AUSTRALIAN LAW REFORM COMMISSION
Review of Judicial Impartiality

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Submission from

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Introduction

The body of material in the consultation documents for the ALRC *Judicial Impartiality* reference is very impressive in scope, depth and detail.

This submission addresses one aspect of judicial impartiality: inappropriate judicial conduct in court. It will address: Problems 6 and 10, Consultation Proposal [CP] 5, CP 6, Consultation Question [CQ] 9, CP 14, CP 17, CP 18, CQ 19, CQ 20, and CQ 21.

The *Consultation Paper* recognises the limitations of the bias rule to respond to inappropriate judicial conduct in court and identifies strategies to address such behaviour. Screening for possible bias in advance of case allocation, referral to a duty judge at the time of the alleged misconduct, or later access to a complaints commission are suggested for use in relation to a particular case. Broader proposals include changes to judicial appointment processes, improved resourcing for courts, and better support for judicial officers such as education and training, especially about implicit/unconscious bias and cultural competence.

Our socio-legal empirical research into judicial performance and impartiality[1] suggests that these measures have merit. However, it is important to recognise that inappropriate judicial conduct in court can arise from understandable human responses to the interactive nature of judicial work in a context of very high caseloads, time pressure, limited resources, and the potential for significant judicial distress, even trauma. Emotions can run high for all participants (lay and professional). Inappropriate judicial conduct may not be linked to bias, but can result from human qualities of temperament, ~~l~~ack of emotion awareness and

[1] Rather than have frequent and detailed footnotes to Judicial Research Project data and publications in the submission itself, a bibliography of relevant research from the Judicial Research Project is included at the end of the submission. The authors appreciate funding, financial and other support from the Australian Research Council (LP0210306, LP0669168, DP0665198, DP1096888, DP150103663), Flinders University, the Australasian Institute of Judicial Administration, the Association of Australian Magistrates and many courts and their judicial officers. The authors are grateful to several research and administrative assistants over the course of the research, and especially to Rhiannon Davies, Colleen delaine, Jordan Tutton and Rae Wood. All phases of this research involving human subjects have been approved by the Flinders University Social and Behavioural Research Ethics Committee. For further information, see <https://sites.flinders.edu.au/judicialresearchproject/>.

limited emotion management skills. Even so, the impact of the judicial conduct may unfairly disadvantage (or be perceived to disadvantage) a party. The significance of judicial emotion and the judicial effort involved in managing a judge's own and others' emotions needs recognition and support throughout judicial selection, orientation, education, training, case management, in-court proceedings, and responses to perceived judicial [mis]conduct.

Judicial Conduct in Court and the Bias Rule

Impartiality is valued very highly by the judiciary. Over 90% of respondents in Australian national judicial surveys regard this quality as essential and the remainder characterise it as very important. Courtesy is also a highly valued quality, with 90% of respondents identifying this quality as essential or very important.

Some judicial conduct in court exhibits exceptional patience, courtesy and human engagement, including humour, consistent with appropriate judicial demeanour. Judicial behaviour can also involve displays of irritation, rudeness, hostility and anger, even insulting or humiliating a party or counsel.

The *Consultation Paper* directly addresses concerns about judicial conduct in court and the limitations of current law and procedures: '…such conduct is particularly corrosive to litigant and public confidence in the administration of justice' [para 20] and 'may reasonably give rise to an apprehension of bias' [para 73]. The *Consultation Paper* also recognises that '[t]he bias rule is insufficient to address unacceptable judicial conduct in court' [problem 6 page 10] and is 'not well suited to managing or responding to such behaviour' [para 73]

There are several problems with using the bias rule to control undesirable judicial conduct in court.

The conduct may arise from institutional factors beyond the control of an individual judge. Unacceptable judicial conduct may be linked to '[u]nder-resourcing of the justice system, and inadequacies in appointment processes, training, and support for judges [which] may undermine judicial impartiality and leave some judges ill-equipped to deal with challenges in maintaining judicial impartiality ' [problem 10 page 10]. A number of these difficulties are enumerated in Para 23. Others, drawn from our research, are identified below.

Using the bias rule to address judicial misconduct in court has the potential to generate an unwarranted implication of purpose or intent. Because an allegation of bias claims that a judicial officer has breached the central requirement of the judicial role, such an accusation is intensely emotionally charged. Even an allegation or finding of apprehended bias could be interpreted as an accusation of intentional misconduct, though intent is not an element of the legal criteria.

A further difficulty with application of the bias rule to in-court judicial conduct is that it may reflect a limited understanding of impartiality itself. Conventionally, impartiality is associated with a view of law and judging as wholly rational, detached and unemotional and judges are expected to conform to this construction. However, impartiality is something judges do, an aspect of judicial practice, a practical skill of court craft, as well as an ideal

which influences how they think, feel and ultimately make their decisions. Judges may legitimately understand impartiality in different ways, and so perform it in different ways, in different settings.

Applying the bias rule to in-court conduct entails a challenge during the court proceedings, or raising it as part of a later challenge to the case outcome or perhaps in a complaint mechanism. In addition to the problems identified by the *Consultation Paper* [para 73, 75], a review of a number of cases demonstrates that kinds of judicial conduct found to breach the bias rule in some cases overlaps substantially with conduct found not to breach the bias rule in other cases. Only very extreme cases are distinguishable. Thus, it is not possible to draw a clear line between judicial conduct that is legally acceptable compared with that which demonstrates bias. Even worse, some judicial conduct which is legally allowed appears to fall well below what is desirable or even acceptable to litigants, the legal profession, or to wider publics.

As courts themselves have pointed out, appeal or judicial review applications are not really appropriate processes to address judicial conduct suggestive of partiality[2] or determining 'preferable judicial behaviour'.[3]

For these reasons, strategies other than the bias rule are needed to address judicial conduct in court which is not sufficiently impartial, in relation to individual cases or judges and more systemically across the judiciary.

Proposals to address judicial [mis]conduct in court

The *Consultation Paper* suggest three responses in relation to possible bias manifested through in-court judicial misconduct in a particular case: pre-screening [CQ 9], referral to another judge to determine if the judge should no longer hear the case [paras 41-52, CP 6], and a complaints mechanism [paras 95-96, CQ 20].

Screening

Proposals to screen in advance for sources of bias which may be apparent to the parties, counsel, the judicial officer or court staff in a case may not address most undesirable judicial conduct in court, as such behaviour does not appear to arise from the factors that can be identified in advance such as conflicts of interest. In addition, such screening is only possible when cases are allocated some time in advance, which is not always possible, especially in busy first instance courts such as the Federal Circuit Court of Australia.

Referral

Based on our research, the kinds of emotions and related conduct displayed by the judge and other participants can have the appearance of loss of impartiality, especially if directed only or primarily at one participant. At the same time, there is often a dynamic, interactive

[2] *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30, [41]–[44]; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104, [33]–[37] (special leave to appeal refused: [2020] HCASL 225).

[3] *Dennis v Commonwealth Bank of Australia* [2019] FCAFC 231, [35].

and cumulative quality, where the conduct of other participants may also be inappropriate. As a judicial officer commented to us recently: The problem is that when a judge becomes too frustrated with litigants or counsel, sense and prudence often go out the window.

While this dynamic suggests the need for some kind of circuit breaker in the moment, the complexities of a referral process during court proceedings are well identified in the *Consultation Paper*. A judge to whom the challenge might be referred is still faced with the legal task of applying the bias rule to the conduct, rather than ameliorating the underlying emotional and behavioural issues. Our research has identified a number of strategies used by judicial officers themselves to manage emotions, their own and others, in such situations, which could be incorporated into judicial orientation and education programs.

Complaints

Judicial complaint mechanisms have been well established in US jurisdictions for some years, but less so in Australia, except in New South Wales and more recently elsewhere. The *Consultation Paper* identifies a complaints mechanism as a possible response 'in relation to unacceptable judicial conduct in court', 'where the law on bias and ordinary appeals procedures are unable to respond adequately to litigants' concerns' [para 95, CQ 20].

One US source suggests that '[c]harges of impatient, angry, and impolite behavior on the bench generate a large proportion of complaints filed with judicial conduct commissions'.[4] Our research, looking at the publicly available data on complaints in relation to in court judicial conduct in the US, England and Wales and Australia, finds that complaints of any sort against judicial officers are very rare, and those that are pursued ~~are~~ unlikely to result in much satisfaction either for the complainant or the judicial officer, given the limited scope of such reviews and the length of time taken to address complaints.

Another concern with a complaints mechanism is that it individualises and decontextualises the judicial conduct of concern, treating the behaviour solely as an attribute or fault of the judge, rather than recognising it as emergent from a dynamic situation or wider court context.

Systemic change

Other consultation questions and proposals are directed at appointment [CP 14], orientation [CP 17], education and training [para 24, CP 18], especially encouraging diversity, generating awareness of unconscious or implicit bias and improving cultural competence [para 99, CQ 19, CQ 21]. Directing attention to these qualities is important, where lack of cultural competence or implicit bias is the source of problematic judicial conduct, and education or training is available that can improve judicial decision-making capacity and in-court conduct.

[4] Cynthia Gray, *Ethical Standards for Judges* Des Moines IA: American Judicature Society (2009) 4. Retrieved 9 May 2020, from https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Ethical-Standards-for-Judges.ashx

These factors are not necessarily the primary source of inappropriate judicial conduct in court, which often entails understandable emotions such as frustration or anger. Judicial temperament is sometimes identified in judicial appointment criteria. As Maroney suggests, lack of judicial temperament can be understood as poor judicial emotion regulation.[5]

CQ 20 asks about 'more structured systems of ethical and other types of support' (emphasis added). Framing concerns about judicial conduct in court as a matter of ethics raises similar concerns to those identified above about bias—implications of deliberate, purposeful or intentional wrongdoing, or worse, dishonesty. Much of the infrastructure around judicial ethics operates on an implicit assumption that ethical concerns arise in circumstances where there is opportunity for reflection or advice seeking. When inappropriate judicial conduct occurs in court, it is likely to arise in the moment, as part of the dynamic interaction of the courtroom context, and so may be less amenable to ethical framing, when compared to other aspects of bias, such as interest in the proceedings or association with a party.

While these approaches may be characterised as systemic, in the sense that they are not focussed on particular conduct in a specific case, they tend to focus on improving the capacity of individual judicial officers and may not adequately account for the dynamic institutional context in which judicial conduct in court arises. Assessing individual responsibility for flaws in institutional structures is also reflected in the appeal cases and disciplinary processes reviewed in our research. Judicial emotion and related conduct in court are sometimes sought to be justified by work pressures and the court context. While these circumstances may explain judicial [mis]conduct, they are rarely accepted as justification on appeal or applications for review, reflecting the importance of impartiality, and its appearance, to the judicial function. Similarly, judicial conduct commissions tend not to accept similar pressures as justifying serious in-court misconduct. However, there is increasing recognition of and concern about the nature and extent of judicial workloads, and the resulting stress.[6]

Promoting public and litigant understanding

CP 5 suggests a range of information strategies to publicise the ways judicial impartiality is supported and judicial accountability is addressed [paras 39-40]. This approach reflects the views of judicial officers more generally about how public opinion is formed and changed—that public attitudes are based on information, accurate and inaccurate, and that false beliefs, especially those that negatively affect public confidence, can be remedied by provision of more and better information. This approach, and that advocated by the

[5] Terry A Maroney, '(What We Talk About When We Talk About) Judicial Temperament' (2020) 61(6) *Boston College Law Review* 2085, 2151–2152.

[6] See for example, recent coroner's and media reports in Australia and New Zealand:
https://www.coronerscourt.vic.gov.au/sites/default/files/2020-08/COR%202018%201210%20-%20Stephen%20Myall%20finding.pdf
https://www.coronerscourt.vic.gov.au/sites/default/files/2020-12/JacintaMaryDwyer_537117.pdf
https://www.abc.net.au/news/2020-10-09/guy-andrew-death-sign-of-crushing-workload-facing-judiciary/12734736
https://www.stuff.co.nz/national/crime/125418046/coronial-inquest-into-auckland-judges-suicide-highlights-pressures-isolation-faced-by-judges

Consultation Paper, reflect the fundamental commitment of the legal system to rational evaluation of proven evidence. This may not be sufficient for effective communication with diverse publics in the new public spheres where opinions and attitudes are formed and disseminated, and ideas about 'truth' are contested.

Conclusion

Our research has undertaken extensive empirical investigation, using judicial surveys, interviews and court observation, as well as legal research. It finds that judicial commitment to impartiality is universal, but how it is understood and practiced vary. Impartiality is best regarded as a dynamic, relational concept, a goal and a process. A central component is listening to both sides. However this listening may require more than the conventional passive, detached judicial approach. It may entail an 'open-minded readiness to be persuaded'[7] and perhaps some degree of empathy or emotion.

Judicial emotion, properly understood, managed and deployed, can play significant positive roles in judicial work. A judge who communicates empathy can enhance a litigant's experience of positive judicial engagement and fairness. A display of emotion can be practical, even strategic, to manage parties, lawyers and proceedings. Judicial awareness of emotion can be a valuable form of self-assessment in maintaining impartiality.

Judicial appointment, education and training need to be directed towards enhancing judicial emotion awareness, emotion management skills and assisting judges to effectively deploy emotion in everyday judicial work, especially during difficult in-court interactions. This can entail learning from other judges, and their expectations and strategies for achieving excellence as judges, as well as mutual debriefing and support, to reduce the drive towards individualising judicial [mis]conduct and increase recognition of contextual and situational factors. Some strategies are identified in para 99. One is 'to humanise litigants, including procedures for greeting and explaining procedures to them'. While this may seem like common courtesy, it can be lost in a busy, time pressured courtroom.

These approaches are aimed at improving individual judicial skills or helping a judge, who may be struggling, to cope. However, they may be of limited value in a broader sense. Every day, judges are faced with difficult or improper conduct from court participants, inadequate support, extremely busy workloads, limited court resources, and pressure to use those resources efficiently and within set time limits. Even the most emotionally skilled and culturally aware judge cannot increase the time available in a busy court list or conjure up missing resources.

Judges will need institutional support and change so that everyday work demands do not overwhelm individual judicial capacity to judge impartially, and so that judges are better able to consistently conduct themselves in court in a way that demonstrates their impartiality.

[7] Australian Law Reform Commission, 'Conceptions of Judicial Impartiality in Theory and Practice' [para 45], quoting *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* (2000) 3 SA 705, [13].

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