Monash University Faculty of Law

Submission to the ALRC Consultation Paper on Judicial Impartiality

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Submission author information

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It is in these capacities as academic researchers that we make this submission.

Submission

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.

We support the proposal to develop and publish an accessible guide to recusal and disqualification for members of the public. We also agree with the content of the Guide as stated in the proposal, that is, that it be informed by case law and the Guide to Judicial Conduct.

We do, however, have some concerns about the proposal to include a description of circumstances that 'will never or almost never give rise to apprehended bias'.

It is vital that the perspective of members of the public be considered in deciding whether to include such material in a guide. Our concern is that such guidance may have a chilling effect on persons wishing to raise a bias claim (particularly if they are self-represented). There is a danger that members of the public will misunderstand such guidance and assume that their case does not constitute bias (when in fact it may). More generally, it may give the impression that the court is attempting to dissuade people from lodging bias claims. Whilst we acknowledge that it is in the interests of justice to regulate unmeritorious bias allegations, it is also imperative that the court culture is one which encourages transparency and accountability. Court 'culture' is not simply the way in which judges behave. It also includes the information that is given to the public about the operation of the court – both the content and the tone of that information. This is important as it will affect the public perception of Australian courts.

In formulating the guidance, the drafters should consider the elements of and challenges faced by parts of Australian society in obtaining access to justice. The Law Council of Australia has, helpfully, released a report which lists some of the elements of access to justice. They note that these include:

- getting the right information about the law and how it applies to you;
- understanding when you have a legal problem and knowing what to do about it;
- getting the right help with a legal problem, including from a lawyer;
- being able to deal with your legal problem and being able to understand the outcome; and
- making sure your voice is heard when laws are made.[1]

Providing a 'plain English' guide to bias will fulfil the aim of improving access to justice. However, there is a danger that informing members of the public that certain cases will 'never' constitute bias will be misconstrued and work against access to justice (even if care is taken in the drafting of such guidance). This is because bias is a highly contextual legal matter. If a case is used to show how bias will 'never' apply in a certain situation, it will be difficult for members of the public to understand how that will or will not apply to them. For instance, one of the examples given in the Consultation paper as a grounds where bias will not arise is where a person 'disagrees with the judge'. Whilst we acknowledge that this is not a legal basis for a bias claim, the fact that a person disagrees with a judge's finding or is unhappy with the way a case has been heard may in fact reveal something deeper about judicial conduct in a particular case. For example, in a migration case where a person is unrepresented, a litigant may say they 'disagree with the judges finding' because they feel they were not properly heard. Perhaps the applicant was continually cut off by the judge and was subjected to conduct that may constitute bias (eg told that 'all applicants from Country X concoct their claims'). A person may conceptualise this as 'I did not feel heard' or 'I disagree with the judge'. They may not conceptualise their concern as apprehended bias when in fact there may be a valid reason for needing to examine such judicial behaviour. This is particularly so if the person is unrepresented. Therefore a guide which simply says that 'disagreement with a judge' does not constitute bias will be open to misinterpretation.

Here, again, any guidance must reflect the practical reality of legal knowledge in the community. As the Law Council of Australia has noted, Australians who experience disadvantage can find it more difficult to get access to justice for a multitude of reasons, including but not limited to:

- education and literacy levels;
- language barriers;

[1] Law Council of Australia 'Justice Project – Access to Justice', https://www.lawcouncil.asn.au/justice-project/access-to-justice.

- financial constraints;
- lack of accessibility;
- access to information and digital technology;
- past traumas and hesitation to engage in legal processes; and
- lack of knowledge around rights and where to go for advice or assistance.

These observations about our justice system should be considered in any decisions about public information and guidance. Further, we point to a number of contextual matters relating specifically to bias which explain our concerns:

We are of the opinion that public information should be written in a way that reflects the legal context in which it will operate (so information given in the family law context will be different to that given in the Small Claims division of a court). This is important as it will affect the way in which litigants conduct themselves. There are a number of features of the bias rule which should be considered when drafting public guidance. These include the following:

- The bias rule is part of procedural fairness which has a public interest rationale. Whilst an individual litigant (or his or her legal representative) is the person who can lodge a claim for bias, the bias rule is not simply the right of an individual person. There is a broader public interest that we all have in maintaining integrity in the operation of the judicial system. Any guidance must be seen in that light. Therefore if information about cases which 'never' constitute bias result in people not lodging bias claims (when there may be a prima facie case), then it is not simply that litigant who is disadvantaged, but also the broader public. In this context, we also underline the centrality of the bias rule in improving public confidence in the judicial system. The content and tone of guidance on this topic must therefore be calibrated to give effect to the imperatives and context of the bias rule (the public interest in the integrity of the judicial system and public confidence in that system).
- It is relevant that the legal test for bias is based on the perceptions of a lay person. As Anna Olignk notes in a paper on apprehended bias, ordinary people do not tend to think about bias in a legally technical manner, she notes that '[t]hey're more likely to form their opinion based on matters of general impression.[2] Any legal information about bias given to the public must also reflect the conceptual underpinning of the test, and the fact that often a

[2] Anna Olijnyk, Apprehended bias: a public critique of the fair-minded lay observer, 03/09/2015, AUSPUBLAW https://auspublaw.org/2015/09/apprehended-bias/

litigant's impression of a judge's conduct may in fact reveal something deeper that may establish a bias claim (as explained above).

Consultation Proposal 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?

We submit that there would be benefit in such a project. However, such a project should:

- Only be directed at identifying circumstances which show how apprehended bias will arise, rather than giving categorical examples of where it will 'never' arise
- have input from civil society (eg Legal Aid and community legal centres) as well as legal communication experts to ensure that the information is suitable for a public audience; and
- the guide should be tested on focus groups to ensure that it is appropriate and understandable.

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.

We agree with Consultation Proposal 14 that the Australian Government should commit to a more transparent process to appointing federal judicial officers.

The processes for appointing judicial officers is currently opaque, which leads to the risk of appointments based on political patronage, rather than merit. Transparency in government is a democratic ideal, based on the notion that an informed citizenry is better able to participate in government; thus providing an obligation on government to provide public disclosure of

information.[3] The integrity of the judicial appointment process is integral to public confidence in the legal system.

We therefore recommend that an independent Judicial Appointments Commission be set up to select judicial officers, with a statutory duty to attract diverse applicants from a wide field. The process for appointment should include a public call for expressions of interest and publication of criteria for appointment. In terms of appointment criteria, we support the 2015 Australasian Institute for Judicial Administration (AIJA) Suggested Criteria for Judicial Appointment.[4]

This could be modelled upon the UK Judicial Appointments Commission,[5] which selects candidates for judicial office in England and Wales, and for some tribunals with UK-wide powers. Members come from a wide background to ensure the Commission has a breadth of knowledge, expertise and independence, with the Chairman of the Commission being a lay member.[6] The Commission is responsible for running selection exercises and making recommendations for posts up to and including the High Court, but not the Supreme Court (the highest court in the UK).

A Judicial Appointments Commission would implement a more rigorous and transparent process for judicial appointments, increase public confidence in the appointments process, encourage a wider range of candidates would seek appointment to judicial office, as well as ensure that appointments are based on genuine merit.[7]

We recommend that an independent Judicial Appointments Commission be set up to select judicial officers, with a statutory duty to attract diverse applicants from a wide field.

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[3] Daniel J Metcalfe, 'The History of Government Transparency' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.
[4] Australasian Institute for Judicial Administration (AIJA), Suggested Criteria for Judicial Appointment <https://aija.org.au/wp-content/uploads/2017/10/Suggested-Criteria-for-Judicial-Appointments-AIJA-2015.pdf>.
[5] 'Judicial Appointments Commission' <https://judicialappointments.gov.uk/>.
[6] Of the 14 other Commissioners, 6 must be judicial members (including 2 tribunal judges), 2 must be professional members (each of which must hold a qualification listed below but must not hold the same qualification as each other), 5 must be lay members, 1 must be a non-legally qualified judicial member.
[7] R Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117, 143.

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

It is entirely appropriate that more extensive data be collected by the Commonwealth courts on the reallocation of cases for issues pertaining to potential bias. Getting an accurate understanding of activity in this area depends on it. This is particularly the case in light of the Commission's identification of the largely unseen and unrecorded nature of 'invisible recusals'.

Collecting data is the only way to identify with certainty the scale of activity involved. The Commission's analysis of published judgments referring to bias applications is useful, but the way this analysis is discussed is also indicative of the problem of insufficient data. The Commission writes that these 'preliminary data' suggest 'self-represented litigants are no more likely to bring applications for disqualifications than legal representatives' (Background Paper JI3, p 15). This finding cannot be made on the basis of the analysis undertaken. It is not appropriate to report such a finding (a) without presenting the relevant data in the Commission's consultation paper and (b) given the limited data provided by the published decisions relative to all of the decisions potentially being made. At the most it can be said that in the published judgments involving disqualification applications, there are particular proportions of self-represented and represented litigants. It is possible, for example, that judges might be more prepared to deliver an *ex tempore* decision on a bias application where the applicant is self-represented – that in itself would be valuable information to have in considering the way applications are dealt with. Here, as is typical in justice systems, in the absence of better-quality data we are left with (a) analyses based on published judgments (such as the Commission's), which provide a very partial picture only, and (b) the insights of practitioners and judicial and registry offers, which are necessarily a product of the direct experience of those people (as opposed to more systematically-collected information across a court or system). More and better data are needed.

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.

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?

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?

The Commonwealth courts should absolutely do more to collect feedback from court users about their experience and satisfaction with court processes. It is striking and appalling that the last reported large-scale user survey was undertaken in 2015 (not 2014, as the Consultation Paper indicated). The subsequent use of small-scale and ad hoc surveys to collect data is not enough if the aim is to gather representative and accurate information. The use of invited groups of practitioners is not a sufficient substitute for feedback from litigants themselves. We note, for example, that the user survey reported by the Federal Circuit Court in 2015 indicated marked differences between lawyers and litigants in perceptions about whether the way cases were handled was fair and whether the 'judicial officer listened and led the hearing well'.[8] These differences merit investigation. An experienced practitioner's view is not a proxy for a party's and it is vital to understand the experiences and views of all users. Assessments of users' experiences should also move beyond satisfaction to use standardised tools to gather data on users' perceptions of procedural fairness.[9]

Data shortages in civil justice are notorious and their impacts are far-reaching. We lack basic information about the characteristics of litigants and their cases. The data currently collected are completely inadequate to understand (a) users' experiences and (b) the profile of parties and cases in which matters of concern arise. Both kinds of information are necessary to properly interrogate the issues of interest to the inquiry. This is not news. The annual Report on Government Services published by the Productivity Commission identifies 'perceptions of

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[8] Federal Circuit Court of Australia, *Court User Satisfaction Survey – 2015* (18 February 2016) http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/reports/2015/.

[9] See N Byrom, *Digital Justice: HMCTS data strategy and delivering access to justice* (2019), https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf, 19-20.

court integrity' as 'an indicator of governments' objective to encourage public confidence and trust in the courts', measured by 'the proportion of the community who believe that courts in Australia treat people fairly, equally and respectfully'.[10] The Productivity Commission again reported in 2021 that data 'are not yet available for reporting against this indicator'.[11] In its 2016 Access to Justice Arrangements Inquiry report, the Productivity Commission suggested that statistics to facilitate evaluation of the impact of case management and procedural reforms should be collected via courts' case management systems, and that more extensive data on the involvement of self-represented litigants in proceedings should also be collected.[12] The Productivity Commission indicated in 2016 that it might be too onerous for courts to collect demographic data on court users, and that annual surveys of users be conducted.[13] The latter has not happened, and time and justice system needs have moved on making the former a necessity.

It is time for the Commonwealth courts to collect, analyse and report data on the profile of users of the court system and the matters in which they are involved. This is a broader issue than the present inquiry, but the inquiry and the information it needs indicate why having this data is so important. The need is only magnified by the widespread use of online hearings brought about by reason of the COVID-19 pandemic. We note that in the United Kingdom, Dr Natalie Byrom's report for the Legal Education Foundation on the data strategy the HM Courts and Tribunal Service recommended that data on users' procedural justice perceptions be collected, together with an extensive range of demographic and other characteristics of users instituting and defending claims.[14] These recommendations have been accepted by HMCTS.[15] It is precisely this kind of data that is needed in the Commonwealth courts to better understand users' experiences and to assess whether there are differences between users with different characteristics.

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[10] Productivity Commission, *Report on Government Services: C Justice 7 Courts* (22 January 2021) https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/justice/courts.
[11] Ibid.
[12] Productivity Commission, *Access to Justice Arrangements Inquiry – Final Report* (2016), Appendix J, 1039.
[13] Ibid.
[14] Byrom, Digital Justice: HMCTS data strategy and delivering access to justice (2019), https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf.
[15] HM Courts and Tribunals Service, *HMCTS publishes response to report on use of data* (Web Page, 2 October 2019), https://www.gov.uk/government/news/hmcts-publishes-response-to-report-on-use-of-data/.

If the Commission has any questions arising from the above submission, please contact Dr Maria O'Sullivan at maria.osullivan@monash.edu or [redacted]