Australian Government

Australian Law Reform Commission

SUMMARY REPORT

WITHOUT FEAR OR FAVOUR:

JUDICIAL IMPARTIALITY AND THE LAW ON BIAS

ALRC Report 138
December 2021

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CONTENTS

OVERVIEW

Context

1. Judicial impartiality is fundamental to our legal system. It is central to the exercise of judicial power, crucial to the proper functioning of adversarial trials, and key to litigant and public perceptions of fairness in court proceedings.

2. The Australian judiciary is highly respected internationally for its integrity and its impartiality. Public confidence in judges and the courts in Australia is generally high. There has been no crisis of confidence in the Commonwealth courts in Australia. The impetus for this Inquiry was a particular decision of a Full Court of the Family Court of Australia that considered the issue of personal contact between the trial judge and counsel for one of the parties.[1]

Response to Terms of Reference

3. While the genesis of this Inquiry may have been a technical question as to the appropriateness of the law on actual and apprehended bias, the Terms of Reference for this Inquiry are broader. The ALRC has been asked to consider necessary or desirable reforms to the laws relating to impartiality and bias as they apply to the federal judiciary — the judges of the High Court of Australia ('High Court'), the Federal Court of Australia ('Federal Court'), and the Federal Circuit and Family Court of Australia ('FCFCOA'). In so doing, the ALRC was directed to have regard to three particular matters:

- whether the existing law about actual or apprehended bias remains appropriate and sufficient to maintain public confidence in the administration of justice;
- whether the existing law provides appropriate and sufficient clarity to decision makers, the legal profession, and the community about how to manage potential conflicts and perceptions of partiality; and
- whether current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate, including in the context of review and appeal mechanisms.

4. In relation to the first matter, the ALRC's response is simple. The existing law, as recently clarified by the High Court,[2] does not require amendment. Accordingly, there are no recommendations in this Report that propose amendments to the substantive law. That said, in order for the law to remain appropriate and sufficient to maintain public confidence in the administration of justice, it must be underpinned by appropriate procedures and the right institutional structures. These are addressed below.

5. In relation to the second matter, the ALRC considers that greater transparency in relation to the law is necessary, along with further clarity in relation to certain aspects of ordinary judicial practice. Here, the *Guide to Judicial Conduct* plays an important role in setting out common understandings of ordinary judicial practice in

1 *Charisteas v Charisteas* (2020) 60 Fam LR 483.
2 *Charisteas v Charisteas* (2021) 393 ALR 389.

difficult areas, and assisting judges to balance the competing considerations they face in striving to be, and to appear to be, impartial.[3] **Recommendation 1** (see further below) provides a vehicle for making the law on bias visible to litigants and the public more broadly while also make its operation more transparent. **Recommendation 6** calls for a review of guidance for judges and lawyers to address any inconsistency and remaining uncertainty as to prudent practice in light of the High Court's decision in *Charisteas v Charisteas*.

6. In relation to the third matter, the ALRC considers that reform is required. The law in relation to judicial bias has evolved significantly to prioritise the appearance of impartiality in upholding public confidence in the administration of justice. However, the procedures to determine questions of actual and apprehended bias have not similarly evolved. The practices and procedures for raising, determining, and reviewing questions of actual and apprehended bias have been in a significant state of flux over the past 50 years, and the ALRC's analysis has shown that there is a great deal of variation in approaches across courts, registries, and individual judges. That inconsistency has, in part, arisen because many practices and procedures have historically been informal.

7. The ALRC makes four recommendations (**Recommendations 1**–**4**) to enhance transparency of the law and processes by which each Commonwealth court manages potential issues of judicial bias from the time of filing a case to the finalisation of any appeal. The reforms address concerns about the self-disqualification procedure, while retaining flexibility and judicial control. In framing its recommendations, the ALRC has sought to balance complementary values of access to justice (within limited public resources), efficiency, and public confidence. The recommendations would provide a procedural framework for determining bias claims that matches the evolution that has occurred in the substantive law — cementing the question of apprehended bias as an objective question of law designed to support confidence in the institution, rather than a personal affront to an individual judicial officer.

8. The existing procedural mechanisms have inherent limitations and are designed to deal with issues on a case-by-case basis. Stakeholders expressed concerns about certain isolated instances of poor judicial conduct that were not adequately addressed by existing procedures. A process independent from the court concerned (though ultimately under judicial control) is a necessary safeguard for matters raising an apprehension of bias that have the potential to undermine public confidence in the courts. Accordingly, **Recommendation 5** is that the Australian Government establish a federal judicial commission. A federal judicial commission could provide a transparent and independent mechanism to consider litigants' and lawyers' concerns about judicial behaviour or impairment, including those that give rise to an apprehension of bias. It would also assist courts to proactively support judges to uphold appropriate standards by identifying issues of individual and general concern. There was strong input from stakeholders that a federal judicial

3 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017).

commission was a necessary complement to reforms to existing court procedures relating to judicial bias.

9. Alongside these reforms, the ALRC makes a suite of recommendations addressing judicial appointments, judicial education, ethical guidance, collection of feedback and data, and accessible information (**Recommendations 7–14**). These issues were identified through consultations as particularly important to address the limitations of the law in addressing judicial conduct in court and social and cultural bias at an institutional level. They were also seen as important to ensure the proper functioning of the law on bias and the procedures upholding it. The recommendations seek to: support judges; demonstrate the court's commitment to securing judicial impartiality; address institutional biases; and maintain the confidence of litigants, the profession, and the public. In making these recommendations the ALRC emphasises the importance of the Australian Government providing sufficient resources for implementation.

Framework for reforms

10. These recommendations have been developed within a nuanced theoretical framework that recognises the context in which the Commonwealth courts operate in Australia. Judicial impartiality is not binary: it is not that good judges are impartial and bad judges are biased. Recognising that judges are human and subject to a range of influences means that a 'more realistic approach is to recognise that influences on judicial decision-making lie on a continuum, from the desirable to the intolerable'.[4] Courts have an important role to play in supporting judges to manage challenges to their impartiality in a way that minimises improper and unacceptable influences. The goal of the law on apprehended bias is to draw a line on that continuum, 'where the threat of unacceptable extralegal influences compromises the fairness — real or perceived — of a given proceeding'.[5]

11. **Recommendations 7–14** are in many respects not new. They build on a number of past ALRC recommendations in reports spanning from 1992 to 2018 that have considered issues of bias in judicial decision-making. The recommendations also build on a number of parliamentary inquiries over the last 30 years. Many of these recommendations facilitate transparency about the steps that courts take to address concerns that have been raised about institutional biases, to ensure that justice is not only done, but is seen to be done.

12. The overall approach adopted in the Final Report is consistent with the views of the majority of stakeholders. Stakeholders generally considered that the law is appropriate and sufficient to uphold public confidence if other aspects of the procedural and institutional architecture supporting and safeguarding judicial impartiality are addressed.

4 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 730.

5 Ibid.

OUTCOMES

13. Implementation of the recommendations in the Final Report would promote and protect judicial impartiality and public confidence in it by:

- framing disqualification and recusal (in appropriate circumstances) as a positive step to support the integrity of the courts as an institution, rather than as a negative reflection on a judge's ability or willingness to uphold the oath of office;
- reinforcing the responsibility of the courts as an institution to uphold objective standards of impartiality;
- achieving greater clarity and visibility of the practices and procedures adopted by Commonwealth courts to avoid potential conflicts of interest, and to manage objections on bias grounds;
- supporting judges to address potential conflicts of interest and other challenges to impartiality and perceptions of impartiality;
- enabling lawyers and litigants to more easily navigate objections and appeals on bias grounds;
- encouraging early and efficient resolution of objections on bias grounds;
- providing judges with tools to manage objections on bias grounds flexibly, and as appropriate to the stage of proceedings;
- promoting public confidence in the ability of the Commonwealth courts to manage potential conflicts of interest and concerns about bias at an individual and institutional level;
- enhancing transparency of the process to appoint federal judges, and facilitating the identification of a diverse pool of candidates with the skills and attributes necessary for judicial appointment;
- equipping judges and the Commonwealth courts to be better attuned to the subjective experiences of court users, and to the views of the wider public in relation to issues of fairness and impartiality;
- alerting the Commonwealth courts as to any positive or negative impacts on litigants' and lawyers' perceptions of impartiality that may be linked to broader reforms implemented by the courts; and
- through the establishment of a federal judicial commission, providing an alternative, independent mechanism for raising issues of bias related to judicial conduct or impairment that can:
    - promote confidence among litigants that their complaints have been transparently and independently considered;
    - act as a safeguard mechanism for cases in which judicial conduct damaging to public confidence in the administration of justice is not sufficiently addressed by litigation; and
    - support judges and the courts to identify and proactively address issues giving rise to perceptions of bias at an individual or institutional level.

RECOMMENDATIONS

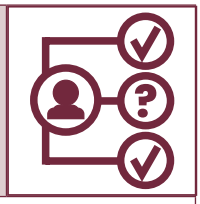
Identifying and Raising Potential Bias Issues

Chapter 6

Recommendation	1	Each Commonwealth court should develop and publish guidelines on the process and principles of judicial disqualification, modelled on the Recusal Guidelines published by each New Zealand court.

Self-Disqualification Procedure

Chapter 7



Recommendation	2	The Federal Court of Australia and the Federal Circuit and Family Court of Australia should each establish a new procedure for the discretionary transfer of applications for disqualification in cases before a single judge. The procedure should facilitate the transfer of the application to another judge of the same court, and should be formalised in a Practice Note or Practice Direction.
Recommendation	3	The Federal Court of Australia and the Federal Circuit and Family Court of Australia should, through the guidelines on judicial disqualification and, where necessary, rules of court, specify that objections on bias grounds to one or more judges sitting on a multimember court are to be determined by the court as constituted.

Review and Appeal Mechanisms

Chapter 8

Recommendation	4	The Federal Court of Australia and the Federal Circuit and Family Court of Australia should each establish streamlined interlocutory appeals procedures in relation to disqualification decisions by a single-judge court. The procedure should be formalised in a Practice Note or Practice Direction.

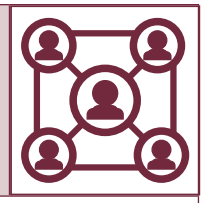
Other Mechanisms for Raising Allegations of Bias

Chapter 9

Recommendation	5	The Australian Government should establish a federal judicial commission.

Finding Clarity in Law and Practice

Chapter 10



Recommendation	**6**	The Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia and its constituent bodies, should review relevant rules and guidance on conduct in light of the High Court of Australia's decision in *Charisteas v Charisteas* [2021] HCA 29. These reviews should aim to achieve coherence between the *Guide to Judicial Conduct* and the relevant legal profession conduct rules.

Institutional Supports and Safeguards

Chapter 12

Recommendation	**7**	The Australian Government should develop a more transparent process for appointing federal judicial officers on merit, involving: • publication of criteria for appointment; • public calls for expressions of interest; and • a commitment to promoting diversity in the judiciary.
Recommendation	**8**	The Attorney-General (Cth) should collect, and report annually on, statistics regarding the diversity of the federal judiciary.

Institutional Supports and Safeguards Chapter 12		
Recommendation	9	Each Commonwealth court, through its head of jurisdiction, should develop a structured and transparent approach to the training and ongoing professional development of judges. Each court should report annually in a standardised manner on the provision of, and attendance at, training and professional development.
Recommendation	10	In implementing Recommendation 9, each Commonwealth court should develop a structured and ongoing program of Aboriginal and Torres Strait Islander cross-cultural education for members of the federal judiciary. The development and delivery of the program should be led by Aboriginal and Torres Strait Islander people and organisations.
Recommendation	11	The Council of Chief Justices of Australia and New Zealand should consider a broad review of the *Guide to Judicial Conduct* as it relates to judicial impartiality.
Recommendation	12	Each Commonwealth court should systematically capture court users' subjective perceptions of procedural justice using standardised tools.

Institutional Supports and Safeguards Chapter 12		
Recommendation	**13**	The Commonwealth courts (individually or jointly) should develop a policy on the creation, development, and use of statistical analysis of judicial decision-making.
Recommendation	**14**	The Commonwealth courts (individually or jointly) should create accessible public resources that explain: • the processes and structures in place to support the independence and impartiality of judges; and • the mechanisms in place to ensure judicial accountability.

KEY POINTS

- **Judges are human, and the public knows it:** Judges, and the public they serve, have recognised that human decision-making can never be completely neutral. But this does not mean that judges are biased in the legal sense, nor that they cannot be impartial in a meaningful way. The goal of the law on apprehended bias is to define the point at which the risk or appearance of an improper influence on decision-making is unacceptable to maintaining public confidence in the administration of justice.

- **Apprehended bias is not accusatory:** Disqualification for apprehended bias can be a sensitive issue for judges, but the law considers how things might appear to an outsider. Recusal and disqualification in appropriate circumstances are important for upholding the integrity of court processes, and need not reflect poorly on the judge concerned.

- **The law relies on its institutional supports:** The law on bias necessarily has pragmatic limits. The success of the law in achieving its aims is dependent on it being supported by appropriate procedures, implemented by the right judges, and complemented by institutional practices.

- **A principled approach is appropriate:** The judge-led, principled approach reflected in the existing substantive law on bias is the right one, but it should be applied realistically and prudently, as emphasised in recent case law.

- **Guidance on procedure and law is needed:** Issues of bias concern the administration of justice. Accordingly, it is appropriate and necessary to publish transparent guidance about how the law has been applied in specific situations, how courts and judges take proactive steps to avoid conflicts of interest, and about the procedures that courts use to determine objections on disqualification grounds.

- **Prudent recusal practices can be sensitive to public views:** Some practices that the legal profession accepts (or that exist in particular jurisdictions or specialised areas of law) may be unfamiliar to the general public and give rise to understandable concerns about conflicts of interest. Regular review of prudent recusal practices in difficult areas through the *Guide to Judicial Conduct* can ensure that a range of considerations are taken into account, including changing community views.

- **Self-disqualification procedures require reform:** Existing self-disqualification procedures can ask too much of judges, do not inspire confidence for litigants, and are seen by many as having a chilling effect on well-founded objections. But reform in this area must be sensitive to many different considerations, and incremental reform is appropriate.

- **Courts and the public need an accessible complaints body:** An independent and accessible body is required to consider litigant complaints, to protect the integrity of the courts as institutions, and to assist courts to proactively identify and address the issues raised.

- **Institutional biases must also be addressed:** Social and cultural factors can impact the way cases are decided, even when judges conscientiously strive to be impartial. The existing substantive law on bias is appropriate in this area, but should be complemented by personal and institutional strategies that recognise the impact of these factors.

- **Appointment processes matter:** Processes of appointment should uphold the appearance of impartiality, and should target a diverse pool of candidates with the right skills and attributes to maintain confidence in judicial impartiality.

- **Judges need support:** Support should include appropriate resourcing, physical and mental health services, professional development, and training to address challenges to impartiality.

- **Courts and judges need to understand user experiences:** The experiences of those who use the court are important. Understanding those experiences is critical to ensure that justice is not only done, but is also seen to be done.

GUIDING PRINCIPLES

1. The court as an institution has a central role in upholding judicial impartiality

2. The nature of judicial impartiality is determined by the function of courts

3. Litigants and the public both have a legitimate interest in judicial impartiality

4. The law on bias is shaped by and dependent on other institutional structures

5. Transparency, equality, integrity, and fairness are crucial complementary values

INQUIRY PROCESS

14. On 11 September 2020, the then Attorney-General (Cth), the Hon Christian Porter MP, asked the ALRC 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 or desirable. The Inquiry is set against the background of the importance of maintaining public confidence in the administration of justice for all Australians, the importance of ensuring that justice is both done and seen to be done, and the fundamental principles of procedural fairness, including that decision makers must be independent and impartial.

15. The scope of the Inquiry is limited to the Commonwealth courts. There are currently three Commonwealth courts: the High Court, the Federal Court, and the FCFCOA. The FCFCOA was established on 1 September 2021, and effectively replaced both the Family Court of Australia and the Federal Circuit Court of Australia.

16. The Inquiry was prompted by the decision of a Full Court of the Family Court of Australia delivered on 10 July 2020 in *Charisteas v Charisteas*.[6] Subsequent to the ALRC being asked to consider these issues, on 12 February 2021, the High Court granted special leave to appeal.[7] It was therefore anticipated that the High Court would consider and pronounce upon the existing law relating to apprehended bias. For that reason, the Attorney-General (Cth), Senator the Hon Michaelia Cash, extended the ALRC's original reporting date of 30 September 2021 to a date not later than two months after the High Court delivered judgment in *Charisteas v Charisteas.*

17. The High Court delivered judgment on the appeal on 6 October 2021.[8] The decision of the High Court has elucidated several of the issues with which this Inquiry has been concerned, but not all.

18. The High Court's consideration of issues relating to apprehended bias occurred in close proximity to a number of important, and sometimes high-profile, judgments of the Full Court of the Family Court and the Full Court of the Federal Court in relation to the law on bias. These have included recent judgments overturning decisions of courts below on the grounds of apprehended bias related to:

- judicial conduct in court;
- balancing efficiency in litigation with exposure to potentially prejudicial information in related proceedings; and
- negative findings of credibility of a party on a preliminary issue in a case.

6 *Charisteas v Charisteas* (2020) 60 Fam LR 483.
7 *Charisteas v Charisteas* [2021] HCATrans 28.
8 *Charisteas v Charisteas* (2021) 393 ALR 389.

Charisteas v Charisteas involved a protracted family law dispute, initially filed in 2006, which had resulted in thirteen substantive judgments prior to reaching a Full Court of the Family Court in March 2019.

The matter was docketed to Walters J in March 2016 for the hearing of the trial, which occurred between 3 August 2016 and 17 August 2016, with a subsequent final hearing on 13 September 2016. Justice Walters delivered judgment on 12 February 2018. His Honour retired three days later.

On 8 May 2018, after delivery of the judgment, the solicitors for the husband wrote to the wife's counsel to the effect that they had been informed through gossip that she and the judge had 'engaged outside of court in a manner that was inconsistent with [her] obligations and those of the Judge'.

The letter sought the counsel's assurance that 'during the time [the Judge] was seised of the *Charisteas* matter, you had no contact with him outside court. If you cannot provide this assurance, then we ask that you outline the circumstances of your dealings with him.'

The wife's counsel replied in a letter of 22 May 2018, which said, relevantly:

…

2. I do not have records prior to 20 June 2016. I have attempted to recover the records but am advised that this is not possible. I rely on my memory of circumstances prior to that date.

3. My contact with [the Judge] from 22 March 2016 is as follows:

   (a) Personal contact for a drink or coffee on approximately four occasions, between 22 March 2016 and 12 February 2018;

   (b) Telephone contact on five occasions between January 2017 and August 2017;

   (c) Exchange of text messages from June 2016 to February 2018:

      (i) 20 June 2016 to 15 September 2017 — numerous;

      (ii) no communication 2 August 2016 to 19 August 2016;

      (iii) 15 September 2017 to 12 February 2018 — occasional.

4. The communications did not concern the substance of the *Charisteas* case.

The husband sought a retrial on the basis of a reasonable apprehension of bias on the part of the judge.

The majority of the Full Court of the Family Court dismissed the appeal on that ground.

On 6 October 2021, the High Court unanimously allowed the appeal and ordered a retrial.

The High Court held that while the fair-minded lay observer 'is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice'.[9] Ordinary judicial practice is that 'save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party'.[10]

19. On 30 April 2021, the ALRC released a Consultation Paper containing 25 reform proposals and questions. In response to the Consultation Paper, 49 formal submissions were received. In addition, the ALRC heard from 46 individuals through informal confidential submissions. These confidential submissions tended to focus on people's experiences before judges in the Commonwealth courts. The ALRC spoke with over 180 individuals and organisations through confidential consultations from February to November 2021. Consultations were held in Brisbane, Sydney, Melbourne, Adelaide, Hobart, and Darwin, and online with stakeholders in Western Australia and the Australian Capital Territory.

20. In addition, the ALRC held two public webinar/seminars. On 2 March 2021, the ALRC, in conjunction with the Australian Academy of Law, hosted a seminar examining issues of public confidence, apprehended bias, and the modern federal judiciary. The panel comprised the Hon Alan Robertson SC, the Hon Justice SC Derrington, Tony McAvoy SC, the Hon Justice M Lee, His Honour Judge M Myers AM, Professor Gabrielle Appleby, and Chris Merritt. The seminar format provided the opportunity for questions relevant to the Inquiry to be discussed. On 19 July 2021, the ALRC co-hosted a webinar with Wolters Kluwer to explore different viewpoints on judicial impartiality. The panel comprised: the Hon Justice JE Middleton, the Hon Chief Justice W Alstergren, Minal Vohra SC, George Selvanera, and Professor Matthew Groves.

9 Ibid [12], quoting *Johnson v Johnson* (2000) 201 CLR 488 [13].
10 Ibid [13], quoting *R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127.

Empirical Research

21. In addition to the ALRC's usual research, submission, and consultation processes, the ALRC sought to better understand issues relating to judicial impartiality and public confidence in it through original empirical research by:

- including questions in the 2020 Australian Survey of Social Attitudes ('AuSSA');[11]
- conducting surveys of:
  - Commonwealth judges ('ALRC Survey of Judges');
  - legal professionals ('ALRC Survey of Lawyers'); and
  - people who have attended an Australian court in the past 10 years for a non-criminal matter ('ALRC Survey of Court Users'); and
- undertaking a review of Commonwealth court decisions ('ALRC Case Review').

22. The primary objective of the ALRC's survey research was to better understand the views of principal stakeholders — namely the public, the judiciary, and the legal profession — as well as to gain insight into the issues that support or undermine public confidence in the administration of justice.[12] The ALRC has also developed a better understanding of how the law and procedures relating to bias work in practice through the ALRC Case Review. The ALRC Case Review covered judgments of the Commonwealth courts between 1 January 2015 and 31 August 2021. This involved a systematic review of published judgments referring to issues of judicial disqualification. The search identified 745 relevant judgments dealing with recusals, requests for recusal or disqualification, appeals of decisions on disqualification, and other appeals on bias grounds.

11 AuSSA is Australian Consortium for Social and Political Research Incorporated. See further 'What Is ACSPRI?' <www.acspri.org.au/about>. See Nicola McNeil et al, 'Australian Survey of Social Attitudes, 2020' <www.dx.doi.org/10.26193/C86EZG> (ADA Dataverse V1, 2021).

12 The methodological limitations of the empirical surveys are set out in Appendix F of the Final Report. These include, for example, that the ALRC Survey of Lawyers was self-selecting and not representative of the population of Australian lawyers as a whole.

Public confidence in the administration of justice

- AuSSA results reveal that, compared with other institutions, the courts have a high level of public trust. The average score for trust in courts was the second highest recorded in the survey. Courts scored lower than university research centres, but higher than business and industry, the Federal Parliament, and the news media.
- AuSSA participants on average expressed a moderate level of confidence in the ability of judges to be fair in deciding cases. This was lower than the average level of confidence regarding fairness that participants in the ALRC Survey of Court Users expressed in relation to the proceedings they attended.
- When asked to rate the importance of a list of skills and qualities in judges, AuSSA participants assigned the greatest importance to the ability of judges to be impartial or not biased.[13]
- The ALRC Survey of Court Users revealed that court users had more confidence in the fairness of the particular proceedings they had attended, than they had confidence in Australia's courts and the legal system broadly.

Adequacy of existing law and procedures

- A large proportion of respondents to the ALRC Survey of Lawyers and ALRC Survey of Judges indicated that they found the test for bias generally straightforward to understand.
- Nevertheless, the vast majority of lawyers and a majority of judges agreed there would be benefit in guidance setting out particular circumstances that will always or almost always give rise to apprehended bias.
- Almost three-quarters of lawyers and a majority of judges agreed there would be benefit in guidance setting out particular circumstances that will never or almost never give rise to apprehended bias.
- Lawyers and judges who responded to the ALRC surveys expressed very different views about the effect of the existing procedures for self-disqualification.
- Significantly fewer lawyers than judges indicated that existing procedures encourage appropriate use of bias claims. (Almost a quarter of lawyers, compared with more than four-fifths of judges.)
- Significantly more lawyers than judges indicated that existing procedures encourage underuse of bias claims. (Almost three-quarters of lawyers, but only one in twenty judges.)

13 Legal knowledge was also rated at the same average level of importance.

Views on reform

- Participants in the ALRC Survey of Lawyers were asked to rank the importance of a list of five possible changes or reforms in the Commonwealth courts to maintain public confidence in judicial impartiality. Overall, participants indicated that they thought more effective complaints procedures concerning judges was the most important reform, followed by increased diversity of background among judges. Reform to the law on bias was rated as least important overall.
- Lawyers responding to the ALRC Survey of Lawyers were more supportive of procedural reform than judges responding to the ALRC Survey of Judges.
- For cases heard by a single judge, significantly more lawyers than judges indicated that there are circumstances in which it would be preferable for an application for disqualification to be decided by another judge (for example, a duty judge). (More than four-fifths of lawyers, but only just over a quarter of judges.)
- For cases heard by a court sitting as a panel, significantly more lawyers than judges considered that there are circumstances in which it would be preferable for the full bench (rather than only the challenged judge) to decide applications for disqualification. (Four-fifths of lawyers, but only just over a fifth of judges.)
- There was majority support from respondents to each of the ALRC Survey of Lawyers and the ALRC Survey of Judges for more specific written guidance on the procedural and substantive dimensions of the law on bias.

Judicial impartiality

23. Impartiality, and the appearance of impartiality, have been called the 'supreme judicial virtues'[14] — 'the fundamental quality required of a judge and the core attribute of the judiciary'.[15] Their fundamental importance is underlined in the judicial oath, by which judges swear to 'do right to all manner of people according to law without fear or favour, affection or ill will'.[16]

24. Because judicial impartiality serves purposes related to upholding the legitimacy and authority of the courts and recognises the dignity of those who come before them, appearances are crucial.

25. While judicial impartiality is usually defined in terms of something that it is *not* — such as an absence of bias or prejudice[17] — others explain it as a goal, aspiration, and a process performed by listening to both sides, such that impartiality is something that judges *do*.[18] In the context of judicial decision-making, impartiality is defined by reference to the purpose and nature of the judicial function. A threat to impartiality is anything that improperly and unacceptably influences a judicial decision.

26. Legal systems, including the Australian legal system, respond to potential threats to judicial impartiality — and the threat they pose to institutional legitimacy and authority — in a number of ways. These include ethical, legal, procedural, and institutional structures and practices that promote and protect judicial impartiality and the appearance of judicial impartiality. As the Hon Chief M Justice Gleeson AC has observed, judges'

> capacity to honour that obligation does not rest only upon their individual consciences. It is supported by institutional arrangements. Citizens are not required to have blind faith in the personal integrity of judges; and judges are not required to struggle individually to maintain their impartiality. The Constitution, written or unwritten, of a society provides for the means of securing the independence and impartiality of judges.[19]

27. This reliance on multiple reinforcing mechanisms is critical to understanding the responsive and flexible manner in which the legal system responds to concerns about judicial impartiality. These laws, practices, and structures are summarised in **Figure 1** below.

14 The Hon Sir Gerard Brennan AC KBE, 'Why Be a Judge' (1996) 14 *Australian Bar Review* 89, 91, citing Lord Patrick Devlin, *The Judge* (Oxford University Press, 1979) 4.

15 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) 43.

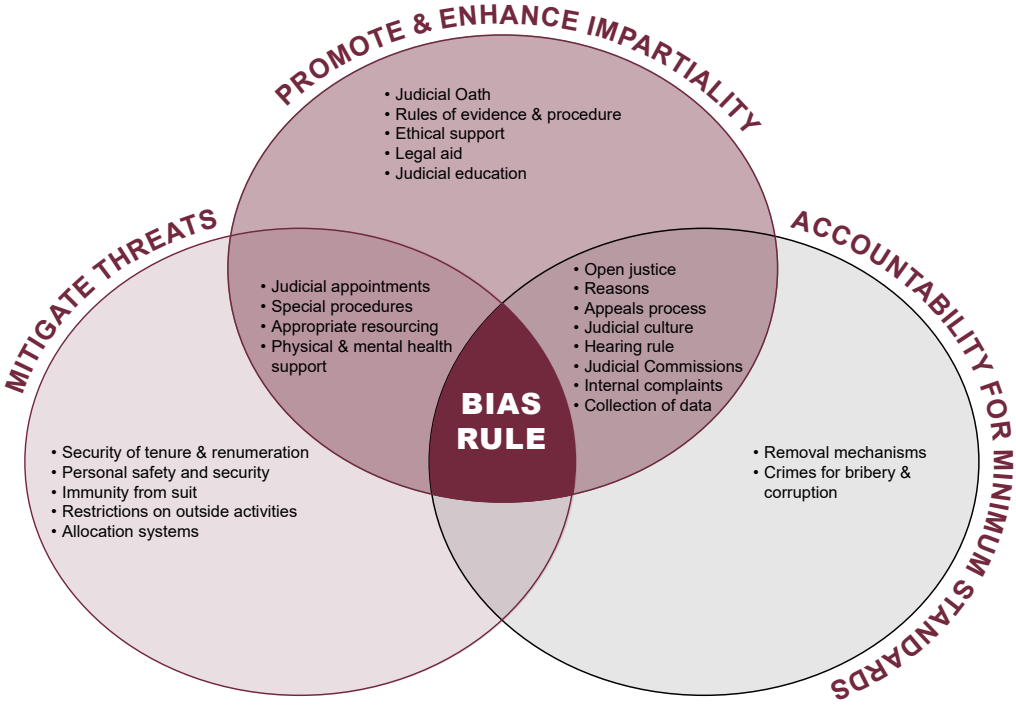
16 The Hon Chief Justice M Gleeson AC, 'The Right to an Independent Judiciary' (Speech, 14th Commonwealth Law Conference, London, September 2005). See further Australasian Institute of Judicial Administration (n 3) 1.

17 United Nations Office on Drugs and Crime (n 15) 44.

18 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 68.

19 Chief Justice M Gleeson (n 16), cited in Australian Judicial Officers Association, *Submission 31*.

Figure 1: Structures and practices contributing to judicial impartiality



28. The bias rule is found at the centre of this complex web of laws, procedures, practices, and structures — promoting impartiality in a positive sense, insulating judges from threats to impartiality, and acting as a mechanism for accountability (and correction) when objective minimum standards are not met. The bias rule provides a discrete, active mechanism for addressing issues of impartiality in individual cases. Nonetheless, it is informed by, and relies on, the other structural and cultural guarantees of impartiality shown in Figure 1.

The law on actual and apprehended bias

29. Judicial impartiality, and the appearance of it, are safeguarded most obviously through the operation of the bias rule — one of the two pillars of natural justice.[20] The law on apprehended bias provides a mechanism by which, if there is a reasonable apprehension that a decision maker might not be impartial, that decision maker will be disqualified from hearing and deciding the matter. The law is concerned 'as much to preserve the public appearance of independence and impartiality as it is to preserve the actuality'.[21]

30. In Australia, the law on bias is predominantly found in common law. Two different types of bias may be alleged — actual or apprehended — reflecting the imperative that justice must both be done, and be seen to be done.[22] Actual bias relates to what is actually going on in the judge's mind. Apprehended bias relates instead to the perceptions of others, and considers the matter from the perspective of how it may *appear*.

Actual bias

31. A claim that a judge is actually biased requires proof of

> a pre-existing state of mind which disables the decision-maker from undertaking or renders [him or her] unwilling to undertake any or any proper evaluation of the materials before him or her which are relevant to the decision to be made.[23]

32. This is a subjective test. It requires 'cogent evidence that the decision-maker was in fact biased', even if unconsciously, and actual bias is for that reason difficult to prove.[24] A claim of actual bias is considered a 'grave matter', because it calls into question the integrity of the decision maker.[25] A finding of actual bias may therefore 'undermine the very institutional integrity it is intended to foster'.[26] Courts are 'naturally reluctant' to make findings of actual bias, and are more willing to uphold a claim of apprehended bias.[27]

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20 The other being the fair hearing rule: Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2016) 643.

21 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [27], citing *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [18] (Kiefel CJ and Gageler J).

22 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

23 *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104 (French J), cited with approval in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [35] (Gleeson CJ and Gummow J).

24 Aronson, Groves and Weeks (n 20) 653.

25 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 127 (Burchett J).

26 Aronson, Groves and Weeks (n 20) 13.

27 Ibid 653.

The legal test for apprehended bias

33. The test for apprehended bias is an objective one. A judge will be disqualified from hearing a case for apprehended bias

> if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[28]

34. The focus on the reaction of a fictional member of the public, rather than the court's own view of the situation, was a deliberate choice justified as best aligned with maintaining public confidence in judges and the legal system.[29] This means that where the risk, or appearance, of prejudice, partiality, or prejudgment influencing the judge is sufficiently specific and intense so as to concern the hypothetical fair-minded lay observer, the risk to public confidence will be considered unacceptable, and the judge should be disqualified.

35. Justice Kirby described the fair-minded lay observer's qualities as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[30]

28 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring); *Charisteas v Charisteas* (2021) 393 ALR 389 [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

29 *Webb v The Queen* (1994) 181 CLR 41, 51. See further Ibid [21].

30 *Johnson v Johnson* (2000) 201 CLR 488 [53].

36. A key feature of the test is that it is concerned with whether the fair-minded lay observer *might* reasonably think that the judge *might* be biased.[31] This is a question of 'possibility (real and not remote), not probability'.[32] This has come to be known as the 'double-might' test. In light of the principle that judges do not choose their cases, and litigants do not choose their judges, the courts frequently stress that a finding of apprehended bias must be 'firmly established'.[33] Despite this, 'in a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view'.[34] What prudence dictates may depend very much on the circumstances, including factors such as

> the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted.[35]

37. In *Ebner v Official Trustee*, the High Court held that two steps are involved in applying the test for apprehended bias.[36] As recently summarised by the High Court:

> first, 'it requires the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits'; and, second, there must be articulated a 'logical connection' between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.[37]

38. The authority of this test has been described as 'not in doubt'.[38] However, its application to particular facts can be 'far from clear'.[39] Application of the bias rule is 'acutely context sensitive', and there may often be 'limited value to be gained from the facts of other cases'.[40]

31 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
32 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).
33 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [28] and citations therein. See further Aronson, Groves and Weeks (n 20) 654.
34 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).
35 Ibid [21] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
36 Ibid [8].
37 *Charisteas v Charisteas* (2021) 393 ALR 389 [11].
38 See, eg, *Antoun v The Queen* (2006) 80 ALJR 497 [82] (Callinan J).
39 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [17] (Finklestein J).
40 Aronson, Groves and Weeks (n 20) 656.

39. In *Webb v The Queen*, Deane J identified four main, sometimes overlapping, categories of case in which a reasonable apprehension of bias may arise.[41] This categorisation has been acknowledged as 'a convenient frame of reference' for determining whether an apprehension of bias might arise,[42] although it is not without its own difficulties. The categories are:

- **Interest** — when a judge has an interest, whether direct or indirect, and whether pecuniary or otherwise, in the outcome of a decision.
- **Conduct** — when something a judge has previously done, or a decision the judge has previously made, is said to give rise to an unacceptable risk of prejudgment. Alternatively, when a judge does or says something during the course of proceedings that might indicate prejudice, partiality, or prejudgment. In either situation the law requires judges to have an 'open mind', not an 'empty one'.[43]
- **Association** — when a judge has a relationship with a family member, personal friend, counsel, witness, or organisation that may suggest a lack of impartiality.
- **Extraneous information** — when a judge has knowledge of some prejudicial but inadmissible fact or circumstance that prevents the judge from bringing an impartial mind to the decision.

40. In each of these cases, the reasonableness of the apprehension of bias will be judged 'in the context of ordinary judicial practice'.[44] In *Charisteas v Charisteas*, for example, the High Court indicated what it considered to be 'the most basic of judicial practice' in relation to contact between a judge and counsel during litigation, including by reference to the *Guide to Judicial Conduct*, and suggested that the communications 'should not have taken place'.[45]

41 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
42 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [24].
43 Aronson, Groves and Weeks (n 20) 645.
44 *Charisteas v Charisteas* (2021) 393 ALR 389 [12], quoting *Johnson v Johnson* (2000) 201 CLR 488 [13].
45 Ibid [13]–[14], [16], [19], [22].

Addressing social and cultural bias

41. Examining these four categories of apprehended bias raises questions as to the ways in which the bias rule is able to respond to the potential for social and cultural factors to improperly impact on judicial decision-making. Expressed discriminatory statements, or reliance by a judge on a consciously held and explicitly expressed stereotype about a particular social group might indicate prejudice or prejudgment and give rise to an apprehension of bias.[46] On the other hand, suggestions that a judge *is likely to be biased* because of particular social characteristics such as her or his gender, religion, or ethnicity, and that the judge should therefore be disqualified, have not been upheld in Australia, nor in comparable jurisdictions.[47]

42. Given the nature of the judicial function, the need for judges to be in touch with their communities, and the impossibility of any person seeing things from an entirely neutral perspective, the scope of the law on apprehended bias is appropriate, and in line with research on public expectations. Nevertheless, Chapter 11 of the Final Report explores how social and cultural factors inevitably influence judicial decision-making and the ways in which these factors can influence outcomes at an institutional level. When the law on apprehended bias cannot appropriately guard against an unacceptable risk, at an institutional level, of improper influences on decision-making, other strategies are needed to address it. As such, public confidence in judicial impartiality at an institutional level (and the confidence of particular communities with lower levels of trust) are dependent on both individual judges, and institutional structures, continuing to recognise and respond to these concerns.

Exceptions to the bias rule

43. At least two exceptions may preclude the application of the bias rule in a particular case. First, a party allegedly injured by bias (or their agent) may waive the party's right to object where such waiver is 'fully informed and clear'.[48] The second exception to the bias rule is the doctrine of necessity. Although the parameters of this exception remain somewhat unclear, it is generally considered to apply to prevent a failure of justice where there is no alternative decision maker who can sit.[49]

46 See, eg, *B v DPP (NSW)* [2014] NSWCA 232.
47 Aronson, Groves and Weeks (n 20), citing *Paramasivam v Juraszek* [2002] FCAFC 141 [8]; *Lindon v Kerr* (1995) 57 FCR 284; *Bird v Free* (1994) 126 ALR 475.
48 Matthew Groves, 'Waiver of Natural Justice' (2019) 40 *Adelaide Law Review* 25, 651.
49 Aronson, Groves and Weeks (n 20) 723.

ANALYSIS

Summary of key recommendations

44. This section provides a brief overview of the context and analysis underpinning key recommendations in the Final Report.

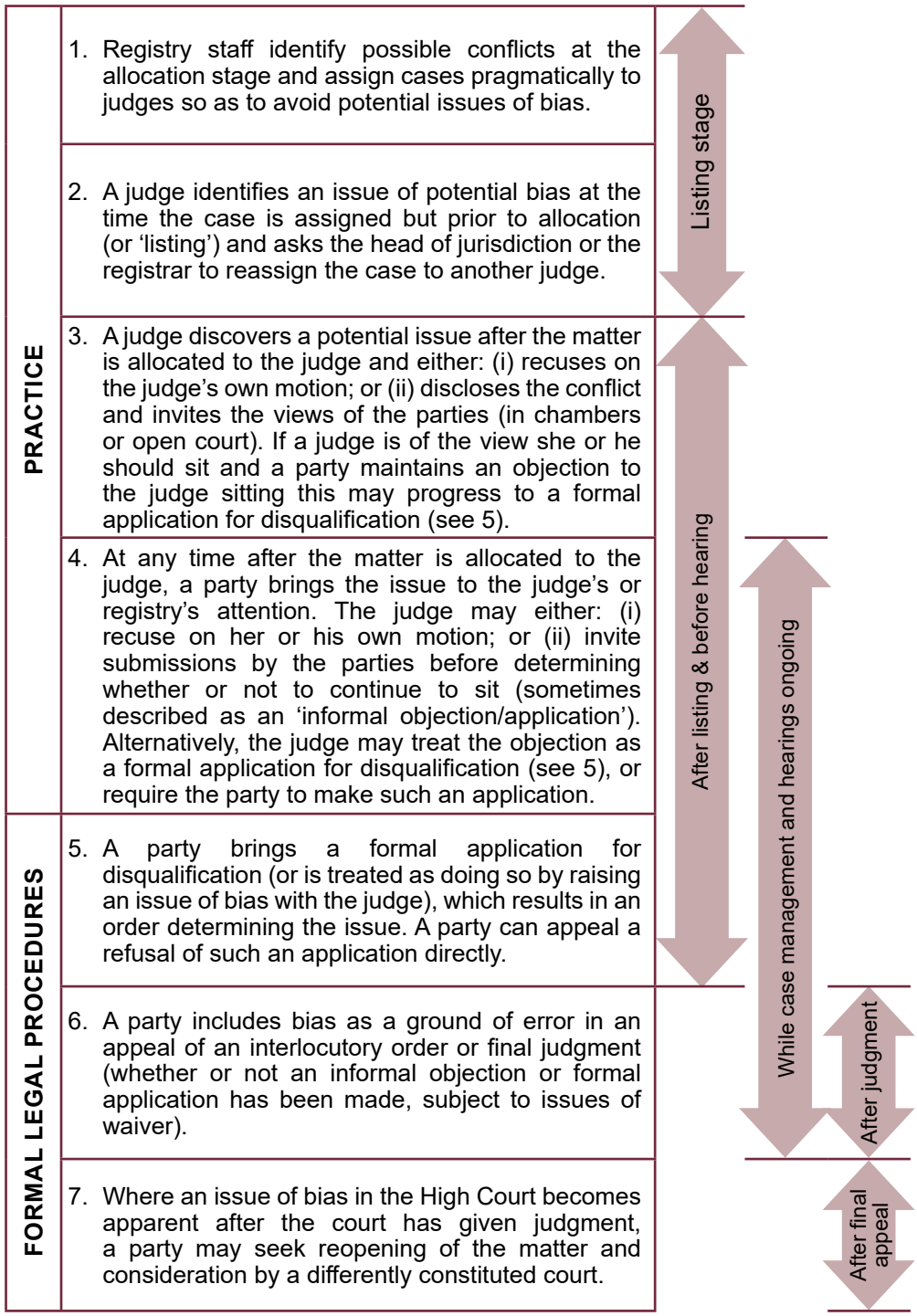
Procedures for upholding the bias rule

45. The Final Report includes four chapters that consider the processes by which the Commonwealth courts manage and address issues of potential judicial bias. Chapters 6, 7, and 8 consider the usual litigation processes to deal with the potential for bias in a case from the time of filing to finalisation of any appeal, making a suite of recommendations to increase transparency and confidence in judicial impartiality. Chapter 9 considers other mechanisms (outside the litigation process) by which issues of bias relating to judicial conduct may be raised.

Identifying and raising issues of bias

46. **Figure 2** provides an overview of different processes used to identify and respond to potential issues of bias at different stages of litigation in the Commonwealth courts.

Figure 2: How is the issue of potential bias dealt with by courts?



47. Chapter 6 examines the processes used by courts and judges to identify and disclose issues of potential bias, and the processes used by parties to raise issues of potential bias. It covers issues prior to allocation of the case to a particular judge, such as pragmatic allocation processes adopted by the registry, and screening for conflicts by judges prior to allocation. It also sets out what might happen if an issue of bias arises after a matter is allocated to a judge, including: disclosure by the judge or notification of the issue by the parties; hearing the views of the parties; and, in some cases, recusal by the judge on her or his own motion. In the first instance, the practices around screening, allocation, and disclosure serve an important function in minimising instances of potential bias concerns arising later in the proceedings. These preventive measures have the benefit of being cost and resource efficient. When concerns are addressed effectively, these practices can reduce the potential negative impact on public and litigant confidence in the courts and the legal system.

48. Processes for judges recusing themselves on their own motion, and for parties raising issues concerning actual and apprehended bias, were traditionally informal and governed by convention. The processes built on the common law's strong assumption of judicial impartiality, which historically relied on procedural safeguards such as parliamentary removal and appeal mechanisms to protect against any bias that might arise.[50] Over the past 50 years, there has been increased use of formal applications for disqualification and acceptance that it is possible to directly appeal a judge's decision to continue to sit.

49. The significant changes in practice, and the law that shapes it, have resulted in a mix of conventional practices and formal processes in relation to the issue of disqualification that are not always obvious to parties or consistent between judges, between registries, or across courts.

50. **Recommendation 1** is that the processes for addressing issues of judicial bias be explained in a single document produced by each court. This should include processes established by practice or convention, and procedures conducted as part of formal legal processes. This document should take the form of judicial disqualification guidelines, modelled on similar documents published by the courts in New Zealand. The ALRC encourages the courts to consult widely in drafting the judicial disqualification guidelines.

50 Geyh (n 4) 678–9.

51. These guidelines are a new type of document in the Australian context. They are neither a Practice Note or Direction, nor a general public guidance document covering each court's internal practices, accepted conventions, and formal legal processes. The recommended judicial disqualification guidelines would be directed to judges and would be expressly for guidance only, similar to the *Guide to Judicial Conduct*.[51] The judicial disqualification guidelines should address, where appropriate for each court:

- administrative processes to avoid conflicts at the allocation stage (such as circulating lists of matters allocated, and conflict checks for new judges);
- relevant legal principles in summary form (and, especially for lower courts, guidance on circumstances that may and may not raise genuine issues);
- informal and formal procedures for raising and determining issues in advance of a hearing;
- procedures for raising and determining issues during a hearing;
- procedures for review and appeal;
- evidential issues; and
- waiver.

52. **Recommendation 1** recognises the central role of courts as institutions in upholding judicial impartiality, by providing impetus for courts to clarify and set out their processes in this regard, and to keep those processes under review. It allows courts to communicate the limits of the bias rule, as expressed in case law, and allows practical and resourcing issues to be addressed on a court-by-court basis as appropriate. **Recommendation 1** highlights the legitimate interest that both litigants and the public have in ensuring judicial impartiality, because its implementation would give prominence to a key document of the court that recognises this interest. Published guidelines would provide greater transparency in relation to some of the institutional structures in place, such as allocation procedures and screening, which safeguard impartiality, and would address the inequality that may arise due to a lack of knowledge about the law and procedures, particularly affecting self-represented litigants.

51 Recusal Guidelines in New Zealand are not expressly for guidance only and have been raised in litigation. See, eg, *Craig v Williams* [2019] NZSC 60 [6]–[12]. However, the Court there found that 'non-compliance with the Guidelines does not necessarily comprise apparent bias': Ibid [12].

Reform of the self-disqualification procedure

53. Chapter 7 considers how formal applications for disqualification are determined in the FCFCOA and the Federal Court. The question of whether or not a judge is disqualified from hearing a matter has traditionally been treated as one for the challenged judge to determine, subject to appellate review. This is the case whether the judge is sitting alone or with other judges to hear a case. Chapter 7 considers criticisms of the self-disqualification procedure and perceptions within the legal profession that the procedure contributes to the underuse of bias applications in circumstances in which an application would be warranted.

54. In relation to single judge cases, **Recommendation 2** is that the Federal Court and the FCFCOA introduce a new procedure by which judges have the discretion to transfer applications for disqualification to a different judge of the same court.

55. **Recommendation 2** is designed to address three primary concerns raised by stakeholders, and those reflected in the academic literature, namely that:

- the existing self-disqualification procedure is not conducive to either positive litigant or public perceptions of procedural fairness, and therefore detracts from public confidence in the administration of justice;
- the existing procedure has a chilling effect on parties bringing disqualification applications; and
- any change to the existing procedure would result in significant cost and delay for litigants.

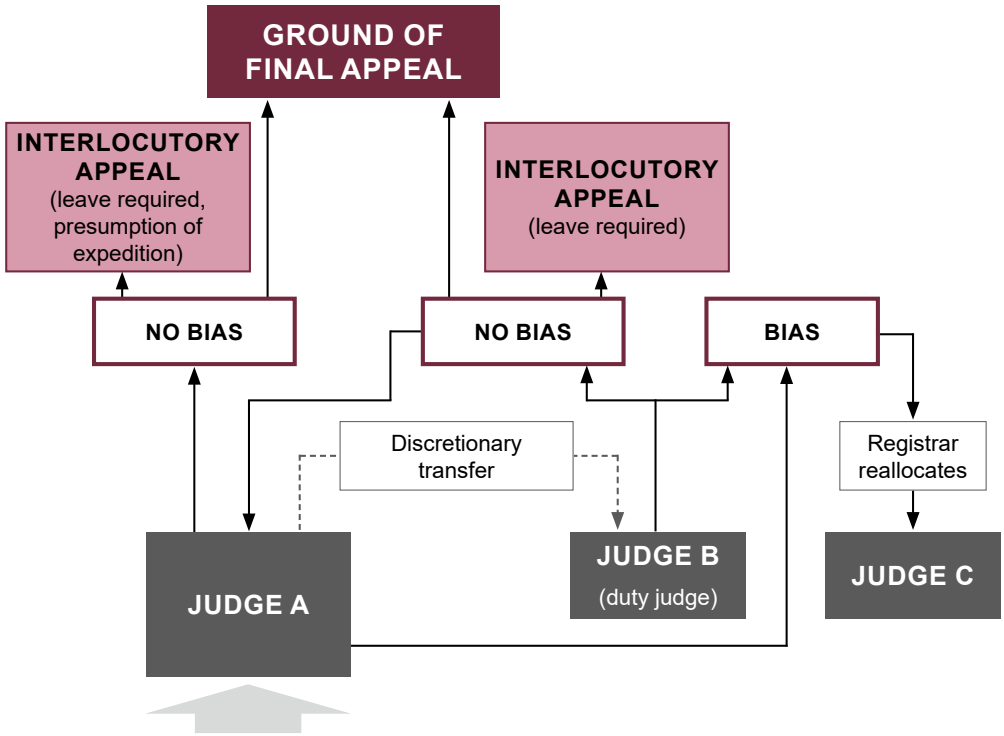
56. By involving the presiding judge in the decision on disqualification in the first instance, the procedure conveys to the public that the legal system has confidence in judges' ability to act impartially — even in the face of a claim that they might not appear to be (or are not) impartial. The recommended discretionary transfer is an important incremental reform that recognises that it is the court as a whole that has responsibility for ensuring that impartiality is upheld. The issue of actual or apprehended bias is not a question of judicial ethics to be determined by the judge alone, but a question of whether the court 'is constituted in accordance with the provisions of the law governing the judicial process, the exercise of judicial power and natural justice'.[52]

52 The Hon Sir Anthony Mason AC KBE CBE QC, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 *Constitutional Law and Policy Review* 21, 26. Sir Anthony Mason made this comment in the context of multimember panels.

57. The recommended procedures also balance concerns about potential negative impacts of more prescriptive transfer processes in terms of cost and delay. The recommendations recognise that in some instances the self-disqualification procedure offers an efficient and cost-effective means of achieving a just result. The procedure allows the judge to resist tactical use of the procedure by exercising discretion not to transfer an application. To balance the discretionary nature of the transfer procedure in **Recommendation 2**, the ALRC also recommends a streamlined interlocutory appeal procedure for disqualification decisions (**Recommendation 4**) (see below).

58. **Figure 3** below depicts how bias claims would be dealt with by judges if **Recommendation 2** were implemented.

Figure 3: Single judge procedure



59. **Recommendation 3** provides for the adoption of a new procedure for multimember courts. Specifically, the guidelines on disqualification (**Recommendation 1**) should provide for processes by which objections to one or more judges on a multimember panel are determined by the court as constituted. In addition, where necessary, the Federal Court and the FCFCOA should each amend their rules of court to provide that, where the court is constituted by more than one judge, applications for disqualification of one or more judges sitting on the case are to be determined by all the judges on the panel.

60. In appellate cases it is particularly appropriate that the resolution of any potential bias concerns happens prior to the hearing and without the need for a formal application for disqualification. Matters are allocated in advance, and parties and judges should ordinarily be aware of any circumstances that may give rise to an apprehension of bias. The disqualification guidelines therefore should provide efficient processes by which early resolution of the issue, prior to any hearing, is encouraged and facilitated. The guidelines for disqualification of appellate courts in New Zealand provide examples of how this might be achieved.

61. Given that it is the panel that has jurisdiction in the matter, there is a compelling argument that the question of bias should fall on the court as a whole to determine. The ALRC foresees that involving all of the judges on the panel in the decision would help to frame the issue as a question of law, rather than of individual ethics. Retaining the involvement of the challenged judge — in their capacity as a member of the panel — helps to convey confidence in the judge's ability to determine issues impartially, as required by the oath of office. This is consistent with the rationale for recommending retaining a role for the challenged judge in single judge cases.

Streamlined appeals

62. Chapter 8 focuses on the operation of review and appeal procedures in circumstances where a party has made an application for a judge to disqualify themselves during the proceedings and the application has been rejected (hereafter called a 'disqualification decision'), although it also touches on aspects of procedure relevant to appeals on bias grounds more generally.

63. Disqualification decisions may be challenged by appeal or judicial review, at an interlocutory stage (before final judgment has been delivered), or (subject to principles of waiver) in an appeal of the final judgment. In general, appeals of decisions made at an interlocutory stage are considered undesirable because they fragment proceedings, and are therefore almost invariably subject to a requirement for leave. However, there are particular reasons to favour such appeals in relation to disqualification decisions. If a judge decides to sit and proceeds with a hearing, in circumstance where an appeal court finds that the judge should have disqualified herself or himself, the whole of the matter will likely need to be reheard by a different judge. This can involve a significant waste of litigant and court resources as the case will essentially have to be run again. The ability to challenge the decision at an interlocutory stage is also important in light of feedback from some litigants that, following long-running litigation, they either felt pressured into accepting an unfair settlement because of concerns about judicial bias, or did not have the emotional or financial resources to pursue an appeal of any final judgment.

64. Despite this, the current procedures for interlocutory appeal of disqualification decisions have been the subject of significant uncertainty and inconsistency, tied to the uncertainty that existed as to how such issues should be raised with the judge (see above). Stakeholders have described how the prospect of long delays and substantial costs associated with appeals of disqualification decisions can dissuade parties from raising issues of bias at all.

65. **Recommendation 4** is that a streamlined interlocutory appeals procedure should be introduced in relation to disqualification decisions. The streamlined procedure would be formalised in a Practice Note (Federal Court) or Practice Direction (FCFCOA). **Recommendation 4** relies on the existing statutory framework for interlocutory appeals, but would serve to provide particular guidance on expedition, evidentiary issues, and costs, and could facilitate applications for leave to appeal being determined on the papers, or outline mechanisms by which that can be done.

66. **Recommendation 4** is a necessary complement to **Recommendation 2** — the discretionary transfer procedure. The Practice Note or Practice Direction of each court implementing **Recommendation 4** should apply to interlocutory appeals from all disqualification decisions, whether made by the challenged judge or by a transfer judge. When an application for leave to appeal concerns a disqualification decision made by the challenged judge, the application should be automatically considered for expedition and allocation to the duty judge, without requiring parties to request this specifically.

67. Greater transparency, including a formal procedure for interlocutory appeals, raises the prospect of unintended impacts, including tactical use of the procedure by litigants, and increased costs and delay. In an already overstretched court system these are serious concerns. However, potential costs and delay may be mitigated by the establishment of clear procedures, by expedition of appeals in appropriate cases, and by encouraging hearing of such applications on the papers. Requiring leave for such an appeal would seek to ensure appeals are only heard when they will not unnecessarily fragment proceedings, and would give the courts control over tactical use of court processes. Tactical use of the procedure could also be guarded against by the power to make costs orders, and — where necessary — the power to make vexatious litigant orders.

Other mechanisms for raising allegations of bias

68. Chapter 9 is the fourth and final chapter that considers the current mechanisms for raising allegations of actual or apprehended bias, and determining those allegations. It considers mechanisms for raising and determining issues of bias outside the context of litigation. In particular, it focusses on the role of complaints mechanisms.

69. Complaints mechanisms cannot deal with legal error, such as whether or not something amounted to actual or apprehended bias in a particular case. They would not, therefore, be likely to apply to issues of bias related to exposure to extraneous information. However, other circumstances that may give rise to legal error through apprehended bias (such as an undisclosed association with a party, or conduct in court displaying prejudice or animosity against a party), might also raise issues of conduct or capacity that may be considered under a complaints procedure.

70. Litigants and lawyers suggested to the ALRC that there were some serious, if isolated, issues in relation to poor judicial behaviour in court giving rise to perceptions of bias that they did not see were being adequately addressed. Where a perception of bias involves an allegation that a judge has fallen short of expected standards of conduct, this may engage concerns about the integrity and impartiality of the institution and the administration of justice as a whole. A perceived institutional inability to deal with perceptions of bias in some cases is very damaging to the confidence of litigants and lawyers.

71. **Recommendation 5** is that the Australian Government should establish a federal judicial commission, as part of the overall institutional architecture complementing the bias rule, and supporting judicial impartiality and public confidence in the administration of justice. A federal judicial commission could provide a transparent and independent mechanism to consider litigants' and lawyers' concerns about judicial behaviour or impairment, including those that might give rise to an apprehension of bias.

72. A federal judicial commission could respond to concerns about case-specific judicial conduct in a way that is substantially more accessible to litigants than appeals. This would provide an important institutional mechanism to protect both the public and the integrity of the courts. It would also provide a more transparent process than currently exists for addressing concerns that a judge's conduct has fallen below the acceptable standard, even when the conduct does not amount to actual or apprehended bias under the law. The fact that a judicial commission would be independent from the courts would, to an extent, address perceived conflicts of interest in the self-disqualification procedure, under which the judge or court the subject of a bias allegation is required to consider and respond to the allegation.

73. The establishment of such a commission would have additional advantages, such as facilitating: the identification of recurring issues that might give rise to perceptions of bias, but that do not reach the very high threshold required for removal of judges from office; and the provision of support to individual judges, or to courts, to address those issues. Finally, experience in other jurisdictions has shown that the small number of complaints ordinarily received (especially in the context of the judiciary's overall workload) can itself be seen as evidence of the high standards that judges generally maintain. In this regard, a federal judicial commission could both support judicial impartiality and protect public confidence.

74. Establishing a federal judicial commission would be a significant reform. It should therefore be subject to its own policy development process, including further broad consultation. The ALRC does not propose any particular model of judicial commission. Instead, the ALRC has considered how establishment of such a commission would assist to maintain public confidence in the administration of justice, in light of the inevitable limitations of laws and procedures relating to impartiality and bias. The Final Report sets out observations on different options that could be considered as part of the policy development process for establishing a judicial commission.

Finding clarity in law and guidance

75. Chapter 10 considers whether reform of the law is required, and whether it provides sufficient clarity to judges, lawyers, and litigants about how to manage potential conflicts of interest and perceptions of partiality. It discusses two major interrelated criticisms of the current law raised during consultations. First, that the current principled approach — without any 'bright lines' — leads to subjective and unpredictable outcomes. Second, and tied to this, that the yardstick of the 'fair-minded lay observer' is not serving its aim of ensuring the law is applied in a way that would enhance public confidence.

76. Stakeholders generally considered that the law is sufficient to uphold public confidence if interpreted realistically, matched by the right procedures, and complemented by transparent institutional supports and safeguards for judicial impartiality. Reform of the law would also raise particular constitutional difficulties. Stakeholders generally did not consider the law on bias to be the appropriate area for reform, and the ALRC agrees. Stakeholders did consider, however, that more visibility and transparency about the law was important, as was more clarity of guidance in certain areas related to prudent judicial practice. The ALRC suggests that greater clarity and transparency, and sensitivity to the different circumstances of each court, and the views of the courts' publics, can be provided in two key ways.

Enhancing transparency of law

77. The court-specific guidelines on judicial disqualification proposed in **Recommendation 1** provide the vehicle through which visibility and transparency about the existing law may be provided — at a high level — to litigants and members of the public. The guidelines should outline, in a user-friendly way, the key features of the apprehended bias test as recently restated in *Charisteas,* and include a small number of specific examples of situations where judicial practice would generally favour recusal, and aspects of ordinary judicial practice that are generally accepted in the case law not to give rise to apprehended bias on their own.

78. Chapter 10 sets out some circumstances that are regarded, in the case law, as being quite straightforward. While application of each of the examples to particular facts involves questions of judgement, the provision of concrete, grounded examples and explanations is helpful to show how the law works in practice. With transparency comes greater assurance that decisions on matters of disqualification are subject to law, not simply the subjective view of the judge — especially where the challenged judge is the one making the decision.

Clarity as to ordinary judicial practice

79. Greater clarity of ordinary judicial practice, particularly in relation to conflicts of interest, can be achieved by revision of parts of the *Guide to Judicial Conduct*. In setting out prudent practices in particularly difficult areas, the *Guide to Judicial Conduct* can be responsive to community views and encourage behaviour that it is generally agreed will limit the opportunities for perceptions of bias to arise. In this respect, the example of the Canadian judiciary in carrying out a public consultation process in developing its revised *Ethical Principles for Judges* is instructive.[53] In doing so it provides a degree of clarity about how the law on bias is likely to be applied, while leaving application of the law flexible to deal with differing circumstances and contexts.

80. The ALRC makes one recommendation in this area. **Recommendation 6** is that the Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia and its constituent bodies, review relevant rules and guidance on conduct in light of the High Court's decision in *Charisteas v Charisteas*. These reviews should aim to achieve coherence between the *Guide to Judicial Conduct* and the relevant legal profession conduct rules. This should develop agreed understandings as to the extent to which *ex parte* communications should be avoided throughout the whole period of litigation, including case management. The review of the *Guide to Judicial Conduct* should also consider whether prudent practice should require judicial disclosure of, or recusal in relation to, particularly close friendships with lawyers appearing before them.

Other areas for attention

81. Chapter 10 also considers a number of other difficult areas of application for the bias rule. It suggests that some of these issues may be the subject of accessible guidance, developed further in case law, or addressed through other institutional strategies. These include: objections on the ground of apprehended bias by way of prejudgment arising from interim rulings, and case management; poor judicial conduct in court; how the law on apprehended bias deals with disqualification claims based on statistical analysis of a judge's track record of decision-making in similar cases; and implied waiver of the right to raise apprehended bias related to a judge's conduct in the courtroom.

53 Canadian Judicial Council, 'Consultation on Ethical Principles for Judges' (Report, 2019).

Institutional supports and safeguards

82. Chapter 12 includes a suite of recommendations relating to judicial appointments, judicial education, ethical guidance, and the collection of feedback and data (**Recommendations 7**–**13**). These recommendations seek to enhance judicial impartiality at an institutional level, and to maintain the confidence of litigants, the profession, and the public. Chapter 12 also recommends the provision of further information to litigants and the public about the institutional structures that are in place to support, promote, and protect impartiality (**Recommendation 14**). These recommendations reflect the emphasis in the Terms of Reference on 'the importance of maintaining public confidence in the administration of justice for all Australians'.

83. These recommendations respond in particular to: challenges to impartiality (and the appearance of impartiality) posed by the difficult role that judges play in navigating often stressful and highly emotive court hearings; the challenges of balancing the practical operation of the legal profession with public perceptions of impartiality; and the important role that judges can play in supporting confidence in impartiality through the way they manage the courtroom. At the same time, these measures seek to ameliorate the risk of institutional biases impacting negatively on particular groups in society.

84. The recommendations in the Final Report recognise that the appropriate operation of the law on bias is shaped by, and dependent on, institutional structures. This approach emphasises the central role of the courts as an institution in upholding judicial impartiality and public confidence.

85. Ultimately, the proper operation of the bias rule and the mechanisms safeguarding it depend on the integrity of individual judges, and the nature and character of those who hold judicial office. This is because a crucial aspect of subjective impartiality — what goes on in the judge's mind — is internal to the judge. The nature and character of the judge also shape how impartiality is demonstrated to, and perceived by, litigants and the public. To a large extent, litigants and the public must trust in the impartiality of judges and courts. This is because, to enable the courts to function, both the scope of the bias rule, and the procedures to determine whether bias exists, must be limited and pragmatic. For this reason, public confidence in the integrity and capacity of the judiciary to perform its judicial role is crucial.

A transparent process for judicial appointment

86. **Recommendation 7** calls on the Australian Government to adopt a more transparent process for appointing federal judicial officers. Transparency of the appointments process is important to:

- minimise the perception that appointments are made for political or patronage reasons;
- ensure that the selection criteria for candidates include skills and attributes that are important to upholding confidence in judicial impartiality, including communication skills, emotion management skills, and cultural awareness; and
- ensure that appointments are drawn from the widest possible pool of candidates with the appropriate skills and experience, both to maximise the chances of high-quality appointments, and to enhance the diversity of both expertise and lived experience on the bench.

87. In line with the Commonwealth Latimer House Principles, the process should, at a minimum, require appointment on merit involving 'a publicly declared process' with 'clearly defined criteria' for appointment, and a commitment to actively promoting diversity in the judiciary without compromising the principle of selection on merit.[54] A range of strategies are needed to identify and address barriers to judicial appointment. However, from the perspective of judicial impartiality, more transparently impartial judicial appointments procedures that widen the pool of potential appointees, and actively promote diversity in the judiciary without compromising the principle of merit selection, are a critical step.

Statistics on judicial diversity

88. **Recommendation 8** is that the Attorney-General (Cth) should collect, and report annually on, statistics regarding the diversity of the federal judiciary. This recommendation would enhance transparency with respect to the extent to which judicial diversity exists and is being achieved within the federal judiciary. Unlike in comparable jurisdictions, there is currently no official collection of statistics on diversity of background of members of the federal judiciary. This makes it difficult to understand where particular problems of overrepresentation and underrepresentation may exist, to identify barriers to judicial appointment, and to track the success or otherwise of measures put in place to increase diversity of background among judges. Given the benefits of judicial diversity for mitigating institutional biases and enhancing public confidence in the impartiality of the courts as an institution, statistics on the diversity of the judiciary should be collected as a way to encourage reflection and measure progress.

54 Commonwealth Heads of Government, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003) Principle IV.

Structured and transparent judicial education

89. **Recommendation 9** is that each Commonwealth court should develop a structured and transparent approach to the training and ongoing professional development of judges. This recommendation builds on recommendations from previous inquiries that have considered bias in the law, and on the work in this respect already done by courts. The recommendation suggests greater attention to mapping out suggested core training and professional development activities for judges across their careers, and increasing transparency in relation to the orientation, education, mentoring, and reflexive learning opportunities provided to judges in their role. Visibility of core training and professional development expectations demonstrates the importance that the courts place on judicial education, including in the areas most important for supporting judicial impartiality and addressing institutional biases. It also recognises that there should be a more open acceptance of public responsibility for supporting individuals to acquire the competence required for the judicial role.

Engaging with Aboriginal and Torres Strait Islander communities, culture, and law

90. **Recommendation 10** builds on **Recommendation 9** and suggests that each Commonwealth court should develop a structured and ongoing program of Aboriginal and Torres Strait Islander cross-cultural education for members of the federal judiciary.

91. The development and delivery of the program should be led by Aboriginal and Torres Strait Islander people and organisations. **Recommendation 10** recognises the special position of Aboriginal and Torres Strait Islander peoples as Australia's First Peoples, and the fact that the Australian legal system has been imposed over Aboriginal and Torres Strait Islander systems of law. It also responds to the particularly high levels of distrust of the legal system recorded among Aboriginal and Torres Strait Islander people.[55] As Deadly Connections Community and Justice Services emphasised in their submission:

> Judicial impartiality and neutrality are intended to be foundational principles of the legal system. For First Nations peoples, however, the law and the broader legal system has been used to enact significant injustices on First Nations peoples, and justify unequal treatment.[56]

92. In this context, the Commonwealth courts have a significant role in enhancing engagement with, knowledge about, and cultural competence and safety in relation to, Aboriginal and Torres Strait Islander peoples — both to promote impartial decision-making, and to build the confidence of Aboriginal and Torres Strait Islander people engaged in court processes that they will be treated equally.

55 See further The Hon Chief Justice TF Bathurst, 'Trust in the Judiciary' (Opening of Law Term Address, Sydney, 3 February 2021).

56 Deadly Connections Community and Justice Services, *Submission 35*.

93. The need for court officers dealing with Aboriginal people to have training that 'generally informs them of the traditions and culture of contemporary Aboriginal society … and the history of relations between Aboriginal and non-Aboriginal people in that area' was recognised 30 years ago by the Royal Commission into Aboriginal Deaths in Custody.[57] Since that time, significant initiatives have been taken across Australia to provide further cross-cultural education for judges in relation to Aboriginal and Torres Strait Islander peoples. However, opportunities exist for intensive high quality cultural learning programs that can contribute to much deeper cultural knowledge and understanding, and reflexive practice.[58]

94. To assist in identification of training needs, development of judicial education programs in relation to Aboriginal and Torres Strait Islander peoples and culture, and engagement with Aboriginal and Torres Strait Islander communities, the Australian Government should establish and adequately resource an Aboriginal and Torres Strait Islander court advisory panel. The panel should be made up of Aboriginal and Torres Strait Islander legal professionals, representatives from justice organisations, and experts and representatives from organisations involved in professional cultural competency training in the justice sector, and should be appropriately remunerated.

Review of the Guide to Judicial Conduct

95. **Recommendation 11** is that the Council of Chief Justices of Australia and New Zealand should consider a broad review of the *Guide to Judicial Conduct* as it relates to judicial impartiality. Given the internal and subjective nature of impartiality, and the degree of introspection involved, a crucial complement to the law on bias is the fundamental duty of impartiality accepted under the judicial oath. Guidance on judicial ethics or judicial conduct can go beyond the 'external yardsticks' in the law to assist judges to be, and to appear to be, as impartial as possible, in light of what we know about inherent challenges in achieving this.[59] In addition, and as recognised in the Canadian *Ethical Principles for Judges*, such guidance is 'intended to assist judges with ethical questions they may encounter', but it may also 'provide the public with a better understanding of the role of the judiciary'.[60]

57 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2 [12.1.32].

58 For an overview see Vanessa I Cavanagh and Elena Marchetti, 'Judicial Indigenous Cross-Cultural Training: What Is Available, How Good Is It and Can It Be Improved?' (2016) 19(2) *Australian Indigenous Law Review* 45.

59 The Hon Justice K Mason AC, 'Impartial, Informed and Independent' (2005) 7 *The Judicial Review* 121, 127.

60 Canadian Judicial Council, *Ethical Principles for Judges* (2021).

96. Although the *Guide to Judicial Conduct* deals with impartiality in the sense covered by the bias rule, it does not refer to the potential impact that social or cultural factors, including reliance on stereotyping, may have on judicial impartiality or the appearance of it.[61] In reviewing the *Guide to Judicial Conduct*, the Council of Chief Justices of Australia and New Zealand and the Australasian Institute of Judicial Administration should have regard to the *Bangalore Principles for Judicial Conduct*, benchbooks developed in Australian jurisdictions, and relevant guides in comparable jurisdictions. Any review of the *Guide to Judicial Conduct* in these areas should be informed by public consultation.

Data on court user experiences

97. In conducting its Inquiry, the ALRC encountered a lack of comprehensive and representative data about litigants' subjective experiences in the Commonwealth courts. **Recommendation 12** is that each Commonwealth court should systematically capture court users' subjective perceptions of procedural justice.

98. **Recommendation 12** is consistent with the *International Framework for Court Excellence*, which commits courts to 'regularly use feedback to measure satisfaction of all court users', 'listen to court users and treat them with respect', 'ensure that all court users are treated equally', and 'report publicly on changes … implement[ed] in response to the results of surveys'.[62]

99. The ALRC's consultations and the responses received to surveys suggest that practitioners, members of the public, and many litigants are confident that Australian judges are committed to upholding impartiality in court proceedings. However, consultations and the ALRC Survey of Lawyers also suggest that perceptions of bias in proceedings arise much more frequently than is reflected in the very small numbers of bias applications and internal complaints made.

100. Being aware of any significant litigant and practitioner perceptions of unfairness is an important first step in addressing them. Collection and analysis of data would help courts to identify systemic problems that are not being addressed adequately by the existing procedural fairness rules, and could be used to inform reflective practice by judges and judicial education programs. Data could help to identify whether any particular groups of court users perceive unfairness more frequently or severely than other groups. Data could also help to track the impact of reforms in other areas on subjective perceptions of fairness, and highlight any disparate outcomes on different groups. Data could also highlight areas where judges may need further support.

61 It does, however, refer to the need for judges to 'protect a party or witness from any display of racial, sexual or religious bias or prejudice' and that 'Judges should inform themselves on these matters so that they do not inadvertently give offence': Australasian Institute of Judicial Administration (n 3) [4.2].

62 Australasian Institute of Judicial Administration et al, *International Framework for Court Excellence* (3rd ed, 2020) 29.

Statistical patterns in decision-making

101. **Recommendation 13** is that the Commonwealth courts should develop a policy on the creation, development, and use of statistical analysis of judicial decision-making. Chapter 10 explores the limitations of the bias rule in addressing disqualification applications based on patterns of decision-making. The use of data to enhance transparency and improve performance is ubiquitous in many industries. However, assessing fairness by reference to statistical patterns of case outcomes is anathema to many lawyers and judges. Lawyers typically examine judicial decisions on an individual basis. The doctrine of precedent operates such that judicial reasons are pored over and assessed, judgment by judgment, to determine whether the facts are similar enough to mean that an earlier ruling must be followed and applied, or can be distinguished. The judicial method requires judges to strive for consistency in litigant outcomes, but this is achieved through orthodox use of sources and the doctrine of precedent, rather than statistics. Statistical methodologies and tools are therefore not typically part of a lawyer's, or a judge's, toolkit.

102. However, across the world, data on the outcomes of cases is increasingly being collected and analysed by courts, legal service providers, academics, media, and other commentators. Improvements in technology, and the move towards greater use of online filing of cases, means that this is likely to increase. Analysis of data on judicial decision-making provides both opportunities and threats for judicial impartiality and public confidence in it. The Commonwealth courts should, in consultation with experts in the field, develop a policy to promote best practice in collection and use of such data internally, including to support judicial impartiality, and to meaningfully engage with externally-compiled analysis. Ideally this should be part of a wider strategy in relation to collection of court data. In addition to developing an internal policy, the Council of Chief Justices of Australia and New Zealand or the Australasian Institute of Judicial Administration might consider being involved in the development of guidelines on minimum standards for the collection, development, and use of such statistics by outside parties.

103. **Recommendation 13** is intended to promote reflection within the courts on the potential usefulness, and limits, of such data, and to equip the courts to effectively engage when issues of judicial impartiality are raised by the use of such data by outside parties.

Information about supports and safeguards for impartiality

104. **Recommendation 14** is that the Commonwealth courts should create accessible public resources that explain: the processes and structures in place to support the independence and impartiality of judges; and the mechanisms in place to ensure judicial accountability.

105. The impartiality of the judiciary is built on a foundation of institutional practices and conventions that protect the judiciary from improper influences, and promote impartiality in judicial decision-making. The law includes multiple mechanisms, aside from recusal and disqualification, to support and protect judicial independence and impartiality, and to ensure judicial accountability for a failure to act impartially in an individual case. The ALRC considers that greater transparency about the procedures relating to judicial disqualification and the law on bias should be matched by transparency about the structures that underlie and complement it.

106. Public resources could include information about:

- the judicial oath and the judicial function;
- the separation of powers under the *Australian Constitution*;
- judicial appointment processes (including any processes introduced in response to **Recommendation 7**) and security of judicial tenure;
- the *Guide to Judicial Conduct*, including guidance on avoiding conflicts of interest, and support structures available to judges (**Recommendation 6**);
- the judicial disqualification guidelines (**Recommendation 1**);
- government and court strategies relating to judicial diversity and inclusion, including statistics on judicial diversity (**Recommendation 8**);
- judicial professional development, including any professional development pathways adopted by courts in response to **Recommendation 9**;
- the availability and function of appeals;
- complaints mechanisms, including any future federal judicial commission (**Recommendation 5**), and how to access them;
- the collection, analysis, and reporting on feedback received from court users (**Recommendation 12**) and other relevant data (**Recommendation 13**); and
- protocols for the profession to bring issues of inappropriate judicial conduct to the attention of the head of jurisdiction.

APPENDIX A

Terms of Reference

Review of Judicial Impartiality

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the importance of maintaining public confidence in the administration of justice for all Australians;
- the importance of ensuring that justice is both done and seen to be done in Commonwealth courts and tribunals; and
- the fundamental principles of procedural fairness, including that decision-makers must be independent and impartial

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms to the laws relating to impartiality and bias as they apply to the federal judiciary are necessary or desirable, in particular in relation to the following matters:

- whether the existing law about actual or apprehended bias relating to judicial decision-making remains appropriate and sufficient to maintain public confidence in the administration of justice;
- whether the existing law provides appropriate and sufficient clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality;
- whether current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate, including in the context of review and appeal mechanisms; and
- any other matters related to these Terms of Reference.

I further request that the ALRC consider what changes, if any, should be made to Commonwealth legislation to implement its recommendations.

Collaboration and consultation

In undertaking this reference, the ALRC should consult widely with the legal profession, courts, tribunals and the broader community. The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 30 September 2021.

On 21 June 2021, the Terms of Reference were amended to extend the reporting deadline to 30 September 2021, or two months from delivery of the High Court of Australia's judgment in *Charisteas v Charisteas & Ors* (Case P6/2021), whichever is later.

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