WITHOUT FEAR OR FAVOUR

THE HON JUSTICE SARAH C DERRINGTON AM*

Judicial impartiality is central to the exercise of judicial power, crucial to the proper functioning of adversarial trials, and key to perceptions of fairness. This speech draws from the Australian Law Reform Commission's ('ALRC') Inquiry into Judicial Impartiality and explores whether the judicial oath to exercise a judge's duties 'without fear or favour' is of itself sufficient to maintain the public's confidence in the judicial process, or is something more required? In answering this question, the speech considers the foundations of judicial impartiality in national and international law, and the role of impartiality in judicial method; explains the importance of judicial impartiality in both its instrumental and inherent values; defines the scope of judicial impartiality with reference to examples; and finally, details the ALRC's Inquiry and its key findings. In concluding, the speech acknowledges that Judges may be tempted (whether consciously or unconsciously) to depart from proper judicial decision-making methodology. It is therefore important to ensure that there are structures and practices to insulate judges from potential threats to impartiality — many which fall within the framework of guarantees of judicial independence. In this way, it might be possible to secure greater confidence in the judiciary and the judicial system.

I INTRODUCTION

I am honoured to give this year's Fiat Justitia Lecture and thank the Monash Faculty of Law, the Dean, and Professor Pittard for inviting me to do so. The Australian Law Reform Commission ('ALRC') and Monash Law have forged a significant partnership over the past four years, one which I hope will continue to flourish, so I am especially delighted to be involved in the Faculty's public engagement program.

The title of this paper is undoubtedly familiar to all in this audience. It is also the title of the ALRC's final report on *Judicial Impartiality and the Law on Bias*, which

* Former President of the Australian Law Reform Commission ('ALRC'). Justice of the Federal Court of Australia. This is the edited text of the Fiat Justitia Lecture given virtually at Monash University Faculty of Law on 7 June 2022. I acknowledge the contribution to this lecture of the significant research undertaken by the ALRC Senior Legal Officer, Sarah Fulton, in the course of the Judicial Impartiality Inquiry.

was delivered to the Commonwealth Attorney-General on 6 December 2021.[1] The title is, of course, an extract from the judicial oath of office by which judicial officers swear to 'do right to all manner of people according to law, without fear or favour, affection or ill will'.[2] It is the modern manifestation of the title of this lecture series: *Fiat justitia ruat caelum* — 'Let justice be done though the heavens fall'.

The public pledge of all judicial officers 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 objective standards. Judicial impartiality is central to the exercise of judicial power, crucial to the proper functioning of adversarial trials, and key to litigant and public perceptions of fairness in court proceedings. 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. So much seems obvious and somewhat trite. Moreover, the empirical research undertaken by the ALRC, which included surveys of Commonwealth judges, legal professionals and court users, providing questions to the 2020 Australian Survey of Social Attitudes and a review of Commonwealth court decisions, showed that public confidence in judges and the courts in Australia is generally high.[3] There has been no crisis of confidence in the federal judiciary.

Nevertheless, a confidence rating of 'generally high' suggests that there are pockets of distrust or discontent, and there is at least some evidence that more needs to be done to enhance public confidence in the judicial system. The question I seek to explore in this paper is whether pointing to the judicial oath of office as evidence of a judge's sworn promise to exercise his or her duties 'without fear or favour' is of itself sufficient to maintain the public's confidence in the judicial process, or is something more required?

II FOUNDATIONS OF JUDICIAL IMPARTIALITY

Impartiality and the appearance of it have been called the 'supreme judicial virtues'[4] — 'the fundamental quality required of a judge and the core attribute of the judiciary'.[5] Impartial decision-making has been considered crucial to third

1 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report No 138, December 2021) ('*Without Fear or Favour*').

2 See, eg, *Federal Court of Australia Act 1976* (Cth) ss 11, 18Y; *High Court of Australia Act 1979* (Cth) s 11.

3 *Without Fear or Favour* (n 1) 31 [1.31].

4 Patrick Devlin, *The Judge* (Oxford University Press, 1979) 4, cited in Sir Gerard Brennan, 'Why Be a Judge?' (1996) 14(2) *Australian Bar Review* 89, 91.

5 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (Report, September 2007) 57 [52].

party adjudication for millennia,[6] finding expression in — among others — certain types of dispute resolution practised by Indigenous peoples in Australia,[7] 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 philosophy, Jewish law and Islamic law.[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 made, taking effect (generally) in the future and publicly administered in the courts'.[9]

The widespread acceptance of the importance of the concept of judicial impartiality is reflected in international instruments. The *Universal Declaration of Human Rights* states that, in the determination of rights and obligations and criminal charges, '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'.[10] The *International Covenant on Civil and Political Rights*, which is binding on Australia as a matter of international law, similarly provides that, in the determination of criminal charges and rights and obligations 'in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[11]

6 Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 144, citing John T Noonan Jr and Kenneth I Winston (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger Publishers, 1993) 3–34.

7 See, eg, the discussion by Professor Behrendt on the *tendi* in the Lower Murray region, and *bugalub* in Arnhem land and the Kimberleys: Larissa Behrendt, *Aboriginal Dispute Resolution: A Step towards Self-Determination and Community Autonomy* (Federation Press, 1995) 20. See also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 12 June 1986) ch 28 ('*Recognition of Aboriginal Customary Laws*').

8 On Egyptian, Babylonian, Biblical and Roman sources, see Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 162. See also Paul Ratchnevsky, 'Jurisdiction, Penal Code, and Cultural Confrontation under Mongol-Yüan Law' (1993) 6(1) *Asia Major* 161, 162–3; SS Dhavan, 'The Indian Judicial System: A Historical Survey', *High Court of Judicature at Allahabad* (Web Document) <http://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.pdf>.

9 Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 8.

10 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 10. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 ('*ICCPR*').

11 *ICCPR* (n 10) art 14(1). Australia ratified the *ICCPR* in 1980: United Nations Human Rights Treaty Bodies, 'Ratification Status for CCPR: International Covenant on Civil and Political Rights', *UN Treaty Body Database* (Database) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en>.

This right is also reflected in a number of regional human rights instruments[12] and in human rights legislation in the Australian Capital Territory, Queensland and Victoria.[13] It also finds its place in a series of internationally agreed documents and declarations which have affirmed the requirement for impartiality in similar terms.[14] Of these, the *Bangalore Principles of Judicial Conduct* contains the most recent and detailed elaboration of what is required of judges to ensure an impartial and independent tribunal, grounded in states' commitments to these human rights obligations.[15]

Common law sources from as early as the 13th century recognised that a judge should be disqualified from hearing a case if the judge was related to, or was an enemy or friend of a party, or if the judge had acted for a party.[16] 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.[17] 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 so doing.[18]

Since the establishment of British colonies in Australia from 1788, the system of common law was considered, in legal terms, to automatically apply as the domestic law of the colonised territories.[19] With the introduction of the common law came the common law conception of judicial impartiality.[20] Like other systems of law, it has developed a number of mechanisms to support judicial impartiality and the

12 These include the *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); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8(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).

13 *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.

14 McIntyre (n 8) 163–6.

15 *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*').

16 John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 19, citing HG Richardson, *Bracton: The Problem of His Text* (Selden Society, 1965) 148–9. See also *Without Fear or Favour* (n 1) 43 [2.12].

17 Tarrant (n 16) 351–5.

18 Ibid 20.

19 *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 also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (n 7).

20 As to the origins of judicial impartiality in the common law, see, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Ebner*').

appearance of it. 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.

The idea of 'impartiality' has provoked many debates in moral and political philosophy outside the context of the courts.[21] 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'? Understanding the judicial function helps to understand why impartiality is important, what it means, and how it is limited in scope. Judicial impartiality is — like all impartiality — performed against a backdrop of partiality.[22]

The role judges play is often described primarily in terms of deciding disputes. However, judiciaries in modern democratic states can be seen more broadly to have *two* related but discrete social roles: (i) in the exercise of judicial power, judges resolve disputes about pre-existing rights and duties by a third party, the judge, with reference to the law;[23] and (ii) the maintenance of order and the preservation of society's norms as reflected in law more generally.[24]

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 of 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'.[25]

Although judges were once thought of as 'neutral ciphers' who 'declared' the law, it is now generally accepted that they must make genuine choices and evaluations in carrying out their role.[26] They must weigh evidence and make findings of fact,

21 For a helpful summary, see Troy Jollimore, 'Impartiality', *Stanford Encyclopedia of Philosophy* (Web Page, 24 August 2021) <https://plato.stanford.edu/entries/impartiality/>. On the relationship and differences between moral and political philosophical understandings of impartiality and legal understandings, see William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *Oxford Journal of Legal Studies* 3, 5.

22 Lucy (n 21) 6.

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

24 *Waterside* (n 23) 442 (Griffith CJ). McIntyre suggests that the judicial function in these two aspects is broadly stable across modern democratic states: McIntyre (n 8) ch 2.

25 *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J).

26 McIntyre (n 8) 82–7; Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44(2) *Melbourne University Law Review* 565, 574–5. See also Sir Anthony Mason, '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; MH McHugh, 'The Judicial Method' (1999) 73(1) *Australian Law Journal* 37, 46–7.

interpret the law, and resolve uncertainties in it.[27] 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 principles are coherent.[28] Judges in the common law system must therefore draw from the law as it is found in legislation and common law and interpreted by reference to other legitimate sources, be as consistent as possible in their decision-making through the doctrine of precedent, and ensure 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. An example of this was highlighted this week following the sad death of Sir Gerard Brennan, the day prior to the 30th anniversary of his landmark leading judgment in *Mabo v Queensland [No 2]*.[29] Much reference has been made to his principled approach to developing the common law in that case, followed by the constraint he demonstrated in the face of established legal principles in his later dissent in *Wik Peoples v Queensland*.[30]

Recognising that judges do make genuine choices, within the confines of the judicial method, 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*'.[31] This was a point made recently by Glenn Martin, 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 [P]arliament 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

27 Beverley 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, 16–17.

28 McIntyre (n 8) ch 6.

29 (1992) 175 CLR 1.

30 (1996) 187 CLR 1.

31 McIntyre (n 8) 159 (emphasis in original).

> not necessarily connote criticism. In such circumstances it establishes a different view that will constitute the binding and final stage of the judicial process.[32]

Impartiality is necessary to fulfil the judicial function. But it is also judged against a background of the things that judges can *properly* be partial to under the judicial method.[33] Judges cannot carry out their role without favouring certain considerations. Most obviously, they must favour the more meritorious legal position.[34] They must take account of evidence that is properly admitted rather than inadmissible evidence.[35] In making sense of, and evaluating evidence, they must have reference to their understanding of how the world works. Where they are required (as judges accept they often are) to resolve uncertainties and fill gaps in the law, they will properly have reference to (and be partial to) values inherent in the legal system and the practical consequences that particular findings may lead to.[36]

This means that the value of impartiality within a legal system is mainly derivative — flowing from the values the legal system upholds.[37] As Lucy emphasises, 'impartiality in adjudication, like impartiality elsewhere, exists within the context of partiality: in the case of judges, it is partiality to the rules, standards and values that constitute the legal system'.[38] Following on from this, Dr Touchie argues that it is possible to say that 'a judge was impartial in their judgment and yet at the same time critique the decision as being partial to particular interests'.[39]

III WHY IS JUDICIAL IMPARTIALITY IMPORTANT?

There are interconnected and overlapping justifications for protecting and promoting judicial impartiality, serving both instrumental and inherent values.

In terms of its *instrumental value*, impartiality — or at least the appearance of 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

32 Glenn Martin, 'Claim of "Legal Adventurism" Misses the Mark', *The Australian* (online, 19 August 2021) <https://www.theaustralian.com.au/commentary/claim-of-legal-adventurism-misses-the-mark/news-story/c76aaba68dc88c400022fb6e255a69c6>.

33 Lucy (n 21) 18.

34 McIntyre (n 8) 171.

35 In Australia, see, eg *Evidence Act 1995* (Cth) s 134; Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 9th ed, 2010) 1. For background, see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005).

36 McIntyre (n 8) 171.

37 Lucy (n 21) 30.

38 Ibid 17.

39 John CW Touchie, 'On the Possibility of Impartiality in Decision-Making' (2001) 1(1) *Macquarie Law Journal* 21, 56.

certain degree of impartiality — otherwise it is simply dependent on the whim of the decision-maker. Ensuring that the judicial method is adhered to requires that only relevant considerations are taken into account. Impartiality is seen to improve the quality of decision-making — promoting accuracy of fact-finding and the rule of law.[40] 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.[41] The appearance of judicial impartiality is also seen as crucial to maintaining public confidence in, and the institutional legitimacy and authority of, the courts.[42] If the courts' authority is undermined by a reputation for a lack of impartiality, there is the 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.[43]

Ensuring (sufficient) 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.[44] This type of justification has been described as 'dignitarian'.[45] This promotes 'the public's participation in decision-making processes [affecting] them individually'.[46]

In a speech delivered last year concerning the closely related concept of judicial independence, Kiefel CJ, 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. She 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

40 *Ebner* (n 20) 343 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928, 955.

41 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2016) 644.

42 *R v Magistrates Court at Lilydale* [1973] VR 122, 126 (McInerney J) ('*Magistrates Court at Lilydale*'). See generally ibid 644.

43 McIntyre (n 8) 175.

44 Aronson, Groves and Weeks (n 41) 644. See also *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [5] (Allsop CJ).

45 Matthew Groves, 'Excessive Judicial Intervention' (2021) 50(1) *Australian Bar Review* 139, 165. On dignitarianism more generally, see Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press, 2018) ch 8.

46 Aronson, Groves and Weeks (n 41) 644.

> citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit'.[47]

In her Honour'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'.[48]

IV DEFINING THE SCOPE OF JUDICIAL IMPARTIALITY

What does judicial impartiality — as far as it goes — require? It is often defined as the absence of favour, bias or prejudice. However, this does not take the inquiry much further when it is acknowledged that certain types of partiality are required to resolve disputes. Sir Grant Hammond provides a helpful insight when he says:

> 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.[49]

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'.[50] However the nature and potential reach of such influences is vast, and many unconscious influences are in fact potentially important to fulfilling the judicial role. What is required to allow judges to fulfil the judicial function is not absolute impartiality, but 'sufficient' impartiality.[51] This is not a static concept, with defined, universal, limits.[52] 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,[53] and their

47 Susan Kiefel, 'Judicial Independence: From What and to What End?' (Speech, Austin Asche Oration, 26 March 2021) 2 (citations omitted).

48 Ibid.

49 Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 33.

50 C*NY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, 89–90 [27] (Kiefel CJ and Gageler J), quoting *Public Utilities Commission of the District of Columbia v Pollak*, 343 US 451, 466 (1952).

51 Matthew Groves, 'Bias by the Numbers' (2020) 100 *Australian Institute of Administrative Law Forum* 60, 61.

52 McIntyre (n 8) 177; Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66, 82.

53 McIntyre (n 8) 177.

own commitment to the oath. It is something that judges strive for,[54] and something that procedures and institutions support.[55]

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 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.[56]
- 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.[57]
- 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, 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.[58]

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)'.[59] 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.[60] To this list could be added challenges in physical and mental health.

54 Mack, Roach Anleu and Tutton (n 52) 67.

55 McIntyre (n 8) 160.

56 Ibid 185–6.

57 Ibid 186–91.

58 Ibid 192–5.

59 Ibid 197.

60 Ibid 200–6.

- 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.[61]
- 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.[62] This could also potentially include criticism undermining the legitimacy of the institution, through political attack and sustained media criticism.[63]
- Threats internal to the judicial institution, including internal judicial management (including allocation of cases), and internal pressures regarding substantive decision-making.[64]

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.[65] As such, it is helpful to consider these under the same framework, especially when considering potential reforms, as changes to address one type of threat to impartiality may introduce new threats.

V THE ALRC'S INQUIRY

The impetus for the ALRC's Inquiry into Judicial Impartiality, as stated to the press by the then Attorney-General, was the outcome of an appeal from the Family Court of Western Australia to the Full Court of the Family Court of Australia delivered on 10 July 2020, *Charisteas v Charisteas* ('*Charisteas*')[66] in which a majority of the Court 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.[67]

61 Ibid 206–13.

62 Ibid 213–17.

63 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, 612–13.

64 McIntyre (n 8) 217–19.

65 For an examination of literature and jurisprudence on the link between judicial independence and judicial impartiality, see ibid 161–9. See also 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, 8–9.

66 (2020) 354 FLR 167 ('*Charisteas*').

67 Ibid 213 [180] (Strickland and Ryan JJ).

The Full Family Court's decision in *Charisteas* was yet another proceeding in the protracted family law dispute, initially filed in 2006, which had resulted in thirteen substantive judgments prior to reaching a Full Court of the Family Court in March 2019. The matter was docketed to Walters J in March 2016 for the hearing of the trial, which occurred between 3 August 2016 and 17 August 2016, with a subsequent final hearing on 13 September 2016. Justice Walters delivered judgment on 12 February 2018 and retired three days later.

On 8 May 2018, after delivery of the judgment, the solicitors for the husband wrote to the wife's counsel to the effect that they had been informed through gossip that she and the judge had 'engaged outside of court in a manner that was inconsistent with [her] obligations and those of the Judge'.[68] The letter sought 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'.[69]

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

> 2. I do not have records prior to 20 June 2016. I have attempted to recover the records but am advised that this is not possible. I rely on my memory of circumstances prior to that date.
>
> 3. My contact with [the Judge] from 22 March 2016 is as follows:
>
> (a) Personal contact for a drink or coffee on approximately four occasions, between 22 March 2016 and 12 February 2018;
>
> (b) Telephone contact on five occasions between January 2017 and August 2017;
>
> (c) Exchange of text messages from June 2016 to February 2018:
>
> (i) 20 June 2016 to 15 September 2017 — numerous;
>
> (ii) no communication 2 August 2016 to 19 August 2016;
>
> (iii) 15 September 2017 to 12 February 2018 — occasional.
>
> 4. The communications did not concern the substance of the Charisteas case.[70]

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

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

68 Ibid 171 [22] (Alstergren CJ).

69 Ibid 172 [22].

70 Ibid 172–3 [24].

Two months after the decision of the Full Family Court, on 11 September 2020, the ALRC received Terms of Reference to undertake an inquiry into the laws relating to judicial impartiality and bias as they apply to the federal judiciary.

Subsequently, and perhaps inevitably, on 12 February 2021, the High Court granted special leave to appeal.[71] On 6 October 2021, the High Court unanimously allowed the appeal and ordered a retrial.[72] 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'.[73] 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'.[74]

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;[75]
- balancing questions of efficiency in litigation with exposure to potentially prejudicial information in related proceedings;[76] and
- negative findings of credibility of a party on a preliminary issue, in respect of the effect of the appearance of impartiality in resolution of the remaining issues.[77]

While the circumstances of the latter two cases were primarily matters of interest for lawyers, the decisions in *Adacot v Sowle*[78] and *Charisteas* received national media attention. Media coverage of decisions by the federal judiciary, and the use of 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. The Australian public would be rightly concerned by many of the issues aired by the

71 Transcript of Proceedings, *Charisteas v Charisteas* [2021] HCATrans 28.

72 *Charisteas v Charisteas* (2021) 393 ALR 389 ('*Charisteas HCA*').

73 Ibid 393 [12] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ), quoting *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

74 Ibid 393 [13], quoting *Magistrates Court at Lilydale* (n 42) 127 (McInerney J).

75 *Adacot v Sowle* (2020) 355 FLR 57; *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343.

76 *GetSwift Ltd v Webb* (2021) 283 FCR 328 ('*GetSwift*').

77 *Jess v Jess* (2021) 361 FLR 126.

78 (2020) 355 FLR 57.

media. The Inquiry 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.

While the genesis for the ALRC Inquiry may have been a technical question as to the appropriateness of the law on actual and apprehended bias, the Terms of Reference were broader. The ALRC was directed to three particular 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*; [and]
- whether *current mechanisms for raising allegations* of actual or apprehended bias, and deciding those allegations, *are sufficient and appropriate*, including in the context of review and appeal mechanisms.[79]

Before dealing specifically with the three matters prescribed in the Terms of Reference, it was necessary for the ALRC to establish a baseline as to the current level of public confidence in the federal judiciary and in the administration of justice at the federal level more generally. The ALRC found that, 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. Empirical research shows that judges take their oath of office seriously, although they may differ as to their understandings of what that requires in given circumstances.[80]

However, both litigants and lawyers identified some serious, albeit isolated, issues in relation to judicial behaviour in court giving rise to perceptions of bias. 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 the removal of Aboriginal and Torres Strait Islander people from their families, communities, and culture.[81]

The ALRC also heard that litigants and lawyers within particular demographic groups were more likely to have negative experiences in court; for example, by it being assumed that a black barrister was a self-represented litigant and not counsel, or by telling practitioners with foreign accents that 'this is not how we practise law in this country'.[82]

79 *Without Fear or Favour* (n 1) 21–2 [1.3] (emphasis added).

80 Ibid 31 [1.31].

81 Ibid 32 [1.32].

82 Ibid 32 [1.33].

It became apparent early on in the Inquiry that the types of strategies and mechanisms necessary to support public confidence in the administration of justice included those relating to judicial appointment, judicial education, and complaints against members of the judiciary. This was, in part, because the law of apprehended bias was being stretched beyond its legitimate boundaries to deal with circumstances of judicial behaviour that were not necessarily a manifestation of bias. Such behaviour might be attributable to a range of other factors including, for example, temperament, lack of confidence, stress, impossible workloads, and mental illness.[83] Consequently, the ALRC takes the view, overwhelmingly supported in the submissions,[84] that a federal judicial commission is warranted to provide a transparent and independent mechanism to consider litigants' and lawyers' concerns about judicial behaviour or impairment.[85] Such a commission would assist courts, particularly heads of jurisdiction, to proactively support judges to uphold appropriate standards by identifying issues of individual and general concern.

A suite of recommendations addresses judicial appointments, judicial education, ethical guidance, collection of feedback and data, and accessible information.[86] These issues and strategies were identified through consultations as particularly important to address the limitations of the law in addressing judicial conduct in court and social and cultural bias at an institutional level. The recommendations were seen as important to ensure the proper functioning of the law on bias and the procedures upholding it. They seek to support judges; demonstrate the courts' commitment to securing judicial impartiality; address institutional biases; and maintain the confidence of litigants, the profession, and the public.

VI KEY FINDINGS

In responding specifically to the three matters raised by the Terms of Reference, the ALRC's key findings were as follows.

In relation to *the first matter*, the ALRC's response is very straightforward — *the existing law*, as recently clarified by the High Court in *Charisteas does not require amendment*. The Court did not cavil with the *Ebner* test, by which 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'.[87]

83 Ibid 378–9 [10.114], 431 [12.5].

84 Ibid 317 [9.48].

85 Recommendation 5: ibid 310–12.

86 Recommendations 7–14: ibid 14.

87 *Ebner* (n 20) 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (citations omitted).

Rather, the High Court has clarified that the qualities to be attributed to the fair-minded lay observer are not that he or she is assumed to have a detailed knowledge of the law, or the character or ability of a particular judge; rather,

> [t]he 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.[88]

The clarification restores the balance of the pendulum, which had almost swung as far as to imbue the lay observer with the qualities of the fair-minded chief justice on the Manly Ferry or at Southern Cross Station.

There was broad consensus that the substantive law did not require reform.

That said, in order for the law to remain appropriate and sufficient to maintain public confidence in the administration of justice, it must be underpinned by appropriate procedures and the right institutional structures.

And so, in relation to *the second matter*, the ALRC considers that *greater transparency* in relation to the law *is necessary*, *along with further clarity* in relation to certain aspects of ordinary judicial practice — as is already provided for in large measure by the *Guide to Judicial Conduct*[89] — to assist judges to balance the competing considerations they face in striving to be, and appearing to be, impartial.

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. In one of the first cases where an Australian court has relied on scientific expert evidence about bias, *GetSwift v Webb*, the Full Federal Court said:

> 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 …[90]

88 *Charisteas HCA* (n 72) 395 [21] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

89 Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd rev ed, 2022).

90 *GetSwift* (n 76) 341 [46], [48] (Middleton, McKerracher and Jagot JJ) (citations omitted).

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

In order for it 'to be seen', however, there needs to be greater visibility of the law. It needs to be accessible and transparent. Currently, the law can be inaccessible for litigants and members of the public, and even for legal practitioners. Some practices that the legal profession accepts (or that exist in particular jurisdictions or specialised areas of law, such as all lawyers dining together when 'on-country') may be unfamiliar to the general public and give rise to understandable concerns about conflicts of interest. Here, the *Guide to Judicial Conduct* plays an important role in setting out common understandings of acceptable judicial practice, in a way that can be responsive to community expectations and balance the competing considerations judges face in striving to be, and appearing to be, impartial.

Social and cultural factors will inevitably influence the decision-making of judges. Concerns were raised with the ALRC about the negative impact personal and institutional biases have on Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds (including legal practitioners), people of a particular religious affiliation, LGBTIQ+ people, those with disabilities, asylum seekers, women, and parties 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 to *the third matter*, *reform of the practices and procedures* for raising, determining, and reviewing questions of actual and apprehended bias need to evolve, and the proposed reforms address concerns about the self-disqualification procedure, the need to retain flexibility and judicial control. The recommendations provide a procedural framework for determining bias claims that matches the evolution that has occurred in the substantive law — cementing the question of apprehended bias as an objective question of law designed to support confidence in the institution, rather than a personal affront to an individual judicial officer.

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. This inconsistency has, in part, arisen because many practices and procedures have historically been informal.

While 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, the procedures have not evolved similarly. When an issue of bias is raised with a judge, that judge is required by practice to decide whether or not he or she is disqualified. This undermines the confidence of both the litigants and lawyers in the outcome, particularly where appeals are time–consuming and costly.

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 are required to ensure judges are adequately supported to address challenges they face and to uphold appropriate standards.

VII CONCLUSION

Despite the importance placed on the judicial oath, judges are human, and litigants and the public know this — even some judges know it! Judges may be tempted (whether consciously or unconsciously) to 'depart from the proper judicial decision-making methodology for a number of reasons'.[91] It is important to ensure that there are structures and practices to insulate judges from potential threats to impartiality — many of them, falling within the framework of guarantees of judicial independence. In this way, it might be possible to secure greater confidence of litigants and the public in the judiciary and the judicial system as a whole.

91 McIntyre (n 8) 160.