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Judicial Impartiality Review
Australian Law Reform Commission

By email: impartiality@alrc.gov.au

23 July 2021

Dear Commissioners,

I am grateful for the opportunity to make these submissions on a matter that is of ongoing significance to the integrity of the law and the administration of justice in this country.

These submissions are written in my personal capacity, and reflect my expertise as a judicial theorist and judicial scholar. Given the time sensitive nature of this process, I have focused on providing conceptually complete and considered analysis, rather than expansive supporting research. I am, of course, able to provide assistance in obtaining the research that supports the propositions I make in these submissions if that is of use to the Commission.

Please do not hesitate to contact me should any further clarification be required.

Kind regards

Dr Joe McIntyre

SUBMISSIONS ON JUDICIAL IMPARTIALITY

Reflecting the structure of the *Consultation Paper*, these submissions are divided into five Parts:

1) Framework Principles;
2) Transparency and Processes of Law;
3) Procedures for Determining Applications for Disqualification;
4) Addressing Difficult Areas for Application of the Bias Rule; and
5) Supporting Judicial Impartiality.

Generally, in each Part I provide a short comment as to the relevant issues raised, and a short overview of any theoretical framework I draw upon, before addressing each concrete Proposal.

PART 1: FRAMEWORK PRINCIPLES

1. Overarching Principles

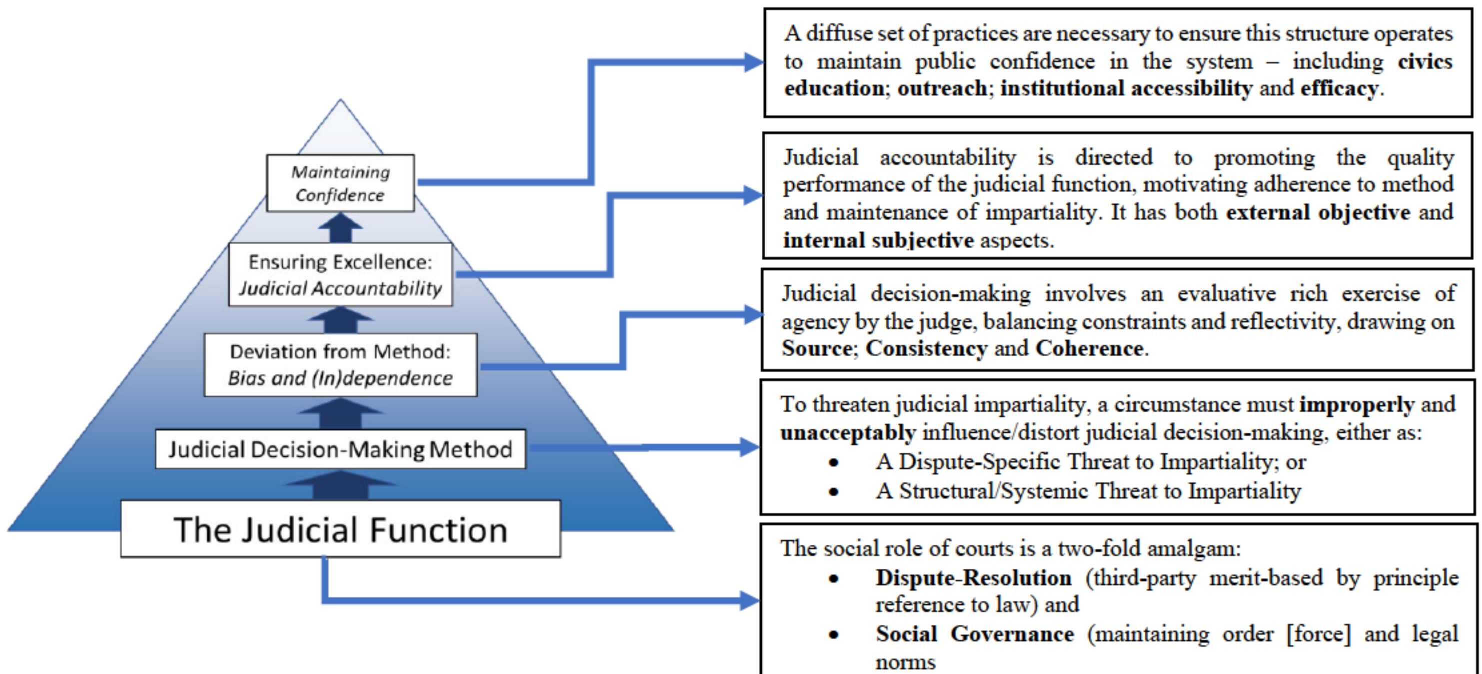
Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?

	Framework Principles
Principle 1	Litigants have the right of equal access to a fair hearing by an impartial judge.
Principle 2	The legitimacy of the courts depends on judicial impartiality.
Principle 3	Institutional structures must support judicial impartiality.
Principle 4	Processes addressing issues of judicial bias should be transparent.
Principle 5	Reforms to procedures on judicial bias must be sensitive to access to justice and efficient court processes.
Principle 6	Judicial independence requires reforms to be judge-led.

Broadly stated, these *Principles* represent an important and useful conceptual framework for understanding the role, and limits, of judicial impartiality.

However, these limits are as important to understand as other aspects of the *Principles*, and are – arguably – underplayed in this articulation. Judicial impartiality is not an absolute impartiality, and nor is it an ultimate judicial good. Judicial bias cannot be understood in the abstract: it content, standards and procedural safeguards emerge from related aspects of the judicial role[1]:

Figure 1: Conceptual Relationship of Judicial Bias to Related Aspects of the Judicial Role



It is inherent in the judicial form that the *resolution* will necessarily be unequal and must *prefer* the more meritorious position. Rather, judicial impartiality strives to make the judge free from ***improper*** influences on decision-making. It is not a self-contained concept.

[1] This framework is derived from conception of the nature and implication of the judicial function. See Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (2019) Springer, p14-16

This status of judicial impartiality as a third order derivative concept is important to highlight in a discussion such as this, as its role is dependent upon those underlying functions and methods and is limited by them. The pursuit of 'impartiality' may undermine those values where it is too vigorously undertaken. Care must be taken to ensure that reforms – often well intentioned – do not unnecessarily diminish confidence and the performance of the judicial function. For example, it is not immediately clear that Australia has a significant issue with judicial impartiality in the Federal Courts system; advocating for significant reform may suggest that there is a greater problem than there actually is with the counter-intuitive effect of diminishing confidence. By highlighting the limited functional nature of impartiality, it can be easier to advocate for refinements in a manner that further core principles.

The overarching principles provide a good means of furthering this approach of conceptually driven analysis, and are an appropriate means of framing this consultation. However, I would respectfully suggest that there are three overarching changes that could be made:

1. Firstly, this conceptual framework should provide a touchstone that it referred to throughout all subsequent discussions and proposals. This framework essentially provides the normative values that will justify particular reforms and suggestions, and should be actively utilised for that purpose. For example, the many references in the paper to 'judge-led' processes should explicitly refer back to *Principle 6*;

2. Secondly, the persuasive value of these normative statements would be advanced by bringing forward a substantive discussion and justification for each of the *Principles*. This would allow readers to understand the values and their significance when they are subsequently referred to, and should create a greater coherence to the analysis; and

3. Thirdly, the discussion would benefit by expressly stating how these *Principles* will be utilised in the subsequent analysis – outlining for the reader their significance in framing and informing subsequent discussion.

In terms of the specific *Principles*, there are a number of relatively minor suggestions that may strengthen the overall analysis.

Principle 1: Litigants have the right of equal access to a fair hearing by an impartial judge.

Firstly, the value of having 'the right of equal access to a fair hearing by an impartial judge', as expressed in *Principle 1*, is a value that extends beyond the concerns of the immediate litigants. While the triadic form of judicial dispute resolution undoubtedly depends upon determination by an independent and impartial judge,[2] that value is not confined to the concerns of the immediate litigants. Judicial dispute resolution is a public good,[3] and there is a public interest in ensuring that judges are, and are seen to be, impartial.

The institutional nature of the judiciary means that this public interest is present even in the discrete dispute specific role of the judicial function. Not only does the broader social legitimacy of a given decision depend upon perceptions of impartiality, but the ongoing capacity of the institution to discharge the broad dispute resolution role depends upon an ongoing and visible commitment to impartiality. Cases such as *Caperton*[4] (where a litigant

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[2] Alec Stone Sweet, *'Governing with Judges: Constitutional Politics in Europe'* (Oxford University Press, 2000) p11; McIntyre (n1), 45

[3] The view of judicial resolution as a public good is developed in the decision of the UK Supreme Court in see *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [66]–[71].

[4] *Caperton v A T Massey Coal Co*, 556 US 1 (2009).

provided significant funding to the re-election campaign of a judge hearing that litigant's case) cause ongoing damage to public confidence in the judicial system – even where the damage in a specific case is remediated.

This broader social interest in the impartiality of a judge in any given dispute is even more acute in the governance aspect of the judicial function. In this context it is vital that all observers – subsequent litigants, practitioners, other judges, academics, members of the public – have confidence that the case has been heard by an impartial judge providing a fair hearing. The normative authority and legitimacy of a judgment will be fatally undermined where there is a reasonable apprehension of partiality *even where* the parties themselves do not raise the issue.

While our adversarial processes give paramountcy to the litigants in controlling the processes whereby impartiality is policed, it is erroneous, therefore, to suggest that impartiality is only a concern for litigants. Rather, the right of equal access to a fair hearing by an impartial judge is a right in which litigants *and* society more generally have an interest, and any consideration of judicial impartiality must recognise the legitimacy of those broader interests in any analysis.

Principle 2: The legitimacy of the courts depends on judicial impartiality.

Similarly, *Principle 2* could be strengthened by highlighting the broader interest of the judiciary in maintaining a reputation for impartiality. As currently phrased, *Principle 2* highlights only the actuality of judicial impartiality ('the legitimacy of the courts depends on judicial impartiality') rather than the additional legitimate concern in the perception of impartiality ('the legitimacy of the courts depends on judicial impartiality … and the institutional reputation for judicial impartiality'). This need to ensure broader reputation for judicial impartiality and independence is, of course, well recognise in the legal doctrine.[5] However, there is value in explicitly recognising its significance in these statements of principle, particularly as this would validate reference to those broader reputational interests in subsequent discussions.

Principle 3: Institutional structures must support judicial impartiality.

Principle 3 illustrates the value of providing a short explanatory note of each *Principle*. As a judicial theorist I recognise the work that *Principle 3* does in highlighting the dependence of dispute specific measures of judicial impartiality upon broader structural issues – including upon concepts commonly referred to as concerns of 'judicial independence'. However, many of these connections and dependencies are not immediately apparent in the language used.

Given that significant matters of scope and legitimacy of inquiry depend upon this connection, there is in my mind real value in explicitly drawing out these dependencies. This is particularly so given that the conceptual foundations for *Principle 3* are so strong and persuasive: by making those connections explicit the persuasiveness of the asserted *Principle 3* becomes much stronger.

Principle 4: Processes addressing issues of judicial bias should be transparent

Principle 4 is, on its face, unobjectionable. However, its current form assumes a number of values that are not otherwise made explicit, and which would benefit from being made so.

[5] This distinct requirement for the demonstrability of justice is, of course, captured in that oft quoted aphorism 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done. R v Sussex Justices; ex parte McCarthy [1924] 1 KB 256, 259 (Lord Hewart).

Transparency matters because of its effect on public confidence in the judicial system and that broader value of the reputation for impartiality. To the extent that shifting public appreciation of transparency increasingly demands demonstrability of process in public decision making, this value may arguably justifies reforms even if exiting mechanisms adequately respond to discrete instances of alleged impartiality.

However, if concerns of transparency are to justify, even partially, such proposals it is necessary that the value of transparency is itself justified within the broader framework of *Principles*. For example, by highlighting the direct public interest in having actual impartiality in all cases (suggested changes to *Principle 1*) and the significance of public perceptions of transparency (in suggested changes to *Principle 2*), *Principle 4* can be seen to flow from the earlier *Principles*. Similarly, by showing the interconnectedness and interdependency of the judicial role as illustrated by *Figure 1*, the significance of transparency and its impact upon public confidence become more apparent.

Principle 5: Reforms to procedures on judicial bias must be sensitive to access to justice and efficient court processes

Again, significance of *Principle 5* is clear and its expression necessary. *Principle 5* illustrates the value of articulating a model of judicial impartiality that highlights its value as a limited and derivative concept that operates as part of a larger schema of the judicial function. In such a model it is entirely unobjectionable that the pursuit of judicial impartiality is constrained by other principled values – including access to justice, efficiency and institutional integrity.

The value of expressing the purposes and interrelationships of the *Principles*, as discussed above, is that it makes such dependencies clear and explicit.

Principle 6: Judicial independence requires reforms to be judge-led

Principle 6 expresses a foundational premise in the design of any response to concerns of judicial partiality. While judicial impartiality is a derivative concept, it is one that goes to the heart of the judicial function. Its operation and realisation must be left to the judiciary – and be for the judiciary to adopt in light of changing social expectations – as the alternative would be to introduce a structural weakness into the judicial systems that could be exploited in an attempt to improperly influence judges.

The significance of this principle, and its foundation in history, judicial theory and constitutional practice, are worth explicitly setting out this discussion. As highlighted above, there are a number of proposals in this Consultation Paper that implicitly depend upon *Principle 6*. By clearly setting out the rationale and justification for *Principle 6* early in the discussion, and by explicitly referencing it in later contexts, those proposals will become more persuasive.

PART II: TRANSPARENCY OF PROCESS AND LAW

Irrespective of all other reforms, our Federal judicial system generally – and the manner in which it regulates judicial impartiality in particular – will be enhanced by moves to increase the transparency and public understanding of these systems.

This value derives directly from the modified *Principles 1, 2* and *4* above, and operates to further advance the related concept of public confidence in the judicial system.

The potential for opportunistic headlines and political grandstanding in response to particular cases is only aided by a poor public understanding of the extensive safeguards, accountability mechanisms, training and judicial integrity systems that currently exist to enhance judicial impartiality. Even without reform we have a system that consistently delivers an exceptionally high standard of judging and which works diligently to maintain that standard. However, we rarely take steps to educate the public about these systems, and even the material available for litigants is often sparse or conceptually inaccessible. Any move to remedy this deficit is to be encouraged.

2. Practice document on applications for disqualification

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.

The basic concept of requiring the clear promulgation of procedures for making and determining applications for disqualification of a judge on the grounds of actual or apprehended bias, is sensible and unobjectionable. The use of *Practice Directions* or *Practice Notes* is a necessary component of that objective, but it should part of a broader project of clarifying relevant practices and procedures.

As is implicit in *Proposal 3*, self-represented litigants continue to present a significant portion of court users in Federal courts, particularly in certain jurisdictions[6] Practitioner directed directives, such as *Practice Directions* or *Practice Notes*, can be inaccessible – both conceptually and logistically – for such litigants.

There is significant potential for technology to help alleviate this issue by making relevant information more accessible and directed above and beyond the use of new *Practice Directions* or *Practice Notes*. To maximise the potential for such technology, court administrators should consider the opportunity for 'digital transformation' rather than simple 'digitisation'.[7] In this context, this can involve the conception of the Court website as an 'ecosystem' where *Practice Directions* or *Practice Notes* are co-located and/or clearly linked to related resources and information – including through the use of hyperlinking within the *Practice Directions* and *Practice Notes* themselves. This 'digital first' mind-set should require that any alteration to *Practice Directions* or *Practice Notes* are seen as a coherent and consistent suite of measures to increase clarity and transparency for all court users – practitioner and layperson alike.

[6] See for example, Productivity Commission, *Access to Justice Arrangements* (2014) Appendix F https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-appendixf.pdf

[7] See Vicki Waye, Joe McIntyre, Jane Knowler, Anna Olinjyk, Collette Snowden, Ben Martini, Gaye Deegan and Jasmine Palmer, 'Maximising the Pivot to Online Courts: Digital Transformation, not mere Digitisation' (2021) 30 *Journal of Judicial Administration* 126

3. Layperson-oriented guide to recusal and disqualification

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.

The need for accessible and high-quality public education about the role of courts in general is well recognised.[8] As The Hon T F Bathurst, Chief Justice of New South Wales recently observed: 'Trust by the public in the judiciary cannot be demanded. It must be earned in how we function and importantly, appear to function.'[9]

This increased use of technology is particularly significant in considering the design of a layperson-oriented guide to recusal and disqualification. The traditional model has been to produce extensive and in-depth documents that are reproduced in digital form as a direct facsimile of their physical counterpart. This model is increasingly seen as outdated, and as poorly suited to conveying complex information to laypersons. Technology offers alternative methods of present such information in targeted and digestible 'snippets' that can provide relevant information in response to the demands to the user.[10] This form of information provision is increasingly being used to great success[11] in modern online-first public dispute resolution bodies – such as the 'solution explorer' of the Civil Resolution Tribunal of British Columbia.[12]

Such modern mixed technology can use a combination of structured user data input, simple artificial intelligence (including chatbots and decision-tree models), 'snippets' of target information extensive use of links to supporting material. In effect this 'digital-first' approach creates a complex and interrelated digital ecosystem that allow users to quickly locate information that is relevant to them and their situation, and is tailored to the level of complexity and sophistication which they require.

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[8] See for example, Jacqueline Charles, *Court Education Project 2019-2021: Churchill Fellowship Report* (2021), p22 available at https://churchilltrustapp.secure.force.com/api/services/apexrest/v1/image/?Id=0697F00000rEyb5QAC&forceDownload=Yes

[9] The Hon T F Bathurst, Chief Justice of New South Wales, 2021 *Opening of Law Term Address: Trust In The Judiciary*, (2021) Supreme Court of the New South Wales, Wednesday 3 February 2021, p 26 https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2021%20Speeches/Bathurst_20210203.pdf

[10] See discussion and model proposed in Joe McIntyre, Vicki Waye, Jane Knowler, Collette Snowden, Ben Martini, Gaye Deegan, Anna Olijnyk and Jasmine Palmer, "*Final Report: An Online Residential Tenancy Bond System for SA*" (2020) UniSA Justice and Society, 29 September 2020, available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701437; see also Waye (n7) p48-9

[11] Katie Sykes et al, Civil Revolution: User Experiences with British Columbia's Online Court (2021) *Windsor Yearbook of Access to Justice* (Forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733015

[12] See https://civilresolutionbc.ca/

The *Practice Directions* and *Practice Notes* discussed above should be seen as part of this ecosystem, so that sophisticated users can quickly locate these formal directives, while less experienced users can additionally have these directives explained in accessible and clear language.

This form of information provision is now emerging as the best practice in terms of information provision for online courts, and this context of judicial impartiality provides an ideal opportunity for the Federal courts to develop expertise in this form of information provision. That expertise can then be utilised in a number of other context within the various jurisdictions of the courts.

4. Clarifying uncontroversial applications of the rule

Would there be benefit in a judicial officer-led project to identify more comprehensively circumstances in which apprehended bias will and will not arise?

Again, the idea of providing grounded and concrete information as to the types of circumstances that will generally give rise to concerns of apprehended bias – and to those that will not – is broadly a good idea, particularly when embedded in an online technological ecosystem that allows users to quickly identify further information.

Such a resource could also be utilised to further public understanding of the role of judicial impartiality, and how it impacts on judicial decision-making through, for example, court education processes.

However, there are a number of issues that arise in the way in which this proposal is presented in the Consultation Paper. Most fundamentally, while it is appropriate and useful to attempt to provide greater information and guidance such a project should not attempt to be, or be portrayed as, a normative statement. There are a number of unsettling indications that such a broader conception is envisaged, including that it may 'allow a potential recalibration of the application of the test' and may become an 'authoritative document'.

I concur with the view that there are likely to be constitutional limitations on attempt to codify circumstances giving rise to apprehended bias, given the centrality of judicial impartiality to the judicial role.[13] However, that centrality of impartiality does not alter the reciprocal restrictions on judicial power which appear relevant to the proposed model of a 'judicial officer-led' project. Specifically, I am concerned that, as presented, the project would take on a quasi-legislative form, where the resultant outcome is taken as a normative statement by consequence of the authority of the authoring body. The constitutional prohibition on non-judicial forms of law-making performed by the judiciary[14] is one that attracts relatively little attention. However, prohibitions such as that on the making of advisory opinions[15] underscore the significance of the principle. Judges make law; but judges can only make law through their judicial decisions.[16]

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[13] See JI7.46

[14] Excluding, of course, the promulgation of Rules of Court.

[15] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

[16] See McIntyre (n1) ch 4; It is striking that in this context, Gageler and Gordon JJ appear almost transgressive when they explicitly acknowledge that judges make law: 'Judges make and develop the common law, as distinct from discovering and declaring it. Identification, modification or even clarification of some general principle or test requires that judgments be made. Those judgments are best made in the context of, and by reference to, contestable and contested questions': *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 171 [127] (Gageler and Gordon JJ)

To the extent that such a project, led by a body of judges such as the Council of Chief Justices of Australia and New Zealand, aspired to an 'authoritative' status, it is likely to have a normative impact on the development of the law. Such a document could easily assume a legal normative status above and beyond the material and case-law it draws upon, simply by right of the collective authority of its authors. This form of 'soft law' is particularly problematic in these circumstances given the discrete particularity of cases where apprehended bias claims are made, such that the deciding judges may feel compelled to conform to such a statement. Such a use would not only offend against 'codification of centre of judicial power' issue highlighted above (subject-matter issue), but against implied constitutional prohibitions on non-judicial lawmaking by judges (author identity issue).

The inappropriateness of a judge-led project to codify the law on apprehended bias is compounded by the suggestion that such a statement may affect an alteration of the law ('allow a potential recalibration') around issues such as divergence from public expectations and behavioural psychology. Judicial involvement in affecting such changes may be appropriate, but only through the traditional caselaw method where there are well established principles for testing evidence and refining developments over time. The reference to empirical methods and interdisciplinary approaches highlights that methods more akin to parliamentary enquiry or academic research is envisaged, approaches for which the judiciary have no special expertise.

Ultimately, these concerns may be addressed in a number of ways. If the purpose is to provide clarity and transparency by providing accessible information and guidance as to the operation of the existing law, then it may be entirely appropriate for the judiciary and the executive to collaborate on such a project. Provided that it is made entirely clear that such a statement is informative, and not authoritative or normative, a judge-led project would be proper.

Similarly, if there are concerns that matters such as divergent public expectations, behavioural psychology and legal professional siloing are distorting the operation of the mechanisms surrounding apprehended bias it may be appropriate to undertake research and develop policy statements. For example, it would be appropriate for the Council of Chief Justices of Australia and New Zealand, to collaborate with growing body of judicial scholars in this country (and internationally) to undertake such projects. Academic involvement has the benefit of expertise and evidence-based research, but with a clear delineation from the branches of government. Any resultant Statement or Paper may have subsequent persuasive value in future normative developments of the law, and may be in subsequent cases to *justify* any recalibration of the law, but would not itself aspire to be authoritative or directly normatively consequential.

5. Promoting public and litigant understanding of judicial impartiality and accountability

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

As discussed above, there is significant benefit in terms of public understanding, transparency and efficiency in the Commonwealth courts developing integrated and coherent online ecosystems for the better provision of information regarding judicial independence and impartiality – both in theory and in practice.

A 'technology first' approach to court education offers significant advantages in terms of accessibility, resourcing and maintainability. Topics of judicial impartiality and independence are excellent test cases for developing expertise in such systems, as they are topics of both deep

importance to the judiciary, and which have an easy resonance and understandable significance to the public.

The types of information outlined in paragraph 40 of the Consultation Paper are all appropriate for such a resource, and illustrate the diversity of topics that can be woven together in such an online environment.

Part III: Procedures for Determining Applications for Disqualification

Affecting substantive changes to the procedures for determining applications for disqualification is likely to be one of the most difficult and controversial aspects of this Inquiry, not least because there are significant complexities of competing concerns and little empirical data on the efficacy of existing mechanisms.

> **6. Single judge court: transfer of decision on disqualification**
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> 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.

Firstly, and fundamentally, it is critical to reiterate that the identity of the judge can and will often have a material impact upon the substantive outcome of the case. Dixonian legalism[17] continues to cast an outsized shadow in this country, such that there persists an outdated view that right-minded judges acting collegiately will ultimately arrive at a single 'correct' position.[18] Such a neo-formalist view diminishes the significance of the individual judge, and presupposes that any 'impartial' judge will be equally appropriate for the resolution of the dispute.

Such fairy tales[19] are comforting and beguiling, but they are misguided and damaging. As any litigator knows, the identity of the judge materially affects both the mode of argument and the

[17] As famously and influentially articulated Dixon on his swearing in as Chief Justice: *Sir Owen Dixon: Address on Being Sworn in as Chief Justice* (1952) 85 CLR 11, 13-4.

[18] This position has been developed in series of articles by sitting High Court justices in response the bombshell article: Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129(April) *Law Quarterly Review* 205. Perhaps the most famous of these contributions has been Susan Kiefel, 'Judicial Methods in the 21st Century', Supreme Court Oration *(Speech delivered at the* Banco Court, Supreme Court of Queensland, 16 March 2017. For an overview of this debate, see Joe McIntyre, 'In Defence of Judicial Dissent' (2016) 37(2) *Adelaide Law Review* 431-459

[19] This reference adopts the language of Lord Reid in an influential article, where he observed that: 'There was a time when it was thought indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions

likelihood of success of particular propositions and, potentially, cases. This is not a flaw in the system. It is the system. Judicial decision-making locates the human agent at the core of the process, I have previously described this as requiring the judge to aspire to both the structured rationality of Judge Machine and the responsive wisdom of Justice Solomon.[20] Judicial decision-making necessarily, and in all cases, involves a degree of evaluative discretion upon which reasonable minds will differ. The identity of the judge matters.

It follows that the rules and procedures regarding judicial recusal and disqualification should not allow the parties to engage in 'judge shopping' to avoid a judge they feel is insufficiently likely to be favourable to them.[21] Institutional decisions should operate to assign the sitting judge, and these should only be altered in exceptional circumstances.

Should the procedures regarding judicial disqualification allow too easily the ready referral of all applications to an independent duty judge, there is a real risk that parties will make unmeritorious applications on the possibility of avoiding a perceived unfavourable judge. Indeed, the perception that they could do so is itself a troublesome institutional risk inherent in such a model.

In Australia, as in most common law jurisdictions, we have no equivalent principles of the 'lawful judge' principle seen in Germany and similar jurisdictions,[22] whereby rigid procedures exist to allocate a judge to a particular case. Instead, Australian courts adopt a pragmatic approach largely dependent upon discretionary choices of the head of jurisdiction, which in turn allows many informal opportunities to minimise the risk of a bias through a range of administrative practices.[23] This is representative of much of the Australian approach to judicial impartiality protects: they depend upon the integrity and judgement of the relevant judicial officers, rather than formal procedures and prescriptive norms.

This is not a defence of the *status quo*, but rather an attempt to highlight several initial considerations that should inform any discussion:

- The identity of the judge matters, and may legitimately affect the outcome;
- It follows that it should be relatively difficult to remove a judge seized of the matter;
- Our current system is skewed towards reliance upon judicial discretion and integrity, rather than formality and prescription.

The relevant Background paper sets out some of the key arguments for (JI2.4) and against (JI2.22-29) the current system. Unfortunately, it is very difficult to empirically determine whether the current systems are working well or not. In the absence of such evidence, there is

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are given when the judge has muddled the pass-word and the wrong door opens. But we do not believe in fairy tales anymore': Lord Reid, 'The Judge as Lawmaker' (1972) 12 *The Journal of the Society of Public Law Teachers* 22

[20] McIntyre (n1) p87-9

[21] *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

[22] Article 101 of the German *Basic Law* states that "No one may be denied the jurisdiction of his lawful judge". This has been interpreted to mean that, in a formal sense 'in each individual case no judge other than the one to whom the case was allotted by the general procedural norms and the organizational plans of the court can act upon or decide the case', subject to certain limitations to ensure appropriate impartiality: Sigmund A. Cohn, Judicial Recusation in the Federal Republic of Germany (1973) 3(18) *Georgia Journal of International and Comparative Law* 18, 30

[23] Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 92.

inevitably a large degree of speculative projection involved in assessing whether reforms are justified or not.

There is some force in the argument that where there is an arguable case of apprehended bias, but the judge is confident that there is no actual bias, an independent judge should assess that application. This approach is consistent with the *Threshold Transfer Model* (Option B) and the *Discretionary Transfer Model* (Option C). By honouring the role of the integrity and judgement of the primary judge, and allowing the summary dismissal of vexatious claims, these options both appear to strike an appropriate balance between the conflicting considerations.

In contrast, there appears to be a very real possibility that litigants would 'game' the *Select Automatic Transfer* (Option A) where they feel that it would be in their tactical advantage. Without a relevant threshold, applications could be bought for ulterior purposes, including advantageous delay. Added to the difficulty of defining the relevant criteria for removal, and the potentially substantial administrative costs implications, in the absence of strong evidence of systemic failure of the current system it seems difficult to justify such a proposal.

Ultimately, our system does depend upon the judgement and integrity of our judicial officers. It is not just decisions of self-disqualification that demand 'almost inhuman level of impartiality'[24]: that aspiration is inherent in a significant number of 'hard' and complex judicial decisions. By too readily allowing the claim that judges cannot functionally achieve the requisite impartiality we risk undermining the very confidence that is sought to be maintained. By empowering judges to refer certain applications, rather than by requiring it, we value the judgement of our judges and allow them to demonstrate their capacity reflective evaluation. In doing so we also bring practice closer into alignment with community expectations and the findings of behavioural psychology.

7. Single judge court: interlocutory appeal

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

Appeals represent the primary accountability mechanism for ensuring the quality of the substantive judicial decision.[25] In allowing an efficient and timely system for reviewing the substantive decision to not recuse, the relevant decision becomes one of systemic collective responsibility.

The concern that improving access to appeal mechanisms 'does not resolve the core criticisms aimed at the self-disqualification procedure' should not be overplayed. Judicial impartiality remains a third-order derivative concept, serving a broader functional purpose. It is misguided to pursue 'perfect' models of impartiality where doing so unduly undermines conflicting values and purpose. Impartiality mechanisms operate in systemic ecosystem that relies upon a broad suite of judicial accountability mechanisms. It is entirely proper that impartiality mechanisms operate in conjunction with accountability mechanisms.

[24] Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', AUSPUBLAW (3 September 2015) <auspublaw.org/2015/09/apprehended-bias/>
[25] McIntyre (n1) 275

I concur with the ALRC suggestion that any interlocutory appeals for disqualification applications from the Federal Circuit Court should be heard by a single judge of the Federal Court, and that the clarification of the availability and procedures regarding such appeals is beneficial.

8. Multi-member court: decision on disqualification by court as constituted

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.

Of the proposed reforms, this proposal is arguably the most compelling. The concerns over efficiency and potential 'judge-shopping' are significantly less acute in this context, as multi-member court is already empanelled and capable of quickly determining the application.

While issues of behavioural psychology may suggest that exclusion is likely to be more consistent with an impartial assessment of any claim of apprehended bias, it is important to highlight the core role of human agency in judicial decision-making.[26] Exclusion may leave the impugned judge with a – possibly legitimate – sense of loss of agency and may unnecessarily undermine morale and collegiality within the court. Where an impugned judge dissents from a majority decision to recuse, inclusion in that decision-making process is likely to significantly diminish any sense of aggrievement. Moreover, such inclusion is likely to play an educative role for a judge where their opinion may shift in light of the views of their peers. For these reasons, and those set out in JI2.59, I would support the inclusive model.

The issue as to whether the impugned judge should be excluded from the decision should, in the interests of consistency and coherence, reflect the view taken as to the involvement of the impugned judge in single judge instances.

9. Systems to minimise the need for recusal or disqualification

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

The shift to a more formalised system for the allocation of judges would represent a seismic shift in the operation of Australian courts. There is nothing to suggest that concerns over judicial impartiality currently justify such a shift, and the substantive consideration of such a shift would require substantial more research and consultation.

Without further information it is difficult to make meaningful comment on possible proposals, other than to reiterate that our current system on informality and judicial integrity. Such values can be unintentionally undermined through more structured mechanisms without any substantial countervailing benefit.

While the creation of a financial interests register for judges may appear attractive, this can raise significant ancillary issues. For example, Pakistan is dealing with issues regarding whether it is a disciplinary offence for a judge to fail to declare relevant assets on such a

[26] McIntyre (n1) 95

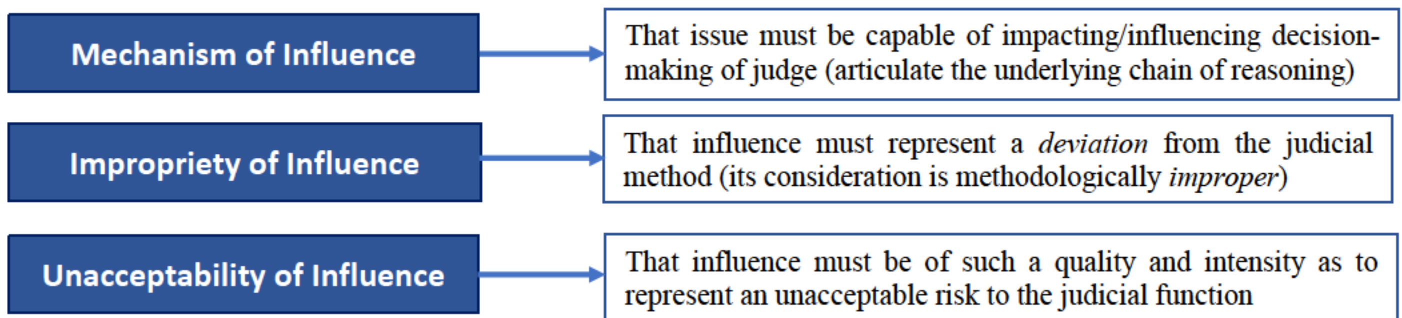
register. The creation of such a register may create significant challenges for judicial discipline that overwhelm any benefits of such a system.

PART IV: ADDRESSING DIFFICULT AREAS FOR APPLICATION OF THE BIAS RULE

The Consultation Paper provides proposals to deal with three specific problems areas regarding the application of the bias rule: communication between judges and lawyers (*Problem 4*); tensions between efficiency and the avoidance of bias (*Problem 4*); and unacceptable judicial behaviour in court (*Problem 4*).

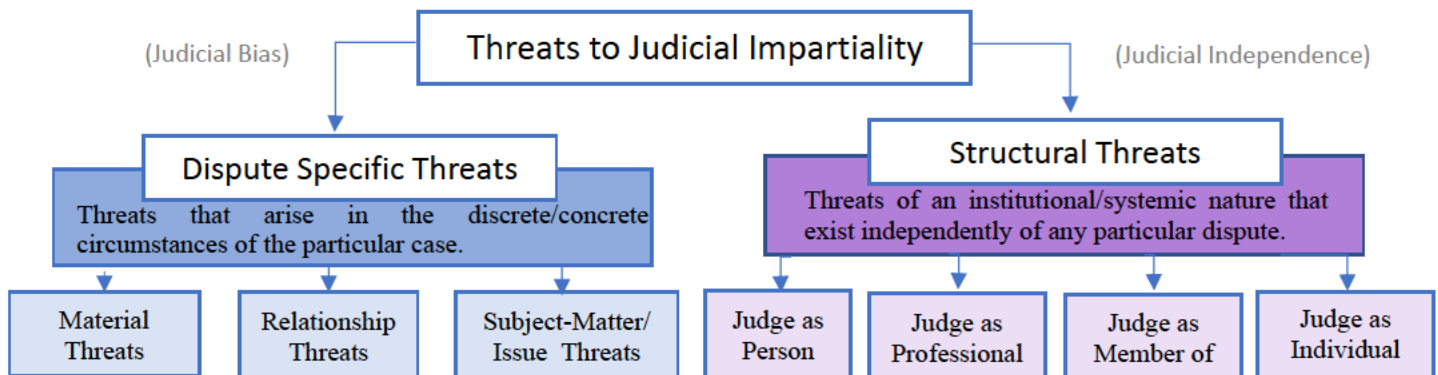
Only the first of these squarely raises a traditional 'bias' issue, and it is necessary, in each case to carefully articulate how the particular circumstances give rise to a threat to judicial impartiality to properly understand why they raise difficulty. In my judicial theory work, I argue that the identification of threats to judicial impartiality requires an inquiry into *how* that issue may influence the judge, *how* this may constitute a deviance from method, and *whether* that influence is nonetheless acceptable.[27] This can be illustrated in the following manner:

Figure 2: Conceptual Test for Judicial Bias



This model largely replicates the test for judicial impartiality[28] but by disaggregating the impropriety and unacceptability aspect allows a more nuanced analysis. Threats to judicial impartiality can arise from both systemic and discrete circumstances, and for this reason it can be more accurate to use these terms than the traditional language of bias and judicial independence:

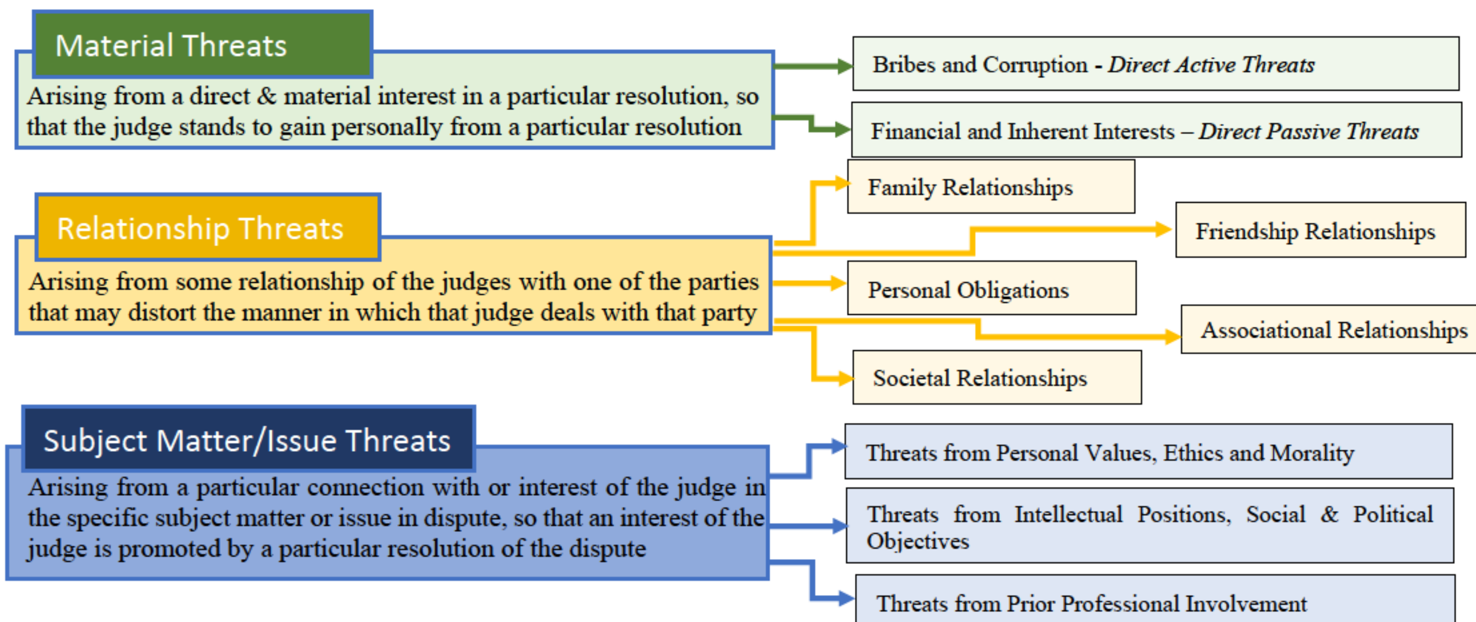
Figure 3: Species of Threats to Judicial Impartiality



[27] McIntyre (n1) p172
[28] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ)

Dispute-specific threats to impartiality arise wherever the concrete circumstances of the dispute may affect, or reasonably appear to affect, the ability of the judge to neutrally and impartially resolve that dispute. Those circumstances create a potential coincidence, or co-identification, of the interests of the judge and the interests of a party. The dominant model for characterising threat to judicial impartiality in Australia is that of Deane J in *Webb v The Queen*, where his honour identified four principle circumstances case in which a reasonable apprehension of bias may arise: interest, conduct, association and extraneous information.[29] However, this taxonomy is both insufficiently comprehensive and tends to conflate evidence of a threat with the threat itself. For these reasons, I utilise a more expansive taxonomy for the examination of potential co-identification of interests.[30] Again, this can be illustrated in the following manner:

Figure 4: Dispute Specific Threats to Judicial Impartiality



This framework can be useful in assessing the nature of specific potential threats to judicial impartiality as it helps force us to articulate why the given circumstance may interfere with the proper methods of judicial decision-making.

Communications between judges and lawyers

The conduct/behaviour of the judge – whether during a hearing or outside of proceedings – is often described as potentially grounding an apprehension of bias.[31] Conceptually, such conduct should be described as *evidence* of such an improper bias, rather than the bias itself. It is critical to articulate the mechanism by which the impugned conduct is said to improperly influence the judge's decision-making.[32] The mere fact that a judge has engage in communication with a party's lawyer does not, without more, involve a mechanism of improper influence. Rather, the relevant concern arises from unstated inferences: for example, that communication may

[29] *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
[30] McIntyre (n1) 183-95
[31] *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J); Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 154
[32] As Nettle and Gordon JJ phrased the question: '*How* will the claimed interest, influence or extraneous information have the suggested effect?': *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [57] (emphasis added)

evidence a friendship or associational relationship with the lawyer that makes the judge more likely to decide in favour of the lawyers client.

The alternative means of articulating the concern related to private communications with one of the parties, a witness or legal representative, without the knowledge or consent of the other party, is that such communications disclosed information relevant to the case. While such a disclosure may threaten the integrity of the hearing, it should not – without more – be characterised as an impartiality threat so much as a threat to the fairness and integrity of the process.

Given the potential for the law in the regard to be reframed, rearticulated or further developed as a result of *Charisteas*[33] appeal to the High Court there is limited value in giving detailed comments to this area. Ideally there would be the opportunity for further (limited) submissions following that decision

10. Clarifying rules on contact between judges and lawyers

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 2015*, 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').

I concur that there is value in undertaking such a review after the High Court has considered the issue further in the appeal from *Charisteas*.

However, it is not immediately clear that public confidence in the administration of justice is best served by an overly prescriptive and detailed set of standards in an attempt to avoid 'unwritten rules.' Such attempts at quasi-codification are particularly ill-suited to dynamic situations such as this that tend to rely upon diffuse social pressures and evolving social mores. There are, further, counter-veiling considerations against strict prohibitions including the undue isolation of the judge and the potential to further damaging perceptions of aloofness. The forms and boundaries of what is 'acceptable' will always depend upon changing social expectations, informal assessments and 'unwritten rules'. This is not a flaw in the system. We better respond to this concern by ensuring that persons of high integrity, and capacity for critical self-reflection, are appointed to the judiciary rather than undertaking quasi-codification processes that pretend to do away with the need for evaluative judgment.

Rather than a prescriptive approach focusing on specific types of conduct, a more appropriate and flexible approach would clearly articulate the manner in which extra-curial communications may create or evidence a mechanism of improper influence, and then provide guidance on how to avoid such situations. This area will be better served by a reliance upon the good judgement and integrity of judges, than upon formal prescriptive rules. Moreover, given the nuance involved in assessing possible interactions, prescriptive rules will not necessarily minimise appeals and subsequent litigation. The focus may instead shift to whether the judge complied with the rules, rather than whether the conduct created an improper apprehension of bias.

[33] *Charisteas v Charisteas* (2020) 60 Fam LR 483.

While there may be value in having broad consistency and coherence between the mode of expression in the *Guide to Judicial Conduct* and the relevant *Professional Rules*, what ultimately matters is whether or not there is a broad understanding within the Profession and the judiciary of what is expected of judges and lawyers in such circumstances. Again, without clear evidence that there is a deficiency in such an understanding, there should be little incentive to affect any form of substantive change. Change breeds uncertainty, and without a clear imperative – either in response to High Court authority or compelling evidence – there is a real risk that it is counterproductive in this context.

Modern litigation practices, efficient allocation of resources, and the bias rule

The use of post-*Woolfe Report* modern case management litigation practices has dramatically disrupted the expectations of what is acceptable involvement of the judge in pre-trail processes. Over the last 30 years we have seen a seismic shift in the expectations of what is appropriate for the level of judicial involvement pre-trial. This cultural shift towards a far greater tolerance of judicial management, and the associated risk to prejudgement that is involved, has been developed through a process of experimentation and trial, with insights from research and appellate court guidance. Nevertheless, in the scheme of the development of common law adversarial process, these remain a develop nascent reforms.

The degree of 'impartiality risk' that we are willing to tolerate through this judicial involvement is a matter that warrants substantial discussion and reflection. However, it is not a matter that has a simple answer and is best analysed through a clear framework of principles that recognises the limited functional value of impartiality.

11. Greater use of registrars in case management

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?

The suggestion that the judicial impartiality risk can be moderated by the increased use of registrars for case management purposes is one that demands, first, reflection on two fundamental issues:

(1) to what extent is case management a 'judicial process' calling for judicial judgement and evaluative discretion; and
(2) to what extent are registrars capable of exercising a judicial power?

In the continental inquisitorial process, these questions are answered by characterising the equivalent power as fundamentally judicial one. For example, in Germany, the *Berichtserstatter* runs the initial file, and prepares a summary of facts and proposals for a solution which are then assessed collectively by the colligiate court.[34]

In contrast, in Australia neither of these issues are not clearly resolved. If the functions involved in case management are seen to be administrative in nature, then it may be appropriate to see an increase role for registrars – not just to reduce potential threats to judicial impartiality, but to allow the more efficient deployment of judicial resources for judicial work. However, the

[34] John Bell, *Judiciaries within Europe: A Comparative Review* (CUP, 2006) p135

more 'judicialised' this work is seen to be, the more appropriate it is for it to be performed by judicial officers. If the underlying concern is that such activities, though judicial in nature, are unduly impacting upon 'judicial time for more reasoned and less rushed decision-making in other matters', the appropriate response is to increase systemic capacity by appointing more judges. The alternative risks undermining the value of this work, and allows concerns of efficiency to distort matters of systemic design.

12. Reducing the tension between impartiality and efficiency

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?

I do not feel that I am best placed to put forward additional systems or procedures, which will perhaps best be done by those closer to the daily operation of these matters. Rather I wish to make an initial point about how to evaluate such suggestions.

Striking the appropriate balance between concerns of efficiency, judicial performance, and judicial impartiality and independence is a challenge that is ongoing and without ready answer. This is a space is which innovation should be encouraged, but such innovation must be constrained by an overarching framework that highlights:

1) The need for evidenced based reform, both in identifying and responding to potential challenges, and in assessing the efficacy of any reform implemented; and
2) The need for any reform to be clearly justified, in both its objectives and its mode, by reference to underlying principles of judicial power and function.

Our system should be seen as one that supports and embraces reform, but does so in a considered and reflective manner.

Additionally, it is important to highlight the role of technology increasing the capacity and efficiency of courts. Australia has a good track record in this regard, one that has been further enhanced in response to the demands of the pandemic.[35] However, there is the opportunity to further utilise such capabilities to enhance both efficiency and impartiality. Well designed and resourced technological solutions, allowing rapid identification of potential conflicts, will have upfront costs but should operate to reduce ongoing judicial labour. Where such systems make use of structured data input system, including through user/litigant inputs, much work may become effectively automated.

Unacceptable judicial conduct in court

As highlighted above with respect to extra-curial communications between judges and lawyers, it is critically important to highlight that while judicial bias constitutes one form of unacceptable judicial conduct, not all unacceptable judicial conduct in court involves bias. The

[35] Anna Olijynk, Joe McIntyre, Michael Legg and Felicity Bell, *The Use of Technology to Increase Court Capacity: A View from Australia* (2020) Submission to Justice Committee of the House of Commons, https://committees.parliament.uk/writtenevidence/13058/pdf/; the submissions are available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873637

issue of unacceptable judicial behaviour in court, such as behaviour that insults or humiliates a party or counsel, (Problem 6) confronts this difficulty head on.

Unacceptable judicial behaviour in court is not, of itself, a threat to judicial impartiality. Rather it may evidence a threat to such impartiality. This is not to say that such conduct is acceptable or appropriate, nor that systemic measures are necessary to deal with it. Rather it highlights that the bias rule is a particular limited tool that looks to identify a co-identification of interests that can distort judicial decision-making. It should not be seen as the only, or even the principle tool, to protect against all forms of judicial misconduct.

This is where it is particularly important to draw upon the conceptual to analyse potential threats to impartiality articulated at the beginning of this Part (which largely echoes the doctrinal position). The conduct of a judge who is rude, insulting or humiliates one party may, create an apprehension of bias on the basis that it supports an inference that the judge has a negative relationship partiality against that party. In such a context, the judge's apparent dislike of a party would bias the judge to find against their interests where possible, thus distorting the proper decision-making process. The conduct in court is taken to be evidence of the partiality. However, that same conduct – when directed to both parties – no longer supports such an inference. The judge who is systematically rude to both parties cannot be accused of being partial to one. That same conduct remains unacceptable, but should not be analysed through an impartiality lens.

This illustration highlights that there can be a tendency to rely on mechanisms designed to deal with judicial bias as a mode of addressing other forms of judicial misbehaviour. There are a range of forms of misconduct that, while clearly unacceptable, are poorly suited to treatment through mechanism designed to protect judicial impartiality. These include judicial rudeness and discourteous behaviour, improperly expansive use of discretionary powers such as contempt of court, humiliating treatment of parties and witnesses.

The reliance upon mechanisms designed to protect judicial impartiality in such circumstances is misguided and structurally risky. However, its use is understandable. These mechanisms are discrete, relatively effective and allow the institutional correction of any injustice without requiring findings that necessitate direct personal consequences for the judge. A finding by an appellate court that a judge ought to have recused themselves does not demand personal or disciplinary sanction (though informal counselling may be warranted). However, where this conduct is treated as a form of judicial misconduct, the systemic imperative for sanction is much higher, which unsurprisingly results in a great reluctance to characterise it in this manner. Ultimately, though, if the concern is one of judicial accountability, it should be treated as such. Mechanisms of judicial impartiality exist as a separate limb of the judicial ecosystem and should not be used for such an ulterior purpose.

13. Operation of the waiver rule in cases of unacceptable judicial conduct

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?

The operation of the waiver rule illustrates this difficulty of unduly relying upon mechanisms of accountability. Unacceptable judicial conduct may warrant a systemic intervention to ensure

the legitimacy and integrity of the proceedings – and of the broader institution itself – but the only ready mechanism available to the parties may be impartiality mechanisms.

There are cases where the waiver principle is an appropriate means of balancing ideals of impartiality with the effective operation of the systems, perhaps most obviously where the judge identifies a relationship threat and outlines a willingness to recuse themselves. There, where the parties make an explicit and considered decision, one that does not place them in any jeopardy either way, it seems eminently appropriate that they be bound by that decision. The issue of implied waiver is far less clear cut. The aversion to a tactical decision not to raise a partiality concern[36] is understandable, but nor should a parties be placed in the invidious position of being forced to bring an application where doing so is likely only to further antagonise the judge.

If impartiality is a systemic concern, inherent in the very core of the notion of the judicial function, the efficacy of protection mechanisms should not be dependant – and indeed should be protected from – tactical decision making on the part of litigants. To the extent that the current waiver rule operates to force litigants to engage in such tactics, balancing the risk of antagonising a judge against the risk of losing a ground of appeal, then it should be reformed.

Such reforms could take several forms. For example, it could be that the capacity to bring an application for recusal is reimagined as a duty: Once the party has sufficient knowledge of the relevant facts that may create an apprehension of bias they have a duty to bring an application. Such an approach reduced the potential for tactical decision-making and antagonising the judge by bringing the matter forward for examination. Alternatively, there could be a variation of the standard required for implied waiver, so that a party is prevented from raising the matter on appeal only in limited circumstances (to avoid the tactical decision-making described above)
Issus with rule – make tactical decision – not taken as acceptance of behaviour

The argument that the common law on waiver is, at least for Federal Courts,[37] modified by operation of the Constitution[38] is an attractive one. Certainly, it is important to highlight – as I do in my reformed *Principles 1 and 2*, that there is a critical public good involved in litigation that needs to be balanced against the discrete interests and values of the litigants. As the UK Supreme Court recognised in *Unison* judicial dispute resolution serves a public good and is not simply a publicly funded form of private dispute resolution.[39] The implications of this are profound, and as relevant to issues of impartiality as to access to justice.

The impact of a judicial decision extends greatly beyond the interests of the immediate parties. Not only does the decision operate as part of a broader system of legal norm enforcement and creation, the efficacy of the decision in finally resolving the dispute will depend upon broader acceptance of the legitimacy of the decision and the institution. Where a judgment is tainted by

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[36] *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ).
[37] It is worth noting that as this argument emanates from a concern about protecting the 'essential elements in the performance of judicial functions' [Campbell and Lee (n31) p172], it may well be that such reasoning would extend to State courts in light of developments related to *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. In particular, if the operation of the waiver rule was to allow a clearly partial judge to adjudicate a case, it is entirely conceivable its operation would 'substantially impairs the [State] court's institutional integrity' such that it would be 'incompatible with that court's role as a repository of federal jurisdiction.' [to quote the well-accepted distillation of the *Kable* principle in *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ)].
[38] Campbell and Lee (n31) p172.
[39] see *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [66]–[71]

a reasonable apprehension of bias, that taint will infect all subsequent uses of that decision. Further, it risks perpetuating a view that the judiciary operates in a manner that supports vested interests and scheming litigator, profoundly undermining confidence in the integrity of the system.

To the extent that the waiver rule operates to promote a 'private good' conception of the judicial function, and undermines broader systemic values, it risks unduly damaging confidence in the judiciary and should be reformed. The extent and mode of such reforms should reflect, however, a coherent and consistent approach to judicial impartiality.

PART V: SUPPORTING JUDICIAL IMPARTIALITY

As is apparent from the overarching scheme outlined in Part I, judicial impartiality needs to be understood the context of related systemic judicial structures and objectives. In particular, the concept of 'judicial impartiality' is itself an amalgam of dispute-specific and systemic concerns. The overarching purpose of judicial impartiality is to ensure that judges decide cases according to the proper and acceptable judicial method and are not influenced to diverge from that decision by extraneous considerations. Such considerations can take arise from both the discrete circumstances of the case, and from general systemic circumstances (see *Figure 3*). To ensure that judges are capable of consistently and demonstrably deciding in a proper and acceptable manner it is necessary, therefore, to consider the broader structural aspects necessary to ensure judges are free from potential bias. Such analysis generally occurs under the rubric of 'judicial independence' but conceptually represents a structured form of protecting judicial impartiality.[40]

An inquiry into judicial bias must, therefore, properly also consider existing structural practices that can operate to introduce potential biases and distortion in the operation of the judicial system. It also must bear in mind the related concepts of judicial accountability, both in the internal and external form.

This value of internal accountability, and the habitualised aspiration for personal judicial integrity, is fundamental to practical realisation and efficacy of any mechanism designed to protect judicial impartiality. As outlined above, almost all aspects of the mechanisms of impartiality involve elements of judicial discretion and judgement, where the judge is expected to engage in a high degree of introspection. This demands a degree of humility and capacity to recognise the feasibility of one's own decision-making that depends upon the personal ethics and integrity of the judge. No system of judicial administration can remove this informal and largely invisible role, but it can be supported and encouraged.

Judicial appointments and judicial diversity

The relationship between appointments mechanisms and judicial impartiality are well articulated in the *Consultation Paper*. So long as appointment processes remain obscure and secretive, concentrated purely in the hands of politicians in the exercise of inscrutable discretion, a perception – if not a reality – will be that some judges will be appointed on grounds other than their integrity and capacity as excellent judges. This can be catastrophic for public

[40] See McIntyre (n1) 161-2

confidence in the administration of justice, which in turn undermines the efficacy and legitimacy of the judicial system.

It is no exaggeration to suggest that in the absence of a sound appointment process that consistently and demonstrably appoints only the best candidates – measured against clearly understood criteria of quality – then all other mechanisms of judicial impartiality become fundamentally deficient and limited in their capacity to ensure judges are, and are seen to be, free from bias. The collective forms of judicial accountability, together with significant devolution of discretionary responsibility to individual judges, depend upon a mutual respect within the judiciary. Where that collapses the impact upon the operation of the institution can be catastrophic.[41]

14. Transparent process for judicial appointments

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.

This proposal is compelling and necessary. My only suggestion is to link it specifically in to the *Principles*, and to provide a clear and persuasive articulation of the relationship between appointment processes and judicial impartiality. Once one explicitly recognises the role of judicial individuality in all aspects of judicial decision-making, and abandons any neo-formalist conceptual of the judge as '*bouche de la loi'*,[42] then the connection between judicial bias and judicial appointment becomes unavoidable.

There are many models around the world, including the *Judicial Appointment Commission*[43] in the UK, which provide useful exemplars of possible models of appointment. These systems have now been in operation for a number of years, and there is a significant body of literature assessing their efficacy and outline potential refinements – including to better diversity of appointment.

15. Reporting on judicial diversity

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.

Australian judges have traditionally adopted a far more constrained approach to developing any public profile. While the 'rock star' judge approach of the US may rightly be rejected, there is value in ensuring that the public has a better understanding of the judges who serve them. The UK Supreme Court has developed a range of methods to enhance such valuable understanding, including opening the doors to a number of documentary teams. These

[41] See for example, the well documented disintegration of collegiate relationships in the Queensland Supreme Court during the ill-fated tenure of Tim Carmody as Chief Justice: Rebecca Ananian-Welsh, Gabrielle Appleby, Andrew Lynch, *The Tim Carmody Affair: Australia's Greatest Judicial Crisis* (NewSouth Books, 2016)
[42] Baron de Montesquieu (Cohler et al (trans.)), *The Spirit of Laws* (first published 1748, Cambridge University Press 1989 ed), p163.
[43] https://judicialappointments.gov.uk/

documentary were very effective in helping humanise the judiciary and demonstrative their engagement as members of society.[44] Further, the Kings College of London online course *The Modern Judiciary*[45] provides an excellent example of well-designed and accessible public courts that has been well received by users and the judiciary. The Australian judiciary would benefit from embracing such opportunities and developing local methods to enhance public understanding of the courts.

The gathering and dissemination of statistic on the diversity of the federal judiciary should be seen as one component of such an agenda, promoting an openness to the understanding and scrutiny of the judiciary.

However, such data needs to be actively analysed and reflected upon if that process is to be anything other than a 'tick-box' exercise. Evaluation of that data should occur on a regular basis, and where there are systemic anomalies in terms of any category then mechanisms should be in place to develop appropriate responses.

16. Supporting diversity in the profession

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?

Problems regarding a lack of gender diversity in the judiciary are well studied,[46] and a number of well researched and considered proposals have been put forward. Rather than adding to these, I wish only to highlight that diversity in the judiciary will only occur when systemic obstacle that prevent appropriate diversity in the profession – at all levels – are removed., is a for All our legal institutions – the judiciary, the professions and the universities - desperately need to work together on a coherent systemic project to achieve in the law appropriate diversity, the removal of gendered practices, and the creation of a culture that values diversity and ensures the safety of all participants.

Recent high-profile cases of sexual harassment by sitting judges have demonstrated that these concerns are desperately real and have the capacity to cause significant ongoing harm to our judicial systems. It may be appropriate for an august body, such as the ALRC, to be involved in guiding a timely inquiry into such issues.

Orientation, judicial education, and ethical and other support for judges

17. Orientation program for new judges

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

[44] Significant documentaries include those by the BBC ('The Highest Court in the Law: Justice Makers' (2016) https://www.bbc.co.uk/programmes/b00xz0s5) and Channel 4 ('Britain's Supreme Court' (2011) https://www.thetvdb.com/series/channel-4-uk-documentaries/episodes/4449537). The Supreme Court itself has produce an introductory films to explain to the public its role: https://www.supremecourt.uk/introductory-film.html

[45] An overview of this course is available here: https://www.kcl.ac.uk/news/who-are-the-modern-judiciary-what-do-they-do-and-why-does-it-matter. For further information, see https://www.kcl.ac.uk/short-courses/modern-judiciary-future-learn

[46] For a useful introduction, see Kcasey McLoughlin, 'The Politics of Gender Diversity on the High Court of Australia' (2015) 40(3) *Alternative Law Journal* 166;

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.

The transition by which we turn lawyers into judges is one that does not require sufficient attention or analysis, but it is public responsibility that demands a more systemic and considered approach.[47]

To this end, the development of a more structured court-specific orientation program upon appointment is to be encouraged. Such program help to ensure the quality performance of the judicial task, and can contribute the *habitus* of judicial integrity critical to internal accountability.

Similarly, interests of transparency and the maintenance of public confidence in the judicial system are enhanced by the reporting of such programs in the relevant Annual Reports. This helps to demonstrate the commitment of the judiciary to ongoing development and improvement.

18. Ongoing judicial education

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.

This proposal for a more systemic approach to judicial education generally is similarly to be encouraged. The value of judicial education is well recognised in this country, but there is scope for a more coherent and consistent approach for the Federal courts. This is particularly the case for some of the issues outlined in *Proposal 18*, the significance and relevance of which are only now becoming accepted within the relevant judicial studies literature.

As with the orientation programs for new judges, the interests of transparency and the maintenance of public confidence in the judicial system are enhanced by the reporting of such programs, and participation rates, in the relevant Annual Reports.

While there are likely to be structural reasons for treating the Federal statutory courts differently from the High Court, it is not readily apparent why justices of the High Court should not similarly be encouraged to engage in the educational courses outlined above. These justices are as vulnerable to the human biases and foibles of any federal judge, and will benefit from the similar education. Public confidence will be enhanced by this demonstrable commitment

[47] See https://auspublaw.org/2020/08/turning-lawyers-into-judges-is-a-public-responsibility/

to self-reflection and professional development. While the mechanisms of providing such education, and the impact upon workload, no doubt require further refinement there is value in aspiring to a systematic commitment to ongoing education.

19. Mapping Judicial Education

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?

Australia has a highly developed network within the broader judiciary to support judicial education and collegiality, including bodies such as the Australian Judicial Officers Association, Australasian Institute of Judicial Administration (AIJA) Judicial College of Victoria; Judicial Commission of New South Wales; and the National Judicial College of Australia (NJCA). For the types of matters outlined in *Proposal 18,* it would be appropriate that a coherent and consistent approach be taken to judicial education to ensure economies of scale are realised and international best practice is obtained.

Additionally, Australia has a growing – and increasingly internationally renowned – network of judicial studies scholars. While there has at times been a tendency to view academic involvement in judicial education and evaluation as taboo,[48] these scholars can provide a diversity of experience and expertise that can greatly enhance these education processes. This expertise can involve both the provision of substantive education, as well as the design and execution of empirical analysis of the efficacy of judicial education programs. Ideally, federal funding may be provided to undertake ongoing evaluation and refinement of judicial education programs. There is a growing number of academics in this country who have the expertise and experience to undertake such work.

20. Ethical and other support structures

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?

While it is desirable that new forms of support and guidance for courts be developed, we should be reluctant to adopt a process where all paths lead to a Federal Judicial Commission. While such Commissions have become somewhat fashionable in the last decade, there is little evidence efficacy so as to support the expansive use of this model. In the context of judicial impartiality it is particularly important to distinguish between the internal accountability and external accountability aspects of such a body. Structured systems of support are entirely consistent with the internal aspects of judicial accountability, helping to guide and support judges in the excellent performance of their judicial role. However, formalised disciplinary modes of accountability, with a focus on external demonstrability of 'accountability' are conceptually and constitutionally problematic. To the extent that a Federal Judicial Commission is seen to perform such a role it is not at all clear that it would act to further the

[48] For example, in 2019, France made it a criminal offence to 'evaluate, analyse, compare or predict' the behaviour of individual judges: See https://verfassungsblog.de/france-criminalises-research-on-judges/

objectives of judicial impartiality. Indeed, such systems can be counter-productive, incentivising (or appearing to incentivise) judges to make 'safe' decisions in favour of the powerful, the litigious or the wealthy.

In this context, it is particularly important to be alert to differences of social juridical conditions in comparative jurisdictions. For example, in the UK the Judicial Conduct Investigations Office (formerly the Office for Judicial Complaints) supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. The work of that body is almost entirely focused upon work of the lay magistracy and tribunal members, which operates as a quasi-professional judiciary of a mode entirely foreign to Australia. In 2019/20, of the 1183 matters dealt with by the JCIO, 683 (57%) were not accepted for investigation, 458 (38%) were dismissed, and only 42 (3.5%) were upheld. Notably, the JCIO has never undertaken an investigation, or made a finding with regards to, senior judicial officers. In essence, such a body *looks* analogous to a Federal Judicial Commission yet bears almost no functional similarity.

Given constitutional protections of judicial tenure, and the related common law constitutional principles of judicial independence from executive interference traceable back to at least the *Act of Settlement 1701*, it is not at all clear what role such a body could lawfully have in Australia. Moreover, it is not clear that – even if lawful – such a body is beneficial in terms of efficiency and the enhancement of public confidence. Legitimate complaints are already capable of being skilfully and effectively investigated in the current system.[49] It is not readily apparent that a Federal Judicial Commission offers a clearly superior model, not least because the adoption of institutionalised models of 'accountability' can quickly become bureaucratised and formalistic. Further, the creation of such a Commission in Federal context that does not have an ICAC that covers the actions of the Executive furthers a perception that the judiciary is somehow unaccountable, deficient and in need of oversight. The adoption of an institutionalised approach supports a view that there are systematic issues of judicial malpractice, where there is little evidence that this is so. Such a view risks harming public confidence in the judiciary without significant countervailing benefits.

This is clearly a matter upon which there can be significant well-informed differences of opinion. Given the contested nature of such a proposal, my view is that it is unduly divisive and unnecessary to propose such a model in this context.

21. Enhancing judicial impartiality for all

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?

The suggestion set out in paragraph 98 and 99 of the *Consultation Paper* are all worth further exploration.

Unfortunately, we do not have a body with a clear mandate to be responsible for the implementation of these measures. One legitimate role for a body such as a Federal Judicial

[49] See for example: http://www federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr080721

Commission would be to focus more on matters of coordination, education and advocacy for the support of judicial institutions, and less on mattes of judicial discipline. The form of such a body, its composition and lines of accountability and responsibility are all matter that would require further consideration.

PART VI: COLLECTION, ANALYSIS, AND REPORTING OF DATA

Finally, and this is a point that bears repeating, it is not at all clear that there is a 'problem' with judicial impartiality in this country. Outside a small number of high-profile cases of judicial misconduct that have garnered ongoing media attention, the issue of impartiality and bias does not appear to be systemic problem in our judiciary. While we should never take the integrity of our judicial system for granted, and should be alert to opportunities for refinement and ongoing improvement, there is a real potential for harm to public confidence if we obsess over an apparent, rather than real, problem. As Onora O'Neil famously argued in her Reith Lecture, our public institutions are like plants that 'don't flourish when we pull them up too often to check how their roots are growing'; our institutions cannot thrive 'if we constantly uproot them to demonstrate that everything is transparent and trustworthy.'[50] It is vital to bear this admonishment in mind in designing any system to 'prove' or 'demonstrate' the impartiality of our judicial system. Data can usefully demonstrate the integrity of the system, but observation and measurement is never neutral.

One risk, over and above the impact upon public confidence, is that measurement can alter behaviour in ways that are unpredictable. One of the reasons that judicial performance evaluation has been so controversial,[51] is that there is a tendency for the measurement of judicial outputs to increase the apparent significance of judicial efficiency.[52] It is not always the case that what is measurable is important.[53] This is particularly so for judicial work.[54] Empirical research on judicial decisions can help reveal trends that might otherwise remain hidden or underappreciated, and to confirm or contradict assumptions of judicial behaviour that might otherwise go unchallenged. The capacity of hard data to help cut against bias and shift entrenched positions is particularly significant given the normative consequence of judicial decisions makes the written judgment as much an act of advocacy as an act of accountability and illumination.[55]

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[50] Onora O'Neil (2002). *A question of trust: Reith lectures 2002 (Lecture 1).* http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/20020403_reith.pdf, 6

[51] For example, concerns over the potential impact of a study about judicial performance evaluation upon judicial independence in Canada forced to Canadian academics to twice abandon well-conceived empirical studies into the feasibility of judicial performance evaluation of Canadian Federal: see Troy Riddel, Lori Hausegger & Matthew Hennigar, 'Evaluating Federally Appointed Judges in Canada: Analysing the Controversy', (2012) 50 *Osgood Hall Law Journal* 403

[52] See Joe McIntyre, 'Evaluating Judicial Performance Evaluation: Theory, Purposes and Limits' (2014) 4(5) Oñati Socio-Legal Series 898; JJ Spigelman, 'Seen to be Done: The Principle of Open Justice – Part I', (2000) 74 Australian Law Journal 290; JJ Spigelman, 'Seen to be Done: The Principle of Open Justice – Part II', (2000) 74 *Australian Law Journal* 378

[53] William Bruce Cameron, *Informal Sociology: A Casual Introduction to Sociological Thinking* (Random House, 1963) 13 (observing that 'not everything that counts can be counted').

[54] See J J Spigelman, 'Measuring Court Performance' (2006) 16(2) *Journal of Judicial Administration* 69, 70; James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375. See also *Lane (Trustee), in the matter of Lee (Bankrupt) v Commissioner of Taxation (No 3)* [2018] FCA 1572 [10] (where Derrington J rather unusually remarks within his reasons that 'the current public zeitgeist … emphasises the temporal aspects of the production of judgments rather than their quality, utility or effectiveness').

[55] See Joe McIntyre, *The Judicial Function* (Springer, 2019) 272–4.

The need for gathering more, and better, empirical data regarding the operation of the judicial system is a matter of broad agreement amongst Australian judicial scholars. But as the above proviso highlight, that task needs to be undertaken carefully and in a considered manner alert to the potential adverse impacts of such a project.

22. Collection of data on reallocation for potential bias issues

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

These concerns become particularly significant when we turn to discrete proposals to gather additional data, particularly when this is carried out by judicial administrators rather than trained empiricists and social scientists.

As a judicial theorist, my first reaction is to ask *why* it is important to collect this data. To what end is that data going to be used, and by whom. Such issues need to be clearly answered before the appropriateness of such proposals can be assessed.

As a researcher, I would be delighted to gain access to this form of data, not least because very little is publicly available about how cases are allocated. However, while there are many reasons to suspect that 'invisible recusals' are the most common type of recusal, it does not follow that it is this category that is the most important to measure. Firstly, this form of recusal depends entirely upon informal methods and cultures of openness, trust and support. It is entirely possible that these conditions may be adversely affected if a judge know that the matter, irrespective of recusal or not, will be formally recorded and reported upon. Secondly, the record of only overall frequency of reallocation for potential bias issues and the general category of bias will present a (potentially misleadingly) partial view of the issue. Any matter that has been disclosed and discussed with the head of jurisdiction, but that a decision has been made that it is inappropriate/insufficient for recusal will not be recorded.

It is entirely proper for the Federal courts to wish to gain some empirical insight into just how widespread this practice is, how it occurs, and what practices are followed, and which are the most common forms of relevant impartiality threat. However, it is does not follow that the implementation of a systematic method for recording and publishing such data is the appropriate means of doing this. A better means may well be to commission a formal research project, with clearly defined purpose, scope and duration, to gain an accurate snapshot of this phenomenon within the Federal courts. That report (or parts of it) could be published, and potential reforms discussed. Whether such a report finds that current practices are operating effectively or that there are systemic issues, it will provide an evidence base for any response.

That evidence base is currently lack. In the absence of such evidence, there should be great reluctance to implement reforms that may distort existing practices for diffuse benefits. This is particularly so the closer the studied activity is to the exercise of core judicial discretions, such as the decision to recuse or not.

23. Structured collection of feedback from court users

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.

It is for this final consideration, the proximity to the activity being studied and the exercise of judicial discretion, that the gathering of structured feedback from court users is potentially less problematic.

As the *Consultation Paper* itself highlights, the intended use of such data is critical to the legitimacy and acceptability of the process. Such data should not be used to evaluate the performance of particular judges, nor should it be used in any way to inform the development of legal norms. However, as a means of gaining a (limited) perspective of the experience of users, and to identify potentially unanticipated or underappreciated problems, such processes can be useful.

Again, there is significant opportunity for technological solutions to be embraced in the execution of such a project. Indeed, if the opportunities for 'digital transformation' inherent in the shift to online Registries is embraced,[56] there is the capacity for the gathering of structured, easily analysed form of such data to become an ongoing systematic activity.

24. Existing collection of feedback from court users

Are the measures that are already in place in Commonwealth courts to collect feedback from, and measure satisfaction of, court users sufficient and appropriate?

The current practices are inadequate, not least because, as outlined in [110] of the *Consultation Paper,* they are not occurring sufficiently often to capture data on changing practices.

25. Collection of data relevant to judicial impartiality

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

Good research practice begins with a clear understanding of what is being interrogated before one designs empirical methods to gather relevant data. In the abstract, it is not possible or appropriate to outline appropriate forms of data relevant to judicial impartiality and bias without first clearly understanding the purpose to which it may be used.

For example, where concerns are raised that the decision-making of a particular judge may be systematically bias for or against a particular class of litigant, statistic can be used for a number of purposes as part of substantive assessment of the matter.[57] While such litigious use is controversial, such data may be used in a more constructive and supportive manner by a head

[56] Together with related 'secondary support' systems of online justice technology: Vicki Waye, Joe McIntyre, Jane Knowler, Anna Olinjyk, Collette Snowden, Ben Martini, Gaye Deegan and Jasmine Palmer, 'Maximising the Pivot to Online Courts: Digital Transformation, not mere Digitisation' (2021) 30 *Journal of Judicial Administration* 126, 134-36

[57] See *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; https://www.abc.net.au/news/2019-09-06/almost-99-per-cent-fail-when-heard-by-judge/11457114; Matthew Groves, 'Bias by the Numbers' (2020) 100 AIAL Forum 60,

of jurisdiction to invite reflection upon the part of the judge. Such statistical patterns may be explicable on other grounds, or they may help the judge to identify a subconscious bias of which they were unaware. This mode of use will only be acceptable where there is a high level of trust, respect and collegiality within that particular court.

Again, it may be that the adoption of well-designed digital systems will allow the fast, accurate and unobtrusive capture of a wide range of data, some of which may be analysed to reveal patterns such as that discussed above. However, any form of 'judicial professional performance management' needs to be carefully and respectfully designed, and not fall into the traps that beset many efforts to roll out Judicial Performance Evaluation systems.

I note that while I have undertaken some limited empirical work, this is not my area of expertise and there are highly trained experts in this country far more alert to the risks of research bias and the importance of project design to ensure the integrity of any data. Such experts should be consulted before any systematic initiatives to gather judicial impartiality data are undertaken.