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BACKGROUND PAPER **JI7**

JUDICIAL IMPARTIALITY

The Fair-Minded Observer and its Critics

April 2021

This paper on the fair-minded observer and its critics is one in a series of background papers being released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality (the 'Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. Other background papers in this series include *The Law on Judicial Bias: A Primer* (December 2020), *Recusal and Self-Disqualification Procedures* (March 2021), *The Federal Judiciary* (March 2021), *Conceptions of Judicial Impartiality* (April 2021), *Ethics, Professional Development, and Accountability* (April 2021), and *Cognitive and Social Biases in Judicial Decision-Making* (April 2021).

In April 2021, the ALRC will publish a Consultation Paper containing questions and draft proposals for public comment. A formal call for submissions will be made on its release. In addition, feedback on the background papers is welcome at any time by email to impartiality@alrc.gov.au.

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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Introduction

1. This paper considers the test used to decide when a judge will be disqualified from hearing a case because there is a risk that people might *think* they might be biased. The notion of judicial impartiality is so central to confidence in the administration of justice that the law has developed this mechanism — disqualification for apprehended bias — to avoid even the appearance of biased judicial decision-making.

2. This paper builds on *The Law on Judicial Bias: A Primer* (Background Paper JI1).[1] It briefly restates the content of the test and the way it is applied. It then considers in more detail the history of the test, critiques of the test, and reforms that have been proposed in academic commentary. It also briefly summarises alternative approaches used to identify situations where disqualification is, and is not, required in a number of other jurisdictions and specialised areas of practice.

Actual and apprehended bias

3. In Australia, including in relation to the federal judiciary, the law on bias is predominantly found in common law.[2] 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.

4. A claim of actual bias

> requires proof that a decision-maker approached the issues with a closed mind or had prejudged them and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[3]

This is a subjective test. It looks to what is actually going on in the judge's mind.

5. Apprehended bias looks instead to perceptions, and considers the matter from the perspective of how it may *appear*. This does not require any conclusion 'about what factors actually influenced the outcome'.[4] It is therefore an objective test — looking at how the matter is perceived from outside.

Test for apprehended bias

6. The test for apprehended bias in Australia is:

> whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[5]

1 See in particular Australian Law Reform Commission, *The Law on Judicial Bias: A Primer* (Background Paper JI1, 2020) [10]–[18].

2 Although a number of statutory provisions also criminalise judges exercising jurisdiction in matters in which they have a personal interest: see, eg, *Crimes Act 1914* (Cth) s 14, in relation to the exercise of federal jurisdiction.

3 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 652, citing *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 [37]–[39].

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).

5 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

7. This test is applied in two steps: first, identification of what it is that may lead to bias, and second, identifying the logical connection between the source of bias and the feared negative impact on the decision.[6]

8. In *Isbester v Knox City Council*,[7] Gageler J employed a third step in the application of the test: 'consideration of the reasonableness of the apprehension of' the deviation from impartiality as suggested by the party claiming bias.[8] This step was first hinted at in *Ebner*, where the court suggested that only after the first two steps of the test had been resolved, could the 'reasonableness of the asserted apprehension of bias be assessed'.[9] The existence of such a third step remains unsettled,[10] and it has been treated with caution by the Full Federal Court of Australia ('Federal Court').[11]

9. At the time of publication, a case concerning the test for apprehended bias is pending before the High Court of Australia ('High Court'),[12] so the principles discussed here may be developed further in the near future.

History of apprehended bias

10. Historically, the common law has been reluctant to recognise that it was even possible for judges to be biased. Writing in the 18th century, Sir William Blackstone SL KC stated that

> the law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[13]

11. 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.[14] By the mid-19th century it was clearly established that a judge would be automatically disqualified from hearing a case where they had a pecuniary interest in the subject matter.[15] The move from statements of principle to the adoption of specific tests for bias began in England and Wales in the mid-1800s.[16] At first, the test was concerned solely with actual bias.[17] 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.[18]

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6 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow, Hayne JJ, Callinan J concurring).
7 *Isbester v Knox City Council* (2015) 255 CLR 135.
8 Ibid 155–6.
9 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345.
10 Matthew Groves, 'A Reasonably Reasonable Apprehension of Bias' (2019) 41(3) *Sydney Law Review* 383, 388.
11 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87, 92.
12 *Charisteas v Charisteas & Ors* [2021] HCATrans 28 (special leave to appeal granted from *Charisteas v Charisteas* [2020] 60 Fam LR 483).
13 Sir William Blackstone SL KC, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed), Volume III, 361.
14 John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 19; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 929.
15 *Dimes v Proprietors of the Grand Junction Canal* [1852] 3 HLC 759; 10 ER 301.
16 See further Tarrant (n 14) 33.
17 Ibid.
18 *R v Rand* [1866] LR 1 QB 230, 232–3 (Blackburn J, Cockburn CJ and Shee J concurring).

12. 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.[19] 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.[20]

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.[21] 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.[22]

13. Over the first half of the 20th century the courts in the United Kingdom and the Commonwealth grappled with how exactly this framework should be applied.[23] In the United Kingdom, 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.[24] 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.[25]

14. 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.[26] Mason CJ and McHugh J noted that the assumption underlying the approach in *Gough* was that public confidence in the administration of justice 'would be maintained because the public will accept the conclusions of the judge'.[27] 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.[28]

15. Another key feature of the test was established that was concerned with whether the fair-minded lay observer *might* reasonably think that the judge *might* be biased.[29] This is a

19 Tarrant (n 14) 35.
20 *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256, 259.
21 Tarrant (n 14) 26.
22 Ibid.
23 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.
24 *R v Gough* [1993] AC 646, 668–70.
25 Ibid 670.
26 *Webb v The Queen* (1994) 181 CLR 41.
27 Ibid 51 (Mason CJ and McHugh J).
28 Ibid (Mason CJ and McHugh J). See further Tarrant (n 14) 33; *Johnson v Johnson* (2000) 201 CLR 488, 492–3. See the debates around the adoption of the 'reasonable suspicion' test in: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 and *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 and *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.
29 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

question of possibility (real and not remote), not probability.[30] This has come to be known as the 'double-might' test, and has been accepted as setting a 'low threshold'.[31]

16. Disqualification for apprehended bias, viewed from the perspective of a fair-minded observer or other 'reasonable person', is now part of the law in much of the Commonwealth, including, since 2002, in the United Kingdom.[32] It is well established, with some variation, for example, in Brunei Darussalam,[33] Canada,[34] Hong Kong,[35] India,[36] New Zealand,[37] Singapore,[38] and South Africa.[39] It is also required by the case law of the European Court of Human Rights on the right to a fair trial,[40] and the *Bangalore Principles on Judicial Conduct* (see paragraph 62).[41]

17. 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.[42] In South Africa, the test is whether the reasonable person 'would' apprehend that the judge 'has not and will not bring an impartial mind'.[43] In Canada, the test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude'.[44]

18. What started as a maxim that 'no [person] can be a judge in [her or his] own cause' is now directly tied to concerns about

> the independence of the judiciary, public confidence in the judicial system, and a concern for fundamental human rights.[45]

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30 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J concurring).

31 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 64, citing *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 (Spigelman CJ). See also Tarrant (n 14) 66.

32 *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.

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

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

35 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) 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.

36 *PK Ghosh, IAS and ANT v JGRajput* (1996) AIR 513, 516.

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

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

39 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) 349–50, citing *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 [48].

40 *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.

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

42 *Porter v Magill* (2002) 2 AC 357 452.

43 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 [48] ('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.')

44 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369, 394 (Grandpré J) ('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'); affirmed in *R v RDS* (1997) 3 SCR 484 [31].

45 Tarrant (n 14) 19.

The move towards an objective test grounded in the perspective of the reasonable person or fair-minded lay observer can be explained, in part, as playing a role in maintaining the legitimacy of the courts. When judges exercise judicial power it affects the rights of people who had no direct say in their appointment, which gives rise to a counter-majoritarian difficulty, or a 'gap' in the legitimation of governmental power.[46] The law sustains its legitimacy, in part, through public confidence in the objectivity of decision-making.[47] This public confidence requires a sensitivity to the high degree of pluralism in modern society.[48] The test for apprehended bias assists in resolving this tension, bridging the legitimacy gap by supporting judges to make decisions from beyond their own perspective. It is a keystone of both the impartiality of the judiciary and the rule of law that relies on an established judicial independence.[49]

Applying the test for apprehended bias

19. Different categories of case have been identified as potentially giving rise to a reasonable apprehension of bias:

- Where the judge has an interest in the outcome of the decision;
- Because of the conduct of the judge in the course of or outside of proceedings;
- By way of the association the judge has with one of the parties, counsel, or witnesses;
- Where the judge is exposed to extraneous information (has knowledge of prejudicial but inadmissible fact or circumstance);
- Where a judge's comments or behaviour suggest the matter is subject to prejudgment.[50]

20. To answer the question of what the fair-minded lay observer would think of the situation, the courts use what has been described as a 'kind of thought experiment'.[51] They make assumptions about the fair-minded observer (for example, that she or he is reasonable, knows commonplace things, is not unduly sensitive or suspicious) and the knowledge that she or he has about the world, and the case.[52] They then try to see the situation from that perspective.

Criticisms of the test for apprehended bias

21. The existing test for apprehended bias, in its various forms across the Commonwealth, and the way it has been applied, has been subject to a number of criticisms. This part of the paper briefly sets out some of the key criticisms, before turning to a number of reforms that critics have proposed.

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46 This legitimacy gap is resolved by: the independence of the judicature from the political branches and the impartiality of the judge; the rule of law; and sovereignty: Daniel Smilov, Michel Rosenfeld and Andras Sajo, 'The Judiciary: The Least Dangerous Branch?' in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 871.

47 The Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 146.

48 Ibid; Andrew Higgins and Inbar Levy, 'What the Fair-Minded Observer Really Thinks about Judicial Impartiality' [2021] *Modern Law Review* (forthcoming), 1.

49 Tarrant (n 14) 1; 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, 860, citing *R v RDS* (1997) 3 SCR 484 [31].

50 See further Australian Law Reform Commission (n 1) [19]–[33].

51 Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29 *Australian Family Lawyer* 18, 30. Professor Chisolm draws parallels to the 'pub test' used in political and public commentary.

52 *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 [21] (Besanko, Flick and Abraham JJ).

The fair-minded observer as a 'flimsy veil' for the judge's own views

22. A key criticism is that that the construct of the fair-minded observer is a fiction. This overarching criticism is central to the more specific criticisms discussed below.[53]

23. According to Kirby J, deciding a case almost fifteen years ago, the observer had been 'stretched virtually to snapping point', and it was a fiction to consider that it provides an objective standard in place of the views of the judge making the decision.[54] As Professor Young notes:

> We may be nearing (or perhaps returning to) the point of admission that in many circumstances the 'lay observer' test, despite the deliberate terminology, is in truth the law's own sophisticated assessment of what the system can bear.[55]

24. Framed another way, the fair-minded observer test represents 'the court's view of the public's view',[56] which is inevitably the judge's own view of the matter.[57]

25. A number of scholars have observed that the fair-minded observer is 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 reasonably reflects general public opinion'.[58]

26. Scholars argue that one way in which courts make the fair-minded observer a vehicle for their own view is by overloading it with knowledge.[59] The fair-minded observer is given detailed knowledge of the facts of the case, the applicable law, and the wider legal system. For example, in areas of law governed predominately by statute, particularly where the regime is detailed or complex, the fair-minded observer's apprehension of bias has been assessed as though she or he possessed 'an expert and microscopic analysis' of the legislative scheme.[60]

27. Professor Groves has argued that attributing the fair-minded observer with detailed knowledge runs counter to the 'low threshold' set by the 'double might' test, leaving the observer with little role to play.[61] This problem becomes acute when questions of the judge's conduct or questions of association between judges and lawyers in the judge's past professional life are at issue. It is suggested that the fair-minded observer is attributed

53 Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388, 389.

54 *Smits v Roach* (2006) 227 CLR 423 [96]–[97]. See also Groves, 'Bias by the Numbers' (n 12) 69.

55 Young (n 14) 934, citing *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306–7 (French CJ).

56 *Webb v The Queen* (1994) 181 CLR 41 [51] (Mason CJ, McHugh J).

57 Olowofoyeku (n 53) 406.

58 Higgins and Levy (n 48) 1. See also Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <auspublaw.org/2015/09/apprehended-bias/>; 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, 380–1. Recently, the concern that the test for apprehended bias leads to results far removed from actual public attitudes has been tested by preliminary empirical study: see further paragraph 32.

59 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 666.

60 Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 390, citing *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [17].

61 Groves, 'Bias by the Numbers' (n 31) 67. He notes that the 'low threshold' of the test is in tension with the reminders of the courts that claims of apprehended bias must be 'firmly established': Ibid 64. See further *GetSwift Limited v Webb* [2021] FCAFC 26 [28] ('Whilst a precautionary approach is to be observed, … an allegation of apprehension of bias must be 'firmly established''), citing *Reece v Webber* (2011) 192 FCR 254 [45]; *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553.

with an unrealistic knowledge and understanding of the culture and traditions of the legal profession.[62] Judges are able to

> ascribe to the informed observer both knowledge and acceptance of practices that any sensible observer would be greatly troubled by and almost certainly reject.[63]

28. Overloading the observer with knowledge of legal culture and traditions in this way takes the decision from being 'what might be apprehended at a more general level' to a question of what 'the observer might actually think of the facts at hand'.[64] As Baroness Hale noted, if the fair-minded observer is too much of an 'insider' to the legal system, she or he runs 'the risk of having the insider's blindness to the faults that outsiders can so easily see'.[65]

29. In addition, one assumption that is often attributed to the fair-minded observer is that judges are more able than others to resist the likelihood of bias because their 'training, tradition and oath or affirmation' require them to 'discard the irrelevant, the immaterial and the prejudicial'.[66] This plays into a common cognitive bias, by which people (including judges) think themselves less susceptible to biases than others (the bias blind spot).[67] However, this is not always the case.[68] This has underpinned suggestions that that fair-minded observer should perhaps begin with more 'basic scepticism about the abilities and habits of judges'.[69]

The test leads to unpredictable outcomes

30. Professor Olowofoyeku has criticised the test as leading to case-by-case decision-making, which gives rise to subjective and unpredictable conclusions, doing 'little to provide reliable guidance to stakeholders in the judicial process'.[70] Similarly, Professors Hughes and Bryden suggest that the highly context- and fact-specific nature of the test means that it gives rise to considerable uncertainty for both judges and litigants in marginal cases about whether a judge should sit.[71]

31. Young observes how 'small gradations in the understanding attributed to the lay observer can quickly determine the outcome of a challenge'.[72] This presents issues for certainty of justice, and is difficult to resolve on appeal.[73]

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62 Matthew Groves, 'The Rule Against Bias' [2009] *Monash University Law Research Series* 10; Groves, 'Bias by the Numbers' (n 31) 65.
63 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* 1, 21.
64 Groves, 'Bias by the Numbers' (n 31) 65.
65 *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 [39].
66 *Vakauta v Kelly* (1988) 13 NSWLR 502, 527 (McHugh J), approved in *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (Toohey J) and *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia, 6th ed, 2016) 651..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) *The Modern Law Review* 633, 643.
67 Edmond and Martire (n 66) 649.
68 See further Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper JI6, 2021) [53].
69 Groves, 'Bias by the Numbers' (n 31) 71–2. See further Edmond and Martire (n 66) 645–9. A scepticism displayed, for example in *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J) cf [43] (Kiefel CJ and Gageler J); *GetSwift Limited v Webb* [2021] FCAFC 26 [39]–[45] (Middleton, McKerracher and Jagot JJ).
70 Olowofoyeku (n 53) 389.
71 Hughes and Bryden (n 49) 858.
72 Young (n 14) 933.
73 Abimbola Olowofoyeku, 'Inappropriate Recusals' (2016) 132 *Law Quarterly Review* 318, 322.

The test leads to results far removed from the public's views

32. Recent empirical research supports the view that there is a significant divergence between results given by the application of the test and what members of the public actually think.

33. In a recent study, Associate Professor Higgins and Dr Levy conducted nationally representative surveys in the UK and Australia asking respondents what they thought about situations of possible bias.[74] The research found that, overall, 'the public think judges should be disqualified from hearing cases much more often than the law of apprehended bias presently requires'.[75] Higgins and Levy reported that:

- in relation to shared characteristics or beliefs between the judge and one of the parties (with the exception of shared religious beliefs), a majority of respondents did not favour disqualification;
- however, in every other scenario, including financial interests, ideological beliefs, and possible prejudgment arising from earlier judicial comments or findings, 'respondents consistently favoured disqualification' (although the public were somewhat more divided on some questions of prejudgment).[76]

34. They concluded that the findings suggest that, overall,

> the judiciary have a higher estimation of their own capacity to exclude irrelevant factors from their decision making than do the general public. In addition, or alternatively, the findings might suggest that judges take into account, explicitly or implicitly, legal policy considerations when applying the law of bias that the public do not, at least not without being prompted.[77]

35. Higgins and Levy note the limitations of using survey data for exploring these issues. They also recognise that the fair-minded observer is not necessarily meant to mirror the public, as the law on bias needs to balance a number of different factors, including public confidence, the objective risk of explicit and implicit bias affecting decision-making, legal policy considerations about the functioning of the legal system, and the risk of strategic use of claims.[78] Nevertheless, they argue that further research is needed to better understand public views, and if that research is consistent with their findings, then

> there will come a point when judges and law makers need to revisit the law of bias to ensure it better reflects public perception, or alternatively to expressly acknowledge that less weight is given to public perception in the rules governing judicial bias.[79]

The test is difficult for lay people to understand

36. All of these issues make for a test that is, it is argued, particularly difficult for non-lawyers to understand. As Dr Olijnyk suggests:

> To the layperson, there's … something odd — even vaguely absurd — about a test that requires the decision-maker to imagine they are a different, imaginary, person.

74 Higgins and Levy (n 48).
75 Ibid 2.
76 Ibid.
77 Ibid 3.
78 Ibid 3–4. See further Higgins and Levy (n 58).
79 Higgins and Levy (n 48) 30.

> Lawyers, on the other hand, are taught this kind or reasoning in week 1… the test relies on the judge being able to deploy expert training to engage in a complex intellectual exercise.[80]

37. Apart from undermining public and litigant confidence, the fact that the test is so difficult to apply can impact negatively on the administration of justice. Emeritus Professor Aronson, Professor Groves, and Professor Weeks suggest that it might contribute to unrepresented parties bringing applications for disqualification on the ground of bias with no prospects of success. They suggest that, while judges may perceive these claims as vexatious,

> just as unrepresented parties who are not schooled in the law struggle to understand the finer details of the bias rules, judges who are deeply immersed in the law may easily fail to realise that a test containing two 'mights', and which purports to reflect the judgment of a non-judicial observer but on closer inspection appears to contain the values of the judges whose conduct it is supposed to govern, may confuse unrepresented parties. Apparently baseless bias claims may simply be an expression of that confusion.[81]

Example: Apprehended bias and modern case management

Some see the law on apprehended bias as raising particular difficulties in the context of modern case management practices.[82] In order to promote efficiency, judges now often preside at multiple pre-trial hearings in a single matter, and take an active part in proceedings, including by trying to promote settlement. This leads to a greater risk of the appearance of — or actual — prejudgment.[83] By engaging with counsel and expressing tentative views during the process, judges risk creating an appearance of bias that disqualifies them from hearing subsequent parts of the matter.[84] The rule against bias, therefore, needs to tread a fine line between maintaining the essential quality of impartiality, and accommodating changes in the role of the judge.[85]

Higgins and Levy have suggested that judges may use an idealised fair-minded observer precisely to 'inject legal policy considerations' into these types of decisions, because she or he is taken to consider both the risk of bias and the 'benefits and costs to the administration of justice of disqualifying a judge'.[86] However they, and others, suggest that such a balancing process would be better carried out openly.[87]

80 Olijnyk (n 58).
81 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 657.
82 Young (n 14) 939; Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761.
83 Australian Law Reform Commission (n 68) [48]–[49].
84 Olijnyk (n 82) 761.
85 Ibid 763.
86 Higgins and Levy (n 48) 7. See also Young (n 14) 934.
87 Higgins and Levy (n 58) 385; John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353, 354; Groves, 'Bias by the Numbers' (n 31) 69–70.

What to do with the 'weary lay observer'?

38. This section considers the different ways in which those who criticise the test and its application suggest that these difficulties should be resolved.[88] Some scholars have suggested returning to the earlier position so that apprehended bias is explicitly decided by reference to the views of the court.[89] Others have urged partial codification of the law to clarify the circumstances in which judges should and should not sit. In one model, codification would be guided by reference to *actual* public perception as measured by empirical methods, the science on decision-making, and legal policy considerations.[90] Most, however, see value in the test, and think that its application can be adjusted to address the criticisms made.

Return to an openly subjective test

39. Some scholars in the United Kingdom, notably Olowofoyeku, have suggested courts should return to the position under which they decide bias claims not by reference to the views of a fair-minded observer, but by open reference to the views and conclusions of the judge who decides the issue.[91] Olowofoyeku argues that this would significantly simplify the process of deciding cases of apparent bias, and would lead to the same conclusions already made under the current test.[92] In his view, anything else is just 'plastering over the cracks of a flawed construct'.[93]

40. In addition, Professor Goudkamp has suggested the lower threshold of the test for apprehended bias, as against actual bias, has created a 'hesitancy of the courts to investigate whether breaches of the rule against actual bias have occurred' and that as a result, it may appear that the law's condemnation of bias is weakened.[94] In his view, the courts should make clear a finding of actual bias where the evidence supports it.

Partial codification

41. The law on bias in Australia has been developed by the courts with no direct input from Parliament. Some researchers have suggested that the law on bias should be partially codified in statute. Hughes and Bryden (writing in a Canadian context) and Higgins and Levy suggest that codification would improve clarity, make policy choices explicit, and allow for greater convergence between the test and public perceptions.

42. Hughes and Bryden suggest that legislative codification would be useful to establish 'a bright line for when disqualification is required' in certain areas.[95] In their view, the

> 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

88 For the reference to the 'weary lay observer' see Young (n 14).
89 Olowofoyeku (n 53).
90 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 *Civil Justice Quarterly* 376, 394.
91 Olowofoyeku (n 53) 408–9. Groves also expressed this view at one point in Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 395.
92 Olowofoyeku (n 53) 408–9.
93 Goudkamp James, 'Facing up to Actual Bias' (2007) 27 *Civil Justice Quaterly* 32, 38–9.
94 Ibid 38–39.
95 Hughes and Bryden (n 49) 884–5.

the rules governing judicial disqualification than on the precise content of the rules themselves.[96]

43. 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).[97]

44. They suggest that a code should include guidance as to the way to address:

- professional relationships between bar and bench;
- prior judicial consideration of the matter at issue;
- extrajudicial writings that suggest predisposition; and
- procedures for disqualification applications.[98]

45. 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.[99] Higgins and Levy posit 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* (2014).[100] This would leave a smaller 'orange' mid-ground for judicial determination (see further paragraph 63).

46. In Australia, any attempted codification of the law on bias would be likely to raise significant constitutional issues. Disqualification for bias goes to the very heart of judicial power, vested in Commonwealth judges under Chapter III of the *Constitution*. Interference in determining how that power is exercised through codification of the law on bias could therefore be unconstitutional.[101] In this context, an alternative that could achieve the same aims is for judges to agree on public guidance that identifies circumstances that do and do not give rise to apprehended bias.[102]

47. The final part of this paper briefly sets how some jurisdictions and areas of practice have identified grounds that do, or do not, require disqualification — providing a shortcut to, or modifying, a general test for apprehended bias.

Adjusting the test or the application of the test

48. While acknowledging the limitations of the hypothetical observer, almost all who criticise the test for apprehended bias, or its application, see the construct as retaining value.[103] Instead of abandoning it, or replacing it with codified rules in certain circumstances, many suggest that the test and/or its application can be adjusted to meet the criticisms.

96 Ibid 859.
97 Ibid 885.
98 Ibid.
99 Higgins and Levy (n 58) 395.
100 Ibid 11.
101 *TCL Air Conditioner v Federal Court* (2013) 251 CLR 433, 574. See also James Stellios, *The Federal Judicature* (LexisNexis, 2nd ed, 2020) 76–9. *R v Davison* (1954) 90 CLR 353 381–2.
102 Se, eg, the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017). Cf Chen and Lo (n 35) 159, citing Hong Kong Special Administrative Region, *Guide to Judicial Conduct* (2004). In the latter, 32 out of 98 paragraphs concern disqualification ([38]–[70]).
103 See, eg, Young (n 35) 955; Aronson, Groves and Weeks (n 3) 671; Campbell and Lee (n 21) 157.

Modify the test to introduce an explicit balancing exercise

49. Some have suggested that the addition into the test of a step to explicitly balance policy considerations could help to address the increasing subjectivity and unpredictability of its application. It is argued that this could allow judges to be more transparent about the policy choices and balancing of interests at play, including maintaining public confidence in judicial decision-making.[104]

50. The addition of Gageler J's 'third step' — assessing the reasonableness of an apprehension of bias (see above paragraph 8) — can be seen as one way in which this could be done.[105]

Use tools of calibration to fine-tune the test

51. Young observes that the courts already employ tools to 'calibrate' the test for apprehended bias — most relevantly in this context, 'speciation'.[106] These tools can be used to make the lay observer's conclusions 'more predictable and sustainable'.[107]

52. By 'speciation', Young refers to situations where the court has carved out a sub-category of bias with a more particularly worded test. He notes how precise taxonomies of bias have been accepted as a way of providing a 'yardstick', or calibration, for the fair-minded observer (see above paragraph 19).[108] Young notes how the High Court engaged in further 'speciation' when it later identified another sub-species of 'prejudgment'.[109] The court held that, to amount to prejudgment, the judge must have 'a mind incapable of alteration'.[110] According to Young,

> the narrowness of this explanation of prejudgment was a conspicuous fine-tuning of the rules, or at least a pointed clarification.[111]

53. Similarly, he suggests that the High Court developed a further sub-species of 'association' case based on the 'incompatibility' of a person's role in the past (eg, as prosecutor) and in the case at issue (as an administrative decision-maker in the same case).[112] This allowed the court to avoid the strictness of the approach introduced in relation to 'prejudgment'. On the other hand, he recognises that it could be argued that increasing specificity may complicate the law and 'unsteady' public confidence.[113]

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104 Griffiths (n 87) 354, citing Simon Atrill, '"Who Is the 'Fair-Minded and Informed Observer'? Bias after Magill"' (2003) 62 *Cambridge Law Journal* 279, 289.

105 Groves, 'Clarity and Complexity in the Bias Rule' (n 63) 23. Contrast Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) 651–2; Groves, 'A Reasonably Reasonable Apprehension of Bias' (n 10) 393.

106 Young (n 14) 945. He also refers to the 'spectrum of standards', which differentiates the approach depending on the nature of decision-making and identity of decision-maker, so of less relevance here: Ibid 22, citing *Isbester v Knox City Council* (2015) 255 CLR 135, 146–8.

107 Young (n 14) 955.

108 Ibid 19, 23.

109 Ibid 949; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507.

110 Young notes that there was some confusion over whether this statement was limited to a consideration of actual bias, but it is now relatively well settled that it applies in relation to apprehended bias: Young (n 14) 950.

111 Ibid 949.

112 Ibid 952–3, citing *Isbester v Knox City Council* (2015) 255 CLR 135. Another potential reform that Young points to, connected to 'speciation', is discarding the second step in *Ebner* (assessing the logical connection between the association and the negative impact on the decision) for 'association' bias, and potentially other forms of interest bias: Ibid 952.

113 Young (n 14) 955.

Careful application of test

54. Finally, a number of scholars and judges suggest that many of the issues identified above can be reduced if courts take a careful approach to the application of the test. This includes by striving 'to act consistently in determining what knowledge or information is to be imputed',[114] and ensuring that the hypothetical person is not overloaded with knowledge. As Kirby J noted, for courts to

> impute all that was eventually known to the court to an imaginary person… would only be to hold up a mirror against to itself.[115]

Similarly, Olijnyk has suggested that the degree of knowledge held by the fair-minded lay observer 'needs to be watched carefully to make sure the lay observer does not accidentally turn into a lawyer'.[116]

55. Tied to this is the suggestion that judges should also have more awareness of the scientific research around human cognition and biases.[117] Recent cases in the High Court and Full Court of the Federal Court on apprehension of bias arising from receipt of extraneous information suggest that knowledge of such research can be helpfully brought to bear in the application of the test.[118]

56. In summary, although there is significant literature on the difficulties associated with the test for apprehended bias, most see it as the correct approach because it requires judges to think about how the case will be perceived from a different perspective. In the words of French CJ:

> 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.[119]

57. For many, the fair-minded observer 'will always be a glove that covers judicial hands, but it is better than the alternatives'.[120]

Guidance on grounds for disqualification

58. The last part of this background paper briefly discusses how some jurisdictions and areas of practice have identified grounds that do, or do not, require disqualification — reducing the need to apply the test for apprehended bias or its equivalent. In some

114 Griffiths (n 87) 369.
115 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 671, citing *Johnson v Johnson* (2000) 201 CLR 488, 506.
116 Olijnyk (n 58).
117 Edmond and Martire (n 66) 661–2.
118 See *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 [24]–[27] (Kiefel CJ and Gageler J); [97] (Nettle and Gordon JJ); [132]–[136] (Edelman J); *GetSwift Limited v Webb* [2021] FCAFC 26 [42]–[45].
119 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306–7.
120 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (n 3) 671.

countries this is achieved by codification, and in others through case law and/or ethical guidance.

'Ground rules' through case law: England and Wales

59. In England and Wales, the courts have provided what Groves describes as 'ground rules' on bias for both judges and lawyers through case law.[121] In *Locabail (UK) v Bayfield Properties Ltd*, the Court of Appeal — while avowing that '[i]t would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias' — stated that it could not

> 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. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers.[122]

60. In contrast, the Court of Appeal thought that

> a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind …; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case.[123]

121 Groves, 'Bias by the Numbers' (n 31) 66.
122 *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Vic 3004; [2000] QB 451, 480 (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC).
123 Ibid (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC).

Guidance through Codes of Conduct: The *Bangalore Principles* and the *IBA Guidelines*

61. Many common law countries have a guide to judicial conduct that 'suggests' a course of action to a judicial officer. In some jurisdictions, such as the United Kingdom, the guide simply directs judges to relevant case law.[124] In others, such as Australia, the guide goes further, giving examples of application of principles to broad categories of scenarios.[125] In contrast, the Hong Kong guide is more prescriptive in illustrating examples that would give rise to an apprehension of bias.[126]

62. Specific grounds that ordinarily do, and do not, provide a basis for disqualification are also enumerated in the *Bangalore Principles on Judicial Conduct* (2002). The commentary repeats the same grounds identified in *Locabail* as irrelevant grounds.[127] Principle 2.5 sets out three grounds where apprehended bias will ordinarily arise (subject to necessity) (see Table 1).[128]

63. The *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* detail situations that, depending on the facts of the case: (i) 'give rise to justifiable doubts as to the arbitrator's impartiality and independence' (red list); (ii) 'may give rise to doubts as to the arbitrator's impartiality or independence' (must disclose) (orange list); and (iii) 'where no appearance and no actual conflict of interest exists from an objective point of view' (green list).

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124 *Guide to Judicial Conduct 4th Amendment, September 2020* (UK) 6-7.

125 Australasian Institute of Judicial Administration (n 102).

126 Hong Kong Special Administrative Region, *Guide to Judicial Conduct* (2004).

127 United Nations Office on Drugs and Crime (n 41) 72.

128 UN Economic and Social Council (ECOSOC), *Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, UN Doc E/RES/2006/23 (27 July 2006) Principle 2.5.

Table 1: Example enumerated grounds in *Bangalore Principles* and *IBA Guidelines*

<table>
<tr><th>Bangalore Principles[129]</th><th colspan="2">IBA Guidelines on Conflicts of Interest in International Arbitration[130]</th></tr>
<tr>
<td>Grounds for disqualification include:

• actual bias or prejudice
• personal knowledge of disputed facts
• judge previously served as lawyer or was material witness in the case
• judge or member of judge’s family has economic interest in outcome</td>
<td>Non-waivable red list:

• arbitrator is legal representative or employee of a party
• arbitrator has a significant financial or personal interest in party or case
• arbitrator or his or her firm regularly advises the party or an affiliate

Waivable red list:

• arbitrator has given legal advice or provided expert opinion on the dispute
• arbitrator holds shares in party (if privately held)
• arbitrator has a close family member who has significant financial interest
• arbitrator currently represents or advises the lawyer of law firm acting for a party
• arbitrator has close family relationship with party or lawyer</td>
<td>Orange list (must disclose):

• arbitrator has served as counsel for or against a party within past three years
• arbitrator and another arbitrator or counsel are members of same barristers’ chambers
• close friendship or enmity exists between arbitrator and counsel
• close personal friendship exists between arbitrator and manager of board
• arbitrator holds material holding of shares in party (publicly listed)
• arbitrator has publicly advocated a position on the case</td>
</tr>
<tr>
<td>Irrelevant grounds (depending on case):

• religion, ethnic or national origin, gender, age, class, means, sexual orientation
• social, education, service or employment background
• membership of social, sporting, or charitable bodies
• previous judicial decisions
• statements made outside court</td>
<td colspan="2">Green list:

• arbitrator has previously expressed legal opinion (not specifically on case)
• arbitrator holds a membership of same professional association, social or charitable organisation, social media network
• arbitrator and counsel previously served together as arbitrators
• arbitrator teaches in same faculty or school as another arbitrator or counsel
• arbitrator holds insignificant amount of shares (publicly listed)</td>
</tr>
</table>

Codification: civil law jurisdictions and the United States

64. Table 2 summarises the grounds requiring disqualification in three jurisdictions where judicial disqualification is governed by statute.

65. In civil law jurisdictions, since at least the sixth century, parties could refuse to have their case be heard by any judge they considered ‘under suspicion’, and request a

129 Ibid.

130 International Bar Association, ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ (23 October 2014). The grounds listed in this table are examples — other grounds are also provided for under each heading in the Guidelines.

replacement.[131] The general approach now is to maintain broad disqualification statutes that (non-exhaustively) enumerate grounds that will automatically disqualify a judge.[132]

66. In Quebec, the *Code of Civil Procedure* sets out one automatic ground of disqualification and certain grounds that may, among others, 'be considered serious reasons for justifying a judge's disqualification'.[133] In Germany, statutory rules of court set out situations that automatically disqualify a judge from hearing a case, as well as those that allow for litigants or a judge to bring a disqualification application where there is a fear of bias, or a judge attempts to sit where there is meant to be automatic disqualification.[134]

67. Disqualification is governed by statute under federal law and in some states in the United States.[135] As such, it is a minority among common law countries. Under federal law, the United States Code identifies a number of specific circumstances that will automatically disqualify a judge, based on the *American Bar Association Model Code of Judicial Conduct*.[136] To supplement this, a party may also make a peremptory challenge to a judge (within certain time limits), alleging that the judge has a bias against the party or in favour of a party adverse in interest, and the judge is required to step aside.[137]

Table 2: Codification: Quebec, Germany, and the United States

Quebec[138]	**Germany**[139]	**United States**[140]
A judge will be disqualified if: • the judge or the judge's spouse has an interest in the case. The following, among others, may be considered serious reasons for justifying a judge's disqualification: • the judge or the judge's spouse is related to one of the parties or lawyers (up to the fourth degree) • personally being party to a similar proceeding • having given advice in the proceeding • having a financial interest • conflict between the judge and party having been uttered in the preceding year	A judge will be automatically disqualified where: • the judge or a close family member is involved in the litigation as a litigant, witness, or (in the criminal courts) a victim • the judge had prior professional involvement in the matter • the judge had prior judicial involvement in the matter	Any judge shall disqualify herself or himself where the judge: • is actually biased or has personal knowledge of facts • has previously acted or advised in the matter • has a personal or family based financial connection to the matter • or the judge's spouse knows, or knows the spouse of, a party or a lawyer in the matter (up to the third degree)

131 *Codex of Justinian*, Book III, Title 1, No 16. See also The Hon Justice John Sackar, 'Disqualification of Judges for Bias' (Speech, Faculty of Law, Oxford, 16 January 2018), citing Richard E Flamm, 'The History of Judicial Disqualification in America,' (2013) *Judges' Journal* 52(3) 12, 12–13.
132 Ibid 2.
133 *Code of Civil Procedure 2014* (Quebec) ss 202–3.
134 Hughes and Bryden (n 49) 868–9.
135 28 US Code § 455 (1990). See also Ibid 862–3.
136 See Rule 2.11: Disqualification. Hughes and Bryden (n 49) 862.
137 28 US Code § 144, cited in Hughes and Bryden (n 49) 862.
138 *Code of Civil Procedure 2014* (Quebec) ss 202–3. See also Ibid 878 (This list of grounds for disqualification has been treated as non-exclusive), citing *Droit de la Famille* - 1559, [1993] RJQ 625 [11]–[12], [21]–[22]. Note that these examples may, not must, give rise to disqualification.
139 As summarised in Ibid 869. Note that each court (eg criminal, civil, and constitutional) has discrete but 'substantially the same' provisions.
140 28 US Code § 455 (1990).

Conclusion

68. The test for apprehended bias recognises that judicial impartiality is not absolute, and that perceptions of bias must be managed. The fair-minded observer is not real. But it is a construct that gained rapid acceptance across the Commonwealth, and one concerning which there is not a large appetite for change within the judicature or the academy. As to the content of the test, suggestions have been made in the literature about how the application of the test may be made more consistent and brought more closely in alignment with public attitudes. Other background papers for this Inquiry show some of the structural issues that may also need to be addressed to complement the test in upholding and supporting judicial impartiality and public confidence in it.