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Submission to ALRC Judicial Impartiality Consultation Paper April 2021

I am grateful for this opportunity to make a submission in response the ALRC Consultation Paper. I am an Associate Professor in the Griffith Law School and Law Futures Centre. My particular area of expertise which is relevant to this inquiry is the use of 'social facts' in judicial reasoning including judicial use of 'common sense' reasoning; use of empirical and social science knowledge by judges; and judicial cognition. My PhD is in this area and I am published nationally and internationally. [1]

It is pleasing to see the impact of cognitive bias and heuristics on judicial reasoning discussed in the consultation paper. The existing research in this area suggests that as human decision-makers, judicial officers will inevitably be impacted by

[1] For example see Kylie Burns, "The Australian High Court and Social Facts: A Content Analysis Study" (2012) 40 *Federal Law Review* 317-348; Kylie Burns, "Its not just policy: The role of social facts in judicial reasoning in negligence cases' (2013) 21 *Torts Law Journal* 73; Kylie Burns 'Judges, 'Common Sense' and Judicial Cognition' (2016) 25 (3) *Griffith Law Review* 319; Burns, Dioso-Villa and Rathus, 'Judicial Decision-Making and "outside" extra-legal knowledge': Breaking Down Silos' (2016) 25(3) *Griffith Law Review* 283; K Burns 'In this Day and Age: Social Facts Common Sense and Cognition in Tort Law Judging in the United Kingdom' (2018) 45(2) *Journal of Law and Society* 226; Kylie Burns and Terry Hutchinson, "The Impact of 'Empirical Facts' on Legal Scholarship and Legal Research Training" (2009) 43 (2) *Law Teacher* 153.

cognitive and social bias.[2] As the consultation paper suggests, this can occur in a wide range of ways and there are multiple personal, interpersonal, environmental and institutional factors which may induce and contribute to biased or inappropriate judicial reasoning.[3] As the consultation paper also noted there have been multiple strategies proposed to address this 'wicked' problem although the research on the effectiveness of these measures is unsettled and evolving. I support Consultation Proposal 14 and 15 (transparency and diversity re judicial appointment) and any measures to improve judicial diversity. I also support proposals 18 and 19 (judicial education). It is clear that increasing judicial diversity and educating judges about the psychology of judicial decision-making, diversity and cultural competency are key starting points for addressing judicial bias. However, by themselves these measures will be insufficient to ensure change occurs.

Consultation Question 21 Further Steps

My own empirical work[4] and other research suggests that judicial use of 'common sense' reasoning is widespread in judicial decisions.[5] Judges are like other human beings and use their 'common sense', their 'common understanding', their contemporary knowledge of society and the expectations of the community, as part of judicial decision-making. Many legal principles require judicial application of

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[2] See a summary in Kylie Burns 'Judges, 'Common Sense' and Judicial Cognition' (2016) 25 (3) Griffith Law Review 319, 327-339. I discuss at 333-336 the work in relation to emotion and judging and at 336-339 the work on ideology and cultural cognition both of which are not explored in detail in the consultation paper. See also https://archive.sclqld.org.au/judgepub/2017/applegarth270717.pdf and https://archive.sclqld.org.au/judgepub/2021/applegarth20210610.pdf for reflections by Justice Peter Applegarth of the Supreme Court of QLD.

[3] Ibid.

[4] Kylie Burns, "The Australian High Court and Social Facts: A Content Analysis Study" (2012) 40 *Federal Law Review* 317

[5] For example, Justice McLellan has noted the dangers of this in relation to assumptions in relation to child sexual abuse litigation- see Hon Justice Peter McClellan (2015) 'Legislative Facts and s 144-A Contemporary Problem?', Supreme Court of New South Wales Annual Conference 2015, https://www.childabuseroyalcommission.gov.au/media-centre/speeches/supreme-court of-new-south-wales-annual-conference; Hon Justice Peter McClellan (2015) 'Professional Knowledge and Judicial Understanding', Keynote Address: 14th Australasian Conference on Child Abuse and Neglect, https://www.childabuseroyalcommission.gov.au/media-centre/speeches/professional-knowledge-and-judicial-understanding. For a recent discussion in the context of labour law see C Sutherland 'Interdisciplinarity in Judicial Decision-Making: Exploring the Role of Social Science in Australian Labour Law Cases (2019) 42(1) MULR 232.

forms of common knowledge- for example the reasonable man (person?) in tort law; the evaluation of the credit-worthiness of a witness late to complain of sexual abuse; the 'best interest' of the child in family law. Factual statements based on common sense or judicial 'intuition' often also form the background of judicial reasons (at trial and in appeal courts), provide context, and form the lens through which adjudicative facts are analysed or framed. In the absence of expert evidence or empirical material submitted by parties to a matter, judges are left with their common sense or intuitive understandings about these matters to fill factual gaps. Unstated judicial social facts assumptions about the world and human behaviour may also form a silent lens through which judges interpret the meaning of adjudicative facts.

While judicial common sense may be accurate, efficient, and consistent with empirical information, it may also be the vehicle through which error, discrimination and bias enters judicial decisions. Judicial common-sense assumptions can be completely inconsistent with empirical knowledge and be a cause of injustice.

A significant factor which requires attention to assist in limiting judicial bias is a lack of quality empirical or "exogenous" knowledge before courts to enable judges access to appropriate material to inform their judgments.[6] This was the focus of a special edition of the Griffith Law Review (volume 25 issue 3) in 2016 "Judicial Decision-Making and 'Outside' Extra-Legal Knowledge'[7] which included articles by leading scholars including Hamer[8], Edmond,[9] Burns, Rathus[10], Blackham and Cunliffe. There are a range of factors which I suggest require further consideration as part of combatting judicial bias arising from common sense reasoning. These are discussed in detail in the articles in the special edition and include:

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[6] I acknowledge that in itself this will not solve the issue of judicial bias without sufficient attention to other factors given cognitive bias may result in cherry picking or selection of only material which will confirm the existing bias.

[7] https://www-tandfonline-com.libraryproxy.griffith.edu.au/toc/rlaw20/25/3.

[8] Edmond G; Hamer D, 2016, 'Judicial notice: beyond adversarialism and into the exogenous zone', *Griffith Law Review*, vol. 25, pp. 291 - 318, http://dx.doi.org/10.1080/10383441.2016.1242182.

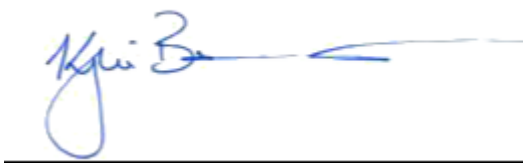
[9] Edmond G; David Hamer ; Emma Cunliffe , 2016, 'A little ignorance is a dangerous thing: engaging with exogenous knowledge not adduced by the parties', Griffith Law Review, vol. 25, pp. 383 - 413, http://dx.doi.org/10.1080/10383441.2016.1238029.

[10] Zoe Rathus' body of work on the use, non-use and misuse of social science in the family court can be accessed at https://experts.griffith.edu.au/18507-zoe-rathus/publications.

- The legal framework for judicial use of quality empirical information (outside of expert evidence) is unsettled, unclear and insufficient. The narrow approach taken by Australian Courts, to the application of the doctrine of judicial notice (s 144 Evidence Act) restricts the ability of judges to access high quality empirical material particularly where parties have not provided that material. This can result in judicial reliance on 'common sense' and unstated 'assumptions' (for example sourced from the media, internet, seminar attendance etc) which may induce and reflect bias. I support a review of s 144 to allow (with appropriate safeguards, notice to parties, and natural justice measures) judges to source and reference empirical information at least in relation to legislative and social framework facts.[11]

- The consideration of a range of appropriate mechanisms which would provide high quality research information to courts. This could include further use of bench books, guidelines and reports developed by 'multidisciplinary committees, judicial guidelines on how to use and interpret empirical material, court research support, enhancement of expert evidence, further use of intervenors and amicus curiae, and further use of specialist courts.[12]

I thank the ARC for the opportunity to make this submission and would be happy to provide any further information which would assist.



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[11] See the publications at n 1. See also the discussion of reforming judicial notice to improve the quality of judicial decision-making in Australia in Edmond G; Hamer D, 2016, 'Judicial notice: beyond adversarialism and into the exogenous zone', *Griffith Law Review*, vol. 25, pp. 291 - 318, http://dx.doi.org/10.1080/10383441.2016.1242182.

[12] These are discussed in various of the articles in the GLR special edition, see n 7.