



REVIEW OF JUDICIAL IMPARTIALITY

SURVEY OF PRACTITIONERS

Last updated 2 September 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

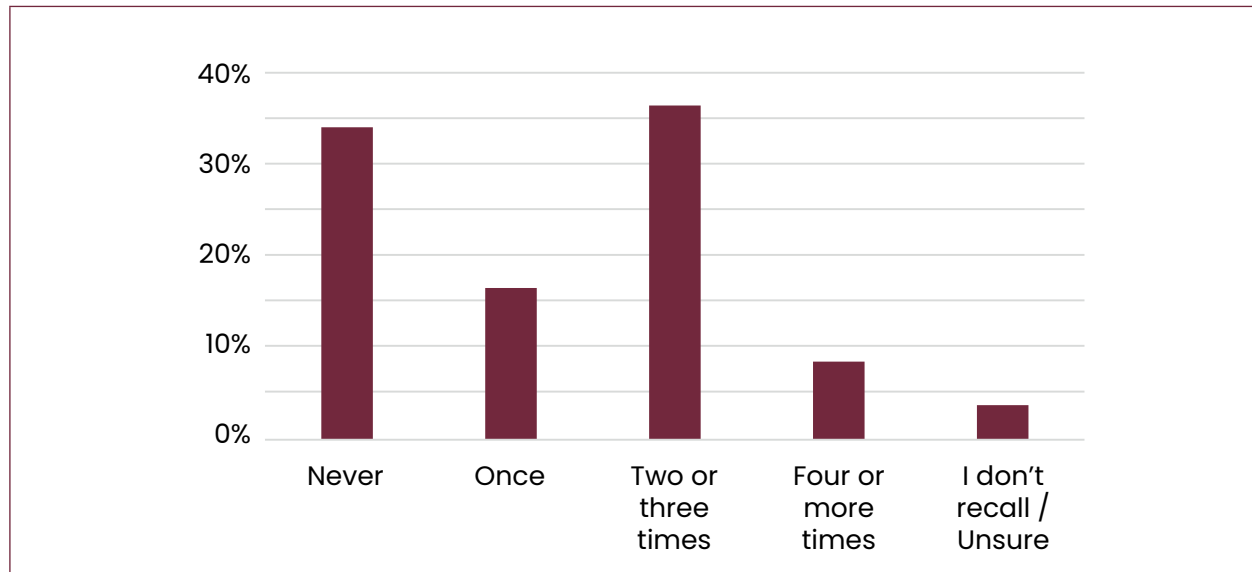
During a three week period in July/August 2021, the ALRC conducted a survey of lawyers who have been admitted into practice in an Australian state or territory and who have practised in Australia in the past five years. The survey provides the ALRC with a unique consultation tool that affords insight into how these lawyers, a good proportion of whom had experience with bias applications, 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 require modification or clarification. Because there are no records kept with respect to how frequently the issue of bias is raised in court, it is difficult to target a representative sample of lawyers. On the basis of consultations, the ALRC understands that the number of lawyers who have been involved in cases where issues of bias arose is low.

The anonymous survey link was distributed by email to lawyers through the Law Council of Australia and its constituent bodies, sections, and committees, as well as to the four member-organisations of the Australian Legal Assistance Forum. A self-selected sample of 211 lawyers participated in the survey. All survey questions were voluntary and not all lawyers responded to all questions. Therefore, the total of responses for each question varies and details of the response rates are provided below.

Experience with disqualification

The survey first asked lawyers to report their experiences with judicial self-disqualification. Thirty-four per cent of participants had never been involved in a case where a judge was asked to disqualify herself or himself for actual or apprehended bias. Conversely, 62% of participants had been involved in such a case. The majority of those participants who had been involved in a case where a judge was asked to disqualify (or 37% of total participants) had been involved in two or three cases. The 16 participants who had been involved in four or more such cases and who specified the frequency, reported the issue having arisen in an average of nine cases.

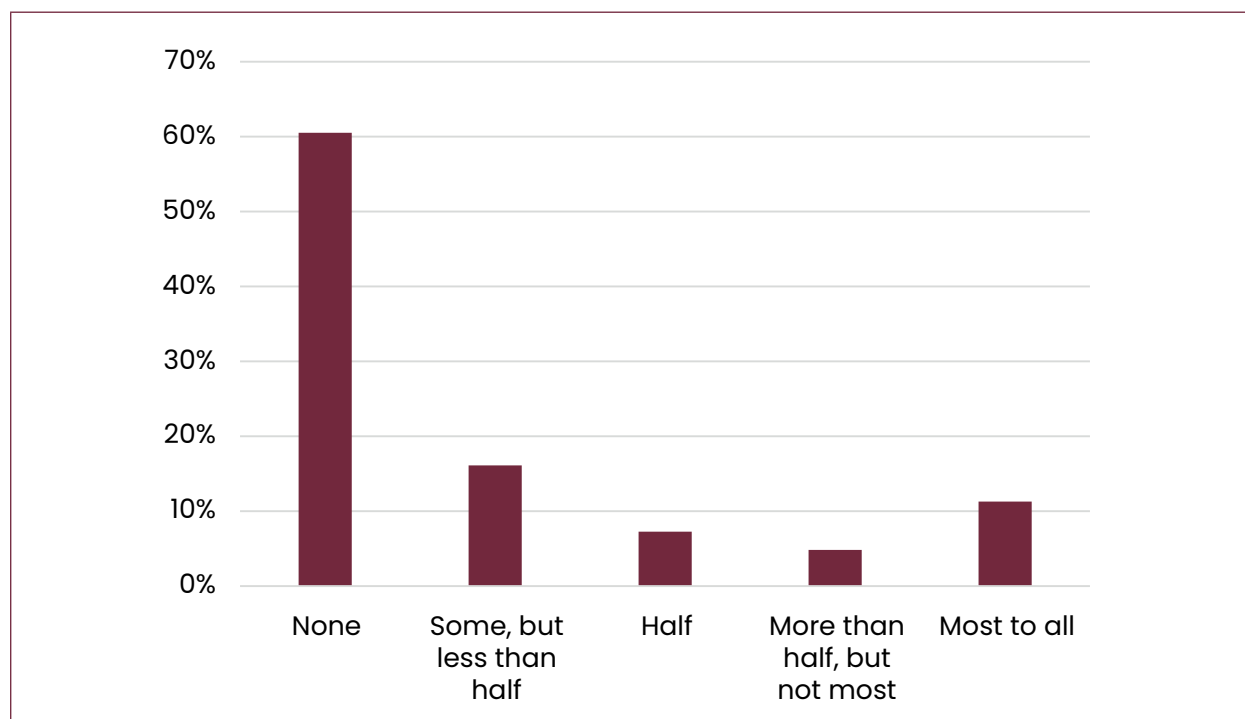
Chart 1: Frequency of involvement in a case where a judge was asked to disqualify for bias



Never	72	34%
Once	35	17%
Two or three times	77	37%
Four or more times	18	9%
I don't recall / Unsure	8	4%
Total	210	100%

Of the lawyers who had been involved in a case where a judge was asked to disqualify for bias, 60% reported that none of the applications had come from self-represented litigants. Fewer than one in six lawyers (16%) indicated that the majority of applications came from self-represented litigants.

Chart 2: Proportion of disqualification applications that came from self-represented litigants



None	75	60%
Some, but less than half	20	16%
Half	9	7%
More than half, but not most	6	5%
Most to all	14	11%
Total	124	100%

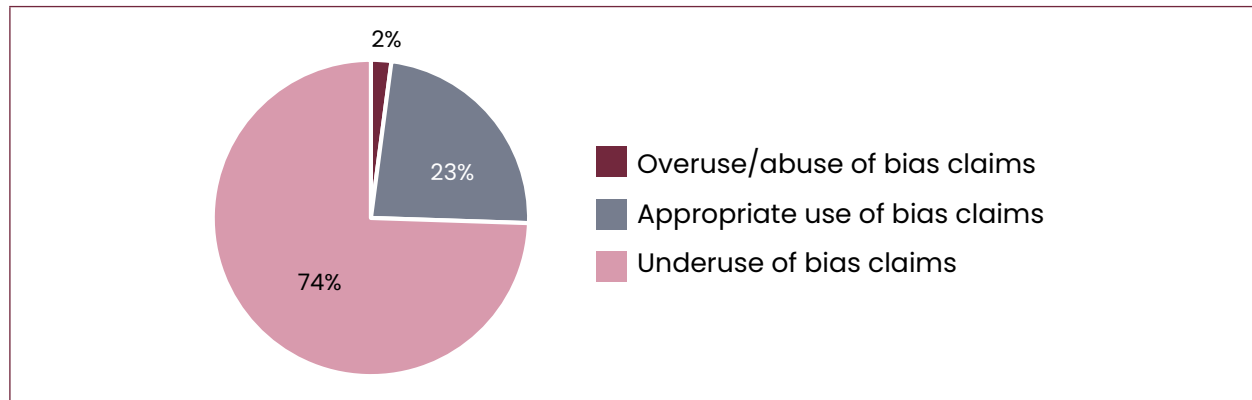
Fifty-two per cent of the lawyers who had been involved in a case where a judge was asked to disqualify for bias reported that none of the applications had resulted in recusal/disqualification. Seventy-eight per cent of participants reported that the applications had been successful less than half of the time.

One third indicated they had previously had a case where they thought a judicial officer should have disclosed something that might give rise to apprehended bias, but did not do so. Fifty-nine per cent of participants had not been involved in such a situation (9% indicated they did not recall or were unsure).

Procedural issues

When asked about the existing procedures for raising issues of bias, 74% of lawyers who responded indicated that the existing procedures encourage underuse of bias claims. Only four of 192 lawyers suggested that the existing procedures encourage overuse/abuse of bias claims.

Chart 3: Existing procedures encourage:



Overuse/abuse of bias claims	4	2%
Appropriate use of bias claims	45	23%
Underuse of bias claims	143	74%
Total	192	

Lawyers were almost evenly split as to whether the procedures for raising and appealing issues of judicial bias are clear (42% agreed; 43% disagreed; 16% neither agreed nor disagreed). Participants who described their gender as man or male (as opposed to woman or female) and those who had been practising law for ten or more years (noting that a disproportionate number of men versus women who responded had practised for ten or more years) were more likely to indicate that the procedures were clear.

Lawyers 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?

In single judge cases, 84% of lawyers responded that there are circumstances where it would be preferable for an application for disqualification be decided by another judge (eg duty judge) (7% disagreed; 9% unsure). Sixty-one per cent indicated there were circumstances in which it would be preferable for a panel of judges to decide the application (18% disagreed; 21% unsure).

With respect to reform where the court is sitting as a panel, 80% felt there are 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 (6% disagreed; 14% unsure).

Law on bias

Seventy-one per cent of participants found the test for bias to be generally straightforward for legal practitioners to understand (20% disagreed; 9% unsure).

Lawyers saw benefit in more guidance relating to the law on bias. Eighty-two per cent of participants agreed that there would be benefit in guidance setting out particular circumstances that will always or almost always give rise to apprehended bias (11% disagreed; 6% unsure). Those who had a significant practice in family law were more likely to strongly agree that there should be guidance here. Seventy-two per cent agreed that there would be benefit in guidance setting out particular circumstances that will never or almost never give rise to apprehended bias (17% disagreed; 10% unsure).

Seventy per cent agreed that there should be greater specificity in the written professional rules about appropriate contact between judicial officers and lawyers appearing in cases before them. Again, those who had a significant practice in family law were more likely to strongly agree that there should be greater specificity.

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.

186 Responses

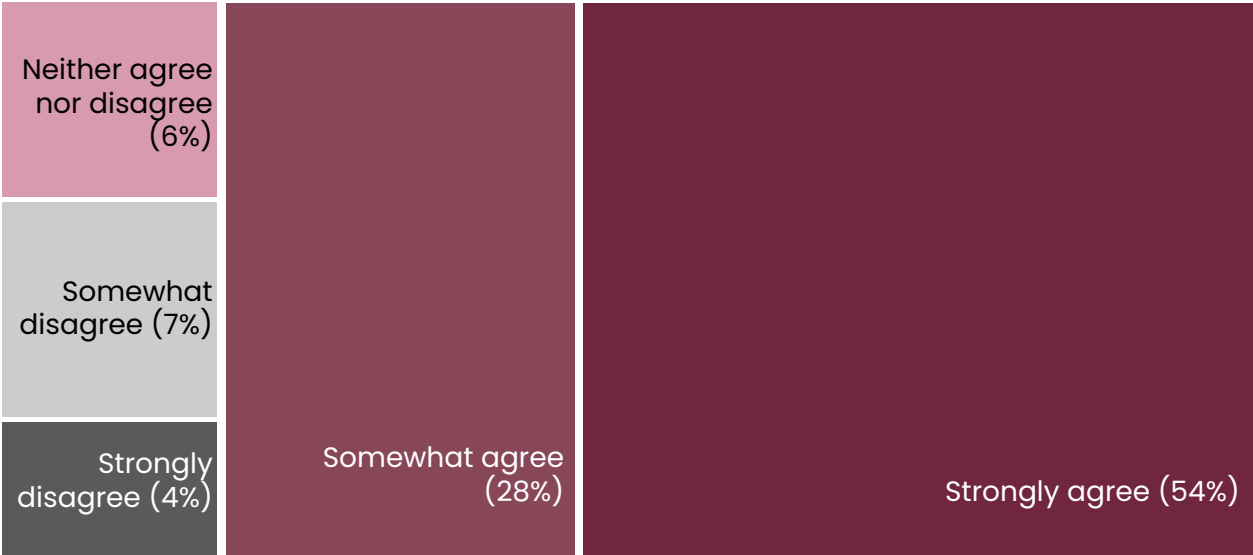
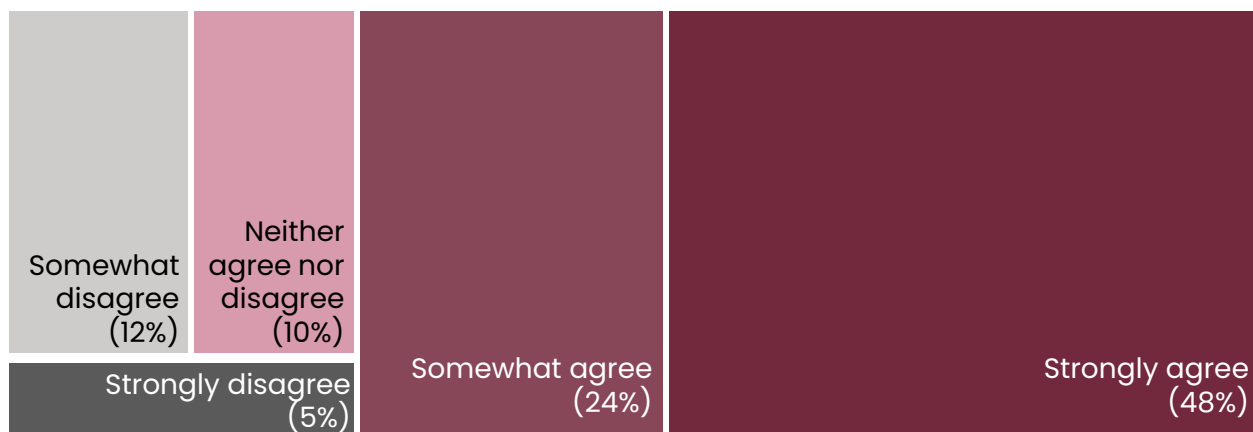


Chart 5: There would be benefit (for judges, lawyers and/or litigants) in guidance setting out particular circumstances that will never or almost never give rise to apprehended bias.

184 Responses



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