Australian Government
Australian Law Reform Commission

CONSULTATION PAPER

JUDICIAL IMPARTIALITY

APRIL 2021

This Consultation Paper reflects the law as at 30 April 2021.

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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TERMS OF REFERENCE — SUMMARY

Review of Judicial Impartiality

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the importance of maintaining public confidence in the administration of justice for all Australians;
- the importance of ensuring that justice is both done and seen to be done in Commonwealth courts and tribunals; and
- the fundamental principles of procedural fairness, including that decision-makers must be independent and impartial

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms to the laws relating to impartiality and bias as they apply to the federal judiciary are necessary or desirable, in particular in relation to the following matters:

- whether the existing law about actual or apprehended bias relating to judicial decision-making remains appropriate and sufficient to maintain public confidence in the administration of justice;
- whether the existing law provides appropriate and sufficient clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality;
- whether current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate, including in the context of review and appeal mechanisms; and
- any other matters related to these Terms of Reference.

View the full Terms of Reference

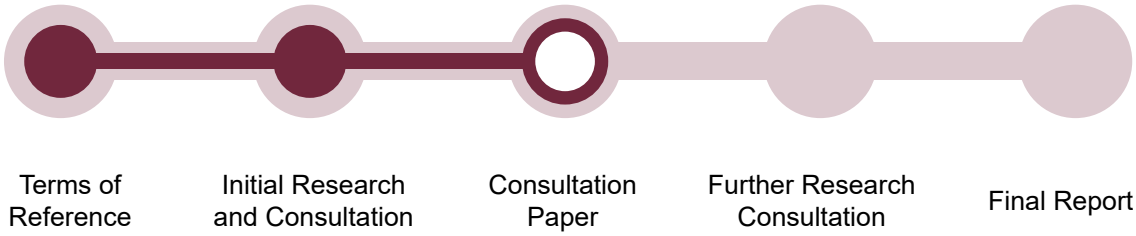
INTRODUCTION

1. On 11 September 2020, the ALRC received Terms of Reference to conduct the first comprehensive review in Australia of laws relating to judicial impartiality and bias. The review focuses specifically on these issues as they relate to the Commonwealth courts: the Federal Circuit Court of Australia ('Federal Circuit Court'), Family Court of Australia ('Family Court'), Federal Court of Australia ('Federal Court'), and High Court of Australia ('High Court').

2. Although the Terms of Reference mention tribunals, they specifically ask the ALRC to consider 'reforms to the laws relating to impartiality and bias as they apply to the federal judiciary', and in relation to 'judicial decision-making'. As such, the ALRC considers that the principles and procedures applicable to administrative and quasi-judicial decision-making are not within the scope of the Inquiry, even though they provide important context for it.

3. Over the past seven months, the ALRC has consulted with over 140 individuals in approximately 45 meetings and roundtables, including current and former members of the judiciary and tribunals, the legal profession, litigants, non-profit legal services, community groups, and academics. The ALRC is also in the process of conducting surveys of the Australian public, the federal judiciary, the legal profession, and Australian court users to enhance the evidence base on which it will make its final recommendations.

4. The ALRC is seeking written submissions in response to this Consultation Paper until 30 June 2021 and will conduct further consultation meetings and public events in June and July 2021. The Final Report is due to the Attorney-General on 30 September 2021.



5. The ALRC seeks stakeholder submissions on 12 proposals for reform relating to judicial impartiality and the law on bias, and asks 13 questions on particular areas of potential reform. The Consultation Paper addresses a number of aspects of the law and institutional structures relevant to judicial impartiality including:

- the mechanisms for raising and determining issues of actual and apprehended bias;
- the test for determining apprehended bias;
- guidance on contact between judges and lawyers appearing in proceedings;
- the collection of data by the courts; and
- institutional processes and structures that complement the law on bias to support judicial impartiality and public confidence in the administration of justice.

6. Judicial impartiality is a core value of our legal system. It is central to the legitimate exercise of judicial power, crucial to the proper functioning of the common law system of adversarial trial, and key to litigant (and public) perceptions of fairness. The Australian judiciary is highly respected internationally for its integrity and impartiality, and generally enjoys a high level of public confidence. These proposals are not made because the ALRC considers there are widespread problems with judicial impartiality or the appearance of it in the federal judiciary. Rather, given the central importance of the value of impartiality, these are areas that require regular review to ensure that the law and institutions supporting it are in line with modern realities of litigation and the expectations of the Australian community.

7. The ALRC has been asked to consider, in particular, whether the law on actual and apprehended bias — a key mechanism used to protect judicial impartiality and the appearance of it — remains appropriate and sufficient to maintain public confidence in the administration of justice. It has reached the preliminary conclusion that the law and procedures associated with it require greater certainty and transparency, and a degree of recalibration to reflect scientific understandings of the extent to which judges, even with their training, experience, and commitment to impartiality, can 'resist bias'.

8. Tied to this, consideration of the areas where the law falls short in addressing a lack or perceived lack of impartiality also shows that the law on bias is not, and can never be, enough to maintain public confidence in the administration of justice on its own. The law on bias is not well suited to addressing systemic and ongoing threats to impartiality and perceptions of judicial bias. Other strategies are required to complement the operation of the bias rule to support impartiality and to uphold the confidence of litigants and the public in all their diversity.

9. In light of this, the ALRC suggests a continuation of the process of reframing the expectations the common law puts on judges, and turning the focus towards supporting impartiality. Rather than the 'good judge' being one who is peculiarly resistant to bias, steps a judge takes to acknowledge and mitigate bias and the appearance of it should be seen as positive contributions to upholding impartiality, public confidence, and the rule of law. In this, judges should be supported by systems and structures that prevent and mitigate, to the extent possible, challenges to impartiality arising, and properly equip judges to manage them when they inevitably do.

MAKING A SUBMISSION

10. The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. These submissions are crucial in assisting the ALRC to develop its recommendations.

11. Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed in PDF format to impartiality@alrc.gov.au. It is helpful if comments address specific proposals or questions in the Consultation Paper.

12. Stakeholders may make a public or confidential submission to the Inquiry. Public submissions may be published on the ALRC website. Submissions that are public are preferred. Subject to the below, in the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public.

13. The ALRC also accepts confidential submissions. If your submission contains information about a proceeding under the *Family Law Act 1975* (Cth) ('*Family Law Act*'), it will be treated as confidential by the ALRC irrespective of the way it is described. Before making a submission, you should carefully consider the terms of any order made by a court in that proceeding relating to the disclosure of information. For example, it is an offence under s 102PK of the *Family Law Act* to contravene a suppression order or a non−publication order made under s 102PE of the *Family Law Act.*

14. The ALRC will not publish submissions that breach applicable laws, promote a product or a service, contain offensive language, express sentiments that are likely to offend or vilify sections of the community, or that do not substantively comment on the issues relevant to the particular inquiry.

MAKE A SUBMISSION

alrc.gov.au/inquiry/review-of-judicial-impartiality/submission

Submissions due by 30 June 2021

PRINCIPLES

15. The proposals and questions in this Consultation Paper are framed by the following principles:

Principle 1:	Litigants have the right of equal access to a fair hearing by an impartial judge.
Principle 2:	The legitimacy of the courts depends on judicial impartiality.
Principle 3:	Institutional structures must support judicial impartiality.
Principle 4:	Processes addressing issues of judicial bias should be transparent.
Principle 5:	Reforms to procedures on judicial bias must be sensitive to access to justice and efficient court processes.
Principle 6:	Judicial independence requires reforms to be judge-led.

	CONSULTATION QUESTION
1	Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?

BACKGROUND PAPERS

16. This Consultation Paper seeks responses to proposals and questions relating to judicial impartiality and the law on bias as they apply to the federal judiciary. This is the primary document on which the ALRC seeks stakeholder input. The ALRC has also prepared seven background papers. These provide context for the proposals made and questions posed in this Consultation Paper. The background papers are designed to provide interested stakeholders with a broader understanding of the research and analysis that underpins the Consultation Paper.

17. All background papers can be downloaded from the ALRC website.

JI1	The Law on Judicial Bias: A Primer
JI2	Recusal and Self-Disqualification Procedures
JI3	The Federal Judiciary: The Inquiry in Context
JI4	Conceptions of Judicial Impartiality in Theory and Practice
JI5	Ethics, Professional Development, and Accountability
JI6	Cognitive and Social Biases in Judicial Decision-Making
JI7	The Fair-Minded Observer and its Critics

PROBLEMS IDENTIFIED

The existing law on actual and apprehended bias

18. Initial consultations have identified some difficulties with the **existing law on actual and apprehended bias**. However, they have also underscored that many consider the existing law to provide an appropriate framework, with difficulties best resolved by the judiciary through the development of case law. Particular issues with the common law test for apprehended bias include that (see further **JI7.21–37**):

- it is difficult for lay people to understand;
- its application is discretionary and unpredictable; and
- judicial decisions on disqualification may be inconsistent with scientific research and wider perceptions of when a judge should continue hearing a case.

19. At the time of publication, a case concerning the test for apprehended bias is pending before the High Court, so some of these issues may be clarified in the near future (see *Charisteas v Charisteas* [2021] HCATrans 28 ('*Charisteas*')).

Summary of problems identified

The existing law and procedures

1 Procedures relating to judicial bias in the Commonwealth courts are not clear or transparent

2 The legal test for apprehended bias is difficult for ordinary people to understand, its application is discretionary and unpredictable, and judicial decisions on disqualification may be inconsistent with scientific research and wider perceptions of when a judge should continue hearing a case

3 The mechanism for determining bias claims (the self-disqualification procedure) is difficult for litigants and the public to accept, incompatible with scientific research, and may have a chilling effect on meritorious applications

4 There is a lack of clarity around appropriate private communications between judges and lawyers

5 There are tensions between the efficient allocation of judicial resources and the bias rule

6 The bias rule is insufficient to address unacceptable judicial conduct in court

7 The bias rule is inappropriate to respond to an increased focus on judges' decision-making patterns

Systemic and ongoing issues

8 Socially-based attitudes, stereotypes, and a lack of cultural competency may negatively impact the impartiality of judicial decision-making in relation to specific groups of people

9 Divergent expectations of the court process, the highly discretionary nature of decision-making under family law legislation, and prior negative experiences of the legal system may contribute to perceptions of judicial bias held by litigants

10 Under-resourcing of the justice system, and inadequacies in appointment processes, training, and support for judges, may undermine judicial impartiality and leave some judges ill-equipped to deal with challenges in maintaining judicial impartiality

Data

11 Commonwealth courts do not collect data on reallocations, recusal, and disqualification, undermining transparency around how issues of judicial bias are dealt with and the ability to implement improvements to systems

12 Some litigants and lawyers report experiencing bias in the Commonwealth courts, but available data is not sufficient to understand fully the extent of these experiences and the underlying reasons for them

20. Our Consultations also indicated some areas where the application of the test can give rise to particular difficulties. These include:

- *Private communication between judges and lawyers*: There is a lack of specificity in written guidance about exactly when contact between a judge and a party or lawyer appearing in litigation before the judge is prohibited, with practice determined to a large extent by unwritten rules and case law (see further **JI1.24**). This is likely to be reconsidered by the High Court in *Charisteas*.
- *Tension with efficient allocation of resources*: Procedures designed to maximise the efficient allocation of judicial resources, including the docket system, active case management, and allocation of related matters to the same judge may increase the opportunities for cognitive biases, and apprehensions of bias, to arise (see further **JI1.27–33** and **JI6.19**, **JI6.47–49**).
- *Difficulty in responding to unacceptable judicial conduct:* The bias rule alone is not effective in responding to unacceptable judicial conduct during proceedings and such conduct is particularly corrosive to litigant and public confidence in the administration of justice (see further **JI1.25** and **JI5.66**).
- *Increased focus on decision-making patterns:* Increased public scrutiny of decision-making patterns by particular judges may undermine litigant and public confidence, but is not adequately addressed by the bias rule (see further **JI1.30**).

Current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations

21. Views on **procedures for raising and determining issues of bias** are mixed. Some stakeholders find it problematic that, when an issue of actual or apprehended bias is raised, it is the judge concerned who must decide whether she or he can continue to hear the case. This is seen as contrary to the idea that a person must not be a judge in her or his own cause, difficult to reconcile with research about the 'bias blind spot' that affects human decision-making, and potentially deterring counsel from bringing meritorious applications for fear of offending the judge (see further **JI2.22–29**). On the other hand, some feel that other potential procedures would be open to abuse and/or unnecessarily increase cost and delay (see **JI2.42–47**).

22. More generally, consultations suggested that there is an overwhelming view amongst stakeholders that procedures for raising and determining issues of actual or apprehended bias (including on appeal) are not clear and consistent, and that information about the procedures and the law is not readily available to either practitioners or litigants.

Systemic and ongoing issues impacting judicial impartiality and perceptions of judicial bias

23. In addition to the law and procedures, significant attention was given in consultations to **systemic and ongoing issues impacting on judicial impartiality and perceptions of judicial bias** that the bias rule is neither designed nor appropriate to manage. Numerous stakeholders indicated that other institutional and systemic issues relevant to judicial impartiality need to be addressed to complement the bias rule to maintain public confidence in the administration of justice. These include issues related to:

- *Bias resulting from heuristics, attitudes, and stereotypes:* These impact all human decision-making, including judicial decision-making. They may favour groups overrepresented in judicial appointments and impact negatively on others, including groups that have been traditionally discriminated against within the legal system (see further **JI6.9–39).**
- *Lack of cross-cultural knowledge:* Some judges may lack cultural competency in relation to the people who come before their courts. This may impact on the impartiality of judicial decision-making (for example in credibility assessments) (**JI6.20–26**) and the way proceedings are conducted, which in itself may give rise to perceptions of bias.
- *Divergent expectations about the court process:* Expectations held by judges and lawyers on one hand, and litigants (including self-represented litigants) on the other, may differ significantly, including around the extent to which litigants should be able to tell their story in court. This can lead to perceptions of judicial bias when litigants feel they have not been able to be heard.
- *The highly discretionary nature of decision-making in family law:* This can readily lead to perceptions that judges rely on their own values or preferences to make decisions and are biased against one party.
- *Judges as part of the 'system':* Lower levels of trust in judicial impartiality may arise from negative experiences of the legal system as a whole (by the individual litigant or as a member of a group that has experienced or continues to experience oppression and discrimination within the legal system) (see further **JI4.32–35** and **JI6.34–35**).
- *Judicial workload:* Judges may face pressure to rush hearings and judgments to deal with the extremely high judicial workload in some courts. This may impact on their ability to act impartially and to manage perceptions of impartiality, including because (i) decisions made under time pressure are more susceptible to error produced by cognitive and social biases (**JI6.11–21**); (ii) it is more difficult for judges to be responsive to litigants' need to be heard in proceedings, to explain proceedings, and to manage expectations; and (iii) it may result in significant stress, resulting in both an increased risk of cognitive and social bias, and inappropriate conduct in court that may give rise to perceptions of bias (**JI5.32** and **JI6.15**).

24. Consultations and research suggest that **current judicial appointment processes, arrangements for new judges, and ethical and other support structures** could be improved to ensure that both the federal judiciary as a whole, and individual judges, are properly equipped to manage these challenges (for further background see **JI5.12–54**).

25. A final set of problems identified in preliminary consultations concerned **data relevant to judicial impartiality**. These were that:

- *Data on recusal:* Commonwealth courts do not collect data on reallocation of cases for potential bias, recusals, and disqualification (**JI3.34–41**). This makes it difficult for trends to be tracked and for litigants and the public to understand how issues of bias are dealt with by the courts.

- *Understanding court user experiences of bias:* Consultations and research indicate that some types of litigants, and some lawyers, experience bias from some judges in the courtroom. However, available data is not sufficient to understand fully the extent of these experiences and the underlying reasons for them.
- *Data on decision-making patterns:* Consultations highlighted the inevitability of increasingly sophisticated public scrutiny of judges' decision-making patterns (see **JI1.30**). It has been suggested in consultations that this type of data may be corrosive to public confidence if it could give rise to a perception of a lack of impartiality, but might also be helpful if used appropriately to enable self-reflection to enhance impartial judicial decision-making (see further **JI6.58**).

CONSULTATION QUESTIONS AND PROPOSALS

Transparency of process and law

26. The proposals and consultation questions in this section seek to bring greater consistency and transparency to how issues of bias are dealt with by the courts and judges, and to make the procedures and law more accessible for litigants, practitioners, and the general public. They also seek to increase the understanding of litigants and the public of the existing institutional structures that are in place to promote and protect judicial impartiality.

Practice document on applications for disqualification

27. Proposal 2 addresses concerns identified in consultations that the procedures relating to bias in the Commonwealth courts are not clear and consistent, or well-communicated to practitioners or litigants (Problem 1).

	CONSULTATION PROPOSAL
2	Each Commonwealth court should promulgate a Practice Direction or Practice Note setting out the procedures for making and determining applications for disqualification of a judge on the grounds of actual or apprehended bias, and procedures for review or appeal.

28. Practice Notes (in the Federal Court) and Practice Directions (in the Federal Circuit Court, Family Court, and High Court) (for simplicity, collectively referred to as Practice Notes) supplement legislation and court rules and provide information to parties and their lawyers on particular aspects of a court's practice and procedure. They are issued by the head of jurisdiction on the advice of the judges of the court under the court's inherent power to control its processes. They therefore provide a convenient and flexible means for judges to set out a court's procedures.

29. The proposed Practice Note should include specific reference to any procedures that parties are expected to follow before making an application for disqualification, the form that such application should take (including how the order sought should be framed), and whether or not an affidavit should be filed in support. The Practice Note should include procedures for the determination of disqualification applications and how reasons should be delivered. The Practice Note should also clarify the mechanism by which an interlocutory decision refusing disqualification can be appealed or reviewed and the circumstances in which a stay of proceedings may be granted pending such appeal or review (see further Question 7).

30. The Practice Note should be referred to and summarised in the Guide proposed in Proposal 3. It would also provide an appropriate mechanism to implement Proposal 6 and Proposal 8.

Layperson-oriented guide to recusal and disqualification

31. Proposal 3 aims to make the law and procedures relating to recusal and disqualification more transparent and accessible for litigants and the public. In doing so, it would address the concerns around the lack of transparency of procedures (Problem 1), and seeks to make the tests for actual and apprehended bias (and areas where their application is uncontroversial) more easily understood (Problem 2). The ALRC considers that transparency of the law is particularly important in light of the issues identified with the self-disqualification procedure (Problem 3).

CONSULTATION PROPOSAL

3 Each Commonwealth court should develop and publish an accessible guide to recusal and disqualification ('Guide') for members of the public. The Guide should be easy to understand, be informed by case law and the *Guide to Judicial Conduct*, and refer to any applicable Rules of Court or Practice Directions/Practice Notes.

In addition to summarising procedures, the Guide should include a description of (i) circumstances that will always or almost always give rise to apprehended bias, and (ii) circumstances that will never or almost never give rise to apprehended bias.

32. The Guide should bring together information about court practices, procedures, and relevant law concerning recusal and disqualification and describe them in plain and simple terms. It should be prepared in such a way as to avoid any unwarranted perception of widespread judicial bias. It could take the form of an Information Note (such as those produced by the Federal Circuit Court and Family Court) or Guide (such as those produced by the Federal Court). The Guide should include information about:

- processes in place at the listing stage to screen cases for potential bias issues;
- how judges disclose issues that may give rise to complaints of bias;
- procedures (i) for parties to raise potential issues of bias and to challenge a judge's decision not to recuse herself or himself, (ii) for determination of applications for disqualification, and (iii) in relation to any stay, review, and appeal of interlocutory decisions on disqualification (see Proposal 2, Proposal 6, Question 7, and Proposal 8); and
- the tests for actual and apprehended bias, and impermissible bases for seeking a judge's disqualification (such as disagreement with a judge's decision).

33. The Guide should also refer to specific circumstances that will always (or almost always) and will never (or almost never) give rise to apprehended bias, although this should be coupled with a disclaimer that every case turns on its facts. Although the test for apprehended bias requires a two-step process in each case (see further **JI1.11**), certain circumstances are recognised in the case law and the *Guide to Judicial Conduct* as generally requiring recusal. These include, for example, where the judge has a substantial economic interest in the matter in dispute, and where the judge's family member within the third degree (such as spouse, child, parent, or sibling) is a party or counsel in the case.

There are also circumstances that will generally not meet the test, such as the fact that the judge previously shared chambers with a barrister in the case or where the challenge is based on personal characteristics of the judge, such as gender, sexuality, or ethnicity (**JI1.30** and **JI6.42–46**). Setting these uncontroversial applications of the rule out in the Guide may aid understanding of how the rule operates and help to deter unmeritorious applications.

34. Procedures and processes may differ across the Commonwealth courts. However, the courts should coordinate in the drafting of their respective Guides, and in regularly reviewing and updating them, to ensure consistency to the extent possible. This could be done, for example, through the Council of Chief Justices of Australia and New Zealand.

Clarifying uncontroversial applications of the rule

35. Question 4 seeks views on one way in which concerns and difficulties identified in relation to the test for apprehended bias at paragraph 18 above might be addressed (Problem 2).

CONSULTATION QUESTION

4 Would there be benefit in a judicial officer-led project to identify more comprehensively circumstances in which apprehended bias will and will not arise?

36. In some international jurisdictions and areas of practice (such as international arbitration) legislation and/or model codes set out certain circumstances in which bias will and will not be held to arise (see further **JI7.61–67**). Often, a general test then applies to other circumstances that do not fall within those examples.

37. Further clarity on situations where apprehended bias will and will not arise in the Australian context could provide greater transparency and consistency of application in the 'easy' cases, and allow a potential recalibration of the application of the test to:

(i) address concerns about areas where the application of the law differs significantly from what members of the public consider to be an unacceptable conflict (measured through empirical study);

(ii) incorporate knowledge gained from behavioural psychology about the extent to which judges can 'resist' bias in particular situations (such as exposure to extraneous information); and

(iii) make the policy choices inherent in the application of the test more explicit and consistent (such as those underlying the degree of knowledge attributed to the fair-minded observer about how the legal profession operates).

38. The ALRC's preliminary view is that an attempt by the legislature to codify the circumstances in which a judge is disqualified for bias may raise constitutional difficulties, because of the separation of powers under the *Australian Constitution*, and the centrality of judicial impartiality to the exercise of judicial power (see further **JI7.46**). However, a judge-led project to identify, in an authoritative document, situations where the application

of the bias rule is appropriate (and inappropriate) to disqualify judicial officers under the law may nevertheless provide useful guidance to judicial officers, lawyers and litigants. Such a project could be led, for example, by the Council of Chief Justices of Australia and New Zealand.

Promoting public and litigant understanding of judicial impartiality and accountability

39. The law includes a number of other mechanisms, aside from recusal and disqualification, to support and protect judicial independence and impartiality, and to ensure judicial accountability for a failure to act impartially in an individual case. Proposal 5 aims to increase public and litigant understanding of these mechanisms. This could help to build the trust of prospective and current litigants in judicial impartiality (Problem 9), in addition to providing a first point of call for litigants unhappy with their experience in court (Problem 12). It also addresses the lack of transparency about the processes of recusal and disqualification (Problem 1), by acting as a signpost to more detailed information, while putting those processes in their wider context.

CONSULTATION PROPOSAL

5 The Commonwealth courts should (in coordination with each other) publicise on their respective websites the processes and structures in place to support the independence and impartiality of judges and mechanisms to ensure judicial accountability.

40. Websites of courts in other jurisdictions including the United Kingdom and New Zealand provide examples of how such information may be communicated. The ALRC suggests that such a webpage should be prominent, easy to locate, and include reference or links to:

- information about the judicial oath and the judicial function;
- information about judicial appointment processes (including any processes introduced in response to Proposal 14) and security of judicial tenure;
- information about government or court strategies relating to judicial diversity and inclusion;
- the *Guide to Judicial Conduct*, including information about guidance on avoiding conflicts of interest, and ethical support structures available to judges;
- information about judicial professional development;
- the Guide on Recusal and Disqualification proposed in Proposal 3;
- information about the availability and function of appeals in individual cases;
- information about the collection, analysis, and reporting of feedback received from court users (see further Proposal 23) and other relevant data (see further Question 25);
- complaints mechanisms, and how to access them; and
- protocols for the profession to bring issues of inappropriate judicial conduct in court to the attention of the head of jurisdiction.

Procedures for determining applications for disqualification

41. The proposals and consultation questions in this section put forward procedural mechanisms for addressing bias claims in both single judge and multi-member courts that will promote public and litigant confidence in the administration of justice, improve judicial decision-making, and are consistent with scientific research (Problem 3). They are also designed to make the procedures relating to disqualification more transparent and accessible for litigants and the public (Problem 1).

Single judge court: transfer of decision on disqualification

CONSULTATION PROPOSAL

6 The Federal Circuit Court of Australia, the Family Court of Australia, and the Federal Court of Australia should amend their rules of court to require a judge sitting alone to transfer certain applications for the sitting judge's disqualification to a duty judge for determination.

Options for reform include requiring transfer:

Option A) when the application raises specific issues or alleges specified types of actual or apprehended bias; or

Option B) when the sitting judge considers the application is reasonably arguable; or

Option C) when the sitting judge considers it appropriate.

42. Under the proposed procedure, in a single judge court, the judge seised of the matter would transfer certain applications for disqualification (however framed) to the duty judge. The duty judge would then decide the application and if she or he concluded that the judge was disqualified for actual or apprehended bias, the underlying case would be referred to the registry for reallocation to a different judge. If the duty judge dismissed the application, the case would be remitted to the original judge for determination. The decision of the duty judge on the application could be appealed as an interlocutory decision.

43. The proposed procedure would replace the existing approach, under which the judge who is the focus of the disqualification application for bias decides the application. However, the ALRC envisions that the current practice of first raising the issue informally before the judge seised of the matter would be retained. This would allow a faster resolution of the issue in circumstances where the judge decides to recuse. It would also provide an opportunity for the judge to explain — to the extent she or he felt necessary — why the informal objection was rejected, which may in turn alleviate the concern underlying the objection. The new procedure should be reflected in the Practice Note referred to in Proposal 2.

44. There is some debate as to the jurisdiction of an alternative judge to determine disqualification applications in single-judge matters, and consequently, the appropriate instrument required to modify the conventional approach (see **JI2.41**). If this proposal were to be implemented, for avoidance of all doubt, the Australian Government should amend the constitutive legislation for each court to clarify their jurisdiction to establish rules of court governing judicial disqualification.

45. Some stakeholders suggest that having a disinterested judge — such as the duty judge — adjudicate disqualification applications would better serve the general public and litigants by enhancing both the appearance and actuality of impartial justice. Transferring the decision to another judge addresses research insights from behavioural psychology that indicate all individuals have a bias blind spot that makes it difficult to recognise bias in oneself (see **JI2.22–23** and **JI6.53–54**). In addition, having a different judge rule on the disqualification application alleviates tension between the precautionary approach towards disqualification and the countervailing duty to sit, and reduces the chilling effect on applications that can result from requiring parties to make the application to the judge concerned (see further **JI2.34–47**).

46. The ALRC recognises that issues of evidence would need to be considered in the design of the procedure, as under the existing procedure no affidavit evidence is admitted. However, these challenges relating to evidence are already addressed effectively by appellate courts in instances where the issue of bias is first raised on appeal after judgment has been delivered (see, eg, *Charisteas*). Moreover, any statements by a judge in response to an informal objection in open court would form part of the record (see **JI2.47**).

47. The ALRC anticipates that additional resources would be required to ensure a duty judge was available and had capacity to hear disqualification applications in a timely manner across all Commonwealth courts, although remote hearings may alleviate resource constraints in smaller registries. The procedure would also require the duty judge's mandate to be expanded in some courts.

Circumstances for referral

48. There are several different ways in which this procedure could be designed.

49. **Select automatic transfer (Option A).** This alternative would see the automatic transfer of applications to another judge made under select circumstances or for specified categories of bias (see **JI2.39**). It provides a targeted approach that would remove applications in circumstances where the existing procedure is most problematic, such as where the alleged ground of bias relates to conduct during a proceeding. This balances costs by focusing resources on areas of key concern; however, this procedure could be used as a tactical tool for delay and, where the application is not transferred, the problems under the existing procedure remain.

50. **Threshold transfer (Option B).** By imposing a threshold requirement that an application must be reasonably arguable in order to be transferred, this alternative provides a middle ground between discretionary and automatic transfers. It should decrease unmeritorious applications, thereby minimising costs and tactical manoeuvering.

However, creating a gatekeeper role for the judge who is the focus of the application risks undermining both the appearance and actuality of impartial justice.

51. **Discretionary transfer (Option C).** This final alternative would allow judges to transfer a disqualification application to another judge where the judge the subject of the application considers it appropriate. Providing the judge who is the focus of the application with the discretion as to when to transfer an application would arguably ensure the most focused use of court resources. The judge seised of the matter would determine whether transferring the decision would better serve the interests of justice (both actual and perceived). However, employing the judge who is the subject of the disqualification application as gatekeeper will reduce the benefits of referral, in terms of both the appearance and actuality of impartial justice. Under this alternative, access to timely review through an interlocutory appeal would be most important (see Question 7).

52. The ALRC has not included a further alternative in the proposal, which would require the automatic transfer of all disqualification applications for bias. This option would remove both the decision and discretion about the transfer of the decision from the judge who is the focus of the application, which is likely to alleviate concerns in relation to public confidence in the process and the incongruity of the current process with the behavioural sciences research. However, this approach imposes the highest level of cost both in terms of time and resources. It also has the potential to be abused to harass or increase costs and delay for another party (including, for example, as a form of system abuse in family law).

Single judge court: interlocutory appeal

CONSULTATION QUESTION	
7	Should Commonwealth courts formalise the availability of an interlocutory appeal procedure for applications relating to bias before a single judge court?

53. The ALRC invites comments on whether Commonwealth courts should formalise an interlocutory appeal procedure for the review of interlocutory decisions denying applications for disqualification and how this procedure should be designed and implemented. This procedure would operate regardless of whether Proposal 6 is adopted.

54. There has previously been some controversy as to whether a decision on bias is an interlocutory order that can be appealed (see **JI2.19**). This seems to be relatively well-settled now, but vestiges of the confusion remain in the form of different approaches to appeal processes across and within the various Commonwealth courts. In formalising the procedure, courts could provide clarity to court users by setting out how an application should be framed so as to attract an interlocutory order that can be appealed, or simply stipulate that interlocutory decisions on applications for disqualification for bias are appealable (this is partly addressed in the *Family Law Act*, ss 94(1AA) and 94AAA(1)(b); see further **JI2.48–49**). Formalising the availability of interlocutory relief would also assist in ensuring timely access to review.

55. Under current legislation, leave is required to appeal most interlocutory decisions, including those relating to disqualification applications — generally from the court above. The judge seised of the underlying matter has the discretion to stay the proceeding pending that appeal. As a general rule, applications for leave to appeal, and appeals, from the Federal Circuit Court on non-family law related matters are already heard by a single judge of the Federal Court (*Federal Court of Australia Act 1976* (Cth), s 25(1AA)(a)). Appeals from the Federal Circuit Court on family law matters can also be heard by a single judge of the Family Court if the Chief Justice considers it appropriate (*Family Law Act*, s 94AAA(3)). The ALRC suggests that ensuring any interlocutory appeals for disqualification applications from the Federal Circuit Court are heard by a single judge could help ensure a more timely review process (as opposed to having the appeal heard by a full court). Registries may also choose to prioritise the hearing of cases relating to bias.

56. While prompt access to an appeal process would not resolve the core criticisms aimed at the self-disqualification procedure, expedient review of the initial decision does help to mitigate concerns about the ultimate impact of the bias blind spot and the tension with the duty to sit. Clear court-specific procedures can ensure that procedures are appropriately adapted to the particular circumstances of the court. The ALRC foresees that this procedure could be set out in the Practice Note referred to in Proposal 2 in order to provide clear and unambiguous guidance for judges and litigants.

Multi-member court: decision on disqualification by court as constituted

CONSULTATION PROPOSAL	
8	The Federal Court of Australia, the Family Court of Australia, and the High Court of Australia should promulgate a Practice Direction or Practice Note to provide that decisions on applications for disqualification made in relation to a judge on a multi-member court should be determined by the court as constituted.

57. This procedure would require that disqualification applications for bias brought against one judge on a multi-member panel be decided by all judges on the panel. This would replace the existing procedure, whereby only the judge who is the focus of the disqualification application decides on its merits (see **JI2.59**). This procedure should be reflected in the Practice Note referred to in Proposal 2.

58. Preliminary views suggest that having the court as constituted adjudicate these disqualification applications could better serve the general public interest and litigants by enhancing both the appearance and actuality of impartial justice. Some suggest that the other judges already have the power to determine the matter (including in relation to the High Court) — arising from the responsibility of all judges assigned to ensure that the court is properly constituted as an incident of the exercise of jurisdiction (**JI2.21, 57–59**). Moreover, this process has effectively been adopted in a number of decisions and would therefore not appear to require amendment by legislative instrument (**JI2.59**). However, as with Proposal 6, if this proposal were to be implemented, for avoidance of all doubt, the

Australian Government should amend the constitutive legislation for the Federal Court and the Family Court to clarify the judges' jurisdiction to establish rules of court governing judicial disqualification.

59. The ALRC also invites comments on a modified version of this proposal that would exclude the impugned judge from the decision and instead have only the judges who are not the focus of the disqualification application make the decision (see **JI2.60**).

Systems to minimise the need for recusal or disqualification

	CONSULTATION QUESTION
9	Should Commonwealth courts adopt additional systems or practices to screen cases for potential issues of bias at the time cases are allocated?

60. Commonwealth courts currently have practices in place to identify possible issues of bias before allocating a case to a judge. However, the courts also rely on judges to identify issues and approach the registry to have cases reallocated (**JI2.8–9**). A number of other jurisdictions employ processes that go further in removing the responsibility for curbing the risk of issues of bias from judges (**JI2.31–33**). When successfully implemented, such systems could also reduce the frequency with which disqualification applications arise and make better use of judicial resources.

61. The ALRC invites comments on the desirability of introducing a more systematic approach to identifying possible bias concerns at the case allocation stage. These systems could include, for example: a more formal process that enables judicial officers to inform court personnel in advance that cases involving certain parties or lawyers should not be assigned to them; using algorithms to assign cases; and the creation of a financial interests register for judges (see further **JI2.31–33**).

Addressing difficult areas for application of the bias rule

62. The following proposals respond to three specific limitations of the bias rule: a lack of clarity on appropriate private communications between judges and legal practitioners appearing in cases before them (Problem 4); the tension between the efficient allocation of resources in litigation and avoiding bias (Problem 5); and the interaction between the bias rule and unacceptable judicial behaviour in court (Problem 6).

Communications between judges and lawyers

63. Proposal 10 responds to the concern about a lack of specificity in written guidance on when contact between judges and lawyers or parties appearing in litigation before them is prohibited, and what contact is allowed (see further **JI1.24**) (Problem 4). Clarification is increasingly necessary in light of the long period over which a judge may manage proceedings under the docket system.

Clarifying rules on contact between judges and lawyers

CONSULTATION PROPOSAL

10 The Council of Chief Justices of Australia and New Zealand and the Law Council of Australia and its constituent bodies should coordinate reviews of Part 4.3 of the *Guide to Judicial Conduct*, and the

(i) Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 54; and

(ii) Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 22.5

(and equivalent rules applicable in any state or territory) (together the 'Professional Rules').

64. This review should be carried out after the High Court has considered the issue further in the appeal from *Charisteas.*

65. Given the importance of this area to litigant and public confidence in the administration of justice, the ALRC considers that the applicable guidance and professional rules should be as detailed and specific as possible, and that reliance on 'unwritten rules' should be avoided. In this respect, the ALRC notes the *Guide to Judicial Conduct* currently reflects a more stringent position than that expressed in the Professional Rules. The *Guide to Judicial Conduct* notes (by reference to case law) that there should be no communication or association 'save in the most exceptional circumstances…once a case is under way', while the Professional Rules only explicitly prohibit communication on 'any matter of substance in connection with current proceedings'.

66. In carrying out the reviews, the respective organisations should consider the differential impact that specific rules may have in smaller registries (i.e. with fewer judges and a smaller profession), and in relation to specialised areas of practice. They should also consider whether informal conventions on contact specific to certain contexts, such as on-country hearings in native title matters, and when the court is on circuit, should be formalised through specific rules or commentary.

67. The ALRC has formed the preliminary view that, although a certain degree of flexibility is likely to be required, greater specificity will assist judges and legal representatives, particularly when they are new to the bench or the profession, and will help to avoid situations of extensive wasted time and costs such as those demonstrated in *Charisteas.*

Modern litigation practices, efficient allocation of resources, and the bias rule

68. The importance of ensuring efficient allocation of public and private resources in litigation can sometimes be in tension with the need to maintain judicial impartiality (Problem 5), for example:

- where the same judge is allocated to hear related matters based on the same substrata of facts in complex commercial or regulatory litigation; and
- where, under the docket system, the same judge manages a case throughout case management and trial, often over the course of a number of years.

69. In such cases there are more opportunities for exposure to extraneous information and for prejudgment, and perceptions of it, to arise (see further **JI7**). Recent research has shown how both of these situations can contribute to increased risks of cognitive bias impacting on decision-making (see **JI6.47–49**). The necessity to make immediate case management decisions also means such decisions are more likely to be intuitive and impressionistic, increasing the risk of error through cognitive and social biases (see further **JI6.11–13**). In both situations, there is also a particularly strong tension between the relatively low threshold of the test for apprehended bias, and the judge's 'duty to sit' (see **JI2.24–25**), where the judge concerned has been involved in a long-running matter and reallocation is likely to involve substantial additional cost and delay.

70. The ALRC's preliminary view is that resolution of the tension between the public interest in impartial decision-making and the public interest in the efficient use of judicial resources is best mediated through the development of case law, informed by the increasingly sophisticated scientific understanding of judicial decision-making (see, for example, the recent decision of the Full Court of the Federal Court in *GetSwift Limited v Webb* [2021] FCAFC 26). However, the ALRC is interested in exploring ways in which the tension between the two values may be avoided at the outset, reducing the need for such a balancing-act to occur.

Greater use of registrars in case management

CONSULTATION QUESTION

11 Has the increased use of registrars for case management in family law cases in the Federal Circuit Court of Australia reduced the potential for prejudgment and perceptions of bias associated with multiple appearances before the same judge under the docket system to arise?

71. Increasing the use of registrars for case management has been suggested as one way to reduce the number of opportunities for prejudgment and perceptions of bias to arise during the course of proceedings. It may also have the benefit of freeing up judicial time for more reasoned and less rushed decision-making in other matters, increasing both judges' capacity to act impartially and to be perceived as impartial (Problem 10).

Reducing the tension between impartiality and efficiency

CONSULTATION QUESTION

12 What additional systems or procedures can Commonwealth courts put in place to reduce the tension between the apprehended bias rule and the demands of efficient allocation of resources in court proceedings?

Unacceptable judicial conduct in court

72. Question 13 relates to the difficulties associated with addressing unacceptable judicial behaviour in court, such as behaviour that insults or humiliates a party or counsel, through the bias rule (Problem 6).

73. The bias rule is one of two main mechanisms available under the law (alongside the fair hearing rule) to challenge judicial conduct in court that is considered unacceptable. Such conduct may reasonably give rise to an apprehension of bias (see further **JI1.25**), but the bias rule is not well-suited to managing or responding to such behaviour. This is because:

- bringing an application on the grounds of apprehended bias can (or can be perceived as likely to) inflame the situation further, meaning that counsel are reluctant to do so;
- such conduct can be cumulative and it is difficult to know when the 'tipping-point' of apprehended bias has been reached; and
- a finding of apprehended bias in an individual case does not usually or necessarily result in an appropriate sanction or in the causes of the behaviour being addressed.

74. As to the last point, see further Question 20.

Operation of the waiver rule in cases of unacceptable judicial conduct

75. Given the difficulties with raising issues of bias arising from in-court conduct in clear terms with the very judge concerned, it has been suggested that the waiver rule (see further **JI1.35–41**) may operate as an unfair barrier to bringing the issue on appeal. The ALRC is interested in hearing from practitioners about their experiences in this area.

CONSULTATION QUESTION

13 In practice, does the waiver rule operate unfairly to prevent issues of unacceptable judicial conduct giving rise to apprehended bias being raised on appeal? Or is the case law on waiver sufficiently flexible to deal with this situation?

Supporting judicial impartiality

76. In addition to dispute-specific threats to impartiality discussed above, a number of (often interconnected) systemic or ongoing issues may also impact decision-making and weaken public and litigant confidence in the administration of justice. Key issues of this type identified in preliminary consultations include:

- the potential for cognitive and social biases, including implicit bias, and lack of cultural competency to impact on the impartiality of judicial decision-making (Problem 8);
- how divergent expectations of the court process, the discretionary nature of decision-making in the family law context, and prior negative experiences of the legal system can impact on perceptions of judicial impartiality (Problem 9); and
- how the very high caseload borne by judges in the Federal Circuit Court and Family Court impacts on judges' ability to act impartially and to manage perceptions of impartiality (Problem 10).

77. The following proposals are intended to complement the bias rule to contribute to an institutional structure within which judges are best able to act impartially in relation to all litigants, and to enhance litigant and public confidence in their impartiality.

Judicial appointments and judicial diversity

78. Judicial appointments processes have a role to play both in ameliorating the effect of implicit social biases and lack of cultural competency (Problem 8), and in ensuring that those appointed to judicial office possess the personal skills and qualities necessary to manage the systemic and ongoing challenges to impartiality identified in consultations (Problem 8, Problem 9, Problem 10) (see further **JI4.57–58** and **JI6.58**).

Transparent process for judicial appointments

79. In consultations, many stakeholders suggested that the current appointments process for the federal judiciary is inadequate to address systemic and ongoing challenges to impartiality and undermines public confidence (Problem 10). Research involving a 2016 survey of judicial officers from across Australian jurisdictions showed that judicial officers themselves are concerned with these issues. Both the integrity of appointments processes and a lack of diversity of the judiciary were seen as challenges by more than 50% of the judicial officers surveyed (for more information on the survey see **JI5.28**).

CONSULTATION PROPOSAL

14 The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community.

80. The ALRC has previously recommended the adoption of more transparent processes for appointment of the federal judiciary and the promotion of greater diversity in appointments (Report No. 69 Part 2: *Equality Before the Law—Women's Equality*).

Implementing this proposal would strengthen public confidence in the impartiality of the judiciary, while promoting the appointment of suitably-qualified candidates from a diverse range of backgrounds and experiences to the bench. Consultations and research suggest that further enhancing the diversity of the judiciary may ameliorate negative effects of in-group preferences and social biases in judicial decision-making overall (see further **JI6.58**), enhance the quality of judicial decision-making through diversity of experience (see further **JI4.57–58**), and promote the confidence of groups who have traditionally been distrustful of the legal system in the courts' commitment to impartiality. The proposal should also help identify and appoint candidates to judicial office who have the requisite skills and personal qualities to manage time pressures and engage in deliberative thinking simultaneously, and to manage the court in such a way as to enhance litigant perceptions of impartiality.

81. ALRC research shows that all but one of the Australian states and territories have adopted criteria for judicial appointment and/or request expressions of interest for judicial vacancies for some or all of their courts. Requirements can be quite prescriptive: for example, in response to allegations of sexual harassment by judicial officers, the heads of jurisdiction of the Victorian courts have supported a recommendation to amend the appointments process for judicial officers in Victoria 'to explicitly require that potential appointees are of good character and have consistently demonstrated professional respect and courtesy for their colleagues, clients and others involved in the legal process'. The recommendation also requires that the Attorney-General consult widely to determine whether a potential candidate has satisfied this requirement.

82. In 2015, the Australasian Institute for Judicial Administration (AIJA) published Suggested Criteria for Judicial Appointment, and these guidelines have received widespread support in consultations as appropriate for appointments to the federal judiciary. Similarly, the (since discontinued) protocol for appointment of federal judicial officers established in 2008 under then Attorney-General of Australia Robert McClelland has been commended by a number of stakeholders as providing an appropriate model for such reform.

Reporting on judicial diversity

CONSULTATION PROPOSAL

15 The Attorney-General of Australia should report annually statistics on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background.

83. Proposal 15 would provide greater transparency to the public on the extent to which judicial diversity exists and is being achieved, with the ultimate aim of ensuring the judicial appointments process contributes to addressing issues associated with implicit bias and trust in judicial impartiality, identified above. It would be possible to include other invisible differences and characteristics that demonstrate the diversity of the judiciary. In the United Kingdom, similar statistics are published annually, with judges encouraged, but not required, to self-classify against a number of diversity characteristics.

Supporting diversity in the profession

84. In addition, given the role of the legal profession in preparing individuals for judicial appointment, the ALRC is interested in hearing from stakeholders about other steps that the Australian Government, the Commonwealth courts, the legal profession, and universities should take to create conditions that support an increasingly diverse profession, reflective of Australian society as a whole.

CONSULTATION QUESTION

16 What should be done to increase diversity in the legal profession and to support lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession?

Orientation, judicial education, and ethical and other support for judges

85. Proposals 17 and 18 and Consultation Questions 19, 20, and 21 respond to concerns expressed in consultations that the current approach to judicial orientation, judicial education, and ethical support does not adequately equip some judges to recognise and respond to difficulties in maintaining judicial impartiality and confidence in it. These proposals and consultation questions are underpinned by the ALRC's view that a more structured approach to judicial orientation, judicial education, and the provision of ethical and other support would better enable all judges to:

- recognise and respond to challenges to their own impartiality created by stereotypes, implicit social bias, and any lack of cultural competency (Problem 8);
- manage the courtroom in a way that enhances trust in their impartiality (Problem 9); and
- manage the challenges to impartiality created by time and resourcing constraints, and to access further support if required (Problem 10).

Orientation program for new judges

CONSULTATION PROPOSAL

17 Each Commonwealth court should commit to providing all judges newly-appointed to judicial office with the opportunity to take part in a court-specific orientation program upon appointment, as specified under the *National Standard for Professional Development for Australian Judicial Officers*, and report on the orientation program in their Annual Report.

86. The orientation referred to in Proposal 17 is in addition to, rather than in place of, the National Judicial Orientation Program provided for new judges by the National Judicial College of Australia. The *National Standard for Professional Development for Australian Judicial Officers* ('*National Standard*') also requires that new judges are provided with

the opportunity to attend the National Judicial Orientation Program within 18 months of appointment (**JI5.37**).

87. Consultations suggest that, although orientation programs have existed and continue to run in the Commonwealth courts, these are not always provided for new judges and are sometimes carried out on an ad hoc basis (**JI5.39**). A stronger commitment to the provision of, and reporting on, structured orientation for newly-appointed judges will encourage courts to be more transparent about how they prepare new judges for the specific demands of their role in the particular court to which they have been appointed.

88. Court-specific orientation programs provide the opportunity for sessions to better prepare judges to recognise and manage the systemic and ongoing issues that affect judicial impartiality prior to taking up sitting duties. This might include shadowing a sitting judge or judges in court; debriefing on courtroom management and specific issues around managing the expectations and perceptions of litigants; introductory sessions on heuristics and biases, including implicit social bias, and how judges can mitigate them; an introduction to court resources, including any available bench books; and, an introduction to mentoring, support, and professional development available to judges.

Ongoing judicial education

CONSULTATION PROPOSAL

18 Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them.

Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

89. Participation in intensive training on these topics should be considered a priority (or otherwise demonstrated) before a judge sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the Family Court. Training on Aboriginal and Torres Strait Islander cultural competency should be trauma-informed and led in conjunction with Aboriginal and Torres Strait Islander controlled organisations. Training on topics (i) and (ii) should also be considered a priority before a judge sits on cases in areas of law with a high proportion of people from culturally and linguistically diverse communities, including migration law and family law (see **JI6.39**). Courses concerning family violence should also be considered a priority (or otherwise demonstrated) for judges of the Family Court and Federal Circuit Court who hear family law matters. In this respect, the recent introduction of specific family violence training for new judges in both courts is welcomed (see **JI5.45**).

90. The *Guide to Judicial Conduct* emphasises the importance of professional development and training to support judges to fulfil their role, uphold their ethical obligations, and respond appropriately to changes in society. It also recognises that judges are 'entitled to expect that their court will support them by providing reasonable time out of court and appropriate funding' (see further **JI5.34**). In relation to ongoing judicial education, the *National Standard* recognises that Australian judicial officers 'should be able to spend at least five days each calendar year participating in professional development activities' (see further **JI5.37**).

91. The National Judicial College of Australia already provides a wide range of courses in addition to the National Judicial Orientation Program that address issues relevant to impartiality and perceptions of it (**JI5.44–46**). Although it previously published a suggested curriculum for judicial officers, no curriculum has ever been formally adopted by the judiciary (**JI5.40**). By at least identifying expectations for ongoing judicial education, the Commonwealth courts would provide greater transparency and support for judges to make use of the judicial education available, and ensure that time is provided as a matter of course to attend them.

92. In making this proposal, the ALRC is conscious of the significant time pressures judges already face. In light of this, the Australian Government should ensure that an appropriate amount of time for ongoing judicial education of current judges is included in its consideration of the number of judicial appointments required for each court. It should also ensure that the National Judicial College and other relevant organisations are funded appropriately to deliver high-quality ongoing education to all current judges.

93. The ALRC is also aware that a significant amount of work has already been done over the past two decades to develop and deliver ongoing judicial education in relation to cultural competency, but that there is recognition that more needs to be done (see **JI5.48–49**). It is interested in views as to what is needed to ensure that these programs operate effectively in each of the Commonwealth courts.

CONSULTATION QUESTION

19 What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

Ethical and other support structures

CONSULTATION QUESTION

20 Should more structured systems of ethical and other types of support be provided to assist judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues affecting their capacity to fulfil their judicial function? If so, how should such systems be developed and what should their key features be? What role could a future Federal Judicial Commission play in this regard?

94. The ALRC is interested in stakeholder views on whether further structured support for judges would be beneficial in addition to the informal systems already in place. More structured ethical support systems could include designating a retired judge to assist with ethical questions in each court; more structured mentoring; 360 degree programs; and ethics advisory committees. These have the potential to assist judges where issues of potential recusal or disqualification arise, and may also assist them to mitigate systemic and ongoing challenges to their own impartiality. Depending on how they are designed, they may also assist judges to access other forms of support when challenges arise that affect their work as a judge and ability to act impartially — including medical and mental health issues.

95. As discussed further at **JI5.33**, structures with a complaints-handling function such as a proposed Federal Judicial Commission can also play a role in early identification of ethical issues, including those concerning alleged judicial bias, and in providing additional ethical and other types of support to judges where required. In addition, these structures can provide a more transparent and independent process for making and considering complaints about issues around judicial impartiality, where the law on bias and ordinary appeals procedures are unable to adequately respond to litigants' concerns (for example, in relation to unacceptable judicial conduct in court (Problem 6)).

96. Preliminary consultations suggest that a Federal Judicial Commission modelled on the Judicial Commission of New South Wales, with a protective and educative function, would be welcomed by many judges, practitioners, and litigants. As demonstrated by other similar bodies, appropriate filtering mechanisms would need to be established to ensure unmeritorious or vexatious complaints are identified and dismissed early in the process (**JI5, App 1**). Although the ALRC has previously expressed reservations about the constitutionality of such a Commission, it has formed the view that it can be designed in a way that fully respects judicial independence under Chapter III of the *Australian Constitution*.

Enhancing judicial impartiality for all

97. Question 21 seeks views on other steps that should be taken to identify and respond to any negative impacts of implicit social biases and lack of cultural competency on impartial judicial decision-making (Problem 8), and to enhance trust in judicial impartiality

from sections of the community with lower levels of trust (Problem 9). Consultations have suggested that by taking proactive steps or appropriately adjusting courtroom procedures, judges can play an important role in building the trust of litigants who have otherwise had negative experiences in the legal system.

CONSULTATION QUESTION

21 What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

98. The United Kingdom judiciary's Judicial Diversity and Inclusion Strategy 2020-25 provides an example of a judge-led strategy aimed at addressing issues of implicit social bias and cultural competency, in addition to increasing diversity of judicial appointment and supporting judicial officers from different backgrounds.

99. Particular steps that have been suggested in consultations and in the literature (see further **JI6.58**) to address these issues include:

- further development of specialised lists in areas with high numbers of First Nations people;
- facilitating experimental research on the impacts of implicit bias in the context of the Australian judiciary;
- intensive and court-specific sessions on implicit bias and judicial decision-making for judges, including voluntary exposure to biases through implicit association tests (focusing on a wide range of potential implicit biases), followed by sessions for individual reflection and training on strategies to overcome biases;
- endorsement and promotion of an equal treatment bench book (which would ideally be created specifically for each court, with extensive participation from the relevant sections of the community, but could also involve promotion of appropriate bench books from other jurisdictions (**JI5.25–27**));
- strategies to humanise litigants, including procedures for greeting and explaining procedures to them, and for allowing them to attend court proceedings via videolink if they cannot be physically present;
- strategies to address particular challenges faced by lawyers from diverse backgrounds appearing in court;
- disaggregated reporting of feedback from court users on issues of experiences of bias (see further Proposal 23); and
- where appropriate, rotation of judges between different areas of the jurisdiction where implicit biases are most likely to be reinforced by repeated exposure to the same issues.

Collection, analysis, and reporting of data

100. The final set of proposals and consultation questions concern data that could be collected by the Commonwealth courts to provide greater transparency about, and insight into, issues of judicial impartiality and bias.

Collection of data on reallocation for potential bias issues

101. Proposal 22 responds to the concern that Commonwealth courts do not collect data on reallocations, recusal, and disqualification, undermining transparency around how issues of judicial bias are dealt with and the ability to implement improvements to systems (Problem 11). This proposal aims to create a better understanding of when matters are reallocated for issues of potential bias.

CONSULTATION PROPOSAL

22 Commonwealth courts should collect and publish aggregated data on reallocation of cases for issues relating to potential bias.

102. This proposal relates to the situations where:

- a judge approaches the registry or head of jurisdiction when a preliminary allocation of cases is circulated, or
- either a judge or a party approaches the registry after the case has been allocated to a judge, but prior to the first hearing in the matter

(see further **JI2.8–10**).

103. As the reasons for reallocation are not recorded by Commonwealth court registries, there is currently no ability to analyse this data. However, preliminary consultations suggest that these 'invisible recusals' are the most common type of recusal.

104. The ALRC proposes that registries collect and publish information that captures both the overall frequency of reallocation for potential bias issues and the general category of bias (for example, financial interest or relationship to parties). Making this data available to the public in an aggregated form on court websites would increase the transparency of court processes. The data may also assist judges in making determinations as to whether to recuse themselves, as the bulk of case law on disqualification currently provides an explanation of why a judge should sit (see further **JI2.52–56**). It could also inform registries as to whether additional systems could be put into place to minimise the need for reallocation (Question 9) (see further **JI2.31–32**).

105. The ALRC also invites views on whether it would be desirable to extend the information recorded and published by registries to include applications filed for disqualification, the source of potential bias alleged in each application, orders made and reasons given in response to applications, and recusals that occur after the first hearing in each matter.

Structured collection of feedback from court users

106. Proposal 23 and Question 24 address concerns that, while it is not uncommon for some litigants to experience that judges are biased against them, available data is not sufficient to understand fully the extent of these experiences and the underlying reasons for them (Problem 12). Proposal 23 seeks to increase courts' and judges' understanding of how court users experience the court process, and in particular, to help identify any systemic issues (and issues affecting court users from particular demographics) undermining confidence in judicial impartiality.

CONSULTATION PROPOSAL

23 Commonwealth courts should introduce methodologically sound processes to seek structured feedback from court users, including litigants and practitioners, about their satisfaction with the court process, in a way that allows any concerns about experiences of a lack of judicial impartiality to be raised.

107. To ensure that judicial independence is respected, this feedback should not be used as a tool to evaluate judicial 'performance' on an individual basis, but can instead be designed in such a way that it is anonymised and reported in aggregate. In designing such a process, it should not be assumed that litigants who lose their case will necessarily have a negative view of the fairness of the process (and vice versa): research on procedural justice demonstrates that for litigants the process is generally more important to satisfaction than the outcome.

108. Being aware of any significant litigant and practitioner experiences of bias is an important first step in addressing them. This will help to maintain the integrity and efficiency of the courts and equal access to justice, and to uphold public confidence in the administration of justice. Collection of data will help courts to identify any systemic problems that are not being addressed adequately by the existing bias rule, and can be used to inform measures recommended under Proposals 17 and 18.

109. This recommendation is consistent with the International Framework for Court Excellence (IFCE), which commits courts to 'regularly use feedback to measure satisfaction of all court users', 'listen to court users and treat them with respect', 'ensure that all court users are treated equally' and 'report publicly on changes … implement[ed] in response to the results of surveys' (Area 5: Court User Engagement).

110. Although the Federal Circuit Court and Family Court have conducted wide-ranging surveys of court user experiences in the past as part of their commitment to the IFCE, the last of these was carried out in 2014. Feedback from court users in the Commonwealth courts is now sought through separate 'User Groups', which the ALRC understands are generally invitation-only and made up primarily, if not wholly, of legal practitioners. Collecting and analysing feedback in a more structured and inclusive way will require additional resourcing from the Australian Government, but advances in technology mean that this can be done in a time and cost efficient manner.

CONSULTATION QUESTION

24 Are the measures that are already in place in Commonwealth courts to collect feedback from, and measure satisfaction of, court users sufficient and appropriate?

Collection of data relevant to judicial impartiality

111. Question 25 seeks stakeholder views on other types of data that the Commonwealth courts could collect. This could include information relevant to allegedly one-sided decision-making, identified as a problem area for the bias rule (Problem 7). It could also include collection of information to understand or address the systemic and ongoing threats to judicial impartiality relating to social biases and cultural competency (Problem 8); divergent expectations of the court process, the discretionary nature of decision-making in family law, and prior negative experiences of the legal system (Problem 9); and judicial resourcing (Problem 10).

CONSULTATION QUESTION

25 What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

112. A concern raised in consultations is that the data currently collected and provided internally to judges by the court focuses almost exclusively on efficiency (such as clearance rates and reserved judgments lists) (**JI5.30**) and is not balanced by data relevant to procedural fairness or impartiality.

113. One suggestion made in consultations is that courts could collect data on judges' decision-making patterns to better equip judges and the heads of jurisdiction to identify patterns of decision-making that could conceivably raise concerns about a lack of impartiality and undermine public confidence in the administration of justice. Based on the insights from experimental research that judges can control implicit social biases to some extent if they are aware of them, this data could be shared with judges on a confidential basis to enable reflexive practice, rather than for disciplinary purposes (see further **JI6.58**). Used carefully, it is suggested that this could provide an alternative, protective, mechanism to the bias rule, which has increasingly been used to argue that particular judges have demonstrated bias through their past decision-making record (see further **JI1.30**).

114. The ALRC is interested to hear stakeholders' views on these matters, and on any other types of data that could be usefully collected to support judicial impartiality.

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