WITHOUT FEAR OR FAVOUR

The Piddington Society

2022 Walyalup (Fremantle) Law Conference
Opening Keynote Address
18 February 2022

The Hon Justice SC Derrington*

I. INTRODUCTION

1 This event has been in my diary now for several months and I was very much looking forward to visiting WA once again – alas, another Teams event it is.

2 I am very pleased to have been asked to speak at this conference this morning and thank the organisers from both the Piddington Society and the Fremantle Community Legal Centre for the honour of your invitation. I particularly want to acknowledge the work of community legal sector lawyers and all lawyers who contribute to society as whole in providing their services pro bono. In my previous role as Dean of Law at the University of Queensland, I was most proud of the Pro Bono Centre, which had been established by several academics within the School. The School coordinates clinical places (for academic credit) across 8 community legal centres in Brisbane and, at last count, has over 500 law students (about 30% of the total student cohort) registered on the pro bono roster to offer voluntary assistance for both policy advocacy and practical assistance where appropriate.

3 The title of this paper is undoubtedly familiar to all in this audience. It is also the title of the Australian Law Reform Commission's (ALRC) Final Report on *Judicial Impartiality and the Law on Bias*, which was delivered to the Commonwealth Attorney-General on 6 December 2021. The title is 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'. 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 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, court users, providing questions to the 2020 Australian Survey of Social Attitudes (AuSSA), and a review of Commonwealth court decisions, showed that public

* President – Australia Law Reform Commission.

confidence in judges and the courts in Australia is generally high. There has been no crisis of confidence in the federal judiciary.

4 Why then a need for an ALRC inquiry?

5 The impetus for the Inquiry, as stated to the press by the then Attorney-General, was the outcome of an appeal from the Family Court of Western Australian to the Full Court of the Family Court of Australia delivered on 10 July 2020, *Charisteas & Charisteas*[2] 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'.[3] It is therefore somewhat fitting to be delivering this address in Western Australia.

6 The Full Family Court's decision in *Charisteas & 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. Walters J delivered judgment on 12 February 2018 and retired three days later.

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

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

> …
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> 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:
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> (a) Personal contact for a drink or coffee on approximately four occasions, between 22 March 2016 and 12 February 2018;
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> (b) Telephone contact on five occasions between January 2017 and August 2017;
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> (c) Exchange of text messages from June 2016 to February 2018:
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> (i) 20 June 2016 to 15 September 2017 — numerous;

[2] *Charisteas & Charisteas* [2020] FamCAFC 162; 60 FamLR 483.
[3] Ibid at [180].

(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.

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

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

11 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.

12 Subsequently, and perhaps inevitably, on 12 February 2021, the High Court granted special leave to appeal.[4] On 6 October 2021, the High Court unanimously allowed the appeal and ordered a retrial.[5] 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'. 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'.[6]

13 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;[7]
- Balancing questions of efficiency in litigation with exposure to potentially prejudicial information in related proceedings;[8] 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.[9]

14 While the circumstances of the latter two cases were primarily matters of interest for lawyers, the decisions in *Adacot & Sowle* and *Charisteas & 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

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[4] *Charisteas & Charisteas* [2021] HCATrans 028.
[5] *Charisteas & Charisteas* [2021] HCA 29; (2021) 393 ALR 389.
[6] Ibid [22].
[7] *Adacot & Sowle* [2020] FamCAFC 215; *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343.
[8] *Getswift Ltd v Webb* (2021) 388 ALR 75.
[9] *Jess v Jess* (2021) 63 Fam LR 545.

reasonable apprehension of bias, have also increased. The Australian public would be rightly concerned by many of the issues aired by the media. The 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 in doing so.

15 Unfortunately, the Attorney has not yet tabled our Report. I am therefore somewhat constrained today about the ALRC's final recommendations.

II. THE TERMS OF REFERENCE

16 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**;
- 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.

III. KEY FINDINGS

17 In relation to t**he first matter**, the ALRC's response is very straightforward – **the existing law**, as recently clarified by the High Court in *Charisteas & 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.

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, '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'.[10]

[10] *Charisteas & Charisteas* (2021) 393 ALR 389 at [12].

18 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 Rottnest Island Ferry.

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

20 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.

21 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* – to assist judges to balance the competing considerations they face in striving to be, and appearing to be, impartial.

22 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:[11]

> The hypothetical observer would recognize 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…

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

24 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 specialized areas of law) 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.

25 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

[11] *GetSwift v Webb* (2021) 388 ALR 75 at [46]-[48].

backgrounds (including legal practitioners), people of a particular religious affiliation, LGBTIQ+ people, those with disability, 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.

26 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.

27 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.

28 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.

29 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.

30 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.

31 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.

32 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'.

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 arrange of other factors including, for example, temperament, lack of confidence, stress, impossible workloads, and mental illness. Consequently, the ALRC takes the view, overwhelmingly supported in the submissions, 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. 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.

34 A suite of recommendations addresses judicial appointments, judicial education, ethical guidance, collection of feedback and data, and accessible information. 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.

35 The key conclusions reached by the ALRC underpin its ultimate suite of recommendations:

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

2. **Apprehended bias is not accusatory** – Disqualification for apprehended bias can be a sensitive issue for judges, but the law considers how things might appear to an outsider.

Recusal and disqualification in appropriate circumstances are important for upholding the integrity of court processes and need not reflect poorly on the judge concerned.

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

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

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

6. **Prudent recusal practices can be sensitive to public views** – Some practices that the legal profession accepts as routine may be unfamiliar to the general public and give rise to understandable concerns about conflicts of interest. Regular review of prudent recusal practices in difficult areas through the *Guide to Judicial Conduct* can ensure that a range of considerations are taken into account, including changing community views.

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

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

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

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

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

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

36 In speaking about the role of the judge generally, Sir Gerard Brennan put it this way:

> [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 recognized 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 begins and prejudice ends.

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