Law Council
OF AUSTRALIA

Judicial Impartiality: Consultation Paper

Australian Law Reform Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the valuable contributions of the following in the preparation of this submission:

- the Law Council's Indigenous Legal Issues, Rural, Regional and Remote and Professional Ethics Committees;
- the Federal Circuit Court Liaison and Migration Law Committees of the Law Council's Federal Litigation and Dispute Resolution Section;
- Queensland Law Society;
- Law Society of New South Wales; and
- Law Society of South Australia.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Australian Law Reform Commission (**ALRC**) regarding its *Judicial Impartiality* Consultation Paper (**Consultation Paper**).

2. Judicial impartiality, both actual and apprehended, is critical to procedural fairness and has a profound impact on public confidence in the judicial system. It is critical that there be clarity and transparency on procedures relating to bias, to assure court users that such issues can be dealt with in a fair and effective manner.

3. As a general position, the Law Council agrees that there may be benefit in providing clearer guidance regarding processes about the recusal and disqualification of judges from the High Court of Australia, Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia (together, **the Federal Courts**), particularly for self-represented litigants and the community.

4. However, should some or all of the ALRC's proposals be progressed, it will be necessary that the Australian Government commit targeted additional resources to ensure proper implementation. In particular, any reform proposals that seek to involve an additional judge in decisions regarding contentions of bias, or allow for greater scope for judges to recuse themselves, will clearly have an impact on judicial resources. It is critical that any such proposals are coupled with adequate funding to avoid adding to existing cost, delay and administrative burden in the Federal Courts.

5. Beyond the ALRC's proposals as they relate to the conduct of a proceeding, the Law Council is of the view that there is significant benefit in a number of the other measures proposed by the ALRC, including:

   - proposals to increase access to education and training for judicial officers, including cultural awareness training;
   - steps to achieve greater diversity in the judiciary and legal profession;
   - a focus on a more transparent process for appointing federal judicial officers; and
   - the potential role of a Federal Judicial Commission in assisting judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues affecting their capacity to fulfil their judicial function.

6. The Law Council welcomes the ALRC's explicit recognition of the fact that Aboriginal and Torres Strait Islander peoples can experience bias within the justice sector as a specific cohort. This is an area of significant concern to the Law Council, and this submission contains a number of references to possibilities for improvement to further promote cultural competency in the federal judiciary, particularly as it relates to Aboriginal and Torres Strait Islander peoples within the justice system.

7. More broadly, the Law Council notes that while the Consultation Paper discusses unacceptable judicial conduct in the courtroom, the ALRC does not make a proposal for further work in this area.[1] In the Law Council's view, any steps taken to give greater clarity to parties on the law and processes for addressing bias should be accompanied by measures, such as the establishment of a Federal Judicial Commission.

[1] See, eg, Australian Law Reform Commission, *Judicial Impartiality* (Consultation Paper CP1, April 2021) [72]-[75] ('*Consultation Paper*').

Introduction

8. On 30 April 2021, the ALRC published the Consultation Paper seeking stakeholder submissions on a range of issues concerning judicial impartiality and the law on bias in Australia. The questions and proposals presented for consultation address several legal and institutional facets of judicial impartiality, including:

    - the mechanisms for raising and determining issues of actual and apprehended bias;
    - the test for determining apprehended bias;
    - guidance on contact between judges and lawyers appearing in proceedings;
    - the collection of data by the courts; and
    - institutional processes and structures that complement the law on bias to support judicial impartiality and public confidence in the administration of justice.[2]

9. The Law Council commends the ALRC on a thoughtful and comprehensive Consultation Paper, and notes the ALRC's 'preliminary conclusion' that:

> *…the law and procedures associated with actual or apprehended bias require greater certainty and transparency, and a degree of recalibration to reflect scientific understandings of the extent to which judges, even with their training, experience, and commitment to impartiality, can 'resist bias'.*[3]

10. The ALRC also determined that the law on bias is, on its own, incapable of ensuring public confidence in the administration of justice.[4] Complementary strategies are required, with a view to 'supporting' impartiality.[5]

11. The Law Council broadly agrees with the direction of the ALRC's preliminary findings and has set out below its responses to each of the consultation questions and proposals put forward by the ALRC.

Principles

Consultation Question 1.

Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?

12. The Law Council supports the six principles set out in the Consultation Paper and agrees that these standards provide a sound basis from which to consider structural reform in the area of judicial impartiality.

[2] Australian Law Reform Commission, *Consultation Paper*, [5].
[3] Ibid [7].
[4] Ibid [8]-[9].
[5] Ibid.

Transparency of process and law

Consultation Proposal 2.

Each Commonwealth court should promulgate a Practice Direction or Practice Note setting out the procedures for making and determining applications for disqualification of a judge on the grounds of actual or apprehended bias, and procedures for review or appeal.

13. The Consultation Paper notes that the process for raising and determining issues relating to bias, recusal and disqualification, including reviews and appeals, is not clearly understood and can be cynically perceived by members of the public.[6]

14. The Law Council broadly agrees with this observation and supports initiatives from the courts to provide appropriate (and accessible) guidance in relation to the procedures for making and determining, as well as reviewing or appealing, the relevant applications. However, care should be taken to avoid creating the misconception that any dispute can be solved by an application for disqualification provided that a certain process is followed,[7] noting that in the experience of the Law Council's members, applications for disqualification are, currently, rare.

15. The Law Council considers that a Practice Direction or Note (here referred to as a **Practice Note** for simplicity) along the terms suggested under Consultation Proposal 2 may be worthwhile, provided it is accompanied by additional, more comprehensive information as described in proposed in Consultation Proposal 3, below.

16. However, the Law Council cautions that the development and promulgation of a Practice Note in this area may create unintended consequences for parties and the administration of justice generally. This is due to the prospect of a Practice Note encouraging unmeritorious applications, recognising that in the experience of the Law Council's members, claims of judicial bias are in some cases masked attempts to overcome genuine judicial criticism or differing views.

17. Similarly, there is a broad concern that detailing the relevant procedures in a Practice Note, as suggested in the Consultation Paper, may render the application process too administratively burdensome, noting that these are often matters dealt with at short notice with practitioners typically asking to stand down to get instructions, and then bringing the application if so instructed.

18. It may also add pressure to court resources and result in delays and disputes about whether the precise process has been followed. Access to justice could also be compromised, with the proposal that a supporting affidavit be required, for example, potentially creating a barrier to a litigant (particularly, a self-represented litigant) seeking to make an application. Should any Practice Note be developed as proposed,

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[6] See, eg, Australian Law Reform Commission, *Consultation Paper*, [10]; Australian Law Reform Commission, *Judicial Impartiality: Recusal and Self-Disqualification* (Background Paper JI2, March 2021) [56] <https://www.alrc.gov.au/wp-content/uploads/2021/03/Self-disqualification-procedure.pdf> ('*Primer on Recusal*'); Australian Law Reform Commission, *Judicial Impartiality: The Fair-Minded Observer and its Critics* (Background Paper JI7, April 2021) 11-2 https://www.alrc.gov.au/wp-content/uploads/2021/04/JI7-The-Fair-Minded-Observer-and-its-Critics.pdf ('*Fair-Minded Observer Paper*').

[7] See, on the dangers of such a prospect, comments by Gleeson CJ, McHugh, Gummow and Hayne JJ observed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [19]-[20] to the effect that: 'if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable'.

the legal profession should be consulted on it to ameliorate as much as possible these concerns.

Layperson-oriented guide to recusal and disqualification

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.

19. Noting the above reservations in relation to the proposed Practice Note, the Law Council is supportive of alternative methods to promote transparency in how issues of bias are dealt with, including the proposal that the Federal Courts produce accessible guides as to the nature, significance, limitations and risks of the applicable processes along the lines suggested under Consultation Proposal 3. This guidance material should be publicised on Federal Court websites and could be provided, as a matter of course, to self-represented litigants at the commencement of a proceeding.

20. However, some of the Law Council's members have raised similar concerns with respect to guidance material as have been noted in relation to the proposed Practice Note. Specifically, questions have been raised as to the utility of a guide to the extent that it may attempt to codify the relevant area of law and bind the courts and parties to a process which in some circumstances may not be reasonable or practicable, or which may lead to unnecessary complexity and delay, or may encourage unmeritorious claims.

21. Further, the inclusion of descriptions of circumstances that will always or almost always give rise to apprehended bias, and circumstances that will never or almost never give rise to apprehended bias, could be problematic. The Law Council considers that such circumstances may depend on the identity of the party and on the factual matrix of the particular matter. If a particular set of facts does not fit neatly into the circumstances described in a guide, further and unnecessary disputes may be triggered. This possibility is exacerbated by the identified trend in the courts developing 'somewhat tailor-made principles for different sub-categories of bias'.[8] Attempts to communicate developments in the law to court users and the community may engender confusion in respect of an emerging category of bias.

22. Nevertheless, the Law Council considers that the proposed guidance material may be useful where it fills gaps in the information currently provided by the courts to self-represented litigants, as well as legal representatives. In order to identify these gaps, the Law Council supports undertaking further consultation with stakeholders in

[8] Australian Law Reform Commission, *Judicial Impartiality: The Law on Judicial Bias: A Primer* (Background Paper JI1, December 2020) [20] <https://www.alrc.gov.au/wp-content/uploads/2020/12/The-law-on-judicial-bias.pdf> ('*Primer on Bias*'), citing Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 954.

different jurisdictions to assess the need for information and the form that it should take and endorses the ALRC's work in surveying stakeholders on these issues.

Consultation Proposal 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?

23. The Law Council considers there would be benefit in the proposed project being undertaken in the context of Consultation Proposals 2 and 3, as considered above.

24. Should such a project be undertaken, consideration should be given as to how best to communicate its findings. This should give due regard to the issues raised above, particularly the possibility that attempts to codify or define circumstances could unintentionally reduce clarity and certainty.

Hypothetical lay observer test

25. The Law Council suggests care be taken to ensure that identifying more comprehensively the circumstances in which apprehended bias will and will not arise is not viewed as a solution to difficulties associated with applying the 'hypothetical lay observer test'. Possible difficulties which have been identified include the 'artifice' of the 'ideal' of a hypothetical observer, as well as the extent to which 'specialist knowledge and confidence in the impartiality of judges' should be attributed to them.[9] These questions go to the appropriateness of the existing law rather than its application. As noted above and in the Consultation Paper, the ALRC has reached the preliminary conclusion that:

> *… the law and procedures associated with actual or apprehended bias require greater certainty and transparency, and a degree of recalibration to reflect scientific understandings of the extent to which judges, even with their training, experience, and commitment to impartiality, can 'resist bias'.*[10]

26. As articulated in the ALRC's Background Paper on the law of judicial bias, the test for apprehended bias in Australia is 'whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[11] The Law Council considers that the threshold for the requisite apprehension is appropriate. It is relatively low, though few disqualification applications succeed.

27. However, the Law Council queries the enduring appropriateness of the 'lay observer' reference point, noting that there is a legitimate question whether the notional lay observer is best placed to make the relevant assessment. On this point, the Law Council anticipates that the decision of the High Court of Australia (**High Court**) in *Charisteas v Charisteas* (**Charisteas**),[12] once delivered, will provide clarity. In that case, the High Court will be asked to consider whether a 'hypothetical observer', being

[9] Australian Law Reform Commission, *Primer on Bias,* [16]-[17].
[10] See, Australian Law Reform Commission, *Consultation Paper*, [7].
[11] See, Australian Law Reform Commission, *Primer on Bias*, [10] citing *Webb v The Queen (1994)* 181 CLR 41, 67 (Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [33] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[12] [2021] HCATrans 28.

the lay observer, would have a 'reasonable apprehension of bias' as a result of 'undisclosed communication and personal contact' between then-counsel and a judge at various points before and after a trial.[13] In this regard, the Law Council notes the challenge for a judge subject to an allegation of apprehended bias to discern how a lay observer would respond. This challenge is addressed below in response to Consultation Proposal 6.

28. The Law Council considers it best to wait until the decision *Charisteas* is handed down for further clarity on the issue, before proceeding with certain proposals outlined below.

Bias and statistics

29. The Law Council suggests that any project to identify more comprehensively circumstances in which apprehended bias will and will not arise should consider, amongst other things, the circumstances under which predispositions or inclinations to determine a matter in a particular way would be considered 'sufficiently specific or intense' to amount to prejudgment for the purposes of judicial bias.[14]

30. Specifically, the Consultation Paper alludes to the argument that a judge's prior record of decisions, as evidenced using statistics, may show a predisposition to a particular view about certain types of cases or parties such that it is impossible for them to hear a case with an open mind.[15] While the ALRC noted that this argument has not yet been accepted by the courts, it also observes that the relevant decisions (rejecting the argument) 'have been subject to some criticism.'[16]

31. The Law Council recognises that analyses have been conducted of statistical trends in judicial decision-making in certain jurisdictions.[17] It notes that disregarding a statistical analysis of a judge's decisions for the purposes of assessing actual or apprehended bias may sit uncomfortably with community expectations, and it suggests that the ALRC should further consider the argument that in some cases 'the numbers do speak for themselves'.[18] This may be an appropriate topic for investigation by a project of the sort contemplated by Consultation Proposal 4.

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[13] See, High Court of Australia, 'Charisteas v. Charisteas & Ors: Case Information' <https://www.hcourt.gov.au/cases/case_p6-2021>.
[14] See, Australian Law Reform Commission, *Primer on Bias*, [30] citing Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 685; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531 (Gleeson CJ and Gummow J).
[15] See, Australian Law Reform Commission, *Primer on Bias*, [30] citing *Vietnam Veterans' Association of Australia (New South Wales Branch Inc) v Gallagher* (1994) 52 FCR 34; *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; *BDS17 v Minister for Immigration and Border Protection* (2018) 76 AAR 246; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.
[16] Australian Law Reform Commission, *Primer on Bias*, [30].
[17] See, eg, Keyvan Dorostkar, 'Judicial Review of Refugee Determinations: More by Luck than Judgement?' *SSRN* (16 March 2020). Dorostkar found a 258 per cent 'variation between the judge with the lowest success rate and the judge with the highest success rate' following analysis of 5812 cases of judicial review of refugee determinations of the Federal Circuit Court of Australia. He concluded that of the main factors which could explain this variation, 'the ideological and personal biases of judges provid[e] the most plausible and strongest correlation'. See also, 'Appendix 4' at 59.
[18] Matthew Groves, 'Bias by the numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 61.

Consultation Proposal 5.

The Commonwealth courts should (in coordination with each other) publicise on their respective websites the processes and structures in place to support the independence and impartiality of judges and mechanisms to ensure judicial accountability.

32. The Law Council supports this Consultation Proposal and endorses any measures that will promote public and litigant understanding and awareness of structures in place to promote judicial independence and impartiality.

33. Noting that this proposal is somewhat complementary to Consultation Proposals 2 and 3 above, and gives rise to similar issues, the Law Council refers to the relevant responses above and repeats its suggestion that further consultation take place in relation to the substance of the information that should be published, noting this may depend on the particular jurisdiction.

Procedures for determining applications for disqualification

Consultation Proposal 6.

The Federal Circuit Court of Australia, the Family Court of Australia, and the Federal Court of Australia should amend their rules of court to require a judge sitting alone to transfer certain applications for the sitting judge's disqualification to a duty judge for determination.

Options for reform include requiring transfer:

Option A) when the application raises specific issues or alleges specified types of actual or apprehended bias; or

Option B) when the sitting judge considers the application is reasonably arguable; or

Option C) when the sitting judge considers it appropriate.

Single judge court: transfer of decision on disqualification

34. Consultation Proposal 6 suggests requiring a judge sitting alone to refer applications for disqualification to a duty judge (or judges) for decision and subsequent referral to the registry for reallocation.

35. Acknowledging the need for improved parameters to ensure a judge cannot decide disqualification applications in circumstances considered inappropriate, the Law Council urges caution in proceeding with this proposal and notes that any referral procedures should be kept as simple and efficient as possible, without undermining the values that underpin the judicial system including access to justice and procedural fairness. The Law Council is aware of concerns that disqualification applications may be used as a weapon against judges, or for purely strategic and inappropriate reasons, such as trying to intimidate a judge, securing a different judge, or simply to delay.

36. Further, the Law Council is wary of adding complexity and cost to existing litigation processes. As identified by the ALRC, the proposed referral procedure will likely come

with costs in respect of delay and fees for parties.[19] Preparing a matter for transfer to another judge, including outlining the history of a hearing/s, will require a considerable time investment by the sitting judge, other court staff and the parties – sometimes in circumstances where an application is unmeritorious. Absent sufficient resources, if an application were transferred to another judge, it may also overload a duty judge or raise questions about case prioritisation against their other matters. Indeed, it may simply not be practical for all applications to be transferred to a duty judge – particularly, in a single judge registry – throwing an automatic right of referral in all cases into question.

37. Subject to these issues being addressed, the Law Council considers that it may be preferable in many cases for a non-sitting judge (where available) to determine applications for disqualification, noting however the practical challenges that may arise where the decision-maker has not experienced the entirety of proceedings firsthand. The Law Council shares the concerns raised by the ALRC that an assessment of a claim of apprehended bias is unlikely to satisfy a litigant or member of the public if made by the judge who is its subject.[20] As Professor Gabrielle Appleby and Stephen McDonald note, this has the potential to undermine public confidence in the judiciary's impartiality, which remains one of the objectives of procedural fairness.[21]

38. There are also other existing issues which transfer of an application for disqualification may resolve, at least in part. As is noted by the ALRC, parties may be deterred from making an application to disqualify a judge where the application will be heard by that judge.[22] Parties may also hesitate to make an application where they perceive a risk that its failure may have impacts for the prospects of their case.

39. The proposal that a duty judge (where available) hear applications for disqualification may not necessarily fix all problems identified, noting the raft of procedural challenges and the fact that the sitting judge will still be aware an application was made and by whom. However, referral would go some way to mitigating concerns with respect to litigant and community expectations and public confidence.

40. The Law Council notes that in theory, having a duty judge hear disqualification matters might result in greater consistency between decisions. However, in practice, this would need to be balanced against the reality that duty judges are extremely busy and in the Federal Circuit Court, for example, may rotate weekly..

41. The Law Council is supportive of steps to interrogate these issues further before determining whether any of the three options presented in Consultation Proposal 6 will, on balance, be better at serving the interests of the public and of litigants than the current system. However, the Law Council outlines below some preliminary views on which of the three options may be preferable.

Options A, B and C

42. The Law Council considers that there may be benefit to a combination of Option A and B, however as noted above, these proposals should be subject to further consultation, particularly given the possible need for certain additional steps to be taken in matters where there is a self-represented litigant or a vulnerable party. Indeed, there are likely to be complexities in the drafting of Option A which may lead

[19] See, ibid 20.
[20] Australian Law Reform Commission, *Primer on Bias*, [55].
[21] Ibid.
[22] Ibid.

to inflexibility, and any support of this approach would be subject to review of the specific wording chosen.

43. One topic of further consideration in relation to Option A should be the manner in which the relevant facts will be made available to the duty judge, in circumstances where the sitting judge does not have the opportunity to provide a decision on disqualification.

44. The Law Council notes the advantages of Option B when compared with Option A, insofar as the former would require a decision that the disqualification application is reasonably arguable from the sitting judge and thereby provide an avenue for facts to be put before the duty judge. By way of amendment to this Option, the Law Council suggests that it may be useful to consider a lower threshold test for referral, for example, that the application is 'not without merit' (rather than the higher threshold of 'reasonably arguable'). This could assist in addressing a perception that too much discretion is preserved for the sitting judge.[23] However, it is noted that this is likely to add layers of litigation, costs to clients and delays for the system if not appropriately administered, and the Law Council continues to have regard to these potential unintended consequences when considering appropriate thresholds.

45. It is noted that Option C may best accommodate the resource-related concerns outlined above, should express provision for the necessary additional resources not be made. However, the Law Council is of the view that Option C is unlikely to assist in addressing perceptions of impartiality. The proposed process would likely cause the same issues that arise from the sitting judge making the actual decision on disqualification. One solution may be to incorporate an inclusive list of relevant considerations for the sitting judge to make in considering whether referral is appropriate, though views vary as to whether this would be sufficient and whether its effect would simply be to create another ground for applications for bias and/or appeal.

Consultation Question 7.

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

46. The Law Council is supportive of the formalisation of the availability of an interlocutory appeal process relating to bias before a single judge court.

Consultation Proposal 8.

The Federal Court of Australia, the Family Court of Australia, and the High Court of Australia should promulgate a Practice Direction or Practice Note to provide that decisions on applications for disqualification made in relation to a judge on a multi-member court should be determined by the court as constituted.

47. The Law Council agrees with Consultation Proposal 8 insofar as a Practice Note or other form of guidance is likely to assist parties to understand the process for applications for disqualification in the context of a multi-member court. However, the process as proposed raises the same challenges identified above when a single judge is asked to rule on their own disqualification and the challenges, both perceived and real, that this may create.

[23] Australian Law Reform Commission, *Consultation Paper,* 10.

48. While the Law Council would welcome further engagement on this proposal, there appears to be merit in a modified version of the proposal that would exclude the impugned judge from the decision and instead have only the judges who are not the focus of the disqualification application make the decision.

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?

49. The Law Council considers that disqualification concerns ought be dealt with at the earliest possible stage, as the timing of such applications will be an important part of minimising disruption and inefficiency. In short, the case cannot proceed until the matter is determined.

50. The Law Council is generally supportive of the proposal contained in Consultation Question 9 and endorses further examination of the suggestions for additional systems or practices the courts may adopt to screen cases for potential issues of bias at the time cases are allocated.[24] Care would need to be taken that legal professional privilege with respect to the judge's cases, when in practice, is not breached in any screening process.

51. One such suggestion is to improve processes for communicating with judges and registries. As noted by the ALRC, algorithms are another potentially effective means of identifying matters which could lead to instances of actual bias, thereby reducing the burden on court registries.[25] However, a wide variety of issues is raised by the use of Artificial Intelligence (**AI**)-assisted decision making, including the need for AI-informed decision making to be 'explainable', as recently outlined by the Law Council.[26] The Australian Human Rights Commission has also recently released a report on AI and Human Rights which discusses these principles including with respect to the explainability of decision-making and implications for administrative law and the courts more generally.[27] Should algorithms or similar processes be pursued, the Law Council notes that such issues should be considered.

52. The Law Council does not, however, support a financial interests register for judges, as mentioned in the ALRC's *Primer on Recusal* background paper.[28] While measures aimed at identifying factors which could lead to the potential for judicial bias have merit, the ALRC has recognised the nuanced nature of assessing bias, with the case law having typically found that a judge's general associations will not require them to recuse themselves.[29] The Law Council also notes that the potential for perceptions

[24] See, Australian Law Reform Commission, *Consultation Paper*, [61]; Australian Law Reform Commission, *Primer on Recusal*, [31]-[33].
[25] See, Australian Law Reform Commission, *Primer on Recusal*, [31].
[26] See, Law Council of Australia, 'Submission on An AI Action Plan for All Australians: A Call for Views' (17 December 2020) https://www.lawcouncil.asn.au/publicassets/015e9467-5259-eb11-9438-005056be13b5/3941%20-%20Artificial%20Intelligence%20Action%20Plan%20for%20All%20Australians.pdf 8.
[27] See, Australian Human Rights Commission, 'Human Rights and Technology Final Report' (2021) https://tech.humanrights.gov.au/downloads?_ga=2.266999054.1691881883.1625613799-2050514323.1567036419 62-67.
[28] See, ibid [32].
[29] See, eg, ibid [32], which notes that: 'past professional associations or arms-length relationships are unlikely to provide a compelling reason for disqualification. Similarly, past professional association with counsel is not in itself a sufficient reason for disqualification.' Citing, Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) ('*AIJA Guide*').

that a judge's privacy will be invaded may also act as an unwelcome disincentive to a strong candidate accepting a judicial appointment.

53. Further, noting the ALRC's comments with respect to regional, rural or remote (**RRR**) courts[30] the Law Council understands that generally, only one Federal Circuit Court Judge is appointed to each regional area. It is the experience of the Law Council's membership that there is likely to be more familiarity between judges, legal representatives and even parties in RRR areas (however as was made clear by *Charisteas*, these issues are not exclusive to RRR areas). For practical reasons, this will not necessarily lead to decisions to recuse or applications for disqualification; the Law Council understands that judges and magistrates who have worked in RRR areas as solicitors or barristers prior to their appointment to the bench in that area are generally adept at using their own judgment as to when recusal may be appropriate. Further, there may be limited opportunity for reallocating matters to other judges in such circumstances. As such, prior to the adoption of systems or practices designed to screen for potential bias, it is important that the circumstances of RRR courts are taken into account, especially the capacities of such courts to accommodate the transfer of a matter.

54. On this subject, the Law Council also notes significant advantages of local appointments in RRR areas; local appointees are more likely to stay given their existing involvement in the community and considered to be understanding of the community.

55. Considerations about small cohorts of judges also arise in respect of certain jurisdictions or areas of law with limited judges, as well as geographical locations. In such circumstances, some practitioners may experience trepidation when considering a bias application due to the potentially adverse impact on their ongoing relationship with that judge.

Addressing difficult areas for application of the bias rule

Consultation Proposal 10.

The Council of Chief Justices of Australia and New Zealand and the Law Council of Australia and its constituent bodies should coordinate reviews of Part 4.3 of the *Guide to Judicial Conduct*, and the

- **(i) Legal Profession Uniform Conduct (Barristers) Rules, rule 54; and**
- **(ii) Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 22.5**

(and equivalent rules applicable in any state or territory) (together the 'Professional Rules').

56. The Law Council notes that rule 54 of the *Legal Profession Uniform Conduct (Barristers) Rules* (**Barristers' Rules**) and rule 22.5 of the Uniform Law Australian Solicitors' Conduct Rules (**ASCR**) – where applicable- state as follows:

> *A solicitor/barrister must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:*

[30] See, Australian Law Reform Commission, *Primer on Bias*, [32].

- *the court has first communicated with the solicitor/barrister in such a way as to require the solicitor/barrister to respond to the court, or*

- *the opponent has consented beforehand to the solicitor/barrister communicating with the court in a specific manner notified to the opponent by the solicitor/barrister.*

57. The Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* (**the AIJA Guide**), to which the Consultation Paper also refers, states that there is a 'very well known' principle that:

> *…save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way…*[31]

58. The AIJA Guide then elaborates upon this principle with some high-level examples of instances where it may be breached.[32]

59. The Law Council agrees with the position set out in the Consultation Paper that any review of the Barristers' Rules or ASCR in respect of contact between judges and lawyers should take place after the High Court has considered the issue further and handed down its decision in *Charisteas*.

60. The Law Council further notes, in terms of the process for amending the ASCR, that the Law Council periodically reviews the ASCR in consultation with its constituent bodies, regulators and other relevant stakeholders. The Law Council's Professional Ethics Committee oversees these reviews with the support of the Law Council's Secretariat. The ASCR were updated in March and April 2015. Except for the omission of former rule 29.12.5, the minor changes did not alter the substance on any of the Rules. In 2018, the Law Council began the first comprehensive review of the ASCR since they were promulgated in June 2011 and, in March 2020, Law Council Directors endorsed the recommendations of the Professional Ethics Committee in respect of the review. The Law Council is currently working with the Uniform Law jurisdictions (and other state and territory jurisdictions) to implement the revised ASCR in accordance with the processes of those jurisdictions.[33]

61. Pending the expression of any contrary view by the High Court, the Law Council notes that the AIJA Guide and the relevant Professional Rules have contained different tests with respect to contact between judges and lawyers for some time and it is not aware of a strong argument for amending the Rules.

62. Indeed, the Law Council understands that its members view the ASCR as an aspirational document for principles-based professionalism, which reflects the underlying equitable and fiduciary common law duties owed by legal practitioners. There is a concern that the increased codification of the Rules may reduce the moral significance they had at inception, risking a perception of the ASCR as being similar to black letter law statutes. This would represent a shift away from ethics being an

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[31] Australasian Institute of Judicial Administration, *AIJA Guide*, 19, citing *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127 (McInerney J); *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 346 (Gibbs CJ); 350-1 (Mason J).

[32] Australasian Institute of Judicial Administration, *AIJA Guide*, 19-20.

[33] For more information, see, Law Council of Australia, 'Australian Solicitors' Conduct Rules' <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>.

accepted responsibility and commitment innate to membership of the practising legal profession.

63. The Law Council also notes that rulemaking does not, in itself, prevent conduct that may jeopardise public trust in the judicial system.

Consultation Question 11.

Has the increased use of registrars for case management in family law cases in the Federal Circuit Court of Australia reduced the potential for prejudgment and perceptions of bias associated with multiple appearances before the same judge under the docket system to arise?

64. While the Law Council does not keep quantifiable data to accurately respond to this question, in at least the Family Court the increased use of registrars has had the effect of reducing the number of interlocutory issues being dealt with by a judge although this experience has not been as prevalent in the Federal Circuit Court. As a result, there is some reason to suspect that contentions as to bias arising from the disposition of such interlocutory issues will lessen, however there is no presently available evidence to support this suspicion. The use of registrars will not however have any impact upon contentions as to bias arising from those matters within the jurisdiction of judges.

65. Caution should be exercised when relying solely on the increased use of registrars to address these matters, noting that it may lead to longer processes, and additional pathways for review where a registrar is tasked with making decisions.

Consultation Question 12.

What additional systems or procedures can Commonwealth courts put in place to reduce the tension between the apprehended bias rule and the demands of efficient allocation of resources in court proceedings?

66. As the Law Council has highlighted above, one risk inherent in introducing additional processes aimed at addressing judicial bias is the potential that this will place extra administrative pressure on judicial officers and registries, particularly in the family law system, which already faces significant resourcing challenges and delays.

67. It must be recognised that systemic resourcing issues for courts create onerous and arguably untenable pressures on judicial officers. This has likely resulted in flow-on effects that may damage the administration of justice and public confidence in the relevant jurisdictions.

68. These circumstances should not prevent the courts from changing processes where necessary. For their part, the Federal Courts should continue to ensure an appropriate rotation of judges between lists and different locations, as best they can, noting the likely preference in many RRR registries for judges to be a person who is or will be part of the community in the long term, and the strain on judicial officers who may be asked to regularly rotate between locations.

69. The Law Council therefore recommends that the ALRC seek the appropriate balance between the need for reform and the overall impact on proceedings, with a view to the best interests of parties and the public. Appropriate additional funding by the Australian Government will be essential for successful reform in this area.

Consultation Proposal 13.

In practice, does the waiver rule operate unfairly to prevent issues of unacceptable judicial conduct giving rise to apprehended bias being raised on appeal? Or is the case law on waiver sufficiently flexible to deal with this situation?

70. The ALRC's *Primer on Bias* background paper explains that under the waiver rule, 'a party allegedly injured by bias (or their agent) may waive their right to object where such waiver is 'fully informed and clear'.'[34] The discussion of this issue by the ALRC suggests that it may be problematic.[35]

71. The Law Council considers the law on waiver to be sufficiently flexible, however, there is merit to further considering the ongoing appropriateness of the rule. When considering this issue further, particular regard should be had to the application to self-represented litigants to ensure there is clarity with respect to its operation.

Supporting judicial impartiality

Consultation Proposal 14.

The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community.

72. The Law Council recognises that Australians have many and varied lived experiences, including with respect to gender, cultural and ethnic background, disability, sexual orientation, socio-economic background, professional experience, state of origin and intersectionality.[36]

73. On this subject, the Law Council refers to the principles and protocol set out in its *Policy on the Process of Judicial Appointments* (**LCA Policy**),[37] as most recently updated in June 2021. The LCA Policy is designed to ensure transparency in federal judicial appointments and diversity in Australia's judicial officers, on the basis that these outcomes will promote public trust in the administration of justice and further the Law Council's key objects to promote the rule of law in the public interest and to advance the profession and the ethical standards of legal institutions.[38]

74. In the Law Council's view, ensuring transparency and promoting greater judicial diversity is also an essential part of supporting judicial impartiality, as well as public and litigant confidence in the administration of justice and, particularly, in judges' ability to make responsive and well-informed decisions.[39] Diversity in the judiciary has a clear flow-on effect for a person's experience in a courtroom, and could be considered a necessary part of enjoying comprehensive access to justice.

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[34] See, Australian Law Reform Commission, *Primer on Bias*, [35] citing Matthew Groves, 'Waiver of Natural Justice' (2019) 40 *Adelaide Law Review* 25, 651.
[35] Australian Law Reform Commission, *Primer on Bias*, [35]-[41].
[36] Law Council of Australia, *Policy on the Process of Judicial Appointments* (Policy Statement, 26 June 2021) ('LCA Policy') 6 <https://www.lawcouncil.asn.au/resources/policies-and-guidelines/policy-statement-process-of-judicial-appointments>.
[37] Ibid.
[38] Ibid 3.
[39] Ibid.

75. While the ALRC sets out authority that claims of apprehended bias relating to a judge's gender or ethnicity have not generally been upheld on appeal, it is also noted that these decisions have, at times, been criticised. [40] In any event, the Law Council considers that greater diversity in the judiciary through a meritorious appointment process will assist public confidence and is an essential feature in ensuring a responsive and well-informed judiciary.[41] Further, in the experience of the Law Council's members, there may be advantages to a judge having direct knowledge of certain matters in a case, including cultural identities and backgrounds, provided these factors are balanced against potential bias issues. In this regard, the Law Council supports Consultation Proposal 14.

76. In respect of the other aspects of Consultation Proposal 14 relating to appointment processes, the Law Council recommends the following judicial appointment process be implemented by the Australian Government, pursuant to the LCA Policy:

- a call for expressions of interest, including through clear and nationally publicised opportunities, accompanied by appointment criteria and an explanation of the selection and appointment process.[42] Nominations by candidates themselves or by third parties should be encouraged.[43] The LCA Policy also provides for direct approach of a candidate by a selection panel (**the panel**), which should be constituted as a matter of priority either within, and by, a new, standalone Judicial Appointments Commission, or by incorporation into an existing (or proposed) independent and impartial body;[44]
- genuine and thorough consultation by the panel with (at a minimum) certain identified office holders[45] as well as, and if the panel thinks appropriate, Aboriginal and/or Torres Strait Islander persons or representative bodies such as senior practitioners, specialist legal services and relevant state or territory-based organisations;[46]
- assessment by the panel of each candidate against the published appointment criteria using all relevant evidence-based claims and evidence made available to the panel through the nomination, consultation and interview processes set out in the LCA Policy;[47] and
- the explicit aim for the panel to strive to create a pool of candidates that is reflective of the diversity of each jurisdiction while ensuring meritorious appointments.[48] This may involve identification and consideration of the proportion of judicial officers belonging to a particular dominant social, cultural or other group, whether in one jurisdiction or nationwide. This recognises diversity as an essential feature in ensuring a responsive and well-informed judiciary. Where the panel is choosing between shortlisting two candidates

[40] Ibid [69].
[41] See, LCA Policy 4.
[42] See, LCA Policy at 6-7.
[43] Ibid 7.
[44] Such as a Federal Judicial Commission. See, ibid at 4.
[45] Namely, the Presidents of the Law Council of Australia and the Australian Bar Association, the President of the Bar Association (or equivalent) of the State or Territory where the appointee will be assigned, or predominantly assigned, upon appointment, the President of the Law Society (or equivalent) of the state and territory where the appointee will be assigned, or predominantly assigned, upon appointment, representatives of the Bar Associations and Law Societies of the other States and Territories, and leaders of the peak representative bodies of lawyer groups in Australia including women lawyers, Aboriginal and Torres Strait Islander legal services, family violence prevention legal services, community legal centres, law deans and legal aid services, amongst others: ibid 7.
[46] Ibid.
[47] Ibid 7-8.
[48] Ibid.

whom it has assessed as equally suitable, the LCA Policy states that it should prefer the candidate who will lend diversity to the Court.[49]

Appointment criteria

77. The Law Council recommends that successful candidates for judicial appointment possess at a minimum the skills, attributes and experience set out under the 'appointment criteria' heading in the LCA Policy (and where relevant, statutory requirements such as section 22 of the *Family Law Act 1975*). These are wide-ranging and cover professional and personal qualities alike. The personal qualities include social and cultural awareness of, and competency in, variations in lived experience, including with respect to gender, cultural and ethnic background, disability, sexual orientation, socio-economic background, professional experience, state of origin and intersectionality, as well as experiences of discrimination and sexual harassment, among others.[50]

78. In those courts exercising jurisdiction under the *Family Law Act 1975* and related legislation, it remains the strong view of the Law Council that candidates ought be required to have specialist knowledge and experience in that jurisdiction, including particularly as to issue concerning family violence.

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.

79. Further to the Law Council's above response to Consultation Proposal 14, the Law Council also supports Consultation Proposal 15. It further suggests that statistical collection should include data on disability.

80. Implementation of this proposal could, in the Law Council's view, promote an improved understanding of the courts and the judiciary – as well as improved transparency. The LCA Policy advocates for appointments that are meritorious and reflective of the diversity of each jurisdiction, including with respect to social, cultural or other groups, in a specific jurisdiction or nationwide.[51] Intuitively, reporting on these factors could assist in ensuring efforts to promote them are maintained.

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?

81. In addition to measures targeting judicial appointment processes, as outlined above, the Law Council supports more structural measures to increase diversity in the pool of candidates for judicial appointment, namely the legal profession itself. This requires identifying and supporting lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession.

[49] Ibid.
[50] Ibid.
[51] Ibid 7-8.

Possible measures should be the subject of further, specific consultation outside of the ALRC's current review. However, some preliminary views are outlined below.

Measures to improve diversity

82. In respect of measures required to improve general diversity in the legal profession and, by extension, the judiciary, the Law Council recognises that holistic and systemic change is required, including in relation to workplace culture.

83. The Law Council notes that increasing diversity in the legal profession is assisted by encouraging wide recruiting and developing an inclusive culture. Studies suggest that workplaces with diverse and inclusive work cultures, policies and practices attract more people and can draw from a larger recruitment pool.[52] Similarly, it is the experience of the Law Council's members that employees who feel valued and respected by their organisation, as a result of fostering an inclusive culture, are likely to remain at a workplace for longer.

84. It is well-recognised that there are many factors and complexities to ensuring diverse workplaces, and these should be addressed in a nuanced and considered way. For example, and of key relevance to gender diversity, numerous factors were exposed in a 2013 survey by the Law Council which investigated and analysed the drivers for attrition of women from the legal profession in Australia.[53] These ranged from a perception of conscious or unconscious bias against women who adopt flexible working arrangements in order to balance family responsibilities, to a very high level of discrimination and harassment at work reported by both male and female practitioners.[54] The resulting report made recommendations for legal associations and law practices, outlining practical measures which can be implemented to address the causes of high attrition rates among women lawyers, and to re-engage women lawyers who have left the profession.[55]

85. The Law Council also recognises that experiences of sexual harassment, workplace bullying and discrimination within the legal profession are problems which relevantly affect workplace culture. The Law Council has sought to address these practices by developing a National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession, and by promulgating resources to address harassment and bullying in legal practice on its website.[56] However, considered and targeted responses are still required to address these aspects of workplace culture, as well as related aspects such as the ability to work flexibly.

86. In addition to the above comments, the Law Council suggests the following measures may be of relevance to addressing the challenges set out in Consultation Question 16:

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[52] Jeremy Tipper, 'How to increase diversity through your recruitment practices' (2004) 36(4) *Industrial and Commercial Training* 158, 159-160.
[53] See, Urbis, 'National Attrition and Re-engagement Study (NARS) Report' (2014) *Law Council of Australia* <https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf> ('*NARS Report*').
[54] Ibid 76.
[55] *NARS Report* 8.
[56] See, Law Council of Australia, 'Release of National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession' (Media Release, 23 December 2020) <https://www.lawcouncil.asn.au/media/media-releases/release-of-national-action-plan-to-reduce-sexual-harassment-in-the-australian-legal-profession->; Law Council of Australia, 'Bullying and harassment in the workplace'<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/bullying-and-harassment-in-the-workplace>.

- early encouragement of students from a range of different cultural and socio-economic backgrounds to undertake legal studies in schools;
- expansion of cadetship or scholarship programs in universities with confirmed placement within law firms at early career stages;
- the creation of opportunities to progress the careers of culturally and linguistically diverse people within legal organisations, including access to independent mentoring and professional development; and
- creating internal policies that address bullying, sexual harassment, racism and discrimination.

Representation of Aboriginal and Torres Strait Islander peoples

87. It is difficult to find authoritative sources on the number of Aboriginal and Torres Strait Islander peoples currently appointed as judges or magistrates in Australia. From news reports and anecdotal information, the Law Council has been able to identify three currently sitting judges and eight sitting magistrates.[57]

88. More broadly, the limited amount of data that is available suggests that representation of Aboriginal and Torres Strait Islander peoples across the legal profession continues to sit well below population parity, with Aboriginal and Torres Strait Islander peoples making up approximately three per cent of the population, but only around 0.7 per cent of solicitors (based on 2018 statistics)[58] and 0.3 per cent of barristers (based on the membership data available in 2021).[59]

89. Figures also suggest that Aboriginal and Torres Strait Islander lawyers are not progressing at significant rates to the higher ranks of the profession from which judicial appointments are traditionally drawn. Australia's first Aboriginal and Torres Strait Islander Silk was appointed in 2015,[60] and, at the date of this submission six years later, he remains one of very few Aboriginal or Torres Strait Islander persons to reach this rank of Senior Counsel or Queens Counsel.[61]

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[57] These are Judge Matthew Myers (Federal Circuit Court); Judge Nathan Jarro (District Court, Queensland); Judge David Maclean (District Court, Western Australia); Magistrate Louise Taylor (Australian Capital Territory); Magistrate Rose Falla (Victoria); Magistrate Catherine Pirie (Queensland); Magistrate Jacqui Payne (Queensland); Magistrate Zac Sarra (Queensland); Magistrate Bevan Manthey (Queensland); Magistrate James Morton (Queensland); Magistrate Mark Douglass (NSW). See, eg, Jeremy Goff, 'Judge Jarro blazes a trail of firsts', *National Aboriginal and Torres Strait Islander Times* (online, 4 April 2018) <https://nit.com.au/judge-jarro-blazes-a-trail-of-firsts/>; Caris Duncan, 'Western Australia appoints first Aboriginal and Torres Strait Islander District Court Judge', *National Aboriginal and Torres Strait Islander Times* (online, 24 January 2020) <https://nit.com.au/western-australia-appoints-first-Aboriginal and Torres Strait Islander-district-court-judge/#:~:text=Making%20history%2C%20Judge%20David%20MacLean, admitted%20to%20practice%20in%201991>; Hon Nicola Roxon MP and Hon Jenny Macklin MP, 'Australia's First Aboriginal and Torres Strait Islander Magistrate Welcomed' (media release, 10 February 2012) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/media-releases/2012/mr100212>; Michael Inman, 'ACT appoints its first Aboriginal judicial officer', *Canberra Times* (10 August 2018) <https://www.canberratimes.com.au/story/6013109/act-appoints-its-first-aboriginal-judicial-officer/>; Law Institute of Victoria, 'State's first Aboriginal and Torres Strait Islander magistrate' (2013) 87(3) *Law Institute Journal* 1, 18 <https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-March-2013/State-s-first-Aboriginal and Torres Strait Islander-magistrate>.

[58] Law Society of New South Wales on behalf of the Conference of Law Societies, *2018 National Profile of Solicitors* (Urbis, 17 July 2019) 10 <https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>.

[59] Australian Bar Association, *Member Information* (website, January 2021) <https://austbar.asn.au/for-members/member-information>.

[60] See, eg, Andrea Booth, 'Aboriginal and Torres Strait Islander Australian appointed silk', *NITV* (online, 24 September 2015) <https://www.sbs.com.au/nitv/article/2015/09/24/tony-mcavoy-appointed-first-Aboriginal and Torres Strait Islander-silk>.

[61] See, eg, James Cook University, 'Mr Lincoln Crowley QC', Outstanding Alumni Awards (online, 2020) <https://www.jcu.edu.au/outstanding-alumni-awards/winners-by-year/2020-winners/mr-lincoln-crowley-qc>.

90. The lack of Aboriginal and Torres Strait Islander representation in the sector becomes particularly stark when one considers the numbers of Aboriginal and Torres Strait Islander people who come into contact with the judiciary, for example, through the criminal law. As of 30 June 2020, Aboriginal and Torres Strait Islander people made up 29 per cent of all prisoners in Australia.[62] In some jurisdictions and instances, these percentages are far higher – at certain times, for example, all of the children in juvenile detention in the Northern Territory have been Aboriginal and Torres Strait Islander.[63] The implication is that a very small proportion of the non-Aboriginal and Torres Strait Islander population are administering to a significant proportion of the Aboriginal and Torres Strait Islander population.

91. Achieving greater diversity in court staffing should also be prioritised at all levels of the court system, from reception and security personnel, to court officers, to a judge's associates and tipstaff, to the judiciary itself.

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.

92. The National Standard for Professional Development for Australian Judicial Officers provides as follows:

> *each judicial officer should be able to spend at least 5 days each calendar year participating in professional development activities relating to the judicial officer's responsibilities.*
>
> *This standard need not be met in each year but can be met on the basis of professional development activities engaged in over a period of 3 years. This standard can be met, in part, by self-directed professional development.*
>
> *Judicial officers should be released from court duties to enable them to meet this standard. However, judicial officers should commit some private time to meet the standard.*[64]

93. The Law Council supports Consultation Proposal 17 in principle. However, judges with heavy workloads may not receive training for several/many months until a training course is available. To be effective, judicial appointments will need to be timed to allow the new judicial officer to take part in orientation and other education and training and then work within the court's timetable and workflow.

94. An *ad hoc* approach to orientation and training, as identified by the ALRC,[65] may mean that due to a court's workload and resources, this training is delayed and/or not taken

[62] Australian Bureau of Statistics, *Prisoners in Australia, 2020* (3 December 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.
[63] Estimates Committee, Northern Territory Legislative Assembly, *Minister Wakefield's Portfolios* (20 June 2018) <https://parliament.nt.gov.au/__data/assets/pdf_file/0019/525322/Corrected-Transcript-Estimates-2018-Day-6-20-June-2018.pdf> 62.
[64] See, Judicial Commission of New South Wales, 'Continuing Judicial Education Policy' <https://www.judcom.nsw.gov.au/education/continuing-judicial-education-policy/>.
[65] Australian Law Reform Commission, *Consultation Paper*, [87].

up for a significant period of time. The Law Council also agrees with the ALRC's comments that court-specific orientation programs would be beneficial.[66]

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.

95. The Law Council is supportive of Consultation Proposal 18, subject to close consideration of the points raised below.

Bias and Aboriginal and Torres Strait Islander Peoples in Australia

Systemic barriers, policy and bias

96. The Law Council endorses the ALRC's explicit recognition that Aboriginal and Torres Strait Islander peoples as a specific cohort can experience bias within the justice sector.[67] This includes structural bias, as well as individual explicit and implicit bias.[68] Importantly, the ALRC also highlights that 'structural biases often operate alongside and mutually reinforce individual explicit and implicit biases', an assertion with which the Law Council agrees.[69]

97. In terms of structural bias relating to Aboriginal and Torres Strait Islander peoples, profound and ongoing distrust in the legal and justice system cannot be divorced from a history of perceptions that laws and policies work 'against them' instead of 'for them'.[70] This can be particularly stark in certain areas of the law, such as the criminal and child protection sectors. These are not simply historic issues. Aboriginal and Torres Strait Islander peoples continue to experience vastly disproportionate rates of incarceration, high numbers of deaths in custody, instances of police discrimination and mistreatment, imposition of income management, and high rates of child removals.

98. The Law Council recognises that bias faced by Aboriginal and Torres Strait Islander peoples in the legal and justice system is entwined with general systemic barriers to wellbeing and productivity, such as lower life expectancy, physical and mental health, literacy and numeracy skills, access to education, housing and employment, and

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[66] Ibid [88].
[67] Australian Law Reform Commission, *Bias and Aboriginal and Torres Strait Islander peoples in Australia*, Judicial Impartiality Background Paper J16 (April 2021) [34] <https://www.alrc.gov.au/wp-content/uploads/2021/05/JI-Consultation-Paper-and-Background-Papers.pdf> ('*Bias and Aboriginal and Torres Strait Islander peoples in Australia*').
[68] Ibid.
[69] Australian Law Reform Commission, *Consultation Paper*, 158.
[70] Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project* (2018) 29-30 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf> ('*Justice Project Chapter*').

higher levels of disability, income management, and discrimination.[71] The Productivity Commission has noted that this overarching disadvantage is 'transmitted across generations through the trauma caused by colonisation, and subsequent government policies'.[72]

99. Further, unfairness in justice outcomes can in some instances be attributed to government legal and related policy settings. These include settings relating to mandatory sentencing, restrictive bail practices, fines and penalties tied to 'low level', 'public nuisance' offences, and the low minimum age of criminal responsibility, as well as investment in corrective services rather than therapeutic and wraparound programs that aim to address the root causes of offending behaviours.

100. In terms of past or current policy responses, the Law Council notes that over recent decades, there have been multiple public policy initiatives by Commonwealth, state and territory governments to attempt to address the significant social and economic disparity between Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander Australians. This includes policies and programs which have sought to address poor education, housing shortages and overcrowding, poor health, poor social justice outcomes, substance abuse and dependency and domestic violence.

101. In the view of the Law Council's members, these approaches continue to lack nuance, despite changes in government policy platforms. In addition, there is a significant disparity in the allocation of resourcing and funds between service providers and Aboriginal and Torres Strait Islander peoples, their communities, and organisations. This has had a detrimental impact on positive social or economic outcomes for Aboriginal and Torres Strait Islander peoples in Australia.

102. Further, the Law Council's members consider that the continuing negative effects of intergenerational transfer of multiple social and economic disadvantages is an organic Australian societal epidemic[73] which cannot be addressed in isolation or with some aspects of the *Closing the Gap* strategy preferenced over others.

103. Unfairness in justice outcomes is also the product of processes and settings entrenched within the legal and justice sector itself.[74] In separate extra-judicial statements, Western Australian former Chief Justice Wayne Martin and New South Wales (**NSW**) Chief Justice Tom Bathurst have highlighted their recognition of systemic bias within the sector, with Chief Justice Martin highlighting 'the differences between formal and substantive equality, noting that the High Court had consistently adopted an approach that favoured the former', and Chief Justice Bathurst describing the 'criminal legal system' as 'a tool of injustice for Aboriginal and Torres Strait Islander Australians'.[75]

104. Chief Justice Martin points to the *Bail Act 1982* (WA), which does not discriminate against Aboriginal people per se, because people who do not have a home, who are not in stable employment and who have a long prior criminal record are treated the same whether they are Aboriginal and Torres Strait Islander or not. What this

[71] Productivity Commission, *Overcoming Aboriginal and Torres Strait Islander Disadvantage: Key Indicators 2020 – Report* (December 2020) <https://www.pc.gov.au/research/ongoing/overcoming-Aboriginal and Torres Strait Islander-disadvantage/2020/report-documents/oid-2020-overcoming-Aboriginal and Torres Strait Islander-disadvantage-key-indicators-2020-report.pdf>.
[72] Ibid.
[73] It is widely accepted through independent and government economic modelling that the cost this disadvantage imposes on the overall Australian economy is significant.
[74] See, eg, Law Council of Australia, *Justice Project Chapter*, 42.
[75] Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) 0(0) *Alternative Law Journal* 1, 6-7 <https://journals.sagepub.com/doi/pdf/10.1177/1037969X211019139>.

approach fails to address is the fact that, proportionally, Aboriginal and Torres Strait Islander people are affected to a much greater degree. While the law presumes 'formal equality', substantive equality is undermined.[76]

105. Similarly, the *Pathways to Justice* report (as noted in the ALRC's background papers) highlighted that Aboriginal and Torres Strait Islander peoples fare worse at every stage of the criminal justice process compared to non-Aboriginal and Torres Strait Islander people.[77] In 2016, they were seven times more likely to be charged with a criminal offence and appear before the courts, 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment following conviction.[78] This is despite the fact – to utilise language from the Uluru Statement from the Heart – that no people can be said to be an innately criminal people.[79]

106. With respect to explicit bias, while not necessarily the norm, there are, regrettably, publicly available reports of particular judges making offensive or racially discriminatory remarks to Aboriginal and Torres Strait Islander defendants, including children, some of which have been the subject of formal complaints and findings of inappropriate judicial conduct.[80] However, there have also been instances where judges have declined to make formal determinations of judicial misconduct against their colleagues, including because their jurisdiction lacked a formal complaints process, or because they themselves lacked the necessary powers to impose sanctions.[81] This may lead to questions over the legitimacy of having a member of the same bench investigate the complaint.[82]

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[76] Ibid 7.
[77] Australian Law Reform Commission, *Bias and Aboriginal and Torres Strait Islander peoples in Australia*, [35].
[78] Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Executive Summary, Overview of the Repor*t (9 January 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/overview-of-the-report-3/>. See also Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) 0(0) *Alternative Law Journal* 1, 6 <https://journals.sagepub.com/doi/pdf/10.1177/1037969X211019139> quoting Wayne Martin, 'Aboriginal and Torres Strait Islander Incarceration Rates: Strategies for Much Needed Reform' (Seminar Paper, Law Summer School, 20 February 2015) 8–9: 'Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.'
[79] Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).
[80] See, eg, Tom Maddocks, 'NT judge's "disgraceful" comments to child offender to be referred to royal commission', *ABC News* (online, 17 June 2017) <https://www.abc.net.au/news/2017-06-17/nt-judge-made-disgraceful-comments-about-teen-offender/8627282>; Tom Maddocks, 'NT lawyers push for judge to be removed from Youth Court over "grossly insensitive" comments', *ABC News* (online, 21 June 2017) <https://www.abc.net.au/news/2017-06-21/nt-lawyers-push-for-judges-removal-from-youth-court/8640058>; Jano Gibson, 'NT Criminal Lawyers Association calls for greater judicial oversight', *ABC News* (online 25 January 2018) <https://www.abc.net.au/news/2018-01-25/criminal-lawyers-association-calls-for-more-oversight-of-judges/9363014>; Jacqueline Breen, 'Judge's "clearly offensive" Aboriginal and Torres Strait Islander parenting barb subject of complaint consideration', *ABC News* (online, 20 July 2019) <https://www.abc.net.au/news/2019-07-20/complaint-considered-nt-judge-Aboriginal and Torres Strait Islander-parenting-comment/11323524>; Emilia Terzon, 'Complaint lodged against judge who made "offensive", "discriminatory" comments to Aboriginal defendants', ABC News (26 July 2019) <https://www.abc.net.au/news/2019-07-26/complaint-lodged-nt-judge-discriminatory-offensive-aboriginal/11349360>.
[81] Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) 0(0) *Alternative Law Journal* 1, 7.
[82] Ibid.

107. Likely even more prevalent at the personal level, however – as recognised across the Australian population as a whole – is implicit bias. Marchetti and Ransley characterise 'unconscious racism' within the court system as directly affecting outcomes for Aboriginal and Torres Strait Islander persons.[83] As the ALRC has noted, recent results from an Australian application of the Implicit Association Test, which examined 11,000 people over a 10-year period, suggest that around 75 per cent of Australians hold an implicit bias against Aboriginal and Torres Strait Islander Australians, with a third of Australians holding what might be considered a strong implicit bias, and that this does not alter based on social setting or position.[84]

108. This suggests that members of the public who are otherwise highly educated, such as judges and magistrates, are not immune from 'hidden' perspectives or judgments occurring at a deeply psychological level, which need to be addressed through conscious, targeted interventions such as cross-cultural professional development.

Requirement for culturally responsive, informed services

109. The need for culturally responsive and informed legal and justice services was consistently recognised throughout the consultations that led to the Law Council's *Justice Project*, with an emphasis that this cannot be left only to specialist services, but must also be incorporated mainstream.[85] The Law Council proposed as a key priority in its *Justice Project* that:

> *Ongoing cultural competence training, informed and led by Aboriginal and Torres Strait Islander people and organisations, should be provided to lawyers, judicial officers, police, corrections and broader justice system professionals who work with Aboriginal and Torres Strait Islander peoples.*
>
> *Strategies to increase the employment of Aboriginal and Torres Strait Islander peoples across these professions should be adopted. Aboriginal and Torres Strait Islander organisations should be appropriately resourced to engage in this work.*[86]

110. In addition, the *Justice Project* highlighted an increasing recognition of the importance of courts and tribunals adopting trauma-informed and recovery-orientated approaches to better address disadvantage and minimise the anti-therapeutic effects of court and tribunal settings.[87]

111. With respect to cultural competency in relation to Aboriginal and Torres Strait Islander peoples, the Law Council notes that its members consider a culturally safe workforce to be one that considers power relations, cultural differences and the rights of the client and/or party, and encourages workers to reflect on their own attitudes and

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[83] Elena Marchetti and Janet Ransley, 'Unconscious Racism: Scrutinizing Judicial Reasoning in "Stolen Generation" Cases' (2005) 14(2) *Social and Legal Studies* 533.
[84] Siddharth Shirodkar, 'Bias against Aboriginal and Torres Strait Islander Australians: Implicit Association Test Results for Australia' (2019) 22: 3-4 *Journal of Australian Aboriginal and Torres Strait Islander Issues* 3, 4.
[85] Law Council of Australia, 'Legal Services', *Justice Project* (2018) <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/18%20-%202018%2009%20-%20Final%20-%20Legal%20Services%20%28Part%202%29.pdf>.
[86] Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project* (2018) 96-97 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>.
[87] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (2018) 115 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>.

beliefs. Cultural respect is achieved when individuals feel safe and cultural differences are respected.

112. The word 'culture' is used because it encompasses the integrated pattern of human behaviour that includes thoughts, communications, actions, customs, beliefs, values and institutions of a racial, ethnic, religious or social group. The word 'competence' is used because it implies having the capacity to function effectively.

113. The Law Council considers that the definition of cultural competency has two broad segments. The first segment consists of a two-part cognitive aspect specifying what a person ought to know and understand, and the second segment is a skills element that requires the possessor of the knowledge and understanding to bring this to bear on practical demands and to do so in a particular way. The aim, from a pedagogical perspective, is to make the scope of learning required in the first segment manageable within the resource constraints of the teaching framework – in the judicial context, being the framework of judicial learning amongst the judge's broader duties.

114. The second part of the first segment requires an 'awareness' of Aboriginal and Torres Strait Islander protocols. The Law Council notes that this is, at a functional level, a modest requirement. It could mean being aware of the various communication protocols that exist for undertaking proceedings with Aboriginal and Torres Strait Islander clients as both the legal system and Aboriginal and Torres Strait Islander communities require.

115. As part of their 2016 evaluation of Aboriginal and Torres Strait Islander-focused cross-cultural professional development for the judiciary, Cavanagh and Marchetti highlighted the difference between cultural awareness and the more robust requirements of cultural competency and cultural safety. They suggested that:

> *the training materials and activities provide information about Aboriginal and Torres Strait Islander people without requiring the judiciary to demonstrate an understanding of Aboriginal and Torres Strait Islander culture that would indicate competency. … In order to ensure that judicial officers can quickly respond to the entrenched whiteness of court proceedings, their familiarity with, and depth understanding of, the contents of the bench books and training programs need to be assessed.*[88]

116. Broadly speaking, in the Law Council's understanding, five essential elements contribute to an institution or agency's ability to become more culturally competent. These include:

- valuing diversity;
- having the capacity for cultural self-assessment;
- being conscious of the dynamics inherent when cultures interact;
- having institutionalised culture knowledge; and
- having developed adaptations to service delivery reflecting an understanding of cultural diversity.

117. These five elements should be manifested at every level of the applicable institution – in this case, the judiciary – including policy making, administrative, and practice. Further, these elements should be reflected in the attitudes, structures, policies and services of the institution. Mechanisms are required to operationalise these

[88] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (2018) 53.

frameworks within systems and organisations, to embed cultural competence in professional and individual practice. Education and training must also occur simultaneously.

118. Further, it must be remembered that genuine cultural competency may require understanding and knowledge of a specific geographical area, with its own discrete cultural, historic and political nuances that affect how a matter may be progressed. The needs, expectations and cultural issues that might affect a group of people living on Palm Island, for example, will not be the same as those who might be living West of Brisbane, or on Mornington Island or Doomadgee. Whilst the Law Council considers that broad cultural competency training should be encouraged along the terms set out in more detail below, locally specific cultural competency training may be equally as important.

Cultural competency in the federal judiciary

119. There have been efforts to increase the cultural understanding, competency and safety of judges and magistrates since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) identified the need for the judiciary to 'participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions'.[89]

Bench books and written manuals

120. Several jurisdictions have developed bench books or other written manuals to help equip judicial officers with the necessary knowledge and skills to understand the cultural needs of different people interacting with the court and how best to communicate with them. In 2016, Cavanagh and Marchetti recorded 19 such materials.[90] These include, for example:

- the *Aboriginal Benchbook for Western Australian Courts*, published by the Australasian Institute for Judicial Administration (**AIJA**), which was launched in May 2002 in direct response to 'concerns about the over-representation of Aboriginal persons in Australia's criminal justice systems' and the [abovementioned] recommendation of the RCIADIC.[91] This resource 'provides broad descriptions of traditional and contemporary Aboriginal society, culture, language and law; it suggests ways of addressing the language and communication issues which can arise in court proceedings involving Aboriginal people; and it discusses relevant legal principles relating to pre-trial and criminal proceedings and sentencing.'[92];
- the *Bugmy Bar Book*, which began as a NSW-focused publication, is expanding to encompass all jurisdictions.[93] This is a resource for Australian sentencing courts and criminal lawyers on the principles endorsed by the High Court in *Bugmy v The Queen* on the regard to be had to an offender's background when

[89] Vanessa Cavanagh and Elena Marchetti, 'Judicial Aboriginal and Torres Strait Islander Cross-Cultural Training: What is Available, How Good Is It and Can It Be Improved?' (2015/2016) 19(2) *Australian Aboriginal and Torres Strait Islander Law Review* 45, 46, quoting Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 5, 91.
[90] Vanessa Cavanagh and Elena Marchetti, 'Judicial Aboriginal and Torres Strait Islander Cross-Cultural Training: What is Available, How Good Is It and Can It Be Improved?' (2015/2016) 19(2) *Australian Aboriginal and Torres Strait Islander Law Review* 45, 52.
[91] Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) <https://aija.org.au/publications/2nd-ed-aboriginal-benchbook-for-western-australian-courts/>.
[92] Ibid 1:2. See also 1:3 for further details.
[93] The Public Defenders, *Bugmy Bar Book* (2020) <https://www.publicdefenders.nsw.gov.au/barbook/>.

sentencing, some of which are specific to Aboriginal and Torres Strait Islander peoples; and

- the *NSW Equality Before the Law Bench Book*, which informs the judiciary about the different values, cultures, socioeconomic disadvantage and potential barriers to equitable participation in court proceedings for specific groups, including Aboriginal and Torres Strait islander peoples, and provides 'guidance about how judicial officers might need to take account of this information in court – from the start to the conclusion of court proceedings'.[94]

Active learning experiences

121. While equal treatment bench books and other publications go some way to ensuring that judicial officers are alert to the diversity of people coming before the courts and the effect these differences may have in relation to the legal problem in question, consideration has also been given to the difference between theoretical/passive and practical/active learning experiences.

122. There have been recent developments towards facilitating 'active discussion and workshopping of the challenges faced by the justice system in responding appropriately to cultural diversity', this being 'a much more powerful way' of engaging with the differences between the judicial officer and those with whom the judicial officer interacts in court.[95]

123. For example, the National Judicial College of Australia has previously funded the South Australian immersion tour of the Anangu Pitjantjatjara Yankunytjatjara lands, which 'saw 19 judicial officers immersed in Aboriginal communities to learn about Aboriginal life and culture, and Aboriginal experiences relating to the Australian justice system'.[96] 'Similar shorter judicial immersion tours have been undertaken in NSW, Victoria, Western Australia and South Australia'.[97]

124. More recently, in the Northern Territory, the North Australian Aboriginal Justice Agency (**NAAJA**) has partnered with the ANU College of Law to develop the *True Justice: Deep Listening* initiative as an on-Country, immersive experience for 16 Bachelor of Laws students. The exemplar course will take place at Mparntwe (Alice Springs) and Uluru in September 2021. Key to the course is connecting students to Traditional Owners, educators, interpreters, academics, and lawyers, and to Aboriginal-led perspectives in health and trauma-informed practice. Different parts of Country will be thread into the course design in a deliberate way and at the invitation of Traditional Owners.

125. By drawing on the experience and strengths of a range of co-facilitators, and partnering with organisations including the Aboriginal Medical Services Association Northern Territory and Winkiku Rrumbangi NT Aboriginal and Torres Strait Islander Lawyers Aboriginal Corporation, NAAJA intends to host several courses in 2022 with different participant cohorts including law students, lawyers, and judicial officers.

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[94] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (Final Report, 2017) 54, quoting Judicial Commission of New South Wales, *Equality Before the Law*, iii. See also Department of the Attorney General Western Australia, *Equality Before the Law Bench Book* (1st ed, 2009); Supreme Court of Queensland, *Equal Treatment Benchbook*.

[95] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (Final Report, 2017) 55, quoting Robert French, 'The Relevance of Difference – Equal Justice and Equality before the Law' (Paper presented at Brennan Justice and Leadership Program, Sydney, 27 August 2015).

[96] Vanessa Cavanagh and Elena Marchetti, 'Judicial Aboriginal and Torres Strait Islander Cross-Cultural Training: What is Available, How Good Is It and Can It Be Improved?' (2015/2016) 19(2) *Australian Aboriginal and Torres Strait Islander Law Review* 45, 52.

[97] Ibid.

Courses will be held at Mparntwe and Uluru in Central Australia and also the Top End at Darwin and Kakadu National Park. Aboriginal and Torres Strait Islander lawyers from other parts of Australia will be invited as co-facilitators.

126. The *True Justice: Deep Listening* initiative seeks to address a significant shortcoming of law school education where opportunities to learn on-Country and from people who can speak from their own experience and authority including cultural authority are severely limited. From the perspective of Aboriginal lawyers and educators at NAAJA, this context is essential as a starting point. The course will consider issues such as how justice as a concept, and as a practice, is presented and rendered credible, strong and 'true'. Deep listening will support engagement with Aboriginal perspectives. By equipping participants with a more critical and meaningful understanding of Aboriginal perspectives, this course aims to achieve long-term changes to the legal system.

127. In addition, the NSW Children's Court is engaging in ongoing education particularly with respect to the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system.[98] Children's Magistrates are 'actively participating' in 'educational activities that are Aboriginal specific, including visits to Aboriginal communities organised by the Ngara Yura Committee of the Judicial Commission'.[99]

128. There are also several examples of 'peer-facilitated learning opportunities' such as the Victorian Koori twilight seminars organised by the Judicial Officers' Aboriginal Cultural Awareness Committee.[100]

Recommended programs for cultural competency

129. The question whether judicial cultural immersion and education is enough to overcome the issues of bias in the courts, as outlined above, is a complex one. It places emphasis on the end point in circumstances where many Aboriginal and Torres Strait Islander peoples are already in the cyclic environment of the judicial system. An understanding of the context of the multifactorial issues at play in addressing bias experienced in the courts by Aboriginal and Torres Strait Islander peoples is vital.[101]

130. Recognising this, the Law Council broadly agrees with Consultation Proposal 18 while noting that one-off training does not create a culturally competent workforce, nor will it sufficiently support impartiality, although it could increase cultural awareness.

Definition and strategy for cultural safety

131. Writing in 2021, Cubillo recommended that 'immediate practical steps' taken by the Australian legal community 'should include following the lead of the Australian Health Practitioners Regulation Agency' to develop and implement 'an appropriate baseline definition of cultural safety' and 'a National Aboriginal and Torres Strait Islander Legal

[98] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (Final Report, 2017) 56.
[99] Ibid, quoting Judge Peter Johnstone, 'Discussion Paper: Aboriginal issues in the Children's Court of NSW' (Speech delivered at the Law Council 2015 Aboriginal and Torres Strait Islander Imprisonment Symposium, 13 May 2015) [6].
[100] Vanessa Cavanagh and Elena Marchetti, 'Judicial Aboriginal and Torres Strait Islander Cross-Cultural Training: What is Available, How Good Is It and Can It Be Improved?' (2015/2016) 19(2) *Australian Aboriginal and Torres Strait Islander Law Review* 45, 52.
[101] It is noted that the Primer on Cognitive and Social Biases in Judicial Decision-Making explores some of these factors from [32].

and Cultural Safety Strategy'.[102] The Law Council suggests that consideration should be given to this proposal.

Engagement with Elders

132. Within the judiciary, the Law Council suggests that cultural competency training could be supported by workshops with Murri or Koori Court members, as applicable, to facilitate engagement across the State and Federal Courts with Elders and members of the judiciary.

133. Further, the ALRC's research and consultation for the current Consultation Paper should be built upon to continue to assess and develop judicial training and education that better supports impartiality when dealing with Aboriginal and Torres Strait Islander peoples.

Trauma-informed approaches

134. In addition, the Law Council recommends that greater impetus might also be given to the rollout of training in trauma-informed approaches for judges and magistrates. For Aboriginal and Torres Strait Islander people, trauma may be intergenerational as a result of historic marginalisation, dispossession, violence and discrimination, and can produce severe psychological and physical health consequences, which may lead to increased interaction with the legal system.[103]

135. The Mental Health Commission of NSW submitted to the *Justice Project* that a 'legacy of childhood trauma can be ongoing problems with authority figures and institutions which frequently lead to conflict with police, the law and incarceration'.[104] However, the Law Council has heard from legal practitioners who see it as increasingly apparent that trauma-informed approaches are also relevant and necessary in areas of the civil law such as native title, where applicants are required to provide detailed evidence, for example, on their clan and family history, requiring them to engage with significant intergenerational trauma.

Changing court environments

136. Along with these initiatives, Cavanagh and Marchetti identify other elements of cultural competency and cultural safety as including the recruitment of Aboriginal and Torres Strait Islander peoples within the legal and justice sector and changes to the usual environment of court rooms.[105] The Law Council has identified these as areas for priority investment that would make a practical difference to the various biases Aboriginal and Torres Strait Islander peoples face when interacting with the court system.

Court structures and processes

137. The Law Council notes that shifts are already occurring through the establishment of Aboriginal and Torres Strait Islander sentencing courts and court programs, which have been recognised as an effective way of enhancing cultural sensitivity across the justice system. These have been established to not only address disproportionate

[102] Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) 0(0) *Alternative Law Journal* 1, 8 <https://journals.sagepub.com/doi/pdf/10.1177/1037969X211019139>.
[103] Law Council of Australia, 'Courts and Tribunals', *Justice Project* (2018) 115.
[104] Ibid.
[105] Vanessa Cavanagh and Elena Marchetti, 'Judicial Aboriginal and Torres Strait Islander Cross-Cultural Training: What is Available, How Good Is It and Can It Be Improved?' (2015/2016) 19(2) *Australian Aboriginal and Torres Strait Islander Law Review* 45, 55.

incarceration, but also overcome the significant lack of trust amongst their communities towards the justice system.

138. For example, in around 2018, there were over 50 adult and children's Aboriginal and Torres Strait Islander sentencing courts operating, although these were lacking in certain states and territories, such as Western Australia and, despite its relatively high Aboriginal and Torres Strait Islander population, the Northern Territory.[106] These courts enable Aboriginal and Torres Strait Islander elders or community representatives to participate in the process by providing cultural advice to the judicial officer in relation to the offender's personal circumstances.[107] This creates a more culturally safe forum for sentencing Aboriginal and Torres Strait Islander offenders. The ALRC has previously recognised these courts' benefits and recommended their expansion.[108] The Koori Courts in Victoria and Murri Courts in Queensland have seen positive results,[109] and there have been renewed calls for the Walama Court to be established in NSW,[110] following research by the NSW Bureau of Crime Statistics and Research on the effectiveness of Circle Sentencing in lowering rates of imprisonment and reoffending.[111]

139. The *Justice Project* relevantly recommended that following a mapping exercise regarding jurisdictional need and/or regional need, state and territory governments should establish additional specialist Aboriginal and Torres Strait Islander sentencing courts. Aboriginal and Torres Strait Islander people and organisations should be involved in the design, establishment and evaluation of these courts.[112] The *Justice Project* also saw value in specialist Aboriginal and Torres Strait Islander personnel, including cultural liaison officers and Aboriginal and Torres Strait Islander-led support services.[113] As well as improving outcomes for Aboriginal and Torres Strait Islander court users, these may over time help to break down all forms of bias in the administration of the law.

The role of the legal profession

140. More foundationally, the legal fraternity has an integral role to play in engaging with Aboriginal and Torres Strait Islander Peoples, communities, Elders and Traditional Owners nationwide. The Law Council considers there is a mutual moral, social and

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[106] Australian Law Reform Commission, Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Access to Justice, Specialist Aboriginal and Torres Strait Islander Sentencing Courts* (11 January 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/10-access-to-justice/specialist-aboriginal-and-torres-strait-islander-sentencing-courts/>.

[107] Ibid.

[108] Ibid, Rec 10-2.

[109] See, eg, George Roberts, 'Elders play key role in giving young Aboriginal and Torres Strait Islander people hope and keeping them out of jail', *ABC News* (online, 18 June 2021) <https://www.abc.net.au/news/2021-06-18/qld-murri-court-keeping-people-out-of-jail/100222886>; Western Sydney University, 'Report: Koori Court effective for young offenders', *News Centre* (online, 7 May 2018) <https://www.westernsydney.edu.au/newscentre/news_centre/story_archive/2018/report_koori_court_effective_for_young_offenders>.

[110] See, eg, 'Circle sentencing success strengthens case for a Walama Court in NSW', *Mirage News* (online, 26 May 2020) <https://www.miragenews.com/circle-sentencing-success-strengthens-case-for-a-walama-court-in-nsw/>; 'Establishing Walama Court must not be ignored in NSW budget or justice system', *Mirage News* (online, 13 November 2020) <https://www.miragenews.com/establishing-walama-court-must-not-be-ignored-in-nsw-budget-or-justice-system/>.

[111] Steve Young and Elizabeth Moore, 'Circle Sentencing, incarceration and recidivism' (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 226, April 2020) <https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CJB/CJB226-Circle-Sentencing-Summary.aspx>.

[112] Law Council of Australia, 'Recommendations and Priorities' (*Justice Project*, 2018) 7, Rec 4.8.

[113] Ibid, 8, Rec 4.9.

economic benefit associated with engagements which touch upon Australian Aboriginal and Torres Strait Islander business, including service delivery, policy platforms and design.

141. The Law Council also suggests that Aboriginal and Torres Strait Islander cultural competence training should be an ongoing and long-term commitment for all members of the legal profession. There should be an expectation that lawyers, barristers and others working in the areas of judicial operation become more aware of the distinctive aspects of Aboriginal and Torres Strait Islander life, culture, spirituality, traditions, languages, attitudes and their socio-economic disposition in all strands of the economy by taking part in accredited cultural competency training. Where resourcing constraints exist at an organisational level, individual practitioners should take steps to supplement their own learning. This is paramount when dealing directly with Aboriginal and Torres Strait Islander Peoples and communities in their practices.

142. Such training can also assist the legal profession in better understanding the subjective factors which are relevant to their client's case and to inform the evidence submitted to the courts. For non-Aboriginal and Torres Strait Islander lawyers, this must be an ongoing learning process.

Broader educational context

143. The Law Council considers that in order to achieve scale for impact at the level of the judiciary and legal profession, there is a need to promote linkages with broader Federal Government and administrative agencies by commencing compulsory training at a school level. This training should centre on Australia's cultural history and use a truth telling approach with respect to Australia's history both pre-colonial, and post-1770.

144. At a tertiary level, Aboriginal and Torres Strait Islander cultural immersion, history, behaviour management, pedagogical approaches, cultural attitudes and impacts of social dislocation and exclusion should also be explored.

Consultation Question 19.

What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

145. As a prerequisite to further mapping, coordinating, monitoring, and developing ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, the Law Council recommends that the Federal Courts and Australian Government consult directly with:

- communities with specific needs in this area (for example, communities whose members are typically parties to, or affected by, migration matters, in jurisdictions where such matters are routinely heard);
- larger professional membership bodies and their members, including – where relevantly, through the Law Council – the Bar Associations, Law Societies and Institutes in all Australian jurisdictions; and
- Aboriginal and Torres Strait Islander legal professionals.

146. It is crucial that the federal judiciary also engage with Aboriginal and Torres Strait Islander communities to facilitate a greater understanding of subjective factors impacting Aboriginal and Torres Strait Islander peoples in their interactions with the courts, as well as the detrimental impact of existing legislative and policy frameworks, processes and decision-making where Aboriginal and Torres Strait Islander perspectives may be overlooked or treated as an afterthought.

Aboriginal and Torres Strait Islander judicial body

147. The Law Council also suggests that consideration be given to establishing and adequately resourcing an Aboriginal and Torres Strait Islander judicial body of culturally sound Aboriginal and Torres Strait Islander legal professionals to assist in the development of judicial educational programs to respond to any issues with respect to judicial impartiality as they arise, and, more broadly, to support it. Such a body could provide the Aboriginal and Torres Strait Islander lens necessary to incorporate a culturally appropriate analysis with respect to areas of practice or jurisdiction in particular Federal Courts. It is important that the body be remunerated to reflect the expertise and time commitments required.

148. Further, the Law Council endorses giving thought to the establishment of a panel of culturally sound Aboriginal and Torres Strait Islander legal practitioners in the federal, state and territory jurisdictions who can guide and assist in cultural education programs to ensure that the training remains responsive to current social needs.

Federal Judicial Commission

149. The Law Council considers that a Federal Judicial Commission should be involved more broadly in the process of mapping, coordinating, monitoring and developing ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and ensuring that the specific needs of each Commonwealth court are met.

150. In the Policy Statement, *Principles underpinning a Federal Judicial Commission* (**FJC Principles**),[114] the Law Council advocates the establishment of a separate Federal Judicial Commission, independent from the Executive.[115] As well as handling judicial conduct and complaints, one of the roles of this body should be to provide training, support and education to the judiciary, including based upon advisory guidelines setting out acceptable standards of judicial conduct.[116] In the Law Council's view, the functions of handling conduct and complaints and administering education are mutually informative, and should be housed in the same body.[117]

151. An example of a comparable body which has performed both functions at the state level is the Judicial Commission of New South Wales (**NSW JC**). The NSW JC runs extensive informational and educational programs in addition to handling judicial

[114] Law Council of Australia, 'Principles underpinning a Federal Judicial Commission' (Policy Statement, 5 December 2020) <https://www.lawcouncil.asn.au/publicassets/96b2f0e1-de70-eb11-9439-005056be13b5/Principles%20underpinning%20a%20Federal%20Judicial%20Commission.pdf>.
[115] Ibid principle 2.
[116] Ibid. The Law Council suggests that such advisory guidelines could be modelled upon guidelines issued pursuant to section 10 of the *Judicial Officers Act 1986* (NSW). The Courts have viewed such guidelines as merely advisory (rather than constituting mandatory considerations which, if not addressed, will result in error of law) because section 10 refers to the formulation of guidelines 'to assist' in the exercise of Commission's functions. See, *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264, [49].
[117] Ibid 3. This recognises that in some cases, conduct issues may be symptomatic of wellbeing issues. The drivers of these behaviours must be addressed, where appropriate, from a protective as well as punitive perspective.

conduct matters. Notably in respect to cultural competency, the NSW JC has run the Ngara Yura Program since 1992, pursuant to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody that judicial officers should receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society.[118] The aim of the program is to lift judicial officers' awareness of social and cultural issues for Aboriginal and Torres Strait Islander peoples, as well as their effect on Aboriginal and Torres Strait Islander peoples in the justice system.[119]

Consultation Question 20.

Should more structured systems of ethical and other types of support be provided to assist judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues affecting their capacity to fulfil their judicial function? If so, how should such systems be developed and what should their key features be? What role could a future Federal Judicial Commission play in this regard?

152. The Law Council considers that in the first instance, the federal judiciary should be consulted on their needs in this regard.

153. For the same reasons that a Federal Judicial Commission could have responsibility for judicial education programs in relation to cultural competency relevant to the federal judiciary, it could also have an educative role with regard to ethical matters, including in relation to conflicts of interest and recusal, and in relation to issues affecting the capacity to fulfil their judicial function. This educative role would be separate to any matter that might be brought before the Commission as a complaint or from when an application to recuse is brought part way through a trial.

154. Again, however, it will important that in the first instance the judiciary is consulted on their needs in this regard.

Consultation Question 21.

What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

155. Further to detailed comments made in response to Consultation Question 18, the Law Council recommends that parties and their legal representatives should be permitted to provide submissions or other material to assist the court's understanding of their cultural or other needs, including with respect to disability.[120] Similarly, the ability for feedback to be provided from court users on their experiences with perceived bias would, together with disaggregated reporting of that feedback, assist the courts to

[118] See, Judicial Commission of New South Wales, 'Ngara Yura Program' <https://www.judcom.nsw.gov.au/education/ngara-yura-program/>.
[119] Ibid.
[120] It is noted that this type of process is already catered for, to some extent, under section 82(2) of the *Native Title Act 1993* (Cth) – which provides that: '(2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.' The Law Council understands that it is common for parties to file a Statement of Cultural Concerns in the native title jurisdiction.

maintain a focus on these issues (noting further remarks contained in the below response to Consultation Proposal 23).

156. The Law Council further considers there is merit in introducing many of the measures listed in the Consultation Paper on this subject.[121] The ability for parties to appear via video link in appropriate cases is particularly attractive and should be implemented in all courts so that, notwithstanding a party's location or other circumstances, they can participate in a proceeding without being physically present.

Consultation Proposal 22.

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

157. The ALRC clarifies that the proposed data collection would occur where:

- a judge approaches the registry or head of jurisdiction when a preliminary allocation of cases is circulated; or
- either a judge or a party approaches the registry after the case has been allocated to a judge, but prior to the first hearing in the matter.

158. The Consultation Paper advises that reasons for reallocation are not presently recorded by Federal Court registries, so it is not currently possible to examine such reasons or the trends associated with reallocations.[122] The ALRC has also advised that it is engaging with the judiciary to obtain further information about these issues.[123] The Law Council considers that such information and data might be useful when implementing the proposals recommended in the review, and in assessing their effectiveness.

159. The Law Council supports this proposal in principle on the basis that reforms ought to be supported by evidence. However, the data collected must be methodologically sound, sufficiently nuanced and sophisticated to be of use. Numbers alone risk obfuscating the real issues, and the relevant qualitative information may be difficult to obtain.[124]

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.

160. The Law Council supports Consultation Proposal 23 as a means to enhance data collection and notes the ALRC's observation that currently, there is insufficient data available to fully understand how litigants experience alleged judicial bias against

[121] See, eg, Australian Law Reform Commission, *Consultation Paper*, [99].
[122] Ibid [101].
[123] See, Australian Law Reform Commission, 'Judicial Impartiality: The Federal Judiciary – the Inquiry in Context' (Background Paper JI3, March 2021) [34]-[36] <https://www.alrc.gov.au/wp-content/uploads/2021/03/Federal-Judiciary.pdf>.
[124] See, in this regard, Chief Justice Spigelman AC, 'Measuring Court Performance' (Australian Institute of Judicial Administration, Adelaide, 16 September 2006) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2006.pdf>; James Spigelman, 'Judicial Accountability and Performance Indicators' *Civil Justice Quarterly* 21 (14 April 2011).

them, and why.[125] This opportunity may also be used to seek feedback in respect of other issues which impact on a person's overall experience with the courts, such as delays.

161. However, any processes developed by the courts would need to be carefully framed to avoid the potential to set up an appeal, or application for recusal, and to avoid draining existing court resources. The Law Council encourages the Australian Government and Federal Courts to take steps to obtain such information from parties, including self-represented litigants, and should particularly engage in more consultation with court users in RRR areas.

162. However, the timing of such feedback needs careful thought, and the Law Council expresses a preliminary trepidation about feedback during the court process – for example, a party who has just 'lost' an interlocutory application is likely to register as dissatisfied, even if their loss was entirely appropriate.

[125] Australian Law Reform Commission, *Consultation Paper*, [106].