What the Fair Minded Observer Really Thinks About Judicial Impartiality

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Abstract

This article presents the results of an empirical study designed to assess the degree of convergence and divergence between public opinion and the fictional *Fair Minded Observer* ('FMO') used to determine whether a judge ought to be disqualified on the grounds of possible bias. As part of the test for apparent bias, judges have to imagine whether an FMO would see a risk of bias on the part of the judge. Although the courts have never definitively stated whether the FMO is meant to represent an ideal or average member of the public, to the extent that the FMO is partly meant to reflect public perception, the obvious weakness in the test is that no one has tested public attitudes to the risk of judicial bias specifically. In our study, we conducted nationally representative public surveys in both the UK and Australia, asking respondents what they think about different situations of possible bias (N=2064). Our results, in the form of descriptive statistics, indicate that a gap exists between the FMO created by the courts and public opinion in both the UK and Australia. This gap extends across a number of areas thought to give rise to possible bias, including financial interests and relationships and the risk of prejudgement, as well as fact patterns based on leading cases. There are methodological limitations in nationally representative opinion surveys, which make it difficult to measure *informed* and *reasonable* public opinion. While further research would be desirable, if the law of bias continues to be partly framed around the need to maintain public confidence in the legal system, law and policy makers will need to take some account of the results of studies such as this one.

Introduction

There are few rights considered more fundamental than the right to an independent and impartial tribunal. Everyone has a right to an independent and impartial judge in the determination of their civil rights and obligations or a criminal charge against them.[1] Confidence in judicial decisions, and indeed respect for the laws that judges enforce, depends on people's confidence that the judge hearing a case decided it fairly, free from biases for or against any of the parties. The famous quote of Lord Hewart CJ reflecting this principle has now become a maxim: justice must be done, and it must be seen to be done.[2] Giving effect to the perception principle in practice, however, is a formidable task. As part of the legal test for bias, the courts have created a fictional fair minded observer (the FMO). The FMO is designed to ensure that decisions on judicial disqualification reflect the views of lay observers rather than judicial or legal insiders. If the FMO would apprehend that there was a real possibility

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[1] See, for example, European Convention on Human Rights and Fundamental Freedoms [ECHR], opened for signature 4 November 1950, 213 UNTS 221, ETS 5 (entered into force 3 September 1953) art 6.

[2] *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256.

that a judge may be biased, even subconsciously, the judge is disqualified from hearing the case.

While no one can say definitively whether the law of bias and public perception are in alignment or not, a number of scholars have raised concerns that the FMO bears no resemblance to an average member of the public or reasonably reflects general public opinion.[3] The levels of knowledge and angelic like attributes attributed to the FMO renders them less like a fictional member of the public and more like an ideal role model. There has also been no serious empirical effort to find out what the public – be they average or fair and informed – actually thinks about judicial bias. There are studies examining public attitudes towards the legal system including public trust in the legal system, the legitimacy of the judiciary, and more,[4] but public opinion about when judges should and should not disqualify themselves for possible bias remains unknown.[5] In this paper we seek to make some modest inroads into this knowledge deficit.[6] We did this by conducting two nationally representative online surveys of UK and Australian residents. We selected these two countries for largely practical reasons[7] and because of the historical, cultural and legal ties between the two countries and the similarities in the law of bias in their respective jurisdictions. For these reasons we considered the UK and Australia would be suitable countries for the purposes of comparative research.[8] It turned out that the views of UK and Australian respondents were strikingly similar across all scenarios asked about in our survey.

We asked respondents about a range of scenarios in which allegations of potential bias might be, or have been, raised, as a well as fact scenarios considered in some of the leading UK and Australian cases. The principal headline finding of our study is that the public think judges should be disqualified from hearing cases much more often than the law of apprehended bias presently requires. In cases involving shared characteristics or beliefs between the judge and

[3] See eg S. Atril, "Who is the 'Fair-Minded and Informed Observer'? Bias after *Magill*" (2003) 62 C.L.J. 279; A.A. Olowofoyeku, "Bias and the Informed Observer: A Call for a Return to Gough" (2009) 68 C.L.J. 388; M. Groves, "The Rule against Bias" (2009) 39 H.K.L.J. 485

[4] See e.g., D.B. Rottman and T.R. Tyler, 'Thinking about Judges and Judicial Performance: Perspective of the Public and Court Users' (2014) 4(5) Oñati Socio-legal Series 1046 (discussing findings from the US); H.G. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) (discussing findings from England).

[5] As far back as 1987 John Leubsdorf observed that no one had ever conducted a poll of public attitudes to judicial bias: J. Leubsdorf, 'Theories of Judging and Judge Disqualification' (1987) 62 NYU L.Rev. 237, 281. As far as we are aware, no one has conducted any survey since Leubsdorf's article either.

[6] For a somewhat similar proposal to use surveys and experiments to interpret the language of contracts see: O. Ben-Shahar and L.J Strahilevitz, 'Interpreting Contracts via Surveys and Experiments' 92 *NYUL Rev* 1753 (2017).

[7] We are respectively based in UK and Australian universities, both us have lived and worked in both countries, and we have a strong familiarity with the law of bias in both jurisdictions.

[8] There are some differences in the Constitutional frameworks that mean they are not perfect comparators. For example, federal judges in Australia are granted tenure under section 72 of the Constitution, and although it is possible to appoint acting judges to the State Courts the practice is rare, and if adopted extensively, would be susceptible to Constitutional challenge. For instance, in *Forge v Australian Securities and Investments Commission* [2006] HCA 46 Gummow, Hayne and Crennan JJ stated at [47]: '[T]he appointment of a legal practitioner to act as a judge for a temporary period, in the expectation that that person would, at the end of appointment, return to active practice, may well present more substantial [constitutional] issues. The difficulty of those issues would be intensified if it were to appear that the use of such persons as acting judges were to become so frequent and pervasive that, as a matter of substance, the court as an institution could no longer be said to be composed of full-time judges having security of tenure until a fixed retirement age.' By contrast, the use of part time judges who sit as judges and practice as lawyers at the same time is common in England & Wales: see eg https://judicialappointments.gov.uk/part-time-judicial-roles/. Because of these constitutional differences we did not ask respondents about the risk of bias arising from judges sitting part time.

one of the parties, with one notable exception regarding shared religious beliefs, a majority of respondents felt that judges should not be disqualified. However, in every other scenario asked about – from financial interests to ideological beliefs to possible prejudgement arising from earlier judicial comments or findings – respondents consistently favoured disqualification. Of these scenarios it was only prejudgment where, on *some* questions, the public seemed more divided about disqualification, and in one scenario regarding adverse findings made against a party in a different case, a majority were *against* disqualification. The scenario asked about was based on the Australian case of *BATAS v Laurie* where the High Court had held by a 3 to 2 majority that the judge was disqualified, making it the only scenario where respondents were more "anti-disqualification" than the judiciary.

In scenarios where a majority of respondents favoured disqualification, presenting respondents with additional information that could militate against that conclusion did have a material impact on respondents' views, and although it did not reverse majorities in favour of disqualification in some cases opinion became much more finely balanced. In some cases a majority in favour of disqualification became a plurality in favour of disqualification with additional information. The reason it was possible to have pluralities for questions that were often binary (Disqualified/Not Disqualified) is that there were a significant number of 'Don't Know' responses. If the Don't Know answers are excluded, the numbers in favour of disqualification become very sizeable majorities in most scenarios.

Overall, our findings suggest that the judiciary have a higher estimation of their own capacity to exclude irrelevant factors from their decision making than do the general public.[9] In addition, or alternatively, the findings might suggest that judges take into account, explicitly or implicitly, legal policy considerations when applying the law of bias that the public do not, at least not without being prompted.

The first part of the paper recaps the law of bias as it is presently applied in England and Australia to help readers understand the significance of the survey responses and the size of the gap between public opinion and the current law of bias as applied in those countries. We then outline the methodology for our study and its limitations. Finally, we outline major findings from our surveys, as well as some of the interesting differences *between* the positions of different sub-groups who were surveyed. We also provide some discussion of the results, although possible explanations for the responses are necessarily speculative.

We refrain from making any reform recommendations on the basis of this research. We have argued elsewhere that the law of bias should not exclusively reflect public perception but rather balance all relevant factors including public perception, the behavioural science on cognitive decision making and legal policy considerations related to the administration of the justice system. [10] Moreover, we believe more research into public opinion, and specifically informed public opinion, would be desirable given the limitations of representative surveys. If, however, further research is consistent with the findings presented here, there will come a point when judges and law makers need to revisit the law of bias to ensure it better reflects public

[9] These findings are consistent with, although do not prove, the psychological literature suggesting people tend to overestimate their own ability to avoid biased decision making, whilst being acutely sensitive to the risk of biased decision making in others. For discussion see, for example, L. Babcock and G. Loewenstein, Explaining Bargaining Impasse: The Role of Self-Serving Biases, 11(1) *Journal of Economic Perspectives* 109 (1997).
[10] A.A Higgins and I. Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' 38(3) *Civil Justice Quarterly* 376 (2019).

perception, or alternatively, to expressly acknowledge that less weight is given to public perception in the rules governing judicial bias.

A recap of the law of apprehended bias in Australia and England

This paper is not intended to provide a detailed doctrinal examination of the law of judicial bias. However, to give the reader a better understanding of the significance of the survey results that follow, it is useful to briefly summarise the law of judicial bias in England and Australia, and the similarities and differences between them. For the sake of jurisdictional clarity, references to England include Wales, and one of the leading cases of bias in the UK from the House of Lords is, in fact, a Scottish case. Nonetheless there are no material differences in the law of judicial bias in England and Scotland. Accordingly, in our public surveys, we covered all of the UK, not just England & Wales.

The law of apparent bias (also known as apprehended bias in some jurisdictions) is largely the same in both England and Australia. There are some differences worth noting. The test for disqualification for apprehended bias under Australian law is easier to meet than it is in England (and other UK jurisdictions). In Australia the test is a "double might": whether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the question the judge is required to decide.[11] By contrast the test in England is meant to capture what an objective observer *would* think about the objective risk of bias. As famously stated by Lord Hope in *Porter* v *Magill*: 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'[12]

The Australian law of apprehended bias also covers a broader range of circumstances than that dealt with by the English rule. This is because English law applies a rule of automatic disqualification or 'presumed bias' for the judge who has a direct interest in the case. The rule originates from the principle that no man should be a judge in their own cause and cannot sit where they have an economic interest in the outcome of the case.[13] This principle was extended by the House of Lords to a close personal interest in the outcome of a case such as association or membership of a party or intervener in the *Pinochet* case.[14] The presumed bias rule is controversial, not because there is disagreement about its objective (the notion that financial interest can influence decisions is universally acknowledged), but rather because many doubt whether it does any useful work that is not already covered by the rule against apprehended bias.[15] For this reason, the presumed bias rule has been abandoned as an independent rule in Australia, on the grounds that it may be both under inclusive (not applying to in-direct financial interests that might be of such a scale and nature that it could realistically affect the judge's

[11] *Johnson v Johnson* [2020] 48, HCA (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* [2020] HCA 63, (2000) 205 CLR 337.
[12] *Porter* v *Magill* [2002] 2 AC 357 [103] (Lord Hope).
[13] *Dimes* v *Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759, 10 ER 301.
[14] *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] AC 119. The rule resulted in the disqualification of Lord Hoffmann who was a director of a related company of one of the interveners in the case; namely, Amnesty International. The precise scope of this extension is unclear and the Court of Appeal has suggested any further extension would be undesirable: *Locabail (UK) Ltd* v *Bayfield Properties Ltd* [2000] QB 451, 475.
[15] A.A.S. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, 3rd ed, 2013) at [3.95]; A.A. Olowofoyeku, 'The Nemo Judex Rule: The Case against Automatic Disqualification' [2000] *Public Law* 456, 456–475.

decision making) and over inclusive (applying to direct but extremely small financial interests that would not be affected by the judge's decision).[16] Accordingly, the Australian courts apply the apprehended bias test to cases where judges have a financial interest in the case, or a formal relationship with a party or affiliated entity, as well as cases where the judge, although independent, might not be able to decide cases impartially due to the influence of explicit or implicit biases. In every case two matters must be satisfied according to jurisprudence from the High Court of Australia. First, it needs to be identified what might lead a judge (or juror) to decide a case other than on its legal and factual merits; secondly, there must be a logical connection between the source of potential bias and the feared deviation from the course of deciding the case on its merits.[17] In other words, it must be shown that the alleged source of possible bias could have a causal impact on the judge's decision. By contrast, the rule against presumed bias in England prima facie requires no causal connection between a person's interest and the risk of deciding the case other than on the merits (because for example, they were unaware of the interest). Even in the case of presumed bias, however, the English courts have adopted a de-minimis requirement in cases of financial interest to exclude cases where the judge's interest is so small that it could not be materially affected by their decision.[18]

There is also some potential difference between English and Australian courts on the proper approach to disqualification on the grounds of prejudgment, although here the distinctions are not as clear cut because the case law is not uniform and the courts in both jurisdictions have affirmed the inquiry must be a case specific one. English law draws a distinction between a judge's conduct required by their judicial function—such as findings in interlocutory hearings or statements made as part of case management—and intemperate and unnecessary criticisms about the parties' credibility or behaviour. In the words of the English Court of Appeal in *Locabail* the need to disqualify a judge on the grounds of prejudgment might well arise where:

a) the credibility of any individual is in issue, the judge had previously rejected their evidence in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind; or
b) the judge had previously expressed views on live issues in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.[19]

Such scenarios would lead to disqualification in Australia as well, but there is also High Court jurisprudence indicating that disqualification is necessary where a judge had acted entirely properly in discharging their judicial function in another case or at an interlocutory hearing and not just used extreme or intemperate language. Specifically, if a judge had previously expressed "clear views" about a question of fact that constituted a significant issue in a subsequent trial, or about the credit of a witness whose evidence is of significance on such a question, they would be disqualified.[20] That said, the Australian courts have recognised that the demands of case management has changed the role of the judge. They can no longer be expected to remain

[16] *Ebner* v *Official Trustee in Bankruptcy* [2020] HCA 63, (2000) 205 CLR 337. The Australian approach of having a unified single rule is supported by several scholars: see eg A.A.S. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, 3rd ed, 2013) at [3.95]; A.A. Olowofoyeku, 'The Nemo Judex Rule: The Case against Automatic Disqualification' [2000] *Public Law* 456, 456–475.

[17] *Ebner* v *Official Trustee in Bankruptcy* [2020] HCA 63, (2000) 205 CLR 337.

[18] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 [8], [10]: 'In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest.'

[19] ibid [25]. See also *JSC BTA Bank v. Ablyazov* [2012] EWCA Civ 1551 and *Otkrite International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315.

[20] *Livesey v New South Wales Bar Association* [1983] HCA 17, (1983) 151 C.L.R. 288 at 297; *BATAS v Laurie* [2011] HCA 2, (2011) 242 C.L.R 283 at [145].

sphinx like until trial, or have formed no preliminary views about the issues at trial or the witnesses who would give evidence at trial.[21] The High Court has candidly acknowledged that the line between legitimate preconception and unacceptable prejudgment is an 'ill-defined one.'[22]

The above noteworthy differences aside, there is a high degree of convergence in the law of apprehended bias, and the rational underpinning it, in both jurisdictions. The risk of apprehended bias is determined from the point of view of an FMO, whose opinion is determinative of the question; in both places, the primary purpose of the test is to maintain public confidence in the impartiality of judicial decisions; and in both places it is judges, and in the first instance the judge whose impartiality might be perceived to be in doubt who decides the application for their disqualification by applying the FMO test.

Defining the FMO is not, however, a straightforward task in either jurisdiction. Because the FMO is meant, at least in part, to represent reasonable and informed public opinion, in both jurisdictions it is assumed that the FMO will know less about the relevant facts than a trained lawyer. In the High Court of Australia case of *BATAS* v *Laurie*, French CJ stated that the lay observer would not have recourse to all the information that a judge or practising lawyer would have.[23] Therefore, applying the test requires the judges to identify the information on which the fair-minded observer would make their determinations.

However the courts regularly attribute quite detailed legal knowledge and even cultural understanding of the legal profession to the observer.[24] The courts also have a tendency to attribute angelic-like character traits to the observer, including the ability to 'always reserves judgment on every point until she has seen and fully understood both sides of the argument'[25]; and that they are neither unduly compliant or naïve[26] sensitive or suspicious, or complacent.[27] Many of us aspire to this ideal, but few of us, including trained lawyers, are routinely capable of it. In *Helow* v *Advocate General for Scotland* Lord Hope acknowledged that the FMO has attributes that many of us might struggle to attain to.[28]

One credible theory for why the courts appear to have created an idealised FMO, is that there is a judicial desire to inject legal policy considerations into the disqualification analysis, by suggesting the FMO would not only consider the risk of bias, but also the benefits and costs

[21] *Johnson v Johnson* [2000] HCA 48 at [13]; *Vakauta v Kelly* (1989) 167 C.L.R. 568.
[22] *Vakauta v Kelly* (1989) 167 C.L.R. 568 at 570–571 (Brennan, Deane and Gaudron JJ).
[23] *BATAS* v *Laurie* [2011] HCA 2, (2011) 242 C.L.R 283 at [46]. See also *Sengupta v Holmes* [2002] EWCA Civ 1104 at [11] per Laws LJ: 'It is not enough that those in the know would not apprehend any bias'.
[24] This knowledge has included, for example, the difference between general and special retainers (*S & M Motor Repairs Pty Ltd* v *Caltex Oil (Australia) Pty Ltd* (1988) 12 N.S.W.L.R 358, 379–380); the content of professional codes of conduct (*Lawal* v *Northern Spirit Ltd* [2004] 1 All ER 187 at [21]); case management practice including judges expressing preliminary views in an effort to encourage settlement; the tort of passing off; the rules regarding security for costs; the concept of goodwill (*Hart* v *Relentless Records Ltd* [2003] FSR 36 at [31], [45]–[49]. See also *Flaherty* v *National Greyhound Racing Club Ltd* (2005) 102(37) LSG 31 at [30]); the judicial oath taken by temporary judges; the limited role of the trial judge in criminal proceedings; the power of appellate courts to correct irregularities at trial and the 'independent spirit of the scots bar' (*Kearney* v *HM Advocate* 2006 SC (PC) 1 at [8]); and the close relationship between the bar and the profession (*Taylor* v *Lawrence* [2003] QB 528 at [61]).
[25] *Helow v Advocate General for Scotland* [2008] UKHL 62 at [2].
[26] *R. v Abdroikov (Nurlon)* [2007] UKHL 37; [2007] 1 W.L.R. 2679 at [81].
[27] *Johnson v Johnson* (2000) 201 C.L.R. 488 at [53] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[28] *Helow v Advocate General for Scotland* [2008] UKHL 62 at [1]. See also *R. v Abdroikov (Nurlon)* [2007] UKHL 37 where Lord Mance acknowledged at [81] that the FMO was a construct of the court.

to the administration of justice of disqualifying a judge. Disqualifying a judge part way through a proceeding would undermine the efficiency benefits, and forensic value, to the legal process of having a single judge develop a deep understanding of the issues in a case by managing it from commencement to trial. In *Ebner* v *Official Trustee in Bankruptcy* the Full Court of the Federal Court of Australia rhetorically asked:

> Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?'[29]

Similarly, in *JSC BTA Bank* Longmore LJ stated that 'it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge'.[30]

Some judges have openly acknowledged that the use of the fictional observer is a crude method for assessing reasonable public opinion. In *BATAS* v *Laurie*, French CJ noted: 'The interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim.'[31] But he claimed that the value of the fictional observer is that it reminds judges of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers.[32]

If this is the function of the FMO test, then the results of our surveys would suggest that the courts in the UK and Australia are failing in this task. Certainly, there are significant gaps between the law of apprehended bias and majority public opinion as to when judges should and should not sit. We now turn to discuss the surveys.

Methodology of the surveys

Before outlining the main results of our survey, we will begin by outlining the methodology used for the surveys to give the reader a better sense of their strengths and weaknesses.

Survey respondents

The survey was conducted in February 2019 using the polling company, Survation, and involved 1036 number of Australian and 1028 number of UK respondents (N=2064). The survey was conducted via Survation's online panels. Invitations to complete surveys were sent out to members of the panel. Differential response rates from different demographic groups were taken into account. Data were weighted to the profile of all adults in Australia and the UK aged 18+. Data were weighted by age, sex, region and household income for Australia and the UK. Targets for the weighted data were derived from Australian Bureau of Statistics data for the Australian Survey, and from the Office for National Statistics census

[29] *Ebner* v *Official Trustee in Bankruptcy* (1999) 91 FCR 353 at [37].
[30] *JSC BTA Bank v. Ablyazov* [2012] EWCA Civ 1551 at [65].
[31] *BATAS v Laurie* [2011] HCA 2, (2011) 242 CLR 283 [48].
[32] *ibid*.

data, the results of the 2017 UK general election and the 2016 EU referendum for the UK survey. The UK data was also weighted by education.[33]

All representative surveys are subject to a margin of error, which means that not all differences in responses are statistically significant. For example, in a question where 50% of respondents gave a particular answer[34] with a sample of 1000 respondents it is 95% certain that the 'true' value will fall within the range of 3% from the sample result. In other words, the margin of error is plus or minus 3%. Even where answers are within the margin of error (such as where there are small pluralities in favour or against disqualification) we have reported them because they confirm that public opinion is evenly divided on these questions. However, findings relating to particular population sub groups who participated in the survey – eg different age groups or different socio-economic groups - are subject to a higher margin of error. Accordingly, results drawn from 'crossbreaks' with very small sub-samples should be treated with caution. For this reason, we have concentrated on UK and Australia wide responses, in the reporting of our findings below, and have only noted population sub-group responses where they are strikingly similar despite the potentially polarising nature of the survey questions, or where there are clear trends in differential responses between sub-groups.

Question format and reporting

There were 44 questions in each survey, including a number of follow up questions put to only some respondents depending on how they answered previous questions. We report the majority of findings below, focusing on results that we believe are particularly noteworthy because, for example, the responses diverged from, or supported, key principles or key cases in the law of judicial bias. To be clear, the questions and responses not reported are not inconsistent with, or undermine, the responses we have reported. They have been omitted only on the grounds of space and because they are broadly consistent with the findings we have reported.

For every question we have reported, we have included the question in full so that readers know exactly what was asked of respondents. We deliberated on the wording of the questions for some time, and took advice from Survation who provided recommendations on phrasing that would be easier for respondents to follow. We also ran a pilot to test respondents' comprehension of the questions, and the level of Don't Know responses. If Don't Know responses are particularly high this might suggest an inability to understand the question or a lack of engagement with them. Thankfully, the level of Don't Know responses were not out of the ordinary (between 7.82%-20.19% in the UK sample and between 6.39%–18.90% in the Australian sample).[35] No doubt readers might have wanted to ask different questions, or differently worded questions. We readily acknowledge different questions might have produced more reliable or insightful answers than some of the questions in our survey. With the benefit of hindsight, we, too, wished we had asked some different questions, and we have identified some of those questions in the reporting below.

[33] Survation advise that it is less common to use voting patterns and education when weighting Australian surveys, and there is a risk that using such weights might make the Australian results less rather than more reliable.

[34] Which is the worst case scenario as far as margin of error is concerned: the higher the percentage in favour or against a proposition, the more confident we can be it reflects the true value

[35] There was one question that was given only to a sub-group of respondents (respondents who have not been a party to a court case) about the independence and impartiality of judges generally, in which the 'Don't Know' responses were higher (28.19% in the UK sample and 37.31% in the Australian Sample).

Wherever possible we tried to ask the same questions of UK and Australian respondents although some variation was necessary to take account of social and political differences between the two countries. For example, when asking questions about judges with political views or connections, we changed the names to reflect the political parties as they were known in the respective countries. Thus, UK respondents were asked about judges attending Conservative Party fundraisers whereas Australian respondents were asked about judges attending Liberal Party Fundraisers. In some instances, the wording of questions had to take account of different economic practices. Many people in the UK have workplace pensions, whereas in Australia pensions are less common but superannuation funds are compulsory for all Australian employees; the questions on potentially disqualifying financial interests reflected of these differences. None of the changes to the questions asked of Australian and UK respondents respectively were designed to alter their meaning or the scenarios that might be said to give to a risk of bias in the eyes of the public. On the contrary, the changes were made only to improve comprehension, and with the aim of ensuring respondents were being asked substantively the same questions. A striking feature of the surveys is that while there was variation in responses between Australian and UK respondents, in relation to none of the questions was there a difference in majority opinion – either in favour or against recusal – as to whether judges should or should not be disqualified. In short there was broad agreement between UK and Australian respondents as to when judges should be disqualified from hearing a case.

There were three main different question formats used during the survey: binary, scalar and multiple choice. As one would predict, scalar and multiple choice questions did produce more mixed results, and we deliberately added further multiple choice questions to the survey so that there was a greater range of binary and multiple choice questions. A further benefit of multiple choice questions was that it was possible to convey to respondents potential reasons both for and against disqualification in different scenarios. However, the different question formats did not decisively alter the results in any direction i.e. the views on when judges should and should not sit remained broadly the same across different question formats. For a small number of questions we also gave respondents the option of providing open text answers. Although such answers could provide more qualitative insights into public attitudes, the primary purpose for which they were used in this survey was as a check or control device, to ascertain whether respondents had understood the question, and that their answers were broadly consistent with the reasons given for them. Set out below are examples of all four question formats.

Binary Example:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?
Allowed to hear the case / Disqualified from hearing the case / Don't know

A judge who is a member of an organisation that is a party in the case

A judge who is a member of an organisation that has a policy which is favourable or hostile to a party in the case

A judge who is a member of an organisation whose members have expressed views that are hostile to a party in the case

Scalar example:

To what extent do you agree or disagree with the following statements? *Strongly agree / Somewhat agree / Neither agree nor disagree / Somewhat disagree / Strongly disagree / Don't know* "There should be a minimum amount of money invested in a company which is a party before a judge is disqualified" "There should be a minimum level of possible financial gain (how much the judge stands to benefit by his or her decision in the case) before a judge is disqualified"

Multiple choice example:

If a black judge was hearing a case about alleged racial discrimination against a black person, do you think they would be: a) Better placed to hear the case than a white judge b) Possibly biased in favour of the black complainant c) As well placed to hear the case as a white judge d) Don't know

Open text example:

You said that a judge with a financial interest in a party in a case should be allowed to hear the case/be disqualified from hearing the case. Why do you think this?

External validity considerations: who is the Fair Minded Observer, what is their role, and can surveys fairly replicate it?

One powerful criticism of a survey of this kind is that it is not suited to capture the reasoning process involved in the law of apprehended bias. Put simply, the methodology cannot measure the process as it is actually applied by the courts. Different criticisms could be made in this regard. First, what the public thinks, or any particular segment of the public, might be irrelevant to the legal question before the court: whether the risk of bias is sufficiently serious to warrant disqualification on the part of the judge. The fact that the FMO is endowed with characteristics that many of us would struggle to attain[36] lends support to the view that FMO is a fig leaf for a legal test developed and applied by judges in the same way that the courts apply other tests involving idealised observers such as the reasonable person. This position was developed by Lord Goff in *R v Gough,* who argued that the court personified the reasonable man and therefore the court could decide the bias question directly without resort to the perspective of a fictional observer.[37] However the *Gough* test was criticised and subsequently rejected by the courts because it failed to give due weight to the importance of maintaining public confidence

[36] See Lord Hope in *Helow v Advocate General for Scotland* [2008] UKHL 62 at [1].
[37] *R. v Gough* [1993] A.C. 646 at 668, [1993] 2 All E.R. 724 at 735–736, HL.

in the impartiality of the judiciary.[38] In keeping with this public confidence objective, there are numerous judicial statements to the effect that it is not the reasoned analysis of lawyers that is determinative, but the *perceptions* of fair minded non-lawyers who would not be armed with all the facts available to a lawyer. In the words of the High Court of Australia 'If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.'[39] The same sentiment was expressed by Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon:*

> The court looks at the impression which would be given *to other people*. Even if he was as impartial as could be, nevertheless if *right-minded persons* would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand…The court will not inquire whether he did, in fact, favour one parties side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased".[40]

The need to maintain public confidence and decide the question of bias from the perspective of a fair-minded observer, as opposed to a lawyer with knowledge of all the relevant facts, raises both philosophical and empirical questions. Is it appropriate to equate majority public opinion – which is what representative surveys are reasonably effective at capturing – with the views of the right thinking or fair-minded observer? Secondly, if the views of right thinking people are not necessarily those of majority public opinion, then who is the FMO, and how can we be sure we can reflect their views in the law of bias in a way that still maintains public confidence more generally?

A related limitation of closed-ended surveys (as opposed to open text questions), is that the reasoning process behind the respondents' answers are a black box, in contrast to the more transparent reasoning process judges engage in (both in exchanges with the parties lawyers and when writing their reasons for judgment) when deciding apparent bias applications. Here, there is a degree of ambiguity in the case law about the role of the FMO: it is universally accepted that the FMO is reasonable and therefore must engage in some kind of reasoning process, but it is less clear whether the FMO is meant to engage a judicial-like deliberation about the case for and against disqualification, albeit without the same information available to a judge, or merely give their reasonable "perspective" on the scenario put to them. The case law, including the cases we have quoted above,[41] can be interpreted to support both approaches. On the one hand, the High Court of Australia has emphasised that the FMO is a lay person, not a lawyer, but the two stage logical causation test in *Ebner* would suggest the FMO may be intimately familiar with methods of legal reasoning.[42] On the other hand, there is House of Lords authority

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[38] *In re Medicaments and Related Classes of Goods (No.2) [2000] EWCA Civ 350* at [35]; *Porter v Magill [2001] UKHL 67* at [103].

[39] *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 263 per Barwick CJ, Gibbs, Stephen and Mason JJ. See also *Webb v The Queen* [1994] HCA 30, (1994) 181 CLR 41 where Mason CJ and McHugh J stated at [11] 'If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored.'

[40] *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599 (Emphasis added).

[41] See notes 22-27 and 37-39 and accompanying text.

[42] *Ebner* v *Official Trustee in Bankruptcy* [2020] HCA 63, (2000) 205 CLR 337 at para [6]: 'A judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the

declaring that even with the same information available, the FMO may not reach the same conclusion as that of a judge[43], which suggests the reasoning process of the FMO is not meant to be entirely objective. Moreover, one of the broader objectives of this survey was to encourage law makers to be more precise, or at least more transparent, in explaining who the FMO is meant to represent, what their role is, and the weight to be given to public perception generally when applying the law of apparent bias. To that end, if judges and law makers respond to surveys of this kind by explaining why they think the results are not relevant to the law of judicial bias, that would be a positive development.

Whatever the FMO's role is, or ought to be, as a matter of legal doctrine, it is undeniable that representative surveys are not well suited to conveying to respondents all the information which may be relevant to the assessment of whether judges should be disqualified, or in facilitating reflective reasoning processes as opposed to capturing initial reactions. More qualitative research, including where interviewers engage directly with respondents, would be highly desirable and it would be particularly interesting to compare the results of such qualitative studies with the representative survey we have conducted here.

However, one should not automatically assume that a representative survey can only capture the perspectives of the general public, and not fair minded and informed observers specifically. Because these surveys were representative of the general population it is safe to assume the respondents included that (unspecified) segment of the population thought to be reasonable and generally informed, unless, of course, the FMO is actually an entirely aspirational character.

While many respondents would be informed about matters of general knowledge (given the representative nature of the surveys), that still leaves the crucial question as to how informed respondents were about the facts of particular scenarios and the risk of judicial bias. Although in a survey it is not possible to ensure respondents are fully informed of all potentially relevant facts, we made a conscious effort not to leave them in the dark either. We provided respondents with some basic background information about the right to an independent and impartial tribunal, why we were conducting the research, and to explain basic legal concepts used in the questions. The General Introduction provided to respondents was as follows:

> *We are conducting research into people's confidence in judges and in particular people's views about when judges are independent and impartial or should be disqualified from hearing a case because they might be biased.*
>
> *Everyone who goes to court has a right to an independent and impartial judge. We want to know when, if ever, you think a judge should be disqualified from hearing a case including, for example, because of their relationships with, attitudes towards, or*

resolution of the question the judge is required to decide' and then at para [8] 'It's application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.'

[43] See, e.g. *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [22] where Lord Steyn observed that knowledge of particular legal practices or traditions does not preclude an FMO from believing those practices might create a risk of bias.

shared backgrounds and experiences as, the parties appearing before them. A party to a case is someone who has a claim or a defence that is being decided.

For some questions we were also able to provide respondents with limited additional information regarding the bias scenario asked about, either suggesting that the judge themselves may not be partial to or against a party, or that the costs to the administration of justice of disqualifying the judge would be high. This additional information still fell short of the factual knowledge typically attributed to the FMO by courts, but it did mean respondents were not considering these questions entirely in a vacuum. As can be seen from the discussion below, providing this additional information did shift the attitudes of some respondents, in one instance shifting public opinion from an overall majority in favour of disqualification to a small plurality in favour of disqualification.

The surveys also provided a 'Don't Know' option for respondents allowing them not to answer specific questions and skip to the next one. Such an option is one mechanism for discounting from those who feel they are not sufficiently informed to answer the question asked, or do not have an opinion about it. The obvious downside with such a mechanism, is that it is self-selective and not necessarily reflective of respondents' actual knowledge about the matters put to them.

Another useful check on the reasonableness of respondents' answers were those questions which allowed them to provide free text answers. The question on why those with financial interests in the case should be disqualified did typically produce the expected answers, although there were some colourful outliers as well.[44] This provides a degree of assurance that the surveys were representative and the respondents broadly "got it" in the sense that they understood the potential conflict of interest and that this created a risk of biased decision making.

Interpreting the answers of respondents

Finally, we must also acknowledge that where we have provided possible interpretations of some of the answers, these interpretations are merely our hypotheses. The survey involved no qualitative component to explore the reasons why respondents gave certain answers, apart from one question regarding financial interests and one question about the trust in the judiciary where respondents were given the opportunity to set out their views in their own words. We make the general caveat that this is just one piece of evidence and we hope more studies will follow, which will help us confirm the extent to which these answers are a true reflection of public opinion and whether that opinion changes over time. On this last point about opinion changing over time, it is worth noting that some of the cases that are asked about in the survey were decided some time ago (ranging between 5 years ago and 18 years ago) and one possible explanation of the difference between judicial views and public opinion is that opinions generally have changed over time. A possible counterview is that because the divergence of opinion occurred in both directions – in that respondents required disqualification when judges did not in most cases, but in the one case where judges did require disqualification respondents

[44] For example, two Australian respondents who said that a judge with a financial interest in a party in a case *should be allowed to hear the case* gave the following reasons for their answers: 'because they have too get paid for there work in the case'; and 'I do not believe a judge would be stupid enough to risk his position in giving his judgement knowing he will be carefully watched if his financial interest is known.'

did not believe it was necessary – means that the divergence of opinion cannot be attributed to a general "hardening" or "softening" of attitudes as to when judges should or should not sit.

Major findings[45]

Questions about shared characteristics in cases where those characteristics were in issue

We begin with the scenarios in which respondents were consistently against disqualification, in line with the case law in both Australia and England, namely cases where judges had shared characteristics with one of parties. The anti-disqualification position is all the more notable for the fact that we deliberately framed the questions in a way that the shared characteristics between judge and party was one of the legal issues in the case i.e. we asked about shared characteristics between party and judge where it was alleged the party had been discriminated against on the basis of that very characteristic.

Across most characteristics asked about – race, age, gender, disability and sexual orientation – a majority of respondents did not give answers requiring disqualification. Importantly, these findings were consistent whether the question had a binary format (disqualified/not disqualified) or multiple choice format (possibly biased/possibly better placed to decide the case/as well placed to decide the case as another judge). The multiple choice format showed that a significant minority of respondents felt that a judge who has the same characteristic as a party upon which their discrimination claim was based, potentially put them in a better position to decide the case than a different judge. These answers suggest there is some, albeit minority, community support for the legally controversial position espoused by the plurality of the Canadian Supreme Court in *R v S;* that judges drawing on their own life experiences when deciding cases is not necessarily bias, or even error, but can constitute good "contextualised judging".[46]

For example, we asked respondents *if a judge in their 60s was hearing a case about alleged age discrimination against a person in their 60s, do you think they would be*:

	UK Responses	***Australian Responses***
Better placed to hear the case than a younger judge	20% (208)	21% (222)
Possibly biased in favour of the older complainant	22% (224)	19% (201)
As well placed to hear the case as a younger judge	45% (466)	46% (482)

[45] The response percentages set out below were rounded for convenience by Survation, and do not always add up exactly to 100%.

46 *R. v S. (R.D.)* [1997] 3 S.C.R. 484 at [56] (L'Heureux-Dubé and McLachlin JJ with whom Gonthier and Forest JJ agreed).

Don't know	13% (130)	13% (132)

The responses to all the other characteristics asked about, in both Australia and the UK, were similar with one notable exception. The exception were the questions relating to religious discrimination. In both Australia and the UK the question that obtained the most responses in favour of disqualification was in relation to a Muslim judge hearing a religious discrimination case against another Muslim. In Australia there was a plurality in favour of disqualification, whereas in the UK there was a small plurality against disqualification. The question stated:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A Muslim judge who is hearing a case against about alleged religious discrimination against a Muslim

	UK Responses	***Australian Responses***
Allowed to hear the case	42% (431)	39% (402)
Disqualified from hearing the case	41% (421)	46% (477)
Don't know	17% (176)	15% (157)

It is difficult to know whether these responses reflect a degree of anti-Muslim sentiment or whether respondents classed religious beliefs differently to other protected characteristics. It is noteworthy that a majority of UK and Australian respondents also favoured disqualification of a Catholic judge in a case involving the lawfulness of abortions.[47]. However, the difference between an abortion and discrimination case is that the religious teachings of the Catholic Church include a clear position on the morality of abortion (putting to one side whether a judge could separate the morality from the lawfulness of abortions) whereas in the discrimination case the religious teachings of Islam did not suggest any answer, or favour any party, on the issue of discrimination.[48]

One possible explanation for respondents' consistently given answers that would allow judges to sit in these cases is that anti-discrimination norms, supported by anti-discrimination laws, have been effective, and that respondents were reluctant to "discriminate" against a judge merely because of who they were. Another explanation, consistent with the law of bias, is the idea of necessity: if the law of bias could be based on characteristics that all humans possess, then it would be impossible to ever find a truly neutral judge qualified to hear the case.

[47] *In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A Catholic judge hearing a case challenging abortion laws* (Australia: Allowed 29% (297); Disqualified 55% (568); Don't Know 17% (171)); (UK: Allowed 27% (277); Disqualified; 55% (560); Don't Know 19% (191)).

[48] In hindsight we should have asked exactly the same discrimination question in relation to a Christian judge and party, but at the time we restricted the number of discrimination questions we asked as we had a limited number of total questions we could ask (both for financial reasons and given longer surveys risked a greater number of respondents skipping questions).

What seems tolerably clear is that respondents do feel religious beliefs is a ground for disqualification – whether or not the religious beliefs are relevant to the issue before the court – and in this respect, respondents views are in sharp opposition to those of the courts. In the leading English decision of Locabail, the Court of Appeal stated 'We cannot conceive of circumstances in which an objection could be based on religion…'.[49]

Questions based on leading cases

Our survey asked about attitudes to various scenarios that might be said to give rise to a risk of bias, but we also designed some questions to reflect the basic fact patterns behind leading apprehended bias cases in both the UK and Australia. The divergence between the outcomes reached by the courts, and the opinions of survey respondents, is stark. Set out below is a simple table setting out the results. For the sake of completeness all the questions we put to respondents about the leading cases are reported below as well.

Case Name	**Court Decision**	**UK Survey Respondents**	**AUS Survey Respondents**
Taylor v Lawrence (EWCA 2002)	Not Disqualified	Majority *for* Disqualification	Majority *for* Disqualification
Helow v Lord Advocate (HL 2007)	Not Disqualified	Majority *for* Disqualification (Based on limited information) Plurality *for* Disqualification (When given further information)	Majority *for* Disqualification (Based on limited information) Plurality *for* Disqualification (When given further information)
BATAS v Laurie (HCA, 2011)	Disqualified	Plurality *against* Disqualification	Majority *against* Disqualification
Royal Commission into Trade Union Corruption	Not Disqualified	Plurality *for* Disqualification	Majority *for* Disqualification

[49] The Court said the same of ethnic or national origins, gender, age, class, and sexual orientation: Locabail [2000] QB 451 at [25].

(JD Heydon, 2015)			

In some of these cases the differences between judicial opinion and survey respondents was even starker when one considers the strength of opinion, not just the binary choice on disqualification. The English Court of Appeal's decision in *Taylor v Lawrence*[50] is noteworthy in this regard. A claim of apprehended bias was made against a judge who accepted free legal services in connection with his will from a law firm representing one of the parties before him. The services were rendered after the case had been heard but before judgment had been handed down. The Court held the judge was not disqualified, and that would be case even if he knew the law firm were providing him with the legal services free of charge. The Court did not doubt the judge's explanation that he was unaware the services would be provided for free, but this was irrelevant to their conclusion. The Court boldly stated:

> 'We regard it as unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party in litigation with whom he has no relationship merely because that party happens to be represented by a firm of solicitors who are acting for the judge in a purely personal matter in connection with a will. There is no reason to doubt the explanation for a bill not being rendered. There is no evidence that the judge knew that this was to be the case, but, even if he did, it would not alter our view.'[51]

In both jurisdictions, contrary to the Court of Appeal's statement, there were clear majorities in favour of disqualification. The question we put to respondents about *Taylor and Lawrence* and respondents' answers was as follows:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge who, during the case, has accepted free legal services from a law firm representing a party in the case

	UK Responses	***Australian Responses***
Allowed to hear the case	27% (274)	23% (240)
Disqualified from hearing the case	53% (547)	58% (602)
Don't know	20% (207)	19% (193)

The other case where there was a sharp divergence of opinion between the judge (in this case a Royal Commissioner) and survey respondents was the decision of JD Heydon not to disqualify himself from hearing the Royal Commission examining unlawful trade union

[50] *Taylor v Lawrence* [2002] EWCA Civ 90.
[51] ibid at [73]

practices. The Inquiry had broad terms of reference to investigate trade union corruption, and chose to focus on 'case studies' including the conduct of lawyers and union officials who subsequently became leaders of the Labour party. During the course of the Inquiry, Heydon accepted an invitation to deliver the Garfield Barwick lecture, which was an event organised by a branch of the Liberal Party, and used to raise funds for the party – the main political rival to the Labour Party. Once Heydon's participation in the event became publicly known and publicly criticised, Heydon decided to withdraw from the event. Heydon, however, declined to recuse himself from the further hearing of the Inquiry, stating he was unaware the event was a fundraiser. Nowhere in his tightly reasoned 66 pages explaining why the allegation of an apprehension of bias is unfounded, does Heydon acknowledge that the FMO's views might be different to his own.[52] Heydon criticised the submissions calling for his recusal as 'imprecise', yet public perceptions, which is what the test is designed to protect, are rarely precise. And a clear majority of survey respondents in both Australia and the UK favoured disqualification. The question we asked about the JD Heydon case, including altering the political associations in order to counter any party political biases, and Australian respondents' answers (with UK responses in the footnote) were as follows:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case? A judge who attended a Liberal Party fundraiser hearing a case alleging wrongdoing by Labor Party officials

	Australian Responses	***UK Responses***[53]
Allowed to hear the case	33% (344)	33% (341)
Disqualified from hearing the case	51% (531)	50% (514)
Don't know	15% (160)	17% (173)

There was no significant difference for answers when the political associations were changed: *'a judge who attended a Labor Party fundraiser hearing a case challenging trade union laws.* '[54]

The case of *BATAS v Laurie* did not produce as stark a difference between the Court and survey respondents, partly because in the UK there was only a plurality in favour of non-disqualification, and partly because the High Court itself was split 3-2 as to whether the judge was disqualified. The result is, however, notable for the fact that this was the only scenario where the respondents, in both the UK and Australia, were more "anti-disqualification" than the judiciary, and in Australia there was a majority against disqualification.

[52] JD Heydon, 'Reasons for Ruling on Disqualification Applications' (Royal Commission into Trade Union Governance and Corruption, 31 August 2015), https://www.tradeunionroyalcommission.gov.au/Pages/default.aspx.

[53] For UK survey respondents the Liberal Party fundraiser was changed to a Conservative Party Fundraiser.

[54] Allowed 34% (356); Disqualified 47% (484); Don't Know 19% (196). For UK respondents, those favouring disqualification dropped in the alternative scenario of a judge attending a labour party fundraiser hearing a case challenging trade union laws: Allowed 36% (371); Disqualified 44% (449); Don't Know 20% (208).

BATAS v Laurie had a complex procedural history but the issue giving rise to apprehended bias was relatively straightforward. Several unrelated cases had been brought against BATAS before the Dust Diseases Tribunal of NSW in which one of the allegations against BATAS was that it had deliberately destroyed internal documents regarding smoking and health, nicotine addiction and the company's marketing strategy for the purposes of preventing their disclosure in any future litigation brought against BATAS. In both cases it was also alleged that legal advice given to BATAS regarding its document destruction were in furtherance of a crime or fraud and therefore not privileged under the crime fraud exception to privilege as set out in section 125 of the uniform evidence legislation.[55] In the first case, *Mowbray,* the judge upheld the application for disclosure of the legal advice, holding they were caught by the crime fraud exception in section 125. BATAS then applied to have the judge disqualified from hearing the *Laurie* case, on the grounds that the plaintiff in *Laurie* had made materially identical claims against BATAS regarding its document retention policy as had been made in *Mowbray*.

The High Court found, by a narrow majority, that while the judge had not used intemperate language in his reasons for judgment, the judge's findings were expressed in strong terms which gave rise to an apprehension of bias. Chief Justice French and Justice Gummow both dissented, emphasising that the judge had expressly noted that the document destruction issue would still be live at the trial, where it would be decided based on a different standard of proof and potentially with different evidence, and the judge had stated that he had to decide 'the application now before me' based on the 'evidence now before me'.[56]

It was not possible to convey the nuance in the *BATAS v Laurie* case to respondents in our survey, but the essential ground of bias – deciding an issue adversely to one party and then having to decide the same issue involving the same party in another case – was put to respondents. The question asked with the survey responses were as follows:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge who made findings against a tobacco company, hearing another case against the same tobacco company dealing with the same issue

	Australian Responses	***UK Responses***
Allowed to hear the case	52% (541)	45% (461)
Disqualified from hearing the case	32% (337)	38% (390)
Don't know	15% (159)	17% (177)

The Scottish case of *Helow v Lord Advocate* is notable for a different reason. While there were also clear differences in the position of respondents and the judiciary as to whether the judge ought to have been disqualified, of equal significance in that case is that putting further

[55] Evidence Act 1995 (NSW), section 125.
[56] For further discussion of the case see A. Higgins 'BATAS v Laurie: Apprehended Bias and Actual Failure of Case Management' (2011) 30 CJQ 246.

information to respondents did have a significant impact on their views. In *Helow* a judge hearing a judicial review application of the decision to deny asylum to a Palestinian rights activist was subject to an apprehended bias application because she was a member of a Jewish Lawyers Association, the International Association of Jewish Lawyers, whose members and publications printed views on the Palestinian/Israeli conflict that were fervently pro-Israel and markedly hostile to Palestinians. A clear majority of survey respondents, in both the UK and Australia, favoured disqualification of the judge, but when respondents were further told that there was no evidence the judge held the same views as her fellow members of the Association, or the views expressed in the publications of the Association, this had a material impact on the result, turning a clear majority in favour of disqualification into a plurality in favour of disqualification. The questions we asked about *Helow*, with the answers of respondents were as follows:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge who is a member of a Jewish cultural association whose members have been critical of Palestinian political activists hearing an asylum case brought by a Palestinian political activist

	UK Responses	***Australian Responses***
Allowed to hear the case	22% (224)	18% (182)
Disqualified from hearing the case	61% (624)	66% (689)
Don't know	17% (179)	16% (166)

Respondents who said the judge should be disqualified were then asked this supplementary question:

You said that a judge who is a member of a Jewish cultural association whose members have been critical of Palestinian political activists should be disqualified from hearing an asylum case brought by a Palestinian political activist. If there was no evidence that the judge endorsed or shared the views critical of Palestinian activists, should the judge be allowed to hear the case or be disqualified from hearing the case?

	UK Responses	***Australian Responses***
Allowed to hear the case	23% (142)	24% (167)
Disqualified from hearing the case	62% (387)	60% (415)
Don't know	15% (95)	15% (106)

Prejudgment Scenarios

Disqualification on the grounds of prejudgment is one of the most intellectually interesting, and practically challenging, grounds of bias. The law of bias recognizes that there are certain experiences and connections that all humans have and develop that could influence their decision making, regardless of their judicial training. Most grounds of bias, therefore, are directed towards ensuring that judges decide the case before them only on the evidence before them, without fear or favour. Disqualification for prejudgment, by contrast, is designed to ensure legal hearings do not become a mere formality because the judge has already made up their mind. Unacceptable sources of pre-judgement *include evidence that is relevant* to the case. Accordingly, this ground of prejudgment has a potentially far bigger, and detrimental impact on the administration of justice, than other grounds of apprehended bias, because it extends beyond a judge's lived experience as an individual, and member of society, to include everything that a judge may have said, done, or heard *as a judge*. If judges can be disqualified from hearing cases merely because they have fulfilled their judicial function – in laymen's terms "done their jobs" – this would undermine the viability of a range of active case management practices. These include early case conferences, docketing and specialist lists, all of which are generally considered to improve the administration of justice, both in terms of efficiency and the quality of judgments rendered by judges. For this reason, the courts in the UK, and Australia to a slightly lesser extent, have developed their jurisprudence in a way that judges doing their jobs *properly* will not normally lead to disqualification.[57] This is so even if there is an elevated risk that a judge's mind might, subconsciously, be closed to further argument and evidence. In this way the rules of apprehended bias seek to strike a balance with the practical needs of the administration of justice. This elevated bar for disqualification on grounds of prejudgment is sometimes justified as consistent with the reasonable perspective of the FMO, who would wish to balance a small risk of prejudgment against the considerable additional cost, delay and disruption that would be involved in changing judges. Our surveys showed that "administration of justice reasons" did shift some respondents on the case for disqualification, and in the *BATAS v Laurie* case discussed above, respondents were more anti-disqualification than the courts. Nonetheless, in many scenarios asked about, the public were also broadly in favour of disqualification where respondents thought there was a risk of judicial prejudgment..

Some prejudgment questions asked about judges making irrelevant and inappropriate comments about the parties, but others concerned judges merely fulfilling their judicial role including comments made during case management hearings and deciding interlocutory applications that raise issues which would be live at trial. Examples of these questions and respondents answers are set out below:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge hearing a case when it goes to trial after making comments that are critical of a party in the case at a preliminary (i e early) hearing

	UK Responses	***Australian Responses***
Allowed to hear the case	23% (233)	22% (230)

[57] See the discussion on prejudgment in Australia and England in the first chapter above.

Disqualified from hearing the case	60% (612)	61% (634)
Don't know	18% (182)	17% (171)

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge hearing a case when it goes to trial having previously made personal comments critical of a party's behaviour (for example, comments on the party's attire, or tone or style of speech) in an early hearing

	UK Responses	***Australian Responses***
Allowed to hear the case	31% (319)	35% (362)
Disqualified from hearing the case	53% (542)	48% (496)
Don't know	16% (167)	17% (178)

Respondents who said that a judge should be disqualified in one of the above instances were then asked a follow up question as to whether their views would change given the costs to the administration of justice in getting another judge to hear the case: *If the financial costs of finding another judge to hear the case were higher than continuing with the same judge, do you think the judge should be allowed to hear the case or be disqualified from hearing the case?* A majority of those respondents still favoured disqualification but a significant minority (19% (121) in the UK, and 19% (114) in Australia) reversed their position and decided the judge could continue to sit.[58]

One prejudgment question used a multiple choice format, similar to those used in the shared characteristic/discrimination questions discussed in section 3A. This format allowed us to put to respondents the possibility that the factors that might give rise to a risk of bias might also *improve* judicial decision making. This question had the effect of producing a small plurality against disqualification in both the UK and Australia. The question and responses are set out below.

If a judge who has heard preliminary (i e early) arguments in a case and had made provisional findings against one of the parties, do you think they would be

[58] Australia: Allowed 19% (114); Disqualified 67% (404); Don't Know 14% (83). UK: Allowed 19% (121); Disqualified 68% (435); Don't Know 14% (88).

	UK Responses	***Australian Responses***
Better placed to hear the case than a new judge	24% (249)	25% (260)
Possibly biased against the party they have made findings against	40% (413)	39% (409)
As well placed to hear the case as a new judge	20% (201)	21% (222)
Don't know	16% (165)	14% (144)

Financial interests and relationships

The opinions of both UK and Australian respondents on whether financial interests in a case should disqualify them from hearing were severe. Respondents favoured disqualification in cases of both direct interests, such as holding shares, and indirect interests, including membership of pension and superannuation funds. Respondents not only required disqualification where a judge had a financial interest in one of the parties to the case, but also in cases where the judge had an ongoing contractual relationship with one of the parties, hence the reference to relationships in the title of this subsection. There was nothing exceptional about the contractual relationships we asked about – mortgages and insurance policies – or any suggestion in the question that the judge's decision might affect their legal obligations and hence financial interests, positively or negatively, under those contractual relationships. We did ask several questions seeking to ascertain whether there was public support for a de minimis requirement for disqualification for financial interest, and related to that requirement, for the Australian position that there must be a possible causal relationship between the judge's interest and how they might decide the case. A significant number of respondents did agree with the idea of de minimis requirements, but the threshold amounts suggested by most respondents were so modest, that the answers might indicate greater support for the English doctrine of presumed bias where disqualification is automatic in cases of financial interest. Set out below are a range of questions asked about financial interests and the respondents answers.

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?:

A judge with shares in a company which is a party in a case

	UK Responses	***Australian Responses***
Allowed to hear the case	16% (166)	14% (147)

Disqualified from hearing the case	74% (759)	79% (817)
Don't know	10% (103)	7% (72)

A judge who is a member of a pension fund that has shares in a party in a case

	UK Responses	***Australian Responses***[59]
Allowed to hear the case	24% (243)	29% (299)
Disqualified from hearing the case	63% (652)	60% (618)
Don't know	13% (133)	11% (118)

A judge who has a contract - for instance, an insurance policy or a mortgage - with a company which is a party in a case

	UK Responses	***Australian Responses***
Allowed to hear the case	31% (322)	29% (297)
Disqualified from hearing the case	55% (561)	61% (634)
Don't know	14% (145)	10% (105)

To what extent do you agree or disagree with the following statements?:

There should be a minimum amount of money invested in a company which is a party before a judge is disqualified

	UK Responses	***Australian Responses***
Strongly agree	13% (130)	11% (116)

[59] The question to Australian respondents referred to superannuation funds rather than pension funds, given the former are far more widely used than the latter.

Somewhat agree	23% (241)	27% (282)
Neither agree nor disagree	23% (231)	20% (211)
Somewhat disagree	14% (143)	15% (156)
Strongly disagree	15% (157)	18% (185)
Don't know	12% (125)	8% (86)

There should be a minimum level of possible financial gain (how much the judge stands to benefit by his or her decision in the case) before a judge is disqualified?:

	UK Responses	***Australian Responses***
Strongly agree	17% (177)	17% (173)
Somewhat agree	23% (240)	24% (253)
Neither agree nor disagree	20% (202)	15% (160)
Somewhat disagree	12% (122)	15% (159)
Strongly disagree	18% (182)	21% (217)
Don't know	10% (105)	7% (74)

For respondents who agree that there should be a minimum amount of money invested in a company before a judge is disqualified, ***what do you think this minimum amount should be?***

UK Responses[60]	
Under £100	17% (62)
£100 - £999	23% (85)
£1,000 - £4,999	28% (103)

[60] Australia: Under $200 15% (58); $200-$1999 25% (101); $2000 - $9999 24% (94); $10,000 – $19,999 14% (57); Over $20,000 12% (47); Don't Know 10% (40).

£5,000 - £9,999	13% (47)
£10,000 or over	12% (45)
Don't know	8% (29)

For respondents who agreed that a there should be a minimum level of possible financial gain before a judge is disqualified, ***what do you think this minimum amount should be?***

UK Responses[61]	
Under £100	22% (93)
£100 - £999	19% (79)
£1,000 - £4,999	27% (113)
£5,000 - £9,999	12% (51)
£10,000 or over	8% (35)
Don't know	11% (45)

Miscellaneous

We have not included all questions asked of respondents in our surveys but instead focused on the key findings under four main areas that we thought would be of most interest to a legal audience. The surveys produced some other interesting answers, including insights into respondents views of the judiciary, and the process of deciding bias applications, some of which we set out in this section. There is no issue or theme underlying these questions so instead we present it by way of a summary list:

- A plurality of respondents in the UK and Australia thought *a judge who was previously a member of the same chambers as a barrister representing a party in the case* should not be disqualified.[62] The wording of this question made clear that *barristers only share the costs of running their chambers; they do not share profits earned from representing clients.*

[61] Australia: Under $200 22% (95); $200-$1999 24% (103); $2000 - $9999 24% (101); $10,000 - $19,999 11% (48); Over $20,000 6% (27); Don't Know 12% (52).
[62] UK: Allowed 45% (459); Disqualified 37% (378); Don't Know 19% (191). Australia: Allowed 46% (481); Disqualified 36% (375); Don't Know 17% (180).

- A plurality of respondents in the UK and Australia thought *a judge who was previously a member of a solicitors firm which is representing a party in the case* should not be disqualified.[63]

- A majority of respondents in the UK and Australia thought *a judge who attended the same school as a party in the case* should not be disqualified.[64]

- A plurality in both the UK (48%) and Australia (48%) thought the question of whether a judge should not sit should be decided by *a different, independent judge*.[65]

- 24% (252) of UK respondents and 30% (312) of Australian respondents had previously been a party to litigation. A clear majority of UK respondents (67%; 168) and Australian respondents (70%; 219) who had been a party to litigation thought that the judge hearing their case was independent and impartial. Much smaller percentages of respondents who have *not* been a party to litigation thought that judges in their country were independent and impartial.[66] This last answer is somewhat troubling given confidence in the judiciary is critical to the rule of law, but it is promising that confidence in the judiciary appears to go up when people come into contact with the legal system, relative to the population as a whole.

Sub-groups

[63] UK: Allowed 44% (451); Disqualified 40% (409); Don't Know 16% (168). Australia: Allowed 44% (455); Disqualified 40% (419); Don't Know 16% (162).

[64] UK: Allowed 62% (642); Disqualified 24% (244); Don't Know 14% (142). Australia: Allowed 70% (722); Disqualified 17% (181); Don't Know 13% (133).

[65] Which of the following do you think should play a role when deciding if a judge should be disqualified from hearing a case? Please select all that apply

	UK Checked	AUS Checked
The judge who is accused of possible bias	26% (265)	33% (341)
A different, independent judge	48% (492)	48% (502)
A jury	27% (278)	29% (298)
A psychologist who is an expert on bias in decision making	20% (207)	30% (310)
Parliament	15% (159)	15% (153)
Other	1% (13)	3% (33)
Don't know	17% (172)	15% (151)

[66] **Which of the following statements best reflects your view?**

Respondents who have not been a party in a court case

Australian judges are independent and impartial	45% (316)
Australian judges are not independent and impartial	18% (126)
Don't know	37% (263)

Respondents who have not been a party in a court case

British judges are independent and impartial	53% (401)
British judges are not independent and impartial	19% (142)
Don't know	28% (213)

The most significant finding about the differential responses of population sub-groups was how little difference there was between respondents. We generally did not find a gender effect, even for questions that have a gender dimension. Two examples are set out below:

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A Catholic judge hearing a case challenging abortion laws:

UK + Australian Responses (combined)[67]	**Female**	**Male**
Allowed to hear the case	284 (27%)	290 (29%)
Disqualified from hearing the case	575 (54%)	554 (55%)
Don't know	195 (18%)	167 (16%)

In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A female judge who is hearing a case about alleged gender discrimination against a woman:

UK + Australian Responses (combined)[68]	**Female**	**Male**
Allowed to hear the case	657 (62%)	617 (61%)
Disqualified from hearing the case	255 (24%)	269 (27%)
Don't know	143 (13%)	125 (12%)

[67] UK (Female): Allowed 27% (140); Disqualified 53% (280); Don't Know 20% (107). UK (Male): Allowed 27% (137); Disqualified 56% (281); Don't Know 17% (84). Australia (Female): Allowed 27% (144); Disqualified 56% (295); Don't Know 17% (88). Australia (Male): Allowed 30% (153); Disqualified 54% (273); Don't Know 16% (83).

[68] UK (Female): Allowed 59% (312); Disqualified 27% (141); Don't Know 14% (74). UK (Male): Allowed 60% (303); Disqualified 26% (129); Don't Know 14% (70). Australia (Female): Allowed 65% (345);

One notable difference in responses by gender is that females tended to choose the option 'Don't know' answer more than males (in 41 questions out of the 43 questions in which there was a 'Don't know' option in the Australian sample and in 40 questions out of the 43 questions in which there was a 'Don't know' option in the UK sample). These results are consistent with psychological studies about confidence and gender.[69]

We did not find notable differences between participants of different household income either, or between those who did and did not have experience of the justice system as parties in a court case. Younger age groups were generally more "lenient" towards judges, and would allow judges to hear the case, i.e. not disqualify them, more often than older respondents, across most cases, with a few exceptions. For example, in the question 'In the following instances, do you think a judge should be allowed to hear the case or be disqualified from hearing the case?: A judge with a financial interest in a party in a case', 35% (40) of UK respondents aged between 18-24 answered that the judge should be allowed to hear the case, while only 2% (5) of the respondents over 65 years old thought that the judge should be allowed to hear the case.

Conclusion

This paper presented the results of a survey, which we believe to be the first of its kind, into public attitudes about judicial impartiality and when judges should be disqualified on the grounds of possible bias. The online surveys were conducted using representative samples of the UK and Australian populations, using the polling company, Survation's, standard techniques for weighting samples in both the UK and Australia.

Representative surveys have strengths in providing a reliable snapshot of public opinion, but they also have limitations. All polls, including this one, have a margin of error, but we would submit that asking the public directly when they think judges should and should not sit is almost certainly more reliable than speculation by judges who are drawn from a relatively narrow segment of society. Surveys are also not an ideal methodology when it comes to communicating the complexity of scenarios that are said to give rise to potential bias, and discovering any nuance in the attitudes of respondents. For these reasons, we think more research into public opinion is needed, ideally utilising different methodologies, with the aim of adding to the evidence base assessing attitudes to disqualification among different groups, and whether and why, those attitudes might be subject to change.

Bearing these caveats in mind, what the surveys did reveal is that the general public, in both the UK and Australia, were consistently in favour of disqualification in the broad range of general and specific circumstances asked about. It was only in the case of shared characteristics between the judge and one of the parties, where the public were consistently, although not always, against disqualification. There was one only question, based on the Australian case of *BATAS v Laurie*, where the public appeared to be against disqualification of a judge when the courts had, in fact, required it. As such, the research revealed a significant gap between the attitudes of the public, and the attitudes of the judiciary, regarding the circumstances in which

Disqualified 22% (114); Don't Know 13% (69).Australia (Male): Allowed 62% (314); Disqualified 28% (140); Don't Know 11% (55).

[69] See, for example: Lena Dahlbom, Albin Jakobsson, Niklas Jakobsson, and Andreas Kotsadam, 'Gender and Overconfidence: Are Girls Really Overconfident?', 18(4) *Applied Economics Letters* 18, 325 (2011).

the latter should be disqualified from hearing cases. Whoever the FMO that the courts call on to decide apparent bias applications might be, this research suggests that this fictional person is not representative of majority, or plurality, public opinion in many instances.

Even if the evidence from this and other future studies, were a reliable reflection of public opinion *and* fair minded public opinion, this does not mean that the law of bias should automatically reflect that opinion. The law of judicial bias balances different factors that do not necessarily lead to the same conclusions as to when judges should and should not sit. These include public confidence in the impartiality of judicial decisions, the behavioural science on cognitive decision making, and policy considerations about the structure of the justice system. is ultimately a legal policy choice. The precise weight to be given to each of these factors in the law of bias is ultimately a legal policy choice. It is, however, difficult to imagine that the law of judicial bias in the UK or Australia, or any advanced legal system, would completely disregard public perception. Accordingly, we hope this paper provides valuable evidence that can be used as a basis for further research and as a contribution towards any future policy process designed to re-evaluate and reshape the law of bias.