Australian Government
Australian Law Reform Commission

REVIEW OF JUDICIAL IMPARTIALITY

SURVEY OF FEDERAL JUDICIARY

Last updated 11 August 2021

The text below is preliminary data analysis.

For final data and analysis see the Judicial Impartiality Final Report:

Without Fear or Favour: Judicial Impartiality and the Law on Bias (Report 138, December 2021)

Introduction

In April 2021, the ALRC conducted a survey of judges of the Commonwealth courts, excluding the High Court of Australia. The survey will afford the ALRC unique insights into how the judges view a number of key issues related to judicial impartiality. It will also provide the ALRC with a better understanding of whether there are areas of law and procedure relating to bias that the judges think require modification or clarification.

The anonymous survey link was emailed to all 151 judges who held office on 22 April 2021 in the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia. A self-selected sample of 61 judges, or 40 percent, participated in the survey. The representativeness of the sample is currently being analysed across available demographic data, including gender, age, and length of service. All survey questions were voluntary and not all judges responded to all questions. Therefore, the total of responses for each question varies and details of the response rate are provided below.

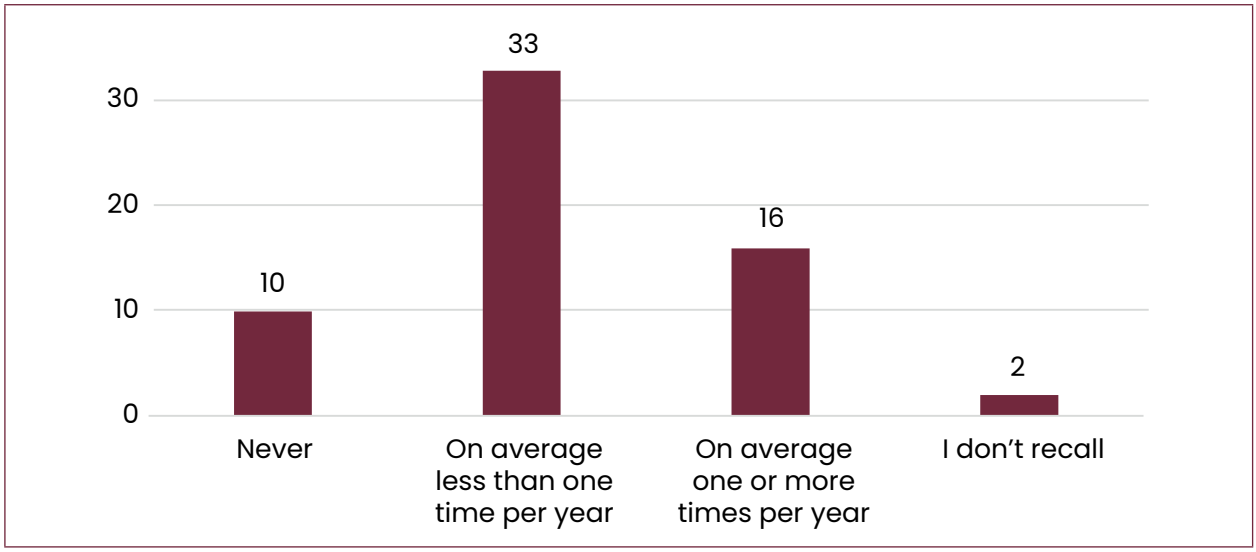
Table 1: Participation rates by court

	Federal Court of Australia	Family Court of Australia	Federal Circuit Court of Australia	All Courts
Total number of respondents	18	13	30	61
Total number of judges on the court at time of survey distribution	53	33	65	151
Percentage of respondents by court	34%	39%	46%	40%

Experiences with recusal and self-disqualification

The survey asked judicial officers to report their experiences with recusal and self-disqualification, which provides a helpful backdrop against which to understand issues raised by the Inquiry. Over two-thirds of judges surveyed (43 of 61) indicated they have either never been asked to recuse/disqualify themselves (10) or are asked, on average, less than once a year (33). For judges who received less than one request a year, the reported average was one request every four years. Sixteen judges reported they receive requests on average one or more times per year, with eight of those reporting they typically receive more than one request per year. The frequency of recusal applications received by judges was not significantly influenced by the court on which they sit.

Chart 1: Estimated frequency with which judges are asked to recuse/disqualify themselves



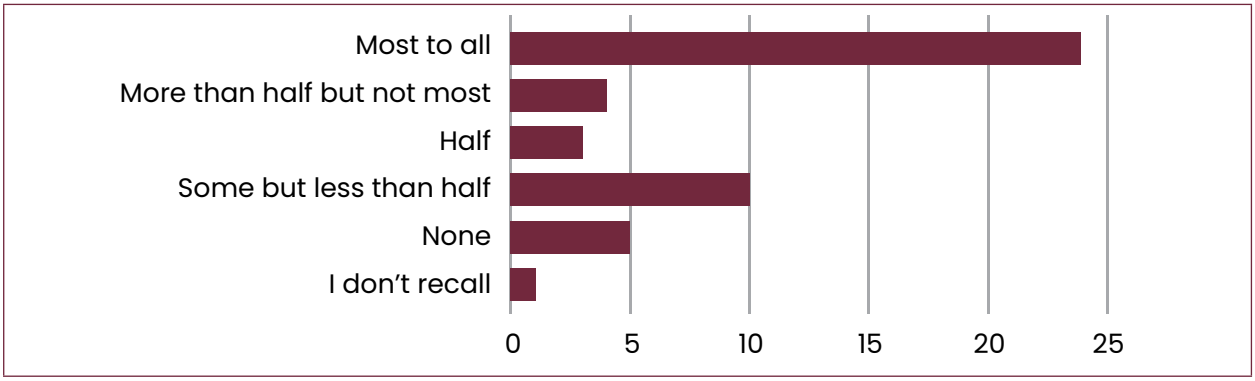
Overview of responses for Chart 1

Never	10
On average less than one time per year	33
On average one or more times per year	16
I don't recall	2
Total	61

Self-represented litigants and disqualification applications

Of the judges who had been asked to recuse/disqualify themselves (whether by informal objection or formal application), just over half (24 of 47) indicated that most to all requests came from self-represented litigants. Nearly one third (15 of 47) reported that less than half of all requests came from self-represented litigants (i.e. that more than half came from lawyers). The proportion of applications made by self-represented litigants was not significantly influenced by the court in which the applications were made.

Chart 2: Proportion of requests for recusal/disqualification reported to originate from self-represented litigants



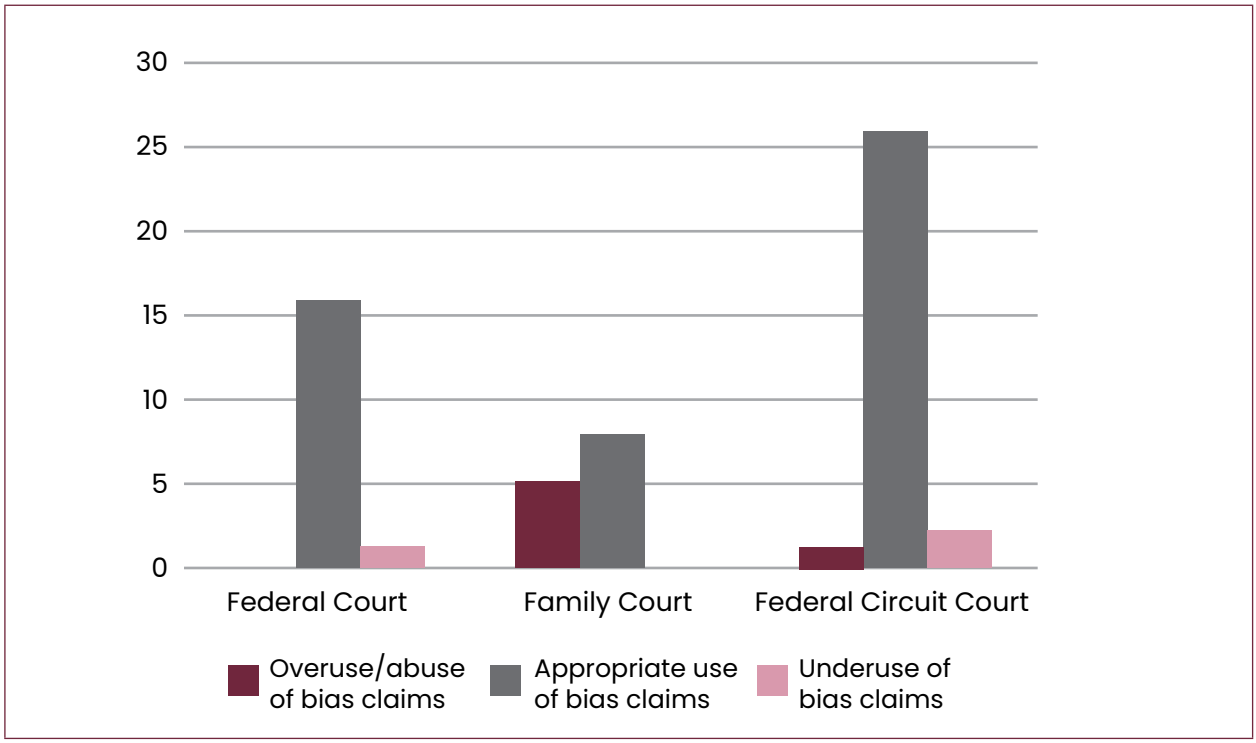
Overview of responses for Chart 2

Most to all	24
More than half but not most	4
Half	3
Some but less than half	10
None	5
I don't recall	1
Total	47

Judicial views on the law relating to bias

The survey asked whether judges thought the existing procedures for raising issues of bias encourage: overuse/abuse of bias claims; appropriate use of bias claims; or underuse of bias claims. Three-quarters of judges who responded to the question (50 of 59) reported that these procedures encourage appropriate use of bias applications. Six judges, five of whom were from the Family Court, responded that the procedures encouraged overuse/abuse and only three indicated that the procedures encouraged underuse. No judges from the Family Court reported that the procedure encouraged underuse.

Chart 3: Existing procedures encourage (by court)



Overview of responses for Chart 3

	Overuse/abuse of bias claims	Appropriate use of bias claims	Underuse of bias claims
Federal Court	0	16	1
Family Court	5	8	0
Federal Circuit Court	1	26	2

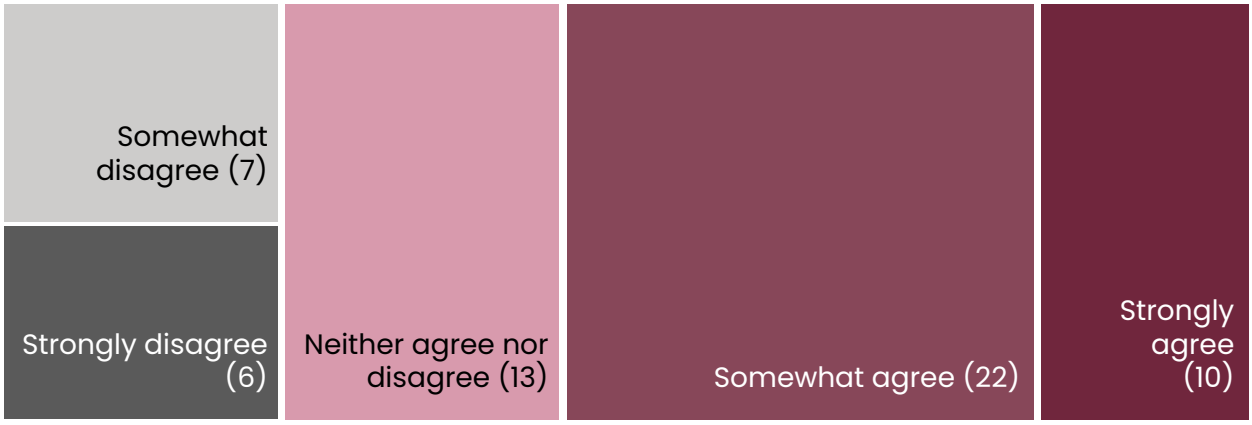
The need for guidance on procedure and the law

Two thirds of judges (38 of 57) thought it would be helpful if there were more specific guidance for judges on the procedures that should be followed by judges and parties in relation to issues of bias. A similar proportion of judges (36 of 56) also thought procedural guidance would be helpful for parties. With regard to what form this guidance should take, judges most frequently suggested it should be as part of a bench book or a practice note/direction.

With regard to the law, well over three quarters of judges (51 of 58) found the legal test for bias to be generally straightforward to apply. A majority of judges agreed there would be benefit in guidance (for judges, lawyers and/or litigants) in setting out particular circumstances that will: (i) always or almost always give rise to apprehended bias (32 of 58) and/or (ii) never or almost never give rise to apprehended bias (33 of 58). Support for guidance was not influenced by the number of years a judge had been on the bench.

Chart 4: There would be benefit (for judges, lawyers and/or litigants) in guidance setting out particular circumstances that will always or almost always give rise to apprehended bias.

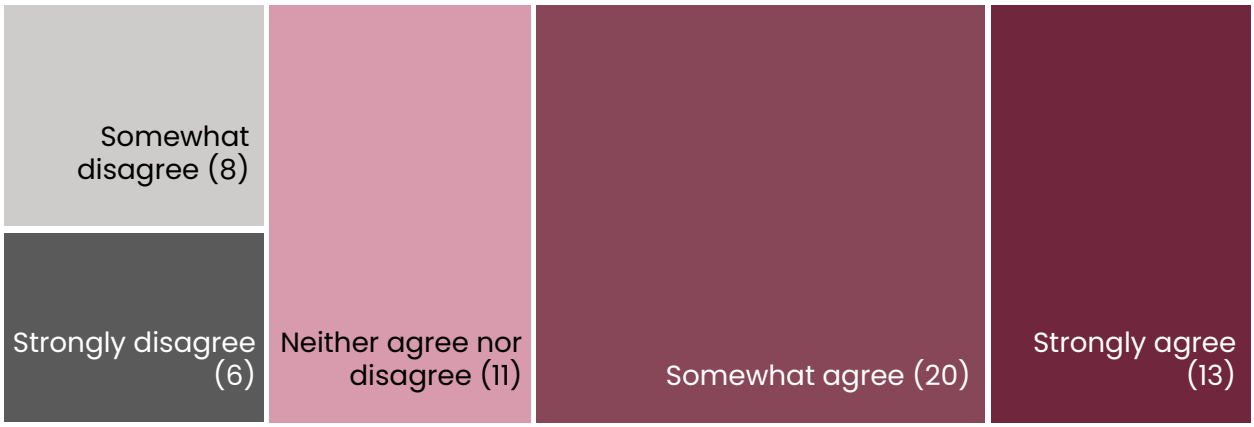
58 Responses



Strongly agree	10
Somewhat agree	22
Neither agree nor disagree	13
Somewhat disagree	7
Strongly disagree	6
Total	58

Chart 5: There would be benefit (for judges, lawyers and/or litigants) in guidance setting out particular circumstances that will never or almost never give rise to apprehended bias.

58 Responses



Strongly agree	13
Somewhat agree	20
Neither agree nor disagree	11
Somewhat disagree	8
Strongly disagree	6
Total	58

Support for proposed procedural reforms

Judges were asked about several proposed procedural reforms in both single judge cases and panel decisions.

Questions on proposed reforms

In single judge cases, are there circumstances where it would be preferable that an application for disqualification be decided by:

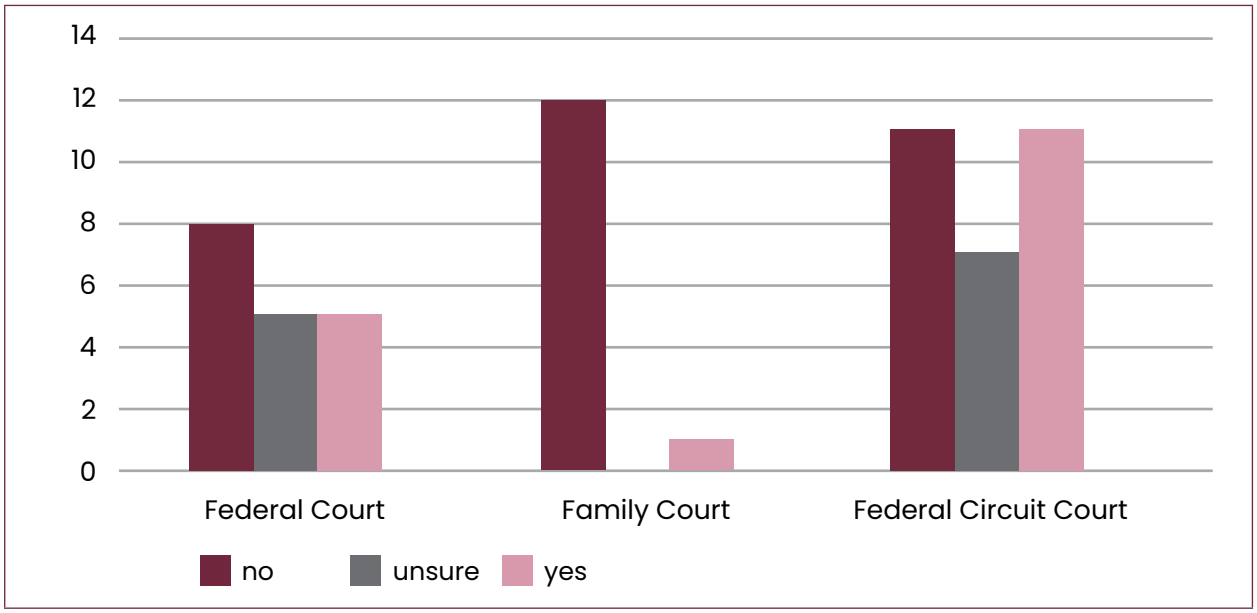
- Another judge (eg duty judge)
- A panel of judges

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?

For single judge cases, judges were asked whether there are circumstances where it would be preferable that an application for disqualification be decided by either (i) another judge (eg a duty judge) or (ii) a panel of judges. A majority of judges who responded to the question (38 of 54) did not think there were circumstances where it was preferable to transfer a bias application relating to the judge to a panel of judges.

A narrower majority of judges (31 of 60) did not think there were circumstances where it was preferable to transfer the application to another judge. Just over a quarter of judges (17 of 60) agreed there were circumstances where transfer to another judge would be preferable and a further 12 of 60 were unsure whether this might be a preferable option.

Chart 6: Support for transfer procedure in single judge cases (by court)



Overview of responses for Chart 6

	No	Unsure	Yes
Federal Court	8	5	5
Family Court	12	0	1
Federal Circuit Court	11	7	11

The highest level of support for the bias application to be transferred to another judge for determination in single judge cases came from the judges in the Federal Circuit Court (11 of 29), while the lowest level of support was reported by judges in the Family Court (where only one judge supported the reform). Five of 18 judges of the Federal Court supported this reform option.

For panel decisions, judges were asked whether there are circumstances in which it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the judge concerned. Comparatively, there was greater uncertainty among judges with respect to whether there may be circumstances where it would be preferable for the full bench to decide applications for bias where the court is sitting as a panel. Less than half (24 of 59) judges felt there were not circumstances where it would be preferable for the full bench to determine an application instead of the judge concerned. Twenty-two of 59 judges who responded to this question were unsure whether the reform would be preferable in certain circumstances. Just over a fifth of judges (13 of 59) agreed there would be circumstances in which the proposed reform of the procedure for panels would be preferable.

For further information about the ALRC see: **www.alrc.gov.au**