WEBINAR: Without Fear or Favour: Responses to the ALRC Report on Judicial Impartiality

THURSDAY 29 SEPTEMBER 2022

TRANSCRIPT

00:00:01:16 - 00:00:46:14

The Hon Justice SC Derrington

Good afternoon, everyone. I'm Sarah Derrington, the President of the ALRC. And it's my pleasure to welcome you all here today, and those of you now on the live stream. And I apologise for the technical difficulties that we've had. It's always the case isn't it when we have the largest number of online responses that that's when the IT will fail. We are told that there are over 500 of you online from Australia and around the world. So thank you again for joining us. First, I acknowledge the country we now stand on. We are here in Meanjin, the language name of the tip of the riverbed where Brisbane CBD is now situated.

00:00:46:29 - 00:01:27:00

The Hon Justice SC Derrington

The court and the ALRC are situated on the north shore of the river bend Kurilpa. I acknowledge the traditional custodians of these lands and waters we gather on today and wish to pay my respects to their elders, past and present. I also acknowledge any other First Nations persons joining us today and acknowledge your country and elders. I particularly express my thanks to those Aboriginal elders of Yawuru and Nyikina country who have recently so generously shared with me and my judicial colleagues their understandings of law and place through a cultural immersion program organised by the Nulungu Research Institute at the University of Notre Dame.

00:01:28:24 - 00:01:50:17

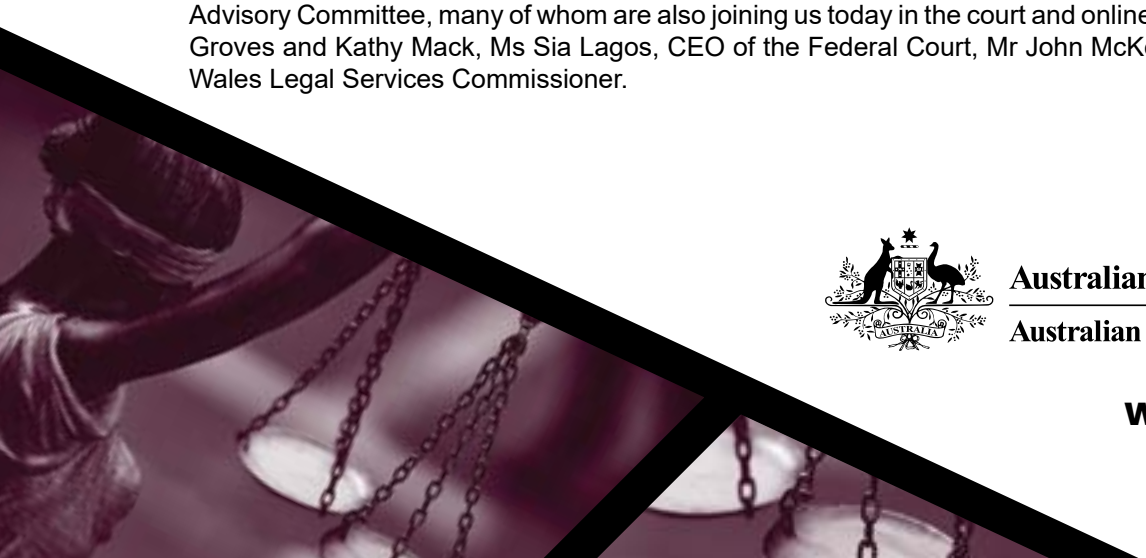
The Hon Justice SC Derrington

I welcome all other distinguished guests joining us here in person and online, including the Honourable Chief Justice Allsop AO of the Federal Court of Australia and the Honourable Chief Justice Alstergren AO of the Federal Circuit and Family Court of Australia, along with many other judges and magistrates from the Commonwealth and State Courts. I hope you will forgive me for not mentioning you all individually.

00:01:51:19 - 00:02:40:22

The Hon Justice SC Derrington

I also particularly welcome the Honourable Justice Middleton AM, part time commissioner of the ALRC, on what will be his last full inquiry with the ALRC. And I particularly welcome our panelists: the Honourable Robert French AC, Mr Tony McAvoy SC, and Professor Gabrielle Appleby, and acknowledge their significant contributions as members of the Advisory Committee for this Inquiry. I would also like to acknowledge the significant contributions of other members of our very generous and constructive Advisory Committee, many of whom are also joining us today in the court and online, Professors Matthew Groves and Kathy Mack, Ms Sia Lagos, CEO of the Federal Court, Mr John McKenzie, the New South Wales Legal Services Commissioner.



00:02:41:03 - 00:03:42:23

The Hon Justice The Hon Justice SC Derrington

Mr Chin Tan, the Race Discrimination Commissioner, Dr Marion Sullivan, psychiatrist and former member of the AAT and the Medical Board of Queensland, Dr Rowena Orr KC prior to her appointment as Solicitor-General for Victoria and our research adviser Professor Sharyn Roach Anleu. The inquiry benefited enormously from the broad and diverse experiences, perspectives and scholarship of our different Advisory Committee members. So thank you. We would like to extend the Commission's particular thanks and welcome to those of you who participated in the Inquiry through consultations, making submissions or participating in the surveys conducted as part of the Inquiry. And we express our sincere thanks to the Honourable Mark Dreyfus KC MP, who, due to the rescheduling of Parliament, is unable to join us live today, but who has prepared a video presentation outlining the Government's response to the Inquiry, which we will show shortly.

00:03:44:03 - 00:04:48:00

The Hon Justice SC Derrington

Mr Dreyfus' presentation will be followed by presentations by our three distinguished panelists on different aspects of the Inquiry's Final Report and recommendations, before a Q&A discussion for the remainder of the session. And if you would like to submit questions or comments for the panel's Q&A session, we'd encourage you to send them at any time to impartiality@alrc.gov.au. Those of you in the room can raise your hands. Although we do not expect to have time to address all audience comments today, we will read and consider all comments we receive. We will be live tweeting this event and a recording of the event will be made available online after its conclusion. Today's event is the culmination of an Inquiry referred to the ALRC in September 2020, when we were asked to consider whether, and if so what, reforms to the laws relating to impartiality and bias as they relate to the federal judiciary are necessary and desirable.

00:04:49:00 - 00:05:45:11

The Hon Justice SC Derrington

As part of the referral, we were asked to consider in particular: whether the existing law on actual and apprehended bias remains appropriate and sufficient to maintain public confidence in the administration of justice; whether the existing law provides sufficient clarity; and whether current mechanisms for raising allegations of actual or apprehended bias and deciding those allegations are sufficient and appropriate. Over the course of the Inquiry, more than 2000 people right across Australia contributed their views to the ALRC through surveys and consultations. Those consulted included litigants and other court users, current and former members of the judiciary and tribunals, the legal profession, not-for-profit legal services, community groups and academics. We also conducted a comprehensive review of all cases referring to recusal in the Commonwealth Courts over a five year period.

00:05:45:11 - 00:06:13:01

The Hon Justice SC Derrington

And we delivered our final report to the previous government in December last year. It was tabled in Parliament by the new Attorney-General in August of this year. And on that note, I would now introduce the Attorney-General to speak to us about his response to the recommendations that were directed specifically to the Government.

00:06:13:11 - 00:07:08:12

The Hon Mark Dreyfus KC MP

I begin by acknowledging the traditional owners of the land on which we meet today and pay my respects to their elders past and present. I would like to extend that respect to any Aboriginal and Torres Strait Islander peoples here today. I am honoured to present today's keynote address on the Australian Law Reform Commission's Report, Without Fear or Favour: Judicial Impartiality and the Law on Bias. Because of the rescheduling of Parliament, I'm sorry that I'm unable to be there in person to celebrate this important contribution to our understanding of the law on bias and the structures that support public confidence in our judiciary. I would like to thank the ALRC, under the stewardship of Justice Sarah Derrington, for its hard work and commitment in delivering this Report and for hosting today's workshop.

00:07:09:15 - 00:08:10:29
The Hon Mark Dreyfus KC MP

I also acknowledge the expert assistance provided by the ALRC's Advisory Committee and the substantial number of contributors to the Report. The Albanese Government is committed to restoring trust and integrity in our institutions, and the ALRC's most recent Report is an important contribution to strengthening the rule of law in Australia, our judiciary, and good governance. As all of you know, the Australian Constitution establishes the Parliament, Executive and judiciary as the three branches of our government. The Courts and judiciary play a significant role by providing important checks and balances on the exercise of powers by the Parliament and the Executive. The Courts also provide an important public service resolving disputes and holding the power to interpret laws and determine their application in individual cases.

00:08:12:03 - 00:09:15:09
The Hon Mark Dreyfus KC MP

Our Courts and judiciary are fundamental to good governance, and it is critical that they continue to be based on the highest standards of integrity. Thankfully, Australia has a proud record of being well-served by our judiciary. However, just as each branch of government is responsible for the promotion and protection of the rule of law, each branch should also continually strive to improve. Judicial independence and impartiality are critical principles which underpin the role of the judiciary. As with the other branches of Australian government, the courts and judiciary must serve all Australians and all Australians must be able to see that integrity is at the heart of our system of government and the heart of our legal system. This means that our legal system and laws must be transparent and accessible.

00:09:16:07 - 00:10:54:28
The Hon Mark Dreyfus KC MP

The laws, rules and structures of the legal system should be understood by those applying the law, and accessible to people who are outside the legal community and who are served by it. Each branch of government should also reflect the Australian community in its diversity. Australians should be able to look to the Parliament, the Executive and the judiciary and see a reflection of the community they are part of. The principle of judicial impartiality is also integral to public trust in the administration of justice in a modern democratic society. That a court will consider matters brought before it without bias is fundamental to public trust in the legal system that serves the Australian people. A system that is, and is seen to be, fair. As the High Court of Australia recognised in Webb and the Queen, and I quote, "the public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias". This is a core value of our legal system, that the law is applied equally to everyone before it. The protection of dignity and equality for people who are before the courts is also aligned with the prohibition of discrimination in international human rights law.

00:10:55:10 - 00:12:11:18
The Hon Mark Dreyfus KC MP

Impartiality can also improve the quality of judicial decision-making by, for example, promoting accuracy of fact finding and application of the law. In this way, it can encourage the confidence and cooperation of litigants and the public who rely on the courts to determine matters in dispute concerning their rights and responsibilities. Conversely, perceptions of bias or poor judicial conduct can undermine the operation of dispute resolution and governance. Judges are people with personal and professional knowledge, social and cultural experiences and interests beyond the bench. Our laws, rules and institutional structures contribute to recognising unacceptable bias or influence and ensuring our justice system is fair. While judges swear an oath to serve the people and are responsible for upholding high standards of judicial conduct, the principle of judicial impartiality is also fostered through our laws and the institutional and administrative structures of the legal system.

00:12:12:14 - 00:13:17:13
The Hon Mark Dreyfus KC MP

Through common law, they operation of the bias rule enables the decision maker to be disqualified or remove themselves from hearing and deciding on an individual case if they have an interest in it. Court rules and guidance assist judges on expected standards of conduct and responding to circumstances giving rise to the appearance of bias. There are also institutional structures providing stewardship of the courts and judiciary, while recognising their independence. Having noted the importance of judicial impartiality and public trust

in our judiciary and the structures that support this, I'll now turn to discuss the Inquiry and the Report itself. The Inquiry and the subsequent Report were prompted by the application of the law on bias arising from a decision of the then full Court of the Family Court of Australia, which eventually came before the High Court for consideration and determination.

00:13:18:16 - 00:14:31:28

The Hon Mark Dreyfus KC MP

Other important judgments concerning judicial bias and high profile allegations of inappropriate behaviour of individual judges provide further context to the ALRC's Inquiry. Set against this background, the Report highlights the regard in which the federal judiciary is held in Australia and internationally, while also recommending reforms to strengthen the administration of justice. I am pleased that the ALRC found that the substantive case law on actual and apprehended bias, as clarified by the High Court, does not require reform. But there is always more to be done. And I appreciate 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. As a strong progressive democratic society, it's right and appropriate that we look to strengthen our system of government. The Albanese Government welcomes the ALRC's 14 recommendations directed at further promoting and protecting judicial impartiality and public confidence in the judiciary.

00:14:32:26 - 00:15:45:09

The Hon Mark Dreyfus KC MP

The recommendations made by the ALRC are intended to enhance transparency and consistency in the application of the law on bias and promote and protect judicial impartiality and public confidence in it. The majority of the ALRC's 14 recommendations are directed at the Federal Courts for consideration and further action. These include recommendations to enhance transparency of the law and processes by which courts manage potential judicial bias and improve the education and guidance available to judicial officers on these issues. I look forward to working with the Federal Courts as they consider those recommendations. The government's swift response to the Report, tabled in August, reflects our deep commitment to law reform. I now want to outline our response to the three recommendations which are directed to the Australian Government — Recommendations 5, 7 and 8. Recommendation 5 calls on the Australian Government to establish a Federal Judicial Commission to consider complaints about the judiciary.

00:15:46:05 - 00:16:58:05

The Hon Mark Dreyfus KC MP

This recommendation reflects wide support for a transparent and independent process for handling complaints, and the Albanese Government has accepted this recommendation in principle. We are committed to restoring public trust and strengthening standards of integrity in our public institutions. That is why this week we delivered on our commitment to introduce legislation for a powerful, transparent and independent National Anti-Corruption Commission that will have broad jurisdiction to investigate serious or systemic corruption across the Commonwealth public sector. This includes the power to investigate ministers, parliamentarians and their staff, statutory office holders and employees and contractors of government agencies. It will have discretion to commence inquiries on its own initiative or in response to referrals from anyone. It will be able to investigate both criminal and non-criminal corrupt conduct and conduct occurring before or after its establishment. It will have the power to hold public hearings where exceptional circumstances justify doing so.

00:16:58:18 - 00:18:44:29

The Hon Mark Dreyfus KC MP

And it is in the public interest. As many of you know, I am also a long standing supporter of a federal judicial commission. The ALRC 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. In response to the ALRC Report, the Albanese Government is carefully considering the establishment of a commission that can independently examine complaints made to it in relation to judicial officers and take appropriate action, further embedding integrity and accountability in the justice system. Of course, any federal complaints handling process must also be consistent with the independence of the courts enshrined in the Constitution. This reform work reflects and builds upon the Government's strong commitment to integrity, fairness and accountability across all areas of government. Recommendation 7 is that the Australian Government develop a more transparent process for appointing federal judicial officers on merit. This is a recommendation that has been all the more necessary due to the practices of the previous government. As

I've previously said, the Albanese Government will be reintroducing a transparent, accountable, merit-based appointments process for the federal judiciary as a priority. Whether it's the judiciary, tribunals or the Australian Human Rights Commission, our government has started work to improve the appointments process.

00:18:45:19 - 00:19:46:02

The Hon Mark Dreyfus KC MP

We want Australians to have confidence in our institutions, allowing any qualified Australian to put up their hand to serve their community. We are already acting to restore integrity to this process and I am looking to further embed integrity into these processes by: publishing the selection criteria for judicial appointments; seeking expressions of interest in nominations through broad consultation with heads of courts and the broader legal community; and establishing panels for each vacancy within the Federal Courts. These panels will usually consist of a number of eminent individuals, including the head of jurisdiction, a retired judge from that jurisdiction, and a senior official of the Attorney-General's Department. The advisory selection panels will work through the expressions of interest, conduct interviews and make independent recommendations to me that I can take forward to Cabinet for consideration.

00:19:47:03 - 00:21:01:15

The Hon Mark Dreyfus KC MP

Given the breadth of work undertaken in each court, I am aiming to have a range of advisory selection panels to consider any vacant positions. I'm currently trialling a similar process in order to expeditiously fill current and emerging vacancies which are in the federal courts this year, using broad consultation with key members of the legal community. I expect to make further announcements on appointments to the federal courts shortly. Recommendation 8 is that I, as Attorney-General, collect and report on statistics regarding diversity of the federal judiciary. The Australian Government is committed to promoting diversity in the judiciary and as Attorney-General, I intend to implement this important recommendation. We must ensure that laws are applied by judges and courts that reflect the diversity of modern Australian society. Implementation of Recommendation 8 of the ALRC's Report will support our understanding of the extent to which judicial diversity exists and is being achieved within the federal judiciary as well as any areas for improvement.

00:21:02:07 - 00:22:04:19

The Hon Mark Dreyfus KC MP

I look forward to engaging closely with the federal courts to consider how collecting additional data on the characteristics of the judiciary could occur. The effectiveness of our legal system is entirely dependent upon an independent and impartial judiciary. I commend the ALRC for its significant contribution in providing a path forward for Australia to uphold a high standard of judicial integrity. This Government strongly supports our judiciary and is committed to working closely with the federal courts and the legal community in considering the ALRC's recommendations. Thank you very much again for your time today to consider this and to discuss the importance of judicial impartiality and the ALRC's Report. I wish you all a productive and engaging workshop, and I look forward to working with you on the recommendations raised in the Report.

Thank you.

00:22:05:06 - 00:22:54:26

The Hon Justice SC Derrington

Well, on behalf of the ALRC, I'd like to thank the Attorney very much for launching this Report. It's the first time that that's happened in a number of years and the swift response that the Government has made to the recommendations directed to it. It's now my pleasure to introduce to you Sarah Fulton, Principal Legal Officer with the Attorney-General, not with the Attorney-General's Department, with the Australian Law Reform Commission, who was the leader of this Report and who is responsible for much of the work together with Ms Genevieve Murray, former staff member of the ALRC, who I'm very pleased to see has joined us again for this launch today. Sarah is going to lead the panel discussion and I will hand over to her.

Thank you.

00:22:55:06 - 00:23:28:08

Ms Sarah Fulton

Thank you very much Judge.

And it's an honour to introduce our panelists today, just as it was an absolute joy and privilege to work with them and other members of our Advisory Committee on this Inquiry. I'll introduce our panelists in the order in which they'll speak, which generally follows the order of the Report itself. Our first panelist is the Honourable Robert French AC, who served as Chief Justice of the High Court of Australia from 2008 to 2017.

00:23:29:21 - 00:24:26:12

Ms Sarah Fulton

Mr French was a judge of the Federal Court for more than 20 years before that, including four years as the first President of the National Native Title Tribunal. He's held numerous other roles domestically and internationally, including that of part time Commissioner for the ALRC for a number of years. Mr French's initiatives as Chief Justice, one of his initiatives, was the establishment of the Judicial Council on Cultural Diversity, and more recently, he served as Chair of the Steering Committee for the Law Council of Australia's Justice Project, a national comprehensive review into the State of Access to Justice in Australia for people experiencing significant economic or social disadvantage. We're delighted to have Mr French with us today to reflect on the Inquiry's approach to judicial impartiality and its importance to the judicial function. This is crucial to understanding the Inquiry's approach and is covered in Chapter Two of the report.

00:24:28:13 - 00:26:04:22

Ms Sarah Fulton

Our second panelist here in Brisbane is Professor Gabrielle Appleby. Professor Appleby is a public law specialist from the University of New South Wales. She's the director of the Judiciary Project at the Gilbert and Tobin Centre of Public Law, the constitutional consultant to the Clerk of the Australian House of Representatives and a member of the Indigenous Law Centre. Professor Appleby has published extensively on issues of direct relevance to this Inquiry, including the procedures for recusal and bias applications, ethical support structures for judges, judicial complaints procedures and the dangers of casual empiricism in statistical analysis of decision making. Today Professor Appleby will speak about the recommendations made by the ALRC on procedural reforms to the self-disqualification procedure and the establishment of a federal judicial commission. These are covered in Chapter 7 to 9 of the report. Our third distinguished panelist is Tony McAvoy, SC. Mr McAvoy is a Wirdi man and traditional owner of Wanggan and Yagalinggu Country in Central Queensland. Initially practicing as a solicitor, Mr McAvoy SC has been a barrister for more than 20 years and is a trailblazer and an inspiration to many as the first Indigenous person appointed to Senior Counsel in Australia. Mr McAvoy has a leading native title practice and also has significant experience in environmental law, administrative law, human rights and discrimination law, coronial inquests and criminal law.

00:26:05:25 - 00:26:48:26

Ms Sarah Fulton

He's the Chair of the Law Council of Australia's Indigenous Issues Committee. He was co-counsel assisting the Royal Commission into Youth Detention in the Northern Territory and he recently served as the acting Northern Territory Treaty Commissioner. In his role as a member of the Advisory Committee, Mr McAvoy was instrumental in the broad approach that the Inquiry took to the Terms of Reference. We're very grateful to have the benefit of his extensive experience and expertise on these issues in speaking today about addressing structural and institutional biases in judicial decision making. These are issues that are addressed in particular in Chapters 4, 11 and 12 of the Report. And with that, I'll hand over to Mr French to offer his reflections.

00:26:49:19 - 00:29:02:01

The Hon Robert French AC

Thank you very much, Sarah. I hope that everybody can hear me. It was a great privilege to be involved in the work of the Australian Law Reform Commission in this important reference. I can recall more than 40 years ago appearing in a civil case in the Supreme Court of Western Australia, my opponent was having some difficulty with his cross-examination and after the luncheon adjournment informed the judge that he had been instructed by his client to request the judge to disqualify himself on the basis of his interventions during the cross-examination. The judge replied, Mr So-and-so, you may assure your client that just because I intervened to restrain your tedious, irrelevant and repetitious cross-examination, it does not mean that I'm biased against him. With the client thus reassured, we continued on to victory for our side. Judicial impartiality and its consideration has moved along a good deal since that time. I'm addressing the, if you like, the theoretical framework, the set up, the context as it's described in Chapter 2 of the Report. Judicial partiality is a functional necessity for a judge in the hearing and deciding of cases by courts of law. As an ethical standard, it is utilitarian. It takes

its place in the larger universe of the rule of law, binding on all official decision makers, exercising powers conferred by law. The rule of law requires that the exercise of official power not exceed the limits of that power as defined by the law. It cannot turn upon considerations irrelevant to the purpose for which the power is granted. Any official decision maker whose decision is informed by his or her personal interests, which may be financial or familial, or involve the decision maker's standing in social networks or risk of public criticism, or by prejudice against a personal class of persons, is a decision-maker who does not discharge his or her legal duties. Impartiality is not merely an absence of bias.

00:29:02:10 - 00:30:06:10

The Hon Robert French AC

It is integral to positive engagement with the discharge of the judicial task. A nice literary example of disengaged impartiality was given in *Gargantua and Pantagruel*, the 16th century satire, by Francois Rabelais, who told the story of Judge Bridlegoose who decided his cases by throwing dice. An American judge, John Marshall Gest, wrote about Bridlegoose's method in 1924 observing: "The method of Judge Bridlegoose indeed insures absolute judicial impartiality, [and] eliminates the irksome task of writing opinions, which to successful litigants are a superfluity, to the losers an aggravation …". Judicial impartiality is a human attribute not a robotic one. It embraces the core requirements to which I have just mentioned. A good example of a rather dramatic application of those core requirements which goes back a long way was the decision of Lord Mansfield in 1770, reversing a judgment of outlawry against John Wilkes in the teeth of popular outcry and hate mail.

00:30:07:15 - 00:31:41:03

The Hon Robert French AC

He said: "What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me". And as to concerns about the political consequences of his decision, he went on to say:

"The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say '*fiat Justitia, ruat cælum*'".

Lord Mansfield linked judicial impartiality to the larger universe of the lawful exercise of official discretion when, in an earlier part of the proceedings in *Wilkes*, he spoke of discretion, in its application to a court of justice as: "… sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular". Well, those words have resonated down the years although they are more often quoted from the judgment of Lord Halsbury LC in *Sharp v Wakefield*. Judicial impartiality is an essential aspect of the judicial function. It is also a standard which must operate in a real world setting in which judges hear and assess evidence and arguments, find facts, interpret the law and apply it, and exercise discretion which may involve evaluative judgments themselves analogous to the exercise of discretion.

00:31:41:03 - 00:32:29:13

The Hon Robert French AC

Judgments may involve leeways of choice, as Julius Stone called them, whose vehicles are terms such as 'fairness', 'reasonableness', 'unconscionable', 'clean hands', 'just cause', 'sufficient cause', 'due care' and 'good faith'. They may also involve constructional choices in the interpretation of statutes. Oliver Wendell Holmes recognised the realities of judicial decision making in his famous observation that "the life of the law has not been logic: but experience". He may, however, have pushed the boundaries when he went on to say that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men have had a good deal more to do than the syllogism in determining the rules by which men should be governed".

00:32:30:01 - 00:33:25:29

The Hon Robert French AC

As the ALRC Report observes at paragraph [2.58], common law legal systems have guarded against the potential for inappropriate influence affecting judicial decision making, such as bribery or the threat of dismissal from office, or an interest in a pecuniary outcome. And they have more gradually come to recognise the impact of less obvious influences, even on conscientious judges, because, quote, "reason cannot control the subconscious influence of feelings of which it is unaware". That quotation from Justice Gageler's judgment in *CNY17 v Minister for Immigration and Border Protection* in 2019. Matthew Groves, one of the consultants to

the Committee and a member of the Advisory Committee for the Commission, observed in 2020 that judges inevitably carry life experience, predispositions and other personal qualities that influence their attitude, their conduct and the decisions they make.

00:33:26:26 - 00:34:29:07

The Hon Robert French AC

The bias rule does not require decision makers to be devoid of those qualities. As the Report goes on to say, adherence to the judicial method means that judges are constrained in the ways that their predispositions and attitudes may be relied on in decision making. And in today's world judges are exposed to much more extensive education about unconscious biases, particularly in areas such as gender awareness and cultural diversity, and including in particular, First Nations culture. An important distinction should be made between the partiality or impartiality of a decision maker and the partiality or impartiality of the norms which have to be applied in decision making. The Report considers judicial impartiality and reforms to the law on bias from the internal perspective of the Australian legal system and the content of its laws. But the legal system and its laws are not always neutral.

00:34:30:00 - 00:35:36:12

The Hon Robert French AC

Operational discrimination may occur between the impacts upon different groups of people within our societies. And we looked at many aspects and examples of that in the Justice Project undertaken by the Law Council, to which Justice Derrington referred earlier. One example is the effect of mandatory minimum sentencing laws. Such laws may apply a one size fits all punishment to quite diverse acts of criminality. They may lead to absurdity and injustice. They may impose unequal burdens across different sectors of our society. The impartial judge may have to apply such laws, albeit in doing so he or she may legitimately draw attention to their unintended consequences. Impartiality is generally seen as a core attribute of the courts, which underpins trust in their processes and decisions. The appearance of want of impartiality — an appearance giving rise to a reasonable apprehension of bias objectively assessed, can be sufficient to vitiate the process or decision in which it has occurred.

00:35:37:10 - 00:36:04:01

The Hon Robert French AC

The principle and its operational application can be described as essential to public confidence in the judicial system, although public confidence itself is an elusive concept and must be treated with some caution. The decisions of courts doing their job without fear or favour have nevertheless, and in today's social media world, been open to criticism based on dislike of the outcomes — characterised as 'activist' or 'failing to meet community expectations'.

00:36:04:21 - 00:36:25:09

The Hon Robert French AC

The latter term frequently refers to the retrospective expectations of other branches of government, or the fourth estate. Those observations lead into the final aspect of my remarks. How to communicate to the public the ways in which courts deal with the risk of bias or the appearance bias in the allocation of cases and how litigants with concerns can deal with the issue.

00:36:26:08 - 00:37:35:16

The Hon Robert French AC

Time does not permit me to undertake an extended discussion of this aspect, but I do draw attention to two important recommendations of the Report. Firstly, Recommendation 1 in Chapter 6: 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. And the second, Recommendation 14 in Chapter 12: 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 to ensure judicial accountability. In closing, I observe that the reference on judicial impartiality appears to have had its origin in a particular case. But the scope of the report and its importance for the authority and legitimacy of the judicial system extends far beyond the significance of that particular case. Greater transparency about the relevant principles and mechanisms, both institutional and remedial, is essential.

Thank you very much.

00:37:36:05 - 00:37:44:10
Ms Sarah Fulton

Thank you very much, Mr French. We really appreciate those comments. And I'd now invite Professor Appleby to the lectern to provide her reflections.

00:37:45:00 - 00:38:37:01
Professor Gabrielle Appleby

Thank you very much, Sarah, for the kind introduction. And thank you also to Justice Derrington, President of the Law Reform Commission, for the invitation to be part of this really extensive and important Inquiry. In my view, and I'm repeating what a number of speakers have really said today, there are two foundational strengths on which the Law Reform Commission's impartiality Inquiry Report and recommendations rest. The first strength is the Commission's openness to being informed by legal experience, as well as data on public perception and psychological science in understanding how bias operates and is perceived. Second, and relatedly, was the Commission's acceptance that addressing impartiality and public perceptions of bias was a task that was not for the individual judge alone, applying a legal test to applications that might arise.

00:38:37:13 - 00:39:31:26
Professor Gabrielle Appleby

It's a broader task, as the Attorney referred to it. It is an institutional task, as the Report refers to it, where there must be institutional leadership across both the courts and the government to support individual judicial officeholders in performing their duties as impartially as possible, as well as informing the public about their work. So today in my remarks, I'm going to reflect on two key sets of findings and recommendations of the Report that relate to the procedures for responding to particular cases of bias. I'll start with some brief reflections on the reforms recommended to the self-disqualification procedure in the Federal Court of Australia and the Federal Circuit Court and Family Court of Australia. And then I'll turn to the recommendation for the Government to establish a Federal Judicial Commission. So generally speaking, the current process for determining whether the bias test has been satisfied involves the challenged judge hearing and determining the matter.

00:39:32:17 - 00:40:04:11
Professor Gabrielle Appleby

The ALRC makes three recommendations that would move away from this focus on the individual judge towards placing responsibility for determining disqualification more broadly on the institution. The ALRC's research revealed a significant split between judicial officers and lawyers and litigants in relation to changes to procedure relating to disqualification applications. Lawyers and litigants supported changes to procedure, while judges were less likely to, raising concerns about tactical abuse and increases in cost and delay.

00:40:05:02 - 00:40:56:11
Professor Gabrielle Appleby

Just a brief snapshot of the survey figures reveal the level of disagreement on these questions. Twenty-three percent of lawyers consider the existing procedures encourage appropriate use of bias applications, whereas 85% of judges considered that they did. Eighty-four percent of lawyers surveyed supported changes in the procedure so that in certain circumstances an application should be transferred to another judge. But only 28% of judges agreed with that change. Eighty percent of lawyers surveyed supported a change in the procedure so that in multi-member panels the panel should decide bias applications, not the challenged judge alone; only 22% of judges supported this change. Now the divide in these figures is perhaps not as surprising when considered against the findings of behavioural psychology that are detailed at length in the report.

00:40:57:03 - 00:42:00:27
Professor Gabrielle Appleby

Humans suffer from a cognitive impairment known as bias blind spot. This is where an individual is less likely to perceive bias in themselves and more likely to perceive bias in others. Under the current legal test, judges assess their own bias against the perspective of a third party. This not only compounds the bias blind spot, but

it often ask them to sit in judgment in relation to their own actions and relationships and is reliant on their own disclosure of those actions and factual background. The Commission's recommendations take the science and the perception problem seriously, as well as taking the potential chilling effect of the existing procedure for parties appearing before a judge, whilst acknowledging the competing concerns that are driving the judges' concerns around the efficiency and delivery of justice, that is, time and delay. The Commission recommends the Federal Court of Australia and the Federal Circuit Court and Family Court of Australia establish a new procedure for the discretionary transfer of bias applications against a single judge to be heard and determined by another judge.

00:42:00:27 - 00:42:51:02

Professor Gabrielle Appleby

That's Recommendation 2. The Commission notes there should be guidelines, picking up Recommendation 1, that provide for the factors that should guide this discretion, as well as set out evidentiary issues such as any suggestion that the judge put forward information within their knowledge. A further important recommendation directed at the Federal Court of Australia and the Federal Circuit and Family Court of Australia is Recommendation 3. When an application is brought against a sitting judge, sitting as a member of a panel bench, the full panel determines the question of bias, not the single judge sitting alone. The question of whether the current practice may affect the judgment of the court has now been granted special leave to appeal to the High Court in the case of *QYFM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs*.

00:42:51:16 - 00:44:02:04

Professor Gabrielle Appleby

So we may now have further light shed on that answer. The High Court is not included in the Commission's recommendation, but the ALRC does indicate that a number of judges and commentators have suggested it would be desirable at this level and of course it would be open for the High Court to adopt a similar procedure. The final recommendation is based on the current level of complexity, uncertainty and inconsistency in the current practice that a clear, streamlined appeals procedure for interlocutory appeals in relation to disqualification decisions by single judge courts should be implemented in the Federal Court of Australia and the Federal Circuit and Family Court of Australia. And this recommendation would complement the discretionary transfer of bias applications by providing an expedited process for appealing against single judge decisions. Turning then to the establishment of a federal judicial commission. The ALRC also recommended that the government establish a federal judicial commission in Recommendation 5. The Commission does not recommend a particular model for that judicial commission, recommending rather that a further process of consultation be undertaken to determine that model.

00:44:02:20 - 00:44:51:17

Professor Gabrielle Appleby

It's encouraging to hear today the Attorney speak about the Government's in-principle commitment to implementing this recommendation. A federal judicial commission would provide an alternative pathway for individuals to raise concerns about bias. This might arise, for instance, where the recusal procedure within a case and the appeal mechanisms are unavailable or seen as insufficient. As the ALRC's own survey data indicates, lawyers ranked this as the most important reform that could be achieved to maintain public confidence in judicial impartiality. That is, they ranked it ahead of reforms to diversity in judicial appointments, reforms to the bias test and the process itself. Litigants' responses also revealed that the lack of a transparent, accessible and robust complaints system was a concern.

00:44:52:04 - 00:45:33:29

Professor Gabrielle Appleby

Litigants who had had a negative judicial experience but had not raised the issue, indicated that they did not do so primarily because they thought there would be no point, nobody would listen, they would not be believed, and there was corruption involved. Others said they did not know they could raise it, that they were scared and they did not have an opportunity to do so. The establishment of a judicial commission would support a number of judicial values. It would provide an equally accessible avenue of fair and transparent accountability for judicial conduct. It would address not just impartiality concerns, which are detailed at length in the Report, but concerns about other inappropriate conduct by judges on and off the bench, including sexual harassment and bullying.

00:45:34:19 - 00:46:05:06
Professor Gabrielle Appleby

As the ALRC points out, such a mechanism would allow for the identification of recurring issues, which can then inform institutional supportive responses, including through the development of judicial education and training programs. Where this is publicly reported, these responses can increase public confidence in the responsiveness of the court to concerns regarding judicial misconduct. This reform would be a significant shift in the current process in these courts for receiving and dealing with complaints against judges.

00:46:05:15 - 00:46:53:14
Professor Gabrielle Appleby

This is done through the head of jurisdiction and, since 2012, that work can be supported by the appointment of a Conduct Committee to assist in investigations. The head of jurisdiction has a limited suite of administrative responses where there is a finding of misconduct, and these are generally of a supportive nature: allowing a judge to sit less to complete delayed judgments, providing mentoring and educational support, for example. For serious conduct the head of jurisdiction can refer the matter to the Parliament to consider removal on grounds of misbehaviour and incapacity. And there are processes that can be engaged to investigate the conduct further before the Parliament contemplates removal. The general response received by the ALRC is that this current system is not sufficient.

00:46:53:28 - 00:47:52:20
Professor Gabrielle Appleby

This was the view of the Australian Bar Association and the Law Council of Australia in their submissions to the Commission. It's also the on-the-record view of many who have held the position as head of jurisdiction with the responsibility of receiving, investigating and responding to reports of misconduct. The current process has been criticized for lacking formality, vesting too much discretion in the head of jurisdiction, not addressing potential conflicts of interest, lacking clarity and transparency, and providing limited powers of response. A federal judicial commission would follow the introduction of similar bodies in many states and territories, and the ALRC draws some key lessons from these experiences. Concerns the judicial commission would be flooded by complaints by disgruntled unsuccessful litigants have simply not been borne out in those jurisdictions. While relatively few complaints have been made out against judicial officers, those that have indicated there are serious transgressions in the judiciary that justify the development of the complaints system.

00:47:53:15 - 00:48:40:27
Professor Gabrielle Appleby

The state and territory commissions also highlight the close connection between problematic judicial behaviour and physical or mental impairments and stress, which must be sensitively navigated in the design and possible responses of a judicial commission. The ALRC, I think rightly, notes that the significance of this reform means there is a need for a further process of consultation before it is implemented. The design of a federal judicial commission will be challenging. It will be challenging because it must be robust and independent enough to meet its objectives of providing an avenue that will operate to increase public confidence in the judiciary. But it must also be designed in a way that's constitutionally aware and sensitive. The imperative of protecting the judiciary from influence from the political branches looms constitutionally large.

00:48:41:16 - 00:50:00:22
Professor Gabrielle Appleby

This tension is apparent in the ALRC's note of caution that the Commission should not have the power to remove or to discipline judges. Rather, the model should follow that in the Australian states and territories and that the disciplinary power should be returned to the head of jurisdiction. Certainly the power of removal is a constitutionally a matter for the Parliament. But I do hold some concerns about the starting point being that the Commission should not have the power to discipline judges. While it reflects the practice in the Australian state and territory commissions, it doesn't reflect what has emerged as international best practice and we see that in the UK, the US and the Canadian mechanisms. Establishing a body, I'm concerned, sorry, I'm concerned that establishing a body without the power to discipline and leaving the head of jurisdiction to use their administrative powers to respond to the findings of misconduct risks undermining the public trust and confidence that it is intended to gain. So this is just one of the important design conversations that need to be had flowing from the recommendations of the ALRC to establish a federal judicial commission. It's a complex

conversation and one that needs to be undertaken in close collaboration with the judiciary, as well as engaging with many other stakeholders. And I congratulate the ALRC for starting this conversation. Thank you.

00:50:02:06 - 00:50:13:01

Sarah Fulton

Thank you very much, Professor Appleby. I'd now like to invite Mr Tony McAvoy SC, who's joining us from Ngunnawal country in Canberra to provide his remarks.

00:50:14:12 - 00:50:52:07

Mr Tony McAvoy SC

Thank you, Sarah. I acknowledge the Jagera people and the Turrbal people of the Brisbane area. I also acknowledge the Ngunnawal and the Kgamberry people of Canberra where I'm situated at the moment. I apologise that I couldn't be there in person, but I'm grateful that I've been able to join online. First, I would like to congratulate Justice Derrington and Sarah and the Australian Law Reform Commission on the launch of this Report.

00:50:53:01 - 00:51:34:19

Mr Tony McAvoy SC

I was honoured to be invited to join the Advisory Committee to the ALRC for this particular referral, and I'm similarly honoured to speak at the launch today. The Report could have taken a very narrow, and in my view, erroneous approach to the terms of reference which dealt with only the technical aspects of the judicial impartiality question. But to the credit of the Committee and the ALRC, it was determined that the Inquiry must look at the institutional and systemic aspects of bias as well as impartiality.

00:51:35:05 - 00:52:44:23

Mr Tony McAvoy SC

Of course, systemic biases cut across the whole spectrum of society. From my own experience, though, I am able to speak to the First Nations sector, and I must confess that this Inquiry came along at a time when I was still digesting the reach and the meaning of a report into unconscious and implicit negative bias towards First Nations People. That report, published in May 2020 by Australian National University, PhD candidate Siddarth Shirdokar, plainly and clearly demonstrated that three out of four Australians hold an unconscious and implicit bias, a negative bias, towards First Nations people. The report demonstrated, contrary to what I expected to find, that the more educated and older Australians featured more strongly in their bias.

00:52:46:11 - 00:53:54:01

Mr Tony McAvoy SC

The report as a whole appeared to me to say not only was there no reason why such figures should not be applicable to the legal profession, but there were many reasons why it should. In the legal and the justice sectors, the exercise of discretion plays an important role in the delivery of justice, and it concerns me, and it should concern all of us that what appears to be such a pervasive level of bias exists in our community. One can only wonder what impact such biases are bringing to bear on the outrageous rates of over-incarceration of First Nations people and the soaring rates of First Nations child removal. However, having researched the subject a little more, I understand that these biases are difficult to overcome entirely. But there are a few things that we do know.

00:53:55:14 - 00:54:51:18

Mr Tony McAvoy SC

We know that greater diversity in the cohort helps people within the system to recognise their own biases and gives the public a greater sense that the judiciary and of course, the rest of the justice system, reflects the community it serves. We know that mandatory training only has limited success, but that voluntary training tends to try and sell enlightenment to the enlightened, so to speak, but nevertheless, comparatively speaking, the bias training available to judicial officers in Australia needs greater investment and development. And it is my layperson's observation that our friends in Aotearoa have a far deeper and more sophisticated approach than is available on these shores.

00:54:53:19 - 00:55:54:13

Mr Tony McAvoy SC

I encourage all readers of this Report to dwell a little on the issues of institutional bias, and ask you to know that the contributors to this section through their submissions and their associated work, are some of the leading First Nations advocates and thinkers in this field. I commend the Report to all interested in the notion that fairness, and apparent fairness, of our justice system is worthy of vigorous pursuit. That's all I wish to say today. Unfortunately, because of our late start, I can't stay for questions. I'm in Canberra for other business and I have to leave. So I wish you well for the rest of the launch and thank you very much for listening to my few words. Thank you.

00:55:54:13 - 00:56:37:00

Ms Sarah Fulton

Thank you, Mr McAvoy and thank you again to all of our panelists for your reflections. We'll use the remainder of the time we have available — and I apologise that it has been truncated somewhat — for a Q&A discussion with our panelists. Unfortunately, Mr McAvoy won't be able to join us for the questions. But a number of questions have been submitted in advance for the session and anyone listening online or watching online, please feel free to send through questions to impartiality@alrc.gov.au. We don't have a roving mic here in the courtroom but if you would like to raise a comment or questions please indicate to me and we will try to get to as many as we can.

00:56:37:28 - 00:57:27:24

Ms Sarah Fulton

So I'll start Mr French, with a question that was submitted in advance for us. In one of your judgments as the Chief Justice of Australia, you expressed perhaps a more frank view of the fair-minded lay observer than many others. But you said it was still a useful test because, and I'm quoting here, 'it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers'. One of the questions that's been submitted to us is: what practical steps can judges take to help them to see things from an outside perspective, and to have confidence that they are, in fact, doing so?

I'm guessing throwing dice is not appropriate.

00:57:29:04 - 00:58:28:17

The Hon Robert French AC

Judges love surrounding, they're lonely people, they love surrounding themselves with imaginary friends, like reasonable persons. And if you're an IT judge, you look to the company of the unimaginative skilled worker, or if you're dealing with offensive conduct, you might look at the innocent bystander and see whether they were actually offended. And so this is another example of the judge's imaginary friend. And that's really just a mechanism for reminding the judge, as I said, in that judgment, which was in *British American Tobacco v Laurie*, where I and Justice Gummow, I think, were in the minority. That dealt with a case of disqualification based on the fact that the judge in question made some interlocutory rulings, which were said to have a predisposed or reflected a predisposition to a particular view of the case.

00:58:28:17 - 00:59:34:03

The Hon Robert French AC

I'm not sure about what practical steps judges can take to help them see things from an outside perspective. Apart from being people who are immersed in the world and their community beyond the confines of their chambers, so that they have something of an understanding of how non-lawyers may view the particular set of circumstances that arise in relation to a question about disqualification or bias. And that's not an easy thing to do because there are so many internalised terms, understandings that we as judges have that we take for granted, but which when you step outside the framework of the judicial company and the company of lawyers, people outside don't take for granted, don't understand, don't necessarily accept. Nevertheless, the judge must do the best he or she can.

00:59:34:03 - 01:00:22:23

The Hon Robert French AC

And I think that means — and we're talking here about a judge dealing with an application for self disqualification, or alternatively an appeal court dealing with a question whether a judge should have been disqualified or whether the decision is vitiated for actual or apparent bias. And I think the best that can be done is to make sure that the explanation for the position that the court reaches, using this principle, reinforces that it is not a sort of an elitist perspective on what constitutes bias or partiality, but rather a perspective from the real world. Now, that's hard to achieve, but I think that judges these days are probably a bit more attuned to it than perhaps they were in other times.

01:00:22:23 - 01:00:54:25

Ms Sarah Fulton

Thank you, Mr French. I have another question now that was submitted that I'll direct to Professor Appleby. As part of the consultation process, we heard many good experiences about courts but we also heard from a significant number of people who had quite traumatic experiences perhaps where they felt that the judge was biased in their case, and that there was no practical means of addressing that — bias procedures weren't accessible, or were of no use.

01:00:55:27 - 01:01:43:24

Ms Sarah Fulton

And that can have really long term impacts on people and affect their trust in institutions more broadly. And at this point, I would also like to acknowledge those people who shared their stories with us. It can be quite, it can take quite a bit of courage to do so. And I wanted to assure you that we really listened to those stories and looked at them very carefully in framing our recommendations. So a number of you have submitted questions about past cases and cases that they have been involved in. Do you think there's a role for a federal judicial commission in considering cases that were heard before the establishment of the commission, for example, if there is a pattern of conduct that might be misconduct, and anything could be done about cases heard before its establishment?

01:01:43:24 - 01:02:59:20

Professor Gabrielle Appleby

Yes. Thank you Sarah for that question. It sounds like a number of people had very similar concerns. I think it raises actually quite a number of issues around design of a federal judicial commission. Obviously the immediate question is the jurisdiction of the institution and would it have a retrospective mandate. And we saw very similar conversations playing out in relation to the national integrity commission, now the national anti-corruption commission, and whether it would extend to past conduct, how far back it would extend, whether there would be a threshold in relation to the type of conduct or perhaps the threshold would be a pattern of misbehaviour. And they are all questions of design. There may be some delicate constitutional questions that need to be navigated with respect to the federal judiciary that I haven't fully thought through yet, but I think that would be a question of design if a federal judicial commission would have retrospective jurisdiction. But I think the question about pattern of behaviour is not necessarily just one about investigating retrospective conduct and complaints and cases.

01:03:00:00 - 01:03:31:16

Professor Gabrielle Appleby

But if there is a contemporary complaint that is made in relation to a judge where there is a pattern of behaviour that can be identified. One of the key design principles that I have been working on for a number of years in relations to commission of this type is that there should be transparency, transparency about: how to make a complaint, about how it is dealt with, but transparency about the consequences for making a complaint, with the likely responses when certain types of behaviour is made out.

01:03:31:25 - 01:04:49:07

Professor Gabrielle Appleby

And I think that whether there is a pattern of behaviour that is also made out, it should be transparent as to how that then affects the responses for the judicial officer. But as I indicated, the ALRC Report rightly notes

that where there is a pattern of behaviour, it may be something that the Commission should also be reporting to the court or the government because it may reveal something institutional that needs to be addressed as well, not just in relation to the individual judge. Just one further issue that I think that question raises, because it's a situation that has arisen in a number of foreign jurisdictions where there are judicial commissions: What happens in relation to a case that may be before a commission that involves a sitting judge, where the judge resigns prior to the investigation being completed? And there are real concerns in relation to the individuals who make those complaints that the resignation isn't the consequence in terms of a response to a finding of misconduct. And I think that's a really important design question that needs to be grappled with. Does the jurisdiction of the Commission continue to extend after the resignation of a judge so that at least the report can be completed? And that's a really important public confidence dimension of design.

01:04:49:07 - 01:04:49:16

Ms Sarah Fulton

Thanks Professor Appleby. Do we have any questions in the room here? Yes.

01:04:49:16 - 01:06:08:29

Question from the floor

Yes. I'd like to address a recent issue and obviously we're all aware of Guy Andrews and what happened in that situation. So there's a delicacy with how it's handled obviously. So there's also the people that are complaining about the judges and looking at the motives and intentions and things in that area to be able to look at it as a broad spectrum. How does the commission, how does that work? So that it's actually the request for looking into a judge's behavioural actions is actually balanced and gets the balance right where the judge is actually treated fairly as well, so that it doesn't become a situation where they feel that they're being bullied and unable to address the complaint as well.

01:06:09:08 - 01:07:10:19

Professor Gabrielle Appleby

Look, thank you very much for that question and it raises all sorts of complicated questions of design which this conversations starts. And I think, I feel quite strongly and I've spoken about it before, that the establishment of a federal judicial commission is not just for the benefit of people who are potentially reporting concerns about misconduct, but it's also for the benefit of the judicial officers as well, because a carefully designed commission will allow for a fair process. It will allow for the sorting of complaints according to a pre-established, transparent procedure that's supplied by independent authority to determine what complaints need to go to the next point and are justified for investigation. There needs to be very careful consideration given to the balance between confidentiality and transparency in relation to an individual complaint, and that needs to take into account both the concerns and requests of the person bringing the complaint, but also the judicial officer.

01:07:10:19 - 01:07:44:03

Professor Gabrielle Appleby

And I think one of my concerns with the current system relying, as it does, in relation to the making of a complaint, to the head of jurisdiction, which is a largely opaque process. But of course it relies heavily, as we saw in relation to Justice Guy Andrews, in relation to the appeal process and the publicity of the appeal process, it's not a tailored institutional response that has considered and worked through all of these competing issues to try to design the most supportive, but robust system.

01:07:45:04 - 01:08:42:27

The Hon Robert French AC

Can I just add that I think the New South Wales Judicial Commission probably has a reasonable model in that respect in how it deals with that with complaints. But taking up Professor Appleby's comment, I think the establishment of such a commission can be very beneficial to the courts as well as to litigants. It can take some of the burden off heads of jurisdiction where there are, I'm not talking about the sort of complaint which might be made in a court, a letter of dissatisfaction with the way somebody behaved, which can be dealt with informally by counseling and peer pressure and so forth, but I think that anything of any significance which can be the subject of an independent investigation and a route which does not have to go through the court but directly to a complaint receiving body is advantageous.

01:08:43:12 - 01:09:24:01

The Hon Robert French AC

I suspect also in the end it will have to be linked to appropriate powers conferred on the head of jurisdiction to give effect to, for example, recommendations or findings by the relevant judicial commission. There is, of course, always the problem that where you get a finding adverse to a serving judge, which is not a finding that would warrant removal, but is nevertheless a reflection on that judge's conduct, what impact does that have on the judge's continuing authority and ability to carry out the judicial function? And that's something that all has to be thought about, I think.

01:09:25:08 - 01:10:23:09

Ms Sarah Fulton

Thank you, Mr French. And I'll just add to that, that we did have some very interesting discussions in consultations about procedures that are in place for complaints about medical practitioners — many similar issues can be brought into play there — and in the types of systems that are involved where immediately, when a complaint goes through the threshold process, it is considered from the capacity perspective and appropriate support is provided to the judge through the process. So I think there are things to be learned from other areas of practice and professions in how that can be done best to support judges and to provide the right outcomes and protection for the public. So that's something that is addressed in brief in the Report as well. I see we're running short of time, but I'll just ask Mr French one further question.

01:10:23:18 - 01:10:59:16

Ms Sarah Fulton

Given the Attorney-General's announcement today about reforms to judicial appointment procedures. Now lawyers responding to the survey ranked diversity of background of judicial officers as the second most important reform to improve public confidence in judicial impartiality. In the past, you publicly expressed some concerns about the bureaucratisation of judicial appointments procedures. I wonder if you have any thoughts on what would be useful in such a process and if there are any dangers that you think should be considered when the processes designed?

01:11:01:06 - 01:12:31:14

The Hon Robert French AC

My concerns about bureaucratisation were a reflection of the way in which things are dealt with in the United Kingdom. And the application process is pretty amazing if you download some of the documents which include what level of demerit points on your licenses you should disclose in your application and so forth and how you should describe previous circumstances in which you have done something and been successful. This is called the Situation Objective Action and Result model, the SOAR model. So there's a lot of paperwork associated with it. That said, I think that a much more systematic approach to judicial appointments is to be welcomed. When Robert McClelland, who I think is participating today in his capacity as Justice McClelland, was the Attorney-General he undertook a very wide-ranging, consultative process. Certainly insofar as the High Court was concerned, well beyond the statutory requirement of simply consulting with the Attorneys-General and of course using the panels procedure that was abandoned by his, or put to one side, by his successor. I think a judicial appointments commission, which can do those things and provide an advisory function to the Executive is appropriate.

01:12:31:14 - 01:13:06:09

The Hon Robert French AC

I think the Executive must the body that ultimately takes accountability and maybe is a guard against a kind of homogenisation of candidates through a bureaucratic process. To finish, I was once asked in England by a member of the English judiciary when I was Chief Justice, what difference do you think it would have made to the composition of the High Court if it had a judicial appointments commission? And looking at the Supreme Court of the UK I said we would probably only have one woman on the court.

01:13:06:09 - 01:13:34:20
Ms Sarah Fulton

Thank you, Mr French. And that certainly reflects concerns that were expressed to us and in the literature about the design of these processes and that perhaps retaining political responsibility in selection is important particularly for judicial diversity. So I would love to keep discussing these issues with you all day, but unfortunately we're running very close to time. So I would just thank our panel members and hand back to Justice Derrington to close the webinar.

01:13:36:00 - 01:14:14:19
The Hon Justice SC Derrington

Thank you all very much indeed. I reiterate my thanks to the panelists, not just for your role today, but for everything that you have contributed to the report thus far. And sincere thanks also to the Attorney-General and to all of you online and here in person for your interest in the Report. Can I say it was a particular privilege for me to work on this Report and as a very inexperienced judge, I have learned more than I think I could have hoped for in very quick time, and I will take the benefit of that.

01:14:14:19 - 01:14:48:04
The Hon Justice SC Derrington

So I'm very grateful for that. And thank you to everyone who has made today possible: the court staff, the ALRC team, our Twitterers over here on the left and we look forward to developing and implementing the recommendations in the federal court system. And we look forward to seeing what the Attorney's ultimate design principles reveal. So that brings the proceedings to a close.

Thank you all very much indeed.

View the webinar recording: www.alrc.gov.au/news/recording-without-fear-or-favour/

Read more about the **Judicial Impartiality Inquiry**:

Download *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Report 138)