Review of Judicial Impartiality

Submission by Andrew Higgins and Inbar Levy

We thank the ALRC for conducting this important inquiry in such a thorough, diligent, and reflective manner, and we are grateful for the ALRC citing our work on judicial impartiality where appropriate.

Below we set out our responses to the ALRC proposals and questions that are most relevant to our joint research in this area.

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*
> I*n 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.'*

Our position on proposal 3

We fully support this proposal. It is consistent with our recommendation to partially codify, and in so doing better explain to the public, the law of bias by creating lists of 'no disqualification' and 'automatic disqualification' for the purpose of judicial recusal: see Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias, 38(3) *Civil Justice Quarterly* 376 (2019), p. 394:

> *'If the results of this process are to meaningfully inform the law of apprehended bias it is likely that there would need to be at least partial codification of the law. The primary purpose of a code on the law of apprehended bias would be to identify circumstances where judges should and should not sit. There are some codes that already perform this function. We deliberately refrain from suggesting what should appear on these "green" (no disqualification) and "red" (automatic disqualification) lists for that would pre-empt the very policy process we are advocating. However, we do want to recommend research that should be carried out as part of this process in order to close the gaps in our knowledge of the relevant factors. In particular, we think there is a strong case for carrying out*

controlled experiments and detailed surveys investigating public attitudes towards judicial bias.'

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'*

…

'38. The ALRC's preliminary view is that an attempt by the legislature to codify the circumstances in which a judge is disqualified for bias may raise constitutional difficulties, because of the separation of powers under the Australian Constitution, and the centrality of judicial impartiality to the exercise of judicial power (see further ***JI7.46****). However, a judge-led project to identify, in an authoritative document, situations where the application of the bias rule is appropriate (and inappropriate) to disqualify judicial officers under the law may nevertheless provide useful guidance to judicial officers, lawyers and litigants. Such a project could be led, for example, by the Council of Chief Justices of Australia and New Zealand.'*

Our position on question 4

We support this proposal. We believe that partial codification would improve clarity, save resources, and allow for greater convergence between public perception and the law of judicial bias. It would also go some way to addressing other issues raised by the ALRC such as the issue of waiver. We acknowledge that depending upon a jurisdiction's constitutional framework, legislative codification may not be possible, and we think a judge led process is a sensible alternative in the Australian context.

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.'

Our position on proposal 6:

We have previously advocated a procedure where bias applications are transferred to an independent judge (Higgins and Levy, 2019).

As for the design of the procedure, we support the following middle ground option outlined by the ALRC in its Consultation Paper, which we think fairly addresses the risk of 'judge shopping' and the possibility of abuse of process by litigants who might use recusal applications to delay proceedings:

> ***'Threshold transfer (Option B).*** *By imposing a threshold requirement that an application must be reasonably arguable in order to be transferred, this alternative provides a middle ground between discretionary and automatic transfers. It should decrease unmeritorious applications, thereby minimising costs and tactical manoeuvering.*
> *However, creating a gatekeeper role for the judge who is the focus of the application risks undermining both the appearance and actuality of impartial justice.'*

We also agree with the observations of the ALRC at paragraph 46 of the Consultation Paper that '*challenges relating to evidence are already addressed effectively by appellate courts in instances where the issue of bias is first raised on appeal after judgment has been delivered (see, eg, Charisteas). Moreover, any statements by a judge in response to an informal objection in open court would form part of the record*.'

Question 9:

> *'Should Commonwealth courts adopt additional systems or practices to screen cases for potential issues of bias at the time cases are allocated?'*
>
> ….

60. *'Commonwealth courts currently have practices in place to identify possible issues of bias before allocating a case to a judge. However, the courts also rely on judges to identify issues and approach the registry to have cases reallocated (**JI2.8–9**). A number of other jurisdictions employ processes that go further in removing the responsibility for curbing the risk of issues of bias from judges (**JI2.31–33**). When successfully implemented, such systems could also reduce the frequency with which disqualification applications arise and make better use of judicial resources.'*

Our response to question 9:

We support implementing additional processes that would make better use of judicial resources. In particular, we support expanding the court led pre-emptive procedure to avoid conflicts at the time judges are allocated to a case (possibly with the use of algorithms, as mentioned in JI2.31, as a decision support tool). We agree with the

ALRC's note in JI2.33, that peremptory judicial challenges by the parties are undesirable due to the risk of 'judge shopping' and tactical litigants' behaviour.

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'

Our response to proposal 15:

We strongly support this proposal. We believe that diversity on the bench plays a crucial role, both directly and indirectly, in minimising the risk of biased decision making. Greater diversity ensures judges are exposed to a wider array of backgrounds, experiences and perspectives in their everyday workplaces and when deciding cases as a panel. Equally importantly, while the boundary between valuable judicial experience and potential bias may be an ill-defined one (inevitably so in our view), because the risk of bias is impossible to eliminate due to the nature of implicit bias, greater judicial diversity ensures that the risk of bias is more fairly distributed between litigants and does not always fall on groups that are under-represented on the judiciary. The importance of diversity for judicial impartiality is considered in our paper (Higgins and Levy 2019)

Question 25

'What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?'

...

*'One suggestion made in consultations is that courts could collect data on judges' decision-making patterns to better equip judges and the heads of jurisdiction to identify patterns of decision-making that could conceivably raise concerns about a lack of impartiality and undermine public confidence in the administration of justice. Based on the insights from experimental research that judges can control implicit social biases to some extent if they are aware of them, this data could be shared with judges on a confidential basis to enable reflexive practice, rather than for disciplinary purposes (see further **JI6.58**). Used carefully, it is suggested that this could provide an alternative, protective, mechanism to the bias rule, which has increasingly been used to argue that particular judges have demonstrated bias through their past decision-making record (see further **JI1.30**).'*

Our position on question 25

We partially support the suggestions noted by the ALRC when addressing this question. We fully support making data *analysis* available to judges on a confidential basis as a tool for better addressing implicit bias. However, we also think that the interests of transparency and the principle of open justice requires that any underlying raw data collected by, or on behalf of, the judiciary should be published and publicly available. Of course, some litigants may seek to use this published data in support of bias applications, but we note the courts have dealt with and rejected such applications in the past: see *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30. We are confident that novel, statistical based biased applications can be dealt with through the case law, with courts developing the law of bias as appropriate. This would not preclude the judiciary taking a policy-based approach to statistical based bias applications in any authoritative code or guidance.

For the record, we should also indicate that we believe that the courts should be facilitating, and where appropriate participating in, empirical studies into both the risks of biased decision making and public perceptions of judicial bias. We have already published one study in this connection and are grateful for the ALRC citing it (Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks About Judicial Impartiality', *The Modern Law Review* (2021)) but believe a lot more research in this area is needed.

Andrew Higgins
Associate Professor of Civil Procedure
Faculty of Law and Mansfield College
University of Oxford

Inbar Levy
Senior Lecturer
Melbourne Law School
University of Melbourne

30 June 2021