Australian Government
Australian Law Reform Commission

CONSULTATION PAPER AND
BACKGROUND PAPERS

JUDICIAL IMPARTIALITY

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

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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

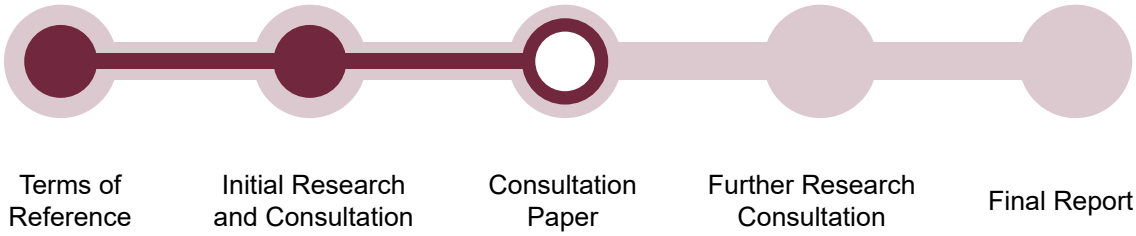
INTRODUCTION

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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BACKGROUND PAPER **JI1**

JUDICIAL IMPARTIALITY

The Law on Judicial Bias: A Primer

December 2020

This primer on the law on judicial bias is the first in a series of background papers to be 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. While the law on actual and apprehended bias is central to the Inquiry's Terms of Reference, the Inquiry will also necessarily consider broader notions of judicial impartiality. Further background papers will be released in early 2021 with more detail on some of the topics covered in this paper, and addressing other issues including theories of judicial impartiality, and specific critiques of law and practice.

The background papers will be followed by the publication in April 2021 of a Consultation Paper containing questions and draft proposals for public comment. A formal call for submissions will be made on its release. Feedback on the background papers is, however, welcome at any point by email to impartiality@alrc.gov.au.

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

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Introduction

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'[1]

1. Any person before a court has the fundamental right to a hearing by a judge who is independent and impartial.[2] In Australia, judicial independence and impartiality[3] are seen as fundamental to the common law system of adversarial trial,[4] to the exercise of judicial power under the Australian Constitution,[5] and to upholding public confidence in the administration of justice.[6] Ensuring impartiality also promotes the important values of treating parties to litigation with equal respect and dignity, which may also enhance litigants' perceptions of the fairness of the process and their sense of 'justice'.[7]

2. A counterpart of this — the rule against bias — is one of the two pillars of natural justice.[8] Australian courts have long recognised that '[t]he public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias'.[9] The rule applies to judges, juries, administrative officials and elected officials in their decision-making (although its content can vary in these differing contexts).[10]

3. Impartiality may be conceptualised in different ways and defining bias can be difficult.[11] However, as Professor Groves explains, for the purposes of administrative law

> the hallmark of bias is insufficient impartiality. The notion of insufficient impartiality reflects an acceptance that no decision-maker is a blank canvas. Judges, tribunal members and administrative officials are a product of their own personal history. They inevitably carry life experience, predispositions and other personal qualities that influence their attitudes, conduct and the decisions they make. The bias rule does not require decision-makers be devoid of those qualities. In fact, many argue that the

1 *Metropolitan Properties Co (FGC) Ltd v Lannon* (1969) 1 QB 577, 599 (Lord Denning MR).

2 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."). See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art. 14.

3 Which are, as Professors Aronson, Groves and Weeks point out, "linked, but different": Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 716 citing *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 All ER 731 [25] (Lady Hale): "[I]mpartiality is the tribunal's approach to deciding cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public". See also the Hon Michael Kirby AC CMG, 'Grounds for Judicial Recusal Differentiating Judicial Impartiality and Judicial Independence' (2015) 40 *Australian Bar Review* 195.

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also Aronson, Groves and Weeks (n 3) 644.

5 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [79]–[80] (Gaudron J). See also *South Australia v Totani* (2010) 242 CLR 1 [62] (French CJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 [119]–[120] (Gageler J).

6 *R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 126 (McInerney J).

7 See further Aronson, Groves and Weeks (n 3) 644; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [1.85]; Sharyn L Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 7–10.

8 The other being the hearing rule: Aronson, Groves and Weeks (n 3) 643. As Professor Groves points out, "[t]he two rules can intersect, such as when excessive judicial intervention is claimed to have caused both unfairness (by precluding a party from adequately presenting its case) and an apprehension of bias (because the interventions are made only to one party)": Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* (forthcoming).

9 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [53] (Nettle and Gordon JJ), citing *Webb v The Queen* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J).

10 Aronson, Groves and Weeks (n 3) 650–51. See further *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [55] (Nettle and Gordon JJ).

11 On different conceptions of impartiality see, eg, Roach Anleu and Mack (n 7) 8–10.

> experience and predispositions that can lead decision-makers to hold preconceptions and opinions which could affect their impartiality, especially if that requirement was applied strictly, are also the very qualities that make people suitable for judicial and other such positions. On this view, experience can inform and assist decision-making, rather than obscure or impede it. These general principles are a key reason why the bias rule requires sufficient rather than absolute impartiality.[12]

4. In other words, 'the bias rule is best understood to require an open mind but not an empty one'.[13]

5. This background paper provides an introductory summary and overview of key aspects of the law on judicial bias as it relates to the Australian federal judiciary, but is not intended to survey the law comprehensively. It draws heavily, although by no means exclusively, from the work of Professors Aronson, Groves and Weeks in *Judicial Review of Administrative Action & Government Liability* (6th ed, 2017), and readers may wish to consult Chapter 9 of that text for further detailed information.

Actual and apprehended bias

6. In Australia, including in relation to the federal judiciary, the law on bias is predominantly found in common law.[14] Two different types of bias may be alleged: actual or apprehended, reflecting the imperative that justice must both be done, and be seen to be done.

7. A claim of actual bias

> requires proof that a decision-maker approached the issues with a closed mind or had prejudged them and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[15]

8. This requires 'cogent evidence that the decision-maker was in fact biased', and is for that reason difficult to prove.[16]

9. Apprehended bias looks instead to perceptions, and considers the matter from the perspective of how it may *appear*. This 'does not require such strong or clear evidence',[17] and does not require any conclusion 'about what factors actually influenced the outcome'.[18] However, 'the courts frequently stress that a claim of apprehended bias will not be upheld lightly'.[19]

12 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 61.
13 Aronson, Groves and Weeks (n 3) 645. See further the discussion at 644–46.
14 Although a number of statutory provisions also criminalise judges exercising jurisdiction in matters in which they have a personal interest: see, eg, *Crimes Act 1914* (Cth) s 14, in relation to the exercise of federal jurisdiction.
15 Aronson, Groves and Weeks (n 3) 652, citing *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 [37]–[39].
16 See further ibid 653.
17 Ibid 654.
18 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing).
19 Aronson, Groves and Weeks (n 3) 654.

The legal test for apprehended bias

10. The test for apprehended bias is

> whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[20]

The focus on the reaction of a fictional member of the public, rather than the court's own view of the situation, was a deliberate choice justified as best aligned with promoting public confidence in judges and the legal system — a key rationale of the rule.[21]

11. In *Ebner v Official Trustee* ('*Ebner*'), the High Court of Australia held that two steps are involved in determining that question.[22] In a recent High Court case, those steps were summarised as follows:

> First, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits. What is said to affect a decision-maker's impartiality? Partiality can take many forms, including disqualification by direct or indirect interest in the proceedings, pecuniary or otherwise; disqualification by conduct; disqualification by association; and disqualification by extraneous information. … Second, a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?[23]

12. The authority of this test has been described as 'not in doubt',[24] however its application to particular facts can be 'far from clear'.[25] Application of the bias rule is 'acutely context sensitive',[26] and there may often be 'limited value to be gained from the facts of other cases'.[27]

The hypothetical lay observer

13. To answer the question of what the 'fair minded and reasonably well informed observer'[28] would think of the situation, the courts use what has been described as a

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20 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [33] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

21 *Webb v The Queen* (1994) 181 CLR 41, 51; *Johnson v Johnson* (2000) 201 CLR 488 [12] (Gleeson CJ, Gaudron, Mchugh, Gummow and Hayne JJ); Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 154.

22 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ): 'First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed'.

23 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [57] (Nettle and Gordon JJ).

24 See, eg, *Antoun v The Queen (*2006) 80 ALJR 497 [82] (Callinan J). Although note the suggestion that the test may be strengthened by a third step as suggested by Gaegler J in *Isbester v Knox City Council* (2015) 255 CLR 135 [59]. See also Groves, 'Clarity and Complexity in the Bias Rule' (n 8). For a similar proposal in the Canadian context see Julia Hughes and Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36 *Dalhousie Law Journal* 171.

25 *Kirby v Centro Properties Ltd* (No 2) (2008) 172 FCR 376, 382 (Finkelstein J).

26 Aronson, Groves and Weeks (n 3) 656.

27 Ibid.

28 Aronson, Groves and Weeks point to other terms used, including "fair minded people", a "fair-minded observer", a "lay observer", a "reasonable or fair-minded observer", a "reasonable person" and a "fair-minded, informed lay observer": Ibid 665.

'kind of thought experiment'.[29] As former Family Court Judge Professor the Hon Richard Chisholm AM explains:

> Since the court determining the bias question has no evidence about what the public actually thinks – and the public does not in fact know about the situation – it has to guess.[30]

14. Professor Chisholm continues: '[t]o make this sort of thought experiment workable, we have to make some assumptions, about the people envisaged'.[31] The Hon Justice MD Kirby AC CMG described the hypothetical observer's qualities as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[32]

15. More recently the hypothetical observer has been described as, among other things:

> (1) taken to be reasonable; (2) does not make snap judgments; (3) knows commonplace things and is neither complacent or unduly sensitive or suspicious; (4) has knowledge of all the circumstances of the case; and (5) is an informed one who will have regard to the fact that a judicial officer's training, tradition and oath or affirmation, equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial.[33]

16. Professor Groves has argued that this hypothetical observer is 'clearly an ideal rather than an ordinary or typical person'. In his view

> the observer does not represent judicial conceptions of a normal or reasonable person, but instead the kind of person who judges feel is suitable to make key decisions about the bias rule. This creature of virtuous reason is clearly one we would like … to make decisions which are important to the parties and the community.[34]

17. There is criticism in the case law and literature of the artifice of the hypothetical observer and/or the degree of specialist knowledge and confidence in the impartiality of judges that is attributed to her or him.[35] According to Justice Kirby, deciding a case almost fifteen years ago, the observer had been 'stretched virtually to snapping point', and it was a fiction to consider that it provides an objective standard in place of the views of the judge making the decision.[36] It has been suggested that the circular reasoning often involved does little to enhance public confidence in judges and the legal system,

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29 Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29 *Australian Family Lawyer* 18, 30. Professor Chisholm draws parallels to the "pub test" used in political and public commentary.

30 Ibid.

31 Ibid 31.

32 *Johnson v Johnson* (2000) 201 CLR 488 [53].

33 *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 [21] (Besanko, Flick and Abraham JJ).

34 Groves, 'Bias by the Numbers' (n 12) 69.

35 For a summary of some of these criticisms see Aronson, Groves and Weeks (n 3) 670–71. See further Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388; Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <https://auspublaw.org/2015/09/apprehended-bias/>; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928; Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 380–81; Groves, 'Bias by the Numbers' (n 12).

36 *Smits v Roach* (2006) 227 CLR 423 [96]-[97]. See also Groves, 'Bias by the Numbers' (n 12) 69.

as intended.[37] Some have suggested returning to the earlier position where apprehended bias was explicitly decided by reference to the views of the court.[38] Others have urged partial codification of the law 'to identify circumstances where judges should and should not sit', determined by reference to *actual* public perception as measured by empirical methods, the science on decision making and legal policy considerations.[39]

18. On the other hand, while acknowledging the limitations of the hypothetical observer, others see the construct as retaining value.[40] Among them is the Hon Chief Justice RS French AC, who said in *British American Tobacco Australia Services Ltd v Laurie* that the

> interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. … However, the utility of the construct is that it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations. While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area. [41]

Circumstances that may give rise to allegations of bias

19. In *Webb v The Queen*, the Hon Justice WP Deane AC KBE identified four categories of case in which a reasonable apprehension of bias may arise: interest, conduct, association and extraneous information.[42] This categorisation, while involving some potential overlap, and not considered completely comprehensive, has been acknowledged as 'a convenient frame of reference' for determining whether an apprehension of bias has arisen.[43] A separate sub-category, 'prejudgment', although part of 'conduct', is increasingly seen as a useful addition to this list.[44]

20. Professor Simon Young has suggested that, in trying to navigate the difficulties faced by the hypothetical lay observer discussed above, the Courts are increasingly developing 'somewhat tailor-made principles' for different sub-categories of bias, including 'prejudgment'.[45] In his view, although this creates certain challenges (among them increasing 'intricacy and variability in the application of the rules'),

> the principled guidance offered by the new tools of 'calibration' can help to make the tiring lay observer test more predictable and sustainable — in a sense they allow the courts to carefully tailor the lay observer's brief to help them navigate the contemporary contests.[46]

37 Groves, 'Bias by the Numbers' (n 12) 69. See also Higgins and Levy (n 35) 380–81.
38 Olowofoyeku (n 35).
39 Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 394.
40 See, eg, Young (n 35) 955; Aronson, Groves and Weeks (n 3) 675; Campbell and Lee (n 21) 157.
41 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [48] (French CJ).
42 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
43 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [24].
44 Young (n 35) 949–51; Aronson, Groves and Weeks (n 3) 672, 687–705.
45 Young (n 35) 954.
46 Ibid 954–55.

Interest

21. The first category of bias is enlivened when a judge has an interest, whether direct or indirect, in the outcome of a decision.[47] As the court explained in *Ebner*, the mere existence of an interest will not result in automatic disqualification; a party alleging bias must articulate a logical connection between the interest of the judge and the prejudicial outcome.[48] This would certainly include where the judge is a party to the case, either directly or through an alter ego.[49] Other potentially disqualifying interests include business, professional or other commercial relationships, such as shareholdings in litigant companies, and even a 'strong commitment to a cause relevant to a party or a case'.[50]

22. While 'interest' is not limited to financial interests,[51] it arises most commonly in this context. For an economic interest to result in disqualification, it must be 'a not insubstantial, direct, pecuniary or proprietary interest'.[52] In *Ebner*, a minor shareholding in a litigant corporation was insufficient to give rise to a reasonable apprehension of bias, as the outcome of the litigation had no logical impact on the financial value of the shares.[53]

Conduct

23. Apprehension of bias may also be derived from the behaviour of a judge, whether in the course of or outside of proceedings.

24. In some cases, a judge who is not disqualified at the outset of a hearing becomes disqualified due to their conduct during the hearing. This may happen, for example, where a judge engages in private communication with one of the parties, a witness or legal representative, without the knowledge or consent of the other party.[54]

25. Conduct in the course of proceedings also extends to a judge's demeanour and tone in court. While occasional displays of impatience, irritation, sarcasm or rudeness are unlikely to be of such a nature and extent that the *Ebner* test is satisfied,[55] excessive, prolonged or particularly harsh interventions may give rise to a reasonable apprehension of bias. In the recent Family Court decision of *Adacot & Sowle*, frequent interventions described as 'cruel, insulting, humiliating and rude' directed at legal counsel were sufficient to give rise to the reasonable apprehension of bias.[56]

26. Apprehension of bias may also arise from judicial conduct outside of proceedings.[57] Judges are advised to carefully consider whether their extrajudicial activities are aligned with the appearance of impartiality. This includes membership of government

47 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
48 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
49 Ibid [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
50 Aronson, Groves and Weeks (n 3) 676. See, eg, *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* (2000) 1 AC 119. See further Aronson, Groves and Weeks (n 3) 672–77.
51 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
52 Ibid [58].
53 Ibid [35].
54 Campbell and Lee (n 21) 159. However, for a recent case where a majority of the Family Court of Australia Full Court found that numerous instances of private contact between a judge and counsel for a party did not give rise to a reasonable apprehension of bias see *Charisteas v Charisteas* (2020) 60 Fam LR 483. The case is currently subject to an application for special leave to appeal to the High Court. For a critique of the majority's reasoning, see Chisholm (n 29).
55 *Galea v Galea* (1990) 19 NSWLR 263, 281; *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 131 FCR 102.
56 *Adacot & Sowle* [2020] FamCAFC 215 [117].
57 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

bodies, participation in public debate, political activity, and engagement with community organisations.[58] The actual or apprehended bias test remains the primary consideration.

Prejudgment

27. An apprehension of bias may arise if a judge's comments or behaviour suggest that the matter has been subject to prejudgment. Such a finding will arise where 'an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion'.[59]

28. Judicial decision-makers are not expected to enter proceedings with a blank mind, but they must not be 'so committed to a conclusion already formed as to be incapable of alteration'.[60] This does not mean that a judge must remain silent throughout proceedings. Indeed, to do so is regarded as poor judicial conduct.[61] A judge may express preliminary or tentative views during proceedings, express doubts, or seek clarification without creating an apprehension of bias.[62] These statements should not be peremptory, however, and must not express firm views without allowing counsel to present their arguments.[63]

29. Issues of prejudgment may also arise where a judge has separately determined issues relating to one of the parties. In *British American Tobacco,* 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.[64] 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'.[65]

30. Predispositions or inclinations to determine a matter in a particular way are not, however, prohibited by the bias rule, unless they are 'sufficiently specific or intense' to amount to prejudgment.[66] Claims of apprehended bias based on a judge's gender or ethnicity (and alleged concomitant unconscious prejudice) have not been upheld.[67] In some cases, litigants have used a judge's prior record of decisions (including by use of statistics) to argue that the judge is predisposed to certain views about particular types of cases or litigants and that it is impossible for the judge to hear the case with an open mind.[68] This was argued, for example, in *ALA15 v Minister for Immigration and Border Protection*, where the applicant provided statistics to show that, out of the 254 migration matters a Federal Circuit Court judge had decided, 100% were delivered *ex tempore*, and

58 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 23–28.
59 Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 950 citing *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [15]–[18] (Spigelman CJ). See also Aronson, Groves and Weeks (n 3) 686.
60 *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 [72]. See *MZZLO v Minister for Immigration and Border Protection (No 2)* [2016] FCA 356 [75].
61 *Vakuata v Kelly (1989)* 167 CLR 568, 571.
62 *Anderson v National Australia Bank* [2007] VSCA 172 [81].
63 *Antoun v The Queen* (2006) 80 ALJR 497 [19]–[24].
64 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.
65 Aronson, Groves and Weeks (n 3) 699, citing *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, 495.
66 Ibid 685; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531 (Gleeson CJ and Gummow J).
67 See further Aronson, Groves and Weeks (n 3) 686.
68 See, eg *Vietnam Veterans' Association of Australia (New South Wales Branch Inc) v Gallagher* (1994) 52 FCR 34; *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; *BDS17 v Minister for Immigration and Border Protection* (2018) 76 AAR 246; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

no contested cases were decided in the applicant's favour.[69] To date, such arguments have not been accepted, although these decisions have been subject to some criticism.[70]

Association

31. A judge's association with a party may also result in an apprehension of bias.[71] This includes relationships with family members, personal friends, counsel, witnesses or organisations that may suggest a lack of impartiality.[72] Whether a reasonable apprehension of bias arises depends on the nature and extent of the relationship and the application of the *Ebner* test. Ultimately, the question is whether the reasonable observer would consider that the existence of the association might 'divert the judge from deciding the case on its merits'.[73]

32. In examining this requirement, the *Guide to Judicial Conduct* (see further 57–59) suggests that while current business associations may be grounds for disqualification, past professional associations or arms-length relationships are unlikely to provide a compelling reason for disqualification.[74] Similarly, past professional association with counsel is not in itself a sufficient reason for disqualification.[75] Especially in regional jurisdictions, it is common for judicial officers and legal counsel to be acquainted and/or friendly. In most jurisdictions, Bar Rules require a barrister to return a brief if their relationship with the judge might 'give rise to the apprehension that there may not be a fair hearing', which may reduce the necessity for judges to disqualify herself or himself on this basis.[76] Where the relationship between a judge and legal counsel goes beyond general friendship or professional association (such as an intimate relationship), however, a reasonable apprehension of bias is likely to arise.[77]

Extraneous information

33. The last category of bias identified by Deane J arises where a judge or other decision-maker has knowledge of some prejudicial but inadmissible fact or circumstance that prevents them from bringing an impartial mind to the decision.[78] A recent example is the case of *CNY17 v Minister for Immigration and Border Protection*, where irrelevant and prejudicial information about the applicant was provided to the Immigration Assessment Authority during the 'Fast Track Review' of his protection visa application.[79] In that case, the High Court was split as to whether the informed observer would consider there was a realistic possibility that knowledge of the material would play on the subconscious of the Authority, with the majority holding that it could.[80] As such, a fair-minded lay observer might apprehend a lack of impartiality on the part of the Authority.

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69 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [11].
70 For a critique of this and other decisions see Groves, 'Bias by the Numbers' (n 12).
71 *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87.
72 *S&M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1998) 12 NSWLR 358, 396.
73 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [30]. See further *Smits v Roach* (2006) 227 CLR 423 [58] in which the High Court held that the familial relationship between the judge and his brother (who was a partner at a law firm interested in the proceedings) was not sufficient to give rise to a reasonable apprehension of bias).
74 Australasian Institute of Judicial Administration (n 58) 16.
75 Ibid.
76 See, for example, *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)* s 105(l).
77 *Kennedy and Cahill* (1995) 118 FLR 60.
78 *Webb v The Queen* (1994) 181 CLR 41, 74.
79 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47, 17.
80 Ibid [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J) cf. [43] (Kiefel CJ and Gageler J).

Exceptions to the bias rule

34. At least two — and perhaps three — exceptions may preclude the application of the bias rule in a particular case.[81]

Waiver

35. A party allegedly injured by bias (or their agent) may waive their right to object where such waiver is 'fully informed and clear'.[82]

36. In terms of the level of knowledge required, parties must have 'full knowledge of all the facts relevant to the decision whether to waive or not'.[83] Professor Groves explains how in some cases, the

> point at which this level of knowledge is reached may be difficult to gauge because the detail in support of a bias claim may accrue slowly during the course of a hearing. Sometimes that tipping point may be difficult, almost impossible, to identify.[84]

37. In one such case, concerning excessive judicial intervention, the Judge on appeal considered that the issue of waiver did not arise because there was no 'inescapable point' at which counsel should have complained.[85]

38. Waiver can be made expressly or — more commonly — impliedly, such as by failing to object. A party (and especially a party with legal representation) certainly cannot 'stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground [of apprehended bias]'.[86] However, courts will adjust their view of whether a failure to object is clear enough to amount to waiver depending on whether or not a party is represented, and are more willing to consider that silence does not amount to waiver where a party is unrepresented.[87]

39. Once the party has sufficient knowledge of the relevant facts, any application must be made promptly, although here a certain degree of flexibility (of a day or two) is given even to experienced counsel.[88]

40. Some commentators and judges have expressed discomfort with the very notion of waiver in clear cases of bias.[89] Kirby J, in particular, was critical of this exception, arguing that allowing waiver requires 'the appellate court [to] simply ignore the complaint', damaging

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81 A third exception applies to bias of non-judicial decision-makers. For such decision-makers, the rule on bias may be modified or abrogated by statute: see further Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285; Aronson, Groves and Weeks (n 3) 724–25. Campbell and Lee (n 21) 165–66.

82 Matthew Groves, 'Waiver of Natural Justice' (2019) 40 *Adelaide Law Review* 25, 651. See further Aronson, Groves and Weeks (n 3) 715; Matthew Groves, 'Waiver of the Rule against Bias' (2009) 35(2) *Monash University Law Review* 315; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 (Gummow ACJ, Hayne, Crennan and Bell JJ).

83 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [15]. See further Groves, 'Waiver of Natural Justice' (n 82) 651; Aronson, Groves and Weeks (n 3) 717–18.

84 Groves, 'Waiver of Natural Justice' (n 82) 651 citing *Johnson v Johnson* (2001) 201 CLR 488 [79] (Callinan J) and *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [34].

85 *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [34] (Basten J).

86 *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ). Although the reserved judgment may provide fresh grounds for a fresh apprehension of bias: at 579 (Dawson J).

87 Groves, 'Waiver of Natural Justice' (n 82) 651–2.

88 Ibid 652. See further *Johnson v Johnson* (2000) 201 CLR 488 [517]–[518]; *John Fairfax Publications Pty Ltd v Maurice Kriss* [2007] NSWCA 79 [26]-[27].

89 See, eg, Campbell and Lee (n 21) 171–72. They note that legislation in the United States has limited the circumstances in which federal judicial officers may accept waiver of disqualifying causes.

the community's confidence in the impartiality of the judicial system.[90] Professors Enid Campbell and HP Lee suggested that it was arguable that the common law on waiver had been modified by the Constitution, at least in respect of the federal judiciary, because

> the rule against bias is one of the rules which defines essential elements in the performance of judicial functions, and that in consequence, parties to litigation before courts exercising a federal jurisdiction cannot be allowed, by their agreement, to waive the rule.[91]

41. Nevertheless, the High Court has continued to endorse the exception and considers it 'well established'.[92]

Necessity

42. Another exception to the bias rule is the doctrine of necessity. Although the parameters of the exception remain somewhat unclear, it is generally considered to apply to prevent a failure of justice where there is no alternative decision-maker who can sit (or where any alternative decision-makers would suffer from the same complaint of bias).[93] Such a situation might arise, for example, if High Court judges were required to consider the constitutionality of a statute concerning their own remuneration.[94] Although different judges have favoured different scopes of application, in determining such cases, courts will usually balance a range of factors. In *Metropolitan Fire & Emergency Services Board v Churchill* the Hon Justice EW Gillard surveyed the authorities and said that the factors to be considered and weighed up included

> the qualifications and experience of the adjudicator, the nature of the bias, the degree and gravity of the bias, whether it is pecuniary, actual or perceived, the conduct of the parties, whether there is a right of appeal and the public interest where applicable.[95]

43. If it is possible to appoint another decision-maker the exception of necessity will usually not apply.[96] However, the case law shows that 'this is not an inflexible rule and there may be circumstances where the doctrine should apply because not to do so, would result in enormous cost or substantial delay'.[97]

A further exception: special circumstances?

44. Some cases have suggested that an exception to the bias rule may also be made in 'special circumstances', however this has not been successfully invoked and there is little clarity on what those circumstances may be.[98] It has been suggested that this exception

90 *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, 687. See also *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541.
91 Campbell and Lee (n 21) 172.
92 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 (Gummow ACJ, Hayne, Crennan and Bell JJ).
93 Aronson, Groves and Weeks (n 3) 723.
94 Campbell and Lee (n 21) 166.
95 *Metropolitan Fire & Emergency Services Board v Churchill* [1998] VSC 51 [159]. See further Aronson, Groves and Weeks (n 3) 721–24.
96 *Metropolitan Fire & Emergency Services Board v Churchill* [1998] VSC 51 [149].
97 Ibid.
98 *Livesey v NSW Bar Association* (1983) 151 CLR 288, 299–300 (Mason, Murphy, Brennan, Deane and Dawson JJ). See further Aronson, Groves and Weeks (n 3) 725–27.

> if deployed thoughtfully, has the potential to apply where a strict application of the rule against bias would lead to grossly inefficient results, and where the appearance of bias — arising from a tentative finding made on an interlocutory basis — is minimal.[99]

45. However, others have warned against the exception — seen as an alternative to 'the rare and cautiously used exception of necessity' on the basis of 'mere convenience'.[100] Professors Aronson, Groves and Weeks suggest that a number of the cases potentially raising 'special circumstances' can be decided under the doctrine of necessity, while other cases raising particular difficulties may be accommodated by special procedures, rather than by allowing an apprehension of bias to stand.[101]

Procedures for upholding the bias rule

46. Procedures for upholding the bias rule derive from common law, ethical obligations and court practice.

The self-recusal procedure

Judicial disclosure of potentially disqualifying circumstances

47. Judges have an ethical obligation to disclose 'facts which might reasonably give rise to a perception of bias or conflict of interest' to the parties. However, the decision as to whether or not it is appropriate to sit rests with the judge concerned.[102]

48. To minimise risks of disqualification in particular cases, some courts have developed precautionary administrative practices to listing arrangements. Justice Kirby explained that in the New South Wales Court of Appeal, for example, if

> a judge has had any connection, even indirect, with litigation that comes before the court, he or she will so indicate when the list of sitting arrangements is distributed. A substitution will then be arranged.[103]

49. Once a case is allocated to a judge, if issues of potential bias exist, the judge will usually make disclosure to the parties informally, such as through a letter to the parties, or in court.[104] The judge may consider that she or he should decline to sit, and a substitute will be arranged.[105] Where a judge is uncertain, they are encouraged to discuss the matter with colleagues, and where necessary the head of jurisdiction, person in charge of listing, and the parties.[106] If the judge does not recuse herself or himself, they should give reasons in open court and it will then be open to the party potentially injured by the disclosed circumstances to waive a claim of bias based on those circumstances or to make an application for recusal.[107]

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99 Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761, 779. See, eg, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411.

100 *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 422 (Kirby P).

101 Aronson, Groves and Weeks (n 3) 726–727, referring to *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 and *BHP Billiton Ltd v District Court of South Australia* (2012) 112 SASR 494.

102 Australasian Institute of Judicial Administration (n 58) 12; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 90.

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

104 Appleby and McDonald (n 102) 90; Australasian Institute of Judicial Administration (n 58) 17.

105 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 369. See further Australasian Institute of Judicial Administration (n 58) 17.

106 Australasian Institute of Judicial Administration (n 58) 17.

107 Appleby and McDonald (n 102) 90. As to the requirement to give reasons see Australasian Institute of Judicial Administration

50. Though judges must eschew bias, there is a countervailing imperative. Balanced against the risk of cost, delay and reputational damage associated with a possible claim of bias is a 'strong presumption that judges will approach a matter with an impartial mind and not stand aside without good reason'.[108] It has been said that judges should be slow to accept a call for disqualification because of an allegation of bias, as doing so is an abdication of duty and encourages procedural abuse and judge-shopping.[109] However, especially before proceedings have begun, there is support for a precautionary approach where there is an arguable question of bias (subject to particular considerations concerning final courts of appeal).[110]

Deciding applications for recusal

51. If a party believes that a reasonable apprehension of bias has arisen during proceedings, they may make an application for disqualification to the judge.[111] The practice in Australia and throughout much of the common law world is that the judge against whom bias is alleged decides whether or not actual or apprehended bias is made out.[112] This is almost always the case, even on multi-member courts — the judge who is the target of the application determines the question at first instance, rather than the full court.[113]

Appeal and review

52. Some uncertainty remains about the extent to which decisions not to recuse are immediately appealable in superior courts of unlimited jurisdiction such as state Supreme Courts (although bias will form a potential ground of appeal in any interlocutory or final appeal).[114] However, immediate review is available from a recusal decision of a judge of the Federal Court, Family Court or Federal Circuit Court. This is because decisions of inferior courts (including the Federal Circuit Court), and superior courts of limited jurisdiction (including the Federal Court and Family Court) may be challenged by a writ of prohibition to prevent the court hearing and determining the case.[115] Relief in such cases is discretionary. Where an application for judicial review is successful and the court finds a reasonable apprehension of bias, the matter will generally be remitted to the relevant court to be heard by a different judge.[116] Again, alleged actual or apprehended bias may also form a ground of appeal in any interlocutory or final appeal.

53. On the other hand, it is not entirely clear that the High Court, as a final court of appeal, has jurisdiction to review a decision of one of its own members not to recuse herself or himself.[117] It has been argued that jurisdiction for such review can be found in either s 31 of the Constitution or in the inherent jurisdiction of the court to protect its processes

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(n 58) 18.

108 Aronson, Groves and Weeks (n 3) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

109 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [17]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20]. See further Australasian Institute of Judicial Administration (n 58) 18.

110 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *AWG Group Ltd v Morrison* (2006) 2 WLR 1163 [9]. See further Appleby and McDonald (n 102) 92, 109.

111 *Bainton v Rajski* (1992) 29 NSWLR 539, 544.

112 Appleby and McDonald (n 102) 90.

113 Ibid.

114 See Aronson, Groves and Weeks (n 3) 727–29; Appleby and McDonald (n 102) 91.

115 Appleby and McDonald (n 102) 91, citing *Re Gray; Ex parte Marsh* (1985) 157 CLR 351, 373 (Gibbs CJ), 374 (Mason J), 384–6 (Deane J), 393–4 (Dawson J). See also Enid Campbell, 'Review of Decisions on a Judge's Qualification to Sit' (1999) 15 *Queensland University of Technology Law Journal* 1, 1–2.

116 See *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 266 (Barwick CJ, Gibbs, Stephen and Mason JJ).

117 Appleby and McDonald (n 102) 110. See also Campbell (n 115).

or uphold the Constitution.[118] It has also been suggested that appellate courts, including the High Court, should determine disqualification objections by all members of the court as constituted, rather than by the judge who is the subject of the application.[119] This would obviate the need for appeal, except where information giving rise to the objection is revealed after judgment is delivered.[120]

Criticisms of the current approach

54. The self-recusal procedure has been subject to considerable criticism.[121] At its most basic, Professors Campbell and Lee suggest that some

> may think it strange that when a party to litigation submits that the judge listed to decide a case is disqualified, that judge should be the one who has to rule on whether he or she is disqualified.[122]

55. In a wide-ranging critique of the procedures, Professor Gabrielle Appleby and Stephen McDonald argue that behavioural psychology research shows how cognitive biases make it particularly difficult for anybody, including judges 'to bring an impartial mind to an application that concerns their own conduct'.[123] It is unlikely that a litigant raising a claim of apprehended bias or an interested member of the public will be satisfied by the same judge ruling on the matter — thereby risking 'undermining one of the underlying objectives of the rules of procedural fairness: to maintain and promote public confidence in the impartiality of the judiciary'.[124] The procedure also presents a dilemma for lawyers, who may be deterred from making applications to disqualify judges, as it can be seen as an insult to the honesty and integrity of the judicial officer.[125] These issues are heightened where the apprehension of bias claim rests on contested facts.[126]

56. Considered at the most fundamental level, former Chief Justice of the High Court of Australia, Sir Anthony Mason, questioned whether the practice of recusal has kept pace with the changing scope of the law on bias. In his view, the current practice of self-recusal was justified when the only question was whether a judge was actually biased, as the judge concerned is best placed to determine that question. However, this justification no longer holds now that the bias rule is concerned equally with appearances, and recusal is also required in cases where a reasonable apprehension of bias exists.[127] Although issues of efficiency and case management are important considerations, it has been argued that alternative procedures may better reflect the scope and rationale of the rule on bias, and contribute to greater public confidence in the administration of justice.[128]

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118 Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1998) 73 *Australian Law Journal* 72, 73; Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 *Constitutional Law and Policy Review* 21, 27; Campbell (n 115) 1; Appleby and McDonald (n 102) 111–12. Final courts of appeal in the United Kingdom and New Zealand have reviewed their own judgments for alleged apprehended bias of one of their members, based on their inherent jurisdiction: see further Ibid 110–11.

119 Mason (n 118) 27; Appleby and McDonald (n 102) 112.

120 Appleby and McDonald (n 102) 112.

121 See, eg, Appleby and McDonald (n 102); Campbell and Lee (n 21) 167–69; Mason (n 118); Olijnyk (n 35); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185] (Callinan J). See also Julia Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53 *Osgoode Hall Law Journal* 853, 894.

122 Campbell and Lee (n 21) 167.

123 Appleby and McDonald (n 102) 95.

124 Ibid 98.

125 Charles, Gardner, Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30 *Review of Litigation* 671, 678. See also ibid 97.

126 Ibid 101–05.

127 Mason (n 118) 24.

128 See, eg. Appleby and McDonald (n 102); Campbell and Lee (n 21) 169–70.

The Guide to Judicial Conduct

57. In addition to guidance given by case law, the judiciary has in the past two decades developed its own *Guide to Judicial Conduct* to assist judges to navigate difficult ethical areas, including in relation to judicial impartiality and perceptions of bias. The Guide, first published under the auspices of the Council of Chief Justices of Australia in 2002, is now in its third edition.[129] The preface to the current edition draws a clear link between judicial conduct and public confidence, stating that the Guide:

> provides principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances. It is by maintaining the high standards of conduct to which the Guide aspires that the reputation of the Australian judiciary is secured and public confidence in it maintained.[130]

58. The Guide emphasises the central role and importance of judicial impartiality (notably without defining it), alongside independence and integrity.[131] A great deal of the Guide provides suggestions on how issues around impartiality and bias may arise and be addressed — including in a judge's private life and by conduct in court.[132]

59. Although published under the auspices of considerable collective authority, the Guide is expressly stated to be generally non-binding.[133] It emphasises that in difficult or uncertain situations, the primary responsibility of deciding which course of action to take rests with an individual judge. However it 'strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction'.[134] This may explain why although some cases look to the Guide as evidence of what may be considered to give rise to an apprehension of bias, many do not consider it directly.[135]

129 Australasian Institute of Judicial Administration (n 58).
130 Ibid ix.
131 Ibid 5.
132 Ibid. See in particular Chapters 3 and 4.
133 Ibid 1.
134 Ibid 2.
135 For a recent case where judges reaching different conclusions on apprehended bias did each refer to the Guide, see *Charisteas v Charisteas* (2020) 60 Fam LR 483 [32]–[34], [135]–[137].

Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI2**

JUDICIAL IMPARTIALITY

Recusal and Self-Disqualification

March 2021

Updated April 2021

This paper on recusal and self-disqualification procedures is the second in a series of background papers being released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality ('the Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. A primer on the law on judicial bias (December 2020) was the first in this series. Further background papers will be released addressing issues including the federal judiciary, critiques of the test for apprehended bias, implicit bias in judicial decision-making, and ethical infrastructure for judicial officers.

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

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

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State of Australian procedure

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

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

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

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

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

A) recuses of her or his own motion; or

B) discloses the conflict and invites submissions from parties.

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

8 Hammond (n 5) 144.

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

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

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

Precautionary practices at the allocation stage

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

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

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

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

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

Judicial disclosure

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

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

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

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

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

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

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

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

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

Application

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

Decision and review

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

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23 Australasian Institute of Judicial Administration (n 10) 11.
24 Ibid 12.
25 Ibid 18.
26 *Taylor v Lawrence* [2003] QB 528 [64].
27 See, eg, Gabrielle Appleby and Stephen McDonald, 'Disqualification of Judges and Pre-Judicial Advice' (2015) 43 *Federal Law Review* 201, 203, discussing Gageler J's decision not to sit in *Unions NSW v New South Wales* (2013) 252 CLR 530.
28 Australasian Institute of Judicial Administration (n 10) 18; Appleby and McDonald (n 4) 90.
29 This includes in New South Wales. See Andrew Morrison, Kylie Weston-Scheuber and Tim Goodwin, 'Apprehended Bias: To Recuse or Not to Recuse?' (Commbar Civil Procedure Committee CPD, 22 November 2018) 22–3.
30 Ibid; *Comcare v John Holland Rail Pty Ltd (No 3)* [2011] FCA 164 [79]; *Margarula v Northern Territory* (2009) 175 FCR 333 [32]–[38]; *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [18]–[23].
31 Australasian Institute of Judicial Administration (n 10) 17.
32 Ibid 18. This practice is a matter of convention rather than law. See, eg, Callinan J in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185].
33 Appleby and McDonald (n 4) 90.
34 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; Australasian Institute of Judicial Administration (n 10) 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Criticisms

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

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

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

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

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45 Geyh (n 11) 720.

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

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

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

49 Geyh (n 11) 677–9.

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

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

52 Appleby and McDonald (n 4) 97.

53 Hammond (n 5) 148.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reforms

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

Minimising the need for recusal and disqualification

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

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

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

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

Referral of the decision on bias to another judge

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

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

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

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

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

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

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

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

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

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

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

77 Mason (n 44) 26.

78 Hammond (n 5) 80.

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

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

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

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

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

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

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

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

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

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

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

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

88 See Scenarios 3 and 4 above.

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

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

91 Geyh (n 11) 728.

92 Higgins and Levy (n 48) 390.

93 Ibid.

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

Appeal processes

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

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

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

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

Reasons for recusal

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

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

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

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

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

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

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

Bias applications before appellate courts

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

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

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

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

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

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

Conclusion

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

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

106 Hughes and Bryden (n 6) 895.

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

108 Appleby and McDonald (n 4) 106–7.

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

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

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

112 Hughes and Bryden (n 6) 895.

113 See Barns (n 61).

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

Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI3**

JUDICIAL IMPARTIALITY

The Federal Judiciary – the Inquiry in Context

March 2021

This paper on the federal judiciary 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) and *Recusal and Self-Disqualification Procedures* (March 2021). Further background papers will be released addressing issues including critiques of the test for apprehended bias, implicit bias in judicial decision-making, and ethical infrastructure for judicial officers.

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

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

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Introduction

1. The Terms of Reference for this Inquiry ask the ALRC to consider '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.' The ALRC does not interpret the Terms of Reference as suggesting that the principles or standards of conduct appropriate to the judicial office vary as between members of the federal judiciary and those who comprise the judiciaries of the states and territories. Nevertheless, the focus of this Inquiry is limited to an analysis of how the existing laws relating to impartiality and bias have been understood and applied within those courts that comprise the federal judiciary within the Commonwealth of Australia.

2. This background paper provides an overview of the composition of the federal judiciary, the jurisdiction of the Commonwealth courts, the workload of those courts, and the frequency of complaints against judicial officers (noting that such complaints may not necessarily be in relation to an allegation of impartiality or bias). This data has been sourced from the Annual Reports of each of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia, and is current as at 30 June 2020 unless otherwise stated.

3. This background paper also provides an empirical analysis of available information as to the frequency with which applications are made to federal judicial officers for those officers to recuse themselves from a matter on the ground of actual or apprehended bias. The paper seeks to inform an understanding of the extent to which issues of actual and apprehended bias are raised by parties within the context of the overall workload of the federal judiciary, the rate at which such applications are granted, and the sources of bias most commonly recorded.

Composition of the federal judiciary

4. Chapter III of the *Australian Constitution* establishes the High Court of Australia and empowers parliament to create other Commonwealth courts and to vest federal judicial power in state and territory courts.

5. There are four Commonwealth courts and these four courts are the focus of this Inquiry: the High Court of Australia ('High Court'), the Federal Court of Australia ('Federal Court'), the Family Court of Australia 'Family Court'), and the Federal Circuit Court of Australia ('Circuit Court'). The latter two Courts will be merged to become the Federal Circuit and Family Court of Australia consequent upon the passage of the Federal Circuit and Family Court of Australia Bill 2019 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 by both Houses on 18 February 2021.

6. The High Court consists of seven Justices, each appointed until the age of 70. Full Court Sittings (two or more Justices) are mostly held in Canberra, the seat of the Court, but can be at any place, on any day, as fixed by a rule of Court if warranted by the amount of business. It is common for Constitutional Cases to be heard by all seven Justices, and for appeals to be heard by five or seven Justices. The Court must grant leave or special

leave to appeal before an appeal is heard.[1] Special leave applications are examined by a panel of Justices, usually two, and can be granted or refused with or without oral argument.[2]

7. The Federal Court is currently constituted by 53 judges, three of whom hold positions as members of other courts or tribunals which occupy all, or most, of their time. In addition, officers of the Court are appointed by the Chief Executive Officer and Principal Registrar under s 18N of the *Federal Court of Australia Act 1976* (Cth). These officers include a District Registrar for each District Registry, Registrars and Deputy District Registrars as necessary, a Sheriff and Deputy Sheriffs as necessary, and Marshals under the *Admiralty Act 1988* (Cth). Registrars perform statutory functions pursuant to various Commonwealth statutes and also exercise various powers delegated by judges under the *Federal Court of Australia Act, Bankruptcy Act 1966* (Cth)*, Corporations Act 2001* (Cth), and *Native Title Act 1993* (Cth). There are currently 44 Registrars of the Court.

8. The Family Court is currently constituted by 33 judges, including the Chief Justice and Deputy Chief Justice. Of those 33, 10 are assigned to the Appeal Division. In addition, there are 42 Registrars who provide support to both the Family Court and the Circuit Court.

9. The Circuit Court is currently constituted by 68 judges, including the Chief Judge (who is also the Chief Justice of the Family Court).

Jurisdiction of the Commonwealth courts

The High Court of Australia

10. Section 71 of the *Australian Constitution* vests the judicial power of the Commonwealth in the High Court, in such other Commonwealth courts as the Parliament creates, and in such other courts as it vests with federal jurisdiction.

11. The High Court has original jurisdiction in matters defined by s 75 of the *Constitution* and original jurisdiction conferred by laws made by the Parliament under s 76 of the *Constitution*, including in any matter:

- arising under the *Constitution* or involving its interpretation;
- arising under any laws made by the Parliament;
- of Admiralty and maritime jurisdiction;
- relating to the same subject-matter claimed under the laws of different States.

12. The High Court also has jurisdiction to hear electoral disputes as the Court of Disputed Returns under s 354 of the *Commonwealth Electoral Act 1918* (Cth).

The Federal Court of Australia

13. The Federal Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary and indictable criminal matters.

1 See, eg, *Judiciary Act 1903* (Cth) Pt V; *Federal Court of Australia Act 1976* (Cth) s 33.
2 High Court of Australia, *Annual Report 2019–20*, 12.

14. The Federal Court has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Federal Court, from the Circuit Court in non-family law matters, and from other courts exercising certain federal jurisdiction. In recent years, a significant component of its appellate work has involved appeals from the Circuit Court concerning decisions under the *Migration Act 1958* (Cth). The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island.[3]

15. The Federal Court has jurisdiction to hear and determine:

- any matter arising under the *Australian Constitution* through the operation of s 39B of the *Judiciary Act 1903* (Cth);
- cases arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*');
- appeals on questions of law from the Administrative Appeals Tribunal ('AAT');
- appeals in taxation matters from the AAT and first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation;
- matters in relation to intellectual property (copyright, patents, trademarks, designs and circuit layouts) including all appeals in such matters from the state and territory Supreme Courts;
- native title determination applications (and their mediation) under the *Native Title Act 1993* (Cth), including revised native title determination applications, compensation applications, claim registration applications, applications to remove agreements from the Register of Indigenous Land Use Agreements and applications about the transfer of records;
- appeals from the National Native Title Tribunal and matters filed under the *ADJR Act* involving native title;
- maritime claims, and related matters, arising under the *Admiralty Act 1988* (Cth);
- matters arising under the *Fair Work Act 2009* (Cth), *Fair Work (Registered Organisations) Act 2009* (Cth) and related industrial legislation;
- matters arising under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), including the appointment of registered liquidators, the winding up of companies, applications for orders in relation to fundraising, corporate management and claims relating to misconduct by company officers;
- matters arising under the *Bankruptcy Act 1966* (Cth), including exercising power to make sequestration (bankruptcy) orders against persons who have committed acts of bankruptcy, to grant bankruptcy discharges and annulments and to deal with matters arising from the administration of bankrupt estates; and
- cases arising under Part IV (restrictive trade practices) and Schedule 2 (the Australian Consumer Law) of the *Competition and Consumer Act 2010* (Cth), including jurisdiction in relation to indictable offences for serious cartel conduct.

3 *Supreme Court Act 1960* (NI), ss 32–33.

The Family Court of Australia

16. The Family Court exercises original and appellate jurisdiction in family law, including in a number of highly specialised areas. At first instance, it deals with the most complex and difficult family law cases.[4] It provides national coverage as the appellate court in family law matters, including hearing appeals from decisions of single judges of the Court, from judges of the Circuit Court in family law matters, and from the Family Court of Western Australia.

17. At first instance, the Family Court:

- determines cases with the most complex law, facts and parties, and hears cases arising under the regulations implementing the *Hague Convention on the Civil Aspects of International Child Abduction* ('the *Hague Convention*');
- has jurisdiction under all aspects of the *Family Law Act 1975* (Cth), including:
    - parenting cases involving:
        - a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child;
        - family violence and/or mental health issues with other complexities;
        - multiple parties;
        - cases where orders sought would have the effect of preventing a parent from communicating with or spending time with a child;
        - multiple expert witnesses;
        - complex questions of law and/or special jurisdictional issues;
        - international child abduction under the *Hague Convention*;
        - special medical procedures; or
        - international relocation;
    - financial cases involving:
        - multiple parties;
        - valuation of complex interests in trust or corporate structures, including minority interests;
        - multiple expert witnesses;
        - complex questions of law and/or jurisdictional issues; or
        - complex issues concerning superannuation.

18. The Family Court also has original jurisdiction under certain Commonwealth Acts, including:

- *Marriage Act 1961 (Cth);*
- *Child Support (Registration and Collection) Act 1988 (Cth);*
- *Child Support (Assessment) Act 1989 (Cth)*; and
- *Bankruptcy Act 1966 (Cth).*

4 Family Court of Australia, *Annual Report 2019–2020*, 17.

The Federal Circuit Court of Australia

19. The jurisdiction of the Circuit Court includes family law, migration law, and the following areas of general federal law: administrative law, admiralty law, bankruptcy, consumer law (formerly trade practices), human rights, industrial, intellectual property and privacy.

20. The Circuit Court exercises all aspects of jurisdiction under the *Family Law Act 1975* (Cth) with the exception of adoption and applications for nullity or validity of marriage. The Court has the same jurisdiction as the Family Court in relation to child support. The Circuit Court's jurisdiction includes:

- applications for parenting orders, including those providing for where a child lives, with whom a child spends time and communicates, and maintenance or specific issues under Part VII of the *Family Law Act*;
- applications in relation to property and applications for spousal maintenance or maintenance under Part VIII and Part VIIIAB of the *Family Law Act*;
- applications in relation to financial agreements and superannuation under Part VIIIA and Part VIIIB of the *Family Law Act*;
- applications for divorce under Part VI of the *Family Law Act*;
- applications alleging contraventions of orders made under the *Family Law Act*;
- enforcement of orders made by either the Circuit Court or the Family Court under Part XIII of the *Family Law Act*;
- location and recovery orders as well as warrants for the apprehension or detention of a child;
- determination of parentage, under Part VII Division 12, and recovery of child-bearing expenses pursuant to Part VII Division 8 of the *Family Law Act.*

21. Under the *Migration Act 1958* (Cth), the Circuit Court:

- can review some decisions, including decisions made by the Minister for Home Affairs, the AAT and the Immigration Assessment Authority;
- can review the refusal of student visa and cancellations, as well as skilled work visas and business visas;
- hears urgent applications brought to prevent deportation/removal of persons from Australia.

22. Matters of general federal law which are within the jurisdiction of the Circuit Court include the following:

- Administrative law:
  - applications under the *ADJR Act*;
  - judicial review of 'child support first reviews' under s 44AA of the *Administrative Appeals Tribunal Act 1975* (Cth); and
  - appeals from the AAT remitted from the Federal Court.
- Admiralty law:
  - under ss 9, 27 and 28 of the *Admiralty Act 1988* (Cth) and any matters referred to it by the Federal Court.

- Bankruptcy law:
  - concurrent jurisdiction with the Federal Court under the *Bankruptcy Act 1966* (Cth), except those requiring jury trials;
  - general powers in bankruptcy pursuant to s 30 of the *Bankruptcy Act* to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part VIIII, Part X or Part XI coming within the power of the Court; and
  - power to make such orders (including declaratory orders or granting injunctions or other equitable remedies) as the Court considers necessary for the purpose of carrying out or giving effect to the *Bankruptcy Act*.
- Consumer law:
  - jurisdiction for claims under the following provisions of the *Competition and Consumer Act 2010* (Cth):
    - Section 46 (Misuse of Market Power);
    - Section IVB (Industry Codes);
    - Part IVD (Consumer Data Right);
    - Part XI (Application of the Australian Consumer Law as a law of the Commonwealth); and
    - Schedule 2 (Australian Consumer Law); and
  - civil jurisdiction with respect to claims under the *National Consumer Credit Protection Act 2009* (Cth).
- Human rights law:
  - civil matters arising under Part IIB or IIC of the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'); and
  - federal unlawful discrimination matters under the *AHRC Act* relating to complaints under the:
    - *Age Discrimination Act 2004* (Cth);
    - *Disability Discrimination Act 1992* (Cth);
    - *Racial Discrimination Act 1975* (Cth); and
    - *Sex Discrimination Act 1984* (Cth).
- Industrial law:
  - small claims jurisdiction under the *Fair Work Act 2009* (Cth) if the compensation is not more than $20,000;
  - certain matters under the *Independent Contractors Act 2006* (Cth), the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);
  - matters under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the *Workplace Relations Act 1996* (Cth) (in so far as it continues to apply).
- Intellectual property law:
  - civil disputes concerning copyright, designs, and trade marks, including:
    - *copyright* – civil claims and matters under Parts V, VAA, IX and s 248J of the *Copyright Act 1968* (Cth), such as claims for injunctions and damages for breach of copyright;

- *trade marks* – the following matters under the *Trade Marks Act 1995* (Cth):
  - appeals from decisions of the Registrar of Trade Marks – ss 35, 56, 67, 83(2), 83A(8), 84A–84D and 104;
  - infringement actions – ss 120–130;
  - revocation of registration under ss 88 and 89;
  - decision on whether a person has used a trade mark under s 7;
  - determining whether trade mark has become generic – ss 24, 87 and 89;
  - amendment or cancellation of registration under ss 85 and 86;
  - application for an order to remove a trade mark registration for non-use – s 92(3);
  - application for rectification of register by order of court under s 181; and
  - variation of rules governing use of certification trade mark under s 182;
- *designs* – the following matters under the *Designs Act 2003* (Cth):
  - appeals from decisions of the Registrar of Designs – ss 28(5), 67(4), 68(6), 50(6), 52(7) and 54(4);
  - determinations of entitled persons under s 53;
  - infringement actions under ss 71–76;
  - applications for relief from unjustified threats under ss 77–81;
  - applications for compulsory licences under ss 90–92;
  - revocation of registration under s 93;
  - for Crown use provisions, determinations of the term of use of a design under s 98;
  - applications for a declaration of any Crown use under s 101;
  - applications for the cessation of Crown use of a design under s 102; and
  - rectification of register under s 120D.

- Privacy law:
  - enforcing determinations of the Privacy Commissioner and private sector adjudicators under the *Privacy Act 1988* (Cth).

Workload of the federal judiciary

The High Court of Australia

23. The High Court is the apex Court within Australia. Consequently, its workload reflects the Court's functions as the final appellate and constitutional court. It has dealt recently with a wide variety of subject matters, including cases concerned with statutory interpretation, legal professional privilege, insurance, limitation of actions, criminal law and procedure, restitution, corporations law, immigration, taxation, administrative law, practice and procedure, costs, bankruptcy, evidence, customs and excise, native title, stamp duty, damages and tort. In its original jurisdiction, the Court has decided cases involving the implied freedom of communication on political and government matters, the aliens power, elections, and Chapter III of the *Australian Constitution*.

Table 1 Matters before the High Court of Australia by type and year [5]

Matter types	2015/16	2016/17	2017/18	2018/19	2019/20
Special Leave Applications	536	498	523	565	455
Appeals filed	51	68	77	41	57
Original jurisdiction[6]	208	129	166	182	187

Statutory Commonwealth courts - excluding family law

24. In the last financial year, 4,469 cases were commenced in, or transferred to, the Federal Court's original and appellate jurisdictions. In that same period, 4,871 matters were completed. The total number of current matters as at 30 June 2020 was 3,425.[7]

Table 2 Filings in the Federal Court of Australia and Federal Circuit Court of Australia (excluding family law) by year

Filings	2015/16	2016/17	2017/18	2018/19	2019/20
Federal Court[8]	6,001	5,715	5,925	6,034	4,469
Federal Circuit Court	8,655[9]	9,704[10]	9,971[11]	10,110[12]	10,333[13]

25. The Federal Court resolved 65 native title applications and there were an additional 17 applications managed by the native title practice area that were also finalised. In the period, 42 new applications were filed.[14]

5 Table compiled using data published in High Court of Australia, *Annual Report 2019–20*, 20–22.
6 Includes Writs of summons; Constitutional writs; Electoral; Removals, Cause removed; Other matters.
7 Federal Court of Australia, *Annual Report 2019–20*, 21.
8 Federal Court of Australia, *Annual Report 2019–20*, Table A5.1.
9 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.3.
10 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 3.1.
11 Federal Circuit Court of Australia, *Annual Report 2017–18*, Table 3.1.
12 Federal Circuit Court of Australia, *Annual Report 2018–19*, Table 3.1.
13 Federal Circuit Court of Australia, *Annual Report 2019–20*, Table 3.2.
14 Federal Court of Australia, *Annual Report 2019–20*, 24.

26. There were 10,333 cases commenced in the Circuit Court's original jurisdiction, which comprised 6,555 migration matters and 3,778 matters of general federal law. In that same period, 7779 matters were completed. [15]

Table 3 Federal Circuit Court of Australia matters filed and finalised by type of law and year

Case Type	2015/16[16]		2016/17[17]		2017/18[18]		2018/19[19]		2019/20[20]	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Migration	3,544	3,070	4,981	3,003	5,312	3,680	5,597	3,691	6,555	4,045
Bankruptcy	3,879	3,850	3,280	3,408	3,072	3,015	2,890	2,879	1,872	2,105
Fair Work	972	1,011	1,189	1,028	1,298	1,189	1,295	1,262	1,563	1,329
Other	266	N/A	258	N/A	285	N/A	329	N/A	343	300
Total	8,649		9,704		9,971		10,096		10,333	7,779

27. The Federal Court received 1,263 filings in appellate proceedings. In that same year, 1,168 appeals and related actions were finalised. Of these, 335 matters were filed and finalised. There are 834 appeals currently before the Federal Court, of which 571 are migration appeals.

15 Federal Circuit Court of Australia, *Annual Report 2019–20,* (n 13), Table 3.2.
16 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.5.
17 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 3.3.
18 Federal Circuit Court of Australia, *Annual Report 2017–18*, Table 3.3.
19 Federal Circuit Court of Australia, *Annual Report 2018–19*, Table 3.3.
20 Federal Circuit Court of Australia, *Annual Report 2019–20,* (n 13) Table 3.2.

Statutory Commonwealth courts – family law

28. Table 4 below sets out the number of applications filed and finalised in the Family Court of Australia.

Table 4 Family Court of Australia matters by application type and year

Application Type	2015/16[21]		2016/17[22]		2017/18[23]		2018/19[24]		2019/20[25]	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Consent orders	13,458	13,357	14,182	13,919	14,295	13,962	13,872	14,081	14,908	14,946
Applications in a case (interim)	3,616	3,521	3,469	3,265	3,400	3,524	3,236	3,211	3,500	3,216
Final orders applications	3,017	2,979	2,748	2,742	2,427	2,534	2,225	2,395	2,382	2,394
Other applications	327	342	342	321	314	357	255	271	264	231
Total	20,418	20,199	20,741	20,247	20,436	20,377	19,588	19,985	21,054	20,787

29. In the Circuit Court, family law constitutes the largest proportion of the overall workload of the Court.[26] In addition, the Circuit Court's family law case load represents 87 per cent of all family law work filed at the federal level, including 92 per cent of all parenting applications filed across both the Family and Circuit Courts.[27]

21 Family Court of Australia, *Annual Report 2015–16*, Figure 3.2.
22 Family Court of Australia, *Annual Report 2016–17*, Figure 3.1.
23 Family Court of Australia, *Annual Report 2017–18*, Figure 3.1.
24 Family Court of Australia, *Annual Report 2018–19*, Figure 3.1.
25 Family Court of Australia, *Annual Report 2019–20*, Table 3.2.
26 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) 27.
27 Ibid.

Table 5 Federal Circuit Court of Australia family law matters by application type and year

Application Type	2015/16[28]		2016/17[29]		2017/18[30]		2018/19[31]		2019/20[32]	
	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised	Filed	Finalised
Divorce applications	44,098	43,445	43,846	42,630	45,190	46,051	44,342	44,545	45,886	44,963
Applications in a case (interim)	21,521	20,367	22,050	21,182	21,710	21,182	22,115	20,758	21,775	20,715
Final orders applications	17,523	16,379	17,791	17,239	17,241	17,978	17,070	16,683	16,455	15,769
Other applications	1,778	Not reported	1,790	Not reported	1,604	Not reported	1,707	Not reported	1,447	1,440
Total	84,920		85,477		85,745		85,234		85,563	82,887

30. The Appeal Division of the Family Court hears appeals from decisions of both federal and state courts.[33] In the last financial year in that Division, 445 appeals were filed and 304 judgments were delivered. A total of 448 appeals were finalised, of which 130 were allowed, 145 were dismissed, 63 were abandoned, and 110 were withdrawn. At the end of the relevant reporting period, there were 29 appeal judgments outstanding and 213 pending matters.[34]

Complaints about the federal judiciary

31. In the year 2019–20, neither the High Court nor the Federal Court reported any complaints about current judicial conduct in their annual reports.

32. In the same period, the Family Court received 4 complaints about judicial conduct, excluding complaints about delay in delivery of a judgment.[35]

33. The Circuit Court reported 112 complaints relating directly to judicial officers. That represents complaints in less than 0.5 per cent of all final order applications filed during the same period in family law, migration and other general federal law applications, excluding bankruptcy.[36]

28 Federal Circuit Court of Australia, *Annual Report 2015–16*, Table 3.4, Figures 3.4, 3.5, 3.7.
29 Federal Circuit Court of Australia, *Annual Report 2016–17*, Table 1.1, Figures 3.4, 3.5, 3.7.
30 Federal Circuit Court of Australia, *Annual Report 2017–18*, Figures 3.4, 3.5, 3.7.
31 Federal Circuit Court of Australia, *Annual Report 2018–19*, Figures 3.4, 3.5, 3.7.
32 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) Table 3.2.
33 Family Court of Australia, *Annual Report 2019–20*, (n 25) 36.
34 Ibid 37.
35 Ibid 29.
36 Federal Circuit Court of Australia, *Annual Report 2019–20*, (n 13) 55.

Data on applications for disqualification

34. The Commonwealth courts do not collect data on a number of issues relevant to the process of recusal and disqualification on bias grounds. For example, although there are some records of the number of times that a case has been reallocated to a different judge before the parties are notified of the listing, those records do not identify the extent to which this is done to avoid potential risk of a bias claim, rather than for some other reason. Similarly, the courts do not collect data on the number of applications for disqualification made in the courts.

35. In light of this, the ALRC has carried out a review of judgments from the Commonwealth courts from the past five years to gain a preliminary (if limited) picture of applications for disqualification in the Commonwealth courts on the grounds of bias. By searching publicly available judgments, the ALRC has identified judgments that make reference to applications for disqualification in the period 1 January 2015 – 31 December 2020. This includes both interlocutory judgments deciding the application for disqualification and (more frequently) final judgments and appeal judgments that make reference to previous applications for disqualification when recounting the procedural history of the case. For notes on the data, including further detail about how it was collected, see Appendix A. Some of the results are in Table 6 below.

36. This data is necessarily limited. In the Commonwealth courts, issues of actual or apprehended bias are generally expected to be raised by way of formal application and are generally made as an interlocutory application seeking orders for disqualification.[37] However, anecdotal reports from consultations suggest that the issue of bias is often first raised informally in court and where this leads to a formal application for disqualification, most are made orally. Though judges are expected to sit in open court and to give reasons for a decision to continue to sit or not, there is no requirement to give written reasons.[38] It is understood that many, if not most, orders determining applications for self-disqualification are delivered *ex tempore* (that is, orally), and may never be published in writing. This may explain why the ALRC was able to find more references to past applications for disqualification in the procedural history of judgments, and less judgments actually determining applications for disqualification. This means a review of published judgments is likely to reveal only a subset of the applications that are made.

37. Nevertheless, the set of applications recorded in judgments is useful in that it gives a preliminary indication that applications for disqualification are rare and do not occupy much of the courts' time, given that the numbers are so small in the context of the courts' overall workload (see Table 6 below). The preliminary data also suggests that self-represented litigants are no more likely to bring applications for disqualification than legal representatives. This is consistent with preliminary feedback from consultations.

37 See Andrew Morrison, Kylie Weston-Scheuber and Tim Goodwin, 'Apprehended Bias: To Recuse or Not to Recuse?' (Commbar Civil Procedure Committee CPD, 22 November 2018) 22–3; see also *Comcare v John Holland Rail Pty Ltd (No 3)* [2011] FCA 164 at [79]; *Margarula v Northern Territory* (2009) 175 FCR 333 at [35]–[38]; *Kirby v Centro Properties Ltd (No 2)* (2008) 252 ALR 557 at [18]–[23].

38 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 17–18.

38. The most data was available from cases where reference to the application for disqualification was identified in a judgment of the court to which the application related.[39]

Table 6 Disqualification applications for bias by court and outcome 2015 – 2020

	Number of applications for disqualification identified in judgments of target court	Number of applications successful	Rate of successful applications (as %)
Circuit Court	117	21	18
Family Court	124	36	29
Federal Court	54	9	17
Family Court Full Court	12	0	0
Federal Court Full Court	4	0	0

39. Applications for disqualification on the grounds of apprehended bias can be said to fall into cases which obviously require recusal, those that do not obviously give rise an apprehension of bias, and those in the middle which require more consideration. If it can be accepted that judges are more likely to give written reasons for those applications in the middle, then tracking the judgments gives a sense of the scope of the "contested ground". It also picks up a set of the less controversial cases, which are given passing reference in the final judgment.

40. The review also gives insight into the types of issues applicants raise when making a bias application. Table 7 below shows the frequency with which different sources of bias were raised in relation to each court (as identified in the judgments of the target court, and excluding cases only identified on appeal). It should be noted that in each case more than one source of bias could be alleged, and the source of the bias alleged was not recorded in relation to all applications identified.

39 A relatively small number of further references to applications for disqualification and/or appeals on the grounds of bias in first instance courts were identified in appeal judgments. Due to the complexity of reconciling these references with the first instance case, these are excluded.

Table 7 Disaggregation of disqualification for bias application by bias type, court and outcome

	Interest		Association		Conduct		Prejudgment		Extraneous Information	
	Raised	Successful	Raised	Successful	Raised	Successful	Raised	Successful	Raised	Successful
Circuit Court	7	2	10	2	36	2	28	2	9	3
Family Court	0	0	6	2	34	3	44	7	18	8
Federal Court	1	0	8	1	21	0	22	6	9	5
Family Court Full Court	0	0	2	0	22	2	14	0	9	1
Federal Court Full Court	2	0	1	0	3	1	3	0	3	0

41. The ALRC is in the process of carrying out a survey of judges to gain greater insight into the frequency with which judges recuse themselves from cases and the extent to which issues of actual or apprehended bias are raised in proceedings. It is also carrying out further analysis of the information available through the Commonwealth Courts Portal to gain greater insight into applications and orders that are not recorded in judgments. Data obtained from these activities will inform the recommendations made in the Inquiry's final report.

APPENDIX A

Notes on Data

42. The ALRC has carried out a review of judgments from the Commonwealth courts from the past five years to gain a preliminary (if limited) picture of applications for disqualification in the Commonwealth courts on the grounds of bias.

Identification of relevant cases

43. Cases were identified by running a search on Commonwealth court judgments in Austlii using the search terms "'recus! OR "disqualify !self" OR "application w/5 disqualification".[40] Cases were recorded as relevant where a review identified reference to an application for disqualification of a judge made at any stage of the proceedings, or where an appeal raised issues of alleged apprehended bias.

44. Multiple references to the same application across different judgments, whether at first instance or on appeal, have been excluded so that each application is only counted once. If there was a second disqualification application in the same matter, it is only then recorded twice.

45. Cases making reference to an application to disqualify an individual other than an Australian federal judicial officer were excluded, including those relating to tribunal members, lawyers, State judicial officers, and foreign courts.

Review of relevant cases

46. Each case identified as relevant was then reviewed to obtain further information including: the case name, the date of application (if available), the date of decision (if available), the court in which the application was made,[41] whether the application was made by a self-represented litigant, the source of bias alleged (interest, association, conduct, prejudgment, and extraneous information) and whether the application was successful.

47. Categorisation of the source of bias alleged is subjective, and in some cases not clearly argued, but an assessment was made of the most closely aligned source.

48. In some judgments (in particular appeal judgments) the application was only mentioned in passing, so this information was not available in all cases. For this reason, data is reported separately on (i) applications identified in the court against which the application was made, and (ii) total applications and appeals identified by reference to the court to which they relate.

Limitations of the dataset

49. The data does not include applications which are not referenced in a written judgment, including where the reasons were delivered orally only.

40 These search terms were chosen after refining broader searches and were verified as picking up all the applications identified in a sample of the broader searches.

41 Or where the issue of bias is raised for the first time on appeal, the court in relation to which the allegation of bias was made.

Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI4**

JUDICIAL IMPARTIALITY

Conceptions of Judicial Impartiality in Theory and Practice

April 2021

This paper on conceptions of judicial impartiality in theory and practice is one in a series of background papers being released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality (the 'Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. Other background papers in this series include *The Law on Judicial Bias: A Primer* (December 2020), *Recusal and Self-Disqualification Procedures* (March 2021), and *The Federal Judiciary: The Inquiry in Context* (March 2021). Further background papers will be released addressing issues including critiques of the test for apprehended bias, implicit bias in judicial decision-making, and ethical infrastructure for judicial officers.

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

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

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Introduction

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

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

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

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

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

Origins and rationale of the duty of impartiality

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

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

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

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1 Sir Gerard Brennan, 'Why Be a Judge' (1996) 14 *Australian Bar Review* 89, 91.
2 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 161.
3 Charles G Geyh, 'The Dimensions of Judicial Impartiality' (2014) (2) *Florida Law Review* 493, 493.
4 Available at https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/.
5 The Rt Hon Chief Justice Beverley McLachlin, 'Judicial Impartiality: The Impossible Quest?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 15, 17.
6 The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 144. See further John Noonan, 'The Impartiality of God' in Kenneth Winston and John Noonan (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger Publishers, 1993) 3, 3–4.
7 McIntyre (n 2) 162. 'Socrates defined the essential qualities of a judge in the following manner: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."': Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28(3) *Osgoode Hall Law Journal* 507, 508.

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

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

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

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

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

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

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

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

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

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

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

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

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

13 William Blackstone, *Commentaries on the Law of England*, vol 1 (Clarendon Press, 1765) 361.

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

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

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

17 McIntyre (n 2) 169.

18 The Hon Justice Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 677; *Yukon Francophone School Board, Education Area #23 v Attorney General of the Yukon Territory* (2015) 2 SCR 282, 283. See further *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25-26 November, 2002) preamble, which provides that the Bangalore Principles 'are intended to establish standards for ethical conduct of judges'. Contrast to the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) [1.2], which states that it 'purposely avoids using the expression "judicial ethics" or describing conduct as "unethical"'.

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

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

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

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

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

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

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

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

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

Understanding impartiality

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

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

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

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

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

22 Ibid.

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

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

25 McIntyre (n 2) 174.

26 Ibid 174–5, citing T David Marshall, *Judicial Conduct and Accountability* (Carswell, Scarborough, 1995) 70.

The relationship between neutrality and impartiality

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

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

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

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

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

Conceptions of impartiality

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

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

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

Formalist

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

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

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

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

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

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

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

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

41 Ibid.

42 This analogy has been made by others, see, eg: The Hon Justice David Ipp, 'Maintaining the Tradition of Judicial Impartiality' (2008) 12 *Southern Cross University Law Review* 87, 87; Devlin (n 39) 434–435.

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

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

45 Brennan (n 1) 92.

46 Devlin (n 39) 437.

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

> I am conscious … that there is a potential for unconscious bias, particularly through one's reaction to information received becoming part of the decision making matrix as opposed to the information itself. But in all reality, there must be reaction to information, whether it is heard directly or indirectly… I do not accept that it is inappropriate for judges to respond and to feel empathy or sympathy. But they must then be able, within their own mind, to separate objective decision making from such emotions.[48]

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

Dynamic

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

> [t]he judicial decision-making method demands genuine choices and evaluations of the judge, and involves a broad range of influences, objectives and considerations to which the judge is meaningfully partial. Judicial impartiality strives, therefore, only to make the judge free 'from improper … influences on decision-making'.[54]

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

Judging with conscious objectivity

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

48 *Duffy v Gomes (No 2)* (2015) 299 FLR 108 [114] (Harman J).
49 Brennan (n 1) 92.
50 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1989) 67.
51 See Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376, 385–7. See further JI6 (forthcoming).
52 As it is termed in Devlin (n 39) 434–5; although note the criticism in Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 214. Ibid 214.
53 Chief Justice Beverley McLachlin (n 5) 22. See also Roach Anleu and Mack (n 23) 9 ('impartiality is neither a result or end-point, nor a quality located or inherent in a particular decisionmaker or decision; rather, it is a "process" [emphasis in original] of "striving towards a[n] …ideal," which operates "interactively and dynamically" in relation to the environment in which decisions are made and the content of the norms or rules being used' citing Touchie n 76 at 30).
54 McIntyre (n 2) 170.
55 Dr McIntyre provides a useful analytic framework to understand the nature and role of structural and dispute-specific threats to impartiality: see Ibid Part IV.
56 *R v S (RD)* (1997) 3 SCR 484 [44]. A lack of judicial diversity, for example, is held out as an example of an institutional threat to impartiality: see Sherrilyn A Ifill, 'Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts' (1997) 39 *Boston College Law Review* 95.
57 Chief Justice Beverley McLachlin (n 5) 22.

than Themis as blindfolded, a dynamic conception of impartiality might be represented by an image of Themis peering out from beneath her blindfold — a judge who is mindful of the need to be objective but also alert to lived experiences (both her own and those of others).

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

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

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

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

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

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

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

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

58 Graycar (n 39) 74; Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 213; Justice Keith Mason (n 18) 676–678; Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40(1) *Monash University Law Review* 115, 132.

59 *R v S (RD)* (1997) 3 SCR 484 [38], [44] (L'Heureux-Dubé and McLachlin JJ).

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

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

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

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

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

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

61 Although seemingly trite, more than one author has felt the need to expressly state this proposition: see, for example, Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 212–213; Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 68, 1; The Hon Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 198; Chief Justice Beverley McLachlin (n 5) 15.

62 Devlin (n 39) 435.

63 Ibid.

64 Minow (n 29) 1216–7.

65 Ibid 1217.

66 Chief Justice Beverley McLachlin (n 5) 23. This requires three steps: (1) recognising that one does not bring a neutral, empty mind to the process of judging; (2) identifying one's preconceptions; and (3) attempting to eliminate illegitimate preconceptions from one's reasoning.

67 Graycar (n 39) 82.

68 Chief Justice Beverley McLachlin (n 5) 23. Controversy exists around the extent to which a dynamic conception of impartiality should aspire to identify and address inequalities in society through judging. See, eg, Justice L'Heureux-Dubé CC GOQ QC ('[w]hen judges have the opportunity to recognise inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so): Claire L'Heureux-Dubé, 'Reflections on Judicial Independence, Impartiality and the Foundations of Equality' (1999) 7 *Centre for the Independence of Judges and Lawyers Yearbook* 95, 106. But see Justice Mason's reply (this view 'becomes debatable if it is taken outside of a context, like Canada, where broad equality rights are constitutionally entrenched'): Justice Keith Mason (n 18) 679. See also Aronson, Groves and Weeks (n 21) 645–646; Justice David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (n 37) 222; Murray Gleeson, 'Judicial Legitimacy' (2000) 20 4, 6–7; Justice David Ipp, 'Maintaining the Tradition of Judicial Impartiality' (n 42) 95; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, [86] (McHugh J); The Hon Chief Justice Murray Gleeson, *The Role of the Judge and Becoming a Judge* (Speech, Sydney, 16 August 1998).

Constitutive impartiality

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

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

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

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

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

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

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

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

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

71 Lucy (n 28) 30.

72 Ibid 17.

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

74 Lucy (n 28) 17.

75 Parker (n 70) 71.

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

Identifying influences as prohibited threats to impartiality

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

(1) it is capable of influencing the decision making of the judge;

(2) that influence is inconsistent with the proper judicial decision-making processes; and

(3) there are no reasons derived from the overarching judicial function to render it acceptable.[77]

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

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

Conceptions of impartiality and the bias rule

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

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

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

In her view,

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

An open mind not an empty one

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

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

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

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

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84 Ibid.
85 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 1.
86 Ibid.
87 See McIntyre (n 2) 171; Lucy (n 28) 16.
88 *Vakauta v Kelly* (1989) 167 CLR 568, 570. See also *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531.
89 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 61.
90 Aronson, Groves and Weeks (n 21) 645. See further Australian Law Reform Commission (n 82).
91 *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507 [31]–[32] (Gleeson CJ and Gummow J). See further Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928.
92 *Wentworth v Rogers* [2002] NSWSC 1198 (Unreported, Barrett J, 16 December 2002) [24].
93 Justice Keith Mason (n 18) 681. See further *Lindon v Kerr* (1995) 57 FCR 284, where Davies, Sackville and Nicholson JJ rejected an argument that an all male bench gave rise to an apprehension of bias. Indeed, the English Court of Appeal has gone so far as to list the categories for which the Court could not 'conceive of circumstances in which an objection [as to bias] could be soundly based': religion, ethnic or national origin, gender, age, class, means, and sexual orientation: *Locabail (UK) Ltd v Bayfield Properties Ltd* (2000) 1 QB 451 [25]. A table of these factors, including factors 'ordinarily insufficient' and

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

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

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

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

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

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

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

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

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

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

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

96 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* (2000) 3 SA 705 [13].

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

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

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

100 See, eg, *Brien v Dwyer* (1978) 141 CLR 378, 383 (Barwick CJ relying expressly on his own experience to say that a purchaser and vendor do not usually sign a purchase agreement contemporaneously); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 [66] (Kirby J observing without reference to authority the enormous social changes relevant to women, married

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

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

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

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

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

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

101 Constance Backhouse, 'Bias in Canadian Law: A Lopsided Precipice' (1998) 10(1) *Canadian Journal of Women and the Law* 170, 181. See further Graycar (n 39) 73–4: 'Whiteness or maleness are not viewed as impediments to impartiality precisely because they are not recognised as positions at all, but the treatment of decision-makers who are racialized as "other" (of whom, of course, we have very few in Australia), or the response to decisions that make explicit reference to gender, race or unequal race relations (at least if made by "others"), reveals a very different set of assumptions'.

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

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

104 Ibid [68] (Barrett JA).

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

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

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

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

109 *R v Goodall* (2007) 15 VR 673; 169 A Crim R 440. An application for special leave to appeal to the High Court was refused: *Goodall v The Queen* [2007] HCA Trans 397.

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

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

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

Performing impartiality

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

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

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

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

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

113 Ibid 9.

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

115 See Roach Anleu and Mack (n 23) 113–16 for a discussion of approaches to conveying impartiality through demeanour in Australian magistrates' courts. See further Senior Magistrate David Heilpern, 'Judging - A Contextual Approach' (2008) 12 *Southern Cross University Law Review* 26–7, who describes the necessity of having a 'stony face'.

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

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

118 Ibid 10.

119 McIntyre (n 2) 177.

120 Justice Keith Mason (n 18) 683.

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

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

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

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

Implications for judicial diversity

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

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

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

123 Australasian Institute of Judicial Administration (n 18) 25.
124 Finn (n 39) 279.
125 Linda Mulcahy, 'Architects of Justice: The Politics of Courtroom Design' (2007) 16(3) *Social & Legal Studies* 383, 384.
126 The Hon Justice Steven Rares, 'Social Media — Challenges for Lawyers and the Courts' (2018) 45 *Australian Bar Review* 105, 113–14.
127 Sir Frank Kitto suggests that a written judgment is always preferable, as is a separate judgment in multi-member courts: The Rt Hon Sir Frank Kitto, 'Why Write Judgments?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 69, 70–1. These suggestions have been the subject of some controversy: Justice Stephen Gageler (n 61) 190–3.
128 See, eg, Keyvan Dorostkar, 'Judicial Review of Refugee Determinations: More by Luck than Judgement?' (Macquarie University) 29–30, 53 <https://www.ssrn.com/abstract=3536740> which discusses how the timing and method of judgment delivery can affect the appearance of impartiality.
129 The institutional integrity enshrined in Ch III courts by the Australian Constitution gives rise to an obligation to give reasons, at least for 'final decisions and important interlocutory rulings': *Wainohu v New South Wales* (2011) 243 CLR 181 [44], [54] (French CJ and Kiefel J). For discussion about whether this duty should be absolute, see Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(2) *UNSW Law Journal* 923.
130 See, eg, SherrilynA Ifill, 'Through the Lens of Diversity' (2004) 10(1) *Michigan Journal of Race and Law* 55, 57.
131 The Right Hon the Lord Neuberger of Abbotsbury PC, '"Judge Not, That Ye Be Not Judged": Judging Judicial Decision-Making' (2015) 6 *UK Supreme Court Yearbook* 13, 19.
132 Justice Debbie Mortimer (n 20) 51.
133 Lorne Sossin, 'Should Canada Have a Representative Supreme Court?' (2009) 7 *Institute of Intergovernmental Relations School of Policy Studies, Queen's University* 1, 7–8. See also Wilson (n 7) 511. See also Groves, 'Empathy, Experience and the Rule against Bias in Criminal Trials' (n 100) 84.

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

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

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

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

Conclusion

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

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

135 *R v S (RD)* (1997) 3 SCR 484 [115].

136 Justice Debbie Mortimer (n 20) 51.

137 Ibid 51–2.

Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI5**

JUDICIAL IMPARTIALITY

Ethics, Professional Development, and Accountability

April 2021

This paper on ethics, professional development, and accountability for judicial officers is one in a series of background papers being released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality ('the Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. Other background papers in this series include *The Law on Judicial Bias: A Primer* (December 2020), *Recusal and Self-Disqualification Procedures* (March 2021), *The Federal Judiciary* (March 2021), and *Conceptions of Judicial Impartiality in Theory and Practice* (April 2021). Further background papers will be released addressing critiques of the test for apprehended bias and implicit biases in judicial decision-making.

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

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

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Introduction

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

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

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

Impartiality, ethics, education, and accountability

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

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

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

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

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

A dynamic relationship

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

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

7. Connected to this, judicial independence has been seen as threatened by formal judicial education programs, which it was thought might allow improper government influence over what judges are required to know, or 'indoctrination' of judges[5] in 'attitudes reflecting the prevailing enthusiasm of the day'.[6] In the same vein, the imposition of binding ethical standards or structured systems of ethical support have been seen as having the potential to introduce improper influences both from outside the judiciary and within it.[7]

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

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

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

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

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

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

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

9 See further below paragraph [52].

10 McIntyre (n 3) 243.

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

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

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

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

Ethical infrastructure

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

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

11 Ibid 237.
12 For a summary of taxonomies for characterising judicial accountability mechanisms see ibid 250–88.
13 As to the relationship between judicial education and judicial accountability see further Armytage (n 3) 161.
14 McIntyre (n 3) 244.
15 Ibid 245.
16 Ibid 243.
17 Ibid 243–4.
18 Ibid 244.
19 Roach Anleu and Mack (n 2) 157, fn 3. The term 'ethical infrastructures' was coined by Ted Schyner in the context of law firms implementing systems and policies to embed ethical decision making and practices: Ted Schneyer, 'Professional Discipline for Law Firms?' (1991) 77 *Cornell Law Review* 1. It has since been used by others in the context of the judiciary, see further Roach Anleu and Mack (n 2) 157, fn 3.
20 Appleby and Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (n 3) 336.

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

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

Oath of Office

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

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

Guides or codes for judicial officers

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

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

21 Ibid, citing The Hon Sir Gerard Brennan AC KBE, 'Foreword to the Second Edition' in James Thomas (ed) *Judicial Ethics in Australia* (LexisNexis, 3rd ed, 2009) vii.
22 *Federal Court of Australia Act 1976* (Cth) s 11 and the Schedule.
23 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 1.
24 Roach Anleu and Mack (n 2) 64.
25 Ibid 191.
26 *Bangalore Principles of Judicial Conduct*, Judicial Group on Strengthening Judicial Integrity (25-26 November 2002).
27 For example, by the UN Economic and Social Council: UN Economic and Social Council (ECOSOC), *Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, UN Doc E/RES/2006/23 (27 July 2006).
28 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) [56].
29 Ibid [58].
30 Ibid [60], [89].
31 Ibid [61]–[76].

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

19. In Australia, the Council of Chief Justices of Australia and New Zealand has agreed on a set of guidelines about the standards of ethical and professional conduct expected of judicial officers in the *Guide to Judicial Conduct* ('Guide').[34] The first edition of the Guide, published in 2002, was based on a survey of judicial attitudes to issues of judicial conduct.[35] The third and current edition was published in 2017.[36]

20. The Guide provides

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

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

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

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

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

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32 Ibid [90]–[99].
33 Ibid [184]–[186].
34 Australasian Institute of Judicial Administration (n 23). See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020) [1.57]–[1.58].
35 Australasian Institute of Judicial Administration (n 23) vii. It also followed the publication of the first text on judicial ethics in Australia in 1988: The Hon Justice James Thomas, *Judicial Ethics in Australia* (Law Book Co, 1988).
36 Australasian Institute of Judicial Administration (n 23) vii.
37 Ibid 1.
38 Ibid 5.
39 Ibid. See in particular Chapters 3 and 4.
40 Australasian Institute of Judicial Administration (n 23) 1.
41 Ibid 2.
42 The Hon Justice Ronald Sackville, 'Judicial Ethics and Misbehaviour: Two Sides of the One Coin' (2009) 3 *Public Space* 6, 10.
43 Judicial Commission of Victoria, 'Guidelines' <judicialcommission.vic.gov.au/publications/guidelines>.
44 Roach Anleu and Mack (n 2) 164.

regulating conduct through disciplinary agencies.[45] In contrast, the *Guide to Judicial Conduct* in England and Wales adopts a similar approach to the Australian Guide where there is no obligation on a regulator[46] to follow its provisions. However, there is a clear acknowledgement that where a regulator is exercising its disciplinary powers, it 'may choose to have regard to this Guide'.[47]

Bench books

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

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

27. Other relevant bench books in Australia include:

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

Other types of ethical support

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

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

45 See, eg, District of Columbia Courts, *Code of Judicial Conduct* (2018).
46 See Appendix Two.
47 Courts and Tribunals Judiciary UK, *Guide to Judicial Conduct* (2020) 5.
48 Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42 *Melbourne University Law Review* 299, 337. Note however than only 6% of those surveyed were from the federal judiciary (see page 308).
49 Appleby and Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (n 3) 345.

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

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

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

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

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

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50 Ibid 336–7.

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

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

53 Ibid 350.

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

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

56 Schrever, Hulbert and Sourdin (n 55).

57 Ibid 142.

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

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

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

Professional development

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

> Judicial officers will be better able to maintain the high standards expected of them if they are provided with good quality professional development programs. These will help them maintain and improve their skills, respond to changes in society, maintain their health, and retain their enthusiasm for the administration of justice.
>
> Judges should be provided with, and should take part in, appropriate programs of professional development, such as those provided by the National Judicial College of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria. Programs and conferences that involve judges from other courts and places, and which provide an opportunity for the wider discussion of common issues, may be particularly valuable.
>
> Whilst judges have an individual responsibility to pursue opportunities for professional development, they are entitled to expect that their court will support them by providing reasonable time out of court and appropriate funding.[63]

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

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

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

61 Ibid Case study 3.

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

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

Formal judicial education in Australia

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

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

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

National standards

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

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

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

64 Appleby et al (n 48) 334, quoting a response to a survey question on the topic by a judicial officer.
65 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [2.150].
66 In response to the proposition that the education of judicial officers was a challenge, 54% of respondents agreed or strongly agreed, 23% were neutral, and 24% disagreed or strongly disagreed: Appleby et al (n 48) 334. Note that only 6% of those surveyed were from the federal judiciary (see page 308).
67 The text of the National Standard is reproduced in the report of the review conducted in 2010: Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (National Judicial College of Australia, 2010) 1.
68 Roper (n 67).
69 See, eg, Federal Court of Australia, *Annual Report 2019–20* 36.

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

Orientation for judges

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

Curriculum

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

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

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

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

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

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

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

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

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

Figure 1: Extracts from 'Attaining Judicial Excellence: A Guide for the NJCA'

Summary of key skills and qualities relevant to judicial impartiality

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

Content of ongoing judicial education programs

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

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

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

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

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

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

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

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

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76 National Judicial College of Australia, *Annual Report 2019–20* (n 70) 8.
77 Lillian Lesueur (n 51) 8.
78 National Judicial College of Australia, *Annual Report 2019–20* (n 70) 13. All Family Court and Federal Circuit Court judges will also receive additional training on family violence, including issues of coercive control, in the first half of this year, delivered by US based organisation, the Safe and Together Institute: Nicola Berkovic, 'Judges to Be Trained on Domestic Violence', *The Australian* (22 April 2021).
79 National Judicial College of Australia, 'NJCA/ANU Joint Conference 2019; Judges: Angry? Biased? Burned Out?' <njca.com.au/njca-anu-joint-conference-2019-judges-angry-biased-burned-out/>.
80 See National Judicial College of Australia, *Annual Report 2019–20* (n 70) 14–15.
81 Although note that the Commonwealth courts have undertaken activities relevant to raising Aboriginal and Torres Strait Islander cultural awareness, for example, under their relevant Reconciliation Action Plans: see, eg, *Federal Circuit Court of Australia Annual Report 2019–20* 67–8.
82 Judicial Commission of New South Wales, 'Ngara Yura Program' <www.judcom.nsw.gov.au/education/ngara-yura-program/>.
83 Ibid.

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

> A lack of coordination across the judiciary in addressing areas of concern arising from cultural and linguistic diversity;
>
> The absence of national competencies in relation to cultural diversity; … and
>
> Few resources or formal structures dedicated to supporting judicial officers and administrative staff to design or implement cultural diversity policies.[85]

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

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

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

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

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

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84 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 6.
85 Ibid.
86 Law Council of Australia, 'Courts and Tribunals' in *The Justice Project: Final Report* (2018) 52.
87 As the Hon Chief Justice Murray Gleeson later described, there was a suspicion of 'inappropriate proselytisation', which was 'heightened by pressure from some sections of the community for programmes to cultivate in judges attitudes reflecting the prevailing enthusiasm of the day': Chief Justice Murray Gleeson (n 6).
88 See, eg, The Hon Chief Justice David Malcolm, 'Women and the Law—Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia' (1993) 1(1) *Australian Feminist Law Journal* 139. As to the role of Chief Justice Sir Anthony Mason, see Armytage (n 3) 162–3.
89 Judicial Council on Cultural Diversity, 'Responding to Australia's Diversity' <jccd.org.au/>.
90 Law Council of Australia (n 86) 56.
91 This includes: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (May 1994).
92 Armytage (n 3) 164–5.

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

International standards

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

> It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.
>
> …All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.[97]

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

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

Responding to judicial incapacity and misconduct

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

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93 International Organization for Judicial Training, *Declaration of Judicial Training Principles* (2017), Principles 1 and 8 and commentary to Principle 1.
94 Ibid Principle 1.
95 Ibid Principle 3.
96 Ibid Principle 4.
97 Ibid Principles 6 and 7.
98 Ibid Principle 8.
99 Ibid commentary to Principle 8.

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

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

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

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

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

100 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 5.
101 Ibid, quoting The Hon Justice Geoffrey Eames AM QC, 'The Media and the Judiciary' (2006) 2 *High Court Quarterly Review* 47, 58.
102 Ibid.
103 See further Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (n 34) [1.25], [1.30].

Categorising misconduct

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

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

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

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

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

Responses to incapacity and misconduct in the Commonwealth courts

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

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

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

Removal for misbehaviour or incapacity

61. Under the *Constitution*, federal judges:

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

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

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

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107 Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) [12.84].
108 Criminal conduct can be dealt with under the ordinary criminal processes, subject to any applicable immunities. Note, eg, that under the *Crimes Act 1914* (Cth), s 34(4) it is a crime for a judge to perversely exercise jurisdiction in a matter under federal jurisdiction where they have a personal interest in the matter.
109 *Australian Constitution* s 72.
110 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 9–10.
111 Ibid s 3; *Australian Constitution* s 72(ii).
112 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 30.
113 Two separate Senate inquiries and a Commission of Inquiry were tasked with determining whether there was sufficient ground

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

Appeals

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

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

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

Complaints to the head of jurisdiction

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

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

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

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

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

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

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

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

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

120 See ibid 8.

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

person or body of appropriate seniority to act as a 'complaints handler' on her or his behalf.[122]

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

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

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

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

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

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

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

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122 *Federal Court of Australia Act 1976* (Cth) s 15(1AAB); *Family Law Act 1975* (Cth) s 21B(3A); *Federal Circuit Court of Australia Act 1999* (Cth) s 12(3AB).
123 *Federal Court of Australia Act 1976* ss 4, 15(1AAA); *Family Law Act 1975* (Cth) ss 4, 21B(1B); *Federal Circuit Court of Australia Act 1999* (Cth) ss 4, 12(3AA).
124 Law Council of Australia, *Principles Underpinning a Federal Judicial Commission* (2020) 3.
125 Federal Court of Australia (n 111). If a complaint is referred by a head of jurisdiction to the Attorney-General, the Attorney General may, in consultation with the head of jurisdiction, bring the complaint to the attention of the Parliament.
126 *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(d); *Family Law Act 1975* (Cth) s 21B(1A)(d); *Federal Circuit Court of Australia Act 1999* (Cth) s 12(3)(d).
127 Federal Court of Australia (n 111).
128 See further Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 30–1.
129 Law Council of Australia (n 120) 3.
130 Ibid 3–4.

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

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

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

A federal judicial commission?

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

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

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

131 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (n 58) [6.33].
132 Ibid [6.34].
133 See, eg, Law Council of Australia (n 120); Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3); Naomi Neilson, 'ABA Welcomes Reports of Federal Judicial Commission' [2021] *Lawyers Weekly* <https://www.lawyersweekly.com.au/biglaw/30692-aba-welcomes-reports-of-federal-judicial-commission>.
134 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (n 58) [7.82]–[7.84].
135 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [13.63].
136 Neilson (n 129).

Conclusion

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

Appendix One: Judicial Commissions in Australia

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

Size and staffing

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

Types of complaints considered

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

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

Process

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

137 *Constitution Act 1975* (Vic) ss 87AAM, 87AAN; *Judicial Officers Act 1986* (NSW) s 5(3)–(5).
138 *Judicial Commissions Act 1994* (ACT) ss 5B, 5C; *Judicial Commission Act 2020* (NT) s 7.
139 *Judicial Commission Act 2020* (NT) s 7.
140 *Judicial Conduct Commissioner Act 2015* (SA) s 7.
141 *Judicial Commission of Victoria Act 2016* (Vic) s 16(3)(b),(e); *Judicial Officers Act 1986* (NSW) s 15; *Judicial Conduct Commissioner Act 2015* (SA) ss 17(e)–(f); *Judicial Commissions Act 1994* (ACT) ss 35B(1)(f)–(g), 35I.
142 *Judicial Commission of Victoria Act 2016* (Vic) ss 27–9; *Judicial Officers Act 1986* (NSW) ss 18, 39C–39D; *Judicial Conduct Commissioner Act 2015* (SA) s 6(5).

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

These bodies may then either:

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

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

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

Statistics on complaints

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

143 *Judicial Commissions Act 1994* (ACT) ss 35, 35D–35H; *Judicial Commission Act 202*0 (NT) ss 17–18.
144 *Judicial Commission of Victoria Act* (Vic) s 13; *Judicial Officers Act 1986* (NSW) ss 20–1; *Judicial Conduct Commissioner Act 2015* (SA) ss 16–8, 20; *Judicial Commissions Act 1994* (ACT) ss 17, 35B, 35C; *Judicial Commission Act 2020* (NT) ss 44, 48–9. South Australia's Commissioner cannot appoint an investigatory body itself, rather it must 'recommend' the Attorney-General do so: *Judicial Conduct Commissioner Act 2015* (SA) s 20.
145 *Judicial Commission of Victoria Act 2016* (Vic) ss 51, 61–8; *Judicial Officers Act 1986* (NSW) ss 24–5; *Judicial Conduct Commissioner Act 2015* (SA) s 24; *Judicial Commissions Act 1994* (ACT) ss 37–44; *Judicial Commission Act 2020* (NT) s 52.
146 *Judicial Commission of Victoria Act 2016* (Vic) s 34(4); *Judicial Officers Act 1986* (NSW) s 29; *Judicial Conduct Commissioner Act 2015* (SA) s 25; *Judicial Commissions Act 1994* (ACT) ss 21–2; *Judicial Commission Act 2020* (NT) s 57.
147 *Judicial Commission of Victoria Act 2016* (Vic) pt 6, div 1; *Judicial Officers Act 1986* (NSW) s 40; *Judicial Commission Act 2020* (NT) s 59; *Judicial Commissions Act 1994* (ACT) s 19(1).
148 *Constitution Act 1975* (Vic) s 87AAB; *Constitution Act 1902* (NSW) s 53; *Judicial Commissions Act 1994 (ACT)* ss 4–5; *Supreme Court Act 1979* (NT) s 40; *Judicial Conduct Commissioner Act* 2015 (SA) s 26; *Constitution Act* 1934 (SA) s 75.
149 Judicial Commission of Victoria, *Annual Report 2019-2020* 35.
150 Judicial Commission of New South Wales, *Annual Report 2019-2020* 49.
151 Judicial Conduct Commissioner, *Annual Report 2019-2020* 21.

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

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

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

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

Appendix Two: Comparative Complaints Mechanisms

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

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

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

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

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

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154 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 41–2, citing 28 USC §§ 351–64 (2012).
155 Ibid, citing 28 USC § 354(a)(2)(B) (2012).
156 Ibid, citing 28 USC § 354(b)(2) (2012).
157 Ibid, citing 28 USC § 354(b) (2012). See Administrative Office of the U.S. Courts, 'Judges and Judicial Administration - Journalist's Guide'.
158 *Judges Act*, RSC 1985, c J-1, s 63(2); Judicial Conference of Australia, *Report of the Complaints Against Judicial Officers Committee* (Report 2013) 17–18.
159 *Judges Act*, RSC 1985, c J-1 s 63(3).
160 Ibid s 65.
161 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 8. See Office of the Judicial Conduct Commissioner, 'Complaints Process' <www.jcc.govt.nz/complaintprocess.html>; Judicial Conference of Australia (n 158) 16.
162 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 15A.
163 Ibid s 16.
164 Ibid s 17.
165 Ibid s 18.
166 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 44, citing Harrison James, 'Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland' (2009) 13 *Edinburgh Law Review* 427, 433.
167 *Constitutional Reform Act 2005* (UK) pt 4; see Judicial Conduct Investigations Office, 'Create a Complaint' <www.complaints.judicialconduct.gov.uk>; Judicial Conference of Australia (n 158) 19–20.

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

168 *Judicial Discipline (Prescribed Procedures) Regulations 2013* (UK) SI 2013/1674 rr 4, 6.
169 Ibid rr 9(1), 10(1).
170 Appleby and Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (n 3) 44, citing Office for Judicial Complaints, *A Review of the Rules and Regulations Governing Judicial Discipline* (2013) 13.
171 *Judicial Discipline (Prescribed Procedures) Regulations 2013* (UK) r 13(3)(a).
172 Ibid rr 11, 13(3)(e).
173 *Constitutional Reform Act 2005* (UK) s 108, sch 14.
174 Ibid s 108.
175 Ibid ss 110–11; GOV.UK, 'Judicial Appointments and Conduct Ombudsman' <www.gov.uk/government/organisations/judicial-appointments-and-conduct-ombudsman/about.>.

Australian Government
Australian Law Reform Commission

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.

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'.[1] 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'.[2] By contrast, partiality is 'the antithesis of the proper exercise of a judicial function'.[3]

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'.[4]

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.[5]

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.[6] 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.[7] 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.[8]

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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.[9] 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'.[10] 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.[11] The impact of implicit bias in the legal system has also been considered by parliamentary and ALRC inquiries.[12]

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.[13] Judicial education 'has been impressively developed over the past forty years' to combat some of the challenges associated with bias;[14] 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.[15] 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,[16] at training sessions,[17] and at conferences.[18]

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.[19]

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.[20] 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).[21]

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'.[22] 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.[23]

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.[24] 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.[25] System one thinking is an unavoidable and essential part of human decision-making;[26] 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'.[27] 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'.[28] 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'.[29] 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';[30] 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'.[31] These types of bias are, it is suggested, 'driven by attitudes and stereotypes that we have about social categories, such as genders and races'.[32]

Heuristics and cognitive biases

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

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.[37]	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.[38]	When judges initially decide an issue one way, they are more likely to confirm their initial approach in later decisions.[39]
Representativeness bias	Refers to the tendency to make assumptions about something or someone belonging to a particular category.[40]	When assessing the credibility of a criminal defendant, a judge might observe that a defendant's demeanour on the witness stand is representative or a guilty person or an innocent person.[41]

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.[42]	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.[43]	When judges determine damage awards, fines, and criminal sentences after having been presented with sums or duration.[44]
Egocentric bias	Refers to the tendency to make judgments 'that are egocentric or self-serving'.[45]	When judges are reflecting on their capacity for avoiding bias in judging.[46]

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.[47]

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.[48] However, this was a notable exception among a number of studies that show that judges are unable to suppress inadmissible evidence.[49] 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.[50]

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.[51] They find that

42 Ibid 89.
43 See, eg, Jeffrey J Rachlinkski, 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).
44 Rachlinkski, Wistrich and Guthrie (n 43).
45 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.
46 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.
47 Ibid 1501–1504.
48 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.
49 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.
50 Wistrich and Rachlinski (n 13) 96.
51 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[52] (eg, the 'expert heuristic'), and schemas (ways of making sense of the world), such as stereotypes.[53] 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.[54]

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).[55] Instead, attitudes and stereotypes may often be implicit, such that they cannot be accessed by introspection.[56] A positive attitude towards a particular social group does not necessary 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.[57]

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

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,[60] '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.[61] 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.[62]

23. Initial research suggested that the IAT can pick up *negative* biases relating to socially sensitive topics more accurately than other methods.[63] 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.[64] 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.[65] However, recent meta-analyses of research in this area suggest that the link between results on the IAT and behaviour may be relatively weak.[66] 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.[67] 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.[68]

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'.[69]

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.[70] While this research has demonstrated some differences in certain circumstances between judges from different social categories,[71]

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 *Americal 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 JI4, 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.[72]

27. Another line of research has explored whether the characteristics of litigants influence judicial decision-making.[73] 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.[74] 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.[75] 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.[76]

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[77] and age.[78] Studies on the impact of biases in relation to sexual orientation is limited and mixed; however, archival research has demonstrated some difference in treatment.[79] There is also some limited evidence from observational court studies of attractiveness bias impacting judicial decision-making,[80] and that adults with 'baby faces' are likely to be granted more favourable treatment.[81] Recent experimental research has also suggested that the socio-economic status of a litigant can impact judicial decision-making.[82] 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.[83]

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

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 Scurich 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.[85] In the United Kingdom, the data is more limited and mixed, but indicates that race influences decisions relating to custody and sentencing.[86] 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.[87] 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,[88] some have critiqued these studies on the basis that they do not adequately consider subjective factors that are relevant to culpability.[89] 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.[90] Differential outcomes related to ethnic in-group bias have also been demonstrated in civil law contexts in Israel (small claims)[91] and the United States (workplace racial harassment).[92]

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.[93] 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. [94]

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.[95] 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.[96] 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'.[97]

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.[98]

34. For Aboriginal and Torres Strait Islander people, multiple disadvantages and injustices within society can 'accumulate over a lifetime'.[99] 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).[100] Structural discrimination and biases within society and the legal system have been considered crucial to understanding the root causes of this overrepresentation.[101] 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.[102] 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.[103] 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.[104] 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.[105] 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.[106] They also felt less safe in the court environment and in the courtroom than other court users.[107] Dr Stephen Hagan has written extensively on bias experienced by Aboriginal and Torres Strait Islander peoples in the courts.[108]

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.[109] No correlation was found between education level, occupation, and the level of implicit bias held.[110] 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.[111]

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.[112]

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]'.[113]

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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);[114]
- 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.[115] A consciously held and explicitly expressed stereotype about a particular social group might rise to that level.[116]

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 JI4, 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.[117]

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.[118]

43. This is repeated in the commentary to the *Bangalore Principles on Judicial Conduct*, under the heading 'Irrelevant grounds'.[119] 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.[120]

44. There are, as has been recognised, 'institutional, resource and policy reasons' for making issues of implicit social bias off-limits.[121] 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.[122] 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….[123]

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*.[124] 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.[125] 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.[126]

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.[127] 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.[128] 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'.[129]

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'.[130] 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.[131] 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

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, 6th 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 Englich, '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.[132] They require the judge to take a step back, rather than 'simply rely[ing] on information that confirms the result they were predisposed towards'.[133]

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.[134] 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.[135]

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.[136] 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.[137]

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'.[138] That could, however, 'enable the informed observer to reach a view in difficult cases that judges would struggle to accept',[139] 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.[140] 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 *Vakauta v Kelly* (1988) 13 NSWLR 502, 527 (McHugh J), approved in *Vakauta 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.[141] Intelligence does not limit a person's exposure to the blind spot effect.[142] 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.[143] Background Paper JI2 discusses alternative procedures that have been proposed to address this issue.[144]

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.[145] There is, however, still limited evidence on the effectiveness of such strategies.[146]

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).[147]

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.[148] 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.[149] The following grid plots a number of strategies designed to address bias in judicial decision-making according to each strategy's 'target' and 'effect':

A 3x3 model	**Mitigate**	**Insulate**	**Remove**
Personal	Avoid risk factors (hunger, fatigue), articulate reasoning, 'imagine the opposite'	Remove information that activates bias	Cognitive training (e.g. relearning associations)
Interpersonal	Identifying others' biases is easier; challenging conversations	Subdivide tasks to ensure independence of procedures; reveal identifying information last	Exposure to diversity ("Contact hypothesis")
Institutional	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.[150]

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).

149 Ibid 20–1.

150 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');[151] (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';[152] and (iii) perspective taking (considering how the situation would appear to someone else).[153]
- **Humanising litigants**, for example, by spending a little additional time to speak to them during proceedings.[154]
- **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.[155]
- **Deferring judgment** following deliberation in cases where risk of cognitive or implicit social bias is high.[156]

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 .[157] This could include judges fostering diversity in their private lives.[158]

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.[159]
- **Trial bifurcation**: ensuring that different judges make decisions at pre-trial and trial stage to avoid confirmation bias.[160]

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 relativities'.
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.[161] 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.[162]
- **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'.[163] 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.[164] They note that such auditing is already effectively carried out in some cases by the media.[165]
- **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.[166]
- **Design and decoration of courts** to expose judges to counter-stereotypic role models.[167]
- **Reducing discretionary decision-making** by minimising the number of legislative provisions requiring the exercise of discretion.[168]
- **Periodic ceremonies** for judges to retake their oath (eg at the start of each year).[169]
- **Implementing peer review processes** to allow judges to receive feedback on their decision-making or courtroom management. [170]
- **Increasing diversity** in social groups of appointments to judicial office to mitigate the effects of implicit social bias on particular groups.[171]

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.[172] 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.[173]

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,[174] people can address some cognitive biases when they are motivated to do so.[175]

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.[176]

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).[177] It has been suggested that this training should start early in the judicial career, with orientation, when individuals are most likely to be receptive.[178] 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'.[179]

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'. [180] 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'.[181]

Conclusion

59. Judges are expected to discard the 'irrelevant, the immaterial and the prejudicial' when making decisions.[182] 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.[183] 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.[184]

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.

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 *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (approving the remarks of McHugh JA in *Vakauta v Kelly* [1988] 13 NSWLR 502, 527). .
183 Barry (n 1) 1.
184 Chief Justice TF Bathurst (n 9) 15.

Australian Government
Australian Law Reform Commission

BACKGROUND PAPER **JI7**

JUDICIAL IMPARTIALITY

The Fair-Minded Observer and its Critics

April 2021

This paper on the fair-minded observer and its critics 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), *Ethics, Professional Development, and Accountability* (April 2021), and *Cognitive and Social Biases in Judicial Decision-Making* (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.

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 considers the test used to decide when a judge will be disqualified from hearing a case because there is a risk that people might *think* they might be biased. The notion of judicial impartiality is so central to confidence in the administration of justice that the law has developed this mechanism — disqualification for apprehended bias — to avoid even the appearance of biased judicial decision-making.

2. This paper builds on *The Law on Judicial Bias: A Primer* (Background Paper JI1).[1] It briefly restates the content of the test and the way it is applied. It then considers in more detail the history of the test, critiques of the test, and reforms that have been proposed in academic commentary. It also briefly summarises alternative approaches used to identify situations where disqualification is, and is not, required in a number of other jurisdictions and specialised areas of practice.

Actual and apprehended bias

3. In Australia, including in relation to the federal judiciary, the law on bias is predominantly found in common law.[2] Two different types of bias may be alleged — actual or apprehended, reflecting the imperative that justice must both be done, and be seen to be done.

4. A claim of actual bias

> requires proof that a decision-maker approached the issues with a closed mind or had prejudged them and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[3]

This is a subjective test. It looks to what is actually going on in the judge's mind.

5. Apprehended bias looks instead to perceptions, and considers the matter from the perspective of how it may *appear*. This does not require any conclusion 'about what factors actually influenced the outcome'.[4] It is therefore an objective test — looking at how the matter is perceived from outside.

Test for apprehended bias

6. The test for apprehended bias in Australia is:

> whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[5]

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1 See in particular Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020) [10]–[18].

2 Although a number of statutory provisions also criminalise judges exercising jurisdiction in matters in which they have a personal interest: see, eg, *Crimes Act 1914* (Cth) s 14, in relation to the exercise of federal jurisdiction.

3 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 652, citing *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 [37]–[39].

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).

5 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

7. This test is applied in two steps: first, identification of what it is that may lead to bias, and second, identifying the logical connection between the source of bias and the feared negative impact on the decision.[6]

8. In *Isbester v Knox City Council*,[7] Gageler J employed a third step in the application of the test: 'consideration of the reasonableness of the apprehension of' the deviation from impartiality as suggested by the party claiming bias.[8] This step was first hinted at in *Ebner*, where the court suggested that only after the first two steps of the test had been resolved, could the 'reasonableness of the asserted apprehension of bias be assessed'.[9] The existence of such a third step remains unsettled,[10] and it has been treated with caution by the Full Federal Court of Australia ('Federal Court').[11]

9. At the time of publication, a case concerning the test for apprehended bias is pending before the High Court of Australia ('High Court'),[12] so the principles discussed here may be developed further in the near future.

History of apprehended bias

10. Historically, the common law has been reluctant to recognise that it was even possible for judges to be biased. Writing in the 18th century, Sir William Blackstone SL KC stated that

> the law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[13]

11. Nevertheless, concerns regarding judicial bias have been considered since at least the 13th century, when the law considered that a judge should be disqualified on certain grounds.[14] By the mid-19th century it was clearly established that a judge would be automatically disqualified from hearing a case where they had a pecuniary interest in the subject matter.[15] The move from statements of principle to the adoption of specific tests for bias began in England and Wales in the mid-1800s.[16] At first, the test was concerned solely with actual bias.[17] A judge was said to be disqualified wherever

> there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties.[18]

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6 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow, Hayne JJ, Callinan J concurring).
7 *Isbester v Knox City Council* (2015) 255 CLR 135.
8 Ibid 155–6.
9 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345.
10 Matthew Groves, 'A Reasonably Reasonable Apprehension of Bias' (2019) 41(3) *Sydney Law Review* 383, 388.
11 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87, 92.
12 *Charisteas v Charisteas & Ors* [2021] HCATrans 28 (special leave to appeal granted from *Charisteas v Charisteas* [2020] 60 Fam LR 483).
13 Sir William Blackstone SL KC, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed), Volume III, 361.
14 John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 19; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 929.
15 *Dimes v Proprietors of the Grand Junction Canal* [1852] 3 HLC 759; 10 ER 301.
16 See further Tarrant (n 14) 33.
17 Ibid.
18 *R v Rand* [1866] LR 1 QB 230, 232–3 (Blackburn J, Cockburn CJ and Shee J concurring).

12. Concerns about appearances of bias, even in the absence of actual bias, began to appear regularly in the cases at the turn of the 20th century.[19] This shift was marked clearly by the well-known statement of Lord Heward CJ in *R v Sussex Justices; Ex parte McCarthy* that it

> is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[20]

This signalled a move towards a framework within which judges could be disqualified even if they were not actually biased (or presumed to be actually biased because they had a pecuniary interest), but might appear to be.[21] It also made it possible for factors other than a pecuniary interest to be taken into account in determining if bias (or the appearance of it) might exist.[22]

13. Over the first half of the 20th century the courts in the United Kingdom and the Commonwealth grappled with how exactly this framework should be applied.[23] In the United Kingdom, the position was clarified by the House of Lords in the case of *R v Gough*, where the Court held that the test for apprehended bias required a 'real danger' of bias, viewed from the perspective of the judge.[24] According to Lord Goff of Chieveley, it was

> unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[25]

14. However, this approach was criticised and decisively rejected in Australia a year later by the High Court in the case of *Webb v The Queen* — which firmly established that the test was to be considered from the viewpoint of the fair-minded lay observer.[26] Mason CJ and McHugh J noted that the assumption underlying the approach in *Gough* was that public confidence in the administration of justice 'would be maintained because the public will accept the conclusions of the judge'.[27] Their Honours' view of the Australian case law, however, was that public confidence was

> more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member the public to the irregularity in question.[28]

15. Another key feature of the test was established that was concerned with whether the fair-minded lay observer *might* reasonably think that the judge *might* be biased.[29] This is a

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19 Tarrant (n 14) 35.
20 *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256, 259.
21 Tarrant (n 14) 26.
22 Ibid.
23 For a complete history of the back-and-forth in the early part of the 20th century on the bias test, see Ibid ch 3.
24 *R v Gough* [1993] AC 646, 668–70.
25 Ibid 670.
26 *Webb v The Queen* (1994) 181 CLR 41.
27 Ibid 51 (Mason CJ and McHugh J).
28 Ibid (Mason CJ and McHugh J). See further Tarrant (n 14) 33; *Johnson v Johnson* (2000) 201 CLR 488, 492–3. See the debates around the adoption of the 'reasonable suspicion' test in: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 and *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546. For the debates around the possibility/probability standard, see: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 and *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.
29 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

question of possibility (real and not remote), not probability.[30] This has come to be known as the 'double-might' test, and has been accepted as setting a 'low threshold'.[31]

16. Disqualification for apprehended bias, viewed from the perspective of a fair-minded observer or other 'reasonable person', is now part of the law in much of the Commonwealth, including, since 2002, in the United Kingdom.[32] It is well established, with some variation, for example, in Brunei Darussalam,[33] Canada,[34] Hong Kong,[35] India,[36] New Zealand,[37] Singapore,[38] and South Africa.[39] It is also required by the case law of the European Court of Human Rights on the right to a fair trial,[40] and the *Bangalore Principles on Judicial Conduct* (see paragraph 62).[41]

17. However, the standard applied under the test differs across jurisdictions. In England and Wales, the question is whether the fair-minded observer 'would' (rather than 'might'), conclude that there was a 'real possibility' that the tribunal was biased.[42] In South Africa, the test is whether the reasonable person 'would' apprehend that the judge 'has not and will not bring an impartial mind'.[43] In Canada, the test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude'.[44]

18. What started as a maxim that 'no [person] can be a judge in [her or his] own cause' is now directly tied to concerns about

> the independence of the judiciary, public confidence in the judicial system, and a concern for fundamental human rights.[45]

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30 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).

31 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 64, citing *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 (Spigelman CJ). See also Tarrant (n 14) 66.

32 *Porter v Magill* (2002) 2 AC 357, 494 (Lord Hope with Lords Bingham, Steyn, Hobhouse, and Scott concurring). Although note that English law also retains automatic disqualification where the judge has an interest (not necessarily pecuniary) in the case.

33 Ann Black, HP Lee and Marilyn Pittard, 'Judicial Independence, Impartiality and Integrity in Brunei Darussalam' in *Asia-Pacific Judiciaries* (Cambridge University Press, 2018) 67, citing *Bolkiah (HRH Prince Jefri) v State of Brunei Darussalam and Another (No 3)* [2007] UKPC 62 [18] (Lord Bingham).

34 *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369 (Grandpré J), affirmed in *R v RDS* (1997) 3 SCR 484 [31] (L'Heureux-Dubé and McLachlin JJ, La Forest and Gonthier J concurring).

35 Albert HY Chen and PY Lo, 'Hong Kong's Judiciary under "One Country, Two Systems"' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 159, citing *Deacons v White & Case* [2004] 1 HKLRD 291 and *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd* [2014] 3 HKLRD 375.

36 *PK Ghosh, IAS and ANT v JGRajput* (1996) AIR 513, 516.

37 Gerard McCoy, 'Judicial Recusal in New Zealand' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 330, citing *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 [3]–[4].

38 Kevin YL Tan, 'The Singapore Judiciary' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries* (Cambridge University Press, 2018) 302, citing *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791, 825.

39 Kate O'Regan and Edwin Cameron, 'Judges, Bias and Recusal in South Africa' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 349–50, citing *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 [48].

40 *Piersack v Belgium* (1982) 5 EHRR 169 [30]–[31]; *De Cubber v Belgium* (1984) 7 EHRR 236 [30]; *Pullar v United Kingdom* (1996) 22 EHRR 391 [30]. This case law was cited in *Porter v Magill* (2002) 2 AC 357, 452 as providing grounds to change the way the test for apparent bias was formulated in England and Wales.

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

42 *Porter v Magill* (2002) 2 AC 357 452.

43 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 [48] ('Whether a reasonable, objective and informed person would on the correct facts apprehend that the judge has not and will not bring an impartial mind to bear on the adjudication of the case.')

44 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369, 394 (Grandpré J) ('what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly'); affirmed in *R v RDS* (1997) 3 SCR 484 [31].

45 Tarrant (n 14) 19.

The move towards an objective test grounded in the perspective of the reasonable person or fair-minded lay observer can be explained, in part, as playing a role in maintaining the legitimacy of the courts. When judges exercise judicial power it affects the rights of people who had no direct say in their appointment, which gives rise to a counter-majoritarian difficulty, or a 'gap' in the legitimation of governmental power.[46] The law sustains its legitimacy, in part, through public confidence in the objectivity of decision-making.[47] This public confidence requires a sensitivity to the high degree of pluralism in modern society.[48] The test for apprehended bias assists in resolving this tension, bridging the legitimacy gap by supporting judges to make decisions from beyond their own perspective. It is a keystone of both the impartiality of the judiciary and the rule of law that relies on an established judicial independence.[49]

Applying the test for apprehended bias

19. Different categories of case have been identified as potentially giving rise to a reasonable apprehension of bias:

- Where the judge has an interest in the outcome of the decision;
- Because of the conduct of the judge in the course of or outside of proceedings;
- By way of the association the judge has with one of the parties, counsel, or witnesses;
- Where the judge is exposed to extraneous information (has knowledge of prejudicial but inadmissible fact or circumstance);
- Where a judge's comments or behaviour suggest the matter is subject to prejudgment.[50]

20. To answer the question of what the fair-minded lay observer would think of the situation, the courts use what has been described as a 'kind of thought experiment'.[51] They make assumptions about the fair-minded observer (for example, that she or he is reasonable, knows commonplace things, is not unduly sensitive or suspicious) and the knowledge that she or he has about the world, and the case.[52] They then try to see the situation from that perspective.

Criticisms of the test for apprehended bias

21. The existing test for apprehended bias, in its various forms across the Commonwealth, and the way it has been applied, has been subject to a number of criticisms. This part of the paper briefly sets out some of the key criticisms, before turning to a number of reforms that critics have proposed.

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46 This legitimacy gap is resolved by: the independence of the judicature from the political branches and the impartiality of the judge; the rule of law; and sovereignty: Daniel Smilov, Michel Rosenfeld and Andras Sajo, 'The Judiciary: The Least Dangerous Branch?' in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 871.

47 The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 146.

48 Ibid; Andrew Higgins and Inbar Levy, 'What the Fair-Minded Observer Really Thinks about Judicial Impartiality' [2021] *Modern Law Review* (forthcoming), 1.

49 Tarrant (n 14) 1; Jula Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53(3) *Osgoode Hall Law Journal* 853, 860, citing *R v RDS* (1997) 3 SCR 484 [31].

50 See further Australian Law Reform Commission (n 1) [19]–[33].

51 Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29 *Australian Family Lawyer* 18, 30. Professor Chisolm draws parallels to the 'pub test' used in political and public commentary.

52 *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 [21] (Besanko, Flick and Abraham JJ).

The fair-minded observer as a 'flimsy veil' for the judge's own views

22. A key criticism is that that the construct of the fair-minded observer is a fiction. This overarching criticism is central to the more specific criticisms discussed below.[53]

23. According to Kirby J, deciding a case almost fifteen years ago, the observer had been 'stretched virtually to snapping point', and it was a fiction to consider that it provides an objective standard in place of the views of the judge making the decision.[54] As Professor Young notes:

> We may be nearing (or perhaps returning to) the point of admission that in many circumstances the 'lay observer' test, despite the deliberate terminology, is in truth the law's own sophisticated assessment of what the system can bear.[55]

24. Framed another way, the fair-minded observer test represents 'the court's view of the public's view',[56] which is inevitably the judge's own view of the matter.[57]

25. A number of scholars have observed that the fair-minded observer is overloaded with so much knowledge, and its function is so judicial in character, that 'it bears no resemblance to an average member of the public or reasonably reflects general public opinion'.[58]

26. Scholars argue that one way in which courts make the fair-minded observer a vehicle for their own view is by overloading it with knowledge.[59] The fair-minded observer is given detailed knowledge of the facts of the case, the applicable law, and the wider legal system. For example, in areas of law governed predominately by statute, particularly where the regime is detailed or complex, the fair-minded observer's apprehension of bias has been assessed as though she or he possessed 'an expert and microscopic analysis' of the legislative scheme.[60]

27. Professor Groves has argued that attributing the fair-minded observer with detailed knowledge runs counter to the 'low threshold' set by the 'double might' test, leaving the observer with little role to play.[61] This problem becomes acute when questions of the judge's conduct or questions of association between judges and lawyers in the judge's past professional life are at issue. It is suggested that the fair-minded observer is attributed

53 Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388, 389.
54 *Smits v Roach* (2006) 227 CLR 423 [96]–[97]. See also Groves, 'Bias by the Numbers' (n 12) 69.
55 Young (n 14) 934, citing *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306–7 (French CJ).
56 *Webb v The Queen* (1994) 181 CLR 41 [51] (Mason CJ, McHugh J).
57 Olowofoyeku (n 53) 406.
58 Higgins and Levy (n 48) 1. See also Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <auspublaw.org/2015/09/apprehended-bias/>; Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376, 380–1. Recently, the concern that the test for apprehended bias leads to results far removed from actual public attitudes has been tested by preliminary empirical study: see further paragraph 32.
59 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 666.
60 Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 390, citing *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [17].
61 Groves, 'Bias by the Numbers' (n 31) 67. He notes that the 'low threshold' of the test is in tension with the reminders of the courts that claims of apprehended bias must be 'firmly established': Ibid 64. See further *GetSwift Limited v Webb* [2021] FCAFC 26 [28] ('Whilst a precautionary approach is to be observed, … an allegation of apprehension of bias must be 'firmly established''), citing *Reece v Webber* (2011) 192 FCR 254 [45]; *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553.

with an unrealistic knowledge and understanding of the culture and traditions of the legal profession.[62] Judges are able to

> ascribe to the informed observer both knowledge and acceptance of practices that any sensible observer would be greatly troubled by and almost certainly reject.[63]

28. Overloading the observer with knowledge of legal culture and traditions in this way takes the decision from being 'what might be apprehended at a more general level' to a question of what 'the observer might actually think of the facts at hand'.[64] As Baroness Hale noted, if the fair-minded observer is too much of an 'insider' to the legal system, she or he runs 'the risk of having the insider's blindness to the faults that outsiders can so easily see'.[65]

29. In addition, one assumption 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'.[66] This plays into a common cognitive bias, by which people (including judges) think themselves less susceptible to biases than others (the bias blind spot).[67] However, this is not always the case.[68] This has underpinned suggestions that that fair-minded observer should perhaps begin with more 'basic scepticism about the abilities and habits of judges'.[69]

The test leads to unpredictable outcomes

30. Professor Olowofoyeku has criticised the test as leading to case-by-case decision-making, which gives rise to subjective and unpredictable conclusions, doing 'little to provide reliable guidance to stakeholders in the judicial process'.[70] Similarly, Professors Hughes and Bryden suggest that the highly context- and fact-specific nature of the test means that it gives rise to considerable uncertainty for both judges and litigants in marginal cases about whether a judge should sit.[71]

31. Young observes how 'small gradations in the understanding attributed to the lay observer can quickly determine the outcome of a challenge'.[72] This presents issues for certainty of justice, and is difficult to resolve on appeal.[73]

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62 Matthew Groves, 'The Rule Against Bias' [2009] *Monash University Law Research Series* 10; Groves, 'Bias by the Numbers' (n 31) 65.
63 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 1, 21.
64 Groves, 'Bias by the Numbers' (n 31) 65.
65 *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 [39].
66 *Vakauta v Kelly* (1988) 13 NSWLR 502, 527 (McHugh J), approved in *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (Toohey J) and *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia, 6th ed, 2016) 651..See also 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, 643.
67 Edmond and Martire (n 66) 649.
68 See further Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper JI6, 2021) [53].
69 Groves, 'Bias by the Numbers' (n 31) 71–2. See further Edmond and Martire (n 66) 645–9. A scepticism displayed, for example in *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [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).
70 Olowofoyeku (n 53) 389.
71 Hughes and Bryden (n 49) 858.
72 Young (n 14) 933.
73 Abimbola Olowofoyeku, 'Inappropriate Recusals' (2016) 132 *Law Quarterly Review* 318, 322.

The test leads to results far removed from the public's views

32. Recent empirical research supports the view that there is a significant divergence between results given by the application of the test and what members of the public actually think.

33. In a recent study, Associate Professor Higgins and Dr Levy conducted nationally representative surveys in the UK and Australia asking respondents what they thought about situations of possible bias.[74] The research found that, overall, 'the public think judges should be disqualified from hearing cases much more often than the law of apprehended bias presently requires'.[75] Higgins and Levy reported that:

- in relation to shared characteristics or beliefs between the judge and one of the parties (with the exception of shared religious beliefs), a majority of respondents did not favour disqualification;
- however, in every other scenario, including financial interests, ideological beliefs, and possible prejudgment arising from earlier judicial comments or findings, 'respondents consistently favoured disqualification' (although the public were somewhat more divided on some questions of prejudgment).[76]

34. They concluded that the findings suggest that, overall,

> the judiciary have a higher estimation of their own capacity to exclude irrelevant factors from their decision making than do the general public. In addition, or alternatively, the findings might suggest that judges take into account, explicitly or implicitly, legal policy considerations when applying the law of bias that the public do not, at least not without being prompted.[77]

35. Higgins and Levy note the limitations of using survey data for exploring these issues. They also recognise that the fair-minded observer is not necessarily meant to mirror the public, as the law on bias needs to balance a number of different factors, including public confidence, the objective risk of explicit and implicit bias affecting decision-making, legal policy considerations about the functioning of the legal system, and the risk of strategic use of claims.[78] Nevertheless, they argue that further research is needed to better understand public views, and if that research is consistent with their findings, then

> there will come a point when judges and law makers need to revisit the law of bias to ensure it better reflects public perception, or alternatively to expressly acknowledge that less weight is given to public perception in the rules governing judicial bias.[79]

The test is difficult for lay people to understand

36. All of these issues make for a test that is, it is argued, particularly difficult for non-lawyers to understand. As Dr Olijnyk suggests:

> To the layperson, there's … something odd — even vaguely absurd — about a test that requires the decision-maker to imagine they are a different, imaginary, person.

74 Higgins and Levy (n 48).
75 Ibid 2.
76 Ibid.
77 Ibid 3.
78 Ibid 3–4. See further Higgins and Levy (n 58).
79 Higgins and Levy (n 48) 30.

> Lawyers, on the other hand, are taught this kind or reasoning in week 1… the test relies on the judge being able to deploy expert training to engage in a complex intellectual exercise.[80]

37. Apart from undermining public and litigant confidence, the fact that the test is so difficult to apply can impact negatively on the administration of justice. Emeritus Professor Aronson, Professor Groves, and Professor Weeks suggest that it might contribute to unrepresented parties bringing applications for disqualification on the ground of bias with no prospects of success. They suggest that, while judges may perceive these claims as vexatious,

> just as unrepresented parties who are not schooled in the law struggle to understand the finer details of the bias rules, judges who are deeply immersed in the law may easily fail to realise that a test containing two 'mights', and which purports to reflect the judgment of a non-judicial observer but on closer inspection appears to contain the values of the judges whose conduct it is supposed to govern, may confuse unrepresented parties. Apparently baseless bias claims may simply be an expression of that confusion.[81]

Example: Apprehended bias and modern case management

Some see the law on apprehended bias as raising particular difficulties in the context of modern case management practices.[82] In order to promote efficiency, judges now often preside at multiple pre-trial hearings in a single matter, and take an active part in proceedings, including by trying to promote settlement. This leads to a greater risk of the appearance of — or actual — prejudgment.[83] By engaging with counsel and expressing tentative views during the process, judges risk creating an appearance of bias that disqualifies them from hearing subsequent parts of the matter.[84] The rule against bias, therefore, needs to tread a fine line between maintaining the essential quality of impartiality, and accommodating changes in the role of the judge.[85]

Higgins and Levy have suggested that judges may use an idealised fair-minded observer precisely to 'inject legal policy considerations' into these types of decisions, because she or he is taken to consider both the risk of bias and the 'benefits and costs to the administration of justice of disqualifying a judge'.[86] However they, and others, suggest that such a balancing process would be better carried out openly.[87]

80 Olijnyk (n 58).
81 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 657.
82 Young (n 14) 939; Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761.
83 Australian Law Reform Commission (n 68) [48]–[49].
84 Olijnyk (n 82) 761.
85 Ibid 763.
86 Higgins and Levy (n 48) 7. See also Young (n 14) 934.
87 Higgins and Levy (n 58) 385; John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353, 354; Groves, 'Bias by the Numbers' (n 31) 69–70.

What to do with the 'weary lay observer'?

38. This section considers the different ways in which those who criticise the test and its application suggest that these difficulties should be resolved.[88] Some scholars have suggested returning to the earlier position so that apprehended bias is explicitly decided by reference to the views of the court.[89] Others have urged partial codification of the law to clarify the circumstances in which judges should and should not sit. In one model, codification would be guided by reference to *actual* public perception as measured by empirical methods, the science on decision-making, and legal policy considerations.[90] Most, however, see value in the test, and think that its application can be adjusted to address the criticisms made.

Return to an openly subjective test

39. Some scholars in the United Kingdom, notably Olowofoyeku, have suggested courts should return to the position under which they decide bias claims not by reference to the views of a fair-minded observer, but by open reference to the views and conclusions of the judge who decides the issue.[91] Olowofoyeku argues that this would significantly simplify the process of deciding cases of apparent bias, and would lead to the same conclusions already made under the current test.[92] In his view, anything else is just 'plastering over the cracks of a flawed construct'.[93]

40. In addition, Professor Goudkamp has suggested the lower threshold of the test for apprehended bias, as against actual bias, has created a 'hesitancy of the courts to investigate whether breaches of the rule against actual bias have occurred' and that as a result, it may appear that the law's condemnation of bias is weakened.[94] In his view, the courts should make clear a finding of actual bias where the evidence supports it.

Partial codification

41. The law on bias in Australia has been developed by the courts with no direct input from Parliament. Some researchers have suggested that the law on bias should be partially codified in statute. Hughes and Bryden (writing in a Canadian context) and Higgins and Levy suggest that codification would improve clarity, make policy choices explicit, and allow for greater convergence between the test and public perceptions.

42. Hughes and Bryden suggest that legislative codification would be useful to establish 'a bright line for when disqualification is required' in certain areas.[95] In their view, the

> optimal point of balance between achieving … public satisfaction and providing litigants with reassurance about judicial impartiality is likely to be elusive, and ... there are times when it is more productive to focus on the clarity and consistency of

88 For the reference to the 'weary lay observer' see Young (n 14).
89 Olowofoyeku (n 53).
90 Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 394.
91 Olowofoyeku (n 53) 408–9. Groves also expressed this view at one point in Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 395.
92 Olowofoyeku (n 53) 408–9.
93 Goudkamp James, 'Facing up to Actual Bias' (2007) 27 *Civil Justice Quaterly* 32, 38–9.
94 Ibid 38–39.
95 Hughes and Bryden (n 49) 884–5.

the rules governing judicial disqualification than on the precise content of the rules themselves.[96]

43. This would also help judges and litigants in relation to situations where bias is held not to arise for policy reasons, even though there might be an objective basis for arguing that the judge should be disqualified (such as in relation to pre-judicial statements or writing).[97]

44. They suggest that a code should include guidance as to the way to address:

- professional relationships between bar and bench;
- prior judicial consideration of the matter at issue;
- extrajudicial writings that suggest predisposition; and
- procedures for disqualification applications.[98]

45. Higgins and Levy suggest that the content of a code should be crafted by conducting empirical research into public attitudes towards judicial bias, or by holding citizens' assemblies to canvass opinion.[99] Higgins and Levy posit that a code could have a traffic light system of scenarios with 'green' (no disqualification) and 'red' (automatic disqualification) lists analogous to the *International Bar Association, Guidelines on Conflicts of Interest in International Arbitration* (2014).[100] This would leave a smaller 'orange' mid-ground for judicial determination (see further paragraph 63).

46. In Australia, any attempted codification of the law on bias would be likely to raise significant constitutional issues. Disqualification for bias goes to the very heart of judicial power, vested in Commonwealth judges under Chapter III of the *Constitution*. Interference in determining how that power is exercised through codification of the law on bias could therefore be unconstitutional.[101] In this context, an alternative that could achieve the same aims is for judges to agree on public guidance that identifies circumstances that do and do not give rise to apprehended bias.[102]

47. The final part of this paper briefly sets how some jurisdictions and areas of practice have identified grounds that do, or do not, require disqualification — providing a shortcut to, or modifying, a general test for apprehended bias.

Adjusting the test or the application of the test

48. While acknowledging the limitations of the hypothetical observer, almost all who criticise the test for apprehended bias, or its application, see the construct as retaining value.[103] Instead of abandoning it, or replacing it with codified rules in certain circumstances, many suggest that the test and/or its application can be adjusted to meet the criticisms.

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96 Ibid 859.
97 Ibid 885.
98 Ibid.
99 Higgins and Levy (n 58) 395.
100 Ibid 11.
101 *TCL Air Conditioner v Federal Court* (2013) 251 CLR 433, 574. See also James Stellios, *The Federal Judicature* (LexisNexis, 2nd ed, 2020) 76–9. *R v Davison* (1954) 90 CLR 353 381–2.
102 Se, eg, the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017). Cf Chen and Lo (n 35) 159, citing Hong Kong Special Administrative Region, *Guide to Judicial Conduct* (2004). In the latter, 32 out of 98 paragraphs concern disqualification ([38]–[70]).
103 See, eg, Young (n 35) 955; Aronson, Groves and Weeks (n 3) 671; Campbell and Lee (n 21) 157.

Modify the test to introduce an explicit balancing exercise

49. Some have suggested that the addition into the test of a step to explicitly balance policy considerations could help to address the increasing subjectivity and unpredictability of its application. It is argued that this could allow judges to be more transparent about the policy choices and balancing of interests at play, including maintaining public confidence in judicial decision-making.[104]

50. The addition of Gageler J's 'third step' — assessing the reasonableness of an apprehension of bias (see above paragraph 8) — can be seen as one way in which this could be done.[105]

Use tools of calibration to fine-tune the test

51. Young observes that the courts already employ tools to 'calibrate' the test for apprehended bias — most relevantly in this context, 'speciation'.[106] These tools can be used to make the lay observer's conclusions 'more predictable and sustainable'.[107]

52. By 'speciation', Young refers to situations where the court has carved out a sub-category of bias with a more particularly worded test. He notes how precise taxonomies of bias have been accepted as a way of providing a 'yardstick', or calibration, for the fair-minded observer (see above paragraph 19).[108] Young notes how the High Court engaged in further 'speciation' when it later identified another sub-species of 'prejudgment'.[109] The court held that, to amount to prejudgment, the judge must have 'a mind incapable of alteration'.[110] According to Young,

> the narrowness of this explanation of prejudgment was a conspicuous fine-tuning of the rules, or at least a pointed clarification.[111]

53. Similarly, he suggests that the High Court developed a further sub-species of 'association' case based on the 'incompatibility' of a person's role in the past (eg, as prosecutor) and in the case at issue (as an administrative decision-maker in the same case).[112] This allowed the court to avoid the strictness of the approach introduced in relation to 'prejudgment'. On the other hand, he recognises that it could be argued that increasing specificity may complicate the law and 'unsteady' public confidence.[113]

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104 Griffiths (n 87) 354, citing Simon Atrill, '"Who Is the 'Fair-Minded and Informed Observer'? Bias after Magill"' (2003) 62 *Cambridge Law Journal* 279, 289.

105 Groves, 'Clarity and Complexity in the Bias Rule' (n 63) 23. Contrast Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) 651–2; Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 393.

106 Young (n 14) 945. He also refers to the 'spectrum of standards', which differentiates the approach depending on the nature of decision-making and identity of decision-maker, so of less relevance here: Ibid 22, citing *Isbester v Knox City Council* (2015) 255 CLR 135, 146–8.

107 Young (n 14) 955.

108 Ibid 19, 23.

109 Ibid 949; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507.

110 Young notes that there was some confusion over whether this statement was limited to a consideration of actual bias, but it is now relatively well settled that it applies in relation to apprehended bias: Young (n 14) 950.

111 Ibid 949.

112 Ibid 952–3, citing *Isbester v Knox City Council* (2015) 255 CLR 135. Another potential reform that Young points to, connected to 'speciation', is discarding the second step in *Ebner* (assessing the logical connection between the association and the negative impact on the decision) for 'association' bias, and potentially other forms of interest bias: Ibid 952.

113 Young (n 14) 955.

Careful application of test

54. Finally, a number of scholars and judges suggest that many of the issues identified above can be reduced if courts take a careful approach to the application of the test. This includes by striving 'to act consistently in determining what knowledge or information is to be imputed',[114] and ensuring that the hypothetical person is not overloaded with knowledge. As Kirby J noted, for courts to

> impute all that was eventually known to the court to an imaginary person… would only be to hold up a mirror against to itself.[115]

Similarly, Olijnyk has suggested that the degree of knowledge held by the fair-minded lay observer 'needs to be watched carefully to make sure the lay observer does not accidentally turn into a lawyer'.[116]

55. Tied to this is the suggestion that judges should also have more awareness of the scientific research around human cognition and biases.[117] Recent cases in the High Court and Full Court of the Federal Court on apprehension of bias arising from receipt of extraneous information suggest that knowledge of such research can be helpfully brought to bear in the application of the test.[118]

56. In summary, although there is significant literature on the difficulties associated with the test for apprehended bias, most see it as the correct approach because it requires judges to think about how the case will be perceived from a different perspective. In the words of French CJ:

> The interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. … However the utility of the construct is that it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations. While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area.[119]

57. For many, the fair-minded observer 'will always be a glove that covers judicial hands, but it is better than the alternatives'.[120]

Guidance on grounds for disqualification

58. The last part of this background paper briefly discusses how some jurisdictions and areas of practice have identified grounds that do, or do not, require disqualification — reducing the need to apply the test for apprehended bias or its equivalent. In some

114 Griffiths (n 87) 369.
115 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 671, citing *Johnson v Johnson* (2000) 201 CLR 488, 506.
116 Olijnyk (n 58).
117 Edmond and Martire (n 66) 661–2.
118 See *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [24]–[27] (Kiefel CJ and Gageler J); [97] (Nettle and Gordon JJ); [132]–[136] (Edelman J); *GetSwift Limited v Webb* [2021] FCAFC 26 [42]–[45].
119 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306–7.
120 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 671.

countries this is achieved by codification, and in others through case law and/or ethical guidance.

'Ground rules' through case law: England and Wales

59. In England and Wales, the courts have provided what Groves describes as 'ground rules' on bias for both judges and lawyers through case law.[121] In *Locabail (UK) v Bayfield Properties Ltd*, the Court of Appeal — while avowing that '[i]t would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias' — stated that it could not

> 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. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers. [122]

60. In contrast, the Court of Appeal thought that

> a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind …; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case.[123]

121 Groves, 'Bias by the Numbers' (n 31) 66.
122 *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Vic 3004; [2000] QB 451, 480 (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC).
123 Ibid (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC).

Guidance through Codes of Conduct: The *Bangalore Principles* and the *IBA Guidelines*

61. Many common law countries have a guide to judicial conduct that 'suggests' a course of action to a judicial officer. In some jurisdictions, such as the United Kingdom, the guide simply directs judges to relevant case law.[124] In others, such as Australia, the guide goes further, giving examples of application of principles to broad categories of scenarios.[125] In contrast, the Hong Kong guide is more prescriptive in illustrating examples that would give rise to an apprehension of bias.[126]

62. Specific grounds that ordinarily do, and do not, provide a basis for disqualification are also enumerated in the *Bangalore Principles on Judicial Conduct* (2002). The commentary repeats the same grounds identified in *Locabail* as irrelevant grounds.[127] Principle 2.5 sets out three grounds where apprehended bias will ordinarily arise (subject to necessity) (see Table 1).[128]

63. The *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* detail situations that, depending on the facts of the case: (i) 'give rise to justifiable doubts as to the arbitrator's impartiality and independence' (red list); (ii) 'may give rise to doubts as to the arbitrator's impartiality or independence' (must disclose) (orange list); and (iii) 'where no appearance and no actual conflict of interest exists from an objective point of view' (green list).

124 *Guide to Judicial Conduct 4th Amendment, September 2020* (UK) 6-7.
125 Australasian Institute of Judicial Administration (n 102).
126 Hong Kong Special Administrative Region, *Guide to Judicial Conduct* (2004).
127 United Nations Office on Drugs and Crime (n 41) 72.
128 UN Economic and Social Council (ECOSOC), *Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, UN Doc E/RES/2006/23 (27 July 2006) Principle 2.5.

Table 1: Example enumerated grounds in *Bangalore Principles* and *IBA Guidelines*

<table>
<tr><th>Bangalore Principles[129]</th><th colspan="2">IBA Guidelines on Conflicts of Interest in International Arbitration[130]</th></tr>
<tr><td>Grounds for disqualification include:

• actual bias or prejudice
• personal knowledge of disputed facts
• judge previously served as lawyer or was material witness in the case
• judge or member of judge's family has economic interest in outcome</td><td>Non-waivable red list:

• arbitrator is legal representative or employee of a party
• arbitrator has a significant financial or personal interest in party or case
• arbitrator or his or her firm regularly advises the party or an affiliate

Waivable red list:

• arbitrator has given legal advice or provided expert opinion on the dispute
• arbitrator holds shares in party (if privately held)
• arbitrator has a close family member who has significant financial interest
• arbitrator currently represents or advises the lawyer of law firm acting for a party
• arbitrator has close family relationship with party or lawyer</td><td>Orange list (must disclose):

• arbitrator has served as counsel for or against a party within past three years
• arbitrator and another arbitrator or counsel are members of same barristers' chambers
• close friendship or enmity exists between arbitrator and counsel
• close personal friendship exists between arbitrator and manager of board
• arbitrator holds material holding of shares in party (publicly listed)
• arbitrator has publicly advocated a position on the case</td></tr>
<tr><td>Irrelevant grounds (depending on case):

• religion, ethnic or national origin, gender, age, class, means, sexual orientation
• social, education, service or employment background
• membership of social, sporting, or charitable bodies
• previous judicial decisions
• statements made outside court</td><td colspan="2">Green list:

• arbitrator has previously expressed legal opinion (not specifically on case)
• arbitrator holds a membership of same professional association, social or charitable organisation, social media network
• arbitrator and counsel previously served together as arbitrators
• arbitrator teaches in same faculty or school as another arbitrator or counsel
• arbitrator holds insignificant amount of shares (publicly listed)</td></tr>
</table>

Codification: civil law jurisdictions and the United States

64. Table 2 summarises the grounds requiring disqualification in three jurisdictions where judicial disqualification is governed by statute.

65. In civil law jurisdictions, since at least the sixth century, parties could refuse to have their case be heard by any judge they considered 'under suspicion', and request a

129 Ibid.

130 International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (23 October 2014). The grounds listed in this table are examples — other grounds are also provided for under each heading in the Guidelines.

replacement.[131] The general approach now is to maintain broad disqualification statutes that (non-exhaustively) enumerate grounds that will automatically disqualify a judge.[132]

66. In Quebec, the *Code of Civil Procedure* sets out one automatic ground of disqualification and certain grounds that may, among others, 'be considered serious reasons for justifying a judge's disqualification'.[133] In Germany, statutory rules of court set out situations that automatically disqualify a judge from hearing a case, as well as those that allow for litigants or a judge to bring a disqualification application where there is a fear of bias, or a judge attempts to sit where there is meant to be automatic disqualification.[134]

67. Disqualification is governed by statute under federal law and in some states in the United States.[135] As such, it is a minority among common law countries. Under federal law, the United States Code identifies a number of specific circumstances that will automatically disqualify a judge, based on the *American Bar Association Model Code of Judicial Conduct*.[136] To supplement this, a party may also make a peremptory challenge to a judge (within certain time limits), alleging that the judge has a bias against the party or in favour of a party adverse in interest, and the judge is required to step aside.[137]

Table 2: Codification: Quebec, Germany, and the United States

Quebec[138]	**Germany**[139]	**United States**[140]
A judge will be disqualified if: • the judge or the judge's spouse has an interest in the case. The following, among others, may be considered serious reasons for justifying a judge's disqualification: • the judge or the judge's spouse is related to one of the parties or lawyers (up to the fourth degree) • personally being party to a similar proceeding • having given advice in the proceeding • having a financial interest • conflict between the judge and party having been uttered in the preceding year	A judge will be automatically disqualified where: • the judge or a close family member is involved in the litigation as a litigant, witness, or (in the criminal courts) a victim • the judge had prior professional involvement in the matter • the judge had prior judicial involvement in the matter	Any judge shall disqualify herself or himself where the judge: • is actually biased or has personal knowledge of facts • has previously acted or advised in the matter • has a personal or family based financial connection to the matter • or the judge's spouse knows, or knows the spouse of, a party or a lawyer in the matter (up to the third degree)

131 *Codex of Justinian*, Book III, Title 1, No 16. See also The Hon Justice John Sackar, 'Disqualification of Judges for Bias' (Speech, Faculty of Law, Oxford, 16 January 2018), citing Richard E Flamm, 'The History of Judicial Disqualification in America,' (2013) *Judges' Journal* 52(3) 12, 12–13.
132 Ibid 2.
133 *Code of Civil Procedure 2014* (Quebec) ss 202–3.
134 Hughes and Bryden (n 49) 868–9.
135 28 US Code § 455 (1990). See also Ibid 862–3.
136 See Rule 2.11: Disqualification. Hughes and Bryden (n 49) 862.
137 28 US Code § 144, cited in Hughes and Bryden (n 49) 862.
138 *Code of Civil Procedure 2014* (Quebec) ss 202–3. See also Ibid 878 (This list of grounds for disqualification has been treated as non-exclusive), citing *Droit de la Famille* - 1559, [1993] RJQ 625 [11]–[12], [21]–[22]. Note that these examples may, not must, give rise to disqualification.
139 As summarised in Ibid 869. Note that each court (eg criminal, civil, and constitutional) has discrete but 'substantially the same' provisions.
140 28 US Code § 455 (1990).

Conclusion

68. The test for apprehended bias recognises that judicial impartiality is not absolute, and that perceptions of bias must be managed. The fair-minded observer is not real. But it is a construct that gained rapid acceptance across the Commonwealth, and one concerning which there is not a large appetite for change within the judicature or the academy. As to the content of the test, suggestions have been made in the literature about how the application of the test may be made more consistent and brought more closely in alignment with public attitudes. Other background papers for this Inquiry show some of the structural issues that may also need to be addressed to complement the test in upholding and supporting judicial impartiality and public confidence in it.