SUBMISSION TO THE JUDICIAL IMPARTIALITY INQUIRY

KATIE RYAN AND MARY LIU

I INTRODUCTION

We thank the Australian Law Reform Commission ('**ALRC**') for the opportunity to comment on its proposals to the Judicial Impartiality Inquiry, contained in the Judicial Impartiality: Consultation Paper ('**the Paper**'). As Monash University law students and clinical interns at the ALRC, we have assisted the Commission with extensive research on this inquiry, fostering a deep understanding and learned passion for judicial impartiality and its deficiencies in the Australian legal system. This submission is an important opportunity for us to contribute to the review of the national judicial framework of Australia, with the overarching purpose of promoting public confidence in the Australian judiciary.

This submission examines Proposal 3 of the Paper, which suggests that Australia's Commonwealth courts should each develop and publish an accessible guide ('**Guide**') to recusal and disqualification for members of the public, collating circumstances that will or will not amount to bias. It also examines Question 4 of the Paper, which considers whether a Guide should be complemented with a judicial officer led project to develop and streamline the law in relation to judicial recusal and determination. Our paper considers how a Guide for the public might best advance the principles of transparency of process, access to justice and judge-led reforms (as enunciated at paragraph 15 of the Paper), in addition to the ALRC's proposals under paragraphs 31 to 38.

II SUPPORT FOR THE DEVELOPMENT OF A GUIDE

We note that the Paper extensively considers the ambiguity in application of the common law test for actual and apprehended bias and suggests law reforms accordingly. This is mostly outside the scope of our submission, which recommends implementation of the Guide based upon the current substantive law.

The judiciary, as the non-elected branch of government, is legitimated by the public's confidence in its impartial administration of justice. Public confidence is very closely tied to the public's perception of judicial bias, as noted in Lord Denning's often quoted statement that justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'the judge was biased'.[1] Australian judges across jurisdictions attribute a perceived lack of public confidence in the judiciary to misinformation or a lack of information available to the public regarding legal process,

[1] *Metropolitan Properties Co (FGC) v Lannon* [1969] 1 QB 577 CA at 599 (per Lord Denning).

as evidenced in a Flinders University study of 38 Australian Judges.[2] While the judiciary has traditionally not been required to communicate directly with the public, we argue that the advent of social media and the subsequent shift in social expectations has changed the ways that courts must engage with the public.[3] This sentiment was articulated by Chief Justice Bathurst of the NSW Supreme Court in his statement, 'the days when judges could speak solely through their judgments and expect the confidence of the community are… gone'.[4]

We therefore support the ALRC's proposal that the Commonwealth Courts should develop a Guide to inform the public of the way the law of recusal is applied. We believe a Guide may assist in bridging the communication gap between courts and the public, increasing the public's understanding of the law of recusal, and subsequently increasing their confidence in the judiciary's impartial administration of justice. Below, we consider how the Guide should be developed and who should have input to ensure it has its desired effect of advancing transparency of judicial processes and increasing public confidence.

III Suggested Contributors

A *Judicial Officer Led Project*

The ALRC has raised the question of whether the law contained in any Guide for the public should first be streamlined and developed by a judicial officer led project that could identify circumstances that unequivocally will and will not amount to bias (paragraph 71 of the Paper). Although we broadly support the idea for judges to contribute to streamlining the process of recusal law, we have chosen not to address changes to the substantive law in this discussion. We believe that a Guide should be produced regardless of whether the substantive changes to the law of recusal are made. Therefore, we suggest that in addition to a judge-led project to refine recusal law, judicial officers from the Commonwealth Courts across jurisdictions should also contribute to the development of any Guide to the law as it stands, with updates as the law of recusal is developed. This will ensure that the Guides produced by each court are substantially similar. We note that the ALRC suggests that the Guide's content draws from the *Guide to Judicial Conduct*.[5] The *Guide to Judicial Conduct* summarises principles of judicial convention in one comprehensive document and was developed by the Council of Chief Justices of Australia and New Zealand, a group of prominent judicial officers from across jurisdictions. The Council was able to discuss

---

[2] Mack, K, Roach Anleu, S & Tutton, J, 'The Judiciary and the Public: Judicial Perceptions', (2018) 39(1) *Adelaide Law Review* 1, 17-18 ('*Judicial Perceptions*').
[3] Ibid.
[4] Chief Justice T F Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12 *Judicial Review* 27, 42.
[5] Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct,* 3rd ed (Melbourne, November 2017) ('*Guide to Judicial Conduct*') <https://aija.org.au/wp-content/uploads/2017/12/GJC-3ed-Nov2020.pdf>.

conventions in application of the law in a way that did not prescribe the common law as a Code would, while ensuring uniformity of application of judicial principles across jurisdictions. We suggest that not only should the Guide's contents draw on the judicial principles outlined in the *Guide to Judicial Conduct*, but that judges should contribute to the drafting of the Guide, mimicking the successful model of the Council of Chief Justices of Australia and New Zealand.

B *Consultation with the Public*

We propose that while judicial officers are the appropriate group to enunciate the law for the Guide, it is equally necessary to consult with the general public on the Guide's contents. In this submission, we conceptualise the 'public' as people outside of the legal industry who have been or who may one day be involved with court processes. While judicial officers alone successfully developed the *Guide to Judicial Conduct*, that guide was aimed at the audience of judicial officers themselves. If the judiciary is to successfully communicate the law with the public in a way that they understand, they should conduct consultations within *and* outside the legal industry when creating the Guide, including with the general public. Judges are no doubt best placed to explain the law of recusal, but as noted by Andrew Higgins and Inbar Levy, they do not have insight into public perceptions of the judiciary.[6]

We suggest that methods of public consultation outlined by Higgins and Levy, albeit in the context of consulting the public about codifying the law of bias,[7] would be equally useful in the context of consulting the public to produce an informative Guide. For example, Higgins and Levy suggest carrying out surveys investigating public attitudes towards judicial bias.[8] We suggest similar surveys could be carried out to gather the public's views on what they do and do not understand about the law, and how information could best be presented to them to maximise their understanding. Admittedly, as also acknowledged by Higgins and Levy, surveys are imperfect as they are limited to the people who actively wish to participate.[9] However, it seems that it would be far better to at least have some lay-person input rather than having judges decide what the public needs. Surveys could be held online on the Courts' websites, but also hard copy surveys could be provided at the courts so that litigants attending in person have the choice to participate.

An alternative suggested by Higgins and Levy is the idea of 'citizens' assemblies', in which members of the public are selected at random to meet with experts and provide

---

[6]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* 394 ('*Science of Decision Making*').
[7] Ibid.
[8] Ibid.
[9] Ibid.

their views[10]. This method could be used once Guides are drafted so the public can explain whether or not they are clear and cover the necessary points. However, this may be more costly and therefore less appealing than conducting an online survey. As a less costly alternative, we suggest that a draft Guide be published online to allow public comment, as suggested by the Institute for the Advancement of the American Legal System in their review of US judicial recusal procedures.[11]

IV Contents of the Guide

This Submission broadly supports the suggested topics for inclusion in the Guide in paragraph 32 of the Paper. The following section elaborates on topics we believe are necessary to be included in the Guide for it to achieve its purpose of advancing public confidence in impartiality of the Judiciary.

A *Preserving Judicial Discretion*

The Guide's contents should strike a fair balance between its aim of promoting public confidence in the judiciary, which is the key rationale of the legal test of apprehended bias,[12] and maintaining the independence of judges to exercise their discretion free from excess public scrutiny.

Currently, the Australian public is detached from the judicial determination process and the fair-minded observer test. The Guide should be a tool to communicate recusal procedure to the public, with communication of recusal procedures being 'a key component of procedural fairness'.[13] However, public understanding of the fair-minded observer test should not compromise the fact that ultimately the recusal decision lies in the hands of the judges themselves.

We recommend that the Guide provides express disclaimers that the document itself is not binding law, and the question of whether a judge should be recused rests with the court dealing with the claim.[14] This will deter the public from finding a judge biased on the basis that they have adopted approaches different to that summarised in the Guide.

---

[10] Ibid, 395.

[11] 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) 4 ('*IAALS Report'*).
<https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf>.

[12] Australian Law Reform Commission, *Judicial Impartiality Inquiry: The Law on Judicial Bias: A Primer* (Background Paper 1, December 2020) [1.10] ('*Background Paper 1*').

[13] *IAALS Report* (n 11) 4.

[14] *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 282.

B *Court Procedure*

1 *Procedures*

We support the ALRC's suggestions at paragraph 32 of the Paper that the Guide should set out clearly the procedures under which litigants may bring a complaint of bias, challenge a judge's decision not to recuse themselves, have applications for recusal determined, and appeal any interlocutory decisions on disqualification.

The Guide should collate the procedures for recusal and self-disqualification in each court, which are currently spread across a range of sources, including common law, ethical obligations, the practice notes in individual courts and the non-binding *Guide to Judicial Conduct*.[15] In doing so, the Guide should explain that the hearing of an application currently has no uniform procedure, and that some judges hear submissions, some take evidence and most deliver reasons for their recusal decisions. However, we note that this explanation may be unnecessary if procedures are clarified via adoption of other ALRC proposals from the Paper.

We then suggest that the Guide should not only provide steps the public may engage in to initiate or prove judicial bias, but should provide online resources, such as forms to be filled out and submitted to the Courts. We suggest that the Guide follow a similar layout and format as the guides provided on the Supreme Court of Victoria's website to help communicate the law and legal process to self-represented litigants. These guides use simple language and second person pronouns to address the reader.

By way of example, we refer to the Guide to appealing Magistrates' Court decisions.[16] This online guide consists of court procedure written out in stages, with each stage covering a different aspect of the appeal process from 'Start[ing] your appeal' to 'the Decision'. At each stage, the Court has provided an instructional video to explain the process and provide visuals of how to fill in various forms, together with transcriptions of the videos for hearing-impaired litigants, increasing access to justice. Written instructions are also provided, with legal jargon highlighted, for example the words 'appeal', 'affidavit' and 'litigant', with pop-ups of simple definitions available when these words are clicked on. The explanations of procedure contain links to forms to be completed and submitted to the court as the litigant follows the instructions. A dot-point checklist is included at the end of each Stage with steps that should have been taken.

We believe that these guides are an extremely user-friendly model of explaining the process to litigants and that the part of the Guide that explains procedures of bringing a complaint for bias should take this model into consideration. This not only informs

---

[15] Australian Law Reform Commission, *Recusal and Self-Disqualification* (Background Paper 2, March 2021) 5.

[16] Appeal a decision made by the Magistrates' Court', *Supreme Court of Victoria* (Web Page) <https://www.supremecourt.vic.gov.au/appeal-a-decision-made-by-the-magistrates-court>.

the public of their process and their ability to participate but prompts their active engagement with the system.

2 *Justification*

Our suggestion that the Guide's emphasis is on the clarification of Court procedure is based on social scientist Tom Tyler's seminal studies which demonstrate that the public's perceptions of procedural fairness in court influences the public's confidence in the judiciary.[17] Building on this research, social scientist John Greacen conducted surveys comparing public opinion of Courts with judicial opinion of Courts.[18]These surveys show that the public is generally more concerned with how fair the process of judicial decision making is, while the judiciary is more concerned with the fairness of the decision's outcome.[19] Consequently, as suggested by Chamika Gajanayaka in her analysis of the New Zealand law of recusal, 'the public is likely to place an equal, if not greater, level of importance on the process by which a recusal motion is adjudicated as it is on its outcome'[20] when assessing the fairness of the judiciary.

The question then turns to how to increase the public's perception of fairness of process in court. To answer this we can rely on Tom Tyler's research, which shows the four factors that influence people's perceptions of procedural fairness are 'opportunities for participation, neutrality of the forum, the trustworthiness of the authorities, and the degree to which people receive treatment and respect'.[21] Tyler defines participation as giving parties 'an opportunity to make arguments about what should be done to resolve a problem or conflict',[22] which already exists in the current adversarial process for bringing a complaint of bias and subsequent opportunities to appeal a judge's decision not to recuse themselves. However, we suggest that having the recusal process explained comprehensively in the Guide will increase the public's opportunities for participation by highlighting to the public their avenues for presenting their issues to the Court. This will encourage public involvement in the law of recusal, which is so critical to their perception of procedural fairness and therefore their confidence in the judiciary.[23] We therefore believe it essential that the procedural aspects of bringing a complaint for bias be clearly enunciated in the Guide.

---

[17] Tom R Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Review* 103 ('*What is Procedural Justice?'*).
[18] John M Greacen, 'Social Science Research on 'Procedural Justice': What Are the Implications for Judges and Courts?' (2008) 47 *The Judge's Journal* 41.
[19] Ibid.
[20] Chamika Gajanayaka, 'Judicial recusal in New Zealand: looking to procedure as the principled way forward.' (2015) 46 *Victoria University of Wellington Law Review* 2, 430-431.
[21] *What is Procedural Justice?* (n 17) 121-122.
[22] Ibid.
[23]Charles G Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 678–9.

3 *Limitations of Generalised Procedures*

While each Guide should outline specific procedures of the respective Commonwealth Court, it should avoid generalised discussions that would raise different approaches between Courts or other ambiguities in the law. This is because there is currently a lack of practice notes and guiding materials across Australia beside the *Guide to Judicial Conduct*, to unify judicial recusal and disqualification procedures. The lack of consistency in recusal procedures means overly generalised or simplified information regarding procedure should be kept to a minimum to reduce the risk of public misinterpretation.

C *How the Judges Apply the Common Law Bias Rule*

The above research indicates that the public's confidence in the judiciary increases when they are informed about court procedures. We suggest, however, that the public's confidence would increase even further if they were informed about the process that judges use when applying the common law bias rule. Regardless of proposed reforms to the test for apprehended bias, the public deserves to have some indication of the reasoning process by which judges decide to recuse themselves. In explaining how judges apply the bias rule, we suggest the Guide should firstly explain the bias rule and then provide a list of policy considerations that judges may consider in the rule's application.

1 *Explanation of the Bias Rule*

We submit that the Guide should explain the two types of bias that may be alleged: actual or apprehended. We agree with the ALRC proposal at paragraph 32 of the Paper that the Guide should contain an outline of the legal test of actual and apprehended bias per common law, like the explanation by the ALRC background paper JI1.[24] The summary in the Guide, however, should be in plain English, avoiding use of terms such as 'legal and factual merits' that mean little to those not educated in the law.

However, we believe the Guide should only contain so much detail of the relevant law and court practices as is necessary for the public to understand the process. We believe the Guide should not go so far as to highlight the inconsistent approaches in recent Australian decisions in common law judgements.[25] The application of the bias rule is still discretionary and unpredictable at this stage per paragraph 18 of the Paper, and we believe that attempting to introduce to the public and outlining the rules from

---

[24] *Background Paper 1* (n 11) [11].
[25] Justice John Sackar, 'Disqualification of Judges for Bias', (Speech, Oxford, January 2018) [17] ('*Disqualification of Judges*') <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf>.

all current legal sources will merely confuse the public and counter the purpose of the Guide to promote public confidence in the judiciary.

2 *Legal Policy Considerations*

We believe that the Guide should contain the legal policy considerations that judges contemplate in making recusal and disqualification decisions. The considerations can include general factors judges would consider when making determinations (examples of factors can be determined from conducting the ALRC-recommended judicial led officer project), and how judges weigh up the risk of bias and the benefits and costs to the administration of justice of disqualifying a judge. According to Higgins and Levy, this is the usual model that judges adopt.[26]

One benefit of openly illustrating a judge's considerations in recusal and disqualification within the Guide is that it allows the public to step into the shoes of the judiciary and learn about a judge's duty to the court. This can give the public confidence as it showcases judges taking active steps to uphold judicial impartiality and objectivity; it can help correct the public's misapprehensions of bias, which serves the purposes of the Guide.

Another benefit of outlining legal policy considerations is that judges do not have to give reasons for their determinations on a case-by-case basis. While judges are not bound to give reasons for their decisions over recusal and disqualification, it would be useful for them to elaborate on the common application of the fair-minded observer test. A Guide that contains considerations a judge usually weighs up would help preserve public confidence, and free pressure from judges to give reasons that may otherwise cause delays and waste courts' resources.

In applying the bias rule, the current state of the law requires the judge to follow a two-step test for detecting apprehended bias (as stated above). As flagged, the test is controversial in its application and criticised by academics. Due to the aforementioned emphasis that the public places on the fairness of the process by which cases are decided, we believe public confidence will be boosted by judicial impartiality or the appearance of judicial impartiality.[27] An explanation of the general decision making process could quell the public's anxieties as to how a judge comes to their decision, without requiring individual judges to provide explanations in their judgments in a way that may compromise their independence and require them to pander to the public.

---

[26] Andrew Higgins and Inbar Levy, 'What the Fair-Minded Observer Really Thinks About Judicial Impartiality' [2021] 1 *Modern Review* (forthcoming) 85; Australian Law Reform Commission, *The Fair-Minded Observer and Its Critics* (Background Paper 7) [30].
[27] *GetSwift Ltd v Webb* [2021] FCAFC 26.

D *Situations Where Bias Will and Will Not Arise*

1 *Inclusion Only of Circumstances Where Bias Will Not Arise*

We endorse the ALRC's recommendation to include the disqualification procedure [3.5] and other grounds for possible disqualification [3.4] from the *Guide to Judicial Conduct*,[28] which outlines the considerations that guide a judge's decision whether or not to recuse him or herself. However, it may be necessary for the judicial officer led project (as described above) to involve judges from various jurisdictions coming to some agreement about considerations that they all have recourse to.

The ALRC proposed that the Guide include a description of circumstances that will almost always or never give rise to apprehended bias. We support the inclusion in the Guide of the scenarios that will *not* amount to bias as articulated in the ALRC Background Paper 1 and 6.[29] We believe outlining these situations will prevent a flood of bias complaints that have no chance of success. We note this approach is similar to that recommended by the Institute for the Advancement of the American Legal System in its report on Judicial Recusal Procedures, that 'recusal standards and procedures should include a layperson-oriented statement of impermissible bases for seeking a judge's recusal'.[30] Having those circumstances set out will promote efficiency in case management as it provides realistic expectations for parties and the general public as to each case's prospect of success, and helps judges to deal with hopeless complaints or applications in an efficient manner.

However, we do not support the inclusion in the Guide of circumstances that always or almost always amount to bias. Instead, we believe the Commonwealth courts should adopt the approach in the NSW Civil Trials Bench Book, which lists indicia that trigger 'consideration' of judicial bias, rather than judicial bias itself.[31] The use of non-prescriptive language in this approach maintains the judge's discretion in applying the fair-minded observer test.

Having such factors in the Guide is likely to achieve the appearance of judicial impartiality and ensures judges 'remain vigilant and acutely aware of any factors which might reasonably give rise to an apprehension of bias'.[32]

2 *How Circumstances of Bias are Addressed in Other Jurisdictions*

Beyond consideration of NSW Civil Trials Bench Book, we propose that the judicial officer led project could have recourse to the principles for the law of recusal that have

---

[28] *Guide to Judicial Conduct* (n 4) [3.4]-[3.5].

[29] *Background Paper 1* (n 12) [30]; Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper 6, April 2021) [42]-[46].

[30] *IAALS Report* (n 11) 4 [B].

[31] *Disqualification of Judges* (n 22) [37]-[39].

[32] Ibid.

been adopted in other common law countries when determining what circumstances should be listed in the Guide as unequivocally never amounting to bias.

(a) South Africa Model

South African common law recognises situations giving rise to actual bias that trigger the judicial duty to recuse, such as a close familial relationship between the judge and a party. There are also ordinarily accepted principles that disqualify a judge, such as a judge's direct financial interest in the case. Although, some judicial opinion proposes that 'a remote or insignificant financial interest should not give rise to a need for recusal'.[33]

The difference in judicial opinions as to whether certain situations require recusal, often being a matter of degree, is the reason why positive circumstances of judicial bias should not be listed within the Guide. The Guide serves to provide clarity and confidence in the law in a straightforward manner and having a list of situations giving rise to bias when it is ultimately the judge's discretionary finding would be counterintuitive.

(b) United Kingdom Model

The UK model has unequivocal circumstances in which a judge will be disqualified, such as a judge's pecuniary interest in a matter. It is important to note that the UK's listing of these circumstances in a Guide for the public is accompanied by an automatic disqualification process for them, while in Australia we leave the decision in the hands of the presiding judge.[34]

In our view, as Australia does not have automatic disqualification, the law can be distinguished from that of the UK. The proposed Guide should not include circumstances that always or almost always give rise to judicial bias, as ultimately it is the judge's decision on a question of fact that can differ case by case. This will help avoid litigant dissatisfaction if a judge dissents in a circumstance recognised as a case of judicial bias in the Guide, where the litigant has used the Guide as a fundamental basis for his or her application.

(c) New Zealand Model

Each New Zealand court has guidelines as to when a judge may recuse him or herself if they have a conflict of interest in the case before them. The guidelines include guidance for making a complaint about judicial conduct for the public and steps through the follow up process via the Office of the Judicial Conduct Commissioner. This model is like that suggested by the ALRC, strengthening our support for a similar Guide to be produced by Australian Courts.

---

[33] *BTR Industries SA (Pty Ltd) v Metal and Allied Workers Union* 1992 (3) SA 672 (A), 694.

[34] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* [2000] 1 AC 119; James Maurici, 'The Modern Approach to Bias' (2007) *Landmark Chambers* 1.

VI Addressing the Issue of Vexatious Litigants

A common concern about courts releasing informative publications for court users is that such publications may be abused by vexatious litigants. It is feared that litigants equipped with knowledge from publications such as the proposed Guide will find it easy to overwhelm the court system with unfounded claims of bias and applications for recusal.

We argue that this fear of 'opening the floodgates' does not outweigh the necessity for transparency of the judicial system. Further, informing the public will not necessarily encourage litigants to abuse the court system. In fact, the Victorian Law Reform Commission's 2008 Inquiry into vexatious litigants suggests that vexatious litigants are encouraged to abuse court process when they perceive the court has treated them unfairly.[35]

We therefore believe that, contrary to concerns, the Guide will mitigate the risk factor of perceived unfairness that contributes to vexatious litigation.

VII Proposals in Addition to a Guide

We believe the Guide should merely act as an informative tool to increase the public's understanding of the recusal process. The Guide cannot improve the law itself and may need to be considered in addition to other mechanisms to streamline the law. This section considers alternatives or additional processes to a Guide to assist in its uniform application.

A *NSW Model*

We submit that adopting a bench book is a good alternative to a Guide, especially if we are striving to simplify the complex common law before it is put to the public to understand. A bench book would have the effect of collating the principles of law in one place for the use of judicial officers in applying the law, ensuring its uniform application, and removing ambiguities.

We refer to the publicly accessible NSW Civil Trials Bench Book ('**Bench Book**') as an example of how a bench book for the Commonwealth Courts could look. The Bench Book provides guidance for its intended audience of judges on the common law concepts of actual[36] and apprehended bias.[37] Importantly, the Bench Book outlines procedures of common law practice in disqualifying a judge and the standard by which the test should be applied,[38] for example, "[judges] should not accede too readily to

---

[35] Victorian Law Reform Commission, *Inquiry into Vexatious Litigants* (Final Report, December 2008), 102.
[36] Judicial Commission of New South Wales, *Civil Trials Bench Book* (Sydney, 2001) [1-0010] < https://www.judcom.nsw.gov.au/publications/benchbks/civil/index.html>.
[37] Ibid [1-0020].
[38] Ibid [1-0030].

applications for disqualification, otherwise litigants may succeed in effectively influencing the choice of judge in their own cause". This ensures the same standard is applied throughout the jurisdiction.

B *United States Model*

Disqualification provisions in the United States Code[39] state circumstances where any judge shall disqualify him or herself. While Australia does not have legislation governing the judicial recusal process and decision-making, this is worth considering for the long-term, as the fair-minded observer test governed by common law is difficult for the public to digest. However, as acknowledged by the ALRC in the Paper, there are constitutional challenges that may make these suggestions impracticable.

VIII Practical use of the Guide

We recognise that it is not only about the content of the guide that is important, as no matter how comprehensive it is, for it to achieve its effective purpose, it must be brought to the public's attention effectively.

The variations of the Guide should be published on each of the Commonwealth Court's websites, and practitioners and the bench should point parties to the existence of such Guide in the preliminary proceedings.

IX Conclusion

We strongly support the ALRC's proposal that a Guide outlining the law and procedures of judicial recusal be published by each Commonwealth Court. We believe that the Guide is an excellent way to communicate an area of law essential to public confidence in a way the public can understand, without compromising the independence of judges. We believe the transparency of law and subsequent increase in public confidence that a Guide will achieve outweigh any potential short-term repercussions of public debate and media coverage. We hope our suggestions are of value to the ALRC in preparing its final report to the Judicial Impartiality Inquiry.

---

[39] *IAALS Report* (n 11) 4.

I BIBLIOGRAPHY

A *Articles, Books, Reports*

Bathurst, CJ, ‘Community Confidence in the Justice System: The Role of Public Opinion’ (2014) 12 *Judicial Review* 27

Gajanayaka, Chamika, ‘Judicial recusal in New Zealand: looking to procedure as the principled way forward.’ (2015) 46 *Victoria University of Wellington Law Review* 2 <link.gale.com/apps/doc/A434045611/AONE?u=monash&sid=bookmark-AONE&xid=193c4b41>

Geyh, Charles G, ‘Why Judicial Disqualification Matters. Again.’ (2011) 30(4) *Review of Litigation* 671

Greacen, John M, ‘Social Science Research on 'Procedural Justice': What Are the Implications for Judges and Courts?" (2008) 47 *The Judge's Journal* 41.

Higgins, Andrew 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*, 93

Higgins, Andrew and Inbar Levy, ‘What the Fair-Minded Observer Really Thinks About Judicial Impartiality’ [2021] 1 *Modern Review* (forthcoming) 385

Mack, K et al, 'The Judiciary and the Public: Judicial Perceptions', (2018) 39(1) *Adelaide Law Review* 1-35

Maurici, James, ‘The Modern Approach to Bias’ (2007) *Landmark Chambers* 1

Olowofoyeku, Abimbola A, ‘Bias and the Informed Observer: A Call for a Return to Gough’, (2009) 68(2) *The Cambridge Law Journal* 388, 388-409 <http://www.jstor.org/stable/40388808>

Sackar, John J, ‘Disqualification of Judges for Bias’ (Speech, Oxford, January 2018) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf>

Tyler, Tom R, ‘What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22 *Law & Society Review* 103

Victorian Law Reform Commission, *Inquiry into Vexatious Litigants* (Final Report, December 2008)

Wheeler, Russell and Malia Reddick, ‘Judicial Recusal Procedures: A Report on the IAALS Convening’ *Institute for the Advancement of the American Legal System* (June 2017) <https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf>

B *Cases*

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 282

BTR Industries SA (Pty Ltd) v Metal and Allied Workers Union 1992 (3) SA 672

GetSwift Ltd v Webb [2021] FCAFC 26

Metropolitan Properties Co (FGC) v Lannon [1969] 1 QB 577 CA

R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2) [2000] 1 AC 119

C *Other*

‘Appeal a decision made by the Magistrates’ Court’, *Supreme Court of Victoria* (Web Page) <https://www.supremecourt.vic.gov.au/appeal-a-decision-made-by-the-magistrates-court>

Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct,* 3rd ed (Melbourne, November 2017) <https://aija.org.au/wp-content/uploads/2017/12/GJC-3ed-Nov2020.pdf>

Australian Law Reform Commission, *Judicial Impartiality Inquiry: The Law on Judicial Bias: A Primer* (Background Paper 1, December 2020)

Australian Law Reform Commission, *Recusal and Self-Disqualification* (Background Paper 2, March 2021)

Judicial Commission of New South Wales, *Civil Trials Bench Book* (Sydney, 2001) < https://www.judcom.nsw.gov.au/publications/benchbks/civil/index.html>