Guide to Judicial Conduct

Fourth Edition

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Acknowledgments

This is the fourth edition of the *Guide to Judicial Conduct*.

On 18 October 2024 the Council of Chief Justices of Australia and New Zealand agreed to Terms of Reference for a review of the third edition of the Guide published in 2017 to update it and address, among other things, the use of artificial intelligence tools by judicial officers, the scope of judicial education and training, and enhanced guidance on post-judicial activities.

A working group comprising the Hon Chief Justice Peter Quinlan, the Hon Chief Justice Lucy McCallum and the Hon Chief Justice Helen Bowskill was formed to provide oversight of the review. A committee for the review of the Guide was led by the Hon Virginia Bell AC SC as principal reporter and comprised the Hon Justice Murray Aldridge of the Federal Circuit and Family Court of Australia and then President of the Australasian Institute of Judicial Administration, Professor Gabrielle Appleby of the University of New South Wales and Professor Judith Cashmore AO of the University of Sydney. Secretariat support was provided by the Australasian Institute of Judicial Administration.

The Council expresses its sincere thanks to all those involved.

The Council also acknowledges the significant effort of those who contributed to the development of the first three editions of the Guide:

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Preface

This is the fourth edition of the *Guide to Judicial Conduct*.

An integrated Australian Judicature, about which I have written and spoken elsewhere, must necessarily have as one of its attributes a common and consistent understanding of the standards of behaviour expected of judges.

The diversity within the system, and of the challenges routinely faced by judges, requires standards of judicial conduct to be considered at the level of principle. Some hard and fast rules apply, but in many cases the issues are more nuanced. Similarly, many contemporary challenges such as the growing capability of artificial intelligence are fast moving and dynamic.

Accordingly, the Guide provides contemporaneous principled and practical guidance to judges as to what may be an appropriate course of conduct, matters to be considered in determining a course of conduct, and from whom to seek support.

On behalf of the Council of Chief Justices of Australia and New Zealand I extend thanks to the committee for the review of the Guide, the Hon Virginia Bell AC SC, the Hon Justice Murray Aldridge, Professor Gabrielle Appleby and Professor Judith Cashmore AO, and to the Australasian Institute of Judicial Administration for supporting the committee and publication of the Guide.

I also thank my colleagues on the Council of Chief Justices for their active participation in the review of the Guide and with whose endorsement the Guide is published.

The Hon Chief Justice Stephen Gageler AC
Chief Justice of Australia

1 Introduction

1.1 Purpose of this publication

The purpose of this publication is to give *practical guidance* to members of the Australian judiciary at all levels. The words "judge" and "judiciary" when used include all judges and magistrates.

The Guide has come to be recognised as a source of authoritative guidance on aspects of the standard of conduct that is expected of today's judges, for individual judges as well as for heads of jurisdiction and judicial commissions, in jurisdictions which have them. It is freely available online and serves also to inform the public about how judges may be expected to conduct themselves in and out of court.

The Guide seeks to be constructive, and to indicate how particular situations might best be handled.

Judges are primarily accountable to the law, which they must administer, in accordance with the terms of the judicial oath, "without fear or favour, affection or ill-will". It is important not only that judges discharge their duty in accordance with their oath but that there is public confidence that they will do so. To this end, appointment to judicial office imposes limitations on the holder's public and private conduct. By accepting judicial appointment, a judge agrees to these limitations.

Judicial office also has implications for the family of a judge. While the constraints that a judge assumes on appointment are not directly applicable to family members, the conduct of family members may give rise to an apprehension of bias on the part of the judge or suggest that the judge has made inappropriate disclosures or statements. The widespread use of social media, including by members of judges' families, increases the risk of the conduct of a family member giving rise to issues to which the Guide has application. Also, members of a judge's family may be judged or treated as if they were subject to restraints not applicable to others. Accordingly, the Guide provides some guidance to judges in relation to conduct by family members that might raise issues for the judge in Chapter 8. It is the responsibility of a judge to bring such matters to the attention of family members.

It is emphasised that what follows is not intended to be prescriptive, unless it is so stated. The Guide recognises that in cases of difficulty or uncertainty, the primary responsibility of deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual judge. However, it strongly recommends consultation with colleagues in such cases, and preferably with the head of jurisdiction.

It is possible to set out principles or standards of conduct appropriate to judicial office, but their application in particular cases may from time to time reasonably give rise to different answers by different judges. The answer may vary according to the jurisdiction of the court or the place in which the court sits. To give to such standards of conduct the status of rules would be to invest them with a prescriptive role which may be inappropriate in some circumstances.

It is not necessary for present purposes to address the power of parliaments to remove a judge for serious misconduct. It is sufficient to note that there is persuasive authority for the view that it is not necessary to prove an offence in order to invoke the power.

1.2 Guiding principles

Judicial conduct should enhance public confidence in the administration of justice, a concept that may be encapsulated by the phrase "judicial legitimacy". Any course of conduct that has the potential to put this objective at risk must therefore be carefully considered and, as far as possible, avoided.

There are three basic principles against which judicial conduct should be tested to safeguard the object of judicial legitimacy. These are:

- Impartiality;
- Judicial independence; and
- Personal integrity.

The objective and these three principles provide a guide for conduct by a judge in the discharge of their judicial functions and in their private life. If conduct by a judge is likely to affect adversely the ability of a judge to comply with these principles, that conduct is likely to be inappropriate.

Each of these three principles is discussed in Chapter 2, and their application in a range of circumstances is addressed in subsequent chapters. It will become apparent that these basic principles are not in watertight compartments and may often overlap. Together they incorporate the six values stated in the *Bangalore Principles of Judicial Conduct*: independence, impartiality, integrity, propriety, equality, and competence and diligence.

The value of equality requires that a judge be aware of, and understand, diversity in society, and not manifest bias or prejudice on grounds such as race, skin colour, sex, religion, disability, age, marital status, sexual orientation, or social and economic status. The latter proscription is fundamental to judicial impartiality. What may be less well understood is the impact of unintentional, stereotypical thinking on the reality, and appearance, of impartiality. These topics are addressed in Chapter 3.

The value of "competence and diligence" is a dimension of personal integrity. Judges are expected to engage in appropriate courses of judicial education throughout their careers to maintain and enhance their knowledge, skills and the personal qualities necessary for the proper performance of their duties. In today's Australia, the latter includes understanding the history, experiences and circumstances of Aboriginal and Torres Strait Islander peoples as well as the broader cultural diversity of the population.

Attention to personal welfare and to the welfare of colleagues have come to be recognised as further dimensions of the competent exercise of judicial office. These topics are also addressed in Chapter 3.

Chapter 4 offers practical guidance on aspects of the conduct of proceedings in court. Chapter 5 discusses activities outside of the courtroom in which a judge may choose, or be invited, to engage by reason of their judicial office. These include membership of a government advisory body, writing legal texts, and participating in the public discussion of legal questions.

Chapter 6 deals with issues which judges may confront outside their judicial role, including engagement in commercial activities or in public and community organisations, appointment as an executor or trustee, the acceptance of gifts, giving references, use of the judicial title and letterhead, social contacts and service on club committees. Chapter 7 gives guidance to judges contemplating retirement and to former judges concerning post-judicial legal and related work and participation in public debate and community activities.

It is beyond the scope of this Guide to canvass the substantial literature on judicial conduct and judicial ethics. A list of resources on this topic which judges may find useful is set out in Appendix A.

2 Guiding Principles: Judicial Independence, Impartiality and Personal Integrity

2.1 Judicial independence

Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. There are two aspects of this concept that are important for present purposes: constitutional independence and independence in discharge of judicial duties.

2.1.1 Constitutional independence

(a) The principle

The principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government.

The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others. In particular, an appropriate distance should be maintained between the judiciary and the Executive, bearing in mind the frequency with which the Executive is a litigant before the courts.

Communication with the other branches of government on behalf of the judiciary is the responsibility of the head of jurisdiction or the Chief Justice.

(b) Attacks upon constitutional independence

Two important attributes of constitutional independence, namely security of tenure and financial security, are sometimes misunderstood, criticised, threatened, or even ignored. When these are the subject of debate, any response on behalf of the judiciary should come from the head of jurisdiction or from the Chief Justice.

2.1.2 Independence in discharge of judicial duties

(a) The principle

Judges should always take care that their conduct, whether official or private, does not undermine their institutional or individual independence, or the public appearance of that independence.

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

The terms of the judicial oath by which all judges should be guided in the discharge of their duties have already been referred to in section 1.1, but judges should at all times be alert to, and wary of, subtle and sometimes not so subtle attempts to influence them or to curry favour.

It is likely that at some time in a judicial career, a case to be decided (or similar cases) by a particular judge will be the subject of discussions in the media (both in its traditional forms and/or social media), and sometimes such discussions will be calculated to arouse and even to inflame public opinion. On occasions a judge may be subjected to personal and hostile criticism by politicians, by journalists and commentators, on social media, and in print and electronic media. Sometimes the criticism will reveal that the critic does not understand the relevant principles or law, or that the critic is ill-informed and unfair.

Public scrutiny, fair or unfair, informed or not, comes with the exercise of judicial office. Any public response to unfair or ill-informed criticism of a judge or a decision should be undertaken by the head of jurisdiction or the Chief Justice.

(b) Threats to independence in discharge of judicial duties

Occasionally judges receive letters or other communications containing threats to the safety or welfare of themselves or members of their family, in an effort by, or on behalf of, disgruntled parties or special interest groups to influence a judicial decision.

Generally communications of this kind should not be ignored. It is prudent to report any such threat to the administrative officer responsible for the security of the court, and/or to the head of jurisdiction and, if appropriate, to a senior police officer.

Judges should also be alert to other conduct which may not be a direct attempt to influence the judge but may nevertheless be aimed at obstructing the course of justice. A typical example is the intimidation of a witness by the presence in court of persons hostile to that witness, particularly in criminal cases. Appropriate steps to protect such a witness are not inconsistent with judicial impartiality.

A judge who becomes aware of unlawful or improper conduct occurring in connection with the discharge of the judge's judicial duties will have to consider whether that conduct should be reported to the police or to some other appropriate person, and whether it should be disclosed publicly by making a statement in open court or in some other way. The timing of any such action by a judge can be particularly delicate. This is a matter on which discussion with the head of jurisdiction or with an experienced colleague is desirable.

2.2 Impartiality – general principles

Impartiality requires that the judge act without bias or prejudice, real or reasonably apprehended. The large volume of case law involving challenges to judicial impartiality testifies to its importance and sensitivity. There is probably no judicial attribute on which the community puts more weight than impartiality. It is the central theme of the judicial oath of office, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially.

The application of the requirement of impartiality is always subject to the rule of necessity, which allows that a judge may sit to hear a matter notwithstanding that the judge has an apparent conflict of interest in circumstances in which no judge who does not have an apparent conflict is available to sit.

A judge should try to ensure that their conduct, in and out of court, in public and in private, maintains and enhances public confidence in the judge's impartiality and in that of the judiciary.

The apprehension of bias principle is that "a judge is disqualified 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" (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [6], *Charisteas v Charisteas* [2021] HCA 29; 273 CLR 289 at [11]).

The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal.

This chapter deals with aspects of a judge's private life that can raise matters that have the capacity to affect adversely the public perception of a judge's impartiality. Chapter 4, which deals with conduct in court, also raises some matters relevant to impartiality.

For present purposes, it is not necessary to do more than identify some broad areas of sensitivity in no particular order of importance. The list is not exhaustive but may help to keep judges alert to any risk of a challenge to their impartiality. They are in the nature of warning signs, and the direction in which they point in some common factual situations will be examined more closely in Chapter 4.

The fundamental principle is that a judge should not engage in any activity that raises a real risk that the judge will be disqualified from performing judicial duties because of a disqualifying factor, nor engage in any activity that would compromise the objective or infringe the principles identified in Chapter 1.

There are some well-established principles:

- Although active participation in or membership of a political party before appointment would not of itself justify an allegation of judicial bias or an appearance of bias, it is expected that, on appointment, a judge will sever all ties with political parties. Continuing ties, or an appearance of continuing ties such as might occur by attendance at political gatherings, political fund-raising events or through contributions to a political party, should be avoided.
- A judge should be cautious about associations of a business or of a social kind with organisations or persons who might be or become a litigant or a witness in the judge's court.

Beyond these, useful guiding principles for a judge who must consider whether an appearance of bias exists are:

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer.
- Judges have a duty to hear the cases that are allocated to them. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers, and can itself give rise to concerns regarding "judge shopping".
- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest, but (subject to the discussion below in relation to multi-member courts) the judge must themself make the decision whether it is appropriate to sit.

Judges should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay.

The making of a complaint about the conduct of judge by a party, witness or legal representative when proceedings are on foot does not, without more, require the judge to recuse. Ordinarily, the fact of the making of the complaint, which will be dealt with through an independent process, should not have any effect on the proceedings.

If a judge is aware of a matter that may potentially give rise to an apprehension of bias prior to the commencement of a hearing, it will often be appropriate to notify the parties of that matter in advance of the hearing (where that is possible) and ask for the parties to indicate their position so as to minimise the risk of disruption to the hearing and potentially allow for its reallocation if a party takes what the judge considers to be a valid objection. Disqualification procedure is dealt with more fully at section 2.2.8 below.

2.2.1 Common situations of conflict of interest or apprehension of bias

Some common situations are mentioned in this chapter, but whether or not such situations in any particular factual context disclose a relevant conflict of interest, or may give rise to an apprehension of bias, may be the subject of different views.

2.2.2 Close relationships

A judge should not sit on a case in which they are in a close relationship with a party, or to the spouse or domestic partner of a party. Those in a close relationship with the judge include members of the judge's family, the judge's spouse or domestic partner, any other person with whom an intimate relationship exists or has existed, particularly close social relationships in which the judge and the other person consider themselves like family, or relationships where there is an ongoing close mentorship or other close association (such as where one is godparent to the child of the other).

Generally, where the judge is in a close relationship with counsel or the solicitor having the actual conduct of the case (including as instructing solicitor or junior counsel who is being led), or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship where the judge has sat without objection, but current community expectations make such conduct undesirable.

In most of these situations, the Bar Rules of each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge to disqualify themself should only arise infrequently.

There may be a justifiable exception:

- By reference to the principle of necessity (see section 2.2).
- Where a solicitor-relative is a partner (in a professional sense) or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case.
- Where, notwithstanding the relationship, the parties to the case consent to the judge sitting, but that may depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

Where a person who is in a close relationship with the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.

2.2.3 Social and professional associations

Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider whether to inform the parties of an acquaintanceship before the hearing begins.

The mere fact that a witness is personally well known to the judge may not of itself be a sufficient reason for disqualification of the judge. If, however, the credibility of the witness, as distinct from opinion, is known to be or likely to be in dispute, the judge should not sit.

Friendship or past professional association with counsel or a solicitor is not generally to be regarded as a sufficient reason for disqualification. However, all depends on the closeness of the relationship. For example, a particularly close social relationship might give rise to a reasonable apprehension of bias, and call for disqualification, or at least disclosure.

A current or recent business association with a party will usually mean that a judge should not sit on a case. For this purpose, a business association usually does not include associations such as insurer and insured, banker and customer, or rate payer and local government body. However, such associations might do so, depending on the circumstances.

Past professional association with a party as a client is not of itself a reason for disqualification, unless the judge has been involved in the subject matter of the litigation prior to appointment or unless the past association gives rise to some other good reason for disqualification.

If the judge has been involved in the subject matter of the litigation, the judge should not sit, but otherwise the decision to sit or not to sit may depend upon the extent of previous representation and when it occurred. It may be desirable to disclose the circumstances of such representation to the parties before deciding what to do. The nature and content of anything learned, or any views formed, bearing upon the credibility of the party may need to be considered.

A judge should not sit on a matter where there is an existing or recent commercial or business relationship between the judge and counsel or a solicitor in a matter.

A prior business association between a judge and a witness will not necessarily be a basis for disqualification of the judge, particularly if the association involved only an isolated transaction, but all of the circumstances should be carefully considered, and the prior association should be disclosed.

A judge should ordinarily not have a private conversation with a legal adviser or representative (counsel or solicitor) involved in a trial or substantive interlocutory application that the judge is hearing or has heard, until after the delivery of judgment, and the making of any final orders (see *Charisteas* [2021] HCA 29; 273 CLR 289). Incidental conversations at public events, where others are present, or professional meetings in the course of court administration, are generally not objectionable. This may require careful consideration where a judge is managing a case for some time on a “docket” or other case management list.

2.2.4 Public statements

If a judge is known to hold strong views on topics that are relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, or holds an extra-judicial office in an organisation (including a religious organisation) which holds or may have expressed such views, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties. In such a case, the judge will have to assess, and respond to, the risk of an appearance of bias. The risk is especially significant when a judge has taken part publicly in a controversial or political discussion. (Discussions of that nature concerning the administration of justice are dealt with as a separate matter in section 5.7.)

What a judge may have said in other cases by way of expression of legal opinion can seldom, if ever, be a ground for disqualification.

When a close member of a judge's family is engaged in politics or a religious organisation, the judge needs to bear in mind the possibility that, in some proceedings, that political activity or religious engagement might raise concerns about the judge's own impartiality and detachment in a particular case.

2.2.5 Current or commercial business activities

Business, professional and other commercial relationships have the capacity to cause a judge to have a potential interest in the outcome of litigation, and therefore to raise the question of possible disqualification. If a judge has a "not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation" (*Ebner* [2000] HCA 63; 205 CLR 337 at [58]), disqualification will ordinarily be necessary.

The circumstances requiring consideration are varied. A judge should consider any current commercial or business activities, although it is likely that they will be limited. A judge should also consider any such activities undertaken by close relatives. Although these are properly to be considered under the heading "close relationships" (section 2.2.2 above), a financial interest of a close relative might be regarded by an observer as equivalent to a financial interest on the part of the judge.

The relationships or associations that require consideration under this heading include relationships such as insurer and insured, banker and customer, local government body and ratepayer, or school and parent of a child attending that school. In some circumstances, such a relationship could give rise to a disqualifying interest in the outcome of litigation. The judge should consider any such relationship that arises on the facts.

The judge should also consider whether any such relationship might give rise to a conflict of interest because of an appearance of a predisposition in favour of or against the other party to the relationship. There is, for example, an obvious difference between the situation of the judge who is negotiating, say, the terms under which a bank will extend a significant overdraft, and that of a judge whose relations with a bank do not involve the bank doing anything more than honouring its obligations as a banker. Similarly, a judge who is a ratepayer and is also an objector to a rate assessment, or an objector to a planning application, will be in a different situation to a judge who is merely a ratepayer. A judge whose claim under an insurance policy is questioned by the insurer is in a different situation to a judge who is merely a policy holder or whose claim under the policy is quite uncontentious.

2.2.6 Shareholding in litigant companies, or companies associated with litigants

Relevant questions for the judge to consider are:

- Is the shareholding sufficiently large to enable the judicial or related shareholder to influence the decisions of the company?
- Is the value of the judicial or related shareholding likely to be affected by the outcome of the litigation?

But the ultimate issue is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

If the answer to either question is in the affirmative, it is clearly a case for self-disqualification, but if the answer to both questions is negative, the basis for disqualification is much less obvious. Nevertheless, it is important to make full disclosure to the parties before making a decision, although a failure to do so in some circumstances may not be critical.

The judge should disclose the fact of the shareholding in open court, thereby giving the parties an opportunity to make any submissions with respect to disqualification or otherwise.

It may be wise, but not obligatory, to limit the range of investment in public companies, to minimise the need for frequent disclosure. Shareholding in a public investment company or in managed funds may be a sensible alternative. The acquisition of shares in an incorporated legal practice, not publicly listed, is likely to give rise to significant problems, and is not acceptable. The acquisition of shares in a publicly listed incorporated legal practice is better avoided, because of the risk of conflict issues arising.

Judges should bear in mind that the management by others of a share portfolio or other investments will not necessarily avoid the need to consider questions of apprehended bias or interest. Judges therefore need to take reasonable steps to be aware of the nature of all investments in which they have an interest.

For a more comprehensive examination of the relevant principles with respect to judicial shareholding in litigant public companies as a sufficient reason for disqualification, see *Ebner* [2000] HCA 63; 205 CLR 337.

The application of these principles, and the making of a decision whenever issues of possible bias are raised, call for a good deal of care and common sense. It is useful to bear in mind the remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* [2000] HCA 63; 205 CLR 337 at [20]:

> *This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.*

2.2.7 Judicial involvement with community organisations

All community organisations, including those with charitable, religious, educational or sporting objects, may be involved in litigation. Questions similar to those posed with respect to judicial shareholdings and commercial relationships arise in a case in which the judge is involved with a litigant community organisation whether as a member or in another capacity i.e. is the judge able to influence decisions of the organisation; is the litigation likely to have an effect on the organisation that is involved? But even if a negative answer is given to those questions, disqualification may be the most prudent course to adopt where a relationship exists. There may be no significant conflict of interest, but a real risk of the appearance of bias by reason of the judge's empathy with the organisation.

2.2.8 Disqualification procedure

(a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity to minimise costs or delay attributable to disqualification, should that occur.

(b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:

  (i) the head of jurisdiction;

  (ii) the person in charge of listing; and

  (iii) the parties or their legal advisers,

  not necessarily personally, but using the court's usual methods of communication.

(c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.

(d) It may be appropriate for the judge to be informed by correspondence, or for the judge to inform the parties by correspondence, that a question of disqualification has arisen or may arise. Subject to that, the matter should be dealt with in open court.

A transcript of what is said in court should be taken. It will generally be appropriate for the judge to hear submissions from the parties.

(e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.

(f) If the judge decides to sit, the reasons for that decision should be recorded in open court, as should the disclosure of all relevant circumstances.

(g) Consent of the parties is relevant but not decisive in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.

(h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.

(i) The judge has a duty to try cases in the judge's list and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

(j) In the case of a disqualification application made to a member of a multi-member court, reference should be made to the statements in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; 279 CLR 148.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

2.2.9 Summary

In addition to these broadly stated guidelines there is a large volume of case law and academic writing that may assist the judge. In the end, the decision to sit or not to sit must rest comfortably with the judge's conscience.

2.3 Personal integrity

As noted earlier, appointment to judicial office entails some limitations on both public and private conduct. Subject to this recognition, judges are entitled to exercise the same rights and freedoms available to all citizens. It is in the public interest that judges participate in the life and affairs of the community, so that they remain in touch with the community. Judges need to keep these two considerations in mind in assessing whether their conduct in some particular respect is apt to diminish public confidence in, and respect for, the judicial office. Accepting that the effect of conduct on public confidence depends upon community standards, which may vary with time, there are some precepts which are not controversial as a guide to judicial behaviour:

- intellectual honesty;
- respect for the law and observance of the law (although a judge like any other citizen, through ignorance or error, may well commit a breach of a statutory regulation which will not necessarily reflect adversely on judicial integrity or competence);
- prudent management of financial affairs;
- diligence and care in the discharge of judicial duties; and
- discretion in personal relationships, social contacts and activities (including the use of social media).

It is the last of these precepts that is likely to cause the most difficulty in practice. As a general rule, it permits a judge to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a judge to strike a balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family. Judges must accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour that might be regarded as merely "unfortunate" if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

Some specific situations are addressed in Chapters 4, 5 and 6.

2.3.1 Workplace conduct, including harassment, sexual harassment and bullying

Judges must conform to the standard of conduct required by law and expected by the community. They must treat others, including judicial colleagues, with civility and respect in their public life, social life and working relationships. Judges have a responsibility to model respectful behaviour at all times and to confront poor behaviour in the workplace by others, including by other judges.

Judges must not engage in unlawful discrimination, victimisation, bullying or harassment, including sexual harassment. It is important that in all dealings with chambers and court staff, judges are mindful of the marked imbalances of power that exist. Conduct that in other circumstances might not amount to bullying or sexual harassment may cross the line when this imbalance is taken into account. Comments or questions about a staff member's private life or about their appearance may, in all the circumstances, amount to sexual harassment. So, too, may comments or jokes of a sexual nature made in the presence of a member of staff, even if not directed at them. There should be no expectation that a judge's staff will attend social functions or share private transport with the judge. The imbalance in power is such that it is inappropriate for a judge to engage in an apparently consensual sexual relationship with a member of chambers or court staff unless in a pre-existing long-term relationship.

Workplace bullying is conduct that a reasonable person would perceive in all the circumstances as belittling, humiliating, insulting, victimising, aggressive or intimidating. More subtle forms of conduct may amount to bullying, including the setting of unreasonable time frames for the completion of work or repeatedly requiring staff to work after hours, including on weekends. Bullying is to be distinguished from acceptable conduct, such as the reasonable allocation of work to staff, supervision and feedback on allocated work and other reasonable management action.

Taking into account the singular position of power occupied by the judge in their dealings with chambers and court staff, a single instance of conduct may amount to bullying or sexual harassment.

Judges set the standard of workplace conduct. A judge who becomes aware of instances or allegations of bullying, sexual harassment, or other unlawful, discriminatory or unethical conduct by a colleague should take steps to stop the conduct by calling it out and reporting the matter to the head of jurisdiction.

More generally, a judge should treat all court staff courteously and considerately. A judge should be mindful that court staff may feel unable to disagree with the judge. In dealing with senior court staff, a judge should respect the officer's responsibility for the efficient administration of the court and the proper use of court resources.

3 Professional Welfare, Judicial Education and Artificial Intelligence

Judges are expected to take reasonable measures to ensure that they are fit to discharge their duties in a competent and timely manner. Attention to psychological, as well as physical, health and a commitment to judicial education throughout a judge's career are important aspects of the personal integrity expected of those who accept appointment to judicial office.

3.1 Professional welfare

The psychological health of the Australian judiciary has been the subject of academic research in recent years. For instance, in 2021, a comprehensive study in Victoria was undertaken at the suggestion of the former Chief Judge of the County Court of Victoria who was concerned by the rate of attrition of judges in his Court. This study included analysis of in-depth interviews with 59 judges from courts at each level of the hierarchy as to their experience of psychological distress.[1] While the study found that judges experience high levels of job satisfaction and that their levels of depressive and anxiety symptoms are relatively low, it found growing evidence that judicial stress is a significant problem. The causes of stress were varied but prominent among them were workload, the distressing content of cases, public scrutiny (including ill-informed social media posts), and isolation. While magistrates and judges differed in the source of the stress, workload was an issue for almost everyone. So, too, was cultural resistance to the discussion of stress and to seeking support from colleagues. The impacts of stress were varied but included tiredness and irritability, resulting in impatience and terseness in court.

The judges who derived the most enjoyment from their role, categorised by the researchers as "judicial thrivers", were those who prioritised their own wellbeing by doing things such as engaging in physical exercise, leading balanced lives, taking leave throughout the year rather than letting it build up, and maintaining friendships. Accepting that the techniques for managing personal wellbeing are varied, it is critical that judges are mindful of their own psychological health and that they take steps to address symptoms of stress before it affects their capacity to perform their judicial duties.

A judge who is overwhelmed by their caseload needs to raise this concern with the head of jurisdiction before the problem affects their capacity to properly discharge their duties.

The resistance of judges to acknowledging that they are affected by stress needs to be overcome. Judges bear individual responsibility for fostering a collegial culture within their court. There should be no stigma attached to the open discussion of the pressures, including psychological pressures, of judicial work.

It will usually be appropriate to inform the head of jurisdiction if there is cause for concern about the welfare of a colleague. Depending on the circumstances, before doing so or as well as doing so, it would generally be appropriate to talk with and offer assistance to the colleague in question. The issue here is one of appropriate care and concern, not of legal responsibility.

3.2 Judicial education

Judges are expected to participate in educational programs that are appropriate to their judicial duties throughout their careers.[2] The expectation is reflected in Principle 6.3 of the *Bangalore Principles of Judicial Conduct*:

> *A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities which should be made available, under judicial control, to judges.*

1 Schrever, Hulbert, and Sourdin, 'The privilege and the pressure: judges' and magistrates' reflections on the sources and impacts of stress in judicial work' (2024) 31 *Psychiatry, Psychology and Law* 327.

2 National Judicial College of Australia, *National Standard of Professional Development for Australian Judicial Officers*.

Judges will be better able to maintain the high standards expected of them if they are provided with good quality educational programs, which help them maintain and improve their skills, respond to changes in society, maintain their health, and retain their enthusiasm for the administration of justice. They should take part in appropriate programs provided by bodies such as the National Judicial College of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria, and may benefit from programs and conferences that involve judges from other courts and jurisdictions and provide an opportunity for the wider discussion of common issues.

Judicial education serves a variety of functions, all of which contribute to ensuring that the judiciary maintains competence and that judges acquire the personal skills that are necessary to the discharge of judicial duties in a manner that demonstrates the commitment to the judicial oath. Courses on substantive and procedural law serve to keep experienced judges up-to-date with legislative and caselaw developments. These courses also recognise that the diversity of professional backgrounds means that newly appointed judges may not be familiar with the range of matters that fall within the jurisdiction of their court. No less important are courses that are designed to support judicial impartiality and its appearance. These include courses on social and cultural context, stereotyping, implicit bias and cognitive illusion training.

Research shows that the retention and retrieval of implicit bias training is short-lived, making it important that judges have access to and avail themselves of the opportunity to undertake these courses periodically throughout their careers.

While judges have an individual responsibility to pursue opportunities to improve their knowledge, skills and development of the personal qualities necessary for judicial office, they are entitled to expect that their court will support them by providing a reasonable time out of court for these purposes and subject to their other judicial obligations.

3.2.1 Avoidance of stereotypes

Judges should not make assumptions based on general characterisations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics.

Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. Such education should include learning about other cultures and communities that are different from the judge's own life experiences, to expand their knowledge and understanding.

3.2.2 Understanding social and cultural factors

Judges should strive to be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, skin colour, sex, religion, national origin, disability, age, marital status, sexual orientation, gender identity or expression, social and economic status and other like causes. Consciousness of social and cultural factors is desirable not just for the purpose of avoiding inadvertently giving offence, but also to ensure equality before the law, judicial impartiality, and the appearance of impartiality.

It is the duty of a judge to be free of bias or prejudice. A judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist the judge to be, and appear to be, impartial.

Aboriginal and Torres Strait Islander people occupy a unique place as Australia's First Peoples. The *Royal Commission into Aboriginal Deaths in Custody* recommended in its Final Report (April 1991, Recommendation 96) that judges acquaint themselves with contemporary Aboriginal and Torres Strait Islander society, customs and traditions, taking into account the historical and social factors that contribute to the continuing disadvantaged position of many Aboriginal and Torres Strait Islander people in the justice system.

The Australian Law Reform Commission (ALRC) in its 2022 report *Without Fear or Favour: Judicial Impartiality and the Law on Bias* emphasised the link between impartiality, the appearance of impartiality, and the need for cross-cultural education for judges. Recommendation 10 proposed the development of a structured program of cross-cultural judicial education developed and delivered by Aboriginal and Torres Strait Islander peoples and organisations. The recommendation, consistent with the Commission's terms of reference, was addressed to the federal judiciary, however it has evident application to judges in State and Territory courts. Judges should undertake judicial education programs that are designed and run by Aboriginal and Torres Strait Islander people whenever it is feasible to do so and seek out opportunities to engage with members of these communities.

Useful resources in this area include the New South Wales *Equality before the Law Bench Book*, the Queensland *Equal Treatment Bench Book*, the Western Australian *Equal Justice Bench Book*, the *National Bench Book on Aboriginal and Torres Strait Islander People and the Legal System* [due for release June 2026] and the *The Bugmy Bar Book*.

3.3 Artificial intelligence

Courts in the Australian jurisdictions have variously issued practice or guidance notes on the use of Generative AI by judges, parties, lawyers and expert witnesses, or are in the process of formulating guidance in this respect. Judges must follow the guidance issued in their respective jurisdictions.

Judges must not use Generative AI for judicial decision-making. The prohibition on AI use for judicial decision-making does not encompass supportive uses of AI. Judges should also encourage their personal staff to discuss their use of AI tools with the judge.

4 Conduct in Court

4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants and the general public in the ability, the integrity, the impartiality, and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, and tolerance. The entitlement of everyone who comes to court – counsel, litigants, experts and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind.

Bullying by the judge is unacceptable. In a case in which the judge considers a party's legal representative is poorly prepared, or inept in the presentation of the client's case, any criticism should not be couched in language that is belittling or sarcastic. Nor should the judge make baseless threats to report a legal representative to the regulator. If the judge reasonably considers that a legal practitioner's conduct discloses a prima facie case of professional misconduct or unsatisfactory professional conduct, it will generally be appropriate to defer the making of any complaint to the regulator until after the litigation is concluded.

Many complaints by litigants and their lawyers about judicial conduct have as their foundation remarks made by judges in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.

A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial. This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of bias or prejudice, including racial, sexual or religious bias or prejudice. As discussed in Chapter 3, judges should inform themselves on these matters so that they do not inadvertently cause offence.

A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceeding as if it was an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution should extend to all cases.

Judges will often need to exercise restraint in their expression of emotion as part of maintaining impartiality.

While on occasion judges may have an emotional response to the subject matter, the evidence or even the conduct of litigation, it is important that they avoid any display of emotion and strive to maintain a restrained, neutral demeanour. They should also instruct their associates or tipstaves to avoid any display of emotion in court.

4.1.1 Equality in proceedings

Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted by the hypothetical observer as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background, or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Judges should endeavour to use inclusive language in the conduct of proceedings and in their judgments. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial. By contrast, taking care to correctly pronounce the names of counsel, parties and witnesses demonstrates respect and the judge's desire to treat equally all participants in their courtroom.

Judges should be astute to make such reasonable adjustments as are within their power to ensure that people with a disability have an equal opportunity to participate in the proceedings whether as counsel, parties, witnesses or members of the public.

4.1.2 Participation in the trial

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the appropriate level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.

It is easy enough to state the broad indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides. None of this, however, debars the judge from asking questions of witnesses or counsel in order to gain a better understanding and eventual evaluation of the facts or submissions on issues of fact or law. A judge should avoid asking leading questions. It is good practice for a judge if wishing to embark on a series of questions on a particular topic to give counsel an opportunity to object to that course or to any particular question, and also to give counsel an opportunity to ask questions on the topic once the judge has finished.

At all times, it is the responsibility of the judge to ensure that proceedings are conducted with civility and respect. The Evidence Acts of each jurisdiction give the judge power to deal with improper or inappropriate questions in cross-examination. These include questions that are unduly (or in the case of the *Evidence Act 1929* (SA), inappropriately) offensive, oppressive or repetitive. The uniform Evidence Acts and the *Evidence Act 1977* (Qld) impose a *statutory duty* on the judge to disallow such questions. The duty applies whether or not an objection is raised to the question. A duty of this kind is also imposed under the *Evidence Act 1929* (SA). The *Evidence Act 1906* (WA) confers a statutory discretion on the judge to disallow such questions, reflecting the position at common law. Particularly in the conduct of proceedings involving allegations of sexual or other violence, the judge needs to be vigilant to ensure that the cross-examination of the complainant does not include improper or inappropriate questioning.

4.1.3 Private communications

The principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way is well known. The principle is referred to by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 (at 127) in a statement approved in *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342 by Gibbs CJ (at 346) and Mason J (at 350-351). An approach to a judge in chambers by the lawyers for one party should not be made without the presence of, or the knowledge and consent of, the lawyers for the other party. It is important to bear in mind that breaches of the principle can occur through oversight, sometimes when attempts are made to adopt what may seem to be practical, convenient, or time-saving measures. Care should be taken, for example, on country circuits if suggestions are made about shared travel that seem sensible at the time but may in fact involve a breach of the principle.

The frequent use of emails for communication between judges' chambers and lawyers or litigants, usually about listing arrangements, sitting times and other routine matters, means that often a lawyer or litigant will have an email address for a judge's staff and chambers. The use of this form of communication should not be allowed to obscure the principle just stated. Judges should ensure that their staff understand what is and is not permitted. Neither lawyers nor litigants should be permitted to seek guidance from the judge on practical or procedural points that arise, other than by joint approach or with the consent of the other parties. Nor should lawyers or litigants be permitted to advance arguments by email.

Prudence will sometimes dictate that dealings with a litigant in person should be conducted by a registry officer, not by a judge's staff.

4.1.4 Criminal trials before a jury

It is of particular importance in a jury trial that the nature or extent of judicial intervention in the course of evidence or argument does not convey to the jury a judicial view of guilt or innocence.

4.1.5 Revision of oral judgments

A judge may not alter the substance of reasons for decision given orally. That is the basic principle. Subject to that, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be corrected. References to cases may be added, as may be citations for cases referred to in the transcript.

4.1.6 Summing up to a jury

The transcript of a summing up to a jury is, like the transcript of evidence, intended to be a true record of what was said in court.

Apart from errors of spelling or punctuation which may alter the meaning if left uncorrected, there should be no change to the transcript of a summing up unless it does not correctly record what the judge actually said. Where time and opportunity permit, it is desirable for a judge to prepare written notes of the intended charge to the jury, particularly with respect to directions on the law, which may help to validate any proposed change to the transcript of the summing up. If the transcript is corrected, and a fresh transcript of the summing up incorporating the corrections is to be prepared, the original transcript should be retained on the court file.

4.1.7 Reserved judgment

A judge should aim to prepare and deliver a reserved judgment as soon as possible, but sometimes circumstances can lead to an unacceptable accumulation of reserved judgments. A judge should be mindful of the adverse impact on litigants, and others who have an interest in the resolution of the proceedings, of delay in delivering judgment, and of the erosion of public confidence in the administration of justice that delay can cause. Unacceptable delay may lead to complaints.

A judge who is beginning to accumulate reserved judgments should approach the head of jurisdiction to discuss the issue and its cause, and to raise the possibility of assistance for the judge in question. The matter should not be left until the number of judgments involved and the delay involved become significant concerns.

A judge who has difficulty with judgment writing should not hesitate to ask the head of jurisdiction to enrol the judge in one of the numerous judgment writing courses that are available.

4.1.8 Privacy considerations

The wider dissemination and availability of courts' decisions and judgments, including sentencing remarks, by publication on internet databases brings with it a responsibility to be cognisant of the privacy concerns of the participants in court proceedings (including parties, witnesses and their respective family members). Those concerns include the risk of identity theft. Judges should avoid including unnecessary personal identifiers in judgments and remarks (for example, dates of birth or addresses).

4.1.9 Critical comments

Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care with comments made in court (see section 4.1 above) and observations made in reasons for judgment or in remarks on sentence. The legitimate privacy interests of those involved in litigation and of third parties should also be borne in mind. As Gleeson CJ put it in his monograph '*Aspects of Judicial Performance*' published in *The Role of the Judge*, Education Monograph 3, Judicial Commission of New South Wales (2004) at 5:

> *The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.*

Judges exercising an appellate or review jurisdiction should approach the exercise of that function with similar considerations in mind. It is one thing to correct error but quite another to criticise unnecessarily or thoughtlessly the primary judge or tribunal.

4.1.10 The judge as a mediator

Some judges consider that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. The difference lies in the interaction of a mediator with counsel and parties, often in private – i.e. in the absence of opposing counsel or parties, which is seen to be incompatible with the way in which judicial duties should be performed, with the risk that public confidence in the judiciary may thereby be impaired.

In some courts, precedent or established practice are contrary to a serving judge acting as mediator. Views as to the permissibility of a judge of a federal court, subject to Chapter III of the Constitution, acting as a mediator, are divided. It should also be acknowledged that mediation can take differing forms.

In some courts, the Rules of Court with respect to mediation specifically recognise the appointment of a serving judge as a mediator.

The success of judicial mediation in those jurisdictions may justify the practice. The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.

5 Activities Outside the Courtroom

This chapter deals with specific examples of conduct or activities in which a judge might engage; as indicated in Chapter 1, it does not seek to be prescriptive. Opinions about such activities may vary but the cardinal test for each judge in considering what to do is conformity with the objective and principles dealt with in Chapter 1.

5.1 Non-judicial appointments by the Executive

It is not uncommon for the executive government, or even Parliament itself, in matters affecting the administration of justice generally, to want to use the expertise of judges for purposes other than in the exercise of their judicial duties. The fact that the High Court has held the conferral of certain non-judicial functions on judges to be invalid (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; 189 CLR 1) does not necessarily mean that any such request for extra-judicial advice or service must be refused. However, acceptance requires very careful consideration and appropriate safeguards so that the institutional integrity of the court is preserved (*South Australia v Totani* [2010] HCA 39; 242 CLR 1, *Wainohu v NSW* [2011] HCA 24; 243 CLR 181).

Principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and approval to approach the judge in question. The head of jurisdiction will consider the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court. The head of jurisdiction will consult with other members of the jurisdiction as may seem appropriate. If there is no objection in principle, the head of jurisdiction will consider whether the judge can be made available, and whether the first approach to the judge in question should be from the head of jurisdiction or from a representative of the executive government.

A judge who is approached directly by or on behalf of a member of the executive government should, without delay, raise the matter with the head of jurisdiction and should inform the person making the approach that the judge will do so.

It is inappropriate, subject to legislative provision, for a serving judge to accept payment other than reimbursement of expenses or an equivalent allowance, in connection with a non-judicial appointment.

5.2 Appointment to a non-judicial tribunal

The head of jurisdiction should be consulted about a proposed appointment to a non-judicial tribunal. If the appointment is made by a Minister or a government officer, the protocol outlined above should be observed.

There are a number of tribunals in respect of which there is statutory authority for judicial appointment, but in some other cases – particularly if decisions of the tribunal are likely to be controversial as in the case of some sporting disciplinary tribunals – the judge should weigh the risks of involvement and adverse publicity before accepting appointment. In the case of private or sporting tribunals, the judge should consider whether any apparent conferring of judicial authority on the tribunal is appropriate.

5.3 Membership of a government advisory body or committee

There is no simple answer to the question whether a judge should serve on a statutory or government body or committee.

It is generally not inappropriate for a judge to be a member of a committee dealing with matters having a direct relationship with judicial office such as court structures, law reform (but as to this, see section 5.5 below) or other legal issues, and there may be other cases in which it would be desirable in the public interest to have the benefit of a judge's expertise and experience on a government committee or advisory body. Much will depend upon the role and terms of reference of the committee or advisory body. But in weighing the options, a judge should remember that membership of a permanent body might involve advising on controversial issues, which may be inconsistent with the perceived impartiality and political neutrality of a judge.

5.4 Submissions or evidence to a Parliamentary inquiry relating to the law or the legal system

It may be appropriate for a judge to make a submission or give evidence at such an inquiry if care is taken to avoid confrontation or discussion of matters of a political rather than a legal nature but only after prior consultation with and the approval of the head of jurisdiction. Again, the expertise or experience of a judge may be of great assistance in the examination of issues relating to legal or procedural matters. As long as discretion is exercised, this should not detract from the independence of the judiciary from the legislative and executive branches of government.

5.5 A judge as a law reform commissioner

Judges have been appointed as part-time law reform commissioners at both the State and federal level on many occasions, although in some States it is thought that judges should not accept such an appointment. At the federal level, judges have been appointed as full-time commissioners to the Australian Law Reform Commission. In the case of part-time appointments, there need not be any conflict between the role of the commissioner and judge, provided that time spent in the work of the commission does not interfere with judicial duties, and the approval of the head of jurisdiction has been given.

As in situations dealt with already, the experience of a judge can be valuable in considering the need for reform in a particular area of the law, and in looking at the practical effect of proposed changes. This need not be in conflict with a judge's judicial duties or detract from judicial independence.

5.6 Membership of the Armed Forces

A number of judges continue to serve in the Armed Forces after appointment as a judge, in a legal capacity. Such service is contemplated by the *Defence Force Discipline Act 1982* (Cth). Nevertheless, a judge's primary responsibility is the administration of justice in the court to which the judge is appointed. Service in the Armed Forces should not involve commitments that detract from judicial service. Continued service in the Armed Forces after appointment should be undertaken only after consultation with the head of jurisdiction.

5.7 Public comment by judges

5.7.1 Participation in public debate

Many aspects of the administration of justice and of the functioning of the judiciary are the subject of public consideration and debate in the media, at public meetings and at meetings of a wide range of interest groups.

Appropriate judicial contribution to this consideration and debate is desirable. It may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings and to correct false impressions.

Considerable care should be exercised to avoid using the authority and status of judicial office for purposes for which they were not conferred. The place at which, or the occasion on which, a judge speaks may cause the public to associate the judge with a particular organisation, group or cause. Points to bear in mind when considering whether it is appropriate to contribute to public debate on any matter include the following:

- A judge must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice.
- There is a risk that the judge may express views or be led in the course of discussion to express views, that will give rise to issues of bias or prejudgment in cases that later come before the judge even in areas apparently unconnected with the original debate. A distinction might be drawn between opinions and comments on matters of law or legal principle, and the expression of opinions, stereotypes or other attitudes about issues or persons or causes that might come before the judge.
- Expressions of views on private occasions must also be considered carefully as they may lead to the perception of bias.
- Other judges may hold conflicting views, and may wish to respond accordingly, possibly giving rise to a public conflict between judges which may bring the judiciary into disrepute or could diminish the authority of a court.

If the matter is one that calls for a response on behalf of the judiciary of the Commonwealth, State, Territory or court collectively, that should come from the Chief Justice or relevant head of jurisdiction, or with that person's approval. Subject to that, and bearing in mind the points made above, care is called for before contributing to community debate using the judicial title, or when it will be known that the contribution is from a judge.

5.7.2 Judges explaining the legal system

Judges are often asked to speak to community groups and organisations. As long as the object is to improve community understanding of the administration of justice, such opportunities are to be welcomed. Of course, the precautions identified in section 5.7.1 should be borne in mind.

5.8 Writing for newspapers or periodicals; appearing on television or radio

There is no objection to judges writing for legal publications and identifying themselves by their title.

There is no objection to articles in newspapers or non-legal periodicals and contributions to other media intended to inform the public about the law and about the administration of justice generally. Before agreeing to write such an article, the judge should consult with the head of jurisdiction. If a judge writes a letter to a newspaper as a concerned citizen, they should not use their judicial title or in any way advert to their judicial office.

Occasionally a judge may be invited to contribute to public discussion on matters of general public interest. Such contributions might be written, by radio or by television. There is no objection in principle to this, but the precautions identified in section 5.7.1 should be considered. Contribution by radio or by television requires particular care. An invitation to participate in a radio "talk back" program or to appear on television should be discussed with the head of jurisdiction before any decision is made. "Talk back" radio and television require particular care. A court media officer should ensure that the "host" understands and will observe the limits on judicial participation and should be involved in the making of necessary arrangements.

If the subject matter might be controversial, the head of jurisdiction should be consulted. The judge should consider the risk of the judge's opinion being associated by others with the judge's office or court. Even when acting in a private capacity on a non-legal matter, a judge should take care about becoming embroiled in a public controversy.

5.9 Legal teaching

It is common for judges to lecture at law schools after they are appointed and to take part in Bar Association and Law Society professional development programs. As long as this does not interfere with judicial duties, there is an advantage in having a judge give lectures to students. On matters on which there may be differences of views, discretion will have to be exercised – particularly when the lecturer may later have to decide the question as a judge.

5.10 Books – prefaces and book launches

Legal textbooks frequently have prefaces or reviews written by judges and such an activity is unlikely to be open to any reasonable objection.

In writing a preface for, or agreeing to launch, a non-legal book, some care and discretion is called for. Both the subject matter of the work, and the relationship of the judge with the author, need to be weighed, in order to avoid any perception that the judge may be promoting a particular cause or taking a political stance, or that the author's reason for seeking to involve the judge might be more mercenary than personal.

A judge should be mindful of the possible significance of commenting on a book, and the possible association of the judge with the author's opinion on matters of law that might come before the judge.

Short laudatory "quotes" or comments on a dust jacket or soft cover have a distinctly commercial aspect and should be avoided insofar as this is within the judge's control.

5.11 Writing legal books

Judges also write and contribute to legal books. This is not controversial, and it is not wrong for a judge to receive payment for writing of this nature. As a practical matter these payments are unlikely to be large. Writing a book should not, of course, interfere with the performance of a judge's judicial duties.

5.12 Taking part in conferences

Judges may, and frequently do, deliver papers without a fee at legal conferences, organised by not-for-profit organisations.

Participation in, or giving a paper, without a fee at non-legal conferences, organised by not-for-profit organisations, is not objectionable. It is advisable to avoid speaking or writing on controversial or politically sensitive topics. A judge who is asked to speak at a non-legal conference should make sure that there is no risk of the judge appearing to be associated with the organisers or others who share the platform with the judge, if such association may be controversial.

It may be inappropriate for a judge to give a paper at a conference organised by commercial organisations, as opposed to a not-for-profit organisation.

5.13 Social media

Social media is used widely, including by judges, their families and the courts in which judges work. There is no reason in principle to deny judges the use of social media. But a judge should be aware of the risks that go with its use and act with care in light of them. At all times, a judge must act in a manner that promotes public confidence in judicial impartiality, independence and integrity.

Accordingly, a judge should consider the content of any interaction using social media, the possible dissemination of the content without the knowledge of the judge, and the possible disclosure of the judge's connection with the material. The only safe course is to assume that material which the judge creates or receives, or with which the judge comes into contact, may become public without the judge knowing and contrary to the judge's wishes. The fact that a judge has accessed material can itself become public, even though the judge accessed the material anonymously. Material may be disseminated widely, and again without the judge's knowledge. Once disseminated, it may prove impossible to remove the material from the sites to which it has been disseminated.

A judge must also be mindful of the persons with whom the judge has a connection through the use of social media. An established connection between the judge and an individual, or between the judge and a lawyer, might be problematic if the person or lawyer comes before the judge. It may be difficult for a judge to keep track of all of the persons with whom the judge has had contact or connection using electronic media, but the record of that contact will always exist. To an outsider, the contact may seem significant, even though the judge has no memory of it.

A judge should do all that is practical in the circumstances to take care who sees what the judge disseminates. A judge should be mindful that one cannot rely completely on privacy settings because these may change. A judge should use the highest privacy setting available. But the operation of such settings may be affected by the controller or manager of the social media platform used, and the judge may be unaware that in this way the privacy setting has been effectively altered. The use of a privacy setting does not prevent others from sharing material posted by a judge and so does not prevent dissemination by and to others. A judge might create a social media page that does not contain the judge's name or photograph. Despite such an attempt at anonymity, the public might learn that the judge is the author of the page.

A judge should give careful consideration to the content of material disseminated through social media. The considerations here are much the same as apply to any communication by a judge. There are a variety of ways in which the content of a communication might appear to compromise the judge's impartiality, independence or integrity. A judge cannot be certain how far, or to whom, the content created by the judge may be distributed. The "practical permanence" of material disseminated through social media means that casual remarks or embarrassing comments are at risk of exposure long after they have been forgotten by the judge. Comments by a judge relating to litigation or litigants before the judge, or to lawyers before the judge, should be avoided. Generally, a judge should not use social media to disseminate material that would embarrass the judge if it became public.

6 Activities Unrelated to Judicial Office

This chapter poses, in no particular order of importance, questions that a judge may have to answer in relation to activities that are unrelated to their judicial office. Any answer must be within the framework of the objective of judicial legitimacy and guiding principles discussed in Chapter 1.

6.1 Cessation of other roles upon appointment

Care needs to be taken to relinquish inconsistent offices and work upon appointment. In some jurisdictions, the appointment takes effect immediately and is publicly announced at the same time. In such instances, even if some time may elapse before actually commencing judicial duty, the appointee, now a judge, obviously cannot continue to act as counsel or solicitor in any matter.

When an appointment is made but is to take effect from a later date questions sometimes arise about the desirability of the appointee appearing as counsel after the announcement of the appointment, but before it takes effect. It is generally accepted that, during this period, an appointee should not appear as counsel in the court to which he or she has been appointed or in a lower court or tribunal in the same hierarchy. Apart from any other objection, appearance as counsel might give rise to a perception that an unfair or improper advantage is being taken of the standing of the judicial office that the appointee is about to hold.

Appearances in a higher court or in a court or tribunal in another hierarchy may not give rise to the same undesirable perceptions but many would still see this as best avoided. There can, however, be no hard and fast rule and there may be instances – such as when a client would be seriously prejudiced if the brief were returned – when the better course may be to retain the brief. The circumstances can vary greatly, and it would always be prudent for the appointee first to consult with the head of jurisdiction or another senior colleague. Some of the issues are discussed in *Expectation Pty Ltd v PRD Realty Pty Ltd (No 2)* [2006] FCA 392; 151 FCR 160.

6.2 Commercial activities

The permissible scope of involvement in any commercial enterprise concurrently with judicial office is limited by a number of factors:

- The timely discharge of judicial duties must take priority over any non-judicial activity.
- The benefits of office, including pensions (where applicable) or superannuation, should give a comfortable level of financial security for life to obviate the need to augment earnings by activities that might generate a conflict of interest or otherwise pose a potential threat to public confidence.
- Directorships of public companies should be resigned on appointment and not accepted while in judicial office.

It is not possible to be definitive about the commercial activities that are appropriate and inappropriate. The judge should consider how the judge's involvement (whatever it is) might reflect on judicial office. Any activity that will, or might, involve the judge in unlawful activity, obviously should be avoided. A commercial activity that might give rise to public controversy is undesirable. The issue is one on which consultation with colleagues may be helpful.

Some activities may be seen as inappropriate for a judge, simply because of the nature of the activity. Difficult assessments may have to be made. Attitudes can change over time. A judge who lives or works in a small community may face difficulties that those in larger communities do not because of the "practical invisibility" that a larger community may confer on a judge residing or working in it.

A judge should not engage in any financial or business dealing that might reasonably be perceived to exploit the judge's judicial position, or that will involve the judge in frequent transactions or business relationships with persons likely to come before the judge in court.

The judge should be scrupulous to avoid any use of court resources or facilities in connection with commercial activity by the judge.

Some small-scale non-judicial activities that might be perceived as commercial are quite common and not objectionable, particularly if they are primarily recreational. Examples (and there are many others) are:

- Hobby farms and other agricultural enterprises.
- Larger managed enterprises that do not require “hands on” responsibility.
- Directorship of small family companies.

6.3 Judges as executors or trustees

The management of deceased estates for close family members, whether as executor or trustee, is unobjectionable, and may be acceptable even for other relatives or friends if the administration is not complex, time consuming or contentious. If, however, a judge anticipates that the administration of the estate may be contentious and has the potential to lead to litigation, it is preferable to decline the invitation to accept the office if the Court of which the judge is a member has jurisdiction to administer estates. If a dispute over an estate of which a judge is an executor becomes litigious, an interstate judge may be required to resolve it if the conduct of the judge as an executor is the subject of a complaint (however unreasonable).

The risks associated with the office of trustee, even of a family trust, should not be overlooked. Beneficiaries are not always happy with management or discretionary decisions taken by a trustee, and a judge would be wise to weigh such factors before accepting the office.

6.4 Acceptance of gifts

It is necessary to draw a distinction between accepting gifts in a personal capacity unrelated to judicial office, e.g. from family or close friends, and gifts which in some way relate, or might appear to relate, to judicial office. It is only in the latter category that acceptance of gifts or other benefits needs careful consideration.

Some such gifts are unobjectionable: for example, a small gift such as a bottle of wine or a book by way of thanks for making a speech or otherwise participating in a public or private function. Some benefits which may well be legitimate marketing or promotional activities may cause difficulties. Refusal of such a benefit may seem churlish or even offensive if it imputes or implies improper motives, but the short answer is that there is no good reason why judges should receive benefits that others have to pay for. It is common for visiting overseas judges to give a gift to the judge or judges hosting the delegation. In such cases, the gift should be accepted but if it is of significant monetary value, it should be retained by the court and not the judge.

It is axiomatic that judges must not exploit the status and prestige of judicial office to solicit or obtain personal favours or benefits.

Judges should be wary about accepting any gift or benefit or hospitality that might be interpreted by others as an attempt to woo judicial goodwill or favours. Gifts or other benefits from practising members of the legal profession may fall into that category.

6.5 Engagement in public and community organisations

Prior to their appointment, many judges have been actively engaged in community organisations, particularly but not exclusively educational, charitable and religious organisations. Such engagement as a judge is to be encouraged and carries a broad-based public benefit, provided it does not compromise judicial independence or put at risk the status or integrity of judicial office. It is the proviso that helps to define the limits, namely:

- Such activities should not be too numerous or time consuming.
- The judicial role should not involve active business management.
- The extent to which the organisation is subject to government control or intervention must be weighed.

The governing bodies of universities, public or large private hospital boards or other public institutions invite special attention. Although the management and funding structures of such organisations are complex and are often the subject of public debate and political controversy, many judges, present and past, hold or have held high office in such organisations without embarrassment by regulating the nature or extent of personal involvement in contentious situations.

Any pre-existing positions should be reviewed at the time of appointment as a judge.

A judge considering taking up a new appointment or continuing a pre-existing appointment should consult the relevant head of jurisdiction.

The following matters may warrant consideration when considering accepting a proposed appointment or continuing a pre-existing appointment:

- The risk of the organisation becoming involved in disputes, particularly disputes with a political aspect, with the executive government.
- The risk of the organisation failing to comply with legislation binding it.
- The risk of the organisation getting into financial difficulty.
- The risk of the organisation being sued including the risk that board members may be sued independently for matters such as unfair dismissal or in relation to board decisions made in relation to matters such as complaints of sexual harassment or as having some vicarious liability.

The role of many such public institutions is changing. They are often encouraged to be more entrepreneurial. Commercial activities and industrial issues or disputes are likely to appear on their agendas. The more that the business of their governing bodies comes to resemble that of the board of directors of a public company, the less appropriate judicial participation may be. There is, however, no embargo on such an activity. It is for the individual judge to weigh the "pros and cons" by reference to the suggested guidelines.

Experience demonstrates that, for various reasons, the management of bodies and institutions that deal with children or other vulnerable members of society can give rise to difficult and controversial issues relating to the responsibility of the relevant board or council if something goes wrong. A judge should give careful consideration to the issue of risk and risk management before accepting a board or council appointment of this type.

Any conflict of interest in a litigious situation must of course be declared.

6.6 Public fundraising

Organisations of the kind referred to in the preceding paragraphs are often engaged in public fundraising.

A judge should avoid any involvement in fundraising that might create a perception that use is being made, or advantage taken, of the judicial office. A judge should be especially careful to avoid creating such a perception in the minds of actual or potential litigants or witnesses before the judge's court. Publication of the name of a judge as a subscriber or donor is not itself objectionable, but many judges may prefer anonymity. It is a matter of personal taste.

6.7 Character and other references

Judges should generally not, in that capacity, provide character or similar references for any purpose, save for:

- personal staff of the judge including, for example, associates and former associates, personal assistants and secretarial staff; or
- officers of an organisation or division of which the judge, in that capacity, is or was the chair or head.

Where a judge, in their private capacity, wishes to provide a character or similar reference for a person this should be done using a private letterhead, not a judicial letterhead.

Judges should not give character evidence in court.

If in doubt about a request to provide character or similar references, the judge should consult the head of jurisdiction.

6.8 Use of the judicial title

Although there should be no need for a judge to conceal the fact that he or she is a judge, care should be taken not to create an impression that a judge's name, title or status is being used to suggest in some way that preferential treatment might be desired or that the status of the office is being used to seek some advantage, whether for the judge or for someone else.

6.9 Use of judicial letterhead

Judges should avoid the use of judicial letterhead in correspondence unrelated to their official duties in circumstances where the use of the letterhead might be taken to suggest a request for, or expectation of, some form of preferential treatment. To take an obvious example, if a judge were to write a letter complaining to a service company about a defective repair job, it would be wrong to use a judicial letterhead. Similarly, if a judge had a disputed claim on an insurance policy, it would be unwise to use a judicial letterhead even though it may very well be a fact that the insurance company knows that the insured is a judge. It is, however, customary and proper for a judicial letterhead to be used for some private purposes connected with a judge's office, such as writing or responding to notes sent on the occasion of a friend's appointment or retirement from the bench.

A judge should be mindful that email correspondence from a judicial email address might identify the writer as a judge, and in that way is equivalent to using the judicial letterhead.

6.10 Protection of personal interests

Judges should be circumspect about becoming involved in personal litigation, even if the litigation is in another court. Good sense must prevail and although this does not mean that a judge should abandon the legitimate pursuit or defence of private interests, their protection needs to be conducted with great caution to avoid creating any impression that the judge is taking improper advantage of his or her position. The judge should consider also the possibility of an adverse finding, and the impact of that if it occurs.

6.11 Social and recreational activities

There is such a wide range of social and recreational activities in which a judge may wish to engage that it is not possible to do more than suggest some guidelines.

Judges should themselves assess whether the community may regard a judge's participation in certain activities as inappropriate. In cases of doubt, it is better to err on the side of caution, and judges generally will be anxious and careful to guard their own reputation. A brief reference, which is far from exhaustive, to some "grey" areas may help judges to make their own decision with respect to those and other activities.

6.11.1 Social contact with the profession

There is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. And judges, whether drawn from the ranks of the bar or solicitors' practice, commonly attend Law Society and Bar Association functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge. A similar test should be applied in cases of private entertainment. It is inappropriate for a judge to approach a party enquiring whether that party has any objection to private entertainment of the judge by another party. This is likely to be seen as putting the party of whom the request is made in the awkward position of being expected to agree that there is no objection.

Circuit courts, however, may pose some difficulties. It is common for members of the legal profession in country areas to entertain the judge, either in a group or in private homes. The judge in accepting or offering hospitality must be and be seen to be even-handed towards legal practitioners engaged in the current sittings. The judge should not be regularly entertained by or retain too close a relationship with a practitioner who regularly has litigation before the court.

Similarly, in country sittings involving criminal cases, care must be taken not to accept assistance outside the court from police who might be appearing in cases in the sittings. Some judges consider that they should not rely on the police to supply transport to and from the courthouse in order that it might not be thought that the judge is siding with those regarded as representing the prosecution.

Socialising and friendships in a small community can create particular problems for judges who reside there. It is important to avoid being seen as favouring individuals or organisations that are likely to appear before the judge.

6.11.2 Membership of clubs

A judge cannot be a member of a club or society that engages in unlawful discrimination.

Societies and clubs that permit only male or female members have a long history. Some such clubs have arisen in response to the exclusion of females from membership of certain clubs.

Many judges consider that it is invidious to be a member of a club that will not accept as a member fellow judicial colleagues. A number of courts and judges will not hold functions at such clubs. In making a decision about membership, a judge should be mindful of the message that sends to judicial colleagues and to the public.

6.11.3 Visits to bars and clubs; gambling

This is also a matter for the individual judge. A judge should give very careful thought to the perceptions that might arise from, for example, the reputation of the venue, the persons likely to be present, and any possibility that the premises are conducted otherwise than in accordance with law.

6.11.4 Sporting and other club committees

There is in general no objection to a judge serving on such committees so long as they do not make unreasonable demands on a judge's time. Some judges consider that a judge should not sit on a committee exercising disciplinary powers.

7 Post-Judicial Activities

The conduct of former judges may affect perceptions of the independence, impartiality and integrity of the judiciary. Former judges should be careful not to conduct themselves in a manner which may reasonably be seen as incompatible with the objective of judicial legitimacy. The purpose of this chapter is to give guidance to serving judges who are contemplating or planning for their retirement and former judges about their post-judicial work and activities. Subject to this caution, former judges should be free to work and contribute to society making use of their qualifications, skills and experience.

7.1 Before retirement

It is inappropriate for a serving judge to engage in any negotiations or enter any agreements in relation to post-judicial work. Irrespective of the nature of the work, such negotiations or entry into any agreement whilst the judge remains in judicial office may reasonably be perceived to be incompatible with maintenance of public confidence in the administration of justice.

7.2 Legal work and related work

Conduct rules, whether made under legislation, or otherwise adopted, exclude a former judge from appearing before the court of which the former judge was a member or before courts or tribunals from which appeals lie to the court of which the former judge was a member for periods of between two and five years.

These legislative restrictions are, and should be seen as, minimum standards only. The appearance of a former judge before a court of which the former judge was a member or before courts or tribunals from which appeals lie to the court of which the former judge was a member, even after a period of years, even as long as five or more, may still reasonably be perceived to be incompatible with the maintenance of public confidence in the administration of justice. This is particularly so where the former judge's judicial colleagues remain as judges and where the proceedings may involve consideration of any judgment of the former judge.

There is, however, a view, strongly held by some, that a superior court judge should not resume or take up practice at the Bar and should not appear in any superior court or the High Court. If notwithstanding this view, a retired superior court judge proposes to appear in a superior court other than the one of which the judge was a member, they should consider whether involvement in the case in question is inconsistent with maintaining public confidence in the administration of justice.

Judicial legitimacy is not considered to be inconsistent with former judges acting as mediators or arbitrators. But in approaching this work, former judges should still take into account considerations such as whether the mediation relates to a dispute before the court of which the former judge was a member.

The following principles can be seen to apply to legal and related work by a former judge to safeguard judicial legitimacy. It should be recognised that it is not possible to define or exhaustively list those activities which will compromise it. How a former judge holds themself out may undermine public confidence because of all the circumstances and their context. At all times the former judge should reflect upon the proper administration of justice and public confidence in the independence, impartiality and integrity of the judiciary and how the proposed conduct might reasonably reflect upon those matters.

- A former judge who is appointed as an acting judge, or whilst engaged as a reserve or auxiliary judge, should not undertake any legal or related work, independent of their duties as an acting, reserve or auxiliary judge, that involves arbitration or mediation or other activity that involves dealing commercially with firms of solicitors for financial reward.
- A former judge should not:

    1) appear before the court of which the former judge was a member, or before a court or tribunal in a class of matter from which an appeal lies to the court of which the former judge was a member in respect of that class of matter;

2) act as the solicitor on the record or be part of the legal team representing a party in any proceeding in the court of which the former judge was a member or before a court or tribunal in a class of matter from which an appeal lies to the court of which the former judge was a member in respect of that class of matter. It follows that a former judge should not draft or sign written submissions to be used in court in such a case;

3) advise in any matter which is before a court of which the former judge was a member (or may reasonably be expected to come before that court) or upon a decision of the former judge; or

4) whether or not requiring a practising certificate, provide any litigation related advice or service, other than arbitration, mediation or other dispute resolution services to all parties, in respect of proceedings in the court of which the former judge was a member, or before a court or tribunal in a class of matter from which an appeal lies to the court of which the former judge was a member in respect of that class of matter,

other than, if the former judge was a member of a court for less than 10 years, after the expiry of a period equivalent to the period during which the former judge was a member of the court.

- A former judge should not appear in a court or tribunal, or act as the solicitor on the record, in any proceeding in which a judgment of the former judge is relevant. Nor should a former judge draft or sign written submissions to be used in court in such a case.
- A former judge should not provide advice where it is reasonably likely the advice may be disclosed in any proceeding before the court of which the former judge was a member or before a court or tribunal in respect of that class of matter from which an appeal lies to the court of which the former judge was a member in respect of that class of matter.
- A former judge should not provide any advice on any matter involving a proceeding, judgment or order of the court in which the former judge was involved as a judge.
- A former judge should not appear as a legal representative for any party before any quasi-judicial or administrative body, such as an arbitrator, Royal Commission, commission of inquiry or public inquiry unless the former judge is satisfied that the appearance is not incompatible with maintenance of public confidence in the administration of justice or reasonably able to be perceived to be incompatible with public confidence in the independence, impartiality and integrity of the quasi-judicial or administrative body.
- A former judge should not undertake any work without a practising certificate if it is reasonably arguable that the work requires a practising certificate.
- A former judge should not publicly comment on proceedings which were before the former judge in any manner which is reasonably able to be perceived to be incompatible with public confidence in the administration of justice. Comments for educational, law reform and academic purposes will not generally be so perceived.
- A former judge should not publicly comment on matters which might be reasonably perceived to be incompatible with maintenance of public confidence in the administration of justice.
- A former judge should carefully consider if any other legal work or related work is not reasonably able to be perceived to be compatible with the maintenance of public confidence in the administration of justice.
- A former judge should not promote or market themself in a manner which may be perceived to be trading on their status and reputation as a former judge with privileged access to knowledge of and contacts within the justice system, or in a manner which through its tone or content inappropriately dwells upon or highlights the former judge's position in the Court. Nor should a former judge agree to their employer doing so. Merely to state that a person is a former judge in a resume or on a barrister's or solicitor's website would not contravene this principle.

7.3 Commercial activities

It is permissible to engage in commercial activities. However, a former judge should consider whether their activities might harm the standing of the judiciary, because of a continuing association in the public mind with that institution.

7.4 Political activity

The restraints that prevent a serving judge from having any involvement in politics cease to apply on retirement but, as with commercial activity, the former judge should consider whether the particular activity undertaken might reflect adversely on the judiciary, because the public might continue to associate the former judge with that institution.

7.5 Participation in public debate

A former judge has the same freedom as an ordinary citizen to engage in public debate, and in many cases is well qualified to do so, particularly in matters touching the administration of justice generally. A former judge should, however, consider whether a contribution to public debate is appropriately identified as coming from a former judge.

7.6 Community and social activities

A former judge has the freedom of any citizen to engage in chosen recreational and other community and social activities untroubled by the risks of a conflict of interest or perception of bias which have to be weighed by a serving judge, as earlier discussed.

Even in retirement, however, a former judge may still be regarded by the general public as a representative of the judiciary, and any activity that might tarnish the reputation of the judiciary should be avoided.

8 Family and Relatives

As noted, the principles identified in the Guide are the basis for, and a guide to resolution of, issues involving the family and relatives of a judge.

Issues involving a judge's relatives, especially close relatives, can give rise to particularly difficult questions. A judge must accept the restraints that flow from the principles identified in the Guide. The relatives of a judge need not. They are entitled to pursue their own careers and businesses, and to lead their own lives. There are likely to be situations in which the activities or careers of relatives attract consideration of the principles identified in the Guide, because the situation presents an issue under the Guide which the judge must address. So, the fact that a family member is a judge, subject to certain restraints, can cause difficulty from time to time.

If a judge's spouse or partner is involved in a business, or is employed in a commercial activity, can the judge participate in, and support them in, social and other like functions that the spouse or partner will attend, linked to their employment? Are there events or activities involving the judge's spouse or partner that the judge should decline to attend? Can a judge be involved in events, such as fundraising events at the judge's children's school? Can a judge discuss the details of judicial work, and frustrations that the judge might feel, with the judge's immediate family, as a judge might with a trusted colleague? If a judge's spouse, partner or child is a politician, can the judge help out in any way with political activities? If a family member owns or manages a shop, can the judge help in the shop on a weekend? What should a judge do if the judge's child is attending a party at which the judge suspects that alcohol will be provided to teenagers? Examples of these "family issues" can be multiplied.

The response by a judge to such matters will depend on the particular circumstances. Matters affecting a spouse's or partner's career or appointment will, for example, call for consideration of public attitudes or perceptions, the kind of activity the spouse or partner engages in, and the other persons present or participating. Matters involving children are likely to turn on the age of the children, their ability to observe confidentiality, and whether they still reside with the judge. These are examples only.

In the end, each situation must be resolved by the judge applying the principles identified in the Guide. A central issue will always be whether and how the situation might reflect adversely on the judge or the judiciary or might diminish public confidence in them. But just as a judge should not retreat from society, nor should a judge retreat from normal family life. On occasions, the principles in the Guide will prevent a judge from engaging in some aspects of family life. But the principles operate on the basis that, as far as practicable, a judge can engage in normal family life.

There is another aspect to this. Rightly or wrongly, fairly or unfairly, some people will expect a higher standard of conduct from members of a judge's family, simply because they are related to a judge. They may treat poor conduct by a family member as reflecting adversely on the judge, even though the judge may have had no ability to prevent what occurred. Some will treat things said by family members as reflecting the judge's opinion, or as reflecting things the judge may have said within the family circle. In situations like this, the judge's conduct is not in issue. The difficulty, if there is one, arises from the fact that members of a judge's family may be treated or assessed differently from the manner in which other members of the community are assessed or treated.

On appointment, a judge might find it helpful to explain to family members how and why the judge is now subject to a number of restraints that might affect the judge's participation in family life. Likewise, when an issue arises that has, or is likely to have, an impact on family life. A judge might also explain that sometimes people will judge members of the judge's family more critically because they are a member of a judge's family, just as they will assess the conduct of a judge, even in a family setting.

Family members of a judge may also need to be alerted to their use of social media, particularly in relation to their discussion of, or comment about, cases coming before the judge. A judge might be quite unaware of a family member's use of social media. But members of the public may assume that material emanating from a member of a judge's family or from court staff is attributable to the judge or reflects the judge's views. Like a judge, members of the judge's family should be alert to the possibility of a connection through social media with someone involved in a case before the judge. If this arises, the family member should inform the judge, so that the judge can consider whether any action needs to be taken, and if so, what action is appropriate. Judges and their families need to be aware of the possibility in any situation of the presence of a camera and of its use to take pictures of and record sound at public or private functions and events.

On appointment, a judge should consider whether it is desirable for family members to take particular security measures (such as when answering the telephone or opening the front door). The need for such measures will depend on the nature of the jurisdiction exercised by the judge's court.

Appendix A

Books/Journal Articles/Book Chapter

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