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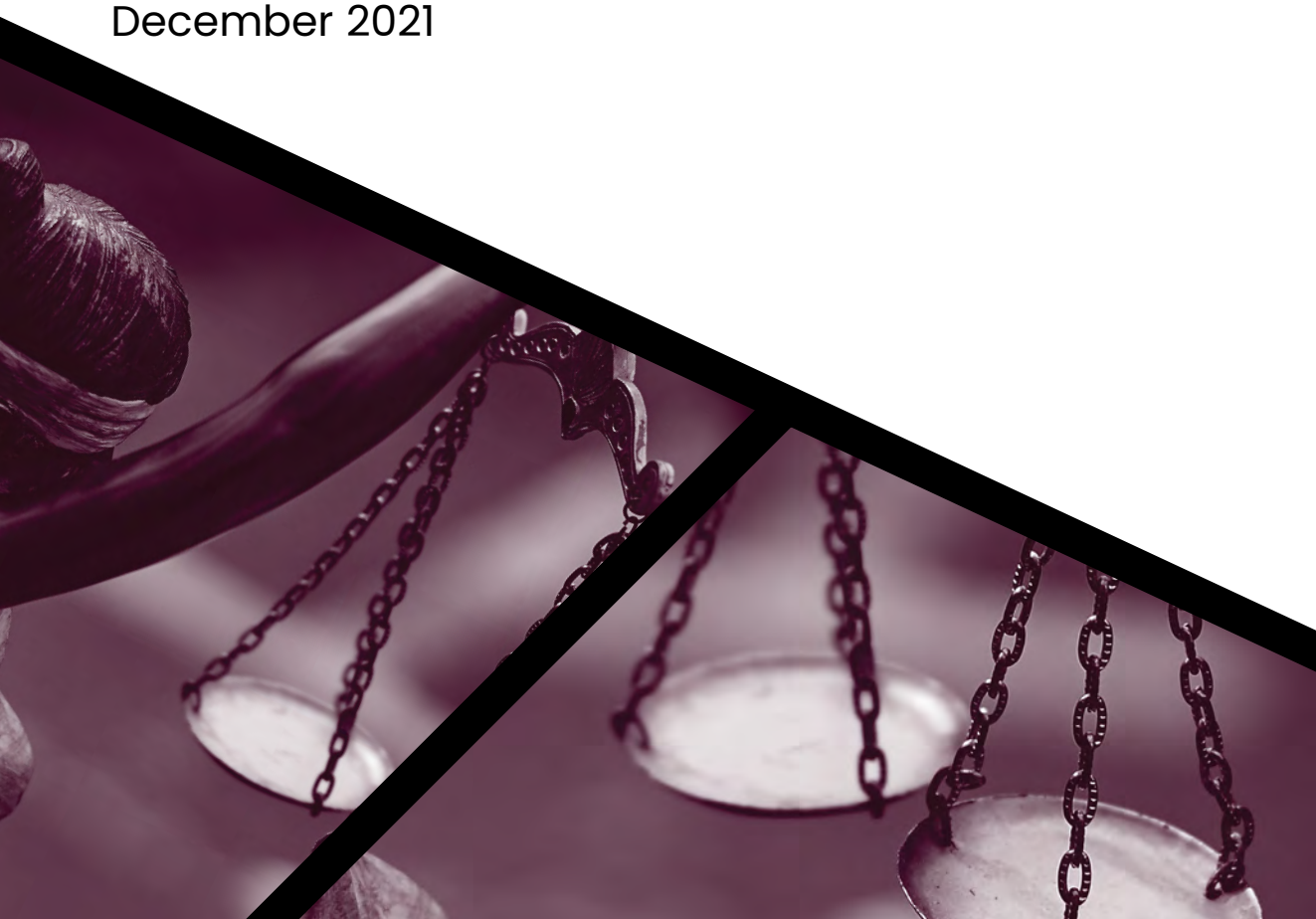
Australian Law Reform Commission

FINAL REPORT

WITHOUT FEAR OR FAVOUR:

JUDICIAL IMPARTIALITY AND THE LAW ON BIAS

ALRC Report 138
December 2021



“I will do right to all manner of people according to law, without fear or favour, affection or ill will.”

Australian Government

Australian Law Reform Commission

FINAL REPORT

WITHOUT FEAR OR FAVOUR:

JUDICIAL IMPARTIALITY AND THE LAW ON BIAS

ALRC Report 138 December 2021

This Report reflects the law as at 1 November 2021.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

Senator the Hon Michaelia Cash
Attorney-General of Australia
Parliament House
Canberra ACT 2600

6 December 2021

Dear Attorney-General

Review of Judicial Impartiality

On 11 September 2020, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into the laws relating to judicial impartiality and bias as they apply to the federal judiciary. On 21 June 2021, the Terms of Reference were amended to change the reporting deadline. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 138, 2021).

Yours sincerely,

The Hon Justice SC Derrington

President

Acknowledgement of Country

The ALRC acknowledges Aboriginal and Torres Strait Islander peoples as the traditional owners of the land on which this Inquiry has been held, and pays its respects to their Elders, past, present, and emerging.

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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 and Ors* (Case P6/2021), whichever is later.

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Recommendations

6. Identifying and Raising Potential Bias Issues

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.

7. Self-Disqualification Procedure

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.

8. Review and Appeal Mechanisms

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.

9. Other Mechanisms for Raising Allegations of Bias

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

10. Finding Clarity in Law and Practice

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.

12. Institutional Supports and Safeguards

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.

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.

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.

List of Background Papers

Number	Title	Date
JI1	**The Law on Judicial Bias: A Primer**	December 2020
JI2	**Recusal and Self-Disqualification**	March 2021
JI3	**The Federal Judiciary — the Inquiry in Context**	March 2021
JI4	**Conceptions of Judicial Impartiality in Theory and Practice**	April 2021
JI5	**Ethics, Professional Development, and Accountability**	April 2021
JI6	**Cognitive and Social Biases in Judicial Decision-Making**	April 2021
JI7	**The Fair-Minded Observer and its Critics**	April 2021

Glossary

ALRC	Australian Law Reform Commission
ALRC Case Review	Review conducted by the ALRC of judgments of Commonwealth courts between 1 January 2015 and 31 August 2021 referring to issues of judicial disqualification
ALRC Survey of Court Users	Survey conducted by the ALRC in July–August 2021 of members of the public who attended any court for non-criminal proceedings in Australia in the past 10 years
ALRC Survey of Judges	Survey conducted by the ALRC in April 2021 of judges of the Federal Court of Australia, Family Court of Australia, and Federal Circuit Court of Australia
ALRC Survey of Lawyers	Survey conducted by the ALRC in July–August 2021 of lawyers who had practised law in Australia in the past five years
AuSSA	The Australian Survey of Social Attitudes
Bangalore Principles	*Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006) annex ('Bangalore Principles of Judicial Conduct')
Consultation Paper	Australian Law Reform Commission, *Judicial Impartiality* (Consultation Paper 1, 2021)
Family Court	Family Court of Australia
Family Law Act	*Family Law Act 1975* (Cth)
FCFCOA	Federal Circuit and Family Court of Australia
FCFCOA (Div 1)	Division 1 of the Federal Circuit and Family Court of Australia, which deals with family law matters (a continuation of the Family Court of Australia)

FCFCOA (Div 2)	Division 2 of the Federal Circuit and Family Court of Australia, which deals with family law, migration, and general federal law matters (a continuation of the Federal Circuit Court of Australia)
FCFCOA Act	*Federal Circuit and Family Court of Australia Act 2021* (Cth)
Federal Circuit Court	Federal Circuit Court of Australia
Federal Court	Federal Court of Australia
Federal Court Act	*Federal Court of Australia Act 1976* (Cth)
Federal Court Rules	*Federal Court of Australia Rules 2011* (Cth)
Guide to Judicial Conduct	Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017, November 2020 revision)
High Court	High Court of Australia
UK	United Kingdom
US	United States of America

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1. Introduction

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The Inquiry

1.1 On 11 September 2020, the then Attorney-General of Australia, 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.

1.2 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 the former Family Court and the former Federal Circuit Court.

1.3 The Terms of Reference require the ALRC to consider, in particular:

- 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.

1.4 Accordingly, the Terms of Reference require the ALRC to consider whether the existing law and procedures are appropriate and sufficient to engender and maintain public confidence in the federal judiciary. In assessing this, the law and procedures must be considered in the context of other institutional structures and practices supporting judicial impartiality and public confidence in it. These shape the appropriate content of the law and sufficiency of the procedures upholding it.

The impetus for reform

1.5 The Inquiry was prompted by the decision of the Full Court of the Family Court in *Charisteas v Charisteas*,[1] delivered on 10 July 2020, in which a majority of the Court (Strickland and Ryan JJ, Alstergren CJ dissenting) held that, although

> at first blush the hypothetical observer would have reasonable grounds to be concerned about private communications between the primary judge and counsel for the wife after judgment was reserved, the totality of the circumstances would be sufficient to dispel concern that the case would be decided other than impartially.[2]

1.6 Subsequent to the ALRC being asked to consider these issues, on 12 February 2021, the High Court granted special leave to appeal.[3] 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, 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.*

1.7 The High Court delivered judgment on the appeal on 6 October 2021.[4] The decision of the High Court has elucidated several of the issues with which this Inquiry has been concerned, but not all.

1 *Charisteas v Charisteas* (2020) 389 ALR 296.
2 Ibid [180] (Strickland and Ryan JJ).
3 *Charisteas v Charisteas* [2021] HCATrans 28.
4 *Charisteas v Charisteas* (2021) 393 ALR 389.

In Focus: The case of *Charisteas v Charisteas*

Charisteas v Charisteas involves a protracted family law dispute, initially filed in 2006, which had resulted in 13 substantial judgments prior to reaching the 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. On 9 September 2016, a number of the parties to the proceeding, supported by the husband, applied for Walters J to disqualify himself on the ground of apprehended bias, arising from 10 statements and rulings made by the judge during the trial. This application was dismissed and Walters J later delivered written reasons. Final submissions were made on 13 September 2016. Justice Walters delivered judgment on 12 February 2018. He 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 that she and the judge had 'engaged outside of court in a manner that was inconsistent with [her] obligations and those of the Judge'.[5]

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'.[6]

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;

5 *Charisteas v Charisteas* (2020) 389 ALR 296 [22].
6 Ibid [22].

(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.[7]

The husband sought a retrial on the basis of a reasonable apprehension of bias on the part of the judge based on the contact between the judge and lawyer while proceedings were ongoing. 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'.[8] 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.[9]

The Court found that a

> fair-minded lay observer, understanding that ordinary and most basic of judicial practice, would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions his Honour was required to decide. The trial judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications.[10]

7 Ibid [24] (Alstergren CJ).
8 *Charisteas v Charisteas* (2021) 393 ALR 389 [12] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).
9 Ibid [13] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).
10 Ibid [15] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

1.8 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;[11]
- balancing questions of efficiency in litigation with exposure to potentially prejudicial information in related proceedings;[12] and
- negative findings of credibility of a party on a preliminary issue, in respect of the effect on the appearance of impartiality in resolution of the remaining issues.[13]

1.9 While the circumstances of the latter two cases were primarily matters of interest for lawyers, the decisions of the Full Court of the Federal Court and Full Court of the Family Court concerning judicial conduct in court, and the actions of the judge involved in the matter giving rise to the High Court's decision in *Charisteas v Charisteas*, received national media attention.[14] Media coverage of decisions by the federal judiciary, and statistical analyses of alleged decision-making patterns of individual judges that are said to give rise to a reasonable apprehension of bias, have also increased.[15] The Australian public would be rightly concerned by many of the issues aired by the media. This Inquiry has provided an opportunity to interrogate whether more is required of the legal system to support judicial impartiality and to maintain the confidence of the public in the administration of justice, and the appropriate scope of the law on actual and apprehended bias in doing so.

Terminology

1.10 The Terms of Reference ask the ALRC to consider the 'laws relating to impartiality and bias' as they apply to the federal judiciary.

1.11 **Chapter 2** explores the concept of impartiality. Impartiality is necessary to fulfil the judicial function. But it is also judged against a background of the matters that judges can *properly* consider under the judicial method. Against this background, achieving impartiality in the courts means ensuring that considerations not required by the judicial method do not improperly and unacceptably influence the decision-

11 *Adacot v Sowle* [2020] FamCAFC 215; *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343.

12 *GetSwift Ltd v Webb* (2021) 388 ALR 75.

13 *Jess v Jess* (2021) 63 Fam LR 545.

14 Kylar Loussikian and Samantha Hutchinson, 'Council Takes on the Big Cheese', *Sydney Morning Herald* (17 December 2019); Kay Dibben, 'Rough Justice', *Courier Mail* (18 December 2019); Nicola Berkovic, 'Questions of Judgment', *The Australian* (5 August 2020); Nicola Berkovic, 'Judge and Barrister's "Secret" Tete-a-Tetes Land in High Court', *The Australian* (12 August 2020); Nicola Berkovic, 'Federal Circuit Court Judge Guy Andrew's "Cruel, Humiliating" Conduct Forces Retrial', *The Australian* (2 September 2020).

15 See Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60.

making process. This ultimately rests on the attitude of decision makers and the process through which they make their decision.

1.12 **Chapter 3** and **Chapter 4** examine the meaning of bias in legal and non-legal contexts. **Chapter 3** sets out the circumstances in which bias in a legal sense may be found to arise in court proceedings. For the purposes of this Report, the ALRC considers that Deane J's characterisation of the law on bias as avoiding 'prejudice, partiality or prejudgment' is a helpful shorthand for the major concerns addressed in the case law, reflecting the ordinary use of such terms.[16]

1.13 **Chapter 4** notes that in non-legal contexts the word 'bias' can have different meanings, and connotations. All the definitions have in common the notion of tending in a particular direction, but most do not convey the idea that the tendency might in some way be unfair or unwarranted. On the other hand, the terms 'unconscious bias' and 'implicit bias' have, in recent years, taken on a particularly negative meaning in general discourse — indicating 'unconscious favouritism towards or prejudice against people of a particular race, gender, or group that influences one's actions or perceptions'.[17] **Chapter 4** explores how judicial ambivalence towards disqualification for bias continues, even though the law now recognises, and accommodates, the potential for irrelevant considerations to impact decision-making without the conscious awareness of the judge.

1.14 Three further terms relevant to the procedures associated with the law on bias require clarification. The terms recusal and self-disqualification are used in distinct senses in this report.

Key terms

Recusal is used to refer to situations where a judge voluntarily transfers a case back to the registry for reallocation on her or his own initiative.[18]

Self-disqualification applies in situations where a formal legal process is brought before the judge seised of the matter to determine whether actual or apprehended bias arises in relation to herself or himself.[19] This process is referred to as the **self-disqualification procedure**.

Disqualification is used in a broader sense to refer to the formal process of having a judge removed from a case for actual or apprehended bias.

16 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J). See further **Chapter 3**.

17 *Oxford English Dictionary Online* (Third Edition, 2021) 'Unconscious bias'.

18 Although recusal has been more recently adopted in Australia, it is now commonly used in proceedings by litigants, legal practitioners, and judges. See *Webb v GetSwift Limited (No 6)* [2020] FCA 1292 [1] (Lee J).

19 This is similar to the distinction between the terms drawn by Professor Tarrant, but adapted to the Australian context. For Professor Tarrant, '[s]trictly speaking, recusal refers to a judge's decision voluntarily to remove himself or herself from a case, whereas disqualification refers to a statutory mandate that a judge not sit when certain statutory provisions apply': John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 11.

Related inquiries

1.15 The present Inquiry is the first of its kind in Australia to specifically consider the laws on impartiality and bias as they relate to the judiciary. However, a number of other inquiries have considered issues relevant to this Inquiry, including:

- Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Cost of Justice: Checks and Imbalances* (Report No 2, 1993);[20]
- Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994);[21]
- Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (Report, 2004);[22]
- Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (Report, 2009);[23] and
- House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, 2017).[24]

1.16 The ALRC has also carried out Inquiries that have raised some of the issues considered in relation to the present Terms of Reference, particularly in relation to social and cultural bias in the operation of the law. Inquiries of particular relevance have included:

- *Multiculturalism and the Law* (ALRC Report 57, 1992);[25]
- *Equality Before the Law — Women's Equality* (ALRC Report 69, Part 2, 1994);[26]

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20 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Cost of Justice: Checks and Imbalances* (Report No 2, 1993) 9–10, 98, 106.

21 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994) particularly xiii-xxi, 72–74, 76–105, 106–117, 118–122.

22 Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (Report, 2004) 191–2.

23 Senate Legal and Constitutional References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (Report, 2009), 6–9, 11–29, 48–9, 53–4, 63–95.

24 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, 2017) 152–153, 263–269, 280–283, 285–289.

25 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [2.27], in relation to cross cultural awareness of courts and the judiciary.

26 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 Part 2, 1994). In particular, see: Recommendation 9.3 ('An advisory commission should be established to advise the Attorney-General on suitable candidates for judicial office'); Recommendation 9.4 ('Federal judges should be able to be appointed on either a full-time or part-time basis'); and Recommendation 9.5 ('Selection criteria for judicial appointment should be identified and publicised').

- *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report 89, 2000);[27]
- *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017);[28] and
- *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135, 2019).[29]

1.17 Relevant work by law reform and other bodies at the international level includes:

- New Zealand Law Commission, *Review of the Judicature Act 1908* (2010); and
- European Committee on Legal Cooperation, *Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality* (2016).

Navigating this Report

1.18 This Report is divided into five parts:

- Part One: Foundations;
- Part Two: Mechanisms for raising and determining issues of bias;
- Part Three: The law on actual and apprehended bias;
- Part Four: Complementary structures to support judicial impartiality and public confidence; and
- Part Five: Appendices.

1.19 *Part One: Foundations* contains four chapters that provide general context for the law reform recommendations in this Report. **Chapter 2** outlines the legal and theoretical sources underpinning judicial impartiality and provides the conceptual foundations for this Report. By providing an explicit framework for understanding the object and purpose of judicial impartiality, the chapter sets out the standards by which existing practices, including the law on bias, and recommended reforms, can be measured. **Chapter 3** provides a brief overview of the existing law on actual and apprehended bias in Australia. **Chapter 4** reviews research into how humans make decisions and the implications of this research for judicial decision-making and the law on bias. **Chapter 5** provides an analysis of data obtained through empirical research conducted by the ALRC.

1.20 *Part Two: Mechanisms for raising and determining issues of bias* contains four chapters that consider the processes by which the Commonwealth courts manage

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27 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) rec 11, regarding a federal complaints protocol and system.

28 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) rec 6-1, regarding unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

29 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) rec 51 (Judicial appointment), rec 52 (professional development).

and address issues of potential judicial bias. Courts and judges have developed a range of approaches to prevent issues of apprehended bias from arising, and to respond when they do arise. **Chapter 6** focuses on preventive measures and the process for bringing the issue to the attention of the judge. It leads into a discussion in **Chapter 7** that considers how a court determines matters of bias raised by formal application during litigation, and the discussion in **Chapter 8** concerning appeal and review of disqualification decisions and issues of bias. **Chapter 6**, **Chapter 7**, and **Chapter 8** consider the court's usual processes to deal with the potential for bias in a case from the time of filing to final appeal, making a suite of recommendations to increase transparency and the appearance of impartiality. **Chapter 9** considers other mechanisms (outside the litigation process) by which issues of bias relating to judicial conduct may be raised.

1.21 *Part Three: The law on actual and apprehended bias* contains two chapters. **Chapter 10** considers views raised during the Inquiry about difficulties with the way the law on bias operates, and how some of these concerns have been addressed, and can be further addressed through the development of guidance and case law. **Chapter 11** considers the ways in which the bias rule responds to — and does not respond to — the potential for social and cultural factors to improperly impact on judicial decision-making.

1.22 *Part Four: Complementary structures to support judicial impartiality and public confidence* contains one chapter. **Chapter 12** addresses areas of institutional practice identified by stakeholders as particularly important to underpin and complement the law on bias to ensure the law is sufficient to maintain public confidence in the administration of justice. This includes discussion of judicial appointments, judicial education, ethical guidance, and the collection of feedback and data.

1.23 *Part Five: Appendices.* The Report also includes 10 Appendices. Appendices include: details of consultations and primacy sources; proposals and questions in the Consultation Paper; a list of submissions; information concerning data methodology; and further supporting information discussed in the Report.

Guiding principles

1.24 In formulating its recommendations, the ALRC was guided by the following overarching principles:

Principle One: The court as an institution has a central role in upholding judicial impartiality

Principle Two: The limits of judicial impartiality are determined by the function of courts

Principle Three: Litigants and the public both have a legitimate interest in judicial impartiality

Principle Four: The law on bias is shaped by and dependent on other institutional structures

Principle Five: Transparency, equality, integrity, and fairness are crucial complementary values

1.25 Each of these principles, and its relevance to the ALRC's consideration of issues for this Inquiry, is briefly addressed below, and discussed in more detail in **Chapter 2**.[30]

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

1.26 This principle recognises that, although judges' commitment to impartiality is crucial, judicial impartiality is not a matter only for the individual judge. Jurisdiction over matters is vested in the court as a whole, and the court has a central role in ensuring impartial decision-making. The central role of impartiality to the judicial function and the constitutional order also means that any reform to the law on bias should be judge-led.

Principle 2: The limits of judicial impartiality are determined by the function of courts

1.27 This principle recognises that, although judicial impartiality is a vital judicial virtue, it cannot be absolute. The scope and limits of judicial impartiality are defined by reference to the courts' role in dispute resolution and social governance. Reform must be sensitive to that role, and to unintended impacts.

30 These principles adapt the principles that the ALRC adopted in its Consultation Paper to assist with framing its proposals. In general, the stakeholders who addressed the issue were supportive of the principles set out in the Consultation Paper. However, three stakeholders made comments suggesting improvements, which have been considered in reformulating these principles.

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

1.28 Litigants have an interest in judicial impartiality as it underpins merit-based resolution of their disputes, and respects their dignity in the exercise of public power. However, judicial dispute resolution is a public good, and there is also a public interest in ensuring that judges are, and are seen to be, impartial more broadly.

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

1.29 A web of interconnected and mutually reinforcing laws, procedures, practices, and institutional structures promote and protect judicial impartiality and the appearance of judicial impartiality. The extent to which the bias rule maintains public confidence in judicial impartiality depends on the balance struck between the scope and application of that rule and the effective functioning of other practices and structures.

Principle 5: Transparency, equality, integrity, and fairness are crucial complementary values

1.30 Various other judicial values contribute to, and interact with, judicial impartiality. Transparency, equality, integrity, and fairness are particularly closely related to judicial impartiality, and are particularly important for public and litigant confidence in the administration of justice.

Overview of key findings

Confidence in the courts

1.31 **At a general level, public confidence in the Australian courts is high:** 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.[31] Research shows that judges take their oath of office to administer justice impartially seriously, although they may differ as to their understandings of what that requires. However, both litigants and lawyers consulted identified some serious, if isolated, issues in relation to judicial behaviour in court giving rise to perceptions of bias.

> *See* **Recommendation 5** *(federal judicial commission),* **Recommendation 7** *(judicial appointments),* **Recommendation 9** *(structured professional development),* **Recommendation 12** *(court user experiences), and* **Recommendation 13** *(policy on statistical analysis).*

31 See **Chapter 5**.

1.32 **Levels of confidence in the courts may differ across, and within, different groups in the community:** For example, many Aboriginal and Torres Strait Islander people have reported low levels of trust in the justice system, linked to the role that the legal system has played in dispossession and over-incarceration of Aboriginal and Torres Strait Islander people, and removal of Aboriginal and Torres Strait Islander children from their families, communities, and culture.[32]

> *See* **Recommendation 7** *(judicial appointments),* **Recommendation 8** *(data on diversity of judiciary),* **Recommendation 9** *(structured professional development),* **Recommendation 10** *(cross-cultural education in relation to Aboriginal and Torres Strait Islander peoples), and* **Recommendation 12** *(court user experiences).*

1.33 **More should be done to understand litigant and lawyer confidence:** Stakeholders suggested that litigants and lawyers from particular demographics were more likely to have negative experiences in court.[33] It is important for courts to better understand litigants' and lawyers' experiences of fairness and impartiality in the Commonwealth courts, including as to whether there are differences across demographic categories.[34]

> *See* **Recommendation 5** *(federal judicial commission), and* **Recommendation 12** *(court user experiences).*

The law on actual and apprehended bias

1.34 **The substantive law does not require amendment:** Although the law on bias can have difficulties in application, stakeholders were broadly of the view that there should be no change to the law on actual and apprehended bias. Rather than reform to the law, stakeholders were most concerned about a realistic approach to the law, and reforms to procedures and the institutional structures underpinning the law. There are a number of areas, however, where further development or clarification through case law would be desirable, including in relation to: the approach to prejudgment; the relationship between the fair hearing rule and bias rule concerning poor judicial conduct in court; the use of statistics to ground a reasonable apprehension of bias; and, implied waiver of the right to raise an issue of bias.[35]

1.35 **An objective approach is crucial:** Disqualification for apprehended bias can be a particularly sensitive issue for judges, but the law considers how things might appear to an outsider, and bias claims need not be considered accusatory of fault. Research shows that it is difficult for judges, like any person, to see their own biases, and to see how their own actions may be perceived by others.[36] It is

32 See **Chapter 2**, **Chapter 11**, and **Chapter 12**.
33 See **Chapter 11**.
34 See **Chapter 12**.
35 See **Chapter 10**.
36 See **Chapter 4**.

important that recusal and disqualification in appropriate circumstances is seen as a positive step important to uphold the integrity of court processes.

> *See* **Recommendation 2** *(discretionary transfer of disqualification application in single judge cases),* **Recommendation 3** *(disqualification in multimember courts)*, **Recommendation 9** *(structured professional development), and* **Recommendation 11** *(review of Guide to Judicial Conduct).*

1.36 **There is a need for greater visibility of the law:** The law on bias goes to the heart of the administration of justice. Accordingly, the law needs to be accessible and transparent. Currently, the law can be inaccessible for litigants and members of the public, and — given the rarity of applications — even for members of the profession.[37]

> *See* **Recommendation 1** *(judicial disqualification guidelines), and* **Recommendation 14** *(accessible resources)*.

1.37 **There is a need for further clarity about basic judicial practice in some areas:** Some practices that the legal profession accepts (or that exist in particular jurisdictions or specialised areas of law) may be perceived differently by litigants and the general public. Here, the *Guide to Judicial Conduct* plays an important role in setting out common understandings of accepted judicial practice, in a way that can be responsive to community expectations and balance the competing considerations judges face in striving to be, and appear to be, impartial.

> *See* **Recommendation 1** *(judicial disqualification guidelines),* **Recommendation 6** *(review of rules and guidance in light of Charisteas v Charisteas),* **Recommendation 11** *(review of Guide to Judicial Conduct), and* **Recommendation 12** *(court user experiences)*.

1.38 **Bias from social and cultural factors must also be addressed through institutional responses:** Social and cultural factors will inevitably influence the decision-making of judges.[38] Stakeholders raised concern about the negative impact personal and institutional biases have on Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with a particular religious affiliation, LGBTQI+ people, people with disability, asylum seekers, women, and parties of both genders to family law proceedings. The law on bias has a limited role to play, by addressing obviously discriminatory statements or reliance on stereotypes. However, where the rule on bias cannot be appropriately employed to 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 (and the confidence of particular communities) in judicial impartiality is dependent on both judges, and institutional structures, continuing to recognise, reflect on, and respond to these concerns.[39]

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37 See **Chapter 10**.
38 See **Chapter 11**.
39 See **Chapter 11**.

See **Recommendation 7** *(judicial appointments),* **Recommendation 8** *(data on diversity of judiciary),* **Recommendation 9** *(structured professional development),* **Recommendation 10** *(cross-cultural education in relation to Aboriginal and Torres Strait Islander peoples),* **Recommendation 11** (*review of Guide to Judicial Conduct),* **Recommendation 12** (*court user experiences), and* **Recommendation 13** *(policy on statistical analysis).*

Procedures for raising and determining issues of bias

1.39 **There is confusion about procedures for requesting disqualification and how to seek review:** The practices and procedures for raising issues of actual and apprehended bias, determining them, and reviewing determinations have been in a significant state of flux over the past 50 years. 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.[40]

See **Recommendation 1** *(judicial disqualification guidelines), and* **Recommendation 4** *(streamlined appeal).*

1.40 **The self-disqualification procedure requires reform:** 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. When an issue of bias is raised with a judge, that judge is required by practice to decide whether or not they are disqualified. This undermines the confidence of both litigants and lawyers in the outcome, particularly where appeals are time consuming and expensive.

See **Recommendation 2** *(discretionary transfer of disqualification application in single judge cases),* **Recommendation 3** *(disqualification in multimember courts)*, **Recommendation 4** (*streamlined appeal), and* **Recommendation 5** *(federal judicial commission).*

1.41 **An additional safeguard is required:** 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. Where poor judicial behaviour giving rise to perceptions of bias is not seen to be adequately addressed by existing mechanisms, confidence in the administration of justice is significantly undermined. Steps also need to be taken to ensure judges are adequately supported to address challenges they face and to uphold appropriate standards.

40 See **Chapter 6** and **Chapter 8**.

See **Recommendation 5** *(federal judicial commission)*.

Process of reform

1.42 The ALRC was asked to consult widely with the legal profession, courts, tribunals, and the broader community. The ALRC was also required to produce consultation papers to ensure that experts, stakeholders, and the community had the opportunity to contribute to the review.

1.43 Over the course of the Inquiry, the ALRC spoke with over 180 individuals 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. Consultees included current and former members of the judiciary and tribunals, litigants, the legal profession including non-profit legal services, community groups, and academics. A list of consultees is set out at **Appendix A**.

1.44 In the early stages of the Inquiry, the ALRC published a series of Background Papers in which it provided a high-level overview of key principles and research on topics of relevance to the Inquiry. This provided context for the proposals and questions on which the ALRC sought submissions.[41]

1.45 On 30 April 2021, the ALRC released a Consultation Paper containing 25 reform proposals and questions. Those proposals and questions are included at **Appendix B**. In response to the Consultation Paper, 49 formal submissions were received. A list of those submissions is included at **Appendix C** and those that are not confidential are available on the ALRC website. 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.

1.46 During the Inquiry, the ALRC held two public webinars/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 J Middleton, the Hon Chief Justice EW Alstergren, Minal Vohra SC, George Selvanera, and Professor Matthew Groves.

41 See page 15 (List of Background Papers).

1.47 In addition to the ALRC's usual research, submission, and consultation processes, the ALRC sought to better understand issues relating to judicial impartiality through original empirical research by:

- including questions in the 2020 AuSSA;[42]
- conducting surveys of:
  - Commonwealth judges ('ALRC Survey of Judges');
  - legal professionals ('ALRC Survey of Lawyers'); and
  - people who had attended an Australian court proceeding 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').

1.48 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.[43] The ALRC has also developed a better, if partial, understanding of how the law and procedures relating to bias work in practice through the ALRC Case Review.

1.49 The ALRC has also been informed by the law and practice relating to matters of judicial impartiality and bias in cognate Commonwealth jurisdictions, particularly New Zealand, Canada, South Africa, and the UK. Although the underlying substantive law is similar throughout these jurisdictions, matters of practice and procedure vary within and across the jurisdictions, being matters over which individual courts have developed disparate rules of practice and procedure.

1.50 In preparing this Report and in reaching its recommendations, the ALRC has been assisted by the numerous individuals and institutional representatives who have contributed their expertise and practical experience of the laws and procedures relating to impartiality and bias as they apply to the federal judiciary. The ALRC is grateful for the work of several external authors who assisted with writing some of the Background Papers. The ALRC also derived significant assistance from two expert panels: the Panel of Expert Readers and the Advisory Committee.

42 AuSSA is run by the ACSPRI: Australian Consortium for Social and Political Research Incorporated, 'What Is ACSPRI?' <www.acspri.org.au/about>. See also Nicola McNeil et al, 'Australian Survey of Social Attitudes, 2020' <www.dx.doi.org/10.26193/C86EZG>.

43 The methodologies of the empirical surveys are set out in **Appendix F**.

PART ONE: FOUNDATIONS

2. Judicial Impartiality in Context

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Introduction

2.1 This chapter provides the conceptual foundation for this Report. Impartiality, and the appearance of impartiality, have been called the 'supreme judicial virtues'[1] — 'the fundamental quality required of a judge and the core attribute of the judiciary'.[2] 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'.[3] When Australian judicial officers were surveyed about

1 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.

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

3 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, *Guide to Judicial Conduct* (3rd ed, 2017) 1.

the skills and attributes that are most important in their work, 90% rated impartiality as 'essential', and the remaining 10% rated it as 'very important'.[4] As Lord Denning MR noted: 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."'[5]

2.2 Despite its unquestionable importance, the scope, nature, and limits of judicial impartiality remain contested territory. Without a clear and explicit shared understanding of the purpose of judicial impartiality, and what falls within the proper domain of judicial impartiality, it is impossible to build any consensus as to the appropriate mechanisms and reforms to protect this ideal.

2.3 This chapter, therefore, aims to articulate what is captured (and excluded) by the concept of judicial impartiality as it is used in this Report. By providing an explicit framework for understanding the object and purpose of judicial impartiality, the chapter sets out the standards by which existing practices, including the law on bias, and recommended reforms, can be measured. This normative framework is crystallised in the set of five principles that are articulated at the end of this chapter.

2.4 In the following chapters, the ALRC provides an overview of the existing law on impartiality and bias in Australia, and presents empirical analysis in relation to how these existing laws (and relevant conventions) operate in practice. This chapter aims to make explicit the often implicit values and principles that inform these practices and analysis of such practices — in essence providing a normative touchstone to guide the reform recommendations.

Foundations of judicial impartiality

2.5 Impartial decision-making has been considered crucial to third party adjudication for millennia,[6] finding expression in — among others — texts of ancient Egyptian kingdoms, ancient legal systems of Africa, India, Mongolia, and China, the Babylonian code of Hammurabi, ancient Greek and Roman sources, Buddhist

4 Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20(1) *Journal of Judicial Administration* 3, 14–15. When members of the public were asked in AuSSA 2020 to rate the importance of 'impartiality/not biased' for the work of judges and magistrates, 99% of participants (n = 1,118) indicated that it was, at a minimum, 'important' (77% rated it 'essential', 16% rated it 'very important', and 6% rated it 'important'): see further **Chapter 5**.

5 *Metropolitan Properties Co (FGC) Ltd v Lannon* (1969) 1 QB 577, 599.

6 The Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 144. See further John Noonan, 'The Impartiality of God' in Kenneth Winston and John Noonan (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger Publishers, 1993) 3, 3–4.

philosophy, Jewish law, and Islamic law.[7] In many legal systems, impartiality is considered both a legal and ethical requirement.[8]

2.6 A number of sources may be seen as underpinning contemporary concepts of judicial impartiality in Australia, including:

- the rule of law and international human rights;
- common law;
- the *Australian Constitution*; and
- the judicial oath and judicial ethics.

2.7 The next section briefly considers the overlapping and mutually reinforcing sources of the requirement for judicial impartiality in Australia. The following sections then build upon these foundational sources to consider, more generally, the scope and theoretical underpinnings of judicial impartiality.

The rule of law and international human rights

2.8 Judicial impartiality is now broadly accepted as a foundational norm in any legal system aspiring to conform to the rule of law. The rule of law is the fundamental principle, with origins in Aristotelian philosophy, that

> all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.[9]

2.9 The rule of law requires that the law 'be the same for everyone, so that no one is above the law, and everyone has access to the law's protection'.[10] Through this, the power that a government must exercise over its citizens is seen to be 'less arbitrary, more predictable, more impersonal, less peremptory, [and] less coercive'.[11]

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7 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 162 (on Egyptian, Babylonian, Biblical and Roman sources); Paul Ratghnevsky, 'Jurisdiction, Penal Code, and Cultural Confrontation under Mongol-Yüan Law' (1993) 6(1) *Asia Major* 161, 162–3; The Hon Justice SS Dhavan, 'The Indian Judicial System: A Historical Survey' (Speech, Allahabad High Court, India, 25 November 1966). See further United Nations Office on Drugs and Crime (n 2) Annex. Impartiality of decision-making may also be seen as involved in certain forms of council-based dispute resolution practised by Indigenous peoples in Australia: see, eg, the discussion by Professor Behrendt of the *tendi* in the Lower Murray region, and *bugalub* in Arnhem land and the Kimberleys: Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995) 20. See also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) ch 28.

8 The Hon Justice K Mason AC, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 676–7; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282 [22]. See further Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (2002) 13.

9 Tom Bingham, *The Rule of Law* (Penguin UK, 2011) 8.

10 Jeremy Waldron, 'The Rule of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Summer 2020) <plato.stanford.edu/archives/sum2020/entries/rule-of-law/>.

11 Ibid.

However, equal application of the law is only possible if a judge is impartial as between the parties.

2.10 The widespread acceptance of the importance of the concepts of the rule of law and judicial impartiality is reflected in international instruments on human rights. The *Universal Declaration of Human Rights* states that, in the determination of rights and obligations and criminal charges, everyone 'is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'.[12] The *International Covenant on Civil and Political Rights*, which is binding on Australia as a matter of international law, similarly provides that, in civil and criminal legal proceedings

> everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[13]

2.11 This right is also reflected in regional human rights instruments,[14] and in human rights legislation in the Australian Capital Territory, Queensland, and Victoria.[15] The importance of an impartial judiciary to upholding the rule of law and human rights is recognised in internationally agreed documents and declarations.[16] Of these, the

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12 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 10.

13 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 14(1). Australia ratified in 1972. Although Australia's obligations under international law are not directly incorporated into Australian law, Australia is subject to complaints mechanisms of United Nations human rights treaties bodies where it has accepted their jurisdiction, such as the Human Rights Committee, under Optional Protocol 1 to the *ICCPR*. Treaty obligations may also have indirect influence on the development of the common law and on statutory interpretation: see, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J); *Momcilovic v The Queen* (2011) 245 CLR 1 [18] (French CJ).

14 These include the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 7(1)(d); *American Convention on Human Rights: 'Pact of San Jose, Costa Rica'*, signed on 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8(1). For interpretation of the rights by their respective oversight bodies see, eg, *Case of Gudmundur Andri Ástradsson v Iceland* (2020) (European Court of Human Rights, Grand Chamber, Application No 26374/18, 1 December 2020); *Camba Campos et a. v Ecuador (Judgment)* (Inter-American Court of Human Rights, Constitutional Tribunal, 28 August 2013); *Article 19 v Eritrea* (African Commission on Human and Peoples' Rights, Communication No 275/2003, 30 May 2007).

15 *Human Rights Act 2004* (ACT) s 21; *Human Rights Act 2019* (Qld) s 31; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.

16 See, eg, International Congress of Jurists, *Report of Committee IV, New Delhi Conference* (1959); *Draft Principles on the Independence of the Judiciary* (adopted by a committee of experts appointed by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, 9 May 1981) ('*Siracusa Principles*'); Law Association for Asia and the Pacific Human Rights Committee, *Statement of Principles on the Independence of the Judiciary in the LAWASIA Region* (Tokyo, 1982); *Universal Declaration on the Independence of Justice* (1983) (adopted at the final plenary session of the First World Conference on the Independence of Justice on 10 June 1983); *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985*, UN Doc A/CONF.121/22 Rev.1 (1986) ch I, sect D.2 ('*Basic Principles on the Independence of the Judiciary*').

Bangalore Principles contains the most recent and detailed elaboration of what is required of judges to secure impartiality and the appearance of impartiality, grounded in states' commitments to these human rights obligations.[17] In a number of Australian cases, judges have been influenced by human rights considerations in interpreting and applying the law on bias.[18]

Common law foundations

2.12 Common law sources from as early as the 13th century recognised that a judge should be disqualified from hearing a case if they were related to, or were an enemy or friend of a party, or if the judge had acted for a party.[19] Principles of judicial independence and impartiality were firmly entrenched in the common law of England by the early 17th century, and consolidated through the *Act of Settlement* in 1701, which formally recognised security of judicial tenure. A number of cases in the 18th century recognised that a judge 'sitting in his own cause' constituted misconduct, and that a judge could be prohibited from doing so.[20]

2.13 The English common law was considered, in legal terms, to automatically apply as the domestic law of the colonised territories of Australia from 1788.[21] This included the common law conception of judicial impartiality.[22] In the common law system, judicial authority is seen as depending greatly on the presumption of impartial justice.[23] Like other systems of law, it has developed a suite of practices, rules, and procedures to support judicial impartiality and the appearance of it.[24] Most obvious among these is the law on bias, which requires judges to step aside from hearing a case if there are reasonable questions about the extent to which they might bring an impartial mind to the resolution of a dispute.[25] The High Court has recognised that the law on bias 'gives effect to the requirement that justice should

17 Judicial Group on Strengthening Judicial Integrity (n 8) Preamble. See also United Nations Office on Drugs and Crime (n 2) 13–16. The *Bangalore Principles* are discussed further below: see [2.26]–[2.28].

18 See John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 351–5 (surveying cases in Australia, England and New Zealand).

19 Ibid 19, citing HG Richardson, *Bracton: The Problem of his Text* (Selden Society, 1965) 148–9.

20 Ibid 20.

21 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 80 (Deane and Gaudron JJ). Although it should be noted that 'many Indigenous people live under both the laws of the Australian state and the distinct laws and lore of their own communities': Nicole Watson and Heather Douglas, 'Introduction' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 1, 1. See further Australian Law Reform Commission (n 7).

22 As to its origins in the common law, see, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

23 The Hon Sir William Blackstone, *Commentaries on the Laws of England*, vol 3 (Clarendon Press, 1765) 361.

24 For discussion of some of the other mechanisms, see further [2.74]–[2.86].

25 An overview of the law on bias is set out in **Chapter 3**.

both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial'.[26]

2.14 The law on bias is one of the two pillars of natural justice, the other being the fair hearing rule. The fair hearing rule 'requires that people affected by the exercise of official power be provided with sufficient notice of a possible adverse decision and a sufficient chance to put their own case before any decision is made'.[27] Professor Groves has observed that, although 'each rule is regularly treated as distinct, they are interrelated principles of fairness that promote the objective of a fair hearing'.[28]

Constitutional foundations

2.15 Since Federation in 1901, the requirement of impartiality in judicial decision-making has also been intricately tied to the *Australian Constitution*. The High Court has upheld the separation of powers between the judiciary on one hand, and the legislature and executive on the other, as constitutionally mandated. This is underpinned by two key principles. First, the judicial power of the Commonwealth can only be exercised by courts identified in s 71 of the *Constitution*, with their attendant guarantees of security of tenure.[29] Second, Parliament 'cannot confer any power other than judicial power and powers ancillary to the exercise of judicial power on those courts'.[30]

2.16 The purpose of the separation of powers is to ensure 'an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power'.[31] That is, the executive government must rule by, and under, law.

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26 *Charisteas v Charisteas* (2021) 393 ALR 389 [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

27 Matthew Groves, 'Waiver of Natural Justice' (2019) 40(3) *Adelaide Law Review* 641, 641–2.

28 Ibid 641.

29 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 469–70 (Isaacs and Rich JJ). See *Nicholas v The Queen* (1998) 193 CLR 173 [68] (Gaudron J), and the sources cited therein. Gaudron J described judicial power as meaning, in general terms, 'that power which is brought to bear in making binding determinations as to guilt or innocence, in making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and, in making binding adjustments of rights and interests in accordance with legal standards': [70].

30 See *Nicholas v The Queen* (1998) 193 CLR 173 [68] (Gaudron J). See further *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

31 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [104]. This is regarded as important to enhancing the federation and to protecting individual liberty. See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 684–5 (Toohey J); *R v Quinn; Ex parte Consolidated Food Corp* (1977) 138 CLR 1, 11 (Jacobs J).

2.17 In exercising their power under the *Australian Constitution*, courts must act 'in accordance with the judicial process',[32] and in a way that is

> compatible with the essential character of a court as an institution that is, and is seen to be, both impartial between the parties and independent of the parties and of other branches of government in the exercise of the decision-making functions conferred on it.[33]

2.18 The High Court has repeatedly emphasised that impartiality is an essential characteristic of courts in the exercise of judicial power.[34] In line with this, the specific protection of impartiality through the law on bias has been explicitly recognised by some judges as having foundations in Chapter III of the *Australian Constitution*.[35] For Gaudron J, the requirement that courts act impartially and are seen to act impartially is 'embedded in the common law', but is 'also required by Ch III of the Constitution'.[36] Her Honour held that:

> Impartiality and the appearance of impartiality are so fundamental to the judicial process that they are defining features of judicial power. And because the only power that can be conferred pursuant to Ch III of the Constitution is the judicial power of the Commonwealth, that Chapter operates to guarantee that matters in federal jurisdiction are determined by a court constituted by a judge who is impartial and who appears to be impartial.[37]

2.19 In Gaudron J's view, although the test

> for the appearance of bias was formulated in a series of cases decided by reference to common law principles and without regard to the role of Ch III of the Constitution … that test properly reflects [the guarantee of independence and impartiality as a] requirement of Ch III.[38]

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32 *Nicholas v The Queen* (1998) 193 CLR 173 [70] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). French CJ and Gageler J have explained that the judicial process involves 'an open and public inquiry (unless the subject matter necessitates an exception), and observance of the rules of procedural fairness': *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [27].

33 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [27] (French CJ and Gageler J). See also *Nicholas v The Queen* (1998) 193 CLR 173 [74] (Gaudron J).

34 See, eg, *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [32] (French CJ). See, most recently, *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 [47] (Keane J).

35 See, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [84] (Gaudron J), [116] (Kirby J). See further *Charisteas v Charisteas* (2020) 389 ALR 296 [30]–[31] (Alstergren CJ).

36 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [79].

37 Ibid [80]. Although Gaudron J referred to 'matters in federal jurisdiction', the High Court has held that state courts must also have the requisite 'institutional integrity', of which impartiality represents one of the 'defining or essential characteristics': see *Wainohu v New South Wales* (2011) 243 CLR 181 [44]–[47] (French CJ and Kiefel J). See further *Kable v DPP (NSW)* (1996) 189 CLR 51.

38 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [84].

2.20 The nature of judicial impartiality as an essential characteristic of the courts, and a defining feature of judicial power, means that there may be limitations on the extent to which parliament can regulate judicial impartiality, including through legislating with respect to the law on bias. Parliament only has limited powers to regulate the jurisdiction of the federal judiciary and to attach conditions on how it is exercised.[39] While Parliament may regulate the practice and procedure of the court, it cannot interfere with the free exercise of judicial decision-making within the scope of jurisdiction.[40] This potentially limits the options for statutory reform. Ultimately, the precise extent to which legislative intervention would be permissible is, as recognised by Kirby J in *Ebner*, a 'question for judgment'.[41] In light of the central importance of the separation of powers and judicial impartiality in the *Australian Constitution*, it is not unlikely that the High Court would consider that, as Kirby J suggested, it is 'more appropriate than in other cases to change the law by judicial decision because this matter is one touching on performance of the judicial function'.[42] The theoretical reasons for this are examined further below.

The judicial oath and judicial ethics

2.21 In addition to the protections afforded by the common law and the constitutional structure of the courts, judges are bound by a set of ethical rules and standards that the Hon Justice J Thomas AM described as 'perhaps the highest and most rigorous standards, sacrifices and disciplines of any profession in the community'.[43] Justice Thomas, the leading author on judicial ethics in Australia, has described 'the three primary imperatives [of] judicial ethics' as 'independence, impartiality and service to humanity'. Justice Thomas observes that:

> If these standards are not effectively maintained, public confidence in the independence and trustworthiness of judges will erode and the administration of justice will be undermined.[44]

2.22 In Australia, judicial ethics are supported by a number of institutions, standards, and practices that have been described as an 'ethical infrastructure'

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39 *Harris v Caladine* (1991) 172 CLR 84, 146; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 [247]; *Thomas v Mowbray* (2007) 233 CLR 307 [111]; *Hogan v Hinch* (2011) 243 CLR 506 [45]; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 [54]–[56].

40 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 37 (Brennan, Deane, and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173. See further James Stellios, *The Federal Judicature* (LexisNexis, 2nd ed, 2020) 326–50.

41 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [142].

42 Ibid. For discussion of exclusion or limitation of the principles of procedural fairness, see also Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285, 285–6. For discussion of the possibility of Parliament excluding or qualifying the operation of the rule against bias, see HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 165–6.

43 The Hon Justice J Thomas, *Judicial Ethics in Australia* (Law Book Co, 1988) 11.

44 Ibid 9.

within the judiciary.[45] These are self-imposed and adopted systems that 'constitute the ethical values and norms of the judiciary and seek to promote good judging'.[46] Key among these are the judicial oath or affirmation, and guides to conduct.

Judicial oath or affirmation

2.23 Upon appointment, a judicial officer must take an oath or affirmation of office, promising to 'do right to all manner of people according to law without fear or favour, affection or ill will'.[47] This public pledge refers to judicial impartiality as a key standard and is an important act involving declaration of a commitment to perform the role in accordance with certain objectives and standards.

2.24 There is much to suggest the oath is taken seriously by judicial officers. Professor Roach Anleu and Emerita Professor Mack have conducted extensive research on Australian judicial officers. They have noted that, when asked to define impartiality in lay terms, it was not uncommon for judicial officers to refer to or quote the judicial oath.[48] They also note how, as a strategy to manage their emotions in court, judges may remind themselves of their oath and the judicial function, as a form of 'self-talk'.[49]

Guides or codes for judicial officers

2.25 Although ethics were traditionally regarded as a matter for each individual judge,[50] since the mid-1990s, common law jurisdictions have seen the development of principles that articulate broad standards for appropriate judicial behaviour, and include principles and guidance in relation to maintaining impartiality and the appearance of impartiality.

2.26 At the international level, the *Bangalore Principles*, developed by the Judicial Integrity Group (consisting of heads of jurisdiction or senior judges around the world), articulate six key principles of judicial conduct, which relate to: independence;

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45 Gabrielle Appleby and Suzanne Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (2019) 47(3) *Federal Law Review* 335. The term 'ethical infrastructures' was coined by Professor Schneyer in the context of law firms implementing systems and policies to embed ethical decision-making and practices: Ted Schneyer, 'Professional Discipline for Law Firms?' (1991) 77 *Cornell Law Review* 1. It has since been used by others in the context of the judiciary, see further Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 157 n 3; Sharyn Roach Anleu et al, 'Judicial Ethics, Everyday Work, and Emotion Management' (2020) 8(1) *Journal of Law and Courts* 127. For further detail on the ethical infrastructure for Australian judicial officers see Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021).

46 Roach Anleu and Mack (n 45) 157 n 3.

47 *High Court of Australia Act 1979* (Cth) s 11; *Federal Court of Australia Act 1976* (Cth) s 11; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 115(1).

48 Roach Anleu and Mack (n 45) 64.

49 Ibid 191.

50 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [13].

integrity; impartiality; propriety; equality; and, competence and diligence.[51] This document has been widely influential since its endorsement by the United Nations.[52]

2.27 The *Bangalore Principles* provide that impartiality 'is essential to the proper discharge of the judicial office.[53]

2.28 The principles and accompanying commentary address actual and apprehended bias,[54] how bias can manifest (including through stereotypes),[55] and indicate types of influences that may not amount to bias.[56] The principles and commentary also set out the types of conduct that should be avoided by judges,[57] and particular circumstances in which judges should recuse themselves.[58] Under the principle of 'equality', the commentary also requires judges to avoid stereotyping and to be aware of, and understand, diversity in society.[59]

2.29 In Australia, the Council of Chief Justices of Australia and New Zealand has agreed on a set of guidelines about the standards of ethical and professional conduct expected of judicial officers, which are published in the *Guide to Judicial Conduct*.[60] The *Guide to Judicial Conduct* provides 'principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances'.[61] It emphasises the central role and importance of judicial impartiality (notably without defining it):

> There is probably no judicial attribute on which the community puts more weight than impartiality. It is the central theme of the judicial oath of office, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially.[62]

2.30 A significant portion of the *Guide to Judicial Conduct* is devoted to offering suggestions on how issues around impartiality and bias may arise and be addressed — including in relation to what a judge does outside court (such as professional and business associations, and family issues, which might require consideration), and

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51 Judicial Group on Strengthening Judicial Integrity (n 8).

52 For example, by the United Nations Economic and Social Council: *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006).

53 Judicial Group on Strengthening Judicial Integrity (n 8) value 2. The United Nations Economic and Social Council invited member states to encourage their judiciaries to take into account the *Bangalore Principles of Judicial Conduct* in *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006) [1].

54 United Nations Office on Drugs and Crime (n 2) 45.

55 Ibid 46.

56 Ibid 46, 57.

57 Ibid 47–52.

58 Ibid 57–61.

59 Ibid 98–9. See also Canadian Judicial Council, *Ethical Principles for Judges* (2021) 33.

60 Australasian Institute of Judicial Administration (n 3). See further Australian Law Reform Commission, 'The Law on Judicial Bias: A Primer' (Background Paper JI1, December 2020) [57]–[58].

61 Australasian Institute of Judicial Administration (n 3) ix.

62 Ibid 5.

through the specification of standards of behaviour in court that maintain confidence in the 'ability, the integrity, the impartiality and the independence of the judge'.[63]

2.31 Although published under the auspices of considerable collective authority, the *Guide to Judicial Conduct* is expressly presented as being for guidance purposes, and is 'not intended to be prescriptive unless it is so stated'.[64] It emphasises that there is 'a range of reasonably held opinions on some aspects of the restraints that come with the acceptance of judicial office', and that, in difficult or uncertain situations, the primary responsibility of deciding which course of action to take rests with an individual judge.[65] However, it 'strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction'.[66]

Understanding judicial impartiality

2.32 The previous section sketched out the laws and ethical structures that specifically recognise judicial impartiality as a value under Australian law. However, the scope of what is meant and required by judicial impartiality is not always clear, and it is widely regarded as under-theorised.[67] For some, this is because impartiality is, in reality, a philosophical and psychological impossibility and the value of (an appearance of) judicial impartiality is therefore a political one.[68] For others, if the concept is appropriately limited, there are meaningful ways in which adjudication can be considered 'impartial', in both substance and appearance.[69]

2.33 Drawing on both of these viewpoints, this section develops a general framework for the analysis in this Report of: the importance and purpose of judicial impartiality; limits on the content and scope of judicial impartiality; and the mechanisms by which judicial impartiality might be secured — in both appearance and in substance. In developing this framework, the ALRC has been guided by issues that have been

63 Ibid 19. See further **Chapter 3** and **Chapter 4**.

64 Ibid 1.

65 Ibid 2.

66 Ibid.

67 Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2014) 65(2) *Florida Law Review* 493, 494–5; McIntyre (n 7) 161.

68 See, eg, Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 68–9. Parker suggests that impartiality 'is a problematic concept and the ability to convey at least a perception of impartiality deflects the disappointed loser from probing it too deeply. ... Perceptions of impartiality enable us to arrive at incompletely theorised agreements about what is just. Such perceptions steer us away from taking on insoluble problems about the meaning of impartiality so that we can get on with our lives, and they have always done so.' See also John M Kang, 'John Locke's Political Plan, or, There's No Such Thing as Judicial Impartiality (and It's a Good Thing, Too)' (2004) 29 *Vermont Law Review* 7, 30–1. Kang contends that it is better for 'impartiality to be understood principally as a political project whereby the judge responds, in a meaningful way, to what the people regard as sufficiently impartial behavior and refrains from arbitrary or absolute power': 30–1.

69 See, eg, William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *Oxford Journal of Legal Studies* 3; John Touchie, 'On the Possibility of Impartiality in Decision-Making' (2001) 1 *Macquarie Law Journal* 21; McIntyre (n 7).

regularly identified in consultations and submissions as important for the purposes of this Inquiry.

2.34 Central to this framework is a distinction that is made in the law between the requirements for:

- subjective impartiality — meaning the judge must be subjectively impartial (and will generally be presumed to be so unless there is evidence to the contrary); and
- objective impartiality — meaning there must be sufficient guarantees that the judge is (sufficiently) impartial to exclude any legitimate doubt in this respect.[70]

2.35 In essence, it is suggested that the maintenance of subjective impartiality requires the judge to adopt both an attitude and a process directed to ensuring improper influences do not impact judicial decision-making. This attitude and process is promoted by laws, institutional structures, and practices, but securing subjective impartiality ultimately rests on the integrity of individual judges.[71]

2.36 The maintenance of objective impartiality requires many of the same laws, practices, and other structures to ensure that certain minimum standards of objective individual and institutional impartiality are met. The law on bias is the central safeguard in this respect, but its limits are informed by the institutional structure as a whole.

A limited concept — impartiality against a background of partiality

2.37 The idea of 'impartiality' has provoked many debates in moral and political philosophy outside the context of the courts.[72] It cannot be considered in the abstract — to ask if someone is impartial it is crucial to specify 'with regard to whom ..., and in what respect'.[73] In relation to judicial decision-making, impartiality is, as recently noted by the Hon Robert French AC,

> defined by reference to the purpose and nature of the judicial function. The purpose and nature of that function are reflected in the judicial oath: 'To do right to all manner of people according to law without fear or favour, affection or ill will.'[74]

2.38 Understanding the judicial function helps to understand why impartiality is important, what it means, and how it may necessarily be limited in scope.

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70 United Nations Office on Drugs and Crime (n 2) 44, citing *Gregory v United Kingdom* (1997) 25 EHRR 577.

71 See further [2.90].

72 For a helpful summary see Troy Jollimore, 'Impartiality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Fall 2021) <plato.stanford.edu/archives/fall2021/entries/impartiality/>. On the relationship and differences between moral and political philosophical understandings of impartiality and legal understandings of impartiality see Lucy (n 69) 5.

73 Jollimore (n 72) [1].

74 The Hon Robert French, 'Preface' (2021) 28 *Australian Journal of Administrative Law* 61, 61.

The judicial function and judicial method

2.39 The role judges play is often described primarily in terms of deciding disputes.[75] However, judiciaries in modern democratic states can be seen more broadly to have two related but discrete social roles: (i) the exercise of judicial power to resolve disputes about pre-existing rights and duties with reference to the law;[76] and (ii) the maintenance of order and the preservation of society's norms as reflected in law more generally.[77]

2.40 Judges perform these roles in a particular way; by using the judicial method. In Australia, a classic statement of the judicial method (though often described in terms of the judicial function) is:

> the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.[78]

2.41 It is now generally accepted that judges must make genuine choices and evaluations in carrying out their role.[79] They must weigh evidence and make findings of fact, interpret the law, and resolve uncertainties in it.[80] In doing so, the judicial method constrains and guides judges' decision-making by limiting the source of norms they may draw from, and by requiring that decisions are consistent, and that the principles applied are coherent.[81] Judges must therefore: draw from the law as found in legislation and common law, and interpreted by reference to other legitimate sources; be as consistent as possible in their decision-making through adherence to the doctrine of precedent; and ensure that where the law is applied in new circumstances, its application is coherent with the law as a whole. In this way, while judges have agency in their decision-making, they are restricted in how they can use it.

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75 See, eg, *Fencott v Miller* (1983) 152 CLR 570, 608 (Murphy, Brennan and Deane JJ).

76 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357–8; *Australian Boot Trade Employees Federation v Whybrow and Co* (1910) 10 CLR 266, 318; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 443.

77 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 442; McIntyre (n 7) 23–75. McIntyre suggests that the judicial function in these two aspects is broadly stable across modern democratic states. As to the second aspect see further the Hon Chief Justice TF Bathurst AC, 'Who Judges the Judges, and How Should They Be Judged?' (2019) 14 *The Judicial Review* 19, 33–5.

78 *Wainohu v New South Wales* (2011) 243 CLR 181 [58] (French CJ and Kiefel J).

79 *Prince Alfred College v ADC* (2016) 258 CLR 134 [127] (Gageler and Gordon JJ); McIntyre (n 7) 82–7; Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 565, 574–5. See also the Hon Sir Anthony Mason AC KBE CBE QC, 'The Nature of the Judicial Process and Judicial Decision-Making' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 1, 5–7; The Hon Justice MH McHugh AC, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 46–7.

80 The Rt Hon Chief Justice B McLachlin PC CC, 'Judicial Impartiality: The Impossible Quest?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 15, 16–7.

81 See generally McIntyre (n 7) chs 6–9.

2.42 Recognising that judges do make genuine choices means that it is possible for judges to reach different conclusions in the same circumstances — a point borne out by the number of cases overturned on appeal, and the regularity of split decisions in appeal courts. This means that judicial decisions 'can be criticised for *impropriety*, but not simple *error*'.[82] This was a point made recently by the Hon Justice G Martin AM, President of the Australian Judicial Officers Association, responding to criticism by a journalist of a Federal Court judge:

> Underlying the attitudes expressed in the article seems to be a belief that law is made only by parliament and a judge's simple job is to apply it. This view is fundamentally flawed.
>
> A great deal of the law governing Australian citizens is made by senior judges through explaining what the law is — by developing the common law or very often by filling in the inevitable gaps in legislation. …
>
> Frequently there will be different but respectable views as to what that law should be. And, of course, there are equally such different and respectable views as to what the written law (the legislation) actually means. That the High Court of Australia makes the final decision and on occasion differs from decisions of other courts does not necessarily connote criticism. In such circumstances it establishes a different view that will constitute the binding and final stage of the judicial process.[83]

2.43 This understanding of the judicial function and the judicial method has implications for how the idea of judicial impartiality is defined and given content.

Judicial impartiality is limited in scope by the judicial function

2.44 Impartiality is necessary to fulfil the judicial function. But it is also judged against a background of the matters that judges can *properly* consider under the judicial method.[84] Most obviously, they must choose the more meritorious legal position.[85] They must take account of evidence that is properly admitted rather than inadmissible evidence.[86] In making sense of, and evaluating evidence, they must have reference to their understanding of how the world works.[87] Where they are required, as judges accept they often are,[88] to resolve uncertainties and fill gaps in the law, they will properly consider and apply values inherent in the legal system and the practical consequences to which particular findings may lead.[89]

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82 Ibid 159.
83 The Hon Justice G Martin, 'Claim of "Legal Adventurism" Misses the Mark', *The Australian* (online) (19 August 2021).
84 Lucy (n 69) 23–4.
85 Dr Joe McIntyre, *Submission 46*; McIntyre (n 7) 171.
86 See, eg *Evidence Act 1995* (Cth); Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 9th ed, 2010) 1; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005).
87 See further **Chapter 4**.
88 See, eg, Martin (n 83).
89 McIntyre (n 7) 171. See also Sir Anthony Mason (n 79) 5–7; McHugh (n 79) 46–7.

2.45 The commentary to the *Bangalore Principles* gives an example of where the judicial method may allow or even require favouring an application of the law that is consistent with values embedded in the legal system over one that does not:

> If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.[90]

2.46 This is because the judicial method allows reference to, and indeed preference for, such rights when interpreting the law. In Australia, for example, there is a specific common law principle of statutory interpretation that assumes that unless Parliament 'makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation'.[91]

2.47 Against this backdrop, the requirements of judicial impartiality must include ascertaining what should *not* play a role in judicial decision-making.

The value of impartiality derives from its context

2.48 The fact that impartiality is defined within a particular framework means that ultimately its value depends on the values and norms that the system upholds.[92] As Touchie notes, 'one can quite sensibly talk of the partiality or impartiality of a decision maker as separate from the partiality or impartiality of the system of norms that they apply in their decision-making'.[93] The moral and political value of an 'impartial' judge within a legal system that is premised on systematically denying individual rights would be limited.[94]

2.49 This insight is particularly relevant in the context of the Australian legal system and its relationship with the sovereignty and laws of Aboriginal and Torres Strait Islander peoples.[95] Associate Professor Watson and Professor Douglas note how 'many Indigenous people question the legitimacy of Australian law'[96] — seeing it, as Monaghan describes, as a tool that 'both legitimates and facilitates the violence of colonisation'.[97] From Cubillo's perspective:

> The theory and history of settler law reflect a self-reinforcing system that is designed to justify continued settler supremacy. My people and our justice systems were here prior to white colonialism, which has ignored or disrespected them. Perhaps this is because the inherently illegal nature of the occupation

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90 United Nations Office on Drugs and Crime (n 2) 45.

91 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J). This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

92 Lucy (n 69) 30. See also Dr Joe McIntyre, *Submission 46*.

93 See also Touchie (n 69) 55.

94 Lucy (n 69) 16–7.

95 Watson and Douglas (n 21) 5–6, citing the 'Uluru Statement from the Heart' (2017).

96 Ibid 8.

97 Osca Monaghan, '*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 25, 27. See further Watson and Douglas (n 21) 1. See also Deadly Connections Community and Justice Services, *Submission 35*.

has yet to be addressed, including through relatively benign measures such as recognition of customary law.[98]

2.50 This leads to the question of whether judicial 'impartiality' within such a system has any value. For Monaghan and others — although engagement with, and reform of, the Australian legal system may serve short- and medium-term benefits — ultimately operating within it at all ('impartial' or not) does not lead to justice.[99]

2.51 These concerns show that concepts of judicial impartiality are not value-neutral. Within the scope of this Report, judicial impartiality and reforms to the law on bias are considered from the internal perspective of the Australian legal system and the content of its laws. However, in doing so, it must be recognised that the legal system and particular laws may not always be viewed by all as neutral. It must also be recognised that judges, acting impartially within the confines of the judicial method, may be required to reach decisions under laws that they themselves do not consider operate impartially.

Why is judicial impartiality important?

2.52 The literature and jurisprudence identify interconnected and overlapping justifications for protecting and promoting judicial impartiality, serving both instrumental and inherent values.

2.53 In terms of its instrumental value, impartiality is seen as crucial to the judicial function and the judicial method. It is argued that many societies turn to the judicial form of dispute resolution *because* it is merit based, and merit-based dispute resolution can only function with a certain degree of impartiality — otherwise it is simply dependent on the whim of the decision maker.[100] Impartiality is seen to improve the quality of decision-making by promoting accuracy of fact-finding and the rule of law.[101] In turn, the appearance of impartiality is seen to secure the confidence and cooperation of individuals affected — promoting litigant acceptance of an adverse decision, and therefore reducing enforcement costs, allowing the system to function effectively.[102]

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98 Eddie Cubillo, '30th Anniversary of the RCIADIC and the "White Noise" of the Justice System Is Loud and Clear' (2021) 46(3) *Alternative Law Journal* 185, 189.

99 Monaghan (n 97) 27. See also Simon Rice, '*Eatock v Bolt* [2011] FCA 1103' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 169. Whittaker suggests that 'to become a decision maker in settler law, or to ask for decisions to be made in these forums, is itself a socio-legal choice and a strategic one in the colony. Placing an Indigenous judge in the position of decision maker does little to change the structure of that law or this reality': Alison Whittaker, '*Eatock v Bolt* [2011] FCA 1103: Poem and Note' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 179, 184. See **Chapter 11** for further discussion of critical judgments projects, including *Indigenous Legal Judgments*.

100 See generally Lucy (n 69).

101 Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928, 955.

102 Ibid; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 644.

2.54 The appearance of judicial impartiality is also seen as crucial to maintaining public confidence in, and the institutional legitimacy and authority of, the courts.[103] If the courts' authority is undermined by a reputation for not being impartial, there is a risk that 'the system will not be respected and hence will not be followed', damaging both the dispute resolution and social governance aspects of their function.[104] As French has observed:

> Courts are established to dispense justice according to law in every case which they decide. Fear or favour, affection or ill will or personal interest in the outcome are therefore irrelevant considerations. They are pernicious irrelevant considerations because they deprive the judicial process and its outcomes of integrity. The mere appearance of those corrupting elements can deprive the process and outcome of legitimacy — in the eyes of the parties and of the public. So the authority of courts may be undermined.[105]

2.55 Securing judicial impartiality can also be seen to have an inherent value, in that it respects the dignity and equality of those subject to the courts' authority.[106] This type of justification has been described as 'dignitarian'.[107] This function of judicial impartiality promotes 'the public's participation in decision-making processes affecting them individually'.[108] In this respect, judicial impartiality can also be seen to be closely tied to the prohibition of discrimination in international human rights law and the principle of equality, which the *Bangalore Principles* identify as essential to the exercise of judicial office. The commentary to those principles observes that, according to the law 'equality is not only fundamental to justice, but is a feature of judicial performance strongly linked to judicial impartiality'.[109] This link between impartiality and equality was made explicitly by Deane and Toohey JJ, in dissent, in *Leeth v The Commonwealth*, where they noted at the heart of an obligation to act judicially is

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103 *R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 126 (McInerney J). See generally Aronson, Groves and Weeks (n 102) 644; Geyh (n 67) 512; French (n 74) 61.

104 McIntyre (n 7) 175.

105 French (n 74) 61. See also Dr Joe McIntyre, *Submission 46*.

106 Aronson, Groves and Weeks (n 102) 644; TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 505–6. See further *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 [5] (Allsop CJ).

107 Matthew Groves, 'Excessive Judicial Intervention' (2021) 50 *Australian Bar Review* 139, 165. On dignitarianism more generally, see further Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press, First edition, 2018) 190–226. Gilabert observes, '[d]ignitarianism states that at least some of the central norms concerning the treatment of individual entities depend on their inherent dignity — they require appropriate responses to it': 190.

108 Aronson, Groves and Weeks (n 102) 644.

109 United Nations Office on Drugs and Crime (n 2) 98. See also 99–100. See further Canadian Judicial Council (n 59) which provides '[e]quality, according to law, is fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice. Accordingly, judges should ensure that their commitment to equality is unwavering and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality': 34.

> the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.[110]

Although the broad doctrine of equality suggested by Deane and Toohey JJ's approach in that case was rejected by the majority, a narrower, procedural requirement of equality derived from Chapter III of the *Australian Constitution* has received some support in later High Court judgments.[111]

2.56 In a recent speech concerning the closely related concept of judicial independence,[112] the Chief Justice of Australia, the Hon Chief Justice S Kiefel AC, noted that there may be a difference in emphasis between instrumental and dignitarian justifications depending on the constitutional context and tradition of a particular country. Her Honour noted that in the Australian constitutional context, judicial independence

> is often spoken of as a systemic quality. For example it has been said that it is '[f]undamental to the common law system of adversarial trial' that it be 'conducted by an independent and impartial tribunal', and that this principle is 'fundamental to the Australian judicial system'. By contrast, in the context of other, rights-based constitutions and conventions, greater stress is placed on the importance of judicial independence to individuals appearing before the courts. As John Adams … put it in art XXIX of the Massachusetts Constitution of 1780, '[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit'.[113]

2.57 In Chief Justice Kiefel's view, whilst 'differing in emphasis, these two approaches are clearly related. On either approach, the importance of judicial independence to our societies is not to be underestimated'.[114] Although in Australia the constitutional requirements for judicial impartiality currently focus on the institutional and instrumental justifications, in terms of a conceptual framework for reform, the dignitarian justifications are equally important.

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110 *Leeth v Commonwealth* (1992) 174 CLR 455, 487.

111 See further Stellios (n 40) 305–60.

112 See further '**In Focus: Judicial independence**' below.

113 The Hon Chief Justice S Kiefel AC, 'Judicial Independence — from What and to What End?' (Speech, Austin Asche Oration, 26 March 2021) (citations omitted).

114 Ibid.

In Focus: Public confidence and public trust in the courts

The Terms of Reference for this Inquiry ask the ALRC to consider whether the law on bias relating to judicial decision-making 'remains appropriate and sufficient to maintain public confidence in the administration of justice'.

Public confidence, especially as it relates to the courts, is often invoked in cases and judicial speeches 'as an abstract or self-evident notion'.[115] However, questions arise as to what 'confidence' means, which 'public' is being referred to, and how its confidence and/or trust is to be measured.[116]

The Hon Chief Justice M Gleeson AC described confidence in the courts as a 'state of reasonable assurance' that the qualities required of judges (competence, independence, and impartiality), and the standards of judicial process (fair and public) are being met.[117] For the Hon Justice S Kenny AM, what is important is 'confidence in the courts as the appropriate agency for adjudicating disputes'.[118] For Justice Kenny, public confidence 'depends in part upon public perception or recognition of the courts doing their task as best as can be done'.[119] Public confidence and public trust are often used interchangeably, although some suggest there is a distinction and difference in emphasis between the two.[120] For the purposes of this Inquiry, public 'trust' will be considered as very closely related to, and evidence of, public confidence.

Sometimes public confidence and public trust is seen as an 'empirical fact capable of measurement', such as through opinion surveys.[121] **Chapter 5** sets out some of the research, including research conducted by the ALRC, which attempts to measure public confidence and public trust in this way.

Others suggest that the court has different 'publics', and the 'publics' that judges and lawyers are most concerned about may be narrower than the general population as a whole. Professor Geyh suggests, for example, that the courts have two 'publics' of concern — the most important being those

115 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39(1) *Adelaide Law Review* 1, 5.

116 Arthur Selwyn Miller, 'Public Confidence in the Judiciary: Some Notes and Reflections' (1970) 35(1) *Law and Contemporary Problems* 69, 73 (emphasis in original).

117 The Hon Chief Justice M Gleeson, 'Public Confidence in the Courts' (Speech, National Judicial College of Australia, Canberra, 9 February 2007).

118 The Hon Justice S Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 213.

119 Ibid 214.

120 Chief Justice Bathurst considered that a critical distinction between the two is that, 'whilst "confidence arises as a result of specific knowledge; it is built on reason and fact", trust "presumes a leap to commitment, a quality of 'faith' which is irreducible"': The Hon Chief Justice TF Bathurst, 'Trust in the Judiciary' (Opening of Law Term Address, Sydney, 3 February 2021).

121 Mack, Anleu and Tutton (n 115) 4.

who have direct contact with the courts.[122] This is the

> segment over whom the legal establishment has direct influence, and it is disaffected litigants and their [supporters] who are most likely to be members of the other 'public' of concern — those who agitate for court reform and who may ultimately challenge the legitimacy of the judiciary itself'.[123]

Professor Parker AO has described how a court's publics can be grouped by their role in relation to the court,[124] and by shared attributes or characteristics.[125] The Hon Chief Justice TF Bathurst AC has recently discussed the need to be concerned about the levels of trust in the judiciary across different groups within society and noted

> it is deeply concerning when different community groups have different levels of trust in the courts. The judiciary serves each and every member of the community. Not merely the ones living in cities or those taught from a young age that judges will protect them and their communities or those who speak English as their first language.[126]

Although a reputation for impartial decision-making is seen as an essential condition for maintaining public confidence, it is not the only factor impacting on public confidence in the administration of justice, and judges are not the only actors responsible for maintaining it. Professors Lee and Campbell suggest that public confidence may also be undermined by the way cases are reported in the media, by under-resourcing of courts leading to delays, and appointments to judicial office that are seen to be made for political reasons.[127] A number of submissions in response to the Consultation Paper also underlined this point. Professor Sourdin points out, for example, that 'only a small fraction of civil matters are determined by a Judge … or may be finalised with no judicial input' and therefore 'it is important not to equate judicial impartiality as the only factor promoting confidence in courts or judges'.[128] As such, public confidence in the administration of justice is impacted heavily by how people experience interactions with the court system as a whole.[129]

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122 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 725.

123 Ibid.

124 Such as 'litigant, defendant or juror': Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 13.

125 Such as women, children, Aboriginal and Torres Strait Islander people, people of non-English speaking backgrounds, migrants, and people with disability: ibid.

126 Chief Justice Bathurst (n 120).

127 Lee and Campbell (n 42) 308–9. See also Justice Kenny (n 118).

128 Professor Tania Sourdin, *Submission 33*.

129 Ibid.

In Focus: Judicial legitimacy

The courts are often considered — as Alexander Hamilton noted — the 'least dangerous' branch of government because they do not control the armies, or the finances.[130] They are therefore particularly dependent on maintaining legitimacy. Professor Tyler describes legitimacy as

> a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. … Being able to gain voluntary acquiescence from most people, most of the time, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict.[131]

Legitimacy is therefore important because 'courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously'.[132] Krebs and others have explained how judicial legitimacy is often equated with a court having 'diffuse support', which 'depends on having a "reservoir of … goodwill" that runs deeper than whether the outcome in a specific case is favourable'.[133] This 'matters when decisions are controversial or unpopular'.[134] When a court lacks legitimacy it is 'more vulnerable to attacks from politicians and media commentators who do not agree with its decisions'.[135] However, legitimacy can be eroded by sustained dissatisfaction with the court's performance.[136]

130 Alexander Hamilton, 'The Federalist No 78: The Judiciary Department' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, Ian Shapiro (ed) (Yale University Press, 2009), cited in the Hon Chief Justice M Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, Launceston, 27 April 2002).

131 Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375, 375. See also the Hon Chief Justice M Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 4.

132 Justice Kenny (n 118).

133 Shiri Krebs, Ingrid Nielsen and Russell Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) 43(2) *Melbourne University Law Review* 605, 606–7.

134 Ibid 607.

135 Ibid 611–12.

136 James L Gibson and Michael J Nelson, *Black and Blue: How African Americans Judge the U.S. Legal System* (Oxford University Press, 2018) 25.

Legitimacy differs from public confidence or public trust — Professor Loth has suggested that legitimacy is rather the whole of 'factors justifying' that trust.[137] Public confidence is 'a contributing factor'.[138] Research on the legitimacy of the US Supreme Court has shown that willingness

> to extend diffuse support … is primarily a function of three major predictors: (1) awareness and knowledge of the Court; (2) evaluations of the performance of the institution; and (3) more general support from democratic institutions and processes.[139]

Research shows that, at least in the US, levels of legitimacy may vary significantly across different racial groups, as may the relative importance of factors underlying it.[140] However, not unexpectedly, significant differences also exist within groups, and further research is exploring the factors underlying these overall findings.[141]

One mechanism 'by which courts maintain their legitimacy is via the creation of readily accessible legal symbols', such as temple-like courthouse buildings, wigs and robes, and the rituals followed.[142] At the same time, researchers note that the same symbols may hold different meanings for different people. Those whose experiences have led them to see law as 'external, repressive, and coercive', rather than as essentially neutral and representing 'consensual views of society' may be likely to perceive such symbols very differently.[143]

The factors underpinning legitimacy can also change with time. Professor Appleby and others point out that, in addition to the 'traditional judicial values of independence, impartiality and the rule of law', 'modern society places emphasis on an additional range of values that are expected of government and public institutions', including 'diversity, transparency, accountability and efficiency'.[144]

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137 Krebs, Nielsen and Smyth (n 133) 606, quoting Marc A Loth, 'Courts in a Quest for Legitimacy: A Comparative Approach' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (TMC Asser Press, 2009) 267, 268.

138 Sarah Murray, 'Preventive Justice, the Courts and the Pursuit of Legitimacy' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 195, 202.

139 Gibson and Nelson (n 136) 22 (citations omitted). Recent research on the legitimacy of the High Court of Australia has similarly found a broad commitment to democratic institutions and processes and the rule of law as correlated to diffuse support for the Court as a whole, rather than on ideological commitment: Krebs, Nielsen and Smyth (n 133).

140 Gibson and Nelson (n 136) 32–3.

141 Ibid 123.

142 Ibid 122; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 3.

143 Gibson and Nelson (n 136) 94–5, 122–3.

144 Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 299.

Defining the scope of judicial impartiality

2.58 With this discussion in mind, what does judicial impartiality require? As Dr McIntyre has explained: 'At one level, its general content is uncontroversial: "judicial impartiality" requires an "absence of favour, bias or prejudice", an "equal treatment" avoiding bent or bias to either side'.[145] The Hon Sir Grant Hammond KNZM suggests that what

> we seem to be looking for is something that inappropriately affects the reasoning process in that it has nothing, or very little, to do with the actual merits of the case, but is somehow brought into play in the determination of it, whether consciously or unconsciously.[146]

2.59 Common law legal systems have long recognised and guarded against the potential for certain types of influences to inappropriately affect judicial decision-making: bribery, for example, or the threat of dismissal from office, or a pecuniary interest in the outcome of a case. They have also more gradually come to recognise the potential impact of other, less obvious, influences — even on conscientious judges who try their best to put aside irrelevant matters — because 'reason cannot control the subconscious influence of feelings of which it is unaware'.[147] However the nature and potential reach of such influences is vast, and many less than conscious influences are in fact potentially important to fulfilling the judicial role.[148] As Groves explains in the context of a discussion of the bias rule, judges

> inevitably carry life experience, predispositions and other personal qualities that influence their attitudes, conduct and the decisions they make. The bias rule does not require decision-makers be devoid of those qualities. In fact, many argue that the experience and predispositions that can lead decision-makers to hold preconceptions and opinions which could affect their impartiality, especially if that requirement was applied strictly, are also the very qualities that make people suitable for judicial and other such positions. On this view, experience can inform and assist decision-making, rather than obscure or impede it.[149]

2.60 However, adherence to the judicial method means that judges are constrained in the ways that those predispositions and attitudes may be relied on in decision-making. They must have — at a minimum — 'an attitude of openness to and lack of pre-judgment upon the claims of the disputants', and be able to hold commitments relevant to the parties and their dispute in check (as to this see further **Chapter 3** and

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145 McIntyre (n 7) 170, citing Paul Mahoney, 'The International Judiciary: Independence and Accountability' (2008) 7(3) *Law and Practice of International Courts and Tribunals* 313, 340; and Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (GlassHouse Press, 2003) 1.

146 Sir Grant Hammond (n 6) 33.

147 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [27] (Gageler J), citing *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451, 466–7. See also *Johnson v Johnson* (2000) 201 CLR 488 [12], citing *Vakauta v Kelly* (1989) 167 CLR 568, 527; and *Re The Queen and Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155 [99].

148 As discussed above at [2.44]. See further **Chapter 4**.

149 Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 61. See also Lucy (n 69) 15.

Chapter 4).[150] The fact that judges 'are capable of suspending at least some such commitments and acting contrary to their pre-judgements is clear', Lucy suggests, 'from cases in which they lament the decision the law compels them to reach'.[151]

2.61 Accordingly, what is required to allow judges to fulfil the judicial function is not absolute impartiality, but 'sufficient' impartiality.[152] This is not a static concept, with defined, universal limits.[153] What is required to be 'impartial enough' will be contextually and culturally specific — judges must be 'impartial enough' to maintain litigant and public confidence to uphold the legitimacy and authority of the courts,[154] and their own commitment to the oath.[155] It is something that judges strive for,[156] and something that procedures and institutions support.[157]

Protecting against improper and unacceptable influences in judicial decision-making

2.62 McIntyre proposes a framework by which the standard of 'impartial enough' can be evaluated in a given context. In his submission in response to the Consultation Paper, he suggests that to be a threat to judicial impartiality 'a circumstance must improperly and unacceptably influence/distort judicial decision-making'.[158] According to McIntyre, a circumstance will be a threat to judicial impartiality where:

> (1) it is capable of influencing the decision making of the judge;
>
> (2) that influence would be in a manner inconsistent with, and deviating from, the proper judicial decision-making processes; and
>
> (3) there are no reasons derived from the overarching judicial function to render it acceptable.[159]

2.63 The last element 'allows a degree of tolerance' for improper influences which 'can be justified either because the impact is sufficiently insignificant to be ignored, or because the influence cannot be acceptably eliminated'.[160] In addition, it requires that there is

> some proportionality between the impact of the influence and the (broadly construed) costs of eliminating it, so that some improper influences must be tolerated as the cost of avoiding them is too high.[161]

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150 Lucy (n 69) 15.
151 Ibid.
152 Groves (n 149) 61. See also Geyh (n 67) 509–10.
153 McIntyre (n 7) 177; Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 82.
154 McIntyre (n 7) 177.
155 Geyh (n 67) 152 (on the ethical dimension of impartiality).
156 Mack, Roach Anleu and Tutton (n 153) 67.
157 McIntyre (n 7) 160.
158 Dr Joe McIntyre, *Submission 46*. See also McIntyre (n 7) 175.
159 McIntyre (n 7) 159, see also 172.
160 Ibid 173.
161 Ibid 174.

2.64 This is a helpful insight that recognises that judicial impartiality cannot be absolute, but that 'acceptability' of any potentially improper influence needs to be judged in light of the overall judicial function as a whole, and a useful framework within which to consider the issues raised in relation to this Inquiry.

Achieving (sufficient) judicial impartiality: an attitude and a process

2.65 Against this background, achieving (sufficient) impartiality in the courts means ensuring that considerations not required by the judicial method do not improperly and unacceptably influence the decision-making process. This ultimately rests on the attitude of the decision makers and the process through which they make their decision.[162]

2.66 While judicial impartiality is usually defined in terms of something that it is *not* — an absence of bias or prejudice[163] — others explain it as a goal, aspiration, and a process performed by listening to both sides, something that judges *do*.[164] For example, Mack and Roach Anleu submitted that impartiality is

> an aspect of judicial practice, a practical skill of court craft, as well as an ideal value which influences how [judges] think, feel and ultimately, make their decisions.[165]

2.67 Often, impartiality is equated primarily with the decision maker's state of mind.[166] However Lucy has explained how impartiality also has a procedural dimension. Ensuring that adjudications are not influenced by improper considerations is also bound to the process through which judges make decisions.[167] This dual aspect is reflected in the *Bangalore Principles*, which state:

> Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.[168]

It is also consistent with how Kirby J described impartiality in the case of *Ebner* as being 'concerned with the approach of the judge to the *hearing* and *determination* of the matters in dispute'.[169]

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162 See generally Geyh (n 67). See also McIntyre (n 7) 221.
163 United Nations Office on Drugs and Crime (n 2) 44.
164 Mack, Roach Anleu and Tutton (n 153) 68.
165 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*. See further Roach Anleu and Mack (n 45) 62; Mack, Roach Anleu and Tutton (n 153) 68.
166 See, eg, *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 [38] (Lady Hale).
167 Lucy (n 69) 7. See further Mack, Roach Anleu and Tutton (n 153) 67.
168 Judicial Group on Strengthening Judicial Integrity (n 8), 'Value 2: Impartiality'.
169 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [145] (Kirby J) (emphasis added). See also the Hon Michael Kirby AC CMG, 'Grounds for Judicial Recusal Differentiating Judicial Impartiality and Judicial Independence' (2015) 40 *Australian Bar Review* 195, 211.

2.68 One of the key components of impartial decision-making is listening to both sides.[170] Professor White has described this as requiring

> attention to the full merits of a case, including to what can fairly be said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.[171]

2.69 Although listening to both sides does not make improper considerations impossible (because one side can just be ignored), Lucy suggests it reduces the room for partiality or bias in decision-making, making it 'more difficult than it might otherwise be'.[172]

2.70 This also means that procedural rules that favour one side over another (such as, for example, rules that are interpreted in some jurisdictions as giving more weight to a man's testimony than to a woman's testimony), or that fail to take account of significant differences between parties to a dispute (such as the inability of one party to speak or fully understand the language of the hearing, or to understand procedures), necessarily disrupt impartiality.[173]

Identifying potential vulnerabilities

2.71 A very wide range of factors, both conscious and unconscious, could conceivably impact on judicial decision-making in ways that are improper and unacceptable in light of the judicial function and the judicial method. McIntyre provides a helpful taxonomy of these factors as potential dispute-specific, and structural, threats to impartiality. Potential dispute-specific threats he identifies include:

- Material threats: where the judge has a direct and material interest in a particular resolution, so that the judge stands to gain personally from a particular resolution. These may include bribes and corruption, and financial and other interests in the outcome of the case.[174]
- Relationship threats: where the judge has some relationship with one of the parties that may distort the manner in which that judge deals with that party. These may include family relationships, friendship relationships, personal obligations, associational relationships (such as membership of an organisation involved in the litigation), and societal relationships.[175]
- Subject-matter or issue-based threats: where the judge has a particular connection with or interest in the specific subject matter or issue in dispute,

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170 Lucy (n 69) 11–12; Mack, Roach Anleu and Tutton (n 153) 67.
171 James Boyd White, *Heracles' Bow : Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985), quoted in Justice Kenny (n 118) 216.
172 Lucy (n 69) 11.
173 According to Lucy, rules that operate in this way 'either rob members of these groups of the opportunity to be heard when involved in a dispute or affected by the outcome of some decision, or devalue their participation in the decision-making process': ibid.
174 McIntyre (n 7) 185–6.
175 Ibid 186–92.

so that an interest of the judge is promoted by a particular resolution of the dispute. These could include threats from personal values, ethics, and morality, from intellectual positions, social and political objectives, and from prior professional involvement in a matter.[176]

2.72 McIntyre also identifies potential structural threats to impartiality — 'threats of an institutional, systemic nature, existing independently of the particular dispute (even if they crystallise in a given discrete case)'.[177] These may include:

- Threats to the judge as a person: including threats to personal safety and security, criminal and civil liability, and involvement in 'outside' activities.[178] To this list could be added challenges in physical and mental health.[179]
- Threats to the judicial 'job': including through methods of appointment and promotion, forms of appointment and tenure, remuneration, conditions of employment, and discipline and removal from office.[180]
- Threats to the judicial institution: including through arrangements for funding and maintenance of adequate resources, the management and administration of courts, relationships with other institutions of government, and threats to the continuing existence of courts.[181] This could also potentially include criticism undermining the legitimacy of the institution, through political attack and sustained media criticism.[182]
- Threats internal to the judicial institution: including internal judicial management (such as the allocation of cases), and internal pressures regarding substantive decision-making.[183]

2.73 Many of these threats are usually considered under the rubric of judicial 'independence'. While this is usually considered a separate value in itself, it is widely accepted that its ultimate purpose is to protect judicial impartiality.[184] As such, it is helpful to consider these within the same framework, especially when considering potential reforms, as changes to address one type of threat to impartiality may introduce new threats.[185]

176 Ibid 192–5.
177 Ibid 197.
178 Ibid 200–206.
179 See further **Chapter 12**.
180 McIntyre (n 7) 206–13.
181 Ibid 213–17.
182 Krebs, Nielsen and Smyth (n 133) 612–13.
183 McIntyre (n 7) 217–19.
184 See ibid 161–9 for an examination of literature and jurisprudence on the link between the two; Parker (n 68) 71–4; The Hon Sir Anthony Mason, 'Judicial Independence in Australia: Contemporary Challenges, Future Directions' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 7–9. Note, however, that the two concepts are treated by many prominent jurists as conceptually distinct and separate values. For an overview, see Michael Kirby AC CMG (n 169) 209–11. See further United Nations Office on Drugs and Crime (n 2) 43.
185 Dr Joe McIntyre, *Submission 46*.

In Focus: Judicial independence

Like impartiality, independence is considered a key judicial value, reflected in international human rights instruments and the *Bangalore Principles*.[186] The commentary on the *Bangalore Principles* identifies the core of the principle as

> the complete liberty of the judge to hear and decide the cases that come before the court; no outsider — be it Government, pressure group, individual or even another judge — should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision.[187]

The *Guide to Judicial Conduct* recognises that two aspects of judicial independence are important in the Australian context: constitutional independence and independence in the discharge of judicial duties.[188] Chief Justice Kiefel has said that, in Australia,

> judicial independence is understood to require freedom from any external influence, other than the law itself. It is understood to reflect the separation of the powers of government and the freedom of the courts from interference by the other, arguably, more powerful, arms of government. … Judicial independence may also be understood as freedom from pressures which are not external. The requirement of impartiality necessarily refers to one's own cast of mind which is brought to bear in the process of decision-making. This may require distancing one's self from one's own prejudices and ideology.[189]

Judicial independence from the executive is traditionally demonstrated at an institutional level by a set of constitutional and operational arrangements concerning the way in which judges are appointed, the security of their tenure, and the conditions of their service.[190] The *Guide to Judicial Conduct* recognises, however, that the

> principle of judicial independence extends well beyond the traditional separation of powers and requires that a judge be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests.[191]

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186 United Nations Office on Drugs and Crime (n 2) 27; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 10; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

187 United Nations Office on Drugs and Crime (n 2) [22].

188 Australasian Institute of Judicial Administration (n 3) 6.

189 Chief Justice S Kiefel (n 113).

190 United Nations Office on Drugs and Crime (n 2) 29.

191 Australasian Institute of Judicial Administration (n 3) 7.

Many jurists consider the concepts of impartiality and independence as distinct, but very closely related. For example, for Lady Hale:

> impartiality is the tribunal's approach to deciding cases before it …, [while] [i]ndependence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public.[192]

At its root, therefore, many accept that the 'object of judicial independence is to promote and preserve judicial impartiality, the central judicial virtue'.[193] Accordingly, judicial independence is — as recognised in the *Guide to Judicial Conduct* — not a 'privilege enjoyed by judges', but a 'cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law'.[194]

Securing (sufficient) judicial impartiality

2.74 Legal systems, including the Australian legal system, respond to the potential threats to judicial impartiality identified above — 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 Chief Justice Gleeson 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.[195]

192 *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 [25] (Lady Hale). Note that the commentary to the *Bangalore Principles* suggests that independence is both a 'state of mind' and a 'set of institutional and operational arrangements': United Nations Office on Drugs and Crime (n 2) 28.

193 Sir Anthony Mason (n 184) 9.

194 Australasian Institute of Judicial Administration (n 3) 6.

195 Chief Justice Gleeson (n 3), cited in Australian Judicial Officers Association, *Submission 31*.

2.75 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 (im)partiality. However, this complex ecosystem can make the analysis of discrete responses and mechanisms difficult. For the purpose of this Report, the ALRC has developed the following taxonomy, which divides these various responses and mechanisms into three overlapping categories. These are mechanisms that aim to:

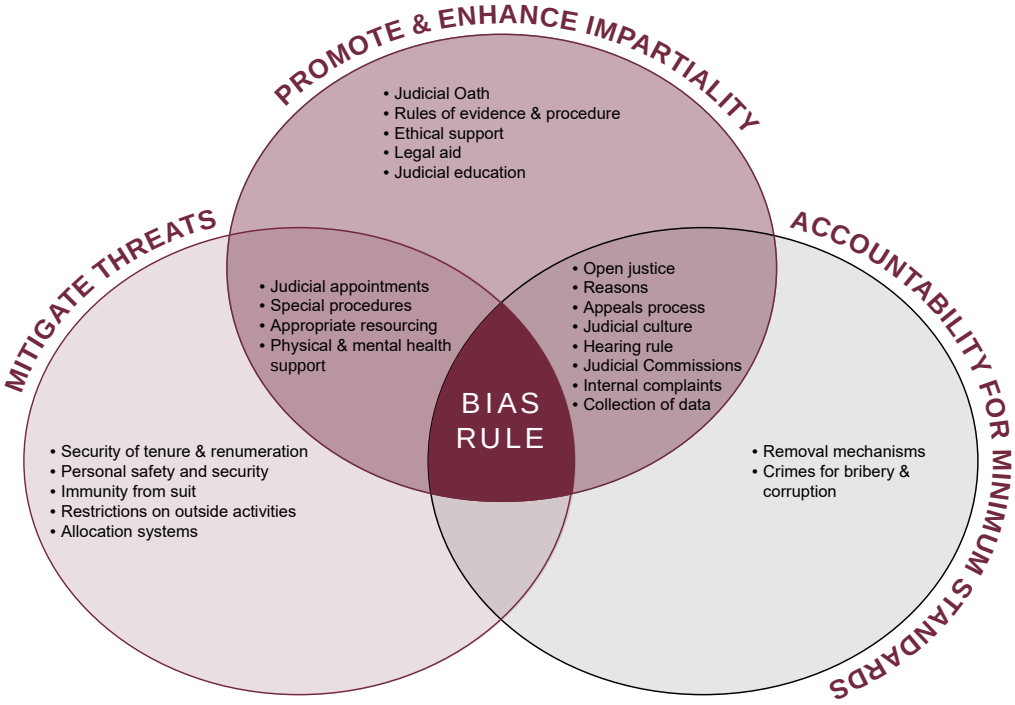
(i) **promote and enhance impartiality** (as an attitude and a process);

(ii) **mitigate threats to impartiality** (by insulating judges from threats to impartiality or ameliorating their effect); and

(iii) **provide accountability for minimum standards** (by maintaining accountability for adherence to minimum standards of impartiality in decision-making).

2.76 These laws, practices and structures are summarised in **Figure 2.1**, and expanded on in the text below.

Figure 2.1: Representation of structures and practices contributing to judicial impartiality



Promoting and enhancing judicial impartiality

2.77 The first category of practices and structures are those that promote, in a positive sense, an impartial attitude and process. Some of these mechanisms are structural in nature and can appear diffuse and unenforceable. However, they do not all aspire to give specific and discrete individual rights to promote impartiality. Rather, they promote a culture of impartiality and provide the underlying conditions that make impartiality possible.

2.78 The subjective and objective aspects of judicial impartiality are promoted most visibly by the imposition on judges of a formal commitment to impartiality and the appearance of impartiality, such as through the **oath or affirmation of office**.[196] For long periods in the history of the common law this was considered to be largely sufficient to maintain the legitimacy of the institution, subject only to requirements to ensure judges had sufficient independence from (and hence impartiality in relation to) the Crown.[197]

2.79 Second, the procedural aspect of impartial adjudication is buttressed by rules, procedures, and practices that ensure all parties are given the opportunity to be meaningfully heard, and that judges can only decide cases once facts are adduced and merits explored (making it more difficult to rely on predispositions or prejudgments).[198] These can include:

- **Rules of procedural fairness such as the common law hearing rule**, which requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.[199]
- **Rules of evidence and procedure** that define the way in which the hearing is run and evidence is accepted and weighed.
- **Ensuring the provision of quality interpretation services**, so that parties can meaningfully understand and participate in proceedings.
- **Use of culturally competent, culturally safe, and culturally appropriate procedures and specialist lists**, which may enhance the ability of particular parties to understand and meaningfully participate in disputes affecting their rights.[200]

2.80 Another aspect of procedural impartiality is in the choice of the decision maker: if the decision maker has an interest in the dispute, or might be perceived to have an interest, they effectively become a party to the dispute, and must ordinarily exclude themselves.[201] In most common law jurisdictions the **bias rule** is an important mechanism upholding procedural impartiality in this way.

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196 See [2.23] above.
197 See further **Chapter 11**.
198 See, eg, Geyh (n 67) 514–22. Mack, Roach Anleu and Tutton (n 153) 67; Groves (n 42).
199 See [2.14] above.
200 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) [10.31]–[10.42].
201 Lucy (n 69) 12.

2.81 Other practices and procedures also contribute to promoting both subjective and objective impartiality. In different legal systems these may include:

- **The requirement to give reasons** for decisions, which is one way in which judges are required to 'step back' from initial reactions and think deliberatively about the cases before them,[202] which may help them to avoid some of the ordinary cognitive 'shortcuts' that can bias decision-making (see further **Chapter 4**). It also enables parties to see the extent to which they, and their arguments, have been heard, increasing the acceptability of the decision.[203] More broadly, the practice of giving reasons 'is understood to be intrinsic to the rule of law precisely because public assurance of the law's neutrality depends on their access to a reasoned account of the neutral, impartial grounds for courts' decisions'.[204]
- **Guides to conduct and codes of ethics**, much of which are directly aimed at assisting judges to act impartially and appear impartial.[205]
- **Judicial education**, directed both at enhancing the ability to facilitate procedural impartiality and the performance of impartiality, as well as increasing knowledge of diverse experiences and perspectives (as to which see further **Chapter 12**).[206]
- **Bench books** that assist judges on areas of law, procedure, ethics, and social context education relevant to impartiality.[207]
- **Other forms of ethical support**, potentially including conversations with colleagues, mentoring, and ethics advisory committees.[208]
- **Judicial appointments procedures**, which are also seen by a number of judges and theorists as playing an important role in promoting impartiality. Such procedures may be designed to lead to the selection of judges with integrity and the skills to facilitate procedural impartiality and confidence in impartiality.[209] Appointments procedures may also aim to identify those candidates with an attitude of openness, and diversity of background and experience allowing for a judiciary that is, as a whole, 'better able to understand, and less likely to pre-judge, the experience, background and situation of those before them'.[210]

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202 See generally *Wainohu v New South Wales* (2011) 243 CLR 181 [54]–[58].
203 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA).
204 Dan M Kahan et al, '"Ideology" or "Situation Sense"?: An Experimental Investigation of Motivated Reasoning and Professional Judgment' (2016) 164 *University of Pennsylvania Law Review* 349, 422.
205 See [2.25]–[2.31].
206 Lucy (n 69) 16.
207 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [25]–[27].
208 Ibid [28]–[30]. See further Appleby and Le Mire (n 45) 347–50.
209 McIntyre (n 7) 207–8.
210 Lucy (n 69) 15–16. See further **Chapter 12**.

In Focus: Judicial conceptions of impartiality and performing impartiality

What the commitment to subjective impartiality requires is expressed differently by individual judges — for some it may mean suppressing pre-existing attitudes and preconceptions and treating everyone the same, and for others, recognising pre-existing predispositions and attitudes and ensuring that the mind remains open to persuasion.[211]

Leaving aside the exact nature of the attitude required, and the effect of such an attitude, research by Mack and Roach Anleu shows that Australian judicial officers *do* consciously take steps to adopt an attitude of impartiality (albeit with different understandings of what that entails) when hearing and deciding cases, with the judicial oath as a key touchstone.[212] This was emphasised recently by the Hon Chief Justice JLB Allsop AO of the Federal Court, who said that all judges

> understand the deep importance of [the] oath. The oath creates the gulf between other spheres of life and beliefs, and the work of a judge, and it is the foundation of the independence of the judiciary.[213]

Aside from *being* impartial, judges are expected to carry out the 'visible performance' of impartiality to maintain public and litigant confidence in their subjective impartiality, and through it, compliance with judicial authority.[214] This is often benchmarked against formalist ideas of the judicial function, which elevate the ideal of 'impersonal, unemotional detachment as the necessary performance of impartiality'.[215] In this view, the judge is the 'passive arbiter' who is expressionless and non-interventionist in demeanour.[216]

211 See, eg, Mack, Roach Anleu and Tutton (n 153) 255. See further **Chapter 11**.
212 Ibid 71–2, 80–1.
213 The Hon Chief Justice JLB Allsop, 'Public Statement of the Chief Justice' (30 August 2021).
214 Mack, Roach Anleu and Tutton (n 153) 67.
215 Roach Anleu and Mack (n 142) 9.
216 Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16(3) *Social and Legal Studies* 405, 406.

However, the way in which judicial impartiality is performed varies across courts and judges, and has adapted to the realities of modern litigation.[217] More active intervention is now expected and in some cases required.[218] In the performance of impartiality, researchers and judges are also increasingly recognising that emotion plays an important role.[219] Displays of judicial emotion can be positive — procedural justice research shows how displays of empathy can contribute to participants' trust in the process, and tact and humour may be an effective tool to manage proceedings and parties.[220] Recognition and acknowledgment of judges' own emotional reactions can be important to maintaining an impartial cast of mind.[221] Similarly, judges must 'routinely manage their own feelings', and the feelings of others in the courtroom, to adhere to norms of courtroom conduct.[222] Courts have recognised that displays of emotion by judges are to be expected, and to a certain degree, tolerated.[223] These issues are examined further in **Chapter 10**.

Insulating judges from and ameliorating threats to impartiality

2.82 Judges are human, and litigants and the public know this.[224] Judges may be tempted (whether consciously or unconsciously) to 'depart from the proper judicial decision-making methodology for a number of reasons'.[225] Courts and the broader legal system have therefore developed structures and practices to insulate judges from potential threats to impartiality. Many of these structures and practices fall within the framework of guarantees of judicial independence. The implementation of these structures and practices can be seen as an attempt to minimise the occurrence and effect of such influences,[226] and (or) to secure greater confidence of litigants and the public about the impact of such influences.[227]

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217 See Roach Anleu and Mack (n 142) 9. See also Groves (n 107) 140–41.

218 *Johnson v Johnson* (2000) 205 CLR 337 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). On this issue, Gordon and Edelman JJ recently expressed the view that 'passive participation in litigation is no longer an option' for judges: *Rozenblit v Vainer* (2018) 262 CLR 478 [76].

219 Mack, Roach Anleu and Tutton (n 153) 69–70. See **Chapter 4**.

220 Roach Anleu and Mack (n 142) 70; Roach Anleu and Mack (n 45) 134–5, 149. See generally Jessica Milner Davis and Sharyn Roach Anleu, *Judges, Judging and Humour* (Palgrave Macmillan, 2018).

221 Mack, Roach Anleu and Tutton (n 153) 70.

222 Ibid 72.

223 For a survey of cases where judicial displays of emotion were recognised, see Mack, Roach Anleu and Tutton (n 153) 72–9.

224 For further discussion, see **Chapter 4**.

225 McIntyre (n 7) 160.

226 Ibid 160–1.

227 Parker (n 68) 71.

2.83 Relevant structures and practices include:

- Constitutional and institutional structures guaranteeing **security of tenure and remuneration**, which insulate judges from influence by government.
- Constitutional and institutional structures protecting judges from direction by other branches of government, such as through the **separation of powers doctrine**.[228]
- **Security arrangements** ensuring the personal protection and safety of judges and aggravated **criminal sanctions for threats to, or attacks on, judges**.
- **Legal immunity** from suit, which is intended to ensure that judges are not influenced in their decision-making by concerns about getting the 'wrong' answer, and therefore are not tempted to favour the 'safe' outcome, or the most well-resourced litigant.[229]
- The **bias rule**, which also operates to insulate judges from potential threats to impartiality by requiring them to remove themselves from a case if they have a direct interest in it, or if there is a reasonable apprehension that they might not be impartial (see further **Chapter 3**).
- **Restrictions on outside activities of judges**, such as those developed and expressed in guides to judicial conduct or ethical codes. Such restrictions may also operate to insulate judges from threats to impartiality by restricting: their commercial, professional, or political activities when they take up office; and, the extent to which they comment publicly on issues they may be called on to determine as part of their role as a judge.
- **Systems for minimising discretion in the allocation of matters** among judges, to protect against the possibility of internal management improperly influencing the outcome of cases or using allocation as a system of reward or punishment.[230]
- **Judicial appointments procedures** can be designed to insulate judges from and ameliorate the effect of threats to impartiality, including with respect to a potential relationship of obligation from the judge to the appointer,[231] and structural biases that may lead to overrepresentation of judges from a particular background (in relation to social characteristics including by gender, class or race).[232]

228 See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51.
229 McIntyre (n 7) 202; Chief Justice Gleeson (n 130).
230 McIntyre (n 7) 218; Kate Malleson, 'Safeguarding Judicial Impartiality' (2002) 22(1) *Legal Studies* 53, 67–8. See further **Chapter 6**.
231 Malleson (n 230) 64–5.
232 McIntyre (n 7) 208; Lucy (n 69) 15–16. See further **Chapter 12**.

- **Appropriate resourcing of courts**, and **restrictions on executive interference with resourcing**. This can insulate judges both from the effect that inadequate resourcing may have on their ability to make decisions deliberatively (such as a result of stress and burnout), and from the possibility of executive interference in resourcing as a mechanism of punishment or reward.[233] Appropriate resourcing (including in relation to the number of judges) can also be seen to *promote* impartiality by allowing sufficient time for hearings in which both sides can be heard effectively.[234]
- **Laws and practices** insulating judges from certain types of criticism in politics and the media, such as the convention that judges cannot be criticised personally in Parliament, and contempt laws, such as the law of scandalising the court.[235]
- In addition, practices referred to above related to **judicial education** and **ethical support**, including **guides to or codes of conduct** and **bench books** may help judges to identify and address particular issues that may arise as threats to impartiality.

Accountability for failure to meet minimum standards of impartiality

2.84 Finally, judges may be held accountable in a number of concrete ways for failures to meet minimum standards of judicial impartiality, or the appearance of judicial impartiality. Countries in the Commonwealth, including Australia, have traditionally held judges accountable in their role by relying on a blend of internal and external mechanisms related to how the role is performed, social pressures, and internal and external complaints and disciplinary procedures.[236]

2.85 Accountability mechanisms can be seen as safeguards for ensuring that the standards and structures upholding judicial impartiality are working appropriately.[237] Some of these — such as internal and external complaints mechanisms — may also play a role in promoting judicial impartiality by serving as early warning signs of potential issues in this respect that can be addressed and monitored.[238] In relation to impartial decision-making in particular, these accountability structures may include:

- **Appeals** under the bias rule or hearing rule.

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233 McIntyre (n 7) 214–15.

234 See further **Chapter 12**.

235 Sir Anthony Mason (n 184) 8. Previously this also included the role of the Attorney-General (Cth) to 'defend judges from political attacks when they occurred and promote understanding of the Court's decisions'. However, this role is 'now largely left to the legal profession'. See Krebs, Nielsen and Smyth (n 133) 612. See further **Chapter 12**.

236 McIntyre (n 7) 237. For a summary of taxonomies for characterising judicial accountability mechanisms see 250–88. See further **Chapter 9**.

237 Ibid 243.

238 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [9]–[11]. See further **Chapter 9**.

- **Internal and external complaints mechanisms**, such as complaints to the head of jurisdiction and Judicial Commissions.
- **Social pressures**, including from judicial colleagues, and media scrutiny.
- **Criminal and professional sanctions** for bribery and corruption. Such sanctions are considered a proper influence on judicial decision-making, as they incentivise the judge to conform with the judicial decision-making method.[239]

2.86 Although they can be mutually reinforcing, there may also be a tension between judicial impartiality (and independence) and accountability mechanisms, as accountability mechanisms have the potential to introduce outside influences and distort impartial judicial decision-making.[240] This requires 'a careful balance to be struck'.[241]

Policing the limits of sufficient impartiality: the bias rule

2.87 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 of 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 structural and cultural guarantees of impartiality outlined above. But how are those minimum standards determined?

2.88 Geyh offers the useful insight that the answer to the question of how much impartiality is enough will depend on 'who we are trying to convince, why they care, and what is needed to convince them'.[242] The law on bias has developed in Australia with the specific purpose of maintaining public confidence in the administration of justice.[243] Therefore, acceptability is determined by reference to the assumed views of 'the public'— with the aim of ensuring that influences on decision-making that 'the public' would consider both inappropriate and unacceptable do not appear to play a role in determining individual cases. At an institutional level, the guarantees of independence from the executive can be seen to play a similar role. In determining the views of the 'public', reference to the views of litigants and their lawyers is likely to be important but not necessarily decisive.[244]

2.89 Standards of courtroom behaviour and the fair hearing rule can be seen as an important way of defining minimum standards for the appearance of impartiality to parties. While the fair hearing rule provides some legal content to these standards, Mack and Roach Anleu show how standards of courtroom behaviour are heavily

239 McIntyre (n 7) 202.
240 Ibid 243–4.
241 Ibid 244. See further **Chapter 9**.
242 Geyh (n 67) 511.
243 See further **Chapter 3**.
244 On the importance of lawyers' views see Chief Justice Gleeson (n 117): 'the views of lawyers influence their clients, and many members of the wider public'.

context-dependent, and can legitimately be interpreted and performed in different ways.[245] It may be for this reason that the limits are policed to a large extent by ethical principles. Meanwhile, the bias rule acts as a potential safeguard to step in when courtroom behaviour is so extreme as to run the risk of shaking public confidence.[246]

2.90 However, a crucial aspect of subjective impartiality — an attitude of impartiality — is internal to the judge. It is therefore impossible to 'construct institutional safeguards which can *guarantee* that individuals will not allow themselves to be' influenced by improper considerations in their decision-making.[247] While institutional measures can be taken to reduce the occurrence and impact of improper influences,[248] securing (sufficient) judicial impartiality ultimately relies on the integrity of individual judges and the nature and character of those who hold judicial office.[249]

2.91 The scope of the ethical commitment to judicial impartiality may therefore be different to the minimum standards set by the laws, practices, and structures supporting it.[250] In the Hon Justice K Mason AC's view, the

> duties of neutrality and impartiality are concerned with more than avoiding the appearance of bias or even the risk of actual bias being found … They are also ethical duties that go beyond compliance with external yardsticks like the rules of evidence, procedural fairness and the like, however much those yardsticks promote impartiality.[251]

2.92 This is a point made explicitly in the recently revised *Ethical Principles for Judges* in Canada: 'While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal'.[252]

Guiding principles for the Inquiry

2.93 Based on the framework developed in this chapter, and informed by submissions received in response to the Consultation Paper, the ALRC has developed five guiding principles to assist in consideration of potential reforms. They are an attempt to crystallise the analysis provided in this chapter into concrete

245 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*; Mack, Roach Anleu and Tutton (n 153).
246 See **Chapter 10**.
247 Malleson (n 230) 63 (emphasis added). The Hon Justice D Mortimer has noted that we 'will never know completely what drives an individual judge to a particular decision. Indeed, the intuitive and internal nature of the reasoning process means that the judge herself or himself may not be able *wholly* to explain why one conclusion, or one argument, seems more appropriate or more persuasive than the competing conclusion or argument': The Hon Justice D Mortimer, 'Whose Apprehension of Bias?' (2016) 84 *Australian Institute of Administrative Law Forum* 45, 51.
248 McIntyre (n 7) 220; The Hon Justice K Mason, 'Impartial, Informed and Independent' (2005) 7 *The Judicial Review* 121, 128.
249 McIntyre (n 7) 221.
250 Justice Mason (n 248) 127.
251 Ibid.
252 Canadian Judicial Council (n 59) 39.

and specific principles, providing the normative touchstone for analysis of existing practices and potential reforms.

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

2.94 These principles adapt and build upon six principles that the ALRC set out in the Consultation Paper. In general, the stakeholders who addressed the issue were supportive of the principles set out in the Consultation Paper.[253] However, three stakeholders made comments suggesting improvements, which have been considered in reformulating these principles. Each of these principles, and its relevance to the ALRC's consideration of issues in the context of this Inquiry, is briefly addressed below.

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

Although judges' commitment to impartiality is crucial, judicial impartiality is not a matter only for the individual judge. Jurisdiction over matters is vested in the court as a whole, and the court has a central role in ensuring impartial decision-making. The importance of impartiality to the judicial function and the role of the judiciary within the framework established by the *Australian Constitution* also means that any reform to the law on bias should be judge-led.

253 Two submissions expressed support for all of the principles: Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*. Two submission expressed support for all but one or two of the principles: Women Lawyers Association of New South Wales, *Submission 26*; Professor Tania Sourdin, *Submission 33*. Dr McIntyre expressed general support for the principles, but made a number of suggestions as to how they could be improved, many of which have been incorporated into the reformulated principles and accompanying analysis: Dr Joe McIntyre, *Submission 46*.

2.95 This principle builds upon the analysis above of the institutional structures supporting judicial impartiality, and analysis of the jurisdiction of the court to determine applications for disqualifications, which is developed further in **Chapter 7**. The High Court has made it clear that disqualification for bias 'is not a matter only for the particular judge, [because] the apprehension of bias principle has its roots in principles fundamental to the common law system of adversarial trial'.[254]

2.96 This principle also reflects and expands upon Principle 6 from the Consultation Paper, which recognised that reform to the law on bias should be judge-led. That principle attracted support from all but one of the stakeholders who specifically addressed the principles set out in the Consultation Paper.[255]

2.97 In developing potential reforms, the ALRC has considered whether such reform should be achieved through legislative intervention or other mechanisms. There are strong arguments that reform should be judge-led rather than through legislation. This was a point emphasised in a number of submissions. For example, the Australian Judicial Officers Association noted that:

> Apparent or actual bias is a question resolved by those who are intimately acquainted with the nature of the complaints which may be raised and the reality of how a judge is trained to and should in fact discharge his or her sworn duty.[256]

2.98 According to McIntyre:

> While judicial impartiality is a derivative concept, it is one that goes to the heart of the judicial function. Its operation and realisation must be left to the judiciary — and be for the judiciary to adopt in light of changing social expectations — as the alternative would be to introduce a structural weakness into the judicial systems that could be exploited in an attempt to improperly influence judges.[257]

2.99 In its submission, the Women Lawyers Association of New South Wales noted, however, that, even if this is accepted, parliament and the executive may still play an important role in reform. They noted that '[t]ransparency of decision-making by judges may be enhanced by clear directions from the Parliament as to the matters to be taken into account'.[258] In addition, they noted that:

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254 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [83] (Gummow A-CJ, Hayne, Crennan and Bell JJ).

255 The Women Lawyers Association of New South Wales did not specifically oppose the principle, but made three observations in relation it: Women Lawyers Association of New South Wales, *Submission 26*. See also the submission from the Australian Judicial Officers Association, who considered that the principles guiding disqualification for bias 'should continue to develop organically through the nation's highest custodian of the common law, the High Court of Australia': Australian Judicial Officers Association, *Submission 31*.

256 Australian Judicial Officers Association, *Submission 31*.

257 Dr Joe McIntyre, *Submission 46*. See also Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

258 Women Lawyers Association of New South Wales, *Submission 26*.

> The Executive Government which appoints Commonwealth judges has the most important role to play in reform of procedures for appointments in order to achieve transparency and public confidence in Commonwealth judicial appointments.[259]

2.100 In any event, there may be constitutional impediments to legislative intervention in relation to the law and procedures on actual and apprehended bias. The ALRC has been mindful of the constitutional framework in shaping its recommendations for law reform.

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

Judicial impartiality is a vital judicial value, but it cannot be absolute. The scope and limits of judicial impartiality are defined by reference to the courts' role in dispute resolution and social governance. Reform must be sensitive to that role, and to unintended impacts.

2.101 In considering possible deficiencies of the existing law on bias, the ALRC has considered whether or not particular influences on judicial decision-making may be improper and unacceptable. This recognises that some influences either cannot practically be eliminated by the law on bias, or that the cost of doing so would be too high. In such cases, litigant or public confidence concerns may need to be addressed by other institutional structures (see Principle 4).

2.102 In addition, this principle recognises that — as emphasised in the submission of Mack and Roach Anleu — judicial impartiality is a dynamic concept with both attitudinal and procedural dimensions, and its content is highly context-specific. The need to consider procedural aspects of impartiality has been repeatedly emphasised in consultations, with many stakeholders referring to the overlap and interdependence of the bias rule and the fair hearing rule. This is particularly reflected in **Recommendations 1 to 4** in **Chapter 6**, **Chapter 7**, and **Chapter 8**.

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

Litigants have an interest in judicial impartiality because judicial impartiality underpins merit-based resolution of their disputes, and is a necessary condition for respect of the dignity of litigants in the exercise of public power. However, judicial dispute resolution is a public good, and there is also a public interest in ensuring that judges are, and are seen to be, impartial, more broadly.

259 Ibid.

2.103 Principle 3 builds upon, and adapts, Principles 1 and 2 as set out in the Consultation Paper.[260] It recognises both the instrumental and dignitarian purposes of securing judicial impartiality.[261] Litigants have an obvious interest in judicial impartiality, which is important to the merit-based resolution of their disputes, as well as in the appearance of impartiality, which enhances confidence in the fairness of the process and enables more ready acceptance of the outcome. Promoting the appearance of impartiality is consistent with respect for the dignity and equality of litigants, whereas evidence of a lack of impartiality denies dignity and equality.

2.104 However, Principle 3 also recognises that judicial dispute resolution 'is a public good, and there is a public interest in ensuring that judges are, and are seen to be, impartial', beyond the interests of the parties.[262] As McIntyre explains, an ongoing and visible commitment to impartiality is important both to the continuing exercise of the dispute resolution function and the court's social governance role. The absence of such a commitment can result in ongoing damage to public confidence, even if the damage in a specific case is remediated. Further, the 'normative authority and legitimacy of a judgment will be … undermined where there is a reasonable apprehension of partiality even where the parties themselves do not raise the issue'.[263]

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

A web of interconnected and mutually reinforcing laws, procedures, practices, and institutional structures promote and protect judicial impartiality and the appearance of judicial impartiality. The extent to which the bias rule contributes to public confidence in judicial impartiality depends on the balance that is struck between the scope and application of that rule and the effective functioning of other practices and structures.

2.105 The bias rule is far from the only mechanism contributing to public confidence in judicial impartiality. It is critical for public confidence that the right balance is struck between the scope and application of that rule and the effective functioning of other practices and structures.[264]

2.106 The discussion above also highlights how limits on the scope and operation of the law on bias may need to be drawn in order to ensure the proper functioning of

260 Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021) 8. Principles 1 and 2 were, respectively, that: 'Litigants have the right of equal access to a fair hearing by an impartial judge'; and 'The legitimacy of the courts depends on judicial impartiality'.
261 See above [2.52]–[2.57].
262 Dr Joe McIntyre, *Submission 46*.
263 Ibid.
264 Malleson (n 230) 70.

the justice system.[265] These limits may be based on the effects that the operation of the rule has on other mechanisms promoting and protecting judicial impartiality, and levels of public confidence in it. As McIntyre has noted, 'responses to one threat can create new avenues for external interference'.[266] McIntyre states in his submission that:

> Care must be taken to ensure that reforms — often well intentioned — do not unnecessarily diminish confidence and the performance of the judicial function. For example, it is not immediately clear that Australia has a significant issue with judicial impartiality in the Federal Courts system; advocating for significant reform may suggest that there is a greater problem than there actually is with the counter-intuitive effect of diminishing confidence.[267]

2.107 Similarly, other values that are also important to the effective and continued operation of the judicial function (and public confidence in the courts) may also legitimately be taken into account in determining the scope of the law on bias and the appropriate mix of practices and institutions to protect judicial impartiality. These may include considerations of access to justice, efficiency, and institutional integrity.[268]

Principle 5: Transparency, equality, integrity, and fairness are crucial complementary values

Various other judicial values contribute to, and interact with, judicial impartiality. Transparency, equality, integrity, and fairness are particularly closely related to judicial impartiality, and are particularly important for public and litigant confidence in the administration of justice.

2.108 This principle builds upon Principle 4 from the Consultation Paper and recognises that various other values contribute to, and may interact with, judicial impartiality. It also recognises that other factors besides a reputation for impartiality are important to levels of public confidence in the administration of justice.[269] Where a key purpose of the law on bias is to contribute to public confidence in the courts, the interaction with these other values must also be borne in mind.

2.109 Transparency in decision-making, through holding proceedings in open court and the publication of reasons, is a value of the Australian system of justice. This is seen as important to upholding public confidence in the courts, and is essential for their legitimacy.[270] However, transparency of *process* is also increasingly considered

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265 Ibid. Malleson notes, for example, that the 'more readily the courts accede to claims for disqualification the greater the danger both of judge-shopping and of increased costs and delays'.
266 McIntyre (n 7) 215.
267 Dr Joe McIntyre, *Submission 46*.
268 Malleson (n 230) 70. See further Dr Joe McIntyre, *Submission 46*.
269 Professor Tania Sourdin, *Submission 33*.
270 Justice Kenny (n 118) 217–19.

important to maintaining legitimacy of institutions. Transparency is important to the appearance of impartiality and to signalling the courts' commitment to upholding judicial impartiality. As McIntyre points out in his submission, this may arguably justify reforms 'even if exiting mechanisms adequately respond to discrete instances of alleged impartiality'.[271]

2.110 Similarly, equality is identified in the *Bangalore Principles* as an essential principle of judicial conduct, which is intricately connected to the requirement of impartiality.[272] This close link is highlighted by the judicial oath, which requires judges to 'do right to *all manner of people* according to law without fear or favour, affection or ill will'.[273] Equality is an important rationale for judicial impartiality in the dignitarian perspective.[274]

2.111 Important dimensions of equality that are affected by judicial impartiality include: access to justice; and equality of treatment in process and outcome. This has implications for how public confidence might be considered — if certain sections of the community do not have confidence in judicial impartiality, they will be less likely to engage in the legal system, negatively impacting their equal access to justice.[275] This connection was recently explored by Chief Justice Bathurst, who noted that

> variation in the levels of trust amongst the community calls into question whether the judiciary is in fact doing right to *all* manner of people. The mere perception (even if unfounded) that there is bias against certain groups in society severely diminishes the trust in and in turn, the legitimacy of the judiciary.[276]

2.112 In addition, diversity of composition, reflecting equality, is also increasingly seen as important to the legitimacy of institutions.[277] It is therefore important that consideration of issues of securing judicial impartiality, and their impact on public confidence, is considered alongside considerations of equality.

2.113 Finally, competence and integrity are also identified in the *Bangalore Principles* and the *Guide to Judicial Conduct* as core judicial values.[278] These are, as suggested by the discussion above,[279] ultimately necessary to the proper functioning of the protections for impartiality provided by the hearing rule and the law on bias.

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271 Dr Joe McIntyre, *Submission 46*.
272 See above [2.28].
273 See the Hon Chief Justice TF Bathurst, 'Doing Right by "All Manner of People": Building a More Inclusive Legal System' (Speech, Opening of Law Term Dinner, Sydney, 1 February 2017) [6]–[7] (emphasis added).
274 See above [2.55].
275 See Chief Justice Bathurst (n 120).
276 Ibid [68], citing Kenneth E Fernandez and Jason A Husser, 'Public Attitudes toward State Courts' in Rorie Spill Solberg and Eric Waltenburg (eds), *Open Judicial Politics* (Oregon State University, 2020).
277 See further **Chapter 12**.
278 Judicial Group on Strengthening Judicial Integrity (n 8) Value 3 (Integrity) and Value 6 (Competence and Diligence); Australasian Institute of Judicial Administration (n 3) 5 (Integrity and personal behaviour).
279 See [2.90]–[2.92].

3. Overview of the Law on Bias

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Introduction

3.1 This chapter provides a brief overview of the law on actual and apprehended bias, including the existing test for apprehended bias, its historical development, and the main contexts in which actual and apprehended bias are found to arise. Although application of the law on bias can be contested, the principles of law in this area, as recently reaffirmed by the High Court, are generally clear.[1]

3.2 This chapter describes how — at the individual case level — the courts have developed a flexible and context-sensitive test, grounded in the perspective of the fair-minded lay observer, against which to judge the acceptability of any risk of improper influences impacting on judicial decision-making.

3.3 Throughout the Inquiry, the ALRC has encountered little appetite for reform of the law. Instead, stakeholders have seen reform of the procedures for raising and determining issues of bias, and transparent approaches to addressing bias at an institutional level, as the areas in which reform is required. Those reforms are important to maintain what the law on bias already explicitly seeks to uphold — that justice is both done, and is seen to be done.

3.4 This chapter therefore provides context for the discussion of bias in decision-making in **Chapter 4**, and consideration of reforms to procedures relating to bias in

1 *Charisteas v Charisteas* (2021) 393 ALR 389.

Part Two. The Report returns to a discussion of particular areas of the law that may require further clarification, through judicial development, in **Part Three**.

The bias rule

3.5 Judicial impartiality, and its appearance, are safeguarded by the common law most obviously through the operation of the bias rule — one of the two pillars of natural justice.[2] The bias rule 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. It is concerned 'as much to preserve the public appearance of independence and impartiality as it is to preserve the actuality'.[3]

3.6 Australian courts have long recognised that 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.[4]

The rule applies to judges, juries, administrative officials, and elected officials in their decision-making (although its content can vary in these differing contexts).[5]

3.7 In Australia, the law on bias is predominantly found in common law.[6] 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.[7] Actual bias looks to what is actually going on in the judge's mind. Apprehended bias looks instead to perceptions, and considers the matter from the perspective of how it may *appear*.

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2 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, 2017) 643. As Professor Groves points out, the 'two rules can intersect, such as when excessive judicial intervention is claimed to have caused both unfairness (by precluding a party from adequately presenting its case) and an apprehension of bias (because the interventions are made only to one party)': Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 565, 566 n 2.

3 *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).

4 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [53] (Nettle and Gordon JJ), citing *Webb v The Queen* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J).

5 Aronson, Groves and Weeks (n 2) 650–51. See further *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [55] (Nettle and Gordon JJ).

6 There are, however, a number of statutory provisions that criminalise judges exercising jurisdiction in matters in which they have a personal interest: see, eg, *Crimes Act 1914* (Cth) s 34, in relation to the exercise of federal jurisdiction.

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

Actual bias

3.8 A claim of actual bias 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.[8]

3.9 This is a subjective test. It requires 'cogent evidence that the decision-maker was in fact biased', even if unconsciously, and is, for that reason, difficult to prove.[9] Justice French explained how actual bias could be based on various circumstances, relevant or irrelevant. For example, a decision would be affected by actual bias if it could be shown that racial or gender prejudice predisposed a decision maker's mind to such an extent 'that he could not bring his mind to a proper consideration of the full range of circumstances relevant to the decision'.[10]

3.10 Similarly, there would be actual bias if awareness of a relevant factor so affected a decision maker's mind that 'he could not properly consider or evaluate' the matter.[11] However, a strong predisposition towards an outcome on the basis of partial facts would not amount to actual bias, provided the decision maker is 'not thereby disabled from considering or unwilling to consider' all the relevant circumstances.[12]

3.11 A claim of actual bias is considered a 'grave matter', because it calls into question the integrity of the decision maker.[13] A finding of actual bias may therefore 'undermine the very institutional integrity it is intended to foster'.[14] Courts are 'naturally reluctant' to make findings of actual bias, and are more willing to uphold a claim of apprehended bias, because it looks only to how the situation might appear to somebody who is not a lawyer.[15]

3.12 Justice Kirby noted that, in these circumstances, a 'party would be foolish needlessly to assume a heavier obligation when proof of bias from the perceptions of reasonable observers would suffice to obtain relief'.[16] Where actual bias is raised and considered in detail, it is often because legislation has modified the requirements

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8 *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).

9 Aronson, Groves and Weeks (n 2) 653. See further *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [73] (Basten JA).

10 *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104.

11 Ibid.

12 Ibid.

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

14 Aronson, Groves and Weeks (n 2) 653.

15 Ibid. See further *Webb v The Queen* (1994) 181 CLR 41, 71–2 (Deane J).

16 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [111].

of procedural justice in relation to the particular (administrative) decision maker to remove apprehended bias as a ground of review.[17]

The legal test for apprehended bias

3.13 The test for apprehended bias is an objective one that does not call into question the subjective state of mind, or the integrity, of the judge. The principles for determining whether a judge is disqualified for apprehended bias are regarded as being 'well established',[18] with disagreement tending to arise about their application rather than their content. 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.[19]

As to what is required by an 'impartial mind', Deane J had previously suggested that the law is concerned with avoiding an apprehension of 'prejudice, partiality or prejudgment'.[20] Although many other more detailed explanations of 'bias' have been given in later decisions,[21] this provides a helpful shorthand for the major concerns to which the law on judicial bias is addressed in the case law.

3.14 The focus on the reaction of an imagined member of the public, rather than the court's own view of the situation, was a deliberate choice justified on the basis of

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17 See, eg, *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, where the relevant legislation had limited the grounds on which the Federal Court could review decisions to cases of 'actual bias'. The High Court retained jurisdiction to consider apprehended bias as a potential ground for the grant of Constitutional writs. See further [111]–[114] (Kirby J).

18 *Charisteas v Charisteas* (2021) 393 ALR 389 [11].

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

20 *Webb v The Queen* (1994) 181 CLR 41, 74.

21 See, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, providing '[b]ias, whether actual or apprehended, connotes the absence of impartiality': [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, noting 'lawyers usually equate "bias" with a departure from the standard of even-handed justice which the law requires from those who occupy judicial, or quasi-judicial, office': [102] (Gleeson CJ and Gummow J), and '"[b]ias" is used to indicate some preponderating disposition or tendency, a "propensity; predisposition *towards*; predilection; prejudice". It may be occasioned by interest in the outcome, by affection or enmity, or, as was said to be the case here, by prejudgment. Whatever its cause, the result that is asserted or feared is a deviation from the true course of decision-making, for bias is "any thing which turns a man to a particular course, or gives the direction to his measures"': [183] (Hayne J). Note some judges have distinguished between 'bias' and 'prejudice', treating bias as involving animus towards a party, and prejudice as involving prejudgment whether driven by animus or not. See, eg, *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 9)* (Supreme Court of Appeal of New South Wales, Kirby P, Mahoney and Priestley JJA, 27 November 1990) (Mahoney JA); *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 435 (Mahoney JA). See further John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 9–11.

being best aligned with maintaining public confidence in judges and the legal system — a key rationale of the rule.[22] The High Court has recently emphasised that the

> hypothetical observer is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system.[23]

This means that where the risk, or appearance, of prejudice, partiality, or prejudgment influencing the judgment is sufficiently specific and intense to concern the hypothetical fair-minded lay observer, the risk to public confidence will be considered unacceptable, and the judge should be disqualified.[24]

3.15 This test does not require any conclusion 'about what factors *actually* influenced the outcome'.[25] 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.[26] This is a question of 'possibility (real and not remote), not probability'.[27] This has come to be known as the 'double-might' test, and has been recognised as setting a 'low threshold'.[28] Nevertheless, in light of a judge's duty to hear the matters assigned to her or him, the courts frequently stress that a claim of apprehended bias must be 'firmly established' and is 'not to be reached lightly'.[29]

3.16 In *Ebner v Official Trustee* ('*Ebner*'), the High Court held that two steps are involved in determining that question.[30] 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.[31]

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22 *Webb v The Queen* (1994) 181 CLR 41, 51; *Johnson v Johnson* (2000) 201 CLR 488 [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 154.

23 *Charisteas v Charisteas* (2021) 393 ALR 389 [21].

24 See further **Chapter 2**.

25 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing) (emphasis in original).

26 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [30], [33] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

27 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).

28 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [14] (Spigelman CJ). See further Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 64; Tarrant (n 21) 66.

29 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [28] and citations therein. See further Aronson, Groves and Weeks (n 2) 654. As to the duty to sit, see further **Chapter 7**.

30 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8].

31 *Charisteas v Charisteas* (2021) 393 ALR 389 [11].

3.17 The authority of this test has been described as 'not in doubt'.[32] However, its application to particular facts can be 'far from clear'.[33] As the High Court recognised in *Ebner*:

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty.[34]

3.18 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'.[35]

Development of the law on bias

3.19 Historically, the common law had been reluctant to recognise that it was even possible for judges to be biased.[36] Nevertheless, concerns regarding judicial bias have been considered since at least the 13th century, when the law considered that a judge should be disqualified on certain grounds.[37] By the mid-19th century it was clearly established that a judge would be automatically disqualified from hearing a case where she or he had a pecuniary interest in the subject matter.[38] The move from statements of principle to the adoption of specific tests for bias began in England and Wales in the mid-1800s.[39] At first, the test was concerned solely with actual bias.[40] A judge was said to be disqualified wherever

> there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties.[41]

3.20 Concerns about appearances of bias, even in the absence of actual bias, began to appear regularly in the cases at the turn of the 20th century.[42] This shift was marked clearly by the well-known statement of Lord Heward CJ in *R v Sussex Justices; Ex parte McCarthy* that it

> is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[43]

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32 See, eg, *Antoun v The Queen* (2006) 80 ALJR 497 [82] (Callinan J). Although note the suggestion that the test may be strengthened by a third step as suggested by Gaegler J in *Isbester v Knox City Council* (2015) 255 CLR 135 [59]. See also Groves (n 2). For a similar proposal in the Canadian context see Jula Hughes and Dean Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36(1) *Dalhousie Law Journal* 171.

33 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [17] (Finklestein J).

34 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8].

35 Aronson, Groves and Weeks (n 2) 656.

36 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed), Volume III, 361. See further **Chapter 1**.

37 Tarrant (n 21) 19; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928, 929.

38 *Dimes v Proprietors of the Grand Junction Canal* (1852) 10 ER 301.

39 See further Tarrant (n 21) 33.

40 Ibid.

41 *R v Rand* [1866] LR 1 QB 230, 232–3 (Blackburn J, Cockburn CJ and Shee J concurring).

42 Tarrant (n 21) 35.

43 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

3.21 This signalled a move towards a framework within which judges could be disqualified even if they were not actually biased (or presumed to be actually biased because they had a pecuniary interest), but might appear to be.[44] It also made it possible for factors other than a pecuniary interest to be taken into account in determining if bias (or the appearance of it) might exist.[45]

3.22 Over the first half of the 20th century, the courts in the UK and the Commonwealth grappled with how exactly this framework should be applied.[46] In the UK, the position was clarified by the House of Lords in the case of *R v Gough*, where the Court held that the test for apprehended bias required a 'real danger' of bias, viewed from the perspective of the judge.[47] According to Lord Goff of Chieveley, it was

> unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[48]

3.23 However, this approach was criticised and decisively rejected in Australia a year later by the High Court in the case of *Webb v The Queen* — which firmly established that the test was to be considered from the viewpoint of the fair-minded lay observer.[49] Chief Justice Mason and Justice McHugh noted that the assumption underlying the approach in *R v Gough* was that public confidence in the administration of justice would 'be maintained because the public will accept the conclusions of the judge'.[50] Their Honours' view of the Australian case law, however, was that public confidence was

> more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member the public to the irregularity in question.[51]

3.24 Finally in *Ebner*, concerning a judge's shareholdings, the High Court collapsed a distinction that had previously been made in the case law (and that still exists in some common law jurisdictions) between automatic disqualification for pecuniary

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44 Tarrant (n 21) 26.

45 Ibid.

46 For a complete history of the back-and-forth in the early part of the 20th century on the bias test, see ibid ch 3.

47 *R v Gough* [1993] AC 646, 668–70.

48 Ibid 670.

49 *Webb v The Queen* (1994) 181 CLR 41. This case concerned apprehended bias in relation to a member of a jury.

50 Ibid 51 (Mason CJ and McHugh J).

51 Ibid (Mason CJ and McHugh J). See further Tarrant (n 21) 33; *Johnson v Johnson* (2000) 201 CLR 488 [11]–[13]. See the debates around the adoption of the 'reasonable suspicion' test in: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546. For the debates around the possibility/probability standard, see: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.

interest in a case, and principle-based disqualification in other circumstances.[52] In doing so, it merged the tests for pecuniary and non-pecuniary interests into the 'ostensibly generic "reasonable apprehension of bias" test'.[53]

3.25 Disqualification for apprehended bias, viewed from the perspective of a fair-minded lay observer or other 'reasonable person', is now part of the law in much of the Commonwealth, including, since 2002, in the UK.[54] It is well established, with some variation, for example, in Brunei Darussalam,[55] Canada,[56] Hong Kong,[57] India,[58] New Zealand,[59] Singapore,[60] and South Africa.[61] It is also required by the case law of the European Court of Human Rights on the right to a fair trial,[62] and reflected in the *Bangalore Principles*.[63]

3.26 However, the standard applied under the test differs across jurisdictions. In England and Wales, the question is whether the fair-minded observer 'would' (rather than 'might'), conclude that there was a 'real possibility' that the tribunal was biased.[64] In South Africa, the test is whether the reasonable person 'would'

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52 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

53 Young (n 37) 945.

54 *Porter v Magill* [2002] 2 AC 357, 494 (Lord Hope with Lords Bingham, Steyn, Hobhouse, and Scott concurring). Although note that English law also retains automatic disqualification where the judge has an interest (not necessarily pecuniary) in the case.

55 Ann Black, 'Judicial Independence, Impartiality and Integrity in Brunei Darussalam' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 57, 67, citing *Bolkiah (HRH Prince Jefri) v State of Brunei Darussalam and Another (No 3)* [2007] UKPC 62 [18] (Lord Bingham).

56 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 (Grandpré J), affirmed in *R v S (RD)* [1997] 3 SCR 484 [31] (L'Heureux-Dubé and McLachlin JJ, La Forest and Gonthier JJ concurring).

57 Albert HY Chen and PY Lo, 'Hong Kong's Judiciary under "One Country, Two Systems"' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 131, 159, citing *Deacons v White & Case* [2004] 1 HKLRD 291 and *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd* [2014] 3 HKLRD 375.

58 *PK Ghosh, IAS and ANT v JG Rajput* (1996) AIR 513, 516.

59 Gerard McCoy, 'Judicial Recusal in New Zealand' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 322, 330, citing *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 [3]–[4].

60 Kevin YL Tan, 'The Singapore Judiciary' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 284, 302, citing *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791, 825.

61 Kate O'Regan and Edwin Cameron, 'Judges, Bias and Recusal in South Africa' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 346, 349–50, citing *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 [48].

62 *Piersack v Belgium* (1982) 5 EHRR 169 [30]–[31]; *De Cubber v Belgium* (1984) 7 EHRR 236 [30]; *Pullar v United Kingdom* (1996) 22 EHRR 391 [30]. This case law was cited in *Porter v Magill* [2002] 2 AC 357, 452 as providing grounds to change the way the test for apparent bias was formulated in England and Wales.

63 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) 45.

64 *Porter v Magill* [2002] 2 AC 357, 452.

apprehend that the judge 'has not and will not bring an impartial mind'.[65] In Canada, the test is: 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude'.[66]

The fair-minded lay observer

3.27 To answer the question of what the 'fair-minded lay observer' would think of a given situation,[67] the courts use what has been described as a 'kind of thought experiment'.[68] As former Family Court Judge, Professor the Hon Chisholm AM explains:

> Since the court determining the bias question has no evidence about what the public actually thinks — and the public does not in fact know about the situation — it has to guess.[69]

3.28 Chisholm continues: '[t]o make this sort of thought experiment workable, we have to make some assumptions, about the people envisaged'.[70] Justice Kirby described the hypothetical 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.[71]

3.29 In a recent case, the High Court noted 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

65 *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147. The Court described the test as 'whether a reasonable, objective and informed person would on the correct facts apprehend that the judge has not and will not bring an impartial mind to bear on the adjudication of the case': [48].

66 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369. The Court described the question to be asked as 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly': 394 (Grandpré J); affirmed in *R v S (RD)* [1997] 3 SCR 484 [31].

67 Aronson, Groves and Weeks point to other terms used, including 'fair minded people', a 'fair-minded observer', a 'lay observer', a 'reasonable or fair-minded observer', a 'reasonable person', and a 'fair-minded, informed lay observer': Aronson, Groves and Weeks (n 2) 665.

68 The Hon Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29(3) *Australian Family Lawyer* 18, 30.

69 Ibid.

70 Ibid 31.

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

> reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice'.[72]

3.30 There has been criticism in the case law and literature of the artifice of the hypothetical observer and the degree of specialist knowledge and confidence in the impartiality of judges that has been attributed to her or him.[73] These criticisms are explored further in **Chapter 10**. However, in two unanimous judgments by the High Court and Full Court of the Federal Court in the past year, both overturning decisions of courts below, the courts have taken a markedly realistic approach to how the fair-minded lay observer would view matters. For example, warning against attributing specialist knowledge and understanding of the practices of the legal profession to the hypothetical observer, the High Court emphasised that the

> hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts. It would defy logic and render nugatory the principle to imbue the hypothetical observer with professional self-appreciation of this kind.[74]

3.31 Similarly, the Full Court has warned against attributing the fair-minded lay observer with complete faith in the ability of judges to put aside the 'irrelevant, the immaterial and the prejudicial' when exposed to inadmissible, but potentially prejudicial information.[75] In *GetSwift v Webb*, Middleton, McKerracher, and Jagot JJ noted that:

> The hypothetical observer would recognise that judges are human, not a 'passionless thinking machine' or robot just assessing information. … The hypothetical observer looking at the reality of the process might apprehend that it might be difficult for any person, even a professional judge, confronted with different and potentially conflicting evidence and submissions in different proceedings … to decide … without the contamination of the extraneous information. As a result the hypothetical observer might reasonably apprehend that the judge might be influenced subconsciously …[76]

Contexts in which apprehended bias may arise

3.32 In *Webb v The Queen*, Deane J identified four main, sometimes overlapping, categories of case in which a reasonable apprehension of bias may arise, described

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72 *Charisteas v Charisteas* (2021) 393 ALR 389 [12], quoting *Johnson v Johnson* (2000) 201 CLR 488 [13].

73 For a summary of some of these criticisms see Aronson, Groves and Weeks (n 2) 670–71. See further Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388; Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <www.auspublaw.org/2015/09/apprehended-bias>; Young (n 37); Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376, 380–81; Groves (n 28).

74 *Charisteas v Charisteas* (2021) 393 ALR 389 [21].

75 See further [3.41].

76 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [46]–[48] (internal citations omitted). See also *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [28] (Kiefel CJ and Gageler J).

as interest, association, extraneous information, and conduct.[77] These covered the four types of situations that Deane J considered might give rise to a reasonable apprehension of 'prejudice, partiality or prejudgment'.[78] Considered in light of the framework developed in **Chapter 2**, these categories can be seen as encompassing 'material threats', 'relationship threats', and 'subject-matter or issue-based threats' to judicial impartiality. This categorisation has been acknowledged as 'a convenient frame of reference' for determining whether an apprehension of bias might arise,[79] although it is not without its own difficulties.[80] Each of the four categories is considered briefly in turn below.

Interest

3.33 The first category is where a judge has an interest, whether direct or indirect, and whether pecuniary or otherwise, in the outcome of a decision.[81] As the court explained in *Ebner*, the mere existence of an interest will not result in automatic disqualification; a party alleging bias must articulate a logical connection between the interest of the judge and the prejudicial outcome.[82] This would certainly include where the judge is a party to the case, either directly or through an alter ego.[83] Similarly, where a decision maker had previously acted as prosecutor or accuser in a case, they are considered to have an interest in the outcome of the case that might conflict with the objectivity required for impartial decision-making.[84] Other potentially disqualifying interests include business, professional or other commercial relationships, such as shareholdings in litigant companies, and even a 'strong commitment to a cause relevant to a party or a case'.[85]

3.34 While 'interest' is not limited to financial interests,[86] it arises most commonly in this context. For an economic interest to result in disqualification, it must be 'a not insubstantial, direct, pecuniary or proprietary interest'.[87] In *Ebner*, a minor shareholding in a litigant corporation was insufficient to give rise to a reasonable apprehension of bias, as the outcome of the litigation had no logical impact on the financial value of the shares.[88]

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77 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
78 Ibid.
79 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [24].
80 In particular, the description of 'conduct' as a category, and frequent addition of 'prejudgment' as a separate subcategory. See further [3.42]–[3.53], and **Chapter 10**.
81 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
82 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
83 Ibid [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
84 *Isbester v Knox City Council* (2015) 255 CLR 135 [34] (Kiefel, Bell, Keane and Nettle JJ), [63] (Gageler J).
85 Aronson, Groves and Weeks (n 2) 676. See, eg, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
86 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
87 Ibid [58].
88 Ibid [35].

3.35 An interesting example of disqualification for interest in a case arose in *Mathews v State of Queensland*.[89] As part of those proceedings the respondent state sought a vexatious litigant order against the claimant. To determine that application, the state asked the judge to make a finding that allegations Mathews had made about the same judge in other proceedings (including that the judge was part of a 'catholic inspired program or regime' aimed at the claimant's destruction) were scandalous and without foundation.[90] The judge in question distinguished the situation from where he might be required to decide the question in an application for disqualification, including on the grounds that the party seeking the ruling was not the party making the allegations. He determined that, although the accusations were undoubtedly 'abusive and offensive', the interests of justice required that he refrain from being the judge to make that finding. He ordered that the proceedings be listed before another judge for determination.[91]

Association

3.36 A judge's association with a party or other person involved in the proceedings may also result in an apprehension of 'prejudice, partiality or prejudgment'.[92] This includes relationships with family members, personal friends, counsel, witnesses, or organisations that may suggest a lack of impartiality.[93] Whether a reasonable apprehension of bias arises depends on the nature and extent of the relationship and the application of the *Ebner* test. Ultimately, the question is whether the reasonable observer would consider that the existence of the association might 'divert the judge from deciding the case on its merits'.[94]

3.37 In *Charisteas v Charisteas*, the relationship between a judge and counsel for one side in a case, evidenced by private contact while the case was ongoing, was considered as giving rise to an apprehension of bias. In addition to the contact providing the opportunity for something to be *said* to compromise the judge's impartiality, the High Court considered that the trial judge's impartiality might have been compromised by 'some aspect of the personal relationship exemplified by the communications', which were contrary to 'the most basic of judicial practice'.[95]

3.38 In examining the potential for apprehended bias to arise from personal relationships, the *Guide to Judicial Conduct* suggests that while current business associations may be grounds for disqualification, past professional associations

89 *Mathews v State of Queensland* [2015] FCA 191.
90 Ibid [10]–[11].
91 Ibid [14]–[17].
92 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J). Justice Deane explained that this category may often overlap with interest, such as where a judge's family member has a direct pecuniary interest in the proceedings: 74 n 28.
93 *S&M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1998) 12 NSWLR 358, 371–372.
94 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [30]. See further *Smits v Roach* (2006) 227 CLR 423, where the High Court held that the familial relationship between the judge and his brother (who was a partner at a law firm interested in the proceedings) was not sufficient to give rise to a reasonable apprehension of bias: [58].
95 *Charisteas v Charisteas* (2021) 393 ALR 389 [15].

or arms-length relationships are unlikely to provide a compelling reason for disqualification.[96] Similarly, past professional association with counsel is not in itself a sufficient reason for disqualification.[97] Especially in regional jurisdictions, it is common for judicial officers and legal counsel to be acquainted and/or friendly. In most jurisdictions, Bar Rules require a barrister to return a brief if their relationship with the judge might 'give rise to the apprehension that there may not be a fair hearing', which may reduce the necessity for a judge to disqualify herself or himself on this basis.[98] Apprehension of bias on the grounds of association relating to professional relationships is discussed further in **Chapter 10**.

3.39 Judges are also advised to carefully consider whether their extrajudicial activities are aligned with the appearance of impartiality. This includes membership of government bodies, participation in public debate, political activity, and engagement with community organisations.[99] Caution about such engagements is considered important to insulate judges from concerns about interests or associations that might give rise to prejudice, partiality, or prejudgment in future cases, although this needs to be balanced against the benefits of judges being engaged in their communities.[100]

3.40 At its broadest, association could be seen to extend to membership of particular social groups, on the basis that if a judge shares perspectives or experiences with one party and not the other, that might lead to partiality, prejudice, or prejudgment.[101] However, as considered further in **Chapter 11**, claims of apprehended bias based simply on a judge's gender or ethnicity (and alleged concomitant biases) have not been upheld.[102]

Extraneous information

3.41 Another situation where an apprehension of bias might arise is where a judge or other decision maker has knowledge of some prejudicial but inadmissible fact or circumstance that prevents them from bringing an impartial mind to the decision.[103] *GetSwift Ltd v Webb* is a recent example of a case where the court considered that a reasonable apprehension of bias would arise from exposure to evidence in two different proceedings concerning the same facts, some of which might not be admissible in the other.[104] Another recent example is the case of *CNY17 v Minister for Immigration and Border Protection*, concerning administrative decision-making, where irrelevant and prejudicial information about the applicant was provided to the

96 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 11, 16.
97 Ibid 16.
98 See, for example, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) s 105(l).
99 Australasian Institute of Judicial Administration (n 96) 23–28.
100 See further **Chapter 11**.
101 In the context of actual bias see, eg, *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104 (French J).
102 See further Aronson, Groves and Weeks (n 2) 686.
103 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J). According to Deane J, this will often overlap with association: 74 n 29.
104 *GetSwift Ltd v Webb* (2021) 388 ALR 75. For further discussion, see [3.31].

Immigration Assessment Authority during the 'Fast Track Review' of his protection visa application.[105] In that case, the High Court was split as to whether the informed observer would consider there was a realistic possibility that knowledge of the material would play on the subconscious of the Immigration Assessment Authority, with the majority holding that it could.[106] As such, a fair-minded lay observer might apprehend a lack of impartiality on the part of the Authority.

Conduct

3.42 The remaining category identified in *Webb v The Queen* was described as 'disqualification by conduct'.[107] Justice Deane suggested that this category 'consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to' a reasonable apprehension of 'prejudice, partiality or prejudgment'.[108] This category can be broadly broken down into two subcategories:

- where the apprehension of bias arises from something the judge has previously done, or a decision the judge has previously made, that is said to give rise to an unacceptable risk of prejudgment, even if subconsciously; and
- where the judge does or says something during the course of proceedings that might indicate prejudice, partiality, or prejudgment, seen in the context of ordinary judicial practice.

3.43 When Deane J referred to the 'disqualification by conduct' category, he gave an example from the first group — 'where a judge is disqualified by reason of having heard some earlier case'.[109] Issues of apprehended prejudgment may arise where a judge has previously made strong findings in relation to the credibility of one of the parties, or on inextricably linked issues of fact arising in the new proceeding, because of the public's reasonable concern that such a finding might, even subconsciously, close the judge's mind to the evidence in the new proceedings.[110] In *British American Tobacco Australia Services Ltd v Laurie,* the High Court held that a judge who had made strong adverse findings about a party in unrelated proceedings was precluded from hearing further cases involving that party because

> a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial.[111]

3.44 In some cases, litigants have used a judge's prior record of decisions (including by use of statistics) to argue that the judge is predisposed to certain views about particular types of cases or litigants and that the fair-minded lay observer would reasonably consider that the judge might not bring an impartial mind to such

105 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [50]–[51].
106 Ibid [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J), cf [43] (Kiefel CJ and Gageler J).
107 *Webb v The Queen* (1994) 181 CLR 41, 74.
108 Ibid.
109 *Webb v The Queen* (1994) 181 CLR 41, 74 n 29.
110 See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 299–300.
111 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [145].

cases.[112] To date, such arguments have not been successful. This is considered further in **Chapter 10**.

3.45 Extrajudicial writing and statements made out of court, including to the media, may raise issues of prejudgment, if a judge expresses '"preconceived views which are so firmly held" that the hypothetical observer may think it might not be possible for them to approach cases with an open mind'.[113]

3.46 As to the second subcategory, apprehended bias may arise when the behaviour of a judge during a matter, whether in or outside of the courtroom, gives rise to an apprehension of 'prejudice, partiality or prejudgment'. This may happen, for example:

- Where a judge engages in private communications with one of the parties or their legal representatives, or with a witness, without the knowledge or consent of the other party.[114] Such communications evidence an association demonstrating potential partiality and give rise to an opportunity for improper influences on the outcome.[115]
- Where the judge's demeanour and tone in court gives the appearance of prejudice against someone connected to the proceedings, such that it might reasonably be thought that it might improperly influence the outcome. While occasional displays of impatience, irritation, sarcasm, or rudeness are unlikely to be of such a nature and extent that the test is satisfied,[116] excessive, prolonged, or particularly harsh interventions may give rise to a reasonable apprehension of bias.[117]
- Where a judge intervenes in proceedings to assist one party to such an extent that there is a reasonable apprehension of partiality towards that party.[118]
- Where something the judge says during the proceedings indicates prejudgment of the matter.[119]

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112 See, eg *Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher* (1994) 52 FCR 34; *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; *BDS17 v Minister for Immigration and Border Protection* (2018) 76 AAR 246; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

113 Aronson, Groves and Weeks (n 2) 699, citing *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, 495. On disqualification for apprehended bias following statements made by a magistrate to the media, see *Gaudie v Local Court of New South Wales* (2013) 235 A Crim R 98.

114 Lee and Campbell (n 22) 159.

115 Such as the situation in *Charisteas v Charisteas* discussed at [3.37], and considered further in **Chapter 10**.

116 *Galea v Galea* (1990) 19 NSWLR 263, 281; *VFAB v Minister for Immigration and Indigenous Affairs* [2003] 131 FCR 102.

117 This is considered further in **Chapter 10**. See, eg, *Adacot v Sowle* [2020] FamCAFC 215 [117]. See further Matthew Groves, 'Excessive Judicial Intervention' (2021) 50 *Australian Bar Review* 139.

118 See, eg, *Tousek v Bernat* [1961] SR (NSW) 203, 206. See further Australasian Institute of Judicial Administration (n 96) 19.

119 Young (n 37) 950, citing *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [15]–[18] (Spigelman CJ). See also Aronson, Groves and Weeks (n 2) 686.

3.47 In each of these cases, the reasonableness of the apprehension of bias will be judged 'in the context of ordinary judicial practice'.[120] This can be seen as acting as a filter for determining when a potentially improper influence on judicial decision-making becomes an unacceptable one.[121] Ordinary judicial practice may change over time to take account of changing realities in litigation and changing expectations of the public.[122] The court will consider what is generally expected of judges, and where the conduct is significantly out of line with basic expectations of judicial behaviour, an apprehension of bias is more likely to be considered to have reasonably arisen.[123] In *Charisteas v Charisteas*, for example, the High Court provided an indication of what it considered to be ordinary 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'.[124] Bringing an application for disqualification in the circumstances set out above can therefore be a sensitive issue.

3.48 As to ordinary judicial practice in relation to how a judge manages proceedings, avoiding an apprehension of prejudice, partiality, or prejudgment does not mean that a judge must remain silent throughout proceedings. Indeed, to do so is regarded as poor judicial conduct.[125] A judge may be required to assist self-represented litigants to present their case.[126] It might be expected that a judge might express irritation or exasperation with parties on occasion.[127] A judge may also express preliminary or tentative views during proceedings, express doubts, or seek clarification without creating an apprehension of prejudgment.[128] These statements should not be peremptory, however, and must not express firm views without allowing counsel or the parties to present their arguments.[129]

Distinguishing prejudgment?

3.49 Prejudgment is sometimes considered as worthy of separate consideration to the categories identified by Deane J described above, because of the specific principles that the courts have developed to consider whether prejudgment, or a

120 *Charisteas v Charisteas* (2021) 393 ALR 389 [12], citing *Johnson v Johnson* (2000) 201 CLR 488 [13].
121 See further **Chapter 2**.
122 *Johnson v Johnson* (2000) 201 CLR 488 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
123 See, eg, *Charisteas v Charisteas* (2021) 393 ALR 389. The question is not one of whether it is 'preferable' judicial behaviour: *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343 [35].
124 *Charisteas v Charisteas* (2021) 393 ALR 389 [13]–[14], [16], [19], [22].
125 *Vakuata v Kelly* (1989) 167 CLR 568, 571.
126 *Re F: Litigants in Person Guidelines* [2001] FamCAFC 348.
127 See, eg, *Galea v Galea* (1990) 19 NSWLR 263, 283 (Priestly JA). See further Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 72–6.
128 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 299 CLR 577 [112] (Kirby and Crennan JJ).
129 *Antoun v The Queen* (2006) 80 ALJR 497 [19]–[24].

reasonable apprehension of prejudgment, has arisen.[130] However, it may be more helpful to consider prejudgment as one of the potential manifestations of bias identified by Deane J (alongside prejudice or partiality) that might arise in any of the categories outlined above.[131] Concerns about prejudgment are central to the category described as 'disqualification by conduct', but this category is not limited to concerns about prejudgment. Similarly, specific interests, associations, or exposure to extraneous information could give rise to the risk of prejudgment, as evidenced by conduct.[132]

3.50 The more helpful distinction is between:

- disqualification for the *risk* of prejudgment arising from findings made or positions adopted in previous proceedings;[133] and
- actual, or apparent, prejudgment evidenced by statements of the decision maker in connection with the case.[134]

3.51 In either situation the law requires judges to have an 'open mind', not an 'empty one'.[135] As Gleeson CJ and Gummow J noted, the 'question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion'.[136] Predispositions or inclinations to determine a matter in a particular way are not prohibited by the bias rule, unless they are 'sufficiently specific or intense' to amount to prejudgment.[137] What has been held to amount to prejudgment, or to give rise to an unacceptable risk of prejudgment, in different circumstances is considered further in **Chapter 10**.

3.52 Consultations revealed what Professor Young has described as 'lingering confusion' about how the principles relating to prejudgment are to be applied.[138] This arises in part because some of the key statements from the High Court in relation to prejudgment were made primarily in the context of claims of actual bias (in relation to administrative decision-making). In *Minister for Immigration and Multicultural Affairs v Jia Legeng*, Gleeson CJ and Gummow J said that the

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130 See, eg, Aronson, Groves and Weeks (n 2) 672.

131 The High Court has referred to both actual bias 'in the form of prejudgment' and apprehended bias 'in the form of prejudgment': see, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [31], [33] (Gummow A-CJ, Hayne, Crennan and Bell JJ). See further *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, referring to the 'state of mind described as bias in the form of prejudgment': [72] (Gleeson CJ and Gummow J); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, noting that the 'apprehension here raised is of pre-judgment': [104] (Heydon, Kiefel and Bell JJ).

132 See, eg, *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104 (French J).

133 See, eg, *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Isbester v Knox City Council* (2015) 255 CLR 135.

134 See, eg, *Vakauta v Kelly* (1989) 167 CLR 568; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *Antoun v The Queen* (2006) 80 ALJR 497.

135 Aronson, Groves and Weeks (n 2) 645. This was also the approach adopted in the first background paper for this Inquiry: Australian Law Reform Commission, 'The Law on Judicial Bias: A Primer' (Background Paper JI1, December 2020) [27]–[30].

136 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [71].

137 Aronson, Groves and Weeks (n 2) 685.

138 Young (n 37) 949.

> state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.[139]

3.53 In cases of apprehended bias in the form of prejudgment, the question is not whether the judge's mind was *actually* incapable of alteration, but whether 'an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion'.[140] In the recent case of *Jess v Jess*, the Full Court of the Family Court applied this test in the context of the judge having made previous adverse findings, and considered that

> a reasonable observer, having read the various serious credit and fraud findings that the primary judge made adverse to the appellants in one stage of the proceedings, might reasonably apprehend that her Honour might not move her mind in dealing with issues of credit in the next phase of the proceedings.[141]

Procedures for upholding the bias rule

3.54 **Chapter 6**, **Chapter 7**, and **Chapter 8** provide detail on the procedures for judges and parties to identify, raise, and determine questions of bias. In summary, the question of whether or not a judge should recuse herself or himself from a case has traditionally been treated as one for the challenged judge to determine, subject to appellate review. Judges may do so on their own motion or at the request, or formal application, of a party. The cases show that judges are required to strike a careful balance between upholding public and litigant confidence in their impartiality, and dissuading 'judge-shopping' through tactical claims of bias. These procedures have been the subject of significant criticism, on the basis that the benefits for public confidence arising from a focus on the importance of avoiding an appearance of bias are undercut by a process that can be seen to involve inherent conflicts of interest.

3.55 When a case raises an issue of bias, the courts have held that the issue must be determined first, as it 'strike[s] at the validity and acceptability of the trial and its outcome'.[142] If an appellate court finds that a judge was disqualified from hearing and determining the matter, the appeal will be allowed and remitted for rehearing, subject to the limited exceptions below.

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139 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [72].

140 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [23] (Spigelman CJ); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [104]; Young (n 37) 950; Aronson, Groves and Weeks (n 2) [9.190]–[9.299].

141 *Jess v Jess* (2021) 63 Fam LR 545 [401].

142 *Charisteas v Charisteas* (2021) 393 ALR 389 [10] (citations omitted). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6]–[8].

Exceptions to the bias rule

3.56 At least two exceptions may preclude the application of the bias rule in a particular case.[143] First, a party allegedly injured by bias (or their agent) may waive their right to object where such waiver is 'fully informed and clear'.[144] Waiver is considered further in **Chapter 10**.

3.57 The second exception to the bias rule is the doctrine of necessity. Although the parameters of the 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 (or where any alternative decision makers would suffer from the same complaint of bias).[145] Such a situation might arise, for example, if High Court judges were required to consider the constitutionality of a statute concerning their own remuneration.[146] Although different judges have favoured different scopes of application, in determining such cases, courts will usually balance a range of factors. In *Metropolitan Fire & Emergency Services Board v Churchill,* Gillard J surveyed the authorities and said that the factors to be considered and weighed up included

> the qualifications and experience of the adjudicator, the nature of the bias, the degree and gravity of the bias, whether it is pecuniary, actual or perceived, the conduct of the parties, whether there is a right of appeal and the public interest where applicable.[147]

3.58 If it is possible to appoint another decision maker, the exception of necessity will usually not apply.[148] However, the case law shows that

> this is not an inflexible rule and there may be circumstances where the doctrine should apply because not to do so, would result in enormous cost or substantial delay.[149]

3.59 Finally, some cases have suggested that an exception to the bias rule may also be made in 'special circumstances'. However, this has not been successfully

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143 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [146] (Heydon, Kiefel and Bell JJ). An additional exception applies to bias of non-judicial decision makers. For such decision makers, the rule on bias may be modified or abrogated by statute: see further Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285; Aronson, Groves and Weeks (n 2) 724–25; Lee and Campbell (n 22) 165–66.

144 Matthew Groves, 'Waiver of Natural Justice' (2019) 40 *Adelaide Law Review* 25, 651. See further Aronson, Groves and Weeks (n 2) 715; Matthew Groves, 'Waiver of the Rule against Bias' (2009) 35(2) *Monash University Law Review* 315; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [76] (Gummow ACJ, Hayne, Crennan and Bell JJ). This is considered further in **Chapter 10**.

145 Aronson, Groves and Weeks (n 2) 723.

146 Campbell and Lee (n 21) 166.

147 *Metropolitan Fire & Emergency Services Board v Churchill* [1998] VSC 51 [159]. See further Aronson, Groves and Weeks (n 2) 721–4.

148 Ibid [149].

149 Ibid [149].

invoked and there is little clarity on what those circumstances may be.[150] It has been suggested that this exception

> if deployed thoughtfully, has the potential to apply where a strict application of the rule against bias would lead to grossly inefficient results, and where the appearance of bias — arising from a tentative finding made on an interlocutory basis — is minimal.[151]

3.60 However, others have warned against the exception — seen as an alternative to 'the rare and cautiously used exception of necessity' on the basis of 'mere convenience'.[152] In its research for the Inquiry, the ALRC did not find any decisions of the Commonwealth courts in the past five years relying on 'special circumstances' to ground an exception for the operation of the bias rule. Rather, the courts have underlined the crucial importance of upholding the appearance of impartiality to the rule of law and public confidence in the administration of justice, even where disqualification results in significant inconvenience.[153] It is therefore unlikely that this suggested exception will gain any further traction.

150 *Livesey v NSW Bar Association* (1983) 151 CLR 288, 299–300 (Mason, Murphy, Brennan, Deane and Dawson JJ). See further Aronson, Groves and Weeks (n 2) 725–27.

151 Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761, 779. See, eg, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411.

152 *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 422 (Kirby P).

153 See, eg, *Charisteas v Charisteas* (2021) 393 ALR 389 [22]; *GetSwift Ltd v Webb* (2021) 388 ALR 75 [62]; *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 [101] (Edelman J).

4. Bias in Broader Perspective

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Introduction

4.1 This chapter reviews research into how people make decisions, and highlights the implications of this research for judicial decision-making and the law on bias. This analysis is relevant to consideration of reforms of the law on bias in several respects. In particular, a review of research in this area provides a better basis for understanding:

- the types of influences already identified in the law on bias as giving rise to the potential for improper influences on judicial decision-making;
- the difficulties in 'resisting' such influences, and the circumstances in which the risk of influence may be too high to enable impartial decision-making and the maintenance of public confidence;
- how factors that have been regarded as marginal in the law on bias — such as social and cultural factors — might play a greater role in influencing judicial decision-making than previously acknowledged in the law; and

- why the current process for self-disqualification is viewed by many with scepticism, as emphasised in submissions and the broader literature.

4.2 Some of the research on social and cultural bias discussed in this chapter is drawn upon in **Chapter 11**, which considers the potential impacts of social and cultural factors on judicial decision-making in more detail.

4.3 Given the large amounts of complex information required to make judicial decisions, intuitive thinking is a necessary part of a judge's work. Similarly, life experience and so-called 'common sense' are essential to judges performing their judicial role — they are, in the words of the Rt Hon the Baroness Hale of Richmond DBE, 'the life-blood of the common law'.[1] Carefully managed emotion can be a useful resource for judges to manage the courtroom, and inform their decision-making. Recognition that judges are human does not mean that they cannot be impartial in a meaningful sense: a judge devoid of life experience and humanity would lack the very qualities required of a judge.[2] However, recognition that certain aspects of decision-making processes can potentially frustrate impartial decision-making is important when designing institutional strategies to insulate judges from improper influences on decision-making and to ameliorate their effects. Understanding these processes is also important for judges to understand the personal strategies required from them to achieve the impartiality necessary for their everyday work.

The meanings of bias

4.4 It is important to acknowledge that the word bias can have different meanings, and connotations, in different contexts. The term has applications in many areas of life, and is not inherently negative. The Oxford English Dictionary relevantly defines bias as:

> That which sways or influences a person in their actions, perceptions, etc.; a controlling or directing influence. …
>
> A tendency, inclination, or leaning towards a particular characteristic, behaviour, etc.; a propensity. Also: something, esp. an action or practice, to which a person is inclined or predisposed. …
>
> Tendency to favour or dislike a person or thing, especially as a result of a preconceived opinion; partiality, prejudice. Also: an instance of this; any preference or attitude that affects outlook or behaviour, esp. by inhibiting impartial consideration or judgement …[3]

4.5 All the definitions have in common the notion of tending in a particular direction, but only the last definition quoted conveys the idea that the tendency

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1 Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319, 330, quoting the Rt Hon the Baroness Hale, 'Should Judges be Socio-Legal Scholars' (Speech, Socio-Legal Studies Association, 2013).

2 William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *Oxford Journal of Legal Studies* 3, 14; *R v S (RD)* [1997] 3 SCR 484 [119] (Cory J).

3 *Oxford English Dictionary Online* (Third Edition, 2021) 'Bias'.

might in some way be unfair or unwarranted.[4] As will be developed further in this chapter, a number of fields including psychology and cognitive sciences see biases as an important part of decision-making, which allow us to function. On the other hand, the terms 'unconscious bias' and 'implicit bias' have, in recent years, taken on a particularly negative meaning — indicating 'unconscious favouritism towards or prejudice against people of a particular race, gender, or group that influences one's actions or perceptions'.[5]

4.6 This draws attention to an important distinction made in some fields between 'bias' (as something that influences decision-making or perception in a particular way, but is not necessarily unfair or unwarranted) and 'prejudice', which concerns a 'negative attitude towards another person or group'.[6] Although prejudice can be a form of bias, it is much narrower in scope.

Bias in a legal sense

4.7 **Chapter 3** set out the circumstances in which legally defined bias may be found to arise in court proceedings. In this context, the concept of bias is a limited one. In *Webb v The Queen*, Deane J suggested that the law was concerned with avoiding a reasonable apprehension of 'prejudice, partiality or prejudgment'.[7] In *Minister for Immigration and Multicultural Affairs v Jia Legeng*, Hayne J considered bias to be

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4 This latter sense is, however, more prominent in the Macquarie Dictionary's relevant definitions of bias as: (in noun form) 'a particular tendency or inclination, especially one which prevents unprejudiced consideration of a question'; and, (in verb form) 'to influence, usually unfairly; prejudice; warp': *Macquarie Dictionary Online* (2020) 'Bias'.

5 *OED Online* (Third Edition, 2021) 'Unconscious bias'. The definition recognises that the term was originally used in a neutral sense, but is now usually used in a negative sense. See also the definition of 'implicit bias': 'Any unconscious or unacknowledged preference that affects a person's outlook or behaviour; (now *esp.*) an unconscious favouritism towards or prejudice against people of a particular race, gender, or group that influences one's actions or perceptions.' Collections of word usage suggest that everyday use of this term (and the related phrase, 'implicit bias') has increased significantly in the period since 2015, with a particularly large spike in usage in 2020: see, eg, Mark Davies, 'Corpus of Contemporary American English (1990–2019)' <www.english-corpora.org/coca/> (showing frequencies of 0.03–0.06 per million in the period 1990–2014 and 0.23 in the five year period 2015–2019); Mark Davies, 'News on the Web Corpus (2010-2021)' <www.english-corpora.org/now/> (showing a significant increase in usage in 2020 and 2021 in comparison to previous years). Data from internet search engine Google shows that searches for the terms 'unconscious bias' and 'implicit bias' saw a significant spike both globally, and in Australia, in June 2020 and the months following: see <https://trends.google.com/trends/?geo=AU>.

6 *American Psychological Association Dictionary of Psychology* (online at 18 September 2021) 'Prejudice'. The definition continues: 'Prejudices include an affective component (emotions that range from mild nervousness to hatred), a cognitive component (assumptions and beliefs about groups, including stereotypes), and a behavioral component (negative behaviors, including discrimination and violence)'.

7 *Webb v The Queen* (1994) 181 CLR 41, 74. Note, however, that some judges have distinguished between 'bias' and 'prejudice', treating bias as involving animus towards a party, and prejudice as involving prejudgment whether driven by animus or not. See, eg, *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 9)* (Supreme Court of Appeal of New South Wales, Kirby P, Mahoney and Priestley JJA, 27 November 1990) (Mahoney JA); *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 435 (Mahoney JA). See further John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 9–11.

'some preponderating disposition or tendency, a "propensity; predisposition *towards*; predilection; prejudice"' that results in (or might be feared to result in) 'a deviation from the true course of decision-making'.[8] In the words of Professors Aronson, Groves, and Weeks:

> bias does not exist simply because a decision-maker has experience or holds a view on issues relevant to a case at hand. It occurs when that experience, view or any other quality, tends against one party to a dispute without good reason.[9]

4.8 As discussed in **Chapter 2**, this imports significance and relevance filters on the tendencies that will amount to bias in a legal sense. Something will reach the level of 'bias' in a legal sense where the potential influence is considered both unacceptable and improper in light of the judicial function.[10]

Bias as a loaded term

4.9 In the context of judicial decision-making, 'bias' is often considered a particularly 'loaded' term,[11] or an 'emotionally charged accusation'.[12] This is reflected in case law that emphasises that an 'allegation of bias, either apprehended or actual, is very serious'.[13] According to former Chief Justice the Hon M Gleeson AC, 'to be judicial is to be impartial'.[14] By contrast, partiality is considered 'the antithesis of the proper exercise of a judicial function'.[15]

4.10 Professor Robertson (writing in relation to the US, but with equal applicability to Australia) has explained how the

> ideal of impartiality is a salient — perhaps the most salient — aspect of the judicial identity. Even in the days of Blackstone, the role of 'judge' was infused with a demand for impartial adjudication that owed allegiance to no party but the law. Blackstone himself 'viewed disqualification for personal bias as an

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8 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 563. The same point was made by French J in his judgment in the same case below. In his view, the law is concerned with correcting 'dysfunctional decision-making', so it is concerned with bias that 'induces or affects the decision': *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104.

9 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 644. This is reflected in the statement of Justice Scalia that the words 'bias' or 'prejudice' connote a 'favourable or unfavourable disposition that is somehow *wrongful* or *inappropriate*, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess…or because it is excessive in degree: *Liteky v United States* 510 US 540 (1994), 550.

10 See **Chapter 2**.

11 Aronson, Groves and Weeks (n 9) 644–5.

12 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 69.

13 See, eg, *Dispute Resolution Associates Pty Ltd v Selth (No 2)* [2020] FCA 844 [120], citing *AZAEY v Minister for Immigration and Border Protection* [2015] 238 FCR 341 [23] and *Bala v Minister for Immigration and Border Protection* [2019] FCA 600 [21]; *Blenkinsop v Wilson* [2019] WASC 77 [335].

14 The Hon M Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 129.

15 *Bahai v Rashidian* [1985] 1 WLR 1337 (Balcombe LJ).

> unimaginable sign of weakness in a judge, whose authority depended on the ability to fairly mete out justice'.[16]

4.11 Against this backdrop, many judges have what Professor Geyh describes as a 'chronic ambivalence to disqualification':

> As long as 'good' judges are women and men who strive to look and be impartial, then asking them to disqualify themselves or colleagues who are or appear less than impartial — and implicitly, less than 'good' — is something that judges will do reluctantly.[17]

4.12 This is so even though the common law has ostensibly moved from an extreme reluctance to countenance the idea that a judge could be 'biased' (limited at first to direct pecuniary interest, and then requiring proof of a 'real danger' of bias),[18] to a greater acceptance that there is a risk that unconscious influences might impact on decision-making, through no personal failing on the part of the judge.[19]

4.13 This growing acceptance has led to the objective test for apprehended bias, which does not require proof that a judge is biased, but instead a reasonable concern that circumstances — such as knowing about matters that are legally irrelevant to the case — *might* lead to biased decision-making.[20] This test exists, as the authorities emphasise, in 'recognition of human nature',[21] and admits 'of the possibility of human frailty'.[22] This greater acceptance was driven in part, Kirby J suggested in *Johnson v Johnson*, because of the 'growing inclination of parties to litigation, and also many members of the public', to regard assertions that judges had a special capacity to resist normal human biases 'with scepticism'.[23]

4.14 Judges in Australia and elsewhere have been alive to the scientific research on bias for decades. Twenty years ago, the Hon Justice K Mason AC wrote that judges should reflect on their own biases, because, '[a]knowledging their existence is the first step towards debating and justifying them where appropriate'.[24] The impact of social biases in the legal system has been considered by parliamentary and

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16 Cassandra Burke Robertson, 'Judicial Impartiality in a Partisan Era' 70 *Florida Law Review* 739, 759. See also Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *Modern Law Review* 633, 633.

17 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 729.

18 See further **Chapter 3**.

19 See *Johnson v Johnson* (2000) 201 CLR 488 [44] (Kirby J).

20 See **Chapter 3**.

21 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [139].

22 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8]. See further *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 [132] (Edelman J).

23 See *Johnson v Johnson* (2000) 201 CLR 488 [44] (Kirby J).

24 The Hon Justice K Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 686.

ALRC Inquiries.[25] Numerous judicial speeches and articles refer to these issues;[26] judicial education covers them;[27] and, in 2019 they were a key focus of the National Judicial College of Australia's joint conference for judges.[28] Explicit reference to such research has, however, been limited in consideration of the application of the law on bias.[29] This is perhaps understandable, although in at least one recent case such research was explicitly taken into account by the court in determining whether or not the fair-minded lay observer would have a reasonable apprehension that bias might arise.[30]

Judging and bounded rationality

4.15 As humans, our cognitive capacity, time, and resources are not infinite, so we may take shortcuts in decision-making that may not be regarded as entirely rational.[31] This is one aspect of what has become known as 'bounded rationality' — 'a wide range of descriptive, normative, and prescriptive accounts of effective behavior which depart from the assumptions of perfect rationality', explored in decision sciences, economics, psychology, neuropsychology, philosophy, and other fields.[32]

4.16 Recourse to these shortcuts may be due to the time or difficulty that would be involved in obtaining all the information required to make a rational decision. However, it is also driven by limits on our cognitive capacity to process information.

Efficient use of cognitive capacity: dual process models

4.17 In relation to limits on our cognitive capacity to process information, it is now well accepted at a general level that much of what feeds into our decision-making

25 See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (May 1994) 73–4; Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 Part 2, 1994) [2.15]–[2.17].

26 Justice Mason (n 24); See also the Hon Justice S Gageler AC, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 199. Reflecting on his own heuristics, his Honour stated, 'I equated my subjective confidence in my ability to arrive at a correct decision with the objective probability of me arriving at a correct answer. Almost certainly, I over-estimated my own ability'. See further the Hon Justice A Robertson, 'Apprehended Bias — The Baggage' (2016) 42 *Australian Bar Review* 249; The Hon Chief Justice TF Bathurst AC, 'Trust in the Judiciary' (Opening of Law Term Address, Sydney, 3 February 2021) 23.

27 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [54].

28 See, eg, National Judicial College of Australia, 'NJCA/ANU Joint Conference 2019; Judges: Angry? Biased? Burned Out?' <njca.com.au/njca-anu-joint-conference-2019-judges-angry-biased-burned-out/>.

29 Edmond and Martire (n 16) 1468–9.

30 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [41]–[45].

31 Burns (n 1), citing Christine Jolls, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1477, and Russell Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051, 1076.

32 Ibid, noting that the term was originally used by Herbert Simon, 'A Behavioral Model of Rational Choice' (1955) 69(1) *The Quarterly Journal of Economics* 99.

processes happens at a level below full consciousness, and that some of those processes can lead us into error. One particular group of theories in cognitive, personality, and social psychology — known as dual process theories — has been particularly influential in recent decades for researchers trying to understand 'how people think about information when they make judgments or solve problems'.[33] They have also been influential in research trying to understand how judges, in particular, make decisions.[34]

4.18 These theories distinguish between two different, but overlapping, ways of thinking about information:

> a relatively fast, superficial, spontaneous mode based on intuitive associations, and a more in-depth, effortful, step-by-step mode based on systematic reasoning.[35]

4.19 Professor Kahneman refers to these as 'system one' (automatic and associative) and 'system two' (deliberative and intentional) thinking.[36] Kahneman describes how, when a person is distracted, rushed, or tired, system two thinking becomes harder, and system one thinking becomes more pervasive.[37] System one thinking is an unavoidable and essential part of human decision-making.[38] However, it cannot be depended upon for reasoning that requires conscious deliberation.

4.20 System one and system two processes operate alongside each other, and experimental research has suggested that they do so to maximise cognitive capacity for information processing.[39] In general, these theories 'assume that people will think about information in a relatively superficial and spontaneous way unless they are both able and motivated to think more carefully'.[40] As Kahneman explains:

> System 1 runs automatically and System 2 is normally in a comfortable low-effort mode, in which only a fraction of its capacity is engaged. System 1 continuously generates suggestions for System 2: impressions, intuitions, intentions, and feelings. If endorsed by System 2, impressions and intuitions

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33 Shelly Chaiken and Alison Ledgerwood, 'Dual Process Theories' in Roy F Baumeister and Kathleen D Vohs (eds), *Encyclopedia of Social Psychology* (SAGE, 2007). For an overview, see Jonathan Evans and Keith Frankish, *In Two Minds: Dual Processes and Beyond* (Oxford University Press, 2009).

34 For a summary of relevant research see Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021) 1–8.

35 Chaiken and Ledgerwood (n 33) 268–9.

36 Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux, 2011) 20–21. Kahneman won a Nobel Prize for his work in behavioural psychology.

37 Ibid 41.

38 The Hon Judge Andrew J Wistrich and Jeffrey J Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It' in Sarah E Redfield (ed), *Enhancing Justice Reducing Bias* (American Bar Association, 2017) 87, 90–1.

39 See, eg, Jeffrey W Sherman, C Neil Macrae and Galen V Bodenhausen, 'Attention and Stereotyping: Cognitive Constraints on the Construction of Meaningful Social Impressions' (2000) 11(1) *European Review of Social Psychology* 145. See further references cited in Blake M McKimmie et al, 'The Impact of Schemas on Decision-Making in Cases Involving Allegations of Sexual Violence' (2020) *Current Issues in Criminal Justice* 1, 9.

40 Chaiken and Ledgerwood (n 33) 269.

> turn into beliefs, and impulses turn into voluntary actions. … When System 1 runs into difficulty, it calls on System 2 to support more detailed and specific processing that may solve the problem of the moment. … System 2 is activated when an event is detected that violates the model of the world that System 1 maintains. … System 2 is also credited with the continuous monitoring of your own behavior—the control that keeps you polite when you are angry, and alert when you are driving at night. System 2 is mobilized to increased effort when it detects an error about to be made. ...
>
> The division of labor between System 1 and System 2 is highly efficient: it minimizes effort and optimizes performance. The arrangement works well most of the time because System 1 is generally very good at what it does: its models of familiar situations are accurate, its short-term predictions are usually accurate as well, and its initial reactions to challenges are swift and generally appropriate. System 1 has biases, however, systematic errors that it is prone to make in specified circumstances. … [I]t sometimes answers easier questions than the one it was asked, and it has little understanding of logic and statistics.[41]

4.21 When engaging in the more intuitive type of thinking, people will rely on automatic, and often unconscious, processes. These may include mental shortcuts, like heuristics ('decision rules' for solving problems), or drawing on stereotypes.[42] Often, those processes involve biases — 'predispositions and preferences that affect judgment and decision-making'.[43] Frequently, it is argued, these processes are useful, even necessary, but they can lead to errors and unfairness.

4.22 The question then is if and when these processes need to be challenged or overcome, and whether this is possible. Research suggests that it is very difficult to do so.[44] As Kahneman explains:

> Because System 1 operates automatically and cannot be turned off at will, errors of intuitive thought are often difficult to prevent. Biases cannot always be avoided, because System 2 may have no clue to the error. Even when cues to likely errors are available, errors can be prevented only by the enhanced monitoring and effortful activity of System 2. As a way to live your life, however, continuous vigilance is not necessarily good, and it is certainly impractical. Constantly questioning our own thinking would be impossibly tedious, and System 2 is much too slow and inefficient to serve as a substitute for System 1 in making routine decisions.[45]

4.23 Research has indicated that '[b]iases in judgment and decision making affect experts and novices alike, yet there is considerable variation in individual decision-

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41 Kahneman (n 36) 24–25.
42 See further [4.25]–[4.26] and [4.45]–[4.62].
43 Edmond and Martire (n 16) 646.
44 A point stressed in the submission by Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.
45 Kahneman (n 36) 28.

making ability'.[46] Emerging research on judicial cognition 'suggests that, like other human decision-making, judging is at least partly an intuitive or unconscious cognitive process'.[47] As such, judicial cognition may, as Associate Professor Burns has suggested, reflect 'a range of cognitive heuristics and biases and other cognitive factors including emotion, group identity, and cultural worldview'.[48] Where the effect of those influences is weighted heavily in favour of one party over another, that may improperly influence judicial decision-making. The remainder of this chapter summarises some of the research relating to judges on three aspects of bounded rationality that may be particularly relevant in the context of the law on actual and apprehended bias: first, heuristics and cognitive biases (sometimes referred to as 'cognitive shortcuts'); second, motivated reasoning; and third, the impact of socially constructed schemas and stereotypes. It then goes on to consider whether research supports any particular strategies to address this.

4.24 In their submissions in response to the Consultation Paper, Dr Chin, and Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, emphasised that a significant amount of research in psychology and science more generally is currently subject to a 'replication crisis', and a process of retesting widely cited studies is currently underway.[49] Both stakeholders suggested that older research in particular should be treated with caution,[50] although others noted that a number of tested heuristics and cognitive biases have been found to be robust.[51] The analysis below recognises the potential limitations of some of the older research in this area. It attempts to capture the most relevant findings that have been validated as robust, or points to potential limitations of studies. However, knowledge may evolve quickly, as other areas are subject to further investigation.

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46 Anne-Laure Sellier, Irene Scopelliti and Carey K Morewedge, 'Debiasing Training Improves Decision Making in the Field' (2019) 30(9) *Psychological Science* 1371, 1371.

47 Burns (n 1) 327.

48 Ibid.

49 See Dr Jason Chin, *Submission 14*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*. See also Vazire Simine, 'Implications of the Credibility Revolution for Productivity, Creativity, and Progress' (2018) 13 *Perspectives on Psychological Science* 411. The replicability crisis results from relatively recent observations that 'a large proportion of experimental results across a number of areas cannot be reliably replicated'. A process of testing widely cited studies, by using much larger samples and more rigorous methods, is currently underway. See, eg, Richard A Klein et al, 'Investigating Variation in Replicability A "Many Labs" Replication Project' (2014) 45 *Social Psychology* 142, 149–50. These have found the same effect observed in relation to only around 50% of studies: Dr Jason Chin, *Submission 14*.

50 Dr Jason Chin, *Submission 14*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

51 Such as the anchoring effect and correspondence bias: see further Klein et al (n 49) 150 (anchoring effect); Richard A Klein et al, 'Many Labs 2: Investigating Variation in Replicability Across Samples and Settings' (2018) 1(4) *Advances in Methods and Practices in Psychological Science* 443, 456–457 (correspondence bias). Note that the incidental anchoring effect was, however, not replicated: 458.

Heuristics and cognitive biases

4.25 One way in which 'fast thinking' can lead to error or unfairness is through the operation of mental shortcuts, or 'decision rules', known as heuristics. Heuristics are a key component of the more intuitive, 'system one' thinking, and make processing new information possible.[52] These are very useful in day-to-day life, but they can also, at times, lead to 'severe and systematic' error in the form of 'cognitive biases'.[53] These 'cognitive biases' can be understood as 'intuitive preferences that consistently [violate] the rules of rational choice'.[54] The danger of heuristics therefore 'lies in unexamined reliance on [them] in inappropriate circumstances'.[55]

4.26 Researchers have been interested in exploring whether judges, as professional decision makers, are susceptible to cognitive biases observed in other populations. Some of this research is summarised briefly below. Examples of heuristics and cognitive biases that have been robustly established in the general population, and that are potentially relevant to judicial decision-making, include:

- Hindsight bias: the tendency to overestimate the probability that an event will occur after the event has occurred.[56]
- Confirmation bias: the tendency to 'selectively seek out information that supports our preconceived belief'.[57]
- Correspondence bias: the tendency 'to draw inferences about a person's unique and enduring dispositions from behaviors that can be entirely explained by the situations in which they occur'.[58]
- Anchoring effect: the tendency to moderate numerical assessments towards a numerical reference point.[59]
- Affect heuristic: the tendency to rely on an emotional response to make a judgement.[60]

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52 Barry (n 34) 13.

53 Daniel Kahneman and Amos Tversky, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124, 1124, 1130.

54 Kahneman (n 36) 10; Barry (n 34) 14.

55 Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 *Texas Law Review* 855, 867.

56 For a review see Rüdiger F Pohl and Edgar Erdfelder, 'Hindsight Bias' in Rüdiger F Pohl (ed), *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (Routledge, 2017) 424.

57 Barry (n 34) 15. Mercier prefers the term 'my-side bias', describing 'the tendency to find arguments that support one's own views': Hugo Mercier, 'Confirmation Bias - Myside Bias' in Rüdiger F Pohl (ed), *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (Routledge, 2017) 99, 99–100. See further National Justice Project, *Submission 44*.

58 Daniel T Gilbert and Patrick S Malone, 'The Correspondence Bias' (1995) 117 *Psychological Bulletin* 21, 21.

59 Štěpán Bahník, Birte Englich and Fritz Strack, 'Anchoring Effect' in Rüdiger F Pohl (ed), *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (Routledge, 2017) 223.

60 Paul Slovic et al, 'The Affect Heuristic' in Thomas Gilovich, Dale Griffin and Daniel Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press, 2002) 397; Kenny Skagerlund et al, 'The Affect Heuristic and Risk Perception – Stability Across Elicitation Methods and Individual Cognitive Abilities' (2020) 11 *Frontiers in Psychology* 970.

- Representativeness heuristic: the tendency to make an assumption that something belongs to a category because it possesses characteristics representative of that category, overriding 'an assessment of the objective probabilities involved'.[61]
- In-group bias: the tendency to have positive attitudes in favour of groups that one is part of.[62]
- Egocentric bias: the tendency for people to overestimate their own abilities and prospects.[63] One example of this is known as the bias blind spot, which describes the tendency for a person to believe, on average, that they are less biased in their judgment and behaviour than their peers.[64] Another is the false consensus effect, which is the tendency of a person to perceive their 'views on a matter as being more commonly held by others than they actually are'.[65]
- 'Halo effect': the tendency to judge a person on the basis of a single attribute (such as physical attractiveness).[66]

61 Barry (n 34) 22. See further Karl H Teigen, 'Judgments by Representativeness' in Rüdiger F Pohl (ed), *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (Routledge, 2017) 204.

62 Roy Baumeister and Kathleen Vohs, SAGE Publications, *Encyclopedia of Social Psychology* (2007) 'Ingroup–Outgroup Bias' 484.

63 Barry (n 34) 22–3.

64 Emily Pronin, Daniel Y Lin and Lee Ross, 'The Bias Blind Spot: Perceptions of Bias in Self Versus Others' (2002) 28(3) *Personality and Social Psychology Bulletin* 369; Irene Scopelliti et al, 'Bias Blind Spot: Structure, Measurement, and Consequences' (2015) 61(10) *Management Science* 2468, 2468.

65 Barry (n 34) 25, citing Lee Ross, David Greene and Pamela House, 'The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes' (1977) 13 *Journal of Experimental Psychology* 279.

66 Joseph P Forgas and Simon M Laham, 'Halo Effects' in Rüdiger F Pohl (ed), *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (Routledge, 2017) 276; Giulio Gabrieli et al, 'An Analysis of the Generalizability and Stability of the Halo Effect During the COVID-19 Pandemic Outbreak' (2021) 12 *Frontiers in Psychology* 1.

In Focus: Heuristics, motivated reasoning, and the law on bias

Heuristics and motivated reasoning might give rise to many different kinds of legal error that are not related to the law on bias, such as inappropriate damages awards or assessment of foreseeable risk.[67] However, they are also relevant to how the disqualification procedures operate and to particular circumstances in which apprehended bias might be considered to arise. For example:

- the risk of motivated reasoning may explain why a judge should be disqualified when they are exposed to irrelevant, but prejudicial material — if material tends them towards a conclusion they may seek out the information that supports it;[68]
- the risk of confirmation bias may explain why a previous negative finding on credibility is a circumstance that would generally require disqualification;[69]
- knowledge about egocentric bias and the bias blind spot may give rise to the concern that the self-disqualification procedure does not adequately promote the appearance of impartiality;[70] and
- knowledge of the operation of in-group preferences, the representativeness heuristic, confirmation bias, the affect heuristic, the 'halo effect', and motivated reasoning may heighten concerns about decisions being affected by factors related to a party's social or cultural identity.[71]

The first two examples are issues that judges have intuitively recognised as having the potential to have an improper and unacceptable influence on judicial reasoning. Research findings may give further insight into how significant those effects are likely to be, what can be done to minimise their impact, and how the public is likely to perceive the risk. The latter two examples pick up critiques of the operation of the law on bias that it has not yet addressed (at least in Australia) in a significant way. These critiques are explored further in **Chapter 11**.

67 See, eg, the Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 33.
68 See further [4.34]–[4.44] for discussion of motivated reasoning.
69 See **Chapter 10**.
70 See **Chapter 7**.
71 See **Chapter 11**.

Judges' susceptibility to heuristics and cognitive biases

4.27 Experimental research on judges' susceptibility to heuristics and cognitive bias is still 'at a relatively early developmental stage'.[72] Experimental research with judges can have particular difficulties, and researchers stress that caution should be exercised 'about how much we extrapolate from results based on experiments using hypothetical legal scenarios'.[73] Aware of these limitations, a number of scholars are now advocating for the use of 'dual methodology' approaches, using both experimental research and analysis from archival studies of actual judicial decisions.[74] With these limitations in mind, studies have, nevertheless, provided useful insights into how heuristics and cognitive biases may impact judges' decision-making, and some of the factors that may influence the extent to which they do.[75]

Anchors in sentencing and costs awards (anchoring effect)

4.28 A recent meta-analysis of experimental and observational studies concluded that judges can be influenced when making numeric decisions in law (such as prison terms or damages awards) by irrelevant numerical anchors.[76] Irrelevant anchors explored in experiments include a journalist's question about appropriate sentencing

72 Barry (n 34) 27.

73 Ibid 7. Given the difficulty of 'catching sufficient wild judges for study' such studies often have small sample sizes: Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 70. Studies with small sample sizes are, as Chin emphasises in his submission, particularly 'susceptible to being influenced by random variation': Dr Jason Chin, *Submission 14*. The power of a study is, however, a function of a number of different variables, and small scale studies may nevertheless be well-powered, if well-designed. Experimental studies with judges are also undertaken in a far 'lower-stakes environment than the courtroom', meaning that judges 'may not agonise over their decision in the same way as they would in a real-life case': Barry (n 34) 7. On the other hand, this can be balanced against the more manageable amount of information that these studies provide. Reduced information load in these simulated scenarios facilitates effortful processing, even if motivation to do so is reduced. Participants, who are aware they are being scrutinised, may also adjust their behaviour, introducing 'participant bias' and 'social desirability bias': Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*. Finally, the majority of experimental research on judges and cognitive bias has been carried out in the US (although this is changing). This too, brings its own limitations, given the different appointment methods of judges, and societal context: Barry (n 34) 8. The ALRC is not aware of any such experimental studies conducted using Australian judges as subjects.

74 See, eg, Jeffrey A Segal, Avani Mehta Sood and Benjamin Woodson, 'The "Murder Scene Exception" - Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases' (2019) 105 *Virginia Law Review* 543, cited in Barry (n 34) 7. Where findings from experimental and observational research converge, it is suggested that researchers can be 'far more confident' in their conclusions.

75 Segal, Sood and Woodson (n 74) 553. See also Barry (n 34) 27.

76 Piotr Bystranowski et al, 'Anchoring Effect in Legal Decision-Making: A Meta-Analysis' (2021) 45(1) *Law and Human Behavior* 1.

impacting on the ultimate sentence,[77] and the provision of a cap on damages as increasing the level of compensation judges awarded.[78]

Influence of preliminary rulings (confirmation bias)

4.29 Two recent small-scale experimental studies have suggested that judges may be susceptible to confirmation bias tied to preliminary rulings, although where they are operating in their area of expertise the effect may be less pronounced. The first, a German study, asked 130 legally trained participants (including 54 judges) to make a preliminary finding on a scenario, then provided further arguments. They found that participants evaluated the arguments that supported their preliminary finding more positively than the arguments that conflicted with it. However, the participants who were specialists in the area of law related to the scenario were less susceptible to this confirmatory processing.[79] The second, a Swedish study (involving 64 Swedish judges considering a criminal law scenario), found that judges were 2.79 times more likely to consider a defendant guilty where they were asked to make a preliminary decision as to whether to detain them pending trial, as opposed to judges who were provided with the same information but told another judge had made an order in relation to pre-trial detention.[80]

Estimating probability in the past (hindsight bias)

4.30 Research on the effect of hindsight bias on judges is mixed, but large-scale studies suggest that judges may have an unusual ability compared to lay decision makers to resist hindsight bias.[81] For example, in a series of experiments involving 900 state and federal US judges, judges were asked whether there was 'probable cause' to carry out a search. The rulings of those who knew the outcome of the search (that it resulted in discovery of incriminating evidence) were not significantly

77 Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice With Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32 *Personality and Social Psychology Bulletin* 188 (study involving 23 German judges and 19 German prosecutors).

78 Jeffrey J Rachlinkski, Andrew J Wistrich and Chris Guthrie, 'Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences' (2015) 90(2) *Indiana Law Journal* 695, 720–4 (study involving 115 Canadian trial judges and 65 newly elected New York state trial judges).

79 Susanne M Schmittat and Birte Englich, 'If You Judge, Investigate! Responsibility Reduces Confirmatory Information Processing in Legal Experts.' (2016) 22 *Psychology, Public Policy, and Law* 386, 395.

80 Moa Lidén, Minna Gräns and Peter Juslin, '"Guilty, No Doubt": Detention Provoking Confirmation Bias in Judges' Guilt Assessments and Debiasing Techniques' (2019) 25 *Psychology, Crime and Law* 219, 232.

81 For a summary, see Barry (n 34) 19–22.

different from those who did not.[82] This is consistent with a number of other small-scale studies (though not all show this effect).[83]

Overconfidence in abilities (egocentric bias)

4.31 Some studies have suggested that judges are susceptible to egocentric bias, with the tendency to underestimate the extent to which their decisions were reversed relative to their peers,[84] and overestimate their ability to assess the credibility of witnesses and avoid prejudice on the grounds of race or gender.[85] This is consistent with another recent study that showed that the bias blind spot is not related to intelligence, cognitive ability, cognitive reflection, or general decision-making ability.[86]

Physical attractiveness of defendant (halo effect)

4.32 Alongside a number of studies of mock jurors showing the influence of physical attractiveness on legal outcomes, two observational studies conducting in the 1980s concerning judges in the US found that attractiveness of a defendant had an inverse correlation to sentence length.[87]

Conclusion

4.33 Overall, these studies show that judges are susceptible to many of the ordinary cognitive limitations that impact human decision-making. These limitations include the anchoring effect, confirmation bias, egocentric bias, and the halo effect. However, other studies suggest that judges may have an ability to resist hindsight bias in simulated scenarios — at least as it relates to assessments of whether procedural rights of criminal defendants were breached. Even here, however, the picture is complicated, as motivated reasoning may be at play.

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82 Jeffrey J Rachlinski, Chris Guthrie and Andrew J Wistrich, 'Probable Cause, Probability, and Hindsight' (2011) 8 *Journal of Empirical Legal Studies* 72.

83 See, eg, W Kip Viscusi, 'How Do Judges Think about Risk?' (1999) 1 *American Law and Economics Review* 26 (study with 95 US judges about whether a railway company must follow an order of a railway safety board requiring safety improvements); Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153(4) *University of Pennsylvania Law Review* 1251 (study with 93 judges concerning 'probable cause' determination). But cf Aileen Oeberst and Ingke Goeckenjan, 'When Being Wise after the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments' (2016) 22(3) *Psychology, Public Policy, and Law* 271.

84 Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice' (2009) 58(7) *Duke Law Journal* 1477.

85 Ibid.

86 Scopelliti et al (n 64) 2482.

87 Barry (n 34) 181, citing John E Stewart, 'Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study' (1980) 10 *Journal of Applied Social Psychology* 348; John E Stewart, 'Appearance and Punishment: The Attraction-Leniency Effect in the Courtroom' (1985) 125 *The Journal of Social Psychology* 373.

Motivated reasoning

4.34 Some related theoretical frameworks in cognitive science and psychology suggest that a person's motivations towards a particular outcome may impact on the way in which they process information, including the extent to which they rely on heuristics and the heuristics they employ.[88] This has been termed 'motivated reasoning' or 'motivated cognition', and involves processing information 'in a skewed manner that leads [decision makers] to their preferred outcomes' (but only if they can muster enough evidence to support them).[89] Motivated reasoning 'is not intentional', but rather

> occurs under an 'illusion of objectivity' whereby 'people do not realize that [their decision-making] process is biased by their goals'.[90]

4.35 Motivated reasoning is seen to span both 'system one' (heuristic) and 'system two' (systematic) thinking.[91] Professor Kahan has explained how it can be driven by diverse goals or needs, ranging from financial interests, to the need to protect a person's self-image as part of a group in the face of feedback challenging the group's identity or commitments (identity-protective cognition).[92] One theorised form of motivated reasoning is termed 'cultural cognition' — 'the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews'.[93] Others have explored the impact that emotions, including disgust or sympathy, may play in motivated reasoning.[94]

Research on judges' susceptibility to motivated reasoning

4.36 Experiments have also been conducted to try to understand the extent to which judges, despite being professional decision makers, may be susceptible to motivated reasoning. This research suggests that judges do have a tendency to employ motivated reasoning, but that there may be some situations in which they are less prone to it than lay decision makers.[95] Here, there seems to be a difference between factors relevant to the case, and those relevant to the individual judge.

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88 Ziva Kunda, 'The Case for Motivated Reasoning' (1990) 108(3) *Psychological Bulletin* 480; Serena Chen, Kimberly Duckworth and Shelly Chaiken, 'Motivated Heuristic and Systematic Processing' (1999) 10(1) *Psychological Inquiry* 44.

89 See references cited in Segal, Sood and Woodson (n 74) 558.

90 Ibid (citations omitted).

91 Dan M Kahan, 'Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law' (2011) 125 *Harvard Law Review* 1, 21.

92 Ibid 20.

93 Ibid 23.

94 Wistrich, Rachlinski and Guthrie (n 55). See further [4.78]–[4.80].

95 Subject to the caveats outlined above at [4.24], and noting that findings in some of the studies cited above in relation to heuristics may also be seen to involve motivated reasoning (eg, those concerning confirmation bias).

Severity of the crime

4.37 When it comes to factors relevant to the case, experimental studies have suggested that judges can be influenced by legally irrelevant factors. This finding has been supported by archival research. In the US, the seriousness of an alleged offence is not relevant to admissibility of illegally obtained evidence. However, an experimental study conducted in the US showed that judges were significantly more likely to admit evidence obtained in an allegedly illegal search if the crime alleged is particularly serious.[96] A recent study looking to triangulate these findings through archival analysis of real-life cases observed the same effect.[97]

Inadmissible, but prejudicial, material

4.38 Motivated reasoning may also help to explain a number of experiments that show that it is very difficult for judges to avoid being influenced by prejudicial but inadmissible material.[98] One early influential study, for example, found that judges were negatively influenced by inadmissible prejudicial information to the same extent as community members who were presented with a warning to ignore the information.[99] Two exceptions have been seen in the studies — where the question is about 'probable cause' to search, and inadmissible confessions, judges have been able to resist the influence of the material.[100] In those cases, however, another study suggests that, rather than resisting motivated reasoning, a different motivation may be at play — the desire to punish police wrongdoing.[101]

Factors relevant to the parties

4.39 Experiments have also suggested that judges can be influenced in their reasoning by factors related to the parties (such as the level of sympathy they arouse). One recent study conducted with extensive simulated case materials showed that legally irrelevant characteristics of a defendant (whether they were described as a 'nationalist, hateful Serb defendant' or a 'conciliatory, regretful Croat defendant') had a strong effect on decision-making, even though this consideration

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96 See Wistrich, Rachlinski and Guthrie (n 55). This involved an experiment conducted with 366 judges from three US states, which found that participants were more likely to exclude evidence of marijuana obtained by an illegal search (44% admitted) than they were to exclude evidence of heroin and a list of high school contacts obtained in the same circumstances (55% admitted).

97 Segal, Sood and Woodson (n 74).

98 See, eg, Wistrich, Rachlinski and Guthrie (n 55) 879–80; Wistrich, Guthrie and Rachlinski (n 83) 1259; Stephan Landsman and Richard F Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12 *Behavioral Sciences and the Law* 113 (involving 88 US judges and 104 people drawn from the juror pool).

99 Landsman and Rakos (n 98).

100 See, eg, Rachlinski, Guthrie and Wistrich (n 82) (probable cause; n = 900); Wistrich, Guthrie and Rachlinski (n 83) 1313–18 (probable cause; n = 93), 1318–23 (confession; n = 104).

101 See Jeffrey J Rachlinkski, Andrew J Wistrich and Chris Guthrie, 'Altering Attention in Adjudication' (2013) 60 *UCLA Law Review* 1586, 1614. Although Wistrich et al's 2005 study found that judges generally suppressed inadmissible confessions as required by law, this follow-up study involving 314 US judges found that even where judges had excluded a confession, they were still influenced by it in certain circumstances (related to the gravity of the crime and severity of the police misconduct).

was not reflected in the judge's reasons. A weak precedent, on the other hand, had no effect.[102] This study had a small sample of judges. These findings were consistent with findings from six other experiments by a team of researchers involving US and Canadian judges. Each experiment involved two case scenarios identical aside from the characteristics of the litigant and the sympathy they were designed to arouse. In each experiment, overall, judges were more likely to favour litigants in scenarios designed to elicit greater sympathy.[103]

Political predispositions

4.40 In relation to factors relevant to the judge, recent research has suggested that judges may be less likely to be influenced by their own personal political ideology in some decision-making tasks than members of the general population.

4.41 One recent study showed that a judge's (and lawyer's) personal political predispositions did not drive motivated reasoning in the context of statutory interpretation.[104] This was different to members of the public, who were 22% more likely to choose an answer aligned with their political predispositions.[105] Outside the context of legal reasoning, the impact of political dispositions was the same for all of the groups.[106] The results were seen to support the position that 'professional judgment imparted by legal training and experience' *can* confer resistance to normal cognitive limitations like identity protective cognition, but 'only for decisions that involve *legal* reasoning'.[107] A study using archival research of 495 search and seizure cases supported this finding to some extent, but found that when the stakes were highest — for cases involving a life sentence or capital punishment — ideology did have a significant impact.[108]

4.42 Other studies are consistent with this finding, but suggest that political predispositions may influence decision-making in more discretionary areas by

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102 Holger Spamann and Lars Klöhn, 'Justice Is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges' (2016) 45(2) *The Journal of Legal Studies* 255 (experiment conducted with 32 US federal judges in 55 minutes using a real case with small adjustments and simulated briefs; judges were required to give reasons; 87% of those who judged the 'nationalist, hateful Serb defendant' upheld conviction; 41% of those who judged the 'conciliatory, regretful Croat defendant' upheld conviction).

103 Wistrich, Rachlinski and Guthrie (n 55). This involved six experiments with US federal judges in six different scenarios: (i) immigration (mix of US judges; n = 508); (ii) medical marijuana (New York and Canadian judges; n = 138); (iii) strip search (Minnesota judges; n = 231); (iv) credit card debt (bankruptcy judges; n = 201); (v) narcotics search (judges from three US states; n = 366); (vi) environmental pollution (judges from three US states; n = 391).

104 Dan M Kahan et al, '"Ideology" or "Situation Sense"?: An Experimental Investigation of Motivated Reasoning and Professional Judgment' (2016) 164 *University of Pennsylvania Law Review* 349, 399–403. This used a sample of US sitting judges (n = 253), lawyers (n = 217), law students (n = 284), and members of the general public (n = 800), who were culturally polarised on climate change, marijuana legalization, and other contested issues.

105 Ibid 399.

106 Ibid 398–403.

107 Ibid 350.

108 Segal, Sood and Woodson (n 74) 579.

affecting the *weight* that is given to evidence.[109] For law students involved in the study, on the other hand, 'bias pervaded all their legal judgments about the evidence'.[110]

4.43 This is consistent with the limited archival research in Australia on judicial behaviour that finds very little correlation between appointing party and outcomes on the High Court.[111]

Conclusion

4.44 In sum, the experimental evidence on judges' ability to resist motivated reasoning is mixed. However, it supports a preliminary conclusion that judges can fall prey to many of the same cognitive shortcuts in their decision-making as lay decision makers. This is not surprising, because these involve basic social and cognitive processes shared by all people. However, the research also suggests that certain aspects of judges' training and experience, and the process through which they make decisions, may reduce the impact of such influences in some cases, at least under experimental conditions.[112]

Attitudes, schemas, scripts, and stereotypes

4.45 Individuals may hold explicit prejudiced attitudes against particular types of people, whether idiosyncratic or reflective of attitudes in wider society, that fall squarely within the bias rule. However, cultural and social factors can also impact on how we interpret and process information, affecting the evaluation of information and decision-making in different ways. This can be explored through the models of cognitive illusions and motivated reasoning.[113] It can also be explored (sometimes in overlapping terms) by reference to the impacts that socially-constructed attitudes, stereotypes, schemas, and scripts have on our decision-making and evaluation of information. The schemas, stereotypes, scripts, and heuristics that judges might draw on in judicial decision-making as understood by these models are essentially the 'common sense' that the law requires judges to use in evaluating evidence and applying legal tests. As these are socially constructed, they may reflect, and reinforce, biases at a societal level, even without conscious awareness of that impact.[114]

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109 Richard E Redding and N Dickon Reppucci, 'Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making' (1999) 23(1) *Law and Human Behavior* 31, 48.

110 Ibid.

111 David Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (2011) 64(2) *Political Research Quarterly* 335, 338. For a recent overview of the ('fairly thin') empirical literature on judicial behaviour and decision-making for courts in Australia, see Russell Smyth, 'Empirical Studies of Judicial Behaviour and Decision-Making in Australian and New Zealand Courts' in Nuno Garoupa, Lydia Tiede and Rebecca D Gill (eds), *High Courts in Global Perspective: Evidence, Methodologies, and Findings* (University of Virginia Press, 2020).

112 Kahan et al (n 104); Segal, Sood and Woodson (n 74) 579. See also Barry (n 34) 27.

113 For example, as 'in-group bias' or 'identity protective cognition' (see above).

114 See further **Chapter 11**.

In Focus: Key concepts

Schema: 'a collection of basic knowledge about a concept or entity that serves as a guide to perception, interpretation, imagination, or problem solving. For example, the schema "dorm room" suggests that a bed and a desk are probably part of the scene, that a microwave oven might or might not be, and that expensive Persian rugs probably will not be.'

Script: 'a cognitive schematic structure — a mental road map — containing the basic actions (and their temporal and causal relations) that comprise a complex action'.

Stereotype: 'a set of cognitive generalizations (e.g., beliefs, expectations) about the qualities and characteristics of the members of a group or social category. Stereotypes, like schemas, simplify and expedite perceptions and judgments, but they are often exaggerated, negative rather than positive, and resistant to revision even when perceivers encounter individuals with qualities that are not congruent with the stereotype.'

Attitude: 'a relatively enduring and general evaluation of an object, person, group, issue, or concept on a dimension ranging from negative to positive. Attitudes provide summary evaluations of target objects and are often assumed to be derived from specific beliefs, emotions, and past behaviors associated with those objects.'

Prejudice: 'a negative attitude toward another person or group formed in advance of any experience with that person or group. Prejudices include an affective component (emotions that range from mild nervousness to hatred), a cognitive component (assumptions and beliefs about groups, including stereotypes), and a behavioral component (negative behaviours, including discrimination and violence).'

Source: American Psychological Association Dictionary of Psychology[115]

Making sense of our world

4.46 Just as we may unconsciously use cognitive shortcuts to reach decisions, so too do we rely somewhat automatically on mental constructs and shortcuts to make sense of our world and the people in it. Our experiences shape how we interpret the world, and the predictions we make about it. Within the framework of those experiences, our brain is wired to readily jump to conclusions to allow us to function. Much of this happens relatively automatically. As Elek and Miller explain:

> Science tells us that what we experience is not what objectively exists, but what we are able to interpret based on the information we collect through

115 *American Psychological Association Dictionary of Psychology* (2020) <dictionary.apa.org/>.

> our bodily senses. We do not have direct access to information about what others are feeling or thinking, but we use our observations about their facial expressions, tone of voice, choice of words, mannerisms, and other behavioural information to deduce what we can about them. So when the human brain processes information, it is making predictions about, or a best guess at, what is going on in our external reality so we can decide how to act within it. As we interact with the world, our mental machinery is designed to quickly search for patterns (e.g., certain types of small, spherical objects are *apples*) and make associations (e.g., *apples* are red, sweet, juicy, and are edible). Our brains do this between groups of people (e.g., older adults) and characteristics (e.g., slow, frail) as well. These associations occur, to some degree, automatically. Unlike *controlled* mental processes, which require at least some intention, effort, or conscious awareness to be enacted, *automatic* associations are formed without apparent mental effort; we may not be consciously aware of or intend to make these associations.[116]

4.47 Researchers in social psychology have identified representations our brain uses to makes sense of all of this information. These are known as schemas, and include stereotypes (generalisations about particular groups or social categories) and scripts (the basic actions making up a complex action). These 'make navigating the world possible'.[117] But they can be wrong, or harmful, because the association does not always reflect reality.[118] Alongside this, psychologists identify that we hold particular 'attitudes', which are a 'relatively enduring and general evaluation of an object, person, group, issue, or concept on a dimension ranging from negative to positive'.[119]

4.48 Our attitudes, including prejudicial attitudes, and the schemas and stereotypes we draw on, are shaped by the social and cultural environment into which we are born and in which we live.[120] It is well established in social psychology that these 'attitudes or internalized stereotypes' can affect our 'perceptions, actions, and decisions', and may lead to differential outcomes for different groups within society.[121] This has been

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116 Jennifer K Elek and Andrea L Miller, *The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community* (National Center for State Courts, March 2021) 4 (citations omitted).

117 Ibid.

118 Ibid (citations omitted).

119 *American Psychological Association Dictionary of Psychology* (online at 18 September 2021) 'Attitude'.

120 Cristian Tileagă, Martha Augoustinos and Kevin Durrheim, 'Towards a New Sociological Social Psychology of Prejudice, Stereotyping and Discrimination' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 3; Kevin Durrheim, 'Stereotypes: In the Head, in Language and in the Wild' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 184; Elek and Miller (n 116) 109.

121 Iain Walker and Susie Wang, 'Implicit Bias' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 197, 198. See also Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

demonstrated across numerous empirical studies, with various explanations offered for why it occurs.[122]

Implicit bias: insights and uncertainties

4.49 One way in which the less than conscious operation of attitudes and stereotypes has recently been explained is through the operation of 'implicit bias' — a term that has 'moved out of psychology laboratories and into popular discourse'.[123] Professor Walker and Dr Wang describe this as an approach that rests upon the idea that

> we acquire through socialisation an insistent association between particular groups and sets of attributes … These associations persist unrecognised in memory, and quietly shape our expectations of members of different groups. These in turn shape our evaluations of behaviours performed by group members.[124]

4.50 It has been suggested that, although people do not know they hold these associations, they can be measured using indirect measures.[125] It has also been suggested that 'implicit bias', as measured by indirect measures, could 'produce [behaviour] that diverges from a person's avowed or endorsed beliefs or principles'.[126] As noted in **Background Paper JI6**, and emphasised in some submissions, there are currently significant uncertainties in the scientific literature about the definition and measurement of 'implicit bias', and the relationship between behaviour and 'implicit bias', as measured indirectly.[127] Part of the controversy arises as a result of more recent research that suggests that people *are* generally aware of the personal beliefs and cultural stereotypes that underlie their responses on implicit

122 Walker and Wang (n 121) 198–9.
123 Ibid 197.
124 Ibid 199. See, eg, Jerry Kang et al, 'Implicit Bias in the Courtroom' (2012) 59 *UCLA Law Review* 1124, 1129.
125 Including by using experiments involving subliminal priming, or measuring reaction time differences on different tasks such as the Implicit Association Test: Anthony G Greenwald, Debbie McGhee and Jordan Schwartz, 'Measuring Individual Differences in Implicit Cognition: The Implicit Association Test' 74(6) *Journal of Personality and Social Psychology* 1464.
126 Nicole E Negowetti, 'Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators' (2014) 4 *St. Mary's Journal on Legal Malpractice and Ethics* 278, 281, citing Anthony G Greenwald and Linda Hamilton Krieger, 'Implicit Bias: Scientific Foundations' (2006) 94 *California Law Review* 945, 951.
127 Australian Law Reform Commission, 'Cognitive and Social Biases in Judicial Decision-Making' (Background Paper JI6, April 2021) [22]–[23]; Dr Jason Chin, *Submission 14*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*. For a recent meta-analysis see Patrick S Forscher et al, 'A Meta-Analysis of Procedures to Change Implicit Measures' (2019) 117 *Journal of Personality and Social Psychology* 522. For a summary of current uncertainties see Walker and Wang (n 121) 199–207.

measures (known as 'content awareness').[128] Others have suggested that, over large populations, implicit bias measures have greater predictive validity.[129]

4.51 Professor Gawronski suggests that it may be necessary to distinguish between different ways in which biases can be 'unconscious'. Gawronski observes that, although people may be aware of the content underlying their responses to implicit measures, they may not be

> aware of or fully understand how they developed this knowledge (referred to as *source awareness*), or how and to what extent that knowledge influences their everyday thinking and behavior (referred to as *impact awareness*).[130]

4.52 Given the current controversies over the mechanisms by which implicit bias operates and through which it can be measured, there has been a call for greater work to investigate and clarify the concept.[131] However, many continue to find the concept useful. For example, Ghezelbash, Ross, and the Behavioural Insights Team emphasise in their submission that

> it is uncontroversial in the psychological sciences that humans have a disposition to form stereotypes against members of unfamiliar or distinct social groups, and that much of our cognition occurs at sub-conscious levels. While the science surrounding the measurement of implicit bias is contested, there remains a strong rationale and evidence of its impacts on the world to support its existence.[132]

4.53 Walker and Wang suggest that implicit bias can be summarised as:

> … an internal cognitive process (an attitude or a stereotype);
>
> [which] influences those around us by affecting our perceptions, actions, and decisions;
>
> thereby leading to unequal treatment of others because of group memberships;
>
> [which] often disallows awareness of those influences; and
>
> is internalised from broader, external social environments.[133]

4.54 Exactly how such processes can be reliably measured, and the extent to which any change in them will result in changes in discriminatory behaviour, is currently the subject of further research. Nevertheless, it remains clear that people's

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128 Bertram Gawronski, 'Six Lessons for a Cogent Science of Implicit Bias and Its Criticism' (2019) 14(4) *Perspectives on Psychological Science* 574, 578; Elek and Miller (n 116) 2.

129 See, eg, Siddharth Shirodkar, 'Bias against Indigenous Australians: Implicit Association Test Results for Australia' (2019) 22(3–4) *Journal of Australian Indigenous Issues* 3, 8–9.

130 Elek and Miller (n 116) 2, citing Gawronski (n 128).

131 See, eg, Gawronski (n 128); Walker and Wang (n 121).

132 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*, citing M Brownstein, A Madva and B Gawronski, 'What Do Implicit Measures Measure?' (2019) 10(5) *Wiley Interdisciplinary Reviews: Cognitive Science* 1501.

133 Walker and Wang (n 121) 202.

experiences, social identities, and cultural framework shape the way they see the world and others in it, and this operates in ways of which they are often not aware.

4.55 Researchers in a number of fields, including psychology, political science, criminology, socio-legal studies, critical legal theory, and philosophy, have explored how social identities and cultural world views can have unequal impacts on decision-making in the courts in a number of different ways. Research in psychology in this area is discussed briefly below. Research in other disciplines, and its theoretical frameworks, is explored further in **Chapter 11**.

Reliance on schemas and stereotypes in evaluating evidence

4.56 Social psychologists have explored how, in situations of uncertainty, schemas and stereotypes influence the recall and evaluation of evidence. Some research suggests that schema-consistent information 'is easier to search for and retrieve from memory than the details of schema-inconsistent information'.[134] A mock jury study involving university students showed, for example, that participants misremembered legally relevant facts in a racially biased manner, depending on whether the protagonist was said to be Caucasian, Hawaiian, or African American.[135]

4.57 In relation to decision-making by members of a jury, experimental research by psychologists has shown how jury members maximise cognitive capacity by using

> schemas about how they expect victims of intimate partner violence and sexual assault to behave in order to evaluate the credibility of the evidence given by that victim.[136]

4.58 The recall and evaluation of evidence by decision makers will be flawed if the schemas they rely on are wrong or misleading (such as stereotypical assumptions about what a 'real rape' is, or stereotypes about how a person of a particular gender or ethnicity will behave).

4.59 For example, studies have explored how 'sexual assault victims who behave in an emotionally upset manner … are perceived to be more believable in court as they fit the expectation of the typical rape victim', even though this expectation is not grounded in reality.[137] A recent meta-analysis of studies examining this effect across 3,128 participants including police officers, judges, community members, and students, found that credibility was assessed as being greater for victims who appeared emotional across all of the studies.[138] Similar research has been conducted into assessments of credibility of children who report experiences of abuse, given

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134 McKimmie et al (n 39) 9.

135 Justin D Levinson, 'Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering' (2007) 57 *Duke Law Journal* 345.

136 McKimmie et al (n 39) 9.

137 For a summary see ibid 4–5.

138 FT Nitschke, BM McKimmie and EJ Vanman, 'A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?' (2019) 145 *Psychological Bulletin* 953.

that 'contrary to popular belief, children commonly report abuse experiences with no emotion'.[139]

Heuristic and systematic information processing

4.60 Connected to this, a number of dual-process models of social psychology suggest that, when thinking intuitively rather than deliberatively, decision makers are more likely to draw on heuristic shortcuts like schemas, as well as cognitive heuristics such as some of those discussed above, to evaluate credibility.[140] In this intuitive processing, it is suggested that individuals focus on

> easily noticed and easily understood cues, such as a communicator's credentials (e.g., expert versus nonexpert), the group membership of the communicator (e.g., Democrat or Republican), the number of arguments presented (many or few), or audience reactions (positive or negative).[141]

4.61 Examples of heuristics that Professors Chaiken and Ledgerwood suggest decision makers may draw upon in intuitive decision-making include 'experts know best' (expert opinion heuristic), 'my own group can be trusted' (in-group bias), 'argument length equals argument strength', and 'consensus implies correctness'.[142] While some of these, such as the expert heuristic and consensus heuristic, may have value in assessment of information, they are not always correct and can lead to error in some circumstances. Some heuristics, such as in-group bias and the expert opinion heuristic, may clearly intersect with social or cultural biases. Other heuristics and cognitive biases identified above,[143] including the halo effect and the affect heuristic, may also be influenced by social and cultural factors.

4.62 However, these models recognise that even systematic processing can be affected by heuristic cues, because motivated reasoning may lead perceivers to 'focus on evidence consistent with heuristic cues they are exposed to'.[144] In this way, simply thinking more carefully may not be enough to avoid the biased evaluations.[145]

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139 Jessica Salerno, *The Impact of Experienced and Expressed Emotion on Legal Factfinding* (preprint, PsyArXiv, 10 August 2021) 193–4 <https://osf.io/w5agm>.

140 See, eg, Shelly Chaiken and Alison Ledgerwood, 'A Theory of Heuristic and Systematic Information Processing' in Paul Van Lange, Arie Kruglanski and E Tory Higgins (eds), *Handbook of Theories of Social Psychology: Volume 1* (SAGE Publications Ltd, 2012) 246 (describing the Heuristic Systematic Model of Persuasion). Another influential dual process model of persuasion in the area is the Elaboration Likelihood Model: see further Richard E Petty and Pablo Briñol, 'The Elaboration Likelihood Model' in Paul Van Lange, Arie Kruglanski and E Tory Higgins (eds), *Handbook of Theories of Social Psychology: Volume 1* (SAGE Publications Ltd, 2012) 224.

141 Chaiken and Ledgerwood (n 140) 247.

142 Ibid 3.

143 See [4.26].

144 McKimmie et al (n 39) 9.

145 Ibid 10.

Strategies to minimise improper influences on decision-making

4.63 The many cognitive processes discussed above can impact decisions affecting people in many different areas of life — from aviation and mine safety, medical practice, and hiring, to judicial decision-making. A significant amount of research across the various disciplines considering these issues has explored how potential negative impacts might be removed or ameliorated in these real life situations. As discussed above,[146] much of this research is currently undergoing review and retesting.

4.64 Understandably, different disciplines and models for explaining how these processes operate will influence the strategies considered to address them. These can include institutional, interpersonal, and personal responses that try to either mitigate, insulate from, or remove biases. Such strategies need to be considered carefully in the particular context in which they are to be employed, and in relation to the particular problem that they are designed to address.

Strategies proposed to address cognitive bias

4.65 In relation to removal, it is generally well accepted that at a personal level it is difficult to remove cognitive biases altogether. For example, Kahneman explains, in terms of his framework, why cognitive illusions are very difficult to overcome:

> Constantly questioning our own thinking would be impossibly tedious, and System 2 is much too slow and inefficient to serve as a substitute for System 1 in making routine decisions. The best we can do is a compromise: learn to recognize situations in which mistakes are likely and try harder to avoid significant mistakes when the stakes are high. … [I]t is easier to recognize other people's mistakes than our own.[147]

4.66 Research is growing on the 'possible role of procedures and institutions in perpetuating, exacerbating or creating cognitive biases in judicial decisions', some of which is touched on in the discussion above.[148] Proposed mitigation strategies may therefore include both institutional and personal strategies. Some strategies target the situational factors that are seen to make it more difficult to employ controlled thinking. These may include reducing pressure to make decisions quickly, or avoiding decision-making in elevated emotional states, including stress, anger, fatigue, and hunger.[149] This is something that has long been recognised as something judges should be aware of — Islamic jurisprudence, for example, holds that a judge

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146 See [4.24].
147 Kahneman (n 36) 28.
148 Adi Leibovitch, 'Institutional Design and the Psychology of the Trial Judge' in Bartosz Brożek, Jaap Hage and Nicole Vincent (eds), *Law and Mind* (Cambridge University Press, 2021) 193, 203.
149 Wistrich and Rachlinski (n 38) 112.

> should not be in a state of anger and should be free from severe thirst, excessive joy or grief and extreme worry. He should not be in need of relieving himself or be overly tired. All of these things can compromise his mental state and his ability to properly consider the testimony of litigants.[150]

4.67 Some judges have emphasised the usefulness of deferring judgment, and writing reasons, where possible.[151] One recent study suggests that the time available to hear cases and make decisions does have an impact on outcomes. A study of the impact of caseload on the decision-making of Israeli judges, in circumstances where some districts were assigned additional registrars and others were not, found a significant difference in outcomes between judges with high caseloads and those with reduced caseloads. Judges with lower caseloads invested the additional time in resolving the cases before them (rather than other activities), and were more likely to find in favour of plaintiffs, and to award them more substantial costs orders.[152] While further investigation would be necessary to determine whether that was a fairer outcome, it shows that more time to consider cases can lead to different outcomes, and that those different outcomes might favour one group over another at an institutional level.

4.68 Other mitigation strategies explored in relation to cognitive biases involve training people to change their decision-making habits, or reminding them of the risk of certain information biasing their decision-making.[153] In relation to the cognitive biases affecting numerical decision-making, such as the anchoring effect, a number of strategies have been proposed, including providing structured decision-making tools, and pooling data about other judges' decision-making to enable individual judges to self-reflect on their own decisions.[154] Evidence of the effectiveness of such techniques in the courtroom context is, however, limited, and there have been calls for more research to be carried out.[155]

4.69 Finally, insulation strategies may be adopted by courts to prevent biases from arising in the first place — for example, ensuring that different judges make decisions at pre-trial and trial stage to avoid confirmation bias.[156] This can, however, have flow on effects for efficiency.

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150 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) Annex, 126.

151 Wistrich and Rachlinski (n 38) 117. See further the Hon Justice A Greenwood, The Art of Decision-Making (Speech, Administrative Appeals Tribunal 2018 National Conference, 29 May 2018) 22: 'In the course of writing, the decision-maker tends to arrange and rearrange material in ways which provide insights and enable the discovery of new implications, connections and relativities'.

152 Christoph Engel and Keren Weinshall, 'Manna from Heaven for Judges: Judges' Reaction to a Quasi-Random Reduction in Caseload' (2020) 17(4) *Journal of Empirical Legal Studies* 722.

153 See, eg, Barry (n 34) 28.

154 Ibid 54–60.

155 Ibid 28–31.

156 Ibid 30.

Strategies proposed to address social and cultural bias

4.70 Research on how to address the impact of social and cultural biases in different settings is again carried out across numerous disciplines and theoretical frameworks. This section highlights some of the relevant research in two areas.

Addressing the impact of reliance on schemas in evaluating evidence

4.71 A number of strategies have been proposed to reduce the biasing effect of reliance on schemas in evaluating evidence. One involves informing the decision maker of specific information to counteract the stereotype through instructions at the time of making the decision. These have mainly been studied in the context of jury decision-making and have had 'mixed success', but there is evidence that they can reduce biased credibility assessments.[157] For judges, such reminders could be included in judicial bench books, such as the *Equality Before the Law Bench Book*.[158]

4.72 Another related strategy involves targeted education of decision makers in relation to schemas. Here, in the context of schemas of sexual assault, studies have shown that training can have an impact on reducing bias in credibility assessments.[159] For example, a program conducted by Professor McKimmie and others with specialist police detectives found that, following training, 'detectives were more likely to view the events described as rape … and were more likely to think that the alleged assailant should be charged'.[160] The research suggested that the effect was 'at least in part because it changed perceptions about the victim's stereotypicality — she was seen as more stereotypical after the training'.[161] Therefore, the further information provided through the training may have modified the schema the police detectives relied on, rather than necessarily changing their reliance on a schema. Further research by another team is now studying the overall effect of the training program.

Prejudice reduction

4.73 More broadly, strategies to reduce prejudicial attitudes at an individual level towards particular social groups — expressed both explicitly and in more subtle ways — have been the subject of significant interdisciplinary focus, and, particularly recently, controversy.[162] A recent meta-analysis of prejudice reduction strategies found that much of the research in this area is subject to significant publication

157 McKimmie et al (n 39) 10.
158 Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2006). See further **Chapter 12**, and Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [25]–[27].
159 McKimmie et al (n 39) 10–11.
160 Ibid 11.
161 Ibid.
162 Dr Jason Chin, *Submission 14*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

bias,[163] and the effects of interventions in large-scale studies are significantly smaller than in lab-based interventions.[164]

4.74 A number of strategies directed at the individual level, and employed on a widespread basis, have now been shown to be largely ineffective at changing behaviour. These strategies include short, generalised implicit bias training, generalised diversity training, or pre-informing people of the existence of an unconscious bias before asking them to complete a task measuring discrimination.[165] In addition, much of the research is Western focused, and most is focused on one group identity, when all people fall within numerous groups, some or all of which may be the subject of prejudice.

4.75 Some strategies do show promise, however. In their submission, Ghezelbash, Ross, and the Behavioural Insights Team noted that there is robust evidence that 'providing individuals with feedback on the outcomes of their behaviour is an effective catalyst for behavioural change'.[166] They suggested that one promising approach is 'introducing interventions which encourage individuals to scrutinise their decision making', such as the collection of statistics on decision-making outcomes, and comparison across decision makers.[167] In relation to training, some studies have shown evidence of long-term behavioural change in circumstances where the training provided is of long duration and incorporates training on strategies to overcome biases in addition to raising awareness of the operation of biases, but further research is needed in this area.[168] A recent meta-analysis of prejudice reduction strategies suggested that studies on peer influence interventions (by which peers use their influence to reduce prejudice or enforce norms) yielded positive results, as did entertainment interventions (through art, film, and music).[169] The analysis also highlighted three recent high quality studies on intergroup contact which found that

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163 Publication bias is when the likelihood of a study being published is affected by the findings of the study; so a preference by academic journals for publishing studies that confirm a hypothesis, rather than studies that do not (which remain in the 'file drawer'), may bias the overall academic literature on a subject.

164 Elizabeth Levy Paluck et al, 'Prejudice Reduction: Progress and Challenges' (2021) 72(1) *Annual Review of Psychology* 533, 553, cited in Dr Jason Chin, *Submission 14*.

165 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*. See further Paluck et al (n 164); Behavioural Insights Team, 'Unconscious Bias and Diversity Training: What the Evidence Says' (December 2020).

166 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

167 Ibid. See further **Chapter 12**.

168 Doyin Atewologun, Tinu Cornish and Fatima Tresh, *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness* (Research Report No 113, Equality and Human Rights Commission, 2018) 39. See, eg, Patrick S Forscher et al, 'Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity' (2017) 72 *Journal of Experimental Social Psychology* 133; Patrick S Forscher and Patricia G Devine, 'Knowledge-Based Interventions Are More Likely to Reduce Legal Disparities Than Are Implicit Bias Interventions' in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) 303; Molly Carnes et al, 'The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial' (2015) 90(2) *Academic Medicine* 221; Francesca Gino and Katherine Coffman, 'Unconscious Bias Training That Works' (2021) (September–October 2021) *Harvard Business Review* <https://hbr.org/2021/09/unconscious-bias-training-that-works>.

169 Paluck et al (n 164) 546, 552–3.

sustained and cooperative intergroup contact had positive effects on discriminatory behaviour, even when attitudes remained unchanged.[170]

4.76 As a review of research in this area recognised,

> there is a spectrum of prejudice, which ranges from overt expressions to much more, subtle, sometimes unconscious, forms. It develops in different ways and requires a myriad of solutions at structural, group, and individual levels in order to address it.[171]

4.77 A key point made in consultations was that 'what works' in terms of reducing social and cultural bias against particular groups is inextricably tied to context, structural factors, and the specific problems identified. In the view of a number of stakeholders, it is impossible to address social biases in the abstract, without understanding the experiences of those subject to such biases and the structural factors contributing to them.

The role of emotion

4.78 Emotion, typically characterised as reactive or spontaneous, is implicated in the operation of cognitive biases and other aspects of bounded rationality (heightened emotional states make reliance on them more likely), and their content (for example, the 'affective heuristic', motivated reasoning, prejudicial attitudes, and processing of information, including by reference to stereotypes).[172] Emotion can be framed as an extra-legal quality, inconsistent with judicial commitment to impartiality and a (potential) source of bias. The judicial oath explicitly excludes feelings such as 'fear or favour, affection or ill-will' from judicial practice.[173] However, considerable research now demonstrates that emotion and cognition are inextricably intertwined and that it is not possible to draw a sharp distinction between reason and emotion.[174]

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170 Ibid 551, citing Salma Mousa, 'Building Social Cohesion between Christians and Muslims through Soccer in Post-ISIS Iraq' (2020) 369 *Science* 866; Matt Lowe, 'Types of Contact: A Field Experiment on Collaborative and Adversarial Caste Integration' (2021) 111(6) *American Economic Review* 1807; Alexandra Scacco and Shana S Warren, 'Can Social Contact Reduce Prejudice and Discrimination? Evidence from a Field Experiment in Nigeria' (2018) 112(3) *American Political Science Review* 654.

171 Maureen McBride, *What Works to Reduce Prejudice and Discrimination? A Review of the Evidence* (Scottish Centre for Crime and Justice Research, 2015).

172 John Dixon and Darren Langdridge, 'Beyond Prejudice as Antipathy' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 213; Salerno (n 139) 186–91.

173 Sharyn Roach Anleu and Kathy Mack, 'Impartiality and Emotion in Everyday Judicial Practice' in Roger Patulny et al (eds), *Emotions in Late Modernity* (Routledge, 2019) 253.

174 Lisa Feldman Barrett, 'How Emotions Are Made: The Secret Life of the Brain' (First Mariner Books, 2017); Hayley Bennett and GA Broe, 'Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning' (2010) 42(1) *Australian Journal of Forensic Sciences* 11; Antonio Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Random House UK, 2006).

Significant literature argues that emotion, properly understood and managed, can enhance human decision-making and the judicial function.[175]

4.79 Empathy is a capacity that entails cognitive and affective components, and can provide insight into others' experiences, which can be important for impartial judging.[176] Judicial officers may experience and strategically display demeanours that might suggest feelings of compassion, sympathy, sadness, distress, disgust, or happiness and pleasure. These demeanours may be shared by or overlap with the emotion of some other court users. A judicial attitude and display of calmness, patience, and courtesy can set an important emotional climate in a courtroom.[177]

4.80 The work of Emerita Professor Mack and Professor Roach Anleu has shown how judicial officers experience and express these and many other emotions.[178] Judges agree that some display of emotion demonstrates that a judge is human, and more than an unfeeling embodiment of impersonal, abstract law. However, judges also describe a strong demarcation between the amount and quality of emotion that can and should be displayed. Mack and Roach Anleu have argued that, in this way, feelings, and the display of them, are managed to become a resource to achieve impartiality, within the framework of the institutional role.[179]

Implications for the law and the courts

4.81 This research, and other streams of research alongside it, suggests that decision-making may be less rational than generally believed. Human reasoning and decision-making can never be completely impartial or neutral, because our decision-making may be influenced by many factors of which we are not consciously aware. Judges are human and, notwithstanding their role as professional decision makers, are necessarily constrained by the limits of human cognition and reasoning. Although the law has long recognised this, it has perhaps overestimated the extent to which judges are equipped to resist them through their 'training, experience and their oath or affirmation'.[180]

4.82 Nevertheless, this does not mean that judges are necessarily biased in the legal sense, or that they cannot be impartial in a meaningful way. As set out in

175 Susan A Bandes, 'Empathetic Judging and the Rule of Law' [2009] *Cardozo Law Review De Novo* 133; Stina Bergman Blix and Asa Wettergren, 'A Sociological Perspective on Emotions in the Judiciary' (2016) 8(1) *Emotion Review* 32; Maria Gendron and Lisa Feldman Barrett, 'A Role for Emotional Granularity in Judging' (2019) 9(5) *Onati Socio-Legal Series* 557; Rebecca Lee, 'Judging Judges: Empathy and the Litmus Test for Impartiality' (2014) 82 *University of Cincinnati Law Review* 145, 145–206; Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99(2) *California Law Review* 629; Terry A Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99(2) *California Law Review* 1485; Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021).

176 See further **Chapter 11**.

177 Roach Anleu and Mack (n 175).

178 Ibid.

179 Ibid.

180 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [140] (Heydon, Kiefel and Bell JJ).

Chapter 2, what impartiality requires will be contextually and culturally specific — judges, and the institution as a whole, must act, and be clearly seen to act, in ways that maintain litigant and public confidence and so uphold the legitimacy and authority of the courts,[181] and judges' commitment to the oath.[182] What is required may change with time, as research expands and community expectations follow suit.

4.83 The insights produced by research are important to understand how irrelevant factors can influence decision-making, and to what extent the impacts play out in practice. Other institutional strategies will be needed where the rule on bias cannot be appropriately employed to guard against an unacceptable risk — at an institutional level — of such bias. Research findings can also help to destigmatise suggestions of apprehended bias, by framing the application of the law on bias as a supportive institutional response to promote the actuality and appearance of impartial decision-making, rather than reflecting a personal failing on the part of the individual judge.

4.84 Geyh has emphasised the importance of this shift in thinking if the law on apprehended bias is to fulfil its promise of upholding public confidence in the administration of justice, and for implementing procedural mechanisms that also support that aim. Rather than adopting a characterisation that 'good judges follow the law, while bad judges succumb to extralegal influences', Geyh suggests that a

> more realistic approach is to recognize that influences on judicial decision-making lie on a continuum, from the desirable to the intolerable. The goal of judicial oversight generally, should be to manage the extralegal influences in ways that minimize the unacceptable. The goal of disqualification, in turn, should be to draw a line on that continuum, where the threat of unacceptable extralegal influences compromises the fairness — real or perceived — of a given proceeding.
>
> If the legal establishment re-conceptualizes the nature of legal and extralegal influences on judicial decision-making in terms of a continuum instead of a dichotomy, the prognosis for the proposed procedural regime improves dramatically. Once judges acknowledge that the best among them are subject to extralegal influences, including bias, and that it is extremely difficult for a judge to accurately self-assess where her real or perceived biases fall on a continuum, then procedural protections aimed at better detecting and managing judicial bias become unobjectionable.[183]

4.85 In addition, some of the research suggests that there may be areas where judges' training and experience *does* let them approach problems in a different way to non-legally trained decision makers. For example, a number of studies have suggested that judges are not as susceptible to motivated reasoning related to their

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181 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 177.

182 Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2014) 65(2) *Florida Law Review* 493, 512 (on the ethical dimension of impartiality).

183 Geyh (n 17) 730–1.

own political predispositions in legal interpretation tasks as members of the public.[184] This, too, has implications for how the law on bias might operate. As the authors of those studies noted, this finding was both 'good news' and 'bad news' for the justice system. It was 'good news' because it suggested that the popular perception of judges as just 'politicians in robes' was not correct:

> In an experiment designed to avoid methodological limitations associated with studies that have purported to corroborate this anxiety, we found evidence that judges of diverse cultural outlooks can be expected to converge on results in cases that predictably divide the public. Their *job* is to decide those sorts of cases neutrally, and our evidence supports the inference that they have both the capacity and disposition to carry it out.[185]

4.86 However, it was 'bad news' because it underscored why members of the public would find this hard to believe. As numerous studies had 'found that members of the general public themselves can be expected to conform their assessments of evidence and their interpretation of rules' to the interests of their own group, members of the public can be 'expected to perceive judges to be biased in cases' where the outcomes are tied closely to issues that divide societies — 'even when the outcomes of those cases reflect neutral decisionmaking'.[186] In the view of the authors of those studies,

> in precisely those cases in which public anxiety about the cultural neutrality of the law is likely to be highest, identity-protective cognition will predictably *disable* members of the public from using their usually reliable lay prototypes of valid decisionmaking to assess cases' outcomes. In that circumstance, no matter how expertly and impartially judges decide, the sense of the public — or at least those who belong to the cultural group whose identity is denigrated by the decision — will be disposed to see judges' decisions as 'politically biased'.[187]

4.87 In other words, the law on apprehended bias, and the procedures and institutions supporting it, should be informed both by what we know about how bounded rationality can impact on judges' decision-making, and how it impacts on the decision-making of others, because that is how the public will see the risk.[188]

4.88 Ultimately, the legitimacy of the judiciary depends on the public having confidence in the system. As former Chief Justice Gleeson has stated, confidence in the judiciary requires

> a satisfaction that the justice system is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.[189]

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184 See above [4.40]–[4.43].
185 Kahan et al (n 104) 419–20.
186 Ibid 420.
187 Ibid.
188 See also Geyh (n 17) 729–30.
189 The Hon Chief Justice M Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558, 561.

4.89 By better understanding the broader forms of bias, and the extent to which judges are subject to 'ordinary human frailty', judges and the public will be best placed to respond to bias in a way that promotes the highest standards of judicial decision-making and increases the confidence of the public, in all its diversity, in the judicial system. The role of the law on bias and other institutional strategies are addressed in the remainder of this Report.

5. Empirical Research

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Introduction

5.1 The ALRC's initial review of the literature revealed a number of areas where further empirical research would illuminate issues raised by the Terms of Reference. This chapter discusses existing empirical research, further empirical research undertaken by the ALRC, and some highlights from the data obtained by the ALRC.

5.2 Although a number of surveys have asked members of the public about their levels of confidence or trust in the courts, the ALRC has further explored the trends in levels of public confidence and trust in judges and the courts over time, levels of public confidence in judicial impartiality, and how members of the public obtained information about the courts.

5.3 In addition, no empirical studies had previously been carried out in Australia on how the law on bias is used and how the processes for raising and determining issues of bias are perceived. Commonwealth courts do not collect data on recusals, disqualification, or reallocation of matters on bias grounds. Issues of bias may be managed through judicial disclosure and informal objections, reasons may not be given in cases of recusal, and decisions on requests for disqualification of judges are often given *ex tempore*. Accordingly, the ALRC is alert to the possibility that published judgments may provide an incomplete picture of the extent to which judges do or do not recuse or disqualify themselves from proceedings and the reasons for their decisions.

5.4 The ALRC has also obtained further information from judges and lawyers about their experiences with the law and procedures for recusal, and their perceptions of the adequacy of existing law and procedures. The ALRC considers that it is important to compare these experiences against a comprehensive review of the published judgments concerning disqualification in the Commonwealth courts and to identify any areas of inconsistency in practice.

5.5 Finally, there is a significant gap in comprehensive data concerning the subjective experiences of litigants in the Commonwealth courts, with the last comprehensive survey being undertaken in 2014. The ALRC has explored how litigants and other court users experience proceedings in court, the types of issues that underlie subjective perceptions of judicial impartiality and bias, and potential impacts on public confidence in the courts. The ALRC has also explored whether there were significant differences in experiences and levels of confidence related to demographic factors.

5.6 To develop a more comprehensive evidence base and help inform its understanding of issues relating to judicial impartiality, the ALRC has obtained data by:

- including questions in the Australian Survey of Social Attitudes ('AuSSA');
- conducting surveys of:
    - Commonwealth judges ('ALRC Survey of Judges');
    - legal professionals ('ALRC Survey of Lawyers');
    - court users ('ALRC Survey of Court Users'); and
- undertaking a case review of Commonwealth court decisions on judicial recusal and disqualification ('ALRC Case Review').

5.7 The primary objective of the ALRC's empirical survey research has been 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. The ALRC has also developed a better, if partial, understanding of how the law and procedures relating to bias work in practice through the ALRC Case Review. This empirical work has informed the ALRC's final recommendations.

5.8 This chapter provides some highlights from the data obtained through the ALRC's empirical research. Further insight could be obtained from this data by examining multivariate relationships within the surveys. To this end, the ALRC has made data available on its website from the ALRC Survey of Lawyers and the ALRC Survey of Court Users.[1] Data from the ALRC AuSSA questions will be available in 2024 from the Australian Consortium for Social and Political Research Inc.

Highlights from the analysis

5.9 Results from AuSSA have allowed the ALRC to understand, at a broad level, public trust and confidence in the administration of justice. Augmenting this, the more targeted ALRC Survey of Court Users explored the experiences of individuals who had attended court proceedings in Australia in the past 10 years, and how they perceived the work of judges and the fairness of proceedings.

5.10 The ALRC Survey of Judges and the ALRC Survey of Lawyers sought information on:

- experiences with issues of disqualification for bias;
- perceptions of the sufficiency and appropriateness of the test for apprehended bias and the procedures for determining disqualification applications;
- the perceived adequacy of existing guidance; and
- potential reforms to support judicial impartiality.

5.11 These surveys provided unique data on the views of key participants in the legal system.[2]

5.12 Finally, the ALRC Case Review has assisted with understanding how Commonwealth courts grapple with the procedural and substantive issues relating to judicial impartiality. The ALRC Case Review provided insight into the frequency and nature of applications for disqualification and appeals, and helped identify aspects of the law and procedure for bias applications that may need greater clarity.

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1 See Australian Law Reform Commission, 'Data Analysis' <www.alrc.gov.au/inquiry/review-of-judicial-impartiality/data-analysis/>.

2 The total number of responses to questions varied within surveys as not all questions were compulsory, and in some instances questions were only put to subgroups of participants. Therefore, the total number of responses to questions varied within the surveys. Where this is the case, the number of participants is noted in parentheses as 'n = X'. In addition, percentages have been rounded to one decimal place. As a result, the total percentages may not equal exactly one hundred per cent. **Appendix F** contains a more detailed discussion of the methodology and data analyses.

Public confidence in the administration of justice

- Participants in AuSSA and the ALRC Survey of Court Users expressed similar levels of confidence in Australia's courts and the legal system.
- 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 agreement that court users expressed in relation to the proceedings they attended being fair.
- The effect of attendance at court was inconclusive.
    - AuSSA participants who had attended court recorded lower average levels of confidence and trust in Australia's courts when compared with those who had not attended court.
    - However, participants in the ALRC Survey of Court Users expressed an average level of confidence similar to that of non-court users in AuSSA. A greater proportion of these participants indicated they had 'complete confidence' or 'a great deal of confidence' in the courts than did those surveyed as part of AuSSA.
    - On average, participants in the ALRC Survey of Court Users 'somewhat agreed' that the proceedings they attended were handled fairly, with litigants indicating a lower level of agreement. Litigants also agreed that the judicial officer was not biased less often than those who had attended court proceedings in a different capacity.
- When asked to rate the importance of a list of skills/qualities in judges, AuSSA participants assigned the highest average level of importance to the ability of judges to be impartial/not biased.[3]

Adequacy of existing law and procedures

- A large proportion of both lawyers and judges who responded 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 surveys expressed different views about the effect of the existing procedures for self-disqualification.

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

- Almost a quarter of lawyers, as compared with more than four-fifths of judges, indicated that the existing procedures encourage appropriate use of bias claims.
- Almost three-quarters of lawyers, but only one in twenty judges, indicated that the existing procedures encourage underuse of bias claims.

Views on reform

- Lawyers responding to the survey were more supportive of procedural reform than judges responding to the survey.
- In single judge cases:
  - More than four-fifths of lawyers, but only just over a quarter of judges, responded that there are circumstances where it would be preferable for an application for disqualification to be decided by another judge (for example, a duty judge).
- In cases where the court is sitting as a panel:
  - Four-fifths of lawyers, but only just over a fifth of judges, considered that there are circumstances where it would be preferable for the full bench to decide applications for disqualification.
- There was majority support from lawyers and judges who responded to the surveys for more specific written guidance on the procedural and substantive dimensions of the law on bias.

Australian Survey of Social Attitudes

5.13 Although public confidence in the administration of justice is considered essential for the legitimate exercise of the judiciary's power, the exact nature of public confidence, and how it is to be measured, is not necessarily clear.[4] One way in which public confidence is measured and assessed is through general social surveys.

5.14 In order to better understand public attitudes towards issues relevant to the Inquiry, the ALRC submitted seven questions to AuSSA 2020, a large-scale, randomly sampled survey conducted annually by the Australian Consortium for Social and Political Research Inc.[5] AuSSA includes a range of questions on the characteristics, social attitudes, beliefs, and opinions of participants. For example, the survey asks participants to identify the most important issue for Australia today from a list of topical issues, and asks a range of demographic questions such as age, gender, and ancestry.

4 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39(1) *Adelaide Law Review* 1, 5.

5 Australian Consortium for Social and Political Research Incorporated, '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).

5.15 The ALRC was interested in finding out whether there had been any changes in levels of trust or confidence in the courts as measured by AuSSA over time. The ALRC sought to explore links between confidence in the courts and confidence in judges across different aspects of judicial practice, including in relation to impartiality. The survey also obtained views on what were considered to be important personal qualities for judges, such as legal knowledge, impartiality, and compassion. The ALRC also wanted to investigate whether there were any significant differences across demographic categories, or between those who had attended court in the past 10 years and those who had not.

5.16 The survey was sent in late February 2021 by post to 5,000 individuals randomly selected from the Commonwealth electoral roll.[6] A total of 1,162 responses were received, giving a response rate of 25%.[7]

5.17 A full description of the methodology of the survey is included at **Appendix F**. A copy of the ALRC's survey questions is available with the supplementary materials on the ALRC's website.[8]

Other relevant studies

5.18 A number of surveys have been undertaken in Australia in recent decades to measure 'public confidence' or 'public trust' in judges and the courts. The literature uses these terms in their ordinary conversational meaning.[9] In general, recent surveys show a trend toward an increased level of trust and confidence in Australian judges and courts over the past two decades.

5.19 The World Justice Project 'Rule of Law Index' examines 128 countries and jurisdictions, and draws from nationwide polls of more than 130,000 households and 4,000 legal professionals and experts.[10] Comparing the results, Australia has a high global ranking in terms of public perception across a number of variables relating to the justice system. These include high rankings for effective enforcement and the absence of delay, corruption, and improper government interference.[11] Australia did not, however, attain a high ranking with regard to the absence of discrimination with respect to 'public services, employment, court proceedings and the justice system, and the accessibility of the civil justice system'.[12] In general, Australians have a favourable perception of the legal system, with similar rankings to the UK, Canada,

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6 272 were ineligible.

7 Contact Rate 1 was 0.35, Cooperation Rate 1 was 0.7, Refusal Rate 1 was 0.1. The response rate for the number of participants who answered any given question is reported as 'n = X'. For further detail see footnote 2, and **Appendix F**.

8 Australian Law Reform Commission, 'ALRC AuSSA Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-AuSSA-Questions.pdf>.

9 Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20(1) *Journal of Judicial Administration* 3, 5.

10 World Justice Project, *Rule of Law Index* (Report, 2020) 7.

11 Ibid 39.

12 Ibid 13.

and New Zealand concerning the effectiveness of both the criminal and civil justice systems as a whole.[13]

5.20 A survey conducted annually by Roy Morgan between 1999 and 2017, and again in 2021, asked respondents to rate Australian High Court judges on their honesty and ethical standards (among other questions).[14] When measuring the proportion that rated judges 'high' or 'very high' the lowest proportion was 61% in 1999, the highest was 75% in 2011, and the latest (in 2021) was 66%.[15] A similar trend is observed in the ratings of state Supreme Court judges. These survey results indicate a general improvement in public opinion about the Australian judiciary over the first decade of the 21st century, which has remained relatively stable over the second decade.

5.21 In the 2021 ABC 'Australia Talks' survey of 60,000 Australians, judges received a trust rating of 3.0 on a four point scale, placing them tied for the third most trustworthy out of 14 professions.[16] This ranked below doctors and nurses (average 3.6), and scientists (average 3.5). The level of trustworthiness was tied with police and law enforcement, and ranked slightly above university professors (average 2.9) and military personnel (average 2.8).

5.22 A 2020 study by Associate Professor Krebs and others suggests that levels of public trust in a court may not necessarily directly correlate to levels of confidence in their impartiality. In that study, concerning the legitimacy of the High Court, they surveyed a sample of 518 people representative of the Australian population as a whole. Those surveyed reported a higher level of overall trust in the High Court (53.7% agreeing that the Court can usually be trusted to make decisions that are right for Australia as a whole), as compared to their confidence in the court's impartiality in relation to all people in the community (with 44.8% agreeing with the proposition that the Court favours some groups more than others).[17]

5.23 More specifically related to the law on bias and disqualification procedures, Professor Higgins and Dr Levy recently conducted public surveys in the UK and Australia to measure the views of members of the public on potential judicial disqualification scenarios.[18] The 2,064 participants were asked about different situations of possible bias to capture whether the legal test aligned with community expectations. In particular, participants were asked if a judge who has heard preliminary arguments in a case and had made provisional findings against one of the parties would be 'better placed to hear the case than a new judge', 'possibly

13 Ibid 28–9.
14 Roy Morgan, 'Image of Professions Survey 2021' (Article No 8691, 27 April 2021).
15 The 2021 percentage indicates a decline since the last survey in 2017 (from 74% to 66%). Twenty-nine of 30 professions were lower rated in 2021 as compared with 2017.
16 Australian Broadcasting Corporation, 'Australia Talks' <https://australiatalks.abc.net.au/>.
17 Shiri Krebs, Ingrid Nielsen and Russell Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) 43 *Melbourne University Law Review* 605, 632.
18 Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks about Judicial Impartiality' (2021) 84(4) *Modern Law Review* 811.

biased against the party they have made findings against', 'as well placed to hear the case as a new judge', or 'don't know'.[19]

5.24 In other jurisdictions, studies have been conducted to capture the views of the public on issues relating to judicial impartiality and judicial disqualification in particular. These include a study on US campaign financing which considered recusal procedures,[20] and a Canadian survey conducted as part of the consultation process for the review of the Canadian Judicial Council's ethical guidelines for judges.[21]

5.25 Surveys of the public have also been completed as part of consultation processes. For example, the Canadian Judicial Council commissioned a company to conduct a public web-based consultation regarding the Canadian Ethical Principles for Judges in 2019 and the public was given an opportunity to provide feedback on proposed principles.[22]

Key findings from AuSSA

5.26 The section below highlights some of the key findings from AuSSA 2020. In order to facilitate measurement of trends against past surveys, the questions in AuSSA 2020 referred to the general concept of 'Australian courts and the legal system'. In addition, as many members of the public may be unlikely to distinguish between the different jurisdictions, the questions and responses relate to both Commonwealth and state and territory courts.

Attendance at court proceedings

5.27 **Attendance at court in past decade:** Thirty-one per cent of participants (n = 1,118) indicated they had been present at a court proceeding in Australia in some capacity within the past decade or so. This could include attendance at court proceedings: for their job; for jury service; for their own case, or cases concerning a family member or friend; or as members of the public. Twelve per cent (n = 1,118) of participants had been to an Australian court more than once.

5.28 **Attendance at family law proceedings:** Thirty-two per cent of participants who had attended court (n = 360) indicated their attendance was family-law related.[23] This represented 10% of all participants.

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19 Ibid 834.

20 See Bert Brandenburg, 'The Role of Public Opinion in the Debate over Recusal Reform' 58(3) *Drake Law Review* 737, 741–2.

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

22 Ibid.

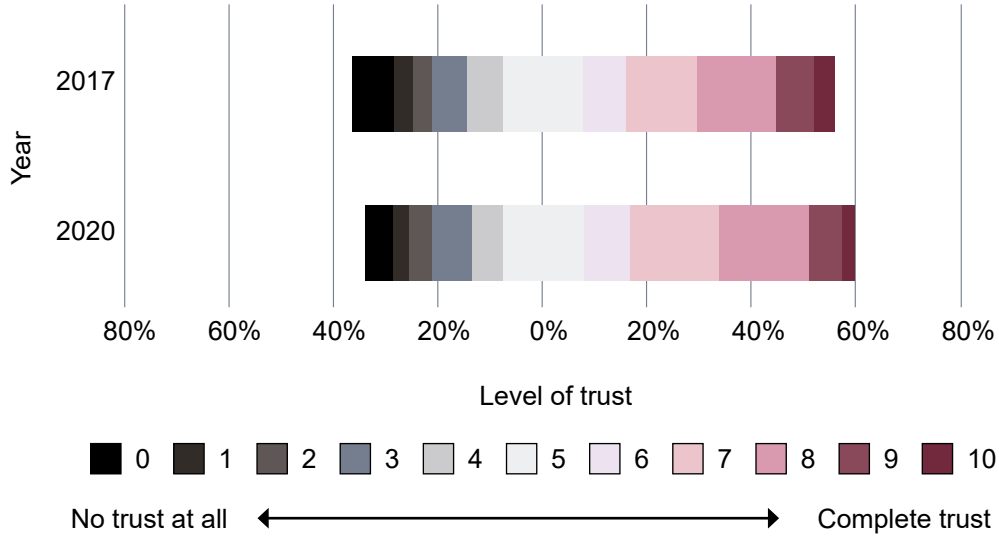
23 For example, relating to questions of marriage and divorce, child custody/parenting orders, or division of property. Note that these proceedings may have been heard in either Commonwealth, or state or territory courts.

Trust in Australia's courts

5.29 AuSSA 2020 asked participants how much they personally trusted Australia's courts, on a scale of 0 (no trust at all) to 10 (complete trust). The scoring out of 10 mirrored a question that had been included in AuSSA 2017,[24] and questions about other institutions in AuSSA 2020.

5.30 **Average level of trust:** The average level of trust in the courts in AuSSA 2020 was 5.6 (n = 1,084) and the median was six. This same question was asked in AuSSA 2017 and the level of trust recorded was virtually identical.[25]

Figure 5.1: Level of trust in the courts in AuSSA 2017 and 2020



5.31 **Comparison against other institutions:** The average score for trust in courts in AuSSA 2020 was the second highest level of trust in institutions recorded in the survey. Courts scored lower than university research centres (average 6.9; n = 1,067), but higher than business and industry (average 5.1; n = 1,086), the Federal Parliament (average 4.7; n = 1,090), and the news media (average 3.7; n = 1,101). The median for courts (six) was lower than that for university research centres (eight). The Federal Parliament and business and industry had median trust scores of five, while the news media had a median trust score of four.

24 See Betsy Blunsdon et al, 'Australian Survey of Social Attitudes, 2017' <www.dx.doi.org/10.26193/JZKRD8> (ADA Dataverse V3, 2018).

25 In 2017, the average level of trust in the courts was 5.5 and the median was six.

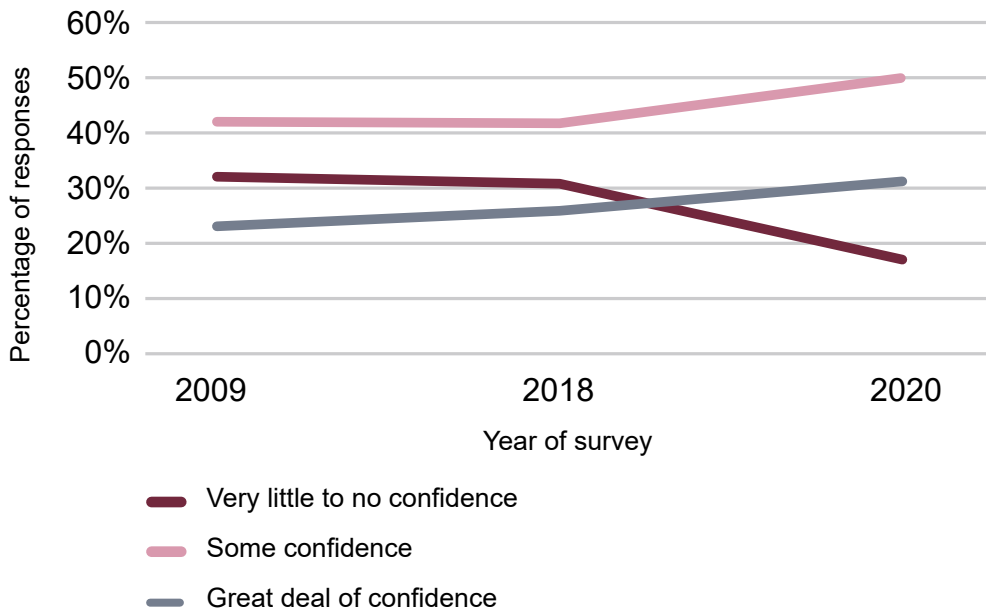
Confidence in Australia's courts

5.32 AuSSA 2020 asked participants to indicate on a five point scale (from 'no confidence at all' to 'a great deal of confidence') how much confidence they had in Australia's courts and the legal system. This question had also been asked, with the same response scale, in AuSSA 2009 and AuSSA 2018.[26]

5.33 **Average level of confidence:** The average level of confidence in AuSSA 2020 was 3.1 (n = 1,080) and the median was 3. Analysis of the data from the 2009, 2018, and 2020 surveys, which included the same question with the same response scales, indicates that the average level of confidence among those surveyed was higher in 2020 than in 2009 (average 2.8, median 3; n = 1,649) and 2018 (average 2.9, median 3; n = 1,236).

5.34 When grouped, the trend line indicates an increase in confidence over time. The level of confidence is shown in **Figure 5.2**, which combines responses marked 'complete confidence' and 'great deal of confidence', and 'no confidence' and 'very little confidence'.

Figure 5.2: Level of confidence in Australia's courts and the legal system



26 See Ann Evans, 'Australian Survey of Social Attitudes, 2009' <www.dx.doi.org/10.4225/87/IH68HQ> (ADA Dataverse V1, 2017); Ann Evans et al, 'Australian Survey of Social Attitudes, 2018' <www.dx.doi.org/10.26193/1U0HNI> (ADA Dataverse V2, 2018). The question had also been asked in AuSSA 2007, AuSSA 2011, and AuSSA 2014 with a different response scale. In 2011 and 2014, participants were asked to respond with one of the following responses: a great deal of confidence, quite a lot of confidence, not very much confidence, no confidence, and cannot choose. For that reason, the results have not been directly compared.

Confidence in judges

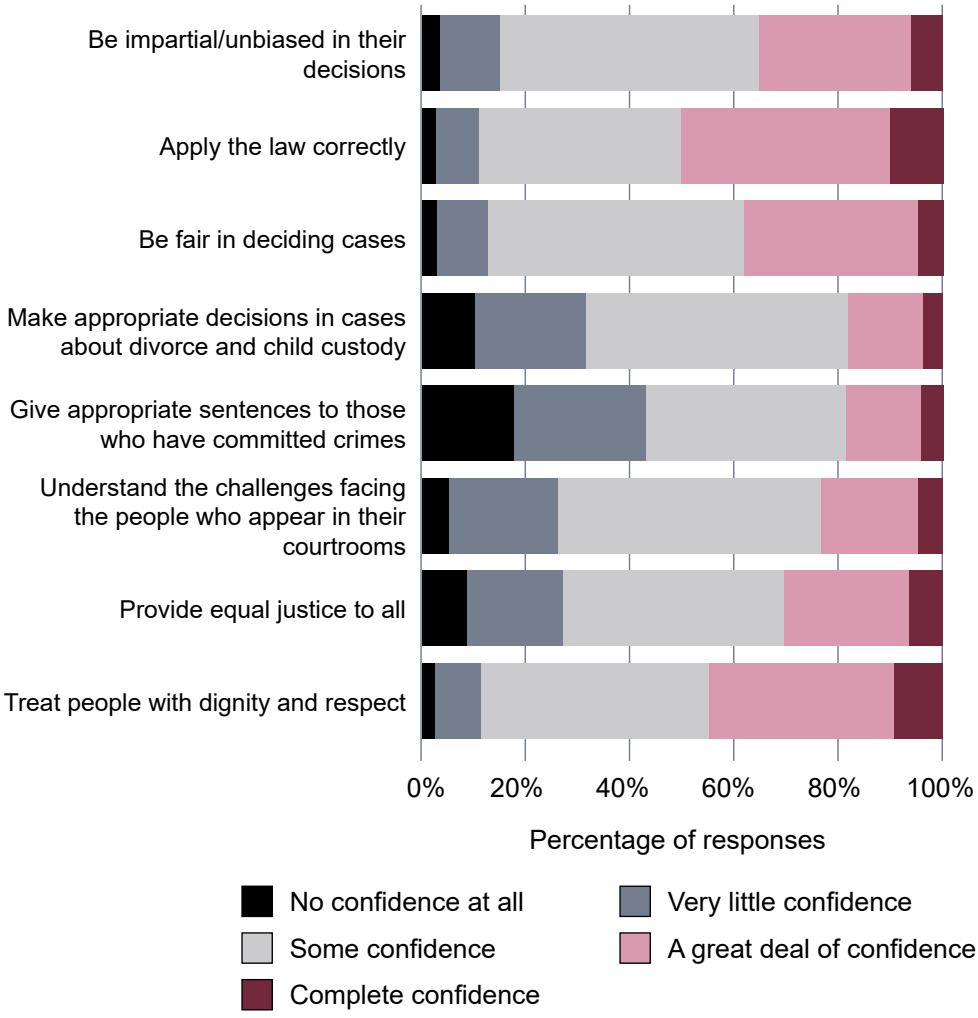
5.35 Using a five point scale (from 'no confidence at all' to 'a great deal of confidence'), participants were also asked a series of questions concerning their confidence in the ability of judges to perform a number of different functions.[27] Specifically, participants were asked to indicate their level of confidence in judges to:

- be fair in deciding cases;
- provide equal justice to all;
- apply the law correctly;
- be impartial/unbiased in their decisions;
- give appropriate sentences to those who have committed crimes;
- make appropriate decisions in cases about divorce and child custody;
- treat people with dignity and respect; and
- understand the challenges facing the people who appear in their courtrooms.

5.36 **Level of confidence:** Participants had the highest average level of confidence that judges would apply the law correctly (average 3.5, median 4; n = 1,086) and treat people with dignity and respect (average 3.4, median 3; n = 1,080). The lowest average level of confidence was expressed in relation to the two answer choices that focused on substantive outcomes of a case: giving appropriate sentences to those who have committed crimes (average 2.6, median 3; n = 1,087) and making appropriate decisions in cases about divorce and child custody (average 2.8, median 3; n = 1,023). Participant confidence in the ability of judges to be impartial/unbiased received the fourth highest average of eight variables (average 3.2, median 3; n = 1,078). **Figure 5.3** shows the breakdown of responses across categories.

27 This analysis excluded those who responded 'cannot choose'.

Figure 5.3: Degree of confidence in judges' abilities



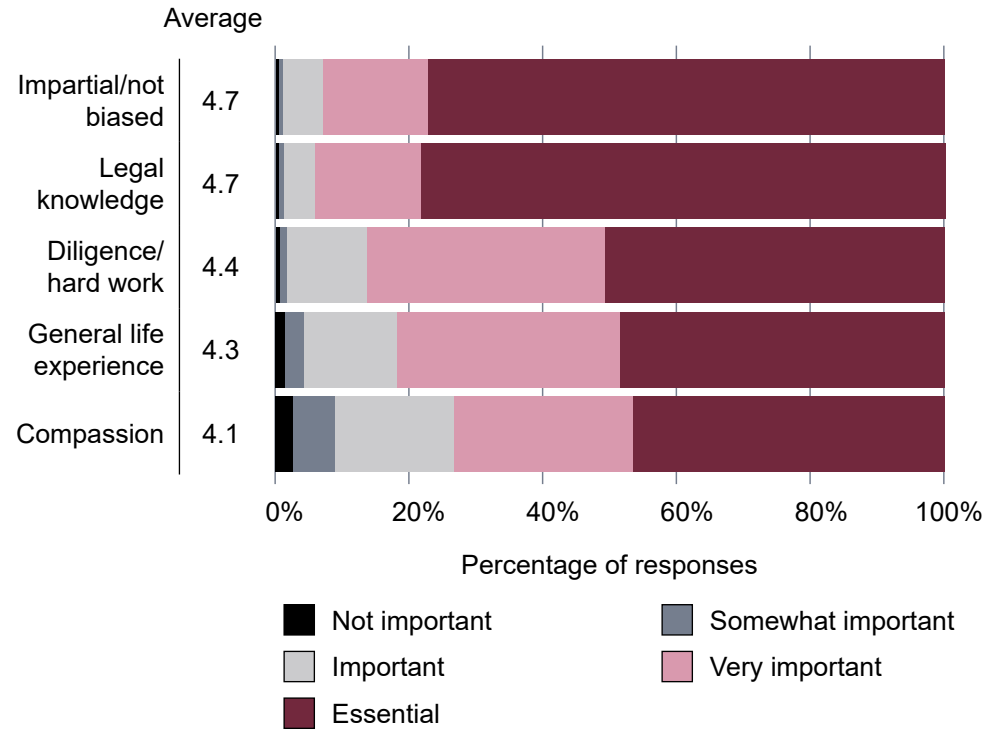
Qualities/skills important to the work of judges and magistrates

5.37 Participants were asked to indicate on a five point scale (from 'not important' to 'essential') the degree of importance they placed on the following qualities/skills for the work of judges and magistrates: impartial/not biased; legal knowledge; diligence/hard work; compassion; and general life experience. This question was based on the same question asked in AuSSA 2007.[28]

28 The 2007 question asked simply about 'impartiality'. This was replaced in 2020 with 'impartial/not biased'. See Timothy Phillips et al, 'Australian Survey of Social Attitudes, 2007' <www.dx.doi.org/10.4225/87/1UPIZO> (ADA Dataverse V1, 2017).

5.38 **Level of importance:** Participants assigned high scores to all qualities/skills, with impartial/not biased and legal knowledge receiving the highest average scores.[29] The breakdown of responses across categories is shown in **Figure 5.4**.

Figure 5.4: Importance of qualities/skills in judges



5.39 Those with a high level of trust in the courts tended to indicate that impartiality/not biased was a more important quality/skill for judges and magistrates, particularly in relation to those who felt it was an essential quality/skill.[30] Overall, 77% (n = 1,118) of participants indicated that impartial/not biased was essential in AuSSA 2020, with a further 16% indicating it was very important. This compares with 63% of participants who considered that impartiality was essential in AuSSA 2017.

Influences on participants' views on courts and judges

5.40 Participants were asked about the importance of various sources of information in informing their views of Australia's courts and judges.

29 Impartial/not biased: average 4.7, median 5; Legal knowledge: average 4.7, median 5; Diligence/hard work: average 4.4, median 5; General life experience: average 4.3, median 4; Compassion: average 4.1, median 4.

30 Eighty-two per cent (n = 493) of those with a high level of trust in the courts (7–10) rated impartial/not biased as 'essential', compared to 71% (n = 347) of those who had medium (4–6) trust in the courts and 73% (n = 232) among those with low (0–3) trust in the courts.

5.41 **Most important sources of information:** The sources were rated on a four point scale (from 'not at all important' to 'very important') with the average importance of all sources falling between 1.8 and 2.7, with medians ranging from 2 to 3. Family was scored the highest (average 2.7, median 3; n = 1,105), followed closely by TV news (n = 1,119), newspapers (print or electronic) (n = 1,110), and direct experience of the courts (n = 1,074) (all with an average rating of 2.6, median 3). Social media ranked least important (average 1.8, median 2; n = 1,093).

Notable relationships

5.42 **Confidence and trust in courts and judges:** Participants with higher levels of confidence in Australia's courts and legal system also generally had greater personal trust in Australia's courts. For example, of those who had complete confidence in the courts, 91% (n = 33) rated their trust in courts as high (7–10) and of those who had no confidence at all in the courts, 98% (n = 43) rated their trust in the courts as low (0–3). Further, of the 526 participants who said they had some confidence in the courts, 50% indicated a medium level of trust in the courts and 33% indicated a high degree of trust. Participants with a higher level of trust or confidence in the courts also had more confidence in the abilities of judges. For instance, 72% (n = 32) of those with complete confidence in Australia's courts and legal system had complete confidence in the ability of judges to be impartial/unbiased, and 44% (n = 43) of those with no confidence in the legal system indicated they had no confidence at all in the ability of judges on this score.

5.43 **Attendance at court and confidence and trust:** Participants who had been present at a court proceeding more often indicated lower levels of confidence in Australia's courts and the legal system.[31] Such participants more often indicated 'very little confidence' in courts and the legal system.[32] Those who had been to court at least once in the last decade also had a lower average level of trust in the Australian courts than those who had not been to court.[33]

5.44 **Source of information and confidence and trust:** In terms of how they formed their views, those with 'no confidence at all' in Australia's courts and the legal system tended to rank direct experience of the courts, family and colleagues, and friends as 'very important' in informing their views.[34]

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31 The average level of confidence of those who had attended court was 3.0 (n = 342) as compared with an average of 3.2 (n = 738) for those who had not attended court.

32 Six per cent of those who had been to court and answered the question on confidence (n = 342) had 'very little confidence' as compared with four per cent of those who had not been to court and responded to the question on confidence (n = 738).

33 Not attended court: average 5.9, median 6 (n = 732); Attended once: average 5, median 5 (n = 207); Attended more than once: average 5.5, median 7 (n = 133). The average level of trust for those who had been to court (aggregated) was 5.2 (n = 340).

34 Of those with 'no confidence at all' in the courts (n = 47): 47% rated direct experience of the courts as 'very important'; 40% rated family as 'very important'; and 28% rated colleagues and friends as 'very important'.

What conclusions can be drawn from the data?

5.45 While AuSSA participants recorded a moderate level of trust and confidence in Australia's judges, courts, and the legal system, the levels of trust and confidence were higher compared with most other institutions and over time:

- The average level of confidence in Australia's courts and the legal system has somewhat increased over time, from 2.8 in 2009, to 2.9 in 2018, and 3.1 in 2020. The median has remained consistent at 3.
- The average level of trust in the courts in 2020 was second highest behind university research centres. Courts were trusted more than business and industry, the Federal Parliament, and the news media. Participants indicated the same average level of trust in the courts in 2017.

5.46 Experience in court was associated with a lower trust and confidence. Those who had been to court in the last decade expressed a lower level of trust in the Australian courts than those who had not been to court. Similarly, those who had been present at a court proceeding disproportionately indicated they had 'very little confidence' in courts and the legal system. Whether participants attended court in relation to a family law matter did not have a discernible impact on their level of confidence.

5.47 A greater proportion of those with 'no confidence at all' in Australia's courts and the legal system rated direct experience of the courts, family, and 'friends and colleagues' as 'very important' in informing their views of Australia's courts and judges.

5.48 While the vast majority of participants regarded the skill/quality of being impartial/not biased as essential for judges and magistrates, participants' confidence in the ability of judges to be impartial/unbiased was assigned a lower score and ranked fourth out of eight confidence variables.

ALRC Survey of Judges

5.49 In April 2021, the ALRC conducted an anonymous survey of judges of the Commonwealth courts.[35] The ALRC conducted the survey to address gaps in knowledge identified in its research including in relation to:

- the frequency of early stage recusal by judges, and the reasons for such recusals;
- the frequency of disqualification applications, the profile of the applicants, the nature of the issues raised, and the success rate of the applications; and
- the extent to which judges consult with colleagues prior to making decisions on disqualification applications.

35 Excluding the High Court. Judges of the High Court were excluded because they are so few in number (seven) that it would likely be easy to identify each judge based on their responses. The anonymity of the survey could therefore not be guaranteed.

5.50 The ALRC also sought to canvass Commonwealth judges' views on issues raised by the Inquiry including:

- the sufficiency and appropriateness of the procedures and law on actual and apprehended bias;
- specific proposed reforms;
- the need or otherwise for further guidance on procedures and law; and
- structural and systemic issues supporting, and inhibiting, judicial impartiality.

5.51 The survey consisted of 50 questions and was conducted online. The anonymous survey link was emailed to all 147 judges who held office on 12 April 2021 in the Federal Court, the Family Court, and the Federal Circuit Court. A total of 61 judges (or 40% of judges) participated in the survey. All survey questions were voluntary and not all judges responded to all questions.[36]

5.52 The survey provided the ALRC with insight into how participants experience and view a number of key issues related to judicial impartiality. It also provided the ALRC with a better understanding of whether there are areas of law and procedure relating to bias that Commonwealth judges consider require modification or clarification.

5.53 A full description of the methodology of the survey and potential limitations of the data is included at **Appendix F**, and a copy of the survey questions is available with the supplementary materials on the ALRC's website.[37]

Other relevant studies

5.54 Prior to the ALRC's survey, there had not been specific research conducted in Australia on the frequency with which issues of disqualification arise, how judicial officers deal with these issues in practice, and the sources of potential bias that are most frequently raised.

36 The response rate for the number of participants who answered any given question is reported as 'n = X'. For further detail see footnote 2 above, and **Appendix F**.

37 Australian Law Reform Commission, 'ALRC Survey of Judges Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Judges-Questions.pdf>.

5.55 However, there has been some empirical research conducted in Australia that has explored judges' views on impartiality and institutional structures relating to it in the context of wider inquiries into judicial work.[38]

5.56 Of particular significance, Professors Roach Anleu and Mack conducted two surveys of Australian magistrates, the first in 2002 and the latter in 2007, to investigate the everyday work practices of magistrates as well as the experiences of magistrates as part of Australian society and as judicial officers.[39] More recently, Professors Appleby, Le Mire, Lynch, and Opeskin conducted a survey of Australian judicial officers which included questions about judicial complaints and disciplinary action, eliciting responses relevant to managing judicial conduct.[40]

5.57 The ALRC has also had regard to a number of studies conducted in overseas jurisdictions that have considered the experiences of judicial officers and how issues of bias and recusal or disqualification are dealt with. Relevant studies include:

- a 1994 survey of judges in four US states on disqualification practices conducted by Professors Shaman and Goldschmidt;[41]
- a 2006 survey by a special committee of the Hawaii Chapter of the American Judicature Society, which asked 108 state and federal judges in Hawaii a series of questions about their experiences with recusal and disqualification;[42]
- a study of 137 Canadian provincial and territorial judges published in 2011 in which the judges were asked to indicate whether they would recuse themselves in 32 hypothetical scenarios and for general comments on their experiences with disqualification; [43] and

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38 See, eg, Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299; Sharyn Roach Anleu and Kathy Mack, 'Managing Work and Family in the Judiciary: Metaphors and Strategies' (2016) 18 *Flinders Law Journal* 213; Sharyn Roach Anleu and Kathy Mack, 'Judicial Performance and Experiences of Judicial Work: Findings from Socio Legal Research' (2014) 4(5) *Oñati Socio-Legal Series* 1015; Anne Wallace, Kathy Mack and Sharyn Anleu Roach, 'Work Allocation in Australian Courts: Court Staff and the Judiciary' (2014) 36(4) *Sydney Law Review* 669; Sharyn Roach Anleu and Kathy Mack, 'Job Satisfaction in the Judiciary' (2014) 28(5) *Work, Employment & Society* 683; Kathy Mack and Sharyn Roach Anleu, 'In Court Judicial Behaviours, Gender and Legitimacy' (2012) 21(3) *Griffith Law Review* 728; Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of FIndings' (2008) 18 *Journal of Judicial Administration* 5; Sharyn Roach Anleu and Kathy Mack, 'The Security of Tenure of Australian Magistrates' (2006) 30(2) *Melbourne University Law Review* 370.

39 Judicial Research Project, 'National Survey of Australian Magistrates 2002' <sites.flinders.edu.au/judicialresearchproject/national-surveys/national-survey-of-australian-magistrates-2002/>; Judicial Research Project, 'National Survey of Australian Magistrates 2007' <sites.flinders.edu.au/judicialresearchproject/national-surveys/national-survey-of-australian-magistrates-2007/>.

40 Appleby et al (n 38).

41 Jona Goldschmidt and Jeffrey Shaman, 'Judicial Disqualification: What Do Judges Think' (1996) 80(2) *Judicature* 68, 69–70.

42 'Survey of Hawaii Judges Explores Disqualification and Recusal Issues' (2008) 92 *Judicature* 34.

43 Philip Bryden and Jula Hughes, 'The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification' (2011) 48(3) *Alberta Law Review* 569, 574.

- a 2020 survey of the attitudes of judicial officers in the UK to court issues and the role of a judge.[44]

5.58 Other experimental studies have been conducted to explore judicial officers' biases, which are set out in greater detail in **Chapter 4**.[45]

Key data from the ALRC Survey of Judges

Experience with recusal and self-disqualification

5.59 The survey asked judges to report their experiences with recusal and self-disqualification both before and after a case had been allocated to them.

5.60 **Reallocation before parties notified:** Two-thirds of judges surveyed (40; n = 61) indicated that they have requested a case be reallocated before the parties have been notified of allocation. Twenty-six reported that they do so, on average, less than one time per year.[46] Participants were asked to select all applicable reasons for recusal in these circumstances (n = 66).[47] The two most frequently selected reasons for recusal were association (relationship with party/counsel/witness) (26) and prior involvement in the case as a judge (16).

5.61 **Recusal on own initiative:** Once the parties have been notified of the allocation, 31 (n = 61) judges reported that they have recused themselves on their own initiative. Twenty-four judges indicated that they do so, on average, less than one time per year. For judges who received less than one request a year, the reported average was one request every five years.[48] Participants were asked to select all applicable reasons for recusal in these circumstances.[49] The two most frequently selected reasons (n = 38) for recusal in these circumstances were association (relationship with party/counsel/witness) (19) and prejudgment (8).

5.62 **Party disqualification requests:** Forty-three (n = 61) judges indicated they have either never been asked to recuse or disqualify themselves (10) or are asked, on average, less than once a year (33).[50] Sixteen judges reported they receive requests on average one or more times per year, with eight of those judges reporting they

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44 UCL Judicial Institute, '2020 UK Judicial Attributes Survey: Report of Findings Covering Salaried Judges in England and Wales Courts and UK Tribunals' (4 February 2021) <www.judiciary.uk/announcements/judicial-attitudes-survey/>.

45 See, eg, Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice' (2009) 58(7) *Duke Law Journal* 1477.

46 The average was once every four and a half years. Not all judges specified the frequency and those who did specify did not always provide a number that could be used to calculate an average.

47 Participants could select multiple responses, which is why the ALRC received a greater number of responses (66) than participants reporting reallocation (40).

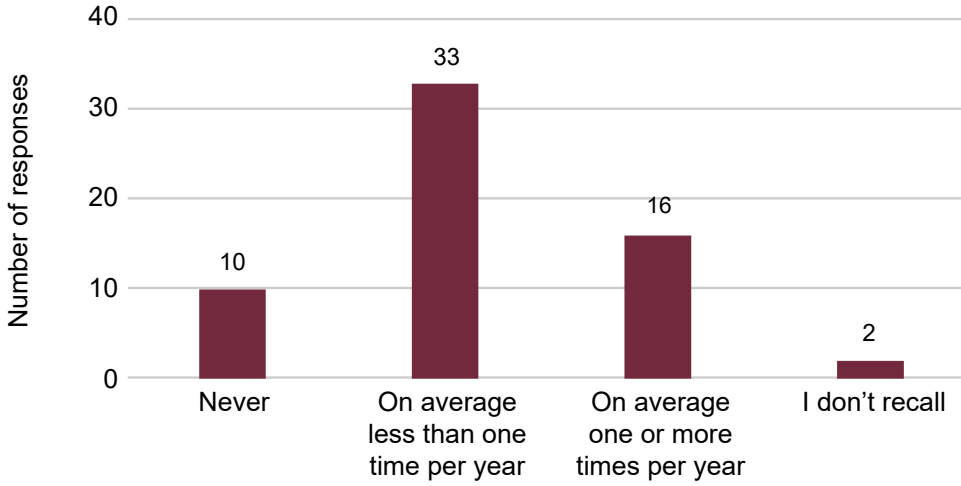
48 Not all judges specified the frequency and those who did specify did not always provide a number that could be used to calculate an average.

49 Participants could select multiple responses to this question.

50 For judges who received less than one request a year, the reported average was one request every four years. Not all judges specified the frequency and those who did specify did not always provide a number that could be used to calculate an average.

typically receive more than one request per year. These responses are illustrated in **Figure 5.5** below. There does not appear to be a pattern regarding frequency of recusal application and the court on which the judge sits.

Figure 5.5: Frequency of disqualification requests reported by judges



5.63 **Representation status of litigants making requests:** Twenty-four (n = 47) judges indicated that 'most to all' requests came from self-represented litigants. Fifteen reported that 'none' or 'less than half' of requests came from self-represented litigants (that is, more than half came from lawyers).[51]

5.64 **Outcome of requests for disqualification:** For those judges who have been asked to recuse or disqualify themselves, 28 (n = 48) had never granted a request for recusal/disqualification. A further 13 judges said that 'some, but less than half' of the applications resulted in recusal/disqualification. Four judges reported that 'most to all' applications were successful.

5.65 **Grounds of bias:** Judges were asked to indicate all applicable grounds of bias that were raised most frequently by parties and that resulted in recusal/self-disqualification (n = 82).[52] The most frequent grounds reported were prejudgment (35), association (relationship to party/counsel/witness) (13), and conduct in court (12). Participants indicated (n = 29) that the grounds on which they most frequently recused/disqualified themselves were prejudgment (10) and association (relationship to party/counsel/witness) (9).

51 The response categories were: None; Some, but less than half; Half; More than half, but not most; Most to all.

52 Participants could select multiple responses.

Views on existing procedures and law, and proposed reforms

5.66 Judges were asked for their perspectives on the existing procedure and law relating to judicial impartiality, as well as a series of proposed reforms.

5.67 **Ability to deal with recusal situations on appointment:** Forty-one (n = 57) judges agreed that at the time they took up their appointment they were well-equipped to manage situations where parties raise issues of actual and apprehended bias.

5.68 **Use of bias claims:** Fifty (n = 59) judges reported that existing procedures for raising issues of bias encourage appropriate use of bias applications. More participant judges of the Family Court thought that existing procedures encourage overuse/abuse than did the judges of the Federal Court and Federal Circuit Court. Six judges, five of whom were from the Family Court (n = 13), responded that the procedures encouraged overuse/abuse. Three judges indicated that the procedures encouraged underuse. No judges from the Family Court reported that the procedure encouraged underuse.

5.69 **Specific guidance on procedure:** Two thirds (38; n = 57) of judges agreed that it would be helpful if there were more specific guidance for judges on the procedures judges and parties should follow when issues of bias arise. Thirty-six (n = 56) judges also thought such procedural guidance would be helpful for parties. With regard to what form this guidance should take, judges most frequently suggested it should be as part of a bench book or a Practice Note or Practice Direction.

5.70 **Views on single judge transfer:** For single judge cases, judges were asked whether there were circumstances where it would be preferable that an application for disqualification be decided by: (i) another judge; or (ii) a panel of judges. A majority of judges (38; n = 54) did not think there were circumstances where it was preferable to transfer the bias application to a panel of judges.

5.71 Thirty-one judges (n = 60) did not think there were circumstances where it was preferable to transfer the application to another judge. Seventeen judges agreed there were circumstances where transfer to another judge would be preferable and a further 12 were unsure. The judges of the Family Court who responded to the survey were less supportive of the single judge transfer procedure than were the judges of the Federal Court and Federal Circuit Court. The highest level of support for the transfer of bias applications to another judge for determination in single judge cases came from the judges in the Federal Circuit Court (11; n = 29), while the lowest level of support was reported by judges in the Family Court (where only one of 13 judges supported the potential reform). Five (n = 18) judges of the Federal Court supported this reform option.

5.72 **Views on disqualification decision by multimember panels:** For decisions where the court is sitting as a panel (rather than a single judge sitting alone), judges were asked whether there are circumstances where it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the judge concerned. Twenty-four (n = 59) judges felt there were

not circumstances where it would be preferable for the full bench to determine an application instead of the judge concerned. Twenty-two judges who responded to this question were unsure whether the reform would be preferable in certain circumstances. Thirteen judges agreed there would be circumstances in which the proposed reform of the procedure for panels would be preferable.

5.73 **Test for bias:** With regard to the law, 51 (n = 58) judges found the legal test for bias to be generally straightforward to apply. Of the five judges who thought the test was not generally straightforward to apply and the two judges who were 'unsure', a majority of responses (4; n = 7) indicated that test was particularly difficult to apply in relation to cases raising prejudgment as the ground of bias. Participants could give multiple reasons for difficulty.

5.74 **Additional guidance on circumstances giving rise to bias:** A majority of judges agreed there would be benefit in guidance (for judges, lawyers and/or litigants) in setting out particular circumstances that will: (i) always or almost always give rise to apprehended bias (32; n = 58); and (ii) never or almost never give rise to apprehended bias (33; n = 58).

Training, education, and other support

5.75 **Consultation with colleagues:** Twenty-eight (n = 61) judges indicated that they rarely (16) or never (12) consult colleagues before deciding whether to recuse or disqualify themselves. This compares with just over a quarter (15) who responded that they usually (12) or always (3) consult colleagues. Thirteen (n = 57) judges agreed that it would be helpful for judges to have access to additional practical support or guidance when making decisions on recusal and disqualification. Judges most frequently raised mentorship by another judge or retired judge as a potential additional support in the open text response field.

5.76 **Guide to Judicial Conduct:** Forty-one (n = 56) participants agreed that the *Guide to Judicial Conduct* provides appropriate guidance on how to minimise the risk of circumstances or conduct giving rise to actual and apprehended bias.

5.77 **Implicit bias:** Thirty-two (n = 56) judges indicated they had taken implicit bias training, and all but one of those participants found the training to be somewhat (22) or very (9) helpful. Almost 9 in 10 judges (49; n = 56) agreed that it is important for judges to take active steps to mitigate any potential negative effects of unconscious or implicit bias in their work. With regard to resources that could help to mitigate any potential negative effects of unconscious or implicit bias, a majority of judges responded that seven of eight suggested resources would be at least somewhat helpful. The highest level of support was for workshops on cross-cultural competency (46; n = 52), followed by practical workshops on implicit bias (42; n = 52).

5.78 **Challenges to judicial impartiality:** Judges identified a wide range of challenges to judicial impartiality in their responses to open-ended questions that do not directly relate to the law and procedure on recusal and disqualification. The most common issues that judges identified as challenges to upholding judicial impartiality

were dealing with self-represented litigants (14 judges) and inadequate resourcing/ high caseloads (six judges).[53] In their further comments, two judges also suggested that a more structured appointment process was an important reform that would support and strengthen judicial impartiality, and an additional two judges raised the need for an independent judicial complaints body.[54]

What conclusions can be drawn from the data?

5.79 The judges who responded to the survey were comfortable with how the current law and procedure relating to applications for disqualification operate, but nevertheless agreed that more guidance would be helpful:

- Almost two thirds of judges agreed there was benefit in additional procedural guidance for parties. Three-quarters of judges nonetheless reported that the existing procedures encourage the appropriate use of bias applications. A similar proportion agreed there was benefit in this type of guidance for judges.
- A majority of judges agreed there would be benefit in guidance (for judges, lawyers, and/or litigants) in setting out particular circumstances that will always or almost always, or never or almost never, give rise to apprehended bias. This is despite the finding that well over three-quarters of judges found the legal test for bias to be generally straightforward to apply.

5.80 Although the judges who participated in the survey largely thought the existing procedure encouraged appropriate use of bias applications, the data suggested that there was not strong opposition to reform. Almost half of the judges were either supportive of, or uncertain as to whether, a single judge transfer procedure would be preferable and this rose to just over three-fifths of judges for the proposed reform for multimember panels.

ALRC Survey of Lawyers

5.81 During a three week period over July to August 2021, the ALRC conducted an anonymous survey of lawyers who have been admitted into practice in an Australian state or territory, and who have practised in Australia in the past five years.

5.82 The ALRC was told in the course of consultations that lawyers may be hesitant to speak openly about their experiences of judicial disqualification and bias, particularly where they work within a small pool of lawyers (whether owing to the size of the jurisdiction or area of legal expertise). The ALRC Survey of Lawyers was therefore designed to provide a way for lawyers to confidentially provide their views to the ALRC on issues raised by the Inquiry. The ALRC was interested in exploring:

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53 The question that elicited these responses was: 'What, if any, do you see as the main challenges to upholding judicial impartiality in your work as a judge?'

54 The questions that elicited these responses were: 'Do you have any further comments on the procedures for recusal/disqualification?'; 'Do you have any further comments on your experience with recusal or disqualification for actual or apprehended bias?'.

- whether lawyers' views matched those of judges in relation to the sufficiency and appropriateness of the law and procedures relating to actual and apprehended bias, and some proposed reforms;
- whether lawyers considered there was a need for further guidance on the procedures and the law; and
- whether lawyers had perceived bias directed against them personally, or against other participants in the proceedings, and if so, how they experienced that bias and why they thought that it had arisen.

5.83 The survey consisted of 73 questions, and was conducted online over a period of three weeks. The anonymous survey link was distributed through the Law Council of Australia and its constituent bodies, sections, and committees, as well as to the four member-organisations of the Australian Legal Assistance Forum. A self-selected sample of 211 lawyers participated in the survey. All survey questions were voluntary and not every participant responded to every question.[55]

5.84 The survey findings provided the ALRC with a tool for obtaining the views of a large number of lawyers across Australia. The survey responses afford an insight into how these participating lawyers, a good proportion of whom had experience with disqualification applications, view a number of key issues related to judicial impartiality. The survey was not intended to be representative of all lawyers in Australia. All conclusions relate only to the experience of lawyers who participated in the survey.

5.85 A full description of the methodology of the survey and potential limitations of the data is included at **Appendix F**, and copies of the survey questions and data are available with the supplementary materials on the ALRC's website.[56]

Other relevant studies

5.86 A small number of practitioner surveys have touched on issues related to the Inquiry. For example, in 2018, the Victorian Bar conducted a Quality of Working Life Survey in which it surveyed 856 barristers on a variety of issues, including workplace bullying (and therefore also bullying by judges).[57] The International Bar Association also conducted a survey in 2018 on bullying and sexual harassment in the legal profession.[58] Nearly 7,000 individuals from law firms, in-house counsel, barristers' chambers, government, and the judiciary across 135 countries responded.[59]

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55 The response rate for the number of participants who answered any given question is reported as 'n = X'. For further detail see footnote 2 above, and **Appendix F**.

56 Australian Law Reform Commission, 'ALRC Survey of Lawyers Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Lawyers-Questions.pdf>; Australian Law Reform Commission, 'ALRC Survey of Lawyers Data' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Lawyers-Data.pdf>.

57 The Victorian Bar, *Quality of Working Life Survey* (October 2018).

58 Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (International Bar Association, 2019).

59 Ibid 11.

Key data from ALRC Survey of Lawyers

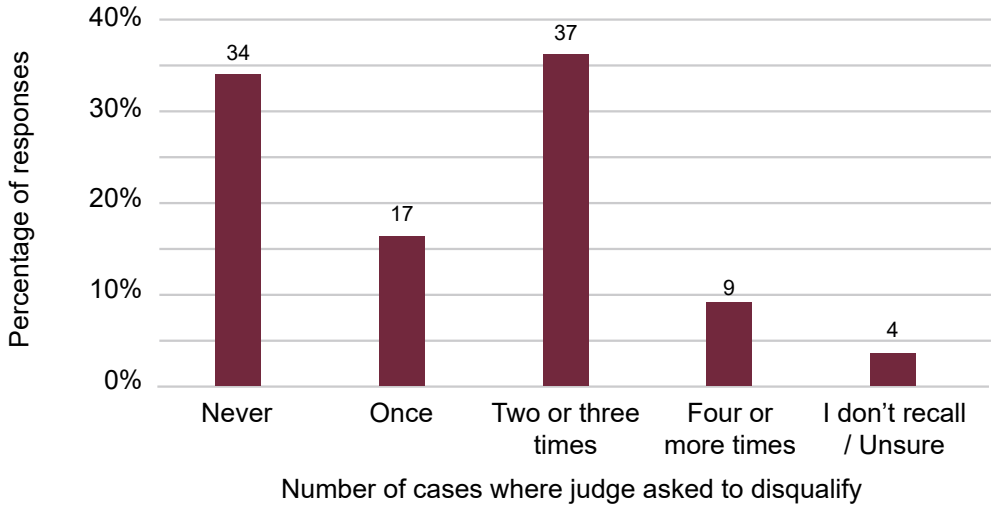
Experience with judicial disqualification

5.87 The survey asked lawyers to report their experiences with judicial disqualification across state and territory courts and Commonwealth courts. These responses helped indicate the extent to which responses to other questions were informed by direct experience and the proportion of applications brought by participating lawyers that are successful and brought by legally represented litigants.

5.88 **Involvement in case where judge asked to disqualify:** Thirty-four per cent (n = 210) of participants had never been involved in a case where a judge was asked to disqualify herself or himself for actual or apprehended bias. Conversely, 63% of participants had been involved in such a case. See **Figure 5.6** below for further detail. There were 77 participants who had been involved in two or three such cases. Eighteen lawyers had been involved in four or more cases involving a request for judicial disqualification, and also specified the number of times they had been in such cases, reporting the issue as having arisen in an average of nine cases.

5.89 The frequency of experiences with judicial self-disqualification among participants was high compared with the frequency with which the issue of bias is raised, as revealed by the empirical case research discussed below. It is also high in comparison to what the ALRC heard from lawyers involved in consultations.[60]

Figure 5.6: Involvement in cases where judge asked to disqualify



60 This may be as a result of a self-selection bias whereby those lawyers who have previously been involved in a case that has raised the issue of bias are more inclined to participate in the survey.

5.90 **Outcomes of applications and representation status:** Participants involved in litigation where disqualification applications were made indicated that the majority of applications were made by practitioners (on behalf of clients) and were unsuccessful. Sixty per cent (n = 124) reported that none of the applications had come from self-represented litigants. Fewer than one in six lawyers (16%) indicated that the majority of applications they had experienced came from self-represented litigants.

5.91 Fifty-two per cent (n = 127) of the lawyers who had been involved in a case where a disqualification application was made for bias reported that none of the applications had resulted in recusal/disqualification. Seventy-eight per cent of participants reported that the applications had been successful less than half of the time.

5.92 **Non-disclosure by judges:** Almost one third of participants (32%; n = 206) indicated they had previously been involved in a case where they thought a judicial officer should have disclosed something that might give rise to apprehended bias, but did not do so. Eighteen per cent had been involved in more than one case where this had occurred. Fifty-nine per cent of participants had not been involved in such a situation (9% indicated they did not recall or were unsure).

5.93 **Contact with registry or chambers to request reallocation:** Fewer than one in 10 participants (9%; n = 211) reported that they had contacted a court's registry to request reallocation of a case to a different judicial officer on bias grounds at least once. One in seven participants (14%) had contacted a judge (for example, through that judge's chambers) to raise an issue of bias.

5.94 **Decision not to raise issue of bias:** Fifty-eight per cent (n = 207) of the lawyers surveyed reported having made the decision (either directly themselves or as part of a legal team) not to raise an issue of actual or apprehended bias with a judicial officer, even though they believed there were strong grounds to raise it. Participants were asked to select all applicable reasons for not having raised the issue with the judge from a list of options provided in the survey, which is why there were a greater number of responses (352) than participants who were eligible to respond to the question (120). The three most common reasons given were: concern that raising it would impact negatively on the case (29%; n = 352); the fact that the disqualification decision would be made by the judicial officer concerned (18%); and concern that raising it would impact negatively on their own career (15%). Concerns relating to additional costs and potential for delay were also common reasons selected (13% each).

Views on existing procedures and law, and proposed reforms

5.95 **Use of bias claims:** When asked about the existing procedures for raising issues of bias, 74% (n = 192) of participants indicated that the existing procedures encourage underuse of bias claims. Only four lawyers suggested that the existing procedures encourage overuse/abuse of bias claims. A disproportionate number of

lawyers who were not of North-West European ancestry (40; n = 46) reported that the existing procedures encouraged the underuse of bias claims.[61]

5.96 **Clarity of procedures:** Participants were almost evenly split as to whether the procedures for raising and appealing issues of judicial bias are clear.[62] Men (compared with women) and those who had been practising for longer tended to agree more that the procedures were clear,[63] as did lawyers whose ancestry was North-West European.[64] Lawyers who indicated that at least half of the applications for bias in cases in which they had been involved came from self-represented litigants also expressed a higher degree of agreement that the procedures were clear.[65]

5.97 **Additional guidance:** Eighty-six per cent (n = 194) agreed that it would be helpful for lawyers if there was more specific written guidance on the procedure judicial officers and parties should follow when issues of bias arise.[66] Again, gender and years of practice seemed to influence this question, with more women and less experienced lawyers expressing greater support for guidance.[67] Those participants who were not of North-West European ancestry were also more supportive of guidance.[68]

5.98 **Views on single judge transfer:** In a question mirroring that asked in the ALRC Survey of Judges, participants were asked in relation to single judge cases whether there are circumstances where it would be preferable that an application for disqualification be decided by: (i) another judge (for example, a duty judge); or (ii) a panel of judges. Eighty-four per cent (n = 183) of participants responded that there are circumstances where it would be preferable for an application for disqualification to be decided by another judge (for example, a duty judge) (7% disagreed and 9% were unsure). Sixty-one per cent (n = 177) indicated there were circumstances in which it would be preferable for a panel of judges to decide the application (18% disagreed and 21% were unsure). Almost all (43; n = 45) lawyers who identified as not being of North-West European ancestry supported the transfer of the decision to another judge (for example, a duty judge) in single judge cases.

5.99 **Views on disqualification decision by multimember panels:** In a further question that mirrored a question asked in the ALRC Survey of Judges, participants were asked, in relation to cases where the court is sitting as a panel, whether there are

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61 Those who preferred not to indicate their ancestry were excluded from the analysis.

62 Forty-two per cent agreed, 43% disagreed, and 16% neither agreed nor disagreed (n = 195).

63 Men: average 3.3, median 4 (n = 77); Women: average 2.6, median 2 (n = 91).

64 North-West European: average 3.2, median 3 (n = 101); Not North-West European: average 2.6, median 3 (n = 46)

65 None: average 3, median 3 (n = 73); Some, but less than half: average 2.8, median 3 (n = 20); Half: average 3.5, median 3.5 (n = 8); More than half but less than all: average 3.2, median 3.5 (n = 6); Most to all: average 3.6, median 4 (n = 14).

66 Six per cent disagreed and 8% neither agreed nor disagreed.

67 Men: average 4.1, median 4 (n = 77); Women: average 4.6, median 5 (n = 91). Zero to 4 years practice: average 4.7, median 5 (n = 27); 5 to 9 years practice: average 4.5, median 5 (n = 28); 10 or more years practice: average 4.2, median 5 (n = 139).

68 Not North-West European: average 4.7, median 5 (n = 46); North-West European: average 4.1, median 4 (n = 101).

circumstances where it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the judge concerned. Eighty per cent (n = 189) of participants felt there are circumstances where it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the judge concerned (6% disagreed and 14% were unsure).

Law on bias

5.100 **Test for bias:** Seventy-one per cent (n = 187) of participants found the test for bias to be generally straightforward for legal practitioners to understand (20% disagreed and 9% were unsure). Public sector solicitors indicated a higher level agreement that the test was straightforward to understand (86%; n = 29), whereas barristers recorded lower levels of agreement (65%; n = 66).

5.101 **Additional guidance on circumstances giving rise to bias:** Participants saw benefit in more guidance relating to the law on bias. Eighty-two per cent (n = 186) of participants agreed that there would be benefit in guidance setting out circumstances that will always or almost always give rise to apprehended bias (11% disagreed and 6% were unsure). A greater level of strong agreement was recorded among those who had a significant practice in family law (66%; n = 50) as compared with overall (54%; n = 186). Similarly, 72% (n = 184) of participants agreed that there would be benefit in guidance setting out circumstances that will never or almost never give rise to apprehended bias (17% disagreed and 10% were unsure).

5.102 **Rules about contact between judges and lawyers:** Seventy per cent (n = 186) of lawyers agreed that there should be greater specificity in the written professional rules about appropriate contact between judicial officers and lawyers appearing in cases before them. Those who had a significant practice in family law were more inclined to strongly agree (62%; n = 50) that there should be greater specificity than overall (46%; n = 186).

Experiences of bias in the Commonwealth courts

5.103 Participants were asked whether they had experienced bias personally or directed towards another participant in proceedings in the Commonwealth courts. If they answered ‘yes’ they were directed to a series of questions about how that bias manifested, what they perceived to be the basis of it, and whether they felt existing mechanisms were sufficient to respond to it.

5.104 **Personal experiences of bias:** Fifty-seven per cent (n = 145) of participants who answered questions in relation to personal experiences of bias in the Commonwealth courts reported that they had never felt that a judge had been biased against them personally. Thirty-five per cent indicated that they felt a judge had been biased against them at least once.[69]

69 The remaining participants were unsure or did not recall.

5.105 **Perception of reason for bias:** Lawyers who indicated that they had experienced personal bias (n = 51) were asked to select all applicable reasons from a list of options about what made them feel the judge had been biased against them. The most common response was intemperate language (38%; n = 110), followed by gestures or other actions (for example, body language) (33%). They were then asked to indicate what they perceived as the reason(s) for the bias by selecting from a list of options. Thirty-five per cent (n = 71) of responses indicated that they thought it was on account of their personal or assumed characteristics, with gender being the most frequently specified characteristic (8 participants). A quarter of responses indicated it related to past interactions with the judge and another quarter attributed the bias to 'other' reasons, which were quite wide-ranging among those who specified those reasons.

5.106 **Sufficiency of mechanisms to respond:** Among participants reporting bias, half (23; n = 51) strongly disagreed that the law and/or other existing mechanisms available for Commonwealth court matters were generally appropriate to deal with the bias they experienced. A further 14 participants somewhat disagreed with this statement.

5.107 **Action other than disqualification application:** In circumstances where they thought actual or apprehended bias had arisen, one in nine participants (11%; n = 142) took action other than: (i) making a bias application; or (ii) appealing on the grounds of bias. Participants who only spoke English at home were underrepresented among those who have taken other action. From the list of options provided in the survey, the most common action taken was removing oneself from the case (11; n = 24).

5.108 **Perception of bias against another participant in proceedings:** With respect to bias against a third party in the proceedings, 55% (n = 143) of survey participants indicated that they felt that a judge had been biased against their client or another participant in the proceedings, with more than one in seven (15%) indicating that this had happened on four or more occasions.

5.109 **Perception of reason for bias:** Lawyers who indicated that they felt a judge had been biased against a third party in the proceedings were asked to select from a list of options about what made them feel the judge had been biased. As in situations of personal bias against the lawyer, the most common response was intemperate language (37%; n = 164), followed by gestures or other actions (for example, body language) (34%). When asked what they thought the basis for the bias was, 37% responded that they thought it was on account of the personal or assumed characteristics of the individual, with ethnicity being the most frequently specified characteristic (10 participants). Thirty-two per cent of participants attributed the bias to 'other' reasons, which were again wide-ranging among those who specified those reasons.

5.110 **Sufficiency of mechanisms to respond:** Thirty-seven per cent (29; n = 78) strongly disagreed that the law and/or other existing mechanisms available for Commonwealth court matters were generally appropriate to deal with the bias they observed. A further 25 participants somewhat disagreed with this statement. Eleven participants strongly or somewhat agreed that the law and existing mechanisms were generally appropriate.

Reforms to maintain public confidence

5.111 Lawyers were asked to use an 11 point scale (where 0 was 'not required at all' and 10 was 'essential') to rank the importance of a list of five possible changes or reforms in the Commonwealth courts to maintain public confidence in judicial impartiality.

5.112 **Most important and least important reforms:** Participants indicated that they thought more effective complaints procedures concerning judges was the most important reform (average 8.1, median 9; n = 170), followed by increased diversity of background among judges (average 7.7, median 9; n = 160). Participants assigned an average value of 7.1 (median 8; n = 170) to reform to procedures for disqualification of judges. This made reform to procedures for disqualification the third most important reform based on ranking average values assigned to each possible reform. Participants assigned the least importance to reform of the test for apprehended bias (average 6.0, median 6; n = 157).

5.113 **Impact of demographic factors on scores:** Women, lawyers who were not born in countries with a common law legal tradition and a majority white culture, and those whose ancestry was not North-West European, assigned higher importance to more effective complaints procedures concerning judges than other participants.

5.114 Participants whose ancestry was not North-West European valued reform to procedures for disqualification more highly on average.[70] Participants with a significant practice in family law also assigned a higher score to this reform on average.[71]

5.115 Women tended to place much higher value than men on the importance of increased diversity of background among judges.[72] Younger participants ranked this reform higher than older participants across each age bracket.[73] When looking

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70 North-West European: average 6.8, median 7 (n = 96); Not North-West European: average 8.1, median 8 (n = 44).

71 Family law practice: average 7.9, median 8 (n = 54); Not family law: average 6.8, median 7 (n = 157).

72 Women: average 8.8, median 10 (n = 92); Men: average 6.2, median 7 (n = 77). Less experienced lawyers, lawyers with disability, and lawyers who were not born in countries with a common law legal tradition and a majority white culture, and those whose ancestry was not North-West European also rated increased diversity of background among judges as more important.

73 20 to 30 years of age: average 9.1, median 10 (n = 17); 31 to 40: average 8.2, median 10 (n = 50); 41 to 50: average 8.1, median 9 (n = 36); 51 to 60: average 7.1, median 9 (n = 39); 61 and older: average 6.2, median 7 (n = 35).

at participants broken down by their current role in the profession, not-for-profit solicitors ranked this reform highest and barristers ranked it lowest.

5.116 Those with a substantial practice in family law ranked reform to the test for apprehended bias higher than others. Lawyers who were not born in countries with a common law legal tradition and a majority white culture also ranked this reform more highly, as did those whose ancestry was not North-West European.

What conclusions can be drawn from the data?

5.117 Lawyers who responded to the survey generally viewed the existing procedures for raising issues of bias unfavourably:

- Almost three quarters of participants indicated that the existing procedures encourage underuse of bias claims. Less than half of participants agreed that the procedures for raising and appealing issues of judicial bias are clear. Furthermore:
    - At least four-fifths of participants supported the single judge transfer procedure and the full bench multimember panel procedure.
    - More than four-fifths of participants supported more specific written guidance on the procedures that judges and parties should follow for judicial disqualification.

5.118 Participants expressed less concern about the legal test for actual and apprehended bias.[74] However, an overwhelming majority of participants wanted more guidance on substantive dimensions of the law on bias.

5.119 The majority of participants felt they had witnessed a judge exhibiting bias towards a participant in a court proceeding and felt that the existing the law and/or other existing mechanisms available for Commonwealth court matters were not generally appropriate to deal with the bias.

5.120 The lawyers who responded to the survey indicated that public confidence in judicial impartiality would be better-supported by reforms that reached beyond the law and procedure. From a list of five possible changes or reforms, participants ranked more effective complaints procedures concerning judges as the most important reform, followed by increased diversity of background among judges. Diversity was particularly important to several subgroups of participants, including women, younger lawyers, and not-for-profit solicitors.

5.121 The experience of lawyers and judges with respect to the success rate of applications for judicial disqualification was similar.

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74 Seventy-one per cent (n = 187) found the test for bias to be generally straightforward to understand, and from a list of five potential reforms, participants assigned this reform the lowest average value.

ALRC Survey of Court Users

5.122 Over a period of approximately four weeks in July and August 2021, the ALRC conducted a survey of members of the public who had attended any state, territory, or Commonwealth court for non-criminal proceedings in Australia in the past 10 years.

5.123 The Commonwealth courts do not systematically collect feedback from users of the courts, including litigants. Building on the consultations the ALRC conducted with litigants who had concerns about impartiality and bias, the ALRC was interested in accessing a broader sample of people who had attended courts in Australia to explore:

- the overall levels of confidence in the courts among individuals attending in different capacities;
- how individuals attending court in different capacities viewed the handling of proceedings by judges;
- the extent to which individuals who had attended court saw judicial bias as a concern in proceedings;
- conduct or circumstances that individuals attending court thought reflected well on courts;
- factors underlying perceptions of bias or unfairness in proceedings; and
- whether individual litigants who had concerns about bias had raised this with their lawyer or the judge, and if they were satisfied with the response.

5.124 The ALRC determined that many court users would be unlikely to be able to distinguish between the different jurisdictions and therefore included both Commonwealth and state and territory court users in the survey population. In addition, the ALRC was interested in gauging the views of attendees at all courts in Australia rather than the views of attendees at Commonwealth courts only to ensure that the broadest range of views, issues, sentiments and ideas could be captured. Where necessary, the ALRC has focused on views expressed by attendees at Commonwealth courts only.

5.125 The survey was conducted online and administered by Qualtrics through market research panels. Initial questions screened participants out of the survey if they were a practising lawyer, if they had not attended court in the past 10 years, or if they had only attended criminal law proceedings in the past 10 years.

5.126 Participants who made it through screening were asked questions about the court they attended, what the proceedings were about, and the capacity in which they attended proceedings. The survey then asked a series of questions about the participant's views of how the judicial officer handled the proceedings, whether there were any concerns of judicial bias, what impressed the participant about proceedings and what they would like to see changed, their assessment of the overall fairness of proceedings, and the participant's level of confidence in the courts.

5.127 A total of 4,206 participants took part in the survey, with the majority being screened out following the initial questions. The final dataset comprised responses from 490 participants.[75] The dataset and a copy of the survey questions is available with the supplementary materials on the ALRC's website.[76]

5.128 A full description of the methodology of the survey and potential limitations of the data is included at **Appendix F**.

Other relevant studies

5.129 The last court user survey conducted by any Commonwealth court took place in the Family Court and Federal Circuit Court in 2014, with results published in 2015. The survey included questions on whether the 'way in which case was handled was fair' and questions on whether the case was handled fairly, whether the judicial officer listened, and whether the hearing was led well.[77] Notably, this survey did not capture the experiences of court users in the Federal Court or High Court.

5.130 Research by the New South Wales Bureau of Crime Statistics and Research examined the experience of court users at two metropolitan courts in New South Wales between November 2015 and February 2016.[78] The survey included questions on court users' understanding of the hearing they had attended as well how confusing or stressful they found attending the court.[79]

5.131 There has also been research conducted with specific groups of court users. In 2017, the Australasian Institute of Judicial Administration commissioned the Australian Centre for Justice Innovation at Monash University to investigate the prevalence of self-represented litigants in the civil and administrative justice systems and its effects on the experiences of litigants, judges, tribunal members, and court staff.[80] Further, Dr Wangmann, Associate Professor Booth and Miranda Kaye have conducted interviews with self-represented litigants and professionals who engage

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75 The number of participants who answered any given question is reported as n = X.

76 Australian Law Reform Commission, 'ALRC Survey of Court Users Data' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Court-Users-Data.pdf>; Australian Law Reform Commission, 'ALRC Survey of Court Users Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Court-Users-Questions.pdf>.

77 Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey* (2015) 27–30.

78 Paul Nelson, Winifred Agney-Pauley and Lily Wozniak, *NSW Court User Experience Survey: Results from Two Metropolitan Courthouses* (NSW Bureau of Crime Statistics and Research, 2017).

79 Ibid 3.

80 Liz Richardson, Genevieve Grant and Janina Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Australasian Institute of Judicial Administration, 2018) 1. See also 19–28. A summary of a number of surveys that measured the experience of court users and client satisfaction was also produced through the Australian Institute of Judicial Administration in 1998: Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 58–62, 135–45. This includes a further discussion of public confidence in the processes, facilities and administration in the court: 126–34.

with self-represented litigants in family law proceedings involving allegations of family violence to assess how these litigants are impacted by their self-representation.[81]

5.132 Dr Kaspiew and others conducted surveys and interviews with 2,743 parents who used family law system services over an approximately 12-month period preceding August 2014.[82] A similar study of 15 women, reported on in 2014, was undertaken to examine the psychological impact of the Family Court process on women who had left abusive relationships.[83]

5.133 There have also been a number of studies conducted overseas that are relevant to this Inquiry. In particular, in 2013, Professor Macfarlane examined the experiences of 259 self-represented litigants in three Canadian provinces as part of the ongoing Canadian National Self-Representing Litigant Project.[84] Similarly, in the UK, Professor Trinder and others conducted a qualitative study involving interviews and focus groups with self-represented litigants in private family law proceedings.[85]

5.134 As discussed further in **Chapter 12**, the substantial literature on procedural justice has also explored how litigants experience the fairness of court proceedings, and courts in a number of jurisdictions systematically collect information from court users on subjective perceptions of procedural justice.

Key data from ALRC Survey of Court Users

Profile of the experiences of the participants

5.135 The participants reported attendance at proceedings in all Australian states and territories, predominantly in-person (89%). Of the 490 court users: 55% had attended court only once; 26% had attended court two to three times; and 20% had attended court four or more times.

5.136 There were 258 participants (53%) who indicated they had been litigants.[86] The remaining 232 participants most commonly attended court to support someone whose case was being heard, or as a witness. Of those who attended court as

81 Jane Wangmann, Tracey Booth and Miranda Kaye, 'Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence' (Research Report Issue No 24, ANROWS, December 2020).

82 Rae Kaspiew et al, *Responding to Family Violence: A Survey of Family Law Practices and Experiences (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 1.

83 Donna Roberts, Peter Chamberlain and Paul Delfabbro, 'Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis' (2014) 22(4) *Psychiatry, Psychology and Law* 599.

84 Julie Macfarlane, 'National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants' (Final Report, National Self-Represented Litigants Project, May 2013).

85 Liz Trinder et al, 'Litigants in Person in Private Family Law Cases' (Ministry of Justice Analytical Series, 2014).

86 This group was identified on the basis that they either had a case being heard by the court, or, a case involving an organisation or business that they own, lead, manage, or work for was being heard by the court.

litigants, over half were represented by a lawyer (57%), and 37% represented themselves or their companies.[87] Of participants who attended court as a result of a case involving an organisation or business that they owned, led, managed, or worked for, 16 (n = 38) indicated they were represented by a lawyer.

5.137 There were 263 participants who had appeared in state or territory courts and 167 who had appeared in Commonwealth courts.[88] The breakdown by court is set out in **Table 5.1** below.[89]

Table 5.1: Court attended

Court attended	Count
High Court	5
Federal Court	14
Family Court	125
Federal Circuit Court	23
State or territory courts	263

Confidence in Australia's courts and the legal system

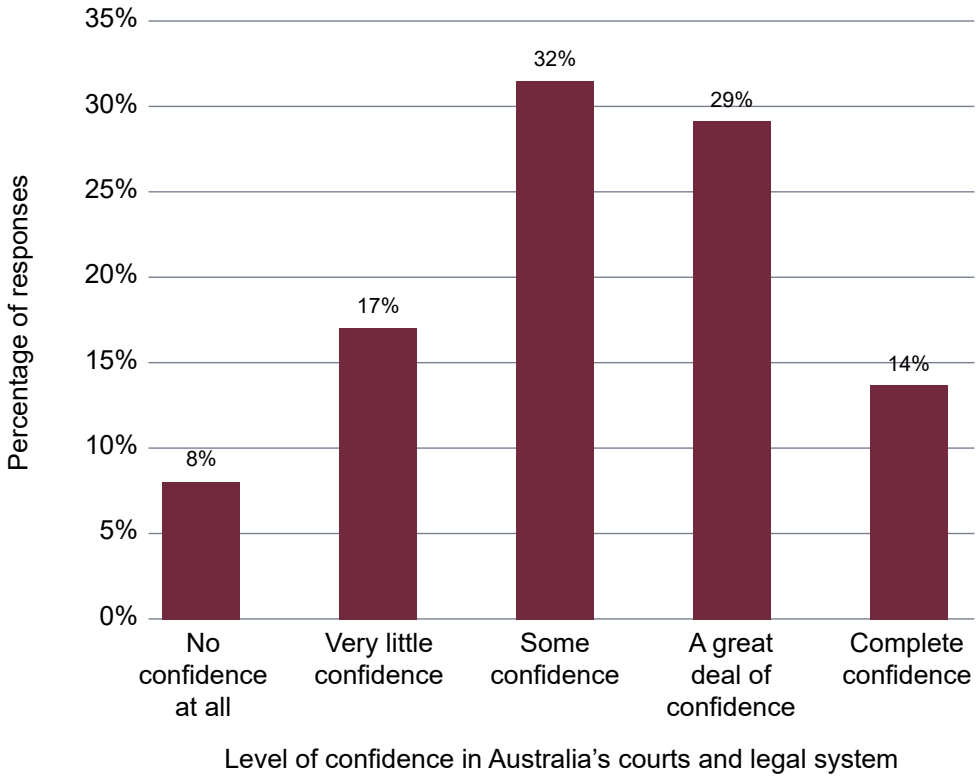
5.138 Participants were asked to rate their level of confidence in Australia's courts and the legal system on a five point scale (from 'no confidence at all' to 'complete confidence'). The average was 3.2 (median 3; n = 484). A complete breakdown of confidence levels is provided in **Figure 5.7** below.

87 Ninety-two participants were themselves party to a case being heard by the court, and the remaining either represented their company in court or were otherwise personally involved with company proceedings. The remainder were unsure.

88 Sixty participants indicated they were unsure in which court they appeared.

89 As discussed in the methodology at **Appendix F**, some responses may be inaccurate as participants may have misstated the court they attended (particularly in family law matters where both state and territory courts and Commonwealth courts are often involved).

Figure 5.7: Confidence in Australia's courts and the legal system



5.139 There was considerably more confidence reported by those who had attended Commonwealth courts as compared with those who had attended state or territory courts, particularly in those who had 'complete confidence' in the courts. However, levels of confidence did not appear to vary based on attendance at the different Commonwealth courts. There also did not appear to be a relationship between confidence and the capacity in which a person attended court, or whether a litigant was represented.

Views on fairness

5.140 The average level of agreement that participants (n = 490) expressed in relation to the most recent proceedings they attended being fair was 4, with an identical median. Scores were expressed on a five point scale (from 'strongly disagree' to 'strongly agree'). In response to the statement 'I feel the way in which the most recent court proceedings I attended were handled was fair', 41% 'strongly agreed' and 35% 'somewhat agreed'. A similar proportion of participants 'neither agreed nor disagreed' (9%), 'somewhat disagreed' (9%), or 'strongly disagreed' (6%) with the statement.

5.141 Those who had attended court as a litigant had a lower average level of agreement with the statement (average 3.8, median 4; n = 258) than those who had attended in a different capacity (average 4.2, median 4; n = 232). Non-litigants more often strongly agreed (49%; n = 232) that proceedings were fair than litigants (35%; n = 258).

5.142 Views on fairness were not impacted by whether or not the litigant was self-represented, with identical averages and medians of four.

5.143 Litigants were also asked whether, regardless of the outcome, they felt the way in which the case as a whole was handled had been fair. Again, the average rating from litigants was 3.8, with a median of four (n = 258). Forty per cent 'strongly agreed' with the statement and 31% 'somewhat agreed'.

5.144 When looking at the question of fairness regardless of the outcome, the average level of fairness recorded by those who were self-represented (average 4; n = 92) was higher as compared with those who were represented (average 3.7; n = 126), though both had a median of four. Seventy-four per cent (n = 92) of self-represented litigants 'strongly agreed' or 'somewhat agreed' that the way in which the case as a whole was handled had been fair, compared with 67% (n = 126) of represented litigants. Twenty-seven per cent (n = 126) of represented litigants 'strongly disagreed' or 'somewhat disagreed' with the statement, compared with 14% (n = 92) of self-represented litigants.

5.145 Those who disagreed that the proceedings were fair (regardless of the outcome) (n = 54) were asked to specify all applicable reasons why they thought the way in which the case was handled had not been fair. Participants could therefore select multiple responses. Of the total responses (n = 151), the most frequently selected reason was that the decision made in the case was not fair (23%), followed by the way the judicial officer(s) dealt with the case in court (20%), and unfairness in the law (15%).

Participant perceptions of judicial officers

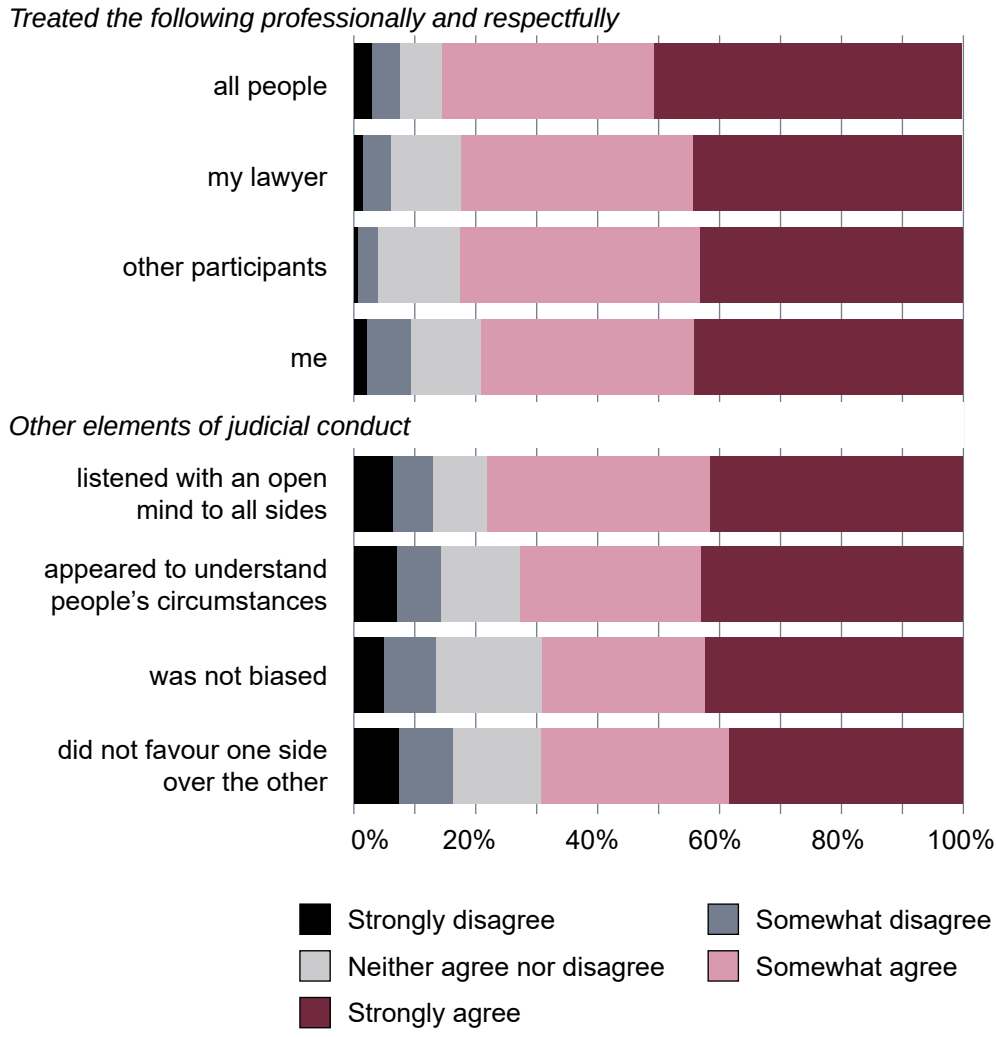
5.146 Participants were also asked a series of questions about their perceptions of the judicial officer they observed in court. In general, participants tended to 'somewhat agree' on average that judicial officers performed well across all questions.[90] Participants recorded the most positive response in relation to the statement that the judge treated all people professionally and respectfully (average 4.3, median 5; n = 230), and the least positive response was recorded in response to the statement that the judge did not favour one side over the other (average 3.8, median 4; n = 483). The level of agreement with the similar statement that the judge was not biased was also relatively lower (average 3.9, median 4; n = 482).

5.147 Over 65% (n = varied by question) of those who responded to the questions on the judicial officer's manner in court 'strongly agreed' or 'somewhat agreed' with

90 The range of averages extended from 3.8 to 4.3 and the medians were 4 or 5.

positive characterisations of the judge. Forty-two per cent (n = 482) of court users 'strongly agreed' that the judicial officer was not biased; 26% 'somewhat agreed' with the statement; and 17% 'neither agreed nor disagreed'. Agreement that the judicial officer was not biased was the lowest among the set of questions on the judicial officer's manner in court (68%). Nonetheless, these figures illustrate that the vast majority of court users had positive experiences with the judicial officer they encountered.

Figure 5.8: Level of agreement concerning elements of judicial conduct



5.148 The comments from the ALRC Survey of Court Users also highlight that many court users had positive experiences of court based on the judicial officer's

approach. When asked '[w]hat, if anything, gave you a positive impression about the court proceedings', 253 of 490 court users commented favourably on the judicial officer's approach. Aspects of the approach of the judicial officer that were considered favourable included their: professionalism (49 participants); fairness (42 participants); and, ability to listen (37 participants). There were 72 participants who had a positive impression based on the outcome of the proceedings and 61 participants who said there was nothing that gave them a positive impression about the court proceedings.[91]

5.149 When asked '[w]hat, if anything, would you like to see changed about the court proceedings', the greatest number of participants (173) responded 'nothing'. With respect to the court itself as an institution, participants most frequently wanted to see the time to resolve a case shortened (33 participants). This was followed by participants wanting to see court be less intimidating (16 participants), and the waiting times at court be reduced (15 participants). There were also a number of comments made in response to this question on the judge's approach: 17 participants stated that they wished the judge was more thorough, and 14 stated that the judge had a bias issue.

Perceptions of bias

5.150 Those who attended court as litigants indicated less agreement with the statement 'I feel the judicial officer was not biased'. Responses are summarised in **Table 5.2** below.

Table 5.2: Perception that judicial officer not biased

	Strongly agree	Somewhat agree	Neither agree nor disagree	Somewhat disagree	Strongly disagree
Litigant (n = 256)	38%	26%	19%	12%	5%
Non-litigant (n = 226)	47%	27%	15%	5%	5%

5.151 Participants who identified as Aboriginal had lower levels of agreement with the statement that the judicial officer was not biased, and indicated disproportionately that they 'strongly disagreed' with the statement that the judicial officer was not biased.

5.152 Conversely, participants in the 61 years of age and older category (n = 87), who were disproportionately male, more frequently agreed with the statement that the judicial officer was not biased.

91 Responses were qualitatively analysed and assigned to one or more relevant themes.

5.153 A number of participants made comments on why they felt the judicial officer was biased. There were 13 participants who indicated that the cause of this feeling was that the parties had unequal time before the judge, 11 participants who perceived the judge to be biased, and 11 participants who felt that the outcome reflected bias. Other reasons included that the judge seemed unengaged (10) and that the judge made comments reflecting bias (9).

Raising issues of bias

5.154 Where participants strongly or somewhat disagreed with the statement that they felt the judicial officer was not biased they were asked a series of follow up questions.

5.155 Twenty-five of the 43 participants who were represented by counsel in proceedings indicated whether they had raised the issue of bias with their lawyer. They were approximately split in their responses: 13 did raise the issue and 12 did not. Just over half of those who did raise it (seven) were happy with the way their lawyer dealt with the issues of bias.

5.156 The five participants who were not happy with how their lawyer dealt with the issue were asked a follow-up open-ended question about why they were not happy with how it was dealt with. Responses included that 'they made excuses and didn't care', they had 'no faith in the system', the lawyer 'did not take it up with the judge to clarify it', and the lawyer said that 'if it went back to court we may get a worse judge and it will cost more'.

5.157 Of the 11 participants who were self-represented in proceedings and who also strongly or somewhat disagreed with the statement that they felt the judicial officer was not biased, two indicated they had raised the issue of bias with the judge.

5.158 There were 33 participants who made comments on why they did not raise the issue of bias with their lawyer or the judge. Thirteen participants did not see the point of raising bias, eight participants did not know they could do so, and five participants did not want to upset the judge. Two participants said that they were not given the opportunity.

5.159 For the 10 participants who raised issues of bias with the judge (either themselves or through their lawyer), six were not happy with the way the judicial officer dealt with the issue of bias, as compared with three who were happy and one who was unsure.[92] Eight of the 10 who had raised the issue of bias in court were attending court for what they described as 'family law/domestic violence/AVO' proceedings.

92 The satisfaction level of four participants has been excluded as they were not parties to the litigation, but through a problem with the survey logic were given the option to respond to the question set regarding raising bias (two were witnesses and two were there to support someone involved in the litigation).

What conclusions can be drawn from the data?

5.160 Court users indicated a higher level of agreement that the proceedings they attended were fair as compared with their average level of confidence in Australia's courts and the legal system broadly:

- Participants generally expressed 'some confidence' in Australia's courts and the legal system (average 3.2, median 3).
- Participants expressed a higher level of agreement that the proceedings they attended were fair (average 4, median 4).
    - Those who had attended court as a litigant had a lower level of agreement with the statement that the proceedings they attended were fair (3.8) than those who had attended in a different capacity (4.2). Litigants also recorded lower levels of agreement with regard to the statement 'I feel the judicial officer was not biased'.
    - Self-represented litigants more often, on average, felt the way in which the case as a whole had been handled had been fair, regardless of outcome, as compared with those who were represented.

ALRC Case Review

5.161 The ALRC conducted a case review covering judgments of the Commonwealth courts between 1 January 2015 and 31 August 2021. The Commonwealth courts do not collect data on judicial recusal and disqualification. Court registries may record the number of times a case has been reallocated to different judges. However, those records do not identify the extent to which this is done to avoid potential risk of a bias claim, or in response to such a claim, rather than for some other reason, such as a judge's workload. The courts also do not collect data on the number of applications for disqualification made in the courts.[93]

5.162 Given the lack of existing information, and in order to gain the broadest view possible of the different ways in which issues of disqualification and bias are handled by judges in the Commonwealth courts, the ALRC carried out a systematic review of published judgments referring to issues of judicial disqualification.[94]

5.163 The search returned 879 judgments. After screening, 745 relevant judgments dealing with recusals, requests for recusal/disqualification, appeals of decisions on disqualification , and other appeals on bias grounds were identified. The full methodology is set out in **Appendix F**, and the underlying data is available on the ALRC's website.[95]

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93 Australian Law Reform Commission, 'The Federal Judiciary — The Inquiry in Context' (Background Paper JI3, March 2021) [34].

94 This was an entirely new review to the preliminary review reported in Australian Law Reform Commission, 'The Federal Judiciary — The Inquiry in Context' (Background Paper JI3, March 2021).

95 Australian Law Reform Commission, 'ALRC Case Review Data <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Case-Review-Data.pdf>.

5.164 The review was intended to identify references to both formal and informal processes for dealing with disqualification requests through:

- published reasons dealing specifically with disqualification requests (formal or informal);
- appeals referring to issues of disqualification being discussed in the court below; and
- recitation of procedural history in cases referring to past recusals or requests for disqualification that may not have been reflected in formal published reasons.

Aims of the review

5.165 The review was conducted with two main purposes:

- to allow the ALRC to identify cases showing how issues relevant to disqualification and bias were handled in the different courts; and
- to obtain data from published judgments about:
    - the overall numbers of requests (both informal and formal) for disqualification in the different Commonwealth courts;
    - the proportion of requests in relation to different types of alleged bias;
    - the proportion of requests in relation to different areas of law, and the success rate of those requests;
    - the proportion of requests brought by legally represented parties and self-represented parties, and the success rate of those requests;
    - the number of successful disqualification requests; and
    - the number of disqualification decisions that were subject to review at appellate level.

5.166 Collecting data on judicial recusal and disqualification from published judgments is complicated. As discussed further in **Chapter 6**, issues of disqualification for bias may be raised by both judges and parties, formally and informally. Issues may be raised in correspondence, in open court, or by filing of an application. They may be also be dealt with in different ways — judges may communicate a disqualification decision by correspondence, in open court, in published reasons, or by way of formal order. Judges are not required to give written reasons.[96] Not all reasons delivered *ex tempore* by judges of the FCFCOA (Div 2) and (Div 1) in their original jurisdiction are reflected in published judgments. On the other hand, reasons for formal orders of the Federal Court, Full Court, and FCFCOA (Div 1) Full Court will generally be reflected in published judgments, even if delivered *ex tempore*. Nevertheless, as discussed further in **Appendix F**, the ALRC has reason to conclude that the ALRC Case Review has been able to identify a large proportion of disqualification decisions made during the relevant period.

96 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 17–18.

Key findings from the ALRC Case Review

5.167 The following tables summarise data obtained from the ALRC Case Review.

Recusal or disqualification issues raised with — or considered by — judge seised

5.168 **Table 5.3** reports the number of unique references in the published judgments to issues of disqualification or recusal being raised with or by a judge of the Commonwealth courts. Cases were coded so that multiple references to the same request were excluded.[97] No references were found to recusal/disqualification issues raised in relation to High Court judges during the period under review and so the High Court is not included.

Table 5.3: Reported recusal or disqualification issues raised with or considered by judge seised

	FCC	FamCA	FamCA FC	FCA	FCAFC	Total
Recusal request made to judge[98]	120	150	33	123	5	**431**
Bias issue raised with judge seised but not pressed[99]	6	9	1	5	1	**22**
Recusal – of own motion	3	7	0	5	0	**15**
Recusal – not clear if of own motion or on request of party	15	12	0	1	0	**28**
Judicial disclosure – no recusal sought	3	5	0	2	0	**10**
TOTAL	**147**	**183**	**34**	**136**	**6**	**506**

97 Where there was more than one primary reference in a judgment, all primary references have been included. The results were obtained through a matrix query run against all cases coded as 'primary reference to recusal request', with each relevant classification for 'Key Bias Reference' against 'Bias Raised in Relation to Court'.

98 Includes primary references at first instance plus unique references at appellate level. Includes where bias raised and treated as request for recusal. See further **Appendix F**.

99 Includes where bias issue raised but request for recusal expressly disclaimed, and where reference to proposed future bias application not reflected in subsequent references. See further **Appendix F**.

Requests for disqualification — by area of law

5.169 **Table 5.4** sorts the 'recusal request to judge' line in **Table 5.3** by area of law.[100]

Table 5.4: Reported requests for disqualification — by area of law

	FCC	FamCA	FamCAFC	FCA	FCAFC	Total
Administrative and constitutional law and human rights	5	0	0	65	1	**71**
Bankruptcy and insolvency	17	0	0	11	1	**29**
Commercial	1	0	0	14	0	**15**
Defamation	0	0	0	2	0	**2**
Employment and industrial relations	9	0	0	15	1	**25**
Family	62	150	33	0	0	**245**
Intellectual property	3	0	0	9	1	**13**
Migration	20	0	0	2	1	**23**
Native title	0	0	0	1	0	**1**
Regulatory and consumer protection	2	0	0	3	0	**5**
Tax	0	0	0	1	0	**1**
Unclear	1	0	0	0	0	**1**
Total	**120**	**150**	**33**	**123**	**5**	**431**

100 The table was obtained through a matrix query run against all cases coded as 'recusal request to judge' (as a subset of 'primary reference').

Requests for disqualification — by representation status

5.170 **Table 5.5** sorts the disqualification requests recorded by representation status.[101] **Table 5.5** shows that references to recusal/disqualification requests in judgments of the Federal Circuit Court and Family Court are fairly evenly split between cases where the request was made by a self-represented party and cases where it was made by a party with legal representation.[102] However, in the Full Court of the Family Court, Federal Court, and Full Court of the Federal Court the requests that are reported skew towards self-represented litigants.

Table 5.5: Requests for disqualification — by representation status

	FCC	FamCA	FamCAFC	FCA	FCAFC	Total
Self-represented	63	80	28	80	4	**255**
Represented by a lawyer	48	55	3	26	1	**133**
Unclear	9	15	2	17	0	**43**
Total	**120**	**150**	**33**	**123**	**5**	**431**

Outcome of party disqualification requests

5.171 **Table 5.6** breaks down the requests for disqualification by outcome.[103] The table shows that requests for disqualification were successful in approximately 8% of the cases recorded. No requests made in relation to appellate courts recorded during the period were successful.

101 The table was obtained through a matrix query run against all cases coded as 'recusal request to judge' (as a subset of 'primary reference'). Where representation status at the time the request was made cannot be discerned from the judgment, the judgment was coded as 'unclear'.

102 Noting here that it is possible that an application brought formally is more likely to be reflected in a written judgment, and it is possible that legally represented parties are more likely to bring an application formally. Accordingly, it may be that requests for disqualification raised by self-represented litigants are less likely to be recorded in formal orders and published judgments than issues raised by litigants with legal representation. This point was raised by Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

103 Where the outcome cannot be discerned from the judgment, the outcome was coded as 'unclear'. The table was obtained through a matrix query run against all cases coded as 'recusal request to judge' (as a subset of 'primary reference').

Table 5.6: Outcome of reported party disqualification requests

	FCC	FamCA	FamCAFC	FCA	FCAFC	Total
Disqualification	13	14	0	5	0	**32**
Part disqualification	0	3	0	1	0	**4**
No disqualification	85	111	31	100	5	**332**
Withdrawn	8	6	0	8	0	**22**
Not determined	1	0	0	0	0	**1**
Not treated as a request for recusal	4	2	1	7	0	**14**
Unclear	9	10	0	1	0	**20**
Not applicable	0	4	1	1	0	**6**
Total	**120**	**150**	**33**	**123**	**5**	**431**

Disqualification requests — by category of bias

5.172 Breaking down the requests for disqualification by category of alleged bias shows that 'conduct and prejudgment' was overwhelmingly the most frequently raised category of bias, with association the next most frequently raised category. However, in a large proportion of cases it was not possible to determine which category of bias had been raised. More than one category could be raised as part of each request, so some requests are counted more than once.[104]

104 Where the category of bias in a case could not be discerned from the judgment, the category of bias was coded as 'unclear'. The table was obtained through a matrix query was run against all cases coded as 'recusal request to judge' (as a subset of 'primary reference').

Table 5.7: Disqualification requests — by category of bias

	FCC	FamCA	FamCAFC	FCA	FCAFC	Total
Association	12	6	1	15	3	**37**
Conduct and prejudgment	72	91	22	75	3	**263**
Extraneous information	3	12	0	3	1	**19**
Interest	2	0	0	8	1	**11**
Other	5	8	0	6	0	**19**
Unclear	41	41	12	27	0	**121**

Reported disqualification — by category of bias

5.173 **Table 10.2** in **Chapter 10** shows a breakdown of disqualification requests that resulted in disqualification or part disqualification, by category of bias that was raised. As some requests involved multiple categories of bias, it does not indicate which ground was ultimately successful.

Appeals and judicial review on refusal of request for disqualification

5.174 **Table 8.1** in **Chapter 8** sets out the number of challenges to judges' decisions not to disqualify themselves recorded in the judgments. Such challenges can be by way of: an appeal, or application for leave to appeal, of an interlocutory order; an appeal of a final order; or judicial review (see further **Chapter 8**). This table includes finalised applications and appeals only because all final appeal judgments are published. This data should be comprehensive.

5.175 The ALRC Case Review also found references to other cases on appeal that did not proceed, or have not yet proceeded, to hearing.[105] These are not counted in the numbers reported at **Table 8.1**.

105 These references were located in the procedural history of other judgments, or in applications in the appeal such as for expedition, for a stay, and for security of costs.

Consultations and submissions

5.176 The ALRC heard from a wide range of stakeholders through in-person consultations and the submissions process.

Submissions

5.177 The ALRC received 49 formal submissions in response to the call for submissions related to the Consultation Paper, which was released in April 2021. Submissions provided the ALRC with feedback on the 25 questions and reform proposals. Formal submissions were received from the stakeholder groups outlined in **Table 5.8**. A list of submissions is included at **Appendix C**.

Table 5.8: Composition of formal submissions to the Inquiry

Stakeholder Group	Count	%
Aboriginal and Torres Strait Islander legal services and other organisations	2	4%
Academic	16	33%
Judicial officer or former judicial officer	1	2%
Judicial organisation	1	2%
Legal professional bodies, including professional networks	8	16%
Litigant or litigant organisation	19	39%
Not-for-profit legal service provider	1	2%
Other	1	2%

5.178 In addition, the ALRC heard from 46 individuals through 'informal submissions'. These confidential submissions tended to focus on people's experiences before judges in the Commonwealth courts. A number of themes emerged in the analysis of these submissions:[106]

- **Many litigants felt that they had not been able to put their case**: Litigants said that they had not been allowed to speak, to challenge evidence, or to challenge the narrative they felt the judge wanted to hear. Some litigants said they had been repeatedly told by their lawyers not to raise allegations of family violence.

106 See further **Appendix E** for an overview of key themes in relation to experiences conveyed to the ALRC as part of this Inquiry.

- **Some litigants felt that the judge had not considered the evidence**: Litigants were concerned when judges said that they had not read the papers, or were not going to consider evidence that had been filed, or felt that they were overly reliant on expert reports. Others suggested that the judge's ability to understand the case was limited by the amount of time available to hear it.
- **Many litigants felt that they had not been treated with respect:** Litigants and family members of litigants reported behaviour by judges that they considered rude, dismissive, bullying, threatening, and intimidating. Some felt that they had been treated with disdain.
- **Lawyers' views of judges are passed on to litigants:** A number of litigants indicated that they had been warned by lawyers of a judge's 'reputation' for unpredictable behaviour in court.
- **Many litigants felt there was no effective oversight:** Litigants said that they felt their complaints had not been acted on. Some commented on the lack of judicial commission or other independent oversight body to which they could make complaints. Some referred to problems with bringing appeals, and others referred to difficulties with and the expense of obtaining transcripts.

5.179 The ALRC wishes to thank each person who made a contribution to the inquiry by sharing their experiences. Each contribution was carefully considered and helped inform the recommendations.

5.180 Informal submissions were received from the stakeholder groups outlined in **Table 5.9**.

Table 5.9: Composition of informal submissions to the Inquiry

Stakeholder Group	Count	%
Litigant or litigant organisation	44	96%
Legal practitioner	2	4%

Consultations

5.181 The ALRC spoke with over 178 individuals and organisations through confidential consultations with stakeholders from February to November 2021. A list of consultations is presented at **Appendix A**. The composition of consultees is outlined in the table below.

Table 5.10: Composition of consultees to the Inquiry (February to November 2021)

Stakeholder Group	Count	%
Aboriginal and Torres Strait Islander Legal Services and other organisations	5	3%
Academic	38	20%
Judicial and court services	9	5%
Judicial officer or former judicial officer	24	13%
Judicial organisation	3	2%
Legal professional bodies, including professional networks	16	8%
Litigant or litigant organisation	9	5%
Not-for-profit legal service provider	14	7%
Other	6	3%
Legal practitioner	66	35%

5.182 Academics, professionals, and the Commonwealth courts have provided further input to the Inquiry through participation in the Advisory Committee described in **Chapter 1**.

Methodology

5.183 The purpose of holding confidential consultations is to inform the ALRC on the topic area and the need for reform. Confidential consultation is a key part of the ALRC process, which, combined with stakeholder submissions, legal research, and quantitative data, forms the ALRC's evidence-base for each inquiry.

5.184 The ALRC developed questions in relation to the particular expertise and experiences of the stakeholders involved in each consultation. Opportunities were also provided for sessions to be guided by consultees. The ALRC has not quantified data from consultations.

PART TWO: MECHANISMS FOR RAISING AND DETERMINING ISSUES OF BIAS

6. Identifying and Raising Potential Bias Issues

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Introduction

6.1 This chapter is the first of four chapters that consider the processes by which the Commonwealth courts manage and address potential issues of judicial bias. Courts and judges have developed a range of approaches to prevent issues of apprehended bias from arising, and to respond when they do arise. As the first in the series, this chapter focuses on preventive measures and the process for bringing such issues to the attention of a judge. It leads into a discussion in **Chapter 7** of how a court determines matters of bias raised by formal application during litigation, and the discussion in **Chapter 8** concerning appeals of disqualification decisions. This chapter, in conjunction with **Chapter 7** and **Chapter 8**, considers the court's

usual processes to deal with the potential for bias in a case from the time of filing to final appeal, making a suite of recommendations to increase transparency and the appearance of impartiality. **Chapter 9** considers other mechanisms (outside the litigation process) by which issues of bias relating to judicial conduct may be raised.

6.2 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.[1] These processes have changed significantly over the past 50 years, with much greater use of formal applications in relation to disqualification. In addition, there has been a growing acceptance of the ability to directly appeal a judge's decision to continue to sit in the face of objections from one of the parties at an interlocutory stage, without having to wait for subsequent orders on which to bring a collateral appeal for bias. Elements of the process are now also contained in the *Guide to Judicial Conduct*.[2]

6.3 This chapter examines the procedures used by courts and judges to identify and disclose potential issues of bias, and those used by parties to raise potential issues of 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 an issue by the parties; hearing the views of the parties; and, in some cases, recusal by the judge on her or his own motion. These steps can happen purely through correspondence between the judge's chambers and the parties, or by fully ventilating the issues in open court, or a mixture of the two. The issues may be raised either 'informally', without resort to formal applications and orders under the court's rules, or through a formal application.

6.4 The ALRC recommends that the procedures relating to issues of judicial bias be explained in a single document produced by each court. This would include both those procedures established by practice or convention, and those procedures conducted as part of formal legal processes. The ALRC recommends this take the form of disqualification guidelines, modelled on similar documents published by the courts in New Zealand.

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1 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 678–9. In contrast, under the Justinian Code, which applied in the Roman Empire, litigants could simply recuse a judge in order for proceedings to take place without suspicion. As Geyh explains, this continues to inform recusal procedures in civil law countries today: 677–8.

2 See **Chapter 10**.

Overview of procedures

6.5 Twenty years ago, prior to her elevation to the bench, the Hon Justice M Perry noted that judicial disqualification for bias raises 'complex and difficult issues' that impact on the procedures adopted to address potential bias. This is because the issue of disqualification may arise in relation to different categories of bias requiring different approaches (for example, interest, as opposed to conduct) and may raise difficult jurisdictional and constitutional considerations.[3] Procedures can also vary depending on the level of court, jurisdiction, and stage of the proceeding at which the issue of bias arises.[4] With this in mind, it was, her Honour suggested, 'not surprising that different approaches have been taken in different courts on matters of practice and procedure and that conflicting decisions exist on some critical issues'.[5] As is explored further in this chapter and those following, those comments remain true today.

6.6 Issues of disqualification for bias may be dealt with by the court and judges at different stages, and in different ways. In the life-cycle of a matter, the relevant stages include:

- prior to allocation of the matter to a particular judge;
- after allocation but before any of the parties appear before the court or the judge;
- while case management and hearings are ongoing;
- while judgment is reserved;
- after final judgment; and
- (potentially) after the time for appeal has passed.

6.7 There are both informal and formal ways of dealing with issues of bias. In some instances, courts and judges adopt practices and conventions to identify and resolve potential bias issues. Alternatively, the judge or the parties may specifically engage the court's jurisdiction to decide the matter. For the purposes of this chapter the former will be referred to as 'practices' (practices and conventions that the court or the judge can adopt and change as considered appropriate and consistent with ethical guidance and the law). The latter will be referred to as 'formal legal processes' (by which the court's jurisdiction is specifically engaged to determine the issue of disqualification, resulting in formal orders).

6.8 **Figure 6.1** provides an overview of different processes at different stages in the Commonwealth courts. This chapter will address potential issues that may arise throughout these stages in the proceedings.

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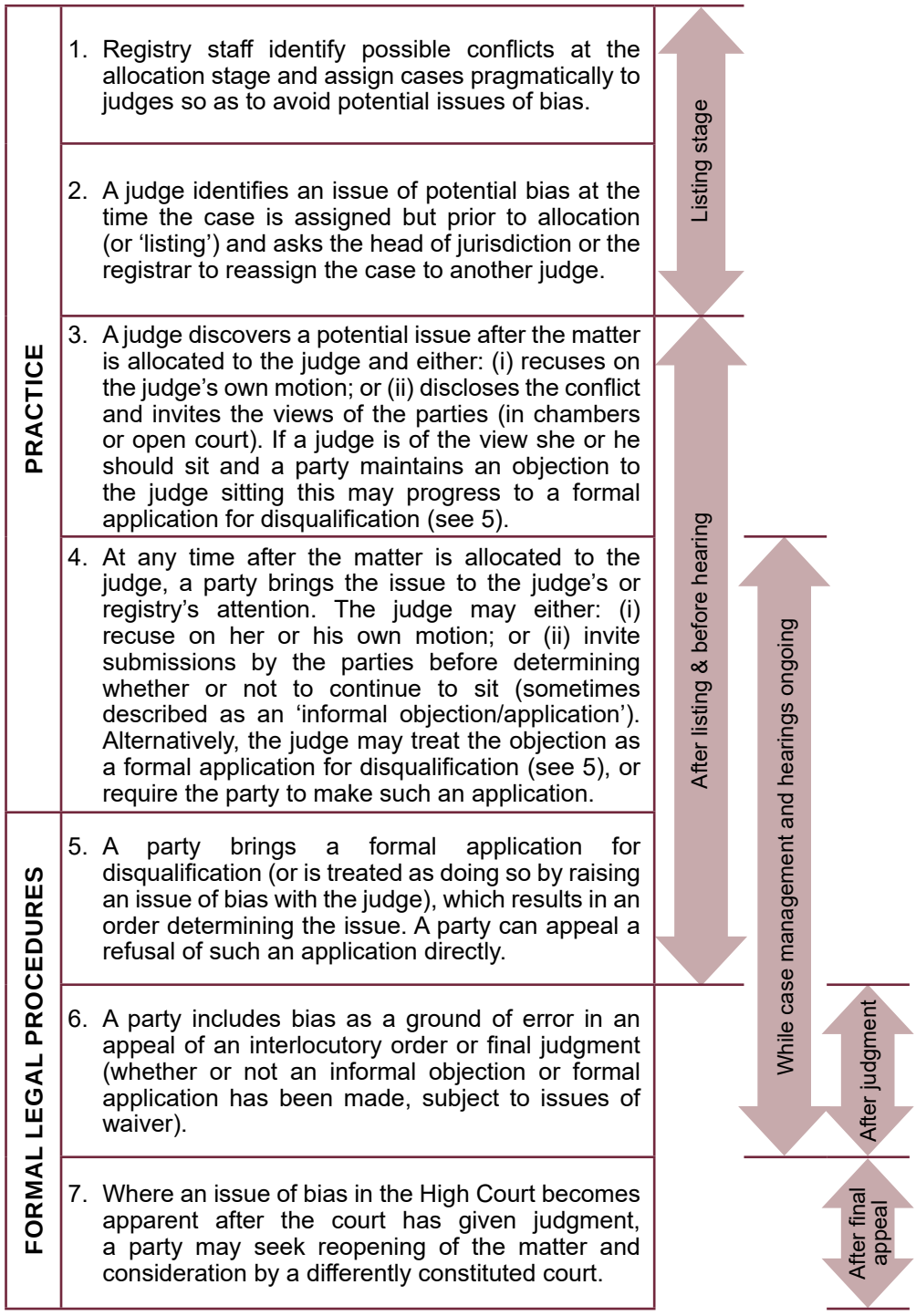
3 Melissa Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, Australian Institute of Judicial Administration, 2001) 5–7.

4 Ibid.

5 Ibid 7.

Figure 6.1: How is the issue of bias dealt with by courts?



Court-specific judicial disqualification guidelines

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.

6.9 The ALRC recommends the development and publication of court-specific judicial disqualification guidelines that build on successful practice in New Zealand. 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 (which typically covers 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.*[6]

6.10 This recommendation draws on the experience in New Zealand, where each court is required by statute to develop Recusal Guidelines (see **Appendix G**). Feedback suggests that in New Zealand, the Recusal Guidelines have been successful in promoting early resolution of issues, enhancing certainty of process, and contributing to collegiality within appellate courts through a shared understanding of the procedures to be adopted.

6.11 This recommendation is grounded in the principles adopted by the ALRC to guide the Inquiry (as outlined in **Chapter 1**). It recognises the central role of courts as institutions in upholding judicial impartiality, by providing impetus for courts to clarify and set out their practices in this regard, and to keep those practices under review (Principle 1). It allows courts to communicate the limits of impartiality, as expressed in case law, and allows practical and resourcing issues to be addressed on a court-by-court basis as appropriate (Principle 2). It highlights the legitimate interest that both litigants and the public have in ensuring judicial impartiality by giving prominence to a key document of the court which recognises this interest (Principle 3). It provides greater transparency in relation to some of the institutional structures in place, such as allocations procedures and screening, that safeguard impartiality (Principle 4), and it addresses the inequality that may arise due to a lack of transparency in proceedings, impacting particularly on self-represented litigants (Principle 5).

6.12 This recommendation highlights the importance of the principle of impartiality to public confidence in the administration of justice, and the importance of transparency of process in this regard. Through greater clarity, disqualification

6 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': [12].

guidelines may also have the benefit of promoting earlier resolution of these issues, which helps to reduce the cost and time spent on questions of disqualification for both parties and the court.

6.13 The disqualification guidelines should be supported by a Practice Note or Direction in relation to formal legal procedures to make and determine applications for disqualification, and for expedited review of such decisions (**Recommendation 2**, **Recommendation 3**, and **Recommendation 4**).

Detail of the guidelines

6.14 The disqualification guidelines should be court-specific in order to reflect the different processes and functions of, and demands on, the various courts. However, each court should develop its guidelines in consultation with the Council of Chief Justices of Australia and New Zealand. This would help to ensure consistency where desirable, and would be appropriate in light of the potential flow-on effects to state and territory jurisdictions. It is also consistent with the role of the Council of Chief Justices in the publication of the *Guide to Judicial Conduct.*

6.15 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; and
- evidential issues.

6.16 In the disqualification guidelines, each court should consider referring to specific principles on association, and common circumstances identified in case law where disqualification on the grounds of association might be warranted, and is likely not to be warranted.[7]

6.17 Disqualification guidelines should also briefly summarise the current common law position on waiver in relation to claims of apprehended bias, specifically implied waiver in relation to apprehended bias arising out of judicial conduct in court.[8]

6.18 Once adopted, the guidelines should be made public and integrated into public education materials about the courts. More specifically, they should be referred to in

7 See further **Chapter 10**.
8 See further **Chapter 10**.

accessible public resources that provide information about supports and safeguards for judicial impartiality (**Recommendation 14**).

6.19 In New Zealand, the Recusal Guidelines are required by statute.[9] This requirement was introduced to implement a recommendation of the New Zealand Law Commission following a high profile controversy in relation to a Supreme Court judge's failure to disclose a relevant association to counsel in litigation before the Court, which required the Supreme Court to reopen the case.[10] However, the ALRC does not recommend a statutory mandate for disqualification guidelines in Australia. Feedback from the ALRC Survey of Judges suggests that there is significant appetite within the judiciary for further clarity in guidance, indicating that a mandate is unnecessary. However, if guidelines are not introduced by the courts, the ALRC does not see any constitutional impediment to the Commonwealth Parliament legislating to require the development and publication of such guidelines.[11]

Process of adopting guidelines

6.20 The ALRC encourages the courts to consult broadly in drafting the judicial disqualification guidelines envisaged by **Recommendation 1**. The benefits of consultation were recognised in submissions. Associate Professor O'Sullivan, Dr Ng, and Associate Professor Grant suggested that any disqualification guidelines should:

- have input from civil society (such as Legal Aid and community legal centres) as well as legal communication experts to ensure that the information is suitable for a public audience; and
- be tested on focus groups to ensure that it is appropriate and understandable.[12]

6.21 In addition, the Law Council of Australia emphasised that consultation with the legal profession would be important to avoid over-complicating the procedural and legal issues relating to bias for parties and their legal representatives.[13]

6.22 A number of new publications are recommended in this chapter, and in **Chapter 7**, **Chapter 8**, and **Recommendation 14**. **Figure 6.2** sets out a high level overview of how these publications relate to one another, while **Figure 6.3** provides greater detail as to the focus and contents of the various documents.

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9 See, eg, *Senior Courts Act 2016* (NZ) s 171.

10 New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, 2012) [6.68]–[6.84]. See recommendations 23 (clear rules) and 24 (clear publication of the rules), in light of *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122.

11 While Parliament cannot interfere with the free exercise of judicial decision-making within the scope of jurisdiction, it may regulate the practice and procedure of the court as an incident of the regulation of jurisdiction: James Stellios, *The Federal Judicature* (LexisNexis, 2nd ed, 2020) [3.26].

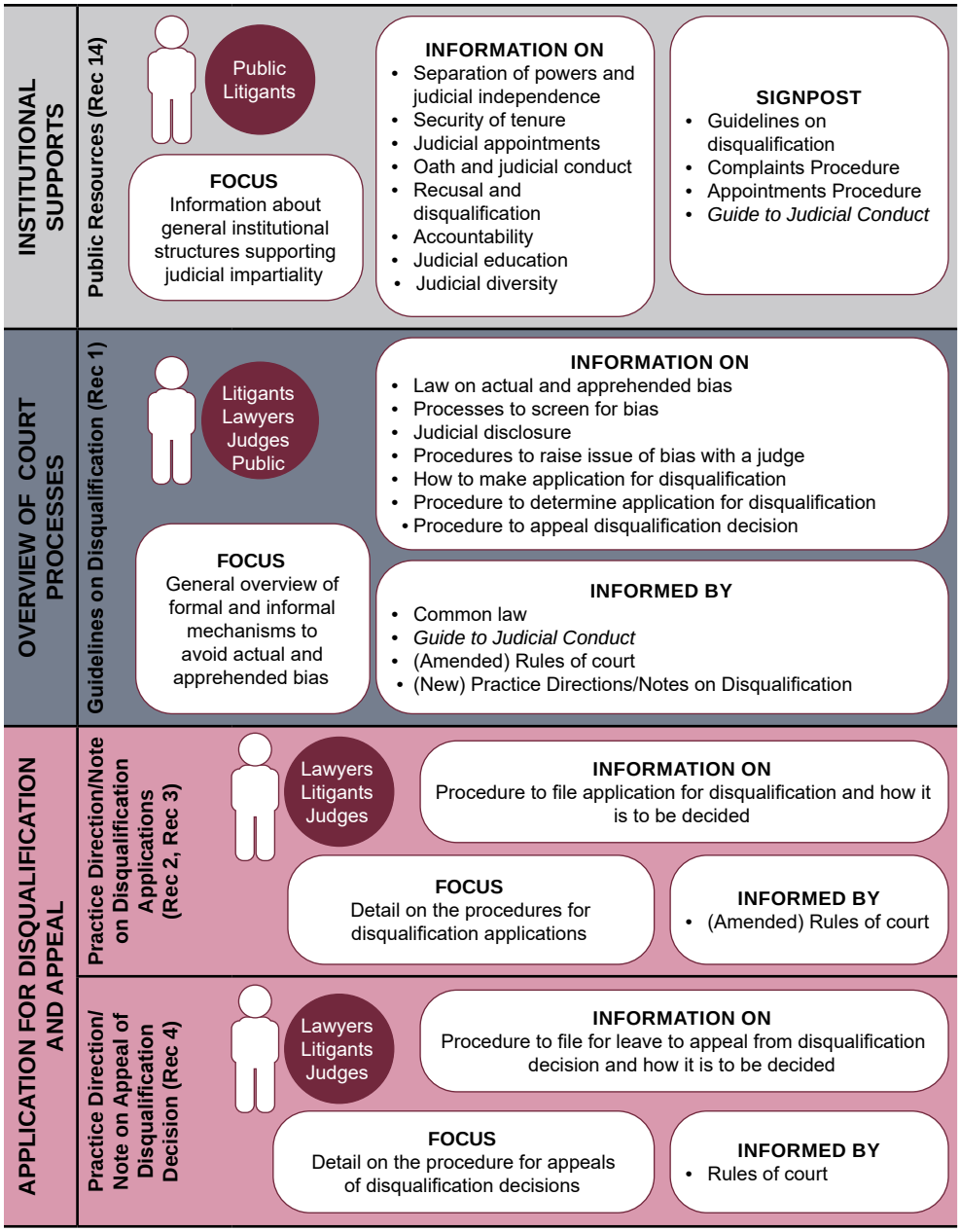
12 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

13 Law Council of Australia, *Submission 37*.

6.23 The judicial disqualification guidelines developed in accordance with Recommendation 1 would provide an overview of the court practices and formal legal procedures relating to disqualification. They would be targeted at lawyers, litigants, and judges who are involved in proceedings where there are concerns relating to actual or apprehended bias. The guidelines would sit alongside more accessible public resources outlining institutional supports for judicial impartiality. The guidelines would also provide information about the more specific procedures that would be set out in Practice Notes and Practice Directions contemplated by **Recommendation 2**, **Recommendation 3**, and **Recommendation 4**.

Figure 6.2: Function of court publications on impartiality

Figure 6.3: Overview of court publications on impartiality



6.24 The remainder of this chapter considers the existing practices for dealing with potential judicial bias. The analysis starts from the listing stage of proceedings, and addresses issues related to allocation of matters and screening. It then considers the recusal and disclosure obligations of judges post-allocation and the practices parties must follow in bringing an issue of potential bias to the attention of the court. The chapter also looks at evidential issues in substantiating bias concerns and the role of reasons for decisions on disqualification applications. For all of the existing practices, judicial disqualification guidelines would provide greater transparency and clarity around the appropriate course of action, and would promote confidence that the courts are appropriately dealing with such issues.

Allocation of cases

6.25 The first stage at which potential issues of bias are considered in relation to individual cases is at the allocation stage. This is when, for example, a matter is formally placed on a judge's 'docket' by the registry. The processes by which cases are allocated to each judge are considered 'a key issue in the institutional arrangements for promoting impartiality'.[14] They also present an opportunity to 'screen out' obvious issues of bias before a case is allocated to a judge.

6.26 The ALRC's understanding of the practices in the courts detailed throughout this chapter have generally been ascertained through consultations (unless a published source of information is cited). As discussed above, the ALRC recommends the Federal Court and FCFCOA make these practices more transparent by including information about screening and allocation in the disqualification guidelines.[15]

6.27 After a party files a case with a court, the court decides in accordance with settled administrative practices which judge will be allocated to the case for case management (if required) and hearing. In its original jurisdiction the Federal Court follows a 'docket system', which follows the general principle that

> a case is allocated to the docket of a particular judge at or about the time of filing with the intention that, subject to any necessary reallocation, it will remain with that judge for case management and disposition.[16]

6.28 The FCFCOA has recently developed a new Central Practice Direction for family law case management, which provides for a significant degree of involvement of judicial registrars at the case management and interim hearing stages. This involvement takes place after the case is filed, but before it is allocated to a trial judge (with provision for different management practices through specialised lists

14 Kate Malleson, 'Safeguarding Judicial Impartiality' (2002) 22(1) *Legal Studies* 53, 67.
15 See [6.15].
16 Federal Court of Australia, 'Allocation of Judicial Matters under the NCF' <www.fedcourt.gov.au/about/national-court-framework/allocations>.

for cases where, for instance, a high risk of family violence has been identified).[17] Judicial registrars also exercise some powers of a judge in managing cases in other areas of law, including general federal law matters and migration cases.[18]

Case allocation and impartiality

6.29 The allocation of cases by the court registry to individual judges is one way in which perceptions of bias may arise, such as when a party is concerned that a case is allocated to a certain judge because the judge is more likely to decide in a specific way. In jurisdictions where allocation is done informally, there is a degree of mystique around the process. In such an environment, concerns may arise that 'the process leaves open the potential for improper interference and, at the very least, gives rise to the perception that justice is not always being done'.[19] Such concerns were voiced in consultations, particularly in relation to matters from which no appeal lies, as there is no potential corrective mechanism for the decision. While there was no suggestion that there are actual issues in the Commonwealth courts in this regard, it was flagged as an area for particular scrutiny in light of the perception created by the opacity of the process.

6.30 A random system of allocation is one way of removing discretion from the process of allocation that prevents undue influence. This was recommended by the Council of Europe Committee of Ministers, for example, who suggested allocation through drawing of lots or by alphabetical order.[20] However, to work properly, such a system needs to be transparently informed by the availability, workload, and expertise of the judges.

Allocation in the Federal Court and FCFCOA

6.31 In the Federal Court and FCFCOA, cases are largely allocated by the registry to judges on the basis of which judge is available and has the capacity to hear the matter. In each of these courts, case allocation falls within the statutory power of the head of jurisdiction to ensure 'the effective, orderly and expeditious discharge of the business' of the Court.[21]

6.32 In a limited number of consultations, the ALRC heard from lawyers who had concerns about the broad powers given to the heads of jurisdiction in allocating

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17 Federal Circuit and Family Court of Australia, *Central Practice Direction — Family Law Case Management*, 1 September 2021. See also Federal Circuit and Family Court of Australia, *Family Law Practice Direction — Lighthouse Project and Evatt List*, 1 September 2021. Other specialised lists include those for major complex financial proceedings (MCFP List) and matters involving Aboriginal and Torres Strait Islander litigants (Indigenous List).

18 See Federal Circuit and Family Court of Australia, *Central Practice Direction — General Federal Law Proceedings*, 1 September 2021 [2.2]; Federal Circuit and Family Court of Australia, *Central Practice Direction — Migration Proceedings*, 1 September 2021 [2.2].

19 Malleson (n 14) 68.

20 Ibid 68–9. See also Council of Europe Committee of Ministers, *Recommendation of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges* (1994) 24.

21 *Federal Court of Australia Act 1976* (Cth) s 15(1); *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 47(1).

matters. However, while in theory the head of jurisdiction has considerable power, the actual practice of allocating matters resembles much more closely a system of random allocation based on effective resource allocation principles. This is one instance where the judicial disqualification guidelines in **Recommendation 1** could help to promote greater transparency.

6.33 The details of how cases are allocated are specific to each court. For example, in the Federal Court, the process for allocation is set out in the National Court Framework. Under that framework, the Federal Court has developed publicly-available 'Allocation Principles'. These require that:

> Matters be allocated to judges in the NPA [National Practice Area] or Sub-area in the registry of the filing, subject to:
>
> - the availability of judges in the NPA in the registry of filing
> - considerations of balance of workload and commitments of judges
> - the character of a matter calling for a different approach. However, this will only be in very limited circumstances.[22]

6.34 In practice, the Allocation Principles are applied by the National Operations Registrar in consultation with the Chief Justice and, in some instances, a panel of senior judges.

6.35 Cases are allocated on a similar basis in the FCFCOA. Judges in the FCFCOA are allocated to hear cases in one or more areas of law (such as family law) based on their areas of expertise. Judges will be assigned to the duty list for intake days within these areas of law at the beginning of each year. At the time of filing, applicants will nominate a day for their case to be listed without knowing which judges are on the duty list for that day. Cases are then allocated to the judges — or judicial registrars — who are on the intake list for that day.[23]

Screening for bias

6.36 Courts have developed precautionary administrative practices in allocation arrangements to minimise the risk of bias concerns arising, and the need for disqualification. Screening for bias at the early stage of the court process seeks to eliminate situations in which the issue of judicial disqualification might arise. If

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22 Federal Court of Australia (n 16). There are nine National Practice Areas based on established areas of law. The third consideration relates to whether a matter 'is of such character, including by reference to its importance or public interest, as to warrant the view that the administration of justice and the reputation of the Court require the choice of a judge of appropriate experience in the class of matter who is able to deal with the matter with appropriate despatch'.

23 Given the expanded role for judicial registrars in the FCFCOA, the allocation to, and screening of, judicial registrars is an additional process that requires attention to impartiality. Impartiality of decisions made by judicial registrars is protected through an expedient *de novo* review to a judge as of right (without an application fee). In addition to this process to address bias in an individual case, the court collects data on reviews of registrar decisions and responds to concerns at a systemic level.

potential issues of bias are identified before a judge is seised of the matter, the need for recusal is eliminated through the pragmatic selection of judges.[24]

6.37 As Dr McIntyre submitted, the current system for screening cases is based on values of informality and judicial integrity.[25] In cases before a Full Court of the Federal Court, for example, this procedure involves screening matters for any related litigation presided over by judges of the Court before cases are allocated.[26] For new judges in the Federal Court, this involves those judges informing court personnel in advance that cases involving certain parties or lawyers should not be allocated to them.[27] In the FCFCOA, new judges will informally meet with the manager of their registry and may choose to share potential issues that should be screened for when allocating matters to their chambers. In both the Federal Court and the FCFCOA, registry staff also become familiar with issues of bias that may arise before certain judges and are able to avoid allocating those cases to those judges. Where there is uncertainty as to a potential issue of bias, the registries will raise the situation with the judge before allocation.

6.38 Judges are also able to screen cases for potential issues of bias. In the Federal Court, the court circulates a list of cases among judges before cases are allocated to give the judges an opportunity to raise any concerns. A similar approach is taken in the Court of Appeal of New Zealand, as set out in the Recusal Guidelines for that Court.[28] Once cases have been allocated, judges in each of the Federal Court and the FCFCOA are able to approach the head of jurisdiction or the registry to be removed from the case if they identify possible bias concerns.[29] This is a common practice across courts. Writing about the New South Wales Court of Appeal in 1998, Kirby P explained that if

> a judge has had any connection, even indirect, with litigation that comes before the court, he or she will so indicate when the list of sitting arrangements is distributed. A substitution will then be arranged.[30]

6.39 In the FCFCOA, the use of judicial registrars — in the Case Management Pathway for family law in particular — helps to screen for issues of bias. Judicial registrars will typically develop greater familiarity with a case than is possible at the time of filing. Through this process, judicial registrars may become aware of potential issues and are able to recommend the case not be allocated to a judge

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24 Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 92. The pragmatic selection of judges can be done in a way that is compatible with removing discretion by providing transparent and clear criteria for screening in advance of allocation.

25 Dr Joe McIntyre, *Submission 46*.

26 As a practical matter, a more wide-ranging screening is undertaken for appellate cases as more is known about the matter.

27 This is also the practice in Hawaii. See, eg, in relation to 'automatic recusal systems' in Hawaii, 'Survey of Hawaii Judges Explores Disqualification and Recusal Issues' (2008) 92 *Judicature* 34, 35.

28 Court of Appeal of New Zealand, 'Recusal Guidelines' (August 2017) [4]–[5].

29 See Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 17.

30 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369.

where issues of bias are likely to arise. It is also common for each judge's associate to run a conflict check once the judge has been allocated a case.

6.40 These practices are in many cases long-standing, if informal. They evidence a strong institutional commitment to minimising the risk of apprehended or actual bias arising in a case. Moreover, the paucity of applications during litigation for bias on the grounds of association or interest suggests that the existing screening systems are effective.[31] Nevertheless, a transparent explanation of these processes in judicial disqualification guidelines would assist in conveying this commitment, as well as the importance placed on early stage preventive processes.

Stakeholder feedback on additional screening processes

6.41 Some other comparable jurisdictions have additional screening in place prior to allocation. Question 9 in the Consultation Paper asked whether Commonwealth courts should adopt additional systems or practices to screen cases for potential issues of bias at the time cases are allocated.

6.42 The majority of submissions addressing this question were supportive of further pre-emptive procedures to identify and eliminate potential issues of bias from the outset of a matter.[32] For instance, the Law Council of Australia was generally supportive of greater screening for bias at the outset, and suggested that courts could 'improve processes for communicating with judges and registries' to screen cases for potential issues of bias at the time cases are allocated.[33] The Asian Australian Lawyers Association took a broader view of the type of screening for bias that could occur at the outset to support multicultural communities:

> Ensuring relevant issues of cultural diversity are identified early and relevant expert evidence is obtained and/or supports and services put in place such as a culturally appropriate support person or an interpreter, would assist considerably to ensure that members of the multicultural community best receive access to justice.[34]

6.43 A number of submissions suggested an increased use of algorithms to allocate cases in a manner that reduces instances in which concerns relating to bias might arise.[35] While the design of algorithms requires care in order to avoid introducing its

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31 Of the 470 disqualification requests that were categorised by area of bias in the ALRC Case Review, just 37 were based on association and 11 on interest. For further details see **Chapter 5**.

32 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*; NSW Society of Labor Lawyers, *Submission 40*.

33 Law Council of Australia, *Submission 37*.

34 Asian Australian Lawyers Association, *Submission 42*.

35 On the use of algorithms in judicial decision-making generally, see Andrew Higgins, Inbar Levy and Thibaut Lienart, 'The Bright but Modest Potential of Algorithms in the Courtroom' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice* (Oxford University Press, 2020) 113, 127–30.

own bias,[36] an algorithm for allocation could provide efficiencies, particularly where less discretionary screening issues arise. While generally supportive of the use of algorithms, the Law Council of Australia cautioned that any artificial intelligence assisted decision-making would need to be 'explainable'.[37] Associate Professor Higgins and Dr Levy also supported an increased reliance on algorithms as a decision support tool.[38]

6.44 No submission advocated for automatic judicial reallocation — or peremptory judicial challenges, which give a party 'the right to reject an assigned trial judge … when litigants or counsel believe the case would be better served by reassignment to another judge' without having to advance a claim of bias.[39] Any system allowing for judicial reallocation at the election of a party effectively embraces judge-shopping, which is undesirable and unethical in the Australian context.[40]

6.45 Support for additional screening was not unanimous among submissions. McIntyre was concerned that moving 'to a more formalised system for the allocation of judges would represent a seismic shift in the operation of Australian courts'.[41] He cautioned that the values underlying the existing screening framework, primarily informality and judicial integrity, could be 'unintentionally undermined through more structured mechanisms without any substantial countervailing benefit'.[42] Before making any changes to how potential conflicts of interest are screened, McIntyre suggested that 'substantially more research and consultation' was required, particularly given there is 'nothing to suggest that concerns over judicial impartiality currently justify such a shift'.[43]

6.46 The Law Council of Australia also highlighted the need to ensure that any changes to how courts screen for bias take into account the realities of regional, rural, and remote courts, as in some areas there may be limited opportunities for reallocation given greater 'familiarity between judges, legal representatives and even parties'.[44] Another concern raised by stakeholders was the need to take care to avoid capturing low risk personal and professional circumstances, and to allow for flexibility in dealing with such matters. Emerita Professor Mack and Professor Roach Anleu observed the limitations of advanced screening in promoting impartiality,

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36 See, eg, Michael Guihot and Lyria Bennett Moses, *Artificial Intelligence, Robots and the Law* (2020) [5.22].

37 Law Council of Australia, *Submission 37*.

38 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*.

39 Jeffrey W Stempel, 'Judicial Peremptory Challenges as Access Enhancers' 86(5) *Fordham Law Review* 2263, 2265.

40 See Appleby and McDonald (n 24) 105; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 686. One submission expressly shared the concern that peremptory judicial challenges by the parties are undesirable due to the risk of 'judge-shopping' and tactical litigants' behaviour: Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*. In some instances where parties prefer to select an arbiter to resolve their dispute they are able to pursue arbitration.

41 Dr Joe McIntyre, *Submission 46*.

42 Ibid.

43 Ibid.

44 Law Council of Australia, *Submission 37*.

suggesting that such practices 'may not address most undesirable judicial conduct in court, as such behaviour does not appear to arise from the factors that can be identified in advance, such as conflicts of interest'.[45]

Financial interest disclosure

6.47 In some jurisdictions, including the US, judges are required by statute to make themselves aware of their financial interests, and those of their family, and to disclose these publicly. The rationale for these requirements is that they facilitate better screening for conflicts of interest by registries and parties at an early stage.[46]

6.48 There was support in two submissions for a system of personal or financial interest disclosure by judicial officers. The New South Wales Society of Labor Lawyers expressed concern over the possible number of financial interest conflicts that may be unknown due to the current reliance on judicial disclosure. To address the concern regarding the lack of information, they suggested that a register with a clear threshold for disclosure should be maintained with limited access provided to legal representatives who would be required to undertake not to disclose the information.[47] The New South Wales Young Lawyers Public Law and Government Committee also emphasised the importance of disclosure of pecuniary interests.[48]

6.49 Other submissions were not in favour of a financial register. For example, the Law Council of Australia was concerned that a financial register lacked the nuance necessary to assess bias, and that perceived invasions into privacy might 'act as an unwelcome disincentive to a strong candidate accepting a judicial appointment'.[49] The privacy concerns can be particularly acute in the family law context where high profile acts of violence against judges have resulted in a heightened sense of concern regarding the personal security of judges and their families.[50]

6.50 When it considered the issue in 2012, the New Zealand Law Commission ultimately decided against recommending a financial register for judges. In reaching its decision, the Commission noted already high levels of public confidence in the judiciary and concerns relating to the efficacy of such a register.[51] Likewise in Australia, the judiciary generally enjoys a high degree of public confidence (see **Chapter 5**). The ALRC Case Review shows that only a small number of bias applications raise financial interest grounds, and those that are raised are often

45 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*. Some examples of undesirable judicial conduct set out in the submission are 'displays of irritation, rudeness, hostility and anger, even insulting or humiliating a party or counsel'.
46 New Zealand Law Commission (n 10) 63–9.
47 NSW Society of Labor Lawyers, *Submission 40*.
48 New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*.
49 Law Council of Australia, *Submission 37*.
50 See, eg, *R v Leonard John Warwick (No 93)* [2020] NSWSC 926.
51 New Zealand Law Commission (n 10) 69–70.

based on a misunderstanding of judicial remuneration.[52] This suggests that there is no need for reform with respect to financial disclosure by judicial officers.[53]

Post-allocation: Judge-led processes

6.51 Once a matter is allocated to a judge, dealing with issues of bias can become more complicated. This is because, in the Australian legal system, as emphasised in the majority judgment of the High Court in *Ebner v Official Trustee in Bankruptcy* ('*Ebner*'), judges 'do not choose their cases; and litigants do not choose their judges'.[54] In light of this, once cases have been allocated, judges may recuse themselves and litigants may seek to disqualify judges only where there is a reasonable apprehension of bias, or actual bias. As Kirby J went on to observe in *Ebner*, while the question of bias should

> be decided dispassionately and in a principled manner, it is equally desirable that litigants should not be able to control which judge or judges will decide their cases; that the applicable rule should take into account the realities of litigation; and that the rule should avoid imposing unnecessary disqualifications on judges, having little or nothing to do with the merits of the judge's involvement in the case.[55]

6.52 Following allocation of a case to a judge, an issue of potential disqualification for bias may either be raised by the judge, or by the parties. Each of these situations is considered below.

Recusal on own motion

6.53 If, at any point after a matter is allocated to a judge, the judge becomes aware of circumstances that the judge considers justify recusal, the judge can (and should) recuse herself or himself, in which case the matter will be reallocated.[56] For example, in the case of *Ambrose v Badcock*, the judge determined that through her prior work as a journalist she had possibly worked on a story related to one of the parties and accordingly explained that:

> Upon reading the affidavit of the Trustee in advance of the hearing, I have determined that I should not preside in this matter on the basis that I am disqualified … on the ground of apprehended bias.[57]

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52 See, eg, *Gargan, in the matter of Gargan* [2018] FCA 871 [13].

53 To the contrary, judges have demonstrated a strong commitment to financial interest disclosure. See, eg, *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [4].

54 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ).

55 Ibid 380.

56 Australasian Institute of Judicial Administration (n 29) 17. See, eg, *Belcher v Belcher* [2019] FamCA 553; *Dickens v Dickens* [2018] FamCA 1109.

57 *Ambrose v Badcock* [2021] FCA 881 [7].

6.54 Judges may also determine that their continued involvement in matters involving a series of orders (such as may arise in the course of family law proceedings, for example) warrants their recusal at a later stage in proceedings.[58]

6.55 As will be discussed in **Chapter 7**, judges make recusal decisions amid two competing tensions. On the one hand, in cases of real doubt, the judge is encouraged to embrace a precautionary approach toward disqualification (or as some refer to it 'if in doubt, out').[59] This helps to preserve both resources, and public confidence in the administration of justice. However, a judge must balance this with the duty to sit in cases unless disqualified, an obligation that has been emphasised by the High Court.[60] Where this balance lies may depend in part on the stage to which the proceedings have progressed. That is, a judge might appropriately take a more precautionary approach at an early stage of proceedings when recusal is likely to have less implications in terms of time and cost for the parties. Conversely, a judge might appropriately be more inclined to continue sitting if a disqualification application is made (but is not clearly made out) after a trial has commenced.

Judicial disclosure

6.56 Where a judge identifies a potential issue of bias after the case has been allocated, but it is not clear to the judge that recusal is required, the judge is advised to disclose 'facts which might reasonably give rise to a perception of bias or conflict of interest' to the parties.[61] Disclosure provides parties with the opportunity to either raise an application or waive any objection.[62] The High Court has said that disclosure of such issues is a 'matter of prudence and professional practice'.[63] However, the High Court has cautioned that it is 'neither useful nor necessary to describe this practice in terms of rights and duties'.[64]

6.57 Chapter 3 of the *Guide to Judicial Conduct* sets out a non-exhaustive list of associations, activities, potential conflicts of interest, and other circumstances that serve as 'warning signs' to alert judges of possible challenges to their impartiality.[65] In cases of uncertainty, the *Guide to Judicial Conduct* suggests that the judge should raise the issue at the earliest opportunity with the head of jurisdiction, the person in charge of allocation, and the parties or their legal advisers.[66]

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58 See, eg, *Imbardelli v Imbardelli (No 2)* [2018] FamCA 865; *Kappas v Kappas (No 5)* [2019] FCCA 1141.

59 The Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 80; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [20].

60 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

61 Australasian Institute of Judicial Administration (n 29) 12. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Appleby and McDonald (n 24) 90.

62 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69]; Appleby and McDonald (n 24) 90.

63 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69]. See also Appleby and McDonald (n 24) 90.

64 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [70].

65 Australasian Institute of Judicial Administration (n 29) 11.

66 Ibid 17.

6.58 The *Guide to Judicial Conduct* encourages a precautionary approach whereby it counsels that even

> if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.[67]

6.59 The judge may disclose relevant facts to the parties by correspondence, such as by letter or email, or it may be done in open court.[68] The *Guide to Judicial Conduct* suggests that once the parties are informed of the issue, the matter should be dealt with in court, and 'it will generally be appropriate for the judge to hear submissions from the parties'.[69]

6.60 To this end, some judges take an active role in screening for bias once a matter is allocated to them, and will draw parties' attention to any potential issues. For example, in *Kirby v Centro Properties Ltd (No 2)*, Finkelstein J described how, as a general rule,

> prior to dealing with any case I or my staff check to see if I have an interest in relation to either the parties or the subject matter of the proceeding.[70]

6.61 In that case, the judge described how, when his Honour discovered (after a trial) that he had a holding through a self-managed superannuation fund in one of the parties, he

> promptly disclosed it to the parties in open court. In response to further inquiries from Freehills, who act for CNP and CPT Manager, the respondents in two actions, by letter dated 17 October 2008 (a Friday), my staff provided most of the historical information set out above in an email sent on Monday, 20 October 2008.[71]

6.62 Following disclosure, a party objected to Finkelstein J continuing to hear the matter, and after hearing submissions from the parties, the judge determined that he was disqualified from giving judgment in the matter and made a formal order to remit the case to the registry for reallocation.

6.63 However, where parties do not object to the judge continuing to sit, a more informal approach may also be adopted. For example, in a case before a Full Court

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67 Ibid 18. In its submission, the Deakin Law Clinic Advocacy Practice Group suggested implementing strict procedures to provide 'additional precautionary administrative practices where there is an obligation for judges to disclose facts that may lead to a perception of bias': Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

68 Australasian Institute of Judicial Administration (n 29) 17; Appleby and McDonald (n 24) 90. For an example of informal disclosure in court see *Commissioner of Police (NSW) v Ritson (No 2)* [2020] FCCA 3035. For an example of disclosure by letter to the parties see *Deputy Commissioner of Taxation v Chemical Trustee Limited (No 9)* [2015] FCA 1178.

69 Australasian Institute of Judicial Administration (n 29) 17.

70 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [4].

71 Ibid [5] (citations omitted). For further examples of judicial disclosure during a proceeding see: *Belcher v Belcher* [2019] FamCA 553; *BWE18 v Minister for Home Affairs* [2019] FCCA 1523.

of the Federal Court, a judge disclosed a possible issue of bias and invited parties to indicate whether they felt he should recuse himself. The respondent requested that the judge recuse himself and, with the agreement of counsel for each party regarding the appropriate procedure, the judge made a decision in chambers. The judge gave reasons for his decision not to recuse himself, but did not think it necessary 'to make any order formally dismissing the respondent's recusal invitation'.[72]

Difficulties in disclosure for legal practitioners and parties

6.64 It has been suggested that the practice of disclosure to the parties, and the opportunity that it affords them to waive any objection, in fact puts the parties in a difficult position. Disclosure suggests that the judge considers it a borderline case, but one in which the judge nevertheless considers recusal is not required.[73] As such, by

> disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to consent, counsel (or their clients) may appear to be taking an unreasonable position.[74]

6.65 Justice Perry has described how practices in other jurisdictions guard against this concern, for example, by ensuring that the judge is informed simply that an objection has been made, but not of the identity of the party who objects.[75] Alternatively, the emphasis on the purpose of the judicial disclosure could be shifted away from that of obtaining consent, and toward that of seeking submissions that assist the judge. Under such an approach, when there is any doubt as to a potential issue of bias, the judge would disclose the facts so as to seek counsel's assistance, and to hear argument on the question of whether the doctrine of necessity applies so as to require the judge to continue sitting.[76] These submissions could be made to the judge without identifying information, though there may be limits on anonymity depending on the nature of the bias alleged.

6.66 An alternative to the current disclosure practices might be for the judge to disclose the potential issue of bias to the head of jurisdiction. Parties (through correspondence) could be notified of the potential issue, and the first case management hearing could be allocated to another judge. At this hearing, the views of the parties could be sought and relayed to the original judge. This process could deal with the issue upfront and transparently, while addressing, to some extent,

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72 *Thiess Pty Ltd v Sheehan* [2020] FCAFC 198 [82].

73 Perry (n 3) 11. For example, in the case of *BWE18 v Minister for Home Affairs* [2019] FCCA 1523, the trial judge had disclosed an issue of possible bias to the parties during the trial, but no objection was made to his Honour continuing to sit. In the final judgment, the trial judge described his view on the issue of possible bias: 'Of course, I do not believe that it was a matter that would cause recusal in any event, but if the parties had actually asked, I would have had to consider the matter': [6].

74 Canadian Judicial Council, *Ethical Principles for Judges* (2021) 49 [E.14].

75 Perry (n 3) 11.

76 Ibid 11–12.

concerns about the pressure counsel and parties may face to accede to the judge continuing to sit.

Relevance of a failure to disclose

6.67 Judges are considered best placed to determine what is relevant and necessary to disclose. As English jurist Lord Woolf CJ cautioned, over-disclosure might 'unnecessarily undermine the litigant's confidence in the judge'.[77] A judge of the Federal Court similarly observed that 'it is neither necessary nor desirable to itemise associations which do not reasonably bear upon whether the judge should recuse himself or herself'.[78]

6.68 However, when a judge fails to disclose information that may give rise to a reasonably arguable apprehension of bias, the non-disclosure can itself raise questions. In *Charisteas*, the High Court remarked that:

> The lack of disclosure in this case is particularly troubling. It is difficult to comprehend how the trial judge could have failed to appreciate the need to disclose the communications, particularly when he was dealing with the application to recuse himself on other grounds.[79]

Consultation feedback on disclosure

6.69 Concerns relating to judicial disclosure were not regularly raised in consultations. However, some lawyers and litigants did raise specific and serious concerns about what they saw as a failure to disclose particularly close relationships with counsel on the other side in particular cases. For example, it was suggested that a judge should have disclosed the fact that opposing counsel was godparent to the judge's child. Subsequent discovery of this fact led to a significant sense of injustice on the part of both the lawyers and parties involved. Given the potential embarrassment of raising issues of bias before judges, lawyers suggested that the onus should rest heavily on judges to disclose these types of issues, rather than relying on parties to raise them.

6.70 In addition, in the ALRC Survey of Lawyers one third of participants indicated they had previously had a case in which they thought a judicial officer should have disclosed something that might give rise to apprehended bias, but did not do so.[80]

6.71 The ALRC recognises the need for balance in determining the degree of disclosure that should be provided by judges. This is an area where collection of further feedback by courts, at an institutional level, may raise awareness of issues that lawyers and parties consider are important to be disclosed. In turn, this could inform review of the *Guide to Judicial Conduct* if there are areas where there appear

77 *Taylor v Lawrence* [2003] QB 528 [64].
78 *Chen v Monash University* [2015] FCA 356 [3].
79 *Charisteas v Charisteas* (2021) 393 ALR 389 [19].
80 ALRC Survey of Lawyers, July–August 2021.

to be gaps between the expectations of the profession and the public, and the normal practice of judges. This is addressed further in **Chapter 10**.

Post-allocation: Party-led processes

6.72 After a matter is allocated to a judge, parties may become aware of circumstances that they consider may give rise to apprehended bias requiring disqualification. They may choose to raise this with the judge directly through their chambers, or in open court. In doing so, this may be framed as an informal objection for the judge to consider, or as a formal application for disqualification. However, confusion persists as to exactly what steps should be followed, and when particular procedures are appropriate.

A changing approach

6.73 It was not common for parties to litigation in the Australian courts to raise issues of bias in the absence of judicial disclosure until relatively recently. Justice Samuels, in the 1979 case of *Barton v Walker*, described how, it was

> of course, not uncommon for a judge to disqualify himself on the ground of some past or present connection with a party; and to arrange, without notice to either party, for another judge to sit in his place. Or, where the circumstances are such that a judge thinks it unnecessary to disqualify himself of his own motion, he will ordinarily disclose the facts to counsel, asking them to obtain instructions whether their clients object to his sitting. If an objection is taken, the judge will invariably heed it, and will not sit. It is rare, however, for a party, through solicitor or counsel, to ask a judge not to sit, unless the judge has himself first disclosed the existence of some interest or association.[81]

6.74 However, in a number of cases in the 20 years following *Barton v Walker*, judges noted that this was changing and that parties were more likely to raise issues of bias and to seek a judge's disqualification formally.[82] In *Re JRL; Ex parte CJL*, Mason J commented on the increase in challenges by litigants and attributed it to the court's acceptance of the test of reasonable apprehension of bias.[83] In *Johnson v Johnson*, Kirby J noted 'the greater willingness of members of the legal profession to challenge things that once would have been left alone', and the growing numbers of self-represented litigants as leading to increased litigation on matters of disqualification.[84] These developments meant a change from the position expressed in *Barton v Walker* — that a judge would 'invariably heed' an objection to them sitting

81 *Barton v Walker* (1979) 2 NSWLR 740, 749.

82 See further John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 66–9.

83 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

84 *Johnson v Johnson* (2000) 201 CLR 488 [44]–[45]. The ALRC Case Review revealed more than half of the requests for disqualification had been brought by self-represented litigants (255 of 431). In addition, in the ALRC Survey of Judges, 31 judges (66%, n = 47) indicated that at least half of the applications for disqualification they had received came from self-represented litigants. In the ALRC Survey of Lawyers, 23% (n = 124) indicated that at least half the disqualification applications in cases they had been involved with came from self-represented litigants.

— to a series of warnings about acceding too readily to issues of disqualification raised by parties.[85]

6.75 With this changing approach came uncertainty and inconsistency about the appropriate ways for such matters to be raised and determined. In *Barton v Walker*, the New South Wales Court of Appeal held that formal applications for disqualification were not cognisable, and that objections on the basis of actual or apprehended bias should be dealt with informally by the judge in line with then-existing practice in the court.[86] Although this approach was questioned, it persisted in many jurisdictions for a number of years, leading to significant uncertainty about the appropriate procedures to be followed, and the extent to which any decision to continue to sit in the face of objection from parties could be reviewed (see further **Chapter 8**). In 1998, a Full Court of the Federal Court expressly disapproved of this approach, and suggested that applications for disqualification could be entertained by the courts.[87]

6.76 While it is now fairly well settled that a formal application can be brought, confusion persists as to how the issue of bias should be raised and determined. As recently as 2020, one judge of the Federal Court observed that, 'from an admittedly brief perusal of the authorities, there appears to be some confusion as to how [a] decision not to disqualify myself from the hearing should manifest'.[88] However, the judge noted that the approach of the court did 'not appear to preclude the making of formal applications, nor the making of orders in respect of them'.[89] This confusion was reflected in consultations, where the ALRC repeatedly heard that the procedures relating to how to raise the issue of bias in the Commonwealth courts are not clear and consistent, nor are they well communicated to practitioners or litigants.

Informal approaches for raising bias

6.77 Consultees explained that issues of bias are still often raised with a judge 'informally', without necessarily making a formal application for disqualification. Depending on the stage of proceedings this may be done by correspondence to the

85 See, eg, *s & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Johnson v Johnson* (2000) 201 CLR 488.

86 *Barton v Walker* (1979) 2 NSWLR 740, 750. *Barton v Walker* was expressly overruled in 2021 in the case of *Polsen v Harrison* [2021] NSWCA 23.

87 *Brooks v The Upjohn Company* (1998) 85 FCR 469, 629. Note that it did not have to decline to follow *Barton v Walker* (1979) 2 NSWLR 740, however, because other interlocutory orders had been made that could act as the vehicle for the appeal of the decision not to recuse. See also *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [21], where Finkelstein J stated that *Barton v Walker* was of 'doubtful authority'.

88 *Thiess Pty Ltd v Sheehan* [2020] FCAFC 198 [81].

89 Ibid.

judge's chambers, or orally in court. Some judges retain a preference for the issue of bias to be raised in this way, at least in the first instance.[90]

Potential benefits and drawbacks of informal approaches

6.78 Raising an issue of bias without making a formal application may be particularly helpful when a judge is not aware of the potential bias concern, or when a judge has overlooked an issue the parties feel is salient. It may also be appropriate at early stages of proceedings, when the matter may be dealt with more easily than in the middle of a trial.

6.79 When an issue of bias is raised informally, judges can consider whether to recuse of their own volition.[91] This has the advantage of being both an efficient process and one that respects the integrity of judges by allowing them to consider the issue privately and recuse themselves when they consider it appropriate to do so.[92]

6.80 Dealing with issues of disqualification informally also has the benefit of flexibility. In consultations, some judges noted that when an issue of bias is raised by a party during a hearing in busy trial courts, and the judge considers that disqualification is justified, the judge simply arranges a 'swap' of the case. This allows another judge sitting on the day to hear the matter without the need for any further formal procedures or delay.

6.81 On the other hand, informal approaches may be seen to reinforce the idea of the legal profession as a 'club', in which embarrassing issues can be sorted out behind closed doors. As one judge remarked in consultations, the reality is that the 'club' of the bar (which leads to the bench), and the shared culture and understandings that it brings, is no longer as relevant or publicly acceptable as it once was. The approach some judges have taken of later setting out in a written judgment the process followed and the result, goes some way to addressing these concerns.

Effect of informal approaches

6.82 Judges approach informal applications in different ways. In some instances, informally raising the issue of bias will be treated as an invitation for a judge to consider recusal. For example, in *Belcher v Belcher*, the judge observed:

> On 12 August 2019 Mr Sweeney, with utmost discretion, courtesy and politeness, brought to my attention that I had raised the issue of club membership

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90 This includes in New South Wales. See Andrew Morrison, Kylie Weston-Scheuber and Tim Goodwin, 'Apprehended Bias: To Recuse or Not to Recuse?' (Commbar Civil Procedure Committee CPD, 22 November 2018) 22–3.

91 See, eg, Gabrielle Appleby and Stephen McDonald, 'Disqualification of Judges and Pre-Judicial Advice' (2015) 43 *Federal Law Review* 201, 203, discussing Gageler J's decision not to sit in *Unions NSW v New South Wales* (2013) 252 CLR 530.

92 The Hon Justice JR Sackar, 'Disqualification of Judges for Bias' (Speech, Faculty of Law, Oxford, 16 January 2018) 34, 41.

> in the first hearing. He submitted that by reason of that membership I may find it awkward and uncomfortable to mix in that club with or near the husband. Mr Sweeney did not apply by motion (whether in writing or *ore tenus*) for an order that I recuse myself. However, he invited me to consider whether that set of circumstances caused embarrassment to me such that I should disqualify myself.
>
> …
>
> Even though the husband did not formally apply, it was open to me of my own motion to consider whether, by reason of apprehended bias, I should recuse myself.[93]

6.83 In other cases, an informal communication on the issue of bias may be treated as an application for disqualification.[94] This includes, for example, correspondence by email to the court's registry, such as in the case of *CPJ16 v Minister for Home Affairs*, where the judge noted that although 'no formal application has been made, I have treated that email communication as an application for me to disqualify myself on the ground of apprehended bias'.[95]

6.84 In another set of cases identified in the ALRC Case Review, when parties raised the issue informally this was treated neither as a request for recusal, nor as a formal application for disqualification.[96] This may affect a party's ability to appeal in relation to the issue. For example, in *Lietzau v Lietzau*, the appellant wrote to the court raising a potential issue of bias. The trial judge did not consider the issue. The appellant appealed an interlocutory order on the basis that the trial judge should have disqualified herself, but that appeal was rejected on the grounds that there was no application for disqualification before the judge.[97]

6.85 The issue of potential bias can also be raised informally through the office of the court registrar, who may choose to reallocate the case where appropriate.[98] In the ALRC Survey of Lawyers, fewer than one in ten lawyers (9%; n = 211) reported

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93 *Belcher v Belcher* [2019] FamCA 553 [44]–[46].

94 See, eg, *Chen v Monash University* [2016] FCAFC 66, in which a letter attached to an email was described as an 'application'. In another case, before addressing the issue of bias, the judge noted 'that in the course of some of the materials that Mr Cristovao has filed, and the materials are not particularly easy to follow … he has suggested that I recuse myself': *Cristovao v Trott* [2019] FCA 360 [3].

95 *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 [77].

96 *Kanakaridis v Westpac Banking Corporation* [2015] FCA 1146 [10]; *Mahoney & Anor v Dieter* [2020] FamCA 667 [55]; *Norris v Denis (No 3)* [2020] FCCA 1374 [34].

97 *Lietzau v Lietzau* [2018] FamCAFC 167 [7]. This approach is likely to have been driven by the particular statutory framework applying to family law cases, which expressly allows an appeal from a decision of a judge 'rejecting an application' for recusal: *Family Law Act 1975* (Cth) s 94(1AA). See further **Chapter 8**.

98 Sackar (n 92) 34.

that they had contacted a court's registry to request reallocation of a case to a different judicial officer on bias grounds.[99]

Informal approaches in multimember courts

6.86 In addition to the informal processes described above, when an objection involves a judge on a court made up of more than one member (such as an appellate court), a different practice has emerged. Consultees suggested that, in such courts, it is not uncommon for the judge who is the subject of the objection to discuss the issue with her or his colleagues on the case before coming to a decision as to whether or not to continue to sit.

6.87 In New Zealand, multimember courts have formalised a similar process. Recusal guidelines set out transparent processes that appellate courts will follow when an issue of bias is raised in relation to one of the judges. For example, the Recusal Guidelines for the Court of Appeal provide that, if a judge becomes aware of a potential bias issue that is not clear-cut, then the judge 'should consult, at that point, with other members of the panel and the President'.[100] If, after consultation, the judge considers that the parties should be informed, the judge should arrange for communication to be made to the parties. When a party first raises the issue of bias, the objection is to be directed to the challenged judge, but that judge is expected to consult with the other judges on the panel when considering the issue.

6.88 Under the New Zealand model, if the challenged judge decides to continue to sit, and if one or more parties maintain an objection, the parties can file brief written submissions (of no more than three pages), and may file an affidavit if appropriate. The challenged judge may also lodge a memorandum with the other members of the court alerting them to any issues the challenged judge thinks should be considered. This is also made available to the parties. The matter is then determined 'either on the papers or at an oral hearing, possibly by telephone' by the whole panel (unless the President otherwise directs).[101] The Supreme Court has published similar guidelines.[102]

Formal approach for raising bias: Application for disqualification

6.89 A party may decide to make an interlocutory application to the court for disqualification of the challenged judge.[103] A formal application process can serve

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99 The surveys conducted by the ALRC were designed in such a way that not all questions were compulsory, and in some instances questions were only put to subgroups of participants. Therefore, the total number of responses to questions varied within the surveys. The number of participants who answered any given question is reported as n = X.

100 Court of Appeal of New Zealand (n 28) [7].

101 Ibid [11]. Oral applications made on the day of the hearing are not considered appropriate. Nevertheless, when 'a recusal application is raised at this late stage, the allocated panel will deal with the matter then and there': [12].

102 Supreme Court of New Zealand, 'Recusal Guidelines' (9 July 2020).

103 Australasian Institute of Judicial Administration (n 29) 18.

to promote public confidence in the administration of justice. As the Federal Court has recognised,

> the public interest in seeing justice done openly is best served by allowing (but not always mandating) recusal applications to be brought in public by motion and whatever process is required to see that the allegations are fully ventilated.[104]

6.90 In some ways, the more formal approach is consistent with the evolution towards a recognition that bias is an institutional issue, and not only a concern for individual judges. In its submission, the Family Law Practitioners' Association of Western Australia suggested that formal applications were preferable in order to emphasise the serious nature of the application, and that applications should be 'supported by an affidavit setting out the grounds alleging bias'.[105] Formal applications, and the resulting requirements for the court to make formal orders and publish reasons, also promote transparency of the processes adopted.

6.91 On the other hand, as emphasised by the Australian Bar Association in its submission, formal applications can add delay and cost to proceedings, particularly if applications are required to be made in writing (rather than orally), and if evidence is required in the form of affidavits or other means. Formal applications may also be more difficult to navigate for self-represented litigants, as opposed to transparent, but flexible, 'practice-based' approaches.

6.92 When a formal application is made, it should be dealt with expeditiously.[106] In some cases, parties have faced situations in which the judge has not listed the application 'with the requisite urgency'.[107] This is problematic, as a challenge for bias threatens to nullify any ongoing proceedings that are not stayed.[108]

Approach to formal applications

6.93 As noted above, in some cases litigants who have raised issues of bias have been required by the judge to make a formal application for the issue to be considered further. For example, in *Acres v Cannon*, the judge acknowledged that the issue of bias was raised by letter, but did not treat the letter as an application and noted that he would only consider it if 'that application is pressed'.[109] In *Norris v Denis (No 3)*, the judge noted that:

> No formal application was made for an adjournment or for the Judge hearing the matter to recuse himself. This Court would clearly consider an oral

104 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [18]–[19].
105 Family Law Practitioners' Association of Western Australia, *Submission 18*.
106 *Re Council of the City of Sydney (No 3)* [2021] NSWSC 1423 [14].
107 *Garnett v Beckworth* [2017] FamCAFC 160 [11].
108 See, eg, *Holden v Dunlop (No 2)* [2016] FCCA 2854.
109 *Acres v Cannon* [2016] FamCA 1 [16]. See also: *Callas v Callas & Ors* [2018] FCCA 4 [147], in which the judge observed that one of the parties 'hinted at, but did not make an application for my recusal' and eventually asked him to 'please consider your withdrawal from this case'; *Bowen v Williams* [2016] FamCA 725 [10], in which the judge noted: 'Notwithstanding the allegation of pre-judgment … the solicitor for the father did not make any application'.

> application, just as it did from the Husband on previous occasions. This Court will not, however, conduct litigation by email correspondence.[110]

6.94 There is also a line of cases in the Federal Circuit Court that suggests a preference for written interlocutory applications seeking orders for recusal. For example, in *C7A/2017 v Minister for Immigration and Border Protection*, the judge requested a written application after receiving an oral application for disqualification, and declined to rule on the question of bias absent the written application.[111] One judge recorded in reasons for judgment that he had decided to 'dispense with the need for a formal application' when determining an oral application for disqualification.[112]

Framing applications in relation to disqualification

6.95 Despite the formal application procedure being fairly widely adopted across both the Federal Court and the predecessors to the FCFCOA, consultees in this Inquiry confirmed that some uncertainty persists about the way that such applications should be framed. A Full Court of the Federal Court recently expressed a preference that a disqualification application should seek that proceedings 'be referred to the National Operations Registrar for the allocation of a new trial judge', rather than seeking 'that the primary judge disqualify himself'.[113] However, a number of provisions in the *FCFCOA Act* refer to the procedures for applications for the 'disqualification' of a judge.[114] The ALRC Case Review shows that applications seeking that a judge 'recuse' herself or himself, or 'be disqualified' from further hearing the matter, are regularly made and determined in both the Federal Court and the FCFCOA.[115]

Notice to judge of formal application

6.96 A formal application may also have informal conventions around it that are not immediately obvious to lawyers or self-represented litigants. In a recent case in the Federal Court, Lee J noted that some practitioners did not appear to be aware of the procedure through which applications for apprehended bias should be raised.[116] He cited, with approval, observations by Rothman J of the New South Wales Supreme Court that the orthodox procedure is that advance notice be provided to the challenged judge of an intent to lodge an application relating to bias.[117] Under this

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110 *Norris v Denis (No 3)* [2020] FCCA 1374 [34].

111 *C7A/17 v Minister for Immigration and Border Protection* [2018] FCCA 458 [35]. See also *Construction, Forestry, Maritime, Mining and Energy Union v Precision Painting Contractors Pty Ltd* [2018] FCCA 1152.

112 *ARW15 v Minister for Immigration* [2015] FCCA 2595 [1].

113 *GetSwift Limited v Webb* (2021) 88 ALR 75 [3]. See also the observations of Lee J that an application framed as seeking an order that he recuse himself 'may have been heterodox': *McKenzie v Cash Converters Int Ltd (No 3)* [2019] FCA 10 [6].

114 *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 26(1)(h), 28(1)(c), 28(3)(f).

115 See, eg, *Cavar v Greengate Management Services Pty Ltd* [2016] FCA 961 (an appeal of a decision by the primary judge not to disqualify himself); *Luck v Chief Executive Officer of Centrelink* (2017) 251 FCR 295 (an appeal from an order dismissing an application that the primary judge recuse himself); *Nghiem v Alberts* [2020] FamCAFC 187 (an appeal of a decision by the primary judge not to disqualify himself).

116 *McKenzie v Cash Converters Int Ltd (No 3)* [2019] FCA 10 [6].

117 *Attorney-General of New South Wales v Bar-Mordecai* [2009] NSWSC 117 [3]–[7].

approach, it is expected that counsel for both parties attend the judge's chambers so the applicant can notify the judge of the application to be made and its basis. For unrepresented litigants, the expectation is that the judicial officer would be notified through the judge's associate. Justice Rothman stated that notice is

> not simply a matter of courtesy. Such notice aids in the administration the justice. It allows the other party, to the extent necessary, to be represented by a different counsel, if the application were to relate to a relationship between the judge and counsel, for example, and it allows the judicial officer to understand the nature of the application and to be prepared for it, prior to it being agitated in Court. That aids the administration of justice.[118]

6.97 However, in consultations, the ALRC heard of cases in other states in which lawyers were threatened with contempt of court by a judge after providing notice of an intention to make an application for disqualification.

Procedure and self-represented litigants

6.98 Justice Rothman has observed that the lack of clarity around the procedure is particularly problematic for self-represented litigants. In *Attorney-General of New South Wales v Bar-Mordecai*, his Honour asserted that:

> One cannot expect a self-represented person to appreciate the process by which apprehended bias is properly raised … and, unless the Court sets out the practice, unrepresented litigants will never find out.[119]

6.99 When it is unclear whether a self-represented litigant is asking the judge to recuse herself or himself, the judge will often inquire as to whether the self-represented litigant would like to make an application. For example, in *Canh v Canh (No 2)* the judge

> asked the father whether his belief in my bias led him to orally apply for me to disqualify myself from hearing these current applications, but he said not. He expressly abstained from making any disqualification or adjournment application.[120]

6.100 In consultations, the ALRC heard the view that some self-represented litigants resort to bias applications based on dissatisfaction with the outcome of their cases, which are 'doomed to fail'.[121] These applications are often brought without an understanding of the law on bias or the significance of such an allegation. Greater transparency around the procedures and the law — and specific situations in which a bias application is not plausible — may help to encourage appropriate use of bias applications.

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118 Ibid [3]–[7].
119 Ibid [4].
120 *Canh v Canh (No 2)* [2020] FamCA 941 [17]. See also *Chen v Secretary, Department of Social Services (No 2)* [2020] FCA 384.
121 See further *Slaveski v Rotstein & Associates Pty Ltd* [2012] VSCA 291 [22] (Maxwell P, Warren CJ agreeing).

Supporting evidence

Transcripts and audio recordings of proceedings

6.101 A critical issue that may arise when an application relates to conduct or statements of the challenged judge during the proceedings, is access by the parties (and any judge considering the matter) to transcripts and audio recordings of proceedings.

6.102 Generally, if a party wishes to rely on statements made in court to raise an issue of bias on appeal, that party is required to obtain and file a copy of the transcript with the notice of appeal.[122] The same may be required for disqualification applications — at least when the statements of the challenged judge were made some time before the disqualification application. In *Carlson v Carlson*, a disqualification application included allegations about the rejection of evidence and certain statements made at a trial 'ranging back over two years'.[123] In considering the application, Cleary J said that 'transcript would be necessary', including so that any alleged statements could be 'put in context', and considered that it would be inappropriate for him to rely upon his own recollections of the events.[124] No order was made that transcripts be provided; instead, it seems that the absence of transcripts (at least in part) led to the conclusion by the judge that there was no evidence that supported the claim of apprehended bias.[125]

6.103 According to rule 6.11 of the *Federal Court Rules*, a person 'must not use a recording device for the purpose of recording or making a transcript of the evidence or submissions in a hearing in the Court'. There is a similar prohibition in rule 15.23 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth). The effective result is that a party must ordinarily obtain a transcript from the exclusive private provider of Commonwealth court transcripts, Auscript.[126] According to a 'Quick Estimator' available on Auscript's website, the estimated cost to obtain a transcript of six hours (roughly one day) of court proceedings is between $2,290 (for a 10-day turnaround) and $3,785 (for a same-day turnaround).[127]

6.104 Accordingly, the cost of obtaining the transcripts necessary to substantiate a disqualification application, or appeal in relation to bias, is likely to be prohibitive for

122 *Baldin v Baldin* [2019] FamCAFC 19 [24].
123 *Carlson v Carlson* [2017] FamCA 1169 [21].
124 Ibid [21].
125 Ibid [29].
126 In contrast, all transcripts of High Court proceedings are published online shortly after each hearing and are freely available. However, High Court cases are far fewer in number than for other Commonwealth courts, and are of particular public significance.
127 Auscript, 'Quick Estimator' <https://auscript.secure.force.com/portal/transcriptestimator>.

many court users, and gives rise to access to justice concerns.[128] One confidential submission noted the financial burden of having to access transcripts and felt that impartiality was undermined by the cost and delay involved in accessing transcripts.

6.105 At least in relation to appeals, a court may obtain a transcript at its own expense, but this step is only taken in 'rare cases'.[129] In *Crabman v Crabman*, Kent J considered an application for an order that the Court provide the transcript at its own expense, rather than at the expense of the applicant. His Honour concluded that 'the preponderance of discretionary considerations, in particular the interests of justice', justified the making of such an order.[130] Those considerations included that the applicant could not afford to obtain the transcript, and that without the transcript it would not be possible to make an assessment of the merits of the appeal.131 In an earlier judgment, his Honour had summarised the relevant principles.[132] That included drawing upon the case of *Forbes v Bream*, where a Full Court of the Family Court said that,

> if the interests of justice require it, and the appellant or cross-appellant or party seeking it cannot afford the cost of transcript, the Court may in the exercise of its discretion agree to provide the transcript of relevant parts to enable the appeal to proceed.[133]

6.106 His Honour also drew upon *Sampson v Hartnett*, where a Full Court of the Family Court identified a number of discretionary considerations, which included the nature of the case, whether the transcript was 'necessary for the determination of the appeal or part of the appeal', the likely cost and whether the party could afford it, the proportionality of the cost in relation to the party's costs of the whole appeal, the prima facie merits of the appeal, whether the question of providing transcripts could be left to the appeal court, and 'any other relevant facts or circumstances'.[134]

6.107 An alternative is for a party to rely on an audio recording of proceedings. A recording may be particularly important where it is suggested that a judge evidenced partiality through the judge's manner of speech or other conduct. For example, in *Dennis v Commonwealth Bank of Australia*, a Full Court of the Federal Court found that a recording of proceedings indicated that the primary judge had 'raised his

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128 There does not appear to be any avenue for fee waiver in cases of financial hardship. The FCFCOA website explains that in 'limited circumstances, if the Court has already obtained a transcript, you may be permitted to peruse (but not copy) the Court's transcript in the court registry. The Court does not order transcript for all events so access to the transcript on the Court file may not always be available': Federal Circuit and Family Court of Australia, 'Court Recording and Transcription Services' <www.fcfcoa.gov.au/recording-transcripts>. Auscript indicates that a fee-waiver program is operable in some circumstances for cases heard in Queensland Courts, but not in the courts of any other jurisdiction (including the Commonwealth): Auscript, 'FAQs — Costs/Payments — Question 7: Am I Eligible for a Fee Waiver? And If so, How Do I Apply?' <www.auscript.com/en-AU/resources/faqs/>.

129 *Crabman v Crabman (No 2)* (2020) 61 Fam LR 191 [5].

130 *Crabman v Crabman* [2020] FamCAFC 118 [15].

131 Ibid [14].

132 *Crabman v Crabman* [2019] FamCAFC 141 [10]–[13].

133 *Forbes v Bream* (2008) 222 FLR 96 [35].

134 *Sampson v Hartnett* [2010] FamCAFC 220 [16].

voice and spoke in an aggressive and sometimes intimidating tone of voice on a number of occasions', and at one point had adopted an 'enraged and intimidating tone of voice in the course of shouting at the appellant'.[135] Such conduct may not be evident from a review of a transcript only.[136]

6.108 While parties are routinely able (subject to cost) to obtain and provide copies of transcripts, they are significantly restrained in their ability to obtain and tender recordings of court proceedings.

6.109 Restrictions on access to audio recordings are noted in case law, and in guidance on court websites. For example, one Family Court judgment suggests that access to an audio recording is 'a matter of negotiation and agreement between a requesting party, the Registry and the transcript provider'.[137] According to the website of the FCFCOA, 'audio recording of matters heard in the Court are only available in exceptional circumstances and when approved by the relevant Registry Manager', and even then 'the necessary facilities and supervision will be arranged, and a fee will be payable to Auscript'.[138] According to one Federal Circuit Court judgment, the 'usual course' for accessing an audio recording is that it 'would be provided to the Registry who would make it available to the Applicant in the Registry' — that is, it would be necessary for a party to physically attend and listen to a recording at the court premises.[139] Recordings of Federal Court proceedings 'are not available other than by order or direction of the Court'.[140] In the case of *Crabman v Crabman*, the Family Court permitted access to a recording of the delivery of *ex tempore* reasons, in circumstances where there was an allegation that the published reasons had removed certain remarks.[141] However, the orders only permitted the parties 'to hear at the registry at a time determined by the Appeal Registrar, the audio of the trial judge's ex tempore reasons' — rather than permitting them to have a copy of that audio.[142]

6.110 Even if parties are able to obtain copies of the audio recordings of proceedings, they are likely to require a copy of the transcript as well to provide evidence in support of a disqualification application or appeal in relation to bias.[143] For example, a court may request a party to take the court to any 'relevant passage in the transcript' in relation to particular issues.[144] As observed in *Baldin v Baldin*, if the appellant 'does

135 *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343 [37]–[38].
136 Ibid. For example, the Court observed that the appellant was not given an opportunity by the primary judge to answer questions, and that to appreciate this point it was 'necessary to read the transcript and listen to the audio recording': [47].
137 *Burt v Merrill (No 2)* [2018] FamCA 606 [44].
138 Federal Circuit and Family Court of Australia (n 128).
139 *Clarke v Premier Youthworks Pty Ltd* [2018] FCCA 2938 [11].
140 Federal Court of Australia, 'Access to Transcript' <www.fedcourt.gov.au/services/access-to-files-and-transcripts/transcript>.
141 *Crabman v Crabman* [2019] FamCAFC 141 [19].
142 Ibid [6].
143 Although, in some cases it appears that the court obtains audio recordings to review on its own initiative. See, eg, *Fowles v Fowles* [2021] FamCA 368 [3].
144 *Hadlett v Ralphson* [2018] FamCAFC 258 [21].

not obtain the transcript, he is at risk in terms of the success of his appeal' because if it were necessary to refer to the transcript, and he did not provide it, 'the risk is the appeal might be dismissed for that reason'.[145]

6.111 The ALRC considers that the transparency of courts and their procedures is a key contributor to perceptions of impartiality. As Gibbs J observed in *Russell v Russell*, 'the public administration of justice tends to maintain confidence in the integrity and independence of the courts'.[146] Further, transparency may have a moderating or constraining effect on judicial conduct, because transparency facilitates 'public and professional scrutiny'.[147] Those are additional reasons, apart from ensuring that disqualification applications or appeals in relation to impartiality are not beyond the practical reach of parties, as to why access to transcripts or recordings of proceedings should not be unduly restricted.

6.112 Consideration should be given by courts to amendments to their rules and commercial arrangements that would enable greater — and more affordable — access to transcripts or recordings. Such measures could include facilitating greater access to recordings of proceedings (particularly when issues of bias are raised), or enabling greater competition in the provision of court transcripts, which may reduce their cost.

6.113 As the ALRC found in 2008, a number of practices and rules restrict access to court records and related information in general, and there is reason to believe that a further review on that issue is justified.[148] Notably, as part of its current review into 'Open Justice', the New South Wales Law Reform Commission has suggested that transcripts of proceedings in open court be classified as 'open access information', so as to enable greater access than is currently the case in that State.[149] The ALRC recognises that increased access to court records and related information would need to be approached with caution in some areas of law, in particular, in relation to family law proceedings.

Use of affidavits in applications for disqualification

6.114 Another area of uncertainty in relation to the procedure for making a disqualification application is whether or not affidavit evidence is required, or even admissible, in support of a disqualification application. Views on appropriate practice across the Commonwealth courts do not appear to be consistent, resulting in potential confusion for parties, and inefficiency in the resolution of disqualification applications. Retaining flexibility may be appropriate given the range of issues that may arise in considering an application for disqualification. However, guidance on

145 *Baldin v Baldin* [2019] FamCAFC 19 [24].
146 *Russell v Russell* (1976) 134 CLR 495, 520.
147 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378 [44].
148 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 2008) [35.83]–[35.128].
149 New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* (Consultation Paper 22, 2020) [6.67].

the use of affidavits (and evidential approaches) could be included in the judicial disqualification guidelines contemplated in **Recommendation 1**.

6.115 For example, in *DOQ17 v Australian Financial Security Authority (No 2)*, Perry J considered an application seeking her disqualification. Her Honour indicated that she had 'explained the inappropriateness of affidavit evidence being filed on an application of this kind' to the applicant.[150] Her Honour considered that 'the giving of sworn evidence in support of allegations of alleged or apprehended bias carries with it certain dangers', which potentially included that:

> (1) the process of proving the facts by affidavit itself may give rise to an apprehension of bias such that the decision maker must in any event disqualify herself or himself;
>
> (2) statements may be made that are regarded as constituting a contempt of court;
>
> (3) inaccurate or dishonest statements may be made; and
>
> (4) the decision maker may know that assertions of fact by the moving party are incorrect but those assertions may not be challenged by the other parties and they cannot, of course, be refuted by evidence from the decision maker.[151]

6.116 In comparison, in *Bondelmonte v Bondelmonte (No 2)*, the applicant sought 'leave to file the Application in the absence of an Affidavit' because the application was 'procedural in nature and will be heard by reference to documents already on the Court file', including a previous judgment.[152] Justice Watts did not expressly deal with the application for leave to file the application in the absence of an affidavit, and observed that:

> Rule 2.02 and rule 5.02 of the Family Law Rules 2004 (Cth) provide that a party who applies for an incidental order in an application in a case must, at the same time, file an affidavit stating the facts relied on in support of the orders sought.[153]

However, his Honour proceeded to deal with the substance of the application.

6.117 The requirement to file an affidavit is now reflected in rule 5.04 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth), and rule 4.04 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth). There does not appear to be any formal exemption from this requirement in circumstances where the facts relied on are on the court record — for instance, in a transcript, or in prior written reasons of the court. However, as *Bondelmonte v Bondelmonte (No 2)* shows, judges may rely on materials to which they have access, but which are not formally admitted into evidence, such as

150 *DOQ17 v Australian Financial Security Authority (No 2)* [2018] FCA 1270 [2].
151 Ibid [2]. See also Perry (n 3) 21.
152 *Bondelmonte v Bondelmonte (No 2)* [2016] FamCA 526 [2].
153 Ibid.

reasons of the court.[154] In another case, regard was had to emails between a judge's associate and the parties, which had not been included in an affidavit.[155]

6.118 Other cases considering affidavits in the context of disqualification applications have been variously: accepted;[156] considered to be inadmissible (such as when the affidavit was said to consist 'largely of submissions and assertions');[157] or treated as submissions rather than as evidence.[158]

Reasons for recusal

6.119 While judges in Australia will generally provide reasons if they conclude there is no reasonable apprehension of bias and remain seised of the matter (in line with the *Guide to Judicial Conduct*),[159] reasons are not always provided when judges decide to recuse themselves.[160] This is almost invariably the situation when judges recuse themselves shortly after allocation or at the outset of case management proceedings. The resulting dearth of reasons contributes to a slant in the reported case law toward cases in which judges did not disqualify themselves.[161]

6.120 In a legal system based on precedent, this may be problematic from a litigant's perspective. When considering whether or not to make an application for disqualification, and in making such applications, it would be helpful to have jurisprudence to understand why judges do recuse themselves, and not just jurisprudence that indicates why judges do not recuse themselves.[162]

6.121 The extent to which the limitations of the case law affect judges' decisions to recuse themselves, however, is unclear. Consultations with registries and judges — as well as academic commentary — suggest that many judges take a very precautionary approach toward bias in any case.[163] In addition, the *Guide to Judicial Conduct* notes that it may be helpful for judges to consult their colleagues

154 Ibid [3].
155 *COV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 670 [2].
156 *Charisteas v Charisteas* (2020) 389 ALR 296 [120]; *Christian v Société Des Produits Nestlé SA (No 1)* [2015] FCAFC 152 [19].
157 *Chard v Ye* [2018] FamCAFC 117 [68].
158 *Cavar v Greengate Management Services Pty Ltd* [2016] FCA 961 [19].
159 Australasian Institute of Judicial Administration (n 29) 18.
160 See, eg *Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149 [72], in which the judge observed that the 'giving of reasons in such a case would be nothing more than an empty recitation of the obvious'. This is borne out by the ALRC Case Review, which shows that recusals referred to in the procedural history of cases are often not matched by published reasons. Moreover, it is often unclear from the procedural history given in decisions whether judges have recused themselves on application or their own motion: see, eg, *Duarte v Mors*e [2017] FamCA 350 [8]; *Ding v Ding* [2017] FamCA 206 [1].
161 Jula Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53(3) *Osgoode Hall Law Journal* 853, 896.
162 In 2014, Quebec's *Code of Civil Procedure* was updated to remove s 236 of the 2002 version of the Code, which had required reasons when a judge initiated recusal.
163 See, eg, Appleby and McDonald (n 24) 98.

in making recusal and disqualification decisions.[164] Therefore, even though judges do not benefit from the written reasons of their colleagues on early-stage recusals, they may benefit from their colleagues' guidance behind closed doors. However, the ALRC Survey of Judges revealed that 28 (n = 61) participants never or rarely consulted colleagues before deciding whether to recuse or disqualify themselves. This compared with just over a quarter (15) who responded that they usually (12) or always (3) consult colleagues.

6.122 Encouraging the provision of reasons for recusal and disqualification would serve to create a more transparent process. A balance would need to be struck with respect to the level of detail contained in the reasons, given the potential embarrassment for judges and their interest in privacy. Striking the appropriate balance would also require consideration of the objective of increasing public confidence on both sides of the equation, as disclosing more information may not achieve that objective if judges are required to disclose significant detail concerning the actual or perceived bias.

6.123 An alternative (mentioned in the Consultation Paper) could be for courts to provide aggregated data that identifies the frequency of and grounds for recusals that occur in the early stages of a case. Increased transparency would help to address public cynicism that may arise when high profile cases are the subject of media attention. It could also assist registries in developing effective screening tools in the initial allocation of cases and help judges in knowing how their colleagues are deciding similar issues. This potential reform did not attract much feedback in consultations and submissions.

The special position of the High Court

6.124 The High Court — as the highest court in Australia — is in a special position, and the law is not clear as to the procedures that should be followed if an issue of bias is raised in relation to one of its Justices.

6.125 For example, questions have been raised in the literature about whether the High Court even has jurisdiction to review a decision of one of its own members not to disqualify herself or himself.[165] The issue was raised in the case of *Kartinyeri v Commonwealth*, where Callinan J initially rejected the plaintiff's motion that he disqualify himself.[166] No review decision was rendered, however, as Callinan J ultimately recused himself. In the commentary that followed, some opined that jurisdiction for such review can be found in either s 31 of the *Judiciary Act 1903* (Cth)

164 Australasian Institute of Judicial Administration (n 29) 17.
165 Appleby and McDonald (n 24) 110.
166 *Kartinyeri v Commonwealth of Australia* (1998) 156 ALR 300.

or in the inherent jurisdiction of the Court to uphold the principles of natural justice, protect its processes, or uphold the *Australian Constitution*.[167]

6.126 In *Bienstein v Bienstein*, concerning a single judge decision of the High Court in its original jurisdiction, McHugh, Kirby, and Callinan JJ proceeded on the basis that they could have heard an appeal of an interlocutory order issued by Hayne J refusing to disqualify himself.[168] They held that leave was required to appeal the order, and dismissed the appeal for incompetence.[169] However, their Honours went on to consider whether they would have granted leave if an application had been made, and held that the application would have been refused because an appeal on those grounds would have had no prospect of success.[170]

6.127 Final courts of appeal in comparable jurisdictions have recognised their inherent jurisdiction to reopen and vacate their own decisions on the grounds that one of the members of the court was disqualified for apprehended bias. For example, where circumstances giving rise to apprehended bias in relation to an apex court judge have become known to the parties only after delivery of the court's judgment in the matter, apex courts in the UK, Ireland, New Zealand, and Canada have found that they have jurisdiction to reopen the proceedings with a reconstituted panel.[171] Although this situation has not specifically arisen in the High Court, in other contexts the High Court has held that it has inherent power to reopen proceedings and set aside a judgment when the proceedings have involved a denial of justice.[172]

6.128 In some comparable legal systems, apex courts also determine applications for disqualification of one of their members as a panel. This occurred, for example, in the South African Constitutional Court case of *President of the Republic of South Africa v South African Rugby Football Union*.[173] In New Zealand, the Supreme Court guidelines on disqualification provide that, where an objection is made to one of the judges sitting on the panel, it will be determined by all the judges available, other

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167 Enid Campbell, 'Review of Decisions on a Judge's Qualification to Sit' (1999) 15 *Queensland University of Technology Law Journal* 1, 5–6; Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1999) 73 *Australian Law Journal* 72, 78; 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, 26–7.

168 *Bienstein v Bienstein* (2003) 195 ALR 225.

169 Ibid [28]–[29]. Leave is required under s 34(2) of the *Judiciary Act 1903* (Cth) to appeal an interlocutory judgment of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or in Chambers.

170 Ibid [37].

171 See, eg, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (United Kingdom); *Kenny v Trinity College* [2008] 2 IR 40 (Ireland); *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122 (New Zealand). See also *Wewaykum Indian Band v Canada* [2003] 2 SCR 259, where the Supreme Court of Canada was willing in principle to reopen its judgment, but rejected the application to vacate on its merits. Note that in this regard, the US is an exception. See further Abimbola A Olowofoyeku, 'Bias in Collegiate Courts' (2016) 65(4) *International and Comparative Law Quarterly* 895, 902–4.

172 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 [4]. See further Tarrant (n 82) 344.

173 *President of the Republic of South Africa v South African Rugby Football Union* [1999] 4 SA 147 [33]–[34]. This occurred with agreement of both parties: see further Olowofoyeku (n 171) 907.

than the judge who is the subject of the objection.[174] Following the *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* ('*Pinochet (No 2)*') decision in the UK,[175] the Lord Chancellor (a member of Cabinet) wrote an open letter to the Senior Law Lord suggesting that

> the decision-making process should be a collective one addressed by the panel of judges before hearing each case and that responsibility for ensuring that a judge who had a conflict of interest did not sit should be that of the law lord in the chair.[176]

6.129 Developing procedures in advance — rather than in response to a specific case — can facilitate a careful and deliberative design process that takes into account a range of potential situations. Procedures that are established in advance of the issue arising may also help to promote public confidence that the court as an institution takes these matters seriously and that the challenged Justice in a given case does not influence the design of the procedures.

6.130 If the High Court were reluctant to develop procedures on the basis of it having inherent jurisdiction to review a recusal decision of one of its members, the Court could instead adopt a procedure whereby recusal decisions are made by the Court as constituted rather than by the challenged Justice alone (see **Recommendation 3**). This would provide a solution in most, but not all, cases. In instances where further information is revealed after the judgment of the Court is finalised, as occurred for example in the *Pinochet (No 2)* and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* litigation, and on determinations made by a single Justice, invocation of the inherent jurisdiction may still be required if a remedy is to be provided.[177]

Support for greater transparency of process

6.131 The significant changes in practice, and the law that shapes it, over the past 50 years 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. In some jurisdictions, such as many states in the US, these issues have been addressed in legislation. In others, such as New Zealand, further guidance has been mandated by statute, and published as administrative guidance.

6.132 However, in Australia, and in the Commonwealth courts in particular, there is no easily accessible guidance on the procedure for litigants or legal practitioners in the form of Practice Notes or Practice Directions, such that litigants and practitioners

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174 Supreme Court of New Zealand (n 102) [7].

175 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

176 Kate Malleson, 'Judicial Bias and Disqualification after Pinochet (No. 2)' (2000) 63(1) *Modern Law Review* 119, 126. See further Olowofoyeku (n 171) 922–3.

177 Appleby and McDonald (n 24) 112. See further *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122.

are expected to rely on case law for guidance. In addition, although we now have greater clarity about the approaches of the Federal Court and the FCFCOA in relation to formal applications and review, as explored in **Chapter 8**, the statutory landscape for challenging disqualification decisions at an interlocutory stage is complex — grounded in multiple statutes and regulations and overlaid by case law. Despite the complexities of procedure, in some recent cases, counsel have been criticised for approaching these issues in a particular way. Further complexities arise when a failure by self-represented litigants to follow proper procedures may also affect the extent to which the underlying issue of bias is dealt with on appeal.[178]

Feedback on Consultation Paper proposals

6.133 The ALRC made two proposals in its Consultation Paper regarding the informal practices and formal legal processes around allocation, screening, disclosure, and raising or framing issues of bias. These proposals were intended to enhance clarity and transparency of procedures by the development of: Practice Notes or Practice Directions on procedure (**Proposal 2**); and an accessible guide for litigants (**Proposal 3**). There was extensive support for each of these proposals in submissions.[179]

6.134 Support for additional guidance was not unanimous. Some submissions were concerned that Practice Notes could introduce an added layer of complexity and rigidity to what are currently often flexible processes, especially for dealing with issues raised by self-represented litigants. There was a view that many circumstances that require a recusal decision are dealt with efficiently and fairly by judicial officers taking unilateral action to recuse themselves and that any new procedure should protect the discretion of judicial officers to continue this practice, given the time and cost efficiency this promotes.

6.135 In response to **Proposal 3**, the Deakin Law Clinic Policy Advocacy Practice Group had several suggestions for what should be included in guidance for the public. In addition to addressing procedural issues in relation to disclosure, screening, and applications for disqualification, they suggested that the guidelines 'should put forth timelines in accordance with best practice'.[180] Another submission suggested that public consultation (through surveys, citizen assemblies, and opportunities for

178 See, eg, *Olman v Teitzel* [2018] FamCAFC 11 [26]–[27].

179 Proposal 3 read: 'Each Commonwealth court should develop and publish an accessible guide to recusal and disqualification ('Guide') for members of the public. The Guide should be easy to understand, be informed by case law and the *Guide to Judicial Conduct*, and refer to any applicable Rules of Court or Practice Directions/Practice Notes. In addition to summarising procedures, the Guide should include a description of (i) circumstances that will always or almost always give rise to apprehended bias, and (ii) circumstances that will never or almost never give rise to apprehended bias.' The proposal was supported by: Mary Liu and Katherine Ryan, *Submission 10*; Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Family Law Practitioners' Association of Western Australia, *Submission 18*; Asian Australian Lawyers Association, *Submission 42*; New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*. See further **Chapter 10**.

180 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

public comment) should inform the content of the guide in order to ensure broad understanding.[181] A further suggestion was for the guide to 'provide online resources, such as forms to be filled out and submitted to the Courts modelled on the Supreme Court of Victoria's website'.[182]

6.136 While generally supportive of additional guidance, the Family Law Practitioners' Association of Western Australia urged:

> Caution should be taken to ensure that any measures taken to promote transparency do not inadvertently encourage unmeritorious applications.[183]

6.137 The Australian Judicial Officers Association was opposed to making guidelines public, pointing instead to the plethora of publicly available information in the form of case law.[184]

6.138 In consultations, the ALRC heard from stakeholders who were concerned that an increase in transparency about how to bring claims of apprehended bias would result in a flood of litigants availing themselves of the procedures. However, the New Zealand experience with Recusal Guidelines has not seen a significant increase in disqualification applications. Moreover, where the abuse of the procedures is vexatious, the courts have authority to address these concerns directly.[185]

6.139 To the extent that any additional applications for disqualification resulting from new disqualification guidelines have merit, the floodgates argument should not be of concern. Increasing transparency in the law and procedures relating to bias would help to promote equality of access to the courts, particularly for self-represented litigants. The lack of clarity in the procedures was pointed to by a self-represented litigant, who described feeling like the lack of transparency was a deliberate attempt to deter applications for disqualification from being brought. Transparent and consistently applied processes would also help to encourage dealing with potential issues of bias at the earliest stage possible, and in the most efficient way. It may also dissuade inappropriate applications by promoting greater understanding about the proper operation of judicial disqualification.

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181 Mary Liu and Katherine Ryan, *Submission 10*.

182 Ibid.

183 Family Law Practitioners' Association of Western Australia, *Submission 18*.

184 Australian Judicial Officers Association, *Submission 31*.

185 The Commonwealth courts have the power to stay, dismiss, prohibit, or otherwise address proceedings the court considers to be vexatious — either of the court's own initiative or on application. See, eg, *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 239; *Federal Court of Australia Act 1976* (Cth) s 37AO. See also the discussion in **Chapter 8**. The ALRC Case Review revealed some 'repeat disqualification litigants', which suggests that some litigants may abuse the process. See, eg, *Luck v Secretary, Department of Human Services (No 4)* [2019] FCA 2071, in which a party had made seven disqualification applications over a period of four years, in addition to five other applications for disqualification in two related cases. See also, *Finch v The Heat Group (No 3)* [2017] FCA 64, in which a party had made six bias applications over a period of two years.

The views of survey participants

6.140 A question about the value of greater clarity around procedures was put to judges and legal practitioners through ALRC surveys.[186] Two thirds (n = 57) of judges agreed that it would be helpful if there were more specific guidance for judges on the procedures that judges and parties should follow when issues of potential bias arise. A similar proportion of judges (36; n = 56) also thought such procedural guidance would be helpful for parties. Some judges felt there was no need for guidance as the procedures should be clear to most lawyers and judges, with one judge remarking that 'by the time you get to be a judge you ought to be fully up on procedure and professional ethics'.[187]

6.141 With regard to what form this guidance should take, judges most frequently suggested it should be online, take the form of a Practice Note or Practice Direction, or form part of a bench book. A number of judges indicated a preference for flexible, court-specific forms of guidance. For example, one judge supported guidance around 'best practices', but was concerned that having 'rules for the process to handle unlike matters is likely to become rapidly counter-productive'.[188]

6.142 Lawyers who responded to the ALRC Survey of Lawyers were almost evenly split as to whether the procedures for raising and appealing issues of judicial bias are clear.[189] Men (rather than women) and those who had been practising for longer were more likely to state that the procedures are clear,[190] as were lawyers whose ancestry is North-West European.[191]

6.143 Eighty-six per cent (n = 194) agreed that it would be helpful for lawyers if there were more specific written guidance on the procedure judicial officers and parties should follow when issues of potential bias arise.[192] Again, gender and years of practice had an influence on this question, with more women and less experienced lawyers expressing greater support for guidance.[193] Those participants who were not of North-West European ancestry were also more supportive of guidance.[194]

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186 Further details of the ALRC's empirical work is found in **Chapter 5**.
187 ALRC Survey of Judges, April 2021.
188 Ibid.
189 Forty-two per cent agreed; 43% disagreed; 16% neither agreed nor disagreed (n = 195).
190 Men: average 3.3/median 4 (n = 77); women: average 2.6/median 2 (n = 91).
191 North-West European: average 3.2/median 3 (n = 101); not North-West European: average 2.6/median 3 (n = 46).
192 Six per cent disagreed, 8% neither agreed nor disagreed.
193 Men: average 4.1/median 4 (n = 77); women: average 4.6/median 5 (n = 91). Zero to four years practise: average 4.7/median 5 (n = 27); 5 to 9 years: average 4.5/median 5 (n = 28); 10 or more years: average 4.2/median 5 (n = 139).
194 Not North-West European: average 4.7/median 5 (n = 46); North-West European: average 4.1/median 4 (n = 101).

7. Self-Disqualification Procedure

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Introduction

7.1 This chapter considers how formal applications for disqualification are determined in the Federal Court and FCFCOA. The existing framework centres on the self-disqualification procedure, whereby the decision on disqualification is made by the challenged judge. This is the case whether the judge is sitting alone or with other judges to hear a case. Although there has been criticism of the procedure, the High Court confirmed in *Ebner v Official Trustee in Bankruptcy* (‘*Ebner*’) that this was ‘the ordinary, and the correct, practice’.[1]

7.2 This chapter considers criticisms of the self-disqualification procedure, including perceptions within the legal profession that it contributes to the underuse of bias applications in circumstances where they are warranted. The

1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [74].

chapter summarises feedback received about alternative models proposed in the Consultation Paper for both single judge cases and cases where more than one judge is assigned to hear a case (such as on appeal).

7.3 In relation to single judge cases, the ALRC recommends the Federal Court and FCFCOA introduce a new procedure by which judges have the discretion to transfer applications for disqualification to a different judge of the same court. For courts constituted as a panel, the ALRC recommends the development of a new process by which the court as a whole determines any objections on bias grounds.

7.4 These reforms would move away from having the challenged judge play a central role in the decision, and instead would place the obligation for the determination of disqualification applications on the court as an institution. The recommendations are not intended to displace informal mechanisms outlined in judicial disqualification guidelines (see **Recommendation 1**), but rather to complement them when informal practices are considered insufficient or inappropriate.

7.5 In the first instance, the practices around screening, allocation, and disclosure set out in **Chapter 6** serve an important function in minimising potential bias concerns arising later in the proceedings. These preventive measures have the benefit of being cost and resource efficient. Where the concerns are addressed effectively, these practices can reduce the potential negative impact on the public's and litigants' confidence in the courts and the legal system. However, in some instances, it is not possible to resolve the issue informally and an order may be necessary for subsequent appeal of the decision on disqualification. Formalising an application for disqualification and having it decided in open court can also contribute to greater transparency.

7.6 To balance the discretionary nature of the single judge transfer procedure in **Recommendation 2**, the ALRC has also recommended a streamlined interlocutory appeal procedure in **Chapter 8**. This would be available in instances where the challenged judge declines to exercise the discretion to transfer the decision on disqualification and rules on the application herself or himself. The combination of these two recommendations helps to convey institutional confidence in the impartiality of the challenged judge while recognising the challenges to public confidence inherent in the self-disqualification procedure.

Existing procedures for disqualification

7.7 In Australia, the challenged judge hears and determines whether the relevant test for bias has been satisfied.[2] This is generally true of both single judge and multimember courts, although in practice there are examples of the full bench of multimember courts making the decision.[3] Where more than one judge is the subject

2 Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 90.

3 See, eg, *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 [50].

of a disqualification application, the individual judges will usually issue separate decisions in the matter. This practice is consistent, at least in respect of single judge courts, with that in most other common law jurisdictions.[4]

7.8 If an application for disqualification is brought and a judge is uncertain as to whether to grant the application, she or he is encouraged to discuss the matter with colleagues, and, where necessary, the head of jurisdiction, the person in charge of allocation, and the parties.[5] However, practice dictates that the decision as to whether or not it is appropriate to sit ultimately rests, in the first instance, with the judge concerned.[6]

7.9 In making this decision, the High Court has been clear that judges should not disqualify themselves too readily.[7] The *Guide to Judicial Conduct* recognises that a judge 'has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available'.[8] The judge's 'duty to sit', and the tensions it creates, are discussed further below.[9]

7.10 If the judge determines that there is no actual or apprehended bias and refuses an application for disqualification, the *Guide to Judicial Conduct* states that reasons should be given in open court.[10] In such a case, the hearing will resume. If the judge decides that she or he should decline to sit, the case will be reallocated to a different judge.[11]

7.11 This procedure is traditionally justified on the basis that the challenged judge is 'best apprised of the facts, and is in the best position to determine any such application'.[12] In other words, the judge is already aware, for example, of their financial interests and relationships, and so has the relevant facts to hand. The procedure also has the benefit of being time and cost efficient, and protects against tactical manoeuvring, such as parties seeking to delay proceedings or have their case

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4 In certain US states, such as California, Texas, and Alaska, procedures exist for the involvement of another judge in the process. See further Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center, 3rd ed, 2020); Russell Wheeler and Malia Reddick, 'Judicial Recusal Procedures: A Report on the IAALS Convening' (Institute for the Advancement of the American Legal System, June 2017). As to appeals see the discussion of comparative practice in relation to the High Court in **Chapter 6**.

5 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 17.

6 Ibid 18; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [74] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [185] (Callinan J). This was framed as a matter of practice rather than law, although the majority raised the question of whether another judge would have the power to determine the matter. As to this question see further [7.48]–[7.51].

7 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; Australasian Institute of Judicial Administration (n 5) 12.

8 Australasian Institute of Judicial Administration (n 5) 18.

9 See discussion at [7.20].

10 Australasian Institute of Judicial Administration (n 5) 18. Note that an application for actual bias must satisfy a subjective test and such applications are rarely made. See **Chapter 3**.

11 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369.

12 The Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 83.

heard by a judge they perceive as being more sympathetic to their case. Litigants in common law jurisdictions do not usually have a right to reject an assigned judge if they believe the case would be better served by reassignment to another judge.[13] In Australia, it is the court, not the parties, who choose the judge, and 'judge-shopping' is regarded as unethical, and incompatible with the integrity of the legal system — a concern which is reflected in the design of existing procedures.[14]

Critique of the existing procedures

7.12 Judicial disqualification procedures require scrutiny to ensure that they remain in line with the evolution of the bias rule and its emphasis on maintaining public confidence in the administration of justice. Procedures that require judges to rule on their own impartiality are seen by many as falling short of this objective.[15] Moreover, and somewhat ironically, the procedures themselves also raise concerns about impartiality given the science relating to the capacity to identify bias in oneself.

7.13 Commentators and judges have acknowledged that the procedure may be perceived as 'strange' and 'awkward',[16] and its universal suitability has recently been questioned by the Full Court of the Federal Court.[17] This echoes concerns raised about the procedure by at least two High Court judges in Australia,[18] two senior appellate judges in England and Wales,[19] and a former judge of the Court of Appeal of New Zealand.[20] The latter, the Hon Sir Grant Hammond KNZM, authored a monograph on judicial disqualification and noted that, if

> we assume a visitation from an intergalactic jurist on a fact-finding mission around our galaxy, it is difficult to see how such a jurist would not feel bound

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13 There are 17 US states that are an exception to this as they have procedures that allow for a form of peremptory judicial disqualification. See Jeffrey W Stempel, 'Judicial Peremptory Challenges as Access Enhancers' 86(5) *Fordham Law Review* 2263, 2265.

14 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]. See further Appleby and McDonald (n 2) 105; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 686.

15 See Greg Barns, 'It's Not a Good Look When Judges Are Seen as Judging Themselves', *The Drum, ABC News* (20 August 2015) <www.abc.net.au/news/2015-08-20/barns-when-judges-are-seen-as-judging-themselves/6711574>.

16 Jula Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53(3) *Osgoode Hall Law Journal* 853, 894; HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 167.

17 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [4] (Middleton, McKerracher and Jagot JJ).

18 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, 24–7 (in relation to the procedure on multimember panels); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [74].

19 The Rt Hon Lord Neuberger of Abbotsbury PC, '"Judge Not, That Ye Be Not Judged": Judging Judicial Decision-Making' (2015) 6 *UK Supreme Court Yearbook* 13, 24–25; The Rt Hon Lord Justice S Sedley, 'When Should a Judge Not Be a Judge?' (6 January 2011) 33(1) *London Review of Books* <www.lrb.co.uk/the-paper/v33/n01/stephen-sedley/when-should-a-judge-not-be-a-judge>.

20 Sir Grant Hammond (n 12).

> to report this feature of recusal jurisprudence as being strange to the point of perversity.[21]

Even within the Milky Way the procedure can be challenging to understand. In consultations a number of practitioners told the ALRC that it is difficult to explain to a client that a judicial officer decides on her or his own actual or perceived bias.

7.14 Considered at the most fundamental level, former Chief Justice of the High Court, the Hon Sir Anthony Mason AC KBE CBE QC, questioned whether the existing procedures to determine claims of bias have kept pace with the changing scope of the law. In his view, the current practice of self-disqualification was justified when the only question was whether a judge was actually biased, as the judge concerned is best placed to determine that question. However, this justification no longer holds now that the bias rule is concerned equally with appearances, and disqualification is also required in cases where a reasonable apprehension of bias exists.[22]

7.15 The general concern that the existing procedures do not promote public confidence in the administration of justice follows from a series of specific concerns with the self-disqualification procedure that are explored below. These concerns include: inconsistency with scientific research on decision-making; internal tension between competing judicial obligations; a negative impact on perceptions of fairness; and a chilling effect on applications being brought.

The bias blind spot

7.16 Critics point out that there are particular challenges in having a judge adjudicate on an application for bias where she or he is the subject of the application. As Dr Olijnyk notes, self-disqualification 'demands of the decision-maker an almost inhuman level of impartiality'.[23] Professor Geyh describes the tension of having judges decide their own disqualification motions as being akin to having the fox guard the henhouse.[24]

7.17 Part of why having a judge decide on her or his own disqualification seems problematic is explained by scientific research that indicates that all individuals have a bias blind spot.[25] In his article entitled 'I'm Ok, You're Biased', Professor Gilbert describes the bias blind spot as a situation in which 'the brain cannot see itself

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21 Ibid 144.

22 Sir Anthony Mason (n 18) 24.

23 Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <auspublaw.org/2015/09/apprehended-bias/>; Law Council of Australia, *Submission 37*.

24 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 720.

25 See Joyce Ehrlinger, Thomas Gilovich and Lee Ross, 'Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others' (2005) 31(5) *Personality and Social Psychology Bulletin* 680. See also Australian Law Reform Commission, 'Cognitive and Social Biases in Judicial Decision-Making' (Background Paper JI6, April 2021).

fooling itself'.[26] Research suggests judges are equally affected by the difficulty of recognising bias in oneself.[27] This scientific research undermines the legitimacy of the self-disqualification procedure.

7.18 As explored in **Chapter 1**, the phenomenon of the bias blind spot is particularly problematic in relation to judges, whose professional identity is entwined with notions of impartiality.[28] Indeed, the common law has at times treated judicial disqualification for bias as antithetical to the oath of office of a judge, who is 'sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'.[29]

7.19 While the common law has moved away from this stark position, there remains a strong presumption that judges approach matters impartially and do not readily stand aside.[30] Bringing an application for disqualification may therefore still be perceived as a 'slight on the judicial character of the judge concerned'.[31] Indeed, Sir Grant Hammond notes that '[a]t least some judges appear to be very sensitive on this score, and take such applications as a professional slur on their objectivity'.[32] As discussed below, this sentiment was reflected in feedback from legal practitioners in consultations and in responses to the ALRC Survey of Lawyers.[33]

Tension with the duty to sit

7.20 An additional concern with the self-disqualification procedure stems from the imperative that judges hear the cases they are allocated.[34] Under the duty to sit, which has been described as 'equally as strong as the duty to not sit where disqualified', a judge must only step down in cases in which the judge is obliged to do so as a strict matter of law.[35] To step aside otherwise is seen as inappropriate,

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26 Daniel Gilbert, 'Opinion: I'm O.K., You're Biased', *The New York Times* (online, 16 April 2006) <www.nytimes.com/2006/04/16/opinion/im-ok-youre-biased.html>.

27 Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021) 24–5; Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376, 390; Melinda Marbes, 'Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform' (2013) 32(2) *Saint Louis University Public Law Review* 235, 252.

28 Geyh (n 24) 677–9.

29 Ibid 679, quoting William Blackstone, *III Commentaries on the Laws of England* (1768), 361. See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021).

30 Aronson, Groves and Weeks (n 14) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

31 Appleby and McDonald (n 2) 97.

32 Sir Grant Hammond (n 12) 148.

33 See [7.26].

34 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352. See further [7.9].

35 Abimbola Olowofoyeku, 'Inappropriate Recusals' (2016) 132 *Law Quarterly Review* 318, 319 quoting Rehnquist J in *Laird v Tatum*, 409 US 824, 837 (1972).

and perhaps even a dereliction of duty.[36] This places a countervailing burden on judges in deciding whether or not to disqualify.

7.21 A key rationale for this circumscribed approach toward disqualification is a desire to protect against judge-shopping. As Mason J stated in *Re JRL; Ex parte CJL*:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[37]

A judge must therefore balance the cost, delay, reputational damage, and inconvenience of an appellate court taking a different view against a 'strong presumption that judges will approach a matter with an impartial mind and not stand aside without good reason'.[38]

The importance of process to perceptions of fairness

7.22 A perception of fairness in procedure is particularly important in circumstances where, by raising the issue, parties have already indicated that they hold concerns about a judge's impartiality. There are also concerns about the perception of the procedures by the general public when cases are brought into the media spotlight. Surveys conducted in the UK and Australia indicate that almost half the public (48% of participants in each country's survey) believe the issue of disqualification should be decided by a different, independent judge.[39] Even without familiarity with the behavioural sciences literature, there is a general perception that a judge will not be neutral and detached when sitting in adjudication of her or his own perceived bias.[40] This is particularly important because social science research on 'procedural justice' has demonstrated that

36 Philip Bryden and Jula Hughes, 'The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification' (2011) 48(3) *Alberta Law Review* 569, 604–5. Inappropriate recusals have been described as '"an abdication of judicial function", "irresponsible", and "being untruthful to one's oath to do right by all manner of persons"… It goes to the heart of whether judicial officers are failing to perform their duty.': Olowofoyeku (n 35) 320.

37 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352.

38 Aronson, Groves and Weeks (n 14) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

39 Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks about Judicial Impartiality' (2021) 84(4) *Modern Law Review* 811, 838.

40 See Barns (n 15); Gabrielle Appleby, 'After Heydon and Carmody, Does Australia Need a New Test for Judicial Recusal?', *The Conversation* (3 September 2015) <www.theconversation.com/after-heydon-and-carmody-does-australia-need-a-new-test-for-judicial-recusal-46939>.

> the public at large including litigants do not, like judges, see fairness as inherently linked to outcome, but rather consider that fairness is inextricably linked to the process that produces those outcomes.[41]

7.23 There is voluminous literature on what constitutes procedural justice and its essential characteristics. Four key elements have been identified as contributing to a party's view of procedural justice:

- that the party feels they were treated with dignity and respect;
- that the party had the opportunity to participate in the process;
- a perception that the judge was transparent and cared about the case; and
- that the judge approached the case neutrally.[42]

7.24 Perceptions about the fairness of the process have ramifications for courts beyond general levels of confidence. A wide body of research shows that the 'procedures used by legal authorities to make decisions influence reactions to those decisions'.[43] In other words, a party who is satisfied with the fairness of the procedures they were afforded will be more satisfied with the process, more likely to comply with court orders, and less likely to appeal the decision.[44] This has implications for both the courts and parties in saving time and money. Conversely, as the ALRC has explored in a previous report, parties who feel they have been harshly dealt with by the court at an early stage may become 'repeat litigators' in an attempt to cure their sense of injustice.[45] One Family Court judge suggested in consultations to that earlier Inquiry that if parties feel they have been treated unfairly at an early stage, it can make parties 'who are basically reasonable at heart — become outrageous and obstructive in their behaviour in Court'.[46]

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41 Sir Grant Hammond (n 12) 72, citing JM Greacen, 'Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts' (2008) 47 *Judges Journal* 41. Procedural justice has been explored extensively in the literature, with influential work including: John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum, 1975); and Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990). See further Diane Sivasubramaniam and Larry Heuer, 'Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness' (2007) 44 *Court Review* 62. For discussion of some of the limits of procedural justice as a concept, see Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 170.

42 Tom R Tyler, 'What Do They Expect? New Findings Confirm the Precepts of Procedural Justice' [2006] (Winter) *California Courts Review* 22, 22–3. Sir Grant Hammond (n 12) 73. For further discussion see **Chapter 12**.

43 See eg Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law & Society Review* 103, 104; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [1.85].

44 Sir Grant Hammond (n 12) 72.

45 Australian Law Reform Commission (n 43) [1.86].

46 Ibid.

A chilling effect on applications

7.25 The self-disqualification procedure raises challenges for counsel and parties wishing to bring an application for bias. Consultations suggest that while it is not often that counsel find themselves faced with issues that may amount to apprehended bias, it is an even rarer situation in which counsel make an application for disqualification. Sir Grant Hammond recognised the difficulty posed by the procedure, remarking that counsel

> should be able to raise whatever objections are appropriate in a fearless manner, without fear of repercussions. Yet this practice puts counsel in an invidious position where they may entertain respectably well-grounded fears that the judge may become alienated against them.[47]

7.26 Practitioners frequently told the ALRC how difficult they find it to bring an application for apprehended bias. One practitioner described it as 'excruciating' to bring such an application, while others described it as 'very difficult' and 'stressful'.[48] A lawyer responding to the ALRC Survey of Lawyers observed that judges 'always take it personally when an application to disqualify is made and some react very irrationally', while others noted that 'applications appear often to be treated as personal affronts', and are 'frequently met with hostility and taken personally'.[49]

7.27 Particularly in smaller jurisdictions, practitioners spoke of being conscious of having to weigh the consequences of the apprehended bias they perceive, as against the perception that 'some judicial officers will hold one application against you forever', thereby creating a 'chilling effect'. The ALRC was told that the decision to bring an application for apprehended bias is, for this reason, a tactical decision — if the practitioner thinks the case is already lost, there is no downside to bringing the application to ensure it is available as a ground of appeal.

7.28 The Law Council of Australia observed that the existing recusal process may deter parties from making an application.[50] Similarly, in its submission, the New South Wales Society of Labor Lawyers asserted that 'the problem with the law of judicial bias in Australia is a procedural, not substantive, problem', noting the likely 'chilling effect' of existing procedures.[51]

7.29 That the procedure could result in a chilling effect was reflected in feedback from a majority of practitioners who responded to the ALRC Survey of Lawyers. Fifty-eight per cent of the lawyers (n = 207) surveyed reported having made the decision (either themselves or as part of a legal team) not to raise an issue of bias with a judicial officer, even though they believed there were strong grounds to raise

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47 Sir Grant Hammond (n 12) 83. See also Melissa Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, Australian Institute of Judicial Administration, 2001) 91.
48 ALRC Survey of Lawyers, July–August 2021; see also Appleby and McDonald (n 2) 97.
49 ALRC Survey of Lawyers, July–August 2021.
50 Law Council of Australia, *Submission 37*.
51 New South Wales Society of Labor Lawyers, *Submission 40*.

it.[52] Participants were asked to select all applicable reasons for not having raised the issue with the judge from a list of options provided in the survey. The most common reason given — concern that raising it would impact negatively on the case (29%; n = 352) — can be linked to the role of the primary judge in the self-disqualification procedure. And the second most common reason given related to the procedure itself — the fact that the disqualification decision would be made by the judicial officer concerned (18%). In the survey and in consultations, some lawyers also expressed concern with the impact that making an application might have both on their careers and on the cases of future clients.[53] This raises a potential tension with the lawyer's duty to their client in cases where it is in their client's best interest to make the application.

7.30 One of the lawyers surveyed remarked that

> the consideration to be made when balancing whether or not to make an application for recusal/disqualification is difficult as it involves the risk of the single judge not granting the application and then proceeding to hear and determine the matter with the knowledge that that party views the judicial officer as holding some form of bias.[54]

7.31 In consultations, it was suggested that concerns stemming from the self-disqualification procedure could be appropriately addressed through existing avenues of appeal. However, as others noted, this is a very costly form of redress that requires time and resources that are not available to all parties. Not only is this true of the process of bringing the appeal itself, but also the ultimate costs of retrying the issue if successful on appeal. The Family Court recognised this challenge in *Dobey v Shey (No 2)*, where the court lamented that there was no option other than to remit the matter for rehearing before a different judge and empathised with the situation of the parties, noting that the court was

> acutely conscious of the difficulties this is likely to occasion for the wife and the legal expenses and stress this must create for both parties.[55]

7.32 Finally, appeal does not fully address concerns arising from the chilling effects of the self-disqualification procedure. As discussed in **Chapter 8**, parties who are aware of facts that they allege give rise to apprehended bias, but do not raise it, may be taken to have waived their right to appeal the issue.

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52 The surveys conducted by the ALRC were designed in such a way that not all questions were compulsory, and in some instances questions were only put to subgroups of participants. Therefore, the total number of responses to questions varied within the surveys. The number of participants who answered any given question is reported as n = X.

53 Fifteen per cent of practitioners indicated they were concerned that raising the issue of bias would impact negatively on their own careers.

54 ALRC Survey of Lawyers, July–August 2021.

55 *Dobey v Shey (No 2)* [2019] FamCAFC 171 [35].

Discretionary transfer in single judge cases

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.

7.33 The recommended procedure is designed to address three primary concerns raised by stakeholders, and concerns 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
- reform to the procedure will result in significant cost and delay.

7.34 By involving the presiding judge in the decision on disqualification in the first instance, the discretionary nature of the transfer procedure may also promote public confidence in the administration of justice insofar as judges are seen to act dispassionately in adjudicating on bias applications of which they are the subject. It conveys to the public that the legal system has confidence in the judges' ability to act impartially — even in the face of an allegation that they do not appear to be (or are not) impartial. As Dr McIntyre observes:

> By too readily allowing the claim that judges cannot functionally achieve the requisite impartiality we risk undermining the very confidence that is sought to be maintained. By empowering judges to refer certain applications, rather than by requiring it, we value the judgement of our judges and allow them to demonstrate their capacity for reflective evaluation. In doing so we also bring practice closer into alignment with community expectations and the findings of behavioural psychology.[56]

7.35 The ALRC considers that 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. Increasingly, it has been recognised that 'a judge's decision to grant or refuse an application for disqualification is not a matter only for the particular judge'.[57] The issue of actual or apprehended bias is not a question of judicial ethics to be determined by the judge alone, but a

56 Dr Joe McIntyre, *Submission 46*.
57 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [83].

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'.[58] This was recognised in a recent New South Wales Court of Appeal decision, which observed that

> properly understood a recusal application involves a challenge to the jurisdictional competency of the tribunal, as then constituted, to determine the case.[59]

7.36 The recommended discretionary transfer procedure also retains trust in the individual judge's integrity and balances concerns about potentially negative impacts of more prescriptive transfer processes in terms of cost and delay. The procedure is cost effective and allows the court to resist tactical use of the procedure by retaining a role in the decision for the judge who is the focus of the application. It also preserves resources by increasing litigant confidence in the fairness of the process, which may reduce the risk of subsequent 'repeat litigation'. When paired with the streamlined interlocutory appeals process where the primary judge does not exercise her or his discretion to transfer,[60] maintaining the role of the challenged judge demonstrates a balanced commitment to the ideal of the judge as an impartial arbiter. It also recognises that in some instances the self-disqualification procedure offers an efficient and cost-effective means of achieving a just result.

How the recommended transfer procedure would work

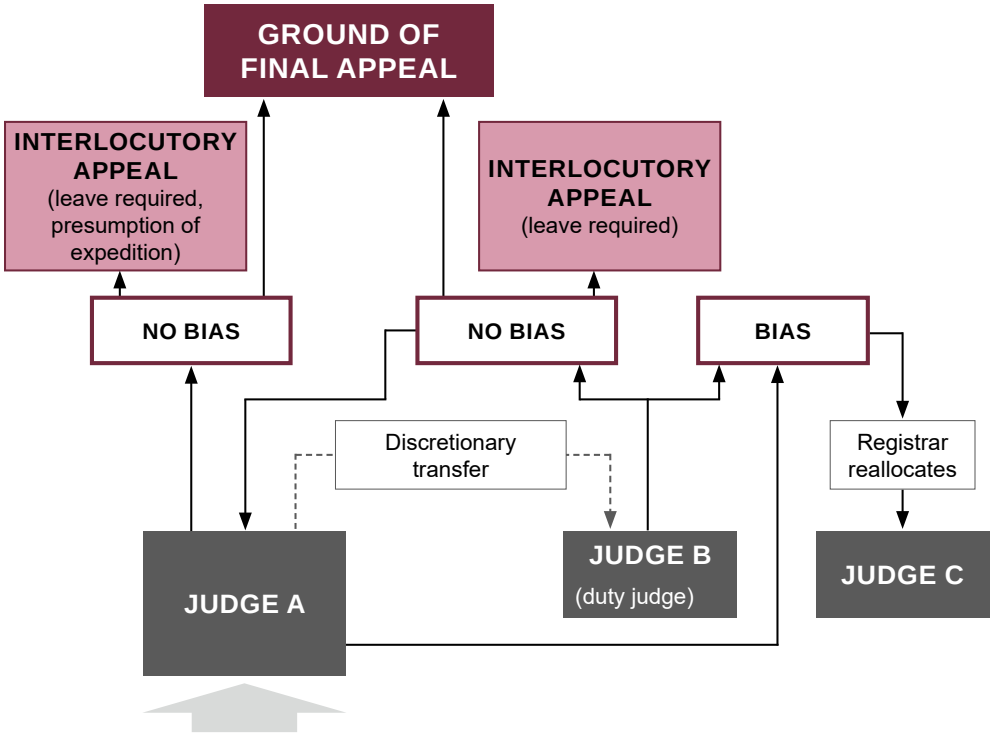
7.37 This section explains how **Recommendation 2** would operate in practice. **Figure 7.1** below depicts how bias claims would be dealt with by judges if this recommendation were implemented.

58 Sir Anthony Mason (n 18) 26. Note that Sir Anthony Mason made this comment in the context of multimember panels. See also Sir Grant Hammond (n 12) 113.

59 *Polsen v Harrison* [2021] NSWCA 23 [41].

60 See **Recommendation 4** in **Chapter 8**.

Figure 7.1: Single judge procedure



7.38 The Practice Note or Direction envisioned by **Recommendation 2** should provide that issues of disqualification for bias should be raised through, or treated as, an application for referral of the case to the registry for reallocation on the grounds of apprehended bias.[61] This framing of the disqualification application was previously adopted in the Federal Court by Lee J at first instance in *Webb v GetSwift Limited (No 6)*,[62] and has been adopted in a number of other Federal Court cases.[63] This is also consistent with the practice the Federal Circuit Court appeared to have adopted generally in non-family law matters.[64] Although applications in the FCFCOA are more often framed as applications that a judge be 'disqualified' from hearing a

61 For the reasons for this framing see further [7.50]. Under rule 1.41 of the *Federal Court Rules*, the Federal Court has the ability to make a different order in response to an application by a party. Similarly, under rule 17.01 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) the FCFCOA may, at any stage in a proceeding on the application of a party, give any judgment or make any order even if the claim was not made in an originating process. Similarly, under rule 10.12 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth), the FCFCOA may make any order on the application of a party.

62 *Webb v GetSwift Limited (No 6)* [2020] FCA 1292.

63 The procedure was cited with approval by the Full Court of the Federal Court in *GetSwift Ltd v Webb* (2021) 388 ALR 75 [3]. See also *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [23].

64 See, eg, *Neale v Mahony* [2019] FCCA 2240; *Karsten v Minister for Immigration (No 2)* [2015] FCCA 1784; *Coady v Yachting Victoria Inc* [2018] FCCA 3113. See further **Chapter 8**.

matter (see **Chapter 8**), there is no reason in principle why this practice cannot also be adopted in the FCFCOA.[65]

7.39 The challenged judge may (at her or his discretion) decide to make a case management order that the application be decided by another judicial officer of the same court. As the determination on the issue of bias may need to occur quickly, the ALRC recommends that the Practice Note or Direction specify that this type of application could be reallocated to the duty judge.

7.40 In determining whether to make the order, the judge should have reference to the judicial disqualification guidelines (see **Recommendation 1**), which would provide a list of factors that may be relevant in determining whether discretionary transfer would be appropriate. This would help to promote consistency in the exercise of judges' discretion to transfer, while still leaving the availability of the transfer open in unique circumstances not anticipated by the judicial disqualification guidelines. Guidance would frame the transfer as an exercise of judicial discretion as opposed to a matter of personal preference. The judge seised of the matter would have the discretion to adjourn the underlying proceedings while the application is heard by the transfer judge. The exercise of discretion not to transfer the determination on the question of bias would not be appealable in itself as it is a discretionary procedural decision in the course of case management.[66]

7.41 The Practice Note or Direction should promote efficient resolution of such applications. It should deal with evidentiary issues, such as: any suggestion that the judge put information within their knowledge on the record; whether an affidavit may be required; and, access by the transfer judge and parties to the transcript and audio recording of any hearing in the underlying matter (see **Chapter 6**). The procedure should be designed to ensure that any transfer judge has the ability to review any transcript or audio recording of proceedings for the purposes of a disqualification application, without the parties being required to provide such material. The Practice Note or Direction should also specifically refer to the relevant provisions allowing for interlocutory applications to be heard on the papers, and encourage such resolution in these matters where appropriate.

7.42 If the transfer judge determines that the test for bias is satisfied, that judge will order that the case be referred to the registry for reallocation.

7.43 If the transfer judge determines the test for bias is not satisfied, the judge originally seised of the matter continues with the determination of the case. In this

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65 There are specific provisions in the *FCFCOA Act* (for example, s 26(1)(h)) that address appeals from decisions of judges who have rejected applications to disqualify themselves. These are now considered interlocutory orders that require leave to appeal: see further **Chapter 8**. The same procedures apply to appeals from other interlocutory orders.

66 While s 73(ii) of the *Australian Constitution* confers jurisdiction on the High Court in relation to appeals from other federal courts, this kind of procedural decision is a common exception.

instance, the normal interlocutory appeal procedure would be available with regard to the transfer judge's determination.[67]

7.44 Where a party is successful in bringing an application for disqualification, the ALRC suggests that cost certificates would be appropriate.[68] Pursuant to s 10 of the *Federal Proceedings (Costs) Act 1981* (Cth), the Commonwealth courts can indicate when they believe it appropriate for the Attorney-General to pay the costs of parties. This includes circumstances in which a judge is no longer able to continue in a proceeding owing to disqualification for actual or apprehended bias. For example, in the case of *Fallon v Bashandi (No 2)*, costs certificates were awarded to the applicant and independent children's lawyer following the judge's decision to disqualify herself.[69]

Implementation of the procedure

7.45 The ALRC has determined that the transfer procedure should be implemented through a Practice Note or Direction and that legislative implementation is not required. It was not immediately apparent how to modify the practice as there is no formal rule that the judge seised of the matter is to rule on the application for disqualification. However, as Sir Grant Hammond notes, '[j]ust how alteration of the current practice is to be achieved should not be beyond the wit of contemporary court systems'.[70]

7.46 Interestingly, it appears that at least one judge in the Federal Circuit Court has contemplated adopting this approach and therefore saw no existing barriers to its implementation.[71] Professor Appleby and Stephen McDonald have contended that, as the changes pertain to court practices and procedure, it might be possible to make any necessary modifications through rules of court — a form of delegated legislation made by judges.[72] Alternatively, they argue that, given existing practices reflect common law procedures, it could also be that recusal procedures could be modified by a final court.[73] In comparison, the Hon Justice M Perry, writing 20 years

67 **Recommendation 4** (see **Chapter 8**) proposes that the procedures for an appeal from the transfer judge's decision be set out in a Practice Note or Direction that also addresses appeals from disqualification decisions taken by the challenged judge (in other words where there is no transfer). The key difference is that the Practice Note or Direction would provide a presumption of expedition where there is no transfer.

68 Additional discussion of costs certificates is included in **Chapter 8**.

69 *Fallon v Bashandi (No 2)* [2016] FamCA 1084 [4].

70 Sir Grant Hammond (n 12) 148.

71 See *Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 8)* [2021] FCCA 1668 [15]. In that case, Judge Baird appears to have offered the parties the opportunity to have their recusal application heard by another judge, or at least to argue that case: 'At that Court appearance on 9 June 2021 I raised with counsel whether either party contended that the recusal application should be heard by another judge. Counsel for both parties advised the Court they did not so contend. They were content for me to hear and determine the recusal application.'

72 Appleby and McDonald (n 2) 114.

73 Ibid.

ago, suggested that implementing a referral process would likely require legislative action.[74]

7.47 The rapid evolution of the common law in explicitly recognising applications for disqualification as cognisable, and in allowing the direct reviewability of orders made in relation to such applications (see further **Chapter 8**), reflects the view that a decision on disqualification is not solely a matter for the judge concerned.[75] In light of these developments in the law, the ALRC has concluded that neither legislative change nor amendments to rules of court should be necessary for the courts to implement this procedure.[76] The ALRC also considers that there would be a significant benefit to this reform being introduced by way of Practice Note or Direction rather than legislation, to avoid unnecessary fragmentation of procedure across state and territory and federal courts.[77]

7.48 The transfer judge would have the power to hear the application under the existing statutory framework because *courts* are granted jurisdiction under statute, not individual judges.[78] As was recognised in *Bird v Free*:

> when a single judge hears an application that invokes the jurisdiction of the Federal Court, he or she is not exercising an authority vested in him or her as an individual, but rather the authority which is vested in that judge and all the other judges of the court, as a group.[79]

7.49 The transfer procedure would require allocating part of the matter to a judge in accordance with court procedures in order to answer the question of whether the court is properly constituted. This characterisation is consistent with the evolution of the law on bias, which has come to recognise the concern with how the situation looks to an outside observer. It helps to cement the question as an objective one of law (rather than one of judicial ethics or integrity), which may allow for a more dispassionate adjudication of the issue, and one that preserves collegiality. The

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74 Perry (n 47) xii.

75 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [83]. See further **Chapter 8**.

76 If there is concern regarding the jurisdiction of the transfer judge to order the case be referred to the registry for reallocation, then Parliament could confer this power by statute. Parliament has significant powers to define the jurisdiction of the courts it creates: see *Australian Constitution* s 77; see also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 662. Moreover, Parliament has already provided by statute for the exercise of power by one judge over another judge of the same court within the appeal framework (including in the context of applications for disqualification). In *Bird v Free*, the court noted that while the exercise of the writ of prohibition across judges at the same level of court was impermissible, statutory authority cures these concerns in the appellate context: see *Bird v Free* (1994) 126 ALR 475, 479–80. The legislation that would enable this procedure is unlikely to give rise to concerns relating to judicial independence, as protected by Chapter III of the *Australian Constitution*. This follows from the overriding objective of the transfer procedure in promoting public confidence in the administration of justice, and the element of judicial discretion retained in the process.

77 If legislation were introduced as a precaution to clarify jurisdiction this may dissuade other state and territory courts from adopting a similar procedure if they were minded to follow it.

78 Even though the court's jurisdiction is usually exercised by a single judge: see, eg. *Federal Court Act 1976* (Cth) s 20(1). This was not always the case — in the common law's history, courts would sit *en banc*: see *Kotsis v Kotsis* (1970) 122 CLR 69, 91.

79 *Bird v Free* (1994) 126 ALR 475, 479.

preservation of judicial collegiality is about more than the professional satisfaction of the judge. As Dr Murray observed, collegiality among judges can 'strengthen the process of judicial-decision-making', the quality of the court's decisions, and therefore also the legitimacy of the court.[80]

7.50 As the transfer judge's order would not be directed at the challenged judge, the procedure would not run afoul of the decision of the Federal Court in *Bird v Free*, and therefore does not require legislative implementation for this reason either.[81] Under the transfer procedure, the primary judge is not *prohibited* from hearing the case. Instead, the remedy upon a finding of bias (actual or apprehended) by the transfer judge would be the referral of the case to the registry for reallocation. This is consistent with the observations of Callinan J in *Ebner* that:

> Although the judge in a particular jurisdiction could hardly order that another judge of it not sit on, or decide a matter, it may well be possible for the former to decide a question whether the relevant facts are capable of giving rise to an apprehension of bias on the part of the latter if that judge were to sit on the case. No matter what the status of the rejection or upholding of such an application may be, and regardless that it is not an issue between the parties, it is still a matter that has to be decided by the Court.[82]

7.51 Involving a second judge in the matter similarly does not require legislative intervention. Matters are routinely split between different judges, under the powers conferred on the office of the Chief Justice to arrange the effective, orderly, and expeditious discharge of the business of the court.[83] Under existing court practices, different judges already determine interlocutory applications within a matter. Duty judges, for example, are able to hear urgent or sensitive applications within a case already assigned to another judge.[84] In the Federal Court and the FCFCOA, it is also not uncommon for the docket judge to make an order in the course of case management to have another judge determine a discrete issue, such as settlement.

7.52 The ALRC encourages the Australian Government to ensure the Federal Court and FCFCOA are adequately resourced to implement the transfer procedure.

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80 Sarah Murray, 'Judicial Collegiality' in Appleby, Gabrielle and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 189, 190.

81 *Bird v Free* (1994) 126 ALR 475, 479. This decision was approved by the High Court in *Re Jarman; Ex parte Cook* (1997) 188 CLR 595, 608–9 (Dawson J), 616–7 (Toohey and Gaudron JJ), 631 (Gummow J). In *Bird v Free*, the issue of a judge preventing the exercise of power by another judge of the same court was addressed in the context of a writ of prohibition. An application was made to prohibit a judge from delivering a judgment that was in reserve, and to restrain the judge from continuing to hear the proceeding. The Federal Court found that 'a judge of the Federal Court cannot prohibit or enjoin another judge of the court' as the authority 'conferred only on the entire group cannot be exercised by one member, or by some of the members, of that group against another member of the group': 479.

82 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185].

83 *Federal Court of Australia Act 1976* (Cth) s 15; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 47.

84 The role of the duty judge in the Federal Court is established in Central Practice Note CPN-1 (National Court Framework and Case Management) [5.5].

Views on reform of the procedure in single judge cases

7.53 In developing **Recommendation 2**, the ALRC canvassed ideas from the academic literature, consulted with stakeholders, and surveyed lawyers and judges. Variations in options for reform that were put forward included a wide range of models, from maintaining the status quo, to bringing in a panel of retired judges to adjudicate the issue. The ALRC has ultimately recommended a discretionary transfer model, as it is capable of responding to myriad concerns, from the shortfall of the existing procedure in promoting public confidence to the costs and inefficiencies of reform.

7.54 Academics and judges have put forward various models for reform. However, as McIntyre observed, determining an appropriate reform to the self-disqualification procedure is marred by 'significant complexities of competing concerns and little empirical data on the efficacy of existing mechanisms'.[85]

7.55 The most commonly proposed reform for single judge cases is to have a different judge decide the application for disqualification. The benefit of transfer in some cases was recently commented on by the Full Court of the Federal Court in the case of *GetSwift Limited v Webb*. In that case, the court said that an appeal before it from a decision not to disqualify for apprehended bias showed why

> it may be more prudent for an independent mind (or minds) to consider disqualification applications on some occasions. This approach may assist to promote confidence in the legal system, which after all is a key rationale for the apprehended bias rule.[86]

7.56 Among those who have publicly supported this reform are several former senior judges. In *Ebner*, although his colleagues on the High Court held otherwise, Callinan J suggested that having a different judge decide applications for disqualification 'would better serve the general public interest and the litigants in both the appearance and actuality of impartial justice'.[87] Only two years prior, his Honour had been faced with a contested disqualification motion, and had observed in that context that the current practice places a judge in 'an invidious position'.[88]

7.57 Similarly, the Rt Hon Lord Justice S Sedley of the Court of Appeal of England and Wales, suggested that such questions should be transferred to a different judge, or different court. Where an issue of apprehended bias arose at the last minute, and could not be resolved through the normal informal mechanisms, he suggested that there 'may be a need for some kind of fire brigade protocol':

> If humanly possible, the objection ought to be renewed before a different judge or court and be determined in time for the trial to go ahead with the same judge

85 Dr Joe McIntyre, *Submission 46*.
86 *GetSwift Ltd v Webb* (2021) 388 ALR 75 [4].
87 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185].
88 Ibid [185]. See *Kartinyeri v Commonwealth of Australia* (1998) 156 ALR 300.

> if recusal is not required or with another judge if it is. … [T]he important thing is that the system should not compound one paradox — a judge who is unbiased but might reasonably be thought not to be — with a further paradox: a judge who, in order to decide whether he will be sitting as judge in his own cause, has to sit as judge in his own cause.[89]

7.58 In the case of *El-Farargy v El-Farargy*, Ward LJ noted that, in the interests of safeguarding the appearance of justice, it may be preferable in some instances for a judge who is the subject of a disqualification application to refer the application to another judge for determination:

> Whilst judges must heed the exhortation in [*Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451] not to yield to a tenuous or frivolous objection, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour.[90]

7.59 Sir Anthony Mason recognised the potential embarrassment of adjudicating on a colleague's perceived ability to hear the case in an unbiased manner. However, he also noted that given the standard to be applied is an objective one, 'it can be said with some force that the other members of such a court are in a better position to apply the standard impartially than the judge who is the target of the objection'.[91] Moreover, transfer might help to cement the issue as a question of law, and as a matter for the court as an institution, as opposed to a perceived attack on the character of a judge.

7.60 The transfer procedure may also help to alleviate tension between competing imperatives faced by the judge who is seised of the matter. On the one hand, the judge is encouraged to embrace a precautionary approach toward disqualification (or as some refer to it, 'if in doubt, out').[92] At the same time, however, the judge is also faced with the countervailing duty to sit.[93] This latter obligation would not weigh as heavily on a different, independent judge in deciding whether a case should be reallocated.

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89 Lord Justice S Sedley (n 19). While some experts comment on the self-disqualification procedure as requiring the judge to sit in her or his own cause, it is not clear that this description is apt — at least not for the modern conception of judicial bias. The focus on the appearance of bias (as opposed to actual bias) requires the determination of questions of law on an objective standard. While there are other tensions and problems with the self-disqualification procedure, the judge does not have a vested interest and has no cause in which to sit.

90 *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 [32]. See further **Chapter 11**.

91 Sir Anthony Mason (n 18) 26.

92 Sir Grant Hammond (n 12) 80. For an example of a case where a judge took this approach, see *Maleknia v Minister for Industry and Science & Ors* [2015] FCCA 2997 [14]–[16]. See also *Minister for Home Affairs v Benbrika (No 2)* [2021] VSC 684 [44]. In that case, the judge found that owing to the difficult application of the legal principles in the circumstances it was prudent not to sit.

93 See [7.20].

Variations on the transfer procedure

7.61 In developing the recommended transfer procedure, the ALRC had regard to a number of different options. The principal variations across transfer procedures are the circumstances that trigger the transfer of the decision, and who decides the application on transfer.

7.62 A transfer procedure can be designed to operate automatically or at the discretion of the primary judge. An automatic procedure would require the transfer of all applications for disqualification for bias as soon as they were raised. The primary judge would have no control over whether or not to transfer the application to another judge under this model. Alternatively, a transfer procedure can be designed using a hybrid process that would enable judges to transfer an application for disqualification to another decision maker at their discretion or under prescribed circumstances. With regard to who should decide the application, the options are generally to either have a different single judge sitting alone determine the application, or to involve a panel of judges in the decision.

7.63 Professors Hughes and Bryden (writing in the Canadian context) propose a procedure by which judges are given the explicit authority to transfer disqualification applications to a panel, but are not compelled to do so.[94] Appleby has suggested a similar but more extensive approach to transfers whereby a judge initially considers the application for her or his own disqualification, but if she or he determines there is an arguable case for disqualification, the decision is then transferred to another judge.[95] Appleby couples this threshold approach to disqualification with a prescribed list of specific circumstances that would also require a transfer, such as where a question arises as to whether the judge has made full disclosure of information in relation to the application, or has to make a judgement about the credibility of the facts that the judge has revealed about her or his own conduct.[96] Further circumstances requiring transfer could include, for example, where issues are raised with regard to the judge's conduct or remarks in the course of a hearing.

7.64 While not a transfer process per se, Sir Grant Hammond suggests an option of review at the court of first instance. Rather than requiring a litigant to appeal (or seek judicial review of) a judge's decision not to disqualify herself or himself, Hammond envisions a review process within the trial court structure. This could be before either another judge assigned to hear the review or before a standing review panel.[97]

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94 Hughes and Bryden (n 16) 894; Jula Hughes and Dean Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36(1) *Dalhousie Law Journal* 171, 191.

95 Appleby (n 40).

96 Ibid. On transfer of the application for disqualification where the facts alleged to found the bias claim are contested or in doubt, including how the question of evidence might be dealt with, see further Appleby and McDonald (n 2) 101–5.

97 Sir Grant Hammond (n 12) 148–9, Appendix E.

Potential drawbacks of reform

7.65 While intuitive in many respects, a transfer procedure is not without drawbacks. A number of concerns in relation to efficiency and cost, tactical use, fragmentation of proceedings, and evidentiary issues have been raised. These concerns inform the recommendation advanced by the ALRC that centres on the discretionary transfer.

Efficiency and cost concerns

7.66 There are concerns relating to the inefficiency and cost of introducing a second judge to decide the application for disqualification. Requiring parties to make the application before a second judge will generally require additional time (and therefore cost) to establish the circumstances of the application. It will also introduce delay, as another judge will have to be assigned to hear the matter. This is a particular concern in busy trial courts, including the FCFCOA (Div 2). In these circumstances, transferring the decision may mean significant further delay before the issue of bias can be determined.

7.67 While automatic transfer provides the benefit of a clear, bright line procedure, it is particularly inefficient in some situations where a concern relating to impartiality arises over the course of the proceedings (in other words, not due to any oversight in the judge's initial disclosure) or is first brought to the judge's attention by the parties. In such circumstances, it would seem prudent to first allow the judge seised of the matter to consider her or his own disqualification to allow for a quick resolution of the issue in instances where the judge agrees with the applicant.

7.68 However, it is not clear that the cost and delay would increase over the course of the entirety of the litigation. Concerns relating to the increased time and costs arising from the involvement of another judge may be mitigated in part by savings that arise due to greater litigant satisfaction in the fairness of the process.[98]

7.69 While concerns about cost and delay may be exacerbated in rural areas or smaller regions where other judges are not readily available to decide the issue, this should not be seen as creating a barrier to reform. As court systems increasingly embrace technology — and specifically remote hearings — it is not clear that geography would pose much of a barrier. Moreover, as a judge cannot be called on to provide evidence, these types of applications could likely also be done on the papers and, where appropriate, submissions could be limited to those made in writing (including potentially the length of such submissions).[99]

98 See [7.24].

99 This would not address any delay incurred as a result of an ultimate need to reassign the case. However, this problem does not arise as a result of any deficiency in disqualification processes but rather pertains to the overarching problem of court resourcing.

Tactical use

7.70 Transfer to another judge could become a tactical tool for parties looking to create delay or engage in judge-shopping.[100] Applicants may be more willing to bring less well-founded applications for disqualification knowing they will not have to go on to argue the substance of the case before the judge who makes a decision on the application. While delay stands to benefit one party over another in many areas of law, family law raises particular concerns relating to systems abuse (or abuse of processes) in relation to family violence. As recognised in the National Domestic and Family Violence Bench Book,

> a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party.[101]

Evidentiary issues

7.71 Another potential concern in relation to a transfer procedure is how any relevant facts can be obtained if they are peculiarly within the knowledge of the challenged judge, and how those facts should be determined if they are disputed.[102] Under the existing procedure, the judge seised of the matter almost invariably has the information required to make the determination. For instance, they know their shareholdings, and their previous social engagements. If a different, independent judge decides the application for disqualification, then information from the judge who is the subject of the application may be unavailable unless it is reflected in the record.

7.72 However, as Professor Frost observes:

> Although the challenged judge would be more familiar with the facts suggesting bias or interest than an impartial judge, this familiarity is the very reason why the challenged judge should not be permitted to issue the final ruling on the motion.[103]

The ALRC considers that these issues do not undermine the practicality of the procedure, as in this respect a transfer judge is not in any different position to an appellate judge.[104]

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100 Hughes and Bryden (n 16) 893. This concern was also shared by Law Council of Australia, *Submission 37*.

101 *National Domestic and Family Violence Bench Book* (Australasian Institute of Judicial Administration, 2020) [3.1.11]. See also Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) [7.3.3].

102 The facts in disqualification applications are not always in dispute — for example, if an application for disqualification is brought on the basis of prejudgment because a judge has made a negative credibility ruling against a party in an earlier matter, the factual basis will be clear on the record. However, issues of fact may be central to other types of challenge, such as where a disqualification application relates to association. In the latter type of case, questions about the existence and nature of a relationship between a judge and a party or witness may be central.

103 Amanda Frost, 'Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal' (2005) 53 *Kansas Law Review* 65, 585.

104 This conclusion was supported by Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*.

7.73 This is a situation that appeal courts encounter regularly. In determining issues of bias, appeal courts may refer to statements made by the judge in the course of proceedings explaining their understanding of the facts, in addition to evidence filed by the parties.[105] There is no reason in principle why the same approach could not be adopted by a judge to whom an application for disqualification is transferred, if a practice was established by which the judge disclosed their knowledge of the facts in open court prior to making any order for transfer. As observed by Callinan J in *Ebner*, when a claim of apprehended bias is made,

> the basic facts should almost always be uncontroversial in the sense that, between them, the parties and the judge under challenge, should have laid out all of the relevant matters and facts that he or she can recall, for the decision whether they establish the relevant apprehension.[106]

7.74 Such statements, however, are 'unable to be tested', so questions therefore arise about how disputed facts should be approached if, for example, a party takes issue with any information provided by the judge whose perceived impartiality is in question.[107] Again, appeal courts have resolved this issue by reference to the nature of apprehended bias applications. As Appleby and McDonald note, in cases of actual bias, the individual judge is likely 'in the best position to know the circumstances of the case, to probe his or her actual state of mind, and to determine whether bias existed'.[108] However, for apprehended bias, the test is concerned with how the situation would appear to a fair-minded lay observer. As such, 'the assessment of whether a reasonable apprehension of bias arises should take into account the very fact that the facts are in dispute'.[109] In the view of Appleby and McDonald, courts should take an approach that 'limits the need to choose between alternative versions of contested facts', and consider 'whether there is a reasonable basis to suppose that the version put forward in favour of recusal *might* be accurate'.[110] The view that factual disputes do not necessarily need to be resolved received endorsement in *CUR24 v Director of Public Prosecutions (NSW)*.[111] As Meagher JA observed in that case (Whealy JA agreeing):

> Where there is a dispute as to the terms of an out of court statement made by the judicial officer and plausible evidence as to the making of that statement, in my view the relevant principles do not require that the court first resolve that dispute by making findings of fact before applying the fair-minded bystander test. In a case such as the present, the objective assessment called for by that

105 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69].
106 Ibid [185].
107 Appleby and McDonald (n 2) 104–105.
108 Ibid 95.
109 Ibid 105.
110 Ibid.
111 *CUR24 v Director of Public Prosecutions (NSW)* (2012) 83 NSWLR 385. However, in some other cases the factual dispute has been resolved. For example, in one case it was said that there was 'no plausible evidence' that an alleged statement had been made, and that '[a]ccordingly, we would resolve the evidential dispute in this case, leaving for another day the question whether an appellate court should determine disputed questions of fact in more equivocal cases'. See *Director of Public Prosecutions (DPP) (Cth) v Fattal* [2012] VSCA 276 [147].

test should take account of the circumstance that there is a dispute concerning the conduct or statements relied upon.[112]

In Focus: Obtaining information from judges on underlying facts

In the context of the existing self-disqualification process, it is accepted that 'judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying'.[113] However, except where this is done, no further information may be obtained directly from the judge. As observed by Professors Aronson, Groves, and Weeks, there is 'no *voir dire* of the judge', and a failure by a judge to answer questions by parties 'cannot provide evidence in support of a bias claim or the basis for a reasonable apprehension'.[114] Where information is disclosed by the judge, there 'can be no question of cross-examining the judge on it'.[115]

Where issues of apprehended bias are raised by a party, a judge will often set out their version of the facts in open court. The *Guide to Judicial Conduct* notes that it may be appropriate for a judge to 'inform the parties', and that generally this 'should be dealt with in open court'.[116] Further, an account of relevant facts may also be provided in a judgment dealing with a request or application for disqualification. For example, in *CPJ16 v Minister for Home Affairs*, disqualification was sought on the basis of an alleged connection between the current and former Presidents of the ALRC. In addressing the issue, it was observed that the two had 'never worked together'.[117] Although it may not be appropriate to describe such self-disclosed information by a judge as 'evidence', in *Ebner*, the High Court nonetheless considered that such information could cast 'some evidentiary light on the ultimate question of reasonable apprehension of bias',[118] and appeal courts do refer to such statements. Similarly, if a judge was asked to recuse herself or himself, or to exercise their discretion to transfer a disqualification application, the judge could first set out their understanding of the facts in open court. This would have the benefit of providing the opportunity for misunderstandings to be clarified before any further steps were taken.[119]

112 *CUR24 v Director of Public Prosecutions (NSW)* (2012) 83 NSWLR 385 [41].
113 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69].
114 Aronson, Groves and Weeks (n 14) 659.
115 *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031 [39].
116 Australasian Institute of Judicial Administration (n 5) [3.5(d)].
117 *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 [77].
118 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69].
119 In relation to the need for consideration of how relevant facts will be made available to a transfer judge, see Law Council of Australia, *Submission 37*.

In some other jurisdictions, procedures have been developed that may enable information from a judge to be obtained by way of written statement. For example, in *Locobail (UK) Ltd v Bayfield Properties Ltd*, the Court of Appeal of England and Wales said that a 'reviewing court may receive a written statement from any judge … specifying what he or she knew at any relevant time'.[120] In New Zealand, the Recusal Guidelines of the Supreme Court provide that if there are any known circumstances that may give rise to a concern that the judge might not be impartial, but the judge does not recuse themselves, they must 'issue a minute addressed to the parties drawing their attention to the relevant circumstances'.[121] In Australia, in at least one state jurisdiction, criminal appeals legislation allows, and may compel, a judge at first instance to provide a report on the trial to an appellate court.[122] However, Professor Tarrant has noted that the value of such a report is likely to be minimal in the context of an appeal on matters of bias. As stated by Callinan J, whether or not apprehended bias is made out is to 'be ascertained by having regard to what actually happened at the trial and not a judge's subsequent justification of it'.[123]

7.75 These issues should be addressed in the guidelines recommended in **Recommendation 1**, or the Practice Note or Direction referred to in **Recommendation 2**, as appropriate. In particular, these should address the circumstances when, and means by which, a judge may provide any clarifying information necessary to assist any transfer judge. The most straightforward way to do this is likely to be for the challenged judge to put such information on the record, which may be reviewed in transcript, when the issue of bias is raised or when determining a transfer application. However, procedures in other jurisdictions referred to above could also be considered.[124] Provision of such clarifying information may, in some circumstances, help to dispel an apprehension of bias. However, the ALRC does not consider that such information will always be required, or will necessarily be extensive. That is because the resolution of the question by means of the test for apprehended bias precludes any necessity for a determinative resolution of the underlying factual dispute. Instead, the relevant test is focused on the view that might be taken by the hypothetical lay observer. The extent to which there has been judicial disclosure, or silence (which may be amply justified for reasons of privacy or otherwise), will relevantly bear on the application of this test.

Difficulty in addressing fairness concerns

7.76 Finally, transferring the decision may paradoxically not go as far as one might think toward increasing public confidence. It has been suggested that an impression

120 *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477.
121 Supreme Court of New Zealand, 'Recusal Guidelines' (9 July 2020) [6].
122 *Criminal Appeal Act 1912* (NSW) s 11.
123 *RPS v The Queen* (2000) 199 CLR 620 [93] (Callinan J).
124 See, for example, *Hillier v Martin (No 9)* [2021] FCA 1319 [11].

of bias may persist where a case is transferred because of an implication that the challenged judge cannot be trusted to rule impartially.[125] Hybrid models that include a categorical or discretionary transfer may remove the hypothetical foxes guarding the henhouse, but leave them lingering at the front gate.[126]

7.77 Transfer to another judicial officer also fails to wholly alleviate concerns relating to the bias blind spot. As Higgins and Levy note, the inability to recognise bias in oneself also manifests as in-group bias — or 'the phenomenon where people tend to positively evaluate actions of the in-group relative to the out-group'.[127] This bias would most likely be amplified in the context of the transfer of a judicial diqualification application as in-group bias tends to be exacerbated in exclusive groups.[128] The Asian Australian Lawyers Association expressed a similar concern in their submission, noting that a 'transfer to another judicial officer from the same court who is familiar with the sitting judge might still feasibly be perceived to have a dimension of bias'.[129] The result would be a trend toward non-disqualification decisions.

7.78 However, as Frost observes, even if judges are just as reluctant to remove colleagues from cases, having a neutral judge decide the issue would further the appearance of justice.[130] Moreover, it is not at all uncommon for judges to disagree with one another through dissenting opinions or reversal of decisions on appeal. This should be true of decisions on apprehended bias when properly approached as a routine question of law.[131]

Feedback on the single judge transfer procedure

7.79 The ALRC solicited specific feedback from stakeholders on single judge transfer procedures. Stakeholders were invited to comment on several proposed options in the Consultation Paper. In addition, the ALRC Survey of Lawyers and the ALRC Survey of Judges asked participants about their level of support for a transfer procedure more broadly.

7.80 In the Consultation Paper, the ALRC sought feedback on three variations of a transfer procedure that would see disqualification decisions in single judge courts decided by a duty judge in some instances. The proposal suggested that the rules of court be amended to allow for transfer where:

- Option A: the application raises specific issues or alleges specified types of actual or apprehended bias;
- Option B: the sitting judge considers the application to be reasonably arguable; or

125 An argument discussed by Geyh (n 24) 728.
126 Ibid 720.
127 Higgins and Levy (n 27) 390.
128 Ibid.
129 Asian Australian Lawyers Association, *Submission 42*.
130 Frost (n 103) 586.
131 Ibid 586–7.

- Option C: the sitting judge considers it appropriate.[132]

Feedback on a transfer procedure generally

7.81 The majority of submissions that addressed this issue were broadly supportive of the introduction of a transfer procedure in single judge cases.[133] However, several of these submissions (as well as a number of consultations) raised concerns about potential costs and delays associated with a transfer procedure.

7.82 The Law Council of Australia was generally supportive of a transfer procedure. However, it cautioned that transfer procedures should be simple and efficient in order to minimise disruption to access to justice and procedural fairness. The Law Council of Australia observed that

> [p]reparing a matter for transfer to another judge, including outlining the history of a hearing/s, will require a considerable time investment by the sitting judge, other court staff and the parties — sometimes in circumstances where an application is unmeritorious. Absent sufficient resources, if an application were transferred to another judge, it may also overload a duty judge or raise questions about case prioritisation against their other matters.[134]

A similar position was adopted by the Family Law Practitioners' Association of Western Australia, who supported a transfer procedure in single judge cases broadly, but only insofar as 'such a process will not unduly delay or frustrate proceedings or place additional strain on under-resourced Courts or invite "judge shopping"'.[135]

7.83 While acknowledging that a transfer procedure may be of value in rare circumstances, the Australian Judicial Officers Association also expressed concern about tactical use of a transfer procedure to engineer delay.[136] Concerns about tactical use of the transfer were also expressed by the Law Council of Australia, which indicated it was

> aware of concerns that disqualification applications may be used as a weapon against judges, or for purely strategic and inappropriate reasons, such as trying to intimidate a judge, securing a different judge, or simply to delay.[137]

7.84 However, submissions were concerned that the potential time and cost factors that weigh against such a process not be given too much weight at the expense of

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132 Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021) Proposal 6.

133 Family Law Practitioners' Association of Western Australia, *Submission 18*; Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*.

134 Law Council of Australia, *Submission 37*.

135 Note the Family Law Practitioners' Association of Western Australia also suggested there 'may of course be cases where bias or apprehended bias is so obvious that the matter may properly be determined by the judge concerned': Family Law Practitioners' Association of Western Australia, *Submission 18*. See also Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

136 Australian Judicial Officers Association, *Submission 31*.

137 Law Council of Australia, *Submission 37*.

the need to maintain public confidence in the integrity of the legal system.[138] While acknowledging the burden the transfer procedure would place on limited judicial resources and the impact on delay, the Family Law Practitioners' Association of Western Australia opined that 'if an application for the disqualification of a judge is determined summarily, the effect … should be minimised'.[139]

7.85 Some submissions were wary with regard to the value of revisions to the procedure. Emerita Professor Mack and Professor Roach Anleu cautioned that a transfer procedure was not a panacea and would be limited in its ability to ameliorate underlying concerns relating to judicial conduct. In order to better understand and address judicial emotion, they suggested an emphasis on education and training instead.[140] The Asian Australian Lawyers Association similarly considered that the transfer of the decision in single judge cases was of limited value, preferring instead an expedited appeal process.[141]

Feedback on specific options within the proposal

7.86 Responses were mixed in relation to Option A, which allowed for automatic transfer in specific circumstances. The Deakin Law Clinic Policy Advocacy Practice Group noted the potential benefit of this option to public confidence and suggested it be paired with a guide or codification of the law that would provide a 'non-exhaustive list of grounds that may have the potential of triggering an automatic transfer'.[142] The submission also suggested that this transfer procedure only be available to parties once so as to mitigate the risk of judge-shopping.

7.87 The New South Wales Society of Labor Lawyers preferred an automatic transfer procedure in all instances owing to a concern that the specific circumstances for transfer would be too difficult to stipulate. They were concerned that any option that retained an element of discretion would fail to cure the shortfalls identified in the existing procedure.[143]

7.88 On the other hand, the Australian Bar Association was opposed to any automatic transfer procedure because of concerns relating to evidence, delay, and fragmentation.[144] The Law Council of Australia was also concerned that Option A would create situations where the facts would be difficult for the second judge to obtain.[145]

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138 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.
139 Family Law Practitioners' Association of Western Australia, *Submission 18*.
140 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*. See further **Chapter 12**.
141 Asian Australian Lawyers Association, *Submission 42*.
142 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.
143 New South Wales Society of Labor Lawyers, *Submission 40*.
144 Australian Bar Association, *Submission 43*.
145 Law Council of Australia, *Submission 37*.

7.89 A number of submissions were supportive of Option B, which required a transfer where there was a 'reasonably arguable' case for bias. Associate Professor Higgins and Dr Levy thought that Option B fairly addressed 'the risk of "judge shopping" and the possibility of abuse of process by litigants who might use recusal applications to delay proceedings'.[146] They agreed that the challenges relating to evidence could be addressed effectively along the same lines as in appellate courts in instances where the issue of bias is first raised on appeal after judgment has been delivered. The Law Council of Australia expressed support for a modified Option B with a lower threshold for transfer, which would arise where the sitting judge found the application to be 'not without merit'.[147]

7.90 While submissions generally did not prefer Option C, which involved a discretionary transfer by the sitting judge, several suggested that this option was desirable when coupled with guidance for the primary judge. For instance, the Law Council of Australia suggested that Option C would be unlikely to address concerns regarding perceptions of impartiality. However, it suggested that these concerns might be mollified by 'incorporating an inclusive list of relevant considerations for the sitting judge to make in considering whether referral is appropriate'.[148]

7.91 Other procedural options were tendered by individuals and organisations in their submissions. The New South Wales Society of Labor Lawyers suggested that the proposed models would benefit from an additional layer of procedure, whereby decisions of a judge not to transfer the decision could be raised with the head of jurisdiction, who would have the power to order reallocation of the matter.[149] A further confidential submission suggested a committee that would include a mix of judges, legal professionals, social workers, and laypeople.

The views of survey participants

7.92 Commonwealth judges (excluding judges from the High Court) and lawyers were asked about similar procedures to these proposed options in two ALRC-administered surveys.[150] For single judge court decisions, judges and lawyers were asked whether for single judge cases there were circumstances where it would be preferable that an application for disqualification be decided by another judge (for example, a duty judge).

7.93 Judges indicated strong support for the existing procedures for raising issues of bias, with 50 (n = 59) judges reporting that these procedures encourage appropriate use of bias applications. About half of the judges (31; n = 60) did not think there were circumstances where it was preferable to transfer the application to another judge. One of the judges surveyed felt that 'the present procedures

146 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*.
147 Law Council of Australia, *Submission 37*.
148 Ibid.
149 New South Wales Society of Labor Lawyers, *Submission 40*.
150 Further discussion of these surveys is presented in **Chapter 5**.

adequately deal with the issue in most cases'.[151] Other judges expressed concern about the impact of reform on court resources and the potential for additional costs and delay, noting that it is

> a reasonably frequent thing for querulous self reps to ask judges to recuse themselves either from misunderstanding of procedure or concerns that they will not get their way. Formal procedures for dealing with these matters differently from at present is likely to eat resources which are in short supply.[152]

7.94 Another judge observed a potential advantage of having the judge who is the focus of the disqualification application decide that application on the basis that the judge 'may be able to clarify matters which dispel any apprehension of bias'.[153] Similarly, an additional judge remarked that

> it is important that the judge is given the chance to correct any misunderstanding. Shifting responsibility for the decision to stand aside to another judge runs the risk that misunderstandings cannot be rectified and inevitably adds to delay and expense.[154]

7.95 However, 17 (n = 60) judges agreed there were circumstances where transfer to another judge would be preferable and a further 12 were unsure whether this might be a preferable option. As one judge who participated in the survey wrote: 'I regard it as inappropriate that we as judges make the decision whether to recuse ourselves however that's the procedure at present. It needs to change.'[155] Another judge saw only narrow instances in which a reformed procedure would be helpful, remarking that it 'would be a rare case where the issue should be determined by another judge but there may be such a case theoretically. Generally such a procedure would be undesirable.'[156] Federal Circuit Court judges were the most likely to support the reform (11; n = 29), while the lowest level of support was reported by judges in the Family Court (where only one judge supported the reform).

7.96 One judge who supported the reform proposals in part nevertheless had concerns about how they would be developed. The judge felt that 'these processes should emerge organically through court management and the common law as determined by the High Court'.[157]

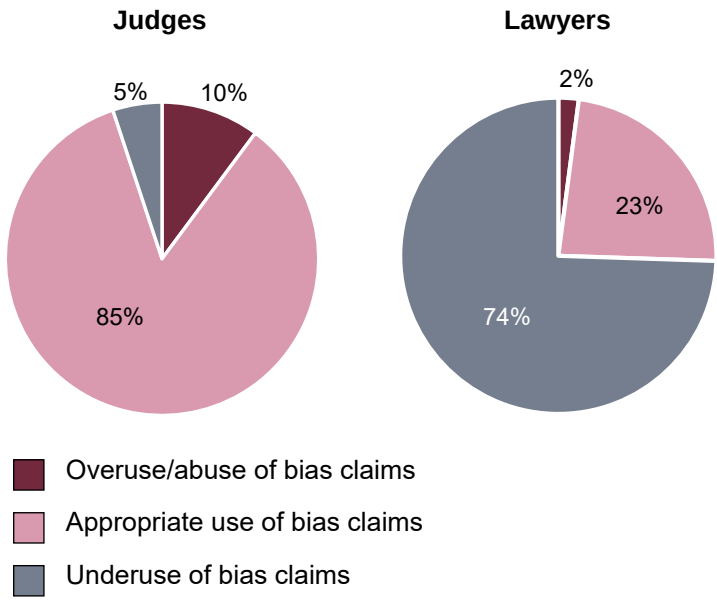
7.97 Judges who responded that it would be preferable in some circumstances that an application for disqualification be decided by another judge were also asked to select all applicable circumstances in which transfer would be preferable (n = 41). The judge's conduct in court (8) and outside court (7) were the most common circumstances selected. Some judges thought transfer should be discretionary (6), while others (5) responded that the application should be decided by another judge

151 ALRC Survey of Judges, April 2021.
152 Ibid.
153 Ibid.
154 Ibid.
155 Ibid.
156 Ibid.
157 Ibid.

in all cases (that is, transfer should be automatic). One judge commented that while it would be difficult to be prescriptive about when a decision should be transferred, 'if a judge's version of facts is to be sensibly challenged, then it may be better for other judges to decide the issue'.[158]

7.98 In contrast to the surveyed judges, the practitioners who participated in the ALRC Survey of Lawyers strongly supported procedural reform. When asked about the existing procedures for raising issues of bias, only 23% (n = 192) of lawyers thought the current procedures encouraged the appropriate use of bias claims. Seventy-four per cent of lawyers who responded indicated that the existing procedures encourage underuse of bias claims. Only four lawyers suggested that the existing procedures encourage overuse/abuse of bias claims. A disproportionate number of lawyers who were not of North-West European ancestry (40; n = 46) reported that the existing procedures encouraged the underuse of bias claims.[159]

Figure 7.2: Views on appropriateness of existing disqualification procedures

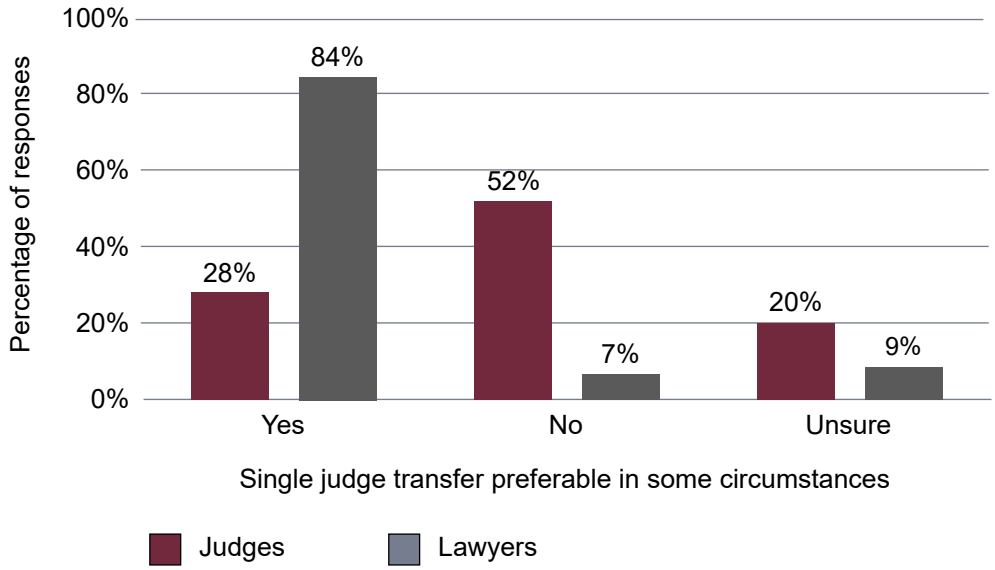


7.99 With respect to applications in single judge courts, 84% (n = 183) of lawyers responded that there were circumstances where it would be preferable for an application for disqualification to be decided by another judge (for example, a duty judge). One lawyer described the reform of procedures as essential to maintaining judicial impartiality or public confidence in it.[160] Another lawyer added that:

158 Ibid.
159 Those who preferred not to indicate their ancestry were excluded from this analysis.
160 ALRC Survey of Lawyers, July–August 2021.

> Asking anyone (in and out of court) to admit to bias is to ask too much. The natural tendency is to resist it strongly. ... [D]isqualification applications must be run before someone other than the subject decision maker.[161]

Figure 7.3: Support for single judge transfer procedure



7.100 Some lawyers felt that the degree of necessity for transfer to another judge was tied to the circumstances of the bias, with one noting that it is particularly difficult to apply to the judge who is the focus of the application 'in circumstances where that judicial officer has an attitude or disposition to be dismissive of such an application'.[162] Another lawyer suggested that the judge who is the focus of the application might be best-suited to determine applications with a 'low level of merit'.[163] Almost all (43; n = 45) lawyers who identified as not being of North-West European ancestry supported the transfer of the decision to another judge (for example, a duty judge) in single judge cases.

7.101 Practitioners acknowledged the potential costs of a transfer procedure, but thought reform was nevertheless preferable to maintaining the status quo. As one lawyer observed, the

> issue with forming a panel or alternate judge is the burden on the court and the overuse of it causing delays. With such big backlogs it's likely to cause further delays. The alternate though is it is difficult to understand how a judge or for that matter a tribunal member (where the same procedure applies) can

161 Ibid.
162 Ibid.
163 Ibid.

> objectively assess whether or not they are biased. Appropriate funding and more judges is needed to make such a model effectively work.[164]

Another lawyer noted, however, that under the current disqualification process there is already the potential for months of delay and thousands of dollars in costs.[165]

Multimember court disqualification decisions

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.

7.102 Many appeals, and certain important questions of law, are heard by a court that is made up of more than one judge.[166] As discussed above, where a court comprises two or more judges, the normal (though not universal) practice is also for any objections on bias grounds to be determined by the challenged judge alone.

7.103 Owing to the same concerns with self-disqualification that arise in the context of single judge cases, the ALRC recommends the adoption of a new procedure for multimember courts. Specifically, the ALRC recommends that the guidelines on disqualification (**Recommendation 1**) outline processes by which objections to a judge or judges on a multimember panel may be considered and, where necessary, determined, by the court as constituted. In addition, the Federal Court and FCFCOA should 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.

7.104 Appellate cases are particularly appropriate for resolution of any potential bias concerns prior to the hearing and without the need for a formal application for disqualification. Matters are allocated in advance, and parties and judges should,

164 Ibid.

165 Ibid. In order to ensure the transfer procedure does not exacerbate these concerns, the ALRC has encouraged courts to adopt expedient procedures where appropriate, such as by restricting applications to decisions on the papers or otherwise limiting submissions. The ALRC recognises that the Australian Government would need to provide appropriate levels of resourcing to ensure the transfer procedure did not contribute to delay or backlog in the courts.

166 In appeals in the Federal Court and FCFCOA (Div 1), a Full Court is usually made up of three judges, although it may be constituted by more. See, eg, *Federal Court of Australia Act 1976* (Cth) ss 14(2), 25(4); *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 17(1).

other than in exceptional cases,[167] be aware of any circumstances that may give rise to an apprehension of bias. The potential disruption to a hearing caused by an application for disqualification on the day of a hearing is significant. The disqualification guidelines therefore should provide efficient processes by which early resolution of the issue, prior to any hearing, is encouraged and facilitated. This should require the challenged judge or judges to first consider the issue, and to recuse themselves if they determine they are disqualified, or otherwise to involve the other members of the court. The guidelines for disqualification of appellate courts in New Zealand provide examples of how this might be achieved.[168]

7.105 This recommendation is consistent with the guiding principles for this Inquiry — in particular, the recognition of the role of the court as an institution in upholding judicial impartiality. As discussed above in the context of single judge cases, the question of whether actual or apprehended bias arises is a question of law and is a matter for the court, not a question of judicial ethics that is solely the concern of an individual judge.

7.106 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. As Sir Anthony Mason has argued, a full court has

> a responsibility to ensure that it is constituted in accordance with the provisions of the law governing the judicial process, the exercise of judicial power and natural justice. The court should not retreat from that responsibility by either delegating that responsibility to one of its number or declining to review his decision on the objection.[169]

7.107 The ALRC foresees that involving all of the judges on the panel in the decision would help to cement the issue as a question of law. Retaining the involvement of the challenged judge helps to convey confidence in the judge's ability to determine issues impartially consistent with the oath of office. This is consistent with the rationale for retaining a role for the challenged judge in single judge cases.

7.108 The reform responds to the same three primary areas of stakeholder concern expressed in relation to the single judge procedure outlined above, namely:

- promoting public confidence;

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167 Such as the situation that arose in *Unions NSW v State of New South Wales* [2013] HCATrans 263, where Gageler J recused himself on the day of hearing after the parties became aware of confidential advice that he had given in relation to relevant legislation in his previous role as Solicitor-General of the Commonwealth. Justice Gageler stated that he had previously given the matter serious consideration and had determined that he was not disqualified from hearing the case, but that this changed once the parties were aware that advice had been given, but not its contents.

168 See **Appendix G**.

169 Sir Anthony Mason (n 18) 26. See also Sir Grant Hammond (n 12) 113, expressing the view that the 'arguments in favour of Mason's proposition seem utterly compelling'. For a contrary view see Abimbola A Olowofoyeku, 'Bias in Collegiate Courts' (2016) 65(4) *International and Comparative Law Quarterly* 895.

- mitigating the chilling effect of the existing procedure on applications; and
- minimising additional costs.

7.109 This recommendation is not directed at the High Court, because of its particular status as the court of final appeal, which often sits *en banc*, and the fact that questions of jurisdiction to review decisions of disqualification of one of its members remain unsettled.[170] However, a number of judges and commentators have suggested that it is both possible and desirable for the High Court to adopt the same procedure.[171] This is something that would be open to the High Court to do in any guidelines on disqualification adopted pursuant to **Recommendation 1**.

Implementation of the procedure

7.110 The ALRC considers that there is benefit in implementing the procedure through the disqualification guidelines envisaged in **Recommendation 1** and, if necessary, rules of court. Consultations suggested that this is already informally the practice in some appellate courts, and has been explicitly adopted on some occasions,[172] and therefore should be formalised. It is also a process that has been adopted by courts in other comparable jurisdictions, including England and Wales,[173] New Zealand,[174] Northern Ireland,[175] Singapore,[176] and South Africa.[177]

7.111 Framing this as an issue for the court, rather than solely an issue for the individual judge, better reflects the evolution of the law's focus on questions of actual bias to those of apprehended bias. Framed in this way, concerns about the impact of the procedure on collegiality should be lessened; instead it can be seen as sharing the burden of a difficult decision, rather than a 'judgement' on the particular judge or judges concerned. On the other hand, where judges on an appellate bench take very different views as to the appropriateness of one judge sitting in a case, differing opinions among judges under the current procedure, without a clear process for resolution of those differences, can be very damaging to public confidence.[178]

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170 See Chapter 6. See further Sir Grant Hammond (n 12) 149–52.

171 Sir Anthony Mason (n 18) 24–7; Enid Campbell, 'Review of Decisions on a Judge's Qualification to Sit' (1999) 15 *Queensland University of Technology Law Journal* 1, 7–8; Sir Grant Hammond (n 12) 113; Appleby and McDonald (n 2) 112. See also Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1999) 73 *Australian Law Journal* 72, 78–9.

172 See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 292; *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 [50]. See also *R v Nicholas* (2000) 1 VR 356 [47]–[48]. See further John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 312, where it was argued that, as the court in *R v Nicholas* (2000) 1 VR 356 was exercising federal jurisdiction, it had an inherent or implied jurisdiction to prevent a member affected by perceived bias from sitting. The court as constituted assumed, without deciding, that it could review the decision of one of its members not to disqualify himself, and found the decision free of reviewable error.

173 *Sengupta v Holmes* [2002] EWCA Civ 1104; *Baker v Quantum Clothing Group* [2009] EWCA Civ 556; *DWR Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97.

174 See the judicial recusal guidelines in **Appendix G**.

175 *McCabe v Northern Ireland Public Services Ombudsman* [2021] NICA 39.

176 *Yong Vui Kon v Attorney General* [2011] SGCA 9.

177 *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147.

178 See, eg, Appleby (n 40).

Views on reform of the procedure in multimember courts

Reform in multimember courts

7.112 The ALRC considered a number of different options for procedural reforms in appellate courts. The first would be to have all members of the court as constituted decide, including the challenged judge.[179] This is also the method preferred by Hughes and Bryden — though they would include the right for a judge to recuse herself or himself from the decision on the application.[180] Like Sir Anthony Mason, Appleby and McDonald suggest that the power of the court to decide as a whole follows as an incident of the exercise of jurisdiction.[181] They liken this to other legal determinations by a multimember court (as opposed to a specific order against a judge not to sit).[182] Moreover, this process has effectively been adopted in a number of decisions in Australia.[183]

7.113 Writing in 1999, Emeritus Professor Campbell suggested that there is

> no legal principle which commands that a judge who has been listed to sit in a case which is to be decided by a bench of judges is the only one who may rule on an objection by a party to his or her qualification to sit.[184]

7.114 Removing the central role of the judge whose impartiality is challenged from the decision-making process has the benefit of being easier to implement with multimember panels, as there are already additional judges seised of the matter who could consider an application for disqualification. As McIntyre observed, 'concerns over efficiency and potential "judge-shopping" are significantly less acute in this context, as a multimember court is already empanelled and capable of quickly determining the application'.[185]

7.115 Models that do not involve all members of the court are likely to face jurisdictional challenges without legislative support. For example, in some jurisdictions the existing

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179 Sir Grant Hammond (n 12) 149. This practice was adopted by the South African Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147. It is also the general practice of the New Zealand Court of Appeal: Court of Appeal of New Zealand, 'Recusal Guidelines' (August 2017) [11].

180 Hughes and Bryden (n 16) 895.

181 Appleby and McDonald (n 2) 106–7. But see Geoffrey S Lester, 'Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure' (2001) 24(3) *Advocates' Quarterly* 326, 341.

182 Appleby and McDonald (n 2) 106–7.

183 See, eg, *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 [50]; *Neil v Legal Profession Complaints Committee (No 2)* [2012] WASCA 150; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 292.

184 Campbell (n 171) 7. See also Sir Anthony Mason (n 18) 26. Cf Olowofoyeku (n 169).

185 Dr Joe McIntyre, *Submission 46* 13.

practice is paired with a right of review to the other panel members.[186] A further alternative is the typical German practice whereby only the other members of the panel decide the motion — in other words the challenged judge is excluded.[187] This is also the practice adopted by the Supreme Court of New Zealand.

Potential drawbacks of reform

7.116 In consultations, some stakeholders expressed concern about the potential for this recommendation to lead to additional costs and delay, including by requiring evidence to be adduced, and the possibility of using up time set aside for the hearing to determine such applications. There is a concern this may lead to the court needing to be reconstituted at a later date, even without disqualification, with consequent timetabling difficulties.

7.117 Another potential concern in assigning the decision to the full bench arises in situations where a minority of the court considers that a judge ought to be disqualified. This may reduce public confidence in the impartiality of the court as constituted and may negatively impact on the perceived legitimacy of the ultimate decision. However, it may be questioned how great a concern this is given that the potential for a split bench on questions of bias already arises in many appeal decisions. This is, however, a reason to facilitate early resolution of the matter prior to the hearing.[188]

7.118 In response to these concerns, the ALRC notes that this recommendation is not intended to displace the important role of informal procedures for resolution of these issues prior to a hearing. It is anticipated that appellate courts would express a preference for resolution of these issues prior to the hearing using administrative mechanisms (such as those specified by the New Zealand appellate courts in their Recusal Guidelines) or, if required, a formal application on the papers.[189] Formal applications for disqualification at the hearing should be discouraged, particularly in appellate courts. However, where the need arises for such an application, coherency of principle suggests that this is an issue for the court, not the individual judge.

Feedback on the multimember court proposal in the Consultation Paper

7.119 In the Consultation Paper, **Proposal 8** suggested that the courts should promulgate a Practice Direction or Practice Note to provide that applications for

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186 Hughes and Bryden (n 16) 895. Such a procedure would seem to be available in Western Australia where the Court of Appeal can review any decision made by a single judge of appeal: *Supreme Court (Court of Appeal) Rules 2005* (WA) pt 2 div 3. This is effectively the process in the Supreme Court of New Zealand, where — if there is an objection to the initial decision of the impugned judge not to recuse — the remaining judges will revisit the claim: Supreme Court of New Zealand (n 121) [7].

187 Hughes and Bryden (n 16) 895.

188 Sir Grant Hammond (n 12) 149.

189 Supreme Court of New Zealand (n 121) [5], [9]; Court of Appeal of New Zealand (n 179) [8].

disqualification made in relation to a judge on a multimember court should be determined by the court as constituted.

7.120 This proposal was supported by a number of submissions.[190] McIntyre found the proposal 'compelling', and agreed that the challenged judge should be involved in the decision, noting that:

> While issues of behavioural psychology may suggest that exclusion is likely to be more consistent with an impartial assessment of any claim of apprehended bias, it is important to highlight the core role of human agency in judicial decision-making. Exclusion may leave the impugned judge with a — possibly legitimate — sense of loss of agency and may unnecessarily undermine morale and collegiality within the court. Where an impugned judge dissents from a majority decision to recuse, inclusion in that decision-making process is likely to significantly diminish any sense of aggrievement. Moreover, such inclusion is likely to play an educative role for a judge where their opinion may shift in light of the views of their peers.[191]

7.121 However, other submissions were more sceptical. The Law Council of Australia expressed concern stemming from the inclusion on the panel of the judge who is the focus of the disqualification application. The Law Council thought there was merit in the procedure adopted by the Supreme Court of New Zealand, whereby the impugned judge is excluded from the panel in making the decision.[192] The Australian Bar Association was not supportive of the proposal, with a view that (for both single judge and multimember courts) 'such procedures are likely to have a number of disadvantages, including necessitating the use of affidavit evidence and prolonging the proceedings, in a manner that is not consistent with case management principles'.[193]

7.122 The Australian Judicial Officers Association was committed to the existing practice, and expressed concern that having all members of a multimember panel decide conflicted 'with the notion of judicial independence' by having the other panel members sitting in judgement of a judge of the same court, and that the proposed procedure could 'give rise to tension in judicial ranks'.[194] On the other hand, it could be argued that significantly more serious impacts on collegiality and public confidence arise from a situation where one member of a panel sits in circumstances where the other members of the panel are of the view that the judge is disqualified.[195] Consultations with individuals in other jurisdictions that do follow a procedure by

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190 Professor Tania Sourdin, *Submission 33*; Asian Australian Lawyers Association, *Submission 42*; Dr Joe McIntyre, *Submission 46*.

191 Dr Joe McIntyre, *Submission 46*.

192 Law Council of Australia, *Submission 37*.

193 Australian Bar Association, *Submission 43*.

194 Australian Judicial Officers Association, *Submission 31*.

195 Such as those made public relating to issues of apprehended bias concerning Chief Justice Carmody in the Queensland Court of Appeal. See Australian Broadcasting Corporation, 'Tim Carmody Stoush: Head of Queensland Appeals Court Margaret McMurdo Refuses to Work with Chief Justice' <www.abc.net.au/news/2015-05-08/decision-reveals-animosity-chief-justice-carmody-margaretmcmurdo/6454206>.

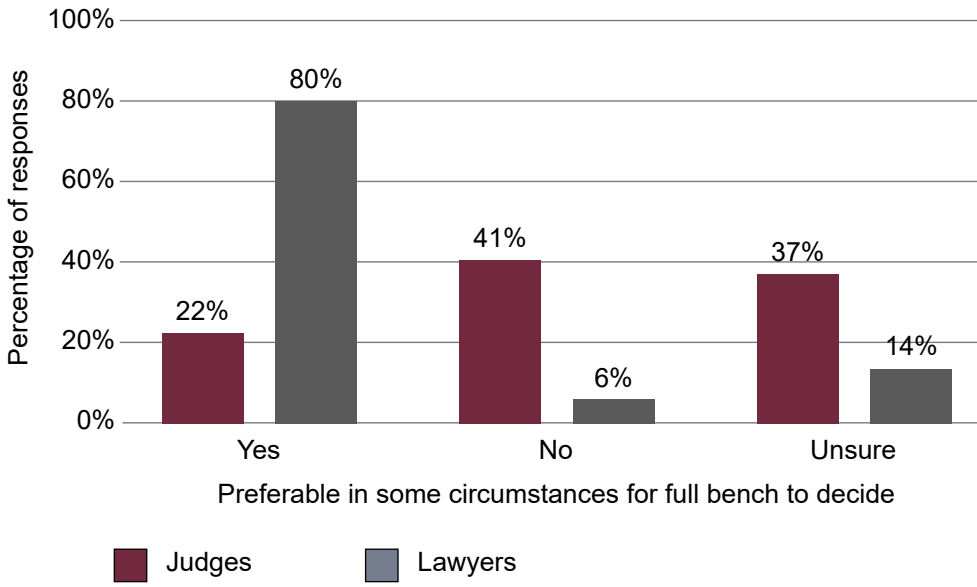
which the whole panel decides cases have indicated that issues of collegiality have not arisen under these procedures. As Sir Grant Hammond notes, '[a]t the end of the day, judges must judge, and they understand the importance of living with collegial decisions'.[196]

The views of survey participants

7.123 Judges and lawyers were also surveyed about whether there were circumstances where it would be preferable for the full bench to decide applications for disqualification in multimember courts, rather than the decision being made solely by the challenged judge. A smaller proportion of judges (24; n = 59) were opposed to this proposal for reform as compared with the proposed reform for single judge courts. Thirteen judges supported the revised procedure in some circumstances and 22 were unsure. The judges were again asked in what circumstances it would be preferable for the full bench to decide. Here, nine (n = 17) indicated that the full bench should decide in all cases.

7.124 Lawyers continued to indicate strong support for procedural reform, with 80% (n = 189) of participants indicating there were circumstances where it would be preferable for the full bench to decide applications for disqualification, rather than the decision being made solely by the challenged judge.

Figure 7.4: Support for full court decisions on disqualification



196 Sir Grant Hammond (n 12) 149.

7.125 Some lawyers offered comments with regard to the composition of such a panel. One participant suggested that 'consideration of a recusal/reconstitution application may be best done by an entirely fresh bench or at least a judge not involved in the "'infected" panel'.[197] Others thought that the decision should be made by a 'panel of judges who have had no or little dealing with the judicial officer in question of bias'.[198]

197 ALRC Survey of Lawyers, July–August 2021.
198 Ibid.

8. Review and Appeal Mechanisms

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Introduction

8.1 This chapter is the third (and final) in a series of chapters that consider the usual case-specific processes by which the Commonwealth courts manage and address potential issues of judicial bias. Any interlocutory or final order may be challenged on the grounds that it was impugned by bias, subject to the doctrine of waiver. This chapter focuses on the operation of review and appeal procedures in circumstances where a party has made an application for a judge to disqualify

herself or himself 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.[1]

8.2 Disqualification decisions may be challenged by appeal or judicial review. There are two key stages at which such decisions may be challenged. The first is at an interlocutory stage (before final judgment has been delivered in the proceedings), at which time a party may seek to have the proceedings assigned to another judge (and potentially to have any interlocutory orders set aside). The second is after final judgment has been delivered, as a ground of appeal or review, in an attempt to have the final judgment set aside.

8.3 Appeals of decisions made at an interlocutory stage are generally 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.

8.4 The ALRC recommends the introduction of a streamlined interlocutory appeals procedure in relation to disqualification decisions. This recommendation is a necessary complement to **Recommendation 2** — the discretionary transfer procedure. Together the recommendations aim to balance litigant confidence in the courts and the efficient use of court resources.

8.5 A streamlined interlocutory appeals procedure would signal a commitment to upholding the substance and appearance of judicial impartiality. Requiring leave for such an appeal would limit the extent to which such appeals unnecessarily fragment proceedings. A leave requirement would also provide the courts with control over attempts to abuse, or take unfair advantage of, court processes.

8.6 This chapter also briefly considers four other issues relevant to appeals:

- the possibility of bringing an appeal after the time for filing an appeal has lapsed;
- the evidence that can be relied on in an appeal;
- the issue of costs if an appeal is successful; and
- the potential for implied waiver if a litigant does not bring an interlocutory appeal.

8.7 The chapter does not consider the reviewability of disqualification decisions made by High Court judges, as this is discussed in **Chapter 6**.

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1 The chapter does not consider the question of whether a party can challenge a decision of a judge to accede to an application for disqualification, that is, to seek an order that they continue to sit. As to that question, see further John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 327–9; Melissa Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, Australian Institute of Judicial Administration, 2001) 38–42.

Options for challenge on the grounds of bias

8.8 A litigant in the FCFCOA or Federal Court who is concerned about judicial bias affecting proceedings may seek review at two different stages.

8.9 First, while proceedings are ongoing — that is, at an interlocutory stage — a litigant may:

- make an application for the judge to disqualify herself or himself,[2] and if that application is refused, appeal the disqualification decision (and/or associated interlocutory judgments), with leave;
- appeal, with leave, any other interlocutory judgment on the grounds that it was affected by bias; or
- seek a constitutional writ of prohibition from a higher court to prevent the judge proceeding to hear and determine the case.

8.10 Second, once final judgment is delivered, the litigant may raise bias as a ground of appeal, or a ground for judicial review, of the final judgment, regardless of whether the litigant made an application for disqualification in the proceedings below. This right to appeal is subject to the doctrine of waiver, which means that if the litigant did not raise the issue of bias when the litigant became aware of it, the litigant may lose the chance to rely on a ground relating to bias in any subsequent appeal.[3]

8.11 Appeal or review of disqualification decisions at an interlocutory stage has, until recently, been the subject of significant uncertainty and inconsistent practice. The law and practice is relatively straightforward in relation to appeal and review of final judgments. This section will therefore focus on the former.

8.12 Particularly in long-running matters, there can be significant benefits to dealing with appeals in relation to disqualification decisions at an early stage. If a judge decides to sit, proceeds with a hearing, and 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 significant waste of litigant and court resources as the case will essentially have to be run again. For this reason some judges specifically enable expedited review of their own disqualification decisions, to ensure that the trial proceeds on a solid footing.[4] 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.

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2 See **Chapter 6** and **Chapter 7**.

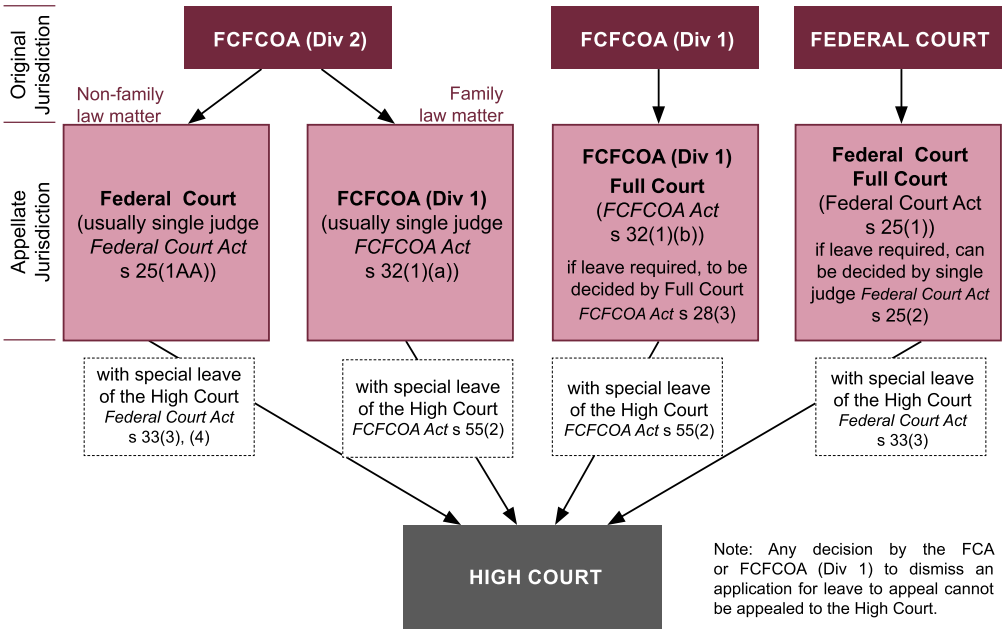
3 See **Chapter 3** and **Chapter 10**.

4 See, eg, *Webb v GetSwift Limited (No 6)* [2020] FCA 1292; *Bowcott v Welling* [2016] FamCAFC 144.

Statutory framework for appeals

8.13 The appellate jurisdiction of the Federal Court and FCFCOA is created by statute. **Figure 8.1** summarises how appeals operate generally in the Commonwealth courts. Appeals from decisions of the FCFCOA (Div 2) may be heard either by the Federal Court, or FCFCOA (Div 1), depending on whether or not the matter concerns family law.[5] Appeals from single judges exercising original jurisdiction in each of the Federal Court and FCFCOA (Div 1) are heard by a Full Court of the relevant court. Leave is required for any appeal against an interlocutory decision in each court.

Figure 8.1: Summary of appeals processes in Commonwealth courts



5 Appeals from decisions of judges of the FCFCOA (Div 2) to the Federal Court are to be heard by a single judge, unless a judge of the Federal Court considers it is appropriate for the appeal to be heard by a Full Court: *Federal Court of Australia Act 1976* (Cth) s 25(1AA). Appeals in family law matters from judges of the FCFCOA (Div 2) are also ordinarily to be heard by a single judge of Division 1, unless the Chief Justice considers it appropriate to be heard by a Full Court: *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 32(1)(a). This reverses the position that applied under the previous legislative framework, where the appellate jurisdiction was to be exercised by a Full Court unless the Chief Justice considered it appropriate for it to be heard by a single judge: *Family Law Act 1975* (Cth) s 94AAA(3) (now repealed).

8.14 Specific statutory authority is given to the FCFCOA (Div 1) to hear appeals from disqualification decisions made by judges of the FCFCOA (Div 2) in family law matters,[6] and made by judges of the FCFCOA (Div 1) exercising original jurisdiction.[7]

Appeal of disqualification decision at the interlocutory stage

8.15 A litigant may seek leave to appeal a disqualification decision, or appeal any subsequent appealable interlocutory judgment. The jurisdiction to hear an appeal, and any requirements for leave in relation to such an appeal, are grounded in particular statutes defining each court's appellate jurisdiction.[8] As context for the discussion in the next section, it is helpful to know that, for example, the Court of Appeal of the Supreme Court of New South Wales can hear an appeal of a 'judgment or order',[9] the relevant Federal Court legislation refers to a 'judgment',[10] and in the context of disqualification, the relevant FCFCOA legislation refers to a 'judgment or decision'.[11]

History of uncertainty about interlocutory appeals from disqualification decisions

8.16 Until very recently there was still some uncertainty about the extent to which a judge's decision not to disqualify herself or himself could be the subject of an interlocutory appeal. The confusion as to whether interlocutory appeal was available is therefore connected to the uncertainty, described in **Chapter 6**, as to whether it was possible to bring a formal application to ask a judge to disqualify herself or himself from proceedings, or for the judge to rule on it. Although the position is now relatively clear, the long shadow of the previous authority has resulted in inconsistent practices in different courts, which are explored further in this chapter.

8.17 Older cases suggested that decisions by judges to sit on a matter (or not to recuse themselves from sitting on a matter) did not amount to a determination that could be appealed.[12] As discussed in **Chapter 7**, in *Barton v Walker*, the New South Wales Court of Appeal held that formal applications for disqualification were not cognisable, and that objections on the basis of actual or apprehended bias should be dealt with informally by the judge in line with then-existing practice in the Court.[13] Accordingly, there was no order that could be appealed.[14] This approach was followed in other jurisdictions regardless of the statutory language granting jurisdiction to appeal.

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6 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 26(1)(h), read with s 26(1)(c).
7 Ibid s 26(1)(h), read with s 26(1)(b).
8 Enid Campbell, 'Review of Decisions on a Judge's Qualification to Sit' (1999) 15 *Queensland University of Technology Law Journal* 1, 2. See further **Table 8.1**.
9 See, eg, *Supreme Court Act 1970* (NSW) s 101.
10 *Federal Court of Australia Act 1976* (Cth) s 24.
11 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 21(1)(h).
12 Perry (n 1) 28, 31–36. See, in particular *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 266 (Barwick CJ, Gibbs, Stephen and Mason JJ); *Barton v Walker* (1979) 2 NSWLR 740.
13 *Barton v Walker* (1979) 2 NSWLR 740, 750.
14 Ibid 758.

8.18 This position was overridden by statute in relation to family law proceedings in 1987 when the *Family Law Act* was amended to provide that a rejection of a disqualification application by a judge exercising jurisdiction under the Act could be appealed.[15] In other areas of law it was ameliorated in practice by courts allowing litigants to use any subsequent interlocutory judgments that *were* amenable to appeal as a vehicle to consider the issue of bias.[16] The latter was criticised, however, for being unnecessarily complex and artificial.[17] A litigant could, for example, appeal a costs order related to a recusal application,[18] or an interlocutory order fixing a trial date,[19] and use it as a vehicle for the court to examine a refusal by a judge to disqualify herself or himself, but could not appeal such a refusal directly.

8.19 In 2011, the High Court appeared to suggest that disqualification decisions could be appealed.[20] However, uncertainty persisted as to whether the Court had endorsed appeal of the disqualification decision itself, or whether the vehicle of a subsequent interlocutory judgment was still required.[21] As recently as 2020, a judge of the Federal Court noted that there was still some confusion about whether disqualification decisions could be appealed.[22]

8.20 In March 2021, the New South Wales Court of Appeal found that its earlier authority had been overruled, and a 'judgment or order' determining a disqualification application, whether made by formal motion or orally, could be appealed.[23] It now appears clear that in most jurisdictions a decision rejecting an application for

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15 *Family Law Act 1975* (Cth) s 94(1AA), as inserted by the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth). Section 94AAA(1)(b) of the *Family Law Act* provided for appeals of disqualification decisions made by the Federal Circuit Court. The insertion of these provisions, in order to address the fact that a disqualification decision was not considered an 'order', gave rise to further subsequent confusion about whether leave was required to appeal a disqualification decision: see further [8.44]. With the establishment of the FCFCOA in 2021, the *Family Law Act* provisions were repealed (with effect from 1 September 2021) and have been replaced by *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 26(1)(h), read with ss 26(1)(b), (c).

16 See *Rajski v Wood* (1989) 18 NSWLR 512, 518 (Kirby P), 522–3 (Priestley JA), 524–5 (Hope AJA); *Brooks v The Upjohn Company* (1998) 85 FCR 469; *Cabcharge Australia Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 111 [12] (Kenny, Tracey and Middleton JJ). See further Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 728; Perry (n 1) 42–4; Tarrant (n 1) 335–41. In *Brooks v The Upjohn Company*, a Full Court of the Federal Court doubted the correctness of the approach taken in *Barton v Walker*, and suggested that the appropriate procedure was for the challenged judge to determine an application for disqualification, giving rise to an order that could be appealed at the interlocutory stage: *Brooks v The Upjohn Company* (1998) 85 FCR 469 629.

17 See, eg, *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [20] (Finkelstein J); *Brooks v The Upjohn Company* (1998) 85 FCR 469, 475 (Beaumont, Carr and Branson JJ).

18 See, eg, *Bidner v Queensland* [2000] QCA 368 [8].

19 *Brooks v The Upjohn Company* (1998) 85 FCR 469.

20 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [80].

21 *Barakat v Goritsas* [2012] NSWCA 8 [15]–[16]. See further *Polsen v Harrison* [2021] NSWCA 23 [33]–[38]; Tarrant (n 1) 341.

22 *Thiess Pty Ltd v Sheehan* [2020] FCAFC 198 [81] (Snaden J).

23 *Polsen v Harrison* [2021] NSWCA 23 [33]–[42] (Bell P, Basten JA and Simpson AJA).

disqualification is an interlocutory determination that can be appealed (although leave to appeal is generally required).[24]

Where a disqualification request is dealt with informally

8.21 Recent case law also supports the view that an 'invitation' for a judge to disqualify herself or himself that is dealt with informally (that is, where there is no formal disqualification application and no order refusing it) can also be the subject of appeal (subject to requirements for leave) prior to determination of the substantive matter.[25] Such a decision cannot be appealed directly, but can be appealed by way of appeal against any subsequent appealable interlocutory judgment or order, and the grounds of appeal may call into question the correctness of the judge's decision to continue to sit.[26]

Constitutional writ of prohibition

8.22 Alternatively (and more traditionally), a litigant may challenge a judge's decision to continue to sit in the face of an objection on bias grounds prior to substantive judgment by seeking a constitutional writ of prohibition from a higher court.[27] Courts cannot, however, issue writs against judges on the same court.[28] It is therefore not possible, for example, for a judge of the Federal Court constituted as a Full Court to issue a writ of prohibition in relation to a single judge of the Federal Court.[29]

8.23 A writ of prohibition forbids a decision maker from commencing or continuing to perform an unlawful act — accordingly, issuance of the writ has the effect of prohibiting the judge from sitting in the case. Such relief is discretionary, and the High Court has indicated that it will 'usually exercise its discretion to refuse the constitutional writs against superior federal courts where the applicant should be using the mechanisms of appeal'.[30] Now that there is greater clarity about the ability of a litigant to appeal a disqualification decision at an interlocutory stage, appeals

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24 Ibid [39]; *Lawrie v Lawler* (2016) 168 NTR 1; *Bidner v State of Queensland* [2000] QCA 368; *Roadside Products Pty Ltd v Cocker* (2020) 31 Tas R 402; *GP v R* (2010) 27 VR 632 [44]–[51]; but cf *GEM v R* [2010] VSCA 168 [12]; *Stone v Moore* (2015) 122 SASR 54.

25 *Thiess Pty Ltd v Sheehan* [2020] FCAFC 198 [81] (Snaden J), citing *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* (2005) 144 FCR 264 [36]–[37] and *Brooks v The Upjohn Company* (1998) 85 FCR 469.

26 *Thiess Pty Ltd v Sheehan* [2020] FCAFC 198 [81] (Snaden J).

27 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248. See further Perry (n 1) 29–31. For the jurisdiction of the High Court to issue writs in relation to the Federal Court and FCFCOA, see s 75(v) of the *Australian Constitution*. For the jurisdiction of the Federal Court to issue writs in relation to the FCFCOA (Div 2) see *Judiciary Act 1903* (Cth) ss 39B(1), (2). Under s 39B(2), the Federal Court is specifically excluded from directing writs to Division 1 of the FCFCOA.

28 *Bird v Free* (1994) 126 ALR 475, 479; *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55 [10].

29 *Bird v Free* (1994) 126 ALR 475, 479-80.

30 Aronson, Groves and Weeks (n 16) 42, citing *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 578.

are therefore the preferred mechanism to challenge a refusal by a judge to disqualify herself or himself.[31]

Formalising streamlined interlocutory appeals

8.24 Disqualification decisions are one area in which the courts have recently recognised that there is a significant public interest in allowing interlocutory appeals. To promote access to justice, procedures for such appeals should be clear and transparent. Further, in the interests of efficiency, any interlocutory appeals process should be designed to ensure that such appeals can be filed and determined in a straightforward manner. A clear process for such appeals is particularly important when the decision on disqualification is made by the challenged judge.[32]

8.25 However, the current procedures are complex, and have been the subject of significant uncertainty and inconsistency. Stakeholders have described how the prospect of long delays and substantial costs associated with appeals of disqualification decisions can dissuade parties from raising any issues of bias. A clear, streamlined appeals procedure would be an important complement to a discretionary transfer procedure (**Recommendation 2**) because, together, they operate to instil confidence in the public that there is an impartial procedure for the determination of disqualification applications.

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.

8.26 The ALRC recommends formalising a streamlined interlocutory appeals procedure for disqualification decisions in a Practice Note (Federal Court) and Practice Direction (FCFCOA). This recommendation would not require amendments to the existing statutory framework for interlocutory appeals. The Practice Note or Practice Direction (as applicable) would serve to provide specific guidance on expedition, evidentiary issues, and costs, and could facilitate applications for leave to appeal being determined on the papers (to save time and costs for the litigants and the courts).

8.27 Introducing greater transparency of process, including in relation to any formal procedure for interlocutory appeals of disqualification decisions, raises the prospect of unintended impacts, such as tactical use of the procedure by litigants, and

31 It used to be more common for a writ of prohibition to be sought as relief from a superior court. See, eg, *Re JRL; Ex parte CJL* (1986) 161 CLR 342.

32 The Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 150.

consequential 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 judges and parties to resolve applications for leave to appeal on the papers, or providing particular mechanisms for doing so. Tactical use of the appeal process can be guarded against through requiring leave to appeal, and through making costs orders, and — where necessary — vexatious litigant orders.

8.28 As the Hon Justice M Perry wrote (prior to her elevation to the bench),

> it is essential to the maintenance of judicial impartiality that the parties are able fearlessly to raise the question of disqualification where reasonable grounds for its apprehension exist. This is so even though it is also plain that such serious allegations should not be lightly made. Equally the parties should feel free to decline to waive an objection without fear of alienating the judge. No doubt judges strive to avoid showing any personal embarrassment at such matters being raised … Nonetheless, the simple fact that the judge against whom an objection is made or maintained is also the judge who determines whether to sit may itself impose real or imagined pressures upon the parties to discard their objections or perhaps not to raise them at all.[33]

8.29 A straightforward process to review disqualification decisions is one way in which the courts as institutions can take institutional responsibility for disqualification decisions and provide assurance to litigants and their legal representatives that they can fearlessly raise such issues.

8.30 This recommendation therefore reflects the legitimate interest of both litigants and the public in judicial impartiality (**Principle 2**), the importance of transparency and equality to upholding public confidence in the courts (**Principle 5**), and the need to ensure that reforms are sensitive to unintended impacts, including in relation to cost and delay, and any wider ramifications for access to justice.

Implementation

8.31 Implementing **Recommendation 4** would not require changes to the courts' constituent legislation, nor to rules of court. The ALRC envisages that Recommendations 1 to 4 would be implemented together as part of a suite of procedural reforms. In particular, as **Recommendation 2** proposes a discretionary transfer process, if a judge decides not to transfer an application for disqualification to another judge, the possibility of expeditious review of the disqualification decision would be an important mechanism to uphold litigant confidence.

8.32 The Practice Note or Practice Direction should apply to interlocutory appeals from all disqualification decisions, whether made by the challenged judge or by a transfer judge. This is important to avoid complexity and inconsistency in practice. However, there may be reasons for the Practice Note or Practice Direction to

33 Perry (n 1) 23 (citations omitted).

provide for a different process in some respects, depending on whether or not the decision was made by the challenged judge. For example, the ALRC recommends that a distinction be made in relation to consideration of appeals of decisions for expedition.

8.33 Current procedures allow for an expedited interlocutory appeal (with leave) from a disqualification decision, and a discretionary stay of proceedings.[34] The Practice Note or Practice Direction for each court should provide that, when an application for leave to appeal concerns a disqualification decision, the application will be automatically considered for expedition and allocation to the Duty Judge, without requiring parties to request this specifically (as currently required for an interlocutory appeal to the Federal Court), or requiring parties to make an application for urgent hearing (as currently required for an interlocutory appeal to the FCFCOA (Div 1)). Applications for leave to appeal a disqualification decision made by a transfer judge should be covered under the Practice Note or Practice Direction, but could be treated the same as any other appeal in relation to consideration for expedition.

8.34 In tandem with procedures for discretionary transfers, the Practice Note or Practice Direction for each court should deal with issues relevant to the appeals process including:

- time limits for filing the application for leave to appeal;
- evidential issues, such as whether an affidavit is required, and how the appellate court and the parties can access the transcript and audio recording of any relevant hearing;[35]
- highlighting provisions that allow applications for leave to appeal to be heard on the papers,[36] or providing mechanisms by which such applications are automatically considered for a hearing on the papers, with amendments to rules of court if necessary;[37] and
- costs, including the possibility of award of costs certificates in the case of successful appeal on a point of law.[38]

8.35 An appeal should be subject to leave requirements, to ensure the recommended procedure does not unduly strain court resources or fragment proceedings.[39] Leave could be granted by the primary judge immediately after announcement of the

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34 See [8.47]–[8.52].

35 See further [8.91]–[8.94]. See also **Chapter 6** and **Chapter 7**.

36 See, eg, *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r. 13.13; *Federal Court Rules 2011* (Cth) r 35.18.

37 In contrast, for example, to the position under *Federal Court Rules 2011* (Cth) r 35.18, by which a party must make a separate application for an order that the application for leave to appeal be heard on the papers.

38 See further [8.95]–[8.97].

39 Until very recently leave was not considered to be required in appeals from disqualification decisions in family law matters, but this position changed in August 2021: *Jess v Jess* (2021) 63 Fam LR 545 [428] (Alstergren CJ, Strickland and Kent JJ). Leave is now required to appeal disqualification decisions in both the Federal Court and the FCFCOA (Div 1). See further [8.44].

disqualification decision, including upon oral application by one of the parties.[40] The ALRC suggests that the courts consider clarifying in the Practice Note and Practice Direction that the court may grant leave on its own motion in circumstances in which the challenged judge has refused an application for disqualification, but the judge considers that an appeal court may take a different view and there is the risk of significant wasted costs if the issue is saved for final appeal. This may potentially have implications for the operation of the doctrine of waiver, and the impact it has on litigants bringing potentially unnecessary applications for leave to appeal, as discussed further below. It would, however, require legislative amendment in the case of the FCFCOA.

8.36 Otherwise, as legislation currently stands, a party may file an application for leave to appeal and the application could be heard by a single judge, except in the case of an appeal from a disqualification decision of a single judge of the FCFCOA (Div 1), which must be heard by a Full Court of the FCFCOA (Div 1).[41] Any change to this position would require amendment of the *FCFCOA Act*.

Current practice and procedure for interlocutory challenge

Case review

8.37 The ALRC Case Review confirmed that applications for leave to appeal, and appeals, are by far the most common mechanism used to challenge judges' decisions not to disqualify themselves at an interlocutory stage in the Federal Court and in the predecessors to the FCFCOA. It also showed that, at present, such challenges are relatively rare, and rarely succeed.[42]

8.38 **Table 8.1** presents the number of challenges to judges' decisions not to disqualify themselves recorded in the judgments, categorised by the courts involved. Such challenges occurred by way of an appeal or application for leave to appeal an interlocutory decision, appeal of a final judgment, or judicial review of an interlocutory or final judgment. This table only includes finalised applications for leave to appeal or appeal because all final appeal judgments are published.[43]

40 This was the approach adopted by Lee J in *Webb v GetSwift Limited (No 6)* [2020] FCA 1292. See further [8.45].

41 See further [8.46].

42 See further **Chapter 5**.

43 The ALRC Case Review also found a small number of references to other cases on appeal that did not proceed, or have not yet proceeded, to hearing. These are not counted in **Table 8.1**. For the methodology adopted see **Appendix F**.

Table 8.1: Appeals and applications for judicial review of disqualification decisions

	Federal Circuit Court to Federal Court	Federal Circuit Court to Federal Court (Full Court)	Federal Circuit Court to Family Court (Full Court)	Family Court to Family Court (Full Court)	Federal Court to Federal Court (leave)	Federal Court to Federal Court (Full Court)	Total
Appeal of Interlocutory Order	10	**0**	**11**	**16**	**3**	**5**	**45**
Successful	0	0	4[44]	2	0	1	7
Unsuccessful	9	0	5	13	2	4	33
Withdrawn/ struck out	1	0	2	1	1	0	5
Final Appeal	**3**	**0**	**4**	**4**	**-**	**4**	**15**
Successful	0	0	0	0	-	0	0
Unsuccessful	3	0	2	3	-	4	12
Withdrawn/ struck out	0	0	2	1	-	0	3
Judicial Review (final)	**0**	**1**	**0**	**0**	**0**	**0**	**1**
Successful	0	0	0	0	0	0	0
Unsuccessful	0	1	0	0	0	0	1
Withdrawn/ struck out	0	0	0	0	0	0	0

8.39 **Table 8.1** records only 61 cases involving a direct or indirect challenge to a decision rejecting a disqualification request in the Commonwealth courts, out of a total of 331 refusals of disqualification requests recorded in the cases.[45] Of the 61 challenges:

44 Note that one of these cases involved an appeal from the Federal Magistrates Court of Australia, the predecessor to the Federal Circuit Court.

45 Here, the term 'disqualification request' refers to a request for a judge to disqualify themselves, whether raised by or treated as an application, or more informally, as this is how requests were counted in the ALRC Case Review. See further **Appendix F**.

- 45 involved an appeal of a disqualification decision, or of an associated or subsequent interlocutory or interim decision;[46]
- 15 involved an appeal of a final judgment, where rejection of a disqualification request was a ground of appeal; and
- one involved an application for judicial review of a final judgment, with failure to accede to a disqualification application included as a ground of review.

8.40 Of the 45 cases involving appeals or applications for leave to appeal at an interlocutory stage, only seven were successful — one from a decision of the Federal Magistrates Court, three from decisions in the Federal Circuit Court, two from decisions in the Family Court, and one involving a decision in the Federal Court.

8.41 The cases reviewed illuminate a number of key practical issues in current practice when disqualification decisions are subject to challenge at an interlocutory stage. These are briefly outlined below.

Direct appeals allowed

8.42 Judges in both the Federal Court and FCFCOA (Div 1) entertain direct appeals from disqualification decisions. As discussed in **Chapter 7**, in some courts there appears to have been a preference for applications related to disqualification to be framed as one seeking the reallocation of the matter, rather than an order that the judge is disqualified.[47] However, appeals in both courts are entertained even when the application to the challenged judge is framed as one seeking disqualification of the judge.[48]

8.43 In family law matters, a Full Court of the Family Court has held that, contrary to the position in other jurisdictions, disqualification decisions *must* be appealed directly, rather than being listed as a ground of appeal in relation to an application to appeal a subsequent interlocutory order.[49]

Leave is required

8.44 Leave is required to appeal from a disqualification decision made by a judge in any of the Commonwealth courts.[50] This is a longstanding requirement in the

46 Note that, as discussed below at [8.54], such appeals were sometimes heard and decided alongside appeals of the final orders in the proceedings.

47 On the basis of the reasoning in *Barton v Walker* (1979) 2 NSWLR 740 that a judge could not order themselves not to sit.

48 See, eg, *Cavar v Greengate Management Services Pty Ltd* [2016] FCA 961; *Luck v Chief Executive Officer of Centrelink* (2017) 251 FCR 295; *Nghiem v Alberts* [2020] FamCAFC 187.

49 *Nghiem v Alberts* [2020] FamCAFC 187 [31]–[32] (Aldridge, Kent and Austin JJ).

50 For the position in the High Court, see *Bienstein v Bienstein* (2003) 195 ALR 225, discussed in **Chapter 6**.

Federal Court,[51] but has only recently been the position in family law matters. Until recently, leave was generally held *not* to be required to appeal from disqualification decisions in relation to family law matters.[52] However, in August 2021, in the case of *Jess v Jess*, a Full Court of the Family Court held that leave is required to appeal a disqualification decision, in accordance with the requirement for other interlocutory determinations.[53]

Who can determine an application for leave?

8.45 Under the *Federal Court Rules*, a party may make an oral application for leave to appeal from an interlocutory order to the judge making the interlocutory order, at the time when the order is made.[54] If the party elects to make such an application, and it is refused, the party cannot subsequently file an application for leave to appeal with the court above, and no appeal can proceed.[55] A Federal Court judge making an order denying a disqualification application may also grant leave to appeal upon the court's own motion. In at least one case identified as part of the case review, *Webb v GetSwift Limited (No 6)*, the judge rejecting the application for disqualification (framed in that case as an application for referral of the proceeding to the National Operations Registrar for reallocation) immediately granted leave to the parties to appeal. The judge did so in that case because he considered that 'the point does give rise to issues of some general importance'.[56]

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51 *Federal Court of Australia Act 1976* (Cth) s 24(1A). See, eg, *Cavar v Greengate Management Services Pty Ltd* [2016] FCA 961 [3]; *Ritson v Commissioner of Police, New South Wales Police Force (No 2)* [2021] FCA 93 [59]; *Luck v Chief Executive Officer of Centrelink* (2017) 251 FCR 295 [30].

52 This position was questioned by a Full Court of the Family Court in 2016, without finally deciding the matter: *Bowcott v Welling* [2016] FamCAFC 144 [81]. Subsequent cases have not required leave: see, eg, *Bulow v Bulow* [2020] FamCAFC 120; *Dobey v Shey (No 2)* [2019] FamCAFC 171; *Dickens v Levine* [2017] FamCAFC 24. In *Dickens v Levine*, the Court expressly held that 'leave is not required in relation to the order refusing the application for disqualification': [45] (Strickland, Ainslie-Wallace and Aldridge JJ). Although cf *McMillan v McMillan* [2017] FamCAFC 88 (application for extension of time where the applicant accepted that he needed leave to appeal the disqualification decision on the basis of *Bowcott v Welling* [2016] FamCAFC 144). Appeals of disqualification decisions in family law matters were brought under ss 94(1AA) and 94AAA(1)(b) of the *Family Law Act*.

53 *Jess v Jess* (2021) 63 Fam LR 545 [428] (Alstergren CJ, Strickland and Kent JJ). Note the legislation for the new FCFCOA reflects the position in relation to appeals of disqualification decisions that existed under the *Family Law Act* for its predecessor courts: *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 26(1)(h), read with ss 26(1)(b), (c). Interlocutory decrees (other than a decree in relation to a child welfare matter, for which separate provisions apply) are prescribed as judgments of the FCFCOA (Div 1) for which leave to appeal is required. See *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 29(1)(b), 28(3)(e)(i); *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth) reg 4.02.

54 *Federal Court Rules 2011* (Cth) r 35.01.

55 Ibid r 35.11; *Bird v Free* (1994) 126 ALR 475, 477.

56 *Webb v GetSwift Limited (No 6)* [2020] FCA 1292 [53] (Lee J).

8.46 Alternatively, a party may file a written application for leave to appeal from an interlocutory order.[57] This is the only procedure available in relation to applications for leave to appeal from decisions of judges of the FCFCOA. In each court, applications for leave to appeal may be heard by a single judge:

- The *Federal Court Act* provides that applications for leave to appeal will be heard by a single judge of the court, unless otherwise ordered.[58] Appeals on non-family law matters from the FCFCOA (Div 2) will generally be heard by a single judge in any event.[59] In practice, applications for leave to appeal from a single judge of the Federal Court are often listed before the Full Court to be heard at the same time as the appeal. However, in at least one case identified in the case review, the application for leave to appeal was heard by a single judge of the Federal Court.[60]
- Under the *FCFCOA Act*, an application for leave to appeal from a disqualification decision of a judge in Division 2 exercising family law jurisdiction will ordinarily be heard by a single judge of Division 1.[61] An application for leave to appeal from a disqualification decision of a judge in Division 1 must, however, be heard by a Full Court.[62]

Stay of proceedings

8.47 If a party is appealing a disqualification decision, there may be good reasons to prevent further hearings from occurring before the appeal is resolved. This is known as a 'stay': an order that 'suspends the progress of proceedings, so that no further step may be taken while the stay is in place'.[63] The Federal Court and FCFCOA each have the power to stay their own proceedings.[64] Judges of the Federal Court and FCFCOA (Div 1) also have the power to order a stay of proceedings in another court, pending resolution of an appeal from that court.[65] The power of a judge to grant a stay is discretionary; in this context the grant of a stay 'will depend on various

57 *Federal Court Rules 2011* (Cth) r 35.11; *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 13.02.
58 *Federal Court of Australia Act 1976* (Cth) s 25(2).
59 Ibid s 25(1AA).
60 *Ferdinands v South Australia* [2017] FCA 32.
61 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 28(2).
62 Ibid s 28(3).
63 Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis Butterworths, 2018) [14.27]. As to the principles applicable to granting a stay pending appeal of a disqualification decision, see Tarrant (n 1) 332–3.
64 *Federal Court of Australia Act 1976* (Cth) s 23; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 44, 140. See further, eg, *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 1.06.
65 *Federal Court of Australia Act 1976* (Cth) s 29; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 38.

circumstances, one of which is the likelihood of a grant of leave to appeal'.[66] An appeal does not of itself act as a stay of the proceedings.[67]

8.48 In *Leone v Cino (No 3)*, the applicant sought a stay of proceedings pending determination of an appeal against a disqualification decision.[68] The primary judge granted the stay, on the basis that allowing

> the final hearing to proceed in the face of an appeal against my refusal to disqualify myself, particularly having regard to the … assertions as to my bias, and in circumstances where the Full Court is able to entertain the appeal within a matter of months, would not in my view be appropriate.[69]

8.49 Similarly, in *Bowcott v Welling*, the trial judge granted a stay of proceedings after the applicant filed an appeal, which was then expedited (see below).[70] However, a Full Court of the Family Court expressed reservations about granting a stay when the trial was already well progressed, noting that

> it would be unfortunate if a practice developed of postponing trials after an appeal is lodged against a recusal decision made at a very advanced stage of the proceedings. Having refused the disqualification application, a trial judge should give careful thought before deciding to postpone the conclusion of the trial. We do not suggest that his Honour did not do so here, but important matters to be taken into account in arriving at the decision 'would include the stage the proceedings had reached … and the consequences that would follow from leaving appellate determination of the issue of disqualification until after trial': *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [84].[71]

Expedition of appeal

8.50 An appeal is 'expedited' if it is heard other than in 'order of priority' based on the order in which appeals are ready for hearing.[72] In the Federal Court, appeals are usually triaged one month after filing. However, any requests for expedition may be brought to the attention of the duty judge or the registry as appropriate.[73] A decision on expedition will be made by the Chief Justice in consultation with the National Appeals Coordinating Judges.[74] For appeals to the FCFCOA (Div 1), if a party wishes

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66 *Barakat v Goritsas* [2012] NSWCA 8 [22] (Basten JA). See further Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (The Federation Press, 2015) [11.38].

67 *Federal Court Rules 2011* (Cth) r 36.08(1); *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 13.12(1). See further *Barakat v Goritsas* [2012] NSWCA 8 [22] (Basten JA).

68 *Leone v Cino (No 3)* [2015] FamCA 757.

69 Ibid [52].

70 *Bowcott v Welling* [2016] FamCAFC 144 [16].

71 Ibid [79].

72 *Tong v Niem* (2020) 61 Fam LR 619 [12].

73 Federal Court of Australia, *Practice Information Note APP 1: Case Management of Full Court and Appellate Matters*, 17 November 2020 [5.1]–[5.4].

74 Ibid [5.5].

an appeal to be expedited, the party must seek an order that the matter be given an urgent listing by making an application in the appeal, accompanied by an affidavit.[75]

8.51 In some cases, appeals of a disqualification decision, once expedited, have been heard and determined very quickly. For example, in *Bowcott v Welling*, a judge of the Federal Circuit Court refused a disqualification application, and granted a stay of proceedings pending appeal. The appeal was filed four days after the decision, expedited, and heard by a Full Court the next month. The Full Court gave judgment dismissing the appeal less than two months later.[76]

8.52 Relevant considerations in determining whether to grant expedition will include the possible detriment to other cases (that is, because expedition will push appeals filed earlier back in the queue).[77] In *Tong v Niem*, a single member of a Full Court of the Family Court expressed the view that, when 'there is a serious challenge to the constitution of the Court, it is desirable that that issue is dealt with as quickly as the appeal court can reasonably accommodate', and made an order for expedition of the appeal.[78]

8.53 **Table 8.2** summarises the position in each court in relation to the matters discussed above, and sets out a number of relevant legislative provisions and Practice Notes or Practice Directions.

Table 8.2: Summary of procedural issues on interlocutory appeal from original jurisdiction

	FCFCOA (Div 2) ***Family law***	**FCFCOA (Div 2)** ***Non-family law***	**FCFCOA (Div 1)** ***Original jurisdiction***	**Federal Court** ***Original jurisdiction***
Appeal to	FCFCOA (Div 1) (generally single judge) *FCFCOA Act,* s 32(1)(a)	Federal Court (generally single judge) *Federal Court Act*, s 25(1AA)	FCFCOA (Div 1) (Full Court) *FCFCOA Act,* s 32(1)(b)	Federal Court (Full Court) *Federal Court Act*, s 25(1)
Direct appeal of disqualification decision	Yes *FCFCOA Act,* ss 26(1)(c), (1)(h)	Yes[79]	Yes *FCFCOA Act,* ss 26(1)(b), (1)(h)	Yes[80]

75 Federal Circuit and Family Court of Australia, *Family Law Practice Direction – Appeals*, 1 September 2021 [2.13]–[2.14].

76 *Bowcott v Welling* [2016] FamCAFC 144.

77 *Tong v Niem* (2020) 61 Fam LR 619; *Nimmo v Bush* [2016] FamCAFC 274. In these cases the courts were guided by rule 12.10A of the *Family Law Rules 2004* (Cth), which provided that, in determining whether to grant expedition, courts may consider 'whether there is a relevant circumstance in which the case should be given priority to the possible detriment of other cases'.

78 *Tong v Niem* (2020) 61 Fam LR 619 [17].

79 See [8.42].

80 See [8.42].

	FCFCOA (Div 2) ***Family law***	**FCFCOA (Div 2)** ***Non-family law***	**FCFCOA (Div 1)** ***Original jurisdiction***	**Federal Court** ***Original jurisdiction***
Leave required for disqualification appeal	Yes[81] *FCFCOA Act*, s 28(1)(b)[82]	Yes *Federal Court Act*, s 24(1A)	Yes[83] *FCFCOA Act*, s 28(3)(e)(i)[84]	Yes *Federal Court Act*, s 24(1A)
Leave can be granted by single judge	Yes *FCFCOA Act*, s 28(2)	Yes *Federal Court Act*, s 25(2)	No *FCFCOA Act*, s 28(3)	Yes *Federal Court Act*, s 25(2)
Stay pending interlocutory appeal	Yes (discretionary) *FCFCOA Act*, ss 38, 140	Yes (discretionary) *FCFCOA Act*, s 140 *Federal Court Act*, s 29	Yes (discretionary) *FCFCOA Act*, s 44	Yes (discretionary) *Federal Court Act*, s 23
Expedited hearing available	Yes *Family Law Practice Direction – Appeals*, 1 September 2021 [2.13]–[2.14]	Yes *Practice Information Note APP: Case Management of Full Court and Appellate Matters,* 17 November 2020 [5.1]–[5.5]	Yes *Family Law Practice Direction – Appeals*, 1 September 2021 [2.13]–[2.14]	Yes *Practice Information Note APP: Case Management of Full Court and Appellate Matters,* 17 November 2020 [5.1]–[5.5]

81 *Jess v Jess* (2021) 63 Fam LR 545 [428].

82 Regulation 4.02 of the *Federal Circuit and Family Court of Australia Regulations 2012* (Cth) prescribes interlocutory decrees (other than a decree in relation to a child welfare matter) as judgments for which leave to appeal is required pursuant to s 28(1)(b). There are particular provisions requiring leave to appeal from decisions of judges or magistrates rejecting applications that they disqualify themselves in a child support matter: *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 28(1)(c).

83 *Jess v Jess* (2021) 63 Fam LR 545 [428].

84 Regulation 4.02 of the *Federal Circuit and Family Court of Australia Regulations 2012* (Cth) prescribes interlocutory decrees (other than a decree in relation to a child welfare matter) as judgments for which leave to appeal is required pursuant to s 28(3)(e). There are particular provisions requiring leave to appeal from decisions of judges rejecting applications that they disqualify themselves in a child support matter: *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 28(3)(f).

Timing of hearing — prior to, or after, delivery of substantive judgment

8.54 In some matters, appeals against interlocutory orders concerning disqualification were heard alongside an appeal of the final judgment, rather than the appeal of the final judgment being grounded in alleged error evidenced by the failure of the judge to disqualify herself or himself.[85] In some cases, this was because the matter had proceeded to final judgment after the appeal of the interlocutory order was filed, and appeals against both the interlocutory orders and the final judgment were accordingly listed before the same judges.[86]

Orders made in successful interlocutory appeals

8.55 Successful interlocutory appeals have included orders directed at the judge (such as, that 'the primary judge be disqualified from further hearing the proceedings'[87]) and orders not directed at the judge (such as, that the proceedings 'be referred to the National Operations Registrar for reallocation to a judge in the Commercial and Corporations National Practice Area'[88]). The former, directed at the judge, were in the context of proceedings under the *Family Law Act*, while the latter approach appears to reflect the preferred practice for disqualification orders generally in the Federal Court, and has also been used in the Federal Circuit Court in non-family law matters.[89]

Problems with existing law and practice on interlocutory challenge

8.56 Feedback from stakeholders in consultations, through surveys, and in submissions, suggested there are three key problems with the existing law and practice on interlocutory challenge in the federal courts of limited jurisdiction, some of which are illustrated by the analysis above. These were that:

- the procedures for interlocutory challenge of disqualification decisions have been unclear, overly complex, and inconsistent between courts, and sometimes within courts;
- the risk of additional cost and delay caused by bringing an interlocutory challenge has a chilling effect on disqualification applications and appeals being brought, even in strong cases; and

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85 See, eg, *Marino v Bello* [2020] FamCAFC 314; *CPF15 v Minister for Immigration and Border Protection* [2018] FCA 1764; *Luck v Chief Executive Officer of Centrelink* (2017) 251 FCR 295.

86 See, eg, *Marino v Bello* [2020] FamCAFC 314.

87 See, eg, *Dobey v Shey (No 2)* [2019] FamCAFC 171.

88 *GetSwift Ltd v Webb* (2021) 388 ALR 75.

89 See, eg, *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376; *Ambrose v Badcock* [2021] FCA 881; *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343; *Neale v Mahony* [2019] FCCA 2240; *Karsten v Minister for Immigration (No 2)* [2015] FCCA 1784; *Coady v Yachting Victoria Inc* [2018] FCCA 3113.

- appellate judges are very reluctant to overturn decisions on disqualification made by their colleagues on the bench.

8.57 Each of these is briefly considered below, before turning to the arguments for and against two potential options for reform.

Lack of consistency and clarity in procedures for interlocutory challenge

8.58 The analysis above suggests that the statutory landscape for challenging disqualification decisions at an interlocutory stage is complex. It is grounded in multiple statutes and regulations, with additional gloss provided by case law, which has been in a state of flux. Although procedures appear to be increasingly consistent between courts, there is no easily accessible guidance to the procedure for litigants or legal practitioners in the form of Practice Notes or Practice Directions.

8.59 The remaining uncertainty, and desire for a more straightforward approach, was illustrated by the comments of a judge responding to the ALRC Survey of Judges:

> Although this is not the preferred procedure, I tend to think it would be good if there were a formal interlocutory application involved. This would mean that if the application was dismissed a party could apply for leave to appeal. I have always thought that the fact that you cannot directly appeal a refusal to disqualify because there is no order, looks like a triumph of technicality over a point which may be very important.

8.60 The uncertainty and inconsistency in practice and procedures for interlocutory challenge can lead to very real difficulties for litigants and counsel. For example, in most courts, a disqualification decision can be relied on as a ground of error on final appeal. However, given the particular statutory provisions applicable in the family law context, in family law matters, judges may require the disqualification decision to be appealed by way of separate interlocutory appeal.[90] In at least one case, after following the process applicable in other contexts (of raising the disqualification decision as a ground of final appeal) a party was required to file an application for an extension of time to appeal the disqualification decision and had costs awarded against them.[91] Their lawyer was also criticised by the Court.

8.61 Recognition of these complexities is consistent with feedback received from legal practitioners that the procedures for disqualification and appeal of disqualification decisions are not clear or transparent. It was suggested that this can impede the ability of both legal practitioners, and self-represented litigants, to avail themselves of the procedures to challenge disqualification decisions. This can have serious consequences — a failure to appeal a disqualification decision may, for

90 See [8.43].
91 *Dobey v Shey* [2019] FamCAFC 68.

example, give rise to questions of waiver on any final appeal.[92] In addition, a lack of clarity about immediate appeal options may dissuade a litigant with strong grounds from bringing an application for disqualification because the litigant may fear that an application will inflame the situation further in front of the primary judge for no benefit if the application is refused.

8.62 In an area of such importance to public confidence and the efficient use of court resources, clarity and transparency of process are particularly important.

Chilling effect caused by risk of additional cost and delay

8.63 Legal practitioners regularly stated in consultations that concerns about costs and delay associated with bringing, and appealing, a disqualification application had a chilling effect on meritorious applications being brought. This view was reflected in the ALRC Survey of Lawyers. In that survey, 58% (n = 207) of participants said that they had made a decision not to bring a bias application although they believed it had merit. Thirteen per cent of responses cited concerns about delay and costs as a reason for the decision.[93] One respondent to the survey said that the 'expense and delays associated with taking these points and appeals based on them means that … it is almost always impractical to take up the issue'.[94]

8.64 As set out above, the rules for each court provide mechanisms by which interlocutory appeals can be expedited, and expedition has been ordered in relation to some appeals of disqualification decisions.[95] However, this requires a specific request for expedition to be made. In other cases interlocutory appeals have taken months to be heard and decided, while proceedings have continued, sometimes to final judgment.[96]

8.65 Numerous stakeholders emphasised in consultations and through comments in the ALRC Survey of Lawyers that the expense of bringing an appeal means that appeals are effectively 'beyond the reach' of many litigants.[97] One litigant, who had ostensibly strong grounds to challenge an interim order on the grounds of apprehended bias, said that after consulting numerous lawyers the litigant had been quoted $20,000 to bring an appeal, and simply could not afford it. Other stakeholders emphasised that, especially after final judgment, some litigants were too traumatised by the process to prolong it by bringing an appeal.

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92 See Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 101; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [84]–[85] (Gummow A-CJ, Hayne, Crennan and Bell JJ).

93 See **Chapter 5**. Participants were asked to select all applicable reasons for not having raised the issue with the judge from a list of options provided in the survey. This is why there were more responses (n = 352) than eligible participants (n = 207).

94 ALRC Survey of Lawyers, July–August 2021.

95 See [8.50]–[8.52].

96 See, eg, *Marino v Bello* [2020] FamCAFC 314, in which the matter was summarily dismissed before the appeal against the primary judge's decision not to disqualify himself was heard.

97 See also Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

Perceived reluctance of appellate judges to overturn colleagues on appeal

8.66 Another issue relevant to both interlocutory and final appeals more generally, which was raised in submissions, in a number of consultation meetings, and in responses to the ALRC Survey of Lawyers, is a perceived reluctance on the part of appellate judges to overturn a disqualification decision made by one of their colleagues on the same court.[98] One respondent to the ALRC Survey of Lawyers suggested that judges are often reluctant to find grounds of bias in order to avoid criticising fellow judges, and may use other grounds, such as a failure to provide a meaningful hearing, to overturn a judgment.[99] Another suggested that this was a particular issue in small jurisdictions.[100]

8.67 On the other hand, some judges responding to the ALRC Survey of Judges thought that appellate courts are not reluctant to overturn disqualification decisions. One expressed the view that the availability of appeals 'helps keep Judges within the law: no one likes to be rolled on appeal and the appeal Courts are merciless'.[101] Another judge thought that 'appeal courts should be more understanding of trial courts' when asked what reforms were important to support and strengthen judicial impartiality.[102]

Consideration of reform

8.68 In the Consultation Paper, the ALRC put forward two sets of proposals to strengthen the availability and effectiveness of timely challenge to a disqualification decision. The first related to greater clarity and transparency of procedures, through the promulgation of Practice Notes or Practice Directions (**Proposal 2**) and Guidance (**Proposal 3**). As discussed in **Chapter 6** and **Chapter 7**, there was overwhelming support in submissions, consultation meetings, and through the ALRC Survey of Judges and the ALRC Survey of Lawyers, for greater clarity and transparency of procedures.

8.69 The second set of proposals asked whether there would be benefit in formalising the availability of an interlocutory appeal procedure for applications relating to bias before a single judge court (**Question 7**). The ALRC noted that, while prompt access to an appeals process does not resolve the core criticisms aimed at

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98 See, eg, Asian Australian Lawyers Association, *Submission 42*. This point was also made in a number of confidential submissions. In this respect, it is notable that of the interlocutory challenges identified in the ALRC Case Review, there were at least three cases in which, even though the challenge to the disqualification decision was not successful (or not determined), the case was remitted to the registry for reallocation to a different judge on other grounds: *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 [235]; *CPF15 v Minister for Immigration and Border Protection* [2018] FCA 1764; *Nimmo v Bush* [2017] FamCAFC 69 (order by consent).

99 ALRC Survey of Lawyers, July–August 2021.

100 Ibid.

101 ALRC Survey of Judges, April 2021.

102 Ibid.

the self-disqualification procedure, expedient review of the initial decision does help to mitigate concerns about the ultimate impact of the bias blind spot and the tension with the duty to sit. The ALRC suggested: 'Clear court-specific procedures can ensure that procedures are appropriately adapted to the particular circumstances of the court'.[103]

Feedback from stakeholders

8.70 Of the seven submissions addressing this question, five were supportive, and two were neutral. Supportive submissions included those from the Asian Australian Lawyers' Association, the Australian Bar Association, and the Law Council of Australia.[104]

8.71 The Asian Australian Lawyers Association considered that expeditious appeals are the best safeguard against erroneous disqualification decisions, and are preferable to transfer of disqualification decisions at first instance.[105] As they wrote, 'the key solution will be the speediness of the appeal'.[106] The Australian Bar Association also emphasised the importance of expedition in any appeal, and the continuing importance of the requirement for leave to appeal. They stated that:

> to the extent necessary, the facility for an expeditious interlocutory appeal, with leave, should be available from the determination of a disqualification application. … Questions of leave require consideration of the particular facts of each case. That said, recognition of the importance of the need for independence and impartiality may, in many cases, militate in favour of a grant of leave.[107]

8.72 Dr McIntyre, too, saw the 'clarification of the availability and procedures regarding such appeals' as 'beneficial'.[108] In his view, facilitating efficient and timely appeals supports appeals as 'the primary accountability mechanism for ensuring the quality of the substantive judicial decision', and allows the disqualification decision to become 'one of systemic collective responsibility'.[109]

8.73 The Australian Judicial Officers Association, on the other hand, was not supportive of a proposal that courts should be required to develop Practice Notes or guidance in this area. However, the Association was not opposed to courts being 'encouraged to develop their own custom-made Practice Notes or Guidelines

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103 Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021) [56].

104 Other supportive submissions were Dr Joe McIntyre, *Submission 46*, and a confidential submission. Neutral submissions were Australian Judicial Officers Association, *Submission 31*; Professor Tania Sourdin, *Submission 33*.

105 Asian Australian Lawyers Association, *Submission 42*.

106 Ibid.

107 Australian Bar Association, *Submission 43*.

108 Dr Joe McIntyre, *Submission 46*.

109 Ibid.

to address questions such as these'.[110] In relation to appeals, the Association recognised that:

> It may, for example, in some courts, be that the judge against whom a contention is raised but refuses it should almost invariably and even without hearing from the parties, grant leave to appeal. But these policies are best left for development by individual courts as part of their own assessment of the best practice in their court.[111]

8.74 The availability of an 'expedited appeal process when recusal is refused' was also raised by one judge in the ALRC Survey of Judges as a reform that would improve the procedures relating to bias.

Models for expeditious review in other jurisdictions

8.75 Other jurisdictions have recognised the importance of expeditious review of disqualification decisions and introduced specific procedures to facilitate this. One submission to the Inquiry, made by a retired Judge of the Jerusalem Family Court, the Hon Philip Marcus, provided helpful information about the procedure for review of disqualification decisions adopted in the Israeli courts, through which appeals are heard very quickly in the Supreme Court:

> The appeal must be filed immediately with the Supreme Court, even if the case is being handled in the Magistrates' Court (from which all other appeals are to the District Court); the President of the Supreme Court (who is the highest judicial officer, and as such has power to issue practice directions and to direct the handling of court business, aided by the Presidents of the courts at each level and in each district) usually handles such appeals, and decisions are handed down within a few days of the final pleadings being filed with the Supreme Court. Such decisions are almost always published.
>
> As a result, the disruption of proceedings by a spurious application to disqualify is kept to a minimum, and the process is open to the public; even cases in the Family Court, which are held *in camera*, and publication of any information which may identify the parties is forbidden, are reported using initial letters.[112]

8.76 The disqualification procedure in the state of Michigan (in the US) provides another example of a review procedure. Under the *Michigan Court Rules*, a judge decides a motion for disqualification filed against them.[113] However, in a single judge court, if the motion is denied, a party may have the motion referred to the 'state court administrator for assignment to another judge, who shall decide the

110 Australian Judicial Officers Association, *Submission 31*.
111 Ibid.
112 Philip Marcus, *Submission 21*. The submission sets out relevant legislative provisions that govern the law on disqualification.
113 *Michigan Court Rules* 2.003(D)(3)(a).

motion de novo'.[114] It also provides for review by the chief judge where a motion for disqualification is denied in a court having two or more judges.[115]

8.77 Expeditious review of disqualification decisions has also been supported as an appropriate response to disqualification applications by scholars who have highlighted the difficulties with the current procedure.[116]

Arguments against a formal and transparent procedure

8.78 Although no submissions opposed the proposal for a formal and transparent procedure for interlocutory challenge, there are three key potential arguments against such an approach:

a) potential misuse and impact on resources;

b) the fragmentation of proceedings; and

c) the apparently limited use, and limited success, of appeals at present.

8.79 Here, the principles guiding the Inquiry discussed in **Chapter 2** provide an important framework to consider these arguments and the competing interests they raise.

Potential misuse and impact on resources

8.80 Some stakeholders suggested in consultations that greater transparency of procedures to challenge disqualification decisions may encourage unmeritorious applications and appeals. These could, it is suggested, be used tactically to prolong proceedings, harass other parties, and add to cost. The devotion of court resources to such appeals will add to an already overburdened court system, particularly in the FCFCOA (Div 2) where judges can be listed to hear many matters in a day, and litigants face delays in their matter being listed. This is similar to concerns raised about transparency of procedures to raise issues of actual and apprehended bias, which are discussed in **Chapter 6**. In relation to interlocutory appeals specifically, however, a Full Court of the Federal Court has recognised concerns about the tactical use of appeals (in the context of concerns about 'judge-shopping') and suggested that the courts already have mechanisms to discourage such practices. The Court considered that the perception that allowing interlocutory appeals would encourage 'judge-shopping' would

> underestimate the capacity of judges at first instance to recognise such a tactic and the controls which exist at appellate level to discourage what might otherwise be a flood of appeals against disqualification decisions. They

114 Ibid 2.003(D)(3)(a)(ii).
115 Ibid 2.003(D)(3)(a)(i).
116 See, eg, Appleby and McDonald (n 92) 99–100; Deborah Goldberg, James Sample and David E Pozen, 'The Best Defense: Why Elected Courts Should Lead Recusal Reform' (2007) 46(3) *Washburn Law Journal* 503, 532.

> include, of course, stringent scrutiny at the stage of application for leave and, where appropriate, a variety of costs orders.[117]

Fragmentation of proceedings

8.81 Second, it has been recognised in literature and case law that there may be situations in which the 'fragmentation of proceedings occasioned by an interlocutory appeal from a recusal decision is undesirable'.[118] This might be the case, for example, where 'the hearing of the substantive matter is likely to be short or where the matter is likely to turn primarily on questions of law'.[119] Here too, the requirement of leave is seen as an important mechanism to promote efficient use of resources.[120] According to Professor Appleby and Stephen McDonald, matters that might appropriately inform a decision to grant leave include:

> prospects of success, the respective costs of determining the appeal before or after the hearing concludes, any potential damage to public confidence in the justice system should the hearing proceed and the judgment later be set aside for apprehended bias, and whether the appeal is frivolous, vexatious, or an abuse of process.[121]

8.82 The approach that the courts take to the grant of leave in disqualification decisions is instructive in this respect. The self-disqualification procedure, and the risk of wasted resources if a trial proceeds and any subsequent judgment is overturned for bias, mean that disqualification decisions are one area in which the grant of leave to appeal at an interlocutory stage is seen as particularly appropriate.[122] In *Barakat v Goritsas (No 2)*, Basten JA recognised that

> because of the particular role placed upon a judge in determining a recusal application it will frequently be appropriate to grant leave to appeal, assuming the challenge is not patently untenable and where a long and costly trial would be avoided if the decision below were incorrect.[123]

8.83 On the other hand, a Full Court of the Federal Court has recognised that it is important that the discretion in respect of consideration of a leave application be maintained: the position is not that 'an arguable appeal on the question of perceived bias would always warrant a grant of leave'.[124] Here, the mechanism of the application for leave allows the institution to manage the significant risks of erroneous disqualification decisions, and the impact that appeals of such decisions

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117 *Brooks v The Upjohn Company* (1998) 85 FCR 469, 477.

118 Appleby and McDonald (n 92) 100. As to the court's reluctance to allow the fragmentation of proceedings generally by interlocutory appeals see, eg, *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 [33].

119 Appleby and McDonald (n 92) 100.

120 Ibid.

121 Ibid.

122 See, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [86].

123 *Barakat v Goritsas (No 2)* [2012] NSWCA 36 [64] (citations omitted) (Young JA and Sackville AJA agreeing).

124 *Brooks v The Upjohn Company* (1998) 85 FCR 469, 477.

have on resources. This was recently explained by Farrell J of the Federal Court, who said that, where leave is sought to appeal a disqualification decision, there are

> two competing interests of justice in play. The first is the interest that judicial decisions are, and are objectively seen to be, unbiased so that the public at large as well as the parties to the proceedings may have confidence in the integrity of judicial decision-making. The second interest is in ensuring that the due despatch of the workload of the courts is not bogged down by unwarranted claims of apprehension of bias arising out of unfavourable rulings on matters of practice or procedure or hurt feelings following robust exchanges. Interested parties are not always in the best position to determine whether, objectively, an interlocutory decision was impartially made.[125]

8.84 Justice Farrell noted that another issue that may weigh particularly heavily on the exercise of the discretion to grant leave is whether the disqualification decision concerns proceedings in which appeal rights have been specifically excluded.[126]

8.85 In summary, the mechanism of requiring leave for appeal provides the courts with a way of managing the potential impacts that such appeals may have on other parties and the court. Providing a transparent, streamlined, and expeditious procedure can contribute to the system working in the most efficient way possible.

Limited use and success of appeals

8.86 Finally, it could be suggested that the very small number of interlocutory appeals recorded in the ALRC Case Review, and the low rate of success of such appeals,[127] indicates that greater transparency and clarity about appeals procedures should not be considered a priority for reform. For context, 45 interlocutory appeals of disqualification decisions were recorded, out of 331 disqualification decisions. Seven of those interlocutory appeals were successful.[128]

8.87 However, the low rate of appeals could also be seen as evidence that this is an area requiring reform. In light of feedback about underuse of bias applications, low appeal numbers could be seen to support concerns that a lack of clarity about procedures, and the risk of significant cost and delay, has a chilling effect on applications for disqualification and related appeals.[129] This concern was raised repeatedly in consultations and is borne out by responses to the ALRC Survey of Lawyers, in which 74% (n = 192) of lawyers who responded indicated that the existing procedures discourage bias claims.[130]

8.88 The ALRC's Case Review did not cover all cases in the past five years in which the issue of bias has been raised on appeal from a final judgment, but rather

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125 *FKP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 19 [59].
126 Ibid [60].
127 See [8.39].
128 In two cases, the successful appeal was after delivery of final judgment in the matter.
129 See above [8.58]–[8.65].
130 See **Chapter 5**.

only those cases in which a reference was made to recusal or disqualification. It is therefore not possible to compare the rate of success of interlocutory appeals against the rate of success of appeals against final judgments when disqualification applications were not made in the proceedings below. Such a comparison might have facilitated a more complete assessment of whether more transparent appeals procedures may contribute to bias issues being 'caught' earlier in proceedings.

Other issues concerning interlocutory and final appeal

Time for filing appeal

8.89 Appeals and applications for leave to appeal must ordinarily be filed within the time specified in the relevant court's rules. However, courts have the discretion to grant an extension of time if the appellant or applicant can show grounds for an extension.[131] Such circumstances might arise, for example, if facts giving rise to an apprehension of bias only became apparent after the time for filing an appeal had passed.

8.90 The object of such rules is 'to ensure that those Rules which fix times for doing acts do not become instruments of injustice'.[132] The FCFCOA's brochure on appeals procedures explains, for example, that matters that will be taken into account when deciding whether or not an extension of time will be granted include: the length of the delay; the reasons for the delay; any disadvantage it has caused the other party; the merits of the proposed appeal; and the overall justice of the case.[133]

Evidential issues

8.91 An appeal in the strict sense relies on the evidence admitted in the proceedings below, and it must be shown that the judge below has made an error of fact, or law, or both. However, in appeals raising issues of alleged bias, it is 'generally accepted that evidence can be admitted on appeal'.[134] As Kirby P noted in *Rajski v Scitec Corp Pty Ltd*, it would be 'absurd' if courts considering issues of bias on appeal were confined to the evidence at first instance:

> Such evidence might not in any way disclose the background of facts which demonstrate the bias suggested on the part of the judge or the facts from which the Court was invited to infer that members of the public might have that reasonable apprehension of bias that would necessitate judicial disqualification and enliven appellate intervention. The very nature of the allegation is such that

131 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 15.06; *Federal Court Rules 2011* (Cth) r 35.14.

132 *Gallo v Dawson* (1990) 93 ALR 479, 480 (McHugh J).

133 Federal Circuit and Family Court of Australia, 'Appeal Procedures – Full Court' <www.fcfcoa.gov.au/fl/pubs/appeal-procedures-full-court>.

134 Tarrant (n 1) 304.

> it may sometimes be necessary to test its viability by reference to extraneous circumstances, properly proved.[135]

8.92 A clear example of such a case is *Charisteas v Charisteas*, concerning allegations of contact between the primary judge and counsel during the trial, which came to light after judgment was delivered. On appeal, the appellant was permitted to adduce additional evidence by way of affidavit as to the contact.[136] The legislation for the Federal Court and FCFCOA set out the ways in which the court may receive additional evidence in an appeal.[137] The ALRC Case Review shows that additional evidence is sometimes admitted in appeals raising issues of bias.[138] When leave to adduce additional evidence is refused, it is often on the grounds that the evidence is considered inadmissible or irrelevant to the appeal.[139]

8.93 As discussed in **Chapter 6**, courts may rely on affidavit evidence in considering issues of bias (including on appeal), but an affidavit may not be necessary where the facts alleged are reflected in an existing judgment of the court. That chapter also discusses access to transcripts and audio recordings of prior proceedings, which may also be necessary in an appeal.

8.94 In **Chapter 7** it was observed that an appeal court has limited ability to hear directly from a judge who is the subject of an appeal on the grounds of bias. Where the issue of bias was raised before the judge who is the subject of the appeal, the judge is likely to have addressed it in open court, or in a judgment on a disqualification application. In cases in which the facts alleged to give rise to bias became known to a party after judgment has been delivered, there is less scope for the appellate court to discover the judge's version of the facts.[140] However, resolution of factual disputes is usually unnecessary.

Costs certificates in successful appeals

8.95 Where an appeal in relation to bias is successful, the matter will ordinarily be remitted to the first instance court to be heard by a different judge. There are likely to be significant costs implications for both parties — both in respect of the costs of the application or appeal, and in respect of the wasted costs in proceedings up to that point.

8.96 Typically, the losing party on an appeal will be required to pay the costs of the other side associated with the appeal. However, when an appeal succeeds on a point of law the Commonwealth courts have the power to order a 'costs certificate',

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135 *Rajski v Scitec Corporation Pty Ltd* (New South Wales Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986) 7–8.

136 *Charisteas v Charisteas* (2020) 60 Fam LR 483 [120].

137 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 35; *Federal Court of Australia Act 1976* (Cth) s 27.

138 See, eg, *Collins v Ricardo* [2017] FamCAFC 42 [11].

139 See, eg, *Ericsson v Jarrold* [2020] FamCAFC 298 [32]–[34]; *Jarrah v Fadel (No 2)* [2015] FamCAFC 161 [58]–[59]; *McMillan v McMillan (No 3)* [2020] FamCAFC 256 [17]–[18].

140 See, eg, *Charisteas v Charisteas* (2021) 393 ALR 389.

by which the Attorney-General (Cth) is authorised to indemnify the unsuccessful party (or in family law, both parties) against any costs the parties have incurred in the appeal, and any costs they would otherwise be required to pay to a successful party.[141] When a new trial is ordered, the court may also grant a costs certificate to both parties to cover the costs associated with the new trial.[142] A Full Court of the Federal Court has emphasised that the decision to grant a costs certificate 'is a discretion to be exercised judicially, having regard to the justice of the case in all the circumstances'.[143] Costs certificates cannot be made, however, in favour of government agencies or large corporate bodies.[144]

8.97 The ALRC Case Review shows that, of the seven successful appeals of disqualification decisions, costs certificates in relation to either or both the appeal and new trial were ordered in at least three cases.[145] It is possible, however, that costs certificates were sought and awarded subsequently to the judgments being handed down in the remaining successful appeals. The ALRC considers that the issue of costs, and cost certificates, should be referred to in any Practice Note or Practice Direction dealing with appeals from disqualification applications.

Waiver

8.98 A party who is aware of facts that they allege give rise to apprehended bias, but who does not raise the issue with the judge concerned, may be taken to have waived the right to object later on. In *Michael Wilson & Partners v Nicholls*, Gummow A-CJ, Hayne, Crennan and Bell JJ suggested that in some circumstances, a failure to apply for leave to appeal a disqualification decision could similarly amount to waiver. Their Honours said:

> Whether failure to seek leave to appeal against refusal of an application that a judge not try the case on account of a reasonable apprehension of bias precluded maintenance of the complaint in an appeal against the final judgment would require consideration of whether the failure to seek that leave was reasonable. That would require examination of all relevant circumstances. Ordinarily those would include the stage the proceedings had reached when the disqualification application was made and refused and the consequences that would follow from leaving appellate determination of the issue of disqualification until after trial.[146]

8.99 The arguments for and against waiver in relation to bias applications, and the uncertainties inherent in implied waiver such as this, are considered further

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141 *Federal Proceedings (Costs) Act 1981* (Cth) ss 6, 9.

142 Ibid s 8.

143 *Minister for Immigration and Border Protection v CQZ15 (No 2)* (2018) 259 FCR 569 [20] (Kenny, Tracey and Griffiths JJ). The Court also stated that the discretion in relation to the ordering of costs certificates is 'broad and unfettered, although it must be exercised judicially': [29].

144 *Federal Proceedings (Costs) Act 1981* (Cth) s 14.

145 *Dobey v Shey (No 2)* [2019] FamCAFC 171; *Sellers v Burns* [2019] FamCAFC 111; *Silva v Phoenix* [2018] FamCAFC 41.

146 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [84].

in **Chapter 10**. In the context of interlocutory appeals specifically, two potentially conflicting considerations apply. On one hand, requiring parties to take the issue on interlocutory appeal stops parties 'saving up' appeal grounds in the event that they are not successful in their action. Especially in a long trial, a failure to correct any error at the interlocutory stage can have a significant impact on efficient use of court resources and on costs for parties. On the other hand, if parties feel that they must always bring an interlocutory appeal to avoid the risk of waiver, because they cannot be sure if an appellate court will consider a failure to do so reasonable or not, this may lead to applications for leave to appeal being brought that would have been dealt with more appropriately in a final appeal. In this respect the vagueness of 'reasonableness' may lead parties and their counsel to err on the side of caution.

8.100 Marcus described in his submission how the provisions in Israeli family law referred to above essentially involve a statutory waiver if a disqualification decision is not appealed, as parties can only raise issues of bias in very rare circumstances on appeal.[147] On the other hand, the legislation for the FCFCOA appears to promote the opposite approach. When hearing an appeal, s 36(5) of the *FCFCOA Act* allows a Full Court to disregard the effect of any decision not to pursue an interlocutory appeal:

> An interlocutory judgment or order from which there has been no appeal does not operate to prevent the Federal Circuit and Family Court of Australia (Division 1), upon hearing an appeal, from giving such decision upon the appeal as is just.

8.101 It is possible that the purpose of this provision is to ensure that applications for leave to appeal are not brought simply to preserve a party's position, in the context of the Court's high workload.

8.102 The ALRC suggests that, in these circumstances, rather than deeming a party to have waived rights of appeal, a better way to guard against tactical use of bias claims, and to provide greater certainty to litigants and their counsel, would be to allow the challenged judge to identify cases in which interlocutory appeal is warranted. The judge may do this by taking the initiative to grant leave to appeal if she or he decides not to disqualify herself or himself, but considers that it is possible an appellate court might take a different view and that there are good reasons for the matter to be determined prior to final judgment.[148] This is likely to be appropriate when there is the risk of significant wasted costs if the point is withheld for an appeal of a final judgment. Any consideration of waiver and, in particular, whether it was reasonable not to challenge the decision at an interlocutory stage, could be informed by the challenged judge's view of the matter at the time. This would not otherwise preclude a party from bringing an application for leave to appeal to the appellate court at an interlocutory stage.

147 Philip Marcus, *Submission 21*. See further [8.75].
148 Such as the approach taken by Lee J in *Webb v GetSwift Limited (No 6)* [2020] FCA 1292.

8.103 This course of action could be raised in any Practice Note or Practice Direction dealing with applications for leave to appeal from disqualification decisions. However, legislative amendment would be required to implement this in the FCFCOA.[149]

149 See [8.35]–[8.36].

9. Other Mechanisms for Raising Allegations of Bias

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Introduction

9.1 This chapter considers mechanisms for raising and determining issues of bias outside the context of litigation.

9.2 The Inquiry's Terms of Reference ask the ALRC to consider whether current mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate. The primary mechanisms are those within the courts' case-specific processes. However, where a complaint 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. This might happen, for example, where the complaint involves the making of discriminatory statements in court, or a failure to disclose an obvious interest in a case.

9.3 Formal mechanisms of accountability for judicial conduct have traditionally been tightly circumscribed, because they are seen to threaten judicial independence, and with it, confidence in judicial impartiality. However, in recent years, a number of jurisdictions in Australia and overseas have established internal processes and external bodies tasked with receiving and investigating complaints. This chapter examines the limitations of existing appeals and internal complaints procedures in

dealing with issues of bias, and outlines stakeholder support for an independent body to consider issues of judicial conduct related to bias.

9.4 In this chapter, the ALRC recommends the Australian Government 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.

9.5 A 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 where the conduct does not amount to actual or apprehended bias under the law.

9.6 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 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.

Judicial independence, impartiality, and accountability

9.7 The law on bias places the primary responsibility for determining issues of actual and apprehended bias with the challenged judge, the court in which the challenged judge sits, and any relevant appellate court. This is consistent with how judges in the common law world are traditionally held accountable in their role. The common law system has generally relied on a blend of internal and external mechanisms,[1] including:

- the way in which the role is required to be performed (including the principle of open justice, the requirement to give reasons, and the availability of appeals);
- social pressures (including the influence that the judicial oath, judicial culture, and public scrutiny have on a judge's conscience); and

1 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 237.

- internal disciplinary processes (through the head of jurisdiction, ordinarily the Chief Justice or Chief Judge).[2]

9.8 Judges have not traditionally been subject to oversight by external bodies, and there are strict constitutional limits on the discipline of judicial officers. Judges 'cannot be punished or disciplined for making a wrong or unpopular decision'.[3] This is because the independence of the judiciary is a fundamental value of Australian democracy, which is embedded in the *Australian Constitution*. Under the *Australian Constitution*, judges of the Commonwealth courts:

- hold office until they resign or reach a compulsory retirement age of 70 years;
- cannot have their remuneration reduced; and
- can only be removed from office by the Governor-General in Council on an address from both Houses of Parliament praying for their removal on the ground of proved misbehaviour or incapacity.[4]

9.9 Judges are generally immune from criminal or civil legal proceedings for actions taken in the exercise of their judicial role.[5] There are, however, clear common law and statutory exceptions providing for criminal liability in some circumstances, such as corruption.[6]

9.10 Judges have been at pains to stress that these protections are not for the 'private advantage of judges, but for the protection of judicial independence in the public interest'.[7] Circumscribing mechanisms of accountability in this way is intended to ensure that judicial officers will be impartial adjudicators, by limiting the opportunities for reprisals by governments or individuals if they disagree with decisions of the judge.[8] As the Hon Chief Justice TF Bathurst AC has noted:

> Independence is important so that the community will have confidence that the judiciary will apply the law fairly and impartially, and will hold other branches of government to account where necessary.[9]

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2 For a summary of taxonomies for characterising judicial accountability mechanisms see ibid 250–1. See further Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [2.244]–[2.246] for a description of how some of the more informal mechanisms of accountability have worked in practice.

3 The Hon Chief Justice TF Bathurst AC, 'Who Judges the Judges, and How Should They Be Judged?' (2019) 14 *The Judicial Review* 19, 29.

4 *Australian Constitution* s 72.

5 *Fingleton v The Queen* (2005) 227 CLR 166 [36]–[40] (Gleeson CJ).

6 Ibid [40] (Gleeson CJ). See further [9.17].

7 Ibid [38] (Gleeson CJ). See also Chief Justice Bathurst (n 3) 26–8.

8 See further **Chapter 2**. See also Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) [12.82]–[12.85].

9 Chief Justice Bathurst (n 3) 27.

Tensions and convergence

9.11 There is 'an inevitable tension between the requirements of judicial independence and any mechanism for dealing with judicial misconduct'.[10] However, judicial independence is instrumental to achieving judicial impartiality and public confidence.[11] Forms of judicial accountability can enhance the ways in which judicial impartiality is protected, and ensure that other protective support structures remain effective.[12] These links have been made by the ALRC in previous inquiries. For example, the ALRC has recognised that proper complaints procedures are important to provide information needed to make continuous improvements to how the courts operate.[13]

9.12 The ALRC has also drawn a clear link between formal mechanisms for judicial accountability and public confidence in the judiciary. Noting the increasingly active role of judges in managing litigation, the ALRC has underscored that:

> The [ALRC's] confidence in the ability of federal judges to manage the system … stems in part from the evident quality and integrity of our bench. … At the same time, the maintenance of public confidence in the judiciary also requires the development of a transparent system of accountability for judicial officers who are invested with such enormous authority.[14]

9.13 These observations apply with equal force to the law on bias within such a system. In this respect, the ALRC endorses the observations of Professor Appleby and others, who have noted that:

> Overall, the Australian judiciary is dedicated, competent, and acts with high levels of integrity. Nevertheless, there are occasions where judicial officers fail to meet the standards expected of them, either as a consequence of misconduct or incapacity. In those instances, their conduct warrants a measured, transparent and appropriate response.[15]

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10 The Hon Chief Justice JJ Spigelman, 'Dealing with Judicial Misconduct' (2003) 6 *The Judicial Review* 241, 242.

11 See further **Chapter 2**.

12 McIntyre (n 1) 243–4. See further **Chapter 2** and Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [8]–[10].

13 Australian Law Reform Commission (n 2) [2.248]. See further Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 63–4.

14 Australian Law Reform Commission (n 2) [2.242]. Similarly, in the ALRC's review of the family law system, the ALRC asked whether establishment of a judicial commission was 'necessary to improve public confidence in judicial officers exercising family law jurisdiction', and received many submissions in support: Australian Law Reform Commission (n 8) [12.106]; Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [13.62].

15 Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 357.

9.14 The Hon Chief Justice JJ Spigelman AC has emphasised that:

> The rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially. Judicial misconduct and judicial incompetence are incompatible with each of these objectives.[16]

9.15 Formal mechanisms of accountability, appropriately designed, can form part of the mix of accountability mechanisms supporting impartial decision-making and public confidence in it. Professor Morabito noted nearly 30 years ago, in writing about the establishment of Australia's first independent judicial accountability mechanism:

> If a given system of judicial accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability and, at the same time, enhance judicial independence. This occurs because 'judicial independence is nourished by, and in the long term only survives in, an atmosphere of general community satisfaction with and confidence in the high quality and total integrity of the judiciary.'[17]

Existing mechanisms for raising allegations of bias

9.16 Aside from raising an issue of actual or apprehended bias with the judge concerned, or on appeal, there are currently three other potential formal routes through which concerns in relation to federal judicial officers about bias may be raised.[18]

9.17 The first is through the criminal law: it is an offence for a judge to exercise federal jurisdiction 'perversely' in a matter in which the judge has a personal interest.[19] This provision would only apply in the clearest of cases of direct interest in the outcome of a dispute, and the ALRC is not aware of a prosecution ever having been considered or pursued under this section.[20]

9.18 Alternatively, issues concerning a Federal Court or FCFCOA judge's conduct can be raised with the court's head of jurisdiction through a court's internal complaints procedures, or through a protocol agreed between the courts and the

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16 Chief Justice Spigelman (n 10) 241.

17 Vince Morabito, 'The *Judicial Officers Act 1986* (NSW): A Dangerous Precedent or a Model to Be Followed?' (1993) 16(2) *University of NSW Law Journal* 481, 490 (citations omitted).

18 Concerns may also be raised in other ways, such as through letters to Members of Parliament and the Attorney-General, and in some instances allegations relating to judges have been raised under parliamentary privilege by Members of Parliament. This discussion is limited, however, to consideration of formal procedures.

19 *Crimes Act 1914* (Cth) s 34(4). See also *Criminal Code Act 1995* (Cth) s 141.1(3) (Bribery of a Commonwealth public official).

20 For a recent example of an Australian judicial officer being convicted under South Australian criminal law for an offence directly related to actual bias (conspiring to commit an abuse of public office by arranging to have a case in which his former partner was a legal representative listed before him and predetermining the outcome), see *R v Harrap* [2021] SASCA 22.

bar associations. These mechanisms are directed towards issues that adversely affect a judge's performance of their duties, or that adversely affect the reputation of the court. No formal complaints procedure exists in relation to the High Court.

9.19 These existing 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 (unless there was an obvious failure to disclose such exposure). 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 court's internal procedures.[21]

Court complaints procedures

9.20 Internal complaints procedures have been established by the heads of jurisdiction of each of the Federal Court and the FCFCOA.[22] These were established under the *Court Legislation Amendment (Judicial Complaints) Act 2012* (Cth),[23] and allow heads of jurisdiction to receive and consider complaints in relation to judges of their court. The head of jurisdiction will not deal with a complaint (otherwise than to summarily dismiss it) unless she or he believes that it is sufficiently serious to: justify removal of the judge; adversely affect or have affected performance of their duties; or have the capacity to adversely affect the reputation of the court.[24] If the head of jurisdiction considers that the complaint requires further consideration, she or he may deal with it in consultation with the judge concerned, refer it to another person or a conduct committee for investigation, or refer it to Parliament if it raises serious matters that would warrant removal.

9.21 Under these procedures, in 2020, an Independent Conduct Committee was established to investigate complaints about sexual harassment by a Federal Circuit Court judge. In April 2021, the committee found the complaints to be substantiated, and recommended (among other things) referral of the complaints to the Attorney-General to consider whether steps should be initiated for parliamentary removal from office. The judge concerned resigned shortly before the Chief Judge of the

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21 See further Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 17–18.

22 Described in more detail in Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [67]–[74]. Since the publication of that background paper, the Family Court and Federal Circuit Court have merged. The relevant statutory provisions for the new court are ss 48, 49 and 45 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

23 Following recommendations in this area in Australian Law Reform Commission (n 2) recs 11, 12; and following recommendations in relation to the establishment of a federal judicial commission in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) recs 10, 11.

24 *Federal Court of Australia Act 1976* (Cth) ss 4, 15(1AAA); *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 48, 145.

Federal Circuit Court, the Hon Chief Justice W Alstergren, formally and publicly accepted the report's recommendations.[25]

9.22 The Federal Court and FCFCOA have publicised the procedure for bringing and determining complaints on the courts' respective websites.[26] Each court's policy states that where an issue raised in a complaint is a matter that is or was capable of being dealt with by an appeal it 'cannot' be dealt with under the complaints procedure.[27]

Bar protocols

9.23 Issues relevant to bias may be raised by barristers, through a protocol agreed between the courts and the Australian Bar Association.[28] Under the protocol, first agreed in 2019 and amended in 2020, the President of the Australian Bar Association and the presidents of the state and territory bar associations may raise any concerns about judicial conduct with the relevant heads of jurisdiction.[29] The protocol was designed to allow barristers to confidentially raise concerns (via a bar association president) about judicial conduct (whether in court or outside of court) 'through a less formal mechanism' than the courts' internal complaints procedures.[30] The protocol provides that the head of jurisdiction may (among other things) discuss the matter with the judge concerned or listen to any recording of relevant hearings, and will subsequently respond to the president of the relevant bar association about the outcome of discussions with the judge or the head of jurisdiction's consideration of the matter.[31]

9.24 **Background Paper JI5** detailed some of the criticism of the operation of these procedures by which complaints are handled internally by the courts. The limitations of existing complaints procedures, including stakeholder feedback on them, is considered further below.

25 Federal Circuit Court of Australia, 'Statement of the Hon Chief Justice William Alstergren Chief Judge of the Federal Circuit Court of Australia' (Media Release, 8 July 2021).

26 Federal Court of Australia, 'Judicial Complaints Procedure' <www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>; Federal Circuit and Family Court of Australia, 'Judicial Complaints Procedure' <www.fcfcoa.gov.au/policies-and-procedures/judicial-complaints>.

27 Federal Court of Australia (n 26); Federal Circuit and Family Court of Australia (n 26). Note that this is not a specific requirement of the *Court Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

28 Note that the Law Council of Australia was in discussions about the establishment of a similar protocol for solicitors, but these discussions did not proceed further in light of the Law Council's renewed focus on a robust external complaints mechanism such as a federal judicial commission.

29 Australian Bar Association et al, *Amended Protocol for the Bar Associations of Australia to Raise Any Concern About Conduct of Commonwealth Judges* (2020).

30 Ibid.

31 Ibid.

A federal judicial commission

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

9.25 **Recommendation 5** responds to 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. The particular difficulties associated with raising those issues with the judge and court concerned, and the crucial importance of perceptions of impartiality for confidence in the administration of justice, mean that additional safeguards are required.

9.26 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. In this Report, the ALRC does not propose a particular model of judicial commission. Instead, it considers why establishment of such a commission is important to maintain public confidence in the administration of justice, in light of the inevitable limitations of laws and procedures relating to impartiality and bias. It also sets out observations on different options that could be considered as part of the policy development process for establishing a judicial commission.

9.27 A federal judicial commission would provide a transparent and independent mechanism to consider litigants', lawyers', and witnesses' concerns about issues of judicial behaviour or impairment giving rise to an apprehension of bias. The fact that a judicial commission would be independent from the courts would, to an extent, address perceived conflicts of interest in the current system under which the judge or court the subject of a bias allegation is required to consider and respond to the allegation.

9.28 As discussed below, there are constitutional limits on the extent to which a federal judicial commission could be invested with disciplinary and removal powers.[32] In light of this, many stakeholders consider the model currently adopted in a number of Australian jurisdictions to be appropriate. Under this model, judicial commissions receive and investigate complaints, and refer those complaints to the Attorney-General if the commission considers removal of the judge from office

32 See discussion at [9.85]. These constitutional limits accord with the framework for understanding judicial impartiality developed in **Chapter 2**.

is warranted, or to the head of jurisdiction for other substantiated complaints not warranting removal of the judge.[33]

9.29 The ALRC has considered the establishment of a federal judicial commission in two previous inquiries. Twenty years ago, in light of stakeholder feedback at the time, the ALRC instead recommended the introduction of a protocol for the handling of complaints by heads of jurisdiction, which at that time did not exist.[34] The ALRC's recommendation was subsequently adopted by legislative amendment in 2012.[35] The ALRC also recommended that the courts publish a statistical breakdown of complaints received in their annual reports, and that judicial training institutions have regard to those reports in developing and refining orientation, education, and training programs.[36] In addition, the ALRC recommended that the Commonwealth Parliament establish a protocol governing the receipt and investigation of serious complaints against federal judicial officers.[37]

9.30 In 2009, a Senate Inquiry recommended the establishment of a federal judicial commission, modelled on the Judicial Commission of New South Wales, and endowed with complaints-handling and educative functions.[38]

9.31 In the ALRC's review of the family law system, completed in 2019, the ALRC again considered the need for a federal judicial commission.[39] In its final report, the ALRC noted significant support for a proposal to establish an independent body to handle complaints about judicial officers. However, the ALRC agreed with a number of stakeholders that such a commission should only be established if it were to apply to all federal judicial officers (and not just those hearing family law matters). Noting that the Terms of Reference for that inquiry precluded the ALRC from considering the issue more broadly, the ALRC suggested that the issue of a federal judicial commission warranted 'further consideration by the Australian Government in the broader context of all federal judicial officers'.[40]

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33 Some have called for stronger powers to sanction misconduct, including public reprimands, ongoing monitoring, and requirements to apologise. See, eg, Appleby and Le Mire (n 21) 58; Suzanne Le Mire, 'Regulation of Judicial Misconduct in Australia: Why, How and Where Next?' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar, 2021) 41–2.

34 Australian Law Reform Commission (n 2) rec 11.

35 *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth). See further [9.20].

36 Australian Law Reform Commission (n 2) rec 11.

37 Ibid rec 12.

38 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 23) recs 10–12, [7.82]–[7.84].

39 Australian Law Reform Commission (n 8) [12.81]–[12.106]; Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (n 14) [13.62]–[13.68].

40 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (n 14) [13.63].

9.32 In February 2021, it was reported that the Attorney-General (Cth) was considering the establishment of a standalone judicial commission, and had sought legal advice in relation to it.[41]

Limitations of existing mechanisms

9.33 A range of stakeholders emphasised the limitations of court procedures and complaints procedures in dealing with certain issues where perceptions of bias arise. Most stakeholders noted that the vast majority of Commonwealth judges perform their work with integrity and dedication under very difficult circumstances. Nevertheless, poor judicial conduct giving rise to (or related to) apprehended bias can be an issue within Commonwealth courts, and is particularly corrosive to the confidence of litigants, the profession, and through them, the public. Additional safeguards to address these issues were seen by stakeholders to be important to protecting the rights of litigants and future litigants, and to maintaining confidence in judicial impartiality and the administration of justice. This section of the chapter will set out identified limitations of appeals and existing complaints procedures.

Limitations of appeals as a corrective mechanism

9.34 Appeals have traditionally been considered the primary corrective mechanism for issues of actual and apprehended bias, and are the primary accountability mechanism in the common law system. Dr McIntyre notes that appeals

> represent a direct form of 'accountability', actively intervening to promote the quality, acceptability and legitimacy of judicial decisions, minimising both the frequency and consequences of judicial 'error'. This not only ensures functional efficacy, but reassures the public of the integrity and quality of the judicial institution. Additionally, appellate mechanisms can provide an opportunity for senior judges to informally sanction judges for inappropriate and unacceptable conduct.[42]

9.35 However, Professors Appleby and Le Mire have argued that where a ground of complaint involves misconduct (rather than simple error) the appeal process may not be a satisfactory response. Appeals can be expensive and time consuming, may fail to properly acknowledge misconduct falling short of the legal criteria for actual and apprehended bias, and are unlikely to provide an appropriate sanction.[43] These concerns and others were raised by stakeholders in this Inquiry, who emphasised that:

- **Appeals are in practice unavailable to many litigants who may have legitimate concerns about judicial behaviour giving rise to an apprehension of bias.** The expense of legal representation, the expense of

41 Naomi Neilson, 'ABA Welcomes Reports of Federal Judicial Commission' (19 February 2021) *Lawyers Weekly*.
42 McIntyre (n 1) 276.
43 See Appleby and Le Mire (n 21) 7–8.

obtaining transcripts,[44] and the risk of adverse costs orders may act as barriers to lodging an appeal. Nearly 30 years ago, Professor Morabito argued that: 'By having appeals as one of the corrective mechanisms, we are implicitly deciding that individuals with greater wealth should have a better chance of attaining justice than individuals who cannot afford appeals'.[45] Feedback from stakeholders confirmed that the same concerns exist today. Other barriers to lodging an appeal may include:

  - litigation fatigue and disillusionment with the legal system after (in some cases) many years of proceedings at first instance;
  - the discretionary nature of the decisions involved, particularly in family law proceedings;
  - the complexity of bringing appeal proceedings for a self-represented litigant; and
  - for some, the emotional toll or trauma of being subjected to discriminatory or rude behaviour in court.

- **Appeals are unavailable where proceedings are settled.** A very high proportion of all cases in the federal jurisdiction are settled by agreement between the parties, effectively precluding an appeal even if there are valid concerns about judicial conduct. Of particular relevance for this Inquiry, some litigants and lawyers, particularly in family law proceedings, reported settling for much smaller sums in property matters than they believed they or their clients were entitled to, as an alternative to risking a hearing on child custody matters before a judge who they perceived through conduct in court to be biased against them.
- **Appeals are not a realistic avenue where the outcome was generally favourable to the litigant concerned.** Although the law on bias is concerned with bias that improperly affects the ultimate decision, a number of litigants reported distress at not being able to complain about what they perceived as conduct that gave rise to concerns about a lack of impartiality during the hearing, even though the outcome of proceedings was generally in their favour (whether finally determined by the judge concerned or by another judge). There was a concern that, even where they were ultimately successful, litigants could be harmed by the experience, damaging confidence in the legal system and significantly impacting the individual involved.
- **Appeals do not transparently act as a corrective mechanism in future cases, nor do appeals address underlying issues.** Despite the potentially corrective effect of criticism at the appellate level, some lawyers and litigants noted that behaviour that had been subject to strong criticism on appeal, such as a judge's behaviour in court towards litigants, had recurred in subsequent cases concerning the same judge.[46] Morabito has noted that the appellate process 'rectifies one of the negative outward symptoms of the problem but

44 See further **Chapter 6**.
45 Vince Morabito, 'Are Australian Judges Accountable?' (1994) 1(1) *Canberra Law Review* 73, 74.
46 See also Le Mire (n 33) 38–40.

does not deal with the cause of the problem'.[47] A perceived failure to respond to the underlying issues at an institutional level may also have a particular impact on the litigant's confidence in the administration of justice, even where the litigant is successful in an appeal. For example, one consultee who had been successful on appeal on bias grounds was left with very little faith in the impartiality of other judges to whom the case was remitted. Sometimes criticism on appeal will result in statements from the head of jurisdiction about steps that are being taken to address concerns about judicial behaviour, but these too bring challenges for the head of jurisdiction in striking the right balance between supporting a colleague and sanctioning behaviour.[48]

9.36 In some cases where appeals have been upheld on the grounds of procedural fairness, the judicial conduct giving rise to that finding has attracted strong criticism from judges at the appellate level.[49] This could be seen as evidence that the system is working effectively to manage issues of poor judicial conduct. However, the feedback from lawyers and litigants suggests that a number of potentially meritorious cases never reach appeal — often because the litigant is disadvantaged or vulnerable in some way.[50] In other cases, judges are subjected to strong criticism for their conduct, but the appeal is not successful.[51] In addition, if strongly worded criticism at the appellate level is seen as the only available corrective mechanism, this may in fact be particularly damaging to public confidence, and to the reputation of the judge concerned and their ability to continue to perform their judicial role.[52] One consultee suggested that, although they do not believe there is a problem with the law about actual and apprehended bias, there is an issue with public confidence in the appellate system's ability to cure unfair applications of the law.

Limitations of internal complaints mechanisms

9.37 Similarly, the existing complaints procedures for the federal judiciary, which occur through the head of jurisdiction, have been criticised as being inadequate for addressing issues that have given, or may give, rise to apprehended bias.[53] In

47 Morabito (n 45) 74.

48 See, eg, Michael Pelly, 'Benched: Judge Forced to Take a Break from Duties', *Australian Financial Review* (22 July 2019).

49 *Stradford v Stradford* (2019) 59 Fam LR 194 [53] ('It is difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness'); *Lysons v Lysons* [2019] FamCAFC 29 [67]–[77]; *CQX18 v Minister for Home Affairs* [2019] FCA 386 [26] ('What happened in this case should never have happened but it is not the role of this Court to discipline the Judges of the Federal Circuit Court. That function is reposed elsewhere'); *Jorgensen v Fair Work Ombudsman* (2019) 271 FCR 461 [151] ('an egregious departure from the role of a judge presiding over an adversarial trial' such that the trial judge's 'capacity to objectively evaluate the evidence was fundamentally compromised'); *Adacot & Sowle* [2020] FamCAFC 215.

50 See further Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014).

51 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 73–6.

52 Le Mire (n 33) 39–40. Le Mire notes that appeals also 'provide no opportunity for correction where commentary in the public forum is unfair': 40.

53 See further Appleby and Le Mire (n 21) 30–1.

its submission, the Australian Bar Association suggested that the current federal complaints procedures 'suffer from a lack of transparency, which undermines public confidence in the judiciary'.[54] It suggested that the procedures are deficient because:

(a) they lack formality and provide too much discretion to the head of jurisdiction;
(b) they may place a head of jurisdiction in an invidious position when dealing with a judge who is also a colleague;
(c) there is uncertainty around how to deal with less serious complaints; and
(d) there is no permanent administration support.[55]

9.38 The Law Council of Australia has also suggested that perceived difficulties with the current system include:

- it is 'overly discretionary and informal', particularly given that the discretion is vested in the head of jurisdiction, who is a colleague of the judge concerned, rather than an independent body;
- there is a 'lack of clarity' about how complaints relating to misbehaviour or impairment falling short of that requiring removal by Parliament should be resolved; and
- the lack of permanent administrative structures for managing complaints about the judiciary means that 'complaints are addressed on a discretionary basis through the existing internal structures', undermining public confidence.[56]

9.39 Information about the investigation into complaints of sexual harassment by a Federal Circuit Court judge conducted under the court's internal complaints procedure became public after the end of the consultation period for this Inquiry.[57] Both the Australian Bar Association and the Law Council of Australia publicly commended what the Law Council described as the 'rigorous and thorough process' implemented to investigate the complaints.[58] In their statements, both stakeholders publicly reiterated their support for a federal judicial commission in this context. The Law Council stated that the investigation underlined the need for a consistent approach across the Commonwealth courts and the Bar Association emphasised that a federal judicial commission 'would be an important step to enhance the public's confidence in the administration of justice'.[59]

9.40 The concerns expressed by the Australian Bar Association and Law Council of Australia in their submissions were reflected in the comments of stakeholders. Even if complaints procedures operate effectively, the fact that they are internal to the

54 Australian Bar Association, *Submission 43*.
55 Ibid.
56 Law Council of Australia, *Policy Statement — Principles Underpinning a Federal Judicial Commission* (2020) 3–4.
57 See further [9.21].
58 Law Council of Australia, 'Court shows sexual harassment will not be tolerated' (Media Release, 8 July 2021); Australian Bar Association, *The National Brief #4* (2021) <https://austbar.asn.au/>.
59 Law Council of Australia, 'Court shows sexual harassment will not be tolerated' (Media Release, 8 July 2021); Australian Bar Association (n 58).

institution undermines confidence in the process. Some litigants noted how judicial findings of apprehended bias were made in their case long after they raised issues through internal complaints procedures concerning the judge's conduct or capacity that they considered were not adequately addressed. Others considered the fact that the complaint was directed to the court, in relation to one of the members of the court, inevitably involved a conflict of interest. In this respect, internal complaints procedures may compound the concern litigants have about the self-disqualification process in relation to bias.[60] The ALRC consulted a number of litigants who had perceived judicial bias in their cases about what they would have liked to have happened; the majority suggested an independent person or body should have looked at the issue. In communications with the ALRC, many other litigants also referred to the inadequacies of the existing complaints-handling processes and the need for an independent body to handle complaints.

9.41 Some of these concerns about internal complaints processes were also reflected in comments of judges in response to a survey of Australian judicial officers across Commonwealth, and state and territory courts, which was conducted in 2016. One judicial respondent suggested that

> informal mechanisms are inadequate and not transparent. … There is no enforceable mechanism to compel a judge to engage with a complaints process, if they choose not to or do not accept or respect the informal authority of the Head of Jurisdiction. There is no guarantee of consistency of practice. There is nothing that can give a member of the public who complains, any sense of a fair and transparent process for dealing with complaints. That is ironic, given the role of the courts and judges as impartial, transparent and accountable arbiters of disputes.[61]

9.42 Others have noted how the traditional internal processes for dealing with complaints are difficult from the perspective of the head of jurisdiction. Professor Appleby and Dr Roberts have noted, for example, that:

> The informality of the traditional process, the limited powers of the chief justice to remedy transgressions, as well as her or his other responsibilities to the court as an institution, have created great difficulties for chief justices wishing to promote accountability of the judicial institution.[62]

9.43 The Hon Chief Justice W Martin AC described to a Senate Inquiry into Australia's judicial system how he received approximately two complaints per week about judges or magistrates, but that

> neither I nor any other Head of Jurisdiction has appropriate facilities or mechanisms for the conduct of such investigations, and there may well be

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60 See **Chapter 8**.

61 Appleby et al (n 15) 363–4.

62 Gabrielle Appleby and Heather Roberts, 'The Chief Justice: Under Relational and Institutional Pressure' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 50, 63.

situations in which it may be alleged by either the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such an investigation.[63]

9.44 Before the same Senate Inquiry, the Hon Chief Justice D Bryant AO, suggested that she was 'not entirely comfortable' with the responsibility for complaints handling resting with the head of jurisdiction, nor did she think other heads of jurisdiction were comfortable with it.[64]

9.45 One head of jurisdiction who had experience both as the manager of an internal complaints process and as a member of a judicial commission, the Hon Justice PD McClellan AM, has reflected that the internal complaints process was 'a much harder exercise to manage'.[65]

9.46 Some stakeholders observed that heads of jurisdiction are placed in a difficult situation by being the person responsible for managing, and defending, the individual judge and the court as an institution, and the person responsible for investigating complaints that directly relate to the conduct of the judge and the operation of the institution.

Disparity with other jurisdictions

9.47 A small number of consultees suggested that a perception held by members of the public that federal judicial officers were unaccountable could be heightened in jurisdictions where a state or territory judicial commission, or equivalent body, was established. In those jurisdictions, it was suggested that it was understandably difficult for litigants or other complainants to accept the difference in mechanisms available for receiving and investigating a complaint depending on whether a matter fell within state, territory, or federal jurisdiction.[66]

Stakeholder support for a federal judicial commission

9.48 Despite not being specifically proposed in the Consultation Paper,[67] a significant number of stakeholders saw the establishment of a federal judicial commission or other independent body that could receive and consider complaints concerning bias as a crucial reform.

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63 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 23) [6.33].

64 Ibid [6.34].

65 Kate Lumley, *From Controversy to Credibility: 20 Years of the Judicial Commission of New South Wales* (Judicial Commission of NSW, 2008) 4.

66 See also Le Mire (n 33) 29 (on the confusion caused by multiple jurisdictions and avenues for complaint).

67 A 'future Federal Judicial Commission' was referred to in Question 20 of the Consultation Paper, and discussed in Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [75]–[77].

Support in submissions

9.49 In submissions, support was particularly strong from professional bodies.[68] For example, the Australian Bar Association emphasised that

> any serious consideration of strengthening the procedures regarding judicial impartiality needs to be accompanied by consideration of establishing a federal judicial commission. Absent a federal judicial commission, there is no readily available, independent of the court recourse for improper behaviour on the part of the federal judiciary; appeals are not a complete answer.
>
> The [Australian Bar Association] firmly supports the establishment of a federal Judicial Commission, not only to assist in the provision of judicial education programs but also to provide a forum for dealing with complaints against members of the federal judiciary.[69]

9.50 Similarly, the Law Council of Australia said that, in its view,

> any steps taken to give greater clarity to parties on the law and processes for addressing bias should be accompanied by measures, such as the establishment of a Federal Judicial Commission.[70]

9.51 The New South Wales Society of Labor Lawyers stated that it 'strongly supports' the introduction of a statutory federal judicial commission, which 'would go some way to meeting the problems identified' in the Consultation Paper.[71] The New South Wales Young Lawyers Public Law and Government Committee also supported '[w]ider accountability mechanisms for judicial officers including appropriate external complaint mechanisms where SRLs [self-represented litigants] may have their concerns heard'.[72]

9.52 An open letter sent to the Attorney-General (Cth) in July 2020 by 500 women working in the law called for the establishment of a federal judicial commission after the Hon Dyson Heydon AC was found by an independent investigation to have sexually harassed young female associates during his time as a Justice of the High Court.[73]

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68 See, eg, Law Council of Australia, *Submission 37*; New South Wales Society of Labor Lawyers, *Submission 40*; Australian Bar Association, *Submission 43*; New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*.

69 Australian Bar Association, *Submission 43*.

70 Law Council of Australia, *Submission 37*.

71 New South Wales Society of Labor Lawyers, *Submission 40*.

72 New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*.

73 Gabrielle Appleby, 'Deep Cultural Shifts Required: Open Letter from 500 Legal Women Calls for Reform of Way Judges Are Appointed and Disciplined', *The Conversation* (6 July 2020) <www.theconversation.com/>. The High Court revised its workplace conduct policies following the investigation, and in 2020–21 each of the remaining Commonwealth courts updated their respective workplace conduct policies in relation to behaviour by judges: Family Court of Australia, *Annual Report 2020–21* (2021) 27–8; Federal Circuit Court of Australia, *Annual Report 2020–2021* (2021) 54; Federal Court of Australia, *Annual Report 2020–21* (2021) 53.

9.53 In this respect, the Hon Chief Justice M Gleeson AC has observed:

> lawyers, especially those whose work regularly takes them into the courts … are knowledgeable and critical observers of judicial behaviour. … It is essential that the courts enjoy their confidence. Without the confidence of the legal profession, it would be impossible for courts to enjoy the confidence of the public. Their good opinion of the courts is not sufficient; but it is necessary. A litigant's perception of the judicial process is likely to be strongly influenced by the lawyer's perception. Lawyers tell litigants what to expect. They predict outcomes. They express opinions about decisions, and prospects of appeal. The lawyer's perception of the judge, or the court system, or the legal process will be communicated to the client and, through the client, to the public. The judicial branch of government should keep itself well informed about what the legal profession thinks of its performance; not because it can expect comfort from professional solidarity, but because the views of lawyers influence their clients, and many members of the wider public.[74]

9.54 Some litigants contacted the ALRC because they considered that a judge hearing their proceedings had been biased, and emphasised that they had been told by their lawyer, or in some cases by multiple lawyers, that the judge was known to always decide a particular way, to favour particular types of parties, or to be impulsive and unpredictable.[75]

9.55 Two submissions expressed caution about the usefulness of establishing a federal judicial commission in this context.[76] For example, McIntyre noted that, while it is 'desirable that new forms of support and guidance for courts be developed, we should be reluctant to adopt a process where all paths lead to a Federal Judicial Commission'.[77] In his view, legitimate complaints were 'already capable of being skilfully and effectively investigated in the current system', and it was not 'readily apparent that a Federal Judicial Commission offers a clearly superior model', while introducing its own risks to public confidence in the administration of justice.[78] As discussed above, this was not a view widely shared by other stakeholders.

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74 The Hon Chief Justice M Gleeson, 'Public Confidence in the Courts' (Speech, National Judicial College of Australia, Canberra, 9 February 2007).

75 See **Appendix E**.

76 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20* (see further [9.81]); Dr Joe McIntyre, *Submission 46*.

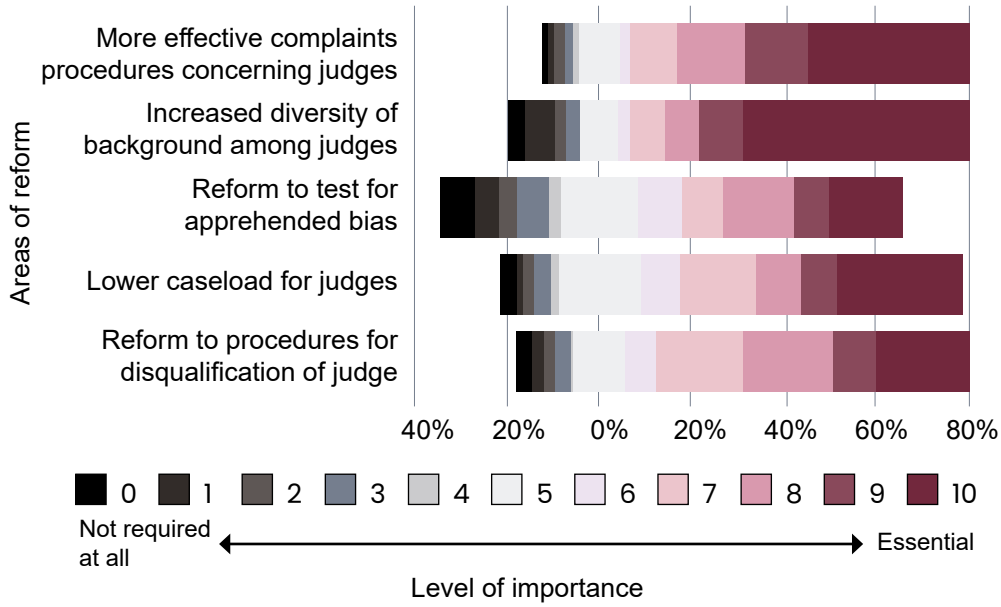
77 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.

78 Dr Joe McIntyre, *Submission 46*.

Support in consultation meetings and in surveys

9.56 In consultations for this Inquiry, there was very strong support from judges, lawyers, and litigants for the establishment of a federal judicial commission.[79] Support for strengthened complaints procedures was also particularly strong among lawyers who responded to the ALRC Survey of Lawyers. As illustrated by **Figure 9.1**, more effective complaints procedures concerning judges was ranked as the most important reform overall in the Commonwealth courts to maintain public confidence in judicial impartiality.[80]

Figure 9.1: Importance of reforms as assessed by respondents to ALRC Survey of Lawyers



79 The issue was not discussed in all consultations, but concerns were raised about the potential role of such a commission in only four consultations, and support for a commission was expressed by a mix of litigants, judges, legal practitioners, and academics in at least 20 consultations.

80 Lawyers were asked to use an 11 point scale (where 0 was not required at all and 10 was essential) to rank the importance of a list of five possible changes or reforms in the Commonwealth courts to maintain public confidence. Other reforms suggested were: reform to procedures for disqualification of judges; reform to the test for apprehended bias; lower caseloads for judges; and increased diversity of backgrounds among judges. More effective complaints procedures concerning judges was ranked first overall, with an average score of 8.1 (median 9; n = 170). There was no statistical significance in support across the different types of practice, or different practice areas. See further **Chapter 5**.

9.57 Two judges, responding to general questions about reforms to support judicial impartiality and public confidence in the ALRC Survey of Judges, referred to the need for an independent body to handle complaints against judicial officers, with one saying that it was 'critically needed'.[81] A 2016 survey of Australian judicial officers found mixed views among judges about the management and investigation of complaints in their jurisdiction, noting that there are different approaches to managing such complaints in the different jurisdictions.[82] However, in the view of Le Mire, the results of the survey were notable because

> at that time, judicial officers did not appear to have strong views that the traditional method of managing complaints in-house was the only appropriate way. The objections seen in the lead up to the introduction of the Judicial Commission of New South Wales seemed to have lessened, with a number of officers commenting favourably on its work. If the views indicated in this study in 2016 are generally held and sustained, it would appear that the judiciary is more open than previously believed to standing complaints bodies, provided they are well designed and do not undermine judicial independence.[83]

9.58 Support for the Judicial Commission of New South Wales was also expressed in consultations for this Inquiry. Many stakeholders however noted that they were more familiar with the New South Wales model than the models adopted in other jurisdictions as it had been operating longer.

9.59 The ALRC Survey of Court Users asked litigants who reported a negative view of a judge's impartiality (n = 42) if the litigant had raised the issue with their lawyer, or with the judge, and if not, why not. Of the 33 participants who indicated why they did not raise the issue:

- 13 thought that there would be no point, because nobody would listen, they would not be believed, or there was corruption involved;
- eight said they did not know that they could, or did not know how to;
- five said they were scared or did not want to cause problems;
- two said they did not get the chance; and
- five indicated other reasons.

9.60 More generally, 16 participants in the ALRC Survey of Court Users noted the significant expense involved in bringing legal proceedings. In comments, one participant noted that

> the main problem I perceive is that when a plaintiff is up against a defendant from a family with deep pockets it can be very one sided, because any legal proceedings are usually expensive, and the party with deeper pockets is significantly advantaged.[84]

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81 ALRC Survey of Judges, April 2021.
82 Appleby et al (n 15) 360–4.
83 Le Mire (n 33) 31.
84 ALRC Survey of Court Users, July–August 2021.

In Focus: Judicial commissions in Australia

The Australian Capital Territory, New South Wales, the Northern Territory, South Australia, and Victoria each have an independent statutory body tasked with receiving and managing complaints about judicial officers. The composition, functions, and powers of these bodies are substantially similar in each jurisdiction.

Size and staffing

The Judicial Commissions in New South Wales and Victoria are composed of six judicial members and four non-judicial members.[85] In the Australian Capital Territory and the Northern Territory, only two judicial officers are required to be on the commission — the Chief Justice and Chief Magistrate/Judge.[86] The non-judicial members are generally required to be lay people of high standing in the community recommended by the Attorney-General, but certain jurisdictions stipulate that one of these members must be a legal practitioner.[87] In the Northern Territory, the President of the Northern Territory Civil and Administrative Tribunal and the President of the Council of the Law Society are also members of the Commission.[88] In South Australia, there is only a single Commissioner, who must be a legal practitioner of at least seven years standing, or a former judicial officer.[89]

Types of complaints considered

All of the complaint bodies may only investigate complaints about the conduct, capacity, ability, or behaviour of sitting judicial officers.[90] They cannot investigate complaints about the correctness of a decision made by a judicial officer, nor can they investigate a complaint made about a former judicial officer.[91] Generally, these bodies also cannot investigate or deal with a complaint (other than to dismiss it) unless it meets a threshold level of seriousness. The wording of this stipulation varies in each jurisdiction, but

85 *Judicial Officers Act 1986* (NSW) ss 5(3)–(5); *Constitution Act 1975* (Vic) ss 87AAM(3), 87AAN.
86 *Judicial Commissions Act 1994* (ACT) ss 5B, 5C; *Judicial Commission Act 2020* (NT) s 7.
87 See, eg, *Judicial Commission Act 2020* (NT) s 8.
88 Ibid s 7.
89 *Judicial Conduct Commissioner Act 2015* (SA) ss 7(1), (3).
90 *Judicial Commissions Act 1994* (ACT) s 14(1); *Judicial Officers Act 1986* (NSW) s 15(1); *Judicial Commission Act 2020* (NT) s 40(1); *Judicial Conduct Commissioner Act 2015* (SA) s 12(1); *Judicial Commission of Victoria Act 2016* (Vic) s 5.
91 *Judicial Commissions Act 1994* (ACT) ss 35B(1)(f)–(g), 35I(1)(a); *Judicial Officers Act 1986* (NSW) s 15; *Judicial Commission Act 2020* (NT) ss 44(1)(e), (h); *Judicial Conduct Commissioner Act 2015* (SA) ss 17(e)–(f); *Judicial Commission of Victoria Act 2016* (Vic) ss 16(3)(b), (e).

generally the complaint must be dismissed unless the subject matter of the complaint could, if substantiated:

- amount to proved misbehaviour or incapacity that would warrant the removal of the officer from office;
- affect the performance of the officer's functions and duties; or
- infringe the standard of conduct expected.

Process

All complaint bodies are empowered to complete a preliminary investigation into the complaint. This may involve: requesting further information from a complainant; obtaining court documents, transcripts, audio, or video recordings of proceedings; and requiring a judicial officer to undergo any medical examination (where appropriate in the circumstances).[92] For instance, in Victoria and New South Wales, the Judicial Commissions may listen to an audio recording of the proceeding to hear interactions between judges and lawyers or litigants.[93] The complaint bodies in the Australian Capital Territory and in the Northern Territory have broader powers, including the ability to issue summons and examine witnesses.[94]

All bodies may then either:

- dismiss the complaint if they deem it does not warrant further action;
- refer the complaint to the head of jurisdiction to take action; or
- establish, and refer the complaint to, an ad hoc investigatory body (referred to commonly as a panel or division) to investigate and report on.[95]

92 *Judicial Commissions Act 1994* (ACT) ss 31–35; *Judicial Officers Act 1986* (NSW) ss 18, 39C–39D; *Judicial Commission Act 2020* (NT) ss 17–20, 28–33; *Judicial Conduct Commissioner Act 2015* (SA) s 6(5); *Judicial Commission of Victoria Act 2016* (Vic) ss 27–9.

93 See, eg, Judicial Commission of New South Wales, 'Complaint Case Studies' <www.judcom.nsw.gov.au/complaints/complaint-case-studies/>; Judicial Commission of Victoria, *Annual Report 2019–2020* (2020) 33.

94 *Judicial Commissions Act 1994* (ACT) ss 35, 35D–35H; *Judicial Commission Act 202*0 (NT) ss 17–18.

95 *Judicial Commissions Act 1994* (ACT) s 17; *Judicial Officers Act 1986* (NSW) s 21(1); *Judicial Commission Act 2020* (NT) ss 48(1)(c), 50–1; *Judicial Conduct Commissioner Act 2015* (SA) s 20; *Judicial Commission of Victoria Act* (Vic) s 13(3). South Australia's Commissioner cannot appoint an investigatory body itself, rather it must 'recommend' the Attorney-General do so: *Judicial Conduct Commissioner Act 2015* (SA) s 20.

In most jurisdictions, if the complaint body considers a complaint is wholly or partly substantiated, and refers it to a head of jurisdiction, it must (or in some cases may) provide the head of jurisdiction with a report setting out its findings and recommendations as to steps that might be taken to deal with the complaint.[96] There are provisions requiring that the complainant is advised of the steps recommended or taken.[97]

The various ad hoc investigatory bodies have similar functions, powers, and outcomes. Generally, they are composed of two judicial members and one non-judicial member. They all have wide powers to investigate a complaint, including the ability to hold a full hearing and issue subpoenas.[98] The body may then dismiss the complaint, refer it to the relevant head of jurisdiction, or, if the body forms an opinion that the matter could justify removal of the judicial officer from office, it may (and in some jurisdictions, must) present a report setting out these findings to the Governor or Attorney-General.[99]

While an investigation is underway, the judicial officer being investigated may be (or is) suspended from sitting, except in South Australia.[100] Yet, apart from this temporary leave from duties, none of these bodies has the power to remove or punish a judicial officer. Judicial officers may only be removed following the passing of a resolution of all of the jurisdiction's houses of parliament.[101] However, the Judicial Commissions in New South Wales and Victoria may make recommendations in relation to complaints when they refer them to the relevant head of jurisdiction.[102]

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96 *Judicial Officers Act 1986* (NSW) s 21(3); *Judicial Commission Act 2020* (NT) ss 56–7; *Judicial Conduct Commissioner Act 2015* (SA) s 18(2)(a); *Judicial Commission of Victoria Act 2016* (Vic) s 19(3)(a).

97 *Judicial Commissions Act 1994* (ACT) s 23(2)(a); *Judicial Commission Act 2020* (NT) s 60(4); *Judicial Conduct Commissioner Act 2015* (SA) s 18(5)(a); *Judicial Commission of Victoria Act 2016* (Vic) s 23; Judicial Commission of New South Wales, 'Guidelines for Complaints against Judicial Officers' [9.4]–[10.4] <www.judcom.nsw.gov.au/complaints/guidelines-for-complaints-against-judicial-officers/>.

98 *Judicial Commissions Act 1994* (ACT) ss 37–44; *Judicial Officers Act 1986* (NSW) ss 23–5; *Judicial Commission Act 2020* (NT) s 52; *Judicial Conduct Commissioner Act 2015* (SA) s 24; *Judicial Commission of Victoria Act 2016* (Vic) pt 5.

99 *Judicial Commissions Act 1994* (ACT) s 22(1)(b); *Judicial Officers Act 1986* (NSW) s 29; *Judicial Commission Act 2020* (NT) s 57; *Judicial Conduct Commissioner Act 2015* (SA) s 25; *Judicial Commission of Victoria Act 2016* (Vic) s 34(4).

100 *Judicial Commissions Act 1994* (ACT) s 19(1); *Judicial Officers Act 1986* (NSW) s 40(1); *Judicial Commission Act 2020* (NT) s 59; *Judicial Commission of Victoria Act 2016* (Vic) s 98(1).

101 *Judicial Commissions Act 1994* (ACT) ss 4–5; *Constitution Act 1902* (NSW) s 53; *Supreme Court Act 1979* (NT) s 40; *Judicial Conduct Commissioner Act* 2015 (SA) s 26; *Constitution Act* 1934 (SA) s 75; *Constitution Act 1975* (Vic) s 87AAB.

102 *Judicial Officers Act 1986* (NSW) s 21(3); *Judicial Commission of Victoria Act 2016* (Vic) s 41(a)(iii).

Potential benefits and limitations of an independent complaints mechanism

9.61 Discussions about the establishment of independent complaints mechanisms in different Australian jurisdictions have been ongoing since before the establishment of the Judicial Commission of New South Wales in 1987. Five Australian states and territories now have independent statutory bodies tasked with receiving and managing complaints in relation to judicial officers.[103] Some of these combine other functions, such as education and collection of data.[104]

9.62 A number of judges, professional bodies, and academics have expressed support for standalone bodies that receive and investigate complaints in relation to judges, or particular models of institutions that do so.[105] Others have been more cautious about their benefits, and have highlighted potential risks.[106] Importantly for this Inquiry, allegations concerning apparent bias or lack of impartiality make up a significant proportion of complaints to existing bodies.[107] This section briefly sets out some of the arguments that have been made.

Independence and transparency

9.63 Supporters of standalone bodies argue that formal and transparent processes for scrutiny by an independent body increases the credibility of the process for complainants. Appleby and Le Mire consider that the creation of a separate complaints-handling body provides 'an important normative statement. It indicates to the public that the system acknowledges the fallibility of the judiciary and provides a serious avenue of recourse and redress'.[108]

9.64 Others have suggested that independent scrutiny through formal complaints procedures can damage the authority and standing that judges have, and that they need to do their work effectively.[109] However, the idea that judges can assume they have the public's trust has been repeatedly rejected by judges, including recently by Chief Justice Bathurst: 'We cannot assume that trust is ever-present and uniform

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103 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [75].

104 Ibid Appendix 1. Appendix 2 of Background Paper JI5 gives a brief overview of complaints-handling bodies in some overseas jurisdictions.

105 See, eg, Law Council of Australia (n 56); Appleby and Le Mire (n 21); Neilson (n 41); The Hon Chief Justice TF Bathurst, 'Trust in the Judiciary' (Opening of Law Term Address, Sydney, 3 February 2021).

106 See, eg, McIntyre (n 1) 241–2, 261–2.

107 See, eg, Judicial Commission of New South Wales, *Annual Report 2019-2020* (2020) 53 (allegations of bias accounted for 16% of the 57 received/referred complaints in 2019–20, and 20% of the 63 complaints in 2018–19. In both years this category had the second-highest number of complaints, after failure to give a fair hearing). In Victoria, 8% of complaints in 2019–2020 related to alleged bias and 1% related to 'apprehension of bias': see Judicial Commission of Victoria (n 93) 37.

108 Appleby and Le Mire (n 21) 47.

109 For a discussion of such views, see Morabito (n 17) 491.

across the community we serve.'[110] In considering how judges maintain that trust, Chief Justice Bathurst noted the important role that a credible and transparent complaints-handling process can play. Referring to the Judicial Commission of New South Wales, his Honour said:

> The existence of an independent complaints channel and the transparency surrounding the number of complaints and how they were handled significantly enhances trust in the competency and integrity of the judiciary.[111]

9.65 It has been argued that a credible complaints-handling process can enhance, rather than damage, the authority and standing of the judiciary.[112] In this way, the Judicial Commission of New South Wales points to the low number of complaints that it receives in the context of the judiciary's overall workload (57 complaints relating to 48 judicial officers in 2019–20) as demonstrating

> the high standard of judicial ability and conduct in NSW and the community's willingness to accept decisions if they are made in accordance with the due process of law.[113]

9.66 The credibility of a judicial commission will, of course, depend on the model adopted, resources provided, and individuals involved in running it. The feedback the ALRC received from stakeholders in jurisdictions where judicial commissions already operate suggested that these commissions provide a credible avenue for complaints and, at the same time, play a supportive role that is appreciated by judges.

Accessibility

9.67 As discussed above, many litigants face significant barriers to bringing appeals.[114] An independent complaints process generally involves fewer barriers. In New South Wales, for example, no fee is paid to bring a complaint, the complaint is made by way of a signed form and statutory declaration (rather than a voluminous appeal book), and the complainant does not need to provide copies of the transcript or audio of proceedings. Instead, following a preliminary assessment, if the complaint raises issues of conduct in court the Commission will obtain a copy of the transcript and/or audio recording from the court concerned. This overcomes a significant barrier that litigants face in appeals, where access to transcripts is expensive, and access to audio recordings is only granted by leave of the court.[115]

9.68 In this way, rather than an independent complaints mechanism 'incentivising (or appearing to incentivise) judges to make safe decisions in favour of the powerful,

110 Chief Justice Bathurst (n 105).
111 Ibid.
112 Morabito (n 17) 491–2.
113 Judicial Commission of New South Wales (n 107) 50.
114 See [9.35]–[9.36].
115 See **Chapter 6**.

the litigious or the wealthy', as McIntyre has suggested it might,[116] an independent complaints mechanism could operate as an effective safeguard.[117] Indeed, one consultee in this Inquiry felt that the presiding judge hearing the consultee's case understood that the consultee would not be able in practice to appeal any decision that the judge made.

9.69 In light of the greater accessibility of complaints mechanisms, concerns are sometimes raised — and were reflected to some extent in consultations for this Inquiry — that the establishment of a complaints mechanism would result in a flood of misconceived complaints.[118] A related concern expressed soon after the establishment of Australia's first judicial commission in 1986 was that any complaint made to the commission would

> harass and pressure judges and that the 'official quality and institutional trappings of the complaints procedure will almost inevitably ensure that any complaint … will assume a status and significance which it would not otherwise have possessed'.[119]

9.70 The concern about a flood of complaints has not been borne out in the experience of external complaints mechanisms in Australian jurisdictions — numbers have been relatively low.[120] Some commissions provide access to informal advice prior to the filing of a complaint to guide potential complainants as to the types of matters that it can properly consider.[121]

9.71 The prediction that most complaints will be dismissed has been borne out.[122] The Judicial Commission of New South Wales, for example, reported in 2020 that its average dismissal rate over the previous five years was 94.8%.[123] Processes are in place for preliminary examination and summary dismissal of complaints that

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116 Dr Joe McIntyre, *Submission 46*.

117 A more fundamental reform would be to reduce the barriers to appeal, but that is a longstanding and intractable problem beyond the scope of this Inquiry.

118 See, eg, Morabito (n 17) 492.

119 Lumley (n 65) 2, quoting the Hon Justice MH McLelland, 'Disciplining Australian judges' (1990) 64 *Australian Law Journal* 388, 390. See also McIntyre (n 1) 262.

120 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) Appendix 1.

121 For example, the Judicial Commission of New South Wales reports that it is 'able to help people by providing information, referring them to another agency, or advising them of the process for making a complaint to the Commission. Providing informal advice often avoids an unnecessary formal complaint being made. Enquiries often relate to matters that should be dealt with on appeal to a higher court and, in these cases, we advise the person to seek independent legal advice': Judicial Commission of New South Wales, *Annual Report 2019-2020* (n 107) 53.

122 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) Appendix 1, fn 153. For a table summarising the resolution of complaints about judicial officers in New South Wales from July 2011 to June 2019, see Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 162.

123 Judicial Commission of New South Wales (n 107) 51.

do not fall within the agency's remit. Processes are also in place to declare repeat complainants vexatious.[124]

9.72 However, a small number of complaints are found to be substantiated each year, and some of them have been considered serious enough to warrant parliamentary consideration of the judge's removal from office.[125] This provides evidence that the commission plays an important role in protecting the integrity of the institution of the judiciary, and protecting litigants.

9.73 The commission model also provides other benefits, even when complaints are dismissed. First, the fact that an independent body has followed a formal process to consider a complaint introduces a greater aspect of procedural fairness for complainants than the existing model. Secondly, in some models, even when a complaint is summarily dismissed, trends in the issues that are raised across complaints, including those that are summarily dismissed, are monitored to inform the development of judicial education and training programs.[126] Thirdly, when complaints are received, previous complaints in relation to the same judicial officer that were summarily dismissed may also be reconsidered and reopened to consider patterns of behaviour.

9.74 The concern about complaints harassing and pressuring judges has also not been borne out. In 2002, after fifteen years of operation, Chief Justice Spigelman stated that he was 'not aware that any New South Wales judge is critical of the system'.[127] This was consistent with feedback from stakeholders in New South Wales in this Inquiry. Complaints-handling bodies in other jurisdictions have been operating for a much shorter period of time, but negative experiences concerning those other bodies have not been reported to the ALRC.

The constrained role of an external complaints body and the remedy provided

9.75 One potential objection to establishing an external complaints mechanism in relation to allegations of actual and apprehended bias is that such allegations are properly within the remit of the appellate process, and therefore generally excluded from the remit of a complaints-handling body. For example,

> where complaints concern essentially matters that (if they have substance) fall within the appellate jurisdiction of a court they must be dealt with in the appellate process. With some possible exceptions (presently irrelevant) the appellate process is the exclusive method for correcting judicial errors,

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124 See, eg, *Judicial Officers Act 1986* (NSW) s 38, which empowers the Judicial Commission of New South Wales to declare as a vexatious complainant a person who 'habitually and persistently, and mischievously or without any reasonable grounds, makes complaints' about judicial officers.

125 See, for example, Judicial Commission of NSW, *Annual Report 2018–19* (2019) 51–2.

126 Judicial Commission of New South Wales (n 107) 52.

127 Chief Justice Spigelman (n 10) 249.

> including alleged errors by reason of matters such as bias or apprehended bias.[128]

9.76 This is true as far as remedying any resulting error from proceedings affected by apprehended bias. However, this does not mean that, where matters of conduct or impairment are involved, the complaint of bias, and the issues underlying it, do not also properly fall within the remit of a body tasked with receiving complaints about judicial behaviour and capacity, a point emphasised in the submission of the Australian Bar Association.[129] This is demonstrated by the approach of judicial commissions in Victoria and New South Wales, which both report a significant number of complaints relating to apprehended bias, and whose public reports make it clear that such complaints are investigated where they raise allegations of poor judicial conduct or impairment.[130] As the Australian Bar Association noted in its submission, the

> frequency of complaints to the NSW Judicial Commission that involve a perception of bias or lack of a fair hearing, suggests that a not insignificant number of litigants before the federal courts may feel sufficiently dissatisfied to lodge a complaint, if a suitable mechanism was available.[131]

9.77 The remedy that a complaints body can provide if a complaint is substantiated is different to an appeal. Resolution by a complaints body involves investigation of the complaint and, where appropriate, acknowledgment that the conduct either fell below the standards expected of a judicial officer or — in the most serious of cases — amounted to sufficient reason to refer the matter to parliament to consider removal for misconduct or incapacity. While removal may be the ultimate guarantee of non-repetition, it will not be appropriate in the vast majority of cases.[132] The more difficult cases to handle, as Chief Justice Gleeson recognised, 'tend to be those in which the complaint, even if made out, would not justify removal'.[133]

9.78 In these cases, a formal complaints procedure can encourage transparency that other measures are to be taken directed at preventing the conduct occurring again in the future. These measures may be directed to the individual judicial officer (through the head of jurisdiction),[134] or may relate to the institution as a whole, such

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128 Australian Law Reform Commission (n 2) [2.267], quoting Federal Court, *Submission 393*.

129 Australian Bar Association, *Submission 43*. The Australian Bar Association acknowledged that the remit of any judicial commission 'may be limited in terms of its ability to deal with complaints of bias or apprehended bias due to the availability of appeal or review mechanisms'. See also Le Mire (n 33) 38; Appleby and Le Mire (n 21) 17–18.

130 See, eg, Judicial Commission of New South Wales (n 107) 12; Judicial Commission of Victoria (n 93) 37. Four reported examples of such cases are set out in 'In Focus: Case studies from state judicial commissions', which follows [9.80] below.

131 Australian Bar Association, *Submission 43*.

132 Appleby and Le Mire (n 21) 29–30; Andrew Lynch and Alysia Blackham, 'Reforming Responses to the Challenges of Judicial Incapacity' (2020) 48(2) *Federal Law Review* 214.

133 The Hon Chief Justice M Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, Launceston, 27 April 2002).

134 Although no punishment can be imposed, a head of jurisdiction may 'privately admonish or reprimand or counsel the judicial officer, or may adopt administrative arrangements designed to avoid repetition of the problems': Chief Justice Spigelman (n 10) 250.

as incorporating relevant topics into training programs. In most jurisdictions, when a complaint is considered to be wholly or partly substantiated and is referred to the head of jurisdiction, the complaints body is either required to provide, or may provide, a report with its findings and recommendations as to action to be taken in relation to the complaint.[135] The complainant is informed of the outcomes, either by being provided with a copy of the report,[136] or by being advised of the actions recommended to, or taken by, the head of jurisdiction.[137] As such, an external complaints procedure can provide transparency about constructive responses falling between the 'nuclear option' of removal,[138] and the alternative of (or at least appearance of) doing nothing. It can also provide support for heads of jurisdiction in taking appropriate measures.

9.79 It has been suggested that complaints-handling bodies are 'a form of retrospective discipline that does not assist the individual litigant'.[139] However, this argument appears to assume that complainants would only be concerned with a change in the outcome of their case, when this may not be all they are seeking from the process. In international human rights law, for example, it is recognised that individuals seeking redress for wrongs committed by government entities may benefit from a process that can acknowledge that a wrong was committed, and put measures in place to prevent it recurring in the future.[140] One consultee in this Inquiry indicated that the consultee's ultimate aim of lodging a complaint was to seek validation rather than compensation. At least three others emphasised the role that complaints could play in mapping issues of concern and introducing training for judges to address the issues that the consultees had experienced to prevent them recurring.

9.80 In addition, in cases in which poor conduct is found by a judicial commission to have been substantiated, a complainant could then seek leave from the court for an extension of time to file an appeal on the grounds of any associated apprehended bias affecting the judge's decision, if the complainant could show good reasons why they had not brought an appeal in time.[141] However, in doing so, the complainant would likely be prevented from relying on any evidence resulting from the complaints process.[142]

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135 See 'In Focus: Judicial commissions in Australia', which follows [9.60] above. See further *Judicial Officers Act 1986* (NSW) s 21(3); *Judicial Commission Act 2020* (NT) s 49; *Judicial Conduct Commissioner Act 2015* (SA) s 18(2)(a); *Judicial Commission of Victoria Act 2016* (Vic) s 19.

136 *Judicial Commission of Victoria Act 2016* (Vic) s 23(4).

137 *Judicial Commission Act 2020* (NT) s 60(4); *Judicial Conduct Commissioner Act 2015* (SA) s 18(5)(a); Judicial Commission of New South Wales (n 97) [9.4].

138 The Hon Justice S Denham, 'The Diamond in a Democracy: An Independent, Accountable Judiciary' (2001) 5 *The Judicial Review* 31, 51.

139 B Walker, 'Judicial Time Limits and the Adversarial System' in H Stacy and M Lavarch (eds) *Beyond the Adversarial System* (Federation Press, Sydney, 1999), 87, 98–9, quoted in Australian Law Reform Commission (n 2) [2.269].

140 See, eg. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/64/147 (21 March 2006, adopted 16 December 2005) [22].

141 See **Chapter 8**.

142 See, eg, *Judicial Commissions Act 1994* (ACT) s 28.

In Focus: Case studies from state judicial commissions

The case studies in the box below, extracted from reports of the Judicial Commission of New South Wales and the Judicial Commission of Victoria, illustrate different ways in which issues of bias have been raised in complaints before state judicial commissions in recent years, and how they have been determined. They demonstrate the role that a judicial commission can play in investigating and addressing concerns underlying the complaints in appropriate cases, while respecting the proper role of the appellate process.

Complaint 2011–12

The complainant appeared before a magistrate charged with the offences of failing to leave a licensed premises and behaving in an offensive manner. He complained that the magistrate during the proceedings made offensive comments about his nationality and was biased and prejudiced.

The Judicial Commission's examination: The Commission reviewed the sound recording of the hearing and the judicial officer's response to the complaint. The investigation confirmed that the judicial officer had made a number of inappropriate comments concerning the complainant's country of origin. The Commission determined that it should not dismiss the complaint and referred the matter to the Chief Magistrate to deal with.[143]

Complaint 2013–14

The complainant represented himself in apprehended violence order (AVO) proceedings. He alleged that the magistrate was biased, did not listen to his side of the story, and made an order not based on the evidence before the court.

The Judicial Commission's examination: To examine the complaint, the Commission reviewed the sound recording of the proceedings and the court file. As with a number of complaints that come before the Commission, in this matter, the complainant misunderstood the way in which judicial officers are obliged or entitled to perform their duties. Court cases commonly, and typically, involve a judicial officer preferring the evidence of one party or witness to the evidence of another. The losing side can misconstrue that process as bias or prejudice. In this complaint, the judicial officer had carefully considered the evidence before the court, and preferred the evidence that the applicant for the AVO had presented. As part of the examination, the Commission also noted that it does not have authority to review judicial decisions, including findings of fact and law. That is a matter for courts of appeal and is recognised in the provisions of section 20 of the Judicial Officers Act 1986. This requires the Commission to dismiss complaints summarily where there is an avenue of appeal or review available. The Commission dismissed the complaint because there was no misconduct and an adequate appeal right existed to the District Court.[144]

143 Judicial Commission of New South Wales, 'Complaint Case Studies' <www.judcom.nsw.gov.au/complaints/complaint-case-studies/>.

144 Ibid.

Inappropriate comments and lack of impartiality

The main thrust of the complaint was allegations the judicial officer made several improper statements towards a victim of crime in relation to a claim for compensation arising out of a serious sexual assault.

Outcome: The Commission found that several of the judicial officer's comments were inappropriate and reinforced outdated misconceptions associated with sexual offending. It found that some comments could reasonably be construed as victim-blaming. It also found some comments indicated a closed mind and a lack of impartiality.

After careful deliberation, the Commission referred these allegations to the Head of Jurisdiction on the grounds that the conduct of the Officer infringed the standards of conduct generally expected of judicial officers. All remaining parts of the complaint were dismissed, on the grounds they had not been substantiated or that further investigation was unnecessary or unjustified.

The Commission recommended the judicial officer:

a. be counselled by the Head of Jurisdiction in appropriate judicial conduct including the need to exercise sensitivity, courtesy and respect in the courtroom towards all court users, including victims of crime;

b. be directed to undertake necessary coaching and mentoring as the Head of Jurisdiction considers appropriate, including peer supervision; and

c. be directed to engage in such judicial education programs as the Head of Jurisdiction considers appropriate including, but not limited to, engaging in programs offered by the Judicial College of Victoria with a focus on the experiences of victims of crime, including victims of sexual offences, and programs focusing on courtroom management.

The Head of Jurisdiction is required to report back on the outcome of this referral and this report will also be provided to the complainants and referrer in the following year.[145]

Alleged bias and bullying

The complainant alleged the judicial officer presiding over the judicial review was biased, a bully and did not respect the adversarial nature of Australian law.

Outcome: The Commission investigated the complaint by analysing an audio-recording of the proceeding.

The Commission found that: Although the Officer made a number of procedural rulings that were not in the complainant's favour, the Officer gave the complainant an opportunity to be heard on each issue, considered each submission and explained his reasons for decision. There was no evidence of any bias in the Officer's conduct. There was no indication the Officer did not respect the 'Australian system of Adversarial law'. The Officer did not raise his voice or attempt to force the complainant to take a position.

145 Judicial Commission of Victoria (n 93) 32.

> The Officer explained his decision-making and made the rulings he was required to, in accordance with his reasoning. There was no evidence of bullying. The complaint was dismissed on the grounds there was no evidence to support any of the allegations made.[146]

Focus on personal or institutional factors

9.81 Dealing with issues of judicial conduct under the rubric of the bias rule, and through a complaints procedure, runs the risk that the complaints procedure

> individualises and decontextualises the judicial conduct of concern, treating the behaviour solely as an attribute or fault of the judge, rather than recognising it as emergent from a dynamic situation or wider court context.[147]

9.82 However, the same can be said with even greater force of appellate processes, which do not formally result in any process to address any underlying issues and which have, in recent years, resulted in a number of very strongly worded public criticisms through judgments. Judicial commissions provide the benefit of being able to deal with complaints confidentially, lessening the potential for loss of reputation and, through that, 'a corresponding loss of effectiveness as a judge'.[148] The synergies in some commissions between complaints, involvement of the head of jurisdiction, and development of judicial education, also mean that institutional issues play a key role in the response adopted.

9.83 Another potential criticism of complaints procedures is that, given that the vast majority of complaints are dismissed, many complainants are likely to remain disappointed by the process.[149] However, Chief Justice Spigelman has noted that, even in relation to dismissed complaints, the Judicial Commission of New South Wales 'has performed a useful "sounding off" role'.[150] In addition, the fact that many complainants will likely be disappointed means that proactive measures to address the factors that might give rise to conduct falling foul of the bias rule, and to minimise such conduct, are crucial. Here, an independent complaints-handling body could play an important role in supporting the court as an institution, while at the same time protecting the public.

Observations on the model to be adopted

9.84 For the purposes of assisting further consideration in another forum, the ALRC offers below the following observations on the feedback that it has received from stakeholders in this Inquiry.

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146 Ibid 33.
147 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.
148 Morabito (n 17) 496.
149 Arguably, complaints are 'unlikely to result in much satisfaction either for the complainant or the judicial officer': Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.
150 Chief Justice Spigelman (n 10) 249.

Constitutional limitations

9.85 As the ALRC has previously recognised, there would inevitably be constitutional constraints on the powers of a federal judicial commission.[151] However, the view of most stakeholders consulted on this issue in the Inquiry was that constitutional issues are not insurmountable.[152] As the Law Council of Australia has noted, section 72(ii) of the *Australian Constitution* 'deals only with the removal of judges and does not prescribe a detailed process for complaint handling, or address complaints which do not warrant removal'.[153] If a body with guarantees of its own independence were to be established to receive and investigate complaints, without the power to remove or discipline judges,[154] there is a strong argument that this would not impermissibly infringe upon judicial independence, particularly if the body (and any conduct panel, or equivalent) includes a significant proportion of judicial members.[155]

Principles underpinning a federal judicial commission

9.86 In their submissions, the Australian Bar Association and the Law Council of Australia each referred to broad features or principles that a federal judicial commission should have. These submissions were essentially consistent with each other, and included that a judicial commission should:

- be independent of the Executive;
- provide judicial officers with a fair opportunity to respond to complaints;
- have confidential processes, subject to certain of its outcomes being made public;
- include a complaints-handling role that is protective of the public, and of the principles fundamental to the Australian judicial system, rather than being disciplinary in nature;
- be accessible to all members of the public;
- have jurisdiction encompassing all members of the federal judiciary;
- have its membership and processes clearly set out in legislation; and

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151 Australian Law Reform Commission (n 8) [12.106].

152 Concerns about constitutionality were raised if a commission were to have a focus on 'external demonstrability of accountability', rather than structured systems of support: Dr Joe McIntyre, *Submission 46*. The view that it would be possible to construct a constitutionally permissible (or valid) body was expressed by the New South Wales Society of Labor Lawyers, *Submission 40*. The Law Council of Australia has expressed the view that although constitutional challenge 'may be inevitable', there is 'reason to doubt that the Constitution prevents the establishment of a body which does not have power to remove or discipline judges': Law Council of Australia (n 56) 4. Similarly, the Australian Bar Association has publicly stated that it is confident that a federal judicial commission could be established without infringing the Constitutional provisions guaranteeing the independence of judges: Australian Bar Association, 'ABA supports the establishment of a Federal Judicial Commission' (Media Release, 17 February 2021).

153 Law Council of Australia (n 56) 4.

154 Arguably, some types of discipline may in fact be compatible with the constitutional guarantees of judicial independence: see Appleby and Le Mire (n 21) 35–6.

155 See further ibid 33–6.

- be transparent, including (in the view of the Australian Bar Association) that complainants should be advised of the outcome of complaints, with reasons provided.[156]

9.87 Appleby and Le Mire have suggested principles for the establishment of a complaints-handling body, such as establishing concrete standards and potential remedies, and providing for involvement of lay members.[157] These principles are reflected in the open letter to the Attorney-General (Cth) by 500 women in the legal profession.[158] The letter suggested that any complaints institution 'should be informed by best practice and the standards that apply to complaint handling',[159] and informed, but not limited, by the design of institutions already operating in Australian states and territories. The letter proposed that the design for a national judicial complaints institution should involve:

- 'clear, publicly available standards against which appropriate judicial behaviour is assessed', developed by the judiciary, that are expressed as being enforceable;
- a separate standing body, appointed by the judiciary, but 'separate from the ordinary judicial hierarchy and process';
- 'a robust, fair and transparent process' with appropriate investigative powers and the ability to protect the privacy of complainants;
- the availability to the body of 'an appropriate suite of avenues for redress', such as 'referral to Parliament for possible removal; referral to prosecutors in relation to possible criminal conduct; as well as intermediate forms of redress, such as public reprimand, orders for compensation, and recommendations for pastoral care and advice (eg mentoring)'; and
- jurisdiction 'that extends to the investigation of retired judges and chief justices'.[160]

9.88 In this respect, the independence, transparency, and fairness of any process adopted are crucial to achieving the appropriate balance between judicial accountability, and protecting and supporting judicial impartiality and public confidence in it.

The importance of a feedback loop

9.89 A number of stakeholders emphasised the particular benefit of combining educative and complaints-handling functions in the same body.[161] First, the body may be able to gain the respect and understanding of the judiciary through provision

156 Australian Bar Association, *Submission 43*; Law Council of Australia (n 56).
157 Appleby and Le Mire (n 21).
158 See [9.52].
159 Such as Standards Australia and Standards New Zealand, *AS/NZS 10002:2014: Guidelines for Complaint Management in Organisations* (2014).
160 Appleby (n 73).
161 Law Council of Australia, *Submission 37*; New South Wales Society of Labor Lawyers, *Submission 40*; Australian Bar Association, *Submission 43*.

of high quality judicial education.[162] Secondly, feedback gleaned from complaints (even from those complaints that are not substantiated, or that are substantiated but do not result in removal of the judge) can then be integrated into future training and development programs to address issues impacting on perceptions of fairness and impartiality within the courts.[163] For this reason, the Australian Bar Association suggested in its submission that the Judicial Commission of New South Wales offered a 'useful model for consideration and replication at a Commonwealth level',[164] a view widely shared in consultations.

9.90 While submissions suggested that external complaints-handling procedures do not necessarily provide satisfactory resolution of concerns in any but the most extreme cases, such procedures can play an important role in addressing repeat and systemic concerns. Some litigant consultees in this Inquiry recognised this as the most important role that such a commission could play, even in the absence of being able to change the outcome in their individual case.

9.91 As the ALRC has previously noted, Australian standards on complaint handling emphasise the importance of building in a 'loop' that permits the organisation to learn from complaints, and to effect improvements in processes (including education and training) as a result.[165] With a broad mandate (or close links to a body with educative functions) a federal judicial commission could play an important preventive and protective role in relation to public confidence in this area, tied to other recommendations in relation to judicial education, support of judges in relation to mental and physical health issues, collection of court user feedback, and collection of other data (see further **Chapter 12**). In this way, significant issues being raised repeatedly about the same judge or a particular court may indicate a need for further mentoring or training. Transparency about this process would strengthen its impact on public confidence.

Impairment and the relevance of medical expertise

9.92 The types of problematic behaviour within the remit of a federal judicial commission may involve misconduct, or could be a symptom of physical or mental impairment.[166] In consultations, some stakeholders suggested that, where problematic judicial conduct arises from an impairment of the judge, a federal judicial commission could play an important role in the identification of these issues and supporting reasonable accommodations and rehabilitation of judges to function

162 Chief Justice Spigelman (n 10) 248–9.
163 Law Council of Australia, *Submission 37*.
164 Australian Bar Association, *Submission 43*.
165 Australian Law Reform Commission (n 2) [2.288]. See further Standards Australia and Standards New Zealand (n 159) 5.4.2.
166 The Judicial Commission of New South Wales issued reports in relation to just four complaints between 2011 and 2020, and each involved significant medical evidence about mental and/or physical health: see further Roach Anleu and Mack (n 122) 163–4.

effectively in their role.[167] In this respect, Professor Lynch and Associate Professor Blackham have considered issues of judicial incapacity through a discrimination law lens, by which removal would only be justified where

> a judge has an impairment and, after all reasonable adjustments have been made to help them fulfil their judicial role, they are still unable to fulfil the inherent requirements of their office.[168]

9.93 The same considerations would apply to misbehaviour that is a result of such impairment.[169] They suggest that

> there is a need to move to a more principled system for responding to judicial incapacity, which clearly identifies that reasonable accommodations may be requested and provided to assist judges with an impairment, focuses on the inherent requirements of the judicial position, and protects judicial independence. This could take the form of a structured program of disability management—which seeks both to prevent disability from occurring and to intervene early upon the onset of a disability—reflecting a commitment to promoting judicial retention and achieving an 'optimum' schedule for return-to-work when impairment occurs.[170]

9.94 In consultations, the ALRC was informed about practices in other professions, such as medicine, where complaints that are accepted for consideration involve a health assessment of the medical practitioner at the outset, and assessment and management of the risks to mental health associated with the complaints process itself. Stakeholders emphasised how a federal judicial commission could play an important role in early intervention in relation to physical and mental health impairment, which is associated with more positive outcomes in terms of protection of the public and rehabilitation of the professional. In this respect, some stakeholders emphasised the importance of involving health expertise, whether in a permanent role or ongoing consultant capacity, in a federal judicial commission.

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167 As to recent research on the psychological impact of judicial work, see Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28 *Journal of Judicial Administration* 141.

168 Lynch and Blackham (n 132) 226.

169 Ibid.

170 Ibid 243–4.

PART THREE: THE LAW ON ACTUAL AND APPREHENDED BIAS

10. Finding Clarity in Law and Practice

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Introduction

10.1 This chapter considers views raised in the course of this Inquiry about difficulties with the way the law on bias operates, and outlines the ALRC's conclusion that legislative reform to the substantive law is not required. Some of those difficulties have been addressed through recent case law; others are amenable to further development and clarification by the judiciary, which the ALRC considers to be the appropriate course.

10.2 In consultations, two major interrelated issues with the current law were raised. 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. One solution offered to address these issues is the development, through legislation, of requirements for disqualification in particular circumstances, and requirements of disclosure in others.

10.3 The majority of stakeholders, however, considered that the solution to these problems should be found in the existing law, complemented by reforms in other areas, rather than in overhauling the law itself. The ALRC heard consistently throughout the Inquiry that the overall principles expressed in the current law on actual and apprehended bias, although not without their difficulties, are the most appropriate ones to deal with perceptions of bias in individual cases. 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.

Addressing shortcomings in the existing law

10.4 This section gives a brief summary of some of the issues raised with the law on bias, stakeholder responses to them, and the ALRC's ultimate conclusion to not recommend statutory intervention.

Of principles and bright lines

10.5 The law on apprehended bias in Australia is expressly based on 'principle' to take account of the multiplicity of circumstances in which apprehensions of bias can arise.[1] This means that each case is decided on its particular facts, and decisions are highly context-specific.[2] In this respect, it mirrors the approach taken in relation to the other pillar of natural justice, the hearing rule.[3]

10.6 On the other hand, it has been suggested that a principled approach does 'little to provide reliable guidance to stakeholders in the judicial process',[4] giving rise to uncertainty for both judges and litigants in marginal cases about whether a judge

1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [32] (Gleeson CJ, McHugh, Gummow and Hayne JJ). Justice Gaudron adopted the principled approach, but considered that, under it, 'a substantial shareholding or financial interest automatically results in a judge's disqualification': [98]. Justice Kirby took a different view to the majority, framing the issue as one primarily of judicial independence, and finding that there was a rule of automatic disqualification for pecuniary interest: [146].

2 Ibid [32] (Gleeson CJ, McHugh, Gummow and Hayne JJ). As explained in **Chapter 3**, this was not always the case — prior to the decision of the High Court in *Ebner*, it was generally accepted that the common law did recognise a category of automatic disqualification for pecuniary interest in a matter.

3 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 643.

4 Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388, 389.

should sit.[5] That different judges will take different views to the 'right' answer under the test is borne out by the fact that appeals on bias have led to split decisions in appellate courts.[6] However, in this respect the law on bias is no different to many other areas of law.

10.7 A related concern is that, without an understanding of case law and methods of legal reasoning, the principled approach is difficult for non-lawyers to understand, impacting on public confidence, and potentially leading to applications for disqualification that would not otherwise be made.[7] This is particularly problematic for self-represented parties. However, litigants' responses about their perceptions of fairness and bias in the ALRC Survey of Court Users, and comments in submissions received from litigants, underline that this can also be a concern for represented parties. In some cases, the impression given is that these are opaque rules that allow the legal profession and judiciary to operate without scrutiny.

The fair-minded lay observer and public confidence

10.8 Concerns about uncertainty in the law are also connected to how the construct of the fair-minded lay observer operates. While ostensibly a touchstone for public confidence, many scholars, and some judges, have suggested that it is a 'flimsy veil' for the judge's own views.[8]

10.9 Some have argued that, when applied in cases, the fair-minded lay observer is often overloaded with so much knowledge, and its function is so judicial in character, that it 'bears no resemblance to an average member of the public or may not reasonably reflect general public opinion'.[9] It is argued that this leads to unpredictable and subjective outcomes, as small 'gradations in the understanding attributed to the lay observer can quickly determine the outcome of a challenge'.[10] It can also lead to decisions on bias far removed from what members of the public

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5 Jula Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53(3) *Osgoode Hall Law Journal* 853, 858. See further Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38(3) *Civil Justice Quarterly* 376; Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [30]–[31].

6 Such as in *Charisteas v Charisteas* (2020) 389 ALR 296.

7 See, eg, Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <www.auspublaw.org/2015/09/apprehended-bias>; Aronson, Groves and Weeks (n 3) 657. See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [35]–[37].

8 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 565, 585. See further *Smits v Roach* (2006) 227 CLR 423 [96]–[97] (Kirby J); Olowofoyeku (n 4) 399–406; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928, 934.

9 Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks about Judicial Impartiality' (2021) 84(4) *Modern Law Review* 811, 812. See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [22]–[29].

10 Young (n 8) 933. See further Olowofoyeku (n 4) 404.

would actually think, undermining the key rationale of the rule. Recent preliminary survey research suggests there is a significant divergence between results that have been given by courts through the application of the test and what members of the public actually think in specific case scenarios.[11]

A case for codification?

10.10 The law on bias in Australia has been developed by the courts with no direct input from Parliament. In some other jurisdictions, legislation sets out particular circumstances in which judges may and may not sit, or circumstances in which a judge must disclose a conflict of interest.[12] In other jurisdictions, case law has set out particular circumstances that generally are, and are not, likely to give rise to an apprehension of bias.[13]

10.11 In Australia, the *Guide to Judicial Conduct*, while generally advisory only, does provide some ground rules in relation to basic judicial practice regarding recusal that are described in prescriptive terms.[14] In this way, it provides shared understandings among members of the judiciary about certain practices that are considered important to prevent issues of apprehended bias arising. These can be seen as promoting a prudent approach to recusal, rather than necessarily indicating that a judge would be disqualified if they took a different approach.[15] However, as the High Court's judgment in *Charisteas v Charisteas* ('*Charisteas*'), shows, clarification of such practices provides an important backdrop to how the law on apprehended bias is applied.[16] In this way, it lies somewhere between codification and pure application of principle.

Arguments for codification

10.12 Professors Hughes and Bryden (writing in a Canadian context) and Associate Professor Higgins and Dr Levy suggest that codification of the law on bias would improve clarity, make policy choices explicit, and allow for greater convergence between the test and public perceptions. Hughes and Bryden suggest that legislative codification would be useful to establish 'a bright-line standard for when disqualification is required' in certain areas.[17] In their view, the

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11 See Higgins and Levy (n 9). See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [32]–[35].

12 See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [64]–[67], Table 2.

13 See, eg, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [25] (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC). See further Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [59]–[60].

14 See, eg, Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 12, 14–16.

15 A similar approach is taken in the Canadian Ethical Principles for Judges: Canadian Judicial Council, *Ethical Principles for Judges* (2021) [5.A.3].

16 *Charisteas v Charisteas* (2021) 393 ALR 389 [13], [16] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

17 Hughes and Bryden (n 5) 885.

> optimal point of balance between achieving … public satisfaction and providing litigants with reassurance about judicial impartiality is likely to be elusive, and … there are times when it is more productive to focus on the clarity and consistency of the rules governing judicial disqualification than on the precise content of the rules themselves.[18]

10.13 They argue that this would also help judges and litigants in relation to situations where bias is held not to arise for policy reasons, even though there might be an objective basis for arguing that the judge should be disqualified (such as in relation to pre-judicial statements or writing).[19] They suggest that a code should include guidance as to the way to address:

- professional relationships between the bar and the bench;
- prior judicial consideration of the matter at issue;
- extrajudicial writings that suggest predisposition; and
- procedures for disqualification applications.[20]

10.14 Higgins and Levy suggest that the content of a code should be crafted by conducting empirical research into public attitudes towards judicial bias, or by holding citizens' assemblies to canvass opinion.[21] Higgins and Levy propose that a code could have a traffic light system of scenarios with 'green' (no disqualification) and 'red' (automatic disqualification) lists analogous to the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration*.[22] This would leave a smaller 'orange' mid-ground for judicial determination.[23]

Arguments against codification

10.15 Others are more wary of the benefits of codification in this context. Concerns about the workability of 'bright line rules' were at the heart of the majority's decision in *Ebner v Official Trustee in Bankruptcy* ('*Ebner*') to adopt a single principle-based approach to disqualification for apprehended bias.[24] In the US context, Professor Geyh suggests that, inevitably

> specific, conflicts-based disqualification 'solutions' operate one step behind the innumerable disqualification problems that arise and cannot address those problems until they have recurred with frequency and force sufficient

18 Ibid 859.
19 Ibid 885.
20 Ibid.
21 Higgins and Levy (n 5) 395.
22 Ibid 394.
23 Ibid 395.
24 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [32] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

> to prompt a rule change. Moreover, disqualification is often desirable under circumstances that are insusceptible to capture in clearly worded rules.[25]

10.16 Geyh notes how several existing conflicts rules in the US Model Code of Judicial Conduct illustrate this problem

> by trading bright lines for flexibility in ways that promote reasonable outcomes at the expense of predictability, thereby blurring the distinction between a conflicts-based approach to disqualification and an appearances regime.[26]

10.17 Geyh sees a role for conflicts rules but notes that they

> are, by their nature, piecemeal reforms that may serve their limited purposes well but which remain too limited in scope to remedy the larger problems of an appearances-based disqualification regime.[27]

10.18 If codification was to be achieved by way of statutory intervention, more fundamental are concerns about the proper role of the legislature in drawing the limits of acceptability.[28] The Hon Sir Grant Hammond KNZM describes the 'considerable value of judicial self-regulation'.[29] In his view, the problem with the law on disqualification is that 'there have been far too many high profile cases which have done quite appalling damage to the virtue of Lady Justitia'.[30] However, he considers that the judiciary has the mechanisms to address this, noting that

> there still appears to be widespread agreement that critically important constitutional values are supported by an emphasis on judicial autonomy. Hence, we should not be looking at a pure 'balancing' exercise'. It would follow that a very clear case indeed is needed for tilting the scale too far in the direction of external regulation. That is the danger with legislation, which must necessarily try to be complete and cover worst-case scenarios. And if the legislation is too draconian, judges may in any event attempt to read it down, whether appropriately or inappropriately.[31]

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25 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30(4) *Review of Litigation* 671, 716. Geyh notes that 'under Model Code Rule 2.11(A)(3), a judge must disqualify himself if he has an "economic interest" in the subject matter of the case. The Code defines "economic interest" to mean more than a "de minimis" interest. "De minimis," in turn, is defined to mean "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality" — which circles the analysis back to an appearances-based standard. Similarly, Rule 2.11(A)(5) calls on a judge to disqualify herself for making a prior public statement that "appears to commit the judge to reach a particular result" in the case. Presumably, whether a judge "appears" to have committed herself must be evaluated from the perspective of the same elusive, objective, reasonable observer that has caused the appearances-based disqualification regime to fracture': 717. See also Matthew Groves, 'Is There a Small Town Exception to the Bias Rule?' (2021) 28(2) *Australian Journal of Administrative Law* 114, 127–8.

26 Geyh (n 25) 717.

27 Ibid 718.

28 Noting that some of the proposals referred to above suggest judge-led 'codification' through the adoption of a Code, rather than through legislation.

29 The Hon Sir Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 153.

30 Ibid.

31 Ibid 154.

10.19 In **Background Paper JI7**, the ALRC noted that any codification of the law on bias through legislation would be likely to raise significant constitutional issues, a view that some stakeholders expressly endorsed.[32] As discussed in **Chapter 2**, disqualification for bias goes to the very heart of judicial power, vested in Commonwealth judges under Chapter III of the *Australian Constitution*. Interference in determining how that power is exercised through codification of the law on bias may be deemed unconstitutional.[33]

Feedback from consultations

The principled approach is the right one

10.20 In consultations and submissions, and in responses to the ALRC Survey of Lawyers, some stakeholders did raise concerns about how the law on actual and apprehended bias operates. However, the ALRC consistently heard from the majority of stakeholders, and overwhelmingly from the judiciary and the legal profession, that the principled approach of the current law on actual and apprehended bias is the most appropriate one.[34] According to the Australian Judicial Officers Association:

> This is an area addressed by the common law for centuries. Apparent or actual bias is a question resolved by those who are intimately acquainted with the nature of the complaints which may be raised and the reality of how a judge is trained to and should in fact discharge his or her sworn duty. … The understanding of the judges' role and the principles of bias are quintessentially part of the common law and those principles should continue to develop organically through the nation's highest custodian of the common law, the High Court of Australia.[35]

10.21 In consultations, stakeholders were generally much more concerned with procedural and institutional issues supporting and complementing the substantive law.

10.22 In relation to clarity of the law, an overwhelming majority of participants in the ALRC Survey of Judges indicated that they found the legal test for bias to be generally straightforward to apply.[36] Of the seven judges who disagreed with or were unsure about this statement, four indicated that it was particularly difficult to apply

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32 Australian Law Reform Commission, 'The Fair-Minded Observer and its Critics' (Background Paper JI7, April 2021) [46]. See, eg, Dr Joe McIntyre, *Submission 46*.

33 See **Chapter 2**.

34 See, eg, Australian Judicial Officers Association, *Submission 31*; New South Wales Society of Labor Lawyers, *Submission 40*; Australian Bar Association, *Submission 43*.

35 Australian Judicial Officers Association, *Submission 31*.

36 Fifty-one participants (n = 58) answered 'Yes' when asked whether the test for apprehended bias was 'generally straightforward to apply in practice'. The surveys conducted by the ALRC were designed in such a way that not all questions were compulsory, and in some instances questions were only put to subgroups of participants. Therefore, the total number of responses to questions varied within the surveys. The number of participants who answered any given question is reported as n = X.

in relation to cases raising prejudgment.[37] A majority of participants in the ALRC Survey of Lawyers also reported that they considered the test for apprehended bias to be generally straightforward for practitioners to understand.[38] When participants in the ALRC Survey of Lawyers were asked to rate a list of five potential reforms in terms of importance to maintaining public confidence in judicial impartiality, reform to the law on bias had the lowest average rating (that is, it was considered the least important reform overall).[39]

The fair-minded lay observer is more sceptical than judges might think

10.23 Where concerns were expressed about the law in consultations and submissions, they commonly related to the knowledge and faith in judges attributed to the fair-minded lay observer and a (related) perceived reluctance of judges to find themselves disqualified in situations that ordinary members of the public would find surprising.[40]

10.24 The ALRC's consultation process concluded before the High Court had delivered its judgment in *Charisteas*. Some comments in consultations and submissions were therefore premised on the possibility that some of the concerns raised might be addressed by the High Court's judgment. For example, the Law Council of Australia noted in its submission that, while it considered the threshold adopted in the test for apprehended bias was appropriate, there were difficulties inherent in judges adopting the perspective of a fair-minded lay observer. It considered that this was an issue that should be reconsidered following the High Court's decision in *Charisteas*.

10.25 Some comments to the ALRC Survey of Lawyers also expressed the view that the threshold for a finding of apprehended bias by reference to the view of the fair-minded lay observer was often set too high. One participant suggested that judges were too reluctant to grant disqualification applications, and that this can have serious impacts on public confidence in high profile cases. In consultations prior to the High Court handing down its judgment in *Charisteas*, other stakeholders noted that they considered the substantive law to be appropriate, but that they would reappraise that if the High Court did not uphold the appeal in that case.

10.26 Stakeholders considered that a mechanism to import consideration of views of those outside the legal profession was important to upholding public confidence. Used realistically, it is a mechanism that promotes self-reflection about some of

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37 See further **Chapter 5**.

38 Seventy-one per cent (n = 187) of participants found the test for bias to be generally straightforward for legal practitioners to understand (20% disagreed and 9% unsure).

39 Participants indicated that they thought more effective complaints procedures concerning judges was the most important reform (average 8.1; median 9; n = 170), followed by increased diversity of background among judges (average 7.7; median 9; n = 160), then reform to procedures for disqualification of judges (average 7.1; median 8; n = 170). Participants assigned the least importance to reform of the test for apprehended bias (average 6.0; median 6; n = 157).

40 See, eg, Law Council of Australia, *Submission 37*; National Justice Project, *Submission 44*.

the psychological impediments judges face in considering these issues identified in **Chapter 4**, such as a judge's own bias blind spots, and the fact that how they see things may not be how others see them. In this, their views were generally in line with those expressed by French CJ, that:

> The interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. … However, the utility of the construct is that 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. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations. While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area.[41]

10.27 Concerns about how the fair-minded lay observer is constructed in individual cases have, however, underpinned suggestions that the fair-minded lay observer should perhaps begin with more 'basic scepticism about the abilities and habits of judges'.[42] This approach has been reflected in recent unanimous judgments of the High Court and the Full Court of the Federal Court. As discussed in **Chapter 3**, those judgments adopted a markedly more realistic approach to the degree of faith the hypothetical observer has in a judge's ability to be impartial. This approach is clearly the right one.

10.28 There remains a particular tension between, on one hand, a test that prioritises outside appearances, and on the other, a number of statements from the High Court that judges have a 'duty to sit'.[43] Those statements were, however, initially made in a context where objections on bias grounds were previously rare, and almost automatically acceded to.[44] While objections on the grounds of bias should be 'firmly established' to guard against the possibility of judge shopping, the test for apprehended bias established by the High Court in *Ebner* does require a prudent approach to achieve its aims.[45] 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.[46]

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41 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [48] (French CJ).

42 Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 71. See further Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *Modern Law Review* 633, 645–9.

43 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J). See further **Chapter 7**.

44 See *Barton v Walker* (1979) 2 NSWLR 740, 749 (Samuels JA).

45 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See further Sir Grant Hammond (n 29) 80.

46 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [21] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

10.29 The ALRC Case Review provides examples of cases where judges have explicitly adopted a prudent approach, both to the assessment of the fair-minded lay observer, and in situations where there is doubt about whether the test is satisfied.[47]

10.30 The assessment of reasonableness of an apprehension of bias in light of ordinary judicial practice, as restated by the High Court in *Charisteas*, appears to allow room for more transparent consideration of policy considerations in the application of the test and in setting out situations where, as a matter of practice, prudence dictates recusal.[48] As Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ recognised in *Johnson v Johnson*:

> The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation.[49]

However, the stage at which those policy considerations are injected is important: it is not when the test is being applied, but in the development of understandings of ordinary judicial practice. As discussed further below, transparency and greater clarity as to some of those basic understandings can be provided through the *Guide to Judicial Conduct*. This provides a proactive mechanism to insulate judges from improper and unacceptable influences, and may address some of the tension with the duty to sit in defined circumstances.

10.31 With respect to how a judge determines whether an apprehension of bias is reasonable, stakeholders emphasised that judicial education can also play an important supporting role.[50] This could include reinforcing the realistic approach to the fair-minded lay observer, and standards of ordinary judicial practice. Such education could usefully include sharing information between judges about situations in which they have recused themselves, given that reasons for decisions of judges to disqualify themselves are rarely published in judgments.[51] It could also include continued education on the research on judicial decision-making discussed in **Chapter 4**, and why members of the public may be more sceptical than judges about their abilities to put aside irrelevant influences. As Geyh notes, overcoming judicial ambivalence to disqualification

> requires that judges more fully appreciate the dual psychological impediments to judicial self-evaluation: that judges (like the general population) have

47 See, eg, *Coady v Yachting Victoria Inc* [2018] FCCA 3113 [15]–[16]; *Cousins v Peake (No 2)* [2018] FamCA 729 [38]; *Hanas v Jolaha (No 3)* [2019] FamCA 342 [26]–[28].

48 For the suggestion that the assessment of reasonableness could introduce 'a greater level of transparency into the bias rule', see Groves (n 8) 587. As to the suggestion that application of the test could include an open balancing exercise allowing the court to address competing policy considerations, see John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38(3) *Federal Law Review* 353, 354, citing Simon Atrill, 'Who is the "Fair-Minded and Informed Observer"? Bias After *Magill*' (2003) 62 *Cambridge Law Journal* 279, 289.

49 *Johnson v Johnson* (2000) 201 CLR 488 [13].

50 See further **Recommendation 9**, **Chapter 12**.

51 See **Chapter 6**.

> difficulty detecting their own biases, and that judges see themselves differently than others see them.[52]

Along with reforms to the self-disqualification procedure recommended in **Chapter 7**, this can play an important role in cementing the test as an objective one, rather than a 'personal affront'.[53]

Significant support for visibility of the law

10.32 Across the board stakeholders did, however, see a need for the existing law to be explained in a way that was more easily understood by litigants. Some also considered that it would be possible to provide more clarity on the types of situations that ordinarily would, and ordinarily would not, give rise to apprehended bias.

10.33 Given that, ultimately, judges are the only people who can decide whether a judge is disqualified, improving transparency about principles and practices underlying those decisions was considered important to maintain confidence in the process. Further transparency of the law was considered important for various reasons, including:

- to support confidence in the processes and outcomes of judicial decision-making;
- recusal and disqualification procedures must rely to a large extent on the integrity of individual judges, and the continued role of self-disqualification;
- the increasing diversity of background, experience, and specialised practice within the legal profession and the judiciary, and diversity within the community;
- significant areas of law with large proportions of self-represented litigants; and
- the increasingly informed scepticism within society, including within the judiciary and legal profession, of judges' special abilities to put aside influences that may bias ordinary human decision-making.

10.34 Support for more concrete guidance was reflected in the surveys where this question was raised. As shown in **Figure 10.1** and **Figure 10.2**, a majority of participants in the ALRC Survey of Judges,[54] and a large majority of participants in the ALRC Survey of Lawyers,[55] 'strongly agreed' or 'somewhat agreed' that it would

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52 Geyh (n 25) 729.

53 See further United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) 56.

54 A majority of participants agreed there would be benefit in guidance (for judges, lawyers, and/or litigants) in setting out particular circumstances that will: (i) always or almost always give rise to apprehended bias (32; n = 58); and (ii) never or almost never give rise to apprehended bias (33; n = 58).

55 Eighty-two per cent (n = 186) of participants agreed that there would be benefit in guidance setting out circumstances that will always or almost always give rise to apprehended bias (11% disagreed and 6% unsure). Similarly, 72% (n = 184) of participants agreed that there would be benefit in guidance setting out circumstances that will never or almost never give rise to apprehended bias (17% disagreed and 10% unsure).

be helpful (for judges, lawyers, or litigants) to have more guidance on circumstances that will, and will not, give rise to bias or an apprehension of it.

Figure 10.1: Level of support for greater guidance by judges

There would be benefit (for judges, lawyers and/or litigants) in guidance setting out particular circumstances that will:

always or almost always give rise to apprehended bias

never or almost never give rise to apprehended bias

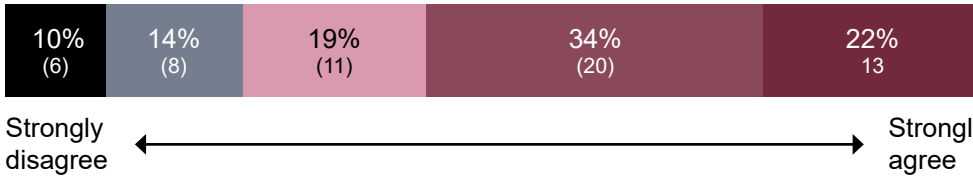
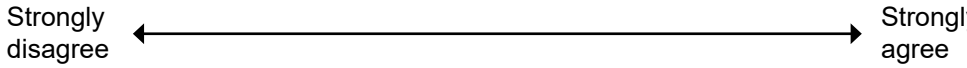


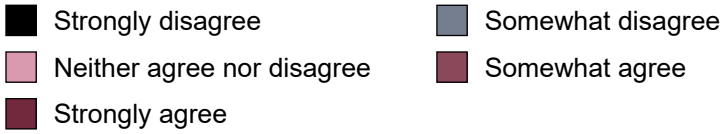
Figure 10.2: Level of support for greater guidance by lawyers

There would be benefit (for judges, lawyers and/or litigants) in guidance setting out particular circumstances that will:

always or almost always give rise to apprehended bias

never or almost never give rise to apprehended bias





10.35 Most submissions on this issue responded to a question in the Consultation Paper about whether there would be benefit in a judicial officer-led project to identify, more comprehensively than at present, circumstances in which apprehended bias will and will not arise.[56] Support for this proposal was mixed, with six submissions in support, three giving qualified support, and two not supportive.[57]

10.36 Most submissions reflected a view that providing 'grounded and concrete information as to the types of circumstances that will generally give rise to concerns of apprehended bias — and those that will not — is broadly a good idea'.[58] At the same time, many submissions were wary of the suggestion that the law could be codified or comprehensively captured in guidance.

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56 Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021) Question 4. See **Appendix B**.

57 Supportive: Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Professor Tania Sourdin, *Submission 33*; Asian Australian Lawyers Association, *Submission 42*; New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*, and two confidential submissions. Qualified support: Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*; Dr Joe McIntyre, *Submission 46*. Not supportive: Australian Judicial Officers Association, *Submission 31*; Australian Bar Association, *Submission 43*.

58 Dr Joe McIntyre, *Submission 46*. See also Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*.

10.37 For example, the Australian Bar Association recorded that it had

> reservations about going beyond the generally applicable principles and seeking to identify more comprehensively the circumstances in which apprehended bias will and will not arise. Both the case law and practical experience tell against an attempt to codify the circumstances in which a judge should or should not disqualify him or herself on the basis apprehended bias.[59]

10.38 Similarly, the Law Council of Australia noted the 'possibility that attempts to codify or define circumstances could unintentionally reduce clarity and certainty'.[60] These concerns were also reflected in a number of comments made by participants in the ALRC Survey of Lawyers.

10.39 Associate Professor O'Sullivan, Dr Ng, and Associate Professor Grant expressed concerns about including a description of circumstances that 'will never or almost never give rise to apprehended bias', on the grounds that it could have a chilling effect on litigants wishing to raise a claim of bias, who might nevertheless have legitimate claims.[61] Dr McIntyre also raised concerns about the extent to which any such project might seek to develop the law, noting the constitutional prohibition on non-judicial forms of law-making by the judiciary.[62]

10.40 On the other hand, Higgins and Levy supported the idea of partial codification of the law through a judge-led process, on the grounds that it would 'improve clarity, save resources, and allow for greater convergence between public perception and the law of judicial bias'.[63]

Enhancing transparency of law and ordinary judicial practice

10.41 In light of the discussion above, the ALRC has concluded that reform to the substantive law on bias is not required. The common law provides a principle-based approach that gives flexibility in application and allows each case to be determined on its merits. In line with the judicial method, the law has evolved to take account of changing societal expectations, and is flexible enough to continue to do so.

10.42 Codification, or partial codification, has its advantages, and its drawbacks. Any statutory codification reduces flexibility to adapt to changing circumstances and creates its own disagreements about what is captured within the 'bright lines' of the law. It might also be difficult to adapt to the particular contexts of different courts — the issues that arise in one Commonwealth court may be very different from those arising in another, or in a state or territory court of criminal jurisdiction.

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59 Australian Bar Association, *Submission 43*.
60 Law Council of Australia, *Submission 37*.
61 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.
62 Dr Joe McIntyre, *Submission 46*. See further *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 [127] (Gageler and Gordon JJ).
63 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*.

Ultimately, the view of the majority of stakeholders was that the drawbacks outweigh the advantages in this context.

10.43 Ordinarily under the common law method, the law is found and explained through case law. However, this is an area concerned with the administration of justice, and the regulation of the court itself. As such there is a need for greater accessibility and transparency about the content of the existing law and the processes through which it is upheld. This can reinforce, rather than undermine, the principle-based approach by providing concrete examples of what it means in practice. Greater transparency about the existing law and basic judicial practice is possible and desirable, especially in a number of key areas discussed further below. It can be provided in ways that are both general and court-specific. 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.

Guidelines on judicial disqualification

10.44 The court-specific guidelines on judicial disqualification proposed in **Recommendation 1** provide the vehicle through which the ALRC considers transparency about the existing law may be provided — at a very high level — to litigants and members of the public.

10.45 These guidelines are intended to be a non-binding overview of the court's practice, and the law, tailored to each court's particular circumstances and court users.

10.46 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 be grounds for disqualification, and aspects of ordinary judicial practice that are generally accepted in the case law not to give rise to apprehended bias on their own. The examples chosen should respond to the types of issues most frequently raised in the court. As discussed further below, that is likely to include issues of personal relationships and views earlier expressed by the judge in the same proceedings or related proceedings.

10.47 The section below 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 give transparency to the existing law. 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. The ALRC suggests that the *Recusal Guidelines* of the High Court of New Zealand provide a helpful example

in this regard,[64] however development of the guidelines should be subject to consultation to ensure that matters are expressed in a way that is accessible to members of the general public.

In Focus: Existing clarity

Below are some examples of areas where clear guidance is possible. The ALRC does not, however, suggest that these are necessarily the most appropriate examples to include in the guidelines on disqualification, which is a matter that would require careful consideration in relation to each court.

Case law is clear, for example, that:

- An expression of tentative views by the primary judge *of itself* does not manifest bias.[65] This is because fairness might require that judges give the party an indication of what they are thinking so the party can respond accordingly.[66]
- The fact that a judge shared chambers with counsel for one of the parties, or that counsel or solicitors are well known to the judge, does not, without more, give rise to an apprehension of bias.[67] It is part of the job that barristers from the same chambers regularly take opposing sides in cases, they work and are paid independently, and any other position would be unworkable in the context of the legal profession, particularly because the judiciary is usually drawn from the bar.[68]
- A judge's ruling in an earlier case on the same point of law as arises in the case at issue will not give rise to disqualification.[69] This is because the common law system is founded in precedent and directed to establishing, and maintaining, consistency of judicial decisions so that like cases are treated alike and principles of law are applied uniformly.[70]

64 Copy reproduced at **Appendix G**.

65 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 299 CLR 577 [112]–[114] (Kirby and Crennan JJ); *Johnson v Johnson* (2000) 201 CLR 488 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See further *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd* [2013] FCAFC 150 [43] (Allsop CJ, Middleton and Katzmann JJ).

66 *Johnson v Johnson* (2000) 201 CLR 488 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also, eg, *Galea v Galea* (1990) 19 NSWLR 263, 278–9 (Kirby A-CJ); *Vakauta v Kelly* (1989) 167 CLR 568, 571 (Brennan, Deane and Gaudron JJ).

67 See, eg, *Bienstein v Bienstein* (2003) 195 ALR 225 [33] (McHugh, Kirby and Callinan JJ); *Day v Woolworths Group Ltd* [2021] QCA 42 [50]–[51] (Henry J, Mullins JA and Williams J agreeing); *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215, 230–1 (Merkel J).

68 *Day v Woolworths Group Ltd* [2021] QCA 42 [50]–[51] (Henry J, Mullins JA and Williams J agreeing); *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 230–1 (Merkel J). As to the particular need for pragmatism where the pool of lawyers or judges is small see Groves (n 25).

69 *Kartinyeri v Commonwealth of Australia* (1998) 156 ALR 300 [24] (Callinan J); *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302 [12] (Hayne J).

70 *SZVBN v Minister for Immigration and Border Protection (No 2)* [2017] FCA 123 [9]–[18] (Robertson J); *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302 [12] (Hayne J).

- Active participation in or membership of a political party before appointment will not of itself give rise to apprehended bias.[71] This is because '[e]xperience outside the law, whether in politics or in any other activity, may reasonably be regarded as enhancing a judicial qualification rather than disabling it'.[72]
- Previously advising or representing a party before becoming a judge is not of itself a reason for disqualification, unless the judge has been involved in the subject matter of the litigation prior to appointment, or unless the past association gives rise to some other good reason for disqualification (for example, if it was long-standing and recent).[73] Again, this recognises the reality of the way the legal profession works.

For each of these circumstances, the reason that the circumstances are not considered *reasonably* to give rise to an apprehension of bias, in light of ordinary judicial practice, may be self-evident to a member of the legal profession, and is attributed to the fair-minded lay observer, but may not necessarily be obvious to a member of the public.

The case law and guidance is also clear that:

- Judicial practice generally dictates that a judge should not sit on a case in which the judge is in a relationship of the first,[74] second,[75] or third[76] degree to a party or the spouse or domestic partner of a party.[77]
- Judicial practice also dictates that, where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should recuse themselves.[78]
- Where a judge has made clear findings about the credit of a witness whose evidence is of significance on a disputed matter, this will normally be a ground for recusal.[79]

71 See, eg, *Overton Investments Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979* [2001] NSWCA 137. See further Australasian Institute of Judicial Administration (n 14) 12.

72 United Nations Office on Drugs and Crime (n 53) 56.

73 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 381 (Priestly and Clarke JJA). Kirby P dissented on this point: see 374–7. See further *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87–8 (Brennan, Gaudron, McHugh JJ). For a situation where disqualification was considered appropriate, because of a long-standing and very recent association, see *Contract Mining Services Pty Ltd v Adelaide Brighton Cement Ltd* [2020] SASC 69 [67] (Livesey J). See further Australasian Institute of Judicial Administration (n 14) 16.

74 Parent, child, sibling, spouse or domestic partner.

75 Grandparent, grandchild, 'in-laws' of the first degree, aunts, uncles, nephews, nieces.

76 Cousins and other relatives.

77 Australasian Institute of Judicial Administration (n 14) 15.

78 Ibid 15.

79 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ). See also *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ).

- Other than in exceptional circumstances, such as fleeting or accidental contact, contact between a judge and legal representative for one of the parties that is not in the presence of or with the previous knowledge and consent of the other party, once the trial of a matter is underway, should be avoided because it may give rise to an apprehension of bias.[80]

10.48 Responses to the ALRC Survey of Judges support the view that that is possible to identify circumstances where there is broad agreement. Participants in the survey were asked to select, from a list of identified circumstances, those that 'will always or almost always give rise to apprehended bias'. Out of 59 participants who proceeded to this part of the survey:

- 58 selected 'Judicial officer gave advice in relation to the case prior to appointment';
- 55 selected 'Judicial officer's spouse/domestic partner is a director of one of the parties';
- 57 selected 'Judicial officer has a significant economic interest in the subject matter of the case'; and
- 53 selected 'Judicial officer's child is counsel in the case'.

10.49 Participants were also asked to select, from a list of identified circumstances, those that 'will never, or almost never, give rise to apprehended bias'. Out of 58 participants who proceeded to this part of the survey:

- 55 selected 'Judicial officer previously shared chambers with counsel for one of the parties (without more)'; and
- 54 selected 'Application based on the judicial officer's personal characteristics (such as gender, sexuality or ethnicity)'.

10.50 In considering the role that marking out 'various interests and associations that ordinarily will, or may hardly ever, support an apprehension of bias' can play, Professor Groves suggests that it

> can be partly understood as ground rules for both judges and lawyers. Listing issues that will hardly ever support an apprehension of bias serves to limit hopeless claims from lawyers. Similarly, the list of those issues that will normally support an apprehension serves to remind judges … of those instances that would invite an almost inevitable bias claim were they to preside. While such categories may be sensible, they also constitute a fairly lengthy list

80 *Charisteas v Charisteas* (2021) 393 ALR 389 [14]–[15] (Kiefel CJ, Gageler, Keane, Gordon, Gleeson JJ); *Re JRL; Ex parte CJL* (1986) 161 CLR 342 350–1 (Wilson J); *R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127 (McInerney J); Australasian Institute of Judicial Administration (n 14) 19–20.

> of situations in which things are thought so obvious that the opinion of the fair-minded and informed observer should not be called upon.[81]

10.51 Given the crucial role the law on bias plays in the administration of justice and confidence in the fairness of proceedings, setting out what are thought to be the obvious situations in a public document, for members of the public who might not find them so obvious, also has an important role to play.

Guide to Judicial Conduct

10.52 As is clear from the discussion above, the *Guide to Judicial Conduct* already plays an important role in setting out areas of agreement as to ordinary judicial practice in some areas of recusal and disqualification. The ALRC recommends greater visibility of the *Guide to Judicial Conduct* to the public by signposting through the guidelines on judicial disqualification (**Recommendation 1**), and accessible public resources (**Recommendation 14**).

10.53 The Terms of Reference ask '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'. In answering this question, the ALRC considers that the law does, in general, provide appropriate clarity. However, particularly in relation to conflicts of interest, if areas are identified where greater clarity is required, it is best achieved by developing clear guidance through the *Guide to Judicial Conduct* as to prudent practices in relation to recusal. Recusal at the outset of a matter raises significantly fewer tensions in relation to the duty to sit — which is centrally tied to concerns about judge shopping. If a judge recuses themselves prior to a request from a party because of something identified as a conflict of interest, those concerns do not arise.

10.54 As such, clarification of prudent judicial practice through the *Guide to Judicial Conduct* can play a flexible role in areas of practice identified as needing particular attention. It encourages behaviour that it is generally agreed will limit the opportunities for perceptions of bias to arise, and 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.

10.55 Developing clear standards in difficult areas through guidance can ensure that a range of considerations are taken into account, including changing community views. This is one way in which ordinary judicial practice might be brought more closely into line with the actual expectations of the community in areas where significant divergence can be shown. This is shown, for example, in the following advice on recusal in the *Guide to Judicial Conduct*:

> Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should

81 Groves (n 42) 66.

> disqualify themselves. … Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.[82]

10.56 This is not couched in prescriptive terms, and would not mean that apprehended bias would necessarily arise if a judge did sit on such a case, but it shapes judicial practice in a way that can take account of community views, allowing for a realistic, prudent approach to disqualification. In turn it can influence the application and development of the law.

10.57 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.[83] Empirical research on views of the public on disqualification scenarios, such as the preliminary work undertaken by Higgins and Levy,[84] could conceivably also be taken into account in any revisions of the guidance. The importance of seeking out public views was emphasised by the Hon Chief Justice M Gleeson AC, who, in discussing the law on bias said that:

> Judges are insiders to the process. Some things that might concern them may be matters of indifference to most people outside the system; and some things that may concern people outside the system may be dismissed as insignificant by judges. Any professional group that seeks to assess the esteem in which it is held by outsiders is undertaking a risky exercise. They need to be sure they are listening to voices from outside, and that they are not working in an echo chamber.[85]

In Focus: Canadian *Ethical Principles for Judges*

The Canadian *Ethical Principles for Judges* provide a recent example of reform to guidelines on judicial conduct that has been subject to a public consultation process. The consultation process asked for levels agreement on the expression of basic principles, and suggested guidance in specific situations.[86] The resulting principles are in many respects more prescriptive than its predecessor document, while expressly stated to be 'aspirational', and 'not intended to be a code of conduct that sets minimum standards'.[87] Instead, the *Ethical Principles* are

82 Australasian Institute of Judicial Administration (n 14) 15.
83 Canadian Judicial Council, 'Consultation on Ethical Principles for Judges' (Report, 2019). See further 'In Focus: Canadian *Ethical Principles for Judges*'.
84 Higgins and Levy (n 9). See further [10.9] above.
85 The Hon Chief Justice M Gleeson, 'Public Confidence in the Courts' (Speech, National Judicial College of Australia, Canberra, 9 February 2007) 4.
86 Canadian Judicial Council (n 83). See further **Chapter 12**.
87 Canadian Judicial Council (n 15) 7.

> advisory in nature and are designed to (i) describe exemplary behaviour which all judges strive to maintain; (ii) assist judges with the difficult ethical and professional issues that confront them; and (iii) help members of the public better understand the judicial role.[88]

The *Ethical Principles* recognise that there may be reasonable disagreements as to how they are applied in practice and that departure from them does not necessarily warrant disapproval.[89] In relation to principles concerning impartiality, the principles note that:

> While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.[90]

Concerning conflicts of interest in particular, they state that:

> The discussion of conflicts of interest in *Ethical Principles* is not intended to state the law relating to judicial disqualification or recusal. It is intended to provide guidance to judges as they identify and assess the circumstances in which their personal interests may be reasonably viewed by others as conflicting with their judicial duties. In assessing their ethical duties in this context, judges should remain conscious of the demands of the sound administration of justice and their duty to hear the cases assigned to them.[91]

However, the *Ethical Principles* go on to provide quite detailed guidance in some areas of practice concerning recusal for conflicts of interest, similar to the Australian *Guide to Judicial Conduc*t. As such they can be seen as providing more of a direct line to the fair-minded lay observer's Canadian cousin in relation to certain difficult areas, than that available to an individual judge determining the issue on their own. They also provide something of a dialogue with the fair-minded lay observer, by providing transparency about what judges have agreed are appropriate practices in light of the peculiarities of the legal profession and the pragmatic choices that may need to be made, informed by the views of actual members of the public.

Areas for further attention or clarification

10.58 Stakeholders have identified a number of key areas where further clarity or guidance from the judiciary through development of case law or the *Guide to Judicial Conduct* would be helpful. They have identified other areas where the bias rule is seen to provide only a partial response to situations giving rise to apprehensions of bias. These are set out below following a review of the findings of the ALRC Case Review on the nature of applications for disqualification in reported judgments.

88 Ibid.
89 Ibid.
90 Ibid [5.A.3].
91 Ibid [5.C.1].

Findings of the ALRC Case Review

10.59 A key finding of the ALRC Case Review is that conduct and/or prejudgment were by far the category of bias raised most frequently in disqualification requests reported in judgments over the past five years in the Commonwealth courts.

10.60 **Table 10.1** shows the breakdown across courts, noting that one request may raise multiple categories of bias.

Table 10.1: Disqualification requests — by category of bias

	FCC	FamCA	FamCAFC	FCA	FCAFC	Total
Association	12	6	1	15	3	**37**
Conduct and prejudgment	72	91	22	75	3	**263**
Extraneous information	3	12	0	3	1	**19**
Interest	2	0	0	8	1	**11**
Other	5	8	0	6	0	**19**
Unclear	41	41	12	27	0	**121**

10.61 This might suggest that courts and judges are proactive in screening for and/or recusing themselves in relation to the other categories. It could indicate that the law in the other categories is clearer, so that matters are only raised where there is a significant likelihood of success. In addition, or alternatively, it might indicate that, by its nature, conduct/prejudgment is the broadest category, potentially applicable in any case, and therefore most likely to arise or to give concern to litigants.

10.62 **Table 10.2** shows the breakdown of disqualification requests that were ultimately successful or partly successful, by category of bias raised. Only one of the identified cases involved more than one category of bias being raised (upholding the conduct and prejudgment ground rather than the association ground),[92] so this is likely to closely reflect the grounds on which the requests were upheld.

92 *Deputy Commissioner of Taxation v Chemical Trustee Limited (No 9)* [2015] FCA 1178. Both association and conduct/prejudgment were raised in this case. The request was upheld on the grounds of prior critical findings of credit giving rise to an apprehension of prejudgment, and the grounds of association were rejected on the basis that the issue had been twice disclosed to the parties with no objection made.

Table 10.2: Successful disqualification requests — by category of bias

	Disqualification	Part disqualification
Association	4	0
Conduct and prejudgment	20	2
Extraneous information	1	2
Interest	0	0
Other	0	0
Unclear	8	0

10.63 Again, issues of conduct/prejudgment are represented most often in successful disqualification requests. On review of the individual judgments, of the 22 cases where judges disqualified themselves in relation to issues of conduct and prejudgment:

- thirteen related to previously adverse findings about the credit or behaviour of one of the parties;
- six related to statements in court – one that identified an issue that assisted one party, and five that were considered to justify a prudent approach to recusal, because they may have given rise to an apprehension of prejudgment or prejudice towards a party;
- two related to previous findings of fact concerning facts at issue in the proceedings; and
- one related to conduct connected to court proceedings, where an order was granted in error that operated unfairly in relation to one party.

10.64 In terms of appeals, five of the seven successful appeals of disqualification decisions concerned conduct/prejudgment, one extraneous information, and the other was unclear. In relation to recusal on a judge's own motion, one case was recorded in relation to interest, five for association, eight for conduct/prejudgment, and one for extraneous information.

10.65 These findings are consistent with the ALRC Survey of Judges, where participants most frequently recorded prejudgment (or involvement with the case as a judge) and association as the reasons for reallocation prior to listing,[93] recusal

93 Here the option given was 'prior involvement with the case as a judge'. The two most frequently selected reasons for recusal were association (relationship with party/counsel/witness) (26) and prior involvement in the case as a judge (16). See further **Chapter 5**.

on their own initiative,[94] party disqualification requests,[95] and successful party disqualification requests.[96] Association was more frequently recorded as the reason for reallocation prior to listing and recusal on own motion, and prejudgment for applications for disqualification.

Describing categories of case where issues of disqualification may arise

10.66 The first area identified through consultations as amenable to potential reframing in the guidelines on judicial disqualification and through case law is the description of categories of case in which apprehended bias may arise. As set out in **Chapter 3**, case law often, though not invariably, refers to the four categories identified by Deane J in *Webb v The Queen* as a helpful frame of reference: interest, association, conduct, and extraneous information.[97] Particular difficulties arise with the description of the category of 'conduct'. In ordinary usage this can give rise to implications of misconduct or poor judicial conduct. 'Conduct' in this sense can be seen by many — and was described by some in consultations — as *evidence* of prejudice, partiality, or prejudgment, rather than a *source* of bias.

10.67 However, a large group of cases in the 'conduct' category relate to an apprehension of bias arising out of intellectual positions that the judge has previously taken — such as findings of credit made in related proceedings, or positions adopted in extrajudicial writings or speeches. This has led to some describing the latter type of case under a sub-category of 'prejudgment',[98] because of the particular principles applied by courts to determine whether an apprehension of prejudgment has arisen. But here, prejudgment can also be conceptualised as a manifestation of bias,[99] rather than — like the other categories — the source of that bias. Prejudgment as a state of mind has been the subject of significant discussion by judges in the case law, in relation to both allegations of actual bias, and apprehended bias.[100]

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94 The two most frequently selected reasons (n = 38) for recusal in these circumstances were association (relationship with party/counsel/witness) (19) and prejudgment (eight).

95 Judges were asked to indicate all applicable grounds of bias that were raised most frequently by parties and that resulted in recusal/self-disqualification (n = 82) (respondents could choose multiple options). The most frequent grounds raised by parties were prejudgment (35), association (relationship to party/counsel/witness) (13), and conduct in court (12).

96 Participants indicated (n = 29) that the grounds on which they most frequently recused/disqualified themselves following a request from a party were prejudgment (10) and association (relationship to party/counsel/witness) (nine).

97 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

98 See **Chapter 3**.

99 The High Court has referred to both actual bias 'in the form of prejudgment' and apprehended bias 'in the form of prejudgment': see, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 [31], [33] (Gummow A-CJ, Hayne, Crennan and Bell JJ). See further *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [72] (Gleeson CJ and Gummow J) (referring to the 'state of mind described as bias in the form of prejudgment'); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [104] (Heydon, Kiefel and Bell JJ) (noting that the 'apprehension here raised is of pre-judgment').

100 See **Chapter 3**.

10.68 Given this, the ALRC considers that it may be helpful — in the guidelines on disqualification — to avoid the use the words 'conduct' and 'prejudgment' to describe situations in which questions of disqualification may arise. This is particularly important because these are the disqualification grounds raised most frequently in the reported judgments.[101]

10.69 The ALRC considers that the *Recusal Guidelines* of the High Court of New Zealand provide a helpful example of one way in which the issues may be presented, adapted and expanded appropriately to Australian law.[102] The *Recusal Guidelines* focus on the issues that may require disclosure and/or recusal by judges prior to a hearing under the following headings:

- Recusal where economic interest;
- Recusal where relationship exists;
- Recusal arising from legal practice; and
- Recusal where opinions earlier expressed.

10.70 If exposure to extraneous information is also included, these cover (with one exception) the major types of issues raised in the ALRC Case Review and by stakeholders. They do not include issues of apprehended bias related to departures from proper standards of fairness or poor judicial conduct during the hearing, which could be dealt with separately, as discussed further below.

10.71 At the same time, the guidelines on disqualification should make it clear that the apprehension of bias is case dependent, and the fact that particular circumstances fall outside the examples in the guidelines does not mean that there cannot be a reasonable apprehension of bias in the circumstances at hand.[103]

Allegations of prejudgment arising from interim rulings

10.72 The ALRC Case Review and comments to the ALRC Survey of Judges highlighted interim decisions against a party as the catalyst for a significant number of requests for disqualification. These objections are usually dismissed on the grounds that a judge deciding an issue against a party does not, without more, give rise to an apprehension of bias.[104]

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101 See **Table 10.1**.

102 Other categorisations for apprehended bias cases have been adopted. Some cases distinguish 'conflict of interest' cases from 'prejudgment cases'. See *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [25]–[26] (Spigelman CJ) (in the context of administrative decision-making). Professor Tarrant examines the case law on disqualifying factors under the following headings: interest in the cause; prejudgment or predetermination; association; outside influence or information; and, conduct by the judge or decision-maker. See John Tarrant, *Disqualification for Bias* (Federation Press, 2012) ch 4. McIntyre, in a general theory of dispute-specific threats to impartiality, discusses material threats, relationship threats, and issue-based threats. See Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) ch 11.

103 See **Appendix G**, *Recusal Guidelines* (High Court of New Zealand, 2017) [1.7].

104 See, eg, *Piepkorn v Caroma Industries Ltd* [2000] FCA 1230.

10.73 In consultations this was considered to be a particular issue in family law litigation, where matters were docketed to a judge for case management and interim orders, and would remain in the judge's docket until final orders, sometimes many years, and many rulings, later.[105]

10.74 With the merger of the Family Court and Federal Circuit Court, the FCFCOA has adopted a new national case management system in family law matters.[106] This makes much greater use of judicial registrars in case management and interim hearings: the first court event is to be listed before a judicial registrar, and an interim hearing is to be listed before a senior judicial registrar, or judge, as necessary or appropriate in the circumstances of the case. Approximately six months from the date of filing matters are to be listed for a compliance and readiness hearing before a senior judicial registrar, or a judge different to the allocated trial judge.[107] Only after this stage is it expected that the parties will come before the allocated trial judge.

10.75 This new process should significantly reduce the opportunities for perceptions of bias by way of prejudgment in relation to the trial judge arising through interim rulings and interactions in case management hearings. As explored further in **Chapter 12**, it is also aimed at increasing the amount of time available to judges to conduct interim hearings and trials, which in itself may support the appearance of judicial impartiality.

10.76 Reliance on judicial registrars may give rise to its own issues in relation to apprehended bias, including in relation to association as many judicial registrars have recently worked in private practice. However, a party may seek review of a registrar's decision by a judge as of right, providing an important and easily accessible safeguard.[108] An information note published by the FCFCOA confirms that all applications for review are managed nationally and may be heard by a local or interstate judge, including the Chief Justice/Chief Judge, and Deputy Chief Justice/Deputy Chief Judge.[109] The submission from the Asian Australian Lawyers Association emphasised the importance of evaluating the impact of such changes on litigant experiences.[110]

10.77 Despite these changes in the family law sphere, given the prevalence of applications for disqualification related to interim rulings and interlocutory orders this would be an important area to consider addressing in each trial court's guidelines

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105 As to the difficulties that the docket system may give rise to in terms of apprehended bias, see *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 299 CLR 577 [176] (Callinan J).

106 Federal Circuit and Family Court of Australia, *Central Practice Direction — Family Law Case Management*, 1 September 2021.

107 Ibid. Confirmation that the judge for the compliance and readiness hearing is intended to be a different judge to the allocated trial judge was obtained through consultations.

108 *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 100, 256.

109 Federal Circuit and Family Court of Australia, *Update to the Profession: Applications for Review* (2021).

110 Asian Australian Lawyers Association, *Submission 42*.

on judicial disqualification (**Recommendation 1**). In this area, at least three key principles are well established and often repeated in the case law:

- The fact that an order has been made against a party is not in itself a disqualifying ground.[111]
- The expression of a tentative view by a judicial officer in the course of a hearing, in particular, a directions hearing, does not necessarily indicate that the judge has closed their mind.[112]
- A previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, will amount to a disqualifying ground.[113]

Relationships and *ex parte* communications with lawyers

10.78 Two major issues arose in consultations and submissions concerning the relationships and contact between judges and lawyers. The first concerned the specificity of guidance around contact between judges and lawyers during litigation in light of the decision in *Charisteas*. The second related more broadly to the approach that the cases take to how members of the public, litigants, and lawyers view the potential for apprehended bias to arise from relationships between the bar and the bench. This is one area where clarification through the *Guide to Judicial Conduct* would be helpful.

Ex parte communications

10.79 The High Court's decision in *Charisteas* has cemented the rule of 'basic judicial practice' 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.[114]

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111 *Piepkorn v Caroma Industries Ltd* [2000] FCA 1230 [10] (Wilcox J); *Cavar v Greengate Management Services Pty Ltd* [2016] FCA 961 [31] (Bromwich J); *Callas v Callas* [2018] FCCA 4 [148] (Judge Altobelli). See further Tarrant (n 102) 134–6.

112 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 299 CLR 577 [112]–[114] (Kirby and Crennan JJ); *Johnson v Johnson* (2000) 201 CLR 488 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See further *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd* [2013] FCAFC 150 [43] (Allsop CJ, Middleton and Katzmann JJ).

113 See, eg, *Jess v Jess* (2021) 63 Fam LR 545 [396] (Alstergren CJ, Strickland and Kent JJ); *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 [20]–[22] (Besanko J); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 300 (Mason, Murphy, Brennan, Deane and Dawson JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ).

114 *Charisteas v Charisteas* (2021) 393 ALR 389 [13] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ), quoting *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127 (McInerney J).

10.80 The High Court's judgment was very short, clear, and unanimous. It demonstrates quite a different approach to both the understanding of 'basic judicial practice' and the application of the test for apprehended bias to that adopted by the majority in the court below. This underscores the potentially important role that guidance can play in shaping and providing transparency to shared understandings of basic judicial practice.

10.81 The High Court explained that the practice of avoiding communications in the absence of the other party, in all but exceptional circumstances, upholds the appearance of impartiality. It quoted previous authority, now reproduced in the *Guide to Judicial Conduct*, to the effect that this is important to avoid exposing the judicial officer to

> a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.[115]

10.82 The High Court's judgment in *Charisteas* has partially clarified the time period in which *ex parte* communications should be avoided.[116] It is clear from the court's judgment that the requirement applies strictly from the time the trial starts until delivery of the judgment.[117] The High Court suggested, without resolving the matter clearly, that it also has application during the pre-trial 'docket' period, noting that nothing in the authorities 'limits the period necessary to avoid communication to after the commencement of the trial' (contrary to the finding of the majority in the judgment below).[118] In light of this, the Hon Richard Chisholm AM suggests that, pending further clarification:

> it might be wise for judges and lawyers to assume that the principle applies fully to the docket period — a period in which, surely, confidence in the administration of justice requires that the judge must act without apparent bias.[119]

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115 Ibid (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ), quoting *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127 (McInerney J).

116 As to the previous uncertainty, see the Hon Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29(3) *Australian Family Lawyer* 18.

117 *Charisteas v Charisteas* (2021) 393 ALR 389 [16]–[18], [22] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

118 Ibid [16] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ); The Hon Richard Chisholm, '*Charisteas*: The High Court Rules on Judicial Bias' (2021) 30 *Australian Family Lawyer* (forthcoming); *Charisteas v Charisteas* (2020) 389 ALR 296 [162]–[163] (Strickland and Ryan JJ).

119 Chisholm (n 118).

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.

10.83 Although the basic judicial practice of avoiding *ex parte* communications during litigation is clearly reflected in the *Guide to Judicial Conduct*, the time period over which the prohibition applies is not clarified. The remaining uncertainty about whether prohibition on *ex parte* communications applies, and the relevance, if any, of the nature of communications during the docket period, is a very important one. The judgment has underscored the negative ramifications for parties and public confidence of departure if judges get it wrong. In consultations, some stakeholders noted that different judges had very different approaches to the extent to which contact was permissible during ongoing litigation — while some judges had clearly established practices of seeking agreement from a party if, for example, they were going to attend a function at which counsel for the other party would be present, it was suggested that other judges had much less strict approaches to the rule. For this reason, clarity about what basic judicial practice requires is important. It is also important to ensure that guidance for the profession is consistent with that practice.

10.84 This is a matter that requires competing considerations to be balanced. Historically, particularly in the family law sphere, cases might remain on a judge's docket for a number of years. Stakeholders from small jurisdictions and/or specialised areas of law emphasised in consultations that it may be very difficult, if not impossible, for judges and lawyers to avoid contact during the docket period without completely withdrawing from professional and social life. The High Court alluded to these concerns in relation to the period between trial and delivery of judgment, noting that:

> It may be accepted that many judges and lawyers, barristers in particular, may have continuing professional and personal connections. The means by which their contact may be resumed is by a judge making orders and publishing reasons, thereby bringing the litigation to an end. It is obviously in everyone's interests, the litigants in particular, that this is done in a timely way.[120]

10.85 It may be that the adoption of the FCFCOA's new national case management system in family law matters, which should limit the period of time individual cases are allocated to a judge's docket, will make these concerns less acute.[121] There may also be particular factors to be considered in relation to judges on circuit, and during

120 *Charisteas v Charisteas* (2021) 393 ALR 389 [22] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

121 See [10.74].

on-Country hearings in Native Title matters.[122] Recognising these concerns, and developing principled guidance as to prudent practice in light of them through the *Guide to Judicial Conduct*, by reference to the High Court's decision in *Charisteas*, is an appropriate way to address the remaining uncertainty.

10.86 Greater specificity generally may assist judges, particularly when they are new to the bench, and may help to avoid situations of extensive wasted time and costs such as those demonstrated in *Charisteas*. Even if the actions of the judge demonstrated a departure from the basic standards of judicial practice that may not have been guarded against by more specific guidance, greater clarity may have assisted the appeals court to see the trial judge's conduct as clearly giving rise to apprehended bias.

10.87 The framing of professional conduct rules and guidance is also important in this area. Those rules expressly deal with communications with a judge in the absence of another party and explicitly prohibit such communication on 'any matter of substance in connection with current proceedings'.[123] This decidedly narrower framing of the prohibition was suggested in the reasons of the majority of the appeals court in *Charisteas* as one reason that the judge and counsel in question may have been confused as to what was required to avoid giving rise to grounds for disqualification in the case.[124] In an area which has been emphasised by the High Court as so crucial to upholding public confidence in the administration of justice, it is important that the scope for confusion is reduced.

10.88 There was some support in submissions and consultations for more guidance on *ex parte* communications.[125] A large majority of participants in the ALRC Survey of Lawyers agreed that there should be greater specificity in the written professional rules about appropriate contact between judicial officers and lawyers appearing in cases before them.[126] Those who had a significant practice in family law were more inclined to strongly agree that there should be greater specificity than overall.[127]

10.89 On the other hand, the Law Council of Australia did not see a need for reform to the rules and noted that

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122 It may, for example, be desirable and arguably necessary that judges hearing native title matters spend time within the claimants' country and culture to understand the claim , but always with the knowledge and consent of the respondent party or parties.. This cultural immersion is as unique as native title itself, and arguably raises unique issues. Some of these are directly tied to the tension inherent in 'impartially' adjudicating within an imposed system of law on matters that directly concern alternative systems of law and lore. See further **Chapter 2**.

123 See, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 54; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 22.5 and equivalent rules applicable in other states and territories.

124 *Charisteas v Charisteas* (2020) 389 ALR 296 [177]–[178] (Strickland and Ryan JJ).

125 Professor Tania Sourdin, *Submission 33*; Asian Australian Lawyers Association, *Submission 42*.

126 Seventy per cent (n = 186) 'strongly agreed' or 'somewhat agreed' with the statement.

127 Of those with a significant practice in family law, 62% (n = 50) strongly agreed with the statement, compared to 46% (n = 186) overall.

> the AIJA Guide and the relevant Professional Rules have contained different tests with respect to contact between judges and lawyers for some time and [the Law Council] is not aware of a strong argument for amending the Rules. … Indeed, the Law Council understands that its members view the ASCR [Australian Solicitors Conduct Rules] as an aspirational document for principles-based professionalism, which reflects the underlying equitable and fiduciary common law duties owed by legal practitioners. There is a concern that the increased codification of the Rules may reduce the moral significance they had at inception, risking a perception of the ASCR as being similar to black letter law statutes. … The Law Council also notes that rulemaking does not, in itself, prevent conduct that may jeopardise public trust in the judicial system.[128]

10.90 The ALRC accepts that upholding standards of basic judicial practice is a matter primarily for judges. However, members of the legal profession also have a role to play as officers of the court in maintaining public confidence in the administration of justice. It is important that the coherence of the legal professional conduct rules with the standards expected of judicial officers is reconsidered in light of the High Court's judgment in *Charisteas*. It may be that, following review, it is concluded that there is no need to revise the legal professional rules, but that any necessary clarification could be provided through the associated commentary. Although these rules are directed at lawyers, and are unlikely to provide any greater clarity directly to litigants or members of the public, a shared and consistent understanding of 'basic judicial practice' in this area can help to prevent situations of apprehended bias arising, and provide more certainty in applying the law in this area.

10.91 Although ideally such reviews will be coordinated, the ALRC notes that the legal professional rules are subject to processes of regular review, and it may be most efficient for the review in this area to be conducted as part of those normal processes.

Professional relationships and the fair-minded lay observer

10.92 A repeated concern raised in consultations and submissions by litigants, and some lawyers, is the perception that some judges are too friendly with counsel or solicitors for one side to impartially hear their case. The ALRC Case Review suggests that this is not an issue that is regularly litigated, and it seems that the most obvious conflicts of interest are generally dealt with sensibly by prophylactic recusal. However, this is an area where sensitivity to community views and transparency about the policy choices involved in ordinary practice is important.

10.93 At a general level, what the legal profession takes for granted in this area does not necessarily match the initial reactions of a significant proportion of the public. As discussed above,[129] case law has clearly established that the fact that a judge

128 Law Council of Australia, *Submission 37*.
129 See 'In Focus: Existing clarity'.

shared chambers with counsel for one of the parties, or that counsel or solicitors are well known to the judge, does not, without more, give rise to an apprehension of bias.[130] A number of cases have treated applications for disqualification on such a basis, or similar bases, as 'absurd', 'tenuous', 'fanciful', or 'ludicrous'.[131] For example in *Christian v Société Des Produits Nestlé SA*, a judge was asked to disqualify herself from an appeal on the grounds that she was previously a member of the same barristers' chambers as counsel for one of the parties, was publicly referred to on the chamber's website as a distinguished alumna, and that her husband was also a senior member of the chambers. Considering the application, the challenged judge noted that the litigant's submission

> shows no understanding of the way in which the Bar works or the relationship between Bench and Bar. No reasonable person would draw the conclusions asserted by [the litigant] … Spurious innuendo based upon evidence obtained by trawling through the Internet to trace indirect and remote links between a judge and a practitioner cannot provide a basis for actual or apprehended bias.[132]

10.94 Against those views, in a recent nationally-representative survey of members of the public in Australia and the UK (n = 2,064) conducted by Higgins and Levy, slightly over one third of respondents in both countries (UK 37%; Australia 36%) thought that a judge who was previously a member of the same chambers as a barrister representing a party in a case should be disqualified from hearing the case. The question in the survey made it clear that barristers who shared chambers contributed to the cost of running the chambers but did not share profits. While there are good reasons for the reasonableness of an apprehension of bias to be considered against ordinary judicial practice in this area — particularly where members of the judiciary are still predominantly drawn from the bar and the system would otherwise be unworkable — this is a reason why transparency about that ordinary judicial practice is important to uphold the appearance of impartiality and to attempt to dispel suspicions of impropriety.

10.95 The case law and guidance is also clear that the fact that a judge and lawyer are good friends is not a reason for disqualification, although there are exceptions where the relationship is an intimate one.[133] However, some litigants and lawyers suggested that, where a judge and lawyer have a particularly close friendship — such as where they are considered like family, have a close mentorship, where

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130 *Bienstein v Bienstein* (2003) 195 ALR 225 [33] (McHugh, Kirby and Callinan JJ); *Day v Woolworths Group Ltd* [2021] QCA 42 [50]–[51] (Henry J, Mullins JA and Williams J agreeing); *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215, 230–1 (Merkel J).

131 *Bienstein v Bienstein* (2003) 195 ALR 225 [33] (McHugh, Kirby and Callinan JJ); *Christian v Société Des Produits Nestlé SA* [2015] FCA 1341 [15]–[16] (Rares J); *Christian v Société Des Produits Nestlé SA (No 1)* [2015] FCAFC 152 [36] (Bennett J).

132 *Christian v Société Des Produits Nestlé SA (No 1)* [2015] FCAFC 152 [36] (Bennett J).

133 See, eg, *Bienstein v Bienstein* (2003) 195 ALR 225 [33] (McHugh, Kirby and Callinan JJ); *Day v Woolworths Group Ltd* [2021] QCA 42 [50]–[51] (Henry J, Mullins JA and Williams J agreeing); *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215, 230–1 (Merkel J). As to the exception see *Kennedy v Cahill* (1995) 118 FLR 60; *Nadkarni v Nadkarni* [2011] FamCAFC 160. See further Australasian Institute of Judicial Administration (n 14) 16.

one is godparent to a child of the other, or one was best man or bridesmaid at the wedding of the other — this is a matter that should be disclosed to the parties to give them the opportunity to raise an objection to the judge sitting in those circumstances. Information about such relationships is now much more easily accessible to members of the public, and a number of people the ALRC consulted expressed significant distress that these were facts that they became aware of only after the hearing of their matter. They felt that it was entirely possible that the very close relationship operated, even if unconsciously, to favour the other side, and left them with a significant sense of injustice.

10.96 This was an issue raised in the consultation process for the *Ethical Principles* in Canada. The previous version of the ethical principles expressly refrained from providing specific guidance as to relationships that may give rise to a conflict of interest requiring recusal. In the consultation process for the revised principles, one question asked participants whether they agreed that 'Judges should not have any close relationships with a lawyer when the other party is self-represented'.[134] Eighty-three per cent of participants agreed with this statement. The principle finally adopted is even broader, stating relevantly that:

> Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member.[135]

10.97 In *Charisteas*, the High Court suggested that a particularly close relationship between a judge and counsel, as evidenced by private communications while proceedings were on foot, might of itself give rise to an apprehension of bias. In *Bienstein v Bienstein*, three members of the High Court suggested that a 'substantial personal relationship' with a person involved in the proceedings may give rise to grounds for disqualification.[136]

10.98 As in the discussion on *ex parte* communications above, there are significant competing considerations involved in suggesting recusal where a close friend of the judge is a lawyer for one of the parties. This is particularly the case in specialised areas of practice and in small jurisdictions, where a judge's support network may be made up of barristers from a small bar. In this respect, the clear rules on *ex parte* communications may be a reason to favour recusal. To uphold public confidence in the administration of justice, an expectation of disclosure of particularly close friendships with lawyers for a party is an area that should be given further consideration in any review of the *Guide to Judicial Conduct* carried out pursuant to **Recommendation 6**. Of course, this raises the question of how close is 'particularly close', but here clarification of judges' existing practice in this area would be helpful to inform any guidance.

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134 Canadian Judicial Council (n 83) 6.
135 Canadian Judicial Council (n 15) [5.C.8].
136 *Bienstein v Bienstein* (2003) 195 ALR 225 [33] (McHugh, Kirby and Callinan JJ).

10.99 Finally, at an individual case level, a number of litigants raised concerns about perceptions of bias arising from what they saw as overly familiar conversation and joking between a judge and lawyer in the courtroom.[137] The *Guide to Judicial Conduct* is clear about the risks to the appearance of impartiality that this can bring, and feedback to the ALRC from stakeholders bears this out.[138]

Bias and courtroom management

10.100 A judge's work in managing courtrooms effectively requires the deployment of significant communication and emotion management skills, often in very difficult circumstances.[139] It is also often crucial to how litigants perceive the fairness of proceedings. In this respect, the *Equal Treatment Bench Book* produced by the Judicial College of England and Wales ('*Equal Treatment Bench Book*') suggests that:

> Judges should try to put themselves in the position of those appearing before them. An appearance before a court or tribunal is a daunting and unnerving experience. …
>
> Empathy is critical. As Judge Brian Doyle has said, 'Empathy is a quality all judges need – it is not partisanship, but understanding how someone is reacting in a process which is alien to most people'. …
>
> Inappropriate language or behaviour is likely to result in the perception of unfairness (even where there is none), loss of authority, loss of confidence in the system and the giving of offence. A thoughtless comment, throw away remark, unwise joke or even a facial expression may confirm or create an impression of prejudice. It is how others interpret the judge's words or actions that matters, particularly in a situation where they will be acutely sensitive to both. Conversely, where people feel that they have been heard, and treated fairly, they are more able to accept an adverse outcome: procedural justice is important for the operation of the rule of law.[140]

10.101 Courts are, by necessity, an uneven environment. There are many legal and practical reasons why a judge is in charge of what happens in court, and must be clearly seen as such. This is why instances of judicial overreach or poor judicial behaviour in court are so damaging to confidence in the process. Although a throwaway comment may seem relatively inconsequential to those in courtrooms

137 See further **Appendix E**.

138 Australasian Institute of Judicial Administration (n 14) 19: 'A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases.'

139 See generally, Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021).

140 Judicial College of England and Wales, *Equal Treatment Bench Book* (2021) 6–7. See also United Nations Office on Drugs and Crime (n 53) 47.

every day, as outlined in **Appendix E**, the issues at stake for many litigants are often of huge personal importance.[141]

10.102 **Table 10.1** shows that complaints of apprehended bias arising from a judge's statements or conduct in proceedings are often found in reported references to disqualification requests. This was reflected in consultations with, and submissions received from, litigants. Key concerns in this area fell into two main categories: first, behaviour in court that gave rise to perceptions of prejudgment; and, secondly, were concerns about inappropriate judicial conduct towards litigants, legal representatives, and witnesses in court.

10.103 As Sir Grant Hammond observed, such cases give rise to difficult questions about

> whether such conduct may amount to bias on a 'stand alone' basis, or whether it is better treated as an objection that a party has not had a fair trial. This may not raise any real difference in respect of the legal tests to be applied, but of course the point at which one can mount a complaint and the procedures to be followed thereafter may well differ depending on how a court sees this issue.[142]

10.104 The ALRC Case Review suggests that both the bias rule and the fair hearing rule have a role to play in addressing these concerns in individual cases. This makes sense, and is consistent with what the ALRC was told by litigants about the reasons they perceived bias in their case, a number of which are traditionally 'fair hearing issues'. As outlined in **Chapter 2**, impartiality requires both an impartial attitude, and a process of listening to both sides. However, in this area the scope of the bias rule is defined by pragmatic limits about behaviour that is considered unacceptable. Addressing these issues also requires assisting judges to manage the courtroom in a way that enhances the confidence of all participants, and appropriately resourcing them so that they are able to do so.

Case management, active intervention, and prejudgment

10.105 The accepted role of judges in a hearing has shifted significantly towards greater recognition of the importance of active case management. Interventions by a judge that were once unthinkable are now required by relevant legislation. For example, in child-related proceedings in family law, judges have specific duties to 'actively direct, control and manage the conduct of proceedings' and powers to give directions about the evidence to be presented and how it is to be given.[143]

10.106 These changes, and time pressures in court systems with significant backlogs, can lead to perceptions that a judge is not interested in hearing a litigant's story, giving rise to concerns that the judge has prejudged a matter. As set out in more detail in **Appendix E**, many perceptions of bias reported by stakeholders related to whether they felt they had been treated with respect in court, and the

141 Judicial College of England and Wales (n 140) 7.
142 Sir Grant Hammond (n 29) 117.
143 *Family Law Act 1975* (Cth) ss 69ZN, 69ZX.

extent to which the judge had been interested in considering evidence, and hearing and trying to understand their story.

10.107 Although the bias rule may operate in such circumstances, its scope is limited.[144] Numerous cases have found an apprehension of bias to have arisen through a judge's actions in the hearing, but judges are given a significant degree of latitude in how they manage cases, as long as their management does not display 'a departure from the standards of fairness and detachment required of a trial judge'.[145] The reasonableness of an apprehension of bias in these circumstances will be judged against changing expectations of the judge's role and the statutory framework in which they operate.[146]

10.108 Some cases identified in the case review show judges adopting a prudent approach to recusal in relation to future proceedings where it is suggested that their statements in managing proceedings have, in combination, given rise to an apprehension of prejudgment or prejudice.[147] These show the difficult considerations that judges may need to balance in such cases. For example, in *Cousins v Peake (No 2)*, the judge noted that:

> My manner with the mother has been terse. She is a difficult litigant in that she constantly interjects, interrupts and makes inflammatory statements tangentially. I get no pleasure from directing her to sit down or to be quiet but, if I did not do so, no-one else would have a say and I do not have unlimited time. All judges have a duty to sit to hear cases. Litigants cannot pick their judges and judges cannot select those who appear before them. Any disqualification of a judge passes a burden onto other judges to take up work that they might not otherwise have had. The smaller the number of judges in a Registry, the more significant that burden may be as well as the possibility that a necessitous occasion may arise and there is no judicial officer to sit. One or other of the parents may experience disadvantage as a result of there being no available judicial officer but the children may suffer the greatest disadvantage. …
>
> The fact the best interest of the children are to the forefront of my mind and paramount in my considerations, requires me to focus on their interests rather than the mother's behaviour. Her behaviour influences the manner in which I can interact with her but it does not impact on my ability to assess her case. That said, I cannot ignore my finding that she is a difficult personality and that I have found her to be so. …
>
> Recusal is a nuanced issue in this case. I do not want any grievance which the mother bears me to make the parenting proceedings more complicated

144 For summaries of the relevant case law, see Tarrant (n 102) 194–203; Sir Grant Hammond (n 29) 117–28; Matthew Groves, 'Excessive Judicial Intervention' (2021) 50 *Australian Bar Review* 139.

145 *Antoun v The Queen* (2006) 80 ALJR 497 [22] (Gleeson CJ). As to the latitude given to judges, see Groves (n 144) 142–4.

146 See, eg, *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 299 CLR 577 [111] (Kirby and Crennan JJ); *Johnson v Johnson* (2000) 201 CLR 488 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Cerwin v Cerwin* [2019] FCCA 3184 [8]–[10].

147 See, eg, *Coady v Yachting Victoria Inc* [2018] FCCA 3113 [15]–[16]; *Cousins v Peake (No 2)* [2018] FamCA 729 [38]; *Hanas v Jolaha (No 3)* [2019] FamCA 342 [26]–[28].

> than they need to be. The final determination of the mother's application for relocation will include an assessment of the mother's personal qualities and her commitment to permit and encourage the children to have an ongoing and meaningful relationship with the father per se and across international borders. In all the circumstances of this case, I am prepared to find that a fair-minded, fully informed observer would have a reasonable apprehension that even before the proceedings commence I have considered the mother's presentation to be difficult and, accordingly, might conclude that I would not bring an impartial mind to the resolution of the question I am required to decide.[148]

10.109 On appeal, some cases have been found to reach the threshold of apprehended bias, requiring remittal for rehearing — one such case identified through the ALRC Case Review is *Reynolds v Sherman*, where the Full Court of the Family Court held there was a reasonable apprehension of prejudgment.[149] The mother, who was self-represented, had submitted that the judge had

> entered the courtroom already of the mind to rule in favour of the respondent and she spent the duration of the hearing making assumptions and defending the respondents [sic] requests. She ignored evidence that I put before her and shrugged off information she did not wish to hear.[150]

10.110 The Full Court found that apprehended bias arose because the judge expressed a 'preliminary view' as to the outcome at the outset of the hearing, and then 'seemingly took over the role of the father's lawyer (even though the father was represented)'.[151] The Full Court found that:

> While it is proper for a judicial officer to test submissions as they are made, we consider that the exchanges between the mother and her Honour compounded the impression that had already been created that the trial judge had made up her mind. In contrast, the father's submissions (which were ultimately handed up in written form) were not tested at all.[152]

10.111 In making this finding, the Court noted the 'pressures of work in a busy trial court' and were 'sympathetic to the effort her Honour made to resolve the matter expeditiously', and suggested that the matter be allocated appropriate time on remittal to a different judge.[153]

10.112 In other cases, claims that the judge did not properly hear and determine matters, also giving rise to claims of bias but without the judge taking an active role, have been upheld on fair hearing grounds.[154] Again, in some of those cases, courts at the appellate level have recognised that extreme pressure on judges to deal with interim matters quickly made it very difficult for a proper process to take place.[155]

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148 *Cousins v Peake (No 2)* [2018] FamCA 729 [33], [35], [38].
149 *Reynolds v Sherman* [2015] FamCAFC 128.
150 Ibid [9] (May, Thackray and Aldridge JJ).
151 Ibid [14] (May, Thackray and Aldridge JJ).
152 Ibid [16] (May, Thackray and Aldridge JJ).
153 Ibid [61] (May, Thackray and Aldridge JJ).
154 *Matenson v Matenson* [2018] FamCAFC 133.
155 Ibid [72]–[75] (Murphy J).

In Focus: Self-represented litigants and experiences of court

The *Equal Treatment Bench Book* produced by the Judicial College of England and Wales provides the following context for judges when considering how self-represented litigants might experience court proceedings and interpret statements made by judges.

> Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.
>
> The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.
>
> …
>
> All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants.[156]

Inappropriate judicial conduct

10.113 More specific concerns were raised in consultations about the operation of the bias rule in responding to poor judicial behaviour, some of which was described as bullying.[157] A majority of stakeholders from the legal profession emphasised that the vast majority of Commonwealth judges do their utmost to uphold the highest standards of behaviour and impartiality, often in difficult circumstances. However, both litigants and lawyers (through submissions, consultations, and surveys) suggested that there were some serious, if isolated, issues in relation to poor judicial behaviour in court giving rise to perceptions of bias and significantly undermining their confidence in the administration of justice. **Appendix E** summarises what the ALRC was told by litigants and lawyers in relation to this issue.

10.114 Research shows that the degree of effort involved in judges' everyday work to manage their own emotions, manage the emotions of others, and effectively deploy emotion, is significant.[158] In this context, some poor judicial conduct, rather than evidencing bias, may reflect

156 Judicial College of England and Wales (n 140) 12.

157 As to bullying in the global legal profession generally, including by members of the judiciary, see, Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, International Bar Association, 2019).

158 See generally Roach Anleu and Mack (n 139).

> understandable human responses to the interactive nature of judicial work in a context of very high caseloads, time pressure, limited resources, and the potential for significant judicial distress, even trauma. Emotions can run high for all participants (lay and professional). Inappropriate judicial conduct may not be linked to bias but can result from human qualities of temperament, lack of emotion awareness and limited emotion management skills.[159]

However, the impact of the behaviour may disadvantage one party, leading to unfairness, and give rise to perceptions of bias. As such, it can be damaging to confidence in both the fairness and impartiality of proceedings, and litigant acceptance of outcomes, undermining the rule of law.[160] For this reason, the law draws a line at certain conduct which is seen to be unacceptable if the courts are to maintain public confidence in the administration of justice.

10.115 Concerns about poor judicial behaviour were reflected, for example, in responses to the ALRC Survey of Lawyers, where comments referred to bullying of litigants and parties in court, sarcastic remarks, angry outbursts and yelling at counsel, discriminatory statements, and discriminatory jokes at the expense of clients. One survey participant noted that they had

> observed a decrease in judicial politeness and manners coupled with a distinct increase in rudeness and sarcasm. This has been accompanied by a significant increase in clients spontaneously raising their concerns with me they are not obtaining a fair trial.[161]

10.116 There was a view from some stakeholders that some members of the judiciary had not kept pace with decreased tolerance for bullying behaviour in society and other professions more generally. One participant in the ALRC Survey of Lawyers suggested that 'judicial office is the last bastion of accepted bullying'.[162] One litigant the ALRC consulted suggested that her experience in court was like being back in medieval times. Another participant in the ALRC Survey of Lawyers said:

> Sometimes judges' conduct (eg intemperate language) is excused on the basis of their workload. This however is not an acceptable excuse. To look at it from the other perspective, it would be regarded as an inadequate excuse to a charge of professional misconduct or unsatisfactory conduct for a solicitor or barrister to say that they had an outburst because they were 'stressed' or had a heavy workload. Also, in no other modern workplace would being 'overworked' be regarded as a normatively acceptable excuse for bullying behaviour. It should be no different in a court.

10.117 Behaviour of this type gives rise to very real apprehensions of bias on the part of litigants and lawyers. However, a number of stakeholders suggested that,

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159 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.
160 See Judicial College of England and Wales (n 140) 7.
161 ALRC Survey of Lawyers, July–August 2021.
162 Ibid.

although the law on bias and fair hearing rules provide important safeguards in such cases, they were not a particularly effective, or sufficient, response.

10.118 Application of the rule on bias in these circumstances is difficult both procedurally and substantively. Procedurally, stakeholders emphasised that this is precisely the type of situation where raising an issue of apprehended bias with the judge concerned was likely to make matters worse for the client, and for lawyers and their future clients.[163] The situation also gives rise to particular difficulties in terms of waiver, discussed further below.

10.119 Substantively, it has been noted that bias 'claims resting upon exchanges or behaviour at a court hearing are rarely successful', although such challenges are relatively frequent.[164] This is borne out by the ALRC Case Review.[165] The case law in this area has recognised that, in the context of the many demands placed upon them, 'judges can sometimes show signs of strain without creating an apprehension of bias'.[166] It has been emphasised that judicial behaviours 'vary, sometimes widely', and the issue is whether 'the judicial scales remained sufficiently balanced'.[167] Professor Young suggests that the review courts have to 'provide pragmatic answers to these challenges for the sake of the lower judges' ability to manage proceedings and interact with parties — even more so in an age of high caseload pressures, unrepresented litigants and bolder litigation strategy'.[168]

10.120 In this respect, Sir Grant Hammond suggests that there is a 'difference in real life between distinct partisanship and things merely getting out of hand somewhat'.[169] In *Galea v Galea*, Kirby A-CJ noted that:

> A judgment of the loss of impartiality and neutrality would not be made from a short and emotional exchange taken out of context and then weighed in isolation. Judges, like witnesses, are human. Despite their professional training they are, in varying degrees, likely to show the range of emotions to which humanity is heir. Whilst patience is a judicial virtue, so also is a concern about justice, the efficient conduct of proceedings, and the avoidance of unnecessary delay, including to other litigants awaiting their hearing.[170]

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163 Ibid.

164 Young (n 8) 935.

165 Although, as discussed above, it did identify some cases where judges adopted an explicitly prudent approach and recused themselves from future proceedings where a party raised a concern in this respect, where they did not think the behaviour was inappropriate, but could see the benefit of transferring the matter to a different judge in maintaining confidence in the proceedings.

166 Groves (n 144) 144.

167 *R v T, WA* (2013) 118 SASR 382 [77] (Kourakis CJ).

168 Young (n 8) 936. See also Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*. They suggest that there are 'several problems with using the bias rule to control undesirable judicial conduct in court'. These include that the conduct may arise from institutional factors beyond the control of the individual judge, that using the bias rule has the potential to generate an unwarranted implication of purpose or intent, and that it may reinforce a limited notion of judicial impartiality that emphasises judging as wholly rational, detached, and unemotional.

169 Sir Grant Hammond (n 29) 118.

170 *Galea v Galea* (1990) 19 NSWLR 263, 279 (Kirby A-CJ).

10.121 This context and fact specific approach can lead to inconsistency in application. In their submission, Emerita Professor Mack and Professor Roach Anleu note that a review of cases they conducted 'demonstrates that kinds of judicial conduct found to breach the bias rule in some cases overlaps substantially with conduct found not to breach the bias rule in other cases'.[171]

10.122 Nevertheless, appellate courts will in some cases find that conduct may cross a line so as to give rise to an apprehension of bias. In a recent case before the Full Federal Court, the court noted that it was

> alive to the fact that the issue before us is one of apprehended bias, not what we might consider preferable judicial behaviour, that there are many different approaches to the judicial function, that the demands of a busy court are many and varied, that some self-represented litigants can be demanding and at times frustrating, and that it is plain beyond argument that a judge has the power and, indeed, the obligation to control the proceedings in his or her courtroom.[172]

10.123 However, having listened to the audio recording of the hearing, the Court observed that the judge 'never stopped questioning or arguing with the appellant until minutes from the end of the submissions', and belittled the appellant's arguments.[173] The recording demonstrated that the judge 'raised his voice and spoke in an aggressive and sometimes intimidating tone of voice on a number of occasions when there was no apparent need to do', used a mocking tone at one point, and at another adopted an 'enraged and intimidating tone of voice in the course of shouting at the appellant for the purpose of admonishing her for talking over him'.[174] In light of all the circumstances, the Court reached the 'clear view' that

> a fair-minded lay observer might reasonably apprehend that the primary judge might not have brought an impartial and unprejudiced mind to the resolution of the respondent's application for summary dismissal.[175]

10.124 In consultations, some judges noted that they have on occasion recognised themselves when they have, out of frustration, crossed the line and will recuse themselves without any formal application being made. Here, the bias rule can be seen as providing an important safeguard mechanism for judges when they realise that they may have undermined confidence in the process.

10.125 Other cases throw the close interaction between a fair hearing and the bias rule in this area into sharp light. Some cases raising these issues are upheld on

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171 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*. See further Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66.

172 *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343 [35] (Greenwood, Besanko and Reeves JJ).

173 Ibid [36] (Greenwood, Besanko and Reeves JJ).

174 Ibid [37]–[38] (Greenwood, Besanko and Reeves JJ).

175 Ibid [49] (Greenwood, Besanko and Reeves JJ).

fair hearing grounds.[176] This was a point commented on in consultations, and borne out by the ALRC Case Review, where some appeals raising allegations of bias and procedural unfairness were upheld on fair hearing grounds, not bias, and remitted to a different judicial officer for rehearing.[177] In some cases, the courts have upheld both grounds.[178]

10.126 In the recent English case of *Serafin v Malkiewicz*, the Supreme Court of the United Kingdom explored the particular difficulties that poor judicial conduct can have for a self-represented person in putting their case. On the basis of the arguments that had been raised, the Court adopted a fair hearing approach, rather than an analysis under the bias rule.[179] Lord Wilson (with whom the other members of the Court agreed) held that 'hostile' interventions towards a self-represented litigant during oral evidence had produced an unfair trial.[180] His Honour referred to the *Equal Treatment Bench Book*, explaining some of the particular difficulties self-represented litigants can face in presenting their cases.[181] The bench book advised '[n]ot interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer'.[182] Lord Wilson emphasised that:

> Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly.[183]

10.127 No argument under the bias rule had been advanced, although the court below had noted that '[o]ne is left with the regrettable impression of a judge who, if not partisan, developed an animus toward the claimant'.[184]

10.128 In cases identified in the ALRC Case Review seeking disqualification on the basis of statements made in court, some judges referred to observations made by the Hon Justice J Thomas AM that

> all judges should regularly ask themselves whether they are being unnecessarily aggressive towards counsel or litigants. The deference with which judges are treated in court makes it easy to fall into this trap. … Courts

176 As to the overlap and distinction between the two, see Groves (n 144) 151–2. See further *RPS v The Queen* (2000) 199 CLR 620 [11].
177 *Huda v Huda* [2018] FamCAFC 85; *Nimmo v Bush* [2017] FamCAFC 69.
178 *Adacot v Sowle* [2020] FamCAFC 215. See further Groves (n 144) 151.
179 *Serafin v Malkiewicz* (2020) 1 WLR 2455.
180 Ibid. The judgment includes extracts from the transcript, with short observations by Lord Wilson, as a Schedule.
181 Ibid [46], quoting Judicial College of England and Wales, *Equal Treatment Bench Book* (2020) [8].
182 Ibid [46], quoting Judicial College of England and Wales, *Equal Treatment Bench Book* (2020) [59].
183 Ibid [46].
184 *Serafin v Malkiewicz* (2020) 1 WLR 2455 [37], quoting *Serafin v Malkiewica* [2019] EWCA Civ 852 [114].

> are robust institutions and it is undesirable that either judges or counsel should be too thin-skinned about an occasional skirmish.[185]

10.129 This can be seen simply to reflect the view that the odd cross word or heated exchange should not be a reason for trust in the process to be diminished. However, in light of the feedback received in consultations, it is questionable whether the framing of the last sentence of this quote reflects contemporary societal values. Some practitioners the ALRC consulted emphasised that what was once considered 'robust conduct' by judges is now considered unacceptable by litigants (both represented and self-represented) and the profession. In addition, what was once considered 'thin-skinned' is now considered a legitimate concern about providing a safe and respectful workplace for practitioners and a process that engenders the confidence of litigants.[186]

Other responses beyond the bias rule

10.130 The preceding discussion suggest that, while the law on apprehended bias has an important role to play in relation to responding to judicial conduct in court that may give rise to perceptions of bias on a case-by-case basis, barriers to using it may mean that courts are not given the opportunity to apply it in all appropriate cases. **Chapter 9** expands on the barriers that many litigants face when trying to address issues of poor judicial conduct through appeal mechanisms, a point repeatedly emphasised by stakeholders. Stakeholders did not consider that appeal and internal complaints mechanisms were able to deal effectively with many of the instances of poor judicial conduct they had encountered that gave rise to perceptions of bias. **Recommendation 5** is partly directed to addressing this problem.

10.131 In addition, given that, for good reasons, the law will only address the clearest of cases, it is important that other strategies are employed to support judges to manage the courtroom, and manage their own emotions, in a way that gives confidence in judicial impartiality. This was a point made by Mack and Roach Anleu in their submission to the Inquiry.[187] They emphasised that the 'significance of judicial emotion and the judicial effort involved in managing a judge's own and others' emotions needs recognition and support'.[188] They suggested that these issues should also be addressed through 'judicial selection, orientation, education, training, case management, in-court proceedings, and responses to perceived judicial [mis]conduct'.[189] **Recommendations 5**, **7**, **9**, **11**, and **12** are partly directed to addressing these issues.

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185 *BOX16 v Minister for Immigration* [2018] FCCA 2910 [71] (quoting the last sentence only); *FKP17 v Minister for Immigration* [2018] FCCA 2053 [25]. The passage quoted is from the Hon Justice J Thomas, *Judicial Ethics in Australia* (Law Book Co, 1988) [4.7].

186 Australasian Institute of Judicial Administration (n 14) 19. See further **Appendix E**.

187 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.

188 Ibid.

189 Ibid.

Judging 'track records' and claims of bias

10.132 The use of statistics on a judge's 'track record' of decision-making to ground a claim of apprehended bias was identified in consultations as raising particular difficulties for the operation of the existing law.[190]

10.133 This relates to arguments that a judge's record of decisions in particular types of cases or concerning particular types of litigants is so one-sided that the fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the dispute. In some cases, these arguments are supported by statistics as to previous decisions,[191] and in others by reference to a sample of past rulings, and/or appellate comment on them.[192] Such arguments have been run in a number of cases over the past 25 years, always unsuccessfully.[193]

10.134 With increasingly sophisticated technology to access and analyse judgments, and to record numbers of cases on the dockets of individual judges, these arguments have become more frequent over the past five years. Such cases are not confined to Australia — the ALRC is aware of similar arguments being raised, for example, in refugee cases in Canada and Ireland.[194] In the latter case, which settled before judgment with the resignation of the tribunal member concerned, in addition to statistics, the evidence included uncontested affidavits 'from a number of solicitors that they feel obliged to advise appellants that there is no prospect of success before this particular member'.[195]

10.135 The reasons judges have given for rejecting such arguments are varied, and often multiple, including the inadmissibility of evidence to prove 'tendency' on the part of the judge,[196] that the reasonable observer would see past decisions as irrelevant to future decisions,[197] that the raw data was not enough, without further analysis, to show bias,[198] that the data itself had flaws,[199] and that a record of decision-making does not show *why* such decisions were made — even if they were

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190 As to this area generally, see Groves (n 42).

191 See, eg, *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30.

192 See, eg, *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

193 See, eg, *Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher* (1994) 52 FCR 34; *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; *CDD15 v Minister for Immigration and Border Protection* (2017) 250 FCR 587 [15] (Perram, Robertson and Wigney JJ); *Veliu v Minister for Immigration and Border Protection* [2018] FCA 53; *Olsen v Olsen* [2019] NSWCA 278; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 [16] (Jagot, Yates and Stewart JJ).

194 *Turoczi v Canada (Citizenship and Immigration)* [2012] FC 1423; *Nyembo v The Refugee Appeals Tribunal* [2007] IESC 25 (Tribunal member resigned before the case was decided).

195 *Nyembo v The Refugee Appeals Tribunal* [2007] IESC 25 [2].

196 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 [30] (Jagot, Yates and Stewart JJ); *CDD15 v Minister for Immigration and Border Protection* (2017) 250 FCR 587 [75] (Perram, Robertson and Wigney JJ).

197 *Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher* (1994) 52 FCR 34.

198 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [38] (Allsop CJ, Kenny and Griffiths JJ).

199 Ibid [40] (Allsop CJ, Kenny and Griffiths JJ).

wrong, they may not have been wrong because the judge was biased, and each case would need to be considered individually.[200] In some cases, such evidence has been held to go to predisposition, rather than prejudgment.[201] Cases in both Canada and Australia have, however, left open the possibility that — with sufficiently sophisticated statistical analysis — such a case might conceivably succeed.[202]

10.136 In cases of apprehended bias by way of prejudgment the question is not whether the judge's mind was actually incapable of alteration (which appears to be the question underlying some of the case law in this area), but whether 'an independent observer might reasonably apprehend that the decision maker might not be open to persuasion'.[203] This formulation can be seen to necessitate a 'precautionary approach'.[204] As explained by the Victorian Court of Appeal,

> the observer may simultaneously consider there is a real possibility that the judge is impartial, and a real possibility that the judge is not impartial. Whenever there is a real possibility that the judge might not bring an impartial mind, the judge should not hear the case.[205]

10.137 Groves notes that this 'low threshold' does not sit comfortably with the courts' insistence that findings of apprehended bias are 'serious' and ones that will not be upheld lightly.[206] It might be argued that this tension is at the heart of the 'track-record' cases. Groves suggests that 'sometimes numbers do speak for themselves and that also sometimes courts seem hard of hearing'. He adds:

> Sometimes statistics are so extreme, so one-sided, that their sheer weight alone *might* say something even in the absence of a detailed analysis of the cases that comprise the statistical set.[207]

10.138 The decisions in these cases may therefore be seen to reflect an unrealistic approach to the view a fair-minded lay observer would take of the situation. The Law Council of Australia emphasised in its submission that

> disregarding a statistical analysis of a judge's decisions for the purposes of assessing actual or apprehended bias may sit uncomfortably with community expectations … [T]he ALRC should further consider the argument that in some cases 'the numbers do speak for themselves'.[208]

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200 Ibid [38] (Allsop CJ, Kenny and Griffiths JJ); *Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher* (1994) 52 FCR 34 [33] (Heerey J).

201 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [38]–[39]. See also *Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher* (1994) 52 FCR 34 [26] (Heerey J).

202 *Turoczi v Canada (Citizenship and Immigration)* [2012] FC 1423 [15]; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 [43] (Jagot, Yates and Stewart JJ).

203 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [23] (Spigelman CJ); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283. See further **Chapter 3**.

204 Groves (n 42) 64.

205 *Melbourne City Investments Pty Ltd v UGL Ltd* [2017] VSCA 128 [67] (Warren CJ, Tate and Whelan JJA).

206 Groves (n 42) 64.

207 Ibid 78.

208 Law Council of Australia, *Submission 37*.

10.139 The implications of a finding of apprehended bias in such a case are, however, very serious. Such a finding would, presumably, rule out the judge from sitting on such matters in the future, and might impugn decisions in the area that the judge had already made.

10.140 Cases regularly stress that judicial independence and the integrity of the justice system requires that 'judges do not choose their cases, and litigants do not choose their judges'. On the other hand, there may be significant implications for public confidence and the rule of law where rigorous statistical analysis provides evidence of very significant discrepancies in outcome. As Dorostkar notes:

> the pursuit of upholding the rule of law does not require judges to strive to become like the blindfolded *Justitia,* achieving perfect neutrality and objectivity. It must be recognised that the formalist processes of judicial decision-making are tainted with the inherent personal preferences and biases of judges. As a result, it can reasonably be expected that a level of natural variation and discrepancy exists in patterns of judicial decision-making from to judge to judge, without conceding that judicial impartiality and the rule of law have been violated. Inconsistencies in decision-making beyond the acceptable levels, however, are theoretically unjustifiable and practically create the perception that the outcome of cases depend more on the luck of which judge is assigned to the case.[209]

10.141 These are very difficult, but important issues for the Commonwealth courts. With increasing technology, more detailed statistical analysis may form part of future challenges. Although this is an area that may be developed further through case law, the ALRC considers that it should also be addressed proactively by the courts. It is therefore considered further in **Chapter 12**. **Recommendation 13** directly addresses this area.

209 Keyvan Dorostkar, 'Judicial Review of Refugee Determinations: More by Luck than Judgement?' (Thesis, Macquarie University, 12 February 2020) 3.

Waiver

10.142 Significant concerns were expressed in consultations, and in two submissions, about the operation of implied waiver in relation to poor judicial conduct during proceedings.[210] The concern is that the operation of implied waiver in such cases forces parties to make tactical decisions determined by private considerations such as time, cost and forensic risk, rather than questions of litigant and public interest. Justice Callinan referred to this problem in *Johnson v Johnson*, noting that even 'exceptionable, apparently biased conduct' could present a dilemma

> almost impossible to resolve … or to resolve without causing offence to the court and the creation of a not unreasonable perception on the part of the parties, of prejudice to the one who takes the point.[211]

10.143 As Groves has noted, the

> point here is the counterintuitive one that more clear cut cases of bias may be harder to raise. The very facts that support a bias claim — an overly intrusive, perhaps even disruptive judge — can also make lawyers especially reluctant to raise the issue in the clear terms required.[212]

10.144 In addition, such cases provide further difficulties because 'the subtlety of individual points may be such that it is almost impossible for a party to harness them for the purposes of a bias submission'.[213]

10.145 On one view, the common law doctrine is already flexible enough to deal with these concerns. Some cases concerning bias arising from in-court behaviour have recognised that given the cumulative nature of many different issues giving rise to apprehended bias it may not be possible to identify the 'inescapable point' at which a party is either required to raise the issue of bias or to forego it.[214]

10.146 Other cases have held that the point should be raised 'once the pattern was said to have become apparent'.[215] In *Tong v Niem*, a case where the relevant party was represented by senior counsel throughout, the Full Court of the Family Court held that a delay of two and a half months between the pattern becoming apparent and the bringing of an application for disqualification was too long, and the court found waiver was established.[216] However, both the challenged judge and appellate judge nevertheless considered the arguments concerning bias on their merits in great detail, holding that apprehended bias did not arise.[217]

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210 See also Dr Joe McIntyre, *Submission 46*; Law Council of Australia, *Submission 37*. As to the operation of waiver generally in relation to procedural fairness, see Matthew Groves, 'Waiver of Natural Justice' (2019) 40(3) *Adelaide Law Review* 641. See further **Chapter 3**.

211 *Johnson v Johnson* (2000) 201 CLR 488 [79] (Callinan J).

212 Groves (n 144) 164.

213 Aronson, Groves and Weeks (n 3) 719.

214 *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [34] (Basten JA).

215 *Tong v Niem* (2020) 61 Fam LR 619 [60] (Ryan, Aldridge and Watts JJ).

216 Ibid [60] (Ryan, Aldridge and Watts JJ).

217 Ibid [24]–[25] (Ryan, Aldridge and Watts JJ).

10.147 This was a pattern regularly encountered in cases where waiver was identified in the ALRC Case Review.[218] Even where waiver was held to be established, the court would almost invariably consider the matter on its merits, concluding that, in any event, apprehended bias did not arise.[219] This indicates that in reality, waiver may play a marginal role in the outcome of decisions on apprehended bias, although judges still value it as important to control potential tactical use of bias claims.[220]

10.148 However, the concern about tactical use of claims arguably does not arise in cases of apprehended bias arising from poor judicial conduct. Groves has suggested that waiver

> operates on the assumption that it is 'wrong and unfair' for parties to store a possible objection for a future, more strategically useful, time. That functional basis of waiver would not normally be present in cases of excessive or improper judicial intervention.[221]

10.149 The specific situation of waiver in a case raising alleged poor judicial conduct was examined by the Full Court of the Federal Court in *Jorgensen v Fair Work Commission*.[222] The appeal in that case was run on other procedural fairness grounds, apparently because counsel had not raised the issue of bias below. The court noted that:

> It is, however, questionable whether the failure to object in the particular circumstances of this case would have constituted a form of waiver … That is because the interventions occurred throughout the trial and it may in those circumstances have been difficult to identify a particular point in time when objection should have been taken … The impact or risks associated with the interventions may also not have materialised until the *ex tempore* judgment was delivered by the primary judge.[223]

10.150 This appears to be a realistic approach to the doctrine of waiver that recognises the very great difficulties it poses in cases of poor judicial conduct. On this basis, it appears that the common law can be appropriately developed to manage the justice of such cases by discretionary approaches to reasonableness.[224] However, others have suggested that cases in which this could be done are simply not brought, because the lack of clarity and discretionary nature of any such inquiry makes any such appeal risky. It has been suggested that a reliance on case law to ameliorate the operation of the rule places the obligation on the parties, not the courts, to protect the right to an impartial judge.

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218 The ALRC did not systematically track waiver across all cases reviewed.

219 See, eg, *Clarke v Premier Youthworks Pty Ltd* [2018] FCCA 2938 [5]; *Cullen v Cullen* [2018] FCCA 851; *Barber v Walfor* [2015] FamCAFC 97 [39]; *Akhtar v Gaber* [2020] FamCA 298 [22]–[23]. Cf *Hackford v Hackford* [2021] FamCA 406 [110].

220 See further Aronson, Groves and Weeks (n 3) 715.

221 Groves (n 144) 166.

222 *Jorgensen v Fair Work Ombudsman* (2019) 271 FCR 461.

223 Ibid [96] (Greenwood, Reeves and Wigney JJ).

224 *Adacot v Sowle* [2020] FamCAFC 215 [109]–[113] (Strickland, Ainslie-Wallace and Watts JJ); *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [26]–[27] (Basten JA).

10.151 Given that any legislative amendment would operate to enhance the protection of judicial impartiality, and would not impinge on judicial independence, there does not appear to be any constitutional limitation on amending the common law doctrine of waiver by statute. However, given the common law does appear flexible enough to manage the concerns in this area, this may be an issue best addressed in the guidelines on judicial disqualification (**Recommendation 1**), with the need for statutory intervention reassessed five years after the publication of those guidelines.

11. Social and Cultural Bias

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Introduction

11.1 Building on the research insights from psychology and behavioural science discussed in **Chapter 4**, this chapter considers the ways in which the bias rule responds to — and does not respond to — the potential for social and cultural factors to improperly impact on judicial decision-making. Given the nature of the judicial function, the need for judges to be in touch with their communities, and the impossibility of maintaining an entirely neutral perspective, the scope of the existing law is appropriate, and in line with research on public expectations.

11.2 Nevertheless, social and cultural factors will inevitably influence the decision-making of judges. Stakeholders have raised concerns about how social and cultural factors can improperly impact on decision-making, negatively affecting some groups more than others. This chapter explores two strands of academic literature in legal theory and philosophy, informed by insights from psychology, that unpack how these factors may influence judgment, even through consciously 'neutral' decision-making. The chapter then considers empirical research that bears out evidence of the operation of social biases at an institutional level in many international, and some domestic, settings.

11.3 As **Chapter 4** concludes, where the rule on bias cannot be appropriately employed to guard against an unacceptable risk, at an institutional level, of improper influences on decision-making, other strategies will be needed to address it. As

such, public confidence (and the confidence of particular communities with lower levels of trust) in judicial impartiality at an institutional level is dependent on both judges, and institutional structures, continuing to recognise and engage with these concerns.

Social and cultural bias, and the judicial oath

11.4 The judicial oath requires judges to 'do right *to all manner of people* according to law without fear or favour, affection or ill will'.[1] It is essential to the judicial function that judges strive, and are seen to strive, to treat parties equally and not favour one side over the other for reasons unrelated to the merits of the case. Prejudice against litigants because of their social characteristics is antithetical to the oath. As the Hon Sir Gerard Brennan AC KBE QC explained, a judge should

> consciously seek to ensure that every party is treated equally before the law, whoever the parties may be, whatever the facts may be and whatever interests will be advanced or defeated by the judgment. But prejudice based on race, religion, ideology, gender or lifestyle may unconsciously affect the mind of a judge, as it affects the minds of others. Unless the basis of prejudice might be material to the merits of the case, the prejudice must be recognised and consciously disregarded. This is easy to say; not always easy to achieve. Indeed, it is sometimes difficult to be sure where the wisdom of human experience ends and prejudice begins.[2]

11.5 Prejudice is a widely studied concept that is both 'complex and multifaceted',[3] and 'deeply embedded in the social organization of societies and connected to structural factors'.[4] As Sir Gerard Brennan recognised in the passage quoted above, prejudice, including that based on social and cultural characteristics, can operate and manifest in different ways.

11.6 Most obviously, prejudice against people can be consciously held and intentionally expressed through discriminatory words or behaviour. An indication that a judge might be prejudiced against one of the parties because of (one or more of) their social characteristics, such as through the explicit expression of obviously discriminatory language or offensive jokes, may be enough to require the disqualification of a judge on the ground that it gives rise to apprehended bias.[5] This is the case even if no offence is intended.[6] Such displays of prejudice — while rare

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1 *High Court of Australia Act 1979* (Cth) s 11; *Federal Court of Australia Act 1976* (Cth) s 11; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 115(1) (emphasis added). See further **Chapter 2**.

2 The Hon Sir Gerard Brennan, 'Why Be a Judge' (1996) 14 *Australian Bar Review* 89, 92.

3 John Duckitt, 'Historical Overview' in John F Dovidio et al (eds), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (SAGE Publications Ltd, 2010) 29, 39.

4 Cristian Tileagă, *The Nature of Prejudice: Society, Discrimination and Moral Exclusion* (Routledge, 2016) 14.

5 See [11.10]–[11.17].

6 *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 [30].

— are directly counter to the standards set out in the *Guide to Judicial Conduct*,[7] and the *Bangalore Principles*.[8]

11.7 However, more difficult to guard against — by both judges and the structures supporting them — are the ways in which prejudice, and judges' social and cultural world views, interact with the social environment and act as 'subtle, ambivalent, generally unintentional biases'.[9] **Chapter 4** explores some of the psychological processes — attitudes (including prejudicial attitudes), scripts, schemas, and stereotypes — that can help to explain why our decision-making may be biased by structural factors in society, and our own social and cultural perspective. This insight is not new to the law. US Supreme Court Associate Justice B Cardozo wrote in 1921 that there is

> in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions … We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[10]

11.8 As the Rt Hon Chief Justice H Winkelmann GNZM has recognised:

> A lack of impartiality can arise for many reasons unrelated to external pressure of any kind. It can arise from prejudice, it can arise from personal animus or affection or it can arise from ignorance.[11]

11.9 The Rt Hon Beverley McLachlin PC CC, former Chief Justice of the Supreme Court of Canada, has emphasised that 'preconceptions that run counter to the law and fair legal process must be rejected', noting that judges

> despite their efforts, may harbour unidentified biases against people of particular races, classes or genders. They may have unwittingly bought into generalisations that people of a certain class, race or gender are likely to act in a certain way.[12]

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7 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 19.

8 *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006) [5.1]–[5.2]. See further United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) [58], [184], [187].

9 Cristian Tileagă, Martha Augoustinos and Kevin Durrheim, 'Towards a New Sociological Social Psychology of Prejudice, Stereotyping and Discrimination' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 1st ed, 2021) 3, 8.

10 Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 12–13.

11 The Rt Hon Chief Justice H Winkelmann, 'What Right Do We Have? Securing Judicial Legitimacy in Changing Times' (Speech, Dame Silvia Cartwright Address, 17 October 2019).

12 The Rt Hon Chief Justice B McLachlin, 'Judicial Impartiality: The Impossible Quest?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 15, 23. For discussion more generally of 'the role of impressions and intuition and the need to take caution to avoid the biases inherent in intuitive or impressionistic decision-making', see also the Hon Justice A Greenwood, The Art of Decision-Making (Speech, Administrative Appeals Tribunal 2018 National Conference, 29 May 2018).

The law on social and cultural bias

Explicitly expressed prejudicial attitudes or stereotypes as prejudgment

11.10 The use of discriminatory language or jokes in relation to one party may give rise to an apprehension of bias. For example, in the English case of *El-Farargy v El-Farargy,* a judge made jokes and comments about a Saudi Sheikh who was a party to proceedings. These included reference to the Sheikh departing 'on his flying carpet', to 'every grain of sand [being] sifted', to the case being 'a bit gelatinous ... like Turkish Delight', and to a 'relatively fast-free time of the year'.[13] On appeal, Ward LJ, with whom Mummery and Wilson LJJ agreed, found that, although there was an appropriate role for humour in the court room, these would

> inevitably be perceived to be racially offensive jokes. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply 'colourful language' as the judge sought to excuse them but, to adopt Mr Randall's submission, to be mocking and disparaging of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith.[14]

11.11 Lord Justice Ward considered that the remarks necessarily gave rise to apprehended bias and allowed the appeal. In doing so, he noted that he had

> given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fairminded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable … they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fairminded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey.[15]

11.12 Reliance on a consciously held and explicitly expressed stereotype about a particular social group might also rise to the level of prejudgment, and give rise to an appearance of bias. In the case of *B v DPP (NSW)*, a District Court Judge, when

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13 *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 [17].

14 Ibid [30].

15 Ibid [31]. The test for apprehended bias in England and Wales requires a 'real possibility', in contrast to the equivalent test in Australia, which is concerned with 'possibility, not probability'. See further **Chapter 3**. In a postscript to his Honour's judgment, Ward LJ also noted the particular difficulties that the self-disqualification procedure gave rise to in such a case, and suggested that 'it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour': [32].

considering the credibility of a witness, stated that 'no normal woman in her right mind would have unprotected sexual intercourse with a man she knew to be HIV positive'.[16] The Court of Appeal was split on whether this statement gave rise to an apprehension of bias.

11.13 In the minority, Barrett JA found that the words used, 'viewed in their context, indicate no more than a permissible testing, against common experience, of a conclusion independently reached'.[17] In the majority, Beazley P (Tobias AJA concurring) recognised that 'judges do not enter upon their decision-making task as if they had no experience of life'.[18] However, her Honour thought that the preconception held by the judge was simply wrong.[19] In her view,

> a fair minded lay observer … might reasonably apprehend that his remark revealed a preconception as to how a reasonable woman, not only this complainant, would act if having sexual intercourse with a man she knew to be HIV positive, such that his Honour might not have brought an impartial and unprejudiced mind to the resolution of the appeal.[20]

11.14 Drawing the line between reliance on impermissible and discriminatory stereotypes and relevant life experience may, as recognised by Sir Gerard Brennan, not be easy.[21] This was highlighted by the split decision of the Supreme Court of Canada in the case of *R v S (RD)* ('*RDS*'), which considered the question of apprehended bias arising from statements a Black judge had made in assessing the relative credibility of a police witness and the person they had arrested.[22] The Crown had asked 'why would the officer say the events occurred the way in which he relayed them', if they did not happen that way.[23] In considering the question, the judge explicitly noted that police officers had been known to mislead the court in the past, and that police officers 'do overreact, particularly when they are dealing with non-white groups'.[24]

11.15 The majority of the Supreme Court considered that the statements made by the judge did not give rise to apprehended bias. L'Heureux-Dubé and McLachlin JJ (with whom La Forest and Gonthier JJ agreed) stated that an

> understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context, … from academic studies properly placed before the Court; and from the judge's

16 *B v DPP (NSW)* [2014] NSWCA 232 [45].
17 Ibid [68] (Barrett JA).
18 Ibid [54] (Beazley P, Tobias AJA concurring).
19 Ibid [58] (Beazley P, Tobias AJA concurring).
20 Ibid [59] (Beazley P, Tobias AJA concurring).
21 Sir Gerard Brennan (n 2) 92.
22 *R v S (RD)* [1997] 3 SCR 484.
23 Ibid [4].
24 As L'Heureux-Dubé and McLachlin JJ noted in the Supreme Court judgment on appeal, this statement took place in the context of a community which had a 'history of widespread and systemic discrimination against Black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: Royal Commission on the Donald Marshall Jr. Prosecution (1989); R. v. Smith (1991), 109 N.S.R. (2d) 394 (Co. CL)': Ibid [47].

> personal understanding and experience of the society in which the judge lives and works.[25]

11.16 Ultimately L'Heureux-Dubé and McLachlin JJ found that in 'alerting herself to the racial dynamic of the case', the judge had

> approached the case with an open mind, [and] used her experience and knowledge of the community to achieve an understanding of the reality of the case.[26]

11.17 A difference between the Australian and Canadian cases may be observed in the extent to which the 'experience' drawn on by the judges at first instance was seen at the appellate level to reflect unidentified, and harmful, negative stereotypes on the one hand, and life experience supported by broader empirical evidence on the other.[27] In the view of the Hon Justice K Mason AC, the 'real tension within the judgments in *RDS* relates to the application of the doctrine of judicial notice'.[28]

The impact of discriminatory comments in the course of hearings

11.18 As the Law Council of Australia's submission points out, in recent years there have been publicly reported instances of judges making 'offensive or racially discriminatory remarks to Aboriginal and Torres Strait Islander defendants, including children'.[29] The Law Council notes that, in the absence of formalised complaints procedures, these comments have in some instances not been met by formal findings of misconduct.[30] Cubillo has described this as a form of systemic bias:

> Here a jurisdiction baldly tolerates problematic judicial behaviour, notably by failing to provide a basic complaint framework, but does not question the legitimacy of having a member of the same bench investigate the complaint.[31]

11.19 The ALRC is not aware of cases where such comments have formed part of a bias application or appeal, although it is possible that, if argued, they may have been considered evidence of apprehended bias. In its submission, Deadly Connections suggested that public litigation funding should be available to provide for appeals

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25 Ibid [44].

26 Ibid [59].

27 Professor Graycar has argued that the distinction the law should make is 'between negatively stereotyping on the one hand, and constructively recognising differences and disadvantage in a way that is sensitive to discrimination and inequality, on the other': Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment' (2008) 15(1–2) *International Journal of the Legal Profession* 73, 82. Similarly, Chief Justice McLachlin has distinguished between 'preconceptions that run counter to the law and fair legal process', such as 'unidentified biases against people of particular races, classes or genders' and those preconceptions which reflect 'values and principles entrenched in our legal system, such as equality or the presumption of innocence': Chief Justice McLachlin (n 12) 23.

28 The Hon Justice K Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 679. See further *R v S (RD)* [1997] 3 SCR 484 [47].

29 Law Council of Australia, *Submission 37*.

30 Ibid.

31 Eddie Cubillo, '30th Anniversary of the RCIADIC and the "White Noise" of the Justice System Is Loud and Clear' (2021) 46(3) *Alternative Law Journal* 185, 191. See further **Chapter 9**.

for First Nations people who perceive racial bias in their proceedings, including where this involves 'reliance on stereotypes or adverse assumptions because the person belongs to a First Nations community'.[32] In this respect, Deadly Connections referred to the ongoing impact of cases such as *R v Brown*, where

> the Ontario Court of Appeal found that the evidence of the trial judge's conduct throughout the trial, taken as whole, supported a finding of a reasonable apprehension of racial bias against the African-Canadian accused.[33]

11.20 The ALRC agrees that the public interest would be served by litigation funding being available for appeals where there are strong grounds to argue that apprehended bias has arisen as a result of discriminatory language against a particular social group used during proceedings or through reliance on negative stereotypes.[34]

11.21 In other cases, language used by a judge in court may not be sufficiently linked to the issues in the case, or to the parties, to amount to apprehended bias, but may nevertheless have a significant impact on how participants in proceedings view the impartiality of the judge and the fairness of the proceedings. In consultations, a number of lawyers explained how judges in Commonwealth and state and territory courts had used discriminatory language in court in relation to clients and/or their legal representatives. These included judicial officers: suggesting to a woman legal practitioner (only) that she might 'enjoy the shopping' in a particular town during the lunch break; repeatedly assuming that a lawyer from a non-white ethnic background was a litigant even after the lawyer had announced appearance as counsel; refusing to use preferred pronouns for transgender litigants, even after being specifically requested to do so; using discriminatory language in relation to a party with an intellectual disability, after being specifically requested not to use it;[35] and telling a lawyer who was born overseas with many years of experience practising in Australia that 'we do things differently in Australia'. One lawyer commented that the situation left them convinced that their client had not had a fair trial, and that they would have been better off had they not gone to court.

11.22 The law on bias may not be the appropriate mechanism for accountability in most if not all of these cases, but confidence in judicial impartiality requires that there are mechanisms to raise concerns about such behaviour, and confidence that

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

33 Ibid, citing *R v Brown* (2003) 64 OR (3d) 161.

34 While noting the different constitutional context between Australia and Canada, given the latter's constitution enshrines a broad right to equality. At a broader level, in her reimagining of the High Court judgment in *Bugmy v The Queen*, Williams finds that apprehended bias arose in the intermediate appellate court, through the court's failure to treat the Aboriginal appellant substantively equally: Mary Spiers Williams, '*Bugmy v The Queen* (2013) 302 ALR 192' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments : Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 277, 290–3.

35 Noting that this occurred many years ago.

those concerns will be addressed without the persons raising them being subject to any repercussions for their career or future cases.[36]

Social characteristics as off-limits for the bias rule

11.23 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 should therefore be disqualified, have not been upheld in Australia or comparable jurisdictions.[37]

11.24 The English Court of Appeal addressed the interaction of a judge's social characteristics and the bias rule expressly in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd*, stating that:

> We cannot … conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.[38]

11.25 This is echoed in the commentary to the *Bangalore Principles*, under the heading 'irrelevant grounds'.[39] The Canadian Supreme Court also endorsed this statement when considering whether an apprehension of bias arose in a case about minority language education, on the basis of the judge's membership in a francophone community organisation.[40] Justice Abella observed that:

> Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.[41]

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36 See further **Chapter 9**.

37 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 686, citing *Paramasivam v Juraszek* [2002] FCAFC 141 [8]; *Lindon v Kerr* (1995) 57 FCR 284; *Bird v Free* (1994) 126 ALR 475. For a more recent example of such a claim being made see *Mathews v State of Queensland* [2015] FCA 1264; *Mathews v State of Queensland* [2015] FCA 1488. See also Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 Part 2, 1994) [16.5]–[16.16].

38 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480 (Lord Bingham of Cornhill CJ, Lord Woolf MR, and Sir Richard Scott VC).

39 United Nations Office on Drugs and Crime (n 8) [89].

40 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282 [59] (Abella J, McLachlin CJ and Rothstein, Moldaver, Karakatsanis, Wagner, and Gascon JJ concurring).

41 Ibid [61] (Abella J, McLachlin CJ and Rothstein, Moldaver, Karakatsanis, Wagner, and Gascon JJ concurring).

11.26 Instead, as discussed in greater detail in **Chapter 10**, for apprehended bias to arise in these circumstances, it must be shown that a judge is so committed to a point of view that their mind might 'not be open to persuasion'.[42]

11.27 There are, as has been recognised, 'institutional, resource and policy reasons' for making issues of presumed social bias off-limits.[43] Not only would it rule out a large proportion of judges from hearing a large proportion of cases, but as Dr McIntyre explains, the

> underlying issues are often closely associated with the self-identification of the individual, and it is neither possible nor desirable for the judges to divest themselves of such relationships …[44]

11.28 All judges will have multiple cultural and social identities, which go to make up who they are as a person. As recognised by the passage from the Supreme Court of Canada quoted above, an approach that assumes a judge will be influenced by a social identity in a particular way can frustrate moves towards greater diversity on the bench — with the targets of applications on the basis of social characteristics often being those judges who bring perspectives that do not fit the mould of the traditional social or professional make-up of the judiciary.[45] In addition, it is very difficult, if not impossible, to make the case that biases arising from a judge's own social identity will impact on decision-making in a *particular* case, because such biases are variable between individuals and often operate in ways we are unaware of, and because such decisions can be influenced by many other factors.[46]

11.29 This is generally consistent with the views of members of the public in Australia and the UK as explored in a recent survey conducted by Associate Professor Higgins and Dr Levy. In that survey, Higgins and Levy asked 2,064 respondents in a nationally representative sample what they thought of different situations of possible bias.[47] Although members of the public across the board were more likely to think judges should be disqualified in particular circumstances than the law required, the one area where this was not the case was in relation to 'shared characteristics or beliefs between the judge and one of the parties', even where the characteristic was

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42 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [104] (Heydon, Kiefel and Bell JJ). See also *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [15]–[24] (Spigelman CJ).

43 Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *Modern Law Review* 633, 651–2.

44 Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 190–91.

45 The Hon Judge M Omatsu, 'The Fiction of Judicial Impartiality' (1997) 9(1) *Canadian Journal of Women and the Law* 1; Graycar (n 27); The Hon Justice D Mortimer, 'Whose Apprehension of Bias?' (2016) 84 *Australian Institute of Administrative Law Forum* 45, 51. This was a point also made by New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*.

46 See **Chapter 4**.

47 Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks about Judicial Impartiality' (2021) 84(4) *Modern Law Review* 811.

relevant to the issue in the case.[48] Respondents were not in favour of disqualification of a judge on the basis of shared characteristics with a party with respect to race, age, gender, disability, and sexual orientation.[49]

11.30 The one exception to this was in relation to religion: a majority of respondents thought that a Catholic judge should be disqualified in a case concerning the lawfulness of abortion, an issue on which the religion has a clear position. A plurality of Australian respondents were also in favour of disqualification of a Muslim judge in a case concerning religious discrimination against a Muslim party, and only a plurality of UK respondents were against disqualification.[50] The different approach taken in the latter question is less easily explained than the example of the Catholic judge — the researchers suggested that it was 'difficult to know whether these responses reflect a degree of anti-Muslim sentiment or whether respondents classed religious beliefs differently to other protected characteristics'.[51] Nevertheless, overall, there was a striking difference in approach by members of the public to issues of disqualification based on social characteristics to other potential reasons for disqualification.

11.31 Despite the good reasons to exclude social characteristics from the operation of the bias rule there is a recognition in the literature, discussed further below, that *at an institutional level* social and cultural factors can and do bias judicial decision-making in a way that may have negative impacts on certain groups.[52] If the bias rule is drawn narrowly in scope around such influences, it is important that other institutional structures acknowledge and, where necessary, actively manage them.[53]

Consultation feedback on bias resulting from social and cultural factors

11.32 Throughout the Inquiry, a significant number of stakeholders highlighted concerns about the impact at an institutional level of social and cultural factors on judicial decision-making. Stakeholders emphasised in both consultations and submissions that:

- it is important for judges to recognise that social and cultural factors, including attitudes and stereotypes, could bias their own decision-making, including in ways they are unaware of, and that they are self-reflective about the potential for such bias;[54]

48 Ibid 813.
49 Ibid 826.
50 Ibid. A majority of respondents in Australia and the UK thought that a Catholic judge should be disqualified.
51 Ibid 827.
52 See, eg, Edmond and Martire (n 43) 652.
53 Ibid 651–2; Kate Malleson, 'Safeguarding Judicial Impartiality' (2002) 22(1) *Legal Studies* 53.
54 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*; Associate Professor Kylie Burns, *Submission 32*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; National Justice Project, *Submission 44*.

- a lack of knowledge about particular issues (such as family violence) or cross-cultural knowledge in relation to particular litigants can lead to decision-making that prefers the perspectives of some groups over others and can impact litigant confidence in the process and the outcome;[55]
- at an institutional level, the relatively homogenous social make-up of the judiciary means that these biases impact decision-making in favour of particular groups and to the disadvantage of other groups;[56] and/or
- institutional failures to provide certain necessary accommodations (such as interpreters, culturally safe procedures, or legal aid) impact impartial decision-making in that they deny some groups of people the opportunity to meaningfully participate in legal proceedings, and prevent the evidence of people from some groups being treated equally.[57]

11.33 In both consultations and in submissions, stakeholders highlighted concrete ways in which these different concerns may arise in relation to specific groups within Australian society.[58]

11.34 These are issues that the ALRC has examined and on which it has made recommendations in a number of inquiries, including in *Multiculturalism and the Law* (1992), *Women's Equality* (1994), *Pathways to Justice* (2016), and *Review of the Family Law System* (2019).[59]

Unpacking bias related to social and cultural factors

11.35 **Chapter 4** summarises some of the research in psychology that explores how cultural and social factors can also impact on how we interpret and process

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55 Progressive Law Network, Monash University, *Submission 30*; Deadly Connections Community and Justice Services, *Submission 35*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

56 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Women Lawyers Association of New South Wales, *Submission 26*; Progressive Law Network, Monash University, *Submission 30*; Deadly Connections Community and Justice Services, *Submission 35*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

57 Deadly Connections Community and Justice Services, *Submission 35*; Asian Australian Lawyers Association, *Submission 42*.

58 Including Aboriginal and Torres Strait Islander people, people with mental illness, people with disability, refugees and asylum seekers, culturally and linguistically diverse people, those from rural and remote communities, LGBTIQ+ people, people of lower socio-economic status, women, men, and survivors of family violence: see, eg, Progressive Law Network, Monash University, *Submission 30*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

59 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [8.29]–[8.38]; Australian Law Reform Commission (n 37) [8.57]–[8.68]; Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) [5.101]–[5.115], [6.165]–[6.166]; Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [13.43]–[13.61].

information, biasing the evaluation of information and even consciously 'neutral' decision-making. This can be explained through models of cognitive illusions and motivated reasoning,[60] and (sometimes in overlapping terms) by reference to the impacts that socially-constructed attitudes, stereotypes, schemas, and scripts have on our evaluation of information and decision-making.

11.36 This section will briefly explore how these insights are reflected in two other areas of research concerned with the justice system. The first is the work of critical legal scholars, including through understanding how 'common sense', which is often required to be drawn on in the evaluation of evidence and application of law, can be culturally and socially specific, and the importance of acknowledging the standpoint a decision maker brings. Insights from philosophy on epistemic injustice also highlight how some groups of people are less likely to be believed, or less likely to be able to have the wrongs committed against them articulated or recognised, in legal proceedings. The section will then consider how empirical research evidences the operation of social biases on judicial decision-making at an institutional level in many international, and some domestic, settings.[61]

The interplay of the structural and the personal

11.37 As Associate Professor Burns notes, 'there are multiple personal, interpersonal, environmental and institutional factors which may induce and contribute to biased or inappropriate judicial reasoning'.[62] The factors that may bias our decision-making at a personal level, including our attitudes and the schemas and stereotypes we draw on, are intricately tied to the social and cultural environment into which we are born and in which we live, and existing structural and institutional biases within it.[63] As people will invariably belong to more than one social group, different aspects of their identity can expose them to intersecting forms of structural bias, or may privilege them in some ways and not others.[64]

11.38 A number of submissions emphasised, for example, how structural biases arising from colonisation, institutional biases, and government policy operate to disadvantage Aboriginal and Torres Strait Islander people in the justice system.[65] As the Law Council of Australia noted:

> bias faced by Aboriginal and Torres Strait Islander peoples in the legal and justice system is entwined with general systemic barriers to wellbeing and

60 For example, as 'in-group bias' or 'identity protective cognition'. See **Chapter 4**.
61 See further **Chapter 4**.
62 Associate Professor Kylie Burns, *Submission 32*.
63 See, eg, Tileagă, Augoustinos and Durrheim (n 9); Kevin Durrheim and Susie Wang, 'Stereotypes: In the Head, in Language and in the Wild' in Martha Augoustinos, Cristian Tileagă and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 184. See further **Chapter 4**.
64 See Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.
65 Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.

> productivity, such as lower life expectancy, physical and mental health, literacy and numeracy skills, access to education, housing and employment, and higher levels of disability, income management, and discrimination. The Productivity Commission has noted that this overarching disadvantage is 'transmitted across generations through the trauma caused by colonisation, and subsequent government policies'.[66]

11.39 At an institutional level, Deadly Connections note how there are

> a number of points at which key decisions are made concerning First Nations people coming into contact with the justice system. At each of these stages, racial bias may surface for the various decisionmakers in criminal (e.g. police), family (e.g. child protection case workers) and civil (e.g. social security bureaucrats) matters. The collective and interrelated impact of racial bias, integrated over time for each person and across all First Nations peoples is significant. Even small biases at each stage may aggregate into a substantial effect. This effect results in direct harm to the individual and the broader First Nations community perceptions of the legal system and judiciary.[67]

11.40 However, although there are different levels at which bias can manifest, and at which it must be addressed, Deadly Connections emphasises the particularly important role that addressing bias at the stage of judicial decision-making can play. In its view,

> the significant power of the judiciary to address and correct injustices occurring at those earlier stages of interactions, and serve as a catalyst for change in the prevalence of racial bias, make the opportunities for judicial reform significant and necessary.[68]

11.41 Research by Professor Devine, Dr Forscher, and others has found substantial evidence that particular interventions involving education, feedback, and self-reflection about personal bias can affect concern about discrimination.[69] The 'changes in concern are themselves associated with an increased tendency to notice when others act with bias and to see biased behaviours in themselves and others as wrong'.[70] Focusing on bias arising at the judicial decision-making stage is only one part of a much larger picture, but, as a number of submissions emphasise, it is an important one.[71]

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66 Law Council of Australia, *Submission 37* (citations omitted).

67 Deadly Connections Community and Justice Services, *Submission 35* (citations omitted).

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

69 Patrick S Forscher and Patricia G Devine, 'Knowledge-Based Interventions Are More Likely to Reduce Legal Disparities Than Are Implicit Bias Interventions' in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) 303, 311, citing Patricia G Devine et al, 'Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention' (2012) 48 *Journal of Experimental Social Psychology* 1267, Patrick S Forscher et al, *A Meta-Analysis of Changes in Implicit Bias* (unpublished manuscript), and Patrick S Forscher et al, *Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity* (unpublished manuscript).

70 Ibid 312, citing Patrick S Forscher et al, *A Meta-Analysis of Changes in Implicit Bias* (unpublished manuscript).

71 Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.

‘Common sense’ and the importance of standpoint

11.42 A large and longstanding body of legal scholarship has explored how social and cultural factors at the individual level can impact on the process and outcomes of judicial decision-making.[72] This is an issue that has also been considered in past inquiries conducted by the ALRC.[73] One strand of this work has examined the role of ‘common sense’ in judicial decision-making. The schemas, including scripts and stereotypes, and heuristics structuring our thinking, are essentially what we think of as our ‘common sense’ and ‘life experience’. When judges evaluate evidence, apply legal tests like the ‘reasonable person’ and ‘reasonable foreseeability’ standards, and interpret legislation, they must rely on their experience of the world and their ‘common sense’.[74] Burns notes that while

> judicial common sense may be accurate, efficient, and consistent with empirical information, it may also be the vehicle through which error, discrimination and bias enters judicial decisions. Judicial common-sense assumptions can be completely inconsistent with empirical knowledge and be a cause of injustice.[75]

11.43 ‘Common sense’ is, as Burns has pointed out, ‘impacted by membership of cultural, institutional and other “groups”’.[76] Common life experiences and common cultural identities can both inform and contribute to motivated reasoning.[77] In addition, ‘common sense’ is culturally specific. Dr Sagiv suggests that judges’ ‘application of common sense can be especially problematic when a case involves individuals who belong to a different cultural group than the judge’.[78] Use of ‘common sense’ based on limited information can lead to misunderstandings. For example, if a litigant uses a metaphor that a judge does not understand, the ‘best case scenario’ is that the judge acknowledges her lack of understanding and asks for clarification. In the ‘worst case scenario’, the judge is ‘unaware of any different cultural interpretations, and will incorrectly apply her common sense’.[79]

11.44 Ignorance and devaluing of Aboriginal and Torres Strait Islander culture and history is one area which is seen to impact on decision-making, and with it, equal

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72 A detailed discussion of the literature is beyond the scope of this Report. For further discussion, see Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2021).

73 See in particular Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [8.29]–[8.38]; Australian Law Reform Commission (n 37) ch 2.

74 Kylie Burns, ‘Judges, “Common Sense” and Judicial Cognition’ (2016) 25(3) *Griffith Law Review* 319; Masua Sagiv, ‘Cultural Bias in Judicial Decision Making’ (2015) 35(2) *Boston College Journal of Law and Social Justice* 229; Chief Justice Winkelmann (n 11); Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [8.37]–[8.38].

75 Associate Professor Kylie Burns, *Submission 32*. See also Burns (n 74) 320.

76 Burns (n 74) 329.

77 Ibid. See **Chapter 4**.

78 Sagiv (n 74) 233.

79 Ibid 233–4.

justice, at the institutional level. The National Justice Project emphasised in its submission how a

> lack of cross-cultural knowledge and understanding can contribute to bias when judges have to make certain assessments, for example make credibility assessments without an understanding of the cultural norms of litigants or assessments about the weight given to certain types of evidence, disregarding the oral traditions in maintaining knowledge in First Nations cultures.[80]

11.45 Cavanagh and Professor Marchetti have highlighted how a lack of understanding of Aboriginal worldviews, including relationships with land, belief systems, and history, can impact on access to justice in areas of law including native title and family law.[81]

11.46 British anthropologist Anthony Good has written about how a lack of knowledge about social and cultural factors and the impact of trauma may also lead to biased credibility assessments in relation to asylum cases: incorrectly adopting the 'common sense' assumptions that people will tell their whole story at every opportunity, that they will be able to recall traumatic events vividly, and that stories will be told in a logical narrative.[82]

11.47 Similarly, retired Canadian judge, the Hon M Omatsu, has suggested that a 'lack of experience of the daily lives of working class people and the circumstances and functioning of specifically working-class institutions' can deprive middle and upper class judges of 'potentially relevant information on which to make impartial judgments'.[83] The impact of a lack of understanding about the circumstances of people living on low incomes was also raised by the submission of the Progressive Law Network, drawing on experiences of the clients of the Springvale Monash Legal Service. One client felt that they had been disadvantaged in family law proceedings as a result of a lack of understanding by the judge and an independent children's lawyer about financial constraints that prevented her from taking time off casual work to travel with her child to visit other family members.[84]

11.48 Use of 'common sense' based on stereotypes can also lead to error.[85] Feminist legal scholars have also shown how male judges' 'common sense' has often involved assumptions about women that are inaccurate and lead to bias and discrimination in

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80 National Justice Project, *Submission 44*.

81 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, 45, citing Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 354, Kado Muir, 'Reconciling through Understanding', *Native Title Newsletter* (online, May and June 1999), and Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32(3) *University of New South Wales Law Journal* 725, 728 ff.

82 Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish, 2006) 190–4.

83 Omatsu (n 45) 7.

84 Progressive Law Network, Monash University, *Submission 30*.

85 Burns (n 74) 331–2.

the law.[86] A notorious example in relation to allegations of rape, contrary to empirical evidence, was the pronouncement of Lord Salmon of the House of Lords that it is

> really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these Courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.[87]

11.49 As the Hon Justice R Atkinson AO recently remarked in a public panel, in her experience the view of many women was the opposite — that rape was a particularly difficult allegation to make because it was likely that it would not be believed.[88]

11.50 As Burns points out, while the 'common sense' assumption relied on by judges may be made explicit, this is not always the case:

> common sense factual assumptions may also be used implicitly in judicial reasoning as a silent lens. These implicit assumptions may be highly influential in the construction of judicial argument, interpretation of adjudicative facts and ultimate decision. For example, every statement of what constitutes 'reasonable' behaviour or the actions of a 'reasonable person' draws on often unconscious judicial assumptions of what constitutes 'reasonable' human behaviour.[89]

11.51 Assumptions about gender roles can also negatively impact on specific legal outcomes such as the assessment of damages awards. In its report on *Women's Equality*, the ALRC examined, for example, how courts had treated unpaid or gratuitously performed work when addressing compensation for personal injury.[90] Others have identified 'how racial stereotyping … can influence judicial decision making', including by 'claiming to accommodate so-called cultural norms'.[91]

11.52 These issues are something that a number of Australian judges have engaged with and discussed publicly. For example, 20 years ago, Justice Mason recognised that:

> Prejudice or its appearance can occur in fact-finding as well as the determination of legal principles. But in neither field does it walk out self-announced. Judges may nevertheless disclose general attitudes, sometimes intentionally sometimes unintentionally. With fact-finding, predispositions may appear in stated or unstated suppositions that influence the judge at point of decision in relation to classes of witnesses (for example, police, plaintiffs from a particular

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86 See, eg, Heather Douglas et al, 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 24–27; Burns (n 74) 322; Graycar (n 27).

87 *R v Henry; R v Manning* (1968) 53 Cr App R 150, 153 (Lord Salmon), cited in *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ), 553 (Gibbs J), 559 (Mason J).

88 Remarks of the Hon Justice R Atkinson at a panel hosted by the Asian Australian Lawyers Association, 'Judicial Diversity in Australia: Panel Discussion' (Brisbane, 21 October 2021).

89 Burns (n 74) 324.

90 Australian Law Reform Commission (n 37) ch 11.

91 See further Elena Marchetti and Janet Ransley, 'Unconscious Racism: Scrutinizing Judicial Reasoning in "Stolen Generation" Cases' (2005) 14(4) *Social and Legal Studies* 533, 541–2.

> ethnic background, children, sexual complainants, persons accused of crime). Such suppositions may relate to the credibility of classes of witnesses (as in *RDS*), but they can affect other factual decisions. Thus, attitudes about the value of domestic work or the likelihood of women remaining in the workforce may have a significant impact in damages assessment, sometimes unawares. … Inherited, learnt or acquired attitudes of particular judicial officers may be deeply influential in the mundane tasks of the judicial life even if they only reveal themselves on spectacular occasions.[92]

Critical judgments projects and the importance of standpoint

11.53 Groups of scholars and practitioners have undertaken judgment rewriting projects to explore how different perspectives, including different versions of 'common sense', might influence the content, reasoning, and outcome of judicial decisions. These began with a number of feminist judgments projects,[93] and include a recent project rewriting judgments from the perspective of Indigenous people in Australia, which had the aim of making the judgments 'inclusive of Indigenous peoples' histories, experiential knowledge, and world views'.[94] In most cases these projects aim, as far as possible, 'to re-write judgments subject to the same constraints as the original judges', including the conventions of judgment writing, the law at the time, the issues and legal authorities raised by the parties, and the facts and expert evidence available on the record.[95] However, some leeway was possible in this regard, and the editors recognise the additional advantages that judgment writers may have had in terms of time, the benefit of hindsight, iterative feedback, and background knowledge of the subject. As such there is recognition that some of the judgments may reach conclusions that might not have been possible for judges in the actual case.

11.54 In relation to the Indigenous Legal Judgments project, editors Associate Professor Watson and Professor Douglas described how some participants in the project

> identified that reconstructing facts through Indigenous eyes provided an opportunity to learn about not just what was said, but also what was missing in the original judgments and, therefore, whose stories were privileged. The rewriting process often exposed assumptions about the concept of 'relevance', the notion of 'expertise', and the choices made about which evidence is highlighted in judgments.[96]

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92 Justice Mason (n 28) 679–80.

93 See, eg, Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010). Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Re-Writing Law* (Hart Publishing, 2014). See further Gilbert + Tobin Centre of Public Law, 'Critical Judgments' <www.criticaljudgments.com/>.

94 Nicole Watson and Heather Douglas, 'Introduction' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 1, 1.

95 See, eg, Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 3, 13–17.

96 Watson and Douglas (n 94) 3.

11.55 As part of their work reimagining judgments, a number of writers have acknowledged their own standpoint, or perspective, drawing on feminist and Indigenous standpoint theories that recognise that 'knowledge is moulded by power relations' and suggest that individuals should acknowledge that they draw upon their own multifaceted perspectives.[97] In her judgment reimagining *Bugmy v The Queen*, lawyer and academic Mary Spiers Williams articulated why she saw it as important that judges do the same:

> Acknowledging one's standpoint is not in tension with the need for courts to aspire to objectivity; in reality, it is not possible to be objective without first addressing one's subjectivity. Standpoint affects how one determines what material is relevant and then how one interprets that material. Judicial officers tend not to reflect on our standpoint (also called 'positionality' or 'perspective'). Acknowledging one's subjectivity is not condoned in the legal field. In this, we are a product of our training and enculturation at law schools and in legal practice, and we engage the methodology in which we have been trained. … While judicial officers must strive for objectivity, we should not be complacent about our capacity to be objective in all cases and should remain vigilant about our susceptibility to bias, recognising the effect that colonisation has had on our society broadly and therefore on us as well.[98]

11.56 Writing the foreword to the publication resulting from the feminist judgments project in England and Wales, the Rt Hon the Baroness Hale of Richmond DBE noted that for her, it was

> remarkable how plausible they mostly are, not only as judicial writing but also as examples of how a different judgment might properly have been written in that case and at that time.[99]

She remarked later that the work from that project, along with her own experience sitting on a collective court, had convinced her that diversity in the judiciary could make a difference to substantive outcomes.[100]

Epistemic injustice

11.57 A related lens through which these issues have been considered is that of 'epistemic injustice'. First developed by philosopher Professor Fricker,[101] the 'concept of epistemic injustice explains the distinctive wrongs that may be done to a person as a knower'.[102] Fricker articulates two forms of such injustice. The first,

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97 Ibid 4–5. See further Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory: A Methodological Tool' (2013) 28(78) *Australian Feminist Studies* 331.

98 Williams (n 34) 291.

99 The Rt Hon the Baroness Hale, 'Foreword' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) v, v.

100 House of Lords Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence* (2012) 272, cited in Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68(1) *Current Legal Problems* 119, 121.

101 Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press, 2007).

102 Jack Maxwell, 'Epistemic Injustice on Palm Island' (2018) 43(1) *Alternative Law Journal* 40, 41.

testimonial injustice, 'occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word'.[103] This may occur, for example, because of their race, or accent.[104] Fricker suggests that where a person is subjected to testimonial injustice they cannot get a 'fair hearing'.[105]

11.58 The second, hermeneutical injustice, 'occurs when a person cannot make sense of or express their experiences because the surrounding culture lacks the requisite conceptual resources'.[106] An example could be where a person suffers domestic violence in a culture that does not properly understand how such violence operates.[107] Both forms of epistemic injustice can lead to biased outcomes.

11.59 Maxwell has examined epistemic injustice in the Australian context, in light of the decision of the Federal Court in *Wotton v Queensland (No 5)*.[108] In that case Mortimer J found that conduct of the police in response to the death of an Aboriginal man on Palm Island in 2004 contravened s 9(1) of the *Racial Discrimination Act 1975* (Cth). Justice Mortimer held that the response of the police was racially discriminatory — both through actions and omissions. In particular, her Honour held that the police did not provide an effective, impartial, and independent investigation into the man's death. Her Honour found that the actions of police officers displayed 'a pattern of disregard for any objective need for impartiality',[109] and that they acted in the way that they did because the investigation concerned an Aboriginal community.[110]

11.60 Maxwell describes the decision as 'a striking example of an Australian court confronting and condemning epistemic injustice'.[111] As Maxwell explained, the Court

> denounced the police's conduct in the language of epistemic injustice. The police did not take [three of the witnesses] seriously because they were Aboriginal, and their accounts potentially implicated a white police officer. Police relied on prejudicial stereotypes to discount their testimony, such as that [one of the witnesses] was a drinker and probably lying to increase his status in the community. Justice Mortimer concluded that 'the officers involved were disposed to disregard or downplay witness accounts given by local Palm Island people, especially where those accounts were adverse to a white police officer.'[112]

11.61 Justice Mortimer found that

> there was no respect from the investigating officers for the members of this community, there was no understanding of them, and there was no sense that

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103 Fricker (n 101) 1.
104 Ibid 1, 17.
105 Miranda Fricker, 'Epistemic Justice as a Condition of Political Freedom?' (2013) 190(7) *Synthese* 1317, 1324.
106 Maxwell (n 102) 41.
107 Fricker (n 105) 1326.
108 *Wotton v Queensland (No 5)* [2016] FCA 1457. See Maxwell (n 102).
109 *Wotton v Queensland (No 5)* [2016] FCA 1457 [848].
110 Ibid [890].
111 Maxwell (n 102) 40.
112 Ibid 42, quoting *Wotton v Queensland (No 5)* [2016] FCA 1457 [1030].

> what they had to say might be more truthful than what a white police officer had to say.[113]

11.62 *Wotton v Queensland (No 5)* is an important example of the courts identifying, and providing a remedy for, epistemic injustice. However, stakeholders suggested that the courts can also be responsible for testimonial and hermeneutical injustice in relation to litigants, including with respect to: Aboriginal and Torres Strait Islander people (for example, by systematically privileging 'expert' testimony on native title matters over the evidence of Elders from the communities concerned,[114] or preferring documentary evidence, however defective, over oral histories);[115] people seeking asylum (by a 'culture of disbelief'); and, victims of family violence (by failing to understand the dynamics of violence such as coercive control). Such injustices, and the biased processes and outcomes they may result in, are also deeply rooted in social and cultural factors.

Research on the institutional impact of social and cultural bias

11.63 The extent to which social and cultural factors operate to bias legal outcomes at an institutional level is the subject of significant empirical research, using both archival and experimental methods.[116] Research has tested whether there is an association between particular characteristics of judges, including their gender, race, ethnicity, and age, and the way they decide specific types of cases. Researchers have also explored whether the characteristics of *litigants* influence judges when making decisions. There is an overlap between research in these two areas, particularly when considering the role of in-group bias in judicial decision-making. Such research poses challenges, as it can be difficult to disentangle whether differences in outcomes relate to bias in judicial decision-making or the manifestation of bias and inequalities in other parts of the legal system.[117] Much of the research is focused on the US.

Judges' characteristics

11.64 One line of research has tested whether there is an association between particular characteristics of judges, including their gender, race, ethnicity, and age, and the way they decide specific types of cases.[118] One criticism of such research,

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113 *Wotton v Queensland (No 5)* [2016] FCA 1457 [987].

114 On this point in relation to Indigenous peoples in the US, see Rebecca Tsosie, 'Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights' (2012) 87(4) *Washington Law Review* 1133, 1155–6.

115 Marchetti and Ransley (n 91) 546.

116 As to the difference between these methods see **Chapter 4**.

117 See further Barry (n 72) 112, 164–5. In this respect, Barry suggests that this is why it is important to triangulate findings from archival studies with results of experimental research: 183. See also Forscher and Devine (n 69) 305.

118 For an overview of this research see Barry (n 72) ch 4. On the issue of the role of lived experience, see further Australian Law Reform Commission, 'Conceptions of Judicial Impartiality in Theory and Practice' (Background Paper JI4, April 2021) [23]–[38].

however, is that it often fails to take into account that judges have multiple personal characteristics that could bear on their decision-making.[119]

11.65 This research provides little evidence for the conclusion that a judge's characteristics influence decision-making in general. However, there is some evidence that personal characteristics may influence decision-making in cases where those characteristics are a salient feature in the case. For example, a recent study found that female judges in the US were more likely to make pre-trial findings in favour of plaintiffs in sex discrimination cases than their male colleagues.[120] This finding is consistent with the results from a similar study on cases brought between 1997 and 2006.[121] Similarly, in a study of judgments from the European Court of Human Rights, it was found that female judges were 25 percentage points more likely to find in favour of a female applicant in sex discrimination cases than male judges.[122]

11.66 A similar pattern of results has been found in relation to a judge's race: differences are generally only shown in relation to cases where race is a salient feature. For example, a study conducted by Cox and Miles found that Black judges in the US decided cases alleging race-related breaches of voting rights more favourably than their white colleagues.[123] Similarly, in a study of employment discrimination cases in the US, researchers found that Black judges were about 39 percentage points more likely to rule in favour of plaintiffs than white judges when the plaintiff's claim related to race discrimination.[124] However, some researchers have found no race-based differences between judicial decision-making when judges' political alignment is taken into account.[125]

11.67 The fact that differences in outcomes are apparent only where the characteristic studied is a salient feature of the case suggests that something other than in-group bias is at play. Some have suggested that differences may result not from illegitimate bias, but rather from shared lived experiences that better inform

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119 Barry (n 72) 112.

120 Ibid 118. The study considered discrimination cases brought by the Equal Employment Opportunity Commission, which is the body with 'statutory authority to sue private employers on discrimination issues in the US'. See Christina L Boyd, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race' (2016) 69(4) *Political Research Quarterly* 788, 793.

121 Barry (n 72) 118. The study 'found that women plaintiffs were six to seven percentage points more likely to settle, and five to seven percentage points more likely to win compensation' whenever a female judge was presiding over a case. See Matthew Knepper, 'When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases' (2018) 36(3) *Journal of Labor Economics* 623, 624.

122 Barry (n 72) 120. See Erik Voeten, 'Gender and Judging: Evidence from the European Court of Human Rights' (2021) 28(9) *Journal of European Public Policy* 1453, 1467. Voeten notes that this effect is 'imprecisely estimated due to the small sample size'.

123 Barry (n 72) 128. Cox and Miles found that 'Black judges were more than twice as likely to find a breach of voting rights legislation than their white colleagues were': see Adam B Cox and Thomas J Miles, 'Judging the Voting Rights Act' (2008) 108 *Columbia Law Review* 1. The study related to cases between 1982 and 2004.

124 Barry (n 72) 129. See Boyd (n 120) 793–4.

125 Barry (n 72) 129. See Jennifer A Segal, 'Representative Decision-Making on the Federal Bench: Clinton's District Court Appointees' (2000) 53(1) *Political Research Quarterly* 137, 144.

their decision-making.[126] This was the view, for example, of former US judge Patricia Wald. In her view, in relation to differences in gender salient cases,

> being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions.[127]

11.68 Similarly, for Omatsu, it is understandable that

> [p]eople who have encountered racial or ethnic prejudice will be better able to identify its various manifestations than those who have not. To the extent that gender, class, race or ethnicity affect one's behaviour on the stand, direct experience will also help judges to interpret a witness's demeanor, for instance to assess credibility.[128]

Litigants' characteristics

11.69 Another line of research has explored whether the characteristics of litigants influence judicial decision-making.[129] Much of this has involved archival research, although again in such research it can be difficult to discern whether differences in court outcomes for particular groups result from a lack of impartiality on behalf of decision makers, or other factors — including legitimate factors, or the manifestation of bias and inequalities in other parts of the legal system.[130] Again, the majority of this research only focuses on one characteristic, when in reality individuals form part of multiple intersecting social groups.

11.70 A significant body of research in this area is on the effect of social bias in relation to ethnicity and race.[131] A large proportion of this research considers disparities in sentencing between racial and ethnic groups, controlling to the extent possible for other factors. In the US, a pattern emerges: judges on US courts sentence Black, Latina/o, and First Nations people more harshly than White people under certain conditions.[132] In the UK, the data is more limited and mixed, but indicates that race influences decisions relating to custody and sentencing.[133] The 2017 Lammy Review in England and Wales, concerning criminal justice in relation to Black, Asian, and Minority Ethnic ('BAME') communities found that decisions on conviction by juries did

126 See, eg, Hunter (n 100) 134–7.
127 Patricia M Wald, 'Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond' (2004) 36 *University of Toledo Law Review* 979, 989, quoted in Barry (n 72) 113.
128 Omatsu (n 45) 8.
129 For an overview of this research see Barry (n 72) ch 5.
130 See further ibid 164–5. In this respect, Barry suggests that this is why it is important to triangulate findings from archival studies with results of experimental research: 183. See also Forscher and Devine (n 69) 305.
131 Barry (n 72) 169–74.
132 Travis W Franklin, 'The State of Race and Punishment in America: Is Justice Really Blind?' (2018) 59 *Journal of Criminal Justice* 18; Barry (n 72) 170, citing (among others) Ojmarrh Mitchell, 'A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies' (2005) 21 *Journal of Quantitative Criminology* 439 and Cassia Spohn, 'Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process' (2000) 3 *Criminal Justice* 427.
133 Barry (n 72) 171.

not show racial disparities, but that disparities did exist for decisions on convictions by magistrates and sentencing by judges concerning BAME communities.[134] The review considered that the way juries make decisions was key to this difference, because 'debate and deliberation acts as a filter for prejudice', and, in the final decision, power is 'never concentrated in the hands of one individual'.[135] It noted that because judges have a broad discretion in sentencing, these issues are unlikely to be picked up and corrected on appeal. The review considered that the disparities were so great in relation to sentencing for drug offences that many

> will conclude that this is evidence of bias. It is now incumbent on the judiciary to produce an evidence-based explanation for the finding [if] it wishes to allay those fears.[136]

11.71 In-group biases have been demonstrated in bail decisions in relation to Israeli/Arab and Jewish suspects in the Israeli courts: Arab and Jewish judges were more likely to release suspects from their own ethnic group.[137] Differential outcomes related to ethnic in-group bias have also been demonstrated in civil law contexts in Israel (small claims),[138] and the US (workplace racial harassment).[139]

11.72 In Australia, research on bias in relation to ethnicity and race has been limited to sentencing disparities in relation to Aboriginal and Torres Strait Islander peoples. While some research has concluded that race has limited or no impact on sentencing,[140] Marchetti and Dr Anthony have critiqued these studies on the basis that they do not adequately consider subjective factors that are relevant to culpability.[141] Studies taking contextual factors into account have found that, for the same offending patterns, Aboriginal and Torres Strait Islander people in Australia are in some circumstances more likely to be imprisoned and receive longer

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134 David Lammy MP, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (2017) 31–3.

135 Ibid 32.

136 Ibid 33.

137 Oren Gazal-Ayal and Raanan Sulitzeanu-Kenan, 'Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment' (2010) 7(3) *Journal of Empirical Legal Studies* 403, cited in Barry (n 72) 172.

138 Moses Shayo and Asaf Zussman, 'Judicial Ingroup Bias in the Shadow of Terrorism' (2011) 126(3) *Quarterly Journal of Economics* 1447, 1483.

139 Barry (n 72) 173, citing Pat K Chew and Robert E Kelley, 'The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race' (2012) 28 *Harvard Journal on Racial and Ethnic Justice* 91.

140 Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *Australian and New Zealand Journal of Criminology* 272, 286; Samantha Jeffries and Christine EW Bond, 'The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature From the United States, Canada, and Australia' (2012) 10(3) *Journal of Ethnicity in Criminal Justice* 223.

141 Elena Marchetti and Thalia Anthony, *Sentencing Indigenous Offenders in Canada, Australia, and New Zealand* (Oxford University Press, 2016) 21. Marchetti and Anthony point to 'subjective factors relevant to culpability, including mental wellbeing, impact of child removal policies, prejudicial exclusion from health and housing services, limited educational or employment opportunities, socioeconomic background, or victimization' that should be considered alongside aggravating factors to give a fuller picture of sentencing proportionality.

sentences.[142] In its 2018 *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, the ALRC found that overrepresentation of Aboriginal and Torres Strait Islander people increases with the stages of the justice system.[143] The ALRC also found that Aboriginal and Torres Strait Islander people are much more likely to receive a sentence of imprisonment and much less likely to receive a community-based sentence or a fine than non-Indigenous Australians.[144] These findings suggest that bias within the justice system may play a role.[145]

11.73 In another line of research in Australia, a recent analysis of every reported decision for cases brought under federal discrimination laws from 1985 to the end of 2018 shows substantially different overall success rates across different discrimination grounds, between courts and tribunals, and across different periods of time.[146] Race and disability discrimination complaints were upheld much less frequently than sex discrimination and sexual harassment complaints.[147] The author of the study, Robin Banks, notes that it 'is not possible to state definitively why there are such marked differences in the rates at which discrimination complaints are upheld as a whole range of variables/factors potentially influence this'.[148] However, the discrepancy between comparatively high success rates for sex discrimination complaints and much lower rates of success in race and disability discrimination complaints is consistent with research by Associate Professor McGlade. McGlade found that, after 20 years of operation of the *Race Discrimination Act 1975* (Cth),

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142 Krystal Lockwood, Timothy C Hart and Anna Stewart, 'First Nations Peoples and Judicial Sentencing: Main Effects and the Impact of Contextual Variability' (2015) 55(4) *British Journal of Criminology* 769.

143 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 59) 26.

144 Ibid [3.47] and see Figure 3.11.

145 Other more structural factors may include a lack of opportunity for community-based sentences in remote and regional areas, and a lack of ability to pay fines: see ibid [7.17], [12.23].

146 Robin Banks, 'An Analysis of Federal Discrimination Case Law' in 'Prejudice and Stigma: Making Their Mark on Discrimination Law Reform' (Unpublished chapter prepared for PhD Thesis (not yet submitted), University of Tasmania, on file with ALRC, 2021). The relevant period for cases were: 1985 to 2001 for cases before the Human Rights and Equal Opportunity Commission; 1988 to 2018 for cases before the Federal Court; 2000 to 2013 for cases before the Federal Magistrates Court; and, 2013 to 2018 for cases before the Federal Circuit Court.

147 Using the figures provided by this analysis, the ALRC has calculated that, at first instance in the Commonwealth courts, sex discrimination complaints were upheld in 35.8% per cent of cases (n = 106), and sexual harassment complaints were upheld in 41.3% of cases (n = 63). In contrast, race discrimination complaints were upheld in 18% of cases (n = 133), and disability discrimination complaints were upheld in 15.6% of cases (n = 218). Before the Human Rights and Equal Opportunity Commission, sex discrimination complaints were upheld in 41.6% per cent of cases (n = 137), and sexual harassment claims in 71.9% of cases (n = 96), while race discrimination complaints were upheld in 30% of cases (n = 110), and disability discrimination complaints were upheld in 55.7% of cases (n = 70).

148 These include (among others) the different statutory regimes applicable to the claims, potentially different levels of resources available to claimants raising different grounds, and different levels of merit in the cases concerned. In relation to decision makers, Banks suggests that relevant factors may include: different levels of awareness about prejudice and how it is experienced by members of the different attribute groups; stronger and/or less conscious biases against some groups; conscious and unconscious attitudes towards different groups; different levels of experience and expertise; and different levels of exposure to diversity across the different attribute groups.

race discrimination is 'very difficult to prove, and harder to establish than sex discrimination'.[149] McGlade also found that 'very low damages are awarded for successful complaints of race discrimination', and the only clear act of racism against Aboriginal people identified by the Human Rights and Equal Opportunity Commission at that point was the refusal of service in hotels.[150] McGlade noted that proof of discriminatory intent was routinely required in practice despite not being required in law.[151]

11.74 Experimental and archival research in a number of jurisdictions also suggests that judges' decision-making may be affected by bias relating to: gender;[152] and, age.[153] Studies on the impact of biases in relation to sexual orientation are limited and mixed; however, archival research has demonstrated some difference in treatment.[154] Recent experimental research has also suggested that the socio-economic status of a litigant can impact judicial decision-making.[155] Notably, studies have also shown that the combination of a litigant's personal characteristics across their different group identities (such as race, gender, and age) may be particularly important to understanding disparities.[156]

11.75 There is also some research, albeit limited in Australia, into whether certain groups of people experience proceedings as less fair than others. The Federal Circuit and Family Court User Satisfaction Survey, conducted in 2014, found that Aboriginal and Torres Strait Islander people reported the lowest level of satisfaction with the fairness of their proceedings (60%, as opposed to 66% of respondents overall).[157] Interviewees who identified as Aboriginal or Torres Strait Islander also 'felt less safe than other interviewees, both in the court environment (88%) and in the courtroom (84%)'.[158] Some stakeholders suggested that perceptions of the potential for institutional bias impacted not only on outcomes, but also access to justice, with individuals who feel they will not be fairly treated being more reluctant to use the courts.

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149 Hannah McGlade, 'Reviewing Racism: HREOC and the Race Discrimination Act 1975 (Cth)' (1997) 4(4) *Indigenous Law Bulletin* 12, 12.

150 Ibid.

151 Ibid 13.

152 Barry (n 72) 168, citing Andrea L Miller, 'Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making' (2019) 10 *Social Psychological and Personality Science* 227. In relation to gender and judging in Australia, see, eg, Samantha Jeffries and Christine EW Bond, 'Sex and Sentencing Disparity in South Australia's Higher Courts' (2010) 22(1) *Current Issues in Criminal Justice* 81.

153 Barry (n 72) 174–7.

154 Ibid 177–80.

155 Ibid 181, citing Jennifer Skeem, Nicholas Scurich and John Monahan, 'Impact of Risk Assessment on Judges' Fairness in Sentencing Relatively Poor Defendants' (2020) 44 *Law and Human Behavior* 51.

156 Ibid 182–3.

157 Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey* (2015) 28.

158 Ibid 20 (overall, 93% of interviewees felt safe in the court environment and the courtroom).

11.76 In summary, there is significant evidence that social and cultural biases can operate at an institutional level to bias judicial decision-making in relation to certain groups of litigants, despite judicial commitments to impartiality, and that some social groups experience the fairness and impartiality of proceedings differently to others. Although the research is limited in Australia, and there is limited data collected by the courts to assist in such research, a number of stakeholders underlined that, in their experience, institutional biases operate in relation to a number of different social categories and across different areas of law.[159] Concern with the potential for actual or apparent social and cultural bias is reflected in answers to the ALRC Survey of Lawyers. Twenty-five participants (n = 51) felt that a judge had been biased against them at least once because of their visible or assumed personal characteristics, most commonly gender. As reported in **Chapter 5**, participants in the ALRC Survey of Lawyers ranked improving diversity in the judiciary as the second most important reform to maintain public confidence in judicial impartiality. The theoretical and case-focused research outlined in the previous section gives an insight into how these biases can operate even where judges are strongly committed to impartiality and neutral decision-making. Better collection of data, and more research in this area, would allow for a more nuanced understanding of where exactly the problems lie.

In Focus: Aboriginal and Torres Strait Islander experiences of bias

Cubillo has written that

> Indigenous Australians cannot help but feel the irony of statements made about the Rule of Law, and 'one law for all' when they bear the brunt of 'criminal justice' laws that are apparently universal on their face but are typically deployed to control and coerce Indigenous peoples. … I reflect on my learning as a law student, being told from my first year that the law is fair and just. It did not then, nor does it now, reflect what I experience and perceive as an Indigenous person in this country.[160]

Cubillo suggests that unconscious bias

> plays a major part in the unjust way our people are treated. Very few judges have a background that equips them to see the world in the way Indigenous people do, and few see this as a problem.[161]

159 Deadly Connections Community and Justice Services, *Submission 35*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.
160 Cubillo (n 31) 189.
161 Ibid 191–2.

McGlade has described a series of cases through which she observed a 'lack of understanding and respect' from the courts 'for the prohibition of racial discrimination and vilification'.[162] From her own personal experience in relation to race discrimination complaints, McGlade had 'even detected a presumption that Aboriginal and Torres Strait Islander people (including myself) who dare to pursue such complaints are not *bona fide*, or are vexatious litigants'.[163] Dr Hagan has written extensively on bias experienced by Aboriginal and Torres Strait Islander peoples in the courts.[164]

Aboriginal and Torres Strait Islander people self-report experiences of discrimination at rates much higher than non-Indigenous Australians.[165] This includes experiences of unfairness and bias in court. In submissions to the ALRC *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, the Australian Capital Territory Government and the Law Society of Western Australia reported that Aboriginal and Torres Strait Islander people regularly encounter bias in court and that bias is greatest when judges are afforded generous discretionary powers and/or have poor cultural awareness.[166]

In the community, Aboriginal and Torres Strait Islanders still experience explicit racism at high levels. The Australian Reconciliation Barometer, a nationally representative biennial study, found in 2020 that 52% of Aboriginal respondents had experienced racial prejudice in the previous six months, compared to 21% of the general community.[167] Thirty-six per cent reported having received verbal abuse.[168] Research suggests that implicit associations in relation to Aboriginal people are also negative among a large proportion of the Australian population. A 2019 study conducted by Dr Shirodkar, using Implicit Association Test scores from 11,099 participants, found that 75% of Australians held an implicit bias against Indigenous Australians, with roughly one third of Australians holding what could be regarded as a strong implicit bias.[169] There were few statistically significant relationships between education level, occupation, and the level of implicit bias held.[170]

162 Hannah McGlade, 'Race Discrimination in Australia: A Challenge for Treaty Settlement?' in Marcia Langton et al (eds), *Honour among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Publishing, 2004) 273, 283–5.

163 Ibid 283.

164 Stephen Hagan, *The Rise and Rise of Judicial Bigotry* (Christine Fejo-King Consulting, 2017).

165 Siddharth Shirodkar, 'Bias against Indigenous Australians: Implicit Association Test Results for Australia' (2019) 22(3–4) *Journal of Australian Indigenous Issues* 3, 4.

166 Australian Capital Territory Government, Submission No 110 to Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (4 October 2017); Law Society of Western Australia, Submission No 111 to Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (12 October 2017).

167 Reconciliation Australia, *2020 Australian Reconciliation Barometer* (2020) 19. The 2020 study surveyed 495 Aboriginal and Torres Strait Islander respondents and 1,988 respondents from the general community.

168 Ibid.

169 Shirodkar (n 165) 4.

170 Ibid 23.

However, the Reconciliation Barometer also showed an increase in the number of respondents who believed it is important to undertake a formal truth telling process in relation to Australia's shared history, with 89% of respondents from the general community and 93% of Indigenous respondents believing it was very important or fairly important.[171] Eighty-three percent of the general community respondents and 91% of Aboriginal and Torres Strait Islander respondents also considered it very important or fairly important that Indigenous histories and cultures are a compulsory part of the school curriculum.[172]

Strategies to address social and cultural bias in decision-making

11.77 At an individual level the risk of social and cultural factors impacting on judicial decision-making is not covered by the bias rule. However, stakeholders have emphasised that the potential for such factors to accumulate and compound to bias decision-making at an institutional level against particular groups is unacceptable for the rule of law. This is a point that has been emphasised by Chief Justice Winkelmann:

> a critical underpinning of judicial legitimacy is the understanding that judges are impartial between the parties who come before them. … The essence of justice, and indeed the rule of law, is the care that judges take to applying the law consistently to circumstances as they arise. It lies at the very heart of the judicial method. If a judge is seen to favour one party over another for reasons unconnected to the merits of the case, then the public will lose confidence in that judge. But if the judiciary as a whole is seen to act in a manner that favours one sector of society over another, then the judiciary will lose its legitimacy.[173]

11.78 In the Consultation Paper, the ALRC referred to issues of social and cultural bias that had been raised in preliminary consultations, and made a number of proposals directed, in part, to addressing these concerns.[174] It also asked stakeholders to comment on further steps that the Commonwealth courts or others should take to ensure that social biases or lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with low levels of confidence in judicial impartiality (**Question 21**).[175]

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171 Reconciliation Australia (n 167) 13.

172 Ibid 9.

173 Chief Justice Winkelmann (n 11) 3.

174 Relevant proposals were: **Proposal 14** (judicial appointments); **Proposal 15** (statistics on judicial diversity); **Proposal 17** (judicial orientation); **Proposal 18** (ongoing judicial education); and **Proposal 23** (collection of court user feedback).

175 The question asked was: 'What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?'.

Institutional strategies

11.79 The detail of many of these strategies, and associated recommendations, is discussed in **Chapter 12**. However, in general, strategies that stakeholders suggested should be considered to address social and cultural bias at an institutional level can be briefly summarised as follows.[176]

Collection of better data

11.80 As discussed in **Chapter 4**, a key point made in consultations with researchers in this area was that determining the strategies needed to reduce the impact of social and cultural bias against particular groups is inextricably tied to context, structural factors, and the specific problems that have been identified. Furthermore, there is some evidence that encouraging individuals to scrutinise their decision-making can have a positive effect in reducing biased decision-making.[177] The collection of more, and better, data — including from those using the courts, and about those *not* using the courts — was seen as an important reform by a number of stakeholders.[178]

Increasing diversity of experience and background among members of the judiciary

11.81 Submissions from a wide range of stakeholders emphasised that increasing the diversity of background of members of the judiciary is crucially important to reduce social and cultural bias at an institutional level, in addition to serving other important ends.[179] This was also ranked as the second most important reform for maintaining public confidence in judicial impartiality among lawyers who responded to the ALRC Survey of Lawyers.[180] The ALRC has also previously made a number of observations and recommendations in this area.[181]

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176 Submissions on issues relevant to criminal law sentencing have not been included here given the very limited role of the federal judiciary in hearing criminal matters.

177 See Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

178 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Women Lawyers Association of New South Wales, *Submission 26*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*; Professor Tania Sourdin, *Submission 33*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Dr Joe McIntyre, *Submission 46*.

179 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Women Lawyers Association of New South Wales, *Submission 26*; Irene Park and Prue McLardie-Hore, *Submission 27*; John Tearle, *Submission 28*; Progressive Law Network, Monash University, *Submission 30*; Associate Professor Kylie Burns, *Submission 32*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; New South Wales Society of Labor Lawyers, *Submission 40*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

180 See further **Chapter 5**.

181 Australian Law Reform Commission (n 37) [9.40]. Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [1.38].

Addressing knowledge gaps

11.82 Improving judicial education on social and cultural issues and cultural awareness, and/or in relation to bias, was regarded by a large number of stakeholders as an important measure to address social and cultural bias at an institutional level.[182] One submission also emphasised the importance of improving knowledge of foreign law.[183] The ALRC has previously also made a number of observations and recommendations in this area.[184]

11.83 Some stakeholders also stressed the importance of addressing knowledge gaps in individual cases through improving the ability for judges to receive and rely on quality empirical or exogenous knowledge to inform their judgments,[185] or to otherwise receive evidence of traditional laws and practices of Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities.[186] This has application more generally, but was presented as an important strategy for correcting social and cultural bias as it would allow judges to appropriately source and reference social framework facts. This has also been the subject of previous consideration and recommendations by the ALRC.[187] In consultations, some stakeholders also emphasised the important role of lawyers in ensuring that information about social and cultural issues is before the court.

11.84 Submissions also emphasised the importance of training lawyers in relation to issues of bias and social and cultural issues, and supporting bilingual and multilingual lawyers.[188]

Engaging with communities on an equal level

11.85 Deadly Connections suggested that, in addition to playing a role in developing training, a First Nations Advisory Committee could play an important role in facilitating engagement with First Nations communities and organisations, in order to build trust

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182 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Irene Park and Prue McLardie-Hore, *Submission 27*; Associate Professor Kylie Burns, *Submission 32*; Professor Tania Sourdin, *Submission 33*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

183 Asian Australian Lawyers Association, *Submission 42*.

184 Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [2.27]; Australian Law Reform Commission (n 37) [8.57]–[8.68]; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) rec 31–1.

185 Associate Professor Kylie Burns, *Submission 32*; Deadly Connections Community and Justice Services, *Submission 35* (in relation to the receipt of *Bugmy* justice reports in family law and relevant civil matters); Law Council of Australia, *Submission 37*.

186 Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

187 See, eg, Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 59) rec 6–2; Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [6.42]–[6.44].

188 See, eg, Asian Australian Lawyers Association, *Submission 42*.

between the Commonwealth courts and First Nations communities.[189] Similarly, the Law Council of Australia also emphasised the importance of an Aboriginal and Torres Strait Islander judicial body, sustained and immersive educational experiences, and the involvement of Elders in cultural awareness programs.[190]

Enhancing people's ability to participate in proceedings at an equal level

11.86 A number of stakeholders also emphasised the importance of providing processes and resources that allow individuals from marginalised groups to participate in proceedings at an equal level. This included: the increased use of adapted court settings and specialised court lists;[191] specific support officers;[192] easy to follow guidance for self-represented litigants; appropriate provision of interpreters; and, guidelines assisting multilingual lawyers to raise issues with inaccurate translation.[193] The Law Council of Australia supported allowing parties to provide submissions or other material to assist the court's understanding of their cultural or other needs, including with respect to disability,[194] and supported enhancing the ability of parties to attend hearings via video link, even if they are legally represented.[195] Again, this has also been the subject of previous ALRC recommendations.[196]

Changes in law and practice

11.87 The National Justice Project's submission emphasised that, where judges are given wide discretions to make decisions, the chance of social and cultural biases impacting on outcomes is greater, and recommended minimising 'the discretionary power afforded to judges throughout the legal process' as a way to manage bias.[197] This point was also raised in consultations by a number of litigants in the family law system.

11.88 Another issue raised in consultations was the potential for bias in decision-making to arise from the practice of assigning refugee claimants a series of letters and numbers in place of a name in cases, and the bias inherent in dehumanising only refugee and migration claimants in this way. One stakeholder suggested that this could be addressed by adopting the same approach used in family law, where a human pseudonym is assigned to protect the identity of parties. This is an approach

189 Deadly Connections Community and Justice Services, *Submission 35*.
190 Law Council of Australia, *Submission 37*.
191 Deadly Connections Community and Justice Services, *Submission 35*; National Justice Project, *Submission 44*.
192 Deadly Connections Community and Justice Services, *Submission 35*.
193 Asian Australian Lawyers Association, *Submission 42*.
194 Law Council of Australia, *Submission 37*.
195 Ibid.
196 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 59) recs 10–1, 10–2, 10–3, 10–4; Australian Law Reform Commission, *Multiculturalism and the Law* (n 59) [3.31], [3.36], [3.44]–[3.45], [3.54]–[3.57]; Australian Law Reform Commission (n 37) recs 6.1, 7.1, 7.2, 7.3, 14.6, 14.7.
197 National Justice Project, *Submission 44*.

that has been adopted at the request of counsel, or accepted by some judges as a course open to the court.[198]

Appropriate resourcing and support of judges

11.89 Two submissions also referred to the importance of ensuring that the court system as a whole is appropriately resourced, and/or that judges are provided with sufficient support and supervision from a mental health perspective, to enable judges to function effectively in their roles and to improve their ability to act impartially in relation to all social groups.[199] This was also emphasised as crucial to supporting impartiality by a number of participants in the ALRC Survey of Judges.[200]

Setting institutional goals and measuring progress towards such goals

11.90 Finally, two submissions emphasised the importance of setting goals or standards and measuring and reporting progress towards them in relation to the strategies above.[201]

An impartial cast of mind

11.91 Although institutional strategies are crucial, being impartial is ultimately something that is strived for by individual judges.[202] Recognition of how biases operate can help to inform how best to mitigate them. A point raised repeatedly in consultations and in a number of submissions was that the law and institutions supporting it should be more open and realistic about the extent to which judges are able to 'resist' the normal cognitive shortcuts and automatic processes that bias human decision-making.[203] As emphasised in the submission from Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team: 'believing we are objective places us at risk of "behaving in ways that belie our self-conception"'.[204] Similarly, the National Justice Project stated that it was crucial that judges 'recognise and accept that they are biased and this can impact their decision-making'.[205] Rather than undermining trust in judges, a number of stakeholders thought that greater humility about the fact that judicial decision-making can be biased by irrelevant factors (and less of a sense that 'bias' was a personal and professional failing) would

198 See, eg, *Atkins v Minister for Home Affairs & Anor* [2019] FCCA 245. But cf *DSN16 v Minister for Immigration and Border Protection* [2021] FCA 202.

199 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*; Asian Australian Lawyers Association, *Submission 42*.

200 See **Chapter 5**.

201 See eg Deadly Connections Community and Justice Services, *Submission 35*; National Justice Project, *Submission 44*.

202 See **Chapter 2**.

203 See, eg, National Justice Project, *Submission 44*.

204 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*, citing Jerry Kang et al, 'Implicit Bias in the Courtroom' (2012) 59(5) *UCLA Law Review* 1124, 1172.

205 National Justice Project, *Submission 44*.

lead to more transparent use of strategies to minimise the influences of biases. In turn, it was suggested that this would increase the quality of decision-making and public confidence in it.

A conception of impartiality: open-minded readiness to persuasion

11.92 As the social sciences and legal theory have developed a greater awareness of the impact of personal factors — including social and cultural factors — on judicial decision-making, many judges have incorporated these insights into their understanding of what it means to be impartial. A traditional, formalist approach to judging sees a judge's role as one of detached neutrality — that it is the duty of judges 'to suppress their preconceptions and leanings of the mind and make decisions based solely on the merits of each individual case'.[206] A more dynamic conception, conscious of the impossibility of completely suppressing the personal factors that influence decision-making, emphasises the importance of an open, and curious, mind.[207] The work of Emerita Professor Mack and Professor Roach Anleu with judicial officers in Australia suggests that, while judges universally strive to be impartial, their approach to doing so can fall along a continuum between the two.[208]

11.93 The law in Australia requires an open mind, not an empty one.[209] The evidence pointing to the impact of social and cultural factors on judicial decision-making discussed in this chapter and **Chapter 4** supports an approach that is grounded in the recognition of a judge's own perspective and is open to other perspectives. Professor Colby argues that a judge who sees their role as one of detached neutrality 'will fail to realize … that he is seeing the case from a particular perspective — his own — and is mistaking that perspective for an unbiased, neutral one'.[210] In doing so, 'he is in fact unwittingly giving disproportionate weight in his doctrinal calculus to the interests of those whose perspectives come most naturally to him'.[211]

11.94 Similarly, in Professor Lucy's view, the 'minimal requirement' of impartiality is 'an attitude of openness to and lack of pre-judgement upon the claims of the disputants', but this is ideally

> but part of a general stance of openness to difference and diversity among citizens, for it is only this that allows judges to go beyond being open-minded about disputants' claims to a more general appreciation of the disputants'

206 The Hon Justice D Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (2000) 19 *Australian Bar Review* 212, 213.

207 See further Australian Law Reform Commission, 'Conceptions of Judicial Impartiality in Theory and Practice' (Background Paper JI4, April 2021); Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 71–2.

208 Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 63–70. See also Mack, Roach Anleu and Tutton (n 207) 71–2.

209 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia, 6th ed, 2016) 645.

210 Thomas B Colby, 'In Defense of Judicial Empathy' (2012) 96(6) *Minnesota Law Review* 1944, 1992.

211 Ibid 1946.

> general situation and circumstances. To call this empathy is to exaggerate; it is merely a combination of open-mindedness to, and a willingness to suspend assumptions about, *both* the disputants *and* their dispute.[212]

11.95 This more dynamic conception of impartiality was expressed by former Chief Justice of the Supreme Court of Canada the Hon Beverley McLachlin, in her comments that:

> impartiality does not require that [judges] adopt a 'view from nowhere'. On the contrary, it relies on our close connection with the community in which we judge and its core values. It requires [judges] to cultivate detachment only in the sense that [they] must try to always increase [their] awareness of [their] own preconceptions, and to see to it that [their] minds are open to other perspectives and amenable to persuasion.[213]

11.96 Similarly, Cameron J of South Africa's Constitutional Court recognised that

> 'absolute neutrality' is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality … Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication.[214]

11.97 The Hon Justice A Robertson suggested that, because all judges bring 'baggage', judges need to 'learn how to feel intrigued, instead of defensive, when we encounter some information that contradicts our beliefs'.[215] So too Justice Mason suggested that judges need to 'expose, debate and contest generalised attitudes so as to appreciate their proper influence upon judicial decision-making, and to remind all judges of the need to stand outside themselves and to question their own certainties'.[216] In the Hon Justice D Mortimer's view, the contemporary challenge for the judiciary, and one that requires constant review, is to agree on 'what is involved

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212 William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *Oxford Journal of Legal Studies* 3, 15, citing Martha Minnow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201, 1214–17.

213 Chief Justice McLachlin (n 12) 22. In this respect note that Chief Justice McLachlin drew a distinction between 'neutrality' and 'impartiality': 'Impartiality does not, like neutrality, require judges to rise above all values and perspectives. Rather, it requires judges to try, as far as they can, to open themselves to all perspectives': 21. Others do not draw the same distinction: see further Australian Law Reform Commission, 'Conceptions of Judicial Impartiality in Theory and Practice' (Background Paper JI4, April 2021) [13]–[16].

214 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] 3 SA 705 [14].

215 The Hon Justice A Robertson, 'Apprehended Bias — The Baggage' (2016) 42 *Australian Bar Review* 249, 250.

216 Justice Mason (n 28) 681.

in maintaining the appearance of impartiality'.[217] For Justice Mortimer, the

> reassurance we can give litigants, and the community in general, is that judges will be sensitive to perceptions of fairness and impartiality about our internal reasoning processes … that we will try to see it from the perspectives of others as well as our own. After all, that is part of having an open mind.[218]

11.98 To be able to see things from the perspective of others, Abella J of the Canadian Supreme Court has suggested that judges should 'be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities'.[219] Many Australian judges have emphasised the same point.[220] As will be discussed in **Chapter 12**, significant strides have been made in this direction, but as both judges and users of the court system have recognised, more can be done.

11.99 This is consistent with what Professor Kahneman and others have identified as the factors that matter for better, and less biased, judgments. Research in various fields of decision-making shows that judgments are

> both less noisy and less biased when those who make them are well trained, are more intelligent, and have the right cognitive style. … Good judges tend to be experienced and smart, but they also tend to be actively open-minded and willing to learn from new information'.[221]

11.100 Kahneman and others describe actively open-minded thinking as 'the humility of those who are constantly aware that their judgment is a work in progress and who yearn to be corrected'.[222]

11.101 The bias rule plays an important, but limited, role in addressing the risk of social and cultural factors improperly impacting on judicial decision-making. In consultations and submissions, stakeholders generally agreed that this is the right approach, but only if it is matched by strategies to mitigate and address social and cultural bias at an institutional level. Twenty years ago, Justice Mason called on judges to 'come clean and get real' about the impact that their own social and personal perspective can have on judging, echoing and adapting Professor Dworkin's exhortation that judges

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217 Justice Mortimer (n 45) 51.
218 Ibid 51–2.
219 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282 [34].
220 See, eg, the Hon Justice K Mason, 'Impartial, Informed and Independent' (2005) 7 *The Judicial Review* 121.
221 Daniel Kahneman, Olivier Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (William Collins, 2021) 225.
222 Ibid 234.

> come clean about the role that [unconscious prejudices] actually play both in the grand design and in the exquisite details of our legal structure. Get real about the hard work that it takes to redeem the promise of those concepts.[223]

11.102 Many judges, and courts, have taken up the challenge. However, research into the views of judges and feedback from stakeholders in the course of this Inquiry has suggested that more can be done to understand and address social and cultural bias at an institutional level, and to support judges in the hard work that is required from them. **Chapter 12** considers further what some of those steps should be.

223 Justice Mason (n 28) 686. Dworkin urged judges to 'come clean about the role that philosophical concepts actually play both in the grand design and in the exquisite details of our legal structure: Ronald Dworkin, 'Must Our Judges Be Philosophers? Can They Be Philosophers?' (Speech, New York Council for the Humanities Scholar of the Year Lecture, 11 October 2000).

PART FOUR: COMPLEMENTARY STRUCTURES TO SUPPORT JUDICIAL IMPARTIALITY AND PUBLIC CONFIDENCE

12. Institutional Supports and Safeguards

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Introduction

12.1 In this chapter, the ALRC makes a suite of recommendations in relation to: judicial appointments; judicial education; ethical guidance; and collection of feedback and data. These recommendations are designed to enhance judicial impartiality at an institutional level, and to maintain the confidence of litigants, the profession,

and the public.[1] The chapter also makes a recommendation about providing further information to litigants and the public about the institutional structures that are in place to support, promote, and protect impartiality. These recommendations respond directly to the Terms of Reference for this Inquiry, which emphasise 'the importance of maintaining public confidence in the administration of justice for all Australians'.[2]

12.2 The recommendations in this chapter have been identified through consultations as particularly important to underpin and complement the law on bias.[3] The recommendations address areas where, as identified in previous chapters, additional measures are necessary to ensure that the law on bias remains 'sufficient and appropriate to maintain public confidence in the administration of justice'.[4] In particular, the recommendations respond to:

- challenges to impartiality, and the appearance of impartiality, which are 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.[5]

At the same time, these measures seek to ameliorate the risk of institutional biases impacting negatively on particular groups in society.[6]

12.3 Many of these recommendations focus on the importance of transparency in relation to the structures and processes supporting judicial impartiality. Some build upon recommendations made by the ALRC and parliamentary bodies in previous inquiries.[7] Significant progress has already been made in some areas to which the recommendations relate, but further transparency is important to demonstrate that progress. A commitment to transparency in these areas enhances the appearance of impartiality at an institutional level.[8]

The importance of resourcing

12.4 An overarching theme that emerged in the course of the Inquiry was the crucial importance of adequate resourcing of the courts and the justice system to ensure that judges can uphold the highest standards of judicial impartiality. This has two main aspects. First, that pressures on judges to hear cases quickly leads to conditions in which perceptions of bias are more likely to arise. Second, that adequate resourcing is necessary to provide additional support to judges to promote

1 See **Principle 1** and **Principle 3**, as set out in **Chapter 2**.
2 See **Chapter 2** for discussion of the ALRC's approach to the Terms of Reference for this Inquiry.
3 See **Principle 4**, as set out in **Chapter 2**.
4 See, eg, **Chapter 10** and **Chapter 11**.
5 See further **Chapter 10**.
6 See further **Chapter 11**.
7 See **Chapter 1**.
8 See **Principle 5**, as set out in **Chapter 2**.

impartiality through education, reflective and reflexive practice, and collection of court user feedback. Resourcing of the courts is, however, 'a matter over which the judges have no control and very little influence'.[9]

12.5 As to the first aspect, consultees suggested that a lack of appropriate resourcing in terms of the number of judicial officers available to hear an expanding number of cases, particularly in the FCFCOA, has played a significant role in perceptions of bias related to courtroom conduct and prejudgment identified in **Chapter 10**.[10] As Emerita Professor Mack and Professor Roach Anleu noted in their submission, even 'the most emotionally skilled and culturally aware judge cannot increase the time available in a busy court list or conjure up missing resources'.[11] Pressure to hear numerous cases in a day makes it very difficult for judges to allow the time for parties to feel they have had a fair hearing, leading to concerns that the judge has already predetermined the matter.[12] What have been described as 'crushing workloads' can also lead to significant stress, which may manifest in inappropriate in-court conduct giving rise to an apprehension of bias, and is more likely to lead to error through reliance on cognitive shortcuts.[13] In the context of a significant backlog of cases, it has also been noted that the (understandable) desire to encourage parties to settle matters may sometimes also involve 'exhortations … that might give the impression, particularly to self-represented litigants, that a judge has closed his or her mind to their contentions or pre-judged their case'.[14]

12.6 Concerns about the way in which judges conducted proceedings were reflected in many of the submissions received by the ALRC. As set out further in **Appendix E**, many litigants and respondents to the ALRC Survey of Court Users who perceived judicial bias in their case emphasised that they did not feel that the judicial officer was interested in hearing their side of the story, or believed that the judicial officer had not read the documents or the evidence that they had provided.[15] This may be driven to some extent by the requirements of legal procedure, the rules of evidence, and the issues required to be proved under the law.[16] However, some judges have also noted in consultations that time pressures can also make it very difficult to give litigants sufficient time to be heard. This was also highlighted by three judges of the Federal Circuit Court who participated in the ALRC Survey of

9 The Hon Chief Justice M Gleeson AC, 'Current Issues for the Australian Judiciary' (Supreme Court of Japan, Tokyo, 2000) 2.

10 See also Harriet Alexander, '"Anything Can Happen Here": How the Family Court Failed to Live up to Its Promise', *Sydney Morning Herald* (online, 6 January 2021) <www.smh.com.au/politics/federal/anything-can-happen-here-how-the-family-court-failed-to-live-up-to-its-promise-20201214-p56nbw.html>.

11 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.

12 See further **Appendix E**.

13 See **Chapter 4**. See further Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28(3) *Journal of Judicial Administration* 141.

14 *Jopson v Lilwall (No 2)* [2016] FamCAFC 262 [43].

15 ALRC Survey of Court Users, July–August 2021.

16 See further Jane Wangmann, Tracey Booth and Miranda Kaye, 'Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence' (Research Report Issue No 24, ANROWS, December 2020).

Judges as a critical issue for judicial impartiality. Judges referred to the pressure to get through 'crushing' numbers of cases as leading to the 'inevitable perception of prejudgment', and sometimes impacting on 'the capacity to act judicially'.[17]

12.7 In contrast, one litigant who spoke with the ALRC described how they had been very impressed when a (state court) judicial officer had adjourned a matter for a number of hours to read all the materials that had been filed at the last minute in their case. The litigant noted that this gave them confidence in the process and in the judicial officer's impartiality. This is something that would likely be impossible for a judge with multiple matters listed before her or him in a single day.

12.8 The impact of insufficient judicial resources is a matter that has been regularly commented on by professional bodies, heads of jurisdiction, and appellate courts.[18] For example, in upholding an appeal on bias and procedural fairness grounds in *Reynolds v Sherman*, the Full Court of the Family Court noted that it was

> mindful that the deficiencies we have identified in the conduct of the trial were likely to have been related to the fact that the matter was listed early in the morning, probably before a busy day in court, and with a time limit of just one hour. We are aware of the pressures of work in a busy trial court, and are therefore sympathetic to the effort her Honour made to resolve the matter expeditiously. Nevertheless, we consider that a dispute about the name by which a child will be known perhaps for his entire life is a matter of real importance. Accordingly, if possible, adequate time should be allocated on the rehearing to ensure the presiding judge is not placed under the same time pressures which the trial judge faced at the first hearing.[19]

12.9 Similarly in the appeal case of *Matenson v Matenson*, which raised issues of bias but was upheld on the grounds of procedural fairness, Murphy J said:

> I have already made comment on the extraordinary size of the lists before judges of the Federal Circuit Court. It is by no means uncommon for in excess of 30 matters to be listed. By reason of simple arithmetic the average time that can be allotted to each matter as a consequence surely gives pause for thought as to whether proper process can be invoked and the requirement for individual justice met where interim decisions affecting children's lives are involved. … Increasingly, appeals from interim parenting proceedings reflect the inordinate pressure which the judges making decisions of that type are under. The pressure for hardworking judges seeking sincerely to do the best they can in difficult circumstances is crushing. It is creating appeals that would otherwise not occur. Many of those appeals are based, validly, on assertions of procedural unfairness and assertions that issues raised by parties — including important issues — are not engaged with and reasons for decisions affecting children's lives are not being given.[20]

17 ALRC Survey of Judges, April 2021.
18 See, eg, Law Council of Australia, *The Justice Project: Final Report* (2018) 41.
19 *Reynolds v Sherman* [2015] FamCAFC 128 [61] (May, Thackray and Aldridge JJ).
20 *Matenson v Matenson* [2018] FamCAFC 133 [72]–[74].

12.10 The new FCFCOA's Practice Direction on family law case management indicates that many case management hearings will now be allocated to registrars, with the aim that matters are resolved within 12 months from the date of filing.[21] This should allow judicial resources to be concentrated on substantive hearings and reduce the number of cases on a judge's docket (even if that may bring its own challenges in relation to the law on bias).[22] Appointment of a significant number of new judges to the FCFCOA should also alleviate strain on the system.[23] However, this underscores the crucial importance of appropriate resourcing, and provision of sufficient time for hearings, to promote confidence in the impartiality of judicial decision-making. Perceptions of unfairness in proceedings may lead to further strains on court resources through appeals and repeat litigation.[24]

12.11 Similarly, the ALRC is cognisant that implementing many of the recommendations in this Report will require sufficient additional resourcing by the Australian Government of the courts and other bodies.[25] For example, the provision of judicial education requires adequate resourcing for the design and delivery of programs, and to release of judges from sitting duties and writing judgments in order to attend and, in some cases, deliver programs. However, as a proportion of the costs spent on the courts and in litigation each year, these are a small, and important, investment in the strength of the system as a whole.[26]

A transparent judicial appointments process

12.12 The framework for this Report recognises both the central role of the judge and the court in the appropriate operation of the law on bias. The previous chapters have shown how, to a large extent, a pragmatic approach must be adopted to the application of the law on bias, and the procedures upholding it, to allow the courts to function. This has implications, however, for the structures required to complement the law on bias to ensure that it remains 'sufficient and appropriate to maintain public confidence in the administration of justice'. As Professor Malleson has noted, if

> the judicial system assumes that bias at an individual level is a highly exceptional event, then the collective impartiality of the judiciary must be safeguarded by ensuring that the process for appointing judges … is demonstrably impartial.[27]

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21 Federal Circuit and Family Court of Australia, *Central Practice Direction — Family Law Case Management*, 1 September 2021.

22 See further **Chapter 10**.

23 The 2021 Federal Budget provided funding for 10 new family law judges, to bring the total to 111: Kate Allman, 'Ten New Family Court Judges, Improved Services for Domestic Violence' (14 May 2021) *LSJ Online* <www.lsj.com.au/articles/federal-budget-2021-legal-services-assistance/>.

24 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000).

25 Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*.

26 In 2019–20, government expenditure on the Commonwealth courts was $314.425 million: Steering Committee for the Review of Government Service Provision, *Report on Government Services 2021* (Productivity Commission, 2021) Courts data tables, 7.11. In addition, substantial costs are paid by parties in fees and for legal representation, which can run into hundreds of thousands of dollars per side for matters that proceed to a final hearing.

27 Kate Malleson, 'Safeguarding Judicial Impartiality' (2002) 22(1) *Legal Studies* 53, 54.

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.

12.13 **Recommendation 7** 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. Transparency of the appointments process is important to:

- minimise the perception that appointments are made for political or patronage reasons, and the perception that a judge's impartiality and independence may be compromised;
- ensure that the criteria on which candidates are selected 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 experiences on the bench.

12.14 In line with the Commonwealth Latimer House Principles,[28] the process should, at a minimum, require appointment on merit involving a call for expressions of interest, publication of criteria for appointment, and a commitment to actively promoting diversity in the judiciary without compromising the principle of selection on merit.

12.15 Submissions were almost universally supportive of more transparent processes for judicial appointments and saw this as an important reform in the context of the Terms of Reference.[29] Submissions were also very supportive of the

28 See [12.22].

29 Supportive submissions included Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Family Law Practitioners' Association of Western Australia, *Submission 18*; Women Lawyers Association of New South Wales, *Submission 26*; Irene Park and Prue McLardie-Hore, *Submission 27*; Progressive Law Network, Monash University, *Submission 30*; Associate Professor Kylie Burns, *Submission 32*; Professor Tania Sourdin, *Submission 33*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

important role increasing judicial diversity plays in enhancing judicial impartiality and public confidence in it.[30] Only one submission received did not support this reform.[31]

Existing processes for judicial appointment

12.16 Judicial appointments in Australia are generally the 'unfettered prerogative of the Executive government' and appointment processes can consequently change based on the preferences of the government of the day.[32] Currently, there is no formal process for selection of federal judicial officers, and no advertised criteria, apart from basic eligibility requirements,[33] and statutory requirements for judges exercising jurisdiction in family law.[34] The only statutory requirement for consultation relates to the appointment of High Court judges.[35] This reflects the traditional approach, by which the executive may choose to consult informally with certain individuals within the courts and legal system, before announcing an appointment.[36]

12.17 A formal, structured process for appointment of federal judicial officers (excluding members of the High Court and heads of jurisdiction) was used between 2008 and 2013, following a number of recommendations in this regard by parliamentary inquiries and the ALRC.[37] The process, established by former federal Attorney-General, the Hon Robert McClelland MP, involved the publication of criteria for judicial appointment, the possibility of a broad range of individuals and organisations nominating candidates, the opportunity for potential candidates to register expressions of interest, and the creation of an advisory panel to assess candidates.[38] The expressed aims of the reforms included increasing public

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30 See, eg, Women Lawyers Association of New South Wales, *Submission 26*; Irene Park and Prue McLardie-Hore, *Submission 27*; John Tearle, *Submission 28*; Progressive Law Network, Monash University, *Submission 30*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*; New South Wales Young Lawyers Public Law and Government Committee, *Submission 48*.

31 The Samuel Griffith Society, *Submission 24*. Proposal 14 in the Consultation Paper was: 'The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community'.

32 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [13.56], quoting Judicial Conference of Australia, *Judicial Appointments: A Comparative Analysis* (2015), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

33 *High Court of Australia Act 1979* (Cth) s 7; *Federal Court of Australia Act 1976 Act* (Cth) s 6(2); *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 111

34 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 111.

35 Under the *High Court of Australia Act 1979* (Cth) s 6, the Commonwealth Attorney-General must consult with the State Attorneys-General before making an appointment to the High Court.

36 Judicial Conference of Australia, *Judicial Appointments: A Comparative Study* (2015) 5.

37 See [12.19]–[12.20] below.

38 Attorney-General's Department (Cth), *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (2010) 3. See further Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' (2015) 37 *Sydney Law Review* 187, 195–7.

confidence in the process, ensuring quality appointments, and diversifying the federal judiciary in terms of gender, residential location, professional experience and cultural background.[39] In introducing the reforms, McClelland stated that:

> Australians rightly demand that justice should be administered 'without fear or favour'. It is just as important that judges and magistrates should be seen to be appointed on a similarly impartial basis.[40]

However, the formal process for appointment ceased after the change of government in 2013.

12.18 In maintaining the traditional approach to appointments to the federal judiciary, the Australian Government is an outlier both domestically and among other Commonwealth countries. All Australian states and territories have adopted criteria for judicial appointment and/or seek expressions of interest for judicial vacancies for some or all of their courts.[41] Some include formal consultation requirements,[42] and/or have statutorily established selection or advisory panels to shortlist candidates.[43] Internationally, most other common law jurisdictions have also introduced reforms for more formal processes of appointment. A 2015 report on best practice in this area found, for example, that 81% of Commonwealth jurisdictions had a judicial appointments body that played some role in the selection or short-listing of candidates for appointment to the judiciary.[44] Further detail on some of these processes is covered in the ALRC Report *Family Law for the Future* (2019).[45]

Previous ALRC recommendations

12.19 The ALRC has previously recognised that appropriate judicial appointments are critical to maintaining public confidence in the administration of justice, and providing optimal outcomes and in-court experiences for litigants.[46] It has also recognised the close link between appointments processes, the diversity of background of those on the bench, and bias in judicial decision-making at an institutional level.[47] In the context of other Inquiries, the ALRC has previously recommended:

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39 Handsley and Lynch (n 38) 195–6.

40 The Hon Robert McClelland MP, 'Judicial Appointments Forum' (Speech, Bar Association of Queensland Annual Conference, 17 February 2008) [21].

41 See **Appendix H**.

42 Australian Capital Territory, Northern Territory, Queensland, and South Australia: see **Appendix H**.

43 New South Wales, Northern Territory, Queensland, and Tasmania: see **Appendix H**.

44 J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law, 2015) [1.6].

45 Australian Law Reform Commission (n 32) [13.61].

46 Ibid [13.43].

47 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 Part 2, 1994) [9.40].

- the statutory introduction of specific requirements in relation to a person's knowledge, experience, skills, and aptitude for future appointments of federal judicial officers exercising family law jurisdiction;[48]
- the establishment of an 'advisory commission' to advise the Attorney-General on suitable candidates to increase judicial independence and impartiality, as well as promote greater diversity that more closely reflects the ethnic, cultural, and gender makeup of the community;[49]
- the publication of criteria for judicial appointment, recognising that a 'highly discretionary approach to the selection of judges may produce gender bias' in the selection of judges;[50] and
- that efforts should be made 'to ensure that membership of the judiciary, magistracy and the legal profession is not drawn only from a narrow elite as this fosters perceptions of bias when value judgements have to be made'.[51]

12.20 In the ALRC's recent Review of the Family Law System, consultations and submissions were supportive of more transparent procedures for judicial appointment, and the ALRC stated that the Australian Government should consider more transparent processes for appointing judicial officers generally. Given that the Terms of Reference for the Inquiry were limited to family law, the ALRC did not, however, make a formal recommendation in this regard.[52] The ALRC has also recommended that federal judges 'should be able to be appointed on either a full-time or part-time basis'.[53] This would widen the pool of potential candidates for appointment, by allowing 'women and men to take proper account of their family responsibilities'.[54]

12.21 A number of parliamentary inquiries have also made recommendations in this area, including recommending the publication of criteria for appointment and the establishment of an advisory committee on judicial appointments.[55] In 2014, the Australasian Institute of Judicial Administration ('AIJA') published 'Suggested Criteria for Judicial Appointments' and sent it to all Attorneys-General and shadow Attorneys-General,[56] and in June 2021 the Law Council of Australia published an updated 'Policy on the Process of Judicial Appointments' in relation to Commonwealth courts

48 Australian Law Reform Commission (n 32) rec 51.
49 Australian Law Reform Commission (n 47) rec 9.3. See further Australian Law Reform Commission (n 32) [13.61].
50 Australian Law Reform Commission (n 47) rec 9.5.
51 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [8.38].
52 Australian Law Reform Commission (n 32) [13.57]–[13.59].
53 Australian Law Reform Commission (n 47) rec 9.4.
54 Ibid [9.42].
55 See eg Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994) recs 2, 3; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 11–29; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Cost of Justice: Checks and Imbalances* (Report No 2, 1993) 9–10.
56 Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 312.

and tribunals.[57] Current and former judges have also expressed their own views on judicial appointments processes, with many favouring greater transparency.[58]

12.22 In November 2003, the Commonwealth Heads of Government adopted a set of principles known as the 'Latimer House Principles', which directly address judicial appointments procedures. Recognising that an 'independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice', the principles provide that:

> Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination …[59]

Benefits of a transparent process

12.23 Stakeholders emphasised three key shortcomings of the current appointments process in relation to judicial impartiality and public confidence in it. The first was that the secrecy of the process gives rise to perceptions of patronage or politically motivated appointments.[60] This is linked to the second criticism — that the mystique surrounding appointments gives rise to perceptions that appointments may not be guided by appropriate considerations about the skills and attributes necessary for the judicial role.[61] Given that the law on bias, and perceptions of impartiality, must rely to a large extent on the integrity and quality of individual judicial officers, it is crucial to ensure that the process of appointment both targets individuals with the required skills, and generates trust in the process.

12.24 A third connected, and again longstanding, criticism, is that the lack of transparency of process limits the pool of candidates considered for the role, and contributes to overrepresentation of particular groups in society in the judiciary, and

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57 Law Council of Australia, 'Policy on the Process of Judicial Appointments' (Policy Statement, 26 June 2021).

58 See, eg, Murray Gleeson QC, 'Judging the Judges' (1979) 53 *The Australian Law Journal* 338, 339; Stephen Gageler, 'Judicial Appointment' (2008) 30(1) *Sydney Law Review* 157, 158; The Hon Sir Gerard Brennan AC KBE, 'The Selection of Judges for Commonwealth Courts' (Speech, Senate Occasional Lecture Series, Parliament House, Canberra, 10 August 2007); The Rt Hon Sir Garfield Barwick, 'The State of the Australian Judicature' (1979) 53(8) *Australian Law Journal* 487.

59 Commonwealth Heads of Government, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003) 11.

60 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Women Lawyers Association of New South Wales, *Submission 26*.

61 Women Lawyers Association of New South Wales, *Submission 26*; Law Council of Australia, *Submission 37*.

significant underrepresentation of other groups.[62] In 1993, the Hon Justice S Brown said in evidence to a Senate Committee that the

> judicial whisper goes around and someone ends up miraculously on the bench … Because there is all this mystique, as if it is somehow by magic that it happens, there is a perception — that may or may not be right in some cases — that it depends on who you know; that it is not based on any objective criteria; and that we do not know what we are trying to achieve when we appoint people.[63]

12.25 In his submission to the Inquiry, McIntyre emphasised that:

> It is no exaggeration to suggest that in the absence of a sound appointment process that consistently and demonstrably appoints only the best candidates — measured against clearly understood criteria of quality — then all other mechanisms of judicial impartiality become fundamentally deficient and limited in their capacity to ensure judges are, and are seen to be, free from bias.[64]

The potential benefits of a transparent process in addressing these shortcomings are set out in turn below.

Addressing perceptions of political appointments

12.26 **Chapter 2** explores why systems of judicial appointment that may favour patronage or appointment for political reasons are damaging to judicial independence and are a threat to judicial impartiality and the perception of judicial impartiality.[65] In this respect, Professor Lynch has suggested that, given the generally very high calibre of the Australian judiciary, its members are 'done a disservice by a process that essentially still adheres to the idea of appointment as a "gift of the executive"'.[66] A more structured, transparent process for appointment has been regularly proposed, including by a number of former Chief Justices of Australia, as one way to reduce these risks.[67] Professors Handsley and Lynch considered that although the reforms introduced by McClelland were 'undoubtedly modest by international standards', they were a 'substantial development towards greater transparency and public confidence that the selection of members of the federal judiciary was uninfluenced by political considerations'.[68]

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62 Women Lawyers Association of New South Wales, *Submission 26*. See further, eg, Australian Law Reform Commission (n 47) [9.39]–[9.40].

63 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994) xiv.

64 Dr Joe McIntyre, *Submission 46*.

65 See **Chapter 2**.

66 Andrew Lynch, 'Will the Heydon Scandal Finally Produce Judicial Appointments Reform?', *AUSPUBLAW* (26 June 2020) <www.auspublaw.org/2020/06/will-the-heydon-scandal-finally-produce-judicial-appointments-reform/>.

67 See, eg, Gleeson QC (n 58); Gageler (n 58); Sir Gerard Brennan AC KBE (n 58); Barwick (n 58). Contrast, however, Chris Merritt, 'Chief Justice Robert French Wary of "Trendy" Selection Reforms', *The Australian* (19 January 2017).

68 Handsley and Lynch (n 38) 187–8.

12.27 A number of stakeholders emphasised the importance of removing the 'mystery' or 'opaque' nature of the judicial appointments process to address concerns about political appointments.[69] On the other hand, the Samuel Griffith Society suggested that the strength of the current system is that it allows 'quiet consultation' that ensures the government can consider a wide pool of candidates 'while preserving the privacy and reputation of all involved'.[70] In examining these different perspectives, there is a distinction between transparency about the process (that is, knowing how the selection of judges is made) and transparency about specific appointments (that is, a public dimension to the process itself for appointing identifiable individuals as judges). In regards to the latter, 'systems involving a higher level of public scrutiny of prospective judicial appointees, such as the United States, have become increasingly more politicised'.[71] The extent to which these concerns are valid depends on the model of transparency adopted. However, the ALRC notes that procedures adopted in other Australian jurisdictions do not involve public disclosure of the identity of those who have made an expression of interest, or the identities of those who have been considered and recommended by selection panels. In addition, there has not been any serious suggestion of US-style confirmation hearings for judicial appointments processes in Australia. The ALRC agrees that such processes would introduce the risk of politicisation and would not be an appropriate model in the Australian context.

Defining and considering core competencies relevant to impartiality

12.28 A central part of many judicial appointments procedures is the publication of criteria for judicial appointment. The ALRC has previously highlighted that:

> Regardless of the court in which a matter is conducted under federal jurisdiction, all litigants should have the same level of assurance regarding key attributes of the judicial officer. … Consistent appointment criteria are an important means of ensuring appropriate levels of experience and knowledge in relation to the family law system. Moreover, establishing core competencies for judicial officers at the time of appointment is fundamental to ensuring good decision-making.[72]

12.29 Under the current approach, appointment is said to be made on the basis of 'merit'. However, many scholars, judges, and parliamentary inquiries have explored how the concept of 'merit' is 'inherently elusive and fluid'[73] even if, as Professor

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69 Women Lawyers Association of New South Wales, *Submission 26*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

70 The Samuel Griffith Society, *Submission 24*.

71 Ibid.

72 Australian Law Reform Commission (n 32) [13.34], [13.44].

73 The Hon Justice S Kiefel AC and Cheryl Saunders AO, 'The Independence of a Meritorious Elite: The Government of Judges and Democracy' (Speech, XIX International Congress of Comparative Law, Vienna, 2014) 8.

Thornton observed, it has a 'mystique of neutrality'.[74] Lynch has suggested that there are 'dangers of omission' in the shorthand justification of appointments as being 'on merit', because 'perceptions of "merit" may be so narrow as to exclude essential personal qualities' required for effective judging.[75] This was a point remarked on recently by the Hon Chief Justice TF Bathurst AC. According to Chief Justice Bathurst:

> Judges should be appointed not merely on their technical ability, but also on their ability to inspire trust in the judiciary by the community. … Merit is not simply technical expertise. It is not the best cross-examiner at the bar nor the most skilful solicitor. If there ever was a time where a judge was appointed merely on their technical excellence, it is long gone. …
>
> What constitutes a high-quality judge will depend on the role and responsibilities of the judge in question. The importance of technical expertise in engendering trust varies. It may be that at the appellate level, trust will depend to a significant extent on technical competence. Even at that level, character, experience and empathy with litigants is extremely important. All the more so with judges in trial courts who interact on a daily basis with members of the community.[76]

12.30 The submission from the Samuel Griffith Society suggested that the traditional approach was appropriate and that 'competence should be the only criterion upon which judicial appointments are made'.[77] Other stakeholders, however, emphasised that competence is necessarily multifaceted and criteria are crucial to understanding how competence is to be assessed. This would support the confidence of litigants, the legal profession, and ultimately the public, in judicial impartiality. These include, for example, the importance of emotional regulation and communication skills in managing the courtroom so as to enhance confidence in judicial impartiality, and to either avoid situations where perceptions of bias arise or deal with them appropriately

74 Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2(2) *Australian Journal of Law & Society* 28, 29. See further Francesca Bartlett and Heather Douglas, '"Benchmarking" a Supreme Court and Federal Court Judge in Australia' (2018) 8(9) *Oñati Socio-legal Series* 1355, 1364.

75 Lynch (n 66).

76 The Hon Chief Justice TF Bathurst, 'Trust in the Judiciary' (Opening of Law Term Address, Sydney, 3 February 2021), quoting Peter H Russell, 'Conclusion' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 420, 431 . For a similar perspective from New Zealand, see the Rt Hon Chief Justice H Winkelmann GNZM, 'What Right Do We Have? Securing Judicial Legitimacy in Changing Times' (Speech, Dame Silvia Cartwright Address, 17 October 2019). See further the Hon Sir Grant Hammond KNZM, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 77–9.

77 The Samuel Griffith Society, *Submission 24*.

when they do.[78] Criteria in these areas are included in both the AIJA and the Law Council of Australia's suggested criteria for judicial appointment.[79]

12.31 Similarly, a number of stakeholders considered it essential that judges have, as recently expressed by Chief Justice Bathurst, 'a deep appreciation of the needs and diversity of the community they serve'.[80] **Chapter 11** explores why an openness to difference and ability to see matters from different perspectives is important to upholding judicial impartiality. This is again reflected in the criteria suggested by the AIJA and the Law Council of Australia.[81]

12.32 Criteria for judicial appointment in New Zealand and Canada specifically include requirements of sensitivity to, and understanding of, issues relevant to the countries' Indigenous peoples.[82] In the Australian context, the Aboriginal Legal Service of Western Australia suggested that an essential precondition for appointment should be 'demonstrated experience, knowledge and/or understanding of Aboriginal culture and Aboriginal history', and that '[e]xperience of Aboriginal and Torres Strait Islander people in the legal system should be highly desirable'.[83] For the reasons explored further in **Chapter 11**, the ALRC agrees, and considers that sensitivity to, and understanding of, Aboriginal and Torres Strait Islander culture, history, and justice issues should be included among criteria for judicial appointment, particularly in respect of certain specialist jurisdictions (such as native title, family law, and administrative and constitutional law and human rights).

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78 See also Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*; Chief Justice Bathurst (n 76). See further **Chapter 10**.

79 The AIJA criteria include: 'sound temperament'; 'willingness to listen with patience and courtesy'; 'commitment to respect for all court users'; and 'ability to inspire respect and confidence': Australasian Institute of Judicial Administration, *Suggested Criteria for Judicial Appointments* (2015). The Law Council criteria include: 'effective and clear written and verbal communication skills with peers and members of the public'; 'the ability to inspire respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly'; 'good character and regard by others'; and 'fairness, humanity and courtesy': Law Council of Australia (n 57).

80 Chief Justice Bathurst (n 76).

81 The AIJA criteria include 'awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs': Australasian Institute of Judicial Administration (n 79). The Law Council of Australia criteria include 'social and cultural awareness of and competency in variations in lived experience, including with respect to gender, cultural and ethnic background, disability, sexual orientation, socio-economic background, professional experience and state of origin and intersectionality, as well as experiences of discrimination and sexual harassment, amongst others': Law Council of Australia (n 57).

82 Office of the Commissioner for Federal Judicial Affairs Canada, 'Guide for Candidates' <www.fja.gc.ca/appointments-nominations/guideCandidates-eng.html>; Attorney-General's Judicial Appointments Unit (NZ), *Judicial Appointments: Office of District Court Judge* (June 2019) <www.justice.govt.nz/about/statutory-vacancies/>. In New Zealand, this followed a recommendation of the Law Reform Commission of New Zealand, which recommended additional statutory criteria for judicial appointments, including consideration of personal qualities, legal abilities, and social awareness of and sensitivity to Māori customs and practices and to other diverse communities in New Zealand: New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, 2012) 57.

83 Aboriginal Legal Service of Western Australia, *Submission 17*.

12.33 Specific changes to criteria for judicial appointment have also been proposed in light of concern about sexual harassment in the legal profession and in the judiciary, in the wake of findings by an independent investigation that a former High Court judge had sexually harassed female associates during his time on the Court.[84] A review into sexual harassment in the Victorian courts by Dr Helen Szoke AO recommended amending the appointments process for judicial officers in Victoria

> to explicitly require that potential appointees are of good character and have consistently demonstrated professional respect and courtesy for their colleagues, clients and others involved in the legal process. [85]

The recommendation also requires that the Attorney-General consult widely to determine whether a potential candidate has satisfied this requirement. [86] These recommendations have been accepted by the heads of jurisdiction in Victoria.[87] In relation to federal judicial officers, a group of 500 women legal professionals wrote an open letter to the Attorney-General (Cth) calling for reform to appointments processes in light of the findings of the High Court investigation.[88]

12.34 In addition, knowledge of specialised areas of practice may be important to upholding confidence in judicial impartiality in certain types of cases. The ALRC has previously recognised the importance of family violence expertise for the appointment of judges exercising jurisdiction in family law, and recommendations it made in this area have recently been implemented by the introduction of new criteria for appointments to the FCFCOA.[89] As detailed in **Appendix E**, a number of litigants and lawyers the ALRC consulted during the course of the Inquiry perceived a failure by judges to understand or appropriately respond to the dynamics of family violence, including coercive control, as giving rise to concerns of judicial bias.

Widening the pool of potential candidates

12.35 Many stakeholders agreed that a more transparent process of judicial appointments, especially including a call for expressions of interest, would widen the pool of potential candidates for judicial appointments.[90] Stakeholders saw this as important in two ways. The first was to enhance the overall quality of appointments generally by providing more candidates to choose from who may have the necessary

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84 See further **Chapter 9**.

85 Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations* (2021) rec 5.

86 Ibid.

87 Joint Statement from the Heads of Jurisdiction, Members of Courts Council and the Chief Executive Officer Court Services Victoria, 'Joint Statement on Review of Sexual Harassment in Victorian Courts and VCAT' (19 April 2021) <www.vcat.vic.gov.au/news/joint-statement-review-sexual-harassment-victorian-courts-and-vcat>.

88 Nina Abbey et al, 'Open Letter to the Attorney General' (6 July 2020), reproduced in Gabrielle Appleby, 'Deep Cultural Shifts Required: Open Letter from 500 Legal Women Calls for Reform of Way Judges Are Appointed and Disciplined', *The Conversation* (6 July 2020) <https://theconversation.com/deep-cultural-shifts-required-open-letter-from-500-legal-women-calls-for-reform-of-way-judges-are-appointed-and-disciplined-142042>. See further **Chapter 9**.

89 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 111(3).

90 Women Lawyers Association of New South Wales, *Submission 26*.

skills and personal qualities as discussed in the previous section. Second, some stakeholders suggested that increased background of appointees could lead to fewer conflicts of interest arising.[91]

12.36 Third, widening the pool of candidates was seen as important to increasing the chance that individuals from non-traditional backgrounds would be appointed.[92] Professor Lynch has described how, in the two years following the return to the traditional appointments process, the government appointed 17 judges, only three of them women.[93]

12.37 The reasons stakeholders saw judicial diversity as important to promoting judicial impartiality were consistent with the justifications summarised in '**In Focus: Judicial diversity and judicial impartiality'**.[94] For example, Associate Professor Higgins and Dr Levy said that:

> We believe that diversity on the bench plays a crucial role, both directly and indirectly, in minimising the risk of biased decision-making. Greater diversity ensures judges are exposed to a wider array of backgrounds, experiences and perspectives in their everyday workplaces and when deciding cases as a panel. Equally importantly, while the boundary between valuable judicial experience and potential bias may be an ill-defined one (inevitably so in our view), because the risk of bias is impossible to eliminate due to the nature of implicit bias, greater judicial diversity ensures that the risk of bias is more fairly distributed between litigants and does not always fall on groups that are under-represented on the judiciary.[95]

12.38 Similarly, the Law Council of Australia suggested that:

> ensuring transparency and promoting greater judicial diversity is also an essential part of supporting judicial impartiality, as well as public and litigant confidence in the administration of justice and, particularly, in judges' ability to make responsive and well-informed decisions. Diversity in the judiciary has

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91 As to the relationship between appointments processes and approaches to conflicts of interest see Matthew Groves, 'Is There a Small Town Exception to the Bias Rule?' (2021) 28(2) *Australian Journal of Administrative Law* 114, 118–9. See further **Chapter 10**.

92 This was also raised by stakeholders in response to the ALRC's Family Law Inquiry: Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) [10.63]. The process introduced by McClelland was, for example, expressly intended to ensure that 'everyone who has the qualities for appointment as a judge or magistrate is fairly and properly considered'. Underlying this was a commitment to increasing judicial diversity: Attorney-General's Department (Cth) (n 38) 2.

93 Andrew Lynch, 'Diversity without a Judicial Appointments Commission: The Australian Experience' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 101, 114.

94 See, eg, John Tearle, *Submission 28* (equality, quality, and legitimacy); Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23* (quality); Law Council of Australia, *Submission 37* (quality and legitimacy); Progressive Law Network, Monash University, *Submission 30* (quality and legitimacy); Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34* (legitimacy); National Justice Project, *Submission 44* (quality and legitimacy).

95 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*.

> a clear flow-on effect for a person's experience in a courtroom, and could be considered a necessary part of enjoying comprehensive access to justice.[96]

12.39 Deadly Connections noted that appointment of significantly more 'suitably experienced and qualified First Nations people to the judiciary' is 'an essential step in reconciliation and rebuilding First Nations trust within the legal system'.[97]

12.40 On the other hand, the Australian Judicial Officers Association stated that:

> The view of this body has always been that appointment should be on merit alone. There has been increasing diversity of appointments. Issues of unconscious bias are routinely addressed in judicial development programmes. Any suggestion that merit precludes, excludes or is incompatible with diversity should be rejected.[98]

12.41 In contrast, Tearle suggested that 'rather than asking under-represented populations to justify their inclusion, we should ask over-represented populations to justify their over-inclusion'.[99]

12.42 Recent surveys have indicated support for increased judicial diversity among key stakeholder groups. In the 2016 survey of Australian judicial officers, diversity of appointments was recognised by a majority of judges as a challenge, with a number of comments indicating that greater diversity was needed (while others suggested a focus on diversity was problematic).[100] In the ALRC Survey of Judges, two judges referred in open-text comments to a more structured appointments process as an important reform to support and strengthen judicial impartiality.[101] Open-text comments in the ALRC Survey of Lawyers reflected the same view, with at least 16 comments raising changes to appointment procedures or practice as crucial to support professional and public confidence in judicial impartiality.[102] Increased diversity in judicial appointments had the second highest level of support in a list of reforms to improve public confidence in judicial impartiality, among those who

96 Law Council of Australia, *Submission 37*.
97 Deadly Connections Community and Justice Services, *Submission 35*.
98 Australian Judicial Officers Association, *Submission 31*.
99 John Tearle, *Submission 28*. This submission cites Professor Malleson on 'ceiling quotas'. Malleson argues that using ceiling quotas for men will promote genuine competition for the appointment of the best and so will directly address the important priority of greater public confidence in the suitability and quality of those males selected for appointment: Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing Over-Representation in the Judiciary' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 259.
100 Appleby et al (n 56) 317–19.
101 See **Chapter 5**.
102 ALRC Survey of Lawyers, July–August 2021.

responded to the ALRC Survey of Lawyers (behind more effective complaints procedures).[103]

12.43 In AuSSA 2020, participants were asked to indicate their confidence in judges across eight different skills and abilities. Although overall levels of confidence in judges were relatively high, substantially fewer people had at least 'some confidence' in the ability of judges to provide equal justice to all (73%, n = 1,088), and to understand the challenges facing the people who appear in their courtrooms (74%, n = 1,075), than to apply the law correctly (89%, n = 1,086) and to treat people with dignity and respect (89%, n = 1,080).

12.44 The effect that a change in procedures can have on widening the pool of potential candidates for judicial appointment was described vividly by the Hon Judge M Omatsu, the first woman of East Asian descent to be appointed a judge in Canada:

> In the July 17th, 1992 edition of the Ontario Reports, I read a notice that changed my life. It invited applications from lawyers of ten years standing for two vacancies on the provincial bench, criminal division. The advertisement concluded that 'In order to improve the representation of traditionally under-represented groups in the judiciary, applications are particularly encouraged from aboriginal peoples, francophones, persons with disabilities, racial minorities and women.' … After some soul searching, I responded, little expecting the letter that arrived several months later requesting me to attend for an interview with the Judicial Appointments Advisory Committee.[104]

12.45 In consultations, some stakeholders noted that the pool of potential candidates should not be limited to those who express interest, particularly because cultural or societal expectations may impact the extent to which a person feels it is appropriate for them to put themselves forward. For this reason, the New Zealand Protocol on Judicial Appointments to the High Court, Court of Appeal and Supreme Court specifically recognises that 'selection should not always be limited to those who have expressed interest', and includes a 'commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection'.[105]

12.46 Similarly, introduction of more transparent procedures will not, on its own, be sufficient to increase judicial diversity. In some jurisdictions with greater transparency concerning appointments, progress towards greater diversity on the bench has

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103 See **Chapter 5**. Against this, reform of the law on bias was ranked as the least important reform in the ALRC Survey of Lawyers. There were 12 comments supportive of increased diversity to enhance judicial impartiality and public confidence in it, describing it, for example, as 'essential' and 'fundamentally important'. There were four comments expressing the view that a focus on diversity was unproductive or unhelpful.

104 The Hon Judge M Omatsu, 'The Fiction of Judicial Impartiality' (1997) 9(1) *Canadian Journal of Women and the Law* 1, 2.

105 Attorney-General's Judicial Appointments Unit (NZ), *Judicial Appointments Protocol* (November 2019) 1. The Protocol also allows for individuals to be nominated or invited to express interest: 6.

been very slow, and unevenly distributed.[106] As Professors Gee and Rackley have explained,

> debates about diversity are complex and interrelated, with transformation of the judiciary's composition likely only via a systematic and collaborative approach. Systematic insofar as diversity must be addressed not only within the appointments process itself, but when thinking about a myriad of other matters as well: retention as well as recruitment; the terms and conditions of judicial service; the provision of training; arrangements for judicial welfare; promotion and professional development across a career; policies on retirement and post-retirement and so forth. A systematic approach also extends more broadly to include thinking about how judicial recruitment is influenced by multiple political and social changes, including changes to the public sector, legal regulatory regimes, legal labour markets and the career choices and working arrangements of lawyers. Insofar as debates about diversity should be informed by the perspectives, experiences and insights of the many different actors with a stake in the judicial system, the approach must also be collaborative.[107]

12.47 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. In terms of diversity deficits, stakeholders have identified the appointment of Aboriginal and Torres Strait Islander people, people from culturally diverse backgrounds, and continued improvements in the rate of appointment of women, as key priorities.[108] The Women Lawyers' Association of New South Wales also suggested that consideration should be given to the appointment of part-time judges so that qualified individuals who wish to, or must, work part-time are also eligible.[109]

12.48 A number of stakeholders emphasised how reforms at the level of the courts need to be matched by ongoing reforms within legal education and the legal profession to remove barriers to progression, and to track and promote diversity of background among lawyers, including at senior levels of the profession.[110]

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106 The Samuel Griffith Society, *Submission 24*. See further Graham Gee and Erika Rackley, 'Introduction: Diversity and the JAC's First Ten Years' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 6–8.

107 Gee and Rackley (n 106) 2 (citations omitted).

108 See, eg, Women Lawyers Association of New South Wales, *Submission 26*; Deadly Connections Community and Justice Services, *Submission 35*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

109 Women Lawyers Association of New South Wales, *Submission 26*.

110 A point emphasised by John Tearle, *Submission 28*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

This includes addressing issues of sexual harassment and bullying in the legal profession.[111] McIntyre suggested that all

> our legal institutions — the judiciary, the professions and the universities — desperately need to work together on a coherent systemic project to achieve in the law appropriate diversity, the removal of gendered practices, and the creation of a culture that values diversity and ensures the safety of all participants.[112]

12.49 In tandem with reforms to appointment procedures, the Council of Chief Justices of Australia and New Zealand, in coordination with the Judicial Council on Cultural Diversity, should also consider court-led processes in other jurisdictions to engage in such systemic projects. These could include processes such as those set out in the *Judicial Diversity and Inclusion Strategy 2021–2025* and adopted by the judiciary of England and Wales,[113] which are intended to promote the personal and professional diversity of the judiciary by increasing the number of well-qualified applicants for judicial appointment from diverse backgrounds and by supporting their inclusion, retention, and progression in the judiciary.

Models for transparent procedures

12.50 Given the significant policy considerations involved in designing a transparent process for judicial appointment, the ALRC has not proposed a particular model, beyond minimum requirements drawn from the Latimer House Principles. However, stakeholders consulted during the Inquiry considered that the procedures operating for appointment of the federal judiciary between 2008 and 2013 had worked well and attracted significant support for reintroduction.

12.51 In considering the record of the process adopted under the previous government, Lynch has suggested that, if reintroduced, it should be enhanced in three ways. First, by enacting it in legislation, 'to protect the system from the vicissitudes of political fortune'.[114] Second, by diversifying the composition of the Advisory Panels, potentially by including lay members. Third, by requiring 'some public justification by the Attorney-General of a decision to appoint an individual not amongst those shortlisted by the Advisory Panel'.[115]

12.52 In submissions, there was support for recognition that in any appointment process there may be a number of meritorious candidates, and that broader considerations, including geographical, gender, or ethnic diversity, may play a role

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111 See, eg, Nina Abbey et al, 'Open Letter to the Attorney General' (6 July 2020), reproduced in Appleby (n 88); Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, International Bar Association, 2019).

112 Dr Joe McIntyre, *Submission 46*.

113 Courts and Tribunals Judiciary (UK), 'Judicial Diversity and Inclusion Strategy 2020–2025' (November 2020).

114 Lynch (n 93) 115.

115 Ibid.

in the final choice between them.[116] Other suggestions in submissions included the creation of a judicial appointments commission,[117] requirements for consultation with bodies representing diverse or multicultural lawyers,[118] quotas for appointment of Aboriginal and Torres Strait Islander judges,[119] development of pathways to fast track appointments of suitably experienced Aboriginal and Torres Strait Islander and culturally and linguistically diverse lawyers to judicial appointment,[120] and caps on appointment of lawyers from traditionally over-represented groups.[121]

In Focus: Judicial diversity and judicial impartiality

It has been repeatedly recognised that, for 'much of its history, the Australian judiciary has been highly homogenous — comprising largely white, middle-aged, Christian males from privileged socio-economic backgrounds, following similar career trajectories'.[122] This is not 'what contemporary Australia looks like'.[123] The Hon Justice K Mason AC noted how in the last century there have been 'different phases' of attention on diversity within the judiciary. 'Yesterday's concerns', his Honour noted, 'were about Roman Catholic/Protestant balance'.[124] More recently, following significant attention on the lack of gender diversity, more women have been appointed to the bench. However, women are still not on the bench in numbers that reflect the population, and other cross-cutting types of diversity — including Aboriginal and Torres Strait Islander peoples, and people of other ethnic and cultural backgrounds — are very poorly represented, even when individuals from those groups make up a significant proportion of the legal profession.[125]

116 John Tearle, *Submission 28*. As to this see further Handsley and Lynch (n 38) 206–8; Lynch (n 93) 106–7; Gageler (n 58) 161.

117 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*.

118 Asian Australian Lawyers Association, *Submission 42*.

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

120 National Justice Project, *Submission 44*.

121 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

122 Brian Opeskin, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary, and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 83, 83.

123 Ibid.

124 The Hon Justice K Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 682.

125 See further [12.54]–[12.57]. See also Asian Australian Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015* (2015).

The past 30 years has seen the development of a rich literature on the justifications for judicial diversity.[126] In a number of Commonwealth jurisdictions, broad political and judicial support has developed for promoting judicial diversity, such that in many jurisdictions its importance has become 'a truth almost universally acknowledged'.[127] Opeskin has summarised the justifications made for judicial diversity under four headings, with different conceptual bases, all of which are relevant to a greater or lesser extent in this Inquiry, and all of which were reflected in submissions.[128] These are:

- **Human rights:** those 'eligible for appointment as judicial officers are entitled to equal opportunity, or at least freedom from discrimination, regardless of attributes such as race, sex, or creed'.[129] Australia is subject to international legal obligations in this regard, although under domestic law judicial appointments lie outside the scope of anti-discrimination law.[130] Aligned to this is the argument that the presence of judges from diverse backgrounds provides 'encouragement and active mentoring' for individuals from diverse backgrounds within the legal profession to 'aspire to, seek and obtain judicial appointment' (and that the absence of senior judges from diverse backgrounds has the opposite effect).[131]
- **Quality:** that judicial diversity 'will improve judicial decision-making by avoiding the narrowness of experience and knowledge implicit in a collection of homogenous, even if excellent, judges'.[132] This is the justification most relevant to this Inquiry, as it is considered a crucial aspect of addressing institutional biases. A range of theoretical perspectives underlie this justification.[133] It is a justification that has been put forward

126 See, eg, Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013); Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68(1) *Current Legal Problems* 119; Heather Douglas and Francesca Bartlett, 'Practice and Persuasion: Women, Feminism and Judicial Diversity' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 76, and sources cited therein.

127 Gee and Rackley (n 106) 1. Specific statutory or policy requirements to promote diversity in judicial appointments exist in the UK, Canada, New Zealand, and South Africa.

128 See, in particular, John Tearle, *Submission 28*; Progressive Law Network, Monash University, *Submission 30*; Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*. See also Law Council of Australia (n 57).

129 Opeskin (n 122) 86–9.

130 Ibid.

131 See, eg, Hunter (n 126) 123. Professor Hunter referred to the argument as it applied to women judges, but noted that her comments applied *mutatis mutandis* to other forms of diversity: 122. One participant in the ALRC Survey of Lawyers emphasised this, saying, 'You can't be what you can't see'.

132 Opeskin (n 122) 86.

133 See ibid 87–8. See further **Chapter 11**.

by numerous judges,[134] by parliamentary inquiries,[135] and by the ALRC in a previous Inquiry.[136] The empirical evidence on the decision-making patterns of judges explored in **Chapter 11**, which indicates that observable differences in outcomes generally arise in cases where one of the judge's social characteristics is a salient feature, gives support to this justification. Judges have also suggested that greater diversity on the bench can impact decision-making by judges from traditional backgrounds, both through appellate decisions and interactions with colleagues on the same court.[137]

- **Utility:** encapsulated by the Hon Chief Justice B McLachlin PC CC as meaning that 'modern societies cannot afford to lose the intellectual power and energy' of those outside the traditional judicial 'profile'.[138] In this way, widening the potential pool of candidates for appointment is seen to enhance the possibilities of meritorious appointments, rather than diluting it.[139] This, too, is relevant to the Inquiry in that a number of stakeholders have emphasised the different skills that it takes to manage confidence in impartiality in busy trial courts, and in relation to certain areas of law, that may be developed in areas of legal practice other than at the bar.
- **Legitimacy**: that there is 'inherent value in having courts that "look like Australia" because fair representation legitimates the courts in the eyes of the community they serve'.[140] In this, there is an important link to confidence in the impartiality of the institution as a whole.[141] As the Hon Justice M McHugh AC noted in relation to appointment of women to the judiciary:

  > The need to maintain public confidence in the legitimacy and impartiality of the justice system is to me an unanswerable argument for having a judiciary in which men and women are equally represented.[142]

134 See, eg, Omatsu (n 104); Justice Mason (n 124) 686–7; The Hon Justice M McHugh, 'Women Justices for the High Court' (Speech, High Court Dinner hosted by the Western Australia Law Society, 27 October 2004); The Rt Hon the Baroness Hale, 'Equality in the Judiciary' (Speech, Kuttan Menon Memorial Lecture, 21 February 2013); The Rt Hon Lord Neuberger of Abbotsbury PC, '"Judge Not, That Ye Be Not Judged": Judging Judicial Decision-Making' (2015) 6 *UK Supreme Court Yearbook* 13, 19; Chief Justice Winkelmann (n 76).

135 See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994) xvi–xviii; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 11–29.

136 Australian Law Reform Commission (n 47) rec 9.3.

137 Hunter (n 126) 137.

138 Opeskin (n 122) 88.

139 Ibid.

140 Ibid.

141 See further **Chapter 2**; Omatsu (n 104) 5–8.

142 Justice McHugh (n 134).

Similarly Chief Justice Bathurst has noted that

> although it is not the role of the judiciary to represent any or all communities … a judiciary seen to be exclusively drawn from a specific ethnic and socio-economic background, [and even particular postcodes], will, even with the best intentions and technical skill, find it difficult to convince people from other backgrounds that they are committed to doing right by all'.[143]

In England and Wales, the Lammy Review into criminal justice and Black, Asian, and Minority Ethnic ('BAME') communities found that a 'fundamental source of mistrust in the [criminal justice system] among BAME communities is the lack of diversity among those who wield power within it'.[144]

A number of critiques have been made of these justifications, some of which were reflected in one submission to the Inquiry.[145] The first is that the obligation of impartiality imposed on all judicial officers means that diversity is unnecessary, because judges are committed to 'doing right by all'.[146] However, **Chapter 4** and **Chapter 11** have shown how even a sincere commitment to impartiality cannot necessarily overcome the impact that experience, world view, and psychological processes have on decision-making. As Opeskin notes, the 'argument for greater judicial diversity does not claim to eliminate these unconscious biases, since everyone is susceptible to them, but to replace one dominant norm with a plurality of cross-cutting affiliations so that courts are less systematically biased'.[147] The Rt Hon Chief Justice H Winkelmann GNZM has suggested that '[t]his aspect of the representative nature of the judiciary connects directly to the perception that a judiciary is independent and that it is impartial'.[148]

The second critique is that the judiciary has 'historically performed its functions with substantial success'.[149] However, as Opeskin notes, 'when one examines judicial performance through the prism of specific groups — specifically those historically excluded from the ranks of the judiciary — the record is less adulatory'.[150] This includes the courts' records in relation to the treatment of women and Aboriginal and Torres Strait Islander people.[151]

143 Chief Justice Bathurst (n 76). See also Chief Justice Winkelmann (n 76).
144 David Lammy MP, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (2017) 37.
145 The Samuel Griffith Society, *Submission 24*.
146 Opeskin (n 122) 89. See further The Samuel Griffith Society, *Submission 24*.
147 Opeskin (n 122) 89. See further Hunter (n 126); Malleson (n 27).
148 Chief Justice Winkelmann (n 76).
149 Opeskin (n 122) 89. See further The Samuel Griffith Society, *Submission 24*.
150 Opeskin (n 122) 90.
151 Ibid.

A third critique is that appointments processes that specifically aim to increase judicial diversity lead to appointees who consider themselves there to 'represent' the interests of a particular social group, contrary to the judicial oath and the judicial method.[152] As the Rt Hon the Baroness Hale of Richmond DBE pithily noted, however, 'a point of view is not the same as an agenda'.[153] The research on judicial decision-making provides significant evidence that differences in judicial decision-making patterns are limited, and more likely to be related to differences in experience, rather than in-group biases.[154] As Professor Hunter has observed, the legal method tightly constrains what non-traditional judges can do, and in some cases their different experiences may lead to greater adherence to the legal method, rather than less.[155]

Finally, and fundamentally, Malleson has argued that the discourse on justifying judicial diversity should change. In her view, rather than asking under-represented populations to justify their inclusion, over-represented populations should be asked to justify their over-inclusion.[156]

Statistics on judicial diversity

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

12.53 Implementation of **Recommendation 8** will provide greater transparency to the public, the Australian Government, the courts, and the legal profession on 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 identify particular problems of overrepresentation and underrepresentation, 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

152 See, eg, The Samuel Griffith Society, *Submission 24*.
153 Baroness Hale, 'A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319, 320
154 **Chapter 11**. See also Hunter (n 126) 136–7.
155 Ibid 137–9.
156 See further Malleson (n 99) 259.

progress.[157] Statistics should be reported in a way that does not allow identification of individual judges. If a federal judicial commission were established in accordance with **Recommendation 5**, collection and publication of these statistics could become part of the commission's role.

Current position

12.54 The only statistics formally collected in relation to social characteristics of the federal judiciary relate to gender, with the most recently available statistics being from June 2020.[158] For the purposes of the ALRC Survey of Judges, the ALRC performed its own analysis of gender of judges on the Commonwealth courts as at 12 April 2021.[159] This showed that at that date women made up 43% of High Court judges (3 of 7), 27% of Federal Court judges (15 of 52), 39% of Family Court judges (13 of 33), and 40% of Federal Circuit Court judges (25 of 63). This is a significant increase on the proportion of women on the bench compared to thirty years ago,[160] but is still not representative of the population as a whole, particularly on the Federal Court.[161]

12.55 Statistics on other types of diversity are not formally collected, and a number of scholars have underlined the difficulties in obtaining data in this area.[162] The ALRC is aware of only one Indigenous member of the federal judiciary, his Honour Judge M Myers AM of the FCFCOA.

12.56 Statistics gathered through other means have provided insight into other disparities in the makeup of the Australian judiciary compared to the Australian population as a whole. A recent study of data from the 2016 Australian census showed that, relative to the general population, judicial officers are more likely to be married and to have Anglo-Celtic ancestry.[163] They are also 'less likely to have been born overseas, to speak a foreign language at home or to be living with a disability'.[164] This research accords with a 2015 analysis by the Asian Australian

157 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Irene Park and Prue McLardie-Hore, *Submission 27*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*.

158 'Judicial Gender Statistics', *Australasian Institute of Judicial Administration* (30 June 2020) <www.aija.org.au/research/judicial-gender-statistics/>.

159 See further **Appendix F**.

160 In 1993, only 6% of Australian judges were women: Bartlett and Douglas (n 74) 1360, citing Sean Cooney, 'Gender and Judicial Section: Should There be More Women on the Courts?' (1993) 19 *Melbourne University Law Review* 20, 22. The first woman appointed to the High Court was the Hon Justice M Gaudron, in 1987.

161 At the last census in 2016, females made up 50.7% of Australia's population: Australian Bureau of Statistics, '2016 Census QuickStats' <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>. The sex ratio of judicial officers has increased year on year across all Australian courts, with the most significant increases at the Magistrates Court level, but '[m]ale dominance increases with the status of the court' (apart from the High Court): Opeskin (n 122) 109–10.

162 See, eg, Bartlett and Douglas (n 74) 1363–5.

163 Opeskin (n 122) 110.

164 Ibid.

Lawyers Association, which found that, across Australia, Asian Australians made up 0.8% of the judiciary.[165] This suggests a significant diversity deficit, given that Asian Australians make up 9.6% of the population.[166]

12.57 The low representation of women, Aboriginal and Torres Strait Islander people, and Asian Australians, is also reflected in statistics about the diversity of the senior bar,[167] which is still the predominant career pathway for senior judges.[168]

Feedback from consultations

12.58 In the Consultation Paper, the ALRC asked for feedback on a similarly worded proposal to collect statistics on judicial diversity.[169] This was supported by all but one stakeholder who addressed the proposal in submissions.[170] A number of the submissions emphasised the potential for collection of statistics on judicial diversity to promote reflection on the part of appointing authorities and the courts on the need for, and progress towards, greater diversity on the bench.[171]

12.59 In other comparable jurisdictions, diversity statistics collected in relation to judges and applicants for judicial appointment include gender, age, professional background, visible minority status, Indigenous status, ethnicity, disability, LGBTIQ+ status, and religion.[172] The courts in England and Wales have also committed to widening the diversity characteristics that judges are asked to self-classify against, including a means of defining socio-economic background.[173] In England and Wales, statistics on serving judges are collected annually by means of a survey, with

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165 Asian Australian Lawyers Association (n 125) 4.

166 Ibid.

167 In 2015, the Asian Australian Lawyers Association found that Asian Australians made up 1.6% of barristers: ibid. In 2018, Professors Bartlett and Douglas reported that women SC/QCs make up only around 1.5% of barristers across the country, and that barristers make up only 8% of the legal profession: Bartlett and Douglas (n 74) 1362–3.

168 Bartlett and Douglas (n 74) 1363.

169 Proposal 15: The Attorney-General of Australia should report annually statistics on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age and professional background: Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021).

170 Supportive: Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Family Law Practitioners' Association of Western Australia, *Submission 18*; Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Women Lawyers Association of New South Wales, *Submission 26*; Irene Park and Prue McLardie-Hore, *Submission 27*; Associate Professor Kylie Burns, *Submission 32*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*. Not supportive: The Samuel Griffith Society, *Submission 24*.

171 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Irene Park and Prue McLardie-Hore, *Submission 27*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.

172 See, eg, Office of the Commissioner for Federal Judicial Affairs Canada, 'Statistics Regarding Judicial Applicants and Appointments' <www.fja.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-2020-eng.html>.

173 Courts and Tribunals Judiciary (UK) (n 113) 12.

judges encouraged, but not required, to self-classify against a number of diversity characteristics.[174]

12.60 The Deakin Law Clinic Policy Advocacy Group suggested that the *Judicial Diversity and Inclusion Strategy 2020 – 2025*, recently published by the judiciary of England and Wales, can provide 'many lessons for a similar scheme in Australia', and emphasised the importance of depth in statistics, such as breaking down statistics on personal characteristics by level of experience.[175] Diversity characteristics that stakeholders suggested should be collected included whether a person identifies as Aboriginal or Torres Strait Islander, age, disability, ethnicity, gender, and professional background, including overseas experience.[176] The Asian Australian Lawyers Association noted that two of its subcommittees were presently considering issues relevant to data collection on cultural diversity in the legal profession, and noted that the Diversity Council Australia has recently established uniform cross-industry guidelines on data collection on cultural diversity.[177] These emphasise that Aboriginal and Torres Strait Islander background should be counted separately, emphasising 'the centrality of Indigenous issues to any diversity and inclusion work', and the special status of Aboriginal and Torres Strait Islanders as First Peoples.[178] These developments will be important to consider for any future implementation of **Recommendation 8**. The Deakin Law Clinic Policy Advocacy Group also suggested that any process of identifying the relevant characteristics for collection should be subject to consultation.[179]

12.61 Stakeholders emphasised in consultations that it was critically important that statistics are collected, and stored, in a confidential and methodologically sound way. The *Judicial Diversity and Inclusion Strategy 2020 – 2025* adopted by the judiciary of England and Wales provides an example of how one jurisdiction is using data on judicial diversity to understand the impact of policies and practices, to identify challenges to diversity and inclusion, and to focus resources.[180] Alongside statistics on judicial diversity, it also collects and analyses statistics on the diversity of the profession and those who apply for judicial appointment, which the judiciary intends to use 'to gain a more detailed picture of career pathways within the professions and into the judiciary'.[181]

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174 Ibid 12.

175 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

176 Ibid; Irene Park and Prue McLardie-Hore, *Submission 27*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*.

177 Asian Australian Lawyers Association, *Submission 42*. See further Diversity Council Australia and University of Sydney Business School, *Counting Culture: Towards a Standardised Approach to Measuring and Reporting on Workforce Cultural Diversity in Australia* (2021).

178 Diversity Council Australia and University of Sydney Business School (n 177) 18–19.

179 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.

180 Courts and Tribunals Judiciary (UK) (n 113) 12. In the UK, the judiciary has much greater say in the appointment of judicial officers and the focus on increased diversity in appointments is, at least in part, a response to concerns that the judiciary were themselves thwarting the diversification of the English and Welsh judiciary through unconscious bias. See further Lynch (n 93).

181 Courts and Tribunals Judiciary (UK) (n 113) 12.

12.62 McIntyre suggested that collection of statistics on the judiciary should be seen as one part of a broader agenda to increase understanding by the public of the judges who serve them.[182] The ALRC agrees, and suggests that, as another aspect of this process, courts should be encouraged to provide insight into the already-existing diversity within their courts, including through profiles of judges from non-traditional backgrounds, or with experiences that may otherwise inform a broader perspective. Again, the judiciary in England and Wales provides an example in this area, with the publication of insights into judges' working lives through a series of videos available on the Courts and Tribunals Judiciary website.[183]

Structured and transparent judicial education

12.63 Structured and ongoing judicial education is important to support judicial impartiality and the law on bias in a number of ways. New judges in particular should be made fully aware of the guidance on conflicts of interest, courtroom conduct, and apprehended bias contained in the *Guide to Judicial Conduct*. They may benefit from the opportunity to discuss with more senior colleagues how to avoid and respond to situations of apprehended bias.[184] They should also have knowledge of the particular procedures in a court for raising and determining issues of apprehended and actual bias.[185] More generally, support and reflection on managing the courtroom and managing emotions may be important to assist judges to deal with the difficult situations in which apprehended bias may arise in court.[186] Specific types of judicial education and cross-cultural education are important to fill knowledge gaps and address underlying stereotypes that can lead to bias at an institutional level in relation to social and cultural issues.[187] Finally, the opportunity to attend judicial education programs can have important benefits in terms of judges' wellbeing: enhancing opportunities for collegiality and potentially enhancing judges' health and enthusiasm for the role.[188]

12.64 The ALRC's background paper *Ethics, Professional Development, and Accountability* describes how the traditional approach to judicial education in Australia has been relatively unstructured, on the historic assumption that 'when a judge is appointed, she or he has the necessary integrity, education, and training to undertake that role'.[189] However, this has gradually changed, with an increasing acceptance of the role and value of ongoing judicial education and the establishment

182 Dr Joe McIntyre, *Submission 46*.
183 Courts and Tribunals Judiciary (UK), 'Day in the Life Of…' <www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/a-day-in-the-life/>.
184 See **Chapter 10**.
185 See **Chapter 6**.
186 See **Chapter 10**.
187 For a brief summary of the link between perceptions of institutional bias and greater acceptance of broader judicial education topics see Gabrielle Appleby et al, *Judicial Education in Australia: A Contemporary Overview* (Report prepared for the Australasian Institute of Judicial Administration, September 2021) 18.
188 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 28.
189 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [4].

of institutions to provide it.[190] Although the inclusion of some topics, particularly in relation to social context education, was initially seen by some judges as a threat to their independence, such education is now widely accepted as important to supporting impartial decision-making.[191]

12.65 Although significant progress has been made in relation to judicial education in Australia, coverage is still described as 'patchy', and judicial education is not transparently tracked or reported across jurisdictions.[192] Apart from court-specific induction processes and a five-day national orientation program, there is currently no publicly available curriculum or professional development pathway for Commonwealth judges. This means that, although a significant number of judicial education courses may be available, covering issues important for supporting judicial impartiality, there is no clear or transparent expectation that judges will attend those courses specifically throughout their judicial career.

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.

12.66 This recommendation builds on the work already done by courts in respect of judicial education. The recommendation suggests better mapping out core training and professional development activities for judges across their careers, and providing transparency about the orientation, education, mentoring, and reflexive learning opportunities provided to judges in their role. Visibility of core training and professional development expectations shows the importance that the courts place on judicial education, including in the areas most important for supporting judicial impartiality.[193] It allows planning of necessary resourcing for providing ongoing judicial education, and releasing judges from sitting duties to attend education programs. It also recognises, as emphasised by Kerr, that there should be a more open acceptance of public responsibility for supporting individuals to acquire the competence required for the judicial role.[194]

12.67 In November 2019, the National Judicial College of Australia ('National Judicial College') published a document on 'Attaining Judicial Excellence', which describes knowledge, skills, and qualities of judicial officers considered to be facilitative

190 See further ibid [50].
191 Ibid [50]–[52].
192 Gabrielle Appleby et al (n 187) 15.
193 Dr Joe McIntyre, *Submission 46*.
194 See, eg, Jessica Kerr, 'Turning Lawyers into Judges Is a Public Responsibility', *AUSPUBLAW* (26 August 2020) <www.auspublaw.org/2020/08/turning-lawyers-into-judges-is-a-public-responsibility/>.

of judicial excellence in order 'to assist in designing professional development programs for Australian judicial officers'.[195] These include many skills and qualities particularly relevant to this Inquiry, which are set out in greater detail in **Background Paper JI5**.[196] Building on this, the National Judicial College has recently developed a suggested professional development pathway for judicial officers, highlighting key courses that it suggests judicial officers might attend at specific stages of their judicial career.[197] Courts should coordinate with the National Judicial College on the development of any court-specific professional development pathways pursuant to **Recommendation 9**, recognising that core competencies may differ depending on the judge's role and any areas of specialisation.

12.68 Stakeholders emphasised the very real difficulties that judges have in attending judicial education courses, given the limited time and resources available to them to do so. In light of this, the Australian Government should ensure that an appropriate amount of time for ongoing judicial education of current judges is included in its consideration of the number of judicial appointments required for each court.[198] It should also ensure that the National Judicial College and other relevant institutions delivering judicial education are funded appropriately to deliver high-quality ongoing education to all current judges. As the *Guide to Judicial Conduct* recognises, this is likely to have benefits not only for the public, but will help judges to 'maintain and improve their skills, respond to changes in society, maintain their health, and retain their enthusiasm for the administration of justice'.[199]

Stakeholder feedback

12.69 In consultations, many stakeholders referred to judicial education as a critical component of the overall architecture for promoting judicial impartiality. It was seen as important to supporting judges in managing the courtroom in a way that best promotes confidence in their impartiality, and to address issues with which the law on bias is unsuited to deal. In most cases, discussions in this area related to supporting intercultural competence and skills in emotional regulation and communication in court, and the importance of understanding psychological processes that may unconsciously influence decision-making.

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195 National Judicial College of Australia, *Attaining Judicial Excellence: A Guide for the NJCA* (2019). In developing the Guide, the National Judicial College consulted with 80 judicial officers from around Australia and internationally. The Guide expressly draws on the National Center for State Courts, *Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges* (2017).

196 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) figure 1.

197 A copy is reproduced at **Appendix I**.

198 See International Organization for Judicial Training, *Declaration of Judicial Training Principles* (2017) art 6: 'The state must ensure that the infrastructure is in place to permit judges to attend judicial training seminars throughout their time on the bench. In practical terms, this means appointing enough judges to give each judge time to undertake training.' See further Gabrielle Appleby et al (n 187) 20–2.

199 Australasian Institute of Judicial Administration (n 188) 28.

12.70 In its Consultation Paper, the ALRC put forward two proposals in this area: **Proposal 17**, relating to judicial orientation; and **Proposal 18**, relating to structured judicial education.[200] All submissions addressing the proposals were supportive.[201] Building on the feedback received, **Recommendation 9** combines these proposals into a single recommendation.

Supporting the transition to the bench

12.71 One area of focus in consultations and submissions was the need to ensure that judges are provided with appropriate support when they are first appointed.[202] In 2006, the National Judicial College adopted a *National Standard for Professional Development for Australian Judicial Officers* (the 'National Standard'). The National Standard was endorsed by the Council of Chief Justices of Australia, Chief Judges, Chief Magistrates, the Judicial Conference of Australia, the Association of Australian Magistrates, the AIJA, and judicial education bodies. In relation to education for new judges, it provided that:

- on appointment, each judicial officer should be offered, by the court to which he or she is appointed, an orientation program; and
- within 18 months of appointment, a judicial officer should have the opportunity to attend a national orientation program, involving judicial officers from different courts and jurisdictions. The program should be a residential program of about five days' duration.[203]

12.72 The ALRC understands from consultations that new judicial officers in the FCFCOA are now provided with an internal induction program run over a number of days, involving sessions with experienced judges, and are assigned a mentor judge when they take up their duties. In line with the National Standard, the National Judicial College also offers a five-day residential National Orientation Program for new judges across all Australian jurisdictions a number of times each year. The ALRC understands from consultations that most new Commonwealth judges take up the opportunity to attend the National Orientation Program, although this may

200 See **Appendix B**.

201 Proposal 17 — Supportive: Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Family Law Practitioners' Association of Western Australia, *Submission 18*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; Dr Joe McIntyre, *Submission 46*. Proposal 18 — Supportive: Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Family Law Practitioners' Association of Western Australia, *Submission 18*; Irene Park and Prue McLardie-Hore, *Submission 27*; Associate Professor Kylie Burns, *Submission 32*; Professor Tania Sourdin, *Submission 33*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

202 See, eg, Dr Joe McIntyre, *Submission 46*.

203 The text of the National Standard is reproduced in the report of the review conducted in 2010: Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (National Judicial College of Australia, 2010) 1.

be some time after their appointment due to scheduling of the training. Attendance within the first 18 months of appointment is not compulsory, however, and rates of attendance broken down by court are not reported in a consolidated format.[204]

12.73 There is also potential to significantly augment the existing provision of on-appointment training, and to develop pre-appointment training, to better support those making the transition from lawyer to judge. Although the traditional common law approach, by which judges are 'found' rather than 'made', assumes that those appointed to judicial office already have the requisite skills, experience, and education for the role, some stakeholders emphasised during consultations that judging requires a different skill set to the adversarial practice of the bar.[205] In addition, appointees who have not practised at the bar may bring important, and different, skills to the role, but may require greater support in certain aspects of courtroom practice.

12.74 This insight is reflected in the work of Kerr, who has noted the potential in Australian courts for more support to be provided to assist newly-appointed judges to make the transition from the legal profession to judging. She has advocated for the benefits of 'intensive, personalised training at the "onboarding" stage — ideally before a judge begins hearing cases', both to support appointees from the bar, and to enhance the possibilities of appointment from other areas of the profession.[206] Kerr has also suggested that education on judging and opportunities for adjudicative experience may be helpfully directed to members of the legal profession prior to appointment, as is the current practice in England and Wales.[207]

12.75 The ALRC notes the positive steps already taken by the establishment of a structured induction process for new judges in the FCFCOA.[208] More substantial on-appointment training, and pre-appointment education, have significant potential to benefit judges and the public, and to facilitate appointment of judges from diverse professional backgrounds, which may have a positive impact on diversity more generally.[209] As such, the development and evaluation of pre-appointment and on-appointment judicial education should therefore be given further consideration by the Council of Chief Justices, judicial education institutions, and continuing legal education providers.

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204 Individual judges' attendance is, however, likely to be reported separately in the relevant court's annual report. The National Judicial College of Australia also reports numbers of overall attendance in its annual reports. National Judicial College of Australia, *Annual Report 2019–20* (2020) 11 (60 Attendees); National Judicial College of Australia, *Annual Report 2018–19* (2019) 12 (61 Attendees).

205 See [12.30].

206 Kerr (n 194).

207 Ibid. See further Dr Joe McIntyre, *Submission 46*.

208 See [12.72].

209 Professor Sourdin suggested in her submission that an appropriate amount of time for such training might be 12 weeks: Professor Tania Sourdin, *Submission 33*.

Structuring ongoing judicial education

12.76 Throughout their career judges should also be provided with structured, high-quality education, with identification of a clear professional development pathway incorporating core courses important to impartial decision-making and litigant confidence. This should be developed by the federal judiciary, in consultation with the National Judicial College, the AIJA, and other relevant institutions.

12.77 In this regard, the National Standard provides that each judicial officer should be able to spend at least five days each calendar year participating in professional development activities relating to the judicial officer's responsibilities. **Background Paper JI5** provides further detail about the content of existing judicial education programs.[210] Judges from the Commonwealth courts are given the opportunity to attend a wide range of courses run by the National Judicial College and other judicial education institutions that address issues relevant to impartiality and perceptions of it.[211] Courts also run their own judicial education sessions during the year, which are generally reported in their annual reports. In 2021, training provided in the Federal Circuit and Family Court included specific family violence training for all court staff involved with family law matters, including judges and registrars.[212] The training, using the 'Safe & Together Model', was considered a very positive development by stakeholders to the Inquiry.[213]

12.78 However, a recent study of judicial education programs across Australia found that provision across different jurisdictions is patchy, and that there was 'limited education aligned to the various stages of the judicial career'.[214] In addition, the authors found that there was an 'ongoing conservatism in the design and provision of judicial education that may reflect … the continuing prevalence of concerns about institutional independence'.[215] This was reflected in the focus on 'substantive law-based programs and corresponding reliance on judges as educators, as well as "on-appointment" education rather than mid- to later career programs; and the continuing voluntary nature of judicial education'.[216]

12.79 The ALRC has previously emphasised the 'need for a coherent and high quality system of judicial education in Australia', leading to it recommending the establishment of the National Judicial College.[217] Once established, the National

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210 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [43]–[48].
211 Ibid [53]–[54].
212 Federal Circuit Court of Australia, 'The Courts engage internationally recognised expert to undertake family violence focussed training' (Media Release, 21 April 2021). The ALRC was advised in consultations that this training had been provided to all judges in the Federal Circuit Court and Family Court during 2021.
213 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [40].
214 Gabrielle Appleby et al (n 187) 46.
215 Ibid.
216 Ibid.
217 Australian Law Reform Commission (n 24) [2.147]–[2.204], rec 8.

Judicial College developed a *National Curriculum for Professional Development for Australian Judicial Officers*.[218] The curriculum was intended to provide guidance to courts to set priorities rather than to be prescriptive, but was not specifically adopted by any court, and is no longer published on the National Judicial College's website.[219] In this regard, the steps that the National Judicial College is now taking to design a new professional development pathway are a further important step towards a more coherent approach.

12.80 Canada provides an example of a significantly more structured approach to judicial education with an emphasis on issues relating to the societal context for judging, including social context education, inter-cultural competence (with particular attention to inter-cultural competence in relation to First Nations people) and bias education.[220] Heads of jurisdiction are expected to 'credit 10 days per year of … authorized educational programs attended by judges against their sitting time', and for the first four years following their appointment to the bench, newly appointed judges develop individual education plans, receive mentoring, and attend an integrated seminar for newly-appointed judges.[221]

Core topics for inclusion in a professional development pathway

12.81 Submissions referred to a number of priority areas that stakeholders considered important for inclusion in, or integration across, judicial education programs to support judicial impartiality. All of these are related to knowledge, skills, and qualities of judicial officers considered to be facilitative of judicial excellence identified by the National Judicial College, and are covered to some extent in existing National Judicial College programs.[222]

12.82 Topics relevant to judicial impartiality that stakeholders considered should be included were:

- **Emotional awareness and emotion management skills:** assisting judges to effectively deploy emotion in everyday judicial work, especially during difficult in-court interactions.[223]

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218 Christopher Roper, 'A Curriculum for Professional Development for Australian Judicial Officers' (National Judicial College of Australia, January 2007). See **Appendix I**.

219 As to the role of the National Curriculum, see National Judicial College, *Judicial Education in Australia* (2012) 5.

220 Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [42]. For the 2021 Prospectus for the Te Kura Kaiwhakawā see Te Kura Kaiwhakawā, Institute of Judicial Studies, 'IJS Schedule of Programmes' <www.ijs.govt.nz/prospectus/default.asp>.

221 Canadian Judicial Council, *Judicial Education Policies and Guidelines for Canadian Superior Courts* (2017) <www.cjc-ccm.ca/en/resources-center/publications/judicial-education-policies-and-guidelines-2017>.

222 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) Figure 1.

223 Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, *Submission 20*.

- **Trauma informed approaches:** the ALRC has previously identified this as a priority for family law judges,[224] and the Law Council of Australia noted the importance of trauma-informed approaches in native title cases 'where applicants are required to provide detailed evidence, for example, on their clan and family history, requiring them to engage with significant intergenerational trauma'.[225] Training in trauma-informed practice may also be particularly important for judges hearing migration matters.
- **Cultural competency, cultural humility, and understanding diversity:** this was also emphasised as critical for upholding judicial impartiality and public confidence in it.[226] When asked in the ALRC Survey of Judges about the potential usefulness of activities to mitigate any potentially negative effects of unconscious or implicit bias, workshops on cross-cultural competency received the highest average rating.[227]

  In *Multiculturalism and the Law* (1992), the ALRC underlined the fundamental importance of the cross cultural awareness of judicial officers, including to providing fair proceedings, assessments of demeanour of witnesses, and assessments of legal concepts of reasonableness or state of mind.[228] It recommended that judicial education should include sessions on cross cultural awareness and provide training in the use of interpreters.[229] The issue of cultural competency is examined further in the next section, in relation to Aboriginal and Torres Strait Islander peoples. However other forms of cultural competency training, or training on intersectional diversity issues, may also be important in particular courts in response to local conditions — a point emphasised by some judges and legal practitioners in consultations and in some submissions.[230]
- **Reflective practice:** supporting judges to reflect on the way they perform their role and how it could be improved.[231] Court user feedback (see **Recommendation 12**) and reporting of data on decision-making patterns (see **Recommendation 13**) may be useful in this context. Other strategies that have been used in Australia include mentoring programs, which are

224 Australian Law Reform Commission (n 32) [13.45].
225 Law Council of Australia, *Submission 37*.
226 For a critique of the term 'cultural competency' and the alternative model of 'cultural humility' see Melanie Tervalon and Jann Murray-Garcia, 'Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education' (1998) 9(2) *Journal of Health Care for the Poor and Underserved* 117. In consultations, some stakeholders preferred the term cultural humility, while others suggested that cultural competency, properly understood, remained a useful concept.
227 See **Chapter 5**. Out of 52 respondents who answered the question, 46 rated workshops on cross-cultural competency as at least 'somewhat helpful' to mitigate potential negative effects of unconscious or implicit bias.
228 Australian Law Reform Commission (n 51) [2.14].
229 Ibid [2.27].
230 See also Asian Australian Lawyers Association, *Submission 42*; National Justice Project, *Submission 44*.
231 Deadly Connections Community and Justice Services, *Submission 35*.

in place in at least the FCFCOA, peer observation of courtroom work, and voluntary 360 degree review processes.[232]

- **Mental health and wellbeing:** the Asian Australian Lawyers Association also referred to the importance of education addressing 'wellbeing and mental health aspects including vicarious trauma', given the documented impact that judicial work can have in this area.[233]
- **Critical reflection on social and cultural bias:** a number of submissions emphasised the importance of substantial and interactive courses on the psychology of decision-making,[234] with 'special attention to unconscious biases arising from the social/cultural standpoint of the judicial officer'.[235]

12.83 As to the last of these, while evidence on the usefulness of short, generalised bias and diversity training for changing behaviour is thin, there is evidence that targeting incorrect schemas that decision makers rely on can improve decision-making. Similarly, such programs — especially if they are intensive and involve interactive and reflective elements — can help to expand understanding of difference and promote reflexive practice and the desire to obtain further information to challenge pre-existing assumptions.[236]

12.84 One stakeholder to the Inquiry pointed to the programs offered by the New Zealand Te Kura Kaiwhakawā (Institute of Judicial Studies) as an example of good practice in this regard, with the provision of a two-day course on diversity and a two-day course on the neuroscience and psychology of decision-making in the courts, tied with other in-depth and immersive programs in relation to Māori culture and language (see relevant courses described at **Appendix J**).

12.85 This is in line with previous consideration of issues of bias by the ALRC. In *Equality Before the Law*, the ALRC emphasised the importance of education in law schools, the legal profession, and for the judiciary, to disrupt assumptions leading to gender bias in the law.[237] It noted the considerable activity in the area of gender

232 Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 172–3. Note judicial 'performance monitoring' is also discussed in a 2014 review of the Federal Court, Family Court, and Federal Circuit Court prepared for the Attorney-General's Department, but relates only to 'efficiency' metrics such as finalisations, clearance rates, transfer times, and pending matters: KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (2014) 52–4.

233 Asian Australian Lawyers Association, *Submission 42*. See further Schrever, Hulbert and Sourdin (n 13).

234 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Irene Park and Prue McLardie-Hore, *Submission 27*; Deadly Connections Community and Justice Services, *Submission 35*.

235 Deadly Connections Community and Justice Services, *Submission 35*; National Justice Project, *Submission 44*.

236 See, eg, Patrick S Forscher and Patricia G Devine, 'Knowledge-Based Interventions Are More Likely to Reduce Legal Disparities Than Are Implicit Bias Interventions' in Sarah E Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) 303. See further Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.

237 Australian Law Reform Commission (n 47) ch 8.

awareness education programs for judges and suggested that there was a need to ensure that such programs were 'co-ordinated and adequately funded'.[238]

Mandatory training?

12.86 The importance of judicial education in judges fulfilling their role and making impartial decisions is recognised in the *Guide to Judicial Conduct*,[239] and internationally in the *Declaration of Judicial Training Principles.*[240] However, there is still a reluctance (with exceptions in some state jurisdictions) to consider any judicial education compulsory, on the grounds that compelling a judge to attend judicial education programs would impermissibly interfere with judicial independence and may be unconstitutional.[241]

12.87 Some submissions called for mandatory training for judicial officers on topics relevant to social and cultural biases.[242] Other litigants that the ALRC consulted expressed their surprise and concern that judges do not have mandatory training. One stakeholder emphasised that as societies changed it was crucial that judges were both willing and able, with adequate resourcing, to access appropriate judicial education.

12.88 While a professional development pathway or similar would not impose compulsory requirements on judges to attend particular courses, it may have the benefit of creating a culture where attendance at particular courses is both expected and facilitated.

Transparency in relation to judicial education

12.89 A key concern of the authors of the AIJA study on judicial education in Australia is that the assessment and understanding of the current state of judicial education is hampered by the limited publicly available data.[243] The report recommended that:

> Courts and judicial education bodies should adopt a standard taxonomy and format for the transparent reporting of judicial education offerings in their respective annual reports. Optimally, an agreed body, such as the AIJA, might assume the responsibility of collecting and disseminating that annual information in a consolidated form.[244]

12.90 This is reflected in the experiences of the ALRC in the conduct of this Inquiry. Many stakeholders raised concerns about judicial education in areas relevant to

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238 Ibid [8.68].
239 Australasian Institute of Judicial Administration (n 188) 28.
240 International Organization for Judicial Training, *Declaration of Judicial Training Principles* (2017). See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [53].
241 See further Gabrielle Appleby et al (n 187) 26.
242 Deadly Connections Community and Justice Services, *Submission 35*; National Justice Project, *Submission 44*.
243 Gabrielle Appleby et al (n 187) 46.
244 Ibid.

the Inquiry, but there was little in the way of public information about any structured approach to such issues beyond the National Judicial College orientation program. Where positive steps have been taken in terms of professional development it is difficult to locate information about this. Some stakeholders emphasised the role that transparency on judicial education (provided and undertaken) plays in maintaining public confidence in judges.[245] Deakin Law Clinic Policy Advocacy Group suggested that information on orientation programs, including syllabus outlines, should be publicly available.[246] For McIntyre, reporting of such programs 'helps to demonstrate the commitment of the judiciary to ongoing development and improvement'.[247]

12.91 The Commonwealth courts do publish some information on judicial education in their annual reports. However, the adoption of a standard taxonomy and format for reporting provision of, and attendance at, judicial education programs would provide significantly more transparency. In addition, Courts (either directly or coordinated through a body such as the AIJA or any future federal judicial commission) should publish a clear summary of the content of any professional development pathways adopted. The website of the Canadian Judicial Council provides an example in this area, with information on the aims and objectives of judicial education, guidelines and policies for judges in relation to judicial education, and a list of all courses provided to judges.[248]

Other ways to address gaps in knowledge and understanding

12.92 In addition to judicial education, in submissions and consultations stakeholders raised the importance of other mechanisms to fill in gaps in judicial knowledge about particular litigants and issues affecting them that might allow judges to better understand different perspectives and experiences.

12.93 A number of submissions referred to the importance of supplementing judges' knowledge in relation to individual cases with specific statutory and social framework facts that are relevant to proceedings. In consultations, some stakeholders suggested that legal professionals needed to be adequately trained to ensure that such information is put before judges, for example in family law proceedings.[249] Stakeholders referred to the usefulness of Bench Books, such as the *Equality Before the Law Bench Book*, and *National Domestic and Family Violence Bench Book.*[250] Some stakeholders emphasised that persons with lived experience of topics covered should be closely involved in the development and updating of such materials.

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245 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*.
246 Ibid.
247 Dr Joe McIntyre, *Submission 46*.
248 Canadian Judicial Council, 'Training That Keeps Moving Forward' <https://cjc-ccm.ca/en/what-we-do/professional-development>.
249 See also Law Council of Australia, *Submission 37*.
250 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [25]–[27].

12.94 Associate Professor Burns considered that there was significant scope to further consider a range of mechanisms to provide high quality research support to the court, including

> further use of bench books, guidelines and reports developed by multidisciplinary committees, judicial guidelines on how to use and interpret empirical material, court research support, enhancement of expert evidence, further use of intervenors and amicus curiae, and further use of specialist courts.[251]

12.95 Deadly Connections emphasised that provision for judge-ordered reports modelled on *Bugmy* justice reports (currently being piloted to inform sentencing in some state courts) would be particularly useful in family law and other civil proceedings concerning Aboriginal and Torres Strait Islander people.[252] A practice established following the decision of the High Court in *Bugmy v The Queen,*[253] these are a comprehensive document that 'identifies the unique cultural and historical factors specific to First Nations offenders'.[254] Deadly Connections considers that these reports are

> important to shed light on the particular experiences of First Nations individuals, their families and community background so as to preclude decisions being made with reference to unconscious bias about First Nations cultures or simply a lack of knowledge that contributes to inappropriate decision making and outcomes.[255]

12.96 The ALRC has previously recognised the importance of presenting culturally-contextualised information to courts involved in sentencing Aboriginal and Torres Strait islander people. In *Pathways to Justice* (2018), the ALRC recommended the development of schemes to facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander people appearing for sentencing in superior courts.[256]

12.97 Burns emphasised that, outside the use of expert evidence, the 'legal framework for judicial use of quality empirical information' is 'unsettled, unclear and insufficient'.[257] Burns and the Asian Australian Lawyers Association called for amendments to the *Evidence Act 1995* (Cth) to address the ways in which evidence on legislative and social framework facts can be considered by the Court.[258] The ALRC agrees that this is an important area for further consideration relevant to

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251 Associate Professor Kylie Burns, *Submission 32*.
252 Deadly Connections Community and Justice Services, *Submission 35*.
253 *Bugmy v The Queen* (2013) 249 CLR 571.
254 Deadly Connections Community and Justice Services, *Submission 35*. See further Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) ch 6.
255 Deadly Connections Community and Justice Services, *Submission 35*.
256 Australian Law Reform Commission (n 254) rec 6–2. See also rec 6–3.
257 Associate Professor Kylie Burns, *Submission 32*.
258 Ibid; Asian Australian Lawyers Association, *Submission 42*.

addressing institutional biases, and suggests that further consideration be given to law reform in this area.

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

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.

12.98 Prior to colonisation, the territory of Australia was governed by sophisticated Aboriginal and Torres Strait Islander legal systems and structures.[259] In 1837, a British House of Commons Select Committee had stated that to require Aboriginal people to observe English laws 'would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust'.[260] Nevertheless, the system of colonial laws was imposed on Aboriginal and Torres Islander peoples, though many continue to 'live under both the laws of the Australian state and the distinct laws and lore of their own communities'.[261] The North Australian Aboriginal Justice Agency has noted that the 'impact of losing decision-making control and authority, or agency, permeates and is far-reaching'.[262]

12.99 **Chapter 11** explored the role that the legal system has played in dispossession and over-incarceration of Aboriginal and Torres Strait Islander people, and removal of Aboriginal and Torres Strait Islander children from their families, communities, and culture. This has enduring impacts, not just on Aboriginal and Torres Strait Islander people but also on the perspectives, knowledge, and implicit associations that that non-Indigenous judges might bring to judging. As Deadly Connections 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

259 See, eg, Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) ch 4.

260 British House of Commons, *Report from the Select Committee on Aborigines (British Settlements)* (House of Commons Parliamentary Paper 425, 1837) 84, cited in Australian Law Reform Commission (n 259) ch 1.

261 Nicole Watson and Heather Douglas, 'Introduction' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision-making* (Routledge, 2021) 1, 1.

262 North Australian Aboriginal Justice Agency, Submission No 113 to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (October 2017).

> legal system has been used to enact significant injustices on First Nations peoples, and justify unequal treatment.[263]

12.100 A report prepared as part of the Law Council of Australia's 'Access to Justice' project ('Access to Justice Report') has set out areas of particular legal need for Aboriginal and Torres Strait Islander people, many of which fall within the jurisdiction of the Commonwealth courts. These included native title, discrimination, social security, credit, debt, consumer issues, and family law and family violence.[264]

12.101 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.[265] This acknowledgement of damage perpetrated by past policies, and the need to improve appropriate cultural competency training for the judiciary, is recognised, for example, in the Reconciliation Action Plan adopted by the Federal Circuit Court in 2019.[266]

12.102 This specific recommendation is not intended to minimise the need for cross-cultural education concerning other communities regularly appearing before the different courts, addressed in **Recommendation 9**. However, it 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.[267]

12.103 The need for court officers interacting 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 as necessary thirty years ago by

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

264 Law Council of Australia, *Aboriginal and Torres Strait Islander People* (The Justice Project, Consultation Paper, August 2017) 14–17.

265 Law Council of Australia, *Submission 37*; Deadly Connections Community and Justice Services, *Submission 35*; National Justice Project, *Submission 44*.

266 Federal Circuit Court of Australia, *Reconciliation Action Plan 2019 – 2021* (2019) <www.fcfcoa.gov.au/node/252>.

267 See further Chief Justice Bathurst (n 76). See also **Chapter 5**.

the Royal Commission into Aboriginal Deaths in Custody.[268] In the Commissioner's view, failure by institutions to provide such training was an example of 'institutional racism which Aboriginal people are very conscious of'.[269] Since that time, significant initiatives have been taken across Australia to provide further cross-cultural education in relation to Aboriginal and Torres Strait Islander people for judges.[270] The (now removed) National Curriculum developed by the National Judicial College included a requirement that judicial officers become knowledgeable about the social context of matters coming before them, including Australia's Indigenous people, and the College's National Indigenous Justice Committee developed a curriculum framework for judicial officers.[271] However, aside from a session at the National Orientation Program provided by the National Judicial College, there does not appear to be a structured approach to the provision of ongoing cross-cultural education for the federal judiciary. The ALRC was told that some members of the federal judiciary nonetheless take part in programs provided by state jurisdictions, such as the *Ngara Yura* program in New South Wales (discussed below), and some courts have undertaken activities under their relevant Reconciliation Action Plans.[272]

12.104 Consultations and submissions were supportive of specific, and ongoing, Aboriginal and Torres Strait Islander cultural competency and cultural safety training for all non-Indigenous members of the federal judiciary.[273] Deadly Connections stated that this was 'essential in limiting the impacts of judicial bias and promoting access to justice for First Nations people'.[274] Submissions emphasised that cultural competency and cultural safety are particularly important in the family law and native title jurisdictions of the Commonwealth courts, but is not limited to these areas.[275] A number of stakeholders agreed in submissions that participation in intensive programs on these topics should be considered a priority (or otherwise

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268 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2 [12.1.32]. See further Recommendation 96, which was that 'judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding'.

269 Ibid [12.1.33].

270 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.

271 Ibid 48. See further [12.79].

272 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021) [46]. The FCFCOA's *Reconciliation Plan 2019–21* commits to development of a cultural awareness training strategy for the court, and documentation on local cultural protocols for each registry and circuit location: Federal Circuit Court of Australia (n 266).

273 Aboriginal Legal Service of Western Australia, *Submission 17*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.

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

275 Ibid.

demonstrated) before a judicial officer sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the FCFCOA.[276]

In Focus: Cross-cultural professional development

Cavanagh and Marchetti have described three predominant types of cross-cultural professional development for the judiciary as follows:

> generally cultural awareness, cultural competency and cultural safety are, in that order, regarded as cumulative points on a linear progression. Cultural awareness as the foundational idea proposes that individuals are introduced to other cultures, (in this case Australian Indigenous cultures) to be made aware of how they might encounter Indigenous people in the workplace, and ideally, are encouraged to consider how personal biases might influence those encounters. Cultural competency then further develops an individual's skills and knowledge so that their behaviours and interactions become more acceptable or appropriate in a cross-cultural sense. Finally, for an individual to provide a culturally safe service, the culture of the client is respected and upheld as the cultural norm informing the interaction as decided upon from the perspective of the client. For a professional to provide a culturally safe service, or a judicial officer to run a culturally safe courtroom, they must at a minimum be both culturally aware and culturally competent.[277]

Cavanagh and Marchetti note, however, that both cultural awareness and cultural competency approaches may have a 'tendency to rely on essentialised versions of Indigenous cultures', and 'may not explicitly address the privilege attached to being a member of the dominant culture'.[278] As observed by Professor Fredericks, a focus on the disadvantage that Indigenous people experience without balancing consideration of the underlying reasons for that disadvantage 'focuses the lens on Indigenous people, as being under-serviced, needy and problematic to non-Indigenous people to some degree'.[279] For this reason,

> cross-cultural professional development must delve deeper into the systemic and institutional issues that underpin social and political inequalities rather than simply being a training session about other cultures.[280]

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276 Ibid. The Indigenous list in the FCFCOA operates in Adelaide, Alice Springs, Darwin, Melbourne, and Sydney: Federal Circuit and Family Court of Australia, 'Indigenous List' <www.fcfcoa.gov.au/indigenous-list>.

277 Cavanagh and Marchetti (n 270) 47.

278 Ibid.

279 Bronwyn Fredericks, 'Which Way? Educating for Nursing Aboriginal and Torres Strait Islander Peoples' (2006) 23(1) *Contemporary Nurse* 87, 95. See further Bronwyn Fredericks and Debbie Bargallie, 'An Indigenous Australian Cultural Competence Course: Talking Culture, Race and Power' in Jack Frawley, Gabrielle Russell and Juanita Sherwood (eds), *Cultural Competence and the Higher Education Sector* (Springer Singapore, 2020) 295.

280 Cavanagh and Marchetti (n 270) 50.

It must also 'acknowledge the diversity that exists within cultural groups including Indigenous Australia, as well as the multiple subjectivities that individuals occupy'.[281]

Others have critiqued the idea of 'cultural competency', 'in part because of the growing understanding that we cannot ever be truly *competent* in another's culture',[282] and have proposed an alternative model of 'cultural humility'.[283] This involves

> a lifelong commitment to self-evaluation and critique, to redressing … power imbalances … and to developing mutually beneficial and non-paternalistic partnerships with communities on behalf of individuals and defined populations'.[284]

In consultations some stakeholders preferred the term cultural humility, while others suggested that cultural competency, properly understood, remained a useful concept in the context of judicial professional development.[285]

12.105 Submissions emphasised that ongoing education in this respect should:

- be developed and delivered by Aboriginal and Torres Strait Islander people and organisations, and appropriately resourced;[286]
- be regular and ongoing;[287]
- be trauma-informed;[288]
- include discussion of the strengths of Aboriginal and Torres Strait Islander peoples and communities;[289]
- involve active and immersive learning experiences, with an appropriate time commitment;[290]

281 Ibid 51.
282 Ella Greene-Moton and Meredith Minkler, 'Cultural Competence or Cultural Humility? Moving Beyond the Debate' (2020) 21(1) *Health Promotion Practice* 142, 143.
283 See Tervalon and Murray-Garcia (n 226). Other alternative models include cultural responsiveness, cultural sensitivity, and cultural capability: Fredericks and Bargallie (n 279) 295.
284 Tervalon and Murray-Garcia (n 226) 123.
285 See further Danso Ransford, 'Cultural Competence and Cultural Humility: A Critical Reflection on Key Cultural Diversity Concepts' (2018) 18(4) *Journal of Social Work* 410.
286 Aboriginal Legal Service of Western Australia, *Submission 17*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.
287 Aboriginal Legal Service of Western Australia, *Submission 17*; Law Council of Australia, *Submission 37*.
288 Aboriginal Legal Service of Western Australia, *Submission 17*; Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*.
289 Deadly Connections Community and Justice Services, *Submission 35*.
290 See generally Aboriginal Legal Service of Western Australia, *Submission 17*; Deadly Connections Community and Justice Services, *Submission 35*.

- develop self-reflexive practices critiquing each member's own culture and standpoint';[291]
- be tailored to the requirements of a judge's role, such that, for example, judges dealing with family law will need 'more specific training about how Aboriginal culture impacts family decision-making and responsibilities and the importance of ongoing connection to culture, community and country';[292] and
- include the acquisition of practical competence in working with Aboriginal and Torres Strait Islander parties in the courtroom and cultural safety practices.[293]

12.106 Submissions also suggested that cross-cultural training could be supported by engagement with Murri and Koori court members, to facilitate engagement between Elders and judicial officers across the state and federal systems.[294]

12.107 A number of stakeholders emphasised the diversity of, and within, Aboriginal and Torres Strait Islanders peoples, and that 'cultural competency' was an ongoing process rather than an absolute position that could be achieved.[295] Professor Nakata has described how even those who have sustained opportunities to learn directly from Indigenous people

> are learning more about the limits of their own knowledge practices than they are about the complexities and meanings of Indigenous knowledge traditions, which in my view makes this perhaps the most valuable exercise of all.[296]

The limits of knowledge are also emphasised in the design of programs relating to Māori tikanga by *Te Kura Kaiwhakawā*. The program on tikanga states that it is designed to 'develop a basic grasp of procedural and substantive tikanga alongside a safe awareness of the limits of that knowledge, and an understanding of when and how to seek help'.[297]

12.108 Stakeholders informed the ALRC of significant opportunities for intensive high quality cultural learning programs that can contribute to much deeper cultural knowledge and understanding, and reflexive practice, such as the 'True Justice: Deep Listening' program.[298] Other active learning experiences referred to included immersion tours by state judges in a number of Australian jurisdictions and visits to Aboriginal communities organised by the Ngara Yura Committee of the Judicial

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291 National Justice Project, *Submission 44*.
292 Aboriginal Legal Service of Western Australia, *Submission 17*.
293 Deadly Connections Community and Justice Services, *Submission 35*.
294 Law Council of Australia, *Submission 37*.
295 See, eg, ibid. See further North Australian Aboriginal Justice Agency, Submission No 113 to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (October 2017).*
296 Martin N Nakata, *Disciplining the Savages, Savaging the Disciplines (Aboriginal Studies Press, 2007) 365.*
297 Te Kura Kaiwhakawā, Institute of Judicial Studies, *Prospectus 2021* (2021) 6 <www.ijs.govt.nz/prospectus/default.asp>.
298 See 'In Focus: Judicial diversity and judicial impartiality' below.

Commission of New South Wales.[299] Stakeholders also emphasised the importance of understanding the diversity of contemporary Aboriginal and Torres Strait Islander experience, including experiences of urban populations. A professional development pathway (see **Recommendation 9**) would ideally prioritise attendance at such courses in the early stages of a judicial career.

12.109 While noting the different cultural, historical, and legal context,[300] in this regard the ALRC notes the range and intensive nature of programs related to Māori culture and language offered by *Te Kura Kaiwhakawā* (Institute of Judicial Studies) in New Zealand (see **Appendix J**), which include a number of opportunities for sustained and immersive education. Stakeholders suggested that the opportunity to attend such courses has been welcomed and appreciated by members of the New Zealand judiciary, and that courses are regularly over-subscribed.

In Focus: 'True Justice: Deep Listening'

'True Justice: Deep Listening' is a program hosted by the North Australian Aboriginal Justice Agency, Winkiku Rrumbangi NT Indigenous Lawyers Aboriginal Corporation, and Aboriginal Medical Services Northern Territory, with an exemplar course developed in partnership with the Australian National University. It aims to provide law students, legal academics, lawyers and members of the judiciary with intensive, on-Country programs to increase Indigenous cultural competency. The exemplar course is scheduled to take place in April 2022 for 16 law students from the Australian National University. It will be delivered over five days at Mparntwe (Alice Springs) and Uluru with Arrernte and Anangu speaking with cultural authority. The course will also connect educators, interpreters, academics and lawyers.

The Australian National University College of Law is enabling Aboriginal-led development and capacity building across the speaker roles to develop future courses in partnership with universities and as continuing professional development for lawyers, with a vision to host courses for judicial officers. The ALRC was told that there is a strong desire and potential for the Aboriginal speaker roles of lawyers, interpreters, Traditional Owners and educators to tailor on-Country, immersive courses specifically for judicial officers and in co-design with the judiciary and education and training bodies.

299 Law Council of Australia, *Submission 37*.

300 Including that tikanga Māori is increasingly recognised as forming a 'integral strand' of the common law of New Zealand: *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 [177].

12.110 Stakeholders emphasised that judicial education should be complemented by continued attention to providing culturally safe court environments, ensuring the availability of quality interpreters, and the availability of specialist Aboriginal and Torres Strait Islander personnel, including cultural liaison officers and Aboriginal and Torres Strait Islander-led support services.[301] The establishment of specialised Indigenous Lists in family law proceedings in the FCFCOA (currently in Adelaide, Alice Springs, Darwin, Melbourne, and Sydney), and recruitment of Indigenous Liaison Support officers for a number of additional registries were noted as positive developments by a number of stakeholders in consultations.[302]

Aboriginal and Torres Strait Islander Court Advisory Panel

12.111 In its submission, the Law Council of Australia emphasised that it is

> crucial that the federal judiciary also engage with Aboriginal and Torres Strait Islander communities to facilitate a greater understanding of subjective factors impacting Aboriginal and Torres Strait Islander peoples in their interactions with the courts, as well as the detrimental impact of existing legislative and policy frameworks, processes and decision-making where Aboriginal and Torres Strait Islander perspectives may be overlooked or treated as an afterthought.[303]

12.112 As part of this, 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, justice organisations, and experts and organisations involved in professional cultural competency training in the justice sector.[304] It is important, as the Law Council of Australia noted, that such a body 'be remunerated to reflect the expertise and time commitments required'.[305]

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301 Law Council of Australia, *Submission 37*.
302 See further Federal Circuit Court of Australia, *Annual Report 2020–2021* (2021) 69.
303 Law Council of Australia, *Submission 37*.
304 This reflects a recommendation proposed in submissions by Deadly Connections Community and Justice Services, *Submission 35*; Law Council of Australia, *Submission 37*; National Justice Project, *Submission 44*.
305 Law Council of Australia, *Submission 37*.

Review of the *Guide to Judicial Conduct*

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.

12.113 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. As described further in **Background Paper JI5**, judicial impartiality is supported by a number of institutions, standards, and practices that have been described as an 'ethical infrastructure' within the judiciary — self-imposed and adopted systems that 'constitute the ethical values and norms of the judiciary and seek to promote good judging'.[306]

12.114 Guidance on judicial ethics or judicial conduct can go beyond the 'external yardsticks' in the law to assist judges to be, and appear to be, as impartial as possible, in light of what we know about how difficult that can be.[307] In addition, and as recognised in the Canadian *Ethical Principles for Judges*, while such guidance is 'intended to assist judges with ethical questions they may encounter', it may also 'provide the public with a better understanding of the role of the judiciary'.[308]

12.115 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 (see **Chapter 11**).[309] In this respect it is different to the *Bangalore Principles*, developed at the international level (see **Chapter 2**). The *Bangalore Principles* note that bias may be manifested through

> epithets, slurs, demeaning nicknames, negative stereotyping, attempted humour based on stereotypes (related to gender, culture or race, for example), threatening, intimidating or hostile acts that suggest a connection

306 Roach Anleu and Mack (n 232) 157, fn 3. The term 'ethical infrastructures' was coined by Professor Schneyer in the context of law firms implementing systems and policies to embed ethical decision-making and practices: Ted Schneyer, 'Professional Discipline for Law Firms?' (1991) 77 *Cornell Law Review* 1. It has since been used by others in the context of the judiciary, see further Roach Anleu and Mack (n 232) 157, fn 3.

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

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

309 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 188) 19. The *Guide to Judicial Conduct* also states: 'It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying': ibid 9.

> between race or nationality and crime, and irrelevant references to personal characteristics.[310]

12.116 The *Bangalore Principles* also recognise equality as a core judicial value 'strongly linked to judicial impartiality'.[311] The commentary recognises that judges must avoid stereotyping, stating that

> a judge who reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived. A judge should not be influenced by attitudes based on stereotype, myth or prejudice. The judge should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.[312]

12.117 The *Bangalore Principles* recognise that a

> judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds').[313]

12.118 The commentary to this principle again links the need to understand diversity in society specifically to avoiding bias and enhancing judicial impartiality:

> It is the duty of a judge not only to recognize and be familiar with cultural, racial and religious diversity in society, but also to be free of bias or prejudice on any irrelevant grounds. A judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist the judge to be, and appear to be, impartial. However, it is necessary to take care that these efforts enhance, not detract from, the judge's perceived impartiality.[314]

12.119 In reviewing the *Guide to Judicial Conduct*, the Council of Chief Justices and the AIJA might have regard to the *Bangalore Principles*, Bench Books developed in Australian jurisdictions, and relevant guides in comparable jurisdictions. The ALRC suggests that the Council of Chief Justices consider including:

- reference to the importance of self-reflection and continuing professional development in relation to managing the courtroom and perceptions of impartiality;[315] and
- reference to the need for self-reflection about the potential impact of stereotypes and attitudes on impartiality, the importance of social context

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310 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) [58].
311 Ibid [184].
312 Ibid.
313 Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (2002) principle 5.1.
314 United Nations Office on Drugs and Crime (n 310) [186].
315 See, eg, Canadian Judicial Council (n 308) [3.C.3], [3.C.6].

education to judicial impartiality, and the importance of an open mind to judicial impartiality.[316]

12.120 These are matters that have been broadly accepted by the Australian judiciary as important to upholding judicial impartiality,[317] and are reflected in a number of Bench Books the judiciary has developed.[318] Although they may seem self-evident, explicit recognition in the judiciary's core ethical document signals to the public a commitment to upholding judicial impartiality in relation to all Australians.

12.121 The ALRC also suggests that the Council of Chief Justices consider explicitly addressing the role of Australian law and the Australian courts in colonial dispossession of Aboriginal and Torres Strait Islander peoples, and the specific responsibility judges have to be familiar with the history, heritage, and laws of Aboriginal and Torres Strait Islander peoples and to create a culturally safe environment in their courtroom. In this respect, it may take inspiration from statements adopted in the medical profession, and should be guided by close consultation with Aboriginal and Torres Strait Islander people.[319]

12.122 In addition, following on from the discussion of difficult issues related to professional relationships in **Chapter 10**, guidance on conflicts of interest arising from particular relationships with counsel or parties should also be kept under review. Any review should take into account analysis of court user feedback (see **Recommendation 12**) and any empirical research on public views in this area, balanced against the practical constraints of the operation of the legal profession.

12.123 Any review of the *Guide to Judicial Conduct* in these areas should be informed by public consultation, such as that adopted by the Canadian Judicial Council in its revision of the *Ethical Principles for Judges*.[320] This can help to ensure that guidance adopted reflects contemporary values and expectations of the public.

316 Modelled on Judicial Group on Strengthening Judicial Integrity (n 313) Part 5; Courts and Tribunals Judiciary (UK) (n 113); Canadian Judicial Council (n 308) [4.C.1]–[4.C.3], [5.A.4].

317 See further Australian Law Reform Commission, 'Ethics, Professional Development, and Accountability' (Background Paper JI5, April 2021).

318 See, eg, Judicial Commission of New South Wales, *Sexual Assault Trials Handbook* (2021) 718; Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2006) [1.2.1], [1.3.1]; *Equal Treatment Bench Book* (Supreme Court of Queensland, 2nd ed); Michael King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 143; *National Domestic and Family Violence Bench Book* (Australasian Institute of Judicial Administration, 2020) [5.10].

319 *Good Medical Practice: A Code of Conduct for Doctors in Australia* (Medical Board of Australia, 2020); Australian Psychological Society, *Ethical Guidelines for the Provision of Psychological Services for, and the Conduct of Research with, Aboriginal and Torres Strait Islander Peoples* (2015).

320 See Canadian Judicial Council, 'Update on Ethical Principles for Judges' (2019) <www.cjc-ccm.ca/en/news/update-ethical-principles-judges>.

Data on court experiences and outcomes

12.124 In conducting this Inquiry, the ALRC encountered a lack of comprehensive and representative data about litigants' subjective experiences in the Commonwealth courts. The lack of comprehensive data on civil justice is, as one submission noted, 'notorious', and its

> impacts are far reaching. The data currently collected are completely inadequate to understand (a) users' experiences and (b) the profile of parties and cases in which matters of concern arise. Both kinds of information are necessary to properly interrogate the issues of interest to the Inquiry.[321]

A recent review of how justice system data is managed in three Australian jurisdictions, including the federal courts, noted that the move to a more virtual registry in Australian courts has not yet led to 'the ability of court services to publish or even make use of court user data'.[322] Although courts routinely collect data on outcomes, the review concluded that collection of court user data had not been a priority, and that the case management systems that courts use have made it difficult.[323] The authors noted a recognition among government and the legal sector, however, that collection of such data is important for the development of policy and practice.[324]

12.125 In her submission, Professor Sourdin noted the importance of court user data and more detailed data on outcomes, not simply to understand the experiences of those who use the courts, but also to understand who does not access the court system, which might also be influenced by perceptions of a lack of judicial diversity, and judicial bias.[325]

Understanding court user experiences

Recommendation 12 Each Commonwealth court should systematically capture court users' subjective perceptions of procedural justice using standardised tools.

12.126 **Recommendation 12** is consistent with the International Framework for Court Excellence ('International Framework'), which commits courts to 'regularly use feedback to measure satisfaction of all court users', 'listen to court users and

321 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.
322 Judith Townend and Cassandra Wiener, *'Justice System Data': A Comparative Study — Report and Recommendations* (The Legal Education Foundation and University of Sussex, 2021) 50.
323 Ibid.
324 Ibid.
325 Professor Tania Sourdin, *Submission 33*.

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'.[326]

12.127 The ALRC's consultations and results from surveys suggest that perceptions of bias in proceedings arise more frequently than is reflected in the very small numbers of bias applications raised and internal complaints made.

12.128 Seventy-four per cent (n = 192) of participants in the ALRC Survey of Lawyers considered that the current procedures encourage underuse of bias claims.[327] Fifty-eight per cent (n = 207) of participants said that they had made the decision not to raise an issue of actual or apprehended bias with a judicial officer, even though they believed there were strong grounds to raise it.[328] Only two of 11 litigant participants in the ALRC Survey of Court Users felt that the judge in their proceeding was biased or favoured one side over the other had raised this with the judge, and only 13 of the 27 legally represented litigants in this category had raised it with their lawyer.[329] However, there is no comprehensive data specific to the Commonwealth courts that the ALRC could draw on to confirm if perceptions of a lack of impartiality are shared across the population of court users.

12.129 Some perceptions of bias may arise from circumstances that could amount to apprehended or actual bias under the law. The recommendations contained in **Chapter 6**, **Chapter 7**, and **Chapter 8** seek to improve the procedures for raising the issues with judges, but strike a careful balance with issues of efficiency relevant to access to justice. Other circumstances giving rise to a perception of bias may not amount to apprehended bias under the law, but may nevertheless taint litigants' sense of the fairness of the process, and potentially affect their conduct of proceedings, and willingness to comply with orders.[330] Experiences may also give an insight into how litigants and lawyers perceive social and cultural factors impacting decision-making, and how these might be addressed.

12.130 Being aware of any significant litigant and practitioner experiences of bias or unfairness is an important first step in addressing them. Collection and analysis of data will help courts to identify systemic problems that are not being addressed adequately by the existing procedural fairness rules, and can be used to inform reflective practice by judges and judicial education programs (**Recommendation 9**). It can also identify whether any particular groups of court users have lower perceptions of fairness. It may also highlight areas where judges may need further support.

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

327 See **Chapter 5**.

328 See **Chapter 5**. Either directly or as part of a legal team.

329 ALRC Survey of Court Users, July–August 2021.

330 See further Diane Sivasubramaniam and Larry Heuer, 'Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness' (2007) 44 *Court Review* 62, 63. See also Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990).

12.131 To ensure that judicial independence is respected, this feedback should not be used as a tool to evaluate judicial 'performance' on an individual basis, but can instead be designed in such a way that it is anonymised and reported in aggregate.

12.132 Collecting and analysing feedback in a more structured and inclusive way will require some additional resourcing from the Australian Government, but advances in technology mean that this can be done in a time and cost efficient manner. Some models for collection of court user feedback — such as twice yearly surveys of court users in court buildings using a short list of standardised questions — are relatively low cost.

Current practice

12.133 The Commonwealth courts do not systematically collect information from court users about their experiences of proceedings. There have been efforts in some Australian courts to obtain such feedback through surveys since at least the 1990s.[331] However, although the Federal Circuit Court and Family Court have conducted wide-ranging surveys of court user experiences in the past as part of their commitment to the International Framework, the last of these was carried out in 2014.[332] Feedback from court users in the Commonwealth courts is now sought through separate 'User Groups', which are generally invitation-only and made up primarily, and in some cases wholly, of legal practitioners.

12.134 Family law is, however, one area in which certain further data in relation to litigants is being collected by the FCFCOA, with the launch of the Lighthouse Project, currently being piloted in three FCFCOA registries (Adelaide, Brisbane, and Parramatta).[333] This involves sending parties a questionnaire at the time a case is filed through a confidential and secure online platform, which is used to screen cases to appropriate case management pathways based on a subsequent risk assessment.[334] This has allowed the Court to confirm, for example, that the prevalence of allegations of family violence in cases is higher than previously understood, and that half of all cases screened as high risk had four or more risk factors.[335] Since the project was launched, the Court has also conducted stakeholder meetings to obtain feedback, and the project is currently undergoing independent evaluation, with input from court staff, the legal profession, and litigants.[336] The Court has reported that:

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331 For an overview of practice in the 1990s, see Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 58-62 , 135–45. For an overview of more recent practice see Paul Nelson, Winifred Agney-Pauley and Lily Wozniak, *NSW Court User Experience Survey: Results from Two Metropolitan Courthouses* (NSW Bureau of Crime Statistics and Research, 2017) 1–2.

332 And the results published in 2015: Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey* (2015).

333 Federal Circuit and Family Court of Australia, 'Lighthouse Project' <www.fcfcoa.gov.au/fl/fv/lighthouse>.

334 The information provided through the questionnaire cannot be disclosed or used as evidence in proceedings: *Family Law Act 1975* (Cth) ss 10U, 10V.

335 Federal Circuit and Family Court, 'New court initiatives help uncover higher prevalence of family violence and other risks' (Media Release, 10 November 2021).

336 Federal Circuit Court of Australia (n 302) 30–33.

> Early feedback from litigants indicate that the interview process has been a helpful and empowering experience. Litigants have reported positivity around the early responsiveness of the Court in hearing their views and experiences.[337]

The Court noted that it 'has been extremely satisfying to receive positive feedback from litigants regarding their experience of the project to date'.[338]

12.135 More broadly, the Productivity Commission produces an annual report on government services, which measures the courts against twelve indicators.[339] One of these is 'perceptions of court integrity', which is 'an indicator of the government's objective to encourage public confidence and trust in the courts'.[340] The report notes that:

> Community confidence and trust in the fairness and equality of court processes and procedures is integral to a willingness to engage with courts and comply with court outcomes.[341]

However, since the establishment of the indicator in 2018, the Productivity Commission has not had data against which to measure it.[342]

12.136 A significant number of courts internationally do collect feedback on court user satisfaction and experiences of fairness.[343]

The relevance of court user feedback

12.137 In consultations, some stakeholders expressed the view that there was limited value in obtaining court user feedback because the feedback would simply be a reflection of whether the person won or lost their case. However, an extensive body of research has shown that, while decision makers' assessment of the fairness of a process is more likely to be concerned with whether an outcome was fair, litigants are most concerned with whether the process engendered trust, was neutral, involved respectful treatment, and gave them a voice.[344] In its 'Global Measures for Court Performance' developed in relation to the International Framework, the International

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337 Ibid 31.

338 Ibid 33.

339 Steering Committee for the Review of Government Service Provision (n 26) ch 7. See further Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

340 Steering Committee for the Review of Government Service Provision (n 26) 7.19.

341 Ibid.

342 Ibid 7.20; Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018* (Productivity Commission, 2018) 7.29.

343 In relation to the US, see, eg, National Center for State Courts, 'Reports from Courts', *CourTools* <www.courtools.org/trial-court-performance-measures/reports-from-courts>. For experiences in Macedonia, see further International Consortium for Court Excellence, *Global Measures of Court Performance* (Secretariat for the International Consortium for Court Excellence, 3rd ed, 2020) 22–3. In relation to England and Wales, see Natalie Byrom, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice* (The Legal Education Foundation, 2019) 19–20.

344 Sivasubramaniam and Heuer (n 330) 62–3. See further Natalie Byrom, *Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice — Report and Recommendations Arising from Two Expert Workshops* (The Legal Education Foundation, 2019) 19.

Consortium for Court Excellence (of which the AIJA is a founding member) notes that:

> It is often assumed that 'winning' and 'losing' is what matters most to those who have encounters with courts. However, this is not what counts most in shaping the public's trust and confidence in the courts. Even those who dislike and may dispute the outcomes of court proceedings may respect the legitimacy and fairness of the court proceedings. Ultimately, it is the rule of law and procedural justice that matters more than the outcome. Research consistently shows that it is people's personal perceptions about their access to justice, how they were treated by the justice system, and whether a court or other tribunal makes its decisions fairly that shapes their satisfaction or dissatisfaction.[345]

12.138 An influential model by which psychologists have explained these findings suggests that, rather than simply serving the instrumental purposes of ensuring a fair outcome, these features — trust, neutrality, respect, and voice — 'convey that the individual is respected by his or her group — prompting people to judge those procedures as fair'.[346] Judgements about whether proceedings are fair also influence public confidence in the courts. In this area, a line of research has shown that 'process concerns were more important than instrumental concerns in shaping citizens' evaluations of the police and the courts'.[347]

12.139 Systematically measuring such feedback can serve various goals, including:

- providing additional information relevant to key values of the administration of justice, including fairness, impartiality, and equality, to be considered alongside measures of efficiency that are currently collected;
- determining whether perceptions and beliefs of those who work within the court are matched by those who use the courts;
- measuring what is important for different actors in the court system which, as discussed above, may differ;
- measuring whether particular social groups experience the fairness of procedures differently;
- measuring the impact of reforms on subjective perceptions of fairness, and on any disparate outcomes on different groups;
- measuring any differences in perceptions depending on the mode of the hearing, whether online or in person;

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345 International Consortium for Court Excellence (n 343) 22.

346 Sivasubramaniam and Heuer (n 330) 63, citing EA Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (1988), in the context of a discussion of the Group Value Model developed by Tyler and Lind in Tyler, TR & Lind, EA, 'A relational model of authority in groups' (1992) 25 *Advances in Experimental Social Psychology* 115. See further Steven L Blader and Tom R Tyler, 'Relational Models of Procedural Justice' in Russell S Cropanzano and Maureen L Ambrose (eds), *The Oxford Handbook of Justice in the Workplace* (Oxford University Press, 2015).

347 Sivasubramaniam and Heuer (n 330) 63, citing four seminal studies by Tyler. See further Byrom (n 344) [9.5].

- communicating progress and success succinctly;
- enabling court managers and judges to spot and address problems quickly; and
- by providing accountability and transparency, enhancing the judiciary's independence from 'inappropriate performance audits and appraisals imposed by executive and legislative agencies'.[348]

12.140 A number of judges have emphasised the importance of the first point. Courts now collect and report (whether internally or externally) statistics on clearance rates of matters filed in a year, time to finalise matters, and numbers of outstanding judgments by judicial officer. However, numerous judges have noted, as stated by Chief Justice Bathurst, that

> the most important criteria by which the performance of courts must be judged are qualitative — fairness of the processes used and the fairness of the outcomes.[349]

12.141 Chief Justice Bathurst notes that if a judge produces judgments quickly, but they result in a number of successive appeals, this is inefficient for the system overall.[350] Particularly relevantly for judicial impartiality is the concern that '"[j]ustice rushed" is as much denied as justice delayed. The proper reflection necessary to formulate a judgment is a time-consuming exercise'.[351] Recognising the importance of fairness of process and outcomes also recognises the important public governance aspect of the judicial function — the courts are not simply service providers, but rather 'part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances'.[352]

12.142 In the criminal justice context, the recent Lammy Review conducted in England and Wales also considered that the collection of feedback was important to build on the principle that 'justice must not only be done — it must be seen to be done'.[353] The review considered that feedback from courts users was important to help judges assess how well they communicate with victims, defendants, and others from Black, Asian, and Minority Ethnic communities.[354] It recommended that the judiciary should establish a system of online feedback on how judges conduct cases to inform the professional development of judges.[355]

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348 International Consortium for Court Excellence (n 343) 7. See further generally the Hon Chief Justice TF Bathurst, 'Who Judges the Judges, and How Should They Be Judged?' (2019) 14 *The Judicial Review* 19, 32; National Center for State Courts, *CourTools: Giving Courts the Tools to Measure Success* (2005).

349 Chief Justice Bathurst (n 348) 32.

350 Ibid.

351 Ibid 36.

352 The Hon Chief Justice JJ Spigelman AC, 'Judicial Accountability and Performance Indicators' (Speech, 1701 Conference: The 300th Anniversary of the Act of Settlement, 10 May 2001, Vancouver), quoted in ibid 33–4. See further **Chapter 2**.

353 David Lammy MP (n 144) 31.

354 Ibid 36.

355 Ibid rec 14.

Stakeholder feedback

12.143 In the Consultation Paper, the ALRC asked whether existing processes for collecting feedback from court users were sufficient and appropriate.[356] All submissions responding to this question considered that they were not.[357] The views about the limitations of the user groups reflect longstanding concerns about their ability to capture litigant views. In 1997, the Attorney-General's Department (NSW) conducted a review of user forums in the New South Wales courts and concluded that such forums

> may not be able to be constituted in a manner which allows for competing and sometimes incompatible needs of professionals and non professional users of courts services to be effectively represented.[358]

12.144 All submissions responding to the proposal in relation to the collection of court user feedback (**Proposal 23**) were supportive[359] and better collection of feedback from court users was also supported in consultation meetings. Stakeholders considered this feedback should be used for informing self-reflection, and judicial education, rather than as formal performance feedback for individual judges.[360] One stakeholder emphasised that it was important that the courts collected feedback directly from self-represented litigants, rather than relying on overstretched community legal centres to do so.

12.145 In their submission, Associate Professor O'Sullivan, Dr Ng, and Associate Professor Grant noted that assessment of experiences should 'move beyond satisfaction to use standardised tools to gather data on users' perceptions of procedural fairness'.[361] McIntyre noted that there are significant opportunities 'for technological solutions to be embraced in the execution of such a project'.[362]

12.146 In consultations, stakeholders emphasised that development of processes for collection of feedback should be done in consultation with litigants and their lawyers, paying attention to specific needs of particular communities, including in

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356 Australian Law Reform Commission, *Judicial Impartiality Inquiry* (Consultation Paper No 1, 2021) Question 24.

357 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Professor Tania Sourdin, *Submission 33*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Asian Australian Lawyers Association, *Submission 42*; Dr Joe McIntyre, *Submission 46*.

358 Attorney-General's Department (NSW), *Response to the Public Accounts Committee 1996 Report: Customer Services in Court Administration* (August 1997) 6, quoted in Parker (n 331) 63.

359 Deakin Law Clinic Policy Advocacy Practice Group, *Submission 16*; Aboriginal Legal Service of Western Australia, *Submission 17*; Women Lawyers Association of New South Wales, *Submission 26*; Professor Tania Sourdin, *Submission 33*; Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*; Law Council of Australia, *Submission 37*; Asian Australian Lawyers Association, *Submission 42*; Dr Joe McIntyre, *Submission 46*.

360 See, eg, Dr Joe McIntyre, *Submission 46*.

361 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.

362 Dr Joe McIntyre, *Submission 46*.

relation to the method of collection, and languages available. Stakeholders also emphasised that easy to understand high-level reporting of such feedback, and any actions taken by the courts to respond to issues raised, should be published by the courts. This reflects the requirements of the International Framework.[363]

Models

12.147 Determining an appropriate model for collection of subjective perceptions of procedural justice requires further consideration and consultation by the courts. In terms of models proposed and adopted elsewhere, this section provides a high level overview.

12.148 A common way in which feedback is collected is through surveys. The International Consortium for Court Excellence has prepared a document, *Global Measures of Court Performance*, which sets out a model for collecting court user feedback by a short survey conducted on a typical court day, twice yearly.[364] This was the basis of the approach used for the 2011 and 2014 surveys of court users by the Family Court and Federal Circuit Court.[365] The Victorian County Court approach appears to adopt a similar model.[366] The National Centre for State Courts provides a variation of the model, with more specific questions relating to judges and perceptions of procedural fairness, on the *CourTools* website.[367] As emphasised in submissions, any such approach would need to be considered carefully to ensure that experiences of users who use a language other than English are also captured. With the increased, and likely continued, prevalence of online hearings, consideration would also need to be given to how to capture experiences of users attending online hearings, such as through online surveys.

12.149 The recent *Data Strategy* prepared for the courts and tribunals in England and Wales recommended that the courts and tribunals should 'commit to capturing data on subjective perceptions of procedural justice using standardised tools'.[368] These validated measures have been developed in the established literature on procedural justice, and papers prepared in advance of the *Data Strategy* set out examples.[369] Dr Byrom notes that the questions in the current 'user satisfaction survey' used by the English and Welsh courts are not publicly available, 'making it difficult to assess the extent to which the user satisfaction surveys deployed map to existing validated approaches for measuring procedural justice'.[370]

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363 Australasian Institute of Judicial Administration et al (n 326) 29.
364 International Consortium for Court Excellence (n 343) 22–6.
365 Ibid 23.
366 County Court of Victoria, 'Eighth County Court User Survey results' (Media Release, 28 November 2019).
367 National Center for State Courts, 'Trial Court Performance Measures', *CourTools* (29 March 2021) <www.courtools.org/trial-court-performance-measures>.
368 Byrom (n 343) rec 6.
369 Ibid 18. For an example of subjective measures, see Appendix C in Byrom's report, which lists measures developed in A Sela 'Streamlining Justice: How Online Courts Can Resolve The Challenges of Pro Se Litigation' (2016) 26 *Cornell Journal of Law and Public Policy* 331, 367.
370 Byrom (n 343) 19.

12.150 The *Data Strategy* has also developed a list of individual attributes that should be captured when collecting data in the English and Welsh context.[371] These include age; disability; employment status/income; English as a foreign language; gender reassignment; highest level of education (proxy for literacy); postcode; pregnancy and maternity; race; religion or belief; sex; sexual orientation; and fear or distress connected with the case (for example, domestic violence/abuse, incarceration, survivor of trafficking/torture).[372] In Australia, identification as an Aboriginal and/or Torres Strait Islander person would be an important addition to this list. Further collection of demographic data could also draw on existing data collection frameworks in relevant areas.[373]

12.151 O'Sullivan, Ng, and Grant considered that it

> is precisely this kind of data that is needed in the Commonwealth courts to better understand users' experiences and to assess whether there are differences between users with different characteristics.[374]

12.152 Some stakeholders, including judges, lawyers, and litigants, also suggested voluntary 360 degree feedback programs, which have been implemented at different times in different Australian courts, as a useful way to provide additional, individualised, feedback to individual judges.[375] These programmes obtain feedback from 'judicial colleagues, court staff and lawyers who regularly interact with the judge' concerned, to assist judges in self-reflection and to improve their work.[376] It is more difficult to obtain feedback from individual litigants in this way. However, in consultations, some judges referred to professional development programs where a litigant spoke directly about their experience in court, and the powerful effect that it had on judges. They suggested that this was another way in which feedback could be provided to judges as a group, in addition to obtaining more representative data.

Statistical patterns in decision-making

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.

12.153 The use of data to enhance transparency and improve performance is ubiquitous in many industries. However, assessing fairness by reference to

371 Byrom (n 343).
372 Ibid 63.
373 See, eg, Victoria State Government, *Victorian Family Violence Data Collection Framework* (2021). See further Asian Australian Lawyers Association, *Submission 42*.
374 Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant, *Submission 34*.
375 As to their use in Australian courts, see further Roach Anleu and Mack (n 232) 172–3.
376 Ibid 172.

statistical patterns on case outcomes is anathema to many lawyers and judges. Lawyers typically examine judicial decisions on an individual basis. The doctrine of precedent operates so 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.

12.154 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.[377] Improvements in technology, and the move towards greater use of online filing of cases, means that this is likely to increase.[378] 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 or the AIJA might consider being involved in the development of guidelines on minimum standards for the collection, development, and use of such statistics by outside parties.

12.155 **Recommendation 13** is not intended to directly impact the law on bias in this area (**Chapter 10**), which will continue to be developed by judges through case law. Rather, it is intended to promote reflection within the courts on the potential usefulness, and limits, of such data, and to equip it to effectively engage when issues of judicial impartiality are raised by the use of such data by outside parties.

Current position

12.156 At an institutional level, case-level data may be used to analyse trends in case outcomes across the institution as a whole.[379] Where appropriate court user data is captured, sophisticated statistical analysis may provide insights into different outcomes in similar cases for different groups of people.[380] This might indicate institutional biases.

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377 Jena McGill and Amy Salyzyn, 'Judging by Numbers: Judicial Analytics, the Justice System and Its Stakeholders' (2021) 44 *Dalhousie Law Journal* 249, 253–8. See further Pamela Stewart and Anita Stuhmcke, 'Judicial Analytics and Australian Courts: A Call for National Ethical Guidelines' (2020) 45(2) *Alternative Law Journal* 82, 82.

378 McGill and Salyzyn (n 377) 261–3.

379 Outcomes might include cases withdrawn and cases settled, in addition to cases determined by judicial decision.

380 See further **Chapter 11**.

12.157 Data on judicial decision-making in individual cases may also be used to analyse the decision-making patterns of individual judges.[381] This latter use, commonly known as 'judicial analytics', has been described as

> the analysis of data (including judgments and other public records of the work of judges) using artificial intelligence (AI) and machine learning to monitor, understand or predict judicial behaviour.[382]

12.158 With appropriate data points, this type of data may also be analysed to highlight differences in decision-making patterns of one judge compared to other judges deciding similar matters, and whether outcomes appear to be related to characteristics of the litigant. This could be suggested as evidence of personal bias, although, as discussed in **Chapter 10**, it is unlikely to be found to evidence actual or apprehended bias under the law.

12.159 In France, publication of the latter type of analysis has recently been criminalised, punishable by up to five years imprisonment.[383] Australia does not specifically regulate publication of analysis of court judgments, although publication of information suggesting that a specific judge is biased in their decision-making could, depending on the facts, amount to defamation,[384] or potentially to the contempt of scandalising the court.[385]

12.160 Although the Commonwealth courts collect and report on a significant amount of data on case outcomes, as discussed above,[386] there is a lack of individual court user data against which such outcomes can be considered to determine whether there are statistically significant differences in outcomes for different types of litigants. The ALRC has not been made aware of any internal process to collect data on and analyse decision-making patterns of individual judges, although it understands that some statistics, such as clearance rates, outstanding judgments, and decisions appealed are tracked internally by courts.

Feedback from consultations

12.161 In consultations and submissions, some stakeholders emphasised the potential benefits of collection, analysis, and internal and external reporting of data on outcomes of judicial decision-making. Other stakeholders were more sceptical about the usefulness of such data, and considered that collection and publication of statistics had the potential to needlessly undermine confidence in the impartiality of judges and the administration of justice.

12.162 Three key issues were raised in the discussions:

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381 See further **Chapter 10**.
382 Stewart and Stuhmcke (n 377) 82.
383 *Loi N° 2019-222 Du 23 Mars 2019 de Programmation 2018-2022 et de Réforme Pour La Justice 2019* (France) art 33.
384 Subject to defences such as fair comment, where applicable.
385 Australian Law Reform Commission, *Contempt* (Report No 35, 1987) ch 10. See further [12.181]–[12.183].
386 See [12.124].

- whether data on decision-making at an institutional level can highlight potential institutional biases;
- whether data on decision-making at an individual level can highlight potential personal biases; and
- whether court data on decision-making patterns should be made public.

12.163 In consultations, some stakeholders expressed the view that statistics on outcomes of judicial decisions were meaningless, because the outcome of every case is dependent on the facts of the case, the arguments presented, the particular legislative and common law framework, and the quality of representation. However, others suggested that, when the types of cases compared were substantially similar, and the sample of cases compared sufficiently large, statistical analysis could provide meaningful insights that could provoke further investigation.

Scope for supporting judicial impartiality and public confidence

12.164 At the institutional level, the research discussed in **Chapter 11** concerning differential outcomes for different social groups across similar cases gives examples of how such analysis may be conducted. Where there are significant disparities in similar cases across demographic variables this might provide evidence of institutional biases.

12.165 The Lammy Review in England and Wales recognised the value of such an approach in reducing bias in the context of the criminal justice system. It considered that 'bringing decision-making out into the open and exposing it to scrutiny is the best way of delivering fair treatment' for different ethnic groups, because this would both deter and expose prejudice or unintended bias.[387] In particular, the review recommended that sentencing data be provided by the courts broken down by demographic characteristics, including gender and ethnicity.[388] The Lammy Review considered that, where there were apparent disparities, the courts should be called on to provide an evidence-based explanation, and if this was not possible, to introduce reforms to address it.[389] If a similar approach were considered in the context of the Commonwealth courts, it would be necessary to identify areas where meaningful comparisons could be drawn across sufficiently large numbers of similar cases.

12.166 At the individual level, Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team consider that collecting data on judges' decision-making patterns can usefully highlight differences between judges in how they make decisions that impact demographic groups differently.[390] They emphasise that such data is useful when it shows significant differences between judges deciding similar cases over time. They note that any

387 David Lammy MP (n 144) 6.
388 Ibid rec 12.
389 Ibid rec 4.
390 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.

> such differences do not necessarily imply that implicit bias is at play. The variation at play could be explained by different factual circumstances of each case. However, this argument is to some degree countered by the docket system, and the random allocation of cases to judges. Therefore, collecting average outcomes for each judge over time has the potential to uncover systematic bias in decision making. We are by no means implying that average outcomes should be uniform between judges, but that large discrepancies over time should open up a wider dialogue about what factors could be contributing to this.[391]

Among supporters of such an approach, there was significant agreement with literature suggesting that analysis of individual decision-making patterns is more likely to be of value where 'comparable matters are decided on a high-volume basis', such as 'granting bail or decisions to allow judicial review of refugee determinations'.[392]

12.167 Stakeholders saw insights into disparities in decision-making as potentially useful to courts, individual judges, and the public. In relation to the courts, some argue that members of the legal profession, especially in specialised practice areas, are likely to already be aware of any significant discrepancies in approaches to decision-making by judges.[393] Where there are large discrepancies, and perceptions of prejudgment in particular types of cases, this can undermine the integrity of the institution more broadly. Stakeholders suggested that this might be evidenced by overrepresentation of filings in some registries and underrepresentation in others, or by lawyers advising against taking matters to a hearing, or refusing to take on pro bono matters before particular judges.[394] Collection and analysis of data can be seen as important for the courts to identify where there is the potential for such issues to arise. The Law Council of Australia suggested that where such analysis is compiled by others and made publicly available, disregarding the information may 'sit uncomfortably with community expectations', and that further consideration should be given to the argument that in some cases 'the numbers do speak for themselves'.[395]

12.168 In relation to judges, there is robust evidence that 'providing individuals with feedback on the outcomes of their behaviour is an effective catalyst for behavioural change'.[396] Some stakeholders considered there was potential in confidentially providing judges with data on their decision-making patterns, to promote self-reflection as to the potential for biases in their own decision-making.[397] Ghezelbash, Ross, and the Behavioural Insights Team pointed to research that suggested that

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391 Ibid.
392 McGill and Salyzyn (n 377) 259.
393 Stewart and Stuhmcke (n 377) 84.
394 See further **Appendix E**.
395 Law Council of Australia, *Submission 37*.
396 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*; Noah Ivers et al, 'Audit and Feedback: Effects on Professional Practice and Healthcare Outcomes' (Cochrane Database of Systematic Reviews, 2012).
397 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*; National Justice Project, *Submission 44*; Dr Joe McIntyre, *Submission 46*.

this is most likely to be effective if tied to some kind of accountability requirement, such as a requirement to discuss feedback with the head of jurisdiction, and to explain any statistical variation that potentially points to bias.[398] McIntyre suggested that such an approach may be useful, but only in a court with 'a high level of trust, respect and collegiality'.[399]

12.169 A smaller number of stakeholders considered the impact of this data on reducing bias in decision-making would be magnified if the data was made public.[400] Others considered that transparency of the underlying data was important for open justice.[401]

12.170 Finally, if data on judges' decision-making was made public, this could arguably be seen as upholding the rule of law by ensuring that all members of the society, not just lawyers in specialised practice and their clients, are aware of patterns of decision-making, and are better able to prepare for litigation before particular judges.[402]

Potential threats to impartiality and public confidence

12.171 On the other hand, in consultations stakeholders raised the potential threats to judicial impartiality and the rule of law posed by the collection and analysis of data on judicial decision-making patterns. These related to fundamental concerns about whether data could provide meaningful insights in the areas of law in which the Commonwealth courts operate, concerns about the quality of data, and data literacy of those to whom the data is reported, and the potential for unintended consequences.

12.172 In relation to collection of data, judges have noted that decisions about what is collected determines what is found from the analysis. As the Hon Chief Justice M Gleeson AC observed in 2004:

> Because the High Court deals with a relatively small number of cases, major statistical variations can result from random causes. I have pointed out to the other Justices that we could make large productivity gains by arranging that special leave applications or appeals that are now listed and heard together be listed and counted separately.[403]

12.173 Stewart and Professor Stuhmcke noted that this quote 'highlights the danger in simply counting judgments, the point being that the science of counting can

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398 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*.
399 Dr Joe McIntyre, *Submission 46*.
400 Associate Professor Ghezelbash, Dr Ross, and the Behavioural Insights Team, *Submission 29*; National Justice Project, *Submission 44*.
401 Associate Professor Andrew Higgins and Dr Inbar Levy, *Submission 23*; National Justice Project, *Submission 44*.
402 Stewart and Stuhmcke (n 377) 84–5; McGill and Salyzyn (n 377) 264.
403 The Hon Chief Justice M Gleeson, 'The High Court of Australia: Challenges for its New Century' (Speech, Constitutional Law Conference, 20 February 2004), quoted in Stewart and Stuhmcke (n 377) 84.

itself be influenced by changing what is counted'.[404] In his submission to the Inquiry, McIntyre emphasised that 'observation and measurement is never neutral'.[405]

12.174 These difficulties are magnified where the process for collection and underlying data is not transparent. Some recent examples of reporting on alleged discrepancies between judges' decision-making patterns have involved non-transparent collection of data, potentially flawed methodology, inaccurate data, and statistical analysis based on very small numbers of cases where variation is to be expected. Such analysis does not provide useful insights into potential procedural fairness issues, but, where widely reported and 'presented as "science"',[406] does have the potential to undermine public confidence in the administration of justice.

12.175 Professors Opeskin and Appleby have emphasised that, when 'commentators deploy jurimetric analysis that lacks methodological rigour, or glosses over the limitations of its method, they risk bringing the judiciary unfairly into disrepute'.[407] They note that

> critique comes with a responsibility to be balanced, and to follow methodologies designed to minimise the misleading allure of statistics … Public confidence in the judiciary is critical to the rule of law, and judges themselves are highly constrained in speaking out in their own defence, as every officer of the court knows.[408]

12.176 Stakeholders were concerned that there may be many legitimate reasons for what might appear to be one-sided decision-making, and publication of statistics, however qualified, cannot capture this. Some stakeholders considered that the apparent simplicity of data would unfairly reflect on the impartiality of judges and the courts as an institution, particularly if statistical information is not provided with sufficient context.[409] McGill and Salyzn give the following two examples where the wrong conclusions may be drawn without knowledge of context in judicial analytics:

- Where data reports that Judge E has a record of denying bail to racialized individuals of crimes in 80 per cent of cases, in contrast to colleagues who deny it in 50 per cent of cases, without contextual information that Judge E is newly appointed and has only presided over 5 cases where her or his colleagues have presided over an average of 300 cases each.
- Where data shows that Judge F has a higher rate of dissent than her or his colleagues on the same court, without contextual information that dissent plays a critical role in the judicial system.[410]

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404 Ibid.
405 Dr Joe McIntyre, *Submission 46*.
406 Stewart and Stuhmcke (n 377) 85 (in relation to judicial analytics).
407 Brian Opeskin and Gabrielle Appleby, 'Responsible Jurimetrics: A Reply to Silbert's Critique of the Victorian Court of Appeal' (2020) 94 *Alternative Law Journal* 923, 923.
408 Ibid 935.
409 On this, see further McGill and Salyzyn (n 377) 269–70.
410 Ibid.

12.177 Similarly, it was suggested that in the family law context, analysis of statistics on the basis of outcomes broken down by gender would require an understanding that the matters that proceed to final hearing, rather than settling, are primarily the cases with complicating factors, including family violence, which is gendered in its incidence and impact.[411]

12.178 Another concern raised in consultations and submissions is that measurement 'can alter behaviour in ways that are unpredictable'.[412] Some stakeholders suggested there is a risk that measurement may encourage judges to make 'safe' mid-range decisions — biasing them towards the middle ground and operating in itself as an improper influence on judicial decision-making. Others have suggested that the use of judicial analytics can itself shape the law, by prompting certain cases to settle that may otherwise have gone to trial, or by favouring particular legal arguments over others.[413]

Preliminary conclusions

12.179 Courts across the world are increasingly coming to grips with the role, and limits, of quantitative analysis of their outputs. As Chief Justice Bathurst recently noted, there is greater acceptance that 'courts are, and should be, subject to public scrutiny, and where appropriate, criticism', and that courts should facilitate scrutiny and ensure that criticism is informed by operating 'as transparently as possible'.[414] However, as he also noted, in the case of the judiciary, accountability requires a 'nuanced approach'.[415] This is particularly so where analysis relates directly to the core value of judicial impartiality. In light of:

- the inevitability of further analysis of judicial decision-making;
- the potential benefits for addressing institutional and individual bias in some areas of judicial work; and
- the potential risks that widely-available analysis of judicial decision-making patterns, particularly at the individual level, may pose for public confidence in judges,

the ALRC suggests that this is an area in which the Commonwealth courts should proactively engage. The courts, individually or together, or through an organisation such as the AIJA, should work with experts to identify areas of judicial practice where meaningful statistical analysis on the basis of demographic characteristics is possible. The courts should identify where and how further data should be captured to allow such analysis and to identify disparities in outcomes. Given the risks to public

411 Recent data from the FCFCOA records that (in locations trialling the Lighthouse Project) 64% of parties allege that they have experienced family violence: Federal Circuit and Family Court, 'New court initiatives help uncover higher prevalence of family violence and other risks' (Media Release, 10 November 2021).
412 Dr Joe McIntyre, *Submission 46*.
413 Stewart and Stuhmcke (n 377) 85.
414 Chief Justice Bathurst (n 348) 39.
415 Ibid 21. See also Opeskin and Appleby (n 407) 935.

confidence and individual judicial reputations posed by reporting of low-quality data, Stuhmcke and Stewart have also suggested that the courts should

> development of ethical guidelines, promulgated by the courts, to set standards for the creation, development and use of judicial predictive analytics by academics, publishers, legal commentators and government.[416]

Involvement in such a project may warrant further consideration by the AIJA or Council of Chief Justices of Australia and New Zealand.

12.180 Stakeholders also suggested other forms of data that the courts should collect and analyse to enhance judicial impartiality. Deadly Connections suggested that judgments should be subject to implicit bias analysis, and that this information should be used to inform cultural competence programs and bias training.[417] Improvements in technology that will allow greater AI functionality to 'read' judicial decisions could provide scope for this to be done on a significant scale.[418] The Asian Australian Lawyers Association suggested that data about the cultural diversity of barristers appearing in the courts and the length of their speaking roles would be helpful in setting targets for expanding equitable briefing policies from a focus solely on gender.[419]

The contempt of scandalising the court

12.181 The discussion on public reporting of data in relation to judges' decision-making comes in the context of a legal system that has been very reluctant to allow public questioning of judicial impartiality on the grounds that this will undermine public confidence in the administration of justice and the ability of the courts to function. The sensitivities around public criticism of judges, and in particular in relation to their integrity and impartiality, were explored more than 30 years ago by the ALRC in its Inquiry on *Contempt* (1987). Under the contempt of scandalising the court, a person may be prosecuted and punished for making

> publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.[420]

12.182 The contempt is strongly connected to attacks on judicial integrity and impartiality, rather than allegations of incompetence, and was previously thought to have a particularly narrow range of defences.[421] The ALRC explored criticisms of this form of contempt, including that it inhibits freedom of expression to an unjustifiable

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416 Stewart and Stuhmcke (n 377) 86.
417 Deadly Connections Community and Justice Services, *Submission 35*.
418 See further McGill and Salyzyn (n 377) 262.
419 Asian Australian Lawyers Association, *Submission 42*. Currently some courts collect this kind of data about the gender of barristers.
420 *R v Dunbabin, ex parte Williams* (1935) 53 CLR 434, 442 (Rich J).
421 Australian Law Reform Commission (n 385) [420]–[421].

degree,[422] and that it is has insufficient precision in defining criminal liability.[423] It noted that judges applying the law generally did so using a 'strict, traditionalist concept of judicial impartiality' viewing the judge as 'something akin to decision-making "machines"' that other judges had publicly denounced as a myth.[424] In its consideration of the topic, the ALRC noted that:

> Public education through (amongst other things) informed criticism is a more enlightened course than repression by the law, even if from time to time it causes a short-term erosion of public confidence in the way the system is operating.[425]

12.183 The ALRC recommended statutory modification to significantly limit the scope of the contempt, and to include a defence of truth or honest and reasonable belief in truth.[426] This was not implemented, but later *obiter dicta* from the High Court has suggested that the defences of truth and fair comment are likely to apply in any event under common law.[427] The force of the criticisms of the contempt made in the ALRC's previous report have only strengthened with time.[428] In more recent consideration of the topic, the Victorian Law Reform Commission recommended statutory enactment framing the offence so that the prosecution must prove the falsity of the statement, and to require intention or recklessness as to 'whether the statement would create a serious risk of undermining public confidence in the independence, integrity, impartiality or authority of the judiciary'.[429]

Information about supports and safeguards for impartiality

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.

12.184 The impartiality of the judiciary is built on a foundation of institutional practices and conventions that protect the judiciary from improper influences,

422 Ibid [429].
423 Ibid [431].
424 Ibid [434].
425 Ibid [424].
426 Ibid [460].
427 *Nationwide News v Wills* (1992) 177 CLR 1.
428 See further Victorian Law Reform Commission, *Contempt of Court: Report* (Report, 2020) [11.7]–[11.8].
429 Ibid rec 90.

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 underlying structures that underlie and complement it.

12.185 This 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 information about guidance on avoiding conflicts of interest, and support structures available to judges;
- the judicial disqualification guidelines *(***Recommendation 1**);
- government or 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 in individual cases;
- complaints mechanisms, including any future federal judicial commission (**Recommendation 5**), and how to access them;
- the collection, analysis, and reporting of court user experiences (**Recommendation 12**) and other relevant data (**Recommendation 13**); and
- protocols for the profession to bring issues of inappropriate judicial conduct in court to the attention of the head of jurisdiction.

12.186 In the Consultation Paper, the ALRC proposed that the Commonwealth courts should publicise on their websites information about these mechanisms (**Proposal 5**). The ALRC suggested that this could help to build the trust of prospective and current litigants in judicial impartiality, in addition to providing a first point of call for litigants unhappy with their experience in court. It also addresses the lack of transparency about the processes of recusal and disqualification, by acting as a signpost to the more detailed information required by **Recommendation 1**, while putting those processes in their wider context.

12.187 There was significant support for this proposal in submissions.[430] Submissions emphasised that this information should be provided in a litigant-friendly way, developed with the expertise of court education specialists, and through consultation with end users as to both form and substance.[431] Some stakeholders saw this information as potentially useful for litigants at the beginning of a court process.[432]

12.188 At its most basic, information could be provided, as envisaged in the ALRC's original proposal, through the courts' websites. Courts in England and Wales and New Zealand, and the website of the Association of Judges of Ireland, provide helpful examples of the types of information that might be included.[433] While some similar information is already available on the Commonwealth courts' websites, it is not collected in a central place and is focused on the courts, or processes at court, rather than focussing on judges and providing information about the institutional structures supporting them and providing accountability.[434] The website for the FCFCOA has accessible information for litigants and members of the public about attending court, including short videos, on its home page.[435] Further information about the role of judges, supports for impartiality, and accountability mechanisms could similarly be included.

430 Supportive: Family Law Practitioners' Association of Western Australia, *Submission 18*; Professor Tania Sourdin, *Submission 33*; Law Council of Australia, *Submission 37*; Jaqueline Charles CF, *Submission 39*; Asian Australian Lawyers Association, *Submission 42*; Australian Bar Association, *Submission 43*; Dr Joe McIntyre, *Submission 46*. Two confidential submissions from litigants were also supportive.

431 Law Council of Australia, *Submission 37*; Jaqueline Charles CF, *Submission 39*; Dr Joe McIntyre, *Submission 46*.

432 See, eg, Professor Tania Sourdin, *Submission 33*.

433 Courts and Tribunals Judiciary (UK), 'Homepage' <www.judiciary.uk/>; Courts of New Zealand, 'Home' <www.courtsofnz.govt.nz/>; Association of Judges of Ireland, 'The Judiciary' <https://aji.ie/the-judiciary/>.

434 For example, the High Court's website has sections on the 'History of the High Court', the 'Operation of the High Court', 'Visiting the High Court' (with information on etiquette), and a short documentary about the High Court. It does not, however, give information about judges, aside from setting out the requirements of s 72 of the *Australian Constitution* concerning appointment and security of tenure, providing information on how to address them, and giving short biographies of current and former judges: High Court of Australia, 'About the Justices' <www.hcourt.gov.au/justices/about-the-justices>.

435 Federal Circuit and Family Court of Australia, 'Home Page' <www.fcfcoa.gov.au/>.

In Focus: Putting judges in the spotlight

Websites related to courts and the judiciary in other jurisdictions provide detailed information about judges and the judicial role. For example, the website for the Courts and Tribunals Judiciary in England and Wales includes the following sections:

- 'About the judiciary' — with accessible subpages on the history of the judiciary, the justice system, the judiciary's place in the constitutional structure of the UK, statistics and biographies on the judiciary and how they are appointed, and who supports the judiciary and how they are trained.
- 'You and the judiciary' — with accessible subpages on going to court, sentencing, judicial review, appeals processes, judicial conduct and complaints, how to address judges, and work of the judiciary beyond the courts.
- 'Diversity' — with accessible subpages on diversity and community relations judges, the Judicial Diversity and Inclusion Strategy 2020–25 and the Judicial Equality and Diversity Statement, videos of judges from different backgrounds, pre-application judicial education program, and statistics and action plans on the diversity of the judiciary.[436]

In New Zealand, the courts have developed a separate website 'Courts of New Zealand', with sections on 'About the judiciary', 'The courts', 'Going to court', 'Publications', and filing and paying. The section on 'About the judiciary' includes:

- the Statement of Principles between the executive and judiciary concerning the administration of justice;
- the court system, role of courts, and history of courts;
- role of the judges — including how they are appointed and the judicial appointments protocol, how to communicate with them, and the support they are provided;
- how decisions on bail and sentencing are made;
- judicial conduct — including information about and links to the Guidelines for Judicial Conduct, guidelines on conflicts of interest and recusal, complaints procedures, and procedures for members of the profession to raise issues of concern with heads of jurisdiction; and
- guidelines for the involvement of judges in research relating to the judiciary, including how to make an application.[437]

436 Courts and Tribunals Judiciary (UK) (n 433).
437 Courts of New Zealand (n 433).

12.189 Some stakeholders suggested that information could also be provided in more sophisticated ways. Jaqueline Charles CF proposed, for example, that the information could

> take the form of an asynchronous online course, designed by a court educator, that can be completed by court users prior to commencing proceedings in federal courts. … The completion of a legal literacy course would ensure that all self-represented litigants, and other court users, would have an improved understanding of court procedure, personnel and most importantly, the role of the judge in proceedings. Units could be focussed on judicial impartiality and judicial conduct, rules of court, practice and procedure, key legal terms, and complaints mechanisms. The benefit of asynchronous online learning is that it can be adapted for culturally and linguistically diverse communities and different jurisdictions. It can also be easily updated over time as courts issue new practice notes or change procedures.[438]

12.190 She noted that such courses have been provided to the general public in the child protection field, and that a free online course provided by Kings College London, *The Modern Judiciary: Who They Are, What they Do, and Why it Matters*, is a 'good example of public legal education that has been very well received by both the judiciary and legal education professionals'.[439]

12.191 Similarly, McIntyre suggested that there would be

> significant benefit in terms of public understanding, transparency and efficiency in the Commonwealth courts developing integrated and coherent online ecosystems for the better provision of information regarding judicial independence and impartiality — both in theory and in practice. A 'technology first' approach to court education offers significant advantages in terms of accessibility, resourcing and maintainability. Topics of judicial impartiality and independence are excellent test cases for developing expertise in such systems, as they are topics of both deep importance to the judiciary, and which have an easy resonance and understandable significance to the public.[440]

438 Jaqueline Charles CF, *Submission 39*.

439 Ibid. See further Kings College London, 'The Modern Judiciary: Who They Are, What They Do and Why It Matters' <www.kcl.ac.uk/short-courses/modern-judiciary-future-learn>.

440 Dr Joe McIntyre, *Submission 46*.

PART FIVE: APPENDICES

Appendix A
Consultations

Note that individuals are listed with the affiliation and title held at the time of consultation.

	Name	Consultee location
1	Professor Rachael Field, Bond University	Brisbane
2	Professor Blake McKimmie, University of Queensland	Brisbane
3	Professor Simon Young, University of Southern Queensland	Brisbane
4	Associate Professor Francesca Bartlett, University of Queensland	Brisbane
5	Assistant Professor Narelle Bedford, Bond University	Brisbane
6	Dr Rebecca Ananian-Welsh, University of Queensland	Brisbane
7	Dr Matt Watson, University of Queensland	Brisbane
8	The Hon Justice Glenn Martin AM, Supreme Court of Queensland and President, Australian Judicial Officers' Association	Brisbane
9	The Hon Chief Justice William Alstergren, Family Court of Australia and Chief Judge, Federal Circuit Court of Australia	Melbourne
10	The Hon Deputy Chief Justice Robert McClelland, Family Court of Australia	Melbourne
11	David Pringle, Chief Executive Officer and Principal Registrar, Family Court of Australia and Federal Circuit Court of Australia	Melbourne
12	Timothy Goodwin, Barrister	Melbourne
13	The late, the Hon Peter Heerey AM QC	Melbourne
14	Helen Rofe QC, Barrister	Melbourne
15	Michael Pearce SC, Barrister	Melbourne
16	Georgina Costello QC, Barrister	Melbourne

	Name	Consultee location
17	Bronwyn Lincoln, Corrs Chambers Westgarth	Melbourne
18	Rowena Orr QC, Barrister	Melbourne
19	Paul Willee RFD QC, Barrister	Melbourne
20	Minal Vohra SC, Barrister	Melbourne
21	Geoffrey Dickson QC, Barrister	Melbourne
22	Caroline Counsel, Caroline Counsel Family Lawyers	Melbourne
23	John Farrell, Law Council of Australia	Melbourne
24	Nazim El-Bardouh, Muslim Legal Network	Melbourne
25	Tanja Golding, LGBTIQ Legal Service	Melbourne
26	David Manne, Refugee Legal	Melbourne
27	Adrian Snodgrass, Fitzroy Legal Service	Melbourne
28	Ella Crotty, Fitzroy Legal Service	Melbourne
29	Alison Birchall, Domestic Violence Victoria	Melbourne
30	Jennie Child, Domestic Violence Victoria	Melbourne
31	Sulaika Dhanapala, inTouch Multicultural Centre Against Family Violence	Melbourne
32	Megan Ross, Eastern Community Legal Centre	Melbourne
33	Sia Lagos, Chief Executive Officer and Principal Registrar, Federal Court of Australia	Melbourne
34	Catherine Forbes, National Judicial Registrar, Federal Court of Australia	Melbourne
35	Dr Colin Campbell, Monash University	Melbourne
36	Professor Matthew Groves, Deakin University	Melbourne
37	Associate Professor Andrew Higgins, University of Oxford	Melbourne
38	Dr Maria O'Sullivan, Monash University	Melbourne
39	Dr Inbar Levy, University of Melbourne	Melbourne
40	Professor Anne Wallace, La Trobe University	Melbourne
41	Her Honour Judge Alexandra Harland, Federal Circuit Court of Australia	Melbourne

	Name	Consultee location
42	Jennifer Jackson, Victim Survivors' Advisory Council	Melbourne
43	Geraldine Bilston, Victim Survivors' Advisory Council	Melbourne
44	The Hon Justice Michael Buss, President, Court of Appeal, Supreme Court of Western Australia	Perth
45	Matthew Howard SC, Barrister and President, Australian Bar Association	Perth
46	Craig Slater, Barrister	Perth
47	Linda Richardson, Kim Wilson & Co	Perth
48	Gary Cobby SC, Barrister	Perth
49	Rebecca O'Brien, Barrister	Perth
50	Nathan MacDonald, Law Council of Australia	Perth
51	Nicola Watts, O'Sullivan Davies	Perth
52	Trevor O'Sullivan, O'Sullivan Davies	Perth
53	Teresa Farmer, Barrister	Perth
54	Rachel Oakeley, Barrister	Perth
55	William Sloan, Kim Wilson & Co	Perth
56	Rebecca Bunney, Cullen Macleod Lawyers	Perth
57	Emeritus Professor HP Lee, Monash University	Melbourne
58	The Hon Chief Justice Peter Quinlan, Supreme Court of Western Australia	Perth
59	Dr Brian Barry, Technological University Dublin	Dublin
60	Raelene Webb QC, Barrister	Perth
61	The Hon Justice Patricia Kelly, President, Court of Appeal, Supreme Court of South Australia	Adelaide
62	The Hon Ann Vanstone QC, South Australian Judicial Conduct Commissioner	Adelaide
63	Dr Joe McIntyre, University of South Australia	Adelaide

	Name	Consultee location
64	The Hon Chief Justice Chris Kourakis, Supreme Court of South Australia, Chair, Judicial Council on Cultural Diversity and Chair, Council of the National Judicial College of Australia	Adelaide
65	Professor Suzanne Le Mire, University of Adelaide	Adelaide
66	Dr Anna Olijnyk, University of Adelaide	Adelaide
67	Associate Professor Lorne Neudorf, University of Adelaide	Adelaide
68	Professor Sharyn Roach Anleu, Flinders University	Adelaide
69	Emerita Professor Kathy Mack, Flinders University	Adelaide
70	Stephen McDonald SC, Barrister	Adelaide
71	Terry Evans, Law Society of South Australia	Adelaide
72	Meredith Dickson SC, Barrister	Adelaide
73	Jane Miller, Barrister	Adelaide
74	David Gaszner, Thomson Geer Lawyers	Adelaide
75	Siobhan Parker, Mitcham Family Law	Adelaide
76	Dr Damian O'Leary SC, Barrister	Adelaide
77	Leah Marrone, Reader and President, Australian Women Lawyers	Adelaide
78	Greg Howe, Howe Jenkin Family Lawyers & Mediators	Adelaide
79	Ben Doyle QC, Barrister	Adelaide
80	Her Honour Judge Charlotte Kelly, Federal Circuit Court of Australia	Adelaide
81	His Honour Judge Timothy Heffernan, Federal Circuit Court of Australia	Adelaide
82	Her Honour Judge Penelope Kari, Federal Circuit Court of Australia	Adelaide
83	His Honour Judge David Dunkley, Federal Circuit Court of Australia	Parramatta
84	His Honour Judge Joe Harman, Federal Circuit Court of Australia	Parramatta

	Name	Consultee location
85	His Honour Judge Matthew Myers AM, Federal Circuit Court of Australia	Parramatta
86	Her Honour Judge Brana Obradovic, Federal Circuit Court of Australia	Parramatta
87	His Honour Judge Douglas Humphreys OAM, Federal Circuit Court of Australia	Parramatta
88	Murali Sagi, Deputy Chief Executive, Judicial Commission of New South Wales	Sydney
89	Una Doyle, Director, Education, Judicial Commission of New South Wales	Sydney
90	Andrew Chalk, Chalk & Behrendt Lawyers & Consultants	Sydney
91	Joanna Davidson, Barrister	Sydney
92	Paul Doolan, Barkus Doolan Family Lawyers	Sydney
93	Michael Kearney SC, Barrister	Sydney
94	Kingsley Liu, President, Asian Australian Lawyers Association	Sydney
95	Michael McHugh SC, Barrister and President, New South Wales Bar Association	Sydney
96	Ali Mojtahedi, Immigration Advice and Rights Centre	Sydney
97	Bilal Rauf, Barrister	Sydney
98	Joanna Abraham, Justice Connect	Sydney
99	Roslyn Cook, Inner City Legal Centre	Sydney
100	Lauren Davies, National Justice Project	Sydney
101	Gregory Rohan, Immigration Advice and Rights Centre	Sydney
102	Geoff Mulherin, Law and Justice Foundation of New South Wales	Sydney
103	George Newhouse, National Justice Project	Sydney
104	Alison Ryan, Refugee Advice & Casework Service	Sydney
105	Emeritus Professor Reg Graycar, Barrister	Sydney
106	Professor Thalia Anthony, University of Technology Sydney	Sydney

	Name	Consultee location
107	Professor Gabrielle Appleby, University of New South Wales	Sydney
108	Professor Tracey Booth, University of Technology Sydney	Sydney
109	Dr Janina Boughey, University of New South Wales	Sydney
110	Professor Gary Edmond, University of New South Wales	Sydney
111	Associate Professor Daniel Ghezelbash, Macquarie University	Sydney
112	Professor Simon Rice OAM, University of Sydney	Sydney
113	Dr Jane Wangmann, University of Technology Sydney	Sydney
114	The Hon Chief Justice Thomas Bathurst AC, Supreme Court of New South Wales	Sydney
115	The Hon Justice Steven Rares, Federal Court of Australia	Sydney
116	Kate Eastman AM SC, Barrister	Sydney
117	The Hon Justice Ann Ainslie-Wallace, Family Court of Australia	Sydney
118	Tamara Phillips, Barrister	Sydney
119	Claire Palmer, Barrister	Sydney
120	Christina Trahanas, Barrister	Sydney
121	Michael Whitbread, Barrister	Sydney
122	Hugh Atkin, Barrister	Sydney
123	Surya Palaniappan, Barrister	Sydney
124	Patrick Knowles, Barrister	Sydney
125	Matthew Sherman, Barrister	Sydney
126	Louise Coleman, Barrister	Sydney
127	Danielle Forrester, Barrister	Sydney
128	Kim Pham, Barrister	Sydney
129	Michael Todd, Barrister	Sydney
130	Karen Beck, Barrister	Sydney
131	Sarwa Abdelraheem, Barrister	Sydney

	Name	Consultee location
132	Eliot Olivier, Barrister	Sydney
133	Barry Apelbaum, Barrister	Sydney
134	Georgina Westgarth, Barrister	Sydney
135	Professor Andrew Lynch, University of New South Wales	Sydney
136	The Hon Michael Kirby AC CMG	Sydney
137	The Hon Justice Duncan Kerr Chev LH, Federal Court of Australia	Hobart
138	The Hon Justice Robert Benjamin AM, Family Court of Australia	Hobart
139	Sandra Tagliere SC, Barrister and President, Tasmanian Bar Association	Hobart
140	Chris Groves, Dobson Mitchell Allport	Hobart
141	Julia Higgins, Bishops	Hobart
142	Kate Mooney SC, Barrister	Hobart
143	Shaun McElwaine SC, Shaun McElwaine + Associates	Hobart
144	Mary Anne Ryan, Barrister	Hobart
145	Andrea Trezise, Barrister and Solicitor	Hobart
146	Marcus Turnbull SC, Ogilvie Jennings	Hobart
147	Adjunct Associate Professor Bernard Cairns, University of Tasmania	Hobart
148	Anja Hilkemeijer, University of Tasmania	Hobart
149	Dr Brendan Gogarty, University of Tasmania	Hobart
150	Dr Phillipa McCormack, University of Tasmania	Hobart
151	Avelina Tarrago, Indigenous Lawyers Association of Queensland	Brisbane
152	Cassie Lang, Indigenous Lawyers Association of Queensland	Brisbane
153	Dr Jacoba Brasch QC, Barrister and President, Law Council of Australia	Brisbane

	Name	Consultee location
154	Dr Natasha Molt, Director of Policy, Law Council of Australia	Canberra
155	Kate Latimer, Chief Executive Officer, National Judicial College of Australia	Canberra
156	Barry Williams OAM, President, Lone Fathers Association of Australia	Canberra
157	Wayne R Butler, Lone Fathers Association of Australia	Canberra
158	Professor the Hon Richard Chisholm AM, Australian National University	Canberra
159	The Hon Chief Justice Michael Grant AO, Supreme Court of the Northern Territory	Darwin
160	Dr Edwin Lourdes Joseph JP, Multicultural Council of the Northern Territory	Darwin
161	Dr Estella Ega, Multicultural Council of the Northern Territory	Darwin
162	Judy Harrison, Darwin Community Legal Service	Darwin
163	David Woodroffe, North Australian Aboriginal Justice Agency	Darwin
164	John Rawnsley, North Australian Aboriginal Justice Agency	Darwin
165	Dr Jillann Farmer	Brisbane
166	Professor James Stellios FAAL, Australian National University	Canberra
167	Matthew Albert, Barrister	Melbourne
168	The Hon Justice Jenny Blokland, Supreme Court of the Northern Territory	Darwin
169	Linda Ryle, Lawyer, Cultural Advocacy and Legal Mediation	Brisbane
170	Donna Cooper, Law Institute of Victoria	Melbourne
171	Michelle Luarte, Law Institute of Victoria	Melbourne
172	Nethmi Perera, Law Institute of Victoria	Melbourne

	Name	Consultee location
173	Sam Pandya, Chair of Diversity Committee, Law Institute of Victoria	Melbourne
174	Peter Papadopoulos, Member, Migration Law Committee, Law Institute of Victoria	Melbourne
175	Carina Ford, Chair of Refugee Law Reform Committee, and Member, Migration Law Committee, Law Institute of Victoria	Melbourne
176	Dr Jason Chin, University of Sydney	Sydney
177	Professor Simine Vazire, University of Melbourne	Sydney
178	The Rt Hon Chief Justice Helen Winkelmann GNZM, Supreme Court of New Zealand	Wellington, New Zealand
179	Kieron McCarron, Office of the Chief Justice	Wellington, New Zealand
180	Assistant Professor Patrick Forscher, Busara Centre for Behavioral Economics	Tromsø, Norway
181	Amanda Morris, National Judicial Registrar, Federal Circuit and Family Court of Australia	Paramatta
182	Paul Radich QC, President, New Zealand Bar Association	Wellington, New Zealand

Appendix B
Consultation Paper Proposals and Questions

Principles	
Consultation Question 1	Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?
Transparency of process and law	
Consultation Proposal 2	Each Commonwealth court should promulgate a Practice Direction or Practice Note setting out the procedures for making and determining applications for disqualification of a judge on the grounds of actual or apprehended bias, and procedures for review or appeal.
Consultation Proposal 3	Each Commonwealth court should develop and publish an accessible guide to recusal and disqualification ('Guide') for members of the public. The Guide should be easy to understand, be informed by case law and the *Guide to Judicial Conduct*, and refer to any applicable Rules of Court or Practice Directions/Practice Notes. In addition to summarising procedures, the Guide should include a description of (i) circumstances that will always or almost always give rise to apprehended bias, and (ii) circumstances that will never or almost never give rise to apprehended bias.
Consultation Question 4	Would there be benefit in a judicial officer-led project to identify more comprehensively circumstances in which apprehended bias will and will not arise?
Consultation Proposal 5	The Commonwealth courts should (in coordination with each other) publicise on their respective websites the processes and structures in place to support the independence and impartiality of judges and mechanisms to ensure judicial accountability.

Procedures for determining applications for disqualification	
Consultation Proposal 6	The Federal Circuit Court of Australia, the Family Court of Australia, and the Federal Court of Australia should amend their rules of court to require a judge sitting alone to transfer certain applications for the sitting judge's disqualification to a duty judge for determination. Options for reform include requiring transfer: Option A) when the application raises specific issues or alleges specified types of actual or apprehended bias; or Option B) when the sitting judge considers the application is reasonably arguable; or Option C) when the sitting judge considers it appropriate.
Consultation Question 7	Should Commonwealth courts formalise the availability of an interlocutory appeal procedure for applications relating to bias before a single judge court?
Consultation Proposal 8	The Federal Court of Australia, the Family Court of Australia, and the High Court of Australia should promulgate a Practice Direction or Practice Note to provide that decisions on applications for disqualification made in relation to a judge on a multi-member court should be determined by the court as constituted.
Consultation Question 9	Should Commonwealth courts adopt additional systems or practices to screen cases for potential issues of bias at the time cases are allocated?

Addressing difficult areas for application of the bias rule	
Consultation Proposal 10	The Council of Chief Justices of Australia and New Zealand and the Law Council of Australia and its constituent bodies should coordinate reviews of Part 4.3 of the *Guide to Judicial Conduct*, and the (i) Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 54; and (ii) Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 22.5 (and equivalent rules applicable in any state or territory) (together the 'Professional Rules').
Consultation Question 11	Has the increased use of registrars for case management in family law cases in the Federal Circuit Court of Australia reduced the potential for prejudgment and perceptions of bias associated with multiple appearances before the same judge under the docket system to arise?
Consultation Question 12	What additional systems or procedures can Commonwealth courts put in place to reduce the tension between the apprehended bias rule and the demands of efficient allocation of resources in court proceedings?
Consultation Question 13	In practice, does the waiver rule operate unfairly to prevent issues of unacceptable judicial conduct giving rise to apprehended bias being raised on appeal? Or is the case law on waiver sufficiently flexible to deal with this situation?
Supporting judicial impartiality	
Consultation Proposal 14	The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community.
Consultation Proposal 15	The Attorney-General of Australia should report annually statistics on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background.

Consultation Question 16	What should be done to increase diversity in the legal profession and to support lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession?
Consultation Proposal 17	Each Commonwealth court should commit to providing all judges newly-appointed to judicial office with the opportunity to take part in a court-specific orientation program upon appointment, as specified under the *National Standard for Professional Development for Australian Judicial Officers*, and report on the orientation program in their Annual Report.
Consultation Proposal 18	Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them. Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.
Consultation Question 19	What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?
Consultation Question 20	Should more structured systems of ethical and other types of support be provided to assist judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues affecting their capacity to fulfil their judicial function? If so, how should such systems be developed and what should their key features be? What role could a future Federal Judicial Commission play in this regard?

Consultation Question 21	What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?
Consultation Proposal 22	Commonwealth courts should collect and publish aggregated data on reallocation of cases for issues relating to potential bias.
Consultation Proposal 23	Commonwealth courts should introduce methodologically sound processes to seek structured feedback from court users, including litigants and practitioners, about their satisfaction with the court process, in a way that allows any concerns about experiences of a lack of judicial impartiality to be raised.
Consultation Question 24	Are the measures that are already in place in Commonwealth courts to collect feedback from, and measure satisfaction of, court users sufficient and appropriate?
Consultation Question 25	What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

Appendix C
Submissions to Consultation Paper

1. Not published
2. Not published
3. Dr Monika Zalnieriute
4. Not published
5. Not published
6. Not published
7. Not published
8. Not published
9. Eddie Fraser
10. Mary Liu and Katherine Ryan
11. Rus Taslin
12. Not published
13. Not published
14. Dr Jason Chin
15. Not published
16. Deakin Law Clinic Policy Advocacy Practice Group
17. Aboriginal Legal Service of Western Australia
18. Family Law Practitioners' Association of Western Australia
19. Not published
20. Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu
21. Philip Marcus

22. Not published

23. Associate Professor Andrew Higgins and Dr Inbar Levy

24. The Samuel Griffith Society

25. Not published

26. Women Lawyers Association of New South Wales

27. Irene Park and Prue McLardie-Hore

28. John Tearle

29. Dr Daniel Ghezelbash, Dr Robert Ross and the Behavioural Insights Team

30. Progressive Law Network, Monash University

31. Australian Judicial Officers Association

32. Associate Professor Kylie Burns

33. Professor Tania Sourdin

34. Associate Professor Maria O'Sullivan, Dr Yee-Fui Ng and Associate Professor Genevieve Grant

35. Deadly Connections Community and Justice Services Ltd

36. Not published

37. Law Council of Australia

38. Not published

39. Jaqueline Charles CF

40. New South Wales Society of Labor Lawyers

41. Not published

42. Asian Australian Lawyers Association

43. Australian Bar Association

44. National Justice Project

45. Not published

46. Dr Joe McIntyre

47. Not published

48. New South Wales Young Lawyers Public Law and Government Committee

49. Don Huggins

In addition, 46 people shared their experience of going to court on an informal and confidential basis.

Appendix D
Primary Sources

Australian Legislation

Commonwealth Acts

Australian Constitution.

Courts Legislation Amendment (Judicial Complaints) Act 2012 (Cth).

Crimes Act 1914 (Cth).

Criminal Code Act 1995 (Cth).

Family Law Act 1975 (Cth).

Federal Circuit and Family Court of Australia Act 2021 (Cth).

Federal Court of Australia Act 1976 (Cth).

Federal Proceedings (Costs) Act 1981 (Cth).

High Court of Australia Act 1979 (Cth).

Commonwealth legislative instruments

Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth).

Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth).

Federal Court and Federal Circuit and Family Court Regulations 2012 (Cth).

Federal Court Rules 2011 (Cth).

State and territory legislation

Charter of Human Rights and Responsibilities Act 2006 (Vic).

Constitution Act 1902 (NSW).

Constitution Act 1934 (SA).

Constitution Act 1975 (Vic).

Criminal Appeal Act 1912 (NSW).

Evidence Act 1995 (Cth).

Human Rights Act 2004 (ACT).

Human Rights Act 2019 (Qld).

Judicial Commission Act 2020 (NT).

Judicial Commission of Victoria Act 2016 (Vic).

Judicial Commissions Act 1994 (ACT).

Judicial Conduct Commissioner Act 2015 (SA).

Judicial Officers Act 1986 (NSW).

Supreme Court (Court of Appeal) Rules 2005 (WA).

Supreme Court Act 1970 (NSW).

Supreme Court Act 1979 (NT).

Australian case law

Acres v Cannon [2016] FamCA 1.

Adacot v Sowle [2020] FamCAFC 215.

Akhtar v Gaber [2020] FamCA 298.

ALA15 v Minister for Immigration and Border Protection [2016] FCAFC 30.

Ambrose v Badcock [2021] FCA 881.

Antoun v The Queen (2006) 80 ALJR 497; [2006] HCA 2.

APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322; [2005] HCA 44.

ARW15 v Minister for Immigration [2015] FCCA 2595.

Atkins v Minister for Home Affairs [2019] FCCA 245.

Attorney-General of New South Wales v Bar-Mordecai [2009] NSWSC 117.

Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd (1996) 65 FCR 215.

Australian Boot Trade Employees Federation v Whybrow and Co (1910) 10 CLR 266; [1910] HCA 8.

Australian National Industries Ltd v Spedley Securities Ltd (in liq) (1992) 26 NSWLR 411.

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300; [1993] HCA 6.

AZAEY v Minister for Immigration and Border Protection (2015) 238 FCR 341; [2015] FCAFC 193.

B v DPP (NSW) [2014] NSWCA 232.

Bala v Minister for Immigration and Border Protection [2019] FCA 600.

Baldin v Baldin [2019] FamCAFC 19.

Barakat v Goritsas (No 2) [2012] NSWCA 36.

Barakat v Goritsas [2012] NSWCA 8.

Barber v Walfor [2015] FamCAFC 97.

Barton v Walker (1979) 2 NSWLR 740.

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9.

BDS17 v Minister for Immigration and Border Protection (2018) 76 AAR 246; [2018] FCA 1683.

Belcher v Belcher [2019] FamCA 553.

Bidner v Queensland [2000] QCA 368.

Bienstein v Bienstein (2003) 195 ALR 225; [2003] HCA 7.

Bird v Free (1994) 126 ALR 475; [1994] FCA 891.

Blenkinsop v Wilson [2019] WASC 77.

Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd [2015] FCA 1343.

Bondelmonte v Bondelmonte (No 2) [2016] FamCA 526.

Bowcott v Welling [2016] FamCAFC 144.

Bowen v Williams [2016] FamCA 725.

BOX16 v Minister for Immigration [2018] FCCA 2910.

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283; [2011] HCA 2.

Brooks v The Upjohn Company (1998) 85 FCR 469.

Bugmy v The Queen (2013) 302 ALR 192; [2013] HCA 37.

Bulow v Bulow [2020] FamCAFC 120.

Burt v Merrill (No 2) [2018] FamCA 606.

BWE18 v Minister for Home Affairs [2019] FCCA 1523.

C7A/17 v Minister for Immigration and Border Protection [2018] FCCA 458.

Cabcharge Australia Ltd v Australian Competition and Consumer Commission [2010] FCAFC 111.

Callas v Callas [2018] FCCA 4.

Canh v Canh (No 2) [2020] FamCA 941.

Carlson v Carlson [2017] FamCA 1169.

Cavar v Greengate Management Services Pty Ltd [2016] FCA 961.

CDD15 v Minister for Immigration and Border Protection (2017) 250 FCR 587; [2017] FCAFC 65.

Cerwin v Cerwin [2019] FCCA 3184.

Chard v Ye [2018] FamCAFC 117.

Charisteas v Charisteas (2020) 389 ALR 296; [2020] FamCAFC 162.

Charisteas v Charisteas (2021) 393 ALR 389; [2021] HCA 29.

Chen v Monash University [2015] FCA 356.

Chen v Monash University [2016] FCAFC 66.

Chen v Secretary, Department of Social Services (No 2) [2020] FCA 384.

Christian v Société Des Produits Nestlé SA (No 1) [2015] FCAFC 152.

Christian v Société Des Produits Nestlé SA [2015] FCA 1341.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; [1992] HCA 64.

Clarke v Premier Youthworks Pty Ltd [2018] FCCA 2938.

CMU16 v Minister for Immigration and Border Protection [2020] FCAFC 104.

CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76; [2019] HCA 50.

Coady v Yachting Victoria Inc [2018] FCCA 3113.

Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15.

Collins v Ricardo [2017] FamCAFC 42.

Commissioner of Police (NSW) v Ritson (No 2) [2020] FCCA 3035.

Commissioner of the Australian Federal Police v Zhao (2015) 316 ALR 378; [2015] HCA 5.

Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546; [1969] HCA 10.

Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 299 CLR 577; [2006] HCA 55.

Construction, Forestry, Maritime, Mining and Energy Union v Precision Painting Contractors Pty Ltd [2018] FCCA 1152.

Contract Mining Services Pty Ltd v Adelaide Brighton Cement Ltd [2020] SASC 69.

COV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 670.

Cousins v Peake (No 2) [2018] FamCA 729.

CPF15 v Minister for Immigration and Border Protection [2018] FCA 1764.

CPJ16 v Minister for Home Affairs [2020] FCAFC 212.

CPK19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1100.

CQX18 v Minister for Home Affairs [2019] FCA 386.

Crabman v Crabman (No 2) (2020) 61 Fam LR 191; [2020] FamCAFC 146.

Crabman v Crabman [2019] FamCAFC 141.

Crabman v Crabman [2020] FamCAFC 118.

Cristovao v Trott [2019] FCA 360.

Cullen v Cullen [2018] FCCA 851.

CUR24 v Director of Public Prosecutions (NSW) (2012) 83 NSWLR 385; [2012] NSWCA 65.

Day v Woolworths Group Ltd [2021] QCA 42.

Dennis v Commonwealth Bank of Australia (2019) 272 FCR 343; [2019] FCAFC 231.

Deputy Commissioner of Taxation v Chemical Trustee Limited (No 9) [2015] FCA 1178.

Dickens v Dickens [2018] FamCA 1109.

Dickens v Levine [2017] FamCAFC 24.

Ding v Ding [2017] FamCA 206.

Director of Public Prosecutions (DPP) (Cth) v Fattal [2012] VSCA 276.

Dispute Resolution Associates Pty Ltd v Selth (No 2) [2020] FCA 844.

Dobey v Shey (No 2) [2019] FamCAFC 171.

Dobey v Shey [2019] FamCAFC 68.

DOQ17 v Australian Financial Security Authority (No 2) [2018] FCA 1270.

DSN16 v Minister for Immigration and Border Protection [2021] FCA 202.

*Duarte v Mors*e [2017] FamCA 350.

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63.

Ericsson v Jarrold [2020] FamCAFC 298.

Fair Work Ombudsman v Priority Matters Pty Ltd [2017] FCA 833.

Fallon v Bashandi (No 2) [2016] FamCA 1084.

Fencott v Miller (1983) 152 CLR 570; [1983] HCA 12.

Ferdinands v South Australia [2017] FCA 32.

Finch v The Heat Group (No 3) [2017] FCA 64.

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34.

FKP17 v Minister for Immigration [2018] FCCA 2053.

FKP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 19.

Forbes v Bream (2008) 222 FLR 96; [2008] FamCAFC 189.

Fowles v Fowles [2021] FamCA 368.

Galea v Galea (1990) 19 NSWLR 263.

Gallo v Dawson (1990) 93 ALR 479; [1990] HCA 30.

Gargan, in the matter of Gargan [2018] FCA 871.

Garnett v Beckworth [2017] FamCAFC 160.

Gaudie v Local Court of New South Wales (2013) 235 A Crim R 98; [2013] NSWSC 1425.

GEM v R [2010] VSCA 168.

GetSwift Ltd v Webb (2021) 388 ALR 75; [2021] FCAFC 26.

GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd [2013] FCAFC 150.

GP v R (2010) 27 VR 632; [2010] VSCA 142.

Hackford v Hackford [2021] FamCA 406.

Hadlett v Ralphson [2018] FamCAFC 258.

Hanas v Jolaha (No 3) [2019] FamCA 342.

Harris v Caladine (1991) 172 CLR 84; [1991] HCA 9.

Helljay Investments Pty Ltd v Deputy Commissioner of Taxation (1999) 166 ALR 302; [1999] HCA 56.

Hillier v Martin (No 9) [2021] FCA 1319.

Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4.

Holden v Dunlop (No 2) [2016] FCCA 2854.

Huda v Huda [2018] FamCAFC 85.

Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330; [1909] HCA 36.

Imbardelli v Imbardelli (No 2) [2018] FamCA 865.

International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319; [2009] HCA 49.

Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20.

Jarrah v Fadel (No 2) [2015] FamCAFC 161.

Jess v Jess (2021) 63 Fam LR 545; [2021] FamCAFC 159.

Jia v Minister for Immigration and Multicultural Affairs (1998) 84 FCR 87; [1998] FCA 768.

Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48.

Jopson v Lilwall (No 2) [2016] FamCAFC 262.

Jorgensen v Fair Work Ombudsman (2019) 271 FCR 461; [2019] FCAFC 113.

Kable v DPP (NSW) (1996) 189 CLR 51; [1996] HCA 24.

Kanakaridis v Westpac Banking Corporation [2015] FCA 1146.

Kappas v Kappas (No 5) [2019] FCCA 1141.

Karsten v Minister for Immigration (No 2) [2015] FCCA 1784.

Kartinyeri v Commonwealth of Australia (1998) 156 ALR 300; [1998] HCA 52.

Kelleher v The Queen (1974) 131 CLR 534; [1974] HCA 48.

Kennedy v Cahill (1995) 118 FLR 60.

Kennedy v Secretary, Department of Industry (No 3) [2016] FCAFC 149.

Kirby v Centro Properties Ltd (No 2) (2008) 172 FCR 376; [2008] FCA 1657.

Kotsis v Kotsis (1970) 122 CLR 69; [1970] HCA 61.

Lawrie v Lawler (2016) 168 NTR 1; [2016] NTCA 3.

Leeth v Commonwealth (1992) 174 CLR 455; [1992] HCA 29.

Leone v Cino (No 3) [2015] FamCA 757.

Lietzau v Lietzau [2018] FamCAFC 167.

Livesey v New South Wales Bar Association (1983) 151 CLR 288; [1983] HCA 17.

Luck v Chief Executive Officer of Centrelink (2017) 251 FCR 295; [2017] FCAFC 92.

Luck v Secretary, Department of Human Services (No 4) [2019] FCA 2071.

Lysons v Lysons [2019] FamCAFC 29.

Mabo v Queensland [No 2] (1992) 175 CLR 1; [1992] HCA 23.

Mahoney v Dieter [2020] FamCA 667.

Maleknia v Minister for Industry and Science [2015] FCCA 2997.

Marino v Bello [2020] FamCAFC 314.

Matenson v Matenson [2018] FamCAFC 133.

Mathews v State of Queensland [2015] FCA 1264.

Mathews v State of Queensland [2015] FCA 1488.

Mathews v State of Queensland [2015] FCA 191.

McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504; [2008] NSWCA 209.

McKenzie v Cash Converters Int Ltd (No 3) [2019] FCA 10.

McMillan v McMillan (No 3) [2020] FamCAFC 256.

McMillan v McMillan [2017] FamCAFC 88.

Melbourne City Investments Pty Ltd v UGL Ltd [2017] VSCA 128.

Metropolitan Fire & Emergency Services Board v Churchill [1998] VSC 51.

Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48.

Minister for Home Affairs v Benbrika (No 2) [2021] VSC 684.

Minister for Immigration and Border Protection v CQZ15 (No 2) (2018) 259 FCR 569; [2018] FCAFC 19.

Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507; [2001] HCA 17.

Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34.

MZXOT v Minister for Immigration and Citizenship (2008) 233 CLR 601; [2008] HCA 28.

Nadkarni v Nadkarni [2011] FamCAFC 160.

Nationwide News v Wills (1992) 177 CLR 1; [1992] HCA 46.

Neale v Mahony [2019] FCCA 2240.

Neil v Legal Profession Complaints Committee (No 2) [2012] WASCA 150.

Nghiem v Alberts [2020] FamCAFC 187.

Nicholas v The Queen (1998) 193 CLR 173; [1998] HCA 9.

Nimmo v Bush [2016] FamCAFC 274.

Nimmo v Bush [2017] FamCAFC 69.

Norris v Denis (No 3) [2020] FCCA 1374.

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [2021] HCA 2.

Olman v Teitzel [2018] FamCAFC 11.

Olsen v Olsen [2019] NSWCA 278.

Overton Investments Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979 [2001] NSWCA 137.

Paramasivam v Juraszek [2002] FCAFC 141.

Piepkorn v Caroma Industries Ltd [2000] FCA 1230.

Polsen v Harrison [2021] NSWCA 23.

Polyukhovich v Commonwealth (1991) 172 CLR 501; [1991] HCA 32.

Prince Alfred College v ADC (2016) 258 CLR 134; [2016] HCA 37.

R v Dunbabin; Ex parte Williams (1935) 53 CLR 434; [1935] HCA 34.

R v Harrap [2021] SASCA 22.

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; [1956] HCA 10.

R v Leonard John Warwick (No 93) [2020] NSWSC 926.

R v Magistrates Court at Lilydale; Ex parte Ciccone [1973] VR 122.

R v Nicholas (2000) 1 VR 356; [2000] VSCA 49.

R v Quinn; Ex parte Consolidated Food Corp (1977) 138 CLR 1; [1977] HCA 62.

R v T, WA (2013) 118 SASR 382; [2014] SASCFC 3.

R v Watson; Ex parte Armstrong (1976) 136 CLR 248; [1976] HCA 39.

Rajski v Scitec Corporation Pty Ltd (New South Wales Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986).

Rajski v Wood (1989) 18 NSWLR 512.

Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 9) (Supreme Court of Appeal of New South Wales, Kirby P, Mahoney and Priestley JJA, 27 November 1990).

Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12.

Re Council of the City of Sydney (No 3) [2021] NSWSC 1423.

Re F: Litigants in Person Guidelines [2001] FamCAFC 348.

Re Jarman; Ex parte Cook (1997) 188 CLR 595; [1997] HCA 13.

Re JRL; Ex parte CJL (1986) 161 CLR 342; [1986] HCA 39.

Re Judiciary and Navigation Acts (1921) 29 CLR 257; [1921] HCA 20.

Re Polites; Ex parte Hoyts Corporation Pty Ltd (1991) 173 CLR 78; [1991] HCA 31.

Re The Queen and Judge Leckie; Ex parte Felman (1977) 52 ALJR 155.

Reynolds v Sherman [2015] FamCAFC 128.

Ritson v Commissioner of Police, New South Wales Police Force (No 2) [2021] FCA 93.

Roadside Products Pty Ltd v Cocker (2020) 31 Tas R 402; [2020] TASSC 17.

Royal Guardian Mortgage Management Pty Ltd v Nguyen [2016] NSWCA 88.

Rozenblit v Vainer (2018) 262 CLR 478; [2018] HCA 23.

RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3.

Russell v Russell (1976) 134 CLR 495; [1976] HCA 23.

S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358.

Sampson v Hartnett [2010] FamCAFC 220.

Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 8) [2021] FCCA 1668.

Sellers v Burns [2019] FamCAFC 111.

Silva v Phoenix [2018] FamCAFC 41.

Slaveski v Rotstein & Associates Pty Ltd [2012] VSCA 291.

Smits v Roach (2006) 227 CLR 423; [2006] HCA 36.

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

Stone v Moore (2015) 122 SASR 54; [2015] SASC 46.

Stradford v Stradford (2019) 59 Fam LR 194; [2019] FamCAFC 25.

Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71.

SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80.

SZVBN v Minister for Immigration and Border Protection (No 2) [2017] FCA 123.

Tang v Minister for Immigration and Citizenship (2013) 217 FCR 55; [2013] FCAFC 139.

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533; [2013] HCA 5.

Thiess Pty Ltd v Sheehan [2020] FCAFC 198.

Thomas v Mowbray (2007) 233 CLR 307; [2007] HCA 33.

Tong v Niem (2020) 61 Fam LR 619; [2020] FamCAFC 27.

Tousek v Bernat [1961] SR (NSW) 203.

Unions NSW v New South Wales (2013) 252 CLR 530; [2013] HCA 58.

Vakauta v Kelly (1989) 167 CLR 568; [1989] HCA 44.

Veliu v Minister for Immigration and Border Protection [2018] FCA 53.

Vietnam Veterans' Association of Australia New South Wales Branch Inc v Gallagher (1994) 52 FCR 34; [1994] FCA 489.

Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24.

Waterside Workers' Federation of Australia v J W Alexander Ltd (1918) 25 CLR 434; [1918] HCA 56.

Webb v GetSwift Limited (No 6) [2020] FCA 1292.

Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30.

Wotton v Queensland (No 5) [2016] FCA 1457.

Foreign legislation

Act of Settlement 1701 (UK).

Loi N° 2019-222 Du 23 Mars 2019 de Programmation 2018-2022 et de Réforme Pour La Justice 2019 (France).

Michigan Court Rules.

Senior Courts Act 2016 (NZ).

Foreign case law

Bahai v Rashidian [1985] 1 WLR 1337.

Bolkiah (HRH Prince Jefri) v State of Brunei Darussalam and Another (No 3) [2007] UKPC 62.

Committee for Justice and Liberty v National Energy Board [1978] 1 SCR 369.

Craig v Williams [2019] NZSC 60.

Deacons v White & Case [2004] 1 HKLRD 291.

Dimes v Proprietors of the Grand Junction Canal (1852) 10 ER 301.

El-Farargy v El-Farargy [2007] EWCA Civ 1149.

Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd [2014] 3 HKLRD 375.

Gillies v Secretary of State for Work and Pensions [2006] 1 All ER 731.

Helow v Secretary of State for the Home Department [2009] 2 All ER 1031.

Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 1 SLR(R) 791.

Kenny v Trinity College [2008] 2 IR 40.

Locabail (UK) Ltd v Bayfield Properties [2000] QB 451; [1999] EWCA Civ 3004.

Liteky v United States 510 US 540 (1994).

McCabe v Northern Ireland Public Services Ombudsman [2021] NICA 39.

Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577.

Nyembo v The Refugee Appeals Tribunal [2007] IESC 25.

PK Ghosh, IAS and ANT v JG Rajput (1996) AIR 513.

Porter v Magill [2002] 2 AC 357.

President of the Republic of South Africa v South African Rugby Football Union (1999) 4 SA 147.

Public Utilities Commission of the District of Columbia v Pollak, 343 US 451 (1952).

R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119.

R v Brown (2003) 64 OR (3d) 161.

R v Gough [1993] AC 646.

R v Henry; R v Manning (1968) 53 Cr App R 150.

R v Rand [1866] LR 1 QB 230.

R v S (RD) [1997] 3 SCR 484.

R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256.

Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 122.

Sengupta v Holmes [2002] EWCA Civ 1104.

Serafin v Malkiewicz (2020) 1 WLR 2455.

South African Commercial Catering and Allied Workers Union v Irvin & Johnson Limited Seafoods Division Fish Processing [2000] 3 SA 705.

Taylor v Lawrence [2003] QB 528.

Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board [2020] NZCA 86.

Turoczi v Canada (Citizenship and Immigration) [2012] FC 1423.

Wewaykum Indian Band v Canada [2003] 2 SCR 259.

Yong Vui Kon v Attorney General [2011] SGCA 9.

Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) [2015] 2 SCR 282.

International law

African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

American Convention on Human Rights: 'Pact of San Jose, Costa Rica', signed on 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, UN Doc A/RES/64/147 (21 March 2006, adopted 16 December 2005).

Camba Campos et a. v Ecuador (Judgment) (Inter-American Court of Human Rights, Constitutional Tribunal, 28 August 2013).

Case of Gudmundur Andri Ástradsson v Iceland (Judgment) (European Court of Human Rights, Grand Chamber, Application Number 26374/18, 1 December 2020).

De Cubber v Belgium (1984) 7 EHRR 236.

Eritrea (African Commission on Human and Peoples' Rights, 41st Ordinary Session, 275/03, 30 May 2007).

European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

Gregory v United Kingdom (1997) 25 EHRR 577.

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Piersack v Belgium (1982) 5 EHRR 169.

Pullar v United Kingdom (1996) 22 EHRR 391.

Strengthening Basic Principles of Judicial Conduct, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006).

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

Universal Declaration on the Independence of Justice (1983) (adopted at the final plenary session of the First World Conference on the Independence of Justice on 10 June 1983).

Appendix E
Experiences of Impartiality and Bias

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Introduction

E.1 This appendix provides a high-level summary of what the ALRC has been told through its consultation processes about experiences of impartiality and bias by individuals who have attended Australian courts, whether as litigants, lawyers, or observers.

E.2 Public confidence in judges and the courts in Australia is generally high.[1] In consultations, the legal profession did not report widespread problems with judicial impartiality. The ALRC Survey of Court Users revealed similarly high levels of satisfaction with the conduct of proceedings and confidence in the courts.[2]

E.3 Within a system that is functioning well and that enjoys general public confidence, there are nevertheless issues of concern. Litigants and legal practitioners reported in consultations that their confidence in the justice system had been damaged by perceptions of judicial bias in cases in which they had been involved.

1 See **Chapter 5**.
2 See **Chapter 5**.

Some participants in the ALRC Survey of Lawyers and ALRC Survey of Court Users similarly described experiences of bias in proceedings in which they had taken part or attended.

E.4 This appendix highlights key themes emerging from consultations and surveys about how people experience impartiality, and how they experience bias. In particular, it summarises factors that litigants and lawyers have associated with promoting a sense of fairness and impartiality, and factors that have been associated with perceptions of bias. It also summarises the impact of experiences of bias on individuals, and in their confidence in the administration of justice.

Methodology

E.5 **Chapter 1** sets out the ALRC's consultation process. In total, the ALRC held 68 consultation meetings, received 49 written submissions in response to the Consultation Paper, and received 46 informal submissions, predominantly from individuals who had experience in cases before the Commonwealth courts. The ALRC also carried out a number of surveys as described in **Chapter 5**.

E.6 Notes of consultations, formal written submissions, informal email submissions, and anonymised qualitative responses from the ALRC Survey of Lawyers and ALRC Survey of Court Users were uploaded to the research program NVivo. Each of these were reviewed and coded for information about personal experiences relevant to perceptions of impartiality and bias. The coding structure was iterative, so that new codes were added as new themes emerged. The information in this appendix is primarily based on this qualitative analysis.

E.7 The ALRC also reviewed submissions that had been made to its previous Family Law Inquiry (ALRC Report 135), through the 'Tell Us Your Story' portal, and has included reference to these submissions in this appendix where relevant.[3]

E.8 This appendix is a summary of the general points made across these sources, and avoids specific reference to any one submission. Necessarily, it only includes the experiences of those who sought to share their views and does not purport to be representative of court users as a whole. The ALRC has not sought to substantiate individual accounts. Instead, this appendix explores how individual court users have experienced proceedings they have been involved in, and what those users have emphasised as giving rise to perceptions of impartiality or bias.

3 In addition to consultations and public submissions for that Inquiry, the ALRC provided a confidential online portal where participants could share their personal experiences with the family law system: 'Tell Us Your Story'. The portal received close to 800 contributions. Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [3.106].

Positive experiences of impartiality and court proceedings

E.9 Consultations, submissions, and surveys indicated that a large number of people who have experience with the justice system have positive experiences and are impressed with how judges manage proceedings.

E.10 The vast majority of the practitioners the ALRC spoke to emphasised that, in general, federal judicial officers observe the highest standards of conduct in both their dealings with parties to litigation and their representatives, and in their management of court processes. One comment made in response to the ALRC Survey of Lawyers captures the essence of what the ALRC was repeatedly told:

> The vast majority of the judiciary are very competent and professional and deal with matters in an impartial manner as best they are able.

E.11 As described in further detail in **Chapter 5**, over 65% of those who responded to questions in the ALRC Survey of Court Users on the judicial officer's manner in court strongly agreed or somewhat agreed with a number of positive characterisations of the judge.[4] When asked what, if anything, gave them a positive impression about their court proceedings, 253 of 490 respondents commented favourably on the judicial officer's approach.[5] This data corresponds with ALRC analysis of the 2020 AuSSA survey, which demonstrates the confidence a comprehensive majority of court users have in judges.[6]

Feeling heard, and hearing both sides

E.12 Some also described positive experiences in court that bolstered their confidence in a judge's impartiality, in contrast to negative experiences that gave rise to perceptions of bias. For some, a key distinction between confidence in impartiality or perceptions of bias was the extent to which the litigant felt the judge had read the materials and listened to their side of the story. For example, one stakeholder who initially felt a judge was biased ultimately reported having a good experience before that same judge because they came to feel that 'the judge was prepared to listen to both sides'.

E.13 One lawyer emphasised the very positive effect that a particular judge had in building trust in the court process and its impartiality among Aboriginal and Torres Strait Islander litigants in a particular case, by providing the opportunity for individual litigants to speak to the judge directly.

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4 See **Chapter 5**. The number of respondents varied by question. In particular, 51% (n = 230) of participants 'strongly agreed' and 35% 'somewhat agreed' that the judicial officer in their proceeding treated all people professionally and respectfully. Seven per cent (n = 230) either somewhat or strongly disagreed.

5 See **Chapter 5**.

6 See **Chapter 5**.

E.14 Responses to the ALRC Survey of Court Users showed the importance of these issues in relation to perceptions of court processes. When asked what, if anything, impressed them about their court proceedings, 37 of 490 respondents identified the fact that the judicial officer listened. Twenty-five respondents also commented that they were impressed by the way the judicial officer treated both parties equally. One respondent noted: 'The magistrate listened and had read all the information provided [and] asked appropriate questions'.

E.15 In consultations and through the ALRC Survey of Judges, judges told the ALRC that they are very conscious of the need for litigants to feel heard. Many nevertheless emphasised the difficulty of doing so given the number of matters they are expected to hear in a day — and some litigants reported recognising this and acknowledged the strain judges can be under.

Special procedures

E.16 Another factor that was emphasised in consultations was the positive role that specialised procedures and the provision of interpreters and other forms of assistance play in creating a more impartial process for litigants with specific cultural or other needs. The ALRC was told of positive experiences arising from special procedures and accommodations which recognise the different needs of litigants. For example, judges of the FCFCOA in Adelaide reported good outcomes from the use of a courtroom for Aboriginal and Torres Strait Islander peoples that is designed for all parties and the judge to sit around a circular table, and good experiences were similarly reported by Aboriginal and Torres Strait Islander organisations. Similarly positive views of specialised processes designed to enhance the participation of Aboriginal and Torres Strait Islander peoples in proceedings were reported in consultations and submissions.

Respectful treatment

E.17 Nearly 80% of litigant respondents to the ALRC Survey of Court Users felt they were treated with respect by the judge hearing their case.[7] One respondent to the ALRC Survey of Lawyers noted how 'members of the public are more confident when judges behave in a calm and courteous manner to all'.

Experiences of bias

E.18 A large proportion of the litigants that the ALRC heard from during consultations had negative experiences of judicial impartiality. The prevalence of these views may be largely due to the nature of the Terms of Reference for the Inquiry, and the fact that consultees are self-selected, rather than drawn randomly from a sample of court

7 See **Chapter 5**. More specifically, 44% (n = 235) of participants 'strongly agreed' and 35% 'somewhat agreed' that the judicial officer in their proceeding treated them professionally and respectfully. Nine per cent (n = 235) either somewhat or strongly disagreed.

users. Similarly, some lawyers discussed negative experiences that they had during the course of their career. Negative experiences were also described in the ALRC Survey of Lawyers and ALRC Survey of Court Users. The following summarises themes that emerged about what gave rise to those experiences, and the impact that stakeholders described those experiences as having.

Association between judges and lawyers

E.19 In consultations, a number of litigants and lawyers raised the fact that a judge was friends with a lawyer appearing in court, or had previous professional dealings with a party as giving rise to, or reinforcing, an apprehension of bias. For some litigants, it was difficult to accept that a judge could impartially hear a case argued on one side by a person with whom the judge was friendly. In one example, a litigant became aware that the opposing lawyer was the spouse of the judge's former associate, and so felt the judge would unconsciously give more weight to their case, particularly where the litigant's case asserted poor conduct by that lawyer. Three respondents to the ALRC Survey of Court Users also raised issues of association between the judicial officer and lawyers or a party as giving rise to a perception that a judicial officer was biased. Some lawyers also raised significant concerns about situations where a judge did not disclose that they had a particularly close friendship with counsel for one side. Discovering this fact later led to a significant sense of injustice in relation to the outcome of the case, and a loss of confidence in the administration of justice, for both the lawyers and the litigants.

E.20 In another instance, a litigant reported a judge making jokes with the barrister for the other side during the hearing, and talking about a conference that they had attended together, which gave rise to the impression that the judge and barrister were friends and that the judge would favour the barrister's side.

Not feeling heard

E.21 When describing why they felt a judge was biased, many stakeholders described a sense that the judge was not interested in hearing their side of the story. In a significant number of cases, court users felt the judge had not read the papers, or that the judge had only read 'the back page' summary of the evidence. Comments judges make in the course of a hearing can heighten this impression: one court user explained that the judge said they had 'not read anything about the case' and asked for parties to 'give [them] the main points'. Another reported not being 'sure if affidavits are read or considered'. A further common issue was litigants being made to feel they could not finish speaking about their issue. One litigant described their impression that 'as a self-represented person [their] arguments were simply ignored' and that 'the judge ignored and reached conclusions contrary to the written evidence presented and was openly hostile and biased'.

E.22 As one stakeholder described it:

> They never hear you, they listen but don't hear. They are put … into bubbles. You're here for an [Intervention Order] so you must fit into a bubble.

E.23 One court user said of a judge that 'he kept reading papers [and] didn't even listen to me'. The effect of this treatment was to 'make the public [feel] like a piece of dirt'. Another suggested that more broadly, the way in which their hearing was conducted did not allow for their side of the story to be heard:

> [The judicial officer] never cross examined the perp[etrator] on any matter. She ignored police evidence that the perp was vexatious … she had no experience in family violence … instead of addressing the family violence and [Family Dispute Resolution] exemption, this history of family violence to me, to my sons …

E.24 In the ALRC Survey of Court Users, participants who were litigants and who indicated that they believed the judicial officer in the proceedings was biased (n = 43) were asked to describe why they thought this. A frequently raised issue was that there was unequal time given to each party. For example, one respondent noted that the judicial officer

> spoke to the other party way more and obviously had not read all or any of [the] material submitted so did not know appropriate circumstances.

E.25 A separate but related issue raised in some submissions by self-represented litigants was that judges had allowed procedural rules to operate in such a way as to deny them the opportunity for their case to be heard. In some cases, it was suggested that this was intentional by judges so as to advantage the other side, or to cover-up an alleged wrongdoing.

E.26 These reports are consistent with research conducted with self-represented litigants in family law proceedings involving allegations of family violence, which describes a gulf between the narrative litigants want to tell, and the way in which legal processes and procedures divide disputes into discrete legal issues.[8]

Interaction of judges with parties and lawyers

E.27 In submissions and through the ALRC Survey of Court Users, stakeholders described how questioning from the bench had the capacity to make court users feel set upon, or even intimidated, particularly when questions are repeated and give the impression the judge is 'trying to illicit a negative response'. One respondent said 'I was literally told to shut up and [that] I didn't know what I was talking about'. Another court user said that 'the judge obviously disliked us intensely and made no pretence in hiding that much to the delight of the opposing side'.

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8 Jane Wangmann, Tracey Booth and Miranda Kaye, 'Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence' (Research Report Issue No 24, ANROWS, December 2020) 107.

E.28 Some litigants described judicial officers as 'openly hostile', 'sarcastic', and as making the litigant feel as though the judge was 'the tom cat playing with a mouse in an enclosure'. In a similar vein, respondents told the ALRC of judges who 'yelled' at them, and others reported feeling a judge was 'rude and dismissive'. One litigant reported feeling 'coerced, bullied, intimidated, and threatened' by a judge. Another reported 'demeaning and insulting language'.

E.29 Through the ALRC Survey of Lawyers and consultations, legal practitioners reported similar judicial conduct (not necessarily confined to the Commonwealth courts) when asked about issues of judicial bias. These included respondents saying that they had seen judges 'scream', be 'abusive to practitioners in court', and 'make disparaging comments and snide remarks'. Another practitioner felt a judge they appeared before was 'intimidating' and another referred to judicial officers showing 'obvious contempt'. Another said that a judicial officer 'frequently engages in loud angry outbursts, humiliates clients, and bullies counsel'. Another lawyer said that 'we have had to tolerate bad tempered judges who bully us our entire careers'.

E.30 As one practitioner noted:

> Recent press reports about judges' behaviour is shocking; I thought it was only in my registry, but now wonder whether this is across the board, and how terrible that must be for litigants. I have sat in court and heard judges bullying self-represented clients, or being rude to solicitors because of the colour of their laptop covers, and everyone just looks away thinking 'glad it's not me'. Reform is essential.

E.31 Some stakeholders suggested that transcripts often do not pick up the subtle ways in which bias can manifest in the courtroom. For example, the transcript does not pick up facial expressions, long pauses, inflexion, or tone.

E.32 Lawyers also highlighted how applications for recusal can 'make judges angry', and that they can be 'taken personally', making such applications all the more difficult to make.

Inappropriate use of humour

E.33 A number of references were made by both litigants and lawyers to inappropriate jokes being made by the judge at the expense of one party. The use of humour in court can make litigants feel the judge and other parties have a relationship that raises an apprehension of bias. It can also undermine confidence in the purpose and function of the judicial system, with one litigant reporting that they felt the decision in their case was ultimately made 'on hubris rather than legal principle'.

E.34 Jokes can also be discriminatory and demeaning to a party. One respondent to the ALRC Survey of Lawyers stated that they had

> experienced humiliating bias (gender/homophobic) from a [judicial officer] who made repeated jokes about the 'missing husband' in a same sex couple application. My PEERS laughed each and every time, seeking to humour [the judicial officer].

Bias arising from discriminatory language, and social and cultural factors

E.35 Social and cultural biases can also manifest within court proceedings, giving rise to perceptions of a lack of impartiality more generally. Reported examples include judicial officers:

- suggesting to a woman legal practitioner (only) that she might 'enjoy the shopping' in a particular town during the lunch break;
- repeatedly assuming that a lawyer from a non-white ethnic background was a litigant even after the lawyer had announced their appearance as counsel;
- refusing to use preferred pronouns for transgender litigants, even after being specifically requested to do so; and
- telling a lawyer who was born overseas with many years of experience practising in Australia that 'we do things differently in Australia'.

E.36 The ALRC was told that these experiences can have a very significant impact on peoples' perception of the fairness of proceedings.

E.37 In the ALRC Survey of Lawyers, one respondent said (not necessarily in relation to a federal judicial officer) that they had

> witnessed a judicial officer in a number of matters … treat a party less favourably when the lawyer representing that party was female. The less favourable treatment was more pronounced the younger the lawyer was, and the darker their skin. This judicial officer has made negative comments to female lawyers, in open Court, about their appearance, including whether or not they wore pantyhose.

E.38 It was suggested that some perceptions of bias can arise because of a judge's lack of awareness of social and cultural issues. The ALRC was told that understanding different perspectives was important for understanding evidence and presentation in court. Some stakeholders suggested that evidence given by Aboriginal Elders was not given appropriate weight, in light of the cultural authority that they have, as opposed to the evidence of court recognised experts. It was suggested that in some cases, the Aboriginality of a self-represented litigant will go unrecognised, and judges may rely on impressions about indicators of a lack of credibility that are not appropriate in such cases.

E.39 A significant number of stakeholders — litigants, lawyers, and academics — suggested that discriminatory stereotypes held by some judges about how women should behave if subjected to family violence, or stereotypes about women inventing allegations of family violence as a 'weapon' in child custody matters, contribute to prejudgment and biased decision-making, or result in evidence of family violence being deliberately withheld from the court even when it is relevant. One respondent to the ALRC Survey of Lawyers suggested that:

> I don't think that most bias is directed against a person personally, but because of their role and qualities (eg: person raising family violence who shows 'inconvenient' trauma behaviours).

E.40 In the family law jurisdiction in particular, there were both men and women who felt that the 'bench book and processes' favour the opposing gender. In the 'Tell Us Your Story' portal submissions, a number of submissions identified the courts as either 'suffering from an entrenched bias which assumes a woman is a liar and a man is beyond reproach' or, conversely, as 'completely biased towards the woman'. One stakeholder suggested that 'men are called the only abusers to justify the pre-determined outcomes of the court's litigations'.

E.41 One submission observed that the inability of judicial officers to empathise with people from different socio-economic backgrounds from their own can give rise to a perception of bias. Another stakeholder particularly highlighted that perceptions of partiality were particularly prevalent in relation to a stigma against persons with mental illness. One litigant suggested that 'people of colour are not seen for who they are, they are all just labelled as the same'.

E.42 A lack of understanding of the importance of interpreters for people for whom English is not a first language was also described as giving rise to perceptions of bias, because it suggests that the court does not value the participation of that person in the proceedings. For example, in consultations, the ALRC was told how an applicant was appearing before a tribunal in an adult guardianship matter. The interpreter had to leave, and the judge decided to proceed without an interpreter. The stakeholder reported that 'trust [in the fairness of the proceeding] crashed to the floor at that moment', leaving the applicant with 'a sense of unfairness and bias'.

Reputation for prejudgment

E.43 A number of litigants reported they had been told by their lawyer, or other lawyers that they consulted, that a particular judge would likely decide a matter in a certain way, or was volatile. This was consistent with the views of some practitioners that certain judges were seen to favour one type of litigant over another. This was also reflected in some responses to the ALRC Survey of Lawyers. One respondent said:

> I'm no longer willing to pretend with clients that certain judicial officers are not biased. I accept that reduces their confidence in the judicial system but there is no point in letting clients live in a fantasy world.

E.44 Another respondent said:

> When every lawyer involved in a case knows, as almost an open secret, that a certain judge will decide a case in a certain way irrespective of the weight of the evidence or the law, it is not possible to have confidence in judicial impartiality and as the legal mechanisms for dealing with this are clunky, risky and costly there unfortunately seems little that can be done about it.

Bias arising from court practices

E.45 Others referred to the subconscious bias arising from certain court practices. For one practitioner, the robing of barristers leads to the impression of an 'unbalanced bar table' in cases involving a self-represented litigant.

E.46 One practitioner told the ALRC of the risk of subconscious bias created by the way case names are used in most migration cases, in which the applicant is given five-character alpha-numeric pseudonyms (like a 'number plate'), rather than a human pseudonym (such as those used in family law matters), whereas the other side is given their full Ministerial title, indicating great status.[9]

Perception that the judge and the system are against you

E.47 Underlying some perceptions of judicial impartiality and bias is a sense that the whole system is stacked against a particular type of litigant. As set out above, the issue can be manifest as a feeling that the legal system does not allow for the presentation of a narrative, and is impenetrable without counsel.[10] One litigant stated that, before they went to court, they

> believed if you went to court and told the truth you would be acknowledged, but actually the system works by favouring those with enough money to pay for expensive legal counsel and truth is a totally flexible commodity.

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9 See, eg, *CPK19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1100.

10 See [E.24]–[E.25].

E.48 Litigants commonly reported feeling that the system is inaccessible. For example, one stakeholder noted in their submission that family law clients in particular can

> feel pressure to consent to orders [even if they are unfavourable] to be perceived as agreeable. [This can] make clients unwilling to use the court system and can impact their access to justice because they are so heavily pressured to consent to orders they perceive as a risk to their children.

E.49 In one consultation, the ALRC was similarly told that:

> For many women who end up in Court, it is such a confronting experience that many of them will take whatever opportunity to get out of it.

E.50 One consultee described how victims of family violence can experience court as 'another area where other people [have] complete control' over a victim's life. A lack of understanding of court processes, and of the distinction between legal issues and the broader narrative of the problems faced by the litigant, can hinder public confidence in the courts. In the ALRC Family Law Inquiry, a key finding was that many people find the law and legal processes too complex to understand and engage with.[11] Many feel they cannot navigate the system to reach agreement without the assistance of professionals, which leaves some feeling disempowered.

E.51 This is consistent with research about the experiences of self-represented litigants: when their expectations for how the legal system works are not met, they may be left with the sense that the system is against them.[12] Although this is not necessarily reflective of a perception of judicial bias, judges are associated with the system, and litigants can feel at an institutional level that the justice system is biased against them.

Experiences with complaints procedures

E.52 Litigants described how, when they tried to make a complaint about judicial conduct, it can be even harder to ensure they feel heard. One litigant described being unable to find an appropriate email address for the court they wanted to send their complaint to. Having found an appropriate email, the litigant was met with a lack of response. Another said:

> We need to have a place where complaints of miscarriage of justice are heard. Not based on the law and forms of the [court] where a registrar can tell you to stop your complaint without even any explanation, not based on solicitors that we cannot afford anymore. It is not about the form, it is about the content. My first language is not English so not only do we pay more to the solicitors, they treat us as second class citizens but then we cannot deal with the form. And I need to be heard.

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11 Australian Law Reform Commission (n 3) [3.106].

12 See, eg, Michelle Flaherty, 'Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law' (2015) 38 *Dalhousie Law Journal* 119, 126.

E.53 Stakeholders, including respondents to the ALRC Survey of Lawyers and ALRC Survey of Court Users, said that in many cases the appeals process is not a suitable mechanism for addressing concerns that proceedings have been affected by bias, or in relation to poor judicial conduct that gives rise to perceptions of bias. One respondent to the ALRC Survey of Lawyers suggested that they were concerned about the confidentiality of internal complaints procedures, and another said they 'usually felt complaints [were] ignored'. Another said

> There needs to be a body independent but part of the judiciary to deal with not just these issues but with the rare cases of judicial misconduct/bullying and judicial incompetency in every jurisdiction. The vast majority of the Judiciary are very competent and professional and deal with matters in an impartial manner as best they are able. However in the rare cases where issues arise […] there is often no real recourse.

E.54 Seven respondents to the ALRC Survey of Lawyers referred to the need for either 'independent oversight' or reform of complaints procedures, and two others referred to the need for better systems to deal with 'repeat offenders' in response to open-text questions about bias, judicial impartiality, and public confidence.

Acceptance of outcome and impacts of experiences

E.55 For many litigants who spoke to the ALRC in consultations, or who made submissions, the perception that the proceedings they had been involved in were tainted by bias made it very difficult for them to accept the outcome. Nearly all litigants emphasised the crucially important issues that were at stake in the matter before the court, including relationships with their children and other family members, their house, their life savings, or businesses that had been built up over generations. A number of litigants described their experiences with court proceedings as traumatic, and some attributed ongoing serious health conditions to their experiences. For some, a sense that there was no possibility of an independent remedy reinforced their sense of injustice. Others described how their negative experience had 'gravely diminished' their confidence in the court system. One litigant described how they felt 'like our lives have been destroyed by the one authority that I thought would protect us'.

Appendix F
Data Methodology

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ALRC Case Review 570

F.1 This appendix supplements the analysis in **Chapter 5** by providing additional detail in relation to the methodology underpinning:

- the four empirical surveys relied upon in this Inquiry; and
- the review conducted by the ALRC of relevant judgments of Commonwealth courts ('the ALRC Case Review').

F.2 This research was undertaken after an analysis of existing literature that identified opportunities for further study of the issues relating to judicial impartiality across various stakeholder groups.

F.3 Further information about the data is available on the **ALRC website**.[1]

Surveys

F.4 The ALRC undertook four surveys over eight months to supplement individual and group consultations. The ALRC has analysed the data with the goal of better understanding stakeholder views on a range of issues relating to judicial impartiality, including the law on bias, procedures for disqualification, and trust and confidence in Australian courts and the legal system.

F.5 The ALRC has not undertaken extensive statistical analysis of the relationships between variables in the data it has obtained. However, the ALRC has published a large volume of its data on the **ALRC website**. The data will offer opportunities for academics and other interested stakeholders to undertake their own analysis and identify additional insights.

F.6 The surveys were designed in such a way that not all questions were compulsory, and in some instances questions were only put to subgroups of

1 Australian Law Reform Commission, 'Data Analysis' <www.alrc.gov.au/inquiry/review-of-judicial-impartiality/data-analysis/>.

participants. Therefore, the total number of responses to questions varied within the surveys. The number of participants who answered any given question is reported as n = X.

AuSSA

F.7 The ALRC submitted seven questions to AuSSA 2020.[2] This is an annual survey conducted by the Australian Consortium for Social and Political Research Inc ('ACSPRI'), concerning the social attitudes and behaviours of Australian citizens.[3] To consider trends, the ALRC also analysed the results from AuSSA in 2009, 2017, and 2018, which included questions on trust and confidence in the courts.[4]

Survey aims

F.8 The questions were designed to provide an understanding of the levels of public confidence and trust in the Australian courts and legal system, and the relationship between:

- confidence in judges across several aspects of judicial work;
- a person's attendance at court; and
- different demographic variables.

F.9 The ALRC also sought to understand the relative importance ascribed to different judicial skills and attributes, including impartiality, by members of the public.

Question design

F.10 The questions were developed by the ALRC in consultation with Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, Judicial Research Project, Flinders University.

F.11 To enable comparison with data from previous years, two questions were included in AuSSA 2020 (on confidence in courts and the legal system, and trust in the courts) that had been in the survey in earlier years.[5] Another question included in AuSSA 2020 was based on a similar question in AuSSA 2007 (concerning the importance of judicial skills and attributes).[6] Two sub-questions in AuSSA 2020 (on

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2 Nicola McNeil et al, 'Australian Survey of Social Attitudes, 2020' <http://dx.doi.org/10.26193/C86EZG> (ADA Dataverse V1, 2021). Those who carried out the original analysis and collection of the data bear no responsibility for the further analysis or interpretation of it.

3 AuSSA is Australia's official survey in the International Social Survey Programme. See further <www.issp.org/menu-top/home/>.

4 Ann Evans, 'Australian Survey of Social Attitudes, 2009' <dx.doi.org/10.4225/87/IH68HQ> (ADA Dataverse V1, 2017); Betsy Blunsdon et al, 'Australian Survey of Social Attitudes, 2017' <http://dx.doi.org/10.26193/JZKRD8> (ADA Dataverse V3, 2018); Ann Evans et al, 'Australian Survey of Social Attitudes, 2018' <dx.doi.org/10.26193/1U0HNI> (ADA Dataverse V2, 2018).

5 AuSSA 2009 and 2018, and AuSSA 2017, respectively: Evans (n 4); Evans et al (n 4); Blunsdon et al (n 4).

6 Timothy Phillips et al, 'Australian Survey of Social Attitudes, 2007' <dx.doi.org/10.4225/87/1UPIZO> (ADA Dataverse V1, 2017).

confidence in judges across different aspects of judicial work) were based in part on questions asked in the annual surveys by the US National Center for State Courts.[7] The final question in AuSSA 2020 (on sources of information) was based on a similar question in AuSSA 2014.[8]

F.12 The questions submitted to AuSSA by the ALRC included questions about trust and confidence in Australia's courts and confidence in judges' abilities in a number of different respects. Participants were also asked whether they had been present at a court proceeding in Australia in any capacity within the past decade or so, and, if so, whether the proceedings related to areas of law that most often arise within the jurisdiction of Commonwealth courts (family law, migration, and native title). Participants were also asked to indicate the degree of importance they placed on five different qualities/skills for the work of judges, and to rate the importance of different sources in informing their views of Australia's courts and judges. A copy of the survey questions is available with the supplementary materials on the ALRC's website.[9]

Sampling, distribution, and response

F.13 AuSSA aims to survey a representative sample of adult Australians. Participants are selected using a random sample drawn from the Australian Electoral Roll, and are contacted by post.

F.14 ACSPRI contacted 5,000 randomly selected Australian citizens from the electoral roll in late February 2021 with a pre-notification letter and followed up a week later with the survey package.[10] One week later ACSPRI sent a reminder postcard. Six weeks later ACSPRI sent a replacement survey package to those who had not responded. A week later ACSPRI sent a final reminder card.

F.15 Of the 5,000 individuals who were sent the survey package, 272 were subsequently determined to be ineligible by ACSPRI.[11] ACSPRI received 1,162 completed responses, which represented a response rate of 25%.[12]

Demographic profile and representativeness of survey sample

F.16 Overall, the survey participants were older than the general population. Fifty-nine per cent (n = 957) of participants were 60 years of age or older, compared with

7 National Center for State Courts, 'The State of State Courts: A 2019 NCSC Public Opinion Survey' <www.ncsc.org/topics/court-community/public-trust-and-confidence/?a=17745>; National Center for State Courts, 'The State of State Courts: A 2014 NCSC Public Opinion Survey' <www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2014-state-of-state-courts-survey>.

8 Betsy Blunsdon, 'Australian Survey of Social Attitudes, 2014' <dx.doi.org/10.4225/87/LTVGMV> (ADA Dataverse V1, 2017).

9 See Australian Law Reform Commission, 'ALRC AuSSA Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-AuSSA-Questions.pdf>.

10 The survey is usually sent in quarterly waves, but due to complications arising from the COVID-19 pandemic, the 2020 survey was sent in one wave.

11 This was because they no longer lived at the address or had died.

12 Contact Rate 1 was 0.35, Cooperation Rate 1 was 0.7, Refusal Rate 1 was 0.1.

only 28% of the total population.[13] There were also more female (53%; n = 1,125) than male participants (47%; n = 1,125), which compares with a roughly even split across the broader Australian population.[14] In light of this, the ALRC considered whether to weight the data. The ALRC used Qualtrics XM software ('Qualtrics') to examine the influence of each of these two variables — gender and age — on substantive questions asked in the survey. This analysis indicated there were few statistically significant relationships in relation to the variables of gender and age. Given the conclusions from this analysis, and noting the inherent risks associated with weighting data, the ALRC concluded that manipulating the data to account for over-representation of older participants and minor over-representation of participants identifying as female was unnecessary.

F.17 Seventy-three per cent (n = 1,131) of participants were born in Australia. Fifty-nine per cent (n = 1,020) of participants identified as being of English ancestry, which was followed by one-fifth (20%; n = 1,131) being of Irish ancestry. Participants could select multiple ancestries. Three per cent (n = 1,128) of participants identified as Aboriginal or Torres Strait Islander.

Analysis of data

F.18 The ALRC analysed the AuSSA 2020 data using Qualtrics.

F.19 The ALRC relied on valid responses to specific questions in the analysis of AuSSA data, which excluded 'missing' responses. For the purpose of analysing relationships in the data, the calculation of averages and medians, and reporting the proportion of responses across a scale, the ALRC also excluded responses such as 'can't choose' and 'I don't know'.

F.20 When analysing the data in Qualtrics, each question was treated as a variable. The ALRC sought to understand the relationship between certain variables.

F.21 The ALRC had a number of hypotheses that were tested through the AuSSA data. These included whether:

- confidence in judges and the legal system is correlated with greater trust in Australia's courts;
- a person's country of birth is correlated with their trust in Australia's courts;
- attendance at court is correlated with confidence in judges and the legal system, and trust in Australia's courts; and
- the sources of information relied on by a person are correlated with confidence in judges and the legal system, and trust in Australia's courts.

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13 Australian Bureau of Statistics, 'Population by Age and Sex — National Data Cube Spreadsheet' (December 2020) <www.abs.gov.au/statistics/people/population/national-state-and-territory-population/dec-2020/31010do002_202012.xls>. The Australian Bureau of Statistics (ABS) age distribution is reported in age brackets. In order to compare the proportion of survey participants to the general population, the youngest ABS age bracket included was 15 to 19 years.

14 Ibid. The ABS percentage for gender is 50% (12,736,391 male; 12,961,702 female).

F.22 These hypotheses were tested through bivariate analyses. This analysis was performed by selecting the two relevant variables and the 'Relate' function in Stats iQ in Qualtrics.[15] Stats iQ chooses the appropriate statistical test based on the structure of the data to measure if any statistically significant relationship exists between the variables.

F.23 Stats iQ performs either a Fisher's Exact Test or a Chi-Squared test when two categorical variables are related. In particular, it uses adjusted residuals to assess whether or not an individual cell is statistically significantly above or below expectations.[16]

F.24 The ALRC also created a range of other descriptive statistics from the AuSSA 2020 data, such as ranges and averages, which are referred to throughout this Report.

ALRC Survey of Judges

F.25 In April 2021, the ALRC conducted an anonymous survey of judges of the Federal Court, Family Court, and Federal Circuit Court.

Survey aims

F.26 The ALRC conducted the survey to address gaps in knowledge identified in its research including:

- the frequency of early stage recusal by judges, and the reasons for such recusal;
- the frequency of disqualification applications, the profile of the applicants, the nature of the issues raised, and the success rate of the applications; and
- the extent to which judges consult with colleagues prior to making decisions on disqualification applications.

F.27 The ALRC also used the survey to canvass judges' views on issues raised by the Inquiry, including:

- the sufficiency and appropriateness of the procedures and law on actual and apprehended bias;
- specific proposed reforms;
- the need or otherwise for further guidance on procedures and law; and
- structural and systemic elements supporting, and inhibiting, judicial impartiality.

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15 For more information on the 'Relate' function, see Qualtrics XM, 'Relate Data' <www.qualtrics.com/support/stats-iq/analyses/relate-data/>.

16 Qualtrics XM, 'Statistical Test Assumptions & Technical Details' <www.qualtrics.com/support/stats-iq/analyses/statistical-test-assumptions-technical-details/>. The calculation of the adjusted residual, and its comparison to specific confidence level values, is a form of z-test. This is commonly summarised as meaning that 'conclusions were based on adjusted residuals'.

Survey design

F.28 The survey was developed by the ALRC in consultation with Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu, Judicial Research Project, Flinders University. The survey comprised 50 questions, which consisted of both open-ended and closed-ended questions. Participants were also invited to provide comments on any aspect of the survey. The questions covered:

- experiences with recusal/self-disqualification;
- procedures for recusal/self-disqualification;
- the law on apprehended bias;
- guidance on recusal and self-disqualification; and
- ways to support judicial impartiality.

F.29 The web-based survey was built and hosted on Qualtrics.

F.30 Participants could complete the survey in more than one session on the same device. Participants were advised that responses to any partially completed surveys would be recorded when the survey period closed.

F.31 A copy of the survey questions and introductory text is available with the supplementary materials on the ALRC's website.[17]

F.32 Prior to launch, the survey was subject to pilot testing by 10 volunteer judges from non-Commonwealth courts. No issues with the survey were detected during the pilot testing process, and results from the pilot testing were not included in the final results.

Distribution

F.33 The survey and an information sheet about the survey were distributed by email to judges with the agreement of the heads of jurisdiction. The link to the survey was sent to all 147 judges who held office on 12 April 2021 in the Federal Court, the Family Court, and the Federal Circuit Court.[18]

F.34 The email and information sheet explained that the survey was part of the ALRC's Judicial Impartiality Inquiry. Judges were informed that participation in the survey was entirely voluntary and individual responses were completely anonymous and strictly confidential. All questions, including demographic questions, were voluntary. The ALRC did not receive any identifying information about the judges who completed the survey.

F.35 The survey link was open for 15 days from the date of distribution. All judges were sent a reminder email five days before the survey closed.

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17 Australian Law Reform Commission, 'ALRC Survey of Judges Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Judges-Questions.pdf>.

18 Justice SC Derrington of the Federal Court was not included in the distribution of the survey given her concurrent appointment as President of the ALRC.

Cleaning of data

F.36 Before the ALRC analysed the data, three responses to the survey were removed. One response was completely blank. The other two responses only provided demographic data and did not respond to any substantive questions.

Demographic profile and representativeness of survey participants

F.37 After data cleaning, a total of 61 judges participated in the survey (which represents 41% of the judges who were sent the survey). Not all judges responded to all questions. Therefore, the total number of responses for each question varies. Details of the response rate for specific questions are provided in the analysis of the data throughout the report.

Table F.1: Participation rates by court

	Federal Court	Family Court	Federal Circuit Court	All courts
Number of participants	18	13	30	61
Number of judges on the court at time of survey distribution	51	33	63	147
Response rate	35%	39%	48%	41%

F.38 Of the 56 judges surveyed who answered the question on gender, 23 (41%) identified as female and 33 (59%) identified as male. This compares with the estimated 52 (35%) female judges and 95 (65%) male judges in the courts surveyed who held office on 12 April 2021.[19]

19 The most recent statistics on the gender of judges appointed to the Commonwealth courts were reported several months before the survey was distributed: Australasian Institute of Judicial Administration, 'AIJA Judicial Gender Statistics' (30 June 2020). Therefore, rather than rely on out-of-date reported gender statistics, the ALRC instead manually measured the impression of gender of judges of the Federal Court, Family Court, and Federal Circuit Court as at the date the survey was distributed. This was determined by reviewing the profiles of the judges for names, visual characteristics (where a photo was available), and the use of gender pronouns. The numbers in Table F.2 are accordingly indicative only and do not necessarily reflect the gender identity of judges of these courts.

Table F.2: Participation rates by gender and court

	Federal Court	Family Court	Federal Circuit Court	All courts
Male	12 of 37	6 of 20	15 of 38	33 of 95
Female	4 of 14	6 of 13	13 of 25	23 of 52
Total	16 of 51	12 of 33	28 of 63	56 of 147

F.39 With regard to the participating judges' years of experience on their current court: 20 judges (33%) had been sitting for zero to four years; 20 judges (33%) had been sitting for five to nine years; and 21 judges (34%) had been sitting for 10 or more years. This compares with the following levels of experience of all sitting judges of the Federal Court, Family Court, and Federal Circuit Court who held office on 12 April 2021: 56 judges (38%) with zero to four years of experience; 38 judges (26%) with five to nine years of experience; and 53 judges (36%) with 10 or more years of experience.

Self-selection

F.40 All individuals in the targeted population were contacted with the survey link. All individuals were advised of the purpose of the survey and given a choice whether or not to take part. This introduces the possibility of: self-selection bias; findings that are not truly representative; and non-response errors.[20] Those who choose to participate in a survey will often have a strong opinion about a topic in either direction, which may differ from the majority.[21] Likewise, refusal and non-completion are systemically linked to participants' attributes, and are accordingly not random.

F.41 Nonetheless, the ALRC took a number of steps to encourage participation in the survey,[22] and the survey was completed by a large proportion (41%) of the total population of interest. Among survey participants, female judges were over-represented to a minor degree, as were judges with zero to four years of experience and, to a lesser extent, judges with 10 or more years of experience. Judges from the Federal Circuit Court were also over-represented to a minor degree. The higher number of female participants may be related to the higher response rate among Federal Circuit Court judges, where there are more female judges than there are on the Federal Court (which had a lower response rate).

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20 Randall Olsen, 'Self-Selection Bias' in Paul Lavrakas (ed), *Encyclopedia of Survey Research Methods* (SAGE Publications, 2008) 809.

21 Alicia O'Cathain and Kate J Thomas, '"Any Other Comments?" Open Questions on Questionnaires – a Bane or a Bonus to Research?' (2004) 4(25) *BioMed Central Medical Research Methodology* 1, 5.

22 See [F.33]–[F.35].

F.42 Given the high response rate and the broadly representative nature of participants, the ALRC considers that the findings from the survey provide useful insights into the views of a significant number of judges in the federal judiciary on the effectiveness of the current law on bias, and the challenges that it presents for judges.

Analysis of data

F.43 The ALRC analysed the responses to the closed-ended survey questions in Qualtrics, using Stats iQ.[23] Open text responses were analysed separately in a commercial qualitative research software program (NVivo) and reported independently from the numerical data. In analysing the data, the ALRC excluded answer categories such as 'I don't know' and 'cannot choose' where participants were asked to respond on a scale, and for the calculation of averages and medians.

F.44 The ALRC tested a number of hypotheses through the data from the Survey of Judges. This included whether any of the following affected judges' experience of, and views on, the law of bias:

- the court in which they hold office;
- the areas of law in which they work;
- the length of their service;
- their degree of experience with disqualification applications from self-represented litigants; and
- the frequency of disqualification applications they receive in a typical year.

F.45 These hypotheses were tested through bivariate analyses. Notable findings from these analyses are reported in **Chapter 5**.

F.46 As the total number of participants in this survey was less than 100, the ALRC reported the count of responses (as opposed to percentages). Not all participants answered every question, so the ALRC chose to report the proportion of answers to a given question against the total number of participants who actually answered that question, rather than the number of individuals who took part in the survey as a whole.

ALRC Survey of Lawyers

F.47 During a three week period from July to August 2021, the ALRC conducted a survey of Australian legal practitioners.

Survey aims

F.48 In consultations for this Inquiry, the ALRC was told on a number of occasions that lawyers are generally hesitant to speak openly about their experiences of disqualification and bias, particularly where they work within a small pool of lawyers

23 See [F.22]–[F.23].

(whether owing to geographic remoteness or area of legal expertise). The ALRC Survey of Lawyers was designed to provide a way for lawyers to confidentially provide their views to the ALRC on issues raised by the Inquiry. The ALRC did not intend for the survey to represent a probability survey, or to be representative of all lawyers. The survey was primarily a consultation tool for reaching a large number of lawyers with current or recent experience rather than a generalisable survey of lawyers across Australia.

F.49 The ALRC was interested in exploring whether lawyers who participated in the survey held similar views to judges in relation to the appropriateness of the law and procedures relating to actual and apprehended bias, and some proposed reforms. The ALRC was also interested in understanding whether participating lawyers considered there to be a need for further guidance on the procedures and the law. In addition, the ALRC was interested in exploring whether participating lawyers had perceived bias directed against them personally, or against other participants in the proceedings, and if so, how and why they thought that bias had arisen.

Survey design

F.50 The survey was developed by the ALRC in consultation with Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu from the Judicial Research Project, Flinders University. The survey comprised 73 questions, which consisted of both open-ended and closed-ended questions. Many of the questions paralleled, or complemented, the ALRC Survey of Judges. Other questions were informed by the issues raised in the Consultation Paper and in consultations with stakeholders. The survey included questions covering:

- the area of law in which the participant practises;
- experiences with recusal/judicial self-disqualification;
- the law on apprehended bias;
- experiences of bias; and
- the importance of several proposed reforms to maintain public confidence in judicial impartiality.

F.51 Nine questions related to demographics and gathered information on the background of participants. The questions covered: age, gender, language spoken at home, Aboriginal or Torres Strait Islander status, ancestry, country of birth, LGBTIQ+ status, disability status, and religion.

F.52 At the commencement of the survey, participants were asked if they had been admitted to practise law in an Australian state or territory and whether they had practised law at any point in the past five years. Participants who did not answer yes to these questions were screened out of the survey and were unable to answer any further questions.

F.53 Participants could complete the survey in more than one session on the same device. Participants were advised that responses to any partially completed surveys would be recorded when the survey period closed.

F.54 A copy of the survey questions and introductory text is available with the supplementary materials on the ALRC's website.[24]

F.55 Prior to launch, the survey was subject to pilot testing by approximately 10 ALRC staff and external legal practitioners. A number of minor issues with survey logic and question wording were addressed as a result of the pilot testing. Data from pilot testing was not included in the final results.

Distribution

F.56 The survey was distributed by the Law Council of Australia ('Law Council') through a number of bodies. The ALRC sent a letter to the President of the Law Council, with information about the survey, the survey link, and an information note for participants.[25] The letter advised that the survey was being conducted as part of the ALRC's Judicial Impartiality Inquiry, and that it was open to any person who had been admitted to practise law in an Australian state or territory, and who had practised in Australia within the past five years. It noted that the survey was of particular relevance to those practitioners who litigate in the Commonwealth courts, but that participation was welcomed by all practitioners. The letter clarified that participation in the survey was entirely voluntary, responses would be fully anonymous, and that the ALRC would not receive any identifying information from participants.

F.57 The Law Council sent a memorandum concerning the survey, with a covering email including a link to the survey and the closing date, to:

- the Law Council's 17 constituent bodies (through their executives);
- the Chairs of the Law Council's five sections; and
- the members of the Law Council's 12 Advisory Committees.

F.58 The Law Council sent a reminder email to all of the above bodies two days before the survey closed.

F.59 On the same day as its initial email, the Law Council also forwarded the survey link to the executives of the four member organisations of the Australian Legal Assistance Forum by email, with accompanying information. These bodies are:

- Community Legal Centres Australia;
- National Aboriginal and Torres Strait Islander Legal Services;
- National Family Violence Prevention Legal Services; and
- National Legal Aid.

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24 Australian Law Reform Commission, 'ALRC Survey of Lawyers Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Lawyers-Questions.pdf>.

25 Copies of the letter and information note are available with the supplementary materials hosted on the ALRC website: Australian Law Reform Commission, 'Data Analysis' <www.alrc.gov.au/inquiry/review-of-judicial-impartiality/data-analysis/>.

F.60 The Law Council of Australia was notified by the New South Wales Bar Association, the Law Society of South Australia, and the Law Society of the Northern Territory that the survey had been distributed or publicised to their members. The ALRC is also aware that the survey was publicised by the Law Institute of Victoria and the Law Society of Queensland through their newsletters, and was publicised in an online professional publication (The Justinian). The ALRC is not aware of the extent to which the Law Council's other constituent bodies, sections, and advisory committees distributed the survey link.

Cleaning of data

F.61 A total of 204 completed responses and 87 partially completed responses were received to the survey. Prior to analysis, 74 participants were removed because they did not answer any substantive questions. Six further participants were removed because they had completed three or fewer questions, spent less than three minutes in the survey, and appeared to have 'straight-lined' the responses (for example, they just chose the negative answer for all questions). After data cleaning, responses from 211 participants were included in the dataset. The ALRC was unable to determine a response rate for the survey because the number of lawyers who received the survey is not known.

Demographic profile of participants

F.62 Seventy-one per cent (n = 211) of survey participants had practised for 10 or more years, 15% had practised between five to nine years, and 14% had practised four years or less. More responses were made by those who identified as a woman or female (51%; n = 179) than for those identifying as a man or male (43%). The remaining participants (6%) indicated that they preferred not to answer, identified as non-binary, or used a different term. Solicitors constituted 61% (n = 211) of participants, while barristers constituted 32% of participants. The breakdown of the type of solicitor across all participants was: 40% private sector solicitors; 13% public sector solicitors; and 8% not-for-profit solicitors.

F.63 Barristers were over-represented in the sample, comprising 34% (n = 211) of participants in the survey, compared with 9% of all legal practitioners (n = approx. 90,000). Public sector and not-for-profit solicitors were also over-represented.

F.64 Participants were asked to indicate all applicable areas of law in which they had a substantial practice (and therefore some selected multiple responses). The most commonly selected responses included: family law (26%; n = 211); employment law (17%); migration law (11%); and native title law (7%).

F.65 An additional 42% indicated they had substantial practices in 'other' areas of law, which were most frequently specified to be commercial law and criminal law.

F.66 Analysis of the demographic data of participants suggests that the participants were not representative of the profession as a whole, and it is not possible to gauge whether the participants are representative of those who have had experience of

disqualification and bias issues.[26] To preserve confidentiality, particularly in relation to smaller jurisdictions, the survey did not include any questions about the state or territory in which the participant was based or practised.

F.67 The lawyers who participated in the survey likely had a disproportionately high level of experience with disqualification applications. Consultations suggested the issue of bias arises infrequently, and requests or applications for disqualification are made even less frequently. A similar view was shared by the Law Council, which noted in its submission that 'in the experience of the Law Council's members, applications for disqualification are, currently, rare'.[27]

Self-selection

F.68 The ALRC did not attempt to engage a representative sample of lawyers. As discussed, there are very few statistics kept regarding the demographic profile of legal professionals in Australia. In addition, the identification of a representative sample in relation to those with experience raising issues of bias or making a disqualification application would be particularly difficult for several reasons. First, courts do not keep records with respect to how frequently the issue of bias is raised in court. Secondly, such issues are often raised informally, and, thirdly, applications for disqualification are rare (see further **Chapter 6**). The ALRC determined that identifying a representative sample of lawyers would be excessively resource-intensive given the need to obtain lists of practising lawyers from every state and territory organisation. A purposive sample of lawyers was therefore recruited via the Law Council. Participants chose to take part in the survey.

F.69 The ALRC does not consider that the findings of the ALRC Survey of Lawyers can be generalised across the population of lawyers as a whole. In particular, the ALRC recognises that the nature of the sample introduces the possibility of self-selection bias.[28] On the other hand, given the relatively small number of practitioners who practise in court regularly, and in particular, the relatively small number of practitioners who have had experience with raising issues of disqualification and bias with judges, the ALRC considers that the survey provides a useful insight into views of those members of the profession who have had experience with issues of disqualification for bias. These insights are particularly valuable in view of the difficulties for lawyers in discussing these issues publicly, even in closed forums, which were reported by some members of the profession during consultations.

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26 There are few statistics regarding the legal profession in Australia. Based on New South Wales Law Society data and Australian Government data, there are approximately 90,000 practising legal practitioners in Australia: URBIS and New South Wales Law Society, *2020 National Profile of Solicitors* (Report for the New South Wales Law Society, 1 July 2021) 6; Australian Government, 'Barristers', *JobOutlook* <https://joboutlook.gov.au/occupations/barristers?occupationCode=2711>. This includes approximately 83,000 practising solicitors (91%) and 8,000 barristers (9%). This suggests barristers are over-represented (34%; n = 211) among the participants in the ALRC Survey of Lawyers.

27 Law Council of Australia, *Submission 37*.

28 See discussion at [F.40].

Analysis of data

F.70 The ALRC analysed the closed-ended survey responses in Qualtrics, using Stats iQ.[29] Open text responses were analysed separately in NVivo and reported independently from the numerical data. In analysing the data, the ALRC excluded answer categories such as 'I don't know' and 'cannot choose' where participants were asked to respond on a scale.

F.71 The ALRC tested whether any of the following affected participants' experience of, and views on, the law of bias:

- demographic variables such as gender, age, ancestry, country of birth, language spoken at home, disability status, and LGBTIQ+ status;
- practice areas;
- frequency of litigation work in the Commonwealth courts;
- type of lawyer (barrister or solicitor); and
- years of experience.

F.72 Statistically significant differences of note across these variables are reported in **Chapter 5**.

ALRC Survey of Court Users

F.73 Over a one month period from July to August 2021, the ALRC conducted a survey of members of the public who had attended any state, territory, or Commonwealth court for non-criminal proceedings in Australia in the past 10 years.

Survey aims

F.74 As discussed further in **Chapter 5**, Commonwealth courts do not systematically collect feedback from users of the courts, including litigants.[30] The ALRC spoke with litigants who had concerns about impartiality and bias during consultations for this Inquiry. Through the survey, the ALRC was able to engage with a broader sample of people who had attended courts in Australia to explore:

- the overall levels of confidence in the courts of individuals attending court in different capacities;
- how individuals attending court in different capacities viewed the handling of proceedings by judges;
- the extent to which individuals who had attended court saw judicial bias as a concern in proceedings;
- issues that individuals attending court thought reflected well on courts;
- factors underlying perceptions of bias or unfairness in proceedings; and

29 See [F.22]–[F.23].

30 The last court user survey conducted by any Commonwealth court took place in each of the Family Court and Federal Circuit Court in 2014, with results published in 2015: Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey* (2015).

- whether individual litigants who had concerns about bias had raised this with their lawyer or the judge, and if they were satisfied with the response.

F.75 Given the limitations of nonprobability panel surveys,[31] the survey was conducted primarily as a consultation tool for reaching a large number of court users rather than a generalisable survey of Australian court users.

Survey design

F.76 The target population for the survey was any person who had been present at any non-criminal court proceeding in Australia in the past 10 years.[32] This included people attending in relation to their own case or the case of someone they knew, as part of their job, or as an observer. Practising lawyers were excluded from this survey.

F.77 It was considered important to broaden the sample to state and territory courts for two main reasons:

- the difficulty that some members of the public may have in distinguishing the different jurisdictions (Commonwealth, compared to state or territory); and
- the difficulty of accessing a large enough sample of the much smaller population who had attended Commonwealth courts.

F.78 Criminal proceedings were specifically excluded because of the different role of the judge in criminal proceedings, in which a jury often plays the role of the 'fact finder', compared to non-criminal proceedings, in which the judge performs this function. Responses from people who had attended magistrates court or equivalent proceedings for traffic offences and apprehended violence orders (or equivalent) were included as these are not criminal law matters and involve the judicial officer as the finder of fact.

F.79 The survey was designed to step individuals through several different paths of the survey depending on the jurisdiction in which they were located, the capacity in which they attended proceedings, and, if they were a litigant, whether or not they represented themselves in proceedings.

F.80 The survey consisted of mainly closed-ended questions, with some open-ended questions. Most questions were compulsory. A participant could not proceed in the survey without answering compulsory questions. Initial questions screened participants out of the survey if they were a practising lawyer, if they had not attended court in the past 10 years, or if they had only attended criminal law proceedings in the past 10 years. Participants who progressed through the survey were then asked questions about the last time they had attended court. These questions included the state or territory in which the court was located, the court they attended, what the proceedings were about, and the capacity in which they attended proceedings. The survey then asked a series of questions about the participants' views of how the

31 See [F.96]–[F.98].
32 Including online and in-person attendance at court.

judicial officer handled the proceedings, the overall fairness of proceedings, and the participants' level of confidence in the courts. Some questions differed depending on the capacity in which the person attended the court and some were the same across all participants.

F.81 The survey included 11 demographic questions to enable the ALRC to understand the demographic profile of those who completed the survey.

F.82 The web-based survey was built and hosted on Qualtrics. A copy of the survey questions and introductory text is available with the supplementary materials on the ALRC's website.[33]

Distribution

F.83 The ALRC contracted Qualtrics to administer the distribution of the survey. The target sample was 600 people who had attended court in Australia for non-criminal law proceedings in the past 10 years, excluding lawyers. Qualtrics used an online panel omnibus method to source and aggregate participants from online market research panels.[34] The sample was not specifically controlled for demographic variable proportions, such as age, gender, or location.

F.84 Active panellists identified as living in Australia and aged over 18 years old were invited to participate in the survey via Qualtrics' online panel portal. To minimise self-selection bias, no information was provided to participants prior to opting in to the survey that might have influenced their decision to participate (such as materials that revealed the contents of the survey).

F.85 Invited participants were given brief information about the survey once they accessed the survey link. This information included the fact that the survey was being conducted by the ALRC, that the ALRC was interested in hearing the perspectives of people who had attended court proceedings, that it would form part of the ALRC's consideration as to whether there was a need to make certain changes to the law, and that it should take between five to ten minutes to complete. Participants were informed that participation in the survey was entirely voluntary, that individual answers were completely anonymous, and that the ALRC would not receive any identifying information.

F.86 Participants in the survey were compensated for the time spent taking the survey through incentive and reward schemes operated by panel providers. The specific type of rewards varied and included small cash payments, airline miles, gift cards, redeemable points, charitable donations, sweepstakes entrance, and vouchers.

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33 Australian Law Reform Commission, 'ALRC Survey of Court Users Questions' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Survey-of-Court-Users-Questions.pdf>.

34 All panels used by Qualtrics are double-opt-in market research panels. The panels used cannot be disclosed. However, Qualtrics partners with panels with the certification ISO20252:2019 – Market, opinion and social research, including insights and data analytics standard.

F.87 A total of 4,206 participants took part in the survey. Of these, 3,409 were screened out by the initial screening questions. Overall, 747 participants completed the survey, while 27 did not attempt the survey as the quotas had been filled by the time they started the survey and 23 participants were automatically screened out for spending too little time on the survey.

F.88 After cleaning of the data, 490 responses formed the basis of the final dataset.

Cleaning of the data

F.89 Qualtrics carried out a number of quality checks to ensure the integrity of the final responses. To ensure that there was no duplication, Qualtrics checked every IP address and used digital fingerprinting technology and bot detection. In addition, each of the survey companies engaged by Qualtrics uses deduplication technology.

F.90 Qualtrics screened responses for quality and removed and replaced any:

- that showed suspicious patterns or straight-lining behaviour (choosing the same answer repeatedly across different questions);
- where responses to open-ended questions contained gibberish or irrelevant responses;
- that did not fit the criteria (where it was clear they related to criminal matters or tribunal hearings);
- that showed suspiciously fast completion times (participants who finish in less than half of the median survey completion length).

Demographic profile of participants

F.91 The participants reported attendance at proceedings in all Australian states and territories, predominantly in-person (89%; n = 490). Of the 490 court users, the majority (55%) had attended court only once. Twenty-six per cent had attended court two to three times and 20% had attended four or more times.

F.92 There were 258 participants (53%; n = 490) who indicated they had been litigants.[35] Of those, over half were represented by a lawyer (57%), and 37% represented themselves or their companies.[36] Of participants who attended court as a result of a case involving an organisation or business that they owned, led, managed, or worked for, 16 of 22 who responded indicated they were represented by a lawyer.

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35 This group was identified from the fact that either: they had a case that was heard by a court (236); or a case involving an organisation or business that they own, lead, manage, or work for was heard by a court (30). The eight who answered that they had been involved in both capacities were only counted once. There were 232 participants who had not been litigants (47%; n = 490). These included those supporting someone else whose case was being heard by the court (162) and witnesses (76). Note that participants could select multiple responses for this question.

36 Ninety-two participants were themselves party to a case being heard by the court, and the remaining either represented their company in court or were otherwise personally involved with company proceedings. The remainder were unsure.

F.93 Participants most frequently appeared in the state and territory magistrates courts (36%), followed by the Family Court and Family Court of Western Australia (34%).[37] The breakdown by court is set out in the table below. Some responses may be inaccurate as participants may have misstated the court they attended (particularly in matters relating to family law and family violence, where state, territory, and Commonwealth courts are often involved).

Table F.3: Court attended

Court attended	Count
High Court	5
Federal Court	14
Family Court	125
Federal Circuit Court	23
State or territory courts	263

F.94 Participants were asked to describe in a few words what the last proceedings they attended were about. Seventy per cent (n = 490) appeared in matters relating to family law/domestic violence/AVO issues; 9% appeared in matters relating to traffic offences; and 3% appeared in matters relating to property.[38] More participants were represented by a lawyer in family law matters and fewer were represented in relation to property matters and in traffic offences.[39]

F.95 The gender profile of participants (n = 485) was skewed towards female, with 65% female and 35% male participants.[40] The greatest proportion of participants (n = 488) were aged between 31 and 40 (27%), and 70% were 50 or younger. Twenty-four per cent (n = 489) of participants identified their ancestry as North-West European.

General limitations of the data

F.96 Court users were captured using a nonprobability opt-in panel. This means that the sample was not randomly drawn from the entire population of interest — all people who have attended court — but instead from those court users who have

37 Sixty participants indicated they were unsure in which court they appeared.

38 Other response options included: child protection; class action; coronial matter; defamation; environmental; guardianship and power of attorney; insolvency; native title; neighbourhood disputes; migration; planning; personal injury; tax matters; will disputes; workplace compensation; workplace relations; other; and unclear.

39 Of self-represented litigants, 61% appeared in family law/domestic violence/AVO proceedings; 17% appeared in traffic offences; and 7% appeared in property matters.

40 In the 20 to 30 age group (n = 100), the uneven distribution between female to male was even more pronounced: 84% female; 16% male. However, in the 61 and older category (n = 87), more than half of the participants (61%) were male compared with 39% who were female.

opted into one of the online panels from which the ALRC drew participants. As Callegaro and others explain, in this kind of process 'people select themselves into the panel, rather than the researcher selecting specific individuals from a sampling frame that contains all members of a target population'.[41] One consequence of the nonprobability nature of the survey and the participant self-selection is that

> it is impossible for the panel recruiter to know the probability of selection of each member of the panel. Because none of these methods are probability-based, researchers have no scientific basis for calculating standard statistics such as confidence intervals.[42]

F.97 Given this limitation, the findings of the ALRC Survey of Court Users should not be generalised across all court users.

F.98 Additionally, while the survey was designed to make it as easy as possible for non-lawyers to respond to questions about courts and legal issues,[43] there is a reasonable possibility that some responses may be inaccurate given the complexity of the survey's subject matter.

Analysis of data

F.99 Prior to analysis, the ALRC coded each participant response to one of 21 types of law by reviewing open text responses describing what the participant's court case was about.

F.100 The ALRC then analysed the responses to the closed-ended survey questions in Qualtrics, using Stats iQ.[44] The answer to each question was analysed descriptively. The ALRC also used Stats iQ to test a number of hypotheses, such as those in relation to the perspectives of litigants compared with non-litigants, and self-represented compared with represented litigants, on their experiences in court and confidence in Australia's courts and the legal system. In analysing the data, the ALRC excluded answer categories such as 'I don't know' and 'cannot choose' where participants were asked to respond on a scale.

F.101 The ALRC also explored the relationship between a number of demographic variables across all other variables to identify statistically significant relationships.[45] Open text responses were analysed separately in NVivo.

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41 Mario Callegaro et al, 'Online Panel Research: History, Concepts, Applications and a Look at the Future' in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (John Wiley & Sons, 2014) 6.

42 Ibid.

43 For example, in relation to a question about the court they attended, the survey asked what state or territory the court was in and then listed the different specific courts in the selected state or territory, given that some courts are known by different names in different jurisdictions.

44 See [F.22]–[F.23].

45 The demographic variables included: ancestry, religion, disability, LGBTIQ+ status, Aboriginal or Torres Strait Islander status, gender, and age.

ALRC Case Review

F.102 This part outlines the methodology underpinning the ALRC Case Review.[46] The ALRC's systematic case review has provided an important source of data on the different ways in which issues of disqualification and bias are handled by judges in the Commonwealth courts.

Research aims

F.103 The ALRC carried out a review of published Commonwealth judgments for two main purposes:

- to allow the ALRC to identify cases showing how issues relevant to disqualification and bias were handled in the different courts; and
- to obtain data from published judgments about:
    - the overall numbers of requests (both informal and formal) for disqualification in the different Commonwealth courts;
    - the proportion of requests in relation to different types of alleged bias;
    - the proportion of requests in relation to different areas of law, and the success rate of those requests;
    - the proportions of requests brought by legally represented parties and self-represented parties, and the success rate of those requests;
    - the number of successful disqualification requests; and
    - the number of disqualification decisions subject to review at appellate level.

F.104 The review was carried out by reviewing and coding in NVivo all documents returned in a search on the Australasian Legal Information Institute ('AustLII') website of judgments for the period 1 January 2015 to 31 August 2021.

Limitations

F.105 The ALRC Case Review draws on the public record of disqualification and recusal decisions and discussions by reviewing recorded judgments of the Commonwealth courts. Not all Commonwealth court judgments are publicly recorded. Thus the ALRC Case Review is necessarily limited by the extensiveness of that public record.

F.106 The data obtained from the case review has other limitations that are largely attributable to the different ways in which issues of bias can be raised, and the fact that not all *ex tempore* reasons are reflected in published judgments. Not all requests for disqualification, or reasons for continuing to sit, are recorded in published

46 When reviewing the cases, the terms 'recusal' and 'disqualification' were used interchangeably. This is not the approach taken in the Final Report (see **Chapter 1**). To be faithful to the language used during the review, the original language has been included where discussing the specific language used during the ALRC Case Review. However, discussion of the findings of the ALRC Case Review use the terms in accordance with the distinction outlined in **Chapter 1**.

judgments. Similarly, not all decisions by judges to recuse or disqualify themselves are included in published judgments (see further **Chapter 6**).

F.107 In addition, the data is limited by the fact that some details about disqualification requests and disqualification were not apparent from the references made to them in all of the judgments. This was often the case if a reference was made in the procedural history of a case, and there were no separate reasons dealing with the preceding disqualification decision. This often resulted in certain results being coded as 'unclear'.

F.108 On the other hand, when judges recite the procedural history of a case in a final written judgment, reference is often made to previous disqualification and requests for disqualification in the history of the matter. In addition, at the appellate level in the Federal Court and FCFCOA (Div 1), reasons for formal orders, even if delivered *ex tempore*, are generally reflected in published judgments.

F.109 Although it is not possible to make a direct comparison, the reported incidence of disqualification decisions in the ALRC Survey of Judges is generally consistent with the conclusion that the ALRC Case Review has been able to identify a large proportion of disqualification decisions that have been made in Commonwealth courts in the relevant period. However, without further research it is not possible to identify any important gaps in the data.

F.110 Comparison against the reported incidence of judges recusing on their own motion from the ALRC Survey of Judges suggests that the ALRC Case Review has not captured most of the cases in which judges have recused themselves on their own motion. This is expected, given that judges are not specifically required to give reasons for deciding not to continue sitting in a matter. Consultations for this Inquiry also indicated that recusals on a judge's own motion often occur at very early stages of proceedings.

Identifying the data set

F.111 The review was designed to capture all cases that made reference to certain search terms related to disqualification and recusal, and to exclude irrelevant cases. The ALRC developed a codebook for consistent qualitative analysis of cases to obtain various pieces of data.

F.112 Cases were identified by searching the AustLII website for judgments of the Federal Circuit Court, Family Court, Federal Court, and High Court, during the period 1 January 2015 to 31 August 2021, using the following terms:

recus! OR "disqualify !self" OR application/5/disqualification

F.113 These search terms were chosen after refining broader search strings and were verified as locating all the applications identified as relevant in a sample of the broader searches.

F.114 The search returned 879 judgments.[47] Copies of the judgments were imported into NVivo. Screening for relevance and coding of relevant documents in NVivo was then carried out.

Screening for relevance

F.115 Cases were first screened for relevance. A total of 745 judgments were identified as relevant in the course of the review. For a full list of cases identified as relevant and irrelevant, and the coding applied to each case classified as 'Relevant — Recusal requests and appeals' see the supplementary materials on the ALRC's website.[48]

Coding of relevant cases

F.116 Relevant cases were then coded into two key groups with different coding structures:

- Relevant — Recusal requests and appeals: where the judgment referred to a request (whether informally or by formal application) to a judge for disqualification of the judge, or to disqualification on a judge's own motion, or to a review or appeal of a disqualification decision. These cases were the key target of the search string, and the ALRC was confident that the search results were comprehensive.
- Relevant — Appeals (no recusal request below): where the judgment referred to an appeal on the grounds of bias, but made no reference to a recusal or disqualification request in the court below. As the search string was not directed at isolating these cases, the search results in this category were only a subset of such cases. These cases were nevertheless useful to the ALRC in its wider research.

F.117 Cases were considered relevant if they fit the criteria, whether or not the request for disqualification was made within the period covered by the search for published judgments (1 January 2015 to 31 August 2021).

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47 The ALRC conducted an initial case search in June 2021. This was updated in August 2021. A final update was run in October 2021 to cover the June–August 2021 period. However, the ALRC later identified that approximately seven additional cases had been added to the AustLII website for the pre-June 2021 period. These seven cases are not included in the ALRC's analysis.

48 Australian Law Reform Commission, 'ALRC Case Review Data' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-JI-Case-Review-Data.pdf>.

F.118 A copy of the codebook used by the ALRC is available with the supplementary materials on the ALRC's website.[49] Cases classified as 'Relevant — Recusal requests and appeals' were coded by:

- court and date of judgment;
- type of reference (how the issue of disqualification or recusal was raised);
- date of any disqualification application, the court in relation to which the disqualification application was raised, and whether substantive reasons were given for the disqualification decision;
- whether the judgment was the primary reference to a recusal or disqualification (and if not, the citation for the primary reference);
- the outcome of the disqualification application or appeal of disqualification decision referred to (as applicable);
- whether the party was self-represented when the application was made;
- the area of law to which the judgment related;
- the categories of bias raised (interest, association, conduct and prejudgment, extraneous information, other, or unclear); and
- whether the judgment included references to multiple disqualification applications.[50]

49 Ibid.
50 If so, an additional copy of the judgment was made to code the additional reference separately.

Appendix G
Recusal Guidelines of New Zealand Courts

The *Recusal Guidelines* excerpted in this appendix are available for download from the Courts of New Zealand and District Court of New Zealand websites.[1]

Supreme Court of New Zealand (Te Kōti Mana Nui o Aotearoa)

Recusal Guidelines

The following guidelines are published in accordance with s 171(2) of the Senior Courts Act 2016.

1. These guidelines replace the Recusal Guidelines dated 1 March 2017.

2. The guiding principle of these guidelines is that a judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the judge might not be impartial in reaching a decision in the case. An instance is where a judge has a material interest in the outcome of the appeal.

3. The test is a two-step one requiring consideration of:

    a. what are the circumstances relevant to the possible need for recusal because of apparent bias?
    b. whether those circumstances lead to a reasonable apprehension the judge may not be impartial.

    The test requires ascertainment of, first, what it is that might possibly lead to a reasonable apprehension that the judge might decide the case other than on its merits and, secondly, whether there is a logical and sufficient connection between those circumstances and that apprehension.

4. Once leave to appeal to the Supreme Court has been sought, each judge has a duty to acquaint all colleagues in the Court with any known circumstances which may give rise to a concern among the litigants, or the public, that the judge might not be impartial in the case. Every judge is similarly under a duty to bring to the attention of all other colleagues any circumstances which may lead to such a concern in respect of any other judge.

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1 Courts of New Zealand, 'Judicial Conduct' <www.courtsofnz.govt.nz/about-the-judiciary/judicialconduct/#conflicts-of-interest>; District Court of New Zealand, 'District Court Recusal Guidelines' <www.districtcourts.govt.nz/statutory-protocolsguidelines/statutory-protocolsguidelines/district-court-recusal-guidelines/>.

5. If, after discussion of the circumstances with all other judges, the judge concerned is satisfied there is a real possibility that he or she cannot act impartially, or is satisfied that a fair-minded and fully informed observer might reach that view, the judge will decide not to sit on the appeal.

6. In any other case, after such discussions, the judge will, unless the other judges decide that this is unnecessary, issue a minute addressed to the parties to the litigation drawing their attention to the relevant circumstances and inviting them to indicate if they have any views on whether the judge should sit on the appeal. The minute will indicate that, in addition to indicating their views and drawing the judge's attention to any additional matters thought relevant, if a party objects to the judge sitting on the grounds raised or any other grounds, counsel should say so. The minute should set a time for response by the parties.

7. If an objection is received, that will be determined by all the judges available, other than the judge who is the subject of the objection. Those judges may call for submissions and hear the parties as they think appropriate.

8. If no objection to the judge sitting is received, all judges will consider any material provided in response to the judge's minute but the judge concerned will decide whether or not to sit.

9. Where a party (of its own motion) considers there to be a possible conflict of interest, a memorandum must be filed at the earliest possible opportunity setting out the particular circumstances giving rise to the alleged conflict. The Court will (usually) ask for a response from the other parties. Subject to paragraph 10, the objection will be dealt with in terms of paragraphs 5 and 7 of these guidelines.

10. Recusal applications made at a hearing or close in time to the allocated hearing date of an application or an appeal are generally not appropriate. If an issue of conflict of interest is raised at this late stage, the Court hearing the application or the appeal will usually deal with the matter.

11. Where a possible conflict of interest arises or may arise after the hearing of an appeal but before the judgment is delivered, the judge (if aware of the possible conflict), or any other judges who are aware of the possible conflict, should raise the issue with the remainder of the panel. A party who becomes aware of a possible conflict after the hearing and before judgment is delivered should also immediately inform the Court. The procedures set out at paragraphs 6, 7 and 8, with necessary modification, will then apply.

Helen Winkelmann
Chief Justice
9 July 2020

Court of Appeal of New Zealand (Te Kōti Pīra o Aotearoa)

Recusal Guidelines

Section 171 of the Senior Courts Act 2016 requires the President of the Court of Appeal, in consultation with the Chief Justice, to develop and publish guidelines to assist Judges of the Court of Appeal to decide if they should recuse themselves from a proceeding. The following recusal guidelines have been adopted accordingly.

Introduction

1. The Judges of the Court of Appeal have agreed on some administrative guidelines as to the processes to be followed to determine issues about recusal. The procedures described are intended only as guidance. Decisions about recusal are very much fact dependent and the approach to be taken in a particular case may vary depending on the factual matrix.

Guiding principles

2. A Judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the Judge may not be impartial in reaching a decision in the case.

3. The test is a two-step one requiring consideration of:

    a. what are the circumstances relevant to the possible need for recusal because of apparent bias; and
    b. whether those circumstances lead to a reasonable apprehension the judge may not be impartial.

Process guidelines

4. Prior to the President allocating panels for given cases in the Permanent Court, a list of prospective cases will be circulated on a monthly basis so that Judges can indicate cases on which they should not be listed for conflict reasons.

5. A similar approach will be followed for cases in the Divisional Court, with lists of prospective cases circulated approximately two weeks before the hearings. Panel members in the Divisional Court should raise any potential conflict issues with the presiding Judge in the first instance.

6. After a Judge has been assigned to a case and seen the papers, that Judge may realise that there is some matter concerning his or her prospective involvement which he or she did not detect earlier and which the Judge considers means he/she should recuse him/herself. In these circumstances,

the Judge will stand aside.

7. Where the issue is not clear cut, the Judge should consult, at that point, with other members on the panel and the President. If, after consultation, the Judge considers the parties should be informed, there should be a formal communication by Minute of the Judge delivered through the Registrar.

8. After a case is listed, objection may be raised by a party to a given Judge sitting. That objection should be directed in the first instance to the particular Judge. That Judge will consider the matter and in so doing will consult with the other Judges on the panel and the President as to whether he or she should sit.

9. If, in either of the cases discussed in [7] and [8] above, the Judge does not decide to stand down, the parties should be informed by Minute. If the party maintains an objection, the parties will have the opportunity to file brief written submissions, normally no more than three pages. On occasion affidavits may be required.

10. The impugned Judge should be invited, if he or she wishes to do so, or if the panel requests it, to lodge a memorandum with any information and observations that Judge wishes to make on the question of recusal. The Judge should include in the memorandum any known circumstances which may give rise to a concern that the Judge may not be impartial in the case. This will be made available to the parties.

11. The matter will then be determined either on the papers or at an oral hearing, possibly by telephone, by the panel including the impugned Judge unless the President otherwise directs. The President's decision as to the composition of the panel will depend on matters such as the nature and seriousness of the objection and the circumstances in which it is raised.

12. On the day oral applications are not considered appropriate. If a recusal issue is raised at this late stage, the allocated panel will deal with the matter then and there.

Stephen Kós P
August 2017

High Court of New Zealand (Te Kōti Matua o Aotearoa)

Recusal Guidelines

Introduction

Section 171 of the Senior Courts Act 2016 requires the Chief High Court Judge, in consultation with the Chief Justice, to develop and publish recusal guidelines for the High Court. These recusal guidelines are issued after consultation with the Chief Justice.

1. General principles

1.1 A judge has an obligation to sit on any case allocated to him or her unless grounds for recusal exist.

1.2 A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

1.3 The standard for recusal is one of "real and not remote possibility", rather than probability.

1.4 The test is a two-stage one. The judge must consider

1.4.1 First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and

1.4.2 Second, whether there is a "logical and sufficient connection" between those circumstances and that apprehension.[2]

1.5 The question of recusal is for the judge hearing the case. Some of the matters the judge should consider are:

1.5.1 A judge should apply the above principles firmly and fairly and not accede too readily to suggestions of bias.

1.5.2 A judge should be mindful of the burden that passes to other

2 See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337; and *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 ALR 753. See also: Grant Hammond, *Judicial Recusal Principles, Process and Problems* (Hart Publishing, Oxford and Portland Oregon, 2009).

judges if the judge recuses him or herself unnecessarily.

1.5.3 A judge is not required to recuse him or herself merely because the issues involved in a case are in some indirect way related to the judge's personal experience or that the judge has previously dealt with the case.

1.5.4 The making of a complaint to the Judicial Conduct Commissioner against a judge does not of itself serve to disqualify the judge from hearing cases involving the complainant.[3]

1.5.5 If, after considering all relevant circumstances, there is doubt about whether there may properly be an appearance of bias, it may be prudent for the judge to decline to sit in that case.

1.6 Conflicts of interest can arise in a number of different situations. A judge should be alert to any appearance of bias arising out of connections with litigants, their legal advisors or witnesses.

1.7 The apprehension of bias is case dependent. The fact that a particular relationship falls outside the examples in these guidelines does not automatically mean that there cannot be a reasonable apprehension of bias in the particular circumstances of the case at hand.

2. Recusal where relationship exists

2.1 The existence of a relationship with a party, lawyer or witness will not in itself create a reasonable apprehension of bias. There must be some logical connection between the relationship and its capacity to influence the judge to deviate from the course of deciding a case on its merits alone.

2.2 A judge should recuse himself or herself where a party, lawyer or witness of disputed facts is a close relative or domestic partner of the judge.

2.3 Other situations are not so clear cut. Some examples of common relationships that a judge should consider as they may give rise to the apprehension of bias are:

2.3.1 A party or witness of disputed facts is a close friend of the judge;

2.3.2 A witness of disputed facts is someone known to the judge or someone about whom he or she has formed a view,

3 See *Slavich v Attorney-General* [2013] NZSC 130 at [6].

such as a former client; or

2.3.3. A party, lawyer or witness of disputed facts is a business associate of the judge. Much will depend on the nature and extent of the association. For example, if the judge is directly or indirectly financially dependent on or indebted or otherwise beholden to a party, lawyer, or witness, the judge should recuse himself or herself unless that dependence or indebtedness is so minimal as to be immaterial.

2.4 The fact a judge has a friendship or past professional association with lawyers engaged in the case, will not generally be sufficient to require recusal. The test as always is whether a fair minded fully informed observer would reasonably apprehend the judge might not be impartial in the circumstances of the case.

3. Recusal arising from legal practice

3.1 A judge should recuse himself or herself if he or she served as a legal advisor in respect of the matter in issue when in practice.

3.2 If the matter in issue was dealt with by the firm at a time when the judge was a member of the firm, the judge may need to consider recusal even if the judge had no personal involvement in providing advice about it if the Judge obtained relevant knowledge about the matter in issue or had formed a view of the parties.

4. Recusal where economic interest

4.1 A judge should recuse him or herself if he or she, or a close relative or member of the judge's household, directly or indirectly has an economic interest in the outcome of the proceedings. Such conflicts may arise out of current commercial or business activities, financial investments (including shareholding in public or private companies) or membership or involvement with educational, charitable or other community organisations which may be interested in the litigation.

4.2 An economic interest may also arise in another situation. That is where the case is to decide a point of law which may affect a judge in his or her personal capacity beyond that of the public generally. In deciding whether to recuse him or herself, a judge should have regard to the point of law, to the nature and extent of his or her interest, and the effect of the decision on others with whom the judge has a relationship, actual or foreseeable.

4.3 Shareholdings in litigant companies or companies associated with litigants should be disclosed even where the shareholding is small.

They should lead to recusal if the value of the shareholding would be affected by the outcome of the litigation.

5. Recusal where opinions earlier expressed

5.1 A judge should consider recusing him or herself if the case concerns a matter upon which the judge has made public statements of firm opinion on the issue before the court.

5.2 An expression of opinion in an earlier case or in an earlier stage of a proceeding is not of itself a ground for recusal.

6. Disclosure of conflict of interest: principles

6.1 Adequate disclosure protects the integrity of the judicial process and is also a defence against later challenges to the decision.

6.2 Disclosure does not constitute an acknowledgement that the circumstances give rise to a reasonable apprehension of bias.

6.3 Disclosure of any matter which might give rise to objection should be undertaken even if the judge has formed the view that there is no basis for recusal. There may be circumstances not known to the judge which may be raised by the parties consequentially upon such disclosure.

7. Disclosure of conflict of interest: practice

7.1 Disclosure should be made as early as possible before the hearing.

7.2 When making disclosure, the judge should issue a minute through the Registrar to counsel for all parties.

7.3 The judge should ensure that the minute contains sufficient information, without unnecessary detail, to enable the parties to decide whether to make a recusal application. It is undesirable for parties to be placed in the position of having to seek further information from the judge.

7.4 On occasion advance disclosure often may not be possible in light of listing arrangements. In this situation, disclosure on the day of the hearing may be unavoidable. If this occurs:

7.4.1 Discussion between the judge and the parties about whether to proceed should normally be in open court, unless the case itself is to be heard in chambers.

7.4.2 The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of recusal.

7.4.3 The judge should be particularly mindful of the difficult position that the parties and their advisors are placed in by disclosure on the day of the hearing. Late disclosure puts the parties in a situation where it might appear to them that consent is sought even although a ground of recusal actually exists.

7.5 The consent of the parties to a judge sitting is important but not determinative, as the subjective perceptions of the parties are not relevant to whether there is a reasonable apprehension of bias.

7.5.1 Even where parties consent, the judge should nonetheless recuse himself or herself where he or she is satisfied recusal is required.

7.5.2 In other cases, where the judge has disclosed a matter which might give rise to objection and has heard and considered submissions, he or she may form the view that the hearing may proceed notwithstanding the lack of consent.

7.6 In circumstances of urgency, where the judge cannot be replaced for practical reasons, he or she may need to hear the case, notwithstanding that there may exist arguable grounds in favour of recusal. Consent will be a particularly relevant consideration in this situation.

Hon Justice G J Venning
Chief High Court Judge – Te Kaiwhakawā Matua
12 June 2017

District Court of New Zealand (Te Kōti ā Rohe o Aotearoa)

Recusal Guidelines

Section 217 District Court Act 2016

1. Introduction

1.1 The Chief District Court Judge, Principal Family Court Judge and Principal Youth Court Judge have conferred with our senior Judges of the District Court and have agreed on some administrative guidelines outlining processes to determine issues about recusal. The processes described are intended only as guidance. Decisions about recusal are very fact specific and the particular case will depend on the facts and circumstances specific to the case in question.

2. Guiding Principle

2.1 The guiding principle is that a Judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the Judge might not be impartial in reaching a decision in the case.

2.2 The test is a two-step one requiring consideration of:

a. What are the circumstances relevant to the possible need for recusal because of apparent bias?
b. Whether those circumstances lead to a reasonable apprehension the Judge may not be impartial.

2.3 The test requires ascertainment of, first what it is that might possibly lead to a reasonable apprehension that the Judge might decide the case other than on its merits and, secondly, whether there is a logical and sufficient connection between those circumstances and that apprehension.

3. Process

3.1 Where application is made for a Judge to recuse his or herself, that application will be determined in open court and reasons for the decision will be delivered in the usual manner.

3.2 Where a Judge independently of the parties realises that there is some matter concerning his or her prospective involvement which may mean he/she should recuse him/herself the Judge will stand aside and where

appropriate deliver reasons in open court or otherwise issue a minute containing reasons for that decision.

3.3 Where the issue is not clear cut, the Judge should consult at that point with the Chief District Court Judge or relevant Principal Court Judge or other senior judge. If, after that discussion, the Judge concerned is satisfied there is a real possibility he or she cannot act impartially or is satisfied that a fair-minded and fully informed observer might reach that view, the Judge will recuse him/herself.

3.4 In any other case, after such discussions, the Judge will where appropriate raise in open court or otherwise issue a minute addressed to the parties drawing their attention to the relevant circumstances, inviting them to indicate if they have any views on whether the Judge should preside over the hearing. In either case counsel will be asked for their views and invited, in particular, to draw the Judge's attention to any additional matters thought relevant. If a party objects to the Judge sitting, counsel should say so, setting out the reasons for the objection. Any minute should set a time for response by the parties.

3.5 If an objection is received the Judge may call for submissions and hear the parties, before issuing a decision giving reasons for the recusal or not as the case may be.

Appendix H
State and Territory Judicial Appointments Processes

Appendix H.1: Process for Judicial Appointments

	Court and Position	Process for appointment
ACT	**Supreme Court**[1] Chief Justice Judge	• The Attorney-General must seek expressions of interest by public notice and invite 'key ACT stakeholders' to suggest or nominate candidates. • The Attorney-General may consult with the current Chief Justice if appointing a Chief Justice. • The Attorney-General must consult with the Chief Justice if appointing a Judge (not being the Chief Justice). • The Attorney-General recommends appointments to the Executive. • The Executive, by commission, appoints judicial officers.
	Magistrates Court[2] Chief Magistrate Magistrate	• The Attorney-General must seek expressions of interest by public notice and invite 'key ACT stakeholders' to suggest or nominate candidates. • The Attorney-General must consult with the Chief Justice if appointing a Chief Magistrate. • The Attorney-General must consult with the Chief Magistrate if appointing a Magistrate (not being the Chief Magistrate). • The Attorney-General recommends appointments to the Executive. • The Executive, by commission, appoints judicial officers.

	Court and Position	Process for appointment
NSW	**Supreme Court**[3] Chief Justice Judge of Appeal Judge	• Public advertisements for expressions of interest are published in local and national newspapers, as well as on the NSW Department of Communities and Justice website. • Call for expressions of interest are communicated to the Law Society of NSW and the NSW Bar Association. • A selection panel is convened, commonly including: the relevant head of the jurisdiction; a senior officer from the Department of Communities and Justice; and at least one leading member of the legal profession. • The selection panel short-lists and interviews candidates suitable for appointment. Candidates are assessed as either being highly suitable, suitable, or unsuitable. A report is then provided to the Attorney General. • The panel may reconvene to conduct new interviews to assist in expanding the pool of suitable applicants. • The Attorney General decides on the recommendations to the Governor-in-Council. • The Governor, by commission under the public seal of the State, appoints judicial officers.
	District Court[4] Chief Judge Judge	
	Local Court[5] Chief Magistrate Deputy Chief Magistrate Magistrate	

	Court and Position	Process for appointment
NT	**Supreme Court**[6] Chief Justice Judge	• Advertisement for expressions of interest is not required. • The Attorney-General will appoint an Advisory Panel comprising: ○ a former Judge of either the Supreme Court or the Federal Court (who preferably has experience in NT) and who has not been retired for more than 7 years; ○ the Solicitor-General for the NT (alternatively, the Director of Public Prosecutions); and ○ the CEO of the Department of the Attorney-General and Justice. • In preparation for consultation with the Advisory Panel, the President of the NT Bar Association and the President of the Law Society of NT must consult with 'specialist and other groups within the legal profession' regarding suitable candidates. • The Advisory Panel conducts face-to-face consultations with the Chief Justice, the President of the Bar Association, and the President of the Law Society, to seek comment on candidates under consideration by the Panel and to invite those persons to raise other potential candidates. • The Advisory Panel recommends at least two candidates suitable for appointment to the Attorney-General. The Panel may indicate whether a particular candidate(s) is preferred, accompanied by brief reasons for that preference. • If the Chief Justice objects to the recommendation of a particular person, this must be communicated to the Attorney-General. • The Attorney-General may meet with the Panel to discuss further details in relation to the recommended persons. • The Attorney-General selects one candidate and provides the selection to Cabinet. • Cabinet may conduct consultations regarding the recommendation before proposing appointment to the Administrator. Cabinet may propose appointing a person not recommended by the Advisory Panel, so long as the proposal is referred to the Panel and the Chief Justice before the appointment is made. • The Administrator, by commission, appoints judicial officers. *Note: If the Attorney-General departs from Protocol, the Attorney-General must inform Cabinet of the departure. If Cabinet departs from the Protocol, the departure must be made public.*

	Court and Position	Process for appointment
NT	**Local Court**[7] Chief Judge Deputy Chief Judge Judge	As above, with the following exceptions: • There is public advertisement for expressions of interest, which is overseen by the Department of the Attorney-General and Justice in liaison with the chair of the Advisory Panel. • In addition to the Chief Justice, the President of the Bar Association, and the President of the Law Society, the Advisory Panel must consult with the Chief Judge of the Local Court prior to providing its recommendation to the Attorney-General. • In addition to the Chief Justice, if the Chief Judge of the Local Court objects to the recommendation of a particular person, this must be communicated to the Attorney-General. • The Advisory Panel decides whether or not to interview suitable candidates for appointment. The Panel's recommendations to the Attorney-General must indicate whether or not the Panel conducted interviews and, if so, with whom. • In the case of appointing a Chief Judge, the outgoing Chief Judge should be consulted, if available.

	Court and Position	Process for appointment
QLD	**Supreme Court**[8] Chief Justice President of the Court of Appeal Judge of Appeal Senior Judge Administrator Judge	• Vacancies for positions will be advertised on the Queensland Courts website, and registration of expressions of interest invited at any time. • The Attorney-General must consult with relevant heads of the jurisdiction before referring vacancies for consideration by the Judicial Advisory Panel, which comprises: ○ the chairperson (a retired judge or magistrate); ○ the President of the Bar Association of Queensland (or an authorised representative); ○ the President of the Queensland Law Society (or an authorised representative); and ○ up to two individuals (one of whom must be a lawyer) who represent community views and possess relevant knowledge, expertise or experience in the justice system (eg, the Anti-Discrimination Commissioner). • The Attorney-General may nominate candidates to the Panel for consideration and the Panel may invite persons to register an expression of interest. • The Panel decides its own selection process, but the process should generally include: ○ consideration of all eligible candidates; ○ assessment of their merits, including interview (if necessary for candidates who are not already judicial officers); and ○ consultation with whoever the panel considers appropriate (including from a diversity perspective). • The Panel's selection list should comprise 4–8 suitable candidates for each vacancy. • For multiple vacancies of the same judicial level, the Attorney-General may specify the number of candidates to be short-listed for consideration. • After receipt of the Panel's list, the Attorney-General should again consult with the relevant heads of jurisdiction before selecting a person to recommend to the Governor in Council. • The Governor in Council, by commission, appoints judicial officers.
	District Court[9] Chief Judge Judge Administrator Judge	
	Magistrates Court[10] Chief Magistrate Deputy Chief Magistrate Magistrate	

	Court and Position	Process for appointment
SA	**Supreme Court**[11] Chief Justice Judge of the Court of Appeal Judge	• The Governor appoints judicial officers on the recommendation of the Attorney-General.
	District Court[12] Chief Judge Judge	• The Governor appoints judicial officers on the recommendation of the Attorney-General. • The Attorney-General must consult with the Chief Justice of the Supreme Court before the Governor assigns a Supreme Court Judge to be Chief Judge of the District Court.
	Magistrates Court[13] Chief Magistrate Magistrate	• The Governor appoints judicial officers on the recommendation of the Attorney-General. • The Attorney-General must consult with the Chief Justice and Chief Magistrate before making a recommendation for appointment. • The Attorney-General's Department (SA) website provides prospective applicants with information about how to apply for appointment as a magistrate.

	Court and Position	Process for appointment
TAS	**Supreme Court**[14] Chief Justice Judge	• The Attorney-General calls for expressions of interest by advertising in three Tasmanian daily newspapers, one national newspaper, and on the Department of Justice website. • Applications must be lodged with the Secretary of the Justice Department and no less than 3 weeks allowed for lodgement of all applications. • Appropriate inquiries are conducted by the Assessment Panel, comprised of the following persons: ○ a representative of a professional legal body chosen by the Attorney-General (for Supreme Court vacancy) or Chief Magistrate or their nominee (for Magistrates' Court vacancy); ○ Secretary (or nominee) of the Department of Justice; and ○ Attorney-General's nominee. • The Assessment Panel recommends candidates to the Attorney-General as either 'suitable for appointment' or 'not suitable for appointment', and provides a statement of reasons to the Attorney-General. • The Attorney-General may conduct further consultations to determine a preferred candidate. • Once the Attorney-General has selected a preferred candidate, the Secretary of the Department of Justice contacts the following officer holders to seek comment on any reasons why the appointment should not proceed: the Executive Director of the Law Society of Tasmania; the President of the Tasmanian Bar Association; and the Chair of the Legal Profession Board. • The candidate is considered by Cabinet prior to being recommended to the Governor-in-Council.
	Magistrates Court[15] Chief Magistrate Magistrate	

	Court and Position	Process for appointment
VIC	**Supreme Court**[16] Chief Justice President of the Court of Appeal Judge of Appeal Judge	• The Governor in Council appoints judicial officers on the recommendation of the Attorney-General. • Expressions of interest for judicial appointments are invited by the Attorney-General.
	County Court[17] Chief Judge Deputy Chief Judge Judge	
	Magistrates' Court[18] Chief Magistrate Deputy Chief Magistrate Magistrate	

	Court and Position	Process for appointment
WA	**Supreme Court**[19] Chief Justice President of the Court of Appeal Judge of Appeal Judge	• The Governor appoints judicial officers by commission under the Public Seal of the State.
	District Court[20] Chief Judge Judge	
	Magistrates Court[21] Chief Magistrate Magistrate	• The Governor appoints judicial officers by commission under the Public Seal of the State. • Vacancies are advertised on the Department of Justice (WA) website and expressions of interest are invited.

Appendix H.2: Selection criteria for judicial appointment

	Court and Position	Selection criteria for appointment
ACT	**Supreme Court**[22] Chief Justice Judge	***Intellectual capacity*** • Appropriate knowledge of the relevant law and its underlying principles • High level of expertise in chosen area or profession • Ability to quickly absorb and analyse information • Litigation experience or familiarity with court processes, including alternative dispute resolution (Supreme Court only) ***Personal qualities*** • Integrity and independence of mind • Sound judgement • Decisiveness • Objectivity • Ability and willingness to learn and develop professionally (and, in the case of the Supreme Court, adapt to change) • Diligence (Supreme Court only) • Sound temperament (Supreme Court only) ***Ability to understand and deal fairly*** • Willingness to listen with patience and courtesy • Ability to treat everyone with respect and sensitivity whatever their background (Magistrates Court only) Supreme Court only: • Impartiality • Awareness of and respect for the diverse communities which the courts serve and an understanding of and sensitivity to differing needs • Commitment to justice, independence, public service, and fair treatment • Commitment to respect for all court users ***Authority and communication skills*** • Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved • Ability to inspire respect and confidence • Ability to maintain authority when challenged • Ability to communicate orally and in writing in clear standard English (Supreme Court only)
	Magistrates Court[23] Chief Magistrate Magistrate	

	Court and Position	Selection criteria for appointment
ACT		***Efficiency*** • Ability to organise time effectively and work at speed and under pressure • Ability to produce clear reasoned judgments expeditiously • Ability to work constructively with others ***Leadership and management skills*** (Supreme Court only) • Ability to form strategic objectives and to provide leadership to implement them effectively • Ability to engage constructively and collegially with others in the court, including courts administration • Ability to represent the court appropriately including to external bodies such as the legal profession • Ability to motivate, support, and encourage the professional development of others in the court • Ability to manage change effectively • Ability to manage available resources
NSW	**Supreme Court**[24] Chief Justice Judge of Appeal Judge **District Court**[25] Chief Judge Judge **Local Court**[26] Chief Magistrate Deputy Chief Magistrate Magistrate	**Overriding principle:** Appointments to be made on the basis of merit. ***Professional qualities*** • Proficiency in the law and its underlying principles • Professional expertise in area(s) of professional specialisation • Applied experience • Intellectual and analytical ability • Ability to discharge duties promptly • Capacity to work under pressure • Effective oral, written, and interpersonal communication skills with peers and members of the public • Ability to clearly explain procedure and decisions to all parties • Effective management of workload • Ability to maintain authority and inspire respect • Willingness to participate in ongoing judicial education • Ability to use, or willingness to learn, modern information technology ***Personal qualities*** • Integrity • Independence and impartiality • Good character • Common sense and good judgement • Courtesy and patience • Social awareness

	Court and Position	Selection criteria for appointment
NT	**Supreme Court** Chief Justice Judge	Not available.
	Local Court Chief Judge Deputy Chief Judge Judge	
QLD	**Supreme Court**[27] Chief Justice President of the Court of Appeal Judge of Appeal Senior Judge Administrator Judge	***Intellectual capacity*** • Legal expertise • Litigation experience or familiarity with court processes, including alternative dispute resolution • Ability to absorb and analyse information • Appropriate knowledge of the law and its underlying principles, and the ability to acquire new knowledge ***Personal qualities*** • Integrity and independence of mind • Sound judgement • Decisiveness • Objectivity • Diligence • Sound temperament • Ability and willingness to learn and develop professionally and to adapt to change ***Ability to understand and deal fairly*** • Impartiality • Awareness of, and respect for, the diverse communities served by the courts and an understanding of differing needs • Commitment to justice, independence, public service and fair treatment • Willingness to listen with patience and courtesy • Commitment to respect for all court users ***Authority and communication skills*** • Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved • Ability to inspire respect and confidence • Ability to maintain authority when challenged • Ability to communicate orally and in writing in clear standard English
	District Court[28] Chief Judge Judge Administrator Judge	

	Court and Position	Selection criteria for appointment
QLD	**Magistrates Court**[29] Chief Magistrate Deputy Chief Magistrate Magistrate	***Efficiency*** • Ability to work expeditiously • Ability to organise time effectively to discharge duties promptly • Manages workload effectively • Ability to work constructively with others ***Leadership and management skills*** • Ability to form strategic objectives and to provide leadership to implement them effectively • Ability to engage constructively and collegially with others in court, including courts administration • Ability to represent the court appropriately including to external bodies such as the legal profession • Ability to motivate, support and encourage the professional development of others in the court • Ability to manage change effectively • Ability to manage available resources
SA	**Supreme Court** Chief Justice Judge of the Court of Appeal Judge	Not available.
	District Court Chief Judge Judge	Not available.

	Court and Position	Selection criteria for appointment
SA	**Magistrates Court**[30] Chief Magistrate Magistrate	***Intellectual capacity*** • Knowledge of relevant law and its underlying principles • Litigation experience or familiarity with court processes, including alternative dispute resolution • An ability to quickly absorb and analyse information • Commitment to continuous learning and professional development • Excellent writing skills ***Personal qualities*** • Integrity and independence of mind • Sound judgement and common sense • Decisiveness • Hard-work and diligence • Collegiality • An ability to adapt to change • Respectful personal working behaviour • Insightfulness ***An ability to understand and deal fairly*** • Willingness to listen with patience and courtesy • Open-mindedness and impartiality • Aware and respectful of diversity • Commitment to respect all court users • Understanding of risk of unconscious bias ***Authority and communication skills*** • Effective oral and written communication skills • An ability to explain procedure and decisions reached clearly and succinctly to all involved • An ability to exercise authority calmly and professionally, particularly when challenged ***Efficiency*** • Ability to work at speed and under pressure • Ability to organise time effectively to deliver judgments and sentencing remarks in a timely manner • An ability to work constructively and collaboratively with others in the court ***Information technology*** • High level of competence and confidence in use of computer technology • Willingness to learn and master new IT skills

	Court and Position	Selection criteria for appointment
TAS	**Supreme Court**[31] Chief Justice Judge	• Experienced legal practitioner with a high record of professional achievement coupled with a knowledge and understanding of the law consistent with judicial office • Excellent conceptual and analytical thinker, displaying independence and clarity of thought • Effective oral and verbal communicator in dealing with legal professionals, litigants, and witnesses and able to explain technical issues to non-specialists • Highly organised, able to demonstrate or develop sound court management skills and work well under pressure • Capable of making fair, balanced, and consistent decisions according to the law without undue delay • A person of maturity, discretion, patience, and integrity who inspires respect and confidence • Committed to the proper administration of justice and continuous improvement in court practice, working collegiately with judicial colleagues and effectively with court officers to those ends
	Magistrates Court[32] Chief Magistrate Magistrate	
VIC	**Supreme Court**[33] Chief Justice President of the Court of Appeal Judge of Appeal Judge	• Knowledge and technical skill (eg conscientiousness, commitment to high standards, sound knowledge of the law and its application, sound knowledge of procedure and appropriate application) • Communication and authority (eg firmness without arrogance, courtesy, patience, tolerance, fairness, sensitivity, compassion, self-discipline) • Decision making (eg decisiveness, confidence, moral courage, independence, impartiality, sound judgement, appropriate exercise of discretion) • Professionalism and integrity (eg capacity to handle stress, sense of ethics, patience, honesty, personal discipline, integrity) • Efficiency (eg commitment to public service and efficient administration, management of hearings to promote fair and timely disposal) • Leadership and management (eg responsibility, imagination, commitment to efficient administration, facilitating teamwork, supporting and developing talent)
	County Court[34] Chief Judge Deputy Chief Judge Judge	
	Magistrates' Court[35] Chief Magistrate Deputy Chief Magistrate Magistrate	

	Court and Position	Selection criteria for appointment
WA	**Supreme Court** Chief Justice President of the Court of Appeal Judge of Appeal Judge	Not available.
	District Court Chief Judge Judge	
	Magistrates Court[36] Chief Magistrate Magistrate	Criteria for appointment have included, for example: • relevant knowledge and experience of the law, practice and procedure • demonstrated competence, skill, impartiality and temperament • integrity and good character • case management skills • the ability to manage a large list of cases each day • demonstrated experience in management and administration • the capacity to introduce and manage change • the ability to take effective leadership and educative roles in the community

1 *Supreme Court Act 1933* (ACT) s 4; *Supreme Court (Resident Judges Appointment Requirements) Determination 2015 (No 1) 2015* (ACT) sch 1.

2 *Magistrates Court Act 1930* (ACT) s 7; *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT).

3 *Supreme Court Act 1970* (NSW) ss 26, 31; Department of Communities and Justice (NSW), 'Judicial Careers' <http://www.careers.justice.nsw.gov.au/appointments>.

4 *District Court Act 1973* (NSW) s 13; Department of Communities and Justice (NSW) (n 3).

5 *Local Court Act 2007* (NSW) ss 13–15; Department of Communities and Justice (NSW) (n 3).

6 *Supreme Court Act 1979* (NT) s 32; *Protocol for Judicial Appointments and Appointments as President or Deputy President of the Northern Territory Civil and Administrative Tribunal* <www.localcourt.nt.gov.au/sites/default/files/reviewoftheprocessesfortheappointmentofjudicialofficersinthenorthernterritory-report.pdf>.

7 *Local Court Act 2015* (NT) s 53; *Protocol for Judicial Appointments and Appointments as President or Deputy President of the Northern Territory Civil and Administrative Tribunal* (n 6).

8 *Supreme Court of Queensland Act 1991* (Qld) ss 12, 34, 37, 48; *Constitution of Queensland 2001* (Qld) s 59; Department of Justice and Attorney-General (Qld), *Protocol for Judicial Appointments in Queensland* <www.publications.qld.gov.au/dataset/86caa0df-3db0-49dc-b259-c01e43185aef/resource/87a0a5c7-96da-4415-bc44-2f840f9fa0ba/download/protocol-judicial-appointments-qld.pdf>.

9 *District Court of Queensland Act 1967* (Qld) ss 10, 28B; *Constitution of Queensland 2001* (Qld) s 59; Department of Justice and Attorney-General (Qld) (n 8).

10 *Magistrates Act 1991* (Qld) ss 5, 10, 13; Department of Justice and Attorney-General (Qld) (n 8).

11 *Supreme Court Act 1935* (SA) s 9.

12 *District Court Act 1991* (SA) ss 11A, 12.

13 *Magistrates Act 1983* (SA) ss 5, 6; Attorney-General's Department (SA), 'Judicial Appointments' <www.agd.sa.gov.au/magistrates>.

14 *Charter of Justice*; *Supreme Court Act 1887* (Tas) s 5; Department of Justice (Tas), *Protocol for Judicial Appointments* (August 2016) <https://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments>.

15 *Magistrates Court Act 1987* (Tas) ss 4, 5, 6; Department of Justice (Tas) (n 14).

16 *Constitution Act 1975* (Vic) ss 75B, 78A, 80; Department of Justice and Community Safety (Vic), 'Judicial Appointments' <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>.

17 *County Court Act 1958* (Vic) ss 8, 8AAB; Department of Justice and Community Safety (Vic) (n 16).

18 *Magistrates' Court Act 1989* (Vic) s 7; Department of Justice and Community Safety (Vic) (n 16).

19 *Supreme Court Act 1935* (WA) s 7A.

20 *District Court of Western Australia Act 1969* (WA) s 10.

21 *Magistrates Court Act 2004* (WA) sch 1 items 3, 6. For an example of an advertised vacancy, including selection criteria, see <https://search.jobs.wa.gov.au/page.php?pageID=160&AdvertID=236569&source=other>.

22 *Supreme Court (Resident Judges Appointment Requirements) Determination 2015 (No 1)* (ACT) sch 1.

23 *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT).

24 Department of Communities and Justice (NSW) (n 3).

25 Ibid.

26 Ibid.

27 Department of Justice and Attorney-General (Qld) (n 8).

28 Ibid.

29 Ibid.

30 Attorney-General's Department (SA) (n 13).

31 Department of Justice (Tas) (n 14).

32 Ibid.

33 For expected attributes of judicial appointees, the Department of Justice and Community Safety (Vic) refers potential candidates to Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (September 2008) <www.judicialcollege.vic.edu.au/sites/default/files/2020-05/2009jcvframework-jcvsite1.pdf>. See Department of Justice and Community Safety (Vic) (n 16).

34 Ibid.

35 Ibid.

36 Judicial Conference of Australia, *Judicial Appointments: A Comparative Study* (December 2015) 50.

NATIONAL JUDICIAL COLLEGE of Australia

Professional Development Pathway for Judicial Officers

☆ WITHIN 12 MONTHS OF APPOINTMENT

NATIONAL JUDICIAL ORIENTATION PROGRAM

A five-day residential program to assist newly appointed judges with their transition to judicial office by facilitating the development and refinement of the skills, knowledge and attitudes necessary for effective judging.

NATIONAL MAGISTRATES ORIENTATION PROGRAM

A five-day program to assist newly appointed magistrates with their transition to judicial office by facilitating the development and refinement of the skills, knowledge and attitudes necessary for effective judging.

☆☆ WITHIN 2 YEARS OF APPOINTMENT

WRITING BETTER JUDGMENTS

A two and a half day program to enhance participants' judgment writing skills through analysis, discussion and rewriting of judgments in small groups. Participants are provided with individual feedback and practical tools and tips for better judgment writing.

ORAL DECISIONS

A one and a half day program to assist judicial officers to determine when it is appropriate to deliver an oral decision; to prepare for and deliver an oral decision; to structure an oral decision; and to make efficient use of hearing time. Participants deliver an oral decision and receive individualised feedback designed to enhance their skills.

JURY MANAGEMENT

A one and a half day program to enable judges to explore and develop more effective and efficient jury management practices, looking at ways of dealing with the many practical issues connected with managing a jury in the course of a jury trial.

☆☆☆ WITHIN 3 YEARS OF APPOINTMENT

NEW PERSPECTIVES ON COURTROOM LEADERSHIP

Building on topics introduced in orientation programs, this two-day program is designed to benefit judicial officers who wish to enhance their control of the courtroom. Topics discussed include effective communication, facilitation skills, power imbalances in the courtroom, managing high emotion, implicit biases and awareness of personal resources.

☆☆☆☆ AFTER 4 YEARS OF APPOINTMENT

REFRESHER JUDGMENT WRITING

A two-day program designed to revitalise participants' skills in writing judgments. The program is highly interactive and includes individual feedback.

REFLECTIONS ON THE JUDICIAL FUNCTION

Formerly called Dialogues on Being a Judge, this two and a half day residential program is directed at experienced (mid-career) judicial officers. It provides an opportunity to reflect upon the role of the judge and the rule of law across cultures and enables the exploration of contemporary themes and social challenges.

Appendix I
Example Professional Development Pathway

Appendix J
Judicial Education Courses in New Zealand

Course descriptions relevant to judicial impartiality extracted from the 2021 Prospectus of *Te Kura Kaiwhakawā* (Institute of Judicial Studies), New Zealand.[1]

Diversity [Two days]

As New Zealand society and courtrooms become more diverse, judges need new tools and skills to navigate the changing landscape. At the core of getting to grips with the increasing diversity of our courtrooms is your duty to ensure that every person who appears in your court has equal access to a fair trial, where evidence is assessed impartially and without prejudgment.

Judges need the opportunity to discuss and reflect on the challenges they face in this area. This seminar provides a forum in which you can safely assess and build your intercultural competence by developing greater awareness and understanding of different communities' sensitivities, cross-cultural experiences and communication issues in court. You will be supported by experts in this field, with a focus on three or four specific communities.

Wellbeing [Two days]

Judicial work is demanding and intense, carrying the potential for both great satisfaction and high stress. Increasingly heavy workloads, exposure to traumatic material, an isolating work environment, and the critical attention of the media can take a toll. Acknowledging the reality of stress and building capacity to manage it effectively are important aspects of judging well. Over two days you will explore individual strategies that can be implemented to manage the pressures of the role, build awareness of the personal and organisational risk factors for judicial stress, learn strategies for managing personal stress, and develop skills for identifying and supporting colleagues who might be experiencing stress.

Noho marae [Four days]

The marae visit is an unrivalled opportunity to better understand tikanga—a key focus of Te Kura's curriculum—and to foster collegiality with fellow judges.[2] It offers a unique opportunity to explore Māori culture and life on the marae, where there is

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1 Te Kura Kaiwhakawā, Institute of Judicial Studies, *Prospectus 2021* <www.ijs.govt.nz/prospectus/default.asp>.

2 **Explanatory Note:** 'Tikanga' is the right or correct way of doing things within Māori society; 'a system comprised of practice, principles, process and procedures, and traditional knowledge. Tikanga encompasses Māori law but also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain': New Zealand Law Society Te Kāhui Ture o Aotearoa, 'Tikanga Māori in NZ Common Law' (15 September 2020) <www.lawsociety.org.nz/>.

a clear expression of tikanga Māori. You will be formally welcomed onto the marae where kaumātua will present aspects of tikanga and explain the significance of land and history. You will be guided by judicial colleagues throughout your stay. Past attendees have described the visit as inspirational and valuable, and as having made a deep impact on them personally and professionally.

One-day te reo wānanga for judges [One day]

The wānanga is an opportunity for judges to develop their competency in te reo Māori. Judges who have completed the beginner and/or advanced beginner online courses may find this programme beneficial. Participants will be streamed into three separate groups—beginner, advanced beginner and intermediate level—depending on their level of competency in te reo. You will learn in a comfortable collegial environment where a key objective is to develop your confidence to use some te reo Māori in the courtroom.

Te reo wānanga for proficient speakers [Five days]

He rumaki reo Māori tēnei wānanga. Ko te whāinga kia whai wā ngā ākonga ki te whakapakari i tōna reo Māori, kia hōhonu ake, kia whakaniko ake, kia Māori ake.

Te reo training is an important aspect of the Te Kura curriculum. This wānanga intensive is taught in rumaki (immersion) style and is aimed at speakers with an intermediate to advanced level of proficiency. It is expected that te reo Māori will be the only language spoken during the wānanga. The wānanga also encompasses aspects of tikanga and kawa and is led by an experienced faculty of kaiako (teachers). The objective of the wānanga is to strengthen the depth, quality and fluency of your te reo.

Communicating with vulnerable witnesses and defendants [Two days]

This seminar looks at measures to address communication vulnerability in the trial setting. You will learn more about how to identify communication vulnerability and the strategies that courts have adopted to meet the needs of vulnerable witnesses and defendants. Expert academics, speech therapists, and judicial presenters will work with you to identify and consider issues in current practice, using a range of scenarios. You will receive practical suggestions to get ‘best evidence’ from vulnerable witnesses and defendants within the current legislative and common law boundaries.

Tikanga [Three days]

Judges must have an understanding of formal Māori protocols, whether to use this knowledge in the courtroom or outside it. Judges also need a basic awareness of tikanga as law—both procedural and substantive—and where it is contained in statutory directives and as part of the wider New Zealand common law. You will be introduced to both in a marae environment where you will stay for the duration of the wānanga.

Under the leadership of tikanga experts who have high standing within Te Ao Māori, and senior judges experienced in dealing with tikanga as law, you will develop a

basic grasp of procedural and substantive tikanga alongside a safe awareness of the limits of that knowledge, and an understanding of when and how to seek help.

Decision making [Two days]

We are very fortunate to have Kimberly Papillon return to lead this seminar in 2021. Kimberly is an International expert in the field of legal and judicial decision making and will explore the neuroscience and psychology of decision making in the courts. Over two days she will:

- pinpoint the areas where decisions are made by judges and where cases can be affected by implicit preferences and unconscious processes and subtleties
- use neuroscience to explore how decisions in criminal and civil court can be affected by implicit bias
- show how the brain reacts while making judgments of competence and character
- demonstrate how communication methods affect the public's trust and confidence in the courts
- use research in neuroscience and psychology to show how unconscious processes can be changed.

Sessions include exercises, tools, and specific strategies for increasing equity in decision making. Participants will explore new methods for reaching the goal of equitable decision making in the courts.