Submission – ALRC Review of Judicial Impartiality

This submission is made by Professor Tania Sourdin (Newcastle University, Australia) and the comments relating to technology that are detailed below have been supported by the Australian Society for Computers and Law (AUSCL).

Professor Tania Sourdin has a courts and tribunal background and has for more than two decades conducted research into judicial innovation. As part of this work she has edited two book collections ('The Multi Tasking Judge' and 'The Responsive Judge') which have each considered a range of matters that are relevant to the ALRC Inquiry. In addition, Professor Sourdin has also conducted research in relation to technology and justice (she was the recipient of two ARC grants in 2003 and 2007 and has recently completed an evaluation of Justice Apps). In the submission below, her recent book 'Judges, Technology and Artificial Intelligence' (2021) is referred to as it is particularly relevant to a discussion about how technology might support judicial impartiality and how biases might be embedded with the justice system.

Initially, there are two matters that are raised below in relation to the April 2021 ARLC Consultation Paper. These matters are relevant as they assist to address some matters raised in the consultation paper that are not necessarily reflected in all of the consultation questions.

1. In relation to data gathering to determine whether or not judicial bias is an issue, it is suggested that the current data gathered in relation to civil (including family) matters within courts remains inadequate. In particular, a lack of demographic material, outcome and compliance data as well as data relating to procedural matters is inadequate. There are substantive issues about who uses courts and the extent to which the court user population is in any event a restricted population that does not reflect the diverse nature of Australian society. Whilst it could be expected that the cost of court proceedings might result in a limited proportion of the Australian population being engaged in civil court matters, it is suggested that additional matters impact on access to the courts which can be linked to perceptions relating to judicial bias and a lack of judicial diversity. There is little data relating to who does, and perhaps more importantly, who does *not*, access the court system. To collect data about this, good demographic data is essential.

2. As noted in the Consultation Paper and above, there is a lack of data about the court and judicial system. Given however that most people who will appear before a judge will only appear in respect of an interlocutory hearing, there needs to be a greater focus on the experience of people during the case management stage. It is often at this stage that people

may feel bullied or uncomfortable and there is little recourse that can be taken unless there is some appeal from an interlocutory order. In any event, it is probable that even where the substantive outcome in an interlocutory matter is perceived to be 'fair', a litigant may still perceive that the way in which they were dealt with (when considering participatory and procedural justice factors) was not 'fair'. Although the consultation material refers to this, at Question Seven, the focus is more on appeals rather than the case management experience.

In relation to the consultation questions the following responses are made:

Question One

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

1. The framework appears to assume that confidence in courts is solely related to judicial impartiality. As only a small fraction of civil matters are determined by a Judge and many matters are only subject to judicial case management or may be finalised with no judicial input, it is important not to equate judicial impartiality as the only factor promoting confidence in courts or judges. There are many factors that may lead disputants in a court system to form a view that a 'system' is biased. To adequately explore this, there needs to be a focus on how people experience the court system which includes the journey they take from commencing the process (or defending) and relates to all of their interactions with the court (and other legal actors). Principle 2 and 5 could therefore be amended.

Proposal Two

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

2. Whilst a Practice Direction is useful if there are issues of substantive fairness raised, this does not address issues relating to a lack of procedural fairness where there is no or little impact on the substantive outcome. A complaints process would enable courts and judges to gather useful data about perceptions of court users and also indicate (through the use of risk matrices that are commonly used outside courts) where there are significant issues. Whilst it might be expected that a complaints process might result in litigants with high conflict behaviours making baseless complaints, this could be managed in the same way as it is managed by other service providers.

Proposal Three

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.

3. Agree – however we note the response to Question Two above.

Question Four

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

4. Yes. This could be an ongoing work with guidelines and hypothetical examples being promulgated to provide guidance. An ethics hotline enabling peer judicial feedback would also be a useful addition.

Proposal Five

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.

5. Perhaps this could be expressed in user friendly terms eg 'About your Judge' and could form part of communication sent to litigants.

Proposal Six

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.

6. Agree – Notably some judges may require training to enable them to operate in a respectful and appropriate manner. There should always be an option to progress a matter to a Duty Judge where the litigants are concerned (with an option for the duty Judge to refer the matter back to the sitting judge to determine the matter where appropriate).

Question Seven

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

7. This question requires more detail in terms of background matters. It appears it is intended to apply to interlocutory appeals relating to bias issues however as noted above, it may be inappropriate to restrict this option. Notably, a complaints process could address concerns that are raised where there is no disagreement about the interlocutory outcome but there is a concern relating to the judicial behaviour and communication.

Proposal Eight

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.

8. Agree. A multi member tribunal is an appropriate body to consider this (together with any single judge who may be the subject of an application).

Question Nine

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

9. Using technology to support case allocation would be a useful. See T.Sourdin 'Judges, Technology and Artificial Intelligence', 2021, Edward Elgar pp 116 – 135.

Question Ten

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).

10. Agree.

Question Eleven

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?

11. Yes. Arguably better supportive technology that assists to address unrealistic expectations of litigants and provides procedural guidance could also provide self represented litigants with a more sophisticated understanding of court processes.

Question Twelve

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?

12. There are some options that can be considered relating to how AI might better support judicial impartiality. In particular, such systems may enable identification of bias issues in respect of substantive judicial decisions and also in relation to interlocutory decision making 9for example orders relating to time frames relating to submission of material). Whilst supportive judge AI is controversial, it may provide guidance to judges. Although it is likely that supportive Judge AI that is helpful is a few years away, it is important to consider some of the systemic and ethical issues now. Notably, Judge AI has developed in China so that it is now 'nudging' or 'correcting' judicial decision making. There are ethical and other issues related to this approach (which could be perceived as an attack

on judicial independence) however it is worthwhile considering how such systems may provide guidance to judges. These matters are explored in some detail in T.Sourdin 'Judges, Technology and Artificial Intelligence', 2021, Edward Elgar (Chapter 5).

Question Thirteen

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?

13. Noted – please see material above relating to a complaints process.

Proposal Fourteen

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.

14. Agreed. It is also important to consider whether more significant orientation and ongoing training can be adopted (see below).

Proposal Fifteen

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.

15. Agreed. It is noted that increased higher education fees have an ongoing impact on access to Law School. In addition, student fees impact on career choice. It is unlikely whether those that end up as barristers (who in turn most often become judges) come from disadvantages backgrounds although the Bar is seeking to support more barristers with an indigenous background. Other data that could be usefully collected on judicial appointments is linked to disability, first in family status and background ethnicity (first generation etc).

Question Sixteen

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?

16. Government University fee scholarships would assist however these must be linked to equity (not just merit). Notably students from rural backgrounds often face significant hurdles in terms of admission into University. Providing some CSP places for JD students would assist to enable people from more diverse backgrounds to enter law and potentially become judges.

Proposal Seventeen

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.

17. Agreed. Perhaps consideration should be given to a 12 week orientation program that includes mentoring and in court experience.

Proposal Eighteen

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.

18. Agreed. This proposal could go further with a requirement that a minimum of 30 hours of ongoing judicial education be undertaken each year with no less than four hours focused on bias and impartiality.

Question Nineteen

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?

19. Perhaps Universities could also be consulted? There is also a need to focus on judges and technology which may also raise questions about bias.

Question Twenty

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?

20. Agreed. Yes an ethical judicial hotline, peer mentoring and a formal debriefing process could be introduced.

Question Twenty One

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?

21. The steps outlined in the text of the Consultation paper are all useful and appropriate. Some jurisdictions are already working in this area and have well developed programs (eg judicial Commission of Victoria). In terms of implementation, an Advisory Committee that includes judges as well as lawyers and academics would be a useful starting point.

Proposal Twenty Two

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

22. Agreed

Proposal Twenty Three

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.

23. Agreed. As noted above, it is also important to determine who *is not* using the courts.

Question Twenty Four

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

24. No

Question Twenty Five

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

25. See material above. There is a great deal of data already collected and case management systems could be enhanced to collect more demographic and other data. At present in courts there is no reference to 'other' sources of data eg social media data. This can be mapped and tracked to support wider reporting. There is a need for better qualitative as well and quantitative data. Supportive Judge AI data could be used to track patterns of behaviour and could be usefully in informing individual judges about their approaches. Consideration could be given to establishing a body to collect and interpret data which could also conduct more in depth research.