

INTERNATIONAL ASSOCIATION OF JUDGES

“DIVERSITY IN THE FEDERAL JUDICIARY”

AUSTRALIAN RESPONSE

29 AUGUST 2022

This commentary is prepared for presentation at the educational program, chaired by The Honourable Justice Clayton Conlon, Judge of the Ontario Superior Court of Justice and Deputy Judge of the Nunavut Court of Justice, at the meeting of the Asian, North American and Oceanian Regional Group of the IAJ-UIM (ANAO), to be held Tel Aviv in September 2022. These brief comments, focus on the Australian experience and follow the excellent report prepared by Judge Allyson Duncan (ret.) and Judge Joanna Seybert, Judge of the United States District Court, Eastern District of New York (**Report**).

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The opinions expressed herein are those of the author and may not necessarily reflect those of the Federal Circuit and Family Court of Australia or the Australian Judicial Officers Association.

The Australian judiciary is bifurcated into the federal and state jurisdictions. This response will discuss the issue of diversity amongst the judiciary at both the state and federal level.

WHAT IS ITS STATUS?

Historically, the Australian judiciary has been homogenous, comprising mostly white, middleclass, and heterosexual males from similar backgrounds.¹ That homogeneity is slowly shifting however limits on the collection of statistical information make changes difficult to measure.²

Gender on the bench is one facet of diversity on which there is data available in Australia. As at June 2021, the percentage of women in the Australian judiciary was 40.7%, which was a marked increase of 12.7% from 2020.³ It should be noted that this percentage represents an overall picture and within each jurisdiction there are significant differences. For example, in the Federal Court of Australia, the percentage of women on the bench in 2021 was 26.9%.⁴ Between superior and inferior courts there are also noticeable differences: in 2021 the percentage of women within the superior Australian courts was 32.7%, whereas in the inferior courts it was 44.2%.⁵

Data regarding ethnicity and country of birth is more difficult to obtain. Australia has one of the highest percentages in the world of foreign-born inhabitants,⁶ and therefore a statistical understanding of how population demography is represented on the bench would be invaluable. Data collection has been

¹ Brian Opeskin, *Future-Proofing the Judiciary: Preparing from Demographic Change* (Palgrave Macmillan, 2021), 236 (‘Future-Proofing the Judiciary’).

² Gabrielle Appleby et al ‘Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption’ 2018 *Melbourne University Law Review* 42(2): 299, 311.

³ Australasian Institute of Judicial Administration Inc. *AJIA Judicial Gender Statistics: Number and Percentage of Women Judges and Magistrates at June 2021*, <<https://aija.org.au/research/judicial-gender-statistics/>>.

⁴ Ibid.

⁵ Ibid.

⁶ Brian Opeskin ‘The State of the Judicature: A Statistical Profile of Australian Courts and Judges’ (2013) UTSLRS 1; (2013) 35(3) *Sydney Law Review* 489.

identified as an obvious barrier as questions of ethnic background, sexual orientation, professional history and socio-economic status can only be obtained by questionnaire, and might be seen by judges as intrusive.⁷

WHY DOES DIVERSITY IN THE JUDICIARY MATTER?

Increasing diversity in the judiciary is important for three reasons: legitimacy, equality, and difference.

Legitimacy

There is an inherent value in having courts that ‘look like Australia’.⁸ The public is more likely to accept the judiciary’s capacity to ‘do right to all manner of people’ if it reflects the diverse and overlapping attributes of the general population.⁹ The only woman to have sat on the UK Supreme Court Bench, Baroness Hale of Richmond, speaks of the importance of a diverse judiciary in maintaining public confidence, since the public expect to see a judiciary which serves ‘the whole of the population not just a section of it’.¹⁰ Currently in Australia, a frequently cited factor bearing upon public confidence in the courts is the ‘extent to which those appointed to them are seen to reflect the community’s diversity’.¹¹ Former Australian High Court Justice Michael McHugh commented on gender diversity in the judiciary saying, “The need to maintain public confidence in the legitimacy and impartiality of the justice system is to me an unanswerable argument for having a judiciary in which men and women are equally represented.”¹²

Equality

The equality rationale for judicial diversity seeks to recognise the abilities of all legal professionals who are eligible for elevation to the bench, and afford them equal opportunity of appointment free from discrimination. This rights-based argument is supported by international law which promotes ‘respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’.¹³ The equality argument for judicial diversity is most often met with the traditional ‘merit’ retort, however merit and diversity need not be antithetical.¹⁴ From a utility perspective, current ‘gatekeeping’ of judicial positions to white middle-class heterosexual males in superior Australian courts can lead to a reduction of capable candidates. When making judicial appointments, judiciaries

⁷ Appleby et al (n 2) 311.

⁸ Brian Opeskin, ‘Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary’ in Gabrielle Appleby and Andrew Lynch ‘*The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia*’ (Cambridge University Press 2021) 83, 88.

⁹ Future-Proofing the Judiciary (n 1) 244.

¹⁰ Erika Rackley ‘Women, Judging and the Judiciary: From difference to diversity’ (2013, Routledge) xv.

¹¹ Elizabeth Handsley and Andrew Lynch ‘Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13’ (2015) *Sydney Law Review* 37(2) 187, 200.

¹² Dismantling the Diversity Deficit (n 8) 88.

¹³ Ibid 86.

¹⁴ Handsley and Lynch (n 11) 206.

should not neglect diversity, as doing so would be limiting the candidate pool and excluding a huge proportion of the population.¹⁵

Difference

To use gender as an example, the former Justice of the High Court, The Honourable Michael Kirby AC CMG has stated that, “Women are not just men who wear skirts, they have different life’s experience. They sometimes have a different way at looking at problems”.¹⁶ The same may be said for all facets of diversity: improving diversity in the judiciary will ‘improve judicial decision-making by avoiding the narrowness of experience and knowledge implicit in a collection of homogenous, even if excellent, judges’.¹⁷ In a survey of 142 judicial officers in Australia, it was found that there was a significant correlation between gender and judges who were concerned about the issue of integrity, quality and diversity of appointments, highlighting that women experience judicial life differently.¹⁸ Looking again at gender diversity, ‘informational theory’ suggests that since women have different experiences to men, women can play a role in countering the ‘gender-based myths, biases, and stereotypes [that] are deeply embedded in many male judges, as well as the law itself’.¹⁹ This theory could easily be transposed onto other diversity characteristics like race, ethnicity, Aboriginal or Torres Strait Islander origin, class, sexuality or geographical location.

WHAT CAN BE DONE?

As noted above, the make-up of the Australian bench is slowly shifting. In June of 2022, the first Indigenous Australian, Lincoln Crowley, was sworn in as a Justice of the Supreme Court of Queensland which is the superior court in that jurisdiction.²⁰ Such an appointment has been long overdue, and will hopefully forge a path for more First Nations peoples to join the bench.

As noted in the Report, an increase in diversity on the bench begins in the education sector, however is also informed by the judicial selection process. Opeskin notes that as “most judicial officers in Australia are appointed from the practicing Bar [...] one cannot expect a diverse Bench without a diverse Bar”.²¹ In Victoria and New South Wales, the two Australian States with the largest populations, the percentage of barristers at the Bar who were born overseas is 15% and 14% respectively. This is worrying when compared to 26% of the population being born overseas.²²

¹⁵ Dismantling the Diversity Deficit (n 8) 88.

¹⁶ Michael Kirby, ‘Women in the Law: What Next?’ (2002) 16 *Australian Feminist Journal* 148, 154-155.

¹⁷ Dismantling the Diversity Deficit (n 8) 86.

¹⁸ Appleby et al (n 2) 323.

¹⁹ Opeskin (n 8) 87.

²⁰ Audrey Courty, ‘Lincoln Crowley first Indigenous person to be sworn in as Supreme Court Justice’, *ABC News* (online, 13 June 2022) <Lincoln Crowley first Indigenous person to be sworn in as Supreme Court Justice - ABC News>.

²¹ Future-Proofing the Judiciary (n 1) 266.

²² *Ibid* 267.

Australia has so far been reluctant to implement any radical changes to judicial appointment.²³ Between 2008 and 2013, the Federal Labour Government introduced new measures for the selection of judges in the Federal jurisdiction which involved seeking expressions of interest for judicial appointments to promote transparency and diversity.²⁴ This appointment model was scrapped in 2013 when the Federal Government changed, and no data was ever formally collected to understand if there was a significant impact on diversity on the bench as a result.

If Australia is to move towards a bench which better reflects the wider populous, it is imperative that more detailed data is collected and more transparent reforms are made to the judicial appointment process where merit and diversity are appropriately balanced.

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²³ Andrew Lynch, 'Diversity without a judicial appointments commission: The Australian experience' in Graham Gee and Erika Rackley, *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 101.

²⁴ Future-Proofing the Judiciary (n 1) 268.