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BACKGROUND PAPER JI6

# JUDICIAL IMPARTIALITY

## Cognitive and Social Biases in Judicial Decision-Making

April 2021



This paper on cognitive and social biases in judicial decision-making 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), *Conceptions of Judicial Impartiality* (April 2021), and *Ethics, Professional Development, and Accountability* (April 2021).

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

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

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## Introduction

1. This paper aims to shed light on the psychology behind the traditionally ‘opaque exercise of judging’.<sup>1</sup> First, the paper explains how heuristics, attitudes, and stereotypes may influence (and bias) human decision-making. It then discusses research that has found that judges are likely to be vulnerable to many of the ordinary cognitive and social biases that pervade human cognition, although they may be able to ‘impressively suppress’ bias in some circumstances. It briefly explores how these ideas interact with the court process and the law on bias, and how the law on bias already responds to some of these issues.

2. Recognition that a judge is human does not mean that they cannot judge impartially. However, it may require additional personal and institutional strategies to remove and disrupt the influence of cognitive and social biases. The final part of this paper details interventions that have been proposed to do so. The scientific research summarised in this background paper will inform the proposals in the Inquiry’s Consultation Paper.

3. According to former Chief Justice the Hon Murray Gleeson AC GBS QC, ‘to be judicial is to be impartial’.<sup>2</sup> By contrast, partiality is ‘the antithesis of the proper exercise of a judicial function’.<sup>3</sup>

4. By extension, judges must administer what Sir William Blackstone SL KC described in 1765 as ‘impartial justice’. According to Blackstone, to further this ideal ‘the law will not suppose a possibility of bias or favour in a judge’.<sup>4</sup>

5. As Professor Gary Edmond and Associate Professor Kristy Martire explain

impartiality has been considered so fundamental to the administration of justice, and partiality (or bias) so disruptive, that judges in common law systems developed rules and procedures to insulate legal institutions and practice from bias and even perceptions of bias.<sup>5</sup>

6. The law relating to bias has tended to focus on mitigating the potential for bias arising from a few specific sources from influencing judicial decisions. These include bias derived from interests, conduct, associations, or exposure to extraneous information.<sup>6</sup> However, economists, legal academics, psychologists, and political scientists have become increasingly interested in the ways that other forms of bias can impact on judicial decision-making.<sup>7</sup> The initial findings from this research show that judicial decision-making, like all human decision-making, is influenced by heuristics (or mental shortcuts), cognitive biases, and other forms of bias.<sup>8</sup>

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1 Brian Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021) 4.

2 The Hon Murray Gleeson AC GBS QC, *The Rule of Law and the Constitution* (ABC Books, 2000) 129.

3 *Bahai v Rashidian* 1985 1 WLR 1337 per Lord Justice Balcombe.

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

5 Gary Edmond and Kristy A Martire, ‘Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making’ (2019) 82(4) *The Modern Law Review* 633, 633.

6 *Ibid* 660–1. See generally Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020).

7 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, 21.

8 See generally Barry (n 1).

7. It is not just legal realists and social scientists that have embraced this more nuanced appreciation of the complexities involved in judicial decision-making: the Australian judiciary has been alive to the difficulties associated with bias for decades.<sup>9</sup> Twenty years ago, the Hon Justice Keith Mason AC QC wrote that judges should reflect on their own biases, because, '[a]knowledging their existence is the first step towards debating and justifying them where appropriate'.<sup>10</sup> Ensuring 'unidentified biases against people of particular races, classes or genders' do not encroach on 'values and principles entrenched in our legal system, such as equality or the presumption of innocence' has also been described in an Australian context as 'essential' to delivering impartial justice.<sup>11</sup> The impact of implicit bias in the legal system has also been considered by parliamentary and ALRC inquiries.<sup>12</sup>

8. There has also been greater recognition that groups who have been marginalised by the law in the past may experience or perceive bias differently from other groups when interacting with the legal system.<sup>13</sup> Judicial education 'has been impressively developed over the past forty years' to combat some of the challenges associated with bias;<sup>14</sup> however, there is scope for the topic of bias to have a more prominent position at training given the important relationship between judicial impartiality and public confidence in the legal system.<sup>15</sup> It is for this reason that the Australian judiciary is increasingly referring to research on bias in decision-making, as seen in in court cases,<sup>16</sup> at training sessions,<sup>17</sup> and at conferences.<sup>18</sup>

## The psychology of judicial decision-making

9. In 1921, US Supreme Court Justice Benjamin Cardozo wrote

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the ... judge.<sup>19</sup>

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9 The Hon Justice Keith Mason AC QC, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676; See also The Hon Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 199: reflecting on his own heuristics, his Honour stated, 'I equated my subjective confidence in my ability to arrive at a correct decision with the objective probability of me arriving at a correct answer. Almost certainly, I over-estimated my own ability'. See also, more recently, The Hon Chief Justice TF Bathurst, *Trust in the Judiciary* (Speech, 2021 Opening of Law Term Address, Sydney, 3 February 2021) 23.

10 Justice Keith Mason (n 9) 686.

11 The Rt Hon Chief Justice Beverley McLachlin PC, '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) 23. See also The Hon Justice Andrew Greenwood, *The Art of Decision-Making* (Speech, Administrative Appeals Tribunal 2018 National Conference, 29 May 2018).

12 See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (May 1994) 73–4; Australian Law Reform Commission, *Equality before the Law: Part Two - Women's Equality* (Report No 69, 1994) [2.15]–[2.17].

13 Judge Andrew J Wistrich and Jeffrey J Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It' in Sarah E Redfield (ed), *Enhancing Justice Reducing Bias* (American Bar Association, 2017) 87, 88–89.

14 Lord Neuberger of Abbotsbury PC (n 7) 22.

15 Ibid.

16 *GetSwift Limited v Webb* [2021] FCAFC 26 The Court referred to scientific research in its assessment of bias.

17 Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (Background Paper JI5, 2021) JI5.4.

18 See, eg, 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/>.

19 Benjamin Cardozo, *The Nature of the Judicial Process* (Oxford University Press, 1921) 167.

10. The humanity associated with judging has since been interrogated in great detail by researchers from legal, economic, and political disciplines.<sup>20</sup> In more recent times, the discipline of psychology has taken an interest in judicial decision-making: in particular, Professors Chris Guthrie and Jeffrey Rachlinski and Judge Andrew Wistrich have conducted a large number of scientific studies in this area. These, and other studies conducted internationally, are usefully summarised in Dr Brian Barry's book *How Judge's Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021).<sup>21</sup>

11. To understand the psychology of judicial decision-making, it is first necessary to appreciate the psychology of human decision-making. A group of theories in cognitive, personality, and social psychology known as dual process theories have been particularly influential in understanding 'how people think about information when they make judgments or solve problems'.<sup>22</sup> These theories distinguish between two main ways of thinking about information:

a relatively fast, superficial, spontaneous mode based on intuitive associations, and a more in-depth, effortful, step-by-step mode based on systematic reasoning.<sup>23</sup>

12. Professor Daniel Kahneman popularised some of these ideas in his book *Thinking, Fast and Slow*. In this book, he refers to these as 'system one' (automatic and associative) and 'system two' (deliberative and intentional) thinking.<sup>24</sup> When a person is distracted, rushed or tired, system two thinking becomes harder, and system one thinking becomes more pervasive. Also, when the systems come into conflict, people prefer to rely on system one thinking.<sup>25</sup> System one thinking is an unavoidable and essential part of human decision-making;<sup>26</sup> however, it cannot be depended on for reasoning that requires conscious deliberation.

13. In general, these theories 'assume that people will think about information in a relatively superficial and spontaneous way unless they are both able and motivated to think more carefully'.<sup>27</sup> When engaging in the more intuitive type of thinking, people will rely on automatic, and often unconscious, processes. These may include mental shortcuts, like heuristics ('decision rules' for solving problems, see below), or drawing on stereotypes (see further below). Often, those processes involve biases — 'predispositions and preferences that affect judgment and decision-making'.<sup>28</sup> Frequently, these processes are useful, but they can lead to errors and unfairness.

14. Professor Tom Stafford explains how '[t]here are two kinds of bias typically studied by psychologists, both of which a judge will wish to avoid'.<sup>29</sup> These are:

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20 Barry (n 1) 3.

21 Ibid 1–8.

22 Shelly Chaiken and Chaiken Ledgerwood, 'Dual Process Theories' in Roy F Baumeister and Kathleen D Vohs (eds), *Encyclopedia of Social Psychology* (SAGE, 2007) 269, 268–269. For an overview, see Jonathan Evans and Keith Frankish, *In Two Minds: Dual Processes and Beyond* (Oxford University Press, 2009).

23 Chaiken and Ledgerwood (n 22) 268–269.

24 Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux, 2011) 19. Kahneman won a Nobel Prize for his work in behavioural psychology.

25 Wistrich and Rachlinski (n 13) 90.

26 Ibid 91.

27 Chaiken and Ledgerwood (n 22) 269.

28 Edmond and Martire (n 5) 646.

29 Tom Stafford, 'Biases in Decision Making' [2017] (Winter) *Tribunals* 19, 19.

- ‘cognitive biases’, which are ‘systematic tendencies in our thought processes that can lead us into error’;<sup>30</sup> and
- ‘social biases’, by which people ‘automatically form impressions of people, or leap to conclusions, based on the social group that they are a member of’.<sup>31</sup> These types of bias are, it is suggested, ‘driven by attitudes and stereotypes that we have about social categories, such as genders and races’.<sup>32</sup>

## Heuristics and cognitive biases

15. Heuristics are a key component of the more intuitive, ‘system one’ thinking.<sup>33</sup> These are ‘decision rules’ used for solving problems — a mental shortcut that a person makes when processing new information.<sup>34</sup> These can sometimes be very useful, but they can also, at times, lead to ‘severe and systematic’ error in the form of ‘cognitive biases’.<sup>35</sup> These ‘cognitive biases’ can be understood as ‘intuitive preferences that consistently [violate] the rules of rational choice’.<sup>36</sup>

16. Examples of cognitive biases explored through research on judicial decision-making are set out in Table 1 below.

**Table 1: Example cognitive biases in judicial decision-making**

Heuristic/cognitive bias	Explanation	Example legal scenario where this heuristic arises
Hindsight bias	Refers to the tendency to overestimate the probability that an event will occur after the event has occurred. <sup>37</sup>	When judges are assessing issues of reasonableness and risk after an event has occurred.
Confirmation bias	Refers to the tendency to interpret information in a way that confirms and reinforces pre-existing beliefs and opinions. <sup>38</sup>	When judges initially decide an issue one way, they are more likely to confirm their initial approach in later decisions. <sup>39</sup>
Representativeness bias	Refers to the tendency to make assumptions about something or someone belonging to a particular category. <sup>40</sup>	When assessing the credibility of a criminal defendant, a judge might observe that a defendant’s demeanour on the witness stand is representative of a guilty person or an innocent person. <sup>41</sup>

30 Ibid.

31 Ibid.

32 Jerry Kang et al, ‘Implicit Bias in the Courtroom’ (2012) 59 *UCLA Law Review* 1124, 1128. They explain further that: ‘An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative. A *stereotype* is an association between a concept (again, in this case a social group) and a trait.’

33 Barry (n 1) 13.

34 Kahneman (n 24) 7–8.

35 Daniel Kahneman, Amos Tversky and Amos Tversky, ‘Judgment under Uncertainty: Heuristics and Biases’, ed Amos Tversky and Daniel Kahneman (1974) 185 *Science* 1124, 1124, 1130.

36 Kahneman (n 24) 10; Barry (n 1) 14. To be distinguished from a bias more generally, which is a tendency to perceive things in a particular way (and which is not necessarily an error).

37 Matthew Groves, ‘Bias by the Numbers’ (2020) 100 *AIAL Forum* 60. Hindsight bias tends to enhance the appearance of individual risks, and reduce the reasonableness of individuals’ actions. See also Eric Harley, ‘Hindsight Bias in Legal Decision-Making’ (2007) 25(1) *Social Cognition* 48. See generally Barry (n 1) 18–22.

38 Barry (n 1) 15–18.

39 Ibid 15–18. For example, Lidén et al found that Swedish criminal judges were more inclined to convict detained defendants than non-detained defendants, but the highest levels of conviction were in cases where judges themselves had decided to initially detain the defendant: see Moa Lidén, Minna Gräns and Peter Juslin, ‘“Guilty, No Doubt”: Detention Provoking Confirmation Bias in Judges’ Guilt Assessments and Debiasing Techniques’ (2019) 25 *Psychology, Crime and Law* 219, 223.

40 Barry (n 1) 22.

41 Ibid 23, citing Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, ‘Inside the Judicial Mind’ (2000) 86 *Cornell Law Review* 777.

Heuristic/cognitive bias	Explanation	Example legal scenario where this heuristic arises
In-group bias	Refers to the tendency to have positive attitudes in favour of groups that one is part of. <sup>42</sup>	When the judge and litigant are part of the same 'group', such as being from the same ethnicity, school, or political party.
Anchoring bias	Refers to the tendency to moderate numerical assessments towards a numerical reference point. <sup>43</sup>	When judges determine damage awards, fines, and criminal sentences after having been presented with sums or duration. <sup>44</sup>
Egocentric bias	Refers to the tendency to make judgments 'that are egocentric or self-serving'. <sup>45</sup>	When judges are reflecting on their capacity for avoiding bias in judging. <sup>46</sup>

Numerous studies have been conducted to investigate how these heuristics and cognitive biases impact on judicial decision-making. Many studies have demonstrated that judges are impacted by the same cognitive biases as other people: for example, in one study testing the effect of the anchoring bias, a group of administrative law judges were asked to determine an appropriate damages award in a particular case. Half of the judges were told the plaintiff had seen a similar case on television where the judge settled on an award of \$415,300, the other half were not told anything. Without the number present, the median award was \$6,250; with the number present, it was \$50,000.<sup>47</sup>

17. Other studies have indicated that judges can, at times, impressively suppress particular biases, such as the hindsight bias. In one study of US judges, researchers found that the judges were not swayed in their decision-making on whether to grant warrants by inadmissible evidence which proved that a defendant had a weapon.<sup>48</sup> However, this was a notable exception among a number of studies that show that judges are unable to suppress inadmissible evidence.<sup>49</sup> It has been suggested by some that this may be because

in this intricate area of law judges focus on the relevant precedent, which requires them to engage in deliberative analysis that nudges judges to look beyond their intuitive reactions.<sup>50</sup>

## Heuristics and stereotypes in evaluating evidence

18. Other models in the field of social psychology use a similar dual process framework to understand how information is evaluated in legal decision-making.<sup>51</sup> They find that

<sup>42</sup> Ibid 89.

<sup>43</sup> See, eg, Jeffrey J Rachlinski, Andrew J Wistrich and Chris Guthrie, 'Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences' (2015) 90(2) *Indiana Law Journal* 695. See also Kahneman (n 24).

<sup>44</sup> Rachlinski, Wistrich and Guthrie (n 43).

<sup>45</sup> Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'The "Hidden Judiciary" An Empirical Examination of Executive Branch Justice' (2009) 58(3) *Duke Law Review* 1477, 1518. See generally Barry (n 1) 24–25.

<sup>46</sup> Ibid 1519. The authors found that, '[w]hen it came to their capacity for avoiding bias in judges, ... 97.2 percent of the [US administrative law judges] placed themselves in the top half [of judges]' when asked to rank their ability against their colleagues. Ibid 1501–1504.

<sup>47</sup> Barry (n 1) 20, citing Andrew J Wistrich, Chris Guthrie and Jeffrey R Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251, 1313.

<sup>48</sup> See, eg, Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can judges ignore inadmissible information? The difficulty deliberately disregarding' (2005) 153(4) *University of Pennsylvania Law Review* 1251, 1251: the authors found that judges who participated in the experiments 'struggled' to disregard inadmissible evidence, particularly 'demands disclosed during a settlement conference' and 'conversation protected by the attorney-client privilege' even when they were reminded, or themselves had ruled, that the information was inadmissible. They did, however, find that judges were able to ignore inadmissible information obtained in violation of a criminal defendant's right to counsel.

<sup>49</sup> Wistrich and Rachlinski (n 13) 96.

<sup>50</sup> See, eg, Shelly Chaiken and Alison Ledgerwood, 'A Theory of Heuristic and Systematic Information Processing' in Paul Van Lange, Arie Kruglanski and E Higgins (eds), *Handbook of Theories of Social Psychology: Volume 1* (SAGE Publications Ltd,



when using intuitive-type processing, decision-makers are more likely to use cognitive shortcuts like heuristics<sup>52</sup> (eg, the 'expert heuristic'), and schemas (ways of making sense of the world), such as stereotypes.<sup>53</sup> Professor McKimmie et al give an example of how this can work in the courts: judges and jury members might

use schemas about how they expect victims of intimate partner violence and sexual assault to behave in order to evaluate the credibility of the evidence given by that victim.<sup>54</sup>

19. If the schemas decision-makers rely on are wrong or misleading (such as through stereotypical assumptions about what a 'real rape' is, or stereotypes about how a person of a particular gender or ethnicity will behave), the credibility assessment made by the decision-maker will be flawed.

### Implicit social biases

20. These ideas intersect with a particular area that has received much attention in the literature on bias in judicial decision-making: the operation of *implicit* social bias. Research has undermined the idea that all attitudes and stereotypes about social groups are consciously held and endorsed by those holding them (that they are explicit).<sup>55</sup> Instead, attitudes and stereotypes may often be implicit, such that they cannot be accessed by introspection.<sup>56</sup> A positive attitude towards a particular social group does not necessarily match with a positive stereotype about the same group, and vice versa. This means that

one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.<sup>57</sup>

21. Implicit biases function automatically and 'can produce [behaviour] that diverges from a person's avowed or endorsed beliefs or principles'.<sup>58</sup> They can be detected and measured through different methods, including experiments involving subliminal priming, or measuring reaction time differences on different tasks.<sup>59</sup>

22. The Implicit Association Test (IAT), a method widely used to measure implicit bias, falls into the second category. This test, which was developed by Professor Anthony Greenwald et al in 1998,<sup>60</sup> 'measures how quickly people can sort categories, such as

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2012) (describing the Heuristic Systematic Model of Persuasion). Another influential dual process model of persuasion in the area is the Elaboration Likelihood Model, see further Richard E Petty and Pablo Briñol, 'The Elaboration Likelihood Model' in Paul Van Lange, Arie Kruglanski and E Tory Higgins (eds), *Handbook of Theories of Social Psychology* (SAGE, 2012) 224.

52 Relevant social heuristics that may be used in this context include the 'consensus heuristic' (by which attitudes are based on the majority's opinion), the 'expert heuristic' (the inference that experts are usually right), 'message length heuristic' (the longer the message the more convincing): Peter Darke, 'Heuristic-Systematic Model of Persuasion' in *Encyclopedia of Social Psychology* (SAGE, 2007) 429, 429.

53 Blake M McKimmie et al, 'The Impact of Schemas on Decision-Making in Cases Involving Allegations of Sexual Violence' [2020] *Current Issues in Criminal Justice* 1, 9, citing Chen, S, & Shelly Chaiken, 'The heuristic-systematic model in its broader context' in Shelly Chaiken & Y Trope (eds), *Dual-process theories in social psychology* (Guilford Press, 1999) 73. A schema is a cognitive representation of a concept, its associated characteristics, and how those characteristics are interrelated.

54 Ibid.

55 Kang et al (n 32) 1129.

56 Ibid.

57 Ibid. See also Nicole E Negowetti, 'Navigating Implicit Bias Pitfalls: Cognitive Science Prime for Civil Litigators' (2014) 4 *St. Mary's Journal on Legal Malpractice and Ethics* 278, 281.

58 Negowetti (n 57), citing Anthony G Greenwald and Linda Hamilton Krieger, 'Implicit Bias: Scientific Foundations' (2006) 94 *California Law Review* 945, 951.

59 Kang et al (n 32) 1129.

60 Anthony G Greenwald, Debbie McGhee and Jordan Schwartz, 'Measuring Individual Differences in Implicit Cognition: The

White and Black faces and positive and negative words’, where faster progress on the sorting task shows that people associate concepts easily.<sup>61</sup> Differences in reaction times can be suggestive of bias. However, the IAT is not universally accepted as a valid and reliable measure of a person’s implicit bias. For example, Dr Hart Blanton and Professor James Jaccard have argued that the use of time as a metric for ‘magnitude of an attitudinal preference’ is problematic.<sup>62</sup>

23. Initial research suggested that the IAT can pick up *negative* biases relating to socially sensitive topics more accurately than other methods.<sup>63</sup> For example, one study in the United States found that doctors with a strong anti-Black bias as measured by the IAT were less likely to prescribe medication for Black heart attack patients than White patients.<sup>64</sup> Another study carried out in Sweden found that recruiters with implicit racial biases were less likely to offer a job to an applicant with an Arab Muslim-sounding name.<sup>65</sup> However, recent meta-analyses of research in this area suggest that the link between results on the IAT and behaviour may be relatively weak.<sup>66</sup> This may be because implicit bias is only one factor that impacts on behaviour, and individuals who hold implicit biases may not necessarily act on them.<sup>67</sup> It has also been argued that, while IAT scores may be predictive of behaviour when used in the aggregate, they should not be used to predict the behaviour of individuals.<sup>68</sup>

24. Explicit social biases (even if concealed) and implicit social biases can exist together. They can also operate with, and mutually reinforce, structural biases — ‘processes that lock in past inequalities, reproduce them, and indeed exacerbate them’.<sup>69</sup>

## Social biases and judicial decision-making

25. Measuring the impact of both explicit and implicit social biases on judicial decision-making is of great interest to researchers. There are two main ways in which this can be attempted: through archival research (investigating patterns of reasoning or outcomes in real cases) and experimental research (putting real judges in situations devised to test a hypothesis).

26. One line of research has tested whether there is an association between particular characteristics of judges, including their gender, race, ethnicity, and age, and the way they decide specific types of cases.<sup>70</sup> While this research has demonstrated some differences in certain circumstances between judges from different social categories,<sup>71</sup>

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Implicit Association Test’ 74 *Journal of Personality and Social Psychology* 1464.

61 Wistrich and Rachlinski (n 13) 100–1. For a detailed explanation of the IAT see Kang et al (n 32) 1130.

62 Hart Blanton and James Jaccard, ‘Arbitrary Metrics in Psychology’ 61 *American Psychologist* 27, 32.

63 For an overview of research see Kang et al (n 32) 1131; Brian A Nosek and Rachel G Riskind, ‘Policy Implications of Implicit Social Cognition: Implicit Social Cognition’ (2012) 6(1) *Social Issues and Policy Review* 113, 127.

64 AR Green et al, ‘Implicit Bias among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients.’ (2007) 22 *Journal of General Internal Medicine* 1231, 1231–8.

65 Dan-Olof Rooth, ‘Automatic Associations and Discrimination in Hiring: Real World Evidence’ (2010) 17 *Labour Economics* 523.

66 See, eg, Patrick S Forscher et al, ‘A Meta-Analysis of Procedures to Change Implicit Measures.’ (2019) 117 *Journal of Personality and Social Psychology* 522.

67 Nosek and Riskind (n 63) 133.

68 Ibid 134.

69 Kang et al (n 32) 1134. It is noted that an individual will also have multiple group identities (eg, ethnicity, gender, age, disability status, sexuality, religion) across which biases may interact.

70 For an overview of this research see Barry (n 1) Chapter 4. On the issue of the role of lived experience see further Australian Law Reform Commission, *Conceptions of Judicial Impartiality in Theory and Practice* (Background Paper J14, 2021).

71 For example, while there is little evidence to support the hypothesis that the gender of a judge influences decision-making

it is very difficult to disentangle whether these differences arise from biases (as may be hypothesised) or from other factors, such as shared lived experiences that inform their decision-making.<sup>72</sup>

27. Another line of research has explored whether the characteristics of litigants influence judicial decision-making.<sup>73</sup> Much of this has involved archival research, although again in such research it can be difficult to discern whether differences in court outcomes for particular groups result from a lack of impartiality on behalf of decision-makers, or other factors — including legitimate factors or the manifestation of bias and inequalities in other parts of the legal system.<sup>74</sup> There have also been a number of experimental studies involving judges which test the potential effect of implicit bias on behaviour in relation to particular social groups. Again, these studies should be treated with caution before any general conclusions are drawn, because different historical and institutional settings can lead to different results.<sup>75</sup> Overall, studies have pointed to the conclusion that it is likely that social biases play a role in judicial decision-making and that there are strategies judges and courts can adopt to mitigate them.<sup>76</sup>

### Research on specific social categories

28. Much of the research in this area is on the effect of social bias in relation to ethnicity and race (discussed below). However experimental and archival research in a number of jurisdictions has also suggested that judges' decision-making may be affected by bias relating to gender<sup>77</sup> and age.<sup>78</sup> Studies on the impact of biases in relation to sexual orientation is limited and mixed; however, archival research has demonstrated some difference in treatment.<sup>79</sup> There is also some limited evidence from observational court studies of attractiveness bias impacting judicial decision-making,<sup>80</sup> and that adults with 'baby faces' are likely to be granted more favourable treatment.<sup>81</sup> Recent experimental research has also suggested that the socio-economic status of a litigant can impact judicial decision-making.<sup>82</sup> Notably, studies have also shown that the combination of a litigant's personal characteristics across their different group identities (such as race, gender, and age) may be important.<sup>83</sup>

29. As mentioned, extensive research has tested whether litigants' ethnicity or race impact on judicial decision-making.<sup>84</sup> A large proportion of this research considers disparities in

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generally, there is some evidence to suggest a link between gender and decision-making in gender-salient cases, such as sex discrimination claims: Barry (n 1) 116–17.

72 Ibid 111.

73 Barry (n 1) ch 5.

74 See further Ibid 164. In this respect, Barry suggests that this is why it is important to triangulate findings from archival studies with results of experimental research: Ibid 183. See also Patrick Forscher and Patricia Devine, 'Knowledge-Based Interventions Are More Likely to Reduce Legal Disparities Than Are Implicit Bias Interventions' in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) 303, 305.

75 Barry (n 1) 164–5.

76 Ibid 164.

77 Ibid 168, citing Andrea L Miller, 'Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making' 18 *Social Psychological and Personality Science* 227.

78 Ibid 174–7.

79 Ibid 177–80.

80 Ibid 181 citing John E Stewart, 'Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study' (1980) 10 *Journal of Applied Social Psychology* 348; John E Stewart, 'Appearance and Punishment: The Attraction-Leniency Effect in the Courtroom' (1985) 125 *The Journal of Social Psychology* 373.

81 Ibid.

82 Ibid, citing Jennifer Skeem, Nicholas Scirich and John Monahan, 'Impact of Risk Assessment on Judges' Fairness in Sentencing Relatively Poor Defendants' (2020) 44 *Law and Human Behavior* 51.

83 Ibid 182–3.

84 Ibid 169–174.

sentencing between racial and ethnic groups, controlling to the extent possible for other factors. In the US, a pattern emerges: judges on US courts sentence Black, Latina/o and First Nations people in the United States more harshly than White people under certain conditions.<sup>85</sup> In the United Kingdom, the data is more limited and mixed, but indicates that race influences decisions relating to custody and sentencing.<sup>86</sup> In-group biases have been demonstrated in bail decisions in relation to Israeli Arab and Jewish suspects in the Israeli courts: Arab and Jewish judges were more likely to release suspects from their own ethnic group.<sup>87</sup> In Australia, research has been limited to sentencing disparities in relation to Aboriginal and Torres Strait Islander peoples. While some research has concluded that race has only a limited impact on sentencing,<sup>88</sup> some have critiqued these studies on the basis that they do not adequately consider subjective factors that are relevant to culpability.<sup>89</sup> Studies taking contextual factors into account have found that, for the same offending patterns, Aboriginal and Torres Strait Islander people in Australia are in some circumstances more likely to be imprisoned and receive longer sentences.<sup>90</sup> Differential outcomes related to ethnic in-group bias have also been demonstrated in civil law contexts in Israel (small claims)<sup>91</sup> and the United States (workplace racial harassment).<sup>92</sup>

30. Experimental studies have been carried out to complement this archival research. One well-known study using practising judges as participants (again in the United States) found that judges displayed the same level of implicit biases in an IAT concerning Black people as most lay adults.<sup>93</sup> The researchers then tested whether those implicit biases impacted decision-making in particular scenarios. The outcomes were mixed: when judges were specifically told of the race of the defendant there was no difference in outcome; but when they were subliminally primed to think about race, differences did exist, and these differences correlated with IAT scores. The researchers concluded that

judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.<sup>94</sup>

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85 Travis W Franklin, 'The State of Race and Punishment in America: Is Justice Really Blind?' (2018) 59 *Journal of Criminal Justice* 18; Barry (n 1) 170 citing (among others) Ojmarrh Mitchell, 'A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies' (2005) 21 *Journal of Quantitative Criminology* 439 and Cassia Spohn, 'Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process' (2000) 3 *Criminal Justice* 427.

86 Barry (n 1) 171.

87 Oren Gazal-Ayal and Raanan Sulitzeanu-Kenan, 'Let My People Go: Ethnic In-Group Bias in Judicial Decisions: Evidence from a Randomized Natural Experiment' (2010) 7 *Journal of Empirical Legal Studies* 403; cited in Barry (n 1) 172.

88 Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *Australian & New Zealand Journal of Criminology* 272, 286; Samantha Jeffries and Christine EW Bond, 'The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature From the United States, Canada, and Australia' (2012) 10(3) *Journal of Ethnicity in Criminal Justice* 223 ('The Impact of Indigenous Status on Adult Sentencing').

89 Elena Marchetti and Thalia Anthony, *Sentencing Indigenous Offenders in Canada, Australia, and New Zealand*, vol 1 (Oxford University Press, 2016) 21 <<http://oxfordhandbooks.com/>>. Professor Marchetti and Dr Anthony point to 'subjective factors relevant to culpability, including mental wellbeing, impact of child removal policies, prejudicial exclusion from health and housing services, limited educational or employment opportunities, socioeconomic background, or victimization' that should be considered alongside aggravating factors to give a fuller picture of sentencing proportionality.

90 Krystal Lockwood, Timothy C Hart and Anna Stewart, 'First Nations Peoples and Judicial Sentencing: Main Effects and the Impact of Contextual Variability' (2015) 55 *British Journal of Criminology* 769.

91 Moses Shayo and Asaf Zussman, 'Judicial Ingroup Bias in the Shadow of Terrorism' (2011) 126 *Quarterly Journal of Economics* 1447, 1483.

92 Barry (n 1) 173, citing Pat K Chew and Robert Kelley, 'The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race' (2012) 28 *Harvard Journal on Racial and Ethnic Justice* 91.

93 Jeffrey J Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges' (2009) 84(3) *Notre Dame Law Review* 1195, 1210.

94 Ibid 1195. See further at 1221.

31. Two other experimental studies have found no difference based on the race or ethnicity of the litigant.<sup>95</sup> It has been suggested that this means that judges are better placed to address their social biases when they are actively aware of them and motivated to avoid them; a finding with significant relevance for mitigation strategies.<sup>96</sup> Barry also concludes from the research that ‘[j]urisdictions with a history of racial or ethnic conflict may well be where discrepancies in judicial decision-making are most likely to arise’.<sup>97</sup>

### **Bias and Aboriginal and Torres Strait Islander peoples in Australia**

32. This research has particular relevance in contributing to an understanding of bias experienced in the courts by particular communities within Australia.

33. An obvious and pressing example given Australia’s colonial legacy of dispossession and marginalisation is Aboriginal and Torres Strait Islander peoples. It is well recognised that a

history of marginalisation and discriminatory justice responses has affected Aboriginal and Torres Strait Islander peoples’ confidence in the justice system. Many are now reluctant to engage with it.<sup>98</sup>

34. For Aboriginal and Torres Strait Islander people, multiple disadvantages and injustices within society can ‘accumulate over a lifetime’.<sup>99</sup> One way in which these manifest is in the critical overrepresentation in the national prison population (including in relation to women, children, and people with disability).<sup>100</sup> Structural discrimination and biases within society and the legal system have been considered crucial to understanding the root causes of this overrepresentation.<sup>101</sup> However, structural biases often operate alongside and mutually reinforce individual explicit and implicit biases.

35. In its 2018 Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander people, the ALRC found that overrepresentation of Aboriginal and Torres Strait Islander people increases with the stages of the justice system.<sup>102</sup> The ALRC also found that Aboriginal and Torres Strait Islander people are much more likely to receive a sentence of imprisonment and much less likely to receive a community-based sentence or a fine than non-Indigenous Australians.<sup>103</sup> These findings suggest that bias within the justice system has a role to play.

36. Aboriginal and Torres Strait Islander people self-report experiences of discrimination at rates much higher than non-Indigenous Australians.<sup>104</sup> This includes experiences of unfairness and bias in court. In submissions to the ALRC Inquiry into the Incarceration

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95 Barry (n 1) 174.

96 See, eg, National Judicial College of Australia, *Attaining Judicial Excellence: A Guide for the NJCA* (2019).

97 Barry (n 1) 174.

98 Law Council of Australia, *The Justice Project: Final Report* (2018) 25. See further NATSIWA, Harmony Alliance and AWAVA, *Submission 122 to ALRC Review of the Family Law System Issues Paper* (11 May 2018) 5; Judicial Council on Cultural Diversity, *Submission No 120 to Productivity Commission’s Inquiry into Access to Justice Arrangements* (29 November 2013) 1; Chief Justice TF Bathurst (n 9).

99 Law Council of Australia (n 98) 24. These may include laws and policies, which can have ‘a disproportionate and discriminatory effect on Aboriginal and Torres Strait Islander communities’ (at 26).

100 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017) [3.2].

101 *Ibid* [1.20]–[1.31].

102 *Ibid* 26.

103 *Ibid* [3.47] and see Figure 3.11.

104 Siddharth Shirodkar, ‘Bias against Indigenous Australians: Implicit Association Test Results for Australia’ 22 *Journal of Australian Indigenous Issues* 3, 4.

Rate of Aboriginal and Torres Strait Islander peoples, the ACT Government and the Law Society of Western Australia reported that Aboriginal and Torres Strait Islander people regularly encounter bias in court and that bias is greatest when judges are afforded generous discretionary powers or have poor cultural awareness.<sup>105</sup> In the 2014 Federal Circuit Court of Australia and Family Court of Australia User Satisfaction Survey, Aboriginal and Torres Strait Islander people had the lowest level of satisfaction when asked if the way their case was handled was fair.<sup>106</sup> They also felt less safe in the court environment and in the courtroom than other court users.<sup>107</sup> Dr Stephen Hagan has written extensively on bias experienced by Aboriginal and Torres Strait Islander peoples in the courts.<sup>108</sup>

37. The research referred to above on implicit social biases in judicial decision-making suggests that these may play a part, alongside structural and explicit biases, in forming these experiences. This is reinforced by new knowledge about the level of implicit bias held against Aboriginal and Torres Strait Islander people by the general population. A 2019 study conducted by Siddharth Shirodkar, using IAT scores from 11,099 participants, demonstrated that 75% of Australians held an implicit bias against Indigenous Australians, with roughly one third of Australians holding a strong implicit bias.<sup>109</sup> No correlation was found between education level, occupation, and the level of implicit bias held.<sup>110</sup> As Shirodkar explains:

Indigenous Australians have repeatedly told the rest of the country that they experience discrimination at higher rates than other groups .... We are often prone to discount such responses, or declare that 'racism does not exist in Australia' on the basis that discrimination is a subjective perception issue. The data presented in this paper suggests that the problem may not reflect the perceptions of Indigenous people, but rather, systematic flaws in our own perceptions.<sup>111</sup>

38. Similar issues may arise in relation to other groups that have been historically marginalised or discriminated against and who also report experiences of bias in the legal system, including people from culturally and linguistically diverse backgrounds, people with a particular religious affiliation, LGBTIQ+ people, people with disability, asylum seekers, older people, women, and children and young people.<sup>112</sup>

39. The research also shows, however, that if judges are aware of their own biases they may take steps to remove their impact from decision-making (see paragraph 30). Some of the strategies suggested — such as cultural competency training and greater judicial diversity — may have the additional effect of engendering greater trust in judicial impartiality in communities with low levels of trust in the legal system and ameliorating some of the structural biases within it. Trust can be acquired when the judiciary is seen to, 'represent, enact, and even embody values [the public] share[s]'.<sup>113</sup>

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105 See *Submission 110* to Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 100). See also *Submission 111* 6.

106 Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey 2015* (2015) 28.

107 *Ibid* 20.

108 Stephen Hagan, *The Rise and Rise of Judicial Bigotry* (Christine Fejo-King Consulting, 2017).

109 Shirodkar (n 104) 4.

110 *Ibid* 23.

111 *Ibid* 25.

112 See generally Law Council of Australia (n 98); *Equality Before the Law Bench Book* (Judicial Commission of New South Wales, 2006).

113 Chief Justice TF Bathurst (n 9) 13, citing Ben Bradford, Jonathon Jackson and Mike Hough, 'Trust in Justice' in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust* (Oxford University Press, 2018) 14. See further Melissa L Breger, 'Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial' (2019) 53 *University of Richmond*

## Procedures and contexts where risk of bias is high

The research referred to above highlights areas of judicial decision-making where errors due to cognitive or social biases are likely to arise. These include:

- credibility assessments;
- evaluation of evidence;
- exercises of discretion, such as in family law cases, bail decisions, sentencing, and awards of damages;
- exposure to inadmissible material (see further paragraph 46);
- assessments of a judge's own bias or appearance of bias (see further paragraph 53).

Explicit and implicit bias can also play a role in how interactions in court are interpreted and perceived both by the judge and parties.

Research also shows that there is more risk of cognitive and/or social bias impacting decision-making when:

- judges have previously made a decision in relation to the case (see further paragraph 48);
- judges are relying on limited information (such as decisions at the pre-trial stage);<sup>114</sup>
- judges give *ex tempore* oral judgments, rather than written judgments;
- judges are rushed, tired, or stressed (see above paragraph 12).

## Intersections between cognitive and social biases and the law

40. As noted above, the law has historically protected against a relatively narrow range of dispute-specific threats to impartiality. The research on cognitive and social biases is relevant to both the substantive law on bias, and the procedures used to determine it. This section briefly examines how they intersect in some key areas.

### Implicit social biases

41. In relation to implicit social biases, the substantive law has not countenanced disqualification of a judge for what it describes as 'predispositions', unless they are 'sufficiently specific or intense' to amount to prejudgment.<sup>115</sup> A consciously held and explicitly expressed stereotype about a particular social group might rise to that level.<sup>116</sup>

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*Law Review* 1039, 1064–5.

114 Kang et al (n 32) 1160–2.

115 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia, 6th ed, 2016) 685; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531 (Gleeson CJ and Gummow J). See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 6).

116 See, eg, *B v DPP (NSW)* [2014] NSWCA 232 (where a statement by a District Court Judge, made in assessing the credibility of a witness, that 'no normal woman in her right mind would have unprotected sexual intercourse with a man she knew to be HIV positive', was held to give rise to an apprehension of bias), discussed at Australian Law Reform Commission, *Conceptions of Judicial Impartiality in Theory and Practice* (Background Paper J14, 2021) [48]. See further Joe McIntyre, *The Judicial*

However, suggestions that a judge *is likely to hold* implicit biases because of a particular social characteristics such as her or his gender or ethnicity, and should therefore be disqualified, have not been upheld in Australia.<sup>117</sup>

42. The English Court of Appeal addressed the interaction of a judge's social characteristics and the bias rule expressly in the case of the *Locabail (UK) Ltd v Bayfield Properties Ltd*, stating that:

We cannot ... conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.<sup>118</sup>

43. This is repeated in the commentary to the *Bangalore Principles on Judicial Conduct*, under the heading 'Irrelevant grounds'.<sup>119</sup> The Canadian Supreme Court also endorsed this statement when considering whether an apprehension of bias arose in a case about minority language education, given the judge's membership in a francophone community organisation:

Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.<sup>120</sup>

44. There are, as has been recognised, 'institutional, resource and policy reasons' for making issues of implicit social bias off-limits.<sup>121</sup> In essence, it is very difficult, if not impossible, to make the case that implicit social biases arising from a judge's own social identity will impact on decision-making in a *particular* case, because such biases are variable between individuals and not consciously held, and because such decisions can be influenced by many other factors.<sup>122</sup> In addition, there are good reasons why the bias rule does not address biases closely linked to a judge's identity — not only would it rule out a large proportion of judges from hearing a large proportion of cases, but as Dr McIntyre explains, the

underlying issues are often closely associated with the self-identification of the individual, and it is neither possible nor desirable for the judges to divest themselves of such relationships....<sup>123</sup>

45. Instead, other strategies and structures within the judicial system contribute to ameliorating the effects of these biases — including judges' ethical obligations to

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*Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 190; United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) 46.

117 Aronson, Groves and Weeks (n 115) 686, citing *Paramasivam v Juraszek* [2002] FCAFC 141 [8]; *Lindon v Kerr* (1995) 57 FCR 284; *Bird v Free* (1994) 126 ALR 475. See also Australian Law Reform Commission, *Equality before the Law: Part Two - Women's Equality* (n 12) [16.5]–[16.16].

118 *Locabail (UK) Ltd v Bayfield Properties Ltd* (2000) 1 QB 451, 480 (Lord Bingham of Cornhill CJ, Lord Woolf MR, and Sir Richard Scott VC).

119 United Nations Office on Drugs and Crime (n 116) 57.

120 *Yukon Francophone School Board, Education Area #23 v Attorney General of the Yukon Territory* (2015) 2 SCR 282 [59], [61] (Abella J, McLachlin CJ and Rothstein, Moldaver, Karakatsanis, Wagner, and Gascon JJ concurring).

121 Edmond and Martire (n 5) 651–2.

122 Forscher and Devine (n 74) 305.

123 McIntyre (n 116) 190–191.



‘recognize, demonstrate sensitivity to, and correct’ ‘attitudes based on stereotype, myth or prejudice’, and to be ‘aware of, and understand, diversity in society’ as set out in the *Bangalore Principles of Judicial Conduct*.<sup>124</sup> Some of these structures and strategies are examined further in the final part of this paper.

### Exposure to extraneous information

46. One area of the law on bias where research on cognitive biases is particularly relevant is that arising out of a judge’s exposure to some prejudicial, but inadmissible, fact or circumstance.<sup>125</sup> The very existence of this category of bias recognises that judges can be biased at a subconscious level by material irrelevant to a case. Both the High Court and Full Court of the Federal Court have recently drawn on scientific research (such as that discussed above at paragraph 17) to recognise the difficulty of decision-makers putting extraneous information out of their mind, and to reach the conclusion that a reasonable apprehension of bias has arisen.<sup>126</sup>

### Prejudgment

47. Another aspect of the bias rule that appears ripe for engagement with the research on cognitive biases, and confirmation bias in particular, is prejudgment arising from prior involvement in a matter.<sup>127</sup> In *British American Tobacco Australia Services Ltd v Laurie*, the High Court held that a judge who had made strong adverse findings about a party in unrelated proceedings was precluded from hearing further cases involving that party.<sup>128</sup> Similarly, extrajudicial writing may raise issues of prejudgment, if a judge expresses “preconceived views which are so firmly held” that the hypothetical observer may think it might not be possible for them to approach cases with an open mind’.<sup>129</sup>

48. The research on confirmation bias supports this approach: two recent experimental studies involving judges found that judges ‘tended to use information in ways biased towards backing up their preliminary views on a case’.<sup>130</sup> One of those studies showed, in particular, that judges’ initial assessments at the pre-trial stage triggered a confirmation bias that influenced their decision in the subsequent trial.<sup>131</sup> Just as for exposure to extraneous information, increased knowledge about the likelihood of confirmation bias impacting judicial decision-making could conceivably be taken into account in determining whether the fair-minded lay observer would accept continued involvement of a judge once a preliminary finding has been made.

### Judicial exceptionalism and the fair-minded observer

49. In some ways, recourse to objective standards, like the ‘fair-minded lay observer’ or ‘reasonable foreseeability’ in tort law, can be seen as mechanisms to manage heuristics

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124 United Nations Office on Drugs and Crime (n 116) 98–9 Principle 5.1 and commentary to Principle 5. See further McIntyre (n 116) 191; Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (n 17) [18].

125 See Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 6) [33].

126 See further *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J), cf [43] (Kiefel CJ and Gageler J); *GetSwift Limited v Webb* [2021] FCAFC 26 [39]–[45] (Middleton, McKerracher and Jagot JJ).

127 See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 6) [29].

128 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

129 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed, 2017) 699, citing *Locabail (UK) Ltd v Bayfield Properties* [2000] 1 QB 451, 495.

130 Barry (n 1) 16, citing Susanne M Schmittat and Birte English, ‘If You Judge, Investigate! Responsibility Reduces Confirmatory Information Processing in Legal Experts’ (2016) 22 *Psychology, Public Policy, and Law* 386.

131 Lidén, Gräns and Juslin (n 39).

and biases.<sup>132</sup> They require the judge to take a step back, rather than ‘simply rely[ing] on information that confirms the result they were predisposed towards’.<sup>133</sup>

50. The research on cognitive and social biases may be important more generally to the assumptions attributed to the fair-minded observer under the test for apprehended bias.<sup>134</sup> As discussed further in *The Law on Judicial Bias: A Primer* (Background Paper JI1) at paragraph 10, the test is whether a fair-minded lay observer

might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question.<sup>135</sup>

51. In imagining what this hypothetical observer would think, judges make assumptions about the fair-minded lay observer, and attribute knowledge to her or him.<sup>136</sup> One assumption, or aspect of knowledge, that is often attributed to the fair minded observer is that judges are more able than others to resist the likelihood of bias because their

training, tradition and oath or affirmation require [them] to discard the irrelevant, the immaterial and the prejudicial.<sup>137</sup>

52. As discussed above, the research to date suggests that judges may, in certain circumstances, be admirably resistant to cognitive and social biases (and that this may in part be due to their ethical obligations), but that this is not always the case. This has underpinned suggestions that the fair-minded observer should perhaps begin with more ‘basic scepticism about the abilities and habits of judges’.<sup>138</sup> That could, however, ‘enable the informed observer to reach a view in difficult cases that judges would struggle to accept’,<sup>139</sup> requiring greater transparency about the policy choices involved. On the other hand, with greater scientific understanding of the circumstances in which judges *can* resist bias, and transparency about how that is enabled, there may in future be a more solid grounding for some of the traditional assumptions.

### Self-disqualification

53. Finally, the research on cognitive biases is also relevant to the procedures by which judges decide questions about bias. As discussed further in *Recusal and Self-Disqualification* (Background Paper JI2), the normal procedure is for the judge concerned to determine the issue. Research on egocentric biases, and what has been termed the ‘bias blind spot’, suggest that this is likely to lead to error.<sup>140</sup> Because of their ‘bias blind spot’, people believe they are less susceptible to, and better at identifying, bias than

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132 Barry (n 1) 28.

133 Ibid.

134 See further Australian Law Reform Commission, *The Fair-Minded Observer and Its Critics* (Background Paper JI7, 2021).

135 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J), quoting *Livsey v NSW Bar Association* (1983) 151 CLR 288, 293–4. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

136 Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 6) [13]–[18].

137 *Vakautu v Kelly* (1988) 13 NSWLR 502, 527 (McHugh J), approved in *Vakautu v Kelly* (1989) 167 CLR 568, 584–585 (Toohey J) and *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), cited in Aronson, Groves and Weeks (n 115) 651. See also Edmond and Martire (n 5) 643.

138 Groves (n 37) 71–2. See further Edmond and Martire (n 5) 645–9. A scepticism displayed, for example in *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J) cf [43] (Kiefel CJ and Gageler J); *GetSwift Limited v Webb* [2021] FCAFC 26 [39]–[45] (Middleton, McKerracher and Jagot JJ).

139 Groves (n 37) 72.

140 This is because people use ‘different types of evidence when assessing bias in the self and in other people’: Irene Scopelliti et al, ‘Bias Blind Spot: Structure, Measurement, and Consequences’ (2015) 61(10) *Management Science* 2468, 2469. As to the research on judges and egocentric bias see Barry (n 1) 24–5.

others.<sup>141</sup> Intelligence does not limit a person's exposure to the blind spot effect.<sup>142</sup> This means that judges are not well-placed to assess their own impartiality or how others will perceive it, although there is evidence that the effects of the bias blind spot can be mitigated with awareness.<sup>143</sup> Background Paper JI2 discusses alternative procedures that have been proposed to address this issue.<sup>144</sup>

54. This section has examined how insights into cognitive and implicit social biases might: underpin developments in the approach to the application of the law on bias; provide impetus for reform to the law or procedures; and/or, underscore the importance of strategies to address biases. The final section of this background paper looks further at the types of strategies that have been proposed.

## Addressing cognitive and social bias

55. Certain safeguards already exist to mitigate the possibility of cognitive and social bias negatively impacting judicial decision-making, including the publication of reasons for judgment, the right to appeal, and even the 'fair-minded lay observer' test (see above paragraph 49). Increasingly, it is suggested that these can be coupled with further strategies to minimise the risk of cognitive and social biases negatively impacting decision-making.<sup>145</sup> There is, however, still limited evidence on the effectiveness of such strategies.<sup>146</sup>

56. Professor Tom Stafford provides a useful framework for considering potential strategies, breaking them down by their target (personal, interpersonal, and institutional) and effect (mitigation, insulation, and removal).<sup>147</sup>

### Target of strategy

- **Personal** strategies —an individual's thoughts or behaviour
- **Interpersonal** strategies —interactions between two or more people
- **Institutional** strategies — the norms and regulations of the whole institution

### Effect of strategy

- **Mitigation** strategies — work against bias (but leave the bias intact)
- **Insulation** strategies — remove the trigger for a bias, preventing it from occurring
- **Removal** strategies — diminish the bias directly

57. Stafford argues that a range of strategies are needed, and that interventions are only sustainable if they are institutionalised — this is because individuals often lack the perspective or resources to combat bias on their own.<sup>148</sup> He similarly argues that strategies to 'mitigate' biases are the easiest to achieve, but are insufficient on their

141 Edmond and Martire (n 5) 649, citing Richard West, Russell Meserve and Keith Stanovich, 'Cognitive sophistication does not attenuate the bias blind spot' (2012) 103 *Journal of Personality and Social Psychology* 506.

142 Ibid 650.

143 Scopelliti et al (n 140) 2483: 'the influence [of the bias blind spot] is not irrevocable...propensity to exhibit bias blind spot can be reduced by as much as 39% ...[where participants are] provided with critical feedback and training'.

144 Australian Law Reform Commission, *Recusal and Self-Disqualification* (Background Paper JI2, 2021) [30]–[60].

145 Including a book on addressing implicit social bias in the courts published by the American Bar Association in 2017: Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017).

146 Barry (n 1) 28. For a recent meta-analysis of procedures to change implicit measures see Forscher et al (n 66).

147 Stafford (n 29) 20.

148 Ibid.

own to address bias at all levels of judicial decision-making.<sup>149</sup> The following grid plots a number of strategies designed to address bias in judicial decision-making according to each strategy’s ‘target’ and ‘effect’:

<i>A 3x3 model</i>	<b>Mitigate</b>	<b>Insulate</b>	<b>Remove</b>
<b>Personal</b>	Avoid risk factors (hunger, fatigue), articulate reasoning, ‘imagine the opposite’	Remove information that activates bias	Cognitive training (e.g. relearning associations)
<b>Interpersonal</b>	Identifying others’ biases is easier; challenging conversations	Subdivide tasks to ensure independence of procedures; reveal identifying information last	Exposure to diversity (“Contact hypothesis”)
<b>Institutional</b>	Tracking outcomes; predeclared criteria; recording process of decisions; norms of fairness	Procedures that remove bias activating information	Avoiding biased outcomes (e.g. quotas / shortlisting requirements)

**Figure 1 Strategies to address bias (Source: Stafford, 2017)**

58. A number of strategies have been proposed in the literature to address cognitive and social bias in judicial decision-making. In relation to the Inquiry’s Terms of Reference, strategies to address social biases are particularly relevant and important to upholding public confidence in the administration of justice and ensuring equality of treatment for all Australians.<sup>150</sup>

## Potential strategies to address bias in judicial decision-making

Some of the strategies suggested by researchers include:

### Personal strategies

- **Training** to raise awareness of cognitive and implicit social bias; on strategies to ‘break the bias habit’; and on cultural competency (see ‘Training as an anti-bias strategy’ below).

<sup>149</sup> Ibid 20–1.

<sup>150</sup> Including because of the difficulties of addressing these issues through the law on bias. These strategies overlap with strategies addressing other forms of cognitive biases relevant to how the law on bias works in practice as discussed above

- **Behavioural countermeasures** using strategies to change the way judges deliberate, such as (i) judges reminding themselves that they are ‘human and fallible, notwithstanding their status, their education, and the robe’ (addressing the ‘bias blind spot’);<sup>151</sup> (ii) stopping to ‘consider the opposite’, a technique by which they imagine and explain the basis for alternative outcomes (eg what if they defendant was male instead of female) or designate an associate as ‘devil’s advocate’;<sup>152</sup> and (iii) perspective taking (considering how the situation would appear to someone else).<sup>153</sup>
- **Humanising litigants**, for example, by spending a little additional time to speak to them during proceedings.<sup>154</sup>
- **Mindfulness meditation** to help control the conditions that magnify cognitive and implicit social biases (such as anger or stress). Research showed promise in reducing IAT scores.<sup>155</sup>
- **Deferring judgment** following deliberation in cases where risk of cognitive or implicit social bias is high.<sup>156</sup>

### Interpersonal strategies

- **Increasing contact** with ‘counter-stereotypic examples’. For example, if a person holds a particular stereotype about a group, ensuring contact with members of that group that do not feature those attributes, or ensuring vicarious contact through positive images.<sup>157</sup> This could include judges fostering diversity in their private lives.<sup>158</sup>

### Institutional strategies

- **Reducing time pressure** on judges by increasing the number of judges and increasing resources available to judges, recognising that the need to make quick decisions increases recourse to system one thinking, and can contribute to stress and burnout.<sup>159</sup>
- **Trial bifurcation**: ensuring that different judges make decisions at pre-trial and trial stage to avoid confirmation bias.<sup>160</sup>

151 Kang et al (n 32) 1173. See also Edmond and Martire (n 5) 658. As to evidence of the ability to counteract the bias blind spot see also Scopelliti et al (n 140). See above at paragraph [53].

152 Wistrich and Rachlinski (n 13) 112–13.

153 Ibid 113–14. This test for apprehended bias, from the perspective of the ‘fair minded lay observer’, could be seen to be adopting this strategy.

154 Ibid 111, on the basis that ‘the more people learn about an individual who belongs to a group, the less likely they are to make stereotyped judgments about him or her based on his or her membership in that group’.

155 Ibid 111–12.

156 Ibid 117. See further Justice Andrew Greenwood (n 11) 22: ‘In the course of writing, the decision-maker tends to arrange and rearrange material in ways which provide insights and enable the discovery of new implications, connections and relationships’.

157 Kang et al (n 32) 1169–70; Wistrich and Rachlinski (n 13) 105–6.

158 Wistrich and Rachlinski (n 13) 115.

159 Ibid 116–17.

160 Barry (n 1) 30–1.

- **Introduction of IAT tests** that could be compulsory for new judges, and training on implicit bias.<sup>161</sup> However there is also research that suggests that imposing requirements to complete IAT tests may have negative consequences, and that such tests and training should be voluntary.<sup>162</sup>
- **Collection of data** by courts for statistical analysis to ‘allow judges to engage in more quantified self-analysis and seek out patterns of behaviour that cannot be recognised in single decisions’.<sup>163</sup> Judge Wistrich and Rachlinski have suggested that the courts could implement an auditing program to evaluate decisions of individual judges to determine if they appear to be influenced by implicit social bias, to allow for self-reflection, and suggest a number of different ways in which this could be done.<sup>164</sup> They note that such auditing is already effectively carried out in some cases by the media.<sup>165</sup>
- **Altering courtroom practices** such as by having three-judge trial courts to increase diversity of decision-makers at the trial level, as there is some evidence that diversity at the appellate level influences outcomes.<sup>166</sup>
- **Design and decoration of courts** to expose judges to counter-stereotypic role models.<sup>167</sup>
- **Reducing discretionary decision-making** by minimising the number of legislative provisions requiring the exercise of discretion.<sup>168</sup>
- **Periodic ceremonies** for judges to retake their oath (eg at the start of each year).<sup>169</sup>
- **Implementing peer review processes** to allow judges to receive feedback on their decision-making or courtroom management.<sup>170</sup>
- **Increasing diversity** in social groups of appointments to judicial office to mitigate the effects of implicit social bias on particular groups.<sup>171</sup>

161 Wistrich and Rachlinski (n 13) 106.

162 Behavioural Insights Team, ‘Unconscious Bias and Diversity Training: What the Evidence Says’ (December 2020).

163 Kang et al (n 32) 1178.

164 Wistrich and Rachlinski (n 13) 108–10.

165 Ibid 110. See also John F Irwin and Daniel L Real, ‘Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity’ (2010) 42 *McGeorge Law Review* 1, 9.

166 Wistrich and Rachlinski (n 13) 110.

167 Ibid 115.

168 Ibid 111.

169 Ibid 116.

170 Ibid 118–19.

171 Lord Neuberger of Abbotsbury PC (n 7); Breger (n 113) 1071–83.

### *Training as an anti-bias strategy*

Literature on judicial decision-making often points to training as a method of addressing cognitive and social bias.<sup>172</sup> Training can fall into two main categories: (i) training on recognising and addressing heuristics and biases, and (ii) training in relation to different social groups, such as through cultural awareness. Courses within these categories form part of the wide range of course offerings provided to judges in Australia and other countries.<sup>173</sup>

In relation to training on heuristics and cognitive biases, studies have suggested that, while being aware of one's own biases at a general level is insufficient to correct them,<sup>174</sup> people can address some cognitive biases when they are motivated to do so.<sup>175</sup>

Concerning implicit social bias in particular, 'implicit bias training' is now a feature of many workplaces and government departments. In the United Kingdom, a review of the available evidence on the effectiveness of such training was carried out by the Equality and Human Rights Commission in 2018. Its findings included that implicit bias training is effective for awareness raising where it is personalised (using an IAT followed by a debrief), or uses more advanced training designs (such as interactive workshops), and is likely to reduce implicit bias scores, but that the evidence for its ability to effectively change behaviour *on its own* is limited.<sup>176</sup>

Reflecting these findings, in the context of judicial decision-making specifically, it has been argued that raising awareness of implicit social bias through training is an important first step towards behavioural change, if matched by motivation to break the 'prejudice habit' (often increased by voluntarily taking an IAT) *and* training in how to overcome biases (see further paragraph 58).<sup>177</sup> It has been suggested that this training should start early in the judicial career, with orientation, when individuals are most likely to be receptive.<sup>178</sup> It has also been suggested that training should start with 'less threatening' types of biases, 'such as the widespread preference for youth over the elderly that IATs reveal'.<sup>179</sup>

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172 Barry (n 1) 184; Wistrich and Rachlinski (n 13) 106–7.

173 Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (n 17) [42]–[52].

174 Edmond and Martire (n 5) 650.

175 See, *Ibid* 660.

176 Doyin Atewologun, Tinu Cornish and Fatima Tresh, *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness* (Research report No 113, Equality and Human Rights Commission, 2018) 6–7. The Commission made specific recommendations about how such training should be designed and how to evaluate effectiveness, and recommended that such training form part of wider institutional measures (at 8–10). Relying in part on this research, in 2020 the United Kingdom Government announced that it would phase out implicit bias training in the United Kingdom civil service, and encouraged other public sector employers to do the same: Unconscious Bias Training (Written statement by Julia Lopez, Parliamentary Secretary, United Kingdom Parliament, 15 December 2020). This was partly on the basis that such training was often general in nature, and it was more important to focus resources on institutional and other strategies.

177 Cynthia Lee, 'Awareness as a First Step Toward Overcoming Implicit Bias' in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017); Forscher and Devine (n 74). On the importance of motivation and the role of knowledge of the scientific research see Kang et al (n 32) 1174–5.

178 Kang et al (n 32) 1176. See further Wistrich and Rachlinski (n 13) 106.

179 Kang et al (n 32) 1176. See further Wistrich and Rachlinski (n 13) 108–10.

The other type of training that has been suggested as important in mitigating negative effects of social bias is cultural competency training, recognising that ‘something as simple as cultural communication style may trigger different implicit biases or intuitive reactions in judges and litigants, leaving court users with a sense they were not treated fairly’.<sup>180</sup> However, it is important that such training is delivered in a way that does not result in labelling people, which ‘can lead to negative stereotypes and assumptions’.<sup>181</sup>

## Conclusion

59. Judges are expected to discard the ‘irrelevant, the immaterial and the prejudicial’ when making decisions.<sup>182</sup> Yet, scientific research has demonstrated that judicial decision-making is more prone to influence from cognitive and social biases than previously acknowledged. Judges, including Australian judges, have been increasingly alive to the influence of bias in recent years. Ultimately, the legitimacy of the judiciary depends on the public having confidence in the legal system.<sup>183</sup> As former Chief Justice Gleeson has observed, confidence in the judiciary requires,

a satisfaction that the justice system is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.<sup>184</sup>

By better understanding how bias operates, and how ‘ordinary human frailty’ impacts impartial decision-making, judges and the public will be best placed to respond to bias in a way that promotes the highest standards of judicial decision-making and increases public confidence in the judicial system.

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180 Judge Karen Arnold-Burger, Jean Mavrelis and Phyllis B Pickett, ‘Hearing All Voices: Challenges of Cultural Competence and Opportunities for Community Outreach’ in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) 197, 199.

181 Law Council of Australia, ‘Courts and Tribunals’ in *The Justice Project: Final Report* (2018) 53.

182 *Vakautu v Kelly* (1989) 167 CLR 568, 584–5 (approving the remarks of McHugh JA in *Vakautu v Kelly* [1988] 13 NSWLR 502, 527).

183 Barry (n 1) 1.

184 Chief Justice TF Bathurst (n 9) 15.