for judicial officers, based in part on the Family Court's online cultural competency program for judges.

76 National Judicial College of Australia, *Annual Report 2019–20* (n 70) 8.

77 Lillian Lesueur (n 51) 8.

78 National Judicial College of Australia, *Annual Report 2019–20* (n 70) 13. All Family Court and Federal Circuit Court judges will also receive additional training on family violence, including issues of coercive control, in the first half of this year, delivered by US based organisation, the Safe and Together Institute: Nicola Berkovic, 'Judges to Be Trained on Domestic Violence', *The Australian* (22 April 2021).

79 National Judicial College of Australia, 'NJCA/ANU Joint Conference 2019; Judges: Angry? Biased? Burned Out?' <njca.com.au/njca-anu-joint-conference-2019-judges-angry-biased-burned-out/>.

80 See National Judicial College of Australia, *Annual Report 2019–20* (n 70) 14–15.

81 Although note that the Commonwealth courts have undertaken activities relevant to raising Aboriginal and Torres Strait Islander cultural awareness, for example, under their relevant Reconciliation Action Plans: see, eg, *Federal Circuit Court of Australia Annual Report 2019–20* 67–8.

82 Judicial Commission of New South Wales, 'Ngara Yura Program' <www.judcom.nsw.gov.au/education/ngara-yura-program/>.

83 Ibid.

48. Despite the progress that has been made by some courts in responding to issues of cultural diversity, a 2016 review by the Judicial Council on Cultural Diversity (see below) found that there were ‘significant gaps amongst policies, protocols and procedures across jurisdictions’ in relation to culturally diverse populations.⁸⁴ Major gaps included:

A lack of coordination across the judiciary in addressing areas of concern arising from cultural and linguistic diversity;

The absence of national competencies in relation to cultural diversity; ... and

Few resources or formal structures dedicated to supporting judicial officers and administrative staff to design or implement cultural diversity policies.⁸⁵

49. These findings were reflected in a major report on access to justice produced by the Law Council in 2018, which reported that:

[a] key theme emerging in consultations and submissions is the need for greater cultural competency across the justice system, including the need for courts and tribunals to be resourced and personnel to be trained to respond to the specific cultural needs of different people using the justice system.⁸⁶

50. The inclusion in judicial education of topics related to contemporary views on inclusion and diversity (through, for example, training on discrimination, implicit biases, and cultural competency), was initially controversial among some judges,⁸⁷ but was strongly championed by others within the judiciary throughout the 1990s and early 2000s.⁸⁸ In 2013, the Judicial Council on Cultural Diversity — an initiative of the Hon Chief Justice Robert French AC endorsed by the Council of Chief Justices of Australia — was established as an advisory body ‘to assist Australian courts, judicial officers and administrators to positively respond to diverse needs, including the particular issues that arise in Aboriginal and Torres Strait Islander communities’.⁸⁹ This has been described as a positive example of judicial leadership in this area.⁹⁰

51. According to Dr Livingston Armytage AC, writing in 1995, eventual acceptance of the need to include such issues in judicial education was linked to concerns about judicial bias within the community, following a number of high profile controversies and inquiries.⁹¹ Even leaving aside the truth of any such perceptions,

once it is recognised at a doctrinal level that justice must not only be done but must also be seen to be done, it is argued that the credibility of the judiciary is impaired if it is not seen to be concerned with redressing these perceived problems.⁹²

84 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 6.

85 Ibid.

86 Law Council of Australia, ‘Courts and Tribunals’ in *The Justice Project: Final Report* (2018) 52.

87 As the Hon Chief Justice Murray Gleeson later described, there was a suspicion of ‘inappropriate proselytisation’, which was ‘heightened by pressure from some sections of the community for programmes to cultivate in judges attitudes reflecting the prevailing enthusiasm of the day’: Chief Justice Murray Gleeson (n 6).

88 See, eg, The Hon Chief Justice David Malcolm, ‘Women and the Law—Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia’ (1993) 1(1) *Australian Feminist Law Journal* 139. As to the role of Chief Justice Sir Anthony Mason, see Armytage (n 3) 162–3.

89 Judicial Council on Cultural Diversity, ‘Responding to Australia’s Diversity’ <jccd.org.au/>.

90 Law Council of Australia (n 86) 56.

91 This includes: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (May 1994).

92 Armytage (n 3) 164–5.

52. Rather than threatening judicial independence, such education therefore became to be seen as a means of ensuring judicial impartiality and promoting confidence in it. This is a point recognised in the more recently-adopted international standards on judicial education (see paragraph 53), which provide that judicial training must encompass ‘social context, values and ethics’, as part of ensuring ‘an independent unbiased mindset for individual judges’ under the principle of judicial independence.⁹³

International standards

53. In November 2017, a set of judicial training principles were adopted by the members of the International Organization for Judicial Training, made up of 129 judicial training institutions from 27 countries (including the AIJA, the Federal Court, the Judicial Colleges of New South Wales and Victoria, and the NJCA). These principles, set out in the *Declaration of Judicial Training Principles*, recognise that ‘[j]udicial training is essential to ensure high standards of competence and performance’, and ‘fundamental to judicial independence, the rule of law, and the protection of the rights of all people’.⁹⁴ They provide that the senior judiciary should support judicial training,⁹⁵ and that states should ‘[p]rovide their institutions responsible for judicial training with sufficient funding and other resources’.⁹⁶ The Declaration further recognises that:

It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.

...All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.⁹⁷

54. As to the content of such training, the principles, ‘acknowledging the complexity of the judicial role’, provide that ‘judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics’ (Principle 8).⁹⁸ The commentary to that principle recognises that judges

enter the judiciary with their own values, opinions, preconceptions and prejudices. Judicial training should instil within members of the judiciary a degree of open-mindedness—and readiness to acknowledge and address their own preconceptions and prejudices to ensure that these do not taint the judicial process.⁹⁹

Responding to judicial incapacity and misconduct

55. Ethical infrastructures and professional development support judges to fulfil their challenging role, buttressed by the dynamic mix of accountability structures discussed at the beginning of this background paper (see paragraph 8). But occasionally those systems break down.

93 International Organization for Judicial Training, *Declaration of Judicial Training Principles* (2017), Principles 1 and 8 and commentary to Principle 1.

94 Ibid Principle 1.

95 Ibid Principle 3.

96 Ibid Principle 4.

97 Ibid Principles 6 and 7.

98 Ibid Principle 8.

99 Ibid commentary to Principle 8.

56. As Appleby and Le Mire have noted, ‘problematic judicial behaviour is rare’.¹⁰⁰ They quote former justice of the Victorian Court of Appeal The Hon Geoffrey Eames AM QC, who explained that, for the most part, dedicated

judges and magistrates daily grind out decisions in stressful and complex cases. They work long hours. They care very much about getting it right. Generally, and overwhelmingly, they do so.¹⁰¹

However, as they also note, ‘the rarity of such behaviour does not undermine the need for an appropriate system to deal with complaints when they do arise’.¹⁰²

57. The final section of this background paper considers how the Commonwealth courts and other institutions respond to allegations that federal judicial officers do not have the capacity to continue as a judge, or have committed misconduct. It then goes on to briefly consider an alternative model adopted in a number of Australian and international jurisdictions: the establishment of a judicial commission.

58. The ALRC considers this relevant to the Inquiry’s Terms of Reference in three ways. First, the Terms of Reference ask it to consider whether the existing law about actual and apprehended bias remains appropriate and sufficient to maintain public confidence in the administration of justice. Preliminary consultations have suggested that the law on bias is not sufficient on its own to respond to some manifestations of judicial bias, especially in relation to potentially ongoing issues such as judicial conduct in court or one sided-decision making patterns.¹⁰³ In addition, as discussed above at paragraph 33, complaints procedures can act as a catalyst for the provision of other types of support to judges, which may assist them in upholding judicial impartiality. Finally, complaints procedures can be seen as an alternative mechanism by which parties can raise allegations of actual or apprehended bias — a point demonstrated by the high proportion of complaints made to judicial commissions in other states and territories concerning allegations of bias (see Appendix One).

100 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 5.

101 Ibid, quoting The Hon Justice Geoffrey Eames AM QC, ‘The Media and the Judiciary’ (2006) 2 *High Court Quarterly Review* 47, 58.

102 Ibid.

103 See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 34) [1.25], [1.30].

Categorising misconduct

Different categories of judicial misconduct and incapacity may give rise to a need for advice or counselling, a complaint, or be grounds for removal.¹⁰⁴ Appleby and Le Mire point out that incapacity (a physical or mental inability to perform the task) may manifest in misconduct.¹⁰⁵ Categories of misconduct can be identified as follows:

- Questionable interactions with parties in the court — judicial incivility, rudeness, discrimination and bullying towards their colleagues and staff, litigants, witnesses, jurors and/or counsel.¹⁰⁶
- Discriminatory behaviour towards parties in the court — in addition to the above inappropriate behaviours towards parties, conduct that is specifically discriminatory such as comments or behaviours that in any other setting would amount to sexual harassment or a breach of an anti-discrimination statute, such as remarks about race, gender, sexual preference, a disability, or religion.
- Failure to accord procedural fairness — judicial behaviour that results in a procedural unfairness or a miscarriage of justice.
- Biased conduct and abuse judicial power — a failure to be impartial and unbiased is a breach of natural justice and jurisdictional error, therefore a legal error.
- Inappropriate behaviour in the judicial office — this might variously include excessive delay in the delivery of judgments.
- Criminal conduct or reprehensible behaviour — a conviction or proven breach of law while in office will be a violation of the judicial oath and ethical standards to uphold the law.
- Misconduct or misbehaviour prior or after taking judicial office — the conduct of a judge prior to taking judicial office can demonstrate that the judge is not fit to hold judicial office or undermine public confidence in the institution itself.

104 The following list of questionable judicial behaviours relies on the discussion in Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3). These authors also cite (at page 6) the analysis in Braithwaite William Thomas, *Who Judges the Judges? A Study of Procedures for Removal and Retirement* (American Bar Foundation, 1971) 161.

105 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 9.

106 Ibid 13–16. See here the definition of 'inappropriate judicial conduct' in the Victorian Bar, *Judicial Conduct Policy* (2018) where it is defined as 'behaviour by a judicial officer, in his or her capacity as a judicial officer, that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person. Inappropriate judicial conduct does not include, without more, robust courtroom exchanges, testing questions from the bench, the rejection of submissions, the making of adverse rulings, or mere expressions of frustration'.

Responses to incapacity and misconduct in the Commonwealth courts

59. The separation of powers under the *Australian Constitution* limits the extent to which a judge can be disciplined, or otherwise sanctioned, for misconduct. As the ALRC has previously explained, this is

intended to ensure that judicial officers will be impartial adjudicators, by limiting the opportunities for reprisals by governments or private citizens if they disagree with decisions of the judicial officer. The independence of the judiciary is a fundamental value of Australian democracy, and is strongly embedded in the *Constitution*.¹⁰⁷

60. If incapacity can be shown, or misconduct rises to the level of ‘misbehaviour’, it is possible that a judge could be removed by Parliament, although there is a very high threshold to meet and this is an extremely rare occurrence. Incapacity or misconduct (apart from criminal conduct)¹⁰⁸ alleged in relation to members of the federal judiciary is generally dealt with in two main ways: appeal or (except in relation to the High Court) complaint to head of jurisdiction. The following section briefly outlines each of these responses.

Removal for misbehaviour or incapacity

61. Under the *Constitution*, federal judges:

- hold office until they resign or reach a compulsory retirement age of 70 years;
- cannot have their remuneration reduced; and
- can only be removed from office by the Governor-General on an address from both Houses of Parliament praying for their dismissal on the ground of proved misbehaviour or incapacity.¹⁰⁹

62. Legislation was passed in 2012 to formalise a process by which misbehaviour and incapacity may be investigated and removal considered. Under the legislation, Parliament may decide to establish a Parliamentary Commission to investigate specific allegations of ‘misbehaviour’ or incapacity in relation to the judge.¹¹⁰ The Commission investigates the allegation, and reports to the Houses of the Parliament on whether there is evidence that would allow the Houses of the Parliament to conclude that the alleged misbehaviour or incapacity is proved. If the alleged misbehaviour or incapacity is proved, and both Houses of the Parliament pray for the removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the *Constitution*.¹¹¹

63. To ensure that judges are free from political interference, the bar for ‘misbehaviour’ or incapacity is a very high one — this process is, as Appleby and Le Mire term it, the ‘nuclear option’.¹¹² Such a process has only been initiated in one case in relation to a member of the federal judiciary.¹¹³ They suggest that the types of misconduct encountered are

107 Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) [12.84].

108 Criminal conduct can be dealt with under the ordinary criminal processes, subject to any applicable immunities. Note, eg, that under the *Crimes Act 1914* (Cth), s 34(4) it is a crime for a judge to perversely exercise jurisdiction in a matter under federal jurisdiction where they have a personal interest in the matter.

109 *Australian Constitution* s 72.

110 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 9–10.

111 *Ibid* s 3; *Australian Constitution* s 72(ii).

112 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 30.

113 Two separate Senate inquiries and a Commission of Inquiry were tasked with determining whether there was sufficient ground

only rarely the type for which removal is warranted, even more so when that misconduct results from incapacity.¹¹⁴

Appeals

64. Where a litigant is unhappy with the decision made by the judge in a case, or considers that she or he was not given a fair hearing, it may be possible to appeal the decision. In order to appeal the decision a litigant must be able to demonstrate that the judge who heard the original case made an error of law and that the error was so significant that the decision should be overturned.

65. Appeal mechanisms have traditionally been considered an important corrective for judicial misconduct or incapacity in individual cases.¹¹⁵ In 2008, the High Court overturned two convictions on the ground that the (state court) trial judge had been asleep at times during the trial and this had led to a miscarriage of justice. It was later revealed that the judge had severe obstructive sleep apnoea, which eventually led to his early retirement.¹¹⁶ In another case, a Federal Circuit Court judge made an order to send a party to jail for contempt of court, but this was found on appeal to have been a gross miscarriage of justice.¹¹⁷ Also in the Federal Circuit Court, a judge was found on appeal to have engaged in ‘hectoring, bullying, insulting and demeaning’ conduct towards counsel that had ‘no basis’, and the court required the original judgment to be set aside on fair hearing and apprehended bias grounds.¹¹⁸

66. Appleby and Le Mire note, however, that where a ground of complaint involves misconduct (rather than honest error), the appeal process is often not a satisfactory response. They argue that it is expensive and time consuming, may fail to properly acknowledge social or moral wrongdoing, and is unlikely to provide an appropriate sanction.¹¹⁹ In addition, an appeal of a specific decision does not provide any mechanism to change or monitor the judge’s future behaviour, such that the impact on public confidence is not addressed.¹²⁰

Complaints to the head of jurisdiction

67. The Federal Circuit Court, Family Court, and Federal Court have also established informal internal processes to deal with complaints about misconduct or incapacity.¹²¹

68. Unlike counterparts in some state courts, federal judges are not subject to oversight by a judicial commission or other independent investigative body (as to which see further below). Instead, complaints about judicial conduct can be made by members of the public directly to the relevant head of jurisdiction. The head of jurisdiction may authorise another

to warrant the removal of His Honour Justice Lionel Murphy, a former High Court judge, from office. Justice Murphy had been accused of perverting the course of justice (he was convicted at his first trial, but this was quashed on appeal and he was acquitted at the retrial). The Commission was terminated prior to removing Justice Murphy following the revelation that he was suffering from terminal cancer.

114 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 29–30.

115 See, eg, Federal Court of Australia, ‘Judicial Complaints Procedure’ <<https://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>>, which notes that ‘[j]udges are accountable through the public nature of their work, the requirement that they give reasons for their decisions and the scrutiny of their decisions on appeal’.

116 *Cesan v The Queen* (2008) 236 CLR 358; Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 11.

117 *Stradford & Stradford* [2019] FamFCAFC 25.

118 *Adacot & Sowle* [2020] FamCAFC 215.

119 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 7–8.

120 See *ibid* 8.

121 Established under the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

person or body of appropriate seniority to act as a ‘complaints handler’ on her or his behalf.¹²²

69. The head of jurisdiction will not deal with a complaint (otherwise than to summarily dismiss it) unless she or he believes that it is sufficiently serious to justify removal of the judge; adversely affect or have affected performance of their duties; or, adversely affect the reputation of the court.¹²³ This means that the head of jurisdiction may decide ‘without following a formal process that a complaint should not be dealt with’.¹²⁴

70. The Federal Court website gives an insight into how the head of jurisdiction may deal with a complaint if she or he decides to consider it further. It states that the Chief Justice may decide to:

- deal with the complaint in consultation with the judge concerned;
- establish a Conduct Committee to investigate and report back with its recommendations; or
- refer the complaint to the Attorney-General.¹²⁵

71. The heads of jurisdiction can take administrative measures that they believe ‘are reasonably necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another Judge to non-sitting duties’.¹²⁶ However, the Federal Court complaints procedures note that the process

does not and cannot, provide a mechanism for disciplining a judge...For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its [judges] and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred, and, where appropriate, to improve the performance of the Court.¹²⁷

72. The existing complaints process for the federal judiciary, through the head of jurisdiction, has been criticised as being inadequate.¹²⁸ According to the Law Council of Australia, the difficulties with the current system include:

- it is ‘overly discretionary and informal’, particularly given that the discretion is vested in the head of jurisdiction, rather than an independent body;¹²⁹
- there is a ‘lack of clarity’ about how complaints relating to misbehaviour or incapacity falling short of that requiring removal by Parliament should be resolved; and
- the lack of permanent administrative structures for managing complaints about the judiciary means that ‘complaints are addressed on a discretionary basis through the existing internal structures’, undermining public confidence.¹³⁰

122 *Federal Court of Australia Act 1976* (Cth) s 15(1AAB); *Family Law Act 1975* (Cth) s 21B(3A); *Federal Circuit Court of Australia Act 1999* (Cth) s 12(3AB).

123 *Federal Court of Australia Act 1976* ss 4, 15(1AAA); *Family Law Act 1975* (Cth) ss 4, 21B(1B); *Federal Circuit Court of Australia Act 1999* (Cth) ss 4, 12(3AA).

124 Law Council of Australia, *Principles Underpinning a Federal Judicial Commission* (2020) 3.

125 Federal Court of Australia (n 111). If a complaint is referred by a head of jurisdiction to the Attorney-General, the Attorney General may, in consultation with the head of jurisdiction, bring the complaint to the attention of the Parliament.

126 *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(d); *Family Law Act 1975* (Cth) s 21B(1A)(d); *Federal Circuit Court of Australia Act 1999* (Cth) s 12(3)(d).

127 Federal Court of Australia (n 111).

128 See further Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 30–1.

129 Law Council of Australia (n 120) 3.

130 *Ibid* 3–4.

73. Heads of jurisdiction have also expressed how informal systems can be problematic from their perspective. Former Chief Justice of Western Australia, The Hon Chief Justice Wayne Martin AC QC, described to a Senate Inquiry into Australia’s judicial system (the ‘2009 Senate Inquiry’) how he received approximately two complaints per week about judges or magistrates, but that

neither I nor any other Head of Jurisdiction has appropriate facilities or mechanisms for the conduct of such investigations, and there may well be situations in which it may be alleged by either the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such an investigation.¹³¹

74. Before the same Senate Inquiry, the then Chief Justice of the Family Court, the Hon Chief Justice Diana Bryant AO QC, suggested that she was not ‘entirely comfortable’ with the responsibility for complaints handling resting with the head of jurisdiction, and thought that similarly, if one asked ‘any of the heads of jurisdiction of any of the jurisdictions they would [also] say they were not’.¹³²

A federal judicial commission?

75. Given the limitations of the existing procedures, professional bodies including the Law Council of Australia and Australian Bar Association, academics, and others have called for the establishment of a standalone federal judicial commission as an alternative to the existing internal complaints process.¹³³ Judicial Commissions with complaints-handling and other functions exist in five of Australia’s states and territories. A summary of their key features is set out in Appendix One. Independent institutions responsible for receiving and responding to complaints against members of the judiciary are also established in a number of comparable jurisdictions, including the United States, Canada, New Zealand, and the United Kingdom (see Appendix Two).

76. The 2009 Senate Inquiry recommended the establishment of such a commission, modelled on the Judicial Commission of New South Wales and with complaints-handling and educative functions.¹³⁴ In its Final Report on the Family Law System, the ALRC also suggested that the issue of a federal judicial commission warranted ‘further consideration by the Australian Government in the broader context of all federal judicial officers’.¹³⁵

77. In February 2021, it was reported that the Attorney-General of Australia was considering the establishment of a standalone judicial commission, and had sought legal advice in relation to it.¹³⁶

131 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (n 58) [6.33].

132 Ibid [6.34].

133 See, eg, Law Council of Australia (n 120); Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3); Naomi Neilson, ‘ABA Welcomes Reports of Federal Judicial Commission’ [2021] *Lawyers Weekly* <<https://www.lawyersweekly.com.au/biglaw/30692-aba-welcomes-reports-of-federal-judicial-commission>>.

134 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (n 58) [7.82]–[7.84].

135 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [13.63].

136 Neilson (n 129).

Conclusion

78. This background paper has provided a brief overview of the ways in which ethical infrastructure, professional development, and complaints procedures have developed and continue to develop to support judicial impartiality and strengthen judicial accountability within the federal judiciary. There is growing acceptance around the common law world that a range of institutional structures are required to enhance judicial impartiality and to ensure that mechanisms to protect it remain effective.

Appendix One: Judicial Commissions in Australia

Victoria, New South Wales, South Australia, the Australian Capital Territory, and (very recently) the Northern Territory each have independent statutory bodies tasked with receiving and managing complaints about judicial officers. The composition, functions, and powers of these bodies are substantially similar in each jurisdiction.

Size and staffing

While similar in function, there are discernible differences in the size and staffing of these bodies according to the size of the jurisdiction. The Judicial Commissions in New South Wales and Victoria are composed of six judicial members and four non-judicial members.¹³⁷ In the ACT and the Northern Territory there are just two judicial officers — the Chief Justice and Chief Judge.¹³⁸ The non-judicial members are generally required to be lay people of high standing in the community recommended by the Attorney-General, but certain jurisdictions stipulate that one of these members must be a legal practitioner. In the Northern Territory, the presidents of the administrative tribunal and the law society are also required to be members of the Commission.¹³⁹ In South Australia there is only a single Commissioner, who is a former judicial officer.¹⁴⁰

Types of complaints considered

All of the complaint bodies may only investigate complaints about the conduct, capacity, ability, or behaviour of sitting judicial officers. They cannot investigate complaints about the correctness of a decision made by a judicial officer, nor can they investigate a complaint made about a former judicial officer.¹⁴¹ Generally, these bodies also cannot investigate or deal with a complaint (other than to dismiss it) unless it meets a threshold level of seriousness. The wording of this stipulation varies in each jurisdiction, but generally the complaint must be dismissed unless the subject of the complaint could, if substantiated, amount to:

- proved misbehaviour or incapacity that would warrant the removal of the officer from office;
- may affect the performance of the officer's functions and duties; or
- infringed the standard of conduct expected.

Process

All complaint bodies are empowered to complete a preliminary investigation into the complaint. This may involve requesting further information from a complainant, obtaining court documents, and requiring a judicial officer to undergo any medical examination (where appropriate in the circumstances).¹⁴² For instance, in Victoria, the Judicial Commission describes listening to an audio recording of the proceeding to hear to interaction between

137 *Constitution Act 1975* (Vic) ss 87AAM, 87AAN; *Judicial Officers Act 1986* (NSW) s 5(3)–(5).

138 *Judicial Commissions Act 1994* (ACT) ss 5B, 5C; *Judicial Commission Act 2020* (NT) s 7.

139 *Judicial Commission Act 2020* (NT) s 7.

140 *Judicial Conduct Commissioner Act 2015* (SA) s 7.

141 *Judicial Commission of Victoria Act 2016* (Vic) s 16(3)(b),(e); *Judicial Officers Act 1986* (NSW) s 15; *Judicial Conduct Commissioner Act 2015* (SA) ss 17(e)–(f); *Judicial Commissions Act 1994* (ACT) ss 35B(1)(f)–(g), 35I.

142 *Judicial Commission of Victoria Act 2016* (Vic) ss 27–9; *Judicial Officers Act 1986* (NSW) ss 18, 39C–39D; *Judicial Conduct Commissioner Act 2015* (SA) s 6(5).

the judge and the lawyer. The ACT Council and the Northern Territory's Commission have broader powers, including the ability to issue summons and examine witnesses.¹⁴³

These bodies may then either:

- dismiss the complaint if they deem it does not warrant further action;
- refer the complaint to the head of jurisdiction to take action; or
- establish and refer the complaint to an ad-hoc investigatory body (referred to commonly as a panel or division) to investigate and report on.¹⁴⁴

In each of these jurisdictions, these ad-hoc investigatory bodies have similar functions, powers, and outcomes. Generally, they are composed of two judicial and one non-judicial member. They all have wide powers to investigate a complaint, including the ability to hold a full hearing and issue subpoenas.¹⁴⁵ The body may then dismiss the complaint, refer it to the head of jurisdiction, or, if it forms an opinion that the matter could justify removal of the judicial officer from office, it may — and in some jurisdictions, must — present a report setting out these findings to the Governor or Attorney-General.¹⁴⁶

While an investigation is underway, the judicial officer investigated may be (or is) suspended from sitting by the head of jurisdiction, except in South Australia.¹⁴⁷ Yet, apart from this temporary leave from duties, none of these bodies have the power to remove or punish a senior judicial officer. Senior judicial officers may only be removed following the passing of a resolution of all of the jurisdiction's houses of parliament.¹⁴⁸ However, the Judicial Commissions in Victoria and NSW, in making recommendations in respect of complaints, might influence behaviours as described above.

Statistics on complaints

While there might be limited powers to discipline or remove a judicial officer, independent commissions provide useful data about complaints about judicial behaviour. The public statistics reveal busy jurisdictions. For instance, the Victorian Commission's Annual Report for 2019–20 revealed that for this period the Commission received 252 complaints from 189 complainants, with a further 61 earlier complaints open.¹⁴⁹ In the 2019–20 period, the New South Wales Commission received 57 complaints about 48 judicial officers (including one complaint referred by the Attorney-General) and responded to 385 requests for information.¹⁵⁰ The South Australian Commissioner received 60 complaints in the 2019–20 period.¹⁵¹ In the same period, the ACT Council received eight complaints about eight

143 *Judicial Commissions Act 1994* (ACT) ss 35, 35D–35H; *Judicial Commission Act 2020* (NT) ss 17–18.

144 *Judicial Commission of Victoria Act* (Vic) s 13; *Judicial Officers Act 1986* (NSW) ss 20–1; *Judicial Conduct Commissioner Act 2015* (SA) ss 16–8, 20; *Judicial Commissions Act 1994* (ACT) ss 17, 35B, 35C; *Judicial Commission Act 2020* (NT) ss 44, 48–9. South Australia's Commissioner cannot appoint an investigatory body itself, rather it must 'recommend' the Attorney-General do so: *Judicial Conduct Commissioner Act 2015* (SA) s 20.

145 *Judicial Commission of Victoria Act 2016* (Vic) ss 51, 61–8; *Judicial Officers Act 1986* (NSW) ss 24–5; *Judicial Conduct Commissioner Act 2015* (SA) s 24; *Judicial Commissions Act 1994* (ACT) ss 37–44; *Judicial Commission Act 2020* (NT) s 52.

146 *Judicial Commission of Victoria Act 2016* (Vic) s 34(4); *Judicial Officers Act 1986* (NSW) s 29; *Judicial Conduct Commissioner Act 2015* (SA) s 25; *Judicial Commissions Act 1994* (ACT) ss 21–2; *Judicial Commission Act 2020* (NT) s 57.

147 *Judicial Commission of Victoria Act 2016* (Vic) pt 6, div 1; *Judicial Officers Act 1986* (NSW) s 40; *Judicial Commission Act 2020* (NT) s 59; *Judicial Commissions Act 1994* (ACT) s 19(1).

148 *Constitution Act 1975* (Vic) s 87AAB; *Constitution Act 1902* (NSW) s 53; *Judicial Commissions Act 1994* (ACT) ss 4–5; *Supreme Court Act 1979* (NT) s 40; *Judicial Conduct Commissioner Act 2015* (SA) s 26; *Constitution Act 1934* (SA) s 75.

149 *Judicial Commission of Victoria, Annual Report 2019-2020* 35.

150 *Judicial Commission of New South Wales, Annual Report 2019-2020* 49.

151 *Judicial Conduct Commissioner, Annual Report 2019-2020* 21.

judicial officers, and seven enquiries.¹⁵² The majority of complaints were dismissed by the respective bodies.¹⁵³

Even when dismissed, the nature of the complaints also provides some insight into concerns raised by the public or profession. In NSW, the majority (53%) of complaints arose from allegations of failure to give a fair hearing; 16% of complaints arose from allegations of an apprehension of bias. In South Australia, most of complaints concerned one of either a judicial decision/order (20 of 60), or inappropriate conduct in court or in chambers (17 out of 60). In the ACT, all complaints were received from self-represented litigants facing difficulties navigating court processes, as was the case in previous years.

152 ACT Judicial Council, *Annual Report 2019-2020* 5.

153 In Victoria, 196 of the 313 complaints were dismissed, three were referred to a head of jurisdiction, and four were withdrawn. No complaints or referrals were referred to an Investigating Panel. In NSW, 94% of complaints (45 of 48 examined) were summarily dismissed. The remaining three were referred to the head of jurisdiction. In South Australia, in the reporting period six complaints were referred to the relevant jurisdictional heads and the remaining complaints were either discretionarily or mandatorily dismissed due to being outside of the Commissioner's jurisdiction, for example, where they concerned a judicial decision/order. Six out of the eight complaints were dismissed by the ACT Council.

Appendix Two: Comparative Complaints Mechanisms

Judicial complaint mechanisms in comparable jurisdictions are largely like those operating in Australia. There is a similar concern to preserve the tenure and constitutional independence of judicial officers. However, in several jurisdictions, there are more powers to manage and discipline a judge provided to the relevant head of jurisdiction after completion of an inquiry. The following provides a brief description of those operating in English speaking, common law countries.

In the **United States**, at the federal level, there is similar constitutional protection of judges from removal by the judiciary. Responsibility for investigating judicial complaints is conferred on circuit judicial councils, assisted by the head of jurisdiction, and the investigations of a special committee.¹⁵⁴ The councils can impose sanctions, but cannot remove Article III judges (Supreme Court justices, and federal circuit and district judges).¹⁵⁵ Where the council is of the view removal may be appropriate, the matter is referred to the Judicial Conference.¹⁵⁶ If the Conference finds possible grounds for impeachment, it will submit a report to the House of Representatives.¹⁵⁷ Only Congress has the authority to remove an Article III judge.

The **Canadian Judicial Council** receives and investigates complaints.¹⁵⁸ An Inquiry Committee can conduct hearings, and then the entire Council makes a recommendation.¹⁵⁹ At the end of the investigation, the Council must report its conclusions to the Minister, including recommending the removal of a judge.¹⁶⁰ The Council operates in addition to complaints systems based in individual provinces.

In **New Zealand**, the Judicial Conduct Commissioner is given responsibility for receiving and investigating complaints.¹⁶¹ The Commissioner may take one of four actions in response to a complaint: take no further action,¹⁶² dismiss the complaint,¹⁶³ refer the complaint to the relevant 'Head of Bench',¹⁶⁴ or recommend that a Judicial Conduct Panel be appointed when an inquiry is justified and may lead to removal.¹⁶⁵

The **United Kingdom's** complaint mechanism operates through co-operation between the executive and judicial branches of government.¹⁶⁶ The Judicial Conduct Investigations Office is the independent statutory body tasked with supporting the Lord Chancellor, a Cabinet Minister, and Lord Chief Justice in their joint responsibility for judicial discipline.¹⁶⁷

154 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 41–2, citing 28 USC §§ 351–64 (2012).

155 Ibid, citing 28 USC § 354(a)(2)(B) (2012).

156 Ibid, citing 28 USC § 354(b)(2) (2012).

157 Ibid, citing 28 USC § 354(b) (2012). See Administrative Office of the U.S. Courts, 'Judges and Judicial Administration - Journalist's Guide'.

158 *Judges Act*, RSC 1985, c J-1, s 63(2); Judicial Conference of Australia, *Report of the Complaints Against Judicial Officers Committee* (Report 2013) 17–18.

159 *Judges Act*, RSC 1985, c J-1 s 63(3).

160 Ibid s 65.

161 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 8. See Office of the Judicial Conduct Commissioner, 'Complaints Process' <www.jcc.govt.nz/complaintprocess.html>; Judicial Conference of Australia (n 158) 16.

162 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A.

163 Ibid s 16.

164 Ibid s 17.

165 Ibid s 18.

166 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 44, citing Harrison James, 'Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland' (2009) 13 *Edinburgh Law Review* 427, 433.

167 *Constitutional Reform Act 2005* (UK) pt 4; see Judicial Conduct Investigations Office, 'Create a Complaint' <www.complaints.judicialconduct.gov.uk>; Judicial Conference of Australia (n 158) 19–20.

The Office has the role of receiving, investigating, dismissing, and providing advice on complaints,¹⁶⁸ either to a ‘nominated judge’ or to an ‘investigating judge’, appointed by the Lord Chief Justice.¹⁶⁹ The nominated judge can then dismiss the complaint, ‘refer matters to a leadership judge to be dealt with pastorally’,¹⁷⁰ or formulate advice for the Lord Chief Justice and Lord Chancellor.¹⁷¹ There is the capacity to convene a disciplinary panel for complex matters.¹⁷² The Office Lord Chancellor, a Cabinet Minister, has power to remove all judicial officers from their office except senior judges, who must be removed by Parliament.¹⁷³ The Lord Chief Justice — the Head of the Judiciary and President of the Courts of England and Wales — may discipline judges short of removal.¹⁷⁴ Additionally, a separate body, the Judicial Appointments and Conduct Ombudsman, has the remit to receive complaints about the handling of a complaint by the Office and review the ‘exercise by any person of a regulated disciplinary function’.¹⁷⁵

168 *Judicial Discipline (Prescribed Procedures) Regulations 2013* (UK) SI 2013/1674 rr 4, 6.

169 *Ibid* rr 9(1), 10(1).

170 Appleby and Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (n 3) 44, citing Office for Judicial Complaints, *A Review of the Rules and Regulations Governing Judicial Discipline* (2013) 13.

171 *Judicial Discipline (Prescribed Procedures) Regulations 2013* (UK) r 13(3)(a).

172 *Ibid* rr 11, 13(3)(e).

173 *Constitutional Reform Act 2005* (UK) s 108, sch 14.

174 *Ibid* s 108.

175 *Ibid* ss 110–11; GOV.UK, ‘Judicial Appointments and Conduct Ombudsman’ <www.gov.uk/government/organisations/judicial-appointments-and-conduct-ombudsman/about>.