

JUDICIAL IMPARTIALITY: CONSULTATION PAPER

Consultation questions and proposals

Principles

Consultation Question 1	Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?
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Transparency of process and law

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.
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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 <i>Guide to Judicial Conduct</i> , and refer to any applicable Rules of Court or Practice Directions/ Practice Notes.
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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.

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?
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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.
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Procedures for determining applications for 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.

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

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.

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?

Addressing difficult areas for application of the bias rule

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').

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?

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?

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

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.

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.

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?

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.

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.

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?

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

Further research and analysis can be found in the **[Inquiry Background Papers](#)**.

Download the **[Consultation Paper with all Background Papers](#)**.

Submissions are due to the ALRC by 30 June 2021.