National Justice Project

Submission to the Australian Law Reform Commission: Judicial Impartiality Inquiry

July 2021

ABOUT THE AUTHORS

The National Justice Project is a not-for-profit human rights legal service that works to eradicate institutional discrimination. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

Our key areas of activity include health justice, specifically for persons with disability and First Nations communities; challenging misconduct in police, prisons and youth services; and seeking justice for asylum seekers and refugees. We receive no government funding and intentionally remain independent in order to do our work. We therefore rely on grassroots community, philanthropic and business support.

We create positive change through our key strategic areas:

- **Undertaking strategic legal action** including representing clients in public interest litigation, which leads to law reform, policy change, attitudinal change, improved services and accountability for people who have been harmed by injustice.
- **Delivering world class, practice-inspired and catalytic social justice education** for the community, and for current and future legal professionals and advocates.
- **Supporting grassroots advocacy** built on ethical, rigorous and fact-based research that amplifies the voices of communities harmed by injustice, and leads to law reform and policy change.

This submission has been co-authored by staff of the National Justice Project: Mr George Newhouse, Director and Principal Solicitor; Ariane Dozer, Projects Manager and Solicitor; and Karina Hawtrey, Solicitor; together with the National Justice Project Clinic operating at Macquarie University.

ACKNOWLEGDEMENT OF FIRST NATIONS PEOPLES' CUSTODIANSHIP

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations peoples throughout this country. The NJP acknowledges the diversity of First Nations cultures and communities and recognises First Nations peoples as the traditional owners and ongoing custodians of the lands and waters on which we work and live.

We acknowledge and celebrate the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations Peoples hold. The NJP recognises that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations Peoples. The NJP seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

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TERMS OF REFERENCE

The review seeks submissions on a broad range of issues relating to the law as it applies to judges in the High Court, Federal Court, Family Court and Federal Circuit Court. In particular, consideration must be given to the following questions:

- Is the law about actual or apprehended bias relating to judicial decision-making, sufficient and appropriate to maintain public confidence in the administration of justice?
- Does the law provide clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality?
- Are the mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, sufficient and appropriate?

RECOMMENDATIONS

We acknowledge and endorse the recommendations made by Dr Daniel Ghezelbash and Dr Robert Ross, Macquarie University and the Behavioural Insights Team.

This submission should be read in conjunction with the separate submission by the National Justice Project highlighting the endemic discrimination faced by First Nation participants in the legal system.[1] Additional to those submissions, and in addressing the terms of reference, we make the following submissions:

1. Judges should be made to undertake specific training on impartiality and bias.
2. The self-recusal model for handling judicial bias matters should be abolished.
3. More work needs to be done to diversify court panels.
4. Additional data should be collected on court bias and the outcomes of decisions.

[1] National Justice Project, Submission No 102 to the *Select Committee into the High Level of First Nations People in Custody Oversight and Review of Deaths in Custody, Oversight and Review of Deaths in Custody* (August 2020).

EXECUTIVE SUMMARY

The current state of the law on actual and apprehended bias, and the system of judicial self-recusal for addressing it, does not maintain public confidence in the administration of justice. Research into the experiences of First Nations people, culturally and linguistically diverse communities and women in the legal system reveal that they continue to be subject to implicit bias by the judiciary and that this affects judicial outcomes when they are a party.

The background section of our submission identifies the current test for bias and the criticisms that have been raised with the current test and the self-recusal process. It highlights the groups in our community that are often subject to bias and the implications for these groups. Finally, it synthesizes the main themes in behavioural psychology on the issue of bias and impartiality.

The issues for discussion include:

(a) How implicit and unconscious biases have resulted in unjust outcomes in criminal law for certain groups and how these biases may apply in other areas of law.
(b) How judicial discretion leads to extra-legal factors (i.e. gender, race) having a significant influence on the disposition of the case, over legal factors.
(c) The assumption that through legal training and experience, judges are able to resist kinds of biases, prejudices and predispositions is rebutted by psychological research.
(d) The issue of the self-recusal procedure & 'bias blind spot'.
(e) The need to diversify judicial panels

The final section of this report suggests a way forward, it examines:

1. Strategies to target bias and impartiality in the judiciary
2. The abolition of the self-recusal model and its suggested replacement

This submission is an amalgam of concerns and is not a personal criticism of any particular tribunal or judicial officer. It is focused on improving the process.

BACKGROUND

a) Types of bias

Implicit bias manifests in all areas of the justice system, including judicial impartiality.[2] Implicit racial bias can have an impact on judicial decision-making in court. A 2009 study found that judges may hold implicit racial biases and that these biases can influence their judgement.[3] Research on American community service sentencing has demonstrated that when circumstances limit discretion, legal factors (such as the seriousness of the offence in criminal matters) determine the disposition of the case. However, when circumstances allow discretion, extra-legal factors (gender and race) will influence the disposition of the case.[4] The discretionary nature of decision-making means that the legal system can continue to perpetuate bias, as the unconscious biases of judges makes it hard for them to put aside influence stemming from the gender, race and culture of parties. Bias can manifest itself in any number of steps in the justice system and have cumulative effects.[5]

Confirmation bias is also a prevalent issue in the judicial system, namely the tendency of judges to seek out information that is consistent with their established views whilst simultaneously diminishing information that might contradict those established views. In this sense, pre-conceived ideas and unconscious biases are highly problematic.[6] There are also studies which suggest that judges unknowingly misremember case facts in racially biased ways.[7] Cognitive biases affect the way people process information. Unlike most cognitive biases which are assumed to operate independent of race, unintentionally biased memory failures by judges may propagate racial biases through the legal process.[8]

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[2] Irene Oritseweyinmi Joe, 'Regulating Implicit Bias in the Federal Criminal Process' (2020) 108(3) *California Law Review*, 965-988, 970-979.
[3] Jeffrey J Rachlinkski et al, 'Does Unconscious Racial Bias Affect Trial Judges' (2009) 84(3) *Notre Dame Law Review*, 1195-1246.
[4] James W. Meeker, J.D., Ph.D., Paul Jesilow, Ph.D., and Joseph Aranda, B.A. 'Bias in Sentencing: A Preliminary Analysis of Community Service Sentences' (1992) 10(2) *Behavioural Sciences and the Law.*
[5] *Ibid.*
[6] W. Bradley Wendall 'The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real' (2010) 42(1) *McGeorge Law Review,* 35-45, 41-42.
[7] Justin D. Levinson 'Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering' (2007) 57 *Duke Law Journal*, 345-424.
[8] Ibid.

Embedded in the law of apprehended bias is the assumption that judges can be trusted to decide cases impartially. Since public perception is key in this area, this makes judges believe that through their 'training, tradition and oath or affirmation'[9] that they can in fact be impartial.

b) Current test

Justice Deane in *Webb v The Queen* [1994] HCA 30 identified four categories which may amount to a judge having apprehended bias. These included, a judge's interest, their conduct, their associations and extraneous information.[10]

Decision makers are not expected to have a blank mind when entering proceedings but rather they must not be 'so committed to a conclusion already formed as to be incapable of alteration'. A judge may express preliminary or tentative views during proceedings, express doubts or seek clarification without creating apprehended bias. However, these statements should not be peremptory and must not express firm views without allowing counsel to present their arguments.

The test for apprehended bias in Australia was established in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 and it is said to involve two steps. The first requirement involves those claiming bias to identify the claimed source of bias. The second requirement involves explaining how that influence will affect the impartiality of a decision-maker. The objective assessment of claims of bias should be decided according to the 'fair minded observer' or the 'reasonable person'.

More recently, in the case of *Isbester v Knox City Council* [2015] HCA 20, Justice Gageler proposed an additional third step to the current steps in the *Ebner* test in which the first two steps were taken and the reasonableness of the asserted apprehension of bias will be assessed. However, this remains unsettled and in *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 different judgements highlighted the difficulties in recourse to the statutory regime and the role of an additional step. The proposed third step is likely to raise the problem of confirmation bias as it will require an assessment of the reasonableness of the asserted apprehension of bias. Indeed, different judges can easily take views of how a claimed source of

[9] Dyson Heydon, Trade Union Royal Commission (2015) <www.tradeunionroyalcommission.gov.au>.
[10] Virginia Bell, 'The Role of a Judicial Officer – Sentencing, Victims and the Media', speech delivered to the Magistrates Court of Victoria Professional Development Conference on 22 July 2015, <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bell22jul2015.pdf>.

impartiality might be perceived by the fair-minded observer. In more than one case, a unanimous High Court bench has reached different conclusions to an equally unanimous intermediate court.

The concept of the fair-minded observer has been routinely criticised as a legal fiction. As a legal concept created by judges and discussed primarily in court, the fair-minded observer test risks becoming "the court's view of the public's view", which is inevitably shaped by what the judge thinks themselves.[11] The observer is often attributed with the assumption that judges are more able to resist bias, however this raises the issue of the bias blind spot and whether judges are aware of their own cognitive biases.

In this system, minority groups miss out as any potential cognitive bias that exists in reality towards them in the judiciary is nullified by the assumption inherent in the fair-minded observer test about the impartiality of judges.[12] The test is also confusing for the public to understand, undermining public confidence in the judicial system and making it difficult for self-represented litigants to bring successful claims of bias.[13]

c) Issues regarding the current process of 'self-recusal' for judicial bias cases

The current process of self-recusal in cases of bias has been strongly criticised by legal professionals and academics. It is said to reinforce confirmation bias as it demands of the decision-maker an impossible level of impartiality, meaning there is a 'bias blind spot' that makes it harder to spot bias in oneself than in others. Embedded in the law of apprehended bias is the assumption that judges can be trusted to decide cases impartially. In this regard, public perception is key and many judges, including former High Court Judge Dyson Heydon, believe that through their 'training, tradition and oath or affirmation' that they can in fact be impartial.[14]

The current test of the fair-minded lay observer illustrates a wide gap between the relevant public and legal standards. This is because there is a difference between what the fair-minded lay observer knows (perception) and what an ordinary member of the public knows. This test or

[11] Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 406.
[12] Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *The Modern Law Review* 633, 643, 649.
[13] Mark Aronson, Matthew Groves and Greg Weeks, 'Judicial Review of Administrative Action and Government Liability' (2016) Thomson Reuters, 657.
[14] Above n 9.

standard casts an unnecessarily broad slur on the intellectual qualities of anybody who disagrees with a ruling on apprehended bias.[15] This is even more relevant when you consider the views that an aggrieved First Nations person might have. The fair-minded observer is supposed to personify an ideal model of how we should assess claims of bias, however this individual does not exist and the public is often of the view that the closest thing to this individual is a judge. Indeed, it is almost impossible to view your own conduct through the lens of a hypothetical person whose characteristics you are unlikely to share.

d) Groups subject to judicial bias

First Nations people

First Nations' Australians have long been subject to racial discrimination at an institutional and community level. While there has been research establishing that First Nations people experience of bias in the criminal justice system (as set out below), there has not been much research in other areas of law. However, given the research findings and the prevalence of discrimination, we submit that First Nations Australians are more likely to face judicial bias than other groups. As First Nations people participate in the federal courts in a number areas including Family Law, Native Title and Administrative and Constitutional Law, the Federal Court judiciary should specifically consider how to address judicial bias against this group.

The gap between First Nations and non-Indigenous imprisonment rates in Australia is now larger than the disparity between African-American and white imprisonment rates in the United States.[16] The Royal Commission into Aboriginal Deaths in Custody highlighted a number of areas where institutional bias contributed to the over-representation of First Nations people in the criminal justice system.[17] These areas included bias against offenders in the willingness of police to employ alternatives to arrest,[18] lack of community-based alternatives to prison in rural communities,[19] inadequate funding of Aboriginal legal aid[20] and excessively punitive sentencing.[21]

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[15] Anna Olijnyk, 'Apprehended bias: a public critique of the fair-minded lay observer' on AUSPUBLAW (3 September 2015) <https://auspublaw.org/2015/09/apprehended-bias/>.
[16] Don Weatherburn, 'Arresting Incarceration: Pathways out of Indigenous Imprisonment' (2014) Aboriginal Studies Press, 1.
[17] Royal Commission into Aboriginal Deaths in Custody, Commonwealth of Australia (1991).
[18] Ibid 30.2.2–30.2.14; 14.14.8–14.14.9; 21.1.7; 30.2.2–30.2.7.
[19] Ibid 22.4.11.
[20] Ibid 22.4.52–22.4.75.
[21] Ibid 14.4.32–14.4.38, 22.3.3.

Bias in courtrooms also has long lasting, detrimental impacts in perpetuating cycles of disadvantage. In New South Wales (NSW), First Nations defendants appear in court on criminal charges at a rate that is 13 times higher than that of their non-Indigenous counterparts.[22] A convicted First Nations offender with no prior record of imprisonment is 2.5 times more likely to be imprisoned in NSW than a convicted non-Indigenous offender with no prior record of imprisonment.[23] Indigenous offenders in NSW who have been previously imprisoned are three times more likely to be imprisoned than non-Indigenous offenders who have been previously imprisoned.[24] First Nations people are refused bail more often than non-Indigenous Australians, receive prison sentences more often and are being sentenced for longer.[25]

Notably, studies have shown that implicit bias particularly comes into play in cases where race is not a salient issue and merely involves parties of different races. In these cases, jurors' judgements tend to be skewed against defendants of colour, whereas in cases that *are* racially charged, jurors' judgments tend to be unaffected by race. [26] Thus, when race is introduced in a subtle manner, people are less vigilant in monitoring potential prejudices.[27]

Gender

Implicit bias due to gender has also been shown to play a role in judicial outcomes. In the criminal justice context, offenders who are male and from a minority group receive more punitive outcomes at sentencing due to judicial decision-making, whilst females are more likely to avoid charges and convictions altogether and twice as likely to avoid incarceration if convicted.[28] Perceived notions of a defendant's dangerousness and culpability influence judicial decisions on

[22] Lucy Snowball and Don Weatherburn, 'Indigenous Over-Representation in Prison: the Role of Offender Characteristics' (2006) Crime and Justice Bulletins, 99.
[23] Ibid.
[24] Ibid.
[25] Ella Archibald-Binge, Nigel Gladstone & Rhett Wyman, 'Aboriginal people twice as likely to get a jail sentence, data shows', *The Sydney Morning Herald* (17 August 2020); Australian Law Reform Commission, 'Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report No. 133, December 2017) [3.2].
[26] Natalie Salmanowitz, 'The impact of virtual reality on implicit racial bias and mock legal decisions' (2018) 5(1) *Journal of Law and the Biosciences* 174-203.
[27] Ibid.
[28] Jeffrey T. Ward, Richard D. Hartley & Rob Tillyer 'Unpacking gender and racial/ethnic biases in the federal sentencing of drug offenders: A causal mediation approach' (2016) 46 *Journal of Criminal Justice* 196-206.

sentencing.[29] Certain attributions of danger and risk are linked to personal characteristics such as gender, race and ethnicity.[30]

However, in a legal professional context, studies have shown that an appellant represented in oral argument by a female barrister, opposed to a respondent represented in oral argument by a male barrister, is less likely to receive the vote of a justice in the majority.[31] Arguably, the recent revelations about former High Court Justice Dyson Heydon have exposed the unspoken currents swirling behind the public face of the Australian legal system – a system dominated by white men, in which women often struggle for equality. Bare statistics support this reality. In 2019 the Workplace Gender Equality Agency reported the legal profession had a gender pay gap of over 25%. Barristers have the highest pay gap of any occupation: in 2017/2018, the average income for female barristers was $70,227; for males it was $190,454; for female lawyers it was $112,731; and for males it was $148,4871. In 2019, women made up only 25% of partners and 10% of the most senior positions.

Unconscious biases persist in the courtroom, such as the idea that men are more competent than women; women are not as ambitious as men; or women tend to shrink from leadership responsibilities as they are instinctively more communal and nurturing. These attitudes continue to prevail in unspoken form. Sometimes, women themselves unknowingly accept and adopt them, and even help to perpetuate these myths. When group members collectively hold and maintain similar biases, they become systemic.[32] This ultimately raises the issue of whether, and to what extent, the relative lack of females in our highest courts and relatively small proportion of females appearing before our highest courts in speaking roles influences the decision-making schema of those courts.

[29] Ibid.
[30] Ibid.
[31] Vinod Mishra and Russell Smyth, 'Barrister Gender and Litigant Success on the High Court of Australia' (2013) Discussion Paper 15/13, *Monash University Department of Economics.*
[32] Heather Price and Errol Price, 'Unconscious bias: a persistent challenge for female lawyers' Sept 2020, *Law Society Journal,* NSW Law Society, https://lsj.com.au/articles/unconscious-bias-a-persistent-challenge-for-female-lawyers/>.

e) Synthesizing themes from behavioural psychology

Judicial discretion plays an integral role in the manifestation of implicit or unconscious biases.[33] Social cognition research indicates that when there is limited discretion in sentencing, legal factors such as the seriousness of the offence determine the disposition of the case.[34] Whilst, when judicial discretion is wider, extra-legal factors such as gender and race, influence the outcome of the case.[35] Therefore, unconscious bias can be exacerbated if greater discretion is afforded to the judiciary. A recommended strategy to mitigate implicit bias is to minimize the discretionary power afforded to judges throughout the legal process.

Cognitive biases affect the way people process and remember information. This occurs outside of conscious awareness, creating false memories that unknowingly reconstruct the past in ways to flatter egos and bolster individual theories and beliefs.[36] This is applicable to the judiciary as they unknowingly misremember case facts in racially biased ways.[37] The false memory generation links to stereotypes, in which perceived notions of a defendant's dangerousness and culpability are attributed to personal characteristics such as gender, race and ethnicity.[38] However, literature suggests that these implicit biases may be malleable, by confronting judges with their bias. A recommendation is to incorporate voluntary completion of the Implicit Association Test (IAT) into judicial education.[39] However, it should be noted that there is contention around whether confrontation of implicit bias is effective. Another recommendation is to diversify the judiciary, by increasing racial and gender diversity to disrupt the homogeneity of judges.[40]

Social cognition researchers also indicate that unwanted prejudice or bias responses are most likely to occur under conditions of distraction or cognitive overload.[41] Courtrooms are busy with judges overseeing a high volume of cases that require them to make instantaneous decisions in

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[33] Above n 4.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[36] Ibid.
[37] Above n 7.
[38] Above n 28.
[39] Willem H Gravatt 'The myth of objectivity: Implicit Racial Bias and the Law (Part 1)' (2017) 20 *Potchefstroom Electronic Law Journal* 5, 18.
[40] Briggs Depew, Ozkan Eren and Naci Mocan 'Judges, Juveniles, and In-Group Bias' (2016) Working Paper 22003 'National Bureau of Economic Research' <www.nber.org/papers/w22003>.
[41] Willem H Gravatt 'The myth of objectivity: Implicit Racial Bias and the Law (Part 2)' (2017) 20 *Potchefstroom Electronic Law Journal* 17.

a high pressure situation.[42] A recommendation to combat this cognition overload is to provide greater resources and attempt to divide the caseload between a variety of judges so that implicit bias does not manifest as readily. Another recommendation is to alter courtroom practices to minimise the untoward impact of implicit biases, such as the use of three-judge trial courts.[43]

An awareness of one's bias is critical to the effectiveness of de-bias training. Whilst there is inconclusive evidence on the effectiveness of bias training of judges, it is also shown that drawing judges' attention to the impact of bias, and specifically their own bias, can be effective at getting them to reconsider their impartiality.[44] For de-bias training to be most effective it would need to be actively engaged in regularly so that judges were consistently reminded of their bias and how it can impact their decision-making.

It is a commonly held assumption that judges are able to separate their bias from their decision-making. Judges are therefore less likely to consider themselves as having any bias at all. Therefore, the first step to rectifying judicial impartiality is acknowledging that it exists and getting judges to recognise and accept that they are biased and this can impact their decision-making.

Research suggests that judges tend to look for evidence in a case that confirms their bias.[45] A recommendation to address this issue is allowing sufficient time for judges to make their decisions. There are studies that demonstrate that rushed decision-making is more susceptible to unconscious bias.[46] Therefore, by restructuring aspects of the system to allow judges adequate time to consider cases more deeply, they may be more inclined to engage with their bias and how it is impacting their decision-making. Whilst it is important not to impact the efficiency of the justice system, the significant risk posed by judicial impartiality needs to be recognised and the system should be restructured to reflect this.

[42] Ibid.
[43] Ibid 18-19.
[44] Above n 2, 980.
[45] Above n 5.
[46] Above n 2.

RECOMMENDATIONS IN DETAIL

1. Judges should undertake specific training on impartiality and bias

There is a false idea in judicial discourse that through legal training and experience, judges are able to resist kinds of biases, prejudices and predispositions. This can be rebutted by psychological research suggesting that training and experience does not transcend biases.[47] Further, all judicial education in Australia is completely *voluntary*. In a report, the ALRC highlighted that the reason why all judicial education is voluntary stems from the idea that judicial independence means that a judicial officer cannot be directed to participate in professional development.

There is mixed evidence on the effectiveness of bias training in combatting implicit bias, however such training has enabled at least some individuals to meaningfully recognise the existence of implicit bias in the short term and attempt to self-regulate.[48] Due to the inability to see one's own bias, general education will likely not be as effective as specific training aimed at revealing the specific biases of judges.[49] We support compulsory, regular and specific judicial training on heuristics and biases, including implicit social bias, the reality of the bias blind spot and how judges can identify and mitigate their own bias. Any such training should be delivered by organisations that are representative of the groups that are affected by bias, including culturally and linguistically diverse communities and First Nations communities. Judges should be encouraged to consider taking the Implicit Association Test as it may assist them to understand the extent of their implicit racial biases and their need to correct them.[50]

As judicial appointments largely come from a small privileged section of society, a lack of cultural competency across the judiciary is also a problem. A lack of cross-cultural knowledge and understanding can contribute to bias when judges have to make certain assessments, for example make credibility assessments without an understanding of the cultural norms of litigants or assessments about the weight given to certain types of evidence, disregarding the oral traditions in maintaining knowledge in First Nations cultures.

[47] See above n 2, 980*;* above n 4.
[48] Above n 2, 980.
[49] Above n 3.
[50] Above n 39, 5-7.

The Federal Courts should review their current cultural awareness and cultural safety training and implement a frequent, long-term, ongoing programme of training that engenders respect for our diverse First Nations cultures, and that develop self-reflexive practices critiquing each member's own culture and standpoint. Judges should undertake First Nations cultural competency training that is presented by a First Nations organisation and that is trauma informed. The judiciary should ensure that the oral submissions of First Nations people are treated with legitimacy and respect by training its members and by reforming its rules and procedures in relation to reception and treatment of such evidence. It should also take positive steps to ensure that courtrooms are culturally safe places by considering and accounting for imbalances of power between parties and protecting vulnerable witnesses from aggressive questioning and bullying during cross examination where it is necessary.

Similarly, Judges should also undertake tailored cultural competency training to work with culturally and linguistically diverse communities regularly to improve in-court communication, mitigate the risk of bias on the basis of race and in turn increase public trust in the judicial system. Increased cultural competency would assist judges to communicate appropriately with and understand our clients, many of whom are from diverse communities who have higher levels of distrust in the judicial system due to the previous injustices and discrimination they have faced.

We acknowledge that introducing judicial training alone is not enough to address systemic bias and impartiality. The legal system needs structural change to remove the risk of subconscious bias and partiality. The Federal Courts should also review their processes and implement processes and policies, including codes of conduct, that are culturally safe.

2. The self-recusal model for handling judicial bias matters should be abolished

The current self-recusal model for dealing with a potential claim of bias has been subject to criticism by legal academics and lawyers.[51] Embedded in the law of apprehended bias is the assumption that judges can be trusted to decide cases impartially and this can lead judges to believe that through their 'training, tradition and oath or affirmation'[52] that they can in fact be impartial. However, the process of self-recusal reinforces confirmation bias, being the tendency to simultaneously seek out information that is consistent with their established views whilst also

[51] Above n 15.
[52] Above n 8.

diminishing information that might contradict established views. As the bias blind spot makes it harder to self-assess bias rather than identify it in others, the self-recusal process demands an impossible level of impartiality from the decision-maker as judges are required to identify and assess their own bias.[53] Former High Court Justice Ian Callinan has suggested that the current model places a judge against whom a bias application is made in an 'invidious position.'[54] These issues suggest that the current model for handling judicial bias matters needs be changed.

Public perception of the integrity of the justice system is an important reason for the law of apprehended bias. However, a judge's perception of what a fair-minded lay observer may view as partiality and what the public actually views as partiality may be quite different. Recent research has found that the public think that judges should be disqualified from hearing cases much more often than the law of apprehended bias presently requires.[55] The research also suggests that the majority of the public believe that the issue of disqualification should be decided by a different, independent judge.[56] Given our clients are often concerned about access to justice and conflicts of interest within the legal system, resolving these issues could help to restore some of their faith in the judicial system.

We support the abolition of the self-recusal model for determining judicial bias matters. Where possible, if the issue of bias is raised by the judge or court at an early stage before the matter begins to be heard, the matter should be re-allocated to another judge for determination. Where practical, judges should inform court personnel in advance that cases involving certain parties or lawyers should not be assigned to them to aid efficiency and impartiality.

Where the claim of bias or apprehended bias is raised by parties or raised at a later stage of proceedings, the claim should be transferred to a duty judge to determine the claim of bias. This removes some of the challenges associated with the bias blind spot as an independent judge can apply the test for apprehended bias with an independent view of the proceedings and more easily recognise bias in another judge rather than relying on self-assessment. This change would also enhance the confidence of our clients and the confidence of the public more broadly that justice

[53] Ibid.
[54] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [185].
[55] Andrew Higgins and Inbar Levy, 'What the Fair-Minded Observer Really Thinks and Judicial Impartiality' [2021] *Modern Law Review* (forthcoming).
[56] Ibid.

is being seen to be done. The suggested options to retain a level of discretion by the sitting judge to refer the matter for independent assessment by the duty judge, retain the associated issues of unconscious bias and the bias blind spot.

The abolition of the self-recusal model should also be applied to multi-member courts for the reasons set out above. Allowing for the multi-member court to determine the claim of bias removes the perception of any conflict of interest in having a judge decide on their own bias or apprehended bias allegation and better serves the interest of parties and the general public by enhancing both the appearance and actuality of impartial justice.

3. More work needs to be done to diversify judicial panels

As judicial appointments largely come from a small privileged section of society, a lack of racial and gender diversity can lead to a lack of public confidence in a judiciary which does not reflect contemporary Australia. Data from the Australian Bureau of Statistics reflects that in 2017 male Federal Court Justices/Judges outnumbered female Justices/Judges by three to one (76% compared with 24%).[57]

A largely homogenous judiciary can lead to in-group bias, a form of unconscious bias where preferential treatment is given to the group with which one identifies. Increasing the racial and gender diversity among the courts introduces varied perspectives and experiences in to the decision-making processes of judges, which can help to counteract in-group bias and challenge unconscious social biases amongst the judiciary.[58] Increased diversity would also strengthen public confidence in the impartiality of the judiciary and may promote the confidence of groups who have been distrustful of the legal system's commitment to impartiality, including many of our clients.

A commitment to a 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 would increase confidence in the impartiality of the system and the opportunities for a diversity of legal practitioners to make up the judiciary. Publishing annual data on the diversity of the federal judiciary, including gender,

[57] 4125.0 - Gender Indicators, Australia, Sep 2017, 'Democracy. Governance and Citizenship' <4125.0 - Gender Indicators, Australia, Sep 2017 (abs.gov.au)>.
[58] Above n 40.

ethnicity, age and professional background would aid accountability for that commitment and demonstrate transparency to the general public. The Federal Courts should also seek to develop community partnerships with First Nations communities, Elders and legal services, to create a First Nations Consultative Group to provide advice on cultural competency and how First Nations litigants can be appropriately supported whilst engaging with the courts.

The legal profession should also undertake more work to be representative of the diversity of contemporary Australia. The profession and its representative bodies should aim to support and encourage increased participation of women, those from culturally and linguistically diverse backgrounds and First Nations peoples, especially at the higher levels and at the bar. Programs such as university pathways into a law degree, targeted graduate jobs and professional mentoring have encouraged an increase in the number of First Nations legal professionals over the last thirty years. As these professionals gain experience and qualifications, they should be encouraged to seek out promotion through clear and open application processes or to consider joining the bar through support from the bar associations. The same encouragement should also be given to female lawyers and lawyers of culturally and linguistically diverse backgrounds. An increase in diversity in the profession should in turn lead to a more diverse and suitably qualified pool from which to select the Federal court judiciary. Consideration should also be given to the development of a pathway for First Nations and culturally and linguistically diverse lawyers with suitable experience to be fast-tracked into magistrate and judicial positions.

4. Additional data should be collected courts on bias and the outcomes of decisions

Collecting and publishing additional data that captures the frequency of reallocation for potential bias issues and for conflicts of interest would increase the transparency of court processes. It would also allow for more research into the prevalence of court action on bias and into them impacts of bias on particular groups. Increased data would allow for judges to make more informed decisions about whether to recuse themselves and aid lawyers and the public to make more informed decisions about making claims of bias, especially if the data included the source of the potential bias alleged, the orders made and the reasons given in response to applications.

We also refer to and support the proposal in the Macquarie University and Behavioural Insights Team submission to this Review to collect statistical data on the outcomes of decision making to allow for data to be broken down by individual judge and for groups that are more likely to be targets of implicit bias, including many of our clients. This would allow individual judges to be

confronted with data on their own decision-making which may suggest the existence of certain implicit biases. This information could be taken into consideration as part of a self-reflection or peer-review exercise to help judges be accountable for their outcomes and to challenge and change their biases. Publishing this data publicly could be used to promote fair judicial decision making and promote public confidence in the judicial system.

CONCLUSION

The current approach of the federal judiciary to bias and impartiality needs to be reformed. The current law about actual and apprehended bias relating to judicial decision-making relies on a legal fiction, is contrary to cognitive psychology principles on bias and does not reflect public expectations of the administration of justice. As such, the self-recusal model for handling judicial bias matters is insufficient and should be abolished. Law reform in this area should provide clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality. Decision-makers in particular should be made to undertake specific training on impartiality and bias, to understand their role and how to limit its effect on their decision-making. More work should be done to diversify court panels and the legal profession to challenge unconscious gender and racial bias in the legal system and increase public confidence in a judiciary that represents the diversity of contemporary Australia. The collection and publication of additional data on bias would aid transparency and public accountability for the judicial system and data on court outcomes should also be utilised to address the issue of implicit bias.