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Gabrielle Appleby and Suzanne Le Mire

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system. At the same time, the system should be designed to operate within an existing regulatory and governance space, and alongside other important mechanisms, such as the open court principle and appeals processes. This article proposes that a cascading set of objectives should inform the design of judicial discipline mechanisms. It then turns to a consideration of existing mechanisms in Australia, before concluding that the "Australian model", insofar as it exists, largely relies on traditional mechanisms, such as the referral to the head of jurisdiction. In Australia, thoughtful design that accounts for both traditional and contemporary judicial values is, as yet, unrealised. 678

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INTRODUCTION

The irreducible core function of the judiciary – to do right to all manner of people according to law, without fear or favour, affection or ill will – is timeless. For that reason, Francis Bacon's essay "Of Judicature", although written 400 years ago, can still be read with profit. The essay includes his famous observation that "an over-speaking judge is no well-tuned cymbal", which may be taken as the inspiration for the brevity of this introduction to the 2023 special issue of the Journal, dedicated to the topic of the Australian judiciary.

Beyond that core function, very little about the judiciary is or should be fixed in time. Judges both serve and shape society, and society, like Heraclitus's river,[1] does not stand still. The continuing legitimacy of the exercise of judicial power depends upon it being seen to reflect appropriately the social circumstances and expectations of the day. Identifying both the evidence and the principles which can guide the achievement of that outcome is a common thread which runs through the essays which follow. It demands the critical discernment of the applicable "values", to use Professor Appleby's word from her introduction below.

This special issue has its origin in both historical and intellectual moments which make an extended reflection on the Australian judiciary especially opportune.

The historical moment is an important set of bicentenaries. Next month will see the 200th anniversary of the Third Charter of Justice, being Letters Patent issued on 13 October 1823 pursuant to the *New South Wales Act 1823* (Act 4 Geo IV, c 96). 10 and 17 May 2024 are the bicentenaries of its promulgation and the respective first sittings of the Supreme Court of Van Diemen's Land and the Supreme Court of New South Wales established by that charter.

As the Hon JJ Spigelman AC KC frequently pointed out during his tenure as Chief Justice of New South Wales, the number of courts around the world which can claim such uninterrupted, independent longevity could be counted on one hand. This issue will be launched at the "Enduring Courts in Changing Times" conference, co-sponsored by the Journal with the Australian Academy of Law and the Australasian Institute of Judicial Administration to mark those bicentenaries.

The intellectual moment is to recognise that Australia now has an eminent body of scholars and practitioners, both established and emerging, who have made the study of the judiciary a specialty. They are amply represented by the distinguished contributors to this issue. However, it is important to acknowledge that their work is not just an academic or theoretical exercise. The insights they offer have the potential to shape the judiciary of the future and thereby enhance the administration of justice.

The Journal is grateful to each of the contributors who have so generously shared their learning. They would not have been brought together without the encouragement and inspiration of the Guest Editor, Professor Gabrielle Appleby of UNSW Law & Justice. Professor Appleby's well-deserved reputation as one of the leaders of the study of the judiciary in this country made her the obvious choice to guide this issue. Her ready acceptance of the General Editor's invitation has borne fruit in an exemplary and thought-provoking collection of essays which it is hoped will have a real impact on the development of the Australian judiciary well beyond the present historical commemorations.

FK

[1] Heraclitus, the ancient Greek pre-Socratic philosopher, conceived of the world as becoming and not being, famously observing that "no one ever steps in the same river twice".

THE CURATED PAGE

Having completed the series of images devoted to the Supreme Court of Tasmania, the Curated Page now turns to New South Wales. The Journal acknowledges Mr Richard Neville, the Mitchell Librarian at the State Library of New South Wales, for his assistance in identifying relevant works held in the library's extensive collections and providing information. To coincide with this special issue, the first picture in the series takes readers back to the earliest days of the colony with Edward Charles Close's watercolour of the "Philo Free" trial, which took place in Sydney in 1817. This was the first libel case heard in the colony. Rev Samuel Marsden accused Colonial Secretary John Campbell of libeling him through a letter published in the Sydney Gazette which suggested that, under the aegis of the Missionary Society, the 'Christian Mahomet' had operated as a gun-runner and moonshiner in the Pacific islands. The watercolour includes caricatures of several notable figures including Marsden at the right, the defendant Campbell on the left and possibly Judge-Advocate John Wylde behind him, as well as the lawyers Frederick Garling (whose descendant Justice Peter Garling is a current judge of the Supreme Court of New South Wales), William Moore, George Allen and George Crossley.

AUSTRALIAN LAW JOURNAL: INTRODUCTION TO THE SPECIAL ISSUE ON THE JUDICIARY

Gabrielle Appleby*

This special issue is intended to provide a contemporary snapshot into the position and debates surrounding the Australian judiciary. The judiciary – as disaggregated into the individual judges, the collective bench, and the court as an institution[2] – are all hot topics in 2023. How members of the judicial branch are selected, how they perform their role, the judicial culture, and how the judicial "workplace" is regulated, are all the subject of debate, reforms and calls for more to be done. The factors that have given rise to this moment are numerous, complicated and intersecting. I will highlight only a few of them here.

While the Australian judiciary are generally seen to do their job well and conduct themselves with integrity, there has been increasing public outcry about the conduct of a small number of Australian judicial officers. For instance, the last five years have seen highly publicised and scathing criticisms made by appellate judges regarding the unacceptable conduct in court (including serious bullying) by a number of federal circuit and family court judges.[3] In one instance, the appellate court decision was followed by the suicide of one of those judges.[4] This was a deeply tragic reminder – once again – of the workplace pressures and mental health stresses of judicial office.[5] In 2020, the findings of sexual misconduct against former High Court judge Dyson Heydon,[6] and the following court reviews and

* Special Issue Editor, Professor, UNSW Law & Justice. Director, The Judiciary Project, Gilbert + Tobin Centre of Public Law. I would like to thank Tony McAvoy SC for his input in relation to understanding the importance of diversity at an institutional level in the Australian context. I would also like to thank Jessica Kerr for her helpful comments on an earlier version of these introductory comments.

[2] On these different dynamics of the judiciary, see Gabrielle Appleby and Andrew Lynch, "The Judge, the Judiciary and the Court: The Individual, the Collective and the Institution" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court* (CUP, 2021).

[3] See, eg, *Jorgensen v Fair Work Ombudsman* (2019) 271 FCR 461; [2019] FCAFC 113; *Stradford v Stradford* (2019) 59 Fam LR 194; [2019] FamCAFC 25; *Lysons v Lysons* [2019] FamCAFC 29; *CQX18 v Minister for Home Affairs* [2019] FCA 386; *Adacot v Sowle* (2020) 355 FLR 57; [2020] FamCAFC 215. And further the explanation of these cases in Gabrielle Appleby and Suzanne Le Mire, "Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678.

[4] Holly Richardson, "Judge Guy Andrew's Death a Reminder of 'Crushing and Relentless' Workload Facing Judiciary, Bar Association Says", *ABC News*, 9 October 2020 <https://www.abc.net.au/news/2020-10-09/guy-andrew-death-sign-of-crushing-workload-facing-judiciary/12734736>.

[5] See further Carly Schrever et al, "Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing" (2019) 28 JJA 141; Jill Hunter et al, "A Fragile Bastion: UNSW Judicial Traumatic Stress Study" (2021) 33(1) *Judicial Officers' Bulletin* 1.

[6] Chambers of the Chief Justice, *Statement By the Hon Susan Kiefel, Chief Justice of the High Court of Australia* (22 June 2022) <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>.

responses that occurred across Australia,[7] highlighted the prevalence of such conduct within the legal profession and the judiciary, and the imperative of a better institutional response.[8]

In 2022, following an extensive inquiry, the report of the Australian Law Reform Commission (ALRC) on judicial impartiality was released.[9] Arising initially from a relatively narrow issue of judicial bias in a specific case, the Commission conducted a much-needed holistic examination of the institutional support provided by judges to deliver impartial justice. Its recommendations ranged from the importance of reform to judicial appointments, monitoring judicial diversity, the transformative potential of judicial education, the need for proactive judicial management of data on judges and the courts,[10] and the creation of a new independent avenue for managing complaints about judicial misconduct.

The ever-present danger of politicisation of judicial appointments has also been underscored by a number of recent events. In 2020, the High Court delivered its decision in *Love v Commonwealth*,[11] which found that the Commonwealth Parliament could not treat Aboriginal people as "aliens" for the purpose of the Constitution, because of their historic and unique connection to the country that is now Australia. Then Assistant Attorney-General Amanda Stoker argued that the unacceptable activism shown by the majority in that case provided a strong case for the screening of judges based on their judicial methodology, with the overriding factor being "a black-letter approach to constitutional interpretation".[12] The potential for politicisation of Executive-pick appointments was also highlighted by the controversy over a series of appointments to the Administrative Appeals Tribunal, which ultimately resulted in the announced abolition of the Tribunal.[13] Diversity – and historical lack of it – was highlighted with the celebrated appointment of Australia's first Aboriginal Supreme Court judge in Queensland in June 2022, Warramunga man Lincoln Crowley,[14] followed in November 2022 with the appointment to the Western Australian Supreme Court of Michael Lundberg, the son of a member of the Stolen Generation,[15] and in July 2023 by the appointment of Kamilaroi woman Louise Taylor, the first female Aboriginal Supreme Court judge who joined the Australian Capital Territory Supreme Court.[16]

A number of developments have reinforced the need for the Australian judicial system to be more responsive to its historical and ongoing impact on Aboriginal and Torres Strait Islander people. The over-incarceration of First Nations people, including youth, has driven the introduction of a number

[7] See, eg, Helen Szoke, "Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations" (Final Report, 2021); New South Wales Supreme Court, *Supreme Court Policy on Inappropriate Workplace Conduct* (2020) <www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/2020_07_02_Workpace%20Conduct%20Policy_v4.0_FINAL.pdf>.

[8] See further Gabrielle Appleby, Rosalind Dixon and Prabha Nandagopal, *Managing Misconduct: A Principled Response to Behavioural Misconduct in Constitutionally Significant Workplaces* (Gilbert + Tobin Centre of Public Law Report, 2022) <https://www.gtcentre.unsw.edu.au/sites/default/files/documents/MT0211_GTCPL001_MISCONDUCT%20REPORT_v5.pdf>.

[9] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) 310 (*Without Fear or Favour*).

[10] See further Daniel Ghezelbash et al, "A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia" (2022) 45 UNSWLJ 1085.

[11] *Love v Commonwealth* (2020) 270 CLR 152; [2020] HCA 3.

[12] Amanda Stoker, "All's Fair in Love and War: The High Court's Decision in Love & Thoms" (Paper presented at the Sir Samuel Griffith Society Conference, 2020) <https://www.google.com/search?q=amanda+stoker+love+and+thoms+sir+samuel+griffith&oq=amanda+stoker+love+and+thoms+sir+samuel+griffith&aqs=chrome..69i57j0i512l9.8068j0j9&sourceid=chrome&ie=UTF-8&safe=active&ssui=on>.

[13] The Hon Mark Dreyfus KC MP, Attorney-General, *Media Release: Albanese Government to Abolish Administrative Appeals Tribunal* (16 December 2022) <https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>.

[14] See further Supreme Court Library Queensland, *The Honourable Justice Lincoln Crowley* <https://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/lcrowley>.

[15] See further *Media Statements* <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/09/Lundberg-named-WAs-first-Aboriginal-Supreme-Court-judge.aspx>.

[16] See further *Aboriginal Judge for ACT Supreme Court* <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rattenbury/2023/aboriginal-judge-for-act-supreme-court>.

of Indigenous-specific court-initiatives over the last couple of decades.[17] Extending that work, in 2022 New South Wales introduced the Walama List in the District Court, guided by a culturally responsive and justice-reinvestment led approach to the criminal sentencing of Indigenous offenders.[18] In 2021, the ALRC made findings about the importance of judicial diversity on the legitimacy of the institution, and recommended changes to judicial appointments and judicial education to reflect this,[19] including a recommendation that each Commonwealth court "should develop a structured and ongoing program of Aboriginal and Torres Strait Islander cross-cultural education for members of the federal judiciary".[20] The ALRC emphasised the unique role that courts can play in increasing knowledge about cultural competency and institutional safety for Aboriginal and Torres Strait Islander people, as well as building trust of the justice system within that community. In 2021, *Indigenous Legal Judgments: Bringing Indigenous Voices into Legal Decision Making* was released,[21] following from the Australian *Feminist Legal Judgments* collection in 2014.[22] Through re-imagining legal decisions that affect Aboriginal and Torres Strait Islander people so as to be inclusive of Indigenous people's stories, historical experience, perspectives and worldviews, the collection highlighted the extent of exclusion, discrimination and subjugation of the law and past judicial decision-making. Recent years have also seen significant projects undertaken by law schools to Indigenise the law degree curriculum.[23]

This is not just, then, about ameliorating the negative impact of the justice system on Aboriginal and Torres Strait Islander people, or enhancing judicial representative or understanding of the unique culture and contemporary circumstances of Aboriginal and Torres Strait Islander people, but an institutional project directed at promoting diversity of judicial thought: reconceptualising the Australian legal system as a bijural or multijural one, where Indigenous systems of governance and law are taught alongside the Western systems, and intersect with them across the entire legal system, from university, into the profession and judiciary. In the words of Australia's first Aboriginal Senior Counsel, Wirdi man Tony McAvoy SC:

> It is my view … that the culture and character of our justice institutions must change to better understand and apply the concepts of First Nations law, to incorporate the procedures which ensure justice is properly dispensed in a land where there are pre-existing and continuing legal systems. The institutions themselves must change.[24]

These public debates and controversies surrounding the role and performance of the Australian judiciary have been preceded and accompanied, and often ignited, by ongoing experimentation within Australia's court systems in designing the most appropriate institutional architecture to support and sustain the judicial role. Across Australia, States and Territories have led the way in the development of tailored judicial education and wellbeing support programs, reform to judicial appointments and judicial misconduct processes, and the introduction of culturally responsive judicial processes. Reforms and experimentation with novel processes and mechanisms of engagement (particularly the take-up of technology) have been hastened by the pressures of the COVID-19 pandemic that have been felt across all sectors.

One of the key themes that emerges from the various discussions in this Special Issue – and more generally around the Australian judiciary – is that the status quo is no longer sufficient. This mirrors

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[17] Including the Youth Koori Court in New South Wales, the Koori Court in Victoria, the Nunga Court in South Australia (Aboriginal Sentencing Court), and the Murri Court in Queensland.

[18] See further NITV, *The Walama List: How Culture Over Crime Hopes to Reduce Incarceraton* <https://www.sbs.com.au/nitv/article/the-walama-list-how-culture-over-crime-hopes-to-reduce-incarceraton/7b7unbcu1>.

[19] *Without Fear or Favour*, n 9, Recommendations 7, 8, 10.

[20] *Without Fear or Favour*, n 9, Recommendation 10.

[21] Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021).

[22] Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014).

[23] See for instance Ambelin Kwaymullina, "Teaching for the 21st Century: Indigenising the Law Curriculum at UWA" (2020) 29(1) *Legal Education Review* 1.

[24] Tony McAvoy SC, *Mullenjaiwakka Trust Oration* (Banco Court, 2023) 8. See also the Australian Research Council project led by Professor Larissa Behrendt (UTS) on *A First Nations Sovereign Approach to Decolonising Colonial Institutions* (Laureate Fellowship Project 2022).

broader conversations happening across Australia about falling trust in public institutions, and the push to create new mechanisms and processes that can oversee the work of the traditional branches of government.[25] In the judicial sphere, the trust that might have been previously reposed in exclusive judicial self-regulation, characterised by informality and opaqueness, no longer exists, or at least, is no longer sufficient. The maintenance of what in Australia we have generally referred to as the "public confidence" in the judiciary,[26] and has been developed in other literature in relation to the sociological legitimacy of the judiciary,[27] requires reform.

In this Special Issue, six articles explore key areas of debate, concern and reform of the Australian judiciary: appointments, education, technology, performance management, managing changing demographics, and discipline.

Andrew Lynch considers the question of judicial appointments from an often over-looked perspective. Much has been written on the current process for judicial appointments in Australia, including by Lynch himself,[28] predominantly focused on the need to open-up the black-box of executive appointment, and introduce criteria for selection, and review by an independent panel, to inform the executive's final pick. Much too has been written on the link between appointment and judicial diversity.[29] This is all reinforced by the ALRC's recent recommendations on the need to reform the federal appointment process.[30] Lynch's contribution in this Special Issue is to consider a different facet of the judicial appointments process, and one that has been controversial in the United Kingdom: judicial participation in the process, and the extent to which judicial influence can create risks for the legitimacy of the courts, in terms of reduction of diversity and public confidence. Lynch provides an overview of the extent of judicial involvement in appointments across Australia, and concludes that there appears to be important differences in practice across the country, and within jurisdictions over time as governments change. But, as with many matters relating to the judiciary, there is still a significant lack of transparency about the true extent and influence of judges in appointing judges. He raises a foundational question for judicial appointments: what is the purpose of consultation with heads of jurisdiction and other judges in judicial appointment? Surely, only when this is answered, can the design of an appointments system that engages with judges be adequately assessed. Lynch argues that there a common understanding needs to be reached between government, the judiciary, the profession and the community of what a judicial appointment process is designed to achieve. The institutional values that support the judiciary's unique role in constitutionalism and rule of law should be identified at the outset so as to guide the appropriate level of judicial participation in appointments.

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[25] Such as the push for a federal integrity commission (now established under the *National Anti-Corruption Commission Act 2022* (Cth)); the push for an enforceable code of conduct for parliamentarians (recommended by the Kate Jenkins, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, Australian Human Rights Commission, 2021)), see further on the development of the Codes, Joint Select Committee on Parliamentary Standards 47th Parliament, *Final Report* (29 November 2022).

[26] See, eg, Justice Susan Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium" (1999) 25 *Monash University Law Review* 209, 214.

[27] See, eg, Richard H Fallon Jr, "Legitimacy and the Constitution" (2005) 118 *Harvard Law Review* 1787; Michael L Wells, "'Sociological Legitimacy' in Supreme Court Opinions" (2007) 64 *Washington & Lee Law Review* 1011; Erin F Delaney, "Analyzing Avoidance: Judicial Strategy in Comparative Perspective" (2016) 66 *Duke Law Journal* 1; Gillian E Metzger, "Considering Legitimacy" (2020) 18 *Georgetown Journal of Law & Public Policy* 353. Frederick Barnard, *Democratic Legitimacy: Plural Values and Political Power* (McGill Queen's University Press, 2001) ix; Mark Bovens, Dierdre Curtin and Paul 't Hart, "Studying the Real World of EU Accountability: Framework and Design" in Mark Bovens, Dierdre Curtin and Paul 't Hart (eds) *The Real World of EU Accountability: What Deficit?* (OUP, 2010) 31, 53.

[28] See, eg, Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37(2) *Sydney Law Review* 187.

[29] Handsley and Lynch, n 28; Brian Opeskin, "Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2020) 83.

[30] *Without Fear or Favour*, n 9, Recommendation 7.

Julie Falck and Jessica Kerr look then at judicial education as a fundamental part of the judicial institutional architecture that promotes and protects public confidence and legitimacy of the judiciary. Kerr and Falck's work builds on the recent significant mapping exercise to understand who provides judicial education – and what – across Australia,[31] and which informed the ALRC's recommendation targeting improved transparency, structure and co-ordination of judicial education.[32] Falck and Kerr accept that there has been significant progress in understanding judicial education as no longer posing a threat to judicial values, and specifically independence, and rather as a valued support for judges – even if it remains "under-evaluated, under-resourced and under-integrated". But they argue there is still an institutional reluctance to talk about judicial education as directed at judicial competence, and this reluctance has meant that the transformative potential of judicial education – for the composition, performance and well-being of the judiciary and public perceptions of the institution – remains only partially unlocked. Judicial education is uniquely placed to target judicial competence, to provide support and even remedy incompetence in judges. This requires a mindset that moves away from judicial education as merely Continuing Professional Development and "updating" knowledge, towards a mindset that accepts judicial education as an institutional tool designed to generate and increase competence. Understanding judicial education as positively contributing to judicial independence, impartiality and other values such as accountability and competence raises questions then about Australia's aversion to compulsory judicial education, which they argue might be particularly important in foundational skill development.

Tania Sourdin confronts the question of how technology has and will impact on the judicial role and workload drawing on her recent survey on judicial attitudes to technology. It comes at a timely juncture, with the enforced technological take-up across government and professions by the COVID-19 pandemic, including across the judiciary. Technology's impact is not uniform and can range from procedural technology assistance in the form of "supportive" or "replacement" technology, to more "disruptive" use in the form of AI-assisted decision-making. Sourdin's research illuminates current levels of judicial technology use and attitudes towards it. Importantly, she argues that often technology solutions are developed without a proper understanding of the judicial role – and without an understanding of varying judicial experience of, understanding and attitudes towards technology. Sourdin explains her findings should be considered alongside the perspective of other justice technology users to inform future take-up and design of technology. The data reveal that judges are not concerned about technological change in and of itself – indeed, Sourdin concludes the data suggests an overall acceptance of the need for increased use of technology. Concerns arise, however, in relation to technological change that is not accompanied with appropriate support and resourcing, where it impacts on the experience of and access to justice by litigants, and the potential impact of more disruptive AI on the quality of the justice. There is also concern that judicial involvement in the policy decisions regarding the adoption and design of technologies is insufficient. Such involvement would both increase judicial take-up, and ensure the system was designed in a way that supports the judicial role.

Brian Opeskin in his piece deploys four case studies through which to understand the impact of population change on the Australian judiciary. Demographic change requires courts and governments to be open to reform, evolution and adaptation, or risk public confidence of the judiciary, and responsiveness to judicial values that he identifies as judicial independence, access to justice, quality of justice, public trust, and cost effectiveness. He considers the impact of increasing life expectancy on judicial tenure; of population ageing on judicial pensions; of international migration on judicial diversity; and of population redistribution on the spatial delivery of justice in lower courts. His recommendations are compelling, driven by the conclusions he draws from the data. They include increasing the mandatory retirement ages for judges, coupled with a new process for assessment of capacity for all judges. He advocates for sweeping reforms to limit the availability and level of the judicial pension to increase its cost effectiveness into the future. He joins others in arguing for more to be done to address what he identifies as persistent and increasing diversity deficits in judicial appointments. Finally, he is more circumspect about how to respond to the challenge of providing justice across the spatial diversity that is Australia, observing the

[31] Gabrielle Appleby et al, "Judicial Education in Australia: A Contemporary Overview" (2022) 31(4) JJA 187.

[32] *Without Fear or Favour*, n 9, Recommendation 9.

transformative potential of online justice, which was accelerated during the COVID-19 pandemic, but notes that these changes are not without costs, and the potential negative ramifications of such reforms on fundamental judicial values.

Sharyn Roach Anleu and Kathy Mack provide an overview of the formal and informal norms, processes and practice that make up the "ethical infrastructure" to support judicial performance and provides different forms of accountability for what they frame as core judicial value: impartiality. They canvass a variety of ways in which the components of judicial ethical infrastructure are changing, as judicial workplace and social pressures and expectations evolve, and are becoming more responsive to the needs of judges, court users and the public. There have been developments in the guides of judicial conduct, the role of the head of jurisdiction, and, particularly following the ALRC's report, an increased understanding of the concept of impartiality and what fosters and supports judicial impartiality. They argue that a judge's individual self-management must remain the core of judicial performance management, but that this must take place within a supportive and reinforcing institutional framework, increasingly concerned with providing avenues for dealing with inappropriate judicial conduct as well as supporting judicial wellness.

Gabrielle Appleby and Suzanne Le Mire turn then specifically to the question of how best to design an institutional response to judicial misconduct through judicial disciplinary systems. This, they agree with Richard Devlin and Sheila Wildeman, is a significant act of "statecraft" that engages with foundational constitutional values.[33] They argue for an expanded understanding of the objectives of judicial disciplinary systems, which should be understood as fundamental to judicial legitimacy through their instantiation of promotion of the judicial values of independence, accountability, impartiality, transparency, efficiency, judicial wellbeing, representativeness and competence. Appleby and Le Mire argue that rather than just being seen as a mechanism for receiving and responding to complaints about judges (while this is an important aspect of its practical purpose), it should also be seen, for instance, as providing institutional support for judicial and public education and judicial wellbeing. Achieving these cascading sets of objectives requires a carefully designed system that takes into account the broader institutional context in which a disciplinary system will operate, the constitutional context, and the unique judicial workplace. Through a survey of the current discipline systems in Australia, Appleby and Le Mire conclude the current systems are not yet fulfilling the potential of judicial discipline systems. The ongoing reliance on traditional models of self-regulation leave many concerns about this process unaddressed.

A shared dimension of these articles is the understanding that *values* that must inform analysis and reform of the judiciary,[34] its culture and institutional governance. Values are seen to sit in a foundational relationship with the idea of public confidence in the judiciary, and judicial legitimacy. Judicial values thus provide teleological touchstones for the study, analysis and reform of judicial institutions and culture. But what are those values? The articles reveal that they are not limited to the traditional values of independence and impartiality – although these continue to play an important role. Values are not static, and they are not uncontested. But a more diverse and complex understanding of the judicial values leads to a richer analytical conversation about judicial institutional design. With the objective of opening up those dialogues, values have been extended to include accountability, representativeness, access to justice, efficiency, competency. Clearly, what values are selected as institutional values have an important impact on assessing, reforming and designing judicial governance structures, the institutional architecture within which judging occurs. They will have an impact on the development of expected standards of conduct of judiciary, and they will impact on the constraints and pressures on judicial decision-making.[35]

[33] Richard Devlin and Sheila Wildeman, "Introduction: Disciplining Judges – Exercising Statecraft" in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing, 2021).

[34] On the responsibility of researchers studying judges and the courts, see further Gabrielle Appleby and Heather Roberts, "Studying Judges: The Role of the Chief Justice, and Other Institutional Actors" (2023) *Oñati Socio-Legal Series* (forthcoming).

[35] See further discussion on the constraining role of judicial values Rachel Cahill-O'Callahan, "A Typology of Judicial Values" in Sophie Turenne (ed), "Research Handbook on Judging and the Judiciary" (Edward Elgar Routledge, 2024 forthcoming).

But how to go about identifying these values? This exercise resonates with other projects, such as the attempt to find and articulate a set of "constitutional values", undertaken by Professor Rosalind Dixon.[36] The identification of judicial values can only be a highly jurisdictionally contextual exercise. Devlin and Dodek, in an influential work, identify values as providing the "normative foundation" for any judicial system.[37] They attempt to articulate, through an exploration to regulative theory and comparative analysis, a set of shared values, acknowledging that these will be inevitably be contested, in a continuous state of flux, and in every jurisdiction this list must be assessed contextually against the historical, social, political, legal and cultural context. Their list includes the more "traditional" values of independence, impartiality and accountability, and extends to representativeness, transparency and efficiency.

Constitutionally there are mandated values associated with a judicial system. In the Australian context these are the implied values of independence and impartiality from the terms and structure of courts created by Ch III of the Constitution at both federal and state level. These values are frequently constitutionally connected to the concept of public confidence and integrity of the courts, which open up the suite of values that might be constitutionally associated with the judiciary. Including in this larger list then are values that are associated with public power more broadly – accountability, transparency and efficiency. They are applied, with caution and appropriate modification, to the judiciary.

But then there are key issues that become associated with the judiciary with changing expectations and our understanding of how the judiciary works, whether that be the effect of experience on judicial decision-making, the experience of litigants in accessing the courts, and the stresses and mental health of being a judge. And so values such as diversity, access to justice, and judicial wellbeing have emerged more recently in the ongoing process of re-evaluation and calibration of the institutional values with the experience and expectations of the justice system.[38] Falck and Kerr's piece in this Special Issue argues for the more explicit embrace of competence as a separate and foundational value for the Australian judiciary, a concept that has long-grounded expectations of the Australian judiciary. Noting the normative importance of understanding competence not just as an expectation, but as a foundational guiding principle, Falck and Kerr argue that the substantive quality of justice can be improved.

Finally, from each of the articles, there are two themes that emerge repetitively. The first is appreciating the interconnectedness of institutional evolutions in judicial governance and culture. A holistic view of judicial practice, culture and governance is needed to achieve judicial value-associated objectives. That need for a holistic institutional response to best support judges perform their public roles was highlighted in the ALRC's recent report, and is continued in the articles of this Special Issue. As Mack and Roach Anleu write, supporting good judges requires a holistic understanding of the necessary institutional, collective and individual components.[39]

The second is the importance of resourcing to the maintenance of judicial independence, and achieving well-designed institutional reform that promotes other judicial values that foster public confidence and legitimacy. The judiciary is vulnerable and dependent on the government to invest in the judges and the courts to resource institutional scaffolding such as appropriate educational and wellbeing support, and appointment and disciplinary processes. Most of the proposals for reform that emerge in the articles require a combination of internal judicial institutional and cultural change with external (government-led) reform and investment. Well-designed judicial reforms, then, will be the combined efforts of all branches of government, informed by research that is sensitive to the institutional context of the judicial system. The articles in this Special Issue provide an important set of contributions to that collective endeavour.

[36] See, eg, Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2020).

[37] Richard Devlin and Adam Dodek, "Regulating Judges: Challenges, Controversies and Choices" in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar Publishing, 2016) 1, 6.

[38] And note collegiality as a possible candidate: Sarah Murray, "Judicial Collegiality" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual. Collegial and Institutional Dynamics in Australia* (CUP, 2021) 189.

[39] Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664.

Judicial Influence on Judicial Appointments

Andrew Lynch*

This article considers the opportunities for judicial influence in the selection of individuals for judicial appointment in Australia. It uses the framework developed by Professor Graeme Gee to explain judicial influence as affecting the content and context of judicial appointments, noting its variability and relational character. Gee's description of inputs, outputs and throughputs in the English appointments system is translated to the Australian scene, which has maintained unfettered executive discretion to appoint judges but added formal opportunities of consultation and advisory panels in many jurisdictions. The article highlights a lack of clarity and coherence around the role of judicial actors in appointment models. A more secure understanding of the purpose of judicial involvement would inform and support the design of a process which appropriately benefits from judicial influence.

I. Introduction

The topic of judicial appointments remains one of significant interest and importance in Australia. Australian governments have maintained a steadfast disinclination to consider any curtailment of their power to select individuals through the creation of a statutory body such as that which exists for the courts of England and Wales.[1] But there has been considerable experimentation with models under which other actors are able to have formal input into the process of identifying candidates for appointment and advising government in its decision. Justice Gageler recently described the overall character of Australian reform of judicial appointments as having been "piecemeal and intermittent".[2]

After almost a decade of a federal judicial appointments process that was flagrantly opaque, the current Commonwealth Attorney-General, Mark Dreyfus QC, took office with an express commitment to greater transparency. This was borne not simply of a desire on behalf of the Labor government elected in 2022 to reinstate the judicial appointments reforms it had instigated when last in office and which the Coalition had discontinued in 2013. In the intervening years, there had also been unease over some appointments to federal courts and concern about suitability as borne out by later performance on the Bench.

In that context, the Attorney-General's undertaking in September 2022 to implement the relevant recommendations of the Australian Law Reform Commission's (ALRC) inquiry report *Without Fear or Favour: Judicial Impartiality and the Law on Bias*[3] is unsurprising.[4] The ALRC's call for the development of a more transparent process for appointing federal judicial officers on merit, involving publication of criteria for appointment and public advertisement of vacancies inviting expressions of interest, essentially asks no more of the Commonwealth than Labor had previously provided. A return to these measures, consistent with Principle IV(a) of the Latimer House Principles agreed by the Commonwealth Heads

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[1] See, eg, Robert McClelland, "Judicial Appointments Forum" (Speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008). Justice Sackville's early assessment of the Australian appetite for embrace of a model similar to the Judicial Appointments Commission of England and Wales has proved correct: Ronald Sackville, "The Judicial Appointments Process in Australia: Towards Independence and Accountability" (2007) 16 JJA 125, 136.

[2] Justice Stephen Gageler, "Judicial Legitimacy" (Paper presented at the Australian Judicial Officers Association Colloquium, 7 October 2022) 13.

[3] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (December 2021).

[4] Australian Law Reform Commission, "Attorney-General Commits to Reforming Judicial Appointments and Complaints" (Media Release, 29 September 2022) <https://www.alrc.gov.au/news/attorney-general-commits-to-reforming-judicial-appointments-and-complaints/>.

of Government,[5] is undoubtedly welcome. But they nevertheless continue the minimalist tradition of Australian judicial appointments reform, with the executive ceding none of its formal power.

It is not the purpose of this article to interrogate the case for more ambitious appointments reform than that which was recommended by the ALRC, whether for the federal judiciary or additionally State and Territory courts. That discussion would revisit familiar arguments that have failed so far to resonate politically and for which there is no sign of an increased receptiveness on behalf of government. In that respect, the Queensland government's response in the wake of the controversy over the appointment of Chief Justice Tim Carmody a few years ago is particularly instructive.[6] A Protocol for Judicial Appointments was introduced to assist and guide executive discretion.[7] Although this model has distinctive features including layperson involvement, not even a judicial crisis of the kind that preceded the creation of the Protocol was enough to induce the Executive to entertain ideas for bolder reform that would constrain executive discretion or possibly constitute a degree of power-sharing with the judiciary.

Further, it is not my view that a reduced role for the Executive is necessarily desirable. That is for reasons going to the implications for judicial power of a "democratic deficit" in the composition of the courts,[8] as well as evidence about the advantages of advancing greater judicial diversity through retaining executive responsibility for appointments.[9]

Instead, this article looks not to the executive role, but seeks to highlight the existing opportunity in most Australian jurisdictions for the judiciary to influence the selection of individuals for appointment to the Bench. This is alternatively provided for by statutory provisions and publicly stated commitments to processes involving judicial consultation or participation in advisory bodies. The vulnerability of the latter to changes in government is obvious but legislative attention to the appointment process remains the exception rather than the rule.

In looking to these arrangements, I draw substantially upon the framework proposed by Professor Graham Gee to understand what is meant by "judicial influence" in the setting of judicial appointments.[10] Gee was moved to develop this tool in response to judicial criticism of earlier work which suggested that the creation, composition and procedures of the Judicial Appointments Commission of England and Wales (the JAC) effectively amounted to a judicial takeover from the Executive of its powers of appointment.[11] The substantial judicial presence in the composition of the JAC (five of the JAC's 15 members are judges) ensures judicial involvement at every stage of the application, assessment and selection process. The JAC handles the majority of judicial appointments while special selection commissions (with JAC representation among the members) are convened for senior positions, including the Supreme Court. Depending on the judicial office, the JAC or special commission recommends to either the Lord Chancellor, who is a member of the Cabinet and in recent times has not been a lawyer, or the Lord Chief Justice a single name for the preferred candidate.[12] The appointing authority need not accept the name

[5] Commonwealth Secretariat et al, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (Report, November 2003) <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf>.

[6] Rebecca Ananian-Welsh, Gabrielle Appleby and Andrew Lynch, *The Tim Carmody Affair - Australia's Greatest Judicial Crisis* (NewSouth Publishing, 2016).

[7] Department of Justice and Attorney-General, Queensland Government, *Protocol for Judicial Appointments in Queensland* (19 October 2021) <https://www.publications.qld.gov.au/dataset/protocol-judicial-appointments-qld>.

[8] Sir Anthony Mason, "The Appointment and Removal of Judges" in Helen Cunningham (ed), *Fragile Bastion Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 7.

[9] Andrew Lynch, "Diversity without a Judicial Appointments Commission – The Australian Experience" in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Edward Elgar, 2017) 101.

[10] Graham Gee, "Judging the JAC – How much Judicial Influence over Judicial Appointments is too much?" in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Edward Elgar, 2017) 152.

[11] Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP, 2015) Ch 7. See also Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, March 2012) <https://strathprints.strath.ac.uk/40759/1/guarding_the_guardians.pdf>.

[12] *The Supreme Court (Judicial Appointments) Regulations 2013* (UK) reg 19; *The Judicial Appointments Regulations 2013* (UK) regs 7, 13, 19, 25 and 31.

but can, with reasons for doing so, reject it or refer it back for reconsideration. There is no capacity to independently appoint a different person and after three recommendations from the commission, the appointing authority must select one for appointment.[13] These changes have been discussed as giving rise to several negative and unforeseen risks, notably the failure to achieve greater diversity among the senior ranks of the Bench and a reduced ability to withstand future attacks on the independence of the courts.[14]

That context is important, because it is not suggested that any similar danger is apparent in Australian judicial appointments given the firm commitment to the traditional approach, albeit aligned to the minimum of the Latimer House principles. As such, "how much judicial influence is too much influence?" is not really the question here. But being explicit about the very real opportunity for judicial influence in Australian appointments, too often obscured by attention on the executive's power, is undoubtedly important as a first step to considering relevant questions about the purpose and form of that influence. This is not just about asking why judges are involved – although it does seem worth explaining that to the community. But the related questions are more testing: why are certain judicial actors eligible for consultation or to serve as members of advisory panels, but not others? Why do judicial officers have the opportunity for involvement in one or other of those processes in some jurisdictions – and which is more valuable? Why do some jurisdictions ensure that judicial input is available through both mechanisms? Ultimately, what is the *purpose* of judicial involvement at any particular stage and how is this optimally achieved? Gee's structured examination of the topic assists with approaching these issues, despite obvious jurisdictional differences that underpin his work.

Two important caveats must be made at the outset. The first is that influence may be exercised in ways beyond those expressly acknowledged or mediated through a publicly available process. Without suggesting any impropriety, it is simply a fact that former and current leaders of the judiciary, with views on those who may be suitable for judicial appointment, will often know and have contact with relevant members of the Executive, especially when the latter are legally qualified and have spent time working in the profession. The formal processes discussed in this article are very likely to be supplemented by various informal opportunities for political and judicial office holders to interact over the qualities and potential suitability of individuals for appointment to the Bench, perhaps not even in respect of a current judicial vacancy. These informal interactions are certainly a form of judicial influence and occasionally may have real bearing, but are beyond the scope of this article.

Second, I endorse Gee's own recognition of the difficulty for academics in researching this topic as "outsiders" to the process, let alone the relational dynamics that may swirl around it between judges, ministers and bureaucrats.[15] Undoubtedly, what actually occurs within "consultation" between the government and any judicial actor is much richer than that single word can hope to convey to anyone not privy to the communications in question. In part this is just a logical presumption, but it is also confirmed by anecdote and insights that may be occasionally shared in conversation, some convened for the purpose and subject to Chatham House rules and others not so. Furthermore, the publicly available information as to the selection process in some jurisdictions may be so basic – or simply lacking – that it remains unclear as to what, if any, process is followed, including consultation. There is a strong chance those with experience in the relevant processes may read any "outsider" discussion of it and find it wanting or the positions adopted to be misguided. But this should not deter academic engagement with the issues, and instead may be seen as making the case for greater clarity about the nature and value of each relevant step in the process.

Part II details the current arrangements in statute or publicly acknowledged protocols and practices through which former or current judicial officers may participate in judicial appointments throughout Australia, noting the diversity among these approaches. Part III considers these opportunities for influence within the framework set out by Gee in order to better understand their place in the overall process through

[13] *The Supreme Court (Judicial Appointments) Regulations 2013* (UK) reg 20; *The Judicial Appointments Regulations 2013* (UK) regs 8(4), (5), 14(4), (5), 20(4), (5), 26(4), (5), 32(5), (6).

[14] Gee, n 10; Gee et al, n 11; Paterson and Paterson, n 11; Shimon Shetreet and Sophie Turenne, *Judges on Trial – The Independence and Accountability of the English Judiciary* (CUP, 2nd ed, 2013) 102–125.

[15] Gee, n 10, 154–155.

which individuals are selected for the Bench. In particular, the extent to which the influence of specific forms of judicial participation may vary and the role of other actors will be examined. Part IV offers some reflections on the nature of judicial involvement in judicial appointments in Australia and whether there is scope for this to be approached in alternative, possibly more structured ways that optimise the value of this participation. Part V concludes by making some general observations and recommendations regarding judicial appointments reform more broadly.

II. Opportunities for Judicial Influence

There are essentially three ways in which judicial influence is directly brought to bear upon decisions to appoint judges in the Commonwealth, States and Territories. These are (1) consultation with the relevant head of jurisdiction, and in some cases other senior judges; (2) the involvement of heads of jurisdiction in a panel or committee assembled to advise the Attorney-General on eligible individuals; and (3) the use of former judicial officers as members of an advisory panel.

Before considering each in turn, it is worth highlighting those jurisdictions where there is a lack of publicly available information on appointments processes. Unfortunately, this is a familiar challenge for anyone seeking to understand how individuals are selected. The 2015 update by the Judicial Conference of Australia (the JCA, now the Australian Judicial Officers Association) of an earlier study by Justice Ronald Sackville comparing judicial appointment across the Federation was able to establish the existence of some practices only through confirmation by correspondence with heads of jurisdiction.[16] In other instances, the JCA was unable to do anything but repeat what Justice Sackville had learned a decade earlier after acknowledging there was "no publicly available information on the current practices".[17] That comment was made in respect of Western Australia – and is just as applicable to that State now as it was then.

For some other jurisdictions, the availability of public information is fragmentary. For example it is unclear whether Victoria has retained an earlier practice of advisory panels for appointments to the Magistrates Court, on which the Chief Magistrate was a participating member.[18] On the webpage on "Judicial Appointments" of the Department of Justice and Community Safety, there is no mention of use of advisory panels or even consultation as part of the process for appointment to any of the three courts of the State.[19] Only by visiting the Supreme Court website does one learn that "judges are appointed by the Governor of Victoria upon recommendation by the Attorney-General after consultation with the Chief Justice".[20]

The Commonwealth presents as an interesting case because although the Attorney-General has declared his use of consultation in making appointments, most significantly in respect of the appointment of Justice Jagot to the High Court of Australia,[21] the information provided on his department's website remains as sparse as that shared by the previous government. It merely states: "As the nation's first law officer, the Attorney-General is responsible for recommending judicial appointments to the Australian Government."[22]

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[16] Judicial Conference of Australia, *Judicial Appointments: Criteria and Processes* (Research Paper, December 2015), updating Ronald Sackville, "Judicial Appointments: A Discussion Paper" (2005) 14 JJA 117.

[17] Judicial Conference of Australia, n 16, 53. Several aspects of the Victorian judicial appointments scheme were also described, "as a result of the change of government in December 2014", as "not clear" or "uncertain" (41, 47). This was despite the final version of the updated JCA paper being released a full year later.

[18] Judicial Conference of Australia, n 16, 47.

[19] Department of Justice and Community Safety, Victoria State Government, *Judicial Appointments* <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>.

[20] Supreme Court of Victoria, *Our Judiciary* <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary>.

[21] Mark Dreyfus, "Address to Western Sydney University" (Speech delivered at the Western Sydney University, 18 November 2022) <https://www.markdreyfus.com/media/speeches/address-to-western-sydney-university-mark-dreyfus-kc-mp/>.

[22] Attorney-General's Department, Australian Government, *Court Appointments* <https://www.ag.gov.au/legal-system/courts/court-appointments>.

Interestingly, in announcing Justice Jagot's appointment, the Attorney-General detailed the consultation he carried out as follows:

> The Government consulted extensively in the lead up to this decision, including with all state and territory Attorneys-General,[23] the Shadow Attorney-General, the heads of the Federal Courts and state and territory Supreme Courts, state and territory Bar associations and law societies, National Legal Aid, Australian Women Lawyers, the National Association of Community Legal Centres and deans of law schools.[24]

Absent from this list were the other Justices of the High Court alongside whom Justice Jagot now sits. But they were expressly included in the consultation carried out by Labor Attorneys-General previously when last in government.[25] It is difficult to know what to make of the Attorney-General's recent omission of Justices of the Court. The list given by the Attorney-General is not presented as exhaustive, but then it seems fair to assume a failure to reference those who were expressly included at an earlier point signifies some change from the past approach.

However, caution is needed in reading too much into silence about any aspect of the appointments process. Despite no mention of the reinstatement of advisory panels by the new Labor government in the relevant section of the Attorney-General's Department's website, it is clear from the announcement of individual appointments that these have involved panels similarly comprised to those used by Labor when last in office. For example, in announcing the three new Justices of the Federal Court of Australia in December 2022, the Attorney-General said:

> I established an advisory panel, comprising the Hon James Allsop AO, Chief Justice of the Federal Court, the Hon Alan Robertson SC, former Justice of the Federal Court, and a senior officer of the Attorney-General's Department. The advisory panel assessed the nominations and provided me with recommendations on suitable candidates. The three people whose judicial appointments I am announcing today were all recommended to me by the panel.[26]

Accordingly, and consistent with the qualifications made in the introduction, silence regarding process is not necessarily interpreted as signifying the non-performance of an activity through which judicial influence may be exercised. In those jurisdictions where no express acknowledgment is given of consultation or some other judicial involvement in the process, it is entirely feasible that it nonetheless occurs – or simply that the Executive is engaged in so-called "secret soundings" with members of the judiciary. But just as it is unwise to assume some contact or informal consultation may not be occurring, nor can it be assumed that it is. Essentially, the discussion for present purposes remains open to that possibility but is unable to meaningfully progress the issue. Instead, as already asserted, the focus of this article is upon the publicly available information as to opportunities for judicial influence.

A. Consultation

Consultation with the head of jurisdiction of the court to which the appointment is to be made is an acknowledged practice in respect of all appointments to the "higher courts" and also the heads of jurisdiction in the District and Local Courts in New South Wales;[27] both the Supreme Court and the Local Court in the Northern Territory;[28] the Supreme Court (with both the Chief Justice and the President of the Court of Appeal consulted), the District Court, the Land Court and the Magistrates Court in

[23] Consultation of whom is statutorily required: *High Court of Australia Act 1979* (Cth) s 6.

[24] Department of the Prime Minister and Cabinet, "Appointment to the High Court of Australia" (Media Release, Australian Government, 29 September 2022) <https://ministers.pmc.gov.au/dreyfus/2022/appointment-high-court-australia>.

[25] Attorney-General's Department, Australian Government, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (April 2010) 3.

[26] Attorney-General's Department, "Appointments to the Federal Court of Australia" (Media Release, Australian Government, 15 December 2022) <https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-15-12-2022>.

[27] Department of Communities and Justice, NSW Government, *Judicial Careers* (5 April 2023) <https://www.dcj.nsw.gov.au/about-us/careers-at-communities-and-justice-nsw/careers/judicial-careers.html#Selection7>.

[28] Northern Territory of Australia, *Protocol for Judicial Appointments and Appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal* <https://localcourt.nt.gov.au/sites/default/files/reviewoftheprocessesfortheappointmentofjudicialofficersinthenorthernterritory-report.pdf>.

Queensland;[29] and the Supreme Court of Victoria.[30] Any practice of consultation with heads of jurisdiction in respect of vacancies in other courts is presently unclear, including for those, such as the Supreme and District Courts in South Australia, that the JCA was able to confirm through correspondence in its 2015 report.[31] Legislative provisions requiring consultation with the head of jurisdiction exist in respect of both the Supreme Court and the Magistrates Court in the Australian Capital Territory,[32] and also the Magistrates Court in South Australia.[33] In the two Territories, the retiring head of jurisdiction is expressly acknowledged as having a right to be consulted about the appointment of their successor.[34]

However, consultation with the judiciary is not limited to the head of jurisdiction in respect of a number of appointments. It was noted above that the previous Labor government consulted with other Justices of the High Court when selecting individuals to join that Bench, although this was not referred to by the Commonwealth Attorney-General in his announcement of Justice Jagot's appointment. The wide consultation carried out by Labor Attorneys-General for other appointments to federal courts included an invitation to all heads of jurisdiction, as well as professional associations, to nominate suitable candidates to vacancies, and this practice appears to have been reinstated.[35]

In some cases, the head of one court is consulted on potential appointments to others. The Chief Justice of the Supreme Court of the Northern Territory is consulted along with the Chief Judge of the Local Court for filling vacancies on the Local Court.[36] Consultation with the South Australian Chief Justice regarding the appointment of Magistrates is statutorily required,[37] as it is for the appointment of a judge of the Supreme Court to be the Chief Judge of the District Court.[38] The appointment of the Chief Magistrate of the ACT Magistrates Court also requires consultation with the Chief Justice of the Australian Capital Territory.[39]

Lastly, under the Tasmanian Protocol for Judicial Appointments, there are two open opportunities for consultation that would enable other judicial actors to give voice on potential candidates. Tasmania utilises advisory panels (discussed further in the following two sections) to supply recommendations as to individuals to appoint and the Protocol provides that the advisory panel "may seek the views of third parties as to the suitability of any person for appointment". The Attorney-General, upon receiving the panel's recommendations, "may consult on a strictly confidential basis with whoever the Attorney-General sees fit".[40] Although heads of jurisdiction are not specifically referred to, they may be presumed as an important and probable source to be consulted.

The provision for consultation of judicial leaders is a substantial feature of Australian judicial appointments, being a feature in most jurisdictions and very likely occurring in those where it is not possible to obtain a public account of the process. The value of this form of judicial input is discussed further in Part III below.

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[29] Department of Justice and Attorney-General, Queensland Government, n 7.

[30] Supreme Court of Victoria, n 20.

[31] Judicial Conference of Australia, n 16, 32.

[32] *Supreme Court (Resident Judges Appointment Requirements) Determination 2015 (No 1)* (ACT) Sch 1; *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT).

[33] *Magistrates Act 1983* (SA) s 5(4).

[34] *Supreme Court (Resident Judges Appointment Requirements) Determination 2015 (No 1)* (ACT) Sch 1; Northern Territory of Australia, n 28, 5.

[35] Attorney-General's Department, n 25, 2.

[36] Northern Territory of Australia, n 28, 5.

[37] *Magistrates Act 1983* (SA) s 5(4).

[38] *District Court Act 1991* (SA) s 11A(2).

[39] *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* (ACT).

[40] Department of Justice, Tasmanian Government, *Protocol for Judicial Appointments* (August 2016) <https://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments>.

B. Heads of Jurisdiction as Members of Advisory Panels

The use of panels constituted to provide advice to the Attorney-General recommending individuals for judicial appointment is far from consistent across Australian jurisdictions. Panels appear to be not used at all in some States and Territories,[41] and may be employed selectively in others for different courts in the hierarchy.

Where panels are used, it is typical that the composition will obtain a judicial perspective through the involvement of either the head of jurisdiction or former judicial officers.[42] Both bring judicial experience to a panel's consideration of possible candidates against any statement of criteria, such as that issued by the Australasian Institute of Judicial Administration (AIJA).[43] But there is obviously a difference between a head of jurisdiction recommending individuals to serve on the court they lead and, in appellate jurisdictions, alongside whom they will frequently sit, and the more disinterested position of a former judge. This section considers the participation of heads of jurisdiction, while the use of retired judges is detailed in section C.

Heads of jurisdiction are members of advisory panels used for appointments to the federal courts (except to the High Court and also to the heads of jurisdiction role in the other courts);[44] for the District and Local Courts in New South Wales;[45] and for the Magistrates Court in Tasmania.[46] It is expressly acknowledged that in the case of federal courts and the Magistrates Court of Tasmania, the head of jurisdiction has the option of nominating another individual to join the panel on their behalf. Further, the Tasmanian Protocol for Judicial Appointments provides:

> Should the Chief Magistrate decline to become a panel member or to nominate a replacement, the Attorney-General will appoint a replacement who preferably has had experience as a member of the Court in which the appointment is to take place or who possesses significant legal experience.[47]

It is not known whether this has occurred in practice, but the expression used in this passage that guides the Attorney-General to appoint a panel member who "has had experience" rather than simply "has experience", suggests the selection of a former magistrate to take the place left vacant by the Chief Magistrate. That would also seem consistent with a respect for the decision of the Chief Magistrate to absent both themselves and any nominee drawn from the Court from the panel.

C. Former Judicial Officers as Members of Advisory Panels

The scenario just considered under the Tasmanian Protocol is the only occasion in which a former judicial officer would be appointed to participate as a member of an advisory panel in that jurisdiction. But elsewhere, it is only former judges who will be involved in such panels. The two jurisdictions where this is unambiguously the case are Queensland and the Northern Territory.

For appointments to each court in Queensland, a Judicial Appointments Advisory Panel is established. For the Supreme and District Courts the panel is to be chaired by a former judicial member of the relevant court. But also for the Land Court and the Magistrates Court, the chair is stipulated to be "a retired District Court Judge" and in the case of the Magistrates Court, the District Court Judge must also have "been a Chief Magistrate".[48] Interestingly, additional judicial experience is made available

[41] Advisory panels are not a feature of appointments in the Australian Capital Territory and no publicly available information confirms their use in Victoria, South Australia or Western Australia.

[42] Only in respect of appointments to the Tasmanian Supreme Court is an advisory panel formed without any participation from those currently serving or previous judicial experience: Department of Justice, Tasmanian Government, n 40.

[43] Australian Institute of Judicial Administration, *Suggested Criteria for Judicial Appointments* (September 2015) <https://aija.org.au/wp-content/uploads/2017/10/Suggested-Criteria-for-Judicial-Appointments-AIJA-2015.pdf>.

[44] Attorney-General's Department, n 25 and Attorney-General's Department, n 26 (as an example).

[45] Department of Communities and Justice, NSW Government, n 27.

[46] Department of Justice, Tasmanian Government, n 40.

[47] Department of Justice, Tasmanian Government, n 40.

[48] Department of Justice and Attorney-General, Queensland Government, n 7.

on panels advising on appointments to the Land Court since the Protocol for Judicial Appointments in Queensland requires one of the two individuals whom the Attorney-General has discretion to appoint (after other ex officio members) to be a former Land Court President or a retired judge of the Supreme or District Court. This is in addition to the Chair who is, as already noted, a retired District Court Judge (unless the appointment is for President of the Land Court, in which case a retired Supreme Court Judge must act as Chair).

Advisory panels on vacancies in the Northern Territory Supreme Court and Local Court also involve only former judges as members and they also act as the Chair of the panel. There is flexibility to appoint a former judge not only of the Supreme Court but, in the alternative, "a former Judge of the Supreme Court of a State or Territory or of the Federal Court, who preferably has had experience in the Northern Territory". The eligibility of former judges for appointment to the panel is time limited by requiring them to have not been retired for more than seven years.[49]

Lastly, and as already noted, the Commonwealth Attorney-General once more uses advisory panels to assist with identifying candidates for appointment to all federal courts, except the High Court.[50] These panels comprise both the current head of jurisdiction *and* a retired judge. As the only other member is a senior official from the Attorney-General's Department, it is these panels, in distinction from all others which are used across the Australian federation, that have a clear majority membership of persons with direct judicial experience. Furthermore, there is no ex officio or other representation from the profession, as is the case with panels in other jurisdictions, nor lay or community members as occurs in Queensland.

III. Understanding Judicial Influence

Part II revealed considerable diversity in the opportunities afforded to judicial actors for influence in the appointment of judges. That diversity itself inevitably prompts some general observations on balancing the benefits of "laboratory federalism"[51] with the virtues of consistency and transparency, and the potential for more deliberate and co-ordinated reform. These issues are set aside for now and are returned to in Part IV of this article.

The immediate focus of this Part is to place a framework around the information just detailed and which has confirmed that the judiciary are active participants in the process of identifying persons for appointment to their ranks. The framework enables a proper appreciation of how that participation supports the exercise of judicial influence and assists in any attempt to evaluate the significance of this in practice. As foreshadowed in the introduction to this article, the work that I draw on here is that of Professor Graham Gee, who has examined judicial influence in the appointments made to the courts of England and Wales since the enactment of the *Constitutional Reform Act 2005* (UK) and the establishment of the JAC. The much more sophisticated nature of that appointments process, including both the formally reduced role of the Executive and the greater extent to which judicial actors are engaged across it, is an obviously critical difference between the object of Gee's work and the arrangements described in Part II.[52] But the concepts Gee has developed to understand influence in that jurisdiction are perfectly translatable; it is simply that their application is reduced, commensurate with the more limited scope of the judiciary's formal involvement in Australian appointments.

A. Conduct-shaping and Context-shaping

Gee's framework is constructed around the idea of influence as both conduct-shaping and context-shaping.[53] Conceding that the former is probably what people mostly have in mind when referring to

[49] Northern Territory of Australia, n 28, 2.

[50] Attorney-General's Department, n 25, 2.

[51] Gabrielle Appleby and Erin Delaney, "Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony" (2023) 132 *Yale Law Journal* (forthcoming).

[52] For a snapshot of the English appointments system, see Peter Leyland, *The Constitution of the United Kingdom* (Hart Publishing, 4th ed, 2021) 183, 190; for a more detailed account see Gee, n 10.

[53] Gee, n 10, 157.

judicial influence, Gee explains "conduct-shaping" influence as the translation of judicial "preferences into concrete decisions" including by directly affecting "the decisions and behaviours of other actors".[54] The place of judicial members in the JAC and the elaborate nature of its judicial recruitment practices, means there are multiple occasions for "conduct-shaping" influence to be brought to bear, often in quite subtle ways (eg drafting position descriptions, designing selection tests and so on) in what Gee is studying. In Australia, the formal opportunities for this influence are limited to those discussed in Part II – consultation and the making of recommendations through membership of an Advisory Panel. But it is undeniable that these are the most critical ways in which judicial input to any process is exercised, short of assuming formal responsibility for the decision to appoint itself.[55]

In contrast to the directness of activities categorised as "conduct-shaping", the other dimension of influence that Gee calls "context-shaping" is indirect and refers to the judiciary's "capacity to shape the context in which individual selection decisions are made" and "to mould the assumptions that inform and underpin the decision and actions of the main stakeholders in the selection regime".[56] Although Part II was very much focused on ways that judicial officers might exert influence on decisions about who to appoint to judicial vacancies, reference has been made in this article already to some significant examples of "context-shaping" activities. A very clear one is the production by the AIJA of *Suggested Criteria for Judicial Appointments*.[57] This document is expressly adopted in the Protocol for Judicial Appointments in Queensland,[58] and has undoubtedly informed and presumably helped shape other articulations of the necessary judicial qualities in the years since its publication. Similarly, the Judicial College of Victoria's adoption of the *Framework of Judicial Abilities and Qualities* produced by the Judicial Studies Board of England and Wales has provided what is used in that State to identify "the attributes the government, courts and community expect from judicial appointees".[59]

Other context-shaping contributions extend far beyond the criteria that may guide selection and should be regarded as including individual and organisational judicial attention to the appointments process generally. Clear examples of the former are the scholarly attention Justice Sackville gave the topic in the first decade of this century,[60] later updated and kept in view by the JCA. The AIJA's annual publication of gender statistics on the Australian judiciary is also a very relevant illustration of shaping the context in which other actors operate.[61] Simply by providing accessible information about the cumulative effect of individual appointment decisions upon the diversity of the bench, the AIJA has assisted in galvanising political action that manifests in both individual selections for vacancies and proposals for more structured reform.[62] Lastly, there is the example of the judicial influence apparent in the recent ALRC report on judicial impartiality, including the judicial leadership in the organisation and advisory panel and also the input judicial officers had through its consultations and data gathering, and which have resulted in recommendations on judicial appointments that have been accepted by the Commonwealth.[63]

[54] Gee, n 10, 157–158.

[55] In 2013, a legislative change saw the transfer of the power of all lower court and tribunal appointments from the Lord Chancellor to the Lord Chief Justice and Senior President of Tribunals: *Crime and Courts Act 2013* (UK) Sch 13, Pt 4. Gee has quantified the effect of this as placing the "ultimate decision whether to appoint the person recommended by the JAC" with a member of the judicial arm for 95% of all appointments: Gee, n 10, 153.

[56] Gee, n 10, 158.

[57] Australian Institute of Judicial Administration, n 43.

[58] Department of Justice and Attorney-General, Queensland Government, n 7.

[59] Department of Justice and Community Safety, Victoria State Government, n 19; Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Officers* (September 2008) <https://www.judicialcollege.vic.edu.au/sites/default/files/2022-06/Judicial%20Abilities%20and%20Qualities%20Framework.pdf>.

[60] Judicial Conference of Australia, n 16; Sackville, n 16.

[61] See, eg, Australasian Institute of Judicial Administration, *AIJA Judicial Gender Statistics: Number and Percentage of Women Judges and Magistrates* (June 2022) <https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-_2022-09-14.pdf>.

[62] Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37 *Sydney Law Review* 187.

[63] Australian Law Reform Commission, n 3.

B. Judicial Influence Is Not Static but Variable and Relational

Gee points out that both forms of judicial influence are "variable" in that they will fluctuate over time.[64] This acknowledges that the specific judicial vacancy to be filled matters, as does the content of any underpinning protocol or statutory requirements, the personalities of the key actors and institutional relationships. He cites shifts in the levels of influence judges have had with respect to appointments in England and Wales. This is obviously true when we think about Australian appointments. Consider, as an obvious example, the initiation, abandonment and reinstatement of advisory panels for federal judicial appointments over the last 15 years. Between 2013 and 2022, the role that heads of jurisdiction and former judicial officers had previously under the Labor government was denied them – and is now returned. At the subnational level, the JCA's update of Justice Sackville's comparative study highlighted the difficulties of keeping up with changes in Victoria between 2005 and 2015 which waxed and waned through changes of government. Lastly, the Queensland government's introduction of advisory panels bestowed on former judicial officers an influential role they previously lacked.

Gee's point about the dynamics of variation acquires a whole other aspect when imported to a federal system. As Part II makes clear (and noting that it does not provide a comprehensive account of all elements of appointment processes, such as advertising vacancies and the extent of consultation with non-judicial actors), there is significant variety and distinction between the way different jurisdictions within Australia appoint judges. Accordingly, it is very difficult to generalise about the extent of judicial influence in this country. Geographically and temporally, judicial appointment is very far from being a stable and readily comprehensible practice of constitutional governance. Perhaps this is to be explained as the result of a piecemeal transition away from the simplicity of the traditional approach (uniform throughout Australia in the last century) of appointment as the gift of the executive, albeit with "secret soundings", towards a more deliberate and formally consultative method, but one which is yet to take an agreed optimal form.

The other dynamic that operates upon judicial influence is relational in character – "the influence of any one actor is related to and partly shaped by the influence exerted by other actors".[65] There are several demonstrations of this readily to hand in the discussion above. Consider, for example, the judicial influence of advisory panels used by the Commonwealth Attorney-General to provide a shortlist of candidates for appointment to federal courts: the current head of jurisdiction and a former judge of that court are joined on the panel by a senior bureaucrat. No other jurisdiction configures advisory panels with a majority of members drawn from the judiciary. As the most extreme contrast, appointments to the Supreme Court of Tasmania are recommended by a panel which has no guarantee of *any* judicial involvement (although it is possible the Attorney-General may use their discretion to nominate a current or former judge to provide this in practice). But compare the Commonwealth approach to that of Queensland. In that State, the advisory panel will consist of up to five members of whom only the Chair will bring judicial experience, and one member need not even be a lawyer. The experience of judicial influence in these two very differently comprised advisory panels can hardly be said to be simply the same.

Another good example of the extent to which the relational lens provides a nuanced way of understanding the opportunities afforded for judicial influence is the way in which the Chief Justice of the Northern Territory is consulted about appointments to the Supreme Court. Unlike other jurisdictions, the Protocol for the Northern Territory does not provide for consultation of the head of jurisdiction by the Attorney-General, but instead by the advisory panel only, which also consults with the Presidents of the Bar Association and the Law Society. The status of the panel as an intermediary between the Minister and the Chief Justice is emphasised by the statement that: "If the Chief Justice expresses an objection to the proposed recommendation of a particular person, the Advisory Panel will communicate that objection in its recommendation to the Attorney-General."[66] While clearly informing the panel's consideration

[64] Gee, n 10, 160–161.

[65] Gee, n 10, 161.

[66] Northern Territory of Australia, n 28, 3.

of candidates and recommendations, the head of jurisdiction's views are not expressed directly to the Executive. The impression, supported also by contrast to arrangements for communication in other jurisdictions, is that the advisory panel's centrality to the process effects a relative containment of the role of the Chief Justice exerting influence.

C. Inputs, Outputs and Throughputs

Finally, the mechanics of Gee's framework for evaluating the degree of judicial influence focus upon the "inputs", "outputs" and "throughputs" that judicial actors bring to the appointments process.[67] It is apparent that the activities grouped under these categories are strongly interconnected rather than strictly demarcated. Obviously, what is contributed to the process has a bearing on the desired outcome, as also does the quality and accountability of the process itself.

The value generally of judicial participation in the appointments process is based on several grounds:

> Judges have a legitimate interest in the composition of the judiciary that justifies their involvement in individual appointments and the crafting of policies on the selection regime. They are well positioned to assess the potential judge-craft of applicants for judicial office. They bring first-hand knowledge of day-to-day life in courts and tribunals, and in this way can help to ensure that the changing demands of litigation are reflected in the blend of professional, administrative and personal qualities necessary for particular vacancies. Equally vital is judicial input into the policies on and the governance of the selection regime. Involving judges can help to foster their confidence (and that of the legal community) in the integrity of the selection regime.[68]

The opportunities for judicial influence that pertain in Australia and were detailed in Part II – consultation and membership of advisory panels – are justified on the grounds Gee recognises for judicial input. Those opportunities capture the critical knowledge of both what the job requires and first-hand exposure to the skills and acumen of many who will be under consideration as practicing members of the bar. But in saying that, the limitations of judicial input are also highlighted insofar as judges will likely have less direct experience of potential candidates drawn from beyond the bar and may even have a tendency to disregard those from different professional backgrounds in law (such as solicitors and legal academics). This may offer its own separate justification for enabling the input of others whether through more extensive consultation or more diverse composition of advisory panels.[69] More generally, the inclusion of other perspectives from the profession and lay people not only broadens and diversifies the available inputs to guide selection, but potentially operates to test the underlying assumptions that judicial actors may bring.[70]

The mention of "inputs" from others highlights the relational aspect of influence that Gee identifies. An assessment of opportunities for judicial input into the process is incomplete, if not largely meaningless, without an eye on the role available for others to play. In some jurisdictions, the judiciary have no more opportunity for input than representatives of lawyers' professional associations, while in others there is a more evident hierarchy through which the judiciary are afforded a more distinct and larger opportunity. In practice, we might anticipate that the *weight* given to judicial input is more meaningful in an understanding of its influence than simply measuring the relative opportunity to make that input. Most significant, of course, is the unfettered power retained by the Executive in all Australian jurisdictions to select individuals for appointment, and against which the influence of judicial input is formally ancillary. In that sense, the relational inquiry that drives much of the extensive debate on the English appointments system has a complexity and essential importance that just does not apply to the Australian landscape.

[67] Gee, n 10, 163–170.

[68] Gee, n 10, 164.

[69] Mason, n 8, 1, 21.

[70] Gee, n 10, 166. It is acknowledged that there is a risk lay members of advisory or committees will essentially defer to judicial actors, but this may be avoided through careful selection and training of lay members: see Gee et al, n 11, 173, 184; Shetreet and Turenne, n 14, 116.

The question of what "outputs" are desired from the process may initially appear obvious: suitably qualified and experienced individuals to perform judicial office. But the judiciary carry public responsibilities that are underpinned by numerous institutional values including independence and impartiality.[71] Dr Sophie Turenne has argued that these must not simply be approached as abstract ideals when thinking about judicial appointments design but must be understood "in the current climate" prevailing in the "broader legal and extra-legal environment" of the jurisdiction, which for her is a post-Brexit United Kingdom where the judiciary have been pressed to hold the Executive to adhere to constitutional values and the rule of law.[72] The Australian polity has not experienced anything to compare to the fundamental reorienting of the United Kingdom's withdrawal from the European Union, but Turenne's point is well-made: what we mean by these familiar judicial values when we consider them in respect of appointments processes will inevitably be contextual and this should guide specific design choices for appointment models.

An additional output that is prominent in any discussion of judicial appointments is diversity. But the goal of a more representative bench (or a "fair reflection of society")[73] remains "a much more contested value" than those traditionally invoked and is seen by some as in fact "antithetical to independence and indeed an assault on impartiality".[74] It is certainly the case that the relationship of diversity to "merit" has been a source of tension in Australian discussions around criteria for appointment and processes.[75] However, the recent ALRC report indicates this is diminishing and that there is broad support for more systematic collection of diversity statistics to "promote reflection on the part of appointing authorities and the courts" on the need for better progress on this issue.[76]

Lastly, connecting the inputs and the outputs of judicial appointment, are what Gee calls the "throughputs" – the features of the process that facilitates the interaction of different actors in a way that is "transparent, accountable and inclusive' and guards against any actor having excessive influence".[77] The issues of transparency and inclusivity are ones that have a straightforward translation, but it is useful to remind ourselves that accountability goes to the heart of Gee's concern in analysing a process which provides the English judiciary with very substantial opportunities for involvement at each stage while the formal powers of the Executive are very tightly constrained. More recently, Gee, with Richard Ekins, has mounted a clear case for the reinvigoration of the political role and greater responsibility for senior judicial appointments,[78] but there are opposing academic views.[79]

For Australian audiences, that is not our fight.[80] But nor can we disregard accountability as an important aspect of the discussion. Sir Anthony Mason was clear that this issue has significance for the authority of the judicial arm when he said: "One justification for the exercise of judicial power by non-elected

[71] See Richard Devlin and Adam Dodek, *Regulating Judges – Beyond Independence and Accountability* (Edward Elgar, 2016) 9–17.

[72] Sophie Turenne, "The 'Good Chap' and a 'New Type of Judge': The UK Constitution under Stress" [2022] (50) *Teoría y Realidad Constitucional* 613, 614.

[73] See Susan Kiefel and Cheryl Saunders, "Concepts of Representation in Their Application to the Judiciary in Australia" in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Springer, 2015), 41.

[74] Devlin and Dodek, n 71, 15.

[75] Handsley and Lynch, n 62, 206–210.

[76] Australian Law Reform Commission, n 3, 455 [12.58].

[77] Gee, n 10, 168.

[78] Richard Ekins and Graham Gee, "Reforming the Lord Chancellor's Role in Senior Judicial Appointments" (Report, Policy Exchange, 9 February 2021). In proposing that the Lord Chancellor be provided with a shortlist rather than a single name for appointment, Ekins and Gee aim to reinstate "an important degree of ministerial choice" that also animated earlier reflections: Kate Malleson, "Taking the Politics out of Judicial Appointments?", *UK Const L Blog* (21 February 2012).

[79] See the response of Turenne, n 72, 621.

[80] Although it undoubtedly has comparative value in assessing judicial appointments options in Australia: Andrew Lynch, "Judicial Appointments in Australia – Reform in Retreat", *UK Const L Blog* (26 May 2014).

judges in a democracy is that judges are indirectly appointed by the people in that it is the duly elected government that makes the appointments."[81]

While it is clear from Part II that opportunities for judicial influence in Australia are at specific steps in the process and that the Executive retains discretion in the exercise of its formal power to appoint, public confidence in the accountability of both arms of government would surely be enhanced by a clearer and more coherent explanation of the exact role played by the judiciary. It would, for instance, be damaging if some came to view the actual operation of an appointment process as one whereby the head of jurisdiction advises the Attorney-General who to appoint and this settles the matter.[82] This suspicion may depend considerably on the identity and professional experience of the Attorney-General at any point in time – a good example of the kind of variable which Gee reminds us as fluctuating judicial influence. While the Executive is, of course, still formally accountable for all appointments, in effect and despite the trappings of a more transparent approach, a concern that the judiciary are essentially deciding its own membership smacks of the old and discredited "secret soundings".

It is impossible for those not participating in the process to understand whether scepticism about who may actually be making the decision is a danger with roots in what occurs or is a mere phantom. But that does not mean the solution is not obvious; the accountability of the Executive for judicial appointments is bolstered by better use of the other throughputs of transparency and inclusiveness in the process. As Gee emphasises, "it is important that, so far as possible, each judicial input into the selection regime is structured by a set of understandings shared by all of the stakeholders as to the purpose and limits of involving judges at specific stages of the selection process".[83] This clarity assists public understanding and so reinforces the executive's accountability while insulating the judiciary and the exercise of its power from a hint of the democratic deficit acknowledged by Mason.

IV. Clarifying and Situating Judicial Influence

When we apply Gee's framework to the opportunities examined in Part II for judicial actors to influence the appointment of judges in Australia, we do not see some antipodean version of the dynamic between the judiciary and Executive that pertains in the United Kingdom. But we do acquire a vocabulary and way of thinking more carefully about how the judiciary contribute to appointment processes here and a means of evaluating whether this is satisfactory or requires further development.

As useful as the framework is, resort to it seems hardly necessary to draw a preliminary and overarching conclusion that the Australian approach to judicial appointments suffers from two obvious deficiencies. The first is simply a lack of clarity and absence of meaningful public information about how judges are appointed. Regardless of their precise content, the Protocols of Queensland and the Northern Territory are an excellent illustration of what can be made publicly available in an accessible form to instil confidence that there actually *is* a process. The legislative provisions that apply in the Australian Capital Territory do not really meet the same standard, but have an obvious edge over bland statements that just confirm appointment by the Executive on the advice of the Attorney-General. The lack of information about some jurisdictions, so that not even a study produced under the auspices of a national association of judicial officers can explain what is going on, is lamentable and inexcusable.

The second deficiency, which may be more contentious, is that the variation across appointment practices is higher than can be justified and efforts should be made for greater consistency. The variety across appointment models presently does not appear to owe much to genuine local differences or need, but rather is the result of a strange combination of complacency punctuated by fitful attention. If, as the ALRC report confirms, process matters to public confidence in an independent and quality judiciary, then it is time we started a conversation about what best practice might look like and the deliberate steps

[81] Mason, n 8, 1, 17.

[82] The statutory consultations with other judicial actors that the Judicial Appointments Commission for England and Wales is required to conduct have been found to carry significant, even "disproportionate", weight: Gee et al, n 11, 173–176.

[83] Gee, n 10, 169–170.

necessary to achieve it. In a recent reflection on the ALRC recommendations, Justice Stephen Gageler did not mince his words:

> The *Without Fear or Favour* report is a wake-up call. To ensure ongoing judicial competence and judicial impartiality, and thereby to preserve judicial legitimacy, structural improvement can and should occur. We who have the privilege and responsibility of serving as existing members of the judiciary know that well. The report's recommendation on the topic of judicial appointments warrants the vocal and enthusiastic support of us all.[84]

Justice Gageler's recognition that the judiciary have a part to play in effecting change – context-shaping, in other words – is welcome.[85] But there is also obviously work to be done by the Standing Council of Attorneys-General in commencing discussion and development towards a more standardised approach.

That should include consideration of the means and extent of judicial influence in an appointments system. Gee's framework assists not only in appraising current judicial involvement in any specific jurisdiction but will also be a useful vehicle in any attempt to bring about better alignment across the Commonwealth, States and Territories. Approaching the judicial participation as a matter of inputs, throughputs and outputs will increase the likelihood that a more principled design is pursued.

Reaching a common understanding between government, the judiciary, profession and community of the desired outputs from an appointments process would be the critical first step. This should take an expansive view of the outputs, as discussed in Part III, recognising that the judiciary is not simply any other occupation, but an arm of government which, through its guardianship of constitutional values, checks the illegitimate use of public power and applies the rule of law. The institutional values of the judiciary that support this, including the more recently acknowledged importance of diversity, should all be identified at the outset to ensure judicial participation is substantial and determined appropriately.

That in turn takes us to considering the judicial inputs into the process, which should take their cue from and be geared towards the agreed outputs. The differences existing across Australian jurisdictions as to the forms of judicial consultation and membership of advisory panels cannot simply be immaterial. Some must be preferable, even actually superior to others, as a means of obtaining sufficient relevant judicial input into the process without precluding the opportunity for other perspectives or suggesting any undermining the accountability of the Executive.

It is not my aim here to answer the questions that will arise from such an exercise. But even thinking about what those questions might include seems useful and likely to yield improvements to judicial appointment models generally in this country. For example, to ask "what is the purpose of consultation with the head of jurisdiction?" is to open the way to a productive consideration of the design features of an appointments model. One of those might be to decide if some guidance or indication of the form and content of that consultation should be provided. This would ensure consistency of process between appointment rounds as individual actors – in both government and the courts – change. It would also ensure that the decision-maker receives the information necessary to inform selection in a way that may be directly connected to published criteria. Further, it might explain why in some jurisdictions the consultation is in respect of courts at all levels while on others there is differentiation between lower and superior courts. As a final example, the question would assist in resolving stark differences in the timing of consultation, noting that presently in Queensland, the head of jurisdiction is consulted by the Attorney-General "before referring vacancies" to the advisory panel,[86] while in the Northern Territory consultation with the Chief Justice is instigated by the advisory panel, and in Tasmania there is no express need to consult the Chief Justice at all.

A similar effect is produced by interrogating the opportunity for judicial input offered by advisory panels, though here the differences in what occurs are even starker. There is a divide between those jurisdictions that have heads of jurisdiction as a member of the panel and those who only include former judges, with the Commonwealth having both forms of judicial participation, while panels are simply not used at all

[84] Gageler, n 2, 14.

[85] See Andrew Lynch, "Judicial Diversity, Leadership and Change" (2022) (2) *Law Society Journal* 76.

[86] Department of Justice and Attorney-General, Queensland Government, n 7, 2.

in some jurisdictions or for appointments to certain courts in a jurisdiction. Asking what advisory panels are for and what is the best way to realise that purpose should assist in determining best practice. So, if the purpose of the panel is essentially to elicit judicial approval of candidates for appointment, then the Commonwealth model delivers. But if the aim is to obtain a broader endorsement or to aid consideration of candidates drawn from different backgrounds, then a larger, more varied membership is justified. This also has the benefit of situating the judicial input alongside that of members of the profession and possibly lay people, as is the case in Queensland.[87] Doing so more clearly signals the specific role of those giving judicial input and emphasises executive accountability.

It is clear from even this brief consideration of inputs and outputs, that inevitably these also shape thinking on the throughputs. The need for a better articulation of what is sought from and contained within "consultation" is an example of greater transparency and consistency in aid of accountability. To the extent it refers to a practice of consulting others, it goes to inclusivity. Likewise, the possibility of larger and more diverse advisory panels achieves a more convincing method of gathering inputs in service of the desired outputs of the process.

The focus of this article has been judicial influence – and it is important to emphasise that while this is a critical aspect of the topic of appointments, it is not the totality of the topic. But the framework discussed here, although developed as a lens through which to examine judicial participation clearly has the potential to drive purposeful design and consolidation of judicial appointments models in their entirety.

V. Conclusion

Given the traditional focus on the executive's power of selecting individuals for judicial appointment, a primary aim of this article has been to highlight the very real role that the Australian judiciary plays in this process. In most jurisdictions this is now expressly acknowledged to at least some degree, which is a positive development from the traditional presentation of appointments as a matter for the Executive alone. As reform has been reliably modest, the opportunities for judicial influence in contemporary appointment processes do not risk usurpation of the Executive nor a democratic deficit in appointments that would challenge the courts' exercise of judicial power. But efforts to understand the value of judicial inputs that have been formally embraced as part of an appointments model are needed to ensure this influence is applied most usefully and appropriately to the agreed aims of that process. This in turn will hopefully create momentum for the development of consensus around the elements of a "best practice" appointments system and greater consistency and clarity throughout the Australian Federation.

[87] It is interesting that none of the Australian jurisdictions have advisory panels that come close to matching the scale and inclusivity of those contemplated by two former Chief Justices of Australia: Sir Garfield Barwick, "The State of the Australian Judicature" (1977) 51 ALJ 480, 494; Mason, n 8, 17.

Centring Competence: Judicial Education in Australia

Julie Falck and Jessica Kerr*

This article considers the evolving place of judicial education in the institutional architecture of Australian judiciaries, and makes the case for further research and investment. Once resisted as a threat to judicial independence and impartiality, participation in post-appointment education is increasingly normalised and valued by judges themselves. Yet commentators remain hesitant to engage squarely with education as a regulatory imperative, essential to maintaining justified public confidence in the judiciary. While education can and should operate to support all core judicial values, it is designed primarily to ensure judicial competence, which warrants more explicit recognition as a core value in its own right. Centring competence in the value framework for judging serves to clarify and reinforce the existing case for a more structured and transparent judicial education system, drawing on a modern national curriculum, incorporating foundational skills-based education upon or before appointment, and maintaining the necessary political commitment to adequate ongoing resourcing.

I. Introduction

Judicial education is now internationally acclaimed as "fundamental to judicial independence, the rule of law, and the protection of the rights of all people",[1] but it remains uniquely difficult to talk about. As in other English-modelled "recognition" judiciaries,[2] we have traditionally assumed in Australia that appointing judges on "merit" from the legal profession is a valid alternative to treating judging as a distinct occupation with distinct professional competencies. This assumption has had the happy consequence of saving governments considerable effort and expense.[3] But times have changed. Judges in Australia, like their counterparts worldwide, are increasingly open about the fact that access to post-appointment education is essential to the competent discharge of their role.[4] This openness is, however, yet to be fully reflected in regulatory or scholarly discussions. It remains rare for outsiders to speak frankly about what even the most senior and accomplished lawyers cannot reasonably be expected to know about judging.[5]

Maintaining public confidence in judges is a "core requirement for the legitimacy of judicial authority".[6] Indeed, its somewhat elusive and "alchemical" quality notwithstanding, public confidence is possibly the only generalisable aspiration of all judicial regulation.[7] The current focus on confidence in our public

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[1] International Organization for Judicial Training, *Declaration of Judicial Training Principles* (2017) principle 1.

[2] On the distinction from "career" judiciaries, in which judges are systematically prepared through a specialised bureaucratic pathway, see Jessica Kerr, "Making Judges in a Recognition Judiciary" (2022) 31 JJA 217.

[3] Michael Kirby, "Modes of Appointment and Training of Judges: A Common Law Perspective" (1999) 41(2) *Journal of the Indian Law Institute* 147, 148; Murray Gleeson, "Judicial Selection and Training: Two Sides of the One Coin" (2003) 77 ALJ 591, 592.

[4] International Organization for Judicial Training, n 1, principle 6 of which characterises training as "the right and the responsibility of all members of the judiciary", was adopted by 129 institutions from 79 countries, including judge-led Australian institutions.

[5] See generally Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer Nature Singapore, 2019) 26–27.

[6] Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, "The Judiciary and the Public: Judicial Perceptions" (2018) 39 *Adelaide Law Review* 1, 4.

[7] Richard Devlin and Adam Dodek, "Regulating Judges: Challenges, Controversies and Choices" in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar Publishing, 2016) 1, 26–27.

institutions generally (and judges specifically) presents a clear opportunity to reinforce and renovate the institutional "architecture"[8] on which judicial legitimacy depends.[9] Recent judicial scholarship, including from contributors to this issue, highlights the need for reform around ethical procedures,[10] incapacity,[11] complaints and misconduct,[12] employment conditions,[13] selection and appointment,[14] and evaluation.[15] Woven through most, if not all, of these discussions is the complex issue of judicial diversity (or lack thereof)[16] and its interaction with judicial impartiality[17] and independence. Together, such discussions lay the foundations of an "infrastructure for a modern judiciary",[18] both sufficiently resilient and sufficiently flexible to withstand unprecedented and continuing change. This infrastructure is being constructed – implicitly or explicitly – around a set of core judicial values necessary to support justified public confidence.

We seek to contribute to this project of understanding and critique by highlighting judicial education, which we see as an essential but often under-valued component of the institutional architecture. It bears emphasis at the outset that judicial education is something of an outlier in the field of professional education.[19] Unlike admission to legal practice or to other professions such as medicine (although not, we note, academia), the transition to the bench in Australia remains unmarked by specialised professional accreditation. Judging is not even necessarily seen as a profession, despite the well-recognised, and growing, disjunct between legal and judicial professional competence.[20] Judicial education has therefore been primarily conceived of as education offered *to* judges, in a voluntary continuing professional development (CPD) paradigm, rather than education *to become* a judge in a "baseline" sense.[21] Within this inherently constrained paradigm, education has become "part of the landscape" of judicial administration in all Australian jurisdictions.[22] It has been gradually re-positioned from a potential threat to the cornerstone values of impartiality and independence to a "vitally important"[23] form of support. But its ultimate purpose – to ensure judicial competence – has remained strangely out of focus.

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[8] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) 459 (*Without Fear or Favour*).

[9] See McIntyre, n 5, 9.

[10] Gabrielle Appleby and Suzanne Le Mire, "Ethical Infrastructure for a Modern Judiciary" (2019) 47(3) *Federal Law Review* 335.

[11] Andrew Lynch and Alysia Blackham, "Reforming Responses to the Challenges of Judicial Incapacity" (2020) 48(2) *Federal Law Review* 214.

[12] Appleby and Le Mire, n 10; Gabrielle Appleby and Suzanne Le Mire, "The Australian Judiciary: Resistant to Reform?"in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar Publishing, 2016) 35.

[13] Alysia Blackham, "Reconceiving Judicial Office through a Labour Law Lens" (2019) 47(2) *Federal Law Review* 203.

[14] Kerr, n 2; Appleby and Le Mire, n 12; Elizabeth Handsley and Andrew Lynch, "Facing Up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37 *Sydney Law Review* 187.

[15] Anne Wallace, Sharyn Roach Anleu and Kathy Mack, "Evaluating Judicial Performance for Caseload Allocation" (2015) 41(2) *Monash University Law Review* 445.

[16] Brian Opeskin, "Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2021) 83.

[17] *Without Fear or Favour*, n 8, 449–453.

[18] Appleby and Le Mire, n 10.

[19] See Gabrielle Appleby et al, *Judicial Education in Australia: A Contemporary Overview* (Report, Australasian Institute of Judicial Administration, 2021) 9.

[20] See, eg, Kirby, n 3, 147–148; Wayne Martin, "Future Directions in Judicial Education" (2011) 10 *The Judicial Review* 277, 279; Robert French, "The Judiciary in an Age of Global Interdependence" (Speech at the International Association for Court Administration Conference, Bogor, Indonesia, 15 March 2011).

[21] Appleby et al, n 19, 9.

[22] Appleby et al, n 19, 6.

[23] Devlin and Dodek, n 7, 19.

The recent assessment by the Australian Law Reform Commission (ALRC) of federal judicial education offerings is unflinching. Despite the enormous strides made by judges and educators in recent decades, the federal system lacks structure and transparency.[24] It can fairly be described as under-evaluated, under-resourced, and under-integrated with other aspects of judicial regulation. That the ALRC devoted two[25] of its 14 recommendations on impartiality to reform of this system reflects growing, if still often implicit, acknowledgment that judges' actual and perceived competence is too important to be taken for granted. In the second part of this article, we suggest it is time to make that acknowledgment explicit: for Australian judicial scholarship to embrace competence as a core judicial value, related to but not subsumed in other values like independence and impartiality, and essential to maintaining justified public confidence.

Centring competence within the judicial reform narrative brings into focus at least three existing priorities for judicial education in Australia. First, the prospect of re-introducing a national curriculum offers a potential focal point for improving transparency, co-ordination and coherence, across all existing domestic systems.[26] Second, more open engagement with the educational needs of new and prospective judges has particularly "transformative"[27] potential for the composition, performance and wellbeing of the judiciary, and for public perceptions of the institution. Finally, securing adequate resourcing for education, like other aspects of back-room infrastructure, is a perpetual challenge. Much has been achieved already; the successes of Australia's judicial education system deserve greater publicity and attention. But so do the constraints under which the system continues to operate and the distance yet to travel. Longstanding assumptions about self-sustaining judicial culture, rooted in concern for judicial independence, must be reconciled with the urgent public duty to guarantee a well-functioning, professional judiciary.

II. Judicial Education as "Part of the Landscape"

A. From Obscurity to Ubiquity

Deference to the judiciary as a prestigious, opaque, and unusually self-regulating institution is ingrained in Australian legal culture. The culture of informal self-regulation is exemplified by the "recognition" appointment paradigm, in which senior barristers' years of appearing before and interacting with judges are taken to have prepared them for a relatively seamless transition to judicial office.[28] Historically, the prestige associated with "shoulder-tap" appointments from the bar (and occasionally beyond) was difficult to reconcile with any form of post-appointment performance management, particularly when combined with the primacy accorded to the "individual virtue"[29] of judicial independence, and the ostensibly merit-based nature of the appointment process. Appointment on merit was understood to effectively insulate judges from subsequent accusations of incompetence.[30] It seemed strained, if not presumptuous, to speak of "educating" judges in a role they had been recognised as competent to discharge.[31]

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[24] *Without Fear or Favour*, n 8, 457–458, citing Appleby et al, n 19.

[25] *Without Fear or Favour*, n 8, 13–14 (Recommendations 9 and 10). The second of these related recommendations deals specifically with Aboriginal and Torres Strait Islander cross-cultural education, an important subject in its own right, but one beyond the scope of this article.

[26] While we use "system" at points in this article to refer generally to the provision of judicial education across Australia, we recognise that the current arrangements involve multiple, partially overlapping and intersecting "systems". The complexities of regulating judicial education in a federal context were highlighted in Appleby et al, n 19, 20–21.

[27] Gabrielle Appleby, *Judges Need Better Education and Structures to Improve Impartiality: Report* (2 August 2022) The Conversation <https://theconversation.com/judges-need-better-education-and-structures-to-improve-impartiality-report-188068>.

[28] Kerr, n 2, 219. See, eg, GJ Samuels, "Judicial Competency: How It Can Be Maintained" (1980) 54 ALJ 581, 585.

[29] See Dame Sian Elias, "The Next Revisit: Judicial Independence Seven Years On" (2004) 10 *Canterbury Law Review* 217, 224.

[30] See, eg, Shimon Shetreet, "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1987" (1987) 10(1) *University of New South Wales Law Journal* 4, 15; Gabrielle Appleby and Suzanne Le Mire, "Judicial Conduct: Crafting a System that Enhances Institutional Integrity" (2014) 38(1) *Melbourne University Law Review* 1, 9.

[31] Samuels, n 28; John Doyle, "How Do Judges Keep up to Date?" (Speech at the LawAsia Downunder Conference, 21 March 2005) 3.

Over the second half of the last century, increasing expectations of accountability, efficiency and representativeness, the increasing professionalisation and regulation of the practice of law,[32] and the growing pressures and complexity of judicial life,[33] all contributed to a gradual, but profound, internal cultural change. Judges themselves began to seek avenues for support and professional development; and judges themselves took responsibility for providing that support, for reasons of both pragmatism and principle. Consistently with international best practice,[34] the development of judicial education in Australia was, and remains, primarily judge-led.[35] Partly as a consequence, educational offerings have tended to respond to immediate, local needs, under the stewardship of individual judicial champions.[36] They have also remained largely invisible to outsiders and thereby insulated from external scrutiny or evaluation. Except for investment in creating institutions (notably the National Judicial College of Australia (NJCA) and the Australian Institute of Judicial Administration (AIJA) at the federal level, and the state-level Judicial College of Victoria and Judicial Commission of New South Wales), the evolution of the domestic judicial education system has taken place below the regulatory radar.

Increasing diversity within the judiciary has undoubtedly hastened this evolution.[37] Public demand for a judiciary more reflective of the community it judges,[38] and the resulting drive to recruit from less notoriously homogenous branches of the legal profession, have exposed the fragility of reliance on the particular skillset of appointees from the independent bar.[39] If the "practical training" gained at the bar is as central to effective judging as traditionally assumed,[40] then the large-scale appointment of non-barristers presents an unprecedented educational challenge. However, without understating the importance of education in facilitating the appointment of "diverse" candidates, caution is needed in conceptualising judicial education as relevant primarily to non-barristers. As the ALRC emphasises, the changing face of the judiciary has revealed the vital contribution that skills and knowledge gleaned from "non-traditional" backgrounds and experiences make to judging.[41] These include core cultural competence and emotion management skills,[42] which "traditional" candidates may have had fewer opportunities to develop.[43]

B. The Current Landscape

Judicial education is no longer regarded as an inherent threat to the independence or impartiality of Australian judges,[44] and it is no longer a taboo subject, at least among judges.[45] Enough data was publicly

[32] Appleby et al, n 19, 9–12; McIntyre, n 5, 6; Keith R Fisher, "Education for Judicial Aspirants" (2010) 43 *Akron Law Review* 163, 167.

[33] Blackham, n 13, 204. See generally Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664.

[34] International Organization for Judicial Training, n 1, principle 9.

[35] Martin, n 20, 285. See further Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (Background Paper No JI5, 2021) 12 (*Ethics, Professional Development and Accountability*). In this issue, see, eg, Tania Sourdin "Technology and Judges in Australia" (2023) 97 ALJ 636.

[36] See, eg, Appleby et al, n 19, 16, text accompanying n 91.

[37] Appleby et al, n 19, 16.

[38] Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law, 2010) 193, 202.

[39] Gleeson, n 3, 597.

[40] For discussion and critique of this assumption, see Susan Kiefel and Cheryl Saunders, "Concepts of Representation in Their Application to the Judiciary in Australia" in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer International, 2015) 41, 50.

[41] *Without Fear or Favour*, n 8, 442–444. This is in addition to the inherent benefit in having a broader range of perspectives on the bench, on which see, eg, Brian Opeskin "Can the Australian Judicial System meet the Structural Challenges of Future Population Change?" (2023) 97 ALJ 651.

[42] See Kathy Mack and Sharyn Roach Anleu this issue on the importance of "interactional skills, including emotion awareness and management" Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664, 668.

[43] See Kathleen Mahoney, "Judicial Bias: The Ongoing Challenge" [2015] *Journal of Dispute Resolution* 43, 65.

[44] Appleby et al, n 19, 15–16; *Ethics, Professional Development and Accountability*, n 35, 5.

[45] See, eg, Gleeson, n 3; Robert French, "Judicial Education: A Global Phenomenon" (Speech at the Fourth International Conference on the Training of the Judiciary, Sydney, 26 October 2009); Martin, n 20; John Basten, "Judicial Education on 'Gender

available to facilitate a nationwide "contemporary overview" in a 2021 report for the AIJA by Appleby et al.[46] This report confirms that educational programs for sitting judges[47] are now available in all Australian jurisdictions; that judges generally value the opportunity to participate; and that most meet the modest national standard for "training", set by the NJCA in 2006 at five days per year.[48]

It is useful to note some other key features of the current landscape, as disclosed in the 2021 report's snapshot of publicly disclosed offerings between 2015 and 2018. Responsibility for educating Australian judges is shared between courts and specialist institutions, but with significant variation within and across different jurisdictions, confirming reported perceptions of the system as "patchy".[49] Two-thirds of all programs are offered in New South Wales or Victoria,[50] which are unique in having established, state-level judicial educational institutions. Even in more sophisticated institutional contexts, design and delivery remain primarily, though not exclusively, in the hands of judges. Most, if not all, appointees complete an intensive multi-day "induction" within their first 18 months on the bench, and all are regularly invited to attend seminars and other programs thereafter.[51] Formal programs are supplemented by background bench books and other resources and, increasingly, less formal "community of practice" sessions.[52] They operate in tandem with a growing range of post-appointment supports such as mentoring and, in some jurisdictions, peer review and performance evaluation processes.[53]

Within the constraints of the available data, Appleby et al observed that offerings are generally not evenly distributed across the standard international subject matter typology of substantive law, skills, and "society" (or "social context").[54] Substantive law offerings predominate across the board,[55] consistently with a relatively conservative CPD paradigm. This trend is, however, less pronounced in lower courts.[56] The authors also noted that other than the 7% of programs directed to new judges,[57] most current offerings do not explicitly target judges at any particular stage of what may be a decades-long career.[58]

The 2021 report set the scene for a significant discussion of the federal judicial education system in the ALRC's report on judicial impartiality.[59] As in previous reports,[60] the ALRC was unequivocal about the importance of education in maintaining impartiality and broader public confidence in the judiciary.[61]

Awareness' in Australia" (2015) 22(2) *International Journal of the Legal Profession* 151; Stephen Gageler, "Judicial Legitimacy" (2023) 97 ALJ 28.

[46] Appleby et al, n 19.

[47] Our present focus on the court judiciary is not in any way intended to diminish the imperative of education for magistrates and other judicial officers: see, eg, Commonwealth Magistrates and Judges Association, *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* (13 September 2018) principle 18 "Training and Development".

[48] Appleby et al, n 19, 21. See Christopher Roper, *Review of the National Standard for Judicial Professional Development* (National Judicial College of Australia, 2010).

[49] Australian Law Reform Commission, "Review of the Federal Civil Justice System" (Discussion Paper No 62, 1999) 59.

[50] Appleby et al, n 19, 31.

[51] Appleby et al, n 19, 28.

[52] See, eg, Judicial Commission of NSW, *Annual Report 2021-2022* (Report, 2022) 33.

[53] Wallace, Anleu and Mack, n 15, 447.

[54] Appleby et al, n 19, 27. For the standard typology see, eg, Latimer House Guidelines for the Commonwealth (adopted 19 June 1998) II.3, as reproduced in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish, 1999) 17, 20; International Organization for Judicial Training, n 1, principle 8.

[55] Appleby et al, n 19, 23–27.

[56] Appleby et al, n 19, 32–23.

[57] Appleby et al, n 19, 35.

[58] Appleby et al, n 19, 35 and Part V.

[59] *Without Fear or Favour*, n 8.

[60] See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000); Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992); *Ethics, Professional Development and Accountability*, n 35.

[61] *Without Fear or Favour*, n 8, 457.

While at pains to highlight positive, future-focused developments, such as the NJCA's comparatively-grounded 2019 guide to *Attaining Judicial Excellence*,[62] the ALRC was unflinching in its assessment of the system as fundamentally lacking structure and transparency.[63] It drew attention to the current absence of any "publicly available curriculum or professional development pathway for Commonwealth judges",[64] with the consequence that "although a significant number of judicial education courses may be available, covering issues important for supporting judicial impartiality, there is no clear or transparent expectation that judges will attend those courses specifically throughout their judicial career".[65] It bears emphasis in this regard that no Australian judge has ever been required to participate in education as a condition of seeking or holding office.[66]

C. Research Constraints: Data Deficits and Deference

The decades-long pedigree of Australian judicial education initiatives, at both federal and state levels, suggests that there is now a wealth of accumulated institutional wisdom about what judicial education can and should achieve. Yet, despite this progress, key research constraints remain. Much remains undisclosed, or simply unknown, regarding both supply and demand. We echo here a common refrain among commentators on the Australian judiciary; the lack of accessible information and a continuing reticence to inquire present persistent "stumbling blocks" to understanding, analysis, and reform.[67] Therefore, we see it as self-evident that the first stage in any renovation of the judicial education system must focus on dispelling mystique[68] and building a critical mass of accessible data.[69]

The lack of transparency highlighted by the ALRC is pervasive, extending at times to such basic matters as the existence of educational initiatives,[70] let alone their content, target audience and reach.[71] As Brian Opeskin argues regarding judicial diversity, and as reflected in the ALRC's first educational recommendation,[72] "[w]hat is missing, but sorely needed, is a comprehensive database […] to collect, analyse and publish data about the judiciary for the benefit of the public."[73] Improving the evidence base on judicial education cannot be done by scholars in isolation; it demands carefully managed and ongoing collaboration with judicial education providers and members of the judiciary. This is particularly so as regards more sensitive matters like the effectiveness of educational programs and their impact on judicial performance,[74] which may not be appropriate subjects for standardised public reporting.

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[62] National Judicial College of Australia, *Attaining Judicial Excellence: A Guide for the NJCA* (2019). This guide has the explicit purpose of laying the groundwork for future educational planning, and is explicitly based on the US National Center for State Courts, *Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges* (Project Final Report, 2017). In a similar vein see Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (2008), adapted from the work of the Judicial Studies Board of England and Wales, and similarly intended to inform future educational design and delivery.

[63] *Without Fear or Favour*, n 8, 457–467.

[64] *Without Fear or Favour*, n 8, 458. See Appleby et al, n 19, 6–7 on prior attempts to introduce a national curriculum.

[65] *Without Fear or Favour*, n 8, 458.

[66] *Ethics, Professional Development and Accountability*, n 35, 4. Cf Part IIIB below on education in a judicial disciplinary context.

[67] Opeskin, n 16, 115; Francesca Bartlett and Heather Douglas, "'Benchmarking' a Supreme Court and Federal Court Judge in Australia" (2018) 8(9) *Oñati Socio-legal Series* 1355, 1377; Handsley and Lynch, n 14, 199.

[68] *Without Fear or Favour*, n 8, 466, 498.

[69] *Without Fear or Favour*, n 8, 466–467.

[70] Appleby et al, n 19, 31.

[71] Appleby et al, n 19, 30.

[72] *Without Fear or Favour*, n 8, 458, Recommendation 9: "Each court should report annually in a standardised manner on the provision of, and attendance at, training and professional development."

[73] Opeskin, n 16, 98.

[74] Livingston Armytage, *Educating Judges: Towards Improving Justice: A Survey of Global Practice. Edited Reprint with Updated Research* (BRILL, 2015) xlviii.

Structural issues like the absence of a national body with overarching supervisory responsibilities have contributed to the difficulties prospective researchers face in this space. It is also, however, important to interrogate the cultural norms of deference that keep judicial education in relative obscurity from both a scholarly and regulatory perspective. The CPD paradigm, in which judges engage in a voluntary "updating" or "enrichment" process that presupposes a comprehensive foundation of relevant professional competence,[75] has continued to provide the starting point for Australian discussions of judicial education. That is despite repeated extra-judicial observations that the level of educational support which judges require has long since transcended this paradigm.[76] Conceptualising judicial education as CPD may have insulated early commentators from criticism as insufficiently attentive to the imperative of judicial independence.[77] But it has also significantly limited imagination regarding the nature and scope of potential reform, and is no longer sufficient to promote a "healthy public commitment" founded on "informed confidence".[78]

III. Centring Judicial Education in the Pursuit of Core Values

A. Competence as a Core Judicial Value

Competence is a core judicial value that deserves more explicit recognition in institutional reform processes. His Honour Justice Stephen Gageler recently observed extra-judicially that to "ensure ongoing judicial competence and judicial impartiality, and thereby to preserve judicial legitimacy, structural improvement can and should occur".[79] Justice Gageler explicitly positions competence alongside impartiality as a cornerstone for guiding reform. This positioning is not radical. It reflects longstanding language in international statements and agreements like the *Bangalore Principles of Judicial Conduct*, which include competence as one of the six "values of judging".[80] It is consistent with the Attorney-General's recent discussion paper on establishing a federal Judicial Commission, which asserts that "[a]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, strengthening public confidence and dispensing justice".[81]

Yet it remains surprisingly rare to see a high-level commitment to judicial competence carried through as a free-standing regulatory value in reform discussions.[82] Richard Devlin and Adam Dodek's influential comparative work, for example, identifies impartiality, independence, accountability, representativeness, transparency, and efficiency as core values to frame any discussion of judicial regulation.[83] Competence does not appear in this list, notwithstanding that several of the processes proposed by Devlin and Dodek to "give institutional form to the core values"[84] are, in practice, directed at ensuring competence. Education is prominent among these processes as a "vitally important form of regulation", because it is "designed to

[75] See National Judicial College of Australia, *Judicial Education in Australia* (2012) 2, emphasising that new judicial appointees in Australia are "presumed to possess the necessary skills and experience for judicial functions". The ALRC's exploration of the potential to "significantly augment" initial judicial education begins by acknowledging the "traditional common law" assumption that "those appointed to judicial office already have the requisite skills, experience, and education for the role": *Without Fear or Favour*, n 8, 461. See further Mack and Anleu on "the traditional view that judges should already know what is acceptable conduct and what is not, without further guidance or education". See Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664, 673.

[76] For example Martin, n 20, 286; French, n 45, 4; Gleeson, n 3, 597.

[77] See, eg, Livingston Armytage, "Judicial Education on Equality" (1995) 58 *Modern Law Review* 160, 165.

[78] McIntyre, n 5, 10.

[79] Gageler, n 45, 34.

[80] Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (2002); see also Armytage, n 74, xxxv; Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (2002).

[81] Attorney-General's Department, "Scoping the Establishment of a Federal Judicial Commission" (Discussion Paper, Australian Government, 2023) 6.

[82] Appleby and Le Mire's contribution to this issue is a welcome exception.

[83] Devlin and Dodek, n 7, 9.

[84] Devlin and Dodek, n 7, 7.

ensure that judges are competent, thereby enhancing public confidence".[85] Similarly, the prominence of education in the ALRC's recent impartiality-focused recommendations suggests that public confidence in the judiciary's impartiality (and independence) is contingent upon its perceived competence. But competence is conspicuously absent from the discussion of "particularly important" core values in the body of the report.[86] So, for that matter, are accountability and efficiency, the other values in Devlin and Dodek's list which most obviously imply an institutional commitment to competence.[87]

We think it is time to confront the tendency for competence to be "lost in translation". Devlin and Dodek's list of core values was not meant to be closed or exhaustive,[88] and several scholars have already proposed potential additions in the Australian context.[89] These proposals do not have solely theoretical implications. As Sarah Murray notes in her recent discussion of an emerging value of collegiality, core values are used by scholars "to denote something of importance that 'inform[s]' the enterprise of judging".[90] Judicial values are significant for both their expressive function and their potential impact on judicial practice,[91] reflecting the maxim that justice must both be done and be seen to be done. Values also operate at both institutional and individual levels, reflecting the interconnectedness of these two dimensions in shaping the judiciary's effectiveness and legitimacy.[92] Devlin and Dodek emphasise that values provide a "normative foundation" for the judiciary's institutional design, without which "the judicial edifice will inevitably collapse".[93]

Given the evident contribution of competence to this normative foundation, why has it struggled for an independent place on the list? Traditionally, direct discussion of judicial competence seems to have been perceived as risky in both public confidence and personal reputational terms, not least by violating norms of deference and mystique; although as signalled above, the internal judicial cultural landscape has shifted in this regard. Acknowledging competence as a focus of regulation certainly requires acknowledging the troubling, if simplistic, prospect of an incompetent judge. While scholars like Shimon Shetreet have focused on the space this might create for misplaced or malicious allegations of individual incompetence,[94] which risk distorting the perennially delicate balance between independence and accountability,[95] it also has more profound implications for the premise of a "recognition" appointment system.[96] Nevertheless, other core values, including the dominant values of independence and impartiality, carry similarly disquieting implications which have proved possible to confront.[97] Judicial competence is also highly context-specific and, accordingly, not easily defined;[98] in this respect, however, it is again not dissimilar to independence or impartiality.[99]

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[85] Devlin and Dodek, n 7, 19.

[86] *Without Fear or Favour*, n 8, 31.

[87] On accountability and efficiency as supporting "institutional justifications" for judicial education, reflecting their connection to competence, see Appleby et al, n 19, 11.

[88] Devlin and Dodek, n 7, 9.

[89] Gabrielle Appleby and Andrew Lynch, "The Judge, the Judiciary and the Court: The Individual, the Collective and the Institution" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2021) 3, 7.

[90] Sarah Murray, "Judicial Collegiality" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2021) 189, 202–203.

[91] Mack, Anleu and Tutton, n 6, 33.

[92] Murray, n 90, 203.

[93] Devlin and Dodek, n 7, 6.

[94] See the discussion in McIntyre, n 5, 259–260; Appleby and Le Mire in this issue. Gabrielle Appleby and Suzanne Le Mire, "Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678, 688.

[95] See Devlin and Dodek, n 7, 2.

[96] See Samuels, n 28, 585.

[97] The ALRC's nuanced discussion of impartiality in *Without Fear or Favour*, n 8, offers an exemplar in this regard.

[98] Gageler, n 45, 28.

[99] McIntyre, n 5, 161.

For present purposes, it suffices to say that expecting a judiciary to embody competence as a core value means expecting an institutional commitment to ensuring that judges have, and are seen to have, the "aggregate of knowledge, skills and values"[100] necessary to do the unique job of judging well.[101] This is an inherently proactive commitment, which is closely related but, importantly, not limited to the pursuit of institutional accountability for incompetence or inefficiency, just as it is related but not limited to the pursuit of independence and impartiality. Centring competence in this way assists in disentangling judicial legitimacy from the "complacent"[102] traditional levers of prestige and mystique. It also foregrounds concern for the substantive quality of justice.[103] Indeed, as Justice Gageler has argued, it may be a logical prerequisite to any broader discussion of independence-based legitimacy:

> Before getting to judicial independence, what is needed for judicial legitimacy is a judiciary that truly is and is seen to be competent and impartial. Without judicial competence and judicial impartiality in the first place, judicial legitimacy cannot long exist other than as an illusion. Without judicial competence and judicial impartiality in the first place, judicial independence will only exacerbate judicial illegitimacy.[104]

We consider that a more open scholarly and regulatory focus on competence has the potential to enhance our understanding of "the enterprise of judging", and thereby to support and strengthen all other recognised values. For present purposes, though, it suffices to say that centring competence in the value framework that grounds the "infrastructure for a modern judiciary" would clarify and reinforce the case for greater investment in judicial education. While not all constituents of the necessary "aggregate" can be formally taught, it is no longer plausible to suggest that none of them can.

B. The Multi-faceted Contribution of Judicial Education

To be clear, we do not see the case for judicial education as dependent on recognising competence as a free-standing regulatory value. Effective judicial education programs have the capacity to address the full range of institutional and individual concerns that impact public confidence.[105] At an individual level, no values generally prized in Australian judges are exclusively innate, nor are they automatically inculcated through experience as a lawyer. Their manifestation within individual judicial decision-making requires deliberate institutional cultivation and support. The ALRC's reliance on education-focused recommendations in a report on impartiality is telling in this regard.[106] Positioning competence as a value to be advanced rather than assumed assists in legitimising what is, in any event, an essential process of institutional support.

If competence is the focus, then while various aspects of judicial regulation must work in concert to secure a competent judiciary, Devlin and Dodek are correct in identifying judicial education as the natural focus of attention, because it alone is "*designed* to ensure that judges are competent".[107] Appointment processes, a perennial preoccupation of scholarly and reform discussions, may or may not prioritise competence over other desirable "outputs"[108] but can, ultimately, only predict it. Disciplinary processes react to misconduct or incapacity, which may but do not necessarily reflect incompetence. Education, on the other hand, can respond directly to existing and potential competence deficits, at both the individual and system level, in a manner that is, at least in principle, more amenable to structured evaluation and public explanation.

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[100] Armytage, n 74, xl.

[101] Compare Mack and Anleu's focus in this issue on the "capacity for good judging". Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664.

[102] Panel Discussion, "Judging Judges" [1990] (August) *New Zealand Law Journal* 291, 296 (Dame Silvia Cartwright).

[103] Brian Opeskin identifies "quality of justice" as a core value of the judicial system in his contribution to this issue Brian Opeskin "Can the Australian Judicial System meet the Structural Challenges of Future Population Change?" (2023) 97 ALJ 651, 652.

[104] Gageler, n 45, 29.

[105] Armytage, n 74, xxvii; Kathleen E Mahoney, "The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice" (1996) 32 *Willamette Law Review* 785, 818.

[106] See *Without Fear or Favour*, n 8, Recommendations 9, 10.

[107] Devlin and Dodek, n 7, 19 (emphasis added).

[108] See Andrew Lynch in this issue Andrew Lynch "Judicial Influence on Judicial Appointments" (2023) 97 ALJ 607, 617.

Acceptance that newly appointed judges may not, yet, be fully competent for judicial work has been a surprisingly long time coming in Australia.[109] However, a growing body of commentary acknowledges the implications of that reality for the appointment process, either explicitly or implicitly.[110] Much of this work has focused on unhooking the contested concept of judicial "merit" from the traditional hallmarks of success as a barrister.[111] There has been relatively little attention to the potential of judicial education to lower the temperature of this debate. Reliance on a conception of barristers as "ready-made" judges becomes both less important and less defensible in a context where all appointees have access to educational support across the full range of judicial competencies. Indeed, the level of investment in "onboarding" programs for all judges may be seen as signalling a shift away from the concept of a "ready-made" appointee, and, from that perspective, offers independent justification for broadening the candidate pool. This is, arguably, judicial education's most direct contribution to addressing the "diversity deficit"[112] in the Australian judiciary. But education has also been identified as diversity-supporting in other important ways, including fostering an environment of inclusion and enhancing the cultural competence of the existing bench.[113] Thus it can respond to the expectations of an increasingly diverse, and demanding, community in ways difficult to achieve solely through reform of appointments.[114]

If appointees no longer possess a relatively uniform bundle of skills and lived experience, then it stands to reason that they will bring different professional strengths and limitations to the bench. Judicial education has a potentially remedial dimension for judges from any background. This is well-recognised in the context of complaints by lawyers and court users, which, while required by law to be framed in terms of "misconduct" or "incapacity",[115] are often suggestive of underlying skill or knowledge deficits. The formal or, more likely, informal use of education as a remedy or sanction for well-founded complaints has precedent in Australia, particularly at state level,[116] and is recognised as warranting close consideration in the current process of federal judicial commission design.[117] However, while potentially effective in addressing sub-standard behaviour, education as discipline is both potentially "difficult" in independence terms[118] and, in any event, insufficient to maintain public confidence in judicial competence generally.[119] Education concerning judicial conduct is, or should be, prophylactic and supportive of judicial self-management,[120] rather than reactive and coercive.[121] The relationship between education and discipline

[109] See *Ethics, Professional Development and Accountability*, n 35, 4.

[110] See generally Kerr, n 2.

[111] For example, Elizabeth Handsley, "'The Judicial Whisper Goes Around': Appointment of Judicial Officers in Australia" in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* (University of Toronto Press, 2006) 122, 126. See generally Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017).

[112] Opeskin, n 16.

[113] Opeskin, n 16, 85; Mahoney, n 43, 66.

[114] Opeskin, n 16, 114.

[115] See generally Appleby and Le Mire, n 30.

[116] See *Without Fear or Favour*, n 8, 329–332.

[117] See Attorney-General's Department, n 81. See generally Gabrielle Appleby and Suzanne Le Mire, "Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678.

[118] See Appleby and Le Mire Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678, 682.

[119] Jennifer O'Toole, "Becoming Solomon: A Comparative Analysis of Judicial Education in Ireland and Canada" (2022) 22 *University College Dublin Law Review* 115, 136. See, eg, Rosemary Cairns-Way and Donna Martinson, "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97 *Canadian Bar Review* 367, discussing a Canadian example in which a judge defended his actions on the basis that he had not been provided with sufficient education, but the Judicial Council still found that remedial education would be inconsistent with maintaining public confidence.

[120] See generally Mack and Anleu in this issue, situating judicial self-awareness and self-management at the heart of the "ethical infrastructure" of judging. Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664, 668.

[121] See Basten, n 45, 162; O'Toole, n 119, 136. On the importance of "proactive assessment of a person's ability to perform the tasks of their job", in the context of concerns about judicial incapacity, see Opeskin. Brian Opeskin "Can the Australian Judicial System meet the Structural Challenges of Future Population Change?" (2023) 97 ALJ 651, 654.

may therefore be more helpfully framed in terms of generating insights for future curriculum planning.[122] This shifts attention from the conduct or qualifications of individual judges to institutional structures and safeguards, thus reducing perceived or actual conflict with independence and emphasising the creation of the conditions for justified public confidence in future judges. It bears emphasis, though, that achieving the full potential of proactive education is only likely to be possible in a system that explicitly positions competence alongside other core values.

IV. Priorities for Research and Reform

Judicial education continues to be a swiftly developing field internationally, and there are valuable insights to be drawn from recent comparative experience and scholarship.[123] However, the evidence base within Australia, critical to securing support for increased regulatory intervention, is still in development. It is beyond the scope of this article to offer an independent comparative or empirical contribution or to make a case for any specific reform. However, in addition to the overarching imperative of greater transparency, we highlight three particular areas in need of closer attention: exploring the potential for greater national co-ordination, prioritising commitment to foundational skill development, and securing adequate resourcing.

A. National Co-ordination

As noted, improving the structure and transparency of judicial education was a core recommendation of the ALRC report[124] and a prominent theme of the preceding report by Appleby et al.[125] In response, the NJCA has committed to "meeting the need for a coherent and high-quality system of judicial education and training in Australia through the development and delivery of a dynamic national curriculum".[126] The new curriculum is due in June 2023 (after this article goes to press) and will be accompanied by a revised national standard regarding "the amount of time and funding that should be available for each member of the Australian judiciary for professional development".[127] The curriculum will, presumably, reflect the nine "elements" of judicial excellence identified by the NJCA in 2019.[128]

The central question arising in light of this welcome announcement is the extent to which a national curriculum with an explicit "benchmarking" role[129] will facilitate increased co-ordination and coherence, given the well-known obstacles facing any Australian reform proposal with nationwide aspirations.[130] While Appleby et al noted the roles played by differing professional cultures and geographical realities in the "patchy" nature of current judicial education provision,[131] they also noted that jurisdictional differences were not necessarily more influential than factors existing at the level of individual courts, like workload, resourcing, and leadership.[132] There is already substantial integration between some systems, within and

[122] See Attorney-General's Department, n 81, 21. Mack and Anleu highlight the recent example of the NJCA's introduction of sexual harassment training and education materials in the wake of the *Respect@Work* Inquiry. Kathy Mack and Sharyn Roach Anleu, "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664, 665.

[123] Very recent comparative developments include the introduction of a post-graduate Diploma in Judicial Studies at the University of Cape Town in South Africa, the adoption of a 20–27 days per annum standard for the professional development of new District Court judges in New Zealand, and the introduction of a legislative requirement for aspirant judges in Canada to commit to post-appointment training in sexual assault law and social context. The list is swiftly expanding.

[124] *Without Fear or Favour*, n 8, 458 (Recommendation 9).

[125] Appleby et al, n 19, 38.

[126] National Judicial College of Australia, *National Curriculum and Standards* <https://www.njca.com.au/a-national-standard-for-professional-development-for-australian-judicial-officers/>.

[127] National Judicial College of Australia, n 126.

[128] National Judicial College of Australia, n 62.

[129] National Judicial College of Australia, n 126.

[130] French, n 45, 9.

[131] Appleby et al, n 19, 20.

[132] Appleby et al, n 19, 20.

across jurisdictional lines, and national bodies like the NJCA and AIJA have played an important role for several decades: the NJCA, for example, runs the National Judicial Orientation Program, attended by judges from all states and territories. However, it is notable that current scoping proposals for a federal judicial commission, in the related context of discipline and complaints, do not even contemplate a body with national jurisdiction.[133] It seems similarly unlikely that a genuinely national *system* of judicial education will emerge in the foreseeable future. The implementation of a national curriculum will have to contend with the current diversity of judicial cultures and constraints across the country, as highlighted by other contributors to this issue, and in particular with the uneven distribution and accessibility of institutional experience and resources.[134] The extent to which it is possible to maximise efficiencies across this sprawling system, or to minimise the risks to public – and judicial – confidence associated with perceptions of inconsistency in the quality and accessibility of education, remains to be seen.

B. Foundational Education

In addition to echoing existing calls for structure, transparency, and co-ordination, we argue that more attention is needed to the foundational or "baseline" character of much modern judicial education, and that mandating participation in such education merits explicit consideration. As Appleby et al noted, "the solicitude for judicial independence that so strongly marked early debates on the introduction of education programs for judicial officers remains manifest in the voluntary nature of those programs to this day."[135] Judges and scholars alike have been distinctly wary about the constitutionality of mandating participation in any education initiative.[136] Maintaining judicial independence is, of course, a constitutionally founded imperative in institutional design. However, given the increasingly acknowledged contribution of judicial education *to* achieving that imperative, we doubt that the constitutional objection – which has never been fully articulated – is insurmountable. Continuing scholarly deference on this point may also become redundant, if not counterproductive,[137] in a context in which participation in judicial education becomes so normalised that a refusal to participate is practically unthinkable.[138]

As argued above, it is essential that commentary on judicial education transcend the CPD paradigm. This paradigm is manifestly ill-suited to discussing offerings intended to *generate* competence, particularly at the initial "onboarding" stage. Acknowledging the reality that the transition from lawyering to judging involves the acquisition of new professional skills and knowledge is fundamental to providing adequate public assurances of the judiciary's commitment to competence.[139] It cannot come as a surprise that those assurances may, in time, need to encompass a guarantee that all new judges will be appropriately educated. The more interesting research question may be where to draw the line between mandatory and voluntary offerings, considering the complex context of increasing diversity in individual professional starting points and judicial roles.

As the ALRC has highlighted, focusing explicitly on the skill-building dimension of judicial education invites more critical attention to questions of timing. As with other professional skills, judicial skills are "for the sake of the public best not learned on the job".[140] Intensive programs for new Australian

[133] Attorney-General's Department, n 81, 3.

[134] Appleby et al, n 19, 37.

[135] Appleby et al, n 19, 21.

[136] Appleby et al, n 19, 21; Basten, n 45, 159; Doyle, n 31, 9.

[137] On the danger of "constitutionally conservative" thinking in judicial regulatory design, see Gabrielle Appleby and Suzanne Le Mire, "Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678, 685.

[138] While there remains no reliable data on how many, if any, Australian judges decline to participate, the extent of the cultural shift to date is indicated by the readiness of institutions like the NJCA to proclaim "the quest of all Australian judicial officers to maintain a steady commitment to career-long judicial education": National Judicial College of Australia, *Leading Judicial Education for an Australian Judiciary* <https://www.njca.com.au/about-us/>.

[139] SI Strong, "Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?" [2015] (1) *Journal of Dispute Resolution* 1, 10.

[140] Silvia Cartwright, "The Judiciary: Qualifications, Training and Gender Balance" in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing, 1999) 39, 42.

judges run on a fixed calendar and may not be available to a judge for up to 18 months, during which period they will have heard and determined numerous cases.[141] While the need for educational support is unequivocally a continuing one, there is a clear in-principle argument, from the perspective of both litigants and judges, that education in the "core competencies" of judging[142] should be available in a defined window immediately following appointment, *prior* to commencing judicial duties.[143] There are also, however, formidable pragmatic and logistical objections to proposing such reform. The ALRC has now explicitly recognised[144] that some of those objections might be overcome by looking further back to the prospect of pre-appointment education.

Several decades of sustained progress in educational design, which will presumably be reflected in the forthcoming national curriculum, demonstrate that many (if not all) of the core skills that modern judges need can and should be transmitted through education. Why, then, should the transmission process be restricted to the post-appointment context? Educating judicial aspirants may seem antithetical to the "recognition" model of appointment, or, more precisely, to the deep-rooted stigma against open aspiration to appointment.[145] However, it has the general advantage of avoiding any perceived incursion on the independence of sitting judges, as well as the specific advantage, which is attracting increasing international recognition,[146] of facilitating the appointment of "non-traditional" candidates. The prospect of relocating some (again, not all) post-appointment offerings to the pre-appointment context is also potentially appealing from a workload and resourcing perspective, for both learners and educators. Undoubtedly complex questions arise regarding who would be responsible for designing and delivering a pre-appointment curriculum, who would fund that delivery, and how inclusive it would or could be. However, to the extent that pre-appointment, and more substantial on-appointment, education could assist in securing a demonstrably competent judiciary from the first day on the bench, it is essential that such questions are not consigned to the too-hard basket.

C. Resourcing as a Public Priority

The ALRC took care to state the obvious point that implementing its education-related recommendations would require new resourcing, both to design and deliver programs and to staff courts adequately to allow judges to participate.[147] Investing in judicial education represents a commitment to the substantive quality of justice and an acceptance of the public responsibility to support judges in the competent discharge of their functions.[148] However, in a context where the judiciary is under "intense, and increasingly existential pressure" in terms of funding, staffing, workload, and public expectations,[149] resourcing for education must jostle for position with other institutional imperatives. In this regard, judicial education in Australia is, like other topics addressed in this issue, "held hostage by the resourcing of the courts generally."[150]

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[141] Appleby et al, n 19, 28; National Judicial College of Australia, n 126; Roper, n 48.

[142] *Without Fear or Favour*, n 8, 459.

[143] Tania Sourdin, *Submission No 33* to *Without Fear or Favour*, n 8, 7. Cf International Organization for Judicial Training, n 1, principle 7: "All members of the judiciary should receive training before or upon their appointment".

[144] *Without Fear or Favour*, n 8, 461.

[145] See Kerr, n 2, 225–226.

[146] For example Hugh Corder, "Struggling to Adapt: Regulating Judges in South Africa" in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 372, 378; Judicial Careers Portal, *Pre-Application Judicial Education Programme (PAJE)* <https://www.judicialcareers.judiciary.uk/shadowing-mentoring-and-other-support-programmes/pre-application-judicial-education-programme-paje/>.

[147] *Without Fear or Favour*, n 8, 433.

[148] International Organization for Judicial Training, n 1, Art 6; *Without Fear or Favour*, n 8, 458, endorsing Jessica Kerr, *Turning Lawyers into Judges Is a Public Responsibility* (AUSPUBLAW, 26 August 2020) <https://auspublaw.org/blog/2020/08/turning-lawyers-into-judges-is-a-public-responsibility>.

[149] McIntyre, n 5, 6.

[150] Appleby et al, n 19, 19.

Explicitly mandating judicial participation in at least some educational programs would strengthen the argument for greater resourcing.[151] However, constitutional and cultural objections aside, it is unlikely that such a step would be contemplated without a pre-existing resourcing commitment. The same might be said for a public commitment to implementing pre-appointment educational initiatives, which, judging by recent developments in the United Kingdom and South Africa,[152] would likely be framed principally as diversity-promoting. Increased emphasis on the role of education in supporting other core judicial values, including diversity, can certainly facilitate the incorporation of education commitments into the scope of broader reform proposals, as the ALRC's work on impartiality demonstrates.[153] Even if this existing momentum can be harnessed, though, it seems likely that resourcing constraints will continue to determine the scope of change possible. There is, then, a clear role for the academy to push governments to prioritise greater investment in judicial education by continuing to build the evidence base for its effectiveness.[154]

V. Conclusion

Achieving the ALRC's vision of a structured and transparent judicial education system would be significantly facilitated by a more explicit commitment to competence as a core judicial value in Australia. That commitment is, however, likely to depend upon the ongoing reconceptualisation of the conferral of judicial office, from an "ultimate accolade" for past legal professional success,[155] to the commencement of a new and uniquely demanding form of professional practice. The extent of cultural change that has already occurred should not be underestimated. Alongside other incursions into the judiciary's "veil of secrecy",[156] it is now uncontroversial to say that public confidence requires assurances that judges have the appropriate knowledge and skills to carry out their essential role.[157] However, closer and more critical attention is needed to a range of issues confronting the evolving judicial education system, including national co-ordination, the timing and resourcing of foundational offerings, and the prospect of mandating judicial participation.

Issues of this kind cannot be tackled by scholars alone; both greater transparency on the part of judicial institutions, and political commitment to providing the necessary infrastructure, remain vital to overcoming the cultural, constitutional, and logistical challenges in this space. Nevertheless, we think it is time to start talking more openly about a public responsibility to maintain justified public trust in the capability, not just the character, of our nation's judges. Making space for competence on the front bench of core judicial values affirms the centrality of education in ensuring, rather than assuming, that our independent and impartial judges are the best possible judges Australia has to offer. It also makes the public duty to invest adequately in that process unambiguous and unavoidable. Lacking that space, by contrast, judicial education in Australia seems likely to remain a topic beset by mystique and hesitancy, consigned to the fringes of constitutional discussions, and struggling for recognition as a regulatory imperative.

[151] Appleby et al, n 19, 21.

[152] See n 123.

[153] See further Attorney-General's Department, n 81.

[154] See Gleeson, n 3, 595.

[155] Lord Sumption, *Home Truths About Diversity: Bar Council Law Reform Lecture* (15 November 2012) 23 <https://www.supremecourt.uk/docs/speech-121115-lord-sumption.pdf>.

[156] Handsley, n 111, 135.

[157] Appleby et al, n 19, 6.

Technology and Judges in Australia

Tania Sourdin*

A survey of Judges in Australia that focused on their use of technology and their attitudes towards technology concluded at the end of 2022. The survey revealed that there are many judges successfully using a range of technologies in relation to their work in Australia. However, many judges consider that they could do more with technology but are hampered at times by excessive workloads (and resultant stress), inadequate technological support and training, connectivity issues, "legacy" systems as well the ability of litigants and their representatives to engage with newer technologies. While the survey suggested that some judges consider that court related technological approaches may not be "fit for purpose", other judges are concerned that a focus on technologies may increase workload with few benefits. Overall, the survey responses suggest that Australian judges are interested, able and willing to use newer technologies provided that concerns are addressed, and support is available.

INTRODUCTION

In the field of justice innovation, technology is continuously evolving to transform the current justice system. The technological changes include a wide spectrum of technologies that present a significant range of use, from low level assistance in procedural matters (ie case management systems and online directions hearings), to artificial intelligence (AI) used for decision-making purposes (ie outcome prediction and "nudging" technologies).[1] Technologies can also vary extensively. In previous work, I have defined technology as being either "supportive, replacement or disruptive" or some combination. At present, technologies used in the judicial sphere are more likely to be "supportive" (eg, using Teams or Zoom), or "replacement", that is technologies that replace humans (such as case management systems that produce correspondence etc). More disruptive technologies, feature more evolved forms of Artificial Intelligence as well as more complex machine learning.[2] These technologies can present various and unique challenges in their inclusion in the justice innovation field and academics currently highlight rising concerns in respect of data management, privacy, policy, and the myriad of ethical issues that may arise.[3]

Little is known about how judges in Australia use technology and this is partly because the way that judges currently use, and have the potential to use, technology is dependent on a wide range of factors and judicial attitudes and use can vary significantly.

In addition, at times, there are misunderstandings about the judicial role,[4] that can mean that technological solutions may be of little assistance to judges in a range of jurisdictions. Essentially, when those creating

* Professor of Law and Dean, Newcastle University Australia, Law and Justice School. The author acknowledges the kind assistant of Charlotte Kuszelyk a researcher and law student at the University of Newcastle and also the kind assistance of Ella Sourdin Brown a researcher and law student at Monash University. This article draws upon a draft Research Report related to Judges and Technology (unpublished) and the project received some funding from the Australian Academy of Law.

[1] See Tania Sourdin, "Justice in the Age of Technology: 'The Rise of Machines Is upon Us" (2017) 139 PrecedentAULA 4.

[2] For a detailed discussion relating to this framework see Tania Sourdin, *Judges, Technology and Artificial Intelligence* (Elgar Law, 2021).

[3] See Tania Sourdin, "Judge v Robot? Artificial Intelligence and Judicial Decision Making" (2018) 41(4) UNSW Law Journal 1114.

[4] See T Sourdin, "Technology and Judges in Australia" (2023) 97 ALJ 636 and also John Morison and Adam Harkens, "Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making" (2019) 39(4) *Legal Studies* 618. Noting that: there is not a huge amount of *socio-legal* work on judges and their everyday activities. Much of what is known about the judiciary is focused on the United States. See N Meveety (ed), *The Pioneers of Judicial Behavior* (University

technologies do not understand the judicial role, they are not able to develop systems or processes to support judges. As has been previously noted the judicial role incorporates a range of poorly understood functions[5] beyond adjudication[6] and prior to the COVID pandemic, technological developments within Australian Courts were often focused on non-judicial functions that might include case management, document storage and relatively simple word processing related functions. In lower Courts and Tribunals, it is likely that Magistrates and Tribunal Members will be familiar with technology employed in case management systems and will produce orders and insert listing and other material into those systems. In the higher courts, although the judicial role extends to case management and a range of other functions beyond core adjudicatory functions,[7] it is less likely that judges in Australia will use technological tools to do this work and it is often associates and registry staff who engage with case management systems.

While judges are expected to be computer literate and review documents, conduct research and write judgments using basic tools, there remains a separating out of functions that has its roots in historical approaches to judging where "administrative" tasks were performed by non-judicial staff who supported a judge. There are certainly good reasons for maintaining this approach, not least of which is a need to ensure that scarce judicial resources are used wisely. However, this dichotomy means that when COVID arrived, many judges were unfamiliar with case management and related "support" technologies. In the past and prior to the COVID period, in terms of judicial interest in technology, apart from a number of judicial and court outliers,[8] often judges and courts relied on paper based and in-person oral exchanges with limited use of technology.[9] In addition, it has been suggested that case management approaches that are often at the heart of the technological reforms within courts can be "inwardly focused" or "outwardly focused". That is, case management can be focused on registry functions rather than external (lawyers and litigants) or judicial users. More outwardly focused systems can support technological reforms that enable digital approaches to be adopted more broadly and which can support litigants, representatives and judges through the use of apps and other systemic supports.[10]

Judges also vary in terms of their understanding and use of technology, which can be linked to past professional experiences, as well as temperament and inclination. The COVID pandemic has highlighted that many judges have found it difficult to adapt to different ways of working although as noted in the discussion below this may also be linked to factors that are not linked to personal "innovation readiness". Importantly, the take-up of newer technologies can also be influenced by the appetite for reform that exists more generally in relation to courts in different jurisdictions. For example, initial moves in the United Kingdom to create Her Majesty's Online Court[11] that were followed by significant reforms[12] directed at the creation of online courts have required a reconsideration of the judicial role and perhaps

of Michigan Press, 2002) or, from a different, insider perspective, Richard Posner, *How Judges Think* (Harvard University Press, 2008). In the United Kingdom the socio-legal focus has been mainly on the most senior courts. See, eg, A Patterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013); or even on particular aspects of their work: B Dickson, *Human Rights and the United Kingdom Supreme Court* (University Press 2013); G Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP, 2015). There is some limited work on everyday role of the judge. For a relatively rare example, see P Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2011); and C Thomas and H Genn, *Understanding Tribunal Decision-Making* (Nuffield, 2013).

[5] See n 4.

[6] Sourdin, n 3, Ch 2.

[7] Tania Sourdin and Richard Cornes, "Do Judges Need to Be Human? The Implications of Technology for Responsive Judging" in Tania Sourdin and Archie Zariski (eds), *The Responsive Judge: International Perspectives* (Springer, 2018) 87, 88. For a helpful discussion see also: Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013).

[8] See examples noted at *Remote Courts Worldwide* <https://remotecourts.org/>.

[9] Monika Zalnieriute and Felicity Bell, "Technology and the Judicial Role" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2020).

[10] John Greacen, *18 Ways Courts Should Use Technology: To Better Serve Their Customers* (IAALS Report, 2018).

[11] Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales Report, 2016).

[12] Ministry of Justice, HM Courts and Tribunals Service, *Transforming our Justice System* (Policy Paper, 28 September 2016).

a greater acceptance of the potential role of technological supports in the justice system.[13] Reforms in China have been far more extensive with the development of the "Smart Court" system[14] requires judges to be both familiar and have expertise with newer technologies.

In addition, there can be factors within courts that have an impact on judges and technology use. Poor connectivity, "difficult" systems (often with legacy technologies), inadequate technological support and training can all impact on the way that judges use technology and what they consider might be useful. Surveys of technology use during the COVID period for example, showed that around the world, judges used very different platforms to support their work with varying levels of success. For example, while some judges used "Teams", others Zoom, some google chat etc, there was little consistency and often little support for the introduction of supportive technologies which is perhaps not surprising given the limited use of these types of supportive technologies in the pre COVID era.[15]

Other factors also play a role in terms of the use or potential use of technology by judges. For example, judicial workload, which can vary widely as well as judicial exhaustion and burnout can mean that some judges may be unable to consider how technology can be useful and reluctant to engage with innovation more generally because they simply do not have time or the capacity to do so.

This article explores how a survey sample of how Australian judges use technology in their work might inform a broader discussion about how technology can reshape the workload of judges into the future. The analysis is undertaken though a focus on the impacts of the COVID pandemic on the Australian Judiciary, an assessment of the connectivity, training and support offered to judges, and regard to innovation readiness and workplace pressures within the Courts. Issues linked to whether judges consider they might be replaced and/or supported by forms of AI and what is the likely future of the Judiciary are also examined. The findings below are intended to inform judges and courts so that technological change can be considered from the perspective of judges as well as other "users".

METHODOLOGY

The purpose of the survey[16] was to enable a more informed understanding about the judiciary and the role of technology in their work. As judges in Australia now must grapple with ever-evolving technological change and its impact on their role and the judicial sector, highlighted by the COVID-19 pandemic changes, the value of research into judges use, understanding and options of technology has become increasingly important.

The International Survey of Judges Project (Project) sought to assess different judges' views about the application of technology to their role and the court's uptake of newer technologies. To achieve this goal, an online survey was delivered through the platform QuestionPro. This data collection platform allowed the research team to create a custom survey, capable of capturing a range of open and close-ended questions, while meeting the security and ethics requirements for the Project.

A number of questions in the survey were drawn from the University College London's 2020 UK Judicial Attitude Survey for the shared aim of assessing the attitudes of judges across technology as well as other general subject areas. Other questions were devised by scholars with input from judges around the world. The Kessler Psychological Distress Scale (K 10) questions were derived from a well know

[13] The Right Hon Sir Geoffrey Vos, *The Future for Dispute Resolution: Horizon Scanning* (Sir Brian Neill Lecture, The Society of Computers and Law, 17 March 2022).

[14] Changqing Shi, Tania Sourdin and Bin Li, "The Smart Court – A New Pathway to Justice in China?" (2021) 21(1) *International Journal for Court Administration* 4.

[15] See Tania Sourdin and John Zeleznikow, "Courts, Mediation and COVID-19" (2020) 48(2) ABLR 138. See also Tania Sourdin et al, "COVID-19, Technology and Family Dispute Resolution" (2020) 30(4) ADRJ 270.

[16] The Australian survey forms part of a comparative international research project, a cross jurisdictional comparison is yet to be completed, but shows promise in allowing a deeper understanding of judicial perceptions of technology use across different international jurisdictions.

measurement tool that has been recently used in separate study into judicial health and wellbeing[17] these questions that were included at the end of the survey and noted as optional.

The survey questions are grouped around the following categories: (1) your judicial post; (2) judicial resources and digital working; (3) the judiciary and technology; (4) working conditions; (5) training and personal development; (6) change in the judiciary; (7) being a member of the judiciary; and (8) "about you" (demographic and K 10 questions).Survey invitations were sent via email to judges associates or in some instances a registry, which included both a link to access the survey and to download the Participant Information Statement.

Support from three Heads of Jurisdiction was sought to ensure support the survey. A small number of higher courts were selected to ensure comparability between participant responses. A total of 53 judges responded to the survey and although this number is relatively low (compared to the number of judges and magistrates in Australia) it is a reasonable sample size given that lower courts were excluded (magistrates were not surveyed) and only three jurisdictions were targeted. The survey's results showed that more male judges responded to the survey (in line with judicial gender statistics) and that most judges who responded had more than five years experience. In the reporting below, the number of responses is shown as not all judges responded to every question and some skipped questions.

Impact of the COVID-19 Pandemic

The COVID-19 pandemic has served to disrupt the traditional operations of the judicial system, highlighting and exemplifying variations in the capacity of courts to use technology. Many courts rapidly adopted supportive technologies such as Teams, Skype, Zoom, Google Hangouts and WebEx to continued operating during the pandemic, as well as continuing to use online filing systems and other supportive online technologies. In particular, it appears that many judges have reservations in relation to online court systems, with results from the survey showing that no respondents preferred online hearing as opposed to, in-person hearings or a mixture of the two. However, any reservations appear to have been dismissed to prioritise the continued operation of courts during the pandemic, with many judges expressing positive views about the use of supportive technology and indicating that some technologies adopted during the pandemic would be likely to remain. Results from the survey showed that the overwhelming majority of judges surveyed indicated they agreed with the statement that some of the changes in judicial work as a result of COVID-19 will remain (95.56%, n = 43).

Uneven Technology Take-up

The take-up of technology in courts reflects a number of different influences on judges, including individual factors related to their personal preferences as well as broader systemic factors related to the quality of technology available to them. Susskind identifies three key reasons why judges may be reluctant to embrace new technologies; "status quo bias", explained as a tendency to resist change, "irrational rejectionism", being the dismissal of a system with which the critic has no direct person experience, and "technological myopia", referring to the inability to anticipate that tomorrow's systems will be vastly more capable than those of today.[18] According to Susskind, judges strongly resist technological shifts that are transformative to the judicial role.[19] The historical resistance to change within the legal system and within the courts may also be a factor.

The research however suggested that although these factors may be an issue for some Australian judges, other factors are also relevant. All judges surveyed used online data bases to support their work however

[17] Carly Schrever, "Judging Stress" (2015) 89(9) *Law Institute Journal* 29. See Carly Schrever, Carol Hulbert and Tania Sourdin, "The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing" (2019) 28 JJA 141. See also Carly Schrever, Carol Hulbert and Tania Sourdin, "Where Stress Presides: Predictors and Correlates of Stress among Australian Judges and Magistrates" (2021) 29(3) *Psychiatry Psychology and Law* 1.

[18] Richard Susskind, *Online Courts and the Future of Justice* (OUP, 2019) 43–45, discussed in Sourdin, n 3.

[19] Susskind, n 18, 43.

many indicated that the quality of IT support within their courts was "poor" or only "adequate" and that IT support when working remotely during the COVID era was often only poor or adequate. There were however some significant differences with 33% of respondents rating IT support during COVID at "excellent" indicating that there can be significant jurisdictional differences in the adequacy of IT support available to judges.

While the COVID-19 era has resulted in many changes to court operations, in many courts the processes in place are still very similar to those that have operated for decades. This may reflect a lack of interest in innovation. However, it is also important to note that the particular conditions of jurisdictions where greater take-up of technology has occurred can differ significantly. For example, as previously noted, in China, more specific supportive technologies, such as the "Smart Court" system, have gained traction in an environment where there is a greater appetite and budget for online technologies. The increased speed and accessibility and reduced costs that can come from greater use of technology in the judiciary can offer a wide range of benefits for access to justice and the rule of law. However, online courts also pose challenges to traditional concepts of justice, particularly in relation to respect for the rule of law in the community, the impact of the physical courtroom and even potentially threats to democracy.[20]

Despite this, the survey responses of judges seem to suggest a positive view of the potential of technology for access to justice and court processes. The majority of respondents (87.5%, n = 42) indicated that the increased use of digital technology has had positive implications for access to justice. Additionally, the majority of respondents agreed that existing court processes could be made more efficient with the "best" use of technology (69.77%, n = 25). These figures suggest that there is a considerable willingness of judges to adopt technology in the courtroom. Despite indications of judicial responsiveness to the benefits of court technology, the take-up of newer or emerging technologies among judges is somewhat limited. In this regard, judges' perspectives on their level of involvement in policy decisions is telling. The majority of respondents (70.46%, n = 31) indicated that they believe the judiciary needs to have control over policy changes that affect judges. The extent of consultation with judges in relation to the adoption of technologies varies across jurisdictions and court in Australia, and in some cases, judges have had very little involvement in the decision-making process at all. Greater consultation and judicial involvement in the adoption of new technologies and policy changes related to technology use in the courtroom may improve take-up of technology use by judges on the individual level.

A reluctance towards innovation can also be linked to inadequate technological infrastructure and outdated court technology. Adequate internet access forms the basis for access to almost all technological infrastructure, yet 33 (67.35%) out of 49 respondents indicated that they did not have access to Wi-Fi in courtrooms or hearing rooms (although there may be effective internet connections in Chambers). Further, the usability of electronic case management systems was indicated as poor by 22.92% of respondents (n = 11) and 20.83% of respondents (n = 10) indicated that they had limited access and training relating to electronic case management systems or the systems did not operate well (Table 1).

[20] Sourdin, n 3.

TABLE 1. Judge Respondents' Assessment of the Electronic Case Management System and Internet at Court

	Assessment of Resource									
	Excellent		Good		Adequate		Poor		Do Not Have	
Resource	*n*	*%*	*n*	*%*	*n*	*%*	*N*	*%*	*N*	*%*
Usability of the electronic case management system (*N* = 48)	7	14.58	14	29.17	6	12.50	11	22.92	10	20.83
Availability of training on the electronic case management system (*N* = 49)	8	16.33	11	22.45	13	26.53	6	12.45	11	22.45
Quality of training on an electronic case management system (*N* = 48)	8	16.67	8	16.67	12	25.00	6	12.50	14	29.17
Quality of internet available for judges in your court (*N* = 50)	20	40.00	11	22.00	12	24.00	3	6.00	4	8.00

Sophisticated Tech Solutions?

It could be suggested that the most sophisticated technological response to the COVID pandemic from the courts was the introduction of online hearings and case management events as a solution to government-mandated lockdowns. Survey participants were asked four questions in which they considered their experience of online remote trials, hearings or conferences with parties using video-conferencing technology. It was found that in the last five years, the majority of respondents (n = 47, 88.68%) indicated that they had participated in online hearings using video-conferencing technology. Fifty-one judges gave varied assessments about how well video-conferencing technology performs for fully or partially remote trials/hearings. Approximately half of these respondents (n = 26, 50.98%) perceived that video-conferencing technology performed "very well" or "well". Sixteen respondents (31.37%) gave an "average" assessment of video-conferencing technology, and 15 (29.41%) respondents reported a negative assessment of the technology for remote trials and hearings.

In general, respondents were supportive of using video-conferencing technology in partially remote trials, hearings, or conferences. Thirty (56.60%) respondents indicated that video-conferencing technology could support fair outcomes "very well" or "well" in remote trials, hearings, or conferences. Approximately a quarter of respondents indicated that video-conferencing technology would be "average'" in supporting fair outcomes, while fewer respondents (n = 9, 16.98%) perceived that video-conferencing technology would negatively impact on the fairness of outcomes. When asked about their preference for in-person hearings, online hearings using video-conferencing technology, or a mixture of both, respondents preferred in-person hearings (n = 29, 54.72%) or a mixture of in-person and online hearings (n = 24, 45.28%). No respondents indicated their preference for fully online hearings, using video-conferencing technology.

Some similar results in attitude towards in-person/remote hearing preferences emerged from an earlier United Kingdom (UK) study that focused on lawyers and disputants in May 2020.[21] When considering the use of remoting hearings during the pandemic, in the context of determining the ways in which COVID-19 safety precautions had affected the UK civil justice system, it was found that while 71.5% of lawyers were satisfied with their experience of remote hearings, only 14.8% showed a showed a preference for audio hearings when compared to in-person hearings, and only 10% for video hearings

[21] Natalie Byrom, Sarah Beardon and Abby Kendrick, *The Impact of COVID-19 Measures on the Civil Justice System* (Report and Recommendations, 2020).

when compared to in-person hearings. Researchers specifically mentioned that lawyers found remote hearings were less effective in facilitating client participation. Researchers also discussed findings that indicated remote hearing did not necessarily result a lower cost than in-person hearings. Further they may have a negative impact on those with lower incomes and those with characteristics that may suggest vulnerability, and posed significant issues to open justice arrangements.

These issues were somewhat reflected in the Australian context in a 2020 article focused on COVID-19's effect on the Australian Civil Justice system.[22] As with the UK study, significant concerns related to the impacts on open justice principals, access to justice, and equality for all individuals attempting to engage with the legal system.[23] Interestingly the Australian article also commented on the issues arising from a lack of the physical characteristics of the court, as well as issues that might be linked to systematic bias in decision-making.[24] The current Project further suggests that Judges remain concerned about the impact of online hearing approaches, with a particular concern being raised about fairness as shown in the graph (Figure 1).

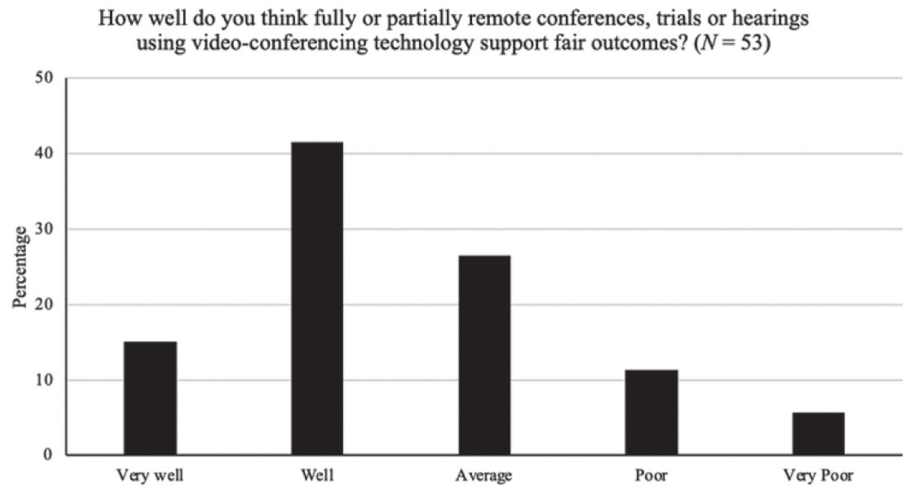

FIGURE 1. How well do you think fully or partially remote conferences, trials and hearings using video-conferencing technology support fair outcomes? (N=53)

Legacy Technology Systems

Significant issues exposed by the shift to greater judicial technology reliance in the COVID pandemic were linked to the outdated and inefficient technology systems available to some judges, a lack of systems in place to adequately manage technology use issues, and judicial perception that technologies available to the court were not being put to their best use. However there were significant differences between judges and courts with one judge noting:

> In my opinion the general technical equipment capacity of the court is poor and needs considerable improvement.

While another judge from a different court jurisdiction said:

> A significant majority of courtrooms (but not all) have been upgraded and offer excellent IT equipment and internet access.

[22] Joe McIntyre, Anna Olijnyk, and Kieran Pender, "Civil Courts and COVID-19: Challenges and Opportunities in Australia" (2020) 45(3) *Alternative Law Journal* 195.

[23] McIntyre, Olijnyk and Pender, n 22.

[24] McIntyre, Olijnyk and Pender, n 22.

Judicial survey respondents assessed the quality of the resources available at the main court where they work. Each resource was rated as being "excellent", "good", "adequate", "poor", or "do not have". While across most of the resources available to judges, assessments about resource quality tended to range between "excellent" and "adequate", and judicial survey respondents were less likely to rate the quality of resources available to them as "poor". One exception was the quality of IT support available to judge respondents when working remotely. Survey response findings indicated that while a sizable number of respondents (n = 16, 30.77%) rated this resource as "excellent", close to half respondents rated the quality of this resource as "adequate" (n = 14, 26.92%) or "poor" (n = 12, 23.08%). This finding suggests that a significant issue for many judges in the context of technology use, relates to the lack of tailored support services particularly when working remotely. One judge noted:

> We are very lucky to have remote access to our case file system however it is very unreliable and connection is often difficult.

In considering access to different digital resources, respondents were asked to rate their access to Wi-Fi both in courtrooms or hearing rooms (n = 49), and in all other parts of the court building (n = 48). Thirty-three (67.35%) out of 49 respondents indicated that they did have access to Wi-Fi in courtrooms or hearing rooms. Among those that have access to Wi-Fi in these rooms, only seven (18.92%) respondents reported that the Wi-Fi is restricted to a judge's use. Thirty-two (66.67%) of respondents indicated that Wi-Fi access was available in other parts of the court building. Among respondents that indicated that Wi-Fi is available in all parts of the court building, 21 (61.77%) reported that it was available to both judges and the public. Given the importance of Wi-Fi in most organisations, this finding is concerning. It suggests that almost one-third of judges or litigants may be unable to use technology, within courts, unless they rely on their own data providers because there are connectivity issues.

This issue is linked to the issues that have been identified in a 2020 UK study, conducted to determine the ways in which COVID-19 safety precautions had affected the UK civil justice system. In this study it was found that 44.7% of all hearings conducted suffered technical difficulties linked to connectivity. This number further increased when solely considering video hearings, with 50.8% of respondents experiencing minor technical issues and 12.9% of respondents experiencing significant technical issues during their hearing.

When asked if the respondents were aware of lawyers and litigants experiencing difficulties while using the remote services provided by their court, of the 50 judge respondents that answered the question, the majority (n = 31, 62%) indicated that legal parties (lawyers and/or litigants) do not experience difficulties in using remote services provided by the court. Nineteen respondents (38%) indicated that legal parties do appear to experience difficulties in using remote services provided by the court. Among the 31 respondents who reported that legal parties do experiences difficulties with remote services, they reported that the most frequent difficulties related to the quality of audio-visual technology (n = 28, 90.32%), difficulty accessing technologies to access court remotely (n = 25, 80.65%), and the availability of audio-visual technology (n = 22, 70.97%).

Judges provided a number of freeform responses to questions relating to the utility of technologies that enabled remote hearings and a number considered that they could be used in different ways into the future and were particularly useful in respect of case management approaches. Judges noted that while remote hearings were helpful for case management and provided a more convenient and cost-effective way to engage with the court system, remote hearings posed many issues in full hearings that were linked to the "impersonal" nature of online processes as well as the technical issues. In particular, judges also found remote hearings challenging for appeals and full hearings involving witnesses:

> Remote hearings are not as good with witnesses, but they do provide more cost effective options for witnesses interstate or overseas. Remote hearings are very cost effective and work well for case management and hearings with mostly legal issues. They do not work well when we sit 3 judges for appeals and the judges are in different locations.

The judges were asked questions regarding the availability and appropriateness of legal data bases in their court building. Of the 48 respondents that answered the question, all indicated that they do have access to legal databases in their court building (n = 48, 100%) and when working remotely (n = 48, 100%). When

asked if the legal databases are appropriate for their needs, most indicated that they "strongly agreed" (n = 18, 37.50) or "agreed" (n = 28, 58.33%) that they were appropriate. No respondents indicated that the legal databases were inappropriate at meeting their needs.

Respondents were asked whether their court's current use of technology in the court process was the best use of that technology. Of the 46 respondents who answered this question, respondents were more likely to not support (indicate 'no'; n = 28, 60.87%) this statement than support it (indicate 'yes'; n = 18, 39.13%). Among those that did not support this statement, a large percentage of respondents 'agreed' or 'strongly agreed' that the existing court process could be made more efficient with the best use of technology (agreed: n = 17, 65.39%; strongly agreed: n = 8, 30.77%) and that the existing court process could be transformed by the better use of technology (agreed: n = 11, 44%; strongly agreed: n = 9, 36%).

Connectivity, Training and Support

As noted above, it appears that many judges lack adequate support services regarding the technology systems they use within their courts. When asked how satisfied they were with the judicial training they have received in relation to technology used in their work, respondents rated their level of satisfaction with the extent judicial training is available, the quality of the judicial training available, and the time available to undertake judicial training. Across the three questions covering judicial training in technology, most respondents indicated that they were "satisfied" with the training or indicated that it "could be better". Fewer respondents indicated that they were "completely satisfied" or "not satisfied at all" with the training. Judges from some jurisdictions noted the following:

> Time pressures make education very much a last priority.
>
> There is no training [relating to technology] at all for judges.

When asked if they would welcome new judicial training opportunities, 53 respondents revealed different areas in which they would welcome new judicial training opportunities. While respondents most frequently indicated that they would like hands-on training using technologies in court (n = 26, 49.06%), they also expressed relatively equal interest in receiving more training in understanding how newer technologies linked to AI can impact on judicial work (n = 17, 32.07%), conducting remote hearings (n = 14, 26.42%), presentation and communication skills when using technology (n = 13, 24.53%), and understanding statistics in the legal context (n = 11, 20.75%).

The need for additional specific training that is personalised can be considered within the broader context of analysing available technology advancements and their use within the courts. One could infer from the lack of education and training surrounding technology, that low levels of judicial engagement and a lack of training, may be factors impacting on effective incorporation of technology into the judiciary and court system. If judges cannot understand, advocate for, and adequately make use of new technological advancements, then the likelihood of the court system incorporating these developments is limited. It could be said that the first step towards greater technology use within the courts system is effective education and introduction of systems to the judges themselves.

Innovation Readiness and Workplace Pressures

Judge respondents were asked to evaluate the adequacy of the facilities and work environment provided at their court building and when working from home in relation to working with technology. Across the various facilities and the work environment, both at the court building and when working from home, respondents' evaluations primarily ranged from "excellent", "good", and "adequate". Respondents less frequently gave the facilities/work environment a "poor" evaluation. However, respondents gave less favourable evaluations of a "space to meet and interact with other judges" within exiting courts and the "security" of the working space when working from home.

These responses suggest, not surprisingly, that while courts can often provide adequate facilities for judges in existing court environments (and more particularly in Chambers), there was a lack of preparation for the shift to remote working that was brought about by the pandemic. The lack of shared spaces during the COVID period that may promote collaborative engagement and learning can also be an

issue when peer learning is considered. Others noted that the experience of working remotely may have impacted on collegiality in the profession (as well as the judiciary):

> I don't think digital hearings are good for the profession, particularly the junior members who have for the last 2 years conducted isolated practice where they cannot feel part of a legal fraternity or sisterhood. it is problematic both in terms of learning and morale.

When asked to assess their judicial workload over the last 12 months, 33 out of 48 judge respondents (68.75%) indicated that their judicial workload over the last 12 months has been "manageable". Thirteen respondents assessed their workload as being "too high" (27.08%) and two assessed it has "lower than usual" (4.17%). Judge respondents were also asked to what extent their work as a judge has changed since they were first appointed. Of the 45 respondents who answered this question, responses were varied. Approximately 35% (n = 16) of the respondents indicated that either no change has occurred, or a small amount of change has occurred, while 64.44% (n = 29) of respondents reported that some change had occurred, or significant change had occurred. These survey responses provide some insight into the workplace pressures that some respondents may be facing within their role as a judge. The constant changing nature of the judicial role is not surprising, given the manner in which the justice system evolves.

Further, in an optional set of questions, judge respondents were asked to indicate to what extent they perceive the work they do as a judge is valued by different societal groups. These questions were pursued partly to determine whether other factors might influence attitudes towards newer technologies, and if these attitudes may then impact on readiness to innovate as judges who may not feel "valued" may be less likely to invest time in "learning" to use newer technologies. Survey respondents most frequently perceived that their work was regarded as "greatly valued" or "generally valued" by the following groups: the public, members of the legal profession (eg, lawyers, barristers, or solicitors), parties in cases that appear before them, court staff, judicial colleagues at their court, and senior judges outside their court. While most respondents did perceive that the government valued their work (n = 27, 61.36%), there were still a minority who considered that the government does not value (n = 9, 20.46%) their work, or respondents were "not sure" (n = 8, 18.18) if they valued their work. When answering the question about media groups, respondents felt sense of value varied; approximately an equal percentage of respondents indicated that they felt valued (n = 14, 31.11%), not valued (n = 17, 37.78%), or they were unsure (n = 14, 31.11%). The negative way in which the value of judicial work is perceived[25] may result in a significant workplace pressure that can in turn impact on the capacity of a judge to "try new things" or react positively to innovation.

Impact of Technology on Judicial Workloads

Large workloads exert pressure on decision-making and may significantly increase judicial stress.[26] Increases in the complexity of litigation over recent decades have had an impact on judicial workload and escalated the need for judges to multi-task, raising questions about the reduction in time for decision-making as well as the implications for judge's wellbeing.[27] The optional K 10 survey results suggest that respondents experience a low level of psychological distress on average. However, 62.86% of respondents (n = 22) reported feeling tired for no-good reason and 51.42% (n = 18) reported feeling restless or fidgety at some point in the 30 days prior to recording their response. Low to moderate levels of stress can impact more significantly on individuals over extended periods of time. 27.08% (n = 13) of survey respondents assessed their workload as being "too high" over the last 12 months, indicating that there is room for improvement in allocating judicial workloads and assisting judges in managing stress and burnout. Interestingly, technology was not perceived as being helpful in managing

[25] See generally Schrever, 17. See also Schrever, Hulbert and Sourdin, n 17.

[26] See Schrever, n 17, 31, in which she states, "The combined implication of all that we do and do not know about judicial stress is significant: as senior members of a stress-prone profession, managing workloads bordering on the oppressive in the context of professional isolation … there is good reason to expect that judicial officers are at particular risk of work-related stress."

[27] Sourdin, n 3, 56.

or supporting judicial work allocation and this is probably because case management systems have not evolved sufficiently to be of assistance to judges although they may assist registry staff.

The concerns regarding judicial wellbeing are reflected in a 2016–2018 Australian study, that focused on judicial wellbeing and stress experienced by Judges and Magistrates in selected Australian courts.[28] A survey of 152 Judges and Magistrates, utilising standardised and validated psychometric instruments, found that a number of judicial officers showed elevated psychological distress and problematic use of alcohol.[29] For some judicial officers, symptoms of burnout and vicarious trauma were significant factors relating to their stress.[30]

Currently, there are few reporting or performance standards relating to judicial workloads. Use of technological case management systems that are better equipped to distribute workloads and respond to individual preferences of judges and allocate workload accordingly may support better judicial wellbeing.[31] In Europe, significant developments in the use of weighting systems and algorithmic calculation tools have been achieved, which could support future use of AI tools to manage judicial workload allocation.[32] Increased use of technology in the courtroom could be paired with increased training to support judges in using IT, which survey respondents indicated interest in. Respondents most frequently indicated interest in more hands-on training for using IT in court (49.06%, $n = 26$), however, as previously mentioned, a high level of interest was also indicated in respect of training as to how newer technologies linked to AI could impact on judicial work (32.07%, $n = 17$) and conducting remote hearings (26.42%, $n = 14$). Further research into how new technologies could be best utilised to support judges in their work would be beneficial to balancing increased use of technology in the courtroom and support judicial wellbeing.

PREDICTING THE FUTURE – JUDICIAL REPLACEMENT OR SUPPORTIVE AI

There has been some academic commentary to suggest that AI advancements in justice innovation is closer to reality than once thought.[33] In the authors' 2021 book, it was noted that the "supportive" use of Judge AI is currently in use in many jurisdictions and had steadily increased in popularity over recent years.[34] Supportive Judge AI is linked to systems that are designed to assist Judges in decision-making, rather than replace them entirely.[35] An example of supportive Judge AI is the use of predictive decision-making templates based on previous jurisdictional precedent or the systems designed predict the most likely outcome in a court matter[36] and targeted CHAT GPT and similar Large Language Models certainly have the potential to transform the way that judges write judgments in the near future.

The author has also noted that recent international advancement in Judge AI technology, indicate fully automated Judge AI systems will be developed in the near future, with the potential to reform entire justice systems globally.[37] Recent developments in the capacity of supportive Judge AI can be explored in the context of the "smart court" system in China. As previously noted, the Chinese smart court system

[28] Schrever, Hulbert and Sourdin, n 17.

[29] Schrever, Hulbert and Sourdin, n 17.

[30] See Schrever, Hulbert and Sourdin, n 17; Similar results have been replicated in a 2022 Survey, see also Kevin O'Sullivan et al, "Judicial Work and Traumatic Stress: Vilification, Threats, and Secondary Trauma on the Bench" (2022) 28(4) *Psychology, Public Policy, and Law* 532.

[31] Sourdin, n 3, 122.

[32] Shanee Benkin and Marco Fabri, *Case Weighting in Judicial Systems* (Council of European Commission for the Efficiency of Justice, CEPEJ Studies No 28, 2 July 2020).

[33] Sourdin, n 3.

[34] Sourdin, n 3, 128–130.

[35] Sourdin, n 3.

[36] Sourdin, n 3, 137–139.

[37] Sourdin, n 3, 209.

was developed to utilise new technology advancements across the entirety of the Chinese courts system that will enable more complex AI development to occur more rapidly in jurisdictions such as China.

While initially, the changes in China fostered digitisation, more recent changes support computer technologies that enable big data and blockchain use and also enable advisory and determinative forms of Judge AI to assist in the judicial decision-making processes. The objectives of these systems are to support access to justice, enable faster dispute finalisation, reduce costs and to support compliance with outcomes. However, such systems raise a number of issues that include whether automated judgments will enable the law to develop, the extent to which such decisions may be subject to algorithmic and other biases, opacity in the context of decision-making, risks to the independence and integrity of the judiciary and questions of data and privacy protection. When considering current court developments of Judge AI, fully automated Judge AI is likely to become more prevalent within the next decade although its use is likely to be restricted particularly in higher courts in jurisdictions such as Australia.[38]

Respondents were asked to reflect on the possibility that judges might be replaced by technology in the next 10 years, 20 years, and 30 years (see Figure 2). 10% or fewer respondents across the three time periods endorsed the notion that judges would be replaced by technology; most respondents did not consider that judges would be replaced by technology. This of itself is an interesting finding and is reflected in the tables below. It could be suggested that had Magistrates and Tribunal members been surveyed the results may have differed however in higher courts, judges tended to consider that a human judge would be retained.

However, a large percentage (n = 35, 68.23%) of respondents considered that technology would enable them to do their work more effectively into the future. Nearly a quarter (n = 12, 23.53%) of respondents considered that technology might make their work more effective, while a small percentage (n = 4, 7.84%) did not support the notion that technology would lead to effective working arrangements. When respondents were asked to expand on their opinions relating to this question, those who considered that technology would or may make their work more effective identified many potential benefits to technology as an aid to effective work, such as; improvement in administration, dictation and filling systems, greater time and cost savings, greater accuracy in determining factual and legal issues, the efficiency and accessibility of online trials, and the allowance of greater access to justice. Notably, there was no consideration of AI writers such as CHATGPT. However, those who considered that technology would not or may not make their work more effective identified some potential issues it may bring, such as; the sacrifice of the quality of justice, flaws that may arise in technology, and the loss of the inherent human role of judging that is developed through years of experience.

[38] Sourdin, n 3.

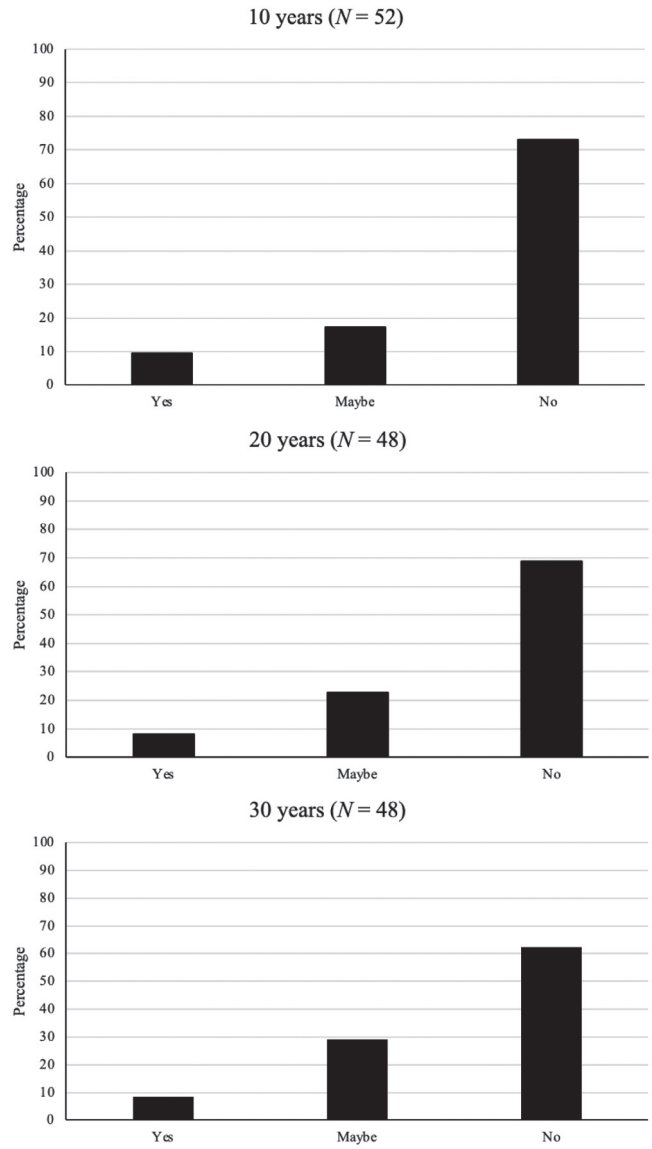

FIGURE 2. IPercentage of judge respondents that considered that judges "might be replaced by technology in the next 10 years, 20 years, and 30 years"

One issue in respect of Judge AI is whether a human judge should always be required to review a decision made by a form of AI. This issue has become increasingly important as AI is used more in criminal cases, administrative law and in relation to insurance claims. The majority of survey respondents (n = 40, 83.33%) indicated that the decisions they make do not involve a review of a decision made by a form of AI. Only 1 (2.08%) respondent indicated that their decisions involved reviewing decisions made by AI. Interestingly, seven (14.58%) respondents indicated that they "did not know" if their decisions involved reviewing decisions by AI.

Judge survey respondents (N = 53) were asked whether the technology used in their court is used to assist with creating template decisions, "nudging", alerting or correcting judges, neither, or for some other purpose. Approximately half of respondents (n = 29, 52.45%) indicated that the technology

used in court is not used for creating template decisions, or "nudging", alerting or correcting judges. Seventeen (32.07%) respondents reported that technology is used to create template decisions in court and four (7.54%) indicated that it is used to nudge, alert or correct judges. Two respondents indicated that the technology used in court is used for another purpose more related to case management such as "communicating with staff in court, checking diary for listing dates, checking databases such as legislation and cases". Responses suggest that sophisticated supportive Judge AI, which includes AI systems designed from algorithmic analysis of previous precedent or legal data, that then acts in an advisory role to judges in their decision-making may play a more extensive role in the future.

Society and the Judicial Role

When asked what impact the increased use of digital technology in their judicial system had on access to justice, of the 48 respondents who answered this question, 42 (87.50%) respondents indicated that the increased use of digital technology in the judicial system has had a positive impact on access to justice. Only two (4.17%) respondents indicated that technology has had a negative impact, while four (8.33%) indicated that it had no impact.

The meaning of justice and access to justice is broad and must be fluid in order to deal with the shifting perspectives and needs of society where a "day in court" may have various meanings (eg, a mediation might be regarded as a "day in court" by some). In an era of increased digitalisation and use of technology, access to justice has been reinterpreted to mean "giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved".[39] This reinterpretation has encouraged the development and use of legal help tools and online dispute resolution outside of the courtroom to manage and resolve disputes in a quicker and cheaper manner. As yet, there has been a lack of integration of sophisticated triage systems within courts as well as apps that are outwardly focused. Judges may need to engage far more with developments that are occurring outside of courts to ensure that courts reflect expectations of contemporary society.

Conclusions

Judicial survey responses about key changes in the judicial system, suggest a low level of concern about technological change, but a high level of concern for the impact of fiscal restraints, reduction in face-to-face hearings, and loss of government respect of the judiciary. In relation to technological change, 45.46% ($n = 20$) respondents indicated that they were not at all concerned, and 27.27% ($n = 12$) indicated that they were only slightly concerned. The low level of concern surrounding future technological change may suggest an overall acceptance of the need for increased use of technology. However, 25% of respondents ($n = 11$) indicated that they were extremely concerned with the reduction in face-to-face hearings and 31.82% ($n = 14$) indicating that they were somewhat concerned. The high level of concern for reduction in face-to-face hearings in the justice system, despite a relatively low level of concern for technological change, might suggest that for survey respondents, technological change and the potential impacts remain unclear and that implementation is problematic in some courts.

These issues are impacted by budget allocations, as fiscal constraints place significant limitations on the ability of courts to adopt new technology and increase capacity to hear cases. A significant number of respondents (total 77.28%, $n = 34$) were extremely concerned or somewhat concerned about the fiscal constraints placed on courts. These concerns may suggest that the inherent tensions between traditional court systems and online dispute resolution and the implications for budgets, access to justice, and the judge's role within the court system are yet to be adequately balanced in some courts.

The survey that was undertaken resulted in only a relatively small response by judges. As a result, any statistical responses must be considered with caution. However, the qualitative responses do suggest that there are some significant barriers that prevent judges from using technological supports more effectively, specifically in relation to the lack of supports in technological use and the legacy technological systems

[39] Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, Attorney-General's Department, Commonwealth of Australia, Canberra, 2009) 4.

available to judges. Judicial responses to questions about Judicial replacement AI and Supportive Judge AI, are provided in the context of cogent practical reasons why judges might not wish to use some technologies as well as good policy reasons why they should not do so. Overall, it is hoped that the findings emerging from this research will inform judges and courts, so that technological change can be considered from the perspective of judges as well as others that use the court system.

Can the Australian Judicial System Meet the Structural Challenges of Future Population Change?

Brian Opeskin*

This article examines the impact of population change on the evolution of the Australian judicial system. Through four case studies, it argues that demography is an important but overlooked lens through which to understand pressures on the judicial system over coming decades. The case studies examine the impact of increasing life expectancy on judicial tenure; of population ageing on judicial pensions; of international migration on judicial diversity; and of population redistribution on the spatial delivery of justice in lower courts. Using data on Australia's historical demographic experience and projected demographic future, the article argues that key structural reforms are needed if the judicial system is to sustain the core values of judicial independence, access to justice, quality of justice, public trust, and cost effectiveness.

I. Introduction

The judicial resolution of disputes is deeply rooted in centuries-old institutions and practices. When viewed from within the system at a specific point in time, judicial institutions may appear static, yet many seasoned judges have noted significant transformations over the course of a single lifetime in the law.[1] These changes reflect evolutionary adaptations to shifting circumstances. As the English essayist GK Chesterton reminds us, leaving things alone does not maintain the status quo: "An almost unnatural vigilance is really required of the citizen because of the horrible rapidity with which human institutions grow old."[2]

This article examines the Australian judicial system through the lens of demography – the social science that studies human populations. Specifically, I investigate how changes in Australia's population impact the judicial system (a positive inquiry), and how the system ought to adapt to better prepare for the demographic challenges that lie ahead (a normative inquiry).[3] The latter question is forward-looking, but reliable answers require an understanding of demographic experience in the past.

Undoubtedly, judicial systems are also influenced by social, economic, political, and technological considerations, but population is not merely a static backdrop against which other forces are played out.[4] Populations are continually changing, and over the long term this exerts a powerful influence that shapes the life of nations. This potency arises from the circumstance that demographic trends reflect the aggregated behaviours of millions of individuals; these behaviours relate to fundamental attributes of humans as biological and social agents (such as birth, partnering, reproduction, mobility, and death); and

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[1] See Michael Kirby, "Australia's Courts: A Quarter Century of Change" (1998) 14 *Queensland University of Technology Law Journal* 1; Murray Gleeson, "A Changing Judiciary" (2001) 75(9) ALJ 547.

[2] Gilbert K Chesterton, *Orthodoxy* (Project Gutenberg, 1994) Ch 7.

[3] This article draws on arguments developed in Brian Opeskin, *Future-Proofing the Judiciary: Preparing for Demographic Change* (Palgrave Macmillan, 2021). Statistics have been updated where necessary.

[4] Regional Australia Institute, *Population Dynamics in Regional Australia* (2015) 10.

changes in the patterns of these behaviours set up momentum for long-term change that has an energy that is difficult to halt or redirect. In this sense, "demography is destiny".[5]

There is ample evidence that governments recognise demographic change as a potent force with significant policy implications. About 25 years ago, Australia led OECD countries by requiring the Treasury to produce an Intergenerational Report every five years to assess the long-term sustainability of government policies over the following 40 years. The enabling legislation requires this assessment to take into account "the financial implications of demographic change".[6] More recently, a government report on a national population strategy emphasised the importance of using population projections "to plan and prepare for our population's needs in the future".[7] And government agencies routinely consider the impact of demographic change on matters within the scope of their functions.

Despite this general awareness of the importance of demography, research on the impact of population change on judicial systems is almost entirely absent.[8] A central objective of this article is to examine this underexplored relationship through four case studies:

- the impact of increasing life expectancy on judicial tenure (Part II);
- the impact of population ageing on judicial pensions (Part III);
- the impact of migration and multiculturalism on judicial diversity (Part IV); and
- the impact of population redistribution on the spatial delivery of justice (Part V).

The case studies have been chosen to highlight the interaction between different attributes of human populations of interest to demographers, on the one hand, and different values of the judicial system that may be jeopardised by policy inaction, on the other. The demographic attributes of interest include population growth, components of population change (ie, births, deaths, and migration), population composition, and spatial distribution. The core values of interest are taken to be judicial independence, access to justice, quality of justice, public trust, and cost effectiveness. Different formulations have been made about these core values over the years, but the five listed here have special relevance to the subject matter of the article.[9]

Pairing these demographic and legal dimensions, Part II examines how increasing life expectancy impacts judicial independence and the quality of justice; Part III examines how an ageing population impacts cost effectiveness of the judicial system. Part IV examines how deficits in judicial diversity can affect both the quality of justice and public trust in the judicial system. Part V examines how population growth and spatial redistribution impact access to justice, especially in regional, rural, and remote areas of the country. Collectively, the case studies illustrate how the Australian judicial system can adjust now to population change of the past, and how it can adapt proactively to the forces of population change that are expected in the future.

II. Life Expectancy and Judicial Tenure

We are so accustomed to judicial officers retiring somewhere between the ages of 70 and 75 years that we rarely consider how the rules relating to judicial tenure came to be, or where they might be headed in the future. This case study contends that increases in human life expectancy (ie declines in mortality) have had a significant impact on the architecture of judicial tenure, and that continuing improvements in life expectancy should prompt a reconsideration of the nature of judicial tenure in the future.

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[5] The aphorism was coined by Richard Scammon and Ben Wattenberg, *The Real Majority: An Extraordinary Examination of the American Electorate* (Coward-McCann, 1970).

[6] *Charter of Budget Honesty Act 1998* (Cth) Sch 1, cl 21.

[7] Department of Sustainability Environment Water Population and Communities Australian Government, *Sustainable Australia, Sustainable Communities* (2011) 25.

[8] In the 1960s there was growing interest in the new field of "population law" but by the 1990s this had largely evaporated: Opeskin, n 3, 1–3.

[9] See, eg, Shimon Shetreet, "Fundamental Values of the Justice System" (2012) 23(1) *European Business Law Review* 61; Neil Andrews, "Fundamental Principles of Civil Procedure: Order Out of Chaos" in Xandra Kramer and C van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press, 2012) 19.

A. Life Tenure

Until the start of the 18th Century, judges in England were appointed at the King's pleasure. This meant they could be dismissed at will, and during the reign of Charles II and James II, troublesome judges were regularly dispatched in this way.[10] The upheaval that followed the Glorious Revolution led to the legislative adoption of life tenure as the preferred model of judicial tenure – judges were appointed for life, subject to good behaviour. But in England at the time of the *Act of Settlement 1700*,[11] life expectancy at birth was only around 37 years,[12] and with such a short average life span, many of the potential problems of life tenure were obscured.

Fast forward to 1976 when Sir Edward McTiernan retired from judicial office at the age of 84, after 46 years on the High Court, making him the longest serving member of that Court. He was able to achieve that milestone because federal judges then enjoyed life tenure, and he might have tarried longer (he died at 97) had Barwick CJ not pressed him to resign.[13] McTiernan's situation is no longer exceptional because of the remarkable increase in life expectancy that has occurred since the Industrial Revolution due to improvements in public sanitation, hygiene, medical practice, and pharmaceuticals. As one demographer has said, "human triumph over disease and early death represents one of, if not the single, most significant improvements ever made in the condition of human life."[14] This can be seen in the increase in Australian life expectancy at birth, from 52.0 years (males) and 56.3 years (females) in 1901, to 81.3 years (males) and 85.4 years (females) in 2019–21. Moreover, the improvements are expected to continue, with the Australian Bureau of Statistics (ABS) projecting life expectancy to rise to 87.7 years (males) and 89.2 years (females) by 2066.[15]

Unfortunately, the combination of life tenure with increasing longevity brought several problems in its wake. First was the decline in capacity that sometimes attends old age. It is well documented that the prevalence of mental decrepitude increases with age, and this might impair the ability of judges to judge.[16] Second was a dampening effect on institutional renewal. If judges enjoy very long tenure on the Bench, rates of turnover decline and opportunities for courts to be refreshed with new ideas and contemporary values are compromised. Third was the impediment to intergenerational equity as younger lawyers were denied opportunities for career progression because judgeships were not regularly vacated.

B. Mandatory Retirement

These problems led to the adoption of mandatory retirement as an alternative model of judicial tenure. The age of "statutory senility", as judicial officers sardonically call it, was first introduced in New South Wales over 100 years ago,[17] and from there the model diffused slowly to other states and territories. The federal judicial system was a late adopter – it was not until 1977 that the Australian C*onstitution* was amended to abolish life tenure for new federal judges and substitute a maximum age of 70 years.[18]

Today, the concept of mandatory judicial retirement is uncontroversial, but what age is the right age to depart? In 1918, New South Wales embraced 70 years by reference to the biblical "three score and

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[10] Sir Henry Brooke, "Judicial Independence: Its History in England and Wales" in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 89.

[11] *Act of Settlement 1700* (Imp) *12 & 13 Will 3, c 2*.

[12] Edward Wrigley and Roger Schofield, *The Population History of England, 1541-1871: A Reconstruction* (CUP, 1981).

[13] Michael Kirby, "Sir Edward McTiernan: A Centenary Reflection" (1991) 20(2) *Federal Law Review* 165.

[14] John Weeks, *Population: An Introduction to Concepts and Issues* (Cengage Learning, 12th ed, 2016) 140.

[15] Australian Bureau of Statistics, *Population Projections, Australia, 2017 (Base) – 2066* (22 November 2018) Series A.

[16] Laurie Brown, Erick Hansnata and Hai Anh La, *Economic Cost of Dementia in Australia 2016-2056* (Institute for Governance and Policy Analysis, University of Canberra, 2017).

[17] *Judges Retirement Act 1918* (NSW) s 3.

[18] *Constitution Alteration (Retirement of Judges) Act 1977* (Cth). For federal courts other than the High Court, a lower age can be set by Parliament.

ten".[19] That is still the most common judicial retirement age in Australia, although some jurisdictions have adopted 72 or 75 years. The difficulty of assessing the merits of these different maxima is that while mandatory retirement solves one set of problems, it does so at the cost of introducing others. The most important downside is the loss of skills and experience that comes from the premature termination of judicial office. I say "premature" because judicial officers are generally not appointed until they are senior members of the profession (usually in their 50s), it takes some years to develop maturity as a judge, and many still have a lot of gas left in the tank at 70, 72, or 75. The problem can be seen vividly in the High Court, where the mean age at appointment is now 54.7 years, and the mean length of service is at an historic low of 10.4 years.[20]

There have been three remedies for the problem of lost skills and experience. One has been to use mandatory retirees as acting judicial officers in state and territory courts. However, this threatens judicial independence because these are typically short-term renewable appointments that give rise to the risk of executive preferment for conforming judges.[21] A second remedy has been to use mandatory retirees in quasi-judicial positions as arbitrators and royal commissioners. These are valuable roles but there are many hundreds of retired judicial officers in Australia; far more than can be absorbed by the available quasi-judicial work. A third remedy has been to increase the mandatory retirement age beyond 70. This has occurred in New South Wales, Tasmania, and the Northern Territory, with their legislatures emphasising the need to cauterise the attrition of labour from the Bench.

C. The Future of Judicial Tenure

As human longevity continues to rise, judicial systems will have to wrestle with the challenge of finding a better balance between mental decrepitude (which is a risk of raising retirement ages) and lost judicial skills (which is a risk of not raising retirement ages). More can be done to prepare the judicial system for inevitable demographic change by reconsidering the nature of judicial tenure. Specifically, higher mandatory retirement ages could be coupled with a process for assessing the capacity of judicial officers. This would entail a proactive assessment of a person's ability to perform the tasks of their job, irrespective of their age. This would support the core value of judicial independence by lessening the need for temporary judicial appointments and it would promote the core value of quality of justice by mitigating the risks of senescence on the Bench.

Currently, judicial officers who face declining capacity on the Bench can be dealt with in several ways, often without fanfare.[22] They may receive a tap on the shoulder from a trusted colleague.[23] They may be subject to a judicial complaint that is investigated by a head of jurisdiction or a judicial complaints body. Or they may be removed from office by Parliament for proved incapacity – a "nuclear option" that has never been successful in contemporary Australia.[24] None of these options is ideal because they are reactive, agonistic, and generally fail to *assess* the ongoing fitness of a person for judicial office. While capacity assessment may be a controversial solution due to its potential threat to judicial independence,[25] these concerns can be met by placing the process under judicial control and incorporating appropriate safeguards for judicial officers. The inexorable march of demographic change necessitates creative solutions to these problems.

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[19] Tony Cunneen, "A Creature of a Momentary Panic" [2010] (Winter) *NSW Bar News* 74, 77.

[20] These averages are based on the past seven appointments and the past seven terminations, respectively.

[21] Gabrielle Appleby et al, *Temporary Judicial Officers in Australia* (Judicial Conference of Australia, 2017). The threat to judicial independence could be ameliorated by reforming the laws regulating temporary judicial office (eg by allowing only a single non-renewable appointment) but there are few signs of reform to date.

[22] Gabrielle Appleby and Suzanne Le Mire, "Ethical Infrastructure for a Modern Judiciary" (2019) 47(3) *Federal Law Review* 335.

[23] James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 55.

[24] Andrew Lynch and Alysia Blackham, "Reforming Responses to the Challenges of Judicial Incapacity" (2020) 48(2) *Federal Law Review* 214.

[25] Surprisingly, in a survey of Australian judges in 2016, 77% of respondents agreed or strongly agreed that it would be appropriate for judicial officers to be asked to undergo capacity checks at the request of a head of jurisdiction or a relevant body constituted

III. Population Ageing and Judicial Pensions

The second case study examines a topic dear to the heart of judges, namely, the viability of judicial pension schemes. I argue that the projected increase in life expectancy over the next 40 years, and the concomitant ageing of the population of former judges and their spouses, will make judicial pension schemes unsustainable. This problem is not unique to *judicial* pensions; rather it is an example of broader challenges to the sustainability of retirement income systems across developed economies. Population ageing has already driven reforms to social security systems, which include increasing eligibility ages, tightening means testing, and altering indexing arrangements.[26] Yet judicial pension schemes have been an island in a sea of change, with their basic parameters remaining untouched for half a century.

A. Population Ageing

Population ageing is a demographic process in which the age distribution of a population shifts towards older ages. It can be measured by the rise in the median age of the Australian population (22.5 years in 1901, 38.5 years in 2022 – an increase of 71%). It can also be measured by the percentage of the population aged 65 years and over (4.0% in 1901, 17.1% in 2022 – a four-fold increase).[27] Moreover, the ageing process will continue, propelled by the twin drivers of declining mortality and fertility. The ABS projects that by 2066 between 20.7% and 23.0% of the Australian population will be aged 65 years and over.[28]

To explain why legislative reforms are needed, it is necessary to build a simple model of a judicial pension scheme. I use the parameters of the federal judicial pension scheme, which covers the High Court, the Federal Court, and the Federal Circuit and Family Court (Division 1).[29] However, all states and territories (other than Tasmania) have similar schemes for their judges.[30]

B. Components of Judicial Remuneration

Judicial remuneration has three main components. First, *judicial salaries* are paid to judges during their working lives. Judicial salaries (currently $480,900 per annum for a Federal Court judge)[31] have increased at an average of 2% in real terms every year for the past 30 years. Second, *judicial pensions* are paid to judges from the time their commissions have terminated until their deaths. This pension is set at the rate of 60% of the current judicial salary, provided two qualifying conditions are met – the judge must have a minimum of 10 years' service and must have reached 60 years of age. Third, *spousal pensions* are paid to surviving spouses from the time of the judges' deaths until the deaths of the spouses. This pension is set at the rate of 62.5% of the judicial pension (ie, 37.5% of judicial salary).

C. Two Paradigms of Appointment and Termination

Under this pension scheme, the total remuneration payable depends on a judge's career trajectory and the underlying demographic assumptions.[32] This can be seen by contrasting paradigms of two male judges,

by judges: Gabrielle Appleby et al, "Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption" (2019) 42(2) *Melbourne University Law Review* 299, 354.

[26] Kadir Atalay and Garry Barrett, "The Impact of Age Pension Eligibility Age on Retirement and Program Dependence: Evidence from an Australian Experiment" (2015) 97(1) *Review of Economics and Statistics* 71, 71.

[27] Australian Bureau of Statistics, *Australian Historical Population Statistics, 2016* (Catalogue No 3105.0.65.001, 18 April 2019); Australian Bureau of Statistics, *National, State and Territory Population, Sep 2022* (2023).

[28] Australian Bureau of Statistics, n 15.

[29] *Judges' Pensions Act 1968* (Cth) s 4(1), definition of "judge".

[30] Magistrates do not receive the generous pension entitlements of judges sitting in higher courts.

[31] Remuneration Tribunal, *Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2022* (2022).

[32] The following examples are explained more fully in Opeskin, n 3.

let us call them Adam and Benedict.[33] For the state, Judge Adam is the most cost-effective appointment. Let us assume he is appointed young (at age 40) and serves as a judge for 30 years until mandatory retirement at 70. He then receives a judicial pension until he dies at an expected age of 81.8 years (based on life tables). His spouse, assumed here to be a female two years his junior, then receives a spousal pension until she dies at an expected age of 85.4 years (also based on life tables). The total remuneration thus comprises 30 years of salary, 11.8 years of judicial pension, and 5.6 years of spousal pension (ie, 47.4 years of payments), where the real cost of each component rises 2% every year.

Contrast this with Judge Benedict. Let us assume he is appointed at age 50, earns a salary for 10 years until age 60, and then retires. He receives a judicial pension until he dies at an expected age of 82.5 years (based on life tables); and his spouse receives a spousal pension until she dies at an expected age of 85.8 years (also based on life tables). For the state, Benedict is the least cost-effective appointment because the judicial and spousal pensions are paid after the shortest period of judicial service that qualifies for a full pension. The total remuneration comprises 10 years of salary, 22.5 years of judicial pension, and 5.3 years of spousal pension (ie, 37.8 years of payments).

The two paradigms demonstrate that the cost of judges varies significantly with age at appointment, age at termination, and length of service. Moreover, the nature of that variation is predictable: all else being equal, a judge is more costly the older the age at appointment and the younger the age at termination. These effects can be quantified. If the economic value of future pension benefits were to be paid to these judges as salary wholly during their years of duty, Judge Benedict would be paid 78% more than Judge Adam in every year of service.

D. Impact of Increasing Longevity

These calculations are based on the assumption that existing mortality patterns are constant and will continue indefinitely into the future, but we know that is not our historical past nor our expected outlook. If we apply the life expectancies projected by the ABS for the future, the cost of Judge Adam rises by 27% and Judge Benedict by 36%, by reason *only* of the fact that people are expected to live longer. These dramatic changes are reflected in the latest audit of the federal judges' pension scheme. On 30 June 2020, the accrued liability under the scheme was $1.2 billion, and this is projected to increase to $5.2 billion by 2060, even assuming the number of serving federal judges remains constant.[34] These sums must come from consolidated revenue because the scheme is unfunded – its members make no contribution to their future benefits.

E. Need for Reform

The time has come to re-evaluate the federal judicial pension scheme and the state and territory schemes that are modelled on it. In assessing the case for reform, it is important to recognise that the milieu in which the judicial pension scheme operates today is vastly different from that at its inception.[35] Individuals are living longer and in better health. Judicial salaries have far outstripped both inflation and average weekly earnings, and this flows through to pensions. Judges are leaving the Bench at faster rates that before, sometimes retiring soon after their pension vests. Judges have access to pre-appointment superannuation, which did not exist before the 1990s. Many judges enjoy paid professional life beyond the Bench. Spouses have greater financial security than when the scheme was introduced. And the scheme is out of kilter with other retirement income schemes – a notable contrast being the federal parliamentary pension scheme, which was overhauled in 2004 to make it more cost effective.[36]

[33] Female judges have different cost implications. Their greater life expectancy and the typical age differential at marriage make it less likely they will have a surviving spouse. This makes female judges slightly more cost effective than their male counterparts: see Opeskin, n 3, 151.

[34] Mercer Consulting (Australia), *Judges' Pensions Scheme Long Term Cost Report 2020* (Australian Government, Department of Finance, 2021) 10.

[35] Brian Opeskin, "Judicial Pensions: Time for Reform?" [2012–2013] (Summer) NSW Bar News 7.

[36] *Parliamentary Superannuation Act 2004* (Cth).

F. The Future of Judicial Pensions

Currently, the judicial pension schemes have an adverse impact on the core system value of cost effectiveness, and steps should be taken to ameliorate this. Although changing an isolated legislative parameter will have only a small impact on the fiscal sustainability of judicial pension schemes, changes to several parameters in combination can address the challenges of population ageing. The qualifying age could be increased beyond age 60 (in New South Wales and Victoria it is now 65).[37] The minimum period of service could be increased beyond 10 years (in South Australia it is 15 years for a full pension).[38] The pension rate could be reduced below 60% of salary. The spousal pension could be abolished or at least reduced below 37.5% of judicial salary (in New South Wales it is 30%).[39] And pensions could be decoupled from current judicial salaries and instead linked to exit salary adjusted for inflation. Of course, there are constraints on reform. Remuneration must not be reduced to an extent that threatens judicial independence because judges must still be allowed to "draw apart from the world of moneymaking".[40] Moreover, entitlements of existing judicial officers and retirees must be preserved. But the latter is not a reason for inaction, rather, it underscores the pressing need for change so that the lengthy process of structural adjustment can begin.

IV. Migration, Multiculturalism, and Judicial Diversity

For much of its history, the Australian judiciary has been highly homogeneous – largely comprising white, middle-aged, Christian males from privileged socio-economic backgrounds. This is not what contemporary Australia looks like. As the beneficiary of 75 years of post-war immigration, Australia has received more than 7.5 million migrants, making society increasingly diverse in ethnicity, language, and religion.[41] This diversity has been added to the plenitude of pre-existing Indigenous cultures and languages that flourished before European occupation of the Australian continent. The compositional gap between a largely homogeneous judiciary and a heterogeneous population is sometimes called the "diversity deficit".[42]

One dimension of judicial diversity that attracted early attention was gender. Commencing in the 1960s, there were important "firsts", such as the first appointment of a woman as a judge of a state Supreme Court (Roma Mitchell in 1965), as a magistrate (Margaret Sleeman in 1970), and as a High Court justice (Mary Gaudron in 1987). When the Australasian Institute of Judicial Administration published its first iteration of the *Judicial Gender Statistics* in 2000, only 17% of judicial officers were women. Today, women account for 43% of the judiciary,[43] reflecting a fundamental and long overdue transformation in the gender of the Bench. However, gender is not a *demographic* problem of the kind being considered in this article. Women did, and still do, comprise about half the adult population, leading to questions of why the judiciary has been resistant to gender equality despite the stability of the underlying demographics. In contrast, this article is concerned with how *changes* in the Australian population might drive future structural changes in the judiciary. Australia's history of post-war migration and multiculturalism have a major bearing on that question.

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[37] *Judges' Pensions Act 1953* (NSW) s 4(2); *Constitution Act 1975* (Vic) s 83; *County Court Act* 1958 (Vic) s 14.

[38] *Judges' Pensions Act 1971* (SA) s 6.

[39] *Judges' Pensions Act 1953* (NSW) s 6(4).

[40] Senate Select Committee on Superannuation, Parliament of Australia, *Parliamentary Contributory Superannuation Scheme and the Judges' Pension Scheme* (Parliamentary Paper No 140/97, 1997) [1.2] (Justice Davies).

[41] Janet Phillips and Joanne Simon-Davies, "Migration to Australia: A Quick Guide to the Statistics" (Research Paper, Australian Parliamentary Library, Parliament of Australia, 18 January 2017).

[42] JUSTICE, *Increasing Judicial Diversity* (2017).

[43] Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (2022) <https://aija.org.au/research/judicial-gender-statistics/>.

Elsewhere I have suggested that discussions of judicial diversity can be usefully framed by four questions.[44] Why does judicial diversity matter? Which characteristics are important for a diverse judiciary? How do we measure the diversity deficit? And what action is needed to redress the diversity deficit?

A. Justifying Judicial Diversity

The initial question is critical because it requires us to justify why changes in the composition of the population should be echoed in the judiciary.[45] The most convincing justifications relate to *quality* (judicial diversity will improve judicial decision-making by avoiding the narrowness of experience implicit in a collection of homogeneous judges); *utility* (societies cannot afford to lose the intellectual power of groups who have been previously excluded from judicial office); and *legitimacy* (judicial diversity promotes public confidence in the legitimacy and impartiality of the justice system). Each justification explains, in different ways, why there is inherent value in having courts that "look like Australia".

B. Identifying Diversity Characteristics

Next, we must ask which characteristics are important for a diverse judiciary. Not every characteristic that differentiates one person from another provides a point of interest – there is "no argument for the appointment of Leos or those born on Sunday".[46] Contemporary literature tends to focus on gender and race because these social categories have resulted in historical exclusion from the Bench. However, we should take a broader view of what characteristics matter on the courts. A useful guide can be found in the periodic national census, which gives a detailed portrait of the nation's diversity and helps us understand which attributes are relevant to the social fabric of the nation. In 2021, the census collected personal information from every individual on sex, age, marital status, religion, citizenship, Aboriginal or Torres Strait Islander origin, ancestry, country of birth, languages used at home, disability, and educational status. Moreover, these categories are subject to review and extensive national consultation before each quinquennial census.

C. Measuring the Diversity Deficit

Assuming these characteristics are relevant to the judiciary, we can measure the diversity deficit by comparing, for each attribute, the composition of the population at large with that of the judiciary. We already have a detailed portrait of population diversity from the latest census, and from this we can calculate the number of judicial officers who would have the chosen attributes if there were no diversity deficits. For example, on 30 June 2022, there were 1,182 judicial officers in Australia.[47] Using the 2021 census data as a benchmark for diversity,[48] we may thus ask whether, in the current cohort of judges and magistrates, there are:

- 599 judicial officers who are female (50.7% of the population);
- 344 judicial officers who are born overseas (29.1% of the population);
- 323 judicial officers who speak a language other than English at home (27.3% of the population); or
- 38 judicial officers who are Indigenous (3.2% of the population)?

Informed observers would answer "no" on each count, but until recently it has been difficult to answer these questions authoritatively. This is because there are no official statistics on judicial diversity in

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

[45] These arguments are canvassed more fully in Opeskin, n 44.

[46] Erika Rackley and Charlie Webb, "Three Models of Diversity" in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 283, 297.

[47] Productivity Commission, *Report on Government Services* (Australian Government, 2022) Table 7A.28. The figures are based on full-time equivalent positions.

[48] Australian Bureau of Statistics, *Australia 2021 Census All Persons Quickstats* (2021).

Australia, and academic studies have been limited in scope regarding the courts selected, sample size, timeframe, and attributes examined. However, useful insights can be gleaned from research conducted using customised census data for three censuses (1996, 2006, 2016) for the occupational classifications of "judge" and "magistrate".[49] These provide a unique dataset of the demographic characteristics of every judge and magistrate present on census night over a 20-year span, and they corroborate many of the findings of earlier academic studies. Relative to the general population, judicial officers are ageing faster, and are more likely to be male, to be married, to have Anglo-Celtic ancestry, and to have attained higher levels of education. But they are less likely to have been born overseas, to speak a language other than English at home, or to be living with a disability.

D. The Future of Judicial Diversity

Migration and multiculturalism – which are key drivers of some aspects of diversity in the Australian population – have been slow to impact the sub-population of judicial officers. There is debate about the steps needed to remedy this imbalance. One step is to improve the career pipeline so that under-represented groups are present in greater numbers in the talent pools from which judicial officers are selected. Another step is to improve selection processes so that historically disadvantaged groups are encouraged to consider a judicial career, and more likely to achieve one if they do. But diversity gains made through a benign appointments process can be quickly lost through later attrition, and hence strategies are also needed to address the "chilly climate" often experienced by individuals from formerly marginalised groups who jump the entry hurdle.[50] Judicial education should also be utilised to give all judges a more sensitive understanding of diversity issues affecting matters they adjudicate, thus making them better judges regardless of their own diversity characteristics.

If the future composition of the judiciary is to respond to changes in the composition of the population, greater reform efforts will be needed than in the past. History demonstrates that progress towards closing the diversity deficit has been slow, uneven across court levels and jurisdictions, and vulnerable to reversal. This fitful progress is no surprise. The appointment of judicial officers is a matter of executive discretion, and governments of different political persuasions have shown different levels of commitment to equality, diversity, and inclusion.[51] An important starting point is to remedy the near-total absence of official data on the diversity characteristics of Australia's judges and magistrates. It is encouraging that the Australian Government has agreed to do this for federal judges in the future, but the situation in the states and territories remains unchanged.[52] The core values of the judicial system could be enhanced if more were done to address persistent diversity deficits. Public trust could be improved by ensuring that courts are a fairer representation of the community they serve, and the quality of justice could be improved by ensuring there is a larger talent pool for appointments and a broader range of judicial perspectives in adjudication.

V. Urban Growth, Rural Decline, and the Geography of Justice

Populations change not only in size and composition but also in how they are dispersed geographically. These geospatial changes have an important bearing on judicial systems because they affect the demand for the services of judicial officers in specific locations. Indeed, the connection between justice, people, and place has a long pedigree. In medieval England, this interdependence was enshrined in the *Magna Carta* (1215), which guaranteed that aggrieved persons would no longer have to follow an itinerant Royal Court from place to place hoping for a hearing, but could have their matters heard in a fixed place

[49] Opeskin, n 44.

[50] Constance Backhouse, 'The Chilly Climate for Women Judges: Reflections on the Backlash from the Ewanchuk Case' (2003) 15(1) *Canadian Journal of Women and the Law* 167.

[51] The executive's discretion may be moderated by the increasing use of protocols that require criteria-based appointments: see Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37(2) *Sydney Law Review* 187, 199–210.

[52] This commitment arose from the government's response to Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias, ALRC Report 138* (2021) Rec 8.

by justices who would travel to them periodically throughout the year. The notion that access to justice requires geographic proximity between courts and people has thus been an *idée reçue* for 800 years. If the Australian judicial system is to be prepared for demographic shifts over coming decades, it must be attentive to the dynamic spatial properties of population change.

A. Spatial Redistribution of Australia's Population

Australia's population is distributed highly unevenly. The overall spatial structure of the national population was largely determined in the late 19th Century by patterns of colonial settlement, and geophysical, social, and economic factors. Yet, paradoxically, the Australian population is one of the most residentially mobile in the world. At the 2021 census, 21% of the population had changed residence within the past year, and 41% within the past five years,[53] placing Australia towards the top of a "global leagues table" of internal migration intensities.[54]

Since federation, there have been major shifts *between* states and territories due to their differential rates of growth – marked by a movement away from the south-eastern states to the northern and western parts of the country. There have also been movements *within* states and territories. These dynamic spatial patterns include growth in coastal areas around major regional cities; growth in mining towns; decline in some inland areas; cyclical movements associated with "fly-in fly-out" workers; temporary flows in coastal areas due to tourism; the ageing of coastal populations due to retirees moving to lifestyle destinations; and ubiquitous outmigration of young adults from regional areas.[55] Such changes have led an eminent demographer to observe that "Australia's population distribution … is one of the most dynamic and policy-relevant dimensions of the nation's contemporary demography".[56]

B. Workforce Planning for the New South Wales Local Court

To illustrate these geospatial challenges in a specific context, the final case study examines the impact of projected population growth and redistribution on the demand for magistrates in the New South Wales Local Court. The Local Court is an apt choice because it is the largest court in Australia and services the needs of a sizeable population over a large territory. In 2021, the Local Court operated in 153 locations, demonstrating a high degree of spatial penetration throughout the state. Moreover, the Local Court's workload is amenable to demographic analysis because a large portion of its caseload is criminal rather than civil, and crime rates are correlated with sex, age, and locality. As a result, changes in the spatial distribution and age-sex composition of the population will be reflected in changes in demand for magistrates.

Workforce planning for the New South Wales magistracy over the period of the study (23 years from 2018 to 2041) rests on four pillars: (1) demographic projections of the state's population; (2) projections of the level of criminal caseload; (3) projections of the derived demand for magistrates; and (4) projections of the supply of magistrates based on specified attrition and recruitment scenarios.

(1) Regarding *population projections*, the New South Wales government has made projections to 2041 for all 129 local government areas in the state, but for the purpose of this analysis it is sufficient to aggregate these into 13 larger districts – five in the Greater Sydney Region and nine in the Rest of New South Wales. Over the projection period (2018–2041), the relevant population is projected to rise by 34%,[57] but regionally this growth is uneven. The Greater Sydney Region is projected to grow

[53] Australian Bureau of Statistics, *Snapshot of Australia* (2021) <https://www.abs.gov.au/statistics/people/people-and-communities/snapshot-australia/latest-release>.

[54] Martin Bell et al, "Internal Migration and Development: Comparing Migration Intensities Around the World" (2015) 41(1) *Population and Development Review* 33.

[55] Ian Burnley and Peter Murphy, *Sea Change: Movement from Metropolitan to Arcadian Australia* (UNSW Press, 2004); Regional Australia Institute, n 4.

[56] Graeme Hugo, "Changing Patterns of Population Distribution in Australia" [2002] *Journal of Population Research and New Zealand Population Review (Joint Special Issue)* 1, 1.

[57] For demographic reasons, the relevant population is not the entire population of New South Wales but only those aged 10+ because only they are at risk of criminal conviction: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

by 46% (and within that region, the Western City district by 72%), while the Rest of New South Wales is projected to grow by only 15% (and within that region, the Far West district will suffer an absolute *decline* of 11%). The age structure of the population is also projected to change, as it skews towards older ages. In 2018, 31% of the population was in the 15–34 age band but this will decline to 27% by 2041, and this exerts downward pressure on crime levels.

(2) Regarding *criminal caseload*, the study uses "criminal convictions" as a measure of the Local Court's workload, recalling that criminal matters dominate its docket. Interesting dynamic forces are at work because conviction rates correlate strongly with sex (higher for males than females) and age (higher for young than old). The analysis first determines *historical* rates of conviction (by age, sex, locality, and offence type) and then determines the *projected* number of convictions by applying the historical rates to the projected future population. A key finding is that the annual number of convictions will increase by 21% between 2018 and 2041. The main driver of this increase is the projected 34% growth in population (see (1) above), tempered by a reduction in the crude conviction rate due to the gradual ageing of the population. Geographically, almost all the increase in caseload is projected to occur in the Greater Sydney Region (up 39%), while convictions in the Rest of New South Wales will be roughly static (up 2%).

(3) The *demand for magistrates* is derived from the demand to adjudicate the Court's caseload. It can be estimated from three components – the initial population of magistrates in the baseline year; the number of cases a magistrate determines each year (which is a productivity measure); and the projected number and spatial distribution of cases per year, measured by criminal convictions. The baseline number of magistrates was calculated as 142 full-time equivalents, the productivity measure was calculated as 1,089 convictions per magistrate per year, and the criminal caseload was determined as described in (2) above. The net result is a projected demand of 171 magistrates in 2041 (up 21% from 142 in 2018). Due to the assumption of constant judicial productivity, this is the same as the 21% increase in the criminal caseload. It also has the same spatial properties, with almost all the increase in demand projected to occur in the Greater Sydney Region (up 39%), while demand in the Rest of New South Wales is static (up 2%).

(4) The final pillar of workforce planning is the *supply of magistrates*, which is the net result of attrition from the workforce through departures, and accretion to the workforce through appointments. Attrition is affected by mandatory retirement ages, early retirement or death, and removal from office, while accretion is determined by decisions of the executive government to appoint magistrates. If the magistracy were subject to the forces of attrition with no replacement, it would steadily decline in size until it eventually ceased to exist. Alternatively, the Executive could replace departing magistrates to maintain the baseline supply (142 in 2018), or it could make appointments beyond the status quo to meet the rising demand (171 in 2041). The last scenario requires substantial recruitment, but as the Chief Magistrate of New South Wales has noted, "It is no easy task to arrange for the funding and appointment of new magistrates, and for that reason more magistrates cannot be the only solution to jurisdictional expansion."[58]

C. The Future of Spatial Adjudication

The New South Wales Local Court case study reveals two types of population challenge for the Local Court. One relates to projected growth in the total population of the state and the resultant increase in *total demand* for magistrates. The other challenge relates to the *spatial dimensions* of that growth, as the population of different regions expands or contracts at different rates, with resultant changes in demand for magistrates in specific localities. The former challenge invites solutions that increase the supply of judicial labour or curb the demand for adjudication. However, the spatial challenge requires different answers, underpinned by the need to support judicial officers who are given circuits in regional, rural, or remote locations.

One mechanism relates to the power, *within a single court*, to determine both the places at which a court will sit and the personnel who will be assigned to sit there. For example, the New South Wales

[58] Local Court of New South Wales, *Annual Review 2021* (2022) 3.

Chief Magistrate may determine where the Local Court sits and which magistrates are to sit in each place to ensure "the orderly and expeditious discharge of the business of the Court".[59] In principle, this provides flexibility to adapt to evolving spatial demands within the territory of the state; in practice, the Law Council has noted that the decline in circuit court services threatens access to justice in many rural, regional, and remote locations across Australia.[60] Population redistribution at a national level is even more troublesome because Australia does not have a national judiciary whose members can move fluidly from the courts of one jurisdiction to another. While there is minor movement of judicial officers between states under ad hoc temporary commissions, for constitutional reasons federal courts cannot appoint state judicial officers in this way.[61] This results in a sub-optimal allocation of resources to the separate judicial institutions that administer the single body of Australian law.[62]

Another possibility is to use the transformative potential of information and communication technologies to sever the physical nexus between populations and the judicial resolution of disputes. Before 2020, steps had already been taken in this direction using audio-visual links, distributed courtrooms, and online dispute resolution, but the arrival of the COVID-19 pandemic significantly accelerated the adoption of virtual technologies. The question is whether courts of the future will discharge their functions at fewer locations and in different places, much like the banking sector has seen a steep decline in the number of bank branches due to the rise in online financial transactions.[63] Yet, courts need to hasten slowly with some of these developments, making sure not to solve one set of challenges (access to justice, population redistribution) by substituting another (decline of open justice, loss of public confidence in the judicial system, and widening the digital divide).[64]

VI. Conclusion

The structure of judicial systems is typically forged over decades or even centuries. One of the challenges of institutional design is that organisations are conceived in the context of the social, economic, and political conditions prevailing at their genesis, with insufficient attention given to "future proofing" them against foreseeable change. Some of these background circumstances are *demographic* conditions, which then become embedded in institutional design because no thought has been given to alternative population futures.

The case studies revealed clear examples of hidden demographic assumptions that have been challenged by later experience. A maximum retirement age of 70 years was embedded for federal judges in 1977, when heartening trends in life expectancy were already manifest (Part II). A generous pension scheme was adopted for federal judges in 1968 without assessing the potential impact of an ageing population on its financial viability or public acceptability (Part III). Old patterns of homochromatic judicial appointment have continued in an increasingly diverse Australia, without considering how this might affect public trust in the judiciary (Part IV). Courthouses have been built in small rural communities without regard to changing patterns in the spatial distribution of the population (Part V).

An important conclusion from the case studies is that judicial institutions should be open to reform and adaptation in response to demographic change. Demography can deliver a deep understanding of potential population futures, and these should be used to reflect on institutional design so the judicial system can be adapted to dynamic social circumstances. It has already been noted that governments are increasingly aware of the need to consider the long-term implications of demographic change in

[59] *Local Court Act 2007* (NSW) ss 22, 23.

[60] Law Council of Australia, *The Justice Project: Final Report* (2018) Pt 1, 4.

[61] Sarah Murray, "Dual Federal and State Judicial Appointments: An Australian Impossibility?" (2014) 25(4) PLR 284.

[62] James Spigelman, "Towards a National Judiciary and Profession" (2010) 48(2) *Law Society Journal* 49, 50.

[63] Clancy Yeates, "Where Are All the Local Bank Branches?", *The Sydney Morning Herald*, 21 January 2023 <https://www.smh.com.au/business/banking-and-finance/where-are-all-the-local-bank-branches-20221212-p5c5qt.html>, citing a decline from around 8,500 branches in 1990 to 4,000 in 2022.

[64] See also Joe McIntyre and Anna Olijnyk, "Public Law Limits on Automated Courts" in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021).

developing policies for public finance. Many government departments also undertake demographic analysis to anticipate future needs in housing, education, health, and other social services. What is needed is an extension of that insight in assessing the needs of the judicial system. This is not an isolated inquiry. Like Darwinian evolution, institutional adaptation is about the persistent accumulation of small change over long intervals. The survival of judicial institutions – in the face of persistent competition from alternative forms of third-party dispute resolution or diversion beyond the courts – can be assured only by continually adapting to change, not by resisting it.

How should the necessary change come about? The primary means by which the judicial system can promote population preparedness is by enacting appropriate *legislation*. Examples from the case studies include raising the mandatory retirement age; introducing a legislative scheme for capacity assessment of judicial officers; and recalibrating the parameters of the judges' pension schemes.

Equally important are the *policies and practices* that flesh-out the legislative frameworks, since it would be a serious omission to ignore the way judicial institutions are operationalised by those who administer them. One example from the case studies is the role of the Executive in making judicial appointments and their impact on judicial diversity. Another example is the role of heads of jurisdiction in administering their courts – by allocating judicial officers to preside in specific localities; by adopting information and communication technologies in courtrooms to address the challenges of remoteness and access; and by facilitating further education to give judicial officers a more sensitive understanding of diversity issues facing the courts.

There is also a role for *constitutional reform* insofar as constitutional rules embody specific demographic assumptions, such as the provision fixing 70 years as the maximum age for federal judges. In 2009, a federal parliamentary committee recommended that the *Australian Constitution* be amended, not simply to increase the mandatory retirement age but to remove that age from the Constitution and vest the power to set an age limit in the legislature.[65] The constitutional change needed to enable future flexibility is politically challenging but not beyond grasp: the 1977 referendum was easily passed, and another might be too, if the case for change were properly made.

The United States President, John F Kennedy, once remarked that 'Time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future.'[66] This article has argued that the judicial system will also need to change in coming decades in response to forces that bear upon it from many quarters. One of those forces is the ineluctable pressure of demographic change, as populations alter in size, composition, and spatial distribution. Without adaptation to these pressures, the judicial system will find it increasingly difficult to adhere to its core values, whereas better institutional design can help it achieve those values. The governments that are responsible for the architecture of the judicial system, and courts themselves, can acquire a deeper understanding of the drivers of change and optimal pathways of reform by viewing courts and judges through the uncommon lens of demography.

[65] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) [4.28] Rec 6.

[66] John F Kennedy, *Address in the Assembly Hall at the Paulskirche in Frankfurt* (The American Presidency Project, 25 June 1963) <https://www.presidency.ucsb.edu/node/236822>.

Managing Judicial Performance: The (Changing) Ethical Infrastructure

Kathy Mack and Sharyn Roach Anleu*

In an independent, impartial judiciary, self-management is the core of managing judicial performance. However, judicial officers work in a context which requires institutional organisation, management and support. They also operate within a network of formal and informal norms, processes, and practices that constitute an ethical infrastructure, seeking to promote good judging. This article first describes the current judicial work context, the changing demands on judicial officers, and the consequences for judicial performance. Following that is a consideration of the adequacy of the ethical infrastructure to support good judging and to manage or regulate judicial conduct.

INTRODUCTION

The notion of "managing judicial performance" may sound contradictory, as the essential judicial values of impartiality and independence are thought to require "almost complete freedom from external control".[1] In an independent, impartial judiciary, self-management is the core of managing judicial performance. However, judicial officers work within an institutional and social context which entails interaction with other participants, and so requires institutional organisation, management and support.[2] All forms of judicial performance management, whether institutional or individual, operate within an array of norms, processes, and practices that constitute the ethical infrastructure of the judiciary, which includes the central values of impartiality and independence.

As the nature of judicial work changes, and Australian society and the judiciary become more diverse, the ways judicial officers undertake their work also vary, so that judicial performance management is more complex.[3] Judicial work today requires more proactive case and courtroom management and more direct engagement with others, with "crushing"[4] case volumes dominated by challenging case types such

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[1] Julie Dodds-Streeton and Jack O'Connor, *Review of Recruitment and Working Arrangements of Judicial Staff Who Work in a Primary Relationship with Judicial Officers in Victorian Courts and VCAT* (Report, 2022) [92] (citation omitted). See also Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) [9.8]–[9.9].

[2] "Judging is a practice which consists of an accumulation of individual and institutional behaviours, norms, attitudes, approaches and actions, enacted or performed by a judicial officer in a specific context": Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack, "Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches" (2016) 12(3) *International Journal of Law in Context* 337, 338.

[3] See Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021); Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017); Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (AIJA, 2012).

[4] ALRC, n 1, [12.5].

as criminal law, family law or domestic/family violence.[5] There is greater awareness of and concern about judicial rudeness, sarcasm, or anger,[6] paralleled by recognition of judicial stress, trauma and the need to support judicial wellbeing.[7]

The ethical infrastructure is also changing, in ways that intersect with judicial performance management.[8] Specific and detailed policies in relation to judicial behaviours such as bullying and sexual harassment have been adopted in several courts.[9] The roles of heads of jurisdiction (HoJs) and other institutional structures are expanding in relation to discipline, pastoral care and fostering good judging.[10] Varied understandings of impartiality, and how it is achieved in everyday judicial practice, are becoming influential.[11] Judicial performance management must support good judging, while also identifying and responding to undesirable judicial conduct. This requires recognising the practical realities of judicial work and engaging all aspects of the ethical infrastructure, while respecting judicial independence.

After a brief introduction to the concept of ethical infrastructure, this article expands on the nature and context of judicial work today, followed by a detailed consideration of changes to the ethical infrastructure.[12]

Ethical Infrastructure

Ethical infrastructure is a broad concept.[13] It encompasses formal and informal structures, explicit and implicit elements, as well as diverse material and artefacts. Together, these generate or constitute the ethical values and norms of the judiciary, seeking to promote good judging.[14] While the recent Australian Law Reform Commission (ALRC) report into judicial impartiality does not expressly mention ethical infrastructure, it frequently refers to "mechanisms" of accountability, and "supports" for impartiality which are part of the ethical infrastructure.[15]

[5] Roach Anleu and Mack, *Performing Judicial Authority*, n 3; Roach Anleu and Mack, *Judging and Emotion*, n 3.

[6] See, eg, Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, 2021); Judicial Commission of Victoria, *Judicial Bullying* (Consultation Paper, 2022).

[7] See, eg, Carly Schrever, Carol Hulbert and Tania Sourdin, "The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing" (2019) 28(3) JJA 141; Jill Hunter et al, "A Fragile Bastion: UNSW Judicial Traumatic Stress Study" (2021) 33(1) *Judicial Officers' Bulletin* 1.

[8] Sharyn Roach Anleu et al, "Judicial Ethics, Everyday Work and Emotion Management" (2020) 8(1) *Journal of Law and Courts* 127.

[9] See, eg, High Court of Australia, *Justices' Policy on Workplace Conduct* (March 2022); Judicial Commission of Victoria, *Judicial Conduct Guideline: Sexual Harassment* (February 2022); Courts Administration Authority (SA), *Judicial Officers Appropriate Workplace Conduct Policy* (August 2022); Federal Circuit and Family Court of Australia, *Judicial Workplace Conduct Policy* (September 2021).

[10] See, eg, *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(b)(i)–(iii). In some jurisdictions, statute authorises HoJs to direct judicial officers to undertake professional development or training: see, eg, *Magistrates' Court Act 1989* (Vic) s 13B(3); *Magistrates Act 1991* (Qld) s 12(4).

[11] ALRC, n 1, [2.32]–[2.51]; Roach Anleu and Mack, *Judging and Emotion*, n 3, Ch 3; Bruce A Greene and Rebecca Roiphe, "Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence" (2009) 64(3) *NYU Annual Survey of American Law* 497.

[12] This article draws on wide-ranging research into Australian judicial officers and courts from the Judicial Research Project, Flinders University, led by Sharyn Roach Anleu and Kathy Mack. The Project documents the changing nature and organisation of judicial work, institutional and individual elements in managing judicial performance, and meanings of judicial impartiality and independence. Project research is conducted and reported independently of the courts and government. See Judicial Research Project <https://sites.flinders.edu.au/judicialresearchproject>.

[13] The term "ethical infrastructure" was apparently first used in relation to professional discipline in law firms: see Ted Schneyer, "Professional Discipline for Law Firms?" (1991) 77(1) *Cornell Law Review* 1, 10. It has since been used in relation to legal ethics more generally and organisational psychology. For further discussion, see Roach Anleu and Mack, *Judging and Emotion*, n 3, 157 fn 3.

[14] See also Jennifer K Elek et al, *Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges* (National Center for State Courts, 2017); Roach Anleu et al, n 8, 130–132; Gabrielle Appleby and Suzanne Le Mire, "Ethical Infrastructure for a Modern Judiciary" (2019) 47(3) *Federal Law Review* 335.

[15] See ALRC, n 1, [2.74]–[2.92].

Ethical infrastructures have three main dimensions: "*formal* systems", "*informal* systems" and "*organisational climate*".[16] For a judicial ethical infrastructure, *formal* mechanisms might include legislation, executive regulation, judicial ethical guidelines,[17] codes of conduct and other authoritative statements of appropriate judicial behaviour.[18] These formal elements may or may not be linked to complaints processes or judicial performance evaluation programs, where they exist. Other formal processes are appeals (or other legal review) involving judicial conduct claimed to create an apprehension of bias or denial of a fair hearing. When Appleby and Le Mire lament the "lack of ethical infrastructure for judicial officers in Australia",[19] they mainly refer to more formal institutional structures, such as mandatory codes of conduct or judicial commissions.

Relatively *informal* systems include the role of HoJs, especially in complaint handling. More generally, HoJs provide guidance institutionally or to individuals. Education and professional development offered by judicial colleges, courts collectively, a particular court, or professional associations, can be key elements in the ethical infrastructure, constituting and transmitting formal or informal norms.[20] *Organisational or ethical climate* might include working conditions, collegial support, mentoring or examples provided by other judicial officers.[21] Extra-curial publications, presentations and personal accounts also inform the ethical infrastructure.[22]

These resources contain normative statements about how judicial officers ought to conduct themselves. They articulate what is required, allowed, or prohibited. They may provide aspirational guidance, education, or feedback to assist judicial officers to achieve acceptable or improved performance in their everyday work. They indicate the behaviour expected of a good judge and what constitutes good judging, while recognising the judiciary is a self-regulating profession and individual self-management is the core of good judicial practice. Ethical infrastructures are "most effective where they ultimately aspire to equip and encourage each individual to develop and put into practice their own ethical values in dialogue with others".[23]

THE JUDICIAL WORK CONTEXT

A frequent explanation for some undesirable judicial conduct, and court user dissatisfaction, is the extent and nature of work demands judicial officers face. The article next describes the context in which judicial work is performed, the demands it places on judicial officers, the skills and qualities now expected of judicial officers, judicial stress and satisfaction, and the implications for individual and institutional capacity to achieve good judging.

Demands on Courts and Judicial Officers

Courts experience immense caseload pressure and expectations to meet performance standards. Work structures and case allocation processes are the mechanisms for transmitting institutional demands to individual judicial officers. The resulting "crushing workload" includes lengthy and expanding case

[16] Ann E Tenbrunsel, Kristin Smith-Crowe and Elizabeth E Umphress, "Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations" (2003) 16(3) *Social Justice Research* 285, 286–287.

[17] The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (AIJA, 3rd ed, amended 2022) (*AIJA Guide*).

[18] See, eg, James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009).

[19] Appleby and Le Mire, n 14, 338.

[20] On the role of judicial education in this infrastructure, see especially Julie Falck and Jessica Kerr, "Centring Competence: Judicial Education in Australia" (2023) 97 ALJ 622. Jessica Kerr, "Making Judges in a Recognition Judiciary" (2022) 31(4) JJA 217, 222–223.

[21] Appleby and Le Mire, n 14.

[22] See Sharyn Roach Anleu, Jennifer Elek and Kathy Mack, "Judicial Conduct Guidance and Emotion" (2019) 28(4) JJA 226.

[23] Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) *UNSW Law Journal* 158, 160.

lists and time pressure;[24] long days in and out of court sometimes including extensive travel; constant decision-making; challenging conduct from court participants; and the dominance of certain case types. Inadequate resourcing, lack of support and the adversarial process can contribute to or aggravate these pressures.[25]

The sheer volume of cases processed in Australian courts requires extremely rapid case processing and decision-making. The National Court Observation Study found the median time for matters in the non-trial criminal list in magistrates/local courts was two minutes and 20 seconds, with an average of four minutes and 20 seconds.[26] Three quarters of judicial officers at all court levels agree that the volume of cases is unrelenting.[27] Long docket and trial lists, especially criminal, dominate in the lower courts; criminal jury trials dominate in the intermediate courts; and judgment writing is especially significant in the higher, especially appellate courts.[28] This experience has not improved at any court level,[29] particularly given the impact of the pandemic on court business.[30]

The demands of high case volume and associated time pressure are exacerbated by unpredictability. Court administrators or individual judicial officers may have limited or no influence on whether or when a guilty plea or settlement will occur, and may not even "know in advance who will appear (or not) or be prepared (or not) and whether any particular case will need considerable judicial effort".[31] Because many scheduled matters will be adjourned or resolved, cases are routinely overlisted: more cases are scheduled than can be heard in the time allowed. This is to ensure there is always a matter ready to go, to avoid wasting scarce judicial and court time. The effect on judicial officers and court staff is a constant experience of work they cannot complete, while facing court users experiencing long waits before and during court proceedings, perhaps lacking information about or understanding of what is happening or why, and sometimes attending a court proceeding which results in no action on their case.

Lower and intermediate courts face expanding work in emotionally challenging areas of law. Criminal proceedings are about two-thirds of the caseload of state/territory courts.[32] Domestic/family violence is significant in the caseload of state/territory courts, and in family law in the Commonwealth courts. These cases inevitably contain distressing evidence of loss, injury, and often deliberate violence, as well as offenders who are themselves disadvantaged.[33] For judicial officers presiding in these matters, constant exposure to "the very worst that humanity does to itself" can lead to what has been called secondary or vicarious trauma.[34]

While certain case types dominate, there is a considerable variety of tasks in everyday work. These include directions or mentions, administrative listings, interlocutory hearings, general or specialised

[24] ALRC, n 1, [12.5].

[25] ALRC, n 1, [12.4], [12.8]–[12.11]; Roach Anleu and Mack, *Judging and Emotion*, n 3, Ch 2; Allan Borowski, "Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts" (2013) 46(2) *Journal of Criminology* 268, 274–280, 285.

[26] Roach Anleu and Mack, *Performing Judicial Authority*, n 3, 91; compare Natalia Antolak-Saper, Jonathan Clough and Bronwyn Naylor, *Unrepresented Accused in the Magistrates' Court of Victoria* (AIJA, 2021) 23–29.

[27] Roach Anleu and Mack, *Performing Judicial Authority*, n 3, 31.

[28] Mack, Wallace and Roach Anleu, *Judicial Workload*, n 3, Chs 4–5.

[29] Andrew Lynch, "Individual Judicial Style and Institutional Norms" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2021) 208, 212, 221; Brian Opeskin, *Future-Proofing the Judiciary: Preparing for Demographic Change* (Palgrave Macmillan, 2021) Ch 5.

[30] See, eg, Local Court of NSW, *Annual Review 2021* (2022) 3–4, 22, 28, 33.

[31] Roach Anleu and Mack, *Judging and Emotion*, n 3, 32. For example in New South Wales in 2021–2022, "late" guilty pleas occurred in 45% of District Court trials and 13% of Supreme Court trials: Office of the Director of Public Prosecutions, *Annual Report 2021–2022* (2022) 26, 28.

[32] Productivity Commission, *Report on Government Services: Justice (Part C)* (Report, 2023) 55; Opeskin, n 29, 191, 201, 208.

[33] Royal Commission into Family Violence, *Report and Recommendations: Volume III* (2016) Ch 16.

[34] Schrever, Hulbert and Sourdin, n 7, 151. See also Brian H Bornstein et al, "Judges and Stress: An Examination of Outcomes Predicted by the Model of Judicial Stress" (2018) 102(3) *Judicature* 50.

lists, presiding at trials and hearing appeals, making and communicating decisions, whether orally or as written judgments. Some assignments require considerable daily or longer travel, such as circuits; proceedings may now take place virtually as well as in person.

Allocating cases and tasks to individual judicial officers can also impose demands. Elek et al identify the importance of "the fit between the individual and the judicial assignment" and judicial self-management.[35] In a study of work allocation in Australia, this same principle was expressed as "horses for courses".[36] However, such a "fit" is often not possible. The need for court efficiency may require every judicial officer to do anything that might be brought before a court. Fairness requires spreading the load of difficult case types and tasks. As a result, some judicial officers will inevitably be allocated kinds of work for which they are not suited, imposing stress and frustration on judicial officers and increasing the risk of judicial conduct which may be or appear unfair to litigants, reducing public confidence.[37]

Changing Judicial Skills and Qualities

Practical and conceptual changes affecting the judicial work context include developments in case management; varied forms of dispute resolution in, alongside and out of court such as restorative justice; therapeutic jurisprudence initiatives such as problem-oriented courts; and social-psychological understandings of court user perceptions of procedural justice.[38] As a result, judicial work increasingly entails more varied tasks and requires different skills and qualities for judicial officers. Proactive case and courtroom management, with more interaction with other court participants, is a central aspect of judgecraft today.[39] Judicial officers, especially magistrates, frequently engage directly with unrepresented litigants and less-experienced or challenging lawyers.[40] This interactive and interdependent nature of judicial work creates considerable unpredictability. If expected actions of parties, witnesses, police or legal representatives, do not occur, judicial officers must manage the resulting disruption, delays and associated emotion, for themselves and others.[41]

Greater direct judicial interaction with court users engenders different judicial approaches, requiring social, interactive skills and emotion management abilities. Judicial work is understood by judicial officers themselves to require interactional skills, including emotion awareness and management. The National Surveys find that 81% of magistrates and 72% of judges identify communication as an essential skill.[42] A major United States (US) study asked respected judges about judicial excellence. As well as confirming the importance of legal knowledge and technical skills, judges describe the social, emotional, and cognitive aspects of work, including emotion management and self-awareness of influences on decision-making, as some of the most important to judicial excellence.[43] These ideas inform everyday judicial work in Australia. The National Judicial College of Australia has substantially adapted the US

[35] Elek et al, n 14, 19.

[36] Mack, Wallace and Roach Anleu, n 4, 137.

[37] Consider, eg, Conduct Division of the Judicial Commission of NSW, *In re Judge Maiden* (2019) [145]–[151], [162]–[165]. Judicial frustration with work allocation may be aggravated by lack of transparency: "there is a degree of mystique around the process": ALRC n 1, [6.29]. Courts may explicitly assign judges to special subject matters, or to specialised lists, but other dimensions of work allocation is rarely spelled out: see generally Anne Wallace, Sharyn Roach Anleu and Kathy Mack, "Evaluating Judicial Performance for Caseload Allocation" (2015) 41(2) *Monash University Law Review* 445.

[38] See generally Michael King et al, *Non-adversarial Justice* (Federation Press, 2nd ed, 2014); Hunter, Roach Anleu and Mack, n 2; Vicki Lens, "Against the Grain: Therapeutic Judging in a Traditional Family Court" (2016) 41(3) *Law & Social Inquiry* 701.

[39] Kathy Mack and Sharyn Roach Anleu, "Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices" (2011) 37(1) *Monash University Law Review* 187.

[40] See Roach Anleu and Mack, *Performing Judicial Authority*, n 3, 46; Antolak-Saper, Clough and Naylor, n 26, 22–24, 35–26, 37.

[41] Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2011); Kathy Mack and Sharyn Roach Anleu, "'Getting through the List': Judgecraft and Legitimacy in the Lower Courts" (2007) 16(3) *Social & Legal Studies* 341; Bridgette Toy-Cronin, "Leaving Emotion Out: Litigants in Person and Emotion in New Zealand Civil Courts" (2019) 9(5) *Oñati Socio-Legal Series* 684.

[42] Roach Anleu and Mack, *Performing Judicial* Authority, n 3, 64.

[43] Elek et al, n 14. See also Roach Anleu, Elek and Mack, n 22, 229.

framework for Australia.[44] In interviews, Australian judicial officers at all levels describe using humour and emotion, especially empathy, as valuable resources.[45]

Stress and Satisfaction

The human consequence of these workload pressures for judicial officers can be tragic. A coroner's report into a Victorian magistrate's suicide noted that the magistrate's difficulties were "accentuated by the significant pressures of the work environment that all magistrates were apparently experiencing – the ever-increasing workloads, the long sitting hours, the expectation to get through long lists, travelling to outlying courts and the absence of time in chambers".[46]

Of course, not all judicial officers are so badly affected, though there is evidence of stress within the judiciary generally (particularly among magistrates). Judicial officers at all levels report experiencing stress or dissatisfaction as well as strong positive feelings towards work. In the National Surveys, nearly one-half of magistrates consider their work emotionally draining always or often, as do nearly one-third of judges. One-third of all respondents agree or strongly agree that making decisions is stressful, though more than half report they are rarely or never kept awake by difficult decisions. Respondents express considerable satisfaction with the intrinsic aspects of their work – level of responsibility, intellectual challenge, content of the work and diversity of the work – but much less satisfaction with the organisational context of their workplace – control over the manner and amount of work, court facilities, scope for improving the court system, and policies and administration.[47]

Recent findings confirm judicial experience of some degree of psychological distress, as well as satisfaction and wellbeing.[48] "[S]ources of fulfilment, accomplishment and purpose within judicial work [may] compensate [for] or offset … stress, providing for a demanding but meaningful professional life".[49] This combination of stress and positive attitudes is apparent even in the most extreme circumstances. A coroner's report into the death of a different magistrate who took his life quoted his wife: "the main reason for Stephen's stress was his work, which he also loved."[50]

In addition to the human consequences for individual judicial officers, the demands of everyday work are sometimes offered as explanations or even justifications for what court users may experience as inappropriate judicial conduct.

Judicial Performance Capacity

The ALRC confirms the importance of context for judicial conduct and public confidence, pointing out "that pressures on judges to hear cases quickly leads to conditions in which perceptions of bias are more likely to arise".[51] Institutional demands will sometimes impact on "the capacity to act judicially",[52] that is, to meet the expectations of impartiality. The ALRC argues that lack of resources, specifically not enough judges, "has played a significant role in perceptions of bias related to courtroom conduct".[53]

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[44] National Judicial College of Australia, *Attaining Judicial Excellence: A Guide for the NJCA* (2019) 5 <https://www.njca.com.au/wp-content/uploads/2023/03/Attaining-Judicial-Excellence.pdf>.

[45] Roach Anleu and Mack, *Judging and Emotion*, n 3, Chs 4–5; Sharyn Roach Anleu, Kathy Mack and Jordan Tutton, "Judicial Humour in the Australian Courtroom" (2014) 38(2) *Melbourne University Law Review* 621, 642–644, 650–651, 655, 660.

[46] Coroners Court of Victoria, *Finding into Death without Inquest of Jacinta Dwyer* (COR 2017 5371, 9 December 2020) [121].

[47] Roach Anleu and Mack, *Performing Judicial Authority*, n 3, 71–79.

[48] Schrever, Hulbert and Sourdin, n 7, 163; Carly Schrever, Carol Hulbert and Tania Sourdin, "Where Stress Presides: Predictors and Correlates of Stress among Australian Judges and Magistrates" (2022) 29(2) *Psychiatry, Psychology and Law* 290; Kevin O'Sullivan et al, "Judicial Work and Traumatic Stress: Vilification, Threats, Secondary Trauma on the Bench" (2022) 28(4) *Psychology, Public Policy, and Law* 532.

[49] Schrever, Hulbert and Sourdin, n 7, 167.

[50] Coroners Court of Victoria, *Finding into Death without Inquest of Stephen Myall* (COR 2018 1210, 4 August 2020) [47].

[51] ALRC, n 1, [12.4].

[52] ALRC, n 1, [12.6].

[53] ALRC, n 1, [12.5].

A key element in this perception is (lack of) time. If litigants have an opportunity to be heard in expressing their concerns, and are treated with dignity and respect, they will be more accepting of court decisions, even if unfavourable.[54] Unfortunately, it is often not possible for an individual judicial officer to provide adequate time for parties to feel that they have fully presented their case.[55]

There is also increasing awareness of and concern about undesirable judicial behaviour. Such conduct may include bullying and sexual harassment, and can encompass demeaning, belittling, humiliating, and denigrating words and conduct as well as sarcastic remarks, angry outbursts, and yelling.[56] Any particular example of conduct assessed as unacceptable may reflect organisational-level factors (eg pressure from workload), specific features of the immediate context (eg responding to challenging behaviour from a court participant) as well as individual qualities (eg temperamentally unsuited, limited self-awareness or self-management skills).[57] These factors may combine: a judicial officer, stressed by long case lists which cannot be completed, allocated to a case type or task for which they lack skill, and faced with challenging behaviour from frustrated court users or over-aggressive lawyers, may be more likely to behave inappropriately, whether initiated by the judicial officer or in response to another participant's conduct. Even substantive decision-making can be compromised; decisions made while rushed, angry, tired or hungry may increase reliance on various well-recognised cognitive biases.[58]

Such incidents of inappropriate or unacceptable judicial conduct may be "isolated".[59] There appear to be very few judicial officers who engage in such behaviour; these judicial officers may be notorious within the legal profession and account for a large proportion of complaints.[60] While heavy workload and difficult work structures are acknowledged as imposing demands on judicial officers, it is significant that empirical research finds that judicial officers display considerable courtesy, patience, civility, and fairness.[61]

While work demands and stress can be accepted as a driver of, or explanation for, inappropriate judicial behaviour, they are generally not, and perhaps should not be, accepted as a justification for (some types of) inappropriate conduct, especially in light of impact on court participants. Workload or other contextual factors will rarely justify any conduct significantly inconsistent with impartiality, reflecting the importance of impartiality, and its appearance, to the judicial function.[62]

The ALRC points to wider social change as a possible explanation for any increased prevalence (or awareness or complaints) of undesirable judicial conduct.[63] Harsh judicial conduct that may have been acceptable in the past is now regarded and publicly named as bullying or sexual harassment and acknowledged as such within courts and the judiciary,[64] though there is a countervailing narrative about "thin-skinned" practitioners.[65] Another factor may be the difficulty of identifying unacceptable conduct

[54] Tom R Tyler, "Procedural Justice and the Courts" (2008) 44(1/2) *Court Review* 26; Kevin Burke and Steve Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44(1/2) *Court Review* 4; American Judges Association et al, *Procedural Fairness/Procedural Justice a Bench Card for Trial Judges: A Bench Card for Trial Judges* (2018) <https://www.amjudges.org/publications/courtrv/cr53-4/PJ-Bench-Card-Full-Final.pdf>.

[55] ALRC, n 1, [12.5].

[56] See Judicial Commission of Victoria, n 6; ALRC, n 1, [10.115]; Kylie Nomchong, "Inappropriate Courtroom Conduct" [2021] (Winter) *Bar News* 44; Quality of Working Life Research Group, *The Victorian Bar: Quality of Working Life Survey* (Final Report and Analysis, University of Portsmouth, 2018).

[57] Judicial Commission of Victoria, n 6, [24]–[44].

[58] Adi Leibovitch, quoted in ALRC, n 1, [4.66].

[59] ALRC, n 1, [10.113].

[60] ALRC, n 1, [10.113]; Judicial Commission of Victoria, n 6, [20]–[21]; Nomchong, n 56, 45.

[61] Nomchong, n 56; ALRC, n 1, [E.9]–[E.15]; Roach Anleu and Mack, *Performing Judicial Authority*, n 3, 121–122.

[62] Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, "Judicial Impartiality, Bias and Emotion" (2021) 28(2) AJ Admin L 66, 77–78, Roach Anleu and Mack, *Judging and Emotion*, n 3, Ch 6; Judicial Commission of Victoria, n 6, [31], [94].

[63] ALRC, n 1, [10.116].

[64] See, eg, the court policies identified at n 9.

[65] ALRC, n 1, [10.128]–[10.129]; Justice Peter W Young, "Current Issues: Judicial Bullying" (2013) 87(6) ALJ 371.

and distinguishing it from acceptable, though perhaps undesirable, judicial behaviour.[66] Limited avenues of redress, and the practical obstacles to accessing them, are another consideration.[67]

Several of these explanations relate to elements of the ethical infrastructure and more particularly to institutional responsibilities for managing and supporting judicial performance, rather than leaving the onus entirely on individual self-management.

Ethical Infrastructure

How does the ethical infrastructure, and judicial performance management, respond to the changing judicial work and context? Until recently, formal guidance and much of the ethical infrastructure have tended to focus on individual judicial conduct, framed as "personal",[68] implicitly accepting judicial self-management as the sole or primary form of management. There has been less attention to the context in which judicial officers work, and its potential to limit opportunities for good judging or increase occasions for inappropriate conduct. As a result, the existing ethical infrastructure and elements of performance management and support have not sufficiently addressed the practical needs of judicial officers.[69]

Several elements of the ethical infrastructure appear to be changing, in line with changes in, or changed perceptions of, judicial performance and context. An especially important change to the ethical climate entails more varied understandings and performance of impartiality itself. Changing formal elements include recent specific judicial conduct guidance about sexual harassment and bullying, as well as changes to the *AIJA Guide*. Roles for HoJs in managing judicial conduct have expanded, including responding to complaints as part of new disciplinary and complaint processes. There is greater explicit emphasis on judicial self-management, including wellbeing, and more institutional support for this.

Meanings of Impartiality

Impartiality is the central individual and institutional judicial value, protected by principles of judicial independence, and a core component of the ethical infrastructure.[70] A significant change in ethical infrastructure is a more complex understanding of impartiality. Conventionally, impartiality is to be achieved through impersonal, detached, unemotional conduct, self-managed by observance of the judicial oath.[71] This understanding of impartiality is aligned with a formalist view of law and is implicitly understood as an achieved (or absent) state.[72]

Other conceptions of impartiality are becoming more influential, within and outside the judiciary, with implications for individual and institutional performance management. Impartiality can be framed as variable in amount and can be measured or assessed: Groves writes of "suitably impartial" and a "sufficient level of impartiality".[73] If impartiality is understood as a dynamic, relational concept, then

[66] ALRC, n 1, [10.129].

[67] Nomchong, n 56; Gabrielle Appleby and Heather Roberts, "The Chief Justice: Under Relational and Institutional Pressure" in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP, 2021) 50, 62–65; Gabrielle Appleby and Suzanne Le Mire, "Opportunity Knocks: Designing Judicial Discipline Systems in Australia" (2023) 97 ALJ 678.

[68] See, eg, *AIJA Guide*, n 17, 19 [4.1].

[69] Roach Anleu et al, n 8, 145; Andrew Wistrich, "Defining Good Judging" in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (OUP, 2010) 249, 257.

[70] *AIJA Guide*, n 17, 5; *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st plen mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006) Annex; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, [26] (Kiefel CJ and Gageler J), [87] (Gordon J), [121] (Edelman J).

[71] See, eg, *High Court of Australia Act 1979* (Cth) Schedule ("I will do right to all manner of people according to law without fear or favour, affection or ill-will").

[72] ALRC, n 1, [2.32], 71, [11.92]; Charles Gardner Geyh, "The Dimensions of Judicial Impartiality" (2014) 65(2) *Florida Law Review* 493, 509–513.

[73] Matthew Groves, "Clarity and Complexity in the Bias Rule" (2020) 44(2) *Melbourne University Law Review* 565, 565, 567.

it can be regarded as a process shaped by context. The central practical and normative element in this process is listening to both sides.[74] Impartiality is an ideal which affects how judicial officers think, feel and approach everyday work, even if not always fully accomplished.[75] Impartiality is also what judicial officers do as part of their courtcraft.[76] Judicial officers describe impartiality as a working practice, including reliance on the express terms of the oath, keeping an open mind, and setting aside attitudes and feelings they regard as inconsistent with impartiality.[77]

Canada's *Ethical Principles for Judges* expresses a more nuanced understanding of impartiality:

> Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.[78]

Devlin et al characterise this articulation of impartiality as:

> [A]n important shift in conceptualizing impartiality. Significantly, [it] also respond[s] to the changes in the functioning of the justice system over the past two decades and the expanded and evolved role of the judiciary. … it seems to recognize that an open mind is not a state of being, an attitude, or a personality trait, so much as the result of ongoing work on careful self-reflection and deliberate curiosity.

Devlin points out that this "definition of impartiality supports a more equal application of the presumption of impartiality", as this presumption may be more readily attributed to judges from a conventional background and less available to "judges whose identity, life and pre-appointment work are not mainstream".[79]

These understandings of impartiality, and recognition of diverse judicial strategies to achieve impartiality, mean that elements of the ethical infrastructure which aim to manage judicial conduct should themselves reflect a more nuanced understanding of impartial judging. Because impartiality is not a fixed, static state, and requires management and effort as part of judicial practice, this impartiality work needs to be supported by the ethical infrastructure.

Formal Conduct Guidance

Traditionally, there was a strong belief that judges knew the ethical principles so there was no need for written guidance.[80] This began changing in the late 1980s with the Judicial Commission of NSW in 1986, Thomas' *Judicial Ethics in Australia* in 1988, and the first *AIJA Guide* in 2002.[81] Formal guidance is now moving from these earlier aspirational, generic or anecdotal sources. The *AIJA Guide* is evolving, and Thomas' work was revised in 1997 and 2009. The current focus of express guidance is on specific forms of unacceptable conduct. Recent judicial conduct policies in relation to sexual harassment and bullying provide detailed, concrete definitions, describing examples of inappropriate behaviour and explaining how

[74] William Lucy, "The Possibility of Impartiality" (2005) 25(1) *Oxford Journal of Legal Studies* 3, 11–12, 21; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 611 [40] (Gaudron and Gummow JJ); Judith Resnik and Dennis E Curtis, *Representing Justice: Invention, Controversy, and Rights in City-states and Democratic Courtrooms* (Yale University Press, 2011); Mack, Roach Anleu and Tutton, n 62, 67.

[75] Katarina Jacobsson, "'We Can't Just Do It Any Which Way': Objectivity Work among Swedish Prosecutors" (2008) 4(1) *Qualitative Sociology Review* 46.

[76] Roach Anleu and Mack, *Judging and Emotion*, n 3, 63–70.

[77] Roach Anleu and Mack, *Judging and Emotion*, n 3, 63–70.

[78] Canadian Judicial Council, *Ethical Principles for Judges* (2021) [5.A.4].

[79] Richard Devlin et al, "A Mixed Bag: Critical Reflections on the Revised Ethical Principles for Judges" (2022) 100(3) *Canadian Bar Review* 325.

[80] See Chief Justice John Doyle, "Judicial Standards: Contemporary Constraints on Judges" (2001) 75(2) ALJ 96, 96, 100; Chief Justice Murray Gleeson, "Preface" in The Council of Chief Justices of Australia, *Guide to Judicial Conduct* (AIJA, 1st ed, 2002).

[81] For further discussion, see Ronald Sackville, "Judicial Ethics and Judicial Misbehaviour: Two Sides of the One Coin?" (2015) 89(4) ALJ 244; David Wood, *Judicial Ethics: A Discussion Paper* (AIJA, 1996).

it may be experienced or perceived by others.[82] The National Judicial College of Australia is introducing a new course on "sexual harassment education & training for judicial officers".[83] This contrasts with normalising or excusing such conduct, as may previously have been the case. These developments are examples of institutional change to the formal ethical infrastructure, supporting improved judicial self-management, in response to publicly acknowledged concerns about judicial conduct.

Changes to the *AIJA Guide* suggest a slower evolution of judicial awareness. Neither sexual harassment nor bullying were mentioned in the first edition (2002), or the second edition (2007). In the third edition (in 2017), the *Guide* introduced the statement that "[b]ullying by the judge is unacceptable".[84] In November 2020, the *Guide* was amended to state that "It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying. Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others".[85] These amendments remain in the current version (revised October 2022). The phrase "it goes without saying" appears to be an echo of the traditional view that judges should already know what is and is not acceptable conduct without further guidance or education.

Another area where the formal ethical infrastructure appears to be changing is enabling a retired judicial officer to return to legal work.[86] After becoming a judicial officer, some find they are unsuited to judicial work, even the primary judicial task of decision-making. As one judicial officer commented in the National Surveys: "Some of the best lawyers find they can't make decisions, and their life becomes hell."[87] Others may be unable to deal with aspects of courtroom management, or particular case types. Unsuitability may manifest as intemperate conduct.[88]

Judicial officers stay in a role in which they struggle for many reasons. Some may be unaware of how inappropriate their conduct is, and "lack any self-awareness of the effect of their conduct".[89] Other obstacles include the loss of income or pension, or the embarrassment at being unsuccessful in a prestigious job.[90] Implicit and explicit norms limit the opportunity for former judicial officers to undertake legal work, especially in court. The latest version of the *AIJA Guide* articulates the traditional view, "strongly held by some, that a superior court judge should not resume practice at the Bar and should not appear in any superior court or the High Court".[91] The *Guide* itself proposes that a retired judge should only "appear in a superior court other than the one of which the judge was a member", and only if it is consistent with "public confidence in the independence, impartiality and integrity of the judiciary".[92] These changes to the ethical infrastructure may provide a valuable opportunity for judicial performance management: to encourage those judges who are unsuited, for whatever reason, to leave the Bench.

Distinguishing Acceptable from Unacceptable Conduct

A challenge for institutional and individual performance management is to delineate a boundary between acceptable and unacceptable conduct, and to assess the influence of work context. For example, the Victorian Bar states:

[82] See n 9.

[83] National Judicial College of Australia, *Sexual Harassment* <https://njca.com.au/sexual-harassment>; see also Judicial College of Victoria, *12 Months of Learning: 2023 Education Prospectus*, 3, 5 <https://www.judicialcollege.vic.edu.au/resources/2023-education-prospectus>.

[84] See *AIJA Guide*, n 17, 19 [4.1].

[85] See *AIJA Guide*, n 17, 9 [2.3].

[86] See Opeskin, n 29, 161–162; The Canadian *Ethical Principles for Judges* (2021) contemplate significant post-judicial legal work and creates a framework for it: see n 70, [5.E.1]–[5.E.4].

[87] Mack, Wallace and Roach Anleu, *Judicial Workload*, n 3, 39.

[88] Nomchong, n 56, 46.

[89] Nomchong, n 56, 46.

[90] See, eg, Coroners Court of Victoria, n 46, [59], [62]–[63], [71].

[91] *AIJA Guide*, n 17, 46 [7.3].

[92] *AIJA Guide*, n 17, 37 [7.1], 38 [7.3].

> [I]nappropriate judicial conduct means behaviour by a judicial officer, in his or her capacity as a judicial officer, that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person.
>
> Inappropriate judicial conduct does not include, without more, robust courtroom exchanges, testing questions from the bench, the rejection of submissions, the making of adverse rulings, or mere expressions of frustration.[93]

The ALRC suggests a robust boundary: "the law *draws a line* at certain conduct which is seen to be unacceptable".[94] How does law draw this line, and what is the significance of context? Two areas of the formal ethical infrastructure which might provide concrete assistance are superior court cases where judicial conduct in court is challenged on appeal or review, and discipline reports such as those published by judicial commissions. Reviews of materials from these sources show that the distinction between unacceptable judicial conduct and robust yet acceptable judicial conduct, justified by an immediate context of difficult behaviour of other court participants or a wider context of insufficient resources, is not clearly drawn.[95]

Examples of judicial conduct identified in appeal or review cases may include harsh criticism directed at court users; displays of apparent anger, hostility, irritation, rudeness; or excessive interventions in the conduct of the case.[96] This conduct is often linked to broader court and work contexts. Nonetheless, case outcomes do not appear to be directly related either to the nature or harshness of judicial conduct or to the extent of contextual justification. Conduct that is assessed as unacceptable overlaps with conduct not so extreme as to give rise to a successful challenge. Case specific factors, and the nature of the legal claim being made, necessarily blur the boundary.

Another possible resource in the ethical infrastructure which might help distinguish acceptable from unacceptable judicial conduct, and the significance of context as an excuse, are discipline proceedings from judicial commissions. However, there are very few examples with sufficient information to provide guidance. Since 2011, four detailed reports have been released publicly by the Judicial Commission of NSW, and one from a South Australian Judicial Conduct Panel. Two reports considered the claims of extreme work pressures, including long lists, long sitting days and complex sentencing matters as a justification for intemperate language in content and tone, and demeaning racialised language.[97] However, "the Conduct Division normalised these working conditions, stating that the sitting times and work hours were 'not excessive or unreasonable'" and noted that there are stressful and emotionally difficult aspects of work for all courts.[98]

In addition to these detailed reports, commission websites generate case studies as examples of complaints regarded as serious enough to be considered and responded to.[99] Unfortunately, the information is often expressed as conclusions, rather than giving factual details of the conduct in a way that would assist other judicial officers or the public to understand the limits of proper judicial conduct, and the appropriate role of work context as a justification.[100] A recent Victorian case study gives more factual detail and links

[93] Victorian Bar, *Judicial Conduct Policy* (May 2021) 1.

[94] ALRC, n 1, [10.114] (emphasis added).

[95] Mack, Roach Anleu and Tutton, n 62; Roach Anleu, Mack and Tutton, n 45; Roach Anleu and Mack, *Judging and Emotion*, n 3, Ch 6.

[96] Mack, Roach Anleu and Tutton, n 62, 75.

[97] *In re Magistrate Betts* (2011); *In re Magistrate Burns* (2018). See also the Conduct Division reports for *In re Magistrate Maloney* (2011) and *In re Judge Maiden* (2019). The South Australian matter considered allegations of sexual harassment: Judicial Conduct Panel, *In re Magistrate Milazzo* (2022).

[98] Roach Anleu and Mack, *Judging and Emotion*, n 3, 164 (citations omitted). Compare, considering US discipline cases, Sharyn Roach Anleu, Kathy Mack and Jennifer Elek, "Judging and Emotion Work: Discipline Processes as Guidance" (2021) 57(3) *Court Review* 152, 160–163.

[99] In New South Wales and Victoria, case studies are provided in Commission annual reports. The Victorian commission has also published several media statements about complaints.

[100] See ALRC, n 1, [10.114].

the conduct to the statutory standard of "conduct generally expected" of a judicial officer.[101] While this development suggests an attempt to provide better individual and institutional performance management, the standard is still opaque, and harks back to the notion that judicial officers do or should know what is acceptable or not.

It appears that it is not possible to draw a fixed line or boundary between acceptable and unacceptable judicial conduct, except perhaps at the extremes, because of the many variables surrounding such assessments.[102] The determination of acceptability or unacceptability is made in different legal and disciplinary contexts, by differently constituted authorities, from different perspectives, for different purposes. The consequences of the assessment will be different, depending on the purpose and contexts.

Another key element in this variability is the recognition that there are many legitimate ways to perform judicial authority and to achieve impartiality.[103] This diversity of judicial practice presents challenges to the ethical infrastructure and performance management. The inability to develop bright line distinctions reinforces the continued and increased dependence on the HoJ as a key element in the ethical infrastructure and on judicial self-management.

Heads of Jurisdiction

Under a traditional view, the HoJ is merely first among equals; hierarchical control was perceived as an internal threat to judicial independence.[104] Today, administrative and management powers of HoJs are somewhat more formalised and expanded through legislation and practice norms; they are a significant element in the ethical infrastructure for the judiciary.[105] In particular, the role of HoJs in relation to complaints about judicial conduct has formalised, in part because of greater avenues of complaint. Protocols agreed by various courts with the legal profession for how to raise complaints,[106] and the increasing prevalence of judicial commissions, impose obligations on HoJs to receive complaints, provide information and, ultimately to deal with substantiated complaints.[107]

Nonetheless, it appears that the ethical infrastructure has not evolved in one crucial way, as the actions the HoJ might take are still limited and opaque. Appleby and Roberts summarise:

> The informality of the traditional process, the limited powers of the chief justice to remedy transgressions, as well as her or his other responsibilities to the court as an institution, have created great difficulties for chief justices wishing to support accountability of the judicial institution.[108]

[101] Judicial Commission of Victoria, *Annual Report 2021–22* (2022) 46.

[102] See, eg, the "factors" identified in Roach Anleu, Mack and Tutton, n 45, 640–658; Judicial Commission of Victoria, n 6, [84]–[96].

[103] Roach Anleu and Mack, *Performing Judicial Authority*, n 3; Roach Anleu and Mack, *Judging and Emotion*, n 3.

[104] James Crawford and Brian Opeskin, *Australian Courts of Law* (OUP, 4th ed, 2004).

[105] See Anne Wallace, Kathy Mack and Sharyn Roach Anleu, "Work Allocation in Australian Courts: Court Staff and the Judiciary" (2014) 36(4) *Sydney Law Review* 669, 671–676. See, eg, *Local Court Act 2007* (NSW) s 23; *Judicial Officers Act 1986* (NSW) s 40(1); *Magistrates' Court Act 1989* (Vic) ss 12A, 13, 13B(3); *Magistrates Act 1991* (Qld) s 12(1), (2), (4); *Magistrates Act 1983* (SA) s 7(1); *Magistrates Court Act 1991* (SA) ss 10(3), (6), 11, 16(3); *Federal Court of Australia Act 1976* (Cth) ss 15(1), (1AA)(a), (1AA)(b)(i)–(iii), (1AA)(d), 18A. See generally *Fingleton v The Queen* (2005) 227 CLR 166, [52] (Gleeson CJ), [122] (Gummow and Hayne JJ).

[106] See, eg, the protocols in respect of Victorian courts: Victorian Bar, *Judicial Conduct Policy* <https://www.vicbar.com.au/members/victorian-bar/ethics-complaints/judicial-conduct-policy>.

[107] At the time of writing, these are Judicial Commission of NSW, SA Judicial Conduct Commissioner, Judicial Commission of Victoria, ACT Judicial Council and Judicial Commission NT. For further discussion of the HoJ's role, see Appleby and Le Mire, n 67; Jordan Tutton, *Complaints about Judicial Conduct in Australia* (Background Paper, 2022); Suzanne Le Mire, "Regulation of Judicial Misconduct in Australia: Why, How and Where Next?" in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar, 2021) 23.

[108] Appleby and Roberts, n 67, 63.

The ALRC addresses HoJ powers in a footnote: "Although no punishment can be imposed, a head of jurisdiction may 'privately admonish or reprimand or counsel the judicial officer, or may adopt administrative arrangements designed to avoid repetition of the problems.'"[109]

"Administrative arrangements" may entail directions to undertake professional development or changes to work allocation.[110] Requiring judges to undertake education can be important to address undesirable judicial conduct and to support good judging. Court resources and judicial education are not always accessed by those most in need of support or improvement.[111] However, education should not be constructed as punishment or, worse, used to limit judicial autonomy in decision-making.[112] Work allocation as a response to undesirable judicial conduct might protect litigants and lawyers from such behaviour, but it raises issues of unfairness in workload across judicial colleagues.

While there is now some greater formality and (perhaps) transparency around the HoJ's expanded role in the ethical infrastructure, the increased role in formal complaint processes may conflict with other (also increasing) obligations to provide support to judicial officers, such as through counselling or other pastoral care. Responses to complaints or to apparent needs for support are still limited by the core principle of judicial independence. Overall, "the extent to which [HoJs] can exercise control over or should be responsible for the management of the behaviour of other judges is uncertain and contentious".[113]

Judicial Self-management and Support

For an independent judiciary, the central mechanism for managing judicial performance is, must be and will remain self-management, supported by the many elements of the ethical infrastructure. Guides and policies are directed largely at self-management of individual behaviour, in accordance with aspirational guidance, such as exhortations to be patient and courteous.[114] Similarly, appeal and review cases, as well as complaints process, are directed at allegations of individual judicial failures.

Effective self-management requires self-awareness, institutional support and clear guidance. The ALRC notes "observations made by the Hon Justice T Thomas AM that all judges should regularly ask themselves whether they are being unnecessarily aggressive towards counsel or litigants. The deference with which judges are treated in court makes it easy to fall into this trap".[115] The Excellence Framework identifies the importance of self-knowledge and self-control, providing concrete practical advice and aspirational statements.[116] An expectation of judicial self-awareness is also contained in the Canadian *Ethical Principles for Judges*: "judges should engage in self-assessment and self-development, taking responsibility for their standard of knowledge, skill and the development of personal qualities related to judicial duties."[117]

Individual judicial self-awareness and self-management are supported institutionally by judicial education and professional development addressing areas such as workload management, communication, interpersonal awareness, stress management, wellness and self-care, as in Victoria and New Zealand, for example.[118] The Canadian *Ethical Principles* explicitly address the need for judicial self-care:

[109] ALRC, n 1, 329 fn 134, quoting Chief Justice JJ Spigelman, "Dealing with Judicial Misconduct" (2003) 6(3) *The Judicial Review* 241, 250. See also Dodds-Streeton and O'Connor, n 1, [93].

[110] See Michael Kirby, "Australia" in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debates* (Martinus Nijhoff Publishers, 1985) 8, 20.

[111] Christopher Roper, "Review of the National Standard for Professional Development for Australian Judicial Officers" (Report, 2010) 26; Gabrielle Appleby et al, *Judicial Education in Australia: A Contemporary Overview* (AIJA, 2021) 21.

[112] See Appleby et al, n 111, 15–18; see also Kerr, n 20, 225–227.

[113] Helen Szoke, "Review of Sexual Harassment in Victorian Courts" (Report and Recommendations, 2021) 26.

[114] Roach Anleu et al, n 8.

[115] ALRC, n 1, [10.128].

[116] National Judicial College of Australia, n 44.

[117] Canadian Judicial Council, n 78, [3.C.6]. See also Elek et al, n 14, 17–21.

[118] See ALRC, n 1, Appendix J; Judicial College of Victoria, n 83.

"[j]udges should set aside sufficient time and make a commitment to the maintenance of physical and mental wellness, and take advantage of judicial assistance programs as appropriate."[119] Aspects of wellness are included in the National Judicial College of Australia's National Judicial Orientation Program.[120]

Conclusion

Good judging is accomplished primarily through individual judicial self-management. This takes place within an institutional framework, involving implicit and explicit norms of judicial conduct, and structures which may enhance or challenge good judging. The nature of judicial work and context, and increasing concerns about inappropriate judicial conduct and about judicial wellness, demonstrate the limitations of the existing ethical infrastructure, and the challenges presented for good judging. Components of the ethical infrastructure are changing, in ways that aim to better address the needs of judicial officers, court users and the public. These changes include moving from aspirational or generic guides for judicial conduct to specific, detailed policies in relation to judicial behaviours of concern such as bullying or sexual harassment; increasing avenues for complaints about judicial conduct; improving guidance provided by complaint processes; and expanding the role for HoJ in complaint handling, and requiring a more proactive role in fostering good judging. Perhaps the most important change to the ethical infrastructure is the understanding of the nature of impartiality itself, and the diverse ways impartiality can be achieved in judicial practice.

Insufficient support for good judging is not only a failure of the ethical infrastructure. As the ALRC emphasised: "An overarching theme that emerged in the course of the … Inquiry was the crucial importance of adequate resourcing of the courts and the justice system to ensure that judges can uphold the highest standards of impartiality."[121] Even the most emotionally skilled and culturally aware judge cannot increase the time available in a busy court list or conjure up missing resources.

While judicial officers overwhelmingly meet their obligations to act impartially, they should be "entitled to a workplace free from the overwhelming pressure caused by unmanageable caseloads and inadequate resources".[122] The stress of these demands may contribute to, explain, or even justify some harsh conduct. It does not excuse the worst behaviour, which is a failure of self-management.

Addressing the sources and effects of inappropriate judicial conduct, and supporting good judging, requires more than revising guidelines or creating judicial commissions. Judicial leadership, engaging formal and informal elements of the ethical infrastructure in ways that more closely reflect the realities of current judicial practice, and generating appropriate connection among the many institutional, collective and individual components involved in managing judicial performance, are all needed.

[119] Canadian Judicial Council, n 78, [3.D.2].

[120] National Judicial College of Australia and Judicial Commission of NSW, *National Judicial Orientation Program: November 2023* (17 November 2023) <https://www.njca.com.au/wp-content/uploads/2023/03/NJOP-2023.11-Flyer.pdf>.

[121] ALRC, n 1, [12.4].

[122] Nomchong, n 56, 46.

Opportunity Knocks: Designing Judicial Discipline Systems in Australia

Gabrielle Appleby and Suzanne Le Mire*

A judicial discipline system, that receives, investigates, and establishes the outcomes of complaints about judicial officers, is a crucial component that can support public perceptions of the legitimacy of judiciary. The design of such mechanisms should seize the opportunity to instantiate the contemporary and traditional values that underpin the judicial system. At the same time, the system should be designed to operate within an existing regulatory and governance space, and alongside other important mechanisms, such as the open court principle and appeals processes. This article proposes that a cascading set of objectives should inform the design of judicial discipline mechanisms. It then turns to a consideration of existing mechanisms in Australia, before concluding that the "Australian model", insofar as it exists, largely relies on traditional mechanisms, such as the referral to the head of jurisdiction. In Australia, thoughtful design that accounts for both traditional and contemporary judicial values is, as yet, unrealised.

INTRODUCTION

Judges are granted the power to resolve disputes and inform broader social norms because they are capable of exercising discretion in complex legal, factual and moral situations with human connection and empathy. In doing this they exercise an important public power, and, consequently, are expected to do so independently, and without corruption or bias. Further, they must conduct themselves in ways that promote the reputation of the judicial institution as a repository of this power. It is this balance between power and accountability that is at the forefront when judicial disciplinary systems are designed.

Richard Devlin and Sheila Wildeman rightly describe the design of a system for judicial discipline as an act of statecraft. A judicial discipline system receives, investigates, and establishes the outcomes of complaints about judicial officers. It is a key governance mechanism for an institution that determines tensions and contests between foundational constitutional values. A well-designed system can foster the legitimacy of the judiciary, while a poorly designed system can be ineffective, provide a veneer of legitimacy, or, most damaging, give rise to political abuse and dangerous incursions in judicial independence for democracy and rule of law.[1] History tells us also that, reflecting the importance of this contest, and the difficulty of its settlement within a particular system, the design of judicial discipline systems is complex to re-litigate once it has been settled.

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[1] See, eg, comments by Susan Kiefel, *Judicial Independence* (Paper presented to the North Queensland Law Association Conference, May 2008) 7–8; Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence" (2009) 57 *American Journal of Comparative Law* 103.

In 2023, Australia has formalised judicial disciplinary systems in many of its States and Territories[2] and now stands on the cusp of implementing a new federal institution to deal with discipline, following the recommendations of the Australian Law Reform Commission for its establishment.[3]

As we explain in this article, the tensions involved in judicial disciplinary design have often been too simply conceived as a contest between the traditional value of judicial independence and the emerging value of accountability. In a well-designed system, both independence and accountability can pull towards sociological legitimacy of the judiciary and public confidence. Further, we argue that these are not the only values that are relevant to the design of a disciplinary process, and we explain how values of impartiality, transparency, efficiency, judicial wellbeing, representativeness, and competence are also in play.

Judicial discipline has not been an historical focus of judicial governance. Indeed, the protection of judicial independence, secured through the guarantees of tenure in the *Act of Settlement* at the start of the 18th century, has been the driving imperative. The confidence of an earlier age that self-regulation through informal norms and closeted sanctions could provide sufficient, and largely unspoken, reassurance to the public has prevailed until remarkably recently. Under this traditional approach, complaints are made to the head of jurisdiction, and from there, their investigation and conclusion are dealt with through informal means. A judge may be counselled, administrative arrangements may be imposed, and, in serious circumstances, a retirement may be quietly mooted. This system of governance leaves the impression that it is accepted that judges can be wrong (and overturned on appeal) but not bad,[4] unless they are truly egregious, and thus justifiably removed.

Traditionally, there is no transparency in terms of the existence, process and consequences of complaints. Often misconduct is revealed in the appeal process, where appellate courts have publicly excoriated the lower court judge, without a fair process and an appropriately calibrated response. Heads of jurisdiction themselves have spoken out against the referral of complaints to them, stating that they have limited powers to deal with concerns, and that it often places them in an invidious position with their judicial colleagues. The traditional system sits in contrast with the orthodoxy in bureaucratised judiciaries in civil law systems, where questions of transgressions are incorporated into a highly formalised and well-established system of management, including for discipline, promotion and education.[5]

But this traditional position is changing. Andrew le Sueur has explained, as expectations of public accountability have changed, this has been accompanied by three responses.[6] The first has been to insist that the constitutional imperative of judicial independence is such that it cannot be compromised by the introduction of a formal disciplinary system. The second is to argue that judges are *already* accountable, that is, the requirements of open justice, the appeal process, and the requirements to give reasons, are already adequate avenues through which to achieve the objectives of public accountability. The third is to argue for a new governance response: a judicial disciplinary system that sits outside the closed box of self-regulation.

In this article, we will consider the opportunity to instantiate a contemporary understanding of the objectives of judicial disciplinary systems. We offer a cascading set of objectives, that start with the

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[2] The Judicial Commission of New South Wales (*Judicial Officers Act 1986* (NSW)); the Australian Capital Territory Judicial Council (*Judicial Commissions Act 1994* (ACT)); the Judicial Conduct Commissioner (*Judicial Conduct Commissioner Act 2015* (SA)); the Judicial Commission of Victoria (*Judicial Commission of Victoria Act 2016* (Vic)); the Northern Territory Judicial Commission (*Judicial Commission Act 2020* (NT)).

[3] See Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (December 2021) 310 (*Without Fear or Favour*); Attorney-General's Department (Cth), *Scoping the Establishment of a Federal Judicial Commission* (Discussion Paper, January 2023).

[4] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (CUP, 2nd ed, 2013) 13; Geoffrey P Miller, "Bad Judges" (2004) 83 *Texas Law Review* 431, 463; "Judges can be wrong but not bad": John Basten, "Judicial Accountability: A Proposal for a Judicial Commission" (1980) 52 *Australian Quarterly* 468, 477.

[5] See, eg, Daniela Cavallini, "Judicial Discipline: Different Approaches in 5 EU Member States" in Ramona Coman and Cristina Dallara (eds), *Handbook on Judicial Politics* (Institutional European, 2010) 125.

[6] Andrew le Sueur, "Developing Mechanisms for Judicial Accountability in the UK" (2004) 24 *Legal Studies* 73.

foundational objective of public confidence and judicial legitimacy, and then step down to judicialvalues and practical objectives. We then turn to the constitutional, governance and unique workplace context within which judicial discipline systems operate, before articulating some general design principles that emerge from this consideration of objectives and context. Finally, we conclude by undertaking a brief survey and analysis of the current state of play in Australia in relation to the development of judicial disciplinary systems.

OBJECTIVES OF A JUDICIAL DISCIPLINARY SYSTEM

The objectives of a judicial disciplinary system are enshrined in international law,[7] scholarship,[8] and practice. They are best understood as cascading from an overarching objective related to judicial legitimacy and public confidence, to a set of objectives relating to the promotion of judicial values associated with ensuring legitimacy and public confidence. Finally, they can be broken down into a more practical set of purposes.

Sociological Legitimacy and Public Confidence

There seems to be general agreement that the overarching objective of a judicial disciplinary system is to protect or even promote the sociological legitimacy of the judiciary, a concept closely associated with public confidence in the judiciary, and maintaining the reputation of the judiciary.[9]

Values

Public confidence and sociological legitimacy in the judiciary are now closely associated with a set of what is often referred to as judicial values, a set of institutional values that is determined by the historical, socio-legal-political context, and will evolve over time. Here, we explore the connection between discipline and the values of independence, impartiality, accountability, efficiency, accessibility, transparency, representativeness (diversity), competence and judicial wellbeing. The presence of these values as both outcomes of, and guardrails in, system design ensures their meaningful incorporation into any judicial disciplinary process.

Judicial independence, the traditional focus of judicial governance, had once been seen as the reason to trust the judges to regulate themselves due to the fear that through discipline will be smuggled arbitrary sanctioning and silencing of judges.[10] There are certainly jurisdictions where there has been democratic

[7] See, eg, United Nations, *Basic Principles on the Independence of the Judiciary*, GA Res 40/32 and GA Res 40/146, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985); *European Charter on the Statute of Judges*, 1998, DAJ/DOC (98)23; Judicial Integrity Group, *The Bangalore Principles of Judicial Conduct*, (2006) ESC Res 2006/23, UN ESCOR, 41st mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006). Note also the non-legal international statements on the judiciary: International Association of Judicial Independence and World Peace, *New Delhi Code of Minimum Standards of Judicial Independence* (22 October 1982); First World Conference on the Independent of Justice, *Universal Declaration on the Independence of Justice* (10 June 1983); *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region* (19 August 1995), as amended at Manila, 28 August 1997 (adopted by the 6th Conference of the Chief Justices of Asia and the Pacific); International Association of Judges, *The Universal Charter of the Judge*, adopted by the IAJ Central Council (17 November 1999, updated 14 November 2017); Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)*, CCJE (2010) 3 Final, Strasbourg (17 November 2010); International Association of Judicial Independence and World Peace, *Mount Scopus International Standards of Judicial Independence* (19 March 2008, consolidated 2015); International Association of Judicial Independence and World Peace, *Bologna and Milan Global Code of Judicial Ethics* (June 2015).

[8] See, eg, Gabrielle Appleby and Suzanne Le Mire, "Judicial Conduct: Crafting a System that Enhances Institutional Integrity" (2014) 38 *Melbourne University Law Review* 1; Richard Devlin and Sheila Wildeman, "Introduction: Disciplining Judges – Exercising Statecraft" in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing, 2021) 17.

[9] See also William Thomas Braithwaite, *Who Judges the Judges? A Study of Procedures for Removal and Retirement* (American Bar Foundation, 1971) 8–9.

[10] See, eg, Enid Campbell, "Suspension of Judges from Office" (1999) 18 *Australian Bar Review* 63, 73–74; Chief Judge Irving R Kaufman, "Chilling Judicial Independence" (1979) 88 *Yale Law Journal* 681, 715–716.

backsliding and the rise of autocratic populist governments, where such concerns remain paramount.[11] Judicial independence, however, is not necessarily at risk within a *well-designed* disciplinary system where judicial independence is well-entrenched.[12] Indeed, such a system can promote independence, given that judicial systems that lack accountability for unacceptable transgressions are more vulnerable to adverse interventions.[13]

Accountability, then, is the second key value associated with judicial discipline.[14] It is increasingly accepted that other judicial accountability measures – appeals, open justice, the giving of reasons – while of value, do not provide the same form of accountability as that provided by a judicial disciplinary system. In essence, accountability establishes "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences".[15] The other mechanisms for judicial accountability pick up aspects within the concept of accountability, but only a judicial disciplinary system, or a removal process by Parliament, has the potential to realise the dialogic potential and the possibility of directed sanction captured within accountability. Accountability theory also gives us a series of questions that can inform the design of disciplinary systems.[16] These have been framed helpfully by Ellen Rock as normatively focused: "to whom *should* judges be held accountable?" "for what *should* judges be accountable for?" "how *should* judges be held accountable?" and "what consequences *should* flow?"[17]

Strongly connected with judicial disciplinary systems is the principle of impartiality. The Australian Law Reform Commission's recent inquiry into judicial impartiality made the strong case that an independent judicial commission to address misconduct could provide an important institutional response to improve judicial impartiality and perceptions of it.[18] The value of impartiality, then, provides an expected value or standard against which judicial conduct must be measured.

Judicial discipline is also closely connected to values of transparency and efficiency. Well-designed systems can promote transparency into how the judiciary operates by increasing public understanding of the standards of conduct expected of judicial officers; how a complaint can be made; how the disciplinary process works; and the likely consequences of judicial misconduct. As we discuss later, the value of transparency must be carefully balanced against concerns about appropriate confidentiality for the individuals involved. Judicial discipline systems also address efficiency: as a systemic solution to failures of procedural fairness in court, and delay in the delivery of judgments. Connected to transparency and efficiency is also the value of accessibility – and an accessible judicial disciplinary process can promote a more generally accessible judicial system.

Representativeness or diversity has also emerged as key judicial institutional value, which has a variety of implications for the design of a judicial disciplinary system. Larger and more diverse judiciaries can undermine the efficacy of the previously informal, collegial and self-regulated approach to ethical

[11] See, eg, Council of Europe's Group of States against Corruption, *Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors: Interim Compliance Report: Poland* (Report, 22 September 2021).

[12] John P Sahl, "Secret Discipline in the Federal Courts – Democratic Values and Judicial Integrity at Stake" (1994) 70 *Notre Dame Law Review* 193, 246.

[13] Francesco Contini and Richard Mohr, "Reconciling Independence and Accountability in Judicial Systems" (2007) 3(2) *Utrecht Law Review* 26, 29–30.

[14] Ellen Rock, *Measuring Accountability in Public Governance Regimes* (CUP, 2020) 3.

[15] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447, 450.

[16] Bovens, n 15, 447, 454–455; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 22–23; Jerry Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance" in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (CUP, 2006) 115, 117; Mark Philp, "Delimiting Democratic Accountability" (2009) 57 *Political Studies* 28, 42; Colin Scott, "Accountability in the Regulatory State" (2000) 27 *Journal of Law and Society* 38, 41; Ruth Grant and Robert Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99(1) *American Political Science Review* 29.

[17] Rock, n 14, 5.

[18] *Without Fear or Favour*, n 3, 310.

guidance, mentoring and discipline.[19] Judicial misconduct in the past has often manifested in the form of inappropriate comments and conduct relating to gender, race, religion, sexuality, or class. More recently, there have been findings of sexual harassment and bullying. Disciplinary processes must respond to these substantive concerns within the judiciary, while also reflecting diversity in their own design.

Judicial wellbeing is closely connected to discipline: experience tells us that judicial misconduct can often be a manifestation of judicial stress, overwork and poor mental health.[20] Judicial discipline systems should be designed to improve individual and institutional support available to judicial officers confronting these issues, as well as to inform the design and availability of institutional initiatives and support mechanisms that could alleviate persistent and systemic issues.[21]

The final value that we consider in relation to judicial discipline systems is competence. Competence in terms of substantive law is corrected through the appeal process, and competence more generally is a difficult yardstick for discipline, as it is open for difference of opinion, and abuse.[22] However, discipline is often associated with competence, particularly cultural competency concerns, but may also arise in relation to delay in judgment writing, failures of process or bias.

Practical Objectives

Sitting under objectives of judicial discipline relating to legitimacy and public confidence, and judicial values, are a set of practically orientated objectives. These objectives can be usefully considered as falling within two categories. First, are those that are directly, or immediately, associated with a disciplinary system:

- to receive and deal with complaints relating to alleged judicial misconduct in a way that promotes the judicial values and ultimately judicial legitimacy;
- to provide an avenue for redress for the individual affected by misconduct;
- to provide consequences to the individual judicial officer involved; and,
- to act as deterrence against future conduct.

Ancillary objectives include:

- articulating and clarifying the expected standards of judicial conduct;
- informing what institutional support is required for judicial officers: particularly with respect to the development of judicial education and institutional wellbeing support;
- educating the public regarding the role and operation of the courts, expected standards of judicial behaviour;
- informing broader institutional responses to litigant support and education; and,
- providing an important source for future research on the judicial branch, and the experience of the justice system by members of the public and the profession.

Context of Judicial Discipline

The design and evaluation of a judicial disciplinary system in Australia needs to have an appreciation of the broader context within which it will operate. Here, we explore three aspects of that context: the other regulatory/governance institutions and processes that exist for the judiciary, the constitutional context, and the unique workplace in which judges perform their role.

[19] Appleby and Le Mire, n 8.

[20] See further Jill Hunter et al, "A Fragile Bastion: UNSW Judicial Traumatic Stress Study" (2021) 33(1) *Judicial Officers' Bulletin* 1; Carly Schrever et al, "Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing" (2019) 28 JJA 141.

[21] See further Alysia Blackham and Andrew Lynch, "Reforming Responses to the Challenges of Judicial Incapacity" (2020) 48(2) *Federal Law Review* 214.

[22] Shimon Shetreet, "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1987" (1987) 10 *University of New South Wales Law Journal* 4.

Governance Context

Judicial discipline is articulated into an existing regulatory and governance space within which there are already measures to promote public confidence and legitimacy in the judicial system. This space will include formal and informal mechanisms – legal, structural and ethical norms. These include existing judicial accountability measures, such as the law of bias, the appeal process and the open court principle. Judicial discipline systems need to ensure that their work addresses complaints about misconduct that cannot be dealt at all or appropriately through these mechanisms. There are many such gaps. For example, the appeal process is well designed to address matters of honest error or difficult questions of law, and ensure a judicial officer is accountable for their practice of the method of the law. It is less well suited to addressing matters of misconduct both because of the expense and delay associated with an appeal process, the fact that this avenue is only open to litigants, and only then if the misconduct gives rise to an avenue of appeal, but also because of the very limited responses available through an appeal process, that are not directed, for instance, at redress or consequences.[23]

The landscape within which a judicial disciplinary system operates also includes other governance mechanisms such as the judicial appointments and removal process, the provision of judicial education, the support of ethical practice and judicial wellbeing and the performance expectations of judges. Questions about the standards of behaviour of a judicial officer, the consequences for judicial officers, and institutional support for systemic issues, show how a judicial discipline system's work intersects constructively with each of these other mechanisms and processes.[24]

Constitutional Context

In designing a disciplinary process, particularly an independent commission, the question of whether it would be consistent with the constitutional requirements for maintaining the integrity of the judicial branch is of utmost importance. This will ensure it is "future-fit" and furthers, rather than detracts, from foundational constitutional principles. Here, we undertake a brief consideration of the federal constitutional context.

The *Australian Constitution*, and specifically Ch III and the High Court's interpretation of the requirements of that Chapter, has relatively little to say directly about the process for dealing with judicial misconduct. Section 72 sets out the institution responsible for removal of judges (the Governor-General on request of both Houses of Parliament) and the grounds of removal (proved misbehaviour or incapacity). Any judicial discipline system must support, but not usurp, the Parliament's role under s 72. There is already statutory provision for the Parliament to establish a committee to assist it in its deliberations regarding removal of a judge.[25] Section 72 also provides that the remuneration of a federal judge cannot be diminished during their continuation in office. Any possible consequences for a substantiated finding of misconduct against a judge in a disciplinary proceeding therefore must not transgress this constitutional requirement.

Any future judicial commission to deal with discipline will be established by legislation as an administrative, that is, executive body exercising executive power. Professional disciplinary bodies – that perform similar functions of receiving complaints, investigation of complaints, and recommending further action or even imposing professionally based disciplinary penalties – are not exercising judicial power. The nature of the power of discipline might have a number of constitutional consequences.

One set of questions arises where a judicial commission might be investigating conduct that might have occurred in the course of the management of a case or a hearing, and might also form, or possibly form, the substance of an appeal, such as on the grounds of bias or perceived bias, or lack of procedural fairness. Here, there are two separate concerns.

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[23] Appleby and Le Mire, n 8, 7–8.

[24] Gabrielle Appleby and Suzanne Le Mire, "Ethical Infrastructure for a Modern Judiciary" (2019) 47(3) *Federal Law Review* 335, and see also Kathy Mack and Sharyn Roach Anleu "Managing Judicial Performance: The (Changing) Ethical Infrastructure" (2023) 97 ALJ 664.

[25] *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

The first is whether a judicial commission would be exercising judicial power because of this connection to the judicial process. But the role of a judicial commission is not to determine whether there has been a legal error in terms of actual or perceived bias, or a breach of procedural fairness, and the powers of a commission would not include determinations of such matters, which remain an exclusive responsibility of the judiciary.[26] The role of a commission is to determine whether there has been inappropriate judicial conduct that requires a set of consequences vastly different from what the appeal process offers. This process is focused on the individual(s) affected, the judge involved, and the institutional integrity of the Court. It is not directed at the correct legal outcome.

There is, however, a second concern, as to the possibility of a collateral challenge in relation to a matter that might also be subject to appeal, is an unacceptable interference into judicial process. There are a number of responses to this. The first is that traditionally there is *already* a mechanism for complaints to be made: through the head of jurisdiction. This is not the creation of a pathway that previously did not exist, it is a change to that pathway, a formalisation. The second returns to the different objectives of appeals as against disciplinary processes. If these types of matters – such as sexist and racist comments and bullying from the Bench – must be left to be dealt with through the appeals process, our constitutional system is failing everyone involved. It fails the individuals involved, many of whom will not be able to bring an appeal because they are not parties – they might be witnesses, associates, counsel or even members of the public – or for other reasons. For the individual, further, the response of an appeal which relates to the legal outcome is often not what is being sought: it would not be tailored directly to the misconduct for the victim or the judge, it speaks not to redress or consequences. For the judge, the appeal process provides no responsive process to deal with the allegations – no opportunity to be heard, no opportunity to understand the complex situation that might sit behind the conduct in question, and no consequences that might be tailored to support that judge rather than the blunt and very public instrument of a scathing appeal judgment.

The nature of the power a judicial commission might exercise raises questions as to whether judges can be involved. While under the implied limits from Ch III of the *Constitution* established in *Boilermakers Case*,[27] a federal court cannot exercise non-judicial functions, individual judges can exercise non-judicial functions *persona designata* provided those functions are not incompatible with their exercise of federal judicial power.[28] We know that the High Court will be informed in determining valid *persona designata* conferrals by the historical functions exercised by judges. Given the historical/traditional function of the Chief Justice in receiving, investigating and responding to complaints against judicial officers, it is likely that giving Chief Justices a role on a judicial commission would fall within the acceptable *persona designata* functions.

The High Court's Ch III jurisprudence is ultimately concerned with maintaining the integrity of Ch III (State and federal) courts, and, in particular, maintaining their judicial independence and impartiality.[29] A well-designed judicial commission will not necessarily undermine these values, and indeed, as President Livesey of the South Australian Court of Appeal noted in a recent decision involving that jurisdiction's commission: "Judicial independence is secured by a combination of institutional arrangements and safeguards, including procedures for dealing with complaints against judicial officers."[30] But these principles do raise questions in relation to a number of the features of a commission where there may be concerns about the intrusion into judicial independence, including in relation to the composition of

[26] Contrast the understanding of what a commission would be doing in Joe McIntyre, *Submissions to the Scoping the Establishment of a Federal Judicial Commission* (21 February 2023) 12.

[27] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.

[28] See *Grollo v Palmer* (1995) 184 CLR 348.

[29] See further *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533, [27] (French CJ and Gageler J).

[30] *Judicial Officer v Judicial Conduct Commissioner* (2022) 368 FLR 462, [236]; [2022] SASCA 42.

the body,[31] the powers of the body to order a judicial officer to appear and give evidence before it, or order the production of documents, and the types of consequences a body can impose.

Some have argued that a judicial commission should not be able to impose any consequences where a finding of misconduct is substantiated against a judicial officer. Rather, as is the case in relation to the State and Territory commissions, the commission should refer the matter back to the head of jurisdiction, perhaps with recommendations for action. We do not agree that there is necessarily a constitutional impediment to a judicial commission having the power to impose consequences – including public findings, or requiring individualised remedial education or other support. Indeed, returning findings of misconduct back to the head of jurisdiction has a number of problems, including undermining the public perception of the independence and robustness of the process, the limited powers of the head of jurisdiction to impose consequences (as opposed to make recommendations and alleviate/change the work of a judicial officer through administrative arrangements), and the potential conflict of the head of jurisdiction in relation to the conduct, given their responsibility for the administration of the court which might have contributed to the conduct.

This may give rise to concerns about impugning the integrity of the federal courts. However, this overlooks the current landscape, in which allegations of misconduct can be (and are) raised in open court, and published in judicial reasons on appeal, but are not able to be dealt with in terms of directed consequences for that action. Indeed, in instances involving federal courts in recent years, the head of jurisdiction has felt compelled to publish their response (recommending education and mentoring, for instance), to combat public perceptions of the lack of appropriate consequence. (See further discussion accompanying nn 54–61) The status quo, in our opinion, is far more likely to raise concerns about the integrity of the judiciary, than a system that has an independent commission able to impose proportionate and transparent consequences, as part of a rigorous process, on the rare occasion that misconduct is made out.

In terms of compliance, we can see that there may be constitutional impediments to the "enforcement" of these consequences against a judicial officer. As with other disciplinary bodies, a judicial discipline body could not issue binding decisions against judges, that could be enforced in the courts. It does not exercise judicial power. But these challenges are not insurmountable. For instance, a judicial officer who refuses to comply with a commission's decision, may be the subject of a further, and more serious complaint, to the commission. Repeated and serious transgressions could potentially found a recommendation to Parliament for removal.

The Judicial Workplace

The workplace context in which judges perform their role is unique and is an important contextual piece in the design of judicial disciplinary systems. Judges exercise extraordinary powers to issue binding orders over individuals and organisations that appear before them. They sit at the top of a professional hierarchy of the lawyers who appear before them. They have administrative responsibilities in managing cases before them, and they have performance expectations. They have a small team around them who are usually personally selected by and responsible to the judge – administrative support and an associate (or two). They work within the court system and with the registry staff, who assist them in the daily management of cases. Judicial independence and impartiality has historically dictated that judges lead an isolated and lonely professional existence in this context of power and deference.[32] Their decisions, even when made as part of a multi-member Bench, are theirs. They come under intense scrutiny from parties, the profession, politicians, media and the public. This is a unique workplace that gives rise to particular pressures and power imbalances, against which judicial misconduct and the appropriate response to it must be understood. The isolation and power associated with the judicial role amplifies the need for a carefully crafted response.

[31] *Judicial Officer v Judicial Conduct Commissioner* (2022) 368 FLR 462, [256] (Livesey P); [2022] SASCA 42.

[32] Gabrielle Appleby and Andrew Lynch, "The Judge, the Judiciary and the Court: The Individual, the Collective and the Institution" in Gabrielle Appleby and Andrew Lynch (eds), *The judge, the Judiciary and the Court* (CUP, 2021).

DESIGNING A JUDICIAL DISCIPLINARY SYSTEM

In this part, we briefly list the design principles that emerge from our consideration of cascading objectives, and constitutional, governance and workplace context in the initial design – and subsequent appraisal – of a judicial disciplinary system.[33] For the purposes of this article, we offer these principles as a summary list.

- *There needs to be an independent, external forum that complements traditional internal complaints procedures*. The imperative of building public confidence in the judiciary underscores the need for an independent complaints system – and, indeed, moves towards independent external processes are occurring across Australia.[34] This addresses the perception that Caesar is judging Caesar.[35] It also relieves the head of jurisdiction from real and perceived conflicts of interest and collegial tensions, and often provides a solution where the head of jurisdiction is involved.
  Appleby, Dixon and Nandagopal have argued that where independent forums are created, particularly in relation to behavioural misconduct such as sexual harassment and bullying, the retention of informal, internal channels is also important. This gives a number of reporting options for individuals, who can choose one that meets their specific needs.[36] It can also influence behaviour, simply by its presence. This is consistent with literature in other contexts that posits that the creation of a body or individual to address ethical issues is valuable.[37]
- *Any system should make use of formal and informal systems for receiving complaints.* Formal and informal, confidential and anonymous reporting options should be available. This is particularly important where there are concerns regarding victimisation and reprisal, such as where there are complaints regarding sexual misconduct. Concerns about fairness that might arise because of the introduction of anonymous or confidential reporting should be addressed through an additional "public interest" test.
- *The composition of an external independent disciplinary body must be judicially controlled, but include lay representatives*. The ultimately responsible body – or "commission" – must have an authoritative and legitimate composition. Judicial representation is important – which can be achieved through the heads of jurisdiction, to provide credibility, judicial perspective and context. Lay representation is also increasingly seen as an important dimension of legitimating the disciplinary forum, creating a more diverse and representative body, and providing perspectives that will not necessarily be apparent to judicial officers. Appointment of lay members should be done through the judiciary to ensure judicial independence.
  The practice of sorting complaints, that we return to below, and investigation of complaints, does not necessarily have to be conducted by this body. Efficiency and quality would dictate that it is done by professionals, with relevant experience and qualifications, appointed by the body, according to procedures and standards set and monitored by the body.
- *There must be clear and transparent standards of behaviour set in advance*. To allow for the flexibility of standards, but have the benefit of specificity and certainty of rules, an approach that adopts standards with examples has emerged as best practice. Another question relating to standards is the scope of conduct they should capture. Standards must capture conduct of judges while on the Bench and performing their official role. It should also capture conduct that might be done in the judge's "private" capacity, where it might bring the judiciary into disrepute. Finally, keeping

[33] These principles are an extension of those we offered in Appleby and Le Mire, n 8, and also developed in Gabrielle Appleby, Rosalind Dixon and Prabha Nandagopal, "Managing Misconduct: A Principled Response to Behavioural Misconduct in Constitutionally Significant Workplaces" (Gilbert + Tobin Centre of Public Law Report, November 2022) <https://www.gtcentre.unsw.edu.au/sites/default/files/documents/MT0211_GTCPL001_MISCONDUCT%20REPORT_v5.pdf>.

[34] See n 2.

[35] Mauro Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsibility" (1983) 31 *American Journal of Comparative Law* 1, 50.

[36] Appleby, Dixon and Nandagopal, n 33, 12.

[37] Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) *University of New South Wales Law Journal* 158.

in mind the overarching objective of public confidence, standards of judicial conduct should apply to conduct that occurred prior to appointment where it becomes known after appointment. The jurisdiction of the body should also extend to misconduct that has occurred while on the Bench, even if the judge has retired, to avoid the perception that a judge can retire out of accountability, while still receiving the State-sponsored judicial pension.

- *The complaints process must be as accessible as possible, with no fee or standing requirements to lodge a complaint. There should be an own motion investigative process*. This would mean referrals could be made from judges, from the Attorney-General, from lawyers, and from representative bodies such as law societies and Bar associations.
- *There must be a robust, efficient, fair and transparent process for sorting complaints*. One claim that has been made regarding formal judicial complaints procedures is that they tend to "create" complaints, and that they provide forums for receiving unsubstantiated and vexatious complaints, rather than meritorious, substantive complaints. The presence of complaints that are summarily dismissed does not undermine the case for a disciplinary body. It is an issue for all public facing complaints systems. Such concerns must be dealt with through the design of the system, which must carefully calibrate concerns that complaints are being insufficiently considered and dismissed, with the concern that complaints are clogging up the process, and illegitimately undermining the integrity of the judiciary. Responsibility for oversight of this sorting process should sit with the highest governance structure within the Commission.
- *The complaints process must accord all parties procedural fairness*, including enabling the complainant to put forward their complaint and according the respondent the right to hear the evidence against them, and be heard themselves, and a right to review and appeal.
- *The complaints process must be transparent, while also safeguarding the confidentiality of the individuals, including the judicial officer, involved*. This will require the commission to have a range of powers to keep matters confidential and prohibit publication, where it is appropriate to do so. At the same time, transparency about the complaints process and appropriate communication with complainants and judicial officers about the progress and outcome of their complaints are important features that underpin confidence in the system.
- *Where a finding of misconduct is made, there must be a set of proportionate consequences that follow*. This should be a carefully calibrated set of responses, and complainants and judicial officers should know in advance the likely type of response to particular behaviours. For minor matters, the most appropriate response might be to refer the matter back to the head of jurisdiction to deal with informally. For the most serious matters, referral should be made to the Parliament to consider whether the conduct warrants removal. Conduct that sits between these points, however, could attract a range of responses, including:
  (1) private advisory letters to the judge;
  (2) publication of findings of misconduct;
  (3) publication of reprimand;
  (4) order an apology;
  (5) order compensation to be paid;
  (6) require remedial training – either developed specifically for the judge involved, or part of generally offered training;
  (7) require counselling or mentoring;
  (8) ongoing monitoring.
- *A judicial discipline system must be designed so as to interact with judicial education and wellbeing support services, including through individual referrals and systemic reporting*. Systemic reporting will also relate to matters that need to be the subject of better public education, and support, for instance, for litigants (particularly self-represented litigants) appearing before the courts.
- *The integrity of the judicial process and the complaints system must be maintained*. This may be undermined, for instance, through resignation if the system does not continue to extend to the judge, or the attempt to use the complaints system to re-open substantive proceedings. An appropriate

appeal process should be incorporated into the design of the system so as to not undermine the system through lengthy collateral challenges.

- *Disciplinary systems, together with the other systems that they interact with such as judicial education and judicial wellbeing support, must be adequately resourced*. Research into judicial education in Australia has revealed that one of the major concerns in all jurisdictions is a lack of resourcing, including supporting judges to take the time to undertake programs.[38] To achieve the cascading objectives of a judicial disciplinary system, this must be addressed.
- *Disciplinary systems must be subject to regular review and evaluation*. This must be undertaken by someone independent from the judiciary and the current disciplinary system, but also independent from the political branches. The review itself should be conducted using the criteria we have set out above, although part of the review should be a consideration of the appropriate contemporary calibration of judicial values.

DISCIPLINE IN AUSTRALIA

In this part, we outline a few of the key features of the design of systems to address judicial misconduct in Australia, and the numbers and nature of complaints received by, investigated, and made out in these systems.

There have been significant reforms in Australia in relation to the question of establishing and designing dedicated systems, separate from the courts, to respond to complaints about judicial conduct in the last 20 years. This followed the introduction of the first system in New South Wales in 1986, which, at the time of its introduction garnered significant criticism in relation to the threat it posed to independence and collegiality, as well as its expense and potential for abuse, and the blurring of investigative and educational functions within the New South Wales (NSW) model.[39]

One of the challenges in Australia for dealing with complaints is the fragmented nature of the judiciary because of our federal design, and the small numbers of judges operating in some of the jurisdictions. Despite this, as Le Mire has observed: "there seems to be little momentum for the jurisdictions to work collaboratively to create the economies of scale that might be obtained by a nationwide judicial misconduct body."[40]

There are now judicial commissions established in New South Wales, the Australian Capital Territory, South Australia, Victoria and the Northern Territory. At the federal level, legislative formalisation of the traditional position was achieved in 2012,[41] and in 2023, a consultation has launched to design a separate judicial commission. As Le Mire has commented, these moves mean that "Australia is now ready to think about 'how' to design systems to respond to judicial complaints and misconduct rather than simply focusing on 'why' such systems are needed in the first place".[42]

The design of such systems varies significantly. We have set out some of these key design features and variations in the following Table.

[38] See further Gabrielle Appleby et al, "Contemporary Challenges Facing the Australian Judiciary" (2019) 42(2) *Melbourne University Law Review* 299, 335–336; Gabrielle Appleby et al, "Judicial Education in Australia: A Contemporary Overview" (2022) 31(4) JJA 187.

[39] See, eg, "New Formalised Judicial Accountability System Established in New South Wales" (1987) 61 ALJ 157 (public statement of 32 judges of the Supreme Court of New South Wales and other persons by the Australian Institute of Political Science); Shetreet, n 22, 4; Harry Gibbs, "Who Judges the Judges?" (1987) 61 *Law Institute Journal* 814; John Goldring, "The Accountability of Judges" (1987) 59(2) *The Australian Quarterly* 145; Michael McClelland, "Disciplining Australian Judges" (1990) 64 ALJ 388.

[40] Suzanne Le Mire, "Regulation of Judicial Misconduct in Australia: Why, How and Where Next?" in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing, 2021) 25.

[41] *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

[42] Le Mire, n 40, 24.

TABLE 1. Table of Key Features

Key Feature	NSW	Vic	SA	ACT	NT
Composition					
Single commissioner (legal practitioner of at least 7 years standing/former judicial officer)			ss 7(1) and (3)		
10 members (six judicial + four non-judicial)	ss 5(3)-(5)	ss 87AAM (3) and 87AAN (*Constitution Act 1975*)			
5-6 members (Chief Justice, Chief Judge, President of NCAT, President of Council of Law Society, 1-2 non-judicial)					S 7
3 members (one presiding member + two members appointed by the Executive)				S 6	
Nature of Complaints Dealt With/Jurisdiction					
Complaint must concern the conduct, capacity, ability, or behaviour of *sitting* judicial officers	s 15(1)	s 5	s 12(1)	s 14(1)	s 40(1)
Complaint cannot be about the merits of a judicial officer's decision, or about a former judicial officer	s 15	ss 16(3)(b) and (e)	ss 17(e)–(f)	ss 35B(1)(f)–(g) and 35I(1)(a)	s 44(1)(e) and (h)
Complaints concerning conduct that took place before a judicial officer's appointment may be considered where the conduct could warrant consideration of removal from office	s 15(3)	s 16(3)(a)			s 44(g)
Complaints may be about non-judicial tribunal members		s 5			s 6(a)
Receiving Referrals					
From head of jurisdiction	s 39B (only re suspected impairment)	s 7	s 12(7)		
From the Attorney-General	s 16(1)	s 8	s 12(6)	2021-2022 Annual Report	s 41(1)
Law Institute and Bar (Vic) or Law Society, Bar Association, and Legal Aid (ACT) may make a complaint on behalf of their members		s 6		2021-2022 Annual Report	
Powers					
May undertake preliminary examination of the complaint	ss 18 and 39C	ss 27-9	s 6(5)	s 21	s 42
May inspect and retain documents				s 34(2)	s 19(1)

TABLE 1. continued

May request more information from the complainant		s 27			
May get court documents, transcripts, audio, or video recordings of proceedings		s 28			
May request a judicial officer to undergo medical or psychological examinations	ss 34 and 39D	s 29		s 35	s 20
May examine witnesses on oath				s 42	s 17
May issue summonses					s 18
May hold hearings				s 37(1)	
May monitor or assist in monitoring sentences imposed by courts	s 8(1)(a)				
May organise and supervise judicial education and training	s 9				
Power to create guidelines concerning standards of ethical and professional conduct expected of judicial officers		s 134			
May discretionarily dismiss complaint (after preliminary investigation)	s 20	s 16	s 16	s 35B	s 44
May disregard or dismiss complaints made by "vexatious complainants"	s 38	s 16(3)(d) (also see s 140)	s 17(1)(c)(i)	s 57	s 45
May refer complaint to the head of jurisdiction	s 21(2)	s 19	s 18	s 35C	s 49
May establish, and refer complaints to, an ad hoc investigatory body (a panel or a division) for investigation and reporting	s 21(1)	ss 13(3) and 19	s 20	s 35D	ss 50–51
Note in the case of VIC and NT, complaints may only be referred to the investigatory body if they could justify consideration of removing the judicial officer from office. In NSW however, a referral may be made to the investigatory body provided the complaint is not summarily dismissed.					
No direct power to remove judicial officers – may only be removed by a resolution passed by all the jurisdiction's Houses of Parliament	s 53	s 87AAB (*Constitution Act 1975*)	s 26	ss 4–5	s 40

We offer some brief reflections on some key trends and differences that emerge across the jurisdictions. While there is a move towards a separate body for receiving and investigating complaints, the composition of the body ranges from a single Commissioner (in South Australia) to a 10-member body in New South Wales and Victoria. Lay representation varies, with four non-judicial members in the NSW and Victorian bodies, 1–2 non-judicial members in a 5–6 member body in the Northern Territory.

In New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory, complaints must concern the conduct, capacity, ability, or behaviour of sitting judicial officers, and cannot be about the merits of a judicial officer's decision, or about a former judicial officer. In New South Wales, Victoria and the Northern Territory, complaints can extend to conduct that occurred before a judicial officer took office, where it could warrant consideration of removal from office. In Victoria and

the Northern Territory, complaints may be made against non-judicial tribunal members. In New South Wales, Victoria and the Australian Capital Territory, referrals can be made from the head of jurisdiction, although in New South Wales only with respect to concerns about impairment. In New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory, referrals can be made from the Attorney-General, and, in Victoria, from the Law Institute or Bar on behalf of their members.

In New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory, the commission undertakes a preliminary examination of the complaint, may discretionarily dismiss a complaint, may disregard or dismiss complaints made by vexatious complainants, and may refer the complaint to be dealt with by the head of jurisdiction. All of the bodies may establish and refer complaints to an investigatory panel or division, for further investigation or reporting, although in Victoria and the Northern Territory, this can only be referred in they could justify removal. In New South Wales, Victoria, Australian Capital Territory and Northern Territory, the Commission can request a judicial officer to undergo a medical or psychological examination as part of the investigations.

None of the current Australian systems have changed the imposition of consequences of a finding of misconduct, meaning they have been unable to respond in nuanced ways to misconduct that can have varied causes, natured and impacts. Findings of misconduct result in either a referral back to the head of jurisdiction to deal with the complaint, or to refer the matter to the Parliament for consideration of removal on the grounds of "misbehaviour" or "incapacity". In Victoria, a head of jurisdiction can stand down a judge for 21 days, but only where they believe, "continued performance of functions by the judicial officer or non-judicial member of VCAT is likely to impair public confidence in the impartiality, independence, integrity or capacity of the officer or member or the court or tribunal". A subsequent order may be made by the commission or an investigating panel to prolong that suspension.[43] This option is only available where the complaint, if substantiated, could warrant removal.[44]

In many ways, then, the modern processes largely replicate the traditional system – and the problems that have been identified with it. A heavy reliance on heads of jurisdiction remains, limited informal sanctions are available, and they are still plagued by a lack of transparency. There have been attempts to connect the work of the commissions with educative offerings,[45] but in the main this work occurs behind closed doors and appears to be inhibited by the limited transparency about complaints.

It is worth pausing at this juncture to consider the numbers and nature of complaints that are made, investigation, and established against judges. We have set the available data (drawn from published annual reports) in the following Table.[46]

TABLE 2. Numbers and Nature of Complaints*

Overview of Complaints					
	NSW	VIC	SA	ACT	NT
2017–2018	74 (+ 17 pending at 30/6)	262 (+2 referrals)	27	12	
2018–2019	63 (+ 26 pending at 30/6)	248 (+1 referral) (+77 which remained open at the end of previous period)	40	12	

[43] *Judicial Commission of Victoria Act 2016* (Vic) ss 97–98.

[44] *Judicial Commission of Victoria Act 2016* (Vic) s 98(3)(a), noting that in addition to this requirement the judicial officer or tribunal member must have been charged, convicted, found guilty or been committed for trial for an indictable offence, or their continued performance might undermine public confidence in the individual or the court or tribunal.

[45] See, eg, the Judicial Commission of NSW, which has both disciplinary and educative functions.

[46] For available statistics from the 2016–2018 period, see Le Mire, n 40, 27–31.

TABLE 2. continued

2019–2020	57 (+19 pending at 30/6)	252 (+ 61 which remained open at the end of previous period)	60	8	
2020–2021	57 (+ 27 pending at 30/6)	212 (+1 referral) (+113 which remained open at the end of previous year)	62	7	
2021–2022	43 (+ 11 pending at 30/6)	134 (+ 29 out-of-jurisdiction submissions) (+73 which remained open at the end of previous year)	79	6	12
Referred to Head of Jurisdiction	11	19	6	4	1
Dismissed	272	997	253	35	5
Total	294	1112 (including referrals)	268	45	12
Nature of complaints from Annual Report Categorisations**					
In court/chambers conduct: Failure to give a fair hearing, discourtesy, and inappropriate questions in NSW. In Victoria, includes failure to give a fair hearing, failure to act in a judicial manner, overbearing manner, inappropriate comments, inappropriate questions and rudeness. In SA, inappropriate conduct in court or in chambers.					
%	NSW	VIC	SA	ACT	NT (operational from 2021)
2017–2018	58.1	67.4	29.6	Appears	N/A
2018–2019	63.5	76	40	Appears	N/A
2019–2020	71.9	47	28.3	Appears	N/A
2020–2021	66.6	33	33.9	Appears	N/A
2021–2022	60.4	53	8.8	Appears	Not provided
Failure to give a fair hearing (NSW/VIC)					
2017–2018	48.6	28.4	Not provided	Appears	N/A
2018–2019	50.8	29	Not provided	Appears	N/A
2019–2020	52.8	17	Not provided	Appears	N/A
2020–2021	49.1	15	Not provided	Appears	N/A
2021–2022	48.8	16	Not provided	Appears	Not provided
Apprehension of bias (NSW/VIC). In SA, conflict of interest.					
2017–2018	21.6	19.7	0	Appears	N/A
2018–2019	20.6	23	5	Appears	N/A
2019–2020	15.8	8	1.7	Appears	N/A
2020–2021	21.1	7	0	Appears	N/A
2021–2022	20.9	6	4.2	Appears	Not provided

TABLE 2. continued

Delay in NSW/VIC; failure or delay in delivering judgment or making decision in SA					
2017–2018	4.1	4.9	0	Appears	N/A
2018–2019	1.6	10	5	Appears	N/A
2019–2020	1.8	2	15	Appears	N/A
2020–2021	1.8	6	0	Appears	N/A
2021–2022	2.3	1	1.2	Appears	Not provided

* Taken from The Judicial Commission of New South Wales, *Annual Report 2017-2018* (2018); The Judicial Commission of New South Wales, *Annual Report 2018-2019* (2019); The Judicial Commission of New South Wales, *Annual Report 2019-2020* (2020); The Judicial Commission of New South Wales, *Annual Report 2020-2021* (2021); The Judicial Commission of New South Wales, *Annual Report 2021-2022* (2022); The Judicial Commission of Victoria, *Annual Report 2017-2018* (2018); The Judicial Commission of Victoria, *Annual Report 2018-2019* (2019); The Judicial Commission of Victoria, *Annual Report 2019-2020* (2020); The Judicial Commission of Victoria, *Annual Report 2020-2021* (2021); The Judicial Commission of Victoria, *Annual Report 2021-2022* (2022); The Judicial Conduct Commissioner, *Annual Report 2017-2018* (2018); The Judicial Conduct Commissioner, *Annual Report 2018-2019* (2019); The Judicial Conduct Commissioner, *Annual Report 2019-2020* (2020); The Judicial Conduct Commissioner, *Annual Report 2020-2021* (2021); The Judicial Conduct Commissioner, *Annual Report 2021-2022* (2022); The Australian Capital Territory Judicial Council, *Annual Report 2017-18* (2018); The Australian Capital Territory Judicial Council, *Annual Report 2018-19* (2019); The Australian Capital Territory Judicial Council, *Annual Report 2019-20* (2020); The Australian Capital Territory Judicial Council, *Annual Report 2020-21* (2021); The Australian Capital Territory Judicial Council, *Annual Report 2021-22* (2022); The Northern Territory Judicial Commission, *Annual Report 2021-2022* (2022).

** As the categorisations are different across the different jurisdictions, this table captures only some aligned categories. Additional categories are present in the Annual Reports and vary across the jurisdictions.

The available data suggest that the remit and objectives of the judicial commission are being misunderstood by many complainants. Complaints that are dismissed, or those that are not sent to the appropriate Commission,[47] reveal that opportunities and resources to provide accessible support to potential complainants need to be prioritised in design. It is also plausible that any gaps in information and support may mean that meritorious complaints are not being lodged. These are most likely to be those of vulnerable complainants.[48] Careful design in the sorting of complaints so that this important task is done with efficiency, transparency and rigour has already been proposed to be an important element within the design. The data also reveals that establishing protocols for referral of complaints between commissions could be valuable and reduce needless friction for complainants.

The key themes of the complaints are also instructive. Across the jurisdictions the descriptions of the causes for complaint are imperfectly aligned, with two small jurisdictions not providing any information about nature at all (Northern Territory) or not indicating the numbers that fall into the categories (Australian Capital Territory). This may well be to preserve confidentiality. In New South Wales, Victoria and South Australia there are some interesting variations, though comparisons are difficult, and some assumptions have been made to align categories. One insight is that designing a uniform reporting taxonomy is crucial if commissions take continuous improvement seriously. Another is that some jurisdictions are showing some success in reducing complaints in specific areas. For example, Victoria appears to have reduced "failure to give a fair hearing" complaints considerably over the five-year period. This may warrant further analysis to identify whether this trend is due to a particular intervention or education initiative. In

[47] See, eg, the 58 complaints to the South Australian Judicial Conduct Commissioner related to "non-SA state court judicial officers" in The Judicial Conduct Commissioner, *Annual Report 2017-2018* (2018) 10; The Judicial Conduct Commissioner, *Annual Report 2018-2019* (2019) 17; The Judicial Conduct Commissioner, *Annual Report 2019-2020* (Report, 2020) 23; The Judicial Conduct Commissioner, *Annual Report 2020-2021* (2021) 22; The Judicial Conduct Commissioner, *Annual Report 2021-2022* (2022) 17.

[48] Carol Brennan et al, "Consumer Vulnerability and Complaint Handling: Challenges, Opportunities and Dispute System Design" (2017) 41 *International Journal of Consumer Studies* 638, 644.

summary, however, designing a uniform reporting taxonomy is crucial if commissions take continuous improvement seriously.

While there are relatively few complaints reported as made against the federal judiciary,[49] there have been a number of significant examples over the last five years that raise significant questions about the design of the current system, and underscore the importance of its reform. The first set of cases involve findings of sexual misconduct against judicial officers. In 2020, an ad hoc administrative investigation that was established by the Chief Justice of the High Court, Susan Kiefel and the Court's Chief Executive and Principal Registrar Philippa Lynch, made a number of findings of sexual harassment against former High Court Justice Dyson Heydon, involving his associates.[50] Kiefel's responses to the allegations at an individual and institutional level, have been commended. However, it was reported that at least one of the associates had approached the former Chief Justice, Murray Gleeson, with no documented response.[51] With no formal, independent body to receive complaints, and protect anonymity, responses largely depended on the individual head of jurisdiction.

In 2021, a number of sexual harassment findings were made by an ad hoc inquiry into Judge Joe Harman of the Federal Circuit Court, following which he resigned.[52] This brought an end to any institutional consequences for his conduct – and he now receives the judicial pension. These findings were not the first time his conduct had been questioned: it was revealed that prior to that investigation, the judge had previously been suspended from "bench duties" for irregular behaviour (meaning only that he did not sit on any cases – but still received full pay). Raising questions about the standard for commencing an investigation, it was also revealed that the Court's inquiry was only commenced after one of the complainants had sought legal advice.[53]

In 2022, Judge Jonathan Davis resigned, despite an investigation clearing him of allegations of inappropriate conduct, although recommendations were made to provide him with mentoring to support the delivery of timely judgments.[54] This points to a concern with the current process as representing a trusted response that has the capacity to clear the judge's name if allegations are not made out.

In the Federal Circuit Court in 2019–2020, a number of appeal judgments revealed – in a very public way – concerns around the conduct of a number of federal circuit court judges on the Bench, which were revealed, but not addressed in appeals. In a series of judgments in 2019, Judge Salvatore Vasta was criticised by the Full Federal Court and Full Family Court for his conduct on the Bench, which described him as engaging in "egregious", "openly hostile", "disparaging", and "sarcastic" conduct, and "aggressive and, at times, unfair" interventions,[55] ordering imprisonment for contempt described as "an affront to justice",[56] and using "hyperbole, deployed in an attempt to bully".[57] The Law Council lodged a

[49] See the summary of these numbers provided in McIntyre, n 26.

[50] "Statement of the Honourable Chief Justice Kiefel AC" (22 June 2020) <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>.

[51] See reporting in Kate McClymont and Jacqueline Maley, "Two High Court Kudges 'Knew of Complaints against Dyson Heydon'", *The Sydney Morning Herald*, 25 June 2020 <https://www.smh.com.au/national/two-high-court-judges-knew-of-complaints-against-dyson-heydon-20200624-p555pd.html>.

[52] Jacqueline Maley, "Federal Circuit Court Judge Found to Have Harassed Two Young Women", *The Sydney Morning Herald*, 7 July 2021 <https://www.smh.com.au/national/federal-circuit-court-judge-found-to-have-harassed-two-young-female-staff-20210707-p587sz.html>; Michael Pelly, "Judge Resigns over 'Sexualised' Conduct", *The Australian Financial Review*, 8 July 2021 <https://www.afr.com/politics/federal/judge-resigns-over-sexualised-conduct-20210708-p587ve>.

[53] Jacqueline Maley, "Judge Who Harassed Women Was Barred from Court Duties after Decisions Criticised", *The Sydney Morning Herald*, 8 July 2021 <https://www.smh.com.au/business/workplace/judge-who-harassed-women-was-barred-from-court-duties-after-decisions-criticised-20210708-p5880s.html>.

[54] Michael Pelly, "Federal Judge Quits after conduct Investigation", *The Australian Financial Review*, 5 May 2022 <https://www.afr.com/companies/professional-services/federal-judge-quits-after-investigation-20220505-p5aio0>.

[55] *Jorgensen v Fair Work Ombudsman* (2019) 271 FCR 461.

[56] *Stradford v Stradford* (2019) 59 Fam LR 194; [2019] FamCAFC 25.

[57] *Lysons v Lysons* [2019] FamCAFC 29.

complaint with the Chief Judge Will Alstergren in relation to Vasta's conduct.[58] The conduct of Federal Circuit Judge, Sandy Street, had been the subject of a series of scathing judgments, finding denial of procedural fairness, failing to try cases properly and give reasons.[59] In one case from 2019, while the substantive judicial review application was dismissed, Nye Perram J was motivated to say:

> What happened in this case should never have happened but it is not the role of this court to discipline the judges of the federal circuit court.[60]

In 2020, the Full Bench of the Family Court found that Judge Guy Andrew had been "hectoring, insulting, belittling, sarcastic and rude", towards the lawyers involved in a custody case, that he had been "cruel, insulting, humiliating and rude' to the father's lawyers, that amounted to an 'abuse of the power of his position".[61] The judge's decision was overturned on the grounds of apprehended bias. Tragically, Judge Guy Andrew, just five weeks after the appeal judgment and the Chief Judge's response, took his own life.

These scathing comments about the judges' behaviour were made without an appreciation of the full context giving rise to the conduct, they provide no institutional response for the individual/s affected, or institutional consequence or support for the judge. In each case, they were followed with public statements from the Chief Judge, Will Alstergren, indicating the judges involved were each dealing with workload, stress and mental health issues, and had agreed to undertake counselling, education, mentoring and monitoring.[62] These responses were voluntary, and occurred within the self-regulation of the Bench.

Concluding Comments

This brief survey confirms that the Australian system for dealing with conduct concerns about judges remains a patchwork, with a lack of efficiency, consistency and clarity.[63] What is apparent from this review, is, to the extent that there is an "Australian model" that has emerged from the jurisdictional experimentation with independent complaints systems, it is one that retains a structural reliance on the traditional design – referring matters back to the head of jurisdiction or the Parliament – and thus the concerns with these processes are as yet not addressed. To put it another way, the potential of a well-designed judicial complaints system to meet a cascading set of objectives has not yet been fully realised, and opportunity knocks.

[58] Michael Pelly, "Law Council Flags Inquiry in Judge Vasta", *The Australian Financial Review*, 14 March 2019 <https://www.afr.com/companies/professional-services/law-council-flags-inquiry-on-judge-vasta-20190314-h1cdvf>.

[59] See, eg, Helen Davidson, "Judge Sandy Street Criticised for 'Professional Discourtesy' in Asylum Seeker Case", *The Guardian*, 26 March 2019 <https://www.theguardian.com/australia-news/2019/mar/26/judge-sandy-street-criticised-again-by-federal-court-over-asylum-case>.

[60] *CQX18 v Minister for Home Affairs* [2019] FCA 386, [26].

[61] *Adacot v Sowle* (2020) 355 FLR 57; [2020] FamCAFC 215.

[62] See, eg, Michael Pelly, "Benched: Judge Forced to Take a Break from Duties", *The Australian Financial Review*, 22 July 2019 <https://www.afr.com/work-and-careers/workplace/benched-judge-forced-to-take-a-break-from-duties-20190719-p528ys>.

[63] Le Mire, n 40, 46.