

ALRC Judicial Impartiality Inquiry - Practitioners' Survey

Start of Block: INTRODUCTION

The Australian Law Reform Commission (ALRC) has been asked to consider “whether, and if so what, reforms to the laws relating to impartiality and bias as they apply to the federal judiciary are necessary and desirable”. As part of this Inquiry we would like to obtain information directly from lawyers. The survey should take approximately 8 to 12 minutes to complete. You can use the back button to return to previous answers and make changes before submitting, without losing responses to later questions. You do not need to complete the survey in one session; you can start it and come back to it on the same device. Responses made to questions on partially-completed surveys will be recorded when the survey period closes. Participation in the survey is entirely voluntary. Individual responses are completely anonymous, strictly confidential, and the ALRC will not receive any identifying information. The statistical analyses and reporting of responses will not be able to identify any particular respondent. For any questions, please email impartiality@alrc.gov.au.

Page Break

Most of the survey questions involve choosing from a set of pre-defined responses. Please choose the response that best represents your views or experiences. At the end of each section there is an open-ended question asking for any additional views, providing the opportunity for further comment.

Click the Next button to start the survey.

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End of Block: INTRODUCTION

Start of Block: Screening

First we would like to ask you a few questions about your legal practice.

Have you been admitted to practise law in an Australian state or territory?

Yes

No

Have you practised law in Australia at any point in the past five years?

Yes

No

End of Block: Screening

Start of Block: LEGAL PRACTICE

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How many years have you been practising law?

0 to 4 years

5 to 9 years

10 or more years

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In what capacity do you currently practise law? (Note: If you do not currently practise, in what capacity did you most recently practise?) Please select all that apply

- Barrister
 - Solicitor (private sector)
 - Solicitor/employed lawyer (public sector)
 - Solicitor (not-for-profit sector)
 - Other – please specify _____
-

Have you ever acted as a tribunal member or judicial officer?

Please select all that apply

- No
 - Yes - Tribunal Member
 - Yes - Judicial Officer
-

Page Break _____

In a typical year, how often does your work involve preparing for and/or appearing in litigation in courts (state/territory and Commonwealth)?

- Never
- Rarely
- Sometimes
- Often
- Always

Display This Question:

If In a typical year, how often does your work involve preparing for and/or appearing in litigation... = Rarely

Or In a typical year, how often does your work involve preparing for and/or appearing in litigation... = Sometimes

Or In a typical year, how often does your work involve preparing for and/or appearing in litigation... = Often

Or In a typical year, how often does your work involve preparing for and/or appearing in litigation... = Always

Please choose one response on each line

In a typical year, how often does your work involve preparing for and/or appearing in litigation in

the following courts?

	Never	Rarely	Sometimes	Often	Always
High Court of Australia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Federal Court of Australia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Family Court of Australia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Federal Circuit Court of Australia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Do you have a substantial practice in any of these areas of law?

Please select all that apply

- Employment law
- Family law
- Migration law
- Native Title law
- Other _____

Page Break _____

End of Block: LEGAL PRACTICE

Start of Block: EXPERIENCES WITH RECUSAL/SELF-DISQUALIFICATION

Now we would like to ask you about experiences with judicial recusal/disqualification on bias grounds.

When answering these questions please consider and include your experiences in both state and territory courts and Commonwealth courts (but not tribunals).

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Have you ever contacted a court's registry to request reallocation of a case to a different judicial officer on bias grounds?

- Yes
- No
- I don't recall / Unsure

Have you ever contacted a judicial officer (eg. through her/his chambers) to raise an issue of bias?

Please select all that apply

- Yes – by email
- Yes – by letter
- Yes – by phone
- Yes – other (please specify)
- No
- don't recall / Unsure

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Approximately how many times have you been involved in a case where a judicial officer was asked to disqualify herself or himself for actual or apprehended bias?

- Never
- Once
- Two or three times
- Four or more times (please specify approximately how many)

- I don't recall / Unsure

Display This Question:

If Approximately how many times have you been involved in a case where a judicial officer was asked... = Once

Or Approximately how many times have you been involved in a case where a judicial officer was asked... = Two or three times

Or Approximately how many times have you been involved in a case where a judicial officer was asked... = Four or more times (please specify approximately how many)

Thinking about those cases, approximately what proportion of the requests:

Please choose one response on each line

	None	Some, but less than half	Half	More than half, but not most	Most to all
came from self-represented litigants	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
resulted in recusal/disqualification	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Page Break

Have you (or a legal team you were part of) ever made a decision not to raise an issue of actual or apprehended bias with a judicial officer even though you believed there were strong grounds to raise it?

- Yes
- No
- I don't recall / Unsure

Display This Question:

*If Have you (or a legal team you were part of) ever made a decision not to raise an issue of actual...
= Yes*

Why did you not raise the issue?

Please choose all that apply

- Belief that bias would not impact outcome of case
- Fact that disqualification decision would be made by judicial officer concerned
- Potential for delay
- Potential for additional costs
- Concern that raising it would impact negatively on case
- Concern that raising it would impact negatively on own career
- Uncertainty about procedures and/or law
- Other (please specify) _____
- I don't recall / Unsure

Have you ever had a case where you think a judicial officer should have disclosed something that might give rise to apprehended bias, but they did not disclose it?

- No
- Once
- Two or three times
- Four or more times
- I don't recall / Unsure

Do you have any further comments on your experience with recusal/disqualification for actual or apprehended bias?

End of Block: EXPERIENCES WITH RECUSAL/SELF-DISQUALIFICATION

Start of Block: PROCEDURES FOR RECUSAL/DISQUALIFICATION

The next few questions ask you about your views on the appropriateness and transparency of the procedures in relation to judicial disqualification, and potential reforms. When a party wants to raise an issue of bias at first instance, the party must typically raise it with the judicial officer concerned, who will make a decision whether or not to recuse/disqualify herself or himself.

The existing procedures for raising issues of bias encourage:

- Overuse/abuse of bias claims
- Appropriate use of bias claims
- Underuse of bias claims

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Please indicate your level of agreement with the following statements: For lawyers, the procedures for raising and appealing issues of judicial bias are clear.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

It would be helpful for lawyers if there was more specific written guidance on the procedure judicial officers and parties should follow when issues of bias arise.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Page Break

In single judge cases, are there circumstances where it would be preferable that an application for disqualification be decided by: *Please choose one response on each line*

	Yes	No	Unsure
another judge (eg. duty judge)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
a panel of judges	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

When the court is sitting as a panel (rather than a single judge sitting alone), are there circumstances where it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the judge concerned?

- Yes
- No
- Unsure

Do you have any further comments on the procedures for recusal/disqualification? (please elaborate)

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Next, we would like to ask you a few questions in relation to the law on apprehended bias.

The test for determining whether a judicial officer should disqualify herself or himself by reason of apprehended bias is: “whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide”: *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

Is the test generally straightforward for legal practitioners to understand?

- Yes
 - No
 - Unsure
-

Page Break

Please indicate your level of agreement with the following statements:

There would be benefit (for judges, lawyers, and/or litigants) in having guidance setting out particular circumstances:

	Strongly agree	Somewhat agree	Neither agree nor disagree	Somewhat disagree	Strongly disagree
that will always or almost always give rise to apprehended bias	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
that will never or almost never give rise to apprehended bias	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

There should be greater specificity in the written professional rules about appropriate contact between judicial officers and lawyers appearing in cases before them.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree
- I don't know / Unsure

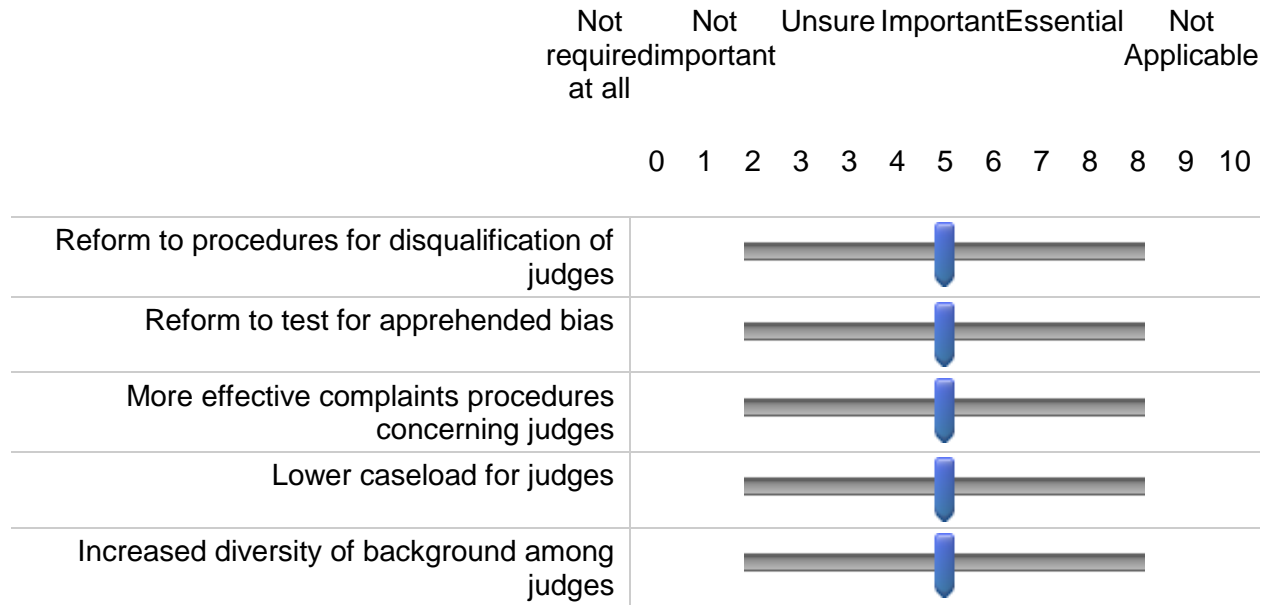
Do you have any further comments on the adequacy or appropriateness of the existing law on apprehended bias? (please elaborate)

Page Break _____

Start of Block: Final Comments

Maintaining public confidence in judicial impartiality In your view, how important are the following changes or reforms in the **Commonwealth courts** to maintain public confidence in judicial impartiality?

Please rate the following possible changes or reforms on a scale of 0 (not required at all) to 10 (essential).



Do you have any further comments on judicial impartiality or public confidence in it?

Start of Block: DEMOGRAPHIC QUESTIONS

Finally, we would like to ask you a few questions about yourself.

What is your age?

- 20 to 30
 - 31 to 40
 - 41 to 50
 - 51 to 60
 - 61 and older
 - Prefer not to answer
-

How do you describe your gender?

- Woman or female
 - Man or male
 - Non-binary
 - I use a different term (please specify)

 - Prefer not to answer
-

Do you speak a language other than English at home?

- No, English only
 - Yes, Arabic
 - Yes, Cantonese
 - Yes, Greek
 - Yes, Italian
 - Yes, other
 - Prefer not to answer
-

Do you identify as:

- Aboriginal
 - Torres Strait Islander
 - Aboriginal and Torres Strait Islander
 - None of the above
 - Prefer not to answer
-



What region/s best describe your ancestry? *Please select up to two responses*

- Oceanian
- North African and Middle Eastern
- Sub-Saharan African
- North-East Asian
- South-East Asian
- Southern and Central Asian
- North-West European
- Southern and Eastern European
- The Americas
- Prefer not to answer



In which country were you born?

▼ Afghanistan ... Zimbabwe

Do you identify as LGBTIQ+?

- Yes
 - No
 - Prefer not to answer
-

Do you identify as a person with disability?

- Yes
 - No
 - Prefer not to answer
-

What is your religion (if any)?

- No religion
 - Buddhism
 - Christianity (any denomination)
 - Hinduism
 - Islam
 - Judaism
 - Other religion (please specify)

 - Prefer not to answer
-

Page Break

End of Block: DEMOGRAPHIC QUESTIONS

Start of Block: EXPERIENCES OF BIAS

Now we would like to ask you a few questions about whether you have had any experiences of bias directed towards you, your client, or other participants in proceedings as individuals.

When answering these questions please consider and include your experiences in Commonwealth courts only.

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In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been biased against you personally?

- No
- Once
- Two or three times
- Four or more times (please specify approximately how many times)

- I don't recall / Unsure

Display This Question:

If In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Once

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Two or three times

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Four or more times (please specify approximately how many times)

What made you feel the judge was biased against you?

Please choose all that apply

- Intemperate language
- Discriminatory language
- Gestures or other actions (eg body language)
- Other (please specify) _____

Display This Question:

If In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Once

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Two or three times

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Four or more times (please specify approximately how many times)

What do you think the basis for that bias was?

Please choose all that apply

- Past interactions with judge (in court or outside)
- Social bias on the basis of your personal or assumed characteristics (Please specify – eg gender, age, sexuality, ethnic and/or religious background)

- Other (please specify) _____
- I don't know

Display This Question:

If In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... =
Once

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi...
= Two or three times

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi...
= Four or more times (please specify approximately how many times)

Please indicate your level of agreement with the following statement: I feel that the law and/or other existing mechanisms available for Commonwealth court matters were generally appropriate to deal with the bias I experienced.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Page Break

In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been biased against your client or another participant in the proceedings personally?

- Never
 - Once
 - Two or three times
 - Four or more times (please specify approximately how many times)
-
- I don't recall / Unsure

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- Intemperate language
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Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Four or more times (please specify approximately how many times)

What do you think the basis for that bias was?

Please choose all that apply

- Past interactions with judge (in court or outside)
- Social bias on the basis of that person's personal or assumed characteristics (Please specify – eg gender, age, sexuality, ethnic and/or religious background)

- Other (please specify) _____
- I don't know

Display This Question:

If In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Once

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Two or three times

Or In relation to litigation in the Commonwealth courts, have you ever felt that a judge has been bi... = Four or more times (please specify approximately how many times)

Please indicate your level of agreement with the following statement: In those instances, I feel that the law and/or other existing mechanisms available for Commonwealth court matters were generally appropriate to deal with the bias experienced.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Page Break _____

Have you ever taken action other than (i) making a bias application, or (ii) appealing on the grounds of bias, in circumstances where you thought actual or apprehended bias had arisen? (For example, removing yourself or filing a complaint)

- Yes
- No
- Unsure

Display This Question:

If Have you ever taken action other than (i) making a bias application, or (ii) appealing on the gro... = Yes

What action(s) have you taken?

Please choose all that apply

- Removed myself from the case
- Filed a complaint with the court
- Complained to the Bar Association / Law Society
- Other (please specify) _____

Do you have any further comments about direct experiences of bias in the Commonwealth courts?

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End of Block: EXPERIENCES OF BIAS
