



**Australian Government**

Government Response to  
Australian Law Reform Commission Report 138:  
*Without Fear or Favour:*  
*Judicial Impartiality and the Law on Bias*

## Introduction

The Australian Government welcomes the Australian Law Reform Commission (ALRC) Report 138, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*. The Government is committed to promoting integrity, fairness and accountability across the three branches of Government in consultation with those branches. This includes considering opportunities to strengthen the rule of law in Australia, as the keystone of our democratic system.

The terms of reference to the ALRC in September 2020 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 ALRC's inquiry into the law on judicial bias was prompted in part by the application of the law on bias arising from a decision of the then Full Court of the Family Court of Australia concerning the trial judge's personal contact with counsel for one of the parties.<sup>1</sup> In undertaking its inquiry, the ALRC considered:

- 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, 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.

The Government welcomes the ALRC finding that the substantive case law on actual and apprehended bias, as clarified by the High Court in *Charisteads v Charisteads*<sup>2</sup>, does not require reform. The Government appreciates the broad approach taken by the ALRC in considering whether more is required of our legal system to support judicial impartiality and public confidence in the federal courts.

The ALRC report highlights the high regard in which the federal judiciary is held in Australia and internationally, while recommending a number of reforms to strengthen procedures and institutional structures to support judicial impartiality, judicial practice and transparency.

The ALRC's report and 14 recommendations emphasise the importance of protecting and enhancing trust, integrity and impartiality within public institutions. The recommendations are designed to enhance transparency of the law and processes by which potential issues of bias are dealt with by the federal courts. In addition, the recommendations address social and cultural bias at an institutional level.

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<sup>1</sup> *Charisteads v Charisteads* (2020) 389 ALR 296

<sup>2</sup> *Charisteads v Charisteads* (2021) 393 ALR 389

The Government supports the three recommendations directed to the Government for consideration. The ALRC recommends that the Government establish a federal judicial commission to consider concerns about judicial behaviour or impairment, including those that give rise to an apprehension of bias. The ALRC also recommends that the Government develop a more transparent process for appointment of judicial officers, and report annually on the diversity of the federal judiciary. The Government is already acting to deliver on its longstanding commitment to restore a more transparent judicial appointments process as practised by the previous Labor Government, and to consider the merit and form of a federal judicial commission. These reforms will require close engagement with the federal courts.

A majority of recommendations are directed to the federal courts for consideration and action, namely the High Court of Australia, Federal Court of Australia and Federal Circuit and Family Court of Australia. The ALRC has also directed recommendations to the Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia. The Government will consult with these entities on these recommendations where appropriate.

The matters raised in the ALRC's report complement the Government's commitment to increasing equality and strengthening Australian democratic and public institutions. In addition to implementing the recommendations in this report, the Government's reform agenda includes legislating a National Anti-Corruption Commission with broad jurisdiction to investigate serious or systemic corruption across the Commonwealth public sector, and introducing legislation to improve whistle-blower protections, by the end of 2022.

The Government extends its thanks to the ALRC, and its President, the Hon Justice Sarah Derrington AM, for undertaking this important inquiry. The Government also wishes to thank Part-time Commissioner, the Hon Justice John Middleton AM, of the Federal Court of Australia, as well as the many legal research, executive and administrative staff, interns and students who supported the inquiry. Finally, the Government would like to acknowledge the members of the ALRC's Advisory Committee and its Expert Readers, whose advice and expertise assisted the ALRC in delivering its report.

## **Response to recommendations**

### ***Recommendations to Government***

The Australian Government welcomes and supports recommendations 5, 7 and 8, which are directed to the Government for consideration and action.

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

The Government **agrees in principle** to this recommendation.

The ALRC's report reflects significant stakeholder concerns that the existing mechanisms for raising allegations of actual and apprehended bias, and deciding those allegations, are not sufficient to maintain public confidence in the administration of justice.<sup>3</sup> The report acknowledges that establishing a federal judicial commission is a significant reform, requiring its own policy development process, and has not proposed a particular model for the Government to adopt.<sup>4</sup>

The Government will consider the establishment of a commission that is empowered to investigate complaints against federal judges. As part of its consideration, the Government will consult closely with the federal courts and other key stakeholders. Any model for a federal judicial commission must respect the independence of the courts and judiciary in accordance with the Constitution. This independence is fundamental to the rule of law and democracy in Australia.

#### ***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.***

The Government **agrees** to this recommendation.

The ALRC's report states that submissions received as part of the ALRC's inquiry were almost universally supportive of a more transparent process for judicial appointments.<sup>5</sup> The report states that this recommendation seeks to promote a more transparent process for appointing federal judicial officers to support judicial impartiality and the appropriate operation of the law on bias.

The Government has already committed to restoring integrity to the process of appointments to the federal judiciary by returning to the transparent, merit-based system for appointments that Labor practised when last in Government. The Government is also acting to strengthen the system of appointments for the Administrative Appeals Tribunal and the Australian Human Rights Commission.

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<sup>3</sup> Australian Law Reform Commission Report 138, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, 9.25, 310.

<sup>4</sup> *Ibid*, 9.26, 310.

<sup>5</sup> *Ibid*, 12.15, 434.

At a minimum, the new appointments process will implement the ALRC’s recommendation to publish criteria for appointment and issue public calls for expressions of interest. Going beyond what the ALRC has recommended, the judicial appointments process will also include broad consultation and the use of advisory or selection panels.

***Recommendation 8 – The Attorney-General (Cth) should collect, and report annually on, statistics regarding the diversity of the federal judiciary.***

The Government **agrees** to this recommendation.

The Government is committed to improving diversity in the federal judiciary. Improving transparency in the judicial appointments process will ensure that appointments are drawn from a wide pool of candidates, broadening the diversity and experience of those on the bench.

The Government supports providing greater transparency to the public, the courts and the legal profession on the extent to which judicial diversity exists and is being achieved within the federal judiciary. The Government will engage with the federal courts to consider the processes and resourcing required for collection of personal data and to enable analysis and reporting on characteristics of the judiciary.

The Government looks forward to working closely with the federal courts to give effect to recommendations 5, 7 and 8.

***Recommendations to the federal courts, Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia***

The Government **notes** recommendations 1, 2, 3, 4, 6, 9, 10, 11, 12, 13 and 14.

Eleven of the 14 recommendations made by the ALRC are directed at the federal courts, Council of Chief Justices of Australia and New Zealand and the Law Council of Australia for consideration and action.

These recommendations address aspects of judicial practice, education, ethical guidance, collection of feedback and data and development of publicly accessible information, including:

- new procedures and guidelines for considering the disqualification of federal judicial officers from proceedings on bias grounds: recommendations 1, 2 and 3
- establishing streamlined review and appeal mechanisms in relation to disqualification decisions: recommendation 4
- finding clarity in law and practice in light of the High Court of Australia’s decision in *Charistead v Charistead* [2021] HCA 29 through a review of relevant rules and guidance: recommendation 6
- implementing further institutional supports and safeguards, such as developing structured and transparent approaches to training, ongoing professional development, and guidance for judges: recommendations 9, 10 and 11
- collection and analysis of data: recommendations 12 and 13, and
- promoting publicly available resources: recommendation 14.

The Government committed to undertake broad consultation in response to the recommendations made by the ALRC when the report was tabled in Parliament. Undertaking broad consultation will allow the Government to support relevant entities to consider and implement the recommendations where appropriate to do so.

Recommendations 1, 2, 3, 4, 9, 10, 12, 13 and 14 are directed at the federal courts for consideration and action. The Government will engage with the federal courts to consider these recommendations as appropriate, noting the constitutional independence of the courts and judiciary.

The Government acknowledges that implementation of some recommendations may have financial, resourcing, or other operational impacts for the courts, and will engage with the courts regarding these impacts as required. For instance, recommendations 9 and 10 relate to the provision of education and professional development of judges. The Government contributes funding to the National Judicial College of Australia and the Australasian Institute of Judicial Administration for the provision of education and professional development programs for judicial officers across Australia.

The Government will engage with the Council of Chief Justices of Australia and New Zealand and the Law Council of Australia regarding recommendation 6 (reviewing relevant rules and guidance) and recommendation 11 (reviewing the Guide to Judicial Conduct) to the extent appropriate. The Government is supportive of ensuring rules and guidelines concerning judicial conduct are transparent and fit-for-purpose, allowing for consideration of changing community views.