Review of Judicial Impartiality

Response to

Australian Law Reform Commission

Discussion Paper

Date of Submission: 28 June 2021

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I INTRODUCTION

1. The Deakin Law Clinic Policy Advocacy Practice Group (Trimester 1 2021) (‘Clinic’) welcomes the opportunity to contribute this submission to the Australian Law Reform Commission ('ALRC') review into judicial impartiality and bias. This submission has been prepared by 28 students undertaking the Clinic, as part of the undergraduate LLB program at Deakin Law School. The Clinic serves as a practical Work Integrated Learning (‘WIL’) component of the LLB, aimed at developing vocational skills and providing an opportunity for students to critically review the adequacy of existing law and policy.

   This submission will provide the ALRC with a unique student perspective, as training practitioners, independent of legal practice, with substantive academic training in the principles and rules that guide the legal profession. The student perspective is important. It represents a vested interest in the proper functioning of the judiciary, by students informed by making a meaningful contribution to the system we will inherit, as diverse members of the Australian community.

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II SUBMISSION PART A

A *Proposal 3, Questions 4 and 9*

	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.

	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?

	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?

1 *Introduction*

2. This section considers the implementation of a guide in accordance with Proposal 3 of the ALRC Consultation Paper. We submit that a guide will better assist the public in self-recusal and disqualification circumstances. Our submission will analyse circumstances which will and will not give rise to an apprehension of bias; and whether a guide will clarify the apprehended bias test in self-recusal. We submit that the Australian legal system would benefit from additional precautionary administrative practices where there is an obligation for judges to disclose facts that may lead to a perception of bias.[1] We submit that reform should be made to the current processes within Courts to

[1] *S&M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 369.

ensure the implementation of strict procedures, designed to avoid possible applications for disqualification.[2]

2 *Should a Guide Be Implemented and What Does This Look Like?*

3. Implementing a guide will address public concern about the lack of transparency of the judicial disqualification procedures. The guide will make the tests for actual and apprehended bias easier to understand. Its' creation would bring together all the information regarding court practices, procedures and the relevant law concerning judicial bias and disqualification in simple terms.

(a) What Should Be Included in the Guide?

4. If judges were provided with clear situations in which to recuse themselves, case management and delays would improve. Judges and the courts could implement these practices without requiring new legislation or waiting for common law development, but through procedures for new practical recusals from directions of the Courts.[3] Examples of administrative practices that could be implemented within the Courts are as follows:
    - A guide provided to all judges outlining procedures for how to disclose any interest or issue they may have with a case assigned to them which may give rise to bias;
    - A process at the listing stage to screen cases which may give rise to potential bias with the judge listed;
    - A procedure in relation to any stay, review and appeal of interlocutory decisions regarding judicial disqualification;
    - A procedure for parties that outlines clearly how to challenge a judge's denial to self-recusal; and
    - Each guideline should put forth timelines in accordance with best practice.

[2] Gabrielle Appleby and Stephen McDonald, 'Pride and prejudice: a case for reform of judicial recusal procedure' (2017) 20(1) *Legal Ethics* 89, 89-114.
[3] Appleby (n 2), 89.

(b) Circumstances Giving Rise to An Apprehension of Bias

(i) The Apprehended Bias Test

5. As part of this guide, we recommend the apprehended bias test ('the Test') be included. Factors identified in *Webb v The Queen*[4] will contribute to apprehension of bias and generally require recusal.

6. We acknowledge the ALRC's preliminary view that an attempt to codify the circumstances where a judge is disqualified for bias may face constitutional difficulties in Australia. To remedy this, some of the circumstances of automatic disqualification explicitly set out in the Codes should be included in the Australian '*Guide',* providing further clarity to the public.

(ii) Judge's Conduct

7. The ALRC expressed apprehension of bias as derivative of judicial behaviour, when considered against conduct both in and outside of the courtroom. A critical consideration of the extent of this conduct will be the golden thread in reaching a reasoned opinion of whether apprehended bias is present.

3 *Eradicating Issues with the Application of the Bias Test/ Helping Clarify the Process of Recusal & Disqualification*

(a) Benefits

8. Legislation and model codes will add clarity to a guide for when apprehended bias arises. This could ultimately add greater transparency and consistency to application of the test, in turn, increasing public confidence.

(b) Limited Support for Judicial Officers

9. The first issue with this guide is its' function in assisting ordinary members of the public, with the aim of improving accessibility for litigants and the public.

[4] (1994) 181 CLR 41.

However, it is arguable the guide should also be formulated for judicial officers. This is supported by Finkelstein J in *Kirby v Centro Properties Limited (No 2)*,[5] identifying the difficulty judges face in understanding what the reasonable man in the apprehended bias test might think.[6] This can create uncertainty regarding what creates apprehension of bias, promoting a subjective application of the test.[7]

10. In *CNY17 v Minister for Immigration and Border Protection*[8], the judge attributed detailed, complex knowledge of administrative regimes to the Observer. This is contrasted to *F&D Bonaccorso Pty Ltd v City of Canada Bay Council (No 2)*,[9] where important knowledge regarding the contract in dispute was not imputed to the Observer, which would have supported a finding of bias.[10]

11. Formulating a guide to be used by judicial officers, litigants and the wider public will ensure greater consistency in understanding the proper application of the apprehended bias test, and circumstances creating an apprehension of bias.

4 *Alternative Recommendations: Further Systems to Screen Cases for Potential Bias Issues*

(a) Bias determined by an independent Judge

12. It is recommended as an additional practice for screening bias, that another independent judge be enlisted to determine bias.[11] The background paper recognises the lack of public confidence in the current method of self-recusal,[12] specifically, regarding a judge "determining the credibility of their own version

[5] (2008) 172 FCR 376.
[6] Ibid [15] (Finklestein J).
[7] Justice Alan Robertson, 'Apprehended Bias – The Baggage' (2016) 42 *Australian Bar Review* 249, 249.
[8] (2018) 264 FCR 87.
[9] (2007) 158 LGERA 250
[10] (2007) 158 LGERA 250 cited in John Griffiths SC, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353, 354.
[11] Jula Hughes and Dean Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36(1) *Dalhousie Law Journal* 171, 191-192.
[12] Australian Law Reform Commission, The law on judicial bias: A Primer (Background Paper No JI1, December 2020), [33].

of events".[13] The ALRC seeks to address this issue by removing the decision from the challenged judge to an independent mind or panel.[14] However, this is likely to be inefficient. Enlisting another judge to determine a recusal application will likely further delays and costs in proceedings.

(i) Bias Blind Spot

13. One of the largest concerns in appointing an alternative judge is that the bias blind spot is not addressed. In the current method of self-recusal, judges are faced with one bias blind spot, which is their inability to sufficiently address the extent of their own bias. However, the implementation of an alternative judge could result in a double blind-spot.

14. In addition, if a disqualification application is referred to an alternative judge, another form of bias could arise, 'in-group' bias, where a member of a group is predisposed to positively evaluate the actions of their peers.[15] This could ultimately result in judges deciding towards non-disqualification decisions, weakening public confidence.

15. There is also an argument that the wealth of knowledge and extensive training a judge must undertake in dispute resolution provides them with a 'superior [level of] cognitive abilities [in] adjudication than the general population'.[16] However, there is no evidence that currently supports this.

(ii) Overall Analysis

16. We agree that this reform has the potential to promote public confidence in the judiciary, as the current method does not encourage confidence. However, as mentioned by the ALRC, we also agree that not every application for disqualification should automatically trigger the decision being referred to an alternative judge for unfeasibility. Certain pre-conditions could be required before referring the application to an alternate judge.

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[13] Gabrielle Appleby, 'After Heydon and Carmody, does Australia need a new test for judicial recusal?' *The Conversation* (online, 3 September 2015) <https://theconversation.com/after-heydon-and-carmody-does-australia-need-a-new-test-for-judicial-recusal-46939>.
[14] *GetSwift Limited v Webb* [2021] FCAFC 26, [4].
[15] 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* 376, 376.
[16] Chamika Gajanayaka, 'Judicial Recusal in New Zealand: Looking to Procedure as the Principled Way Forward' (2015) 17, *Victoria University of Wellington Law Review* 415, 435.

17. Additionally, we acknowledge that in the case of a party being dissatisfied, the parties should have the ability of challenging the decision through judicial review. However, it is essential to note that not all parties have the financial capacity or time to undergo this process.

18. The potential cost and time delay this reform may cause within courts is outweighed by the importance of judges effectively performing their primary function of impartiality. If judges were provided with a clear and updated set of circumstances that would warrant self-recusal, such decisions could be faster.

5 Conclusion

19. We agree with the ALRC that a published guide on judicial disqualification and recusal is prudent to creating public confidence. This guide will assist judges to make a timelier assessment of their potential bias, without the need to wade through common law precedent. We submit that a court-appointed register is the most viable solution.

III SUBMISSION PART B

A *Proposal 6*

		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.

1 *Summary*

20. We agree with the alternative procedural mechanism of transferring certain applications for disqualification to a duty judge. This permits an impartial third party, to partake in the process of assessing the impartiality of the sitting judge. This may alleviate the risks of judicial bias and enhance judicial impartiality, whilst providing an additional layer of accountability.[17] We agree with maintaining the current informal procedure of raising the issue of bias with the challenged judge to enhance judicial accountability whilst adhering to the public confidence.[18]

21. We acknowledge the issues associated with the proposal, specifically regarding cognitive bias issues, highlighted in several of the background papers.[19] Improving public confidence, through determining bias applications by an impartial duty judge, may result in a double bias blind-spot, consequently resulting in a counter-intuitive process.

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[17] Australian Law Reform Commission, *Judicial Impartiality: Consultation Paper* (CP 1, April 2021) 18 [42] ('ALRC').

[18] Ibid [43].

[19] Australian Law Reform Commission, *Judicial Impartiality: Recusal and self-disqualification* (Background Paper No JI2, March 2021); Australian Law Reform Commission, *Judicial Impartiality: Cognitive and Social Biases in Judicial Decision Making* (Background Paper No JI6, April 2021).

(a) Option A: Select Automatic Transfer

22. Removing the original judge from the disqualification process could assist in enhancing public confidence, specifically when utilised in conjunction with the proposal 3 guide.[20]

23. Creating a non-exhaustive list of grounds that may have the potential of triggering an automatic transfer, through the proposal 3 guide or codifying laws, has the capability to assist courts.[21] However, it is critical to note that each case is decided based on its' facts. Thus, we agree that the disclaimer within the guide should be implemented.[22]

24. We acknowledge tension between efficiency and litigant's rights is inevitable, therefore it is crucial to establish the right balance between these competing interests. The ALRC acknowledges that select automatic transfer has the potential to be used as a tactical tool for delay through judge shopping.[23] To address this, we propose that a duty judge has a deadline requirement of 72 hours to determine an application of bias.

25. To mitigate the risk of judge shopping, we propose that litigants are given one opportunity to make an application of bias to the duty judge, which lowers the likelihood of litigants attaining the desired judge[s].[24] As the risks outweigh the benefits, litigants should be deterred from judge shopping.

(b) Option B: Threshold Approach

26. The ALRC indicates that having another judge deciding an application for disqualification might lead to inefficiencies created through increased time, costs and delay of trial.[25] However, in our view, changes should only be

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[20] ALRC (n 17) 15-16.
[21] Ibid.
[22] Ibid 15.
[23] Ibid [49].
[24] Australian Law Reform Commission, *Judicial Impartiality: The Fair-Minded Observer and its Critics (*Background Paper No JI7, March 2021) 20 [67]. We acknowledge that the ALRC has discussed peremptory challenges that are available in the United States of America under 28 US Code § 455 (1990). However, we distinguish from this law in that litigants can raise an application of bias during proceedings to promote public confidence. We further distinguish that litigants must provide a reason when making an application to mitigate the risk of judge shopping and to maintain efficiency.
[25] ALRC JI2 (n 19), 11.

recommended where they address a gap that existing processes do not address, with reference to bias blind spot.

27. We suggest that the ALRC should not approach this from the perspective of whether an alternative approach might adversely impact case management principles, but rather whether any recommended change would mitigate the risk of bias and increase public confidence.

28. In considering mechanisms that could be used to limit the number of 'reasonably arguable'[26] applications, it of acute importance to have regard to improved judicial training, education and professional development.[27] We suggest that improving such areas will curtail 'reasonably arguable' claims, and as a result, any increased time, costs and delays will be offset.

29. Supporting public confidence in the judiciary is of vital importance and any recommendation leaving a judge to decide questionable applications may trigger the bias blind spot. This is daunting and could leave judges vulnerable to making mistakes and being subject to scrutiny.

(c) Option C: Transfer When Deemed Appropriate

30. We accept that such a proposal may be an efficient alternative to preserve court resources, mitigating concerns affiliated with a complicated disqualification process. Particularly, the difficulty for judges in balancing 'risk of cost, delay and reputational damage' with administering proceedings impartially.[28]

31. However, if the proposal were to proceed, bias blind spot issues would arise. For example, since intelligence is not a factor that is consequential to determining one's blind spot, having a judge evaluate their own bias disregards the principle that 'no person should judge their own cause'.[29]

32. We suppose the intention is to not adversely impact on case management. However, this proposal may not achieve this intention, instead resulting in unintended negative consequences on public confidence. For instance, an individual may not find assurance that a judge will take adequate time in

[26] ALRC (n 17) 19.
[27] To accord with Proposals 17 and 18 addressed in this submission.
[28] ALRC JI2 (n 19), 10.
[29] Ibid 10.

recognising a potential injustice in the interests of not occasioning added delays and expense.

33. Further, the need to adequately carry out judicial duties and maintain a reputable standard amongst peers may find judges embarrassed to transfer a case on merits that they are unfit to administer. Ultimately, this proposal may not be an effective means of removing bias and enhancing public confidence.

B *Proposal 15*

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.

1 *Summary*

34. An important part of implementing any policy is the ability to measure its success. Statistics are especially useful for solving problems and improving performance.[30] We therefore recommend annual statistical reporting by the Attorney General to develop and maintain a strong understanding of how diversity impacts the legal profession.[31]

35. Very few jurisdictions in the world consistently report on the diversity of their judiciary, however, the recently implemented UK report on judicial diversity is extensive, with its successes and failures providing many lessons for a similar scheme in Australia.[32] While there is great potential for reported statistics to improve diversity, certain steps must be undertaken to ensure accurate interpretation of the data.[33] The following considerations will allow this data to be robust and reliable.

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[30] College of Liberal Arts and Sciences 'Statistics' *University of Florida* (Web Page, 2021) <https://stat.ufl.edu/about/why-statistics/>.
[31] Ibid.
[32] Ministry of Justice, *Diversity of the Judiciary: Legal professions, new appointments and current post-holders, 2020 statistics* (Report, 2020).
[33] Carol Ey, 'Understanding statistics in social policy development and evaluation: a quick guide' (Research Paper, Parliamentary Library of Australia, 30 September 2016) 1.

2 *What is being measured?*

36. Currently, the UK collects and reports statistics on gender, age, professional background, and BAME (Black, Asian and minority ethnic) identification.[34] This is done thoroughly enough to provide a breakdown of these characteristics according to their role and years of experience, as well as those who applied for a position and those ultimately recommended. Such rigorous reporting provides insights that are not otherwise possible. For example, the UK figures show that the number of women practicing as solicitors outnumber men (at 52%), however this figure drops when examining those with over 20 years' experience (32%) or barristers (38%).[35] One could conclude from these numbers that obtainment of a practicing certificate is not a significant barrier to proportional representation in senior legal roles. This demonstrates the magnifying effect of the depth of these statistics, making it easier to pinpoint where systems are failing, and where resources should be spent.

37. The characteristics examined by the UK provide a strong exemplar. In addition to the characteristics mentioned above, we urge collecting data relating to disability, sexual orientation, religion and public-private school attendance. We suggest a consultation process for determining which characteristics would be relevant to the Australian perspective, and to interrogate the proposed collection process to ensure valid data.

3 *Who is asked?*

38. The UK only gathers data from the judicial appointment process, which has both benefits and drawbacks. Applicants are invited to provide details on their characteristics in the application process as well as continually after their appointment.[36] To ensure compliance with privacy laws, this information is provided on a completely voluntary basis with the option to select '*Prefer not to say*' in response to any question.[37]

39. This is the most convenient method, as the survey is completed alongside a pre-established selection process. However, by considering all applicants, data

[34] Ministry of Justice, *Diversity of the judiciary: Legal professions, new appointments and current post-holders, 2020 statistics* (Report, 17 September 2020).
[35] Ibid 11.
[36] Ministry of Justice, *Statistics on diversity of the judiciary: User guide* (17 September 2020) 7.
[37] Ibid.

can be gathered not just on successful candidates, but also on the wider pool that judicial appointees are drawn from, leading to further insights.

40. The limitation of this method is that the sample size is limited to those who already feel comfortable making a judicial application. The data would be further assisted by a wider survey of the legal profession. Further, it is important that the purpose of the report is not to show improvements in diversity, but what is occurring through the legal profession. There needs to be care taken to ensure that the testing process allows for a linear observation of the data so that lack of increased diversity can be seen in the annual report.

C *Proposal 16*

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?

1 *Judicial Appointment*

41. Judicial appointment upon merit is a hallowed principle, yet where social structures and norms produce a pool for judicial appointment with homogenous characteristics, there is merit in considering other factors. These factors could include: age, race, disability, gender, religious belief or sexual orientation. By having an encompassing knowledge of the lives of those they are judging, broader public good will be ensured.[38] An updated version of the McClelland model is a viable approach for achieving greater equality and representation in the judicial space.

(a) Current Approach

42. The current judicial appointment approach is based on 'merit' and is solely discretionary to the executive branch of government.[39] This can diminish the

[38] Kathleen Mahoney, 'Judicial Bias: The Ongoing Challenge' [2015] (1), *Journal of Dispute Resolution* 66. See also Erica Rackley, 'Judicial diversity, the woman judge and fairy tale endings' (2007) 27(1) *Department of Law, Durham University*, 94.
[39] Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019), 42(2) *Melbourne University Law Review* 299, 309.

community's confidence in judicial appointment, as nominators have the power to abuse the process by recommending and/or appointing persons for personal or political gains.[40] A survey exploring the views and concerns of Australian judges indicates that judges are also concerned about the unfettered executive power available through judicial appointment.[41]

(b) Comparative Jurisdictions

43. To address this concern, other common law countries, such as New Zealand and Canada, have followed the reform model favoured by the United Kingdom.[42] The UK model supports the introduction of detailed selection criterion, advertising and requiring a formal application process. The approach also involves establishment of an independent judicial appointments commission, with the responsibility of providing recommendations to the Lord Chancellor. The Lord Chancellor has the discretion to appoint a rejected recommended candidate.[43]
44. Influenced by this global movement, former Attorney-General Robert McClelland attempted to initiate a similar criterion process in Australia's judicial appointment system.[44] An updated McClelland's approach would introduce more diversity and transparency into the current selection process, without compromising merit, and we urge consideration of such a model.[45]

2 *Gender Equality*

45. We recommend focusing on gender equality on the bench. Although there has been a gradual increase in the proportion of female representation in the judiciary,[46] only 37% of the Australian judiciary are women.[47] There is a disconnect between female law graduates, females entering the legal sector and the number of women represented in higher ranking positions, including seats in the country's highest court.

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[40] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' (2015) 37(2) *Sydney Law Review* 187, 191.
[41] Appleby et al (n 39) 304.
[42] Handsley and Lynch (n 40) 194-5.
[43] Ibid 194.
[44] Appleby et al (n 39) 309.
[45] Handsley and Lynch (n 40) 189.
[46] Kathy Mack and Sharyn Roach Anleu, 'Entering the Australian judiciary: Gender and Court Hierarchy' (2012) 34(3) *Law and Policy* 313, 314.
[47] Appleby et al (n 39) 307.

46. There should also be consideration for members of all genders, including but not limited to those identifying as transgender, non-binary and intersexual. While these recommendations are directed towards women, they will also assist people of a LGBTQI+ background.

(a) Recommendation

47. To address this, we propose the introduction of gender goals within the judiciary as a viable method to fast-track diversity implementation. Although politically contentious,[48] goals and even quotas have been largely successful in political, business and judicial landscapes.

48. Australia has had success with quota systems in other professional areas and industries, leading to no reason why we could not continue with this success. Political quotas have long been utilised by the Australian Labour Party ('ALP') who adopted a mandatory 40:40:20 quota to solidify diversity. They have also adopted new gender targets, ensuring that by 2025 50% of seats held by Labour should have female representation.[49] The percentage of ALP seats has increased from 12.5%, September 1994, to its' current 47.9%.[50] This 40% gender quota applies for BOTH genders on party electoral lists ensuring there is equality across both sexes, as opposed to restricting the presently dominant gender.

49. However, to ensure the use of the hallowed 'merit' principle, we propose a reconceptualised gender target system, which is a gender goal system that seeks to place a cap or ceiling on the dominant group (usually white males from affluent backgrounds). This is instead of a base minimum requirement for persons of non-dominant groups, as recommended by Professor Kate Malleson.[51]

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[48] Mark Dreyfus, 'George Brandis Has Failed the Test on Appointments to the Bench', *Mark Dreyfus QC MP* (Opinion, 18 December 2015) <https://www.markdreyfus.com/media/opinion-pieces/george-brandis-has-failed-the-test-on-appointments-to-the-bench-mark-dreyfus-qc-mp/>.

[49] Anna Hough, 'Quotas for Women in Parliament', *Parliament of Australia* (Web Page, 19 April 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/April/Quotas_for_women_in_parliament>.

[50] Anna Hough, 'Composition of Australian Parliament by Party and Gender: A Quick Guide' (Research Paper, 16 April 2021) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3681701/upload_binary/3681701.pdf;fileType=application%2Fpdf#search=%22library/prspub/3681701%22>.

[51] Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing Over-Representation in the Judiciary' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 259, 273.

50. When goals are reconceptualised this way, they act to *keep out* weaker candidates who would receive preferential treatment from the male-centric system and seek to *allow in* candidates who are currently excluded.[52] If an independent review body, similar to the Judicial Appointment Commission (JAC) in the UK, is implemented in Australia this system will not encroach on the merit principle if it occurs in the preliminary candidate pool application process.[53]

D *Proposal 17*

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.

1 *Summary*

51. Judicial appointment is generally supported by legal professionals who acknowledge a candidate's strong skill and ability in the legal sphere.[54] Despite meritorious characteristics, supported by strong legal foundations, newly appointed judicial officers receive little compulsory training on how to sit on the bench.[55] Accordingly, we support that Commonwealth Courts should be required to provide orientation programs to support newly appointed judges as suggested in the Standard and in its review.[56]. Courts should be required to report on these programs in their Annual Reports, to provide accountability and transparency.

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[52] Ibid.

[53] Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36(3), *Journal of Law and Society* 376, 393.

[54] Max Spry, *Executive And High Court Appointments* (Parliament of Australia, 2000), 20-27.

[55] Ibid.

[56] National Judicial College of Australia, *Review of the National Standard for Professional Development for Australian Judicial Officers* (2010) ('Standard'), 1-3.

2 *Orientation Program*

52. We support the notion that this orientation program should be in addition to, not in replacement of, the programs currently offered by NJCA.[57] It is noted that a NJCA run National Judicial Orientation Program invites judges from both state and federal courts to participate.[58] The topics covered are consequently broad, accommodating all judges, without regard for the nuances of each judicial setting. Judges are encouraged to also undertake such national programs,[59] however, court-specific orientation programs should structurally reflect the function and responsibilities of the individual court. These should provide the judicial officer with a sufficient overview of judicial responsibilities, prepare judges to effectively preside over their specific court and address any other relevant points in a prescribed structure.[60]

3 *Recommendation*

53. A recurrent issue in judicial education programs is the lack of data and accountability on judicial participation in court provisioned orientation programs.[61] We submit that Commonwealth Courts should be required to report on their facilitation of and judicial officers' participation in court-specific orientation programs in annual reports to provide accountability and transparency. Reporting guidelines should conform with auditing standards enforced on courts. For example, the FCA outlined the educational activities provided to judicial officers in 2019-20, including a 'session for judges under three years'; an orientation program.[62] We note that the FCCA and the FamCA did not report their own findings in annual reports, however, they were available through other avenues.[63] This indicates a lack of consolidated data regarding frequency of participation. We submit that the courts should provide information on both the frequency of their orientation programs, rate of participation and other relevant information, such as syllabus outlines of knowledge attained.

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[57] ALRC (n 17) 28, [86].
[58] James Douglas, 'Judicial Education For Judges: Presentation For The International Bar Association's Judges' Forum And The Academic And Professional Development Committee', (Presentation, Tokyo, Japan, 2014), 1-6.
[59] National Judicial College of Australia, *National Judicial Orientation Program Nov 2021* (Web Page, November 2021) <https://njca.com.au/course/national-judicial-orientation-program-nov-2021/>.
[60] ALRC (n 17) 29, [88].
[61] Australian Law Reform Commission, Judicial Impartiality: Ethics, Professional Development, and Accountability (Background Paper No JI5, April 2021) 12, [38].
[62] Federal Court of Australia, *Annual Report 2019-20* (Report No 31, June 2020).
[63] ALRC (n 61) 12, [38].

E *Proposal 18*

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.

1 *Summary*

54. We specifically acknowledge core judicial education courses or other training relate to the psychology of decision making in the early stages of every judicial career. The 'dynamic relationship' between judicial independence, impartiality and judicial education, is 'an important aspect of enhancing judicial impartiality'.[64] The skills and qualities relevant to this Inquiry set out a professional development pathway,[65] having regard for comparative practices of other jurisdictions[66] and incorporating international standards into AIJA training principles.[67] Principle 8[68] highlights the 'content of such training'. In 'acknowledging the complexity of the judicial role', the 'multidisciplinary … training in … non legal knowledge and skills' is relevantly provided for.

2 *A Systems Paradigm Approach*

55. We submit that the psychology of judicial decision making, grounded in Principle 8, should import 'multidisciplinary … training in … non legal knowledge and skills' into the content of its' education and training. The ALRC has contextualised the scientific approach relevant to this Inquiry in JI-6.[69] We propose a systems paradigm approach be taken to widen the scope of the

[64] ALRC (n 61) 5, [8].
[65] Ibid 13-14, [40]; Figure 1.
[66] Ibid 13, [42].
[67] Ibid 17, [53-54].
[68] Ibid, citing International Organization for Judicial Training, Declaration of Judicial Training Principles (2017).
[69] ALRC JI6 (n 19) 5-9.

psychology of judicial decision making, extending the focus on comparative jurisdictions to comparative industrial outcomes and proven techniques. This approach has been recognised by the aviation industry as embracing a totality approach to improving industrial dynamics.[70]

3 *Human Factors in the Judiciary*

56. Comparatively, the study of aviation human factors ('HUF') places great value on knowledge and education. The empirically evidenced and positive contribution HUF has on safety and wellbeing outcomes is key to modern industrial dynamics. HUF are described by WHO as an interdisciplinary science used to understand how people perform.[71] It rests focus on the interrelationship maintained with the working environment. Accordingly, HUF can be understood as 'evidence-based guidelines and principles' informed by 'understanding human limitations', recognising that ergonomics of a functional, structured workplace will allow for and proactively manage 'variability in humans and human performance'.[72]

4 *Recommendation*

57. We recommend a scientific study be undertaken to investigate and design a short course that integrates the heuristics, cognitive and social biases from a psychological human factor and limitation perspective.[73] 'Training as an anti-bias strategy', when structured against an understanding of why it occurs, may provide the necessary motivation Edmond and Martire propose is required at an individual level to effect change.[74] This should contrast with a purely policy-based and procedural approach. The material provided by the ALRC relevant to this Inquiry justifies the application of evidence-based practice towards scientific judicial education and training.

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[70] Neville A Stanton, Wen-Chin Li and Don Harris, 'Ergonomics and Human Factors in Aviation' (2019) 62(2) *Ergonomics* 131, 131-137.

[71] World Health Organisation ('WHO'), 'Topic 2: What is human factors and why it is important to patient safety', *Education* (Web Page, 2020) <https://www.who.int/patientsafety/education/curriculum/who_mc_topic-2.pdf>, 100.

[72] Ibid, 101.

[73] ALRC JI6 (n 19) 5-9, 19-21.

[74] Ibid 23; Gary Edmond and Kristy A Martire 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *The Modern Law Review* 633, 650.

F *Proposal 23*

	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.

1 *Summary*

58. Proposal 23 does not change the law in any systematic capacity; however, it provides methodologically sound processes which accurately aggregate data from litigants, with little sophisticated legal knowledge, in a manner which allow courts to quickly gauge where issues lie from the perspective of real lay observers.

2 *Recommendations*

59. For the data collected to assist in mitigating systemic issues relating to law against bias, it is imperative that it be presented in a simultaneously an easy to understand yet detailed format. Our recommendations to meet this are:
    1. to synthesise data into a dashboard visualising data set for the public to easily access and comprehend; and
    2. to collect the data and categorise it through table and graphs, allowing legal review bodies and the judiciary themselves to efficiently identify issues pertaining to the law against bias from the litigant's perspectives.

3 *Dashboard*

60. A significant role the collection of litigant's feedback plays is to allow the courts themselves to efficiently and effectively identify systemic problems related to existing bias rules. However, we also submit that it is of great importance that data is presented to the public in a digestible way to ensure judiciary transparency. Investments in processes that provide greater openness and transparency in judicial decision-making play a critical role in increasing public confidence. Therefore, it is submitted that the synthesis of data relating to litigants' feedback be relayed back to litigants and the public at large in the form of a 'Dashboard' that efficiently appraises them of how court users perceive the

judicial process as it relates to judicial bias. Attached as an Appendix to this document is an example of what such a dashboard could look like. This has attempted to mirror the way in which data is presented to the public by organisations such as Metro and the Sentencing Advisory Council.[75]

4 *Detailed Categorisation of Data Sets*

61. The data must be presented in a more detailed manner for the judiciary and future legal review bodies to accurately gauge the areas in which the law against bias is presenting issues in public confidence. As outlined above, this has the potential to involve the perspective of the public, or at least lay-litigants, in a more accurate manner than some of the legal tests.

62. The inclusion of such data into detailed tables and datasets is a way in which to achieve an accurate categorisation of a data collected by the feedback processes. It is submitted that this could be modelled on the Sentencing Advisory Council's processes which categorise data relating to sentencing for each charge as it relates to each court in detailed yet easily interpretable graphs and tables.[76] The collated data could also be used to inform the creation of bench-books and in court programs for judges.

5 *How Feedback Will Be Collected*

63. It is recommended that the written complaints will be submitted via a webpage form. This form will then be collected by members of the court or independent body, who will then publish the data in way that is both accessible by the public via their webpage.

64. **Figure 1** represents a "dashboard" version, intended to inform the public of the statistics.

[75] Metro, 'Metro Performance' *Metro Performance* (Web Page, May 2021) <https://www.metrotrains.com.au/metro-performance/>; Sentencing Advisory Council, 'SACStat Magistrates' Court' (Web Page, 31 October 2019) <https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/6231_22.html>.
[76] Sentencing Advisory Council (n 75).

Figure 1: 'Dashboard'
Source: Deakin Law Clinic (Team Submission)