

1. AUSTRALIA

*The independence of a meritorious elite:
the government of judges and democracy*
COUNTRY REPORT: AUSTRALIA
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1. Scope

The central question identified for this theme is "if justice is to be done in the name of the community, how far do the decision-makers need to reflect the community, either in their profile or in the opinions they espouse?" This report responds to the question comparatively, from the perspective of Australia.

It must be acknowledged at the outset that an enquiry as to whether judges ought to "reflect the community" immediately raises the questions: reflect whom and reflect what? One may speak descriptively of a court being composed of judges who might reflect the composition of a society such as Australia, or one may speak substantively, of what judges say. Here, judges may be expected to reflect the values of society generally (assuming there to be such values) or to advocate the interests of the groups from which they are drawn. In what they say in their judgments, they might be expected to be responsive to pressures and popular demands.

Professor Pitkin in her influential work "The Concept of Representation"³ identifies various different ways in which representation can be understood. The versions of representation to which the question for this theme is directed are only two of these. In the context of judging, formalistic or symbolic representation, to use Pitkin's terms, may also be relevant in some form.⁴ As Pitkin notes, the concept of representation depends partly on the context in which it is used. Thus, applied to judging, the concept of a representative as "acting for" another depends on the substance or guiding principle of action. On this basis, a judge might be said to represent the law or, at the highest levels of the judiciary, justice itself, rather than pressure groups or the opinions of society at large. This view of representation, she says, is by far the most difficult.

The idea that judges can or should be more representative of the community is not new. However, putting aside populist demands for heavier sentencing of offenders, which are made from time to time, it is not always evident what is sought to be achieved. No debate, in which these aims are identified, is currently taking place on the issue in Australia. However two questions may be posed: is it that the decisions of the courts will be better accepted if the

¹ High Court of Australia.

² Laureate Professor, Melbourne Law School, University of Melbourne.

³ Hanna F Pitkin, *The Concept of Representation* (1967).

⁴ Hanna F Pitkin, *The Concept of Representation* (1967) at 116-118.

courts are representative of the community? Will the community have greater confidence in the judiciary?

At least in its simpler forms – of who and what – the notion of representation may appear simple, deceptively so. As with any other analysis undertaken for the purposes of comparison, the question whether the role of a judge can be representative, let alone should be representative, becomes more complex in the process. It is necessary to understand a number of matters before the question can seriously be addressed.

In particular, for comparative purposes, it is necessary to understand the context in which judges perform the task of judging. At least in Australia, relevant context includes: the nature of the legal system; the constitutional function of the court and the judges within it; the scope of the judicial function and how it is undertaken; the understanding of judges about how they operate; the forces, constitutional and otherwise, which protect judicial independence; history and tradition; and legal and political cultures.

This report therefore begins with an overview of relevant dimensions of the Australian judicial system as essential context for the enquiry. The following two substantive parts deal, respectively, with the selection of judges, including the criteria that are applied, and the extent of lay participation in courts and tribunals. A brief conclusion will offer a view about the Australian position on the extent to which judges need to reflect the community in order for justice to be done.

2. Australian context

It is not possible to understand the Australian approach to the appointment of judges and the relative lack of involvement of lay persons in Australian courts without some appreciation of the legal and associated historical and political contexts within which the Australian judiciary operates. Two aspects of the Australian legal context are particularly relevant for this purpose. The first is the common law character of the Australian legal system with all that the common law brings with it in terms of institutional design, principles and procedures. The second is the Australian Constitution, which prescribes the general legal framework for the institutions of Australian government, including the courts and places a heavy premium on the separation of powers, which in Australia takes a distinctive form. As will be seen, this framework operates somewhat differently in relation to the courts of the States in the Australian federal system, but it has implications for their composition and operation nonetheless.

Common law legal systems typically are distinctive in their conception of the role of courts in finding and applying the law, in aspects of the judicial process, in arrangements for constituting the courts through the appointment of judges and in the relationship of the courts to the other branches of government. While there are some unusual features of the Australian legal system, in each of these respects it is quintessentially in the common law mould.

Thus, in Australia as in other common law states, courts have an acknowledged law-making function that is limited but significant. It takes place most obviously where courts develop the common law in ways that bind other courts, through the doctrine of precedent.

Exercise of this function by courts in Australia has caused the Australian common law to diverge from common law systems elsewhere.⁵ More contestably, the function occurs also in the interpretation of the Constitution and legislation. To the extent that courts have a law-making function, it potentially has a bearing on whether they "reflect the community", to quote the questionnaire for this theme. The conclusions to be drawn, however, must be tempered by constraints on what judges do. While the common law remains a source of law, it has been overridden by statute to a very significant extent. Even where a field remains a common law domain, courts are wary of overstepping their role, preferring to leave major change to legislation, in the interests of democracy and efficiency. In Australia, such inbuilt constraints are further reinforced by the constitutional separation of powers, in ways that are considered further below.

Common law systems also are typified by procedures in ways that are relevant for present purposes. Most common law courts are general courts, with jurisdiction to deal with a wide range of legal disputes, presented in a concrete, factual setting and determined through an adversarial adjudicative process. To perform the function effectively, judges need a broad knowledge of the law and developed practical and technical legal skills. Lay participation in adjudication is rare, although lay involvement may be achieved in other ways. These include, significantly, the institution of the jury, which traditionally was the trier of fact in common law jurisdictions and continues to be used in selected classes of cases, the range of which appears to be diminishing. They also include the use of amici to present material in relation to a case that is relevant to its resolution but would not otherwise be available to the court. These matters are considered more closely in part 4, below.

The institutional design of Australian courts and their relationship with the other branches of government including, relevantly, through the appointment and removal of judges also have common law roots. The courts are recognised as one of three co-equal branches of government as a matter of constitutional principle. They nevertheless are dependent on the legislature and the executive for a range of logistical purposes: funding, infrastructure, jurisdiction, staffing. Legislation and appropriation is the function of the Parliament, but the appointment of judges in common law legal systems traditionally was the province of the executive branch. While this is changing elsewhere, it broadly remains the position in Australia, as part 3 explains. The dependence of common law courts on the other branches of government makes them vulnerable and the sensitivity of their role, particularly when government is a party to a dispute, offers added incentive. Equilibrium is achieved primarily through respect for the principle of judicial independence. To some extent it is institutionalised, by providing judges with tenure to retirement, protecting their remuneration against decrease and providing safeguards against premature removal. These techniques alone are not sufficient, however. Judicial independence finally is protected in other, more subtle ways: a culture that respects the value of independent courts and that demands institutional self-restraint from both the courts and the elected branches of government.

In Australia, these common law principles and practices are overlaid by the written entrenched Constitution of the Commonwealth of Australia, two aspects of which are particularly significant for present purposes.

⁵ See for example *Dietrich v The Queen* (1992) 177 CLR 292.

First, the Constitution creates a federal system, which it combines with the institutions of parliamentary government, broadly along Westminster lines. The federal system is dualist in design, in the sense that both the Commonwealth sphere of government and each of the six States have a complete set of institutions of their own, including courts and a Constitution. Of course, these institutions cannot operate in isolation from each other. The Constitutions of the States are subject to the Australian Constitution,⁶ which in some respects provides constraints on how State governments and Parliaments structure and operate their courts. These constraints are not stringent, however. Within these relatively generous limits, the constitution and operation of each court system is a matter for the institutions of the polity with which it is primarily associated. The appointment of judges thus is a responsibility of the executive of the polity concerned, in accordance with applicable constitutional and legal provisions. There is not a great deal of variation between the Commonwealth and the several States for this purpose, but there is some. Different governments at different times may place different emphases on the significance of a judiciary that reflects the broader community in some way. There is some experimentation with specialist courts, with implications for staffing. The Koori Court in Victoria, to which reference is made in part 4, below, is an example.

The constitutional provision for Westminster-style parliamentary government has entrenched some procedures and practices that previously derived from the common law, including arrangements for the appointment, removal and remuneration of federal judges. The parliamentary system that the Constitution puts in place differs in many respects from its British counterpart but also shares some similarities with it. In normal times, the levers of both legislative and executive power are readily available to the government in Parliament. Their possession alternates between two, highly disciplined sides of politics, which play politics hard. In Australia, the power of the elected branches is further augmented by the virtual absence of rights protection from the Constitution of either the Commonwealth or the States in contrast to the national constitutional arrangements that have prevailed in most developed states elsewhere from the mid-point of the 20th century. The judiciary is a critical check and balance in such circumstances and its role is more sensitive than ever.

The second dimension of the Australian Constitution that is relevant for the purpose of this theme is that it is interpreted to make provision for a separation of powers and, in particular, for a strict separation of judicial power.⁷ The dualism of Australian federalism means that the separation of judicial power for which the Constitution provides applies only to federal courts, including the High Court of Australia, which the Constitution establishes at the apex of both the federal and State court systems. Nevertheless, in recent decades it has been recognised that in key respects the federal and State court systems are integrated, not just by the unifying function of the High Court but by the authority that the Constitution gives the Australian Parliament to confer federal jurisdiction on State courts.⁸ This has led to a conclusion that, while there is no strict separation of judicial power in the State sphere, the Australian Constitution requires the integrity of State court systems to be maintained.⁹ The *Kable* doctrine, so named after the case in which this development began, inhibits the

⁶ Australian Constitution, s 106.

⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁸ Australian Constitution, s 77(iii).

⁹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

functions that State courts can be asked to perform and would preclude judicial appointments that suggested that they were creatures of the executive branch.

The strict separation of judicial power for which the Constitution provides has been held to require federal courts to exercise only federal judicial power and to preclude other branches from exercising judicial power. This long-standing doctrine has developed as an additional mechanism to protect the independence of the courts, by constitutionally prohibiting other branches from inappropriately interfering with the judicial function.¹⁰ By preventing the judiciary from exercising non-judicial power, however, the doctrine has implications for the functions of the courts as well, several of which are relevant to this report. Australian law now draws a distinction between judicial power, which federal courts can exercise consistently with the Constitution, and resolution of a dispute by reference to the "merits", which falls instead to tribunals, which are by definition outside the judicial branch.¹¹ Consistently with this distinction, the Commonwealth sphere of government has established a relatively sophisticated system of tribunals to deal with merits review of federal decisions, from which appeal lies to the courts on questions of law. Lay persons are amply represented on tribunals, as part 4 of this paper shows. In the absence of a strict separation of judicial power in the State sphere there is not the same imperative to distinguish legal and merits review. In practice, however, most States have a tribunal system that mirrors the Commonwealth system in key respects and that also provides an opportunity for decision-making by a wider range of people than is usual in the courts.

The combined effect of these features of the Australian constitutional and legal system is a framework of rules for the judicature that is not precisely paralleled elsewhere in the world. Common law practice, specific constitutional protection for judicial tenure and remuneration and the separation of judicial power offer a high degree of protection for the independence of the federal judiciary with some spillover effects for the courts of the States. At the same time, however, the scope of the judicial function is confined, not only by considerations of self-restraint, which apply elsewhere, but by a doctrinal distinction between judicial and non-judicial power. Narrow or not, it falls to the courts to maintain the rule of law. In the absence of a bill of rights, the functions that they perform in developing the common law, interpreting statutes, controlling the lawfulness of executive action and applying the Constitution are all the more important. But these are the very functions that bring the courts head to head with the elected branches, sometimes in relation to high profile issues. In these circumstances there is a certain serendipity in the evolution of a judicature that is perceived to concern itself solely with legal considerations, requiring high technical expertise, in the resolution of matters for which it claims rightful authority

This is the background against which the procedures for judicial selection and lay participation in adjudication must be understood and assessed.

¹⁰ *Nicholas v The Queen* (1998) 193 CLR 173.

¹¹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

3. Judicial selection

The Australian Constitution specifies only one qualification for a person to be a Justice of the High Court – a person must be under 70 years of age.¹² The statutory minimum qualifications of a Justice¹³ are that a person has already been a judge or has been enrolled as a solicitor, barrister or legal practitioner for not less than five years. A justice may not hold any other office of profit within Australia.¹⁴ Legislation respecting appointments to Supreme and inferior (federal and State) courts in Australia likewise state age limits and require an appointee to have been a lawyer for a varying period of time.

As a matter of law, appointments of High Court Justices are made by the Governor-General¹⁵. In practice the Commonwealth Attorney-General considers who might be a suitable appointment. The Attorney-General then writes to the Prime Minister (usually after asking the person whether he or she would accept appointment), seeking the approval of the Prime Minister and the Cabinet. If approved, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process.¹⁶ A similar practice is followed for other federal courts and in the States and Territories.

How does the Attorney-General inform himself or herself?

Attorneys-General for the Commonwealth or the States or Territories are often, though not always, lawyers. They therefore have connections with the legal profession, in particular the Bar, from which most judicial appointments are made. The Commonwealth Attorney-General is required to consult with his or her State counterparts in relation to an appointment to the High Court.¹⁷ Beyond that, judicial appointment is a matter for the Attorney-General, although in recent years something of a convention has been established whereby wide-ranging consultation is undertaken and the procedure has become quite formalised. The Attorney-General may speak with existing Justices of the High Court, Chief Justices of the State and Territories, presidents of legal bodies, the Council of Australian Law Deans and others.

There has been considerable debate about establishing a convention regarding the appointment of judges. One reason for the perceived need for a convention is the secrecy which attends the process of selection, which is somewhat at odds with modern notions of open and transparent government. How a particular appointee is decided upon is not discussed, save for press releases usually made by the Attorney-General or the government which state that the person has been chosen on their "merit", about which more will be said later. A former President of the Australian Bar Association, the national body representing

¹² Australian Constitution, s 72.

¹³ *High Court of Australia Act 1979 (Cth)*, s 7.

¹⁴ *High Court of Australia Act 1979*, s 10.

¹⁵ *High Court of Australia Act 1979*, s 5; in the States the appointments are made by Governors (in the Northern Territory by the Administrator and in the Australian Capital Territory by the Executive).

¹⁶ Australian Government, Attorney-General's Department, *Judicial Appointments: Ensuring a Strong and Independent Judiciary through a Transparent Process* (April 2010) at 3.

¹⁷ *High Court of Australia Act 1979*, s 6.

barristers, some time ago lamented the fact that Attorneys-General do not speak about the selection process. He said:¹⁸

"It would be very useful to hear, if only from one Attorney-General, about the store that is placed on an Attorney's own knowledge of possible candidates, about consultation and how it is undertaken and the results of it absorbed, and about criteria for appointment and how they are ranked. Why so little has been written is a matter for conjecture. Perhaps, it is because these are all attributes of a valued privilege of executive government – a privilege that embodies the element of patronage which may inhere in the appointment of a judge. One can understand the reluctance of a government to forego patronage or to see it curtailed. Maybe there is an apprehension that the more an Attorney-General discloses about what actually happens in the process, the more it is open to close public scrutiny, and with that scrutiny comes the possibility of legislative provision for compulsory, independent, external involvement in the process, one way or other."

The Law Council of Australia, which represents the legal profession generally, produced a Policy Statement in 2008¹⁹ which recommended that a judicial appointments protocol be established with respect to federal appointments whereby the Commonwealth Attorney-General is required personally to consult a minimum number of office-holders. The Policy also forms the informal basis for many State and Territory judicial appointment policies. It is not expressed to apply to appointments to the High Court. In reality it is these appointments which involve a greater level of consultation, undertaken by the Commonwealth Attorney-General personally, which has served as an example for appointments in other superior courts.

The Law Council Policy Statement also recommended public advertisements, seeking expressions of interest and nominations for federal judicial appointment, other than for the High Court, and the creation of a selection panel. In 2010 the then Commonwealth Attorney-General commenced the implementation of a new judicial appointments process.²⁰ This process utilises public advertisements and selection panels for federal courts, but its retention is a matter for the Attorney-General of the time and cannot therefore be regarded as certain. The panel has usually comprised a retired judge, an officer of the public service, usually from the Attorney-General's Department, and for a period the Chief Justice of the federal court in question.

It is not as yet a common practice for appointments to superior courts of the States and Territories to be advertised, but it is for lower courts, where an interview is also conducted. A selection or advisory panel is sometimes utilised with respect to appointments, but not uniformly with respect to Supreme Court appointments. The recommendations of panels are confidential. There is no way of knowing whether they have been acted upon.

¹⁸ Robert Gotterson, "The Appointment of Judges", paper presented to the Judicial Council of Australia, November 1998.

¹⁹ Law Council of Australia, *Policy Statement: The Process of Judicial Appointments* (September 2008).

²⁰ Australian Government, Attorney-General's Department, *Judicial Appointments: Ensuring a Strong and Independent Judiciary through a Transparent Process* (April 2010).

The extent to which political affiliation, real or assumed, influences judicial appointments has generated discussion in the past, but not so much in recent times. In a report of the Advisory Committee to the Constitutional Commission²¹ it was said that the Committee was not of the view "that in Australia considerations exist which have given rise to the perceived need for advisory committees in Canada".²² Political patronage did not appear to the Committee to have a significant part in judicial appointment in Australia. That would appear to conform to present thinking. Anecdotally, there have been suggestions that perceived political affiliation or viewpoints contrary to those of the government may have a negative influence, by which a person is overlooked for appointment, rather than a positive one by which a person is favoured for appointment.

Judicial appointments in Australia are rarely criticised by the bodies representing the legal profession. Overall the tendency is for those bodies to state their support for the courts and therefore for any new appointment. Where a lawyer has been considered to have insufficient or unsuitable experience for the appointment this may be emphasised in the statement of support in speeches made by both bodies on the occasion of the appointee's swearing-in. As such the message about the new appointment is maintained within the profession and is rarely reported in the media. The media will report a range of views about potential and confirmed High Court appointments and the Chief Justices of superior courts, but not usually other appointments.

The concept of merit has been described as inherently elusive and fluid and as having a "mystique of neutrality" which has "endowed the concept with considerable political significance and moral persuasiveness when it is invoked to justify, to criticise, or to constrain, any policy proposals."²³ It has been suggested that the concept of merit operates in a discriminatory way against women and other candidates of a non-traditional background, because it is restricted to an understanding of "an experienced advocate of senior rank".²⁴ The view that women in particular are disadvantaged "in competing on merit, as that term has been defined and understood in a male dominated profession" is supported by a former Justice of the High Court.²⁵ Yet, and this is discussed below, the appointment of women as judges has increased significantly in recent years and not all of these appointments will have been of women of the most senior ranking at the Bar.

It may also be observed that, because the term "merit" is invariably used to justify an appointment, it may mean something else when a person not drawn from the senior ranks of the legal profession is appointed, which has happened more often in recent years than in the past. Describing "merit" by reference to experience and standing at the Bar suggests more than competence and training as relevant criteria for appointment. It suggests reliance can be

²¹ The Advisory Committee was comprised of serving judges, a former State Solicitor-General and a Dean of a law school.

²² Advisory Committee to the Constitutional Commission, *Report of the Advisory Committee to the Constitutional Commission — Australian Judicial System* (1987) at [5.21].

²³ Margaret Thornton, "Affirmative Action, Merit and the Liberal State", (1985) 2 *Australian Journal of Law and Society* 28 at 29.

²⁴ Barbara Hamilton, "Criteria for Judicial Appointment and 'Merit'", (1999) 15 *QUT Law Journal* 10 at 12.

²⁵ Michael McHugh, "Women Justices for the High Court", speech delivered to the West Australian Law Society, Perth, 27 October 2004, available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_27oct04.html.

placed upon the extent of the training received by a person in the course of a professional life to the position of senior counsel.

It is customary that appointments to the superior courts, and to a large extent also to lower courts, be drawn from the ranks of practising barristers. A former Chief Justice of the High Court suggested that the senior Bar had historically served as the selection pool for the Bench for two major reasons. First, the independence gained from a life at the Bar made judicial independence natural; and second, the practical training in trial work and court procedure gained by a barrister relieved governments of the need to provide judicial education training programmes.²⁶

Another former Chief Justice identified another reason why judges have historically been drawn from the Bar. He said that identifying suitable candidates who were not members of the Bar is not an easy exercise. The professional reputation of the barrister is well-known or readily ascertainable. His or her skills, generally speaking, provide an indication for suitability for judicial work. The same comment cannot be made about lawyers who are not barristers for the simple reason that their known abilities do not translate as readily into the performance of judicial work. They may not be expected to have the same familiarity with the problems of evidence, procedure and fact-finding that arise in the course of a case, though experienced litigation solicitors will have more familiarity with these matters than other lawyers except experienced barristers.²⁷

To these comments it may be added that lawyers (more particularly those who engage in litigation) are educated professionally to support the judiciary and the courts as institutions. They are reminded of their duty to the court, and are in a position to understand the place and importance of the courts in society.

It must be acknowledged that both former Chief Justices referred to had been barristers. Further, a judicial college which undertakes some training of judges has since been established. The National Judicial College was established in 2002 to provide programmes and professional development resources to judicial officers throughout Australia. The College is run by a Council comprising four judicial members nominated by the Commonwealth, State and Territory Attorneys-General. It developed a project to develop a national curriculum for Australian judicial officers.²⁸ However, it explains that the curriculum is not one for training persons to become judicial officers and that "[t]he curriculum assumes that knowledge of the law and those skills which are required for appointment as a judicial officer." More recently it has conducted judicial education programmes and is in the course of developing further programmes dealing with topics such as judgment writing, case management and decision-making.

The Australian Academy of Law, which was established in 2007, has as one of its objects that it provide a forum for the interchange of views amongst all branches of the legal

²⁶ Murray Gleeson, "Judicial Selection and Training: Two Sides of the One Coin", (2003) 77 *Australian Law Journal* 591 at 592.

²⁷ Sir Anthony Mason, "The Appointment and Removal of Judges" in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (1997) 1 at 10.

²⁸ National Judicial College of Australia, *Report: A Curriculum for Professional Development for Australian Judicial Officers* (January 2007).

community, including judges and legal academics.²⁹ However, it does not presently have any function relating to the education of judges.

Since the 1990s there have been occasions on which Commonwealth Attorneys-General have issued discussion papers or statements concerning selection criteria for judicial appointments. In 1993, the then Attorney-General listed the following:

legal skills

personal qualities (for example, integrity, high moral character, sympathy, patience, even temper, gender and cultural sensitivity, good manners)

advocacy skills (noting that this term encompasses a variety of skills, some of which are highly relevant to judicial work and some of which might be counterproductive to judicial performance);

fair reflection of society of the judiciary

practicability and common sense

vision

oral and communication skills

capability to uphold the rule of law and act in an independent manner

administrative skill; and

efficiency.³⁰

It may be observed that "gender" and a "fair reflection of society" are included. However a policy statement of the Law Council of Australia, which was issued in 2008 listed the attributes to be expected of candidates for judicial office³¹ by reference to three broad categories: legal knowledge and experience; professional qualities and personal qualities. It contains no reference to the need for diversity and the representation of society.

Criteria have been stated for some superior courts. With respect to the courts of one State³², the "overriding principle" is said to be that appointments will be made on the basis of merit. Subject to this principle there is a stated commitment to promoting diversity in the judiciary. It is said that consideration will be given to all legal experience, including that outside mainstream legal practice.³³

It cannot be said that appointments made in the last 20 years or so of judges to the various courts in Australia reflect the diversity of society. On the other hand, while the traditional requirement of merit as the basis for appointment has been said to have been maintained, there has been a significant increase in the number of women promoted to the courts.

²⁹ Australian Academy of Law, *Constitution*, s 4(g), available at <http://www.academyoflaw.org.au/events2012/AALConstitution.pdf>.

³⁰ Australian Government, Attorney-General's Department, *Judicial Appointments: Procedures and Criteria* (September 1993), cited in 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* (2006) 122 at 132.

³¹ Law Council of Australia, *Policy Statement: The Process of Judicial Appointments* (September 2008).

³² New South Wales.

³³ Lenny Roth, *Judicial Appointments*, New South Wales Parliamentary Library Research Service Briefing Paper No 3, April 2012 at 9.

The issue of gender diversity was much discussed in the early 1990s. In 1993 the Commonwealth Attorney-General's Department issued a discussion paper which raised the issue of gender diversity in judicial appointments in which it was said that a broader understanding of the skills necessary for appointment would be favoured³⁴. This caused the Australian Law Reform Commission to draft a report in 1994 entitled "Equality Before the Law: Women's Equality", which recommended the establishment of a judicial commission to advise the Attorney-General on suitable candidates for judicial office.³⁵

Between 1995 and 2004 there was but one woman justice of the High Court.³⁶ Since then three women have been appointed to the seven member court. A review of Commonwealth, State and Territory Courts since 1995 shows a significant increase in the number of women appointed. Expressed as a percentage of the whole of the membership of those courts (judges and also magistrates where applicable):

| | 1995 | 2013 |
|------------------------------|-------|--------------------|
| Commonwealth courts | 21.7% | 31% |
| New South Wales | 6.7% | 34% |
| Queensland | 5% | 30% |
| Victoria | 10% | 39% |
| South Australia | 9.5% | 28% |
| Western Australia | 6.9% | 30% |
| Tasmania | 5% | 25% |
| Northern Territory | 11.8% | 30% |
| Australian Capital Territory | 9% | 45%. ³⁷ |

It is of interest to observe that the representation of women in the senior ranks of the Bar is not high. The proportion of women QCs or SCs (Senior Counsel) in the larger States ranges from about 4% to 10%.³⁸ This may in part be explained by the growing number of women appointed from these ranks to the judiciary.

Women are more highly represented on the lower courts. The current figures for women magistrates, expressed as a percentage of the whole membership of the court are:

| | |
|-----------------|-----|
| New South Wales | 43% |
| Queensland | 34% |
| Victoria | 43% |
| South Australia | 37% |

³⁴ Australian Government, Attorney-General's Department, *Judicial Appointments: Procedures and Criteria* (September 1993), cited in 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* (2006) 122 at 132.

³⁵ Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, (1994) at [9.41].

³⁶ The Hon Justice Mary Gaudron.

³⁷ Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession*, (1996) at 294; The Australasian Institute of Judicial Administration, "Gender Statistics", as at 13 March 2013, available at <http://www.aija.org.au/index.php/gender-statistics>.

³⁸ For Queensland 4.1%; Victoria 8.9%; New South Wales 10.1%: statistics drawn from respective Bar Association's list of members as at 1 November 2013.

| | |
|------------------------------|--------------------|
| Western Australia | 40% |
| Australian Capital Territory | 57% |
| Northern Territory | 29%. ³⁹ |

4. Lay participants

(Juries)

Generally speaking, lay persons do not participate as judges in courts. However the involvement of lay persons in the court process is achieved in a variety of ways: by the use of juries in some forms of trial; by lay person participation in the functions of the many tribunals in Australia; and by the role created for lay persons in special courts. In addition, the views of some groups in the community may on some occasions, albeit rarely, be permitted by the court by the appointment of *amicus curiae*.

Historically, lay persons participated in the court process when they were chosen to be members of a jury. In English history, the verdict of the jury was the verdict of a *pays* or "country", a fiction signifying a community or neighbourhood. Litigants consented to the verdicts of the jury and therefore put themselves on the country for trial.⁴⁰ However, it is necessary to understand that, important as it is to the result for a defendant or an accused person, a jury verdict is not equivalent to the judgment of a court. Only a judge can give judgment or order that a conviction be entered. In a criminal trial, while the judge may not refuse to accept a verdict, it is the court which gives a verdict its legal effect.⁴¹ In a civil trial, the verdict is similarly preliminary to judgment.⁴²

Section 80 of the Constitution, which guarantees trial by jury with respect to indictable offences under Commonwealth law, has been seen to reflect the importance of community participation in the administration of Commonwealth criminal law⁴³. It is an essential feature of trial by jury within the terms of the constitutional guarantee that the jury be adequately representative of the community, act as arbiter of the facts, be randomly selected and return a verdict by consensus.⁴⁴

The method of selection of jurors, which is random in the identification of a group from which jurors may be chosen, may promote a perception of independence akin to that enjoyed by the courts. But is the modern jury truly representative of the community? The view has been expressed that "[t]he nature of the jury as a body of ordinary citizens called from the community to try the particular case, offers some assurance that the community as a

³⁹ The Australasian Institute of Judicial Administration, "Gender Statistics", as at 13 March 2013, available at <http://www.aija.org.au/index.php/gender-statistics>.

⁴⁰ See for example *Criminal Procedure Act 1986 (NSW)*, s 154; Sir Frederick Pollock and Frederick William Maitland, *The History of English Law*, 2nd ed, (1898) vol 2 at 623-624.

⁴¹ *Brown v R* (1986) 160 CLR 171 at 196.

⁴² *Musgrove v McDonald* (1905) 3 CLR 132 at 141-142.

⁴³ Justice Virginia Bell, "Section 80 – The Great Constitutional Tautology", speech delivered as the Lucinda Lecture, Monash University, 24 October 2013 at 31, available at <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/bellj/bellj241013.pdf>.

⁴⁴ *Cheatle v The Queen* (1993) 177 CLR 541.

whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate".⁴⁵ Here we see expressed the theory that a judge might be "remote from the affairs and concerns of ordinary people".

However, some time ago in England doubts were expressed⁴⁶ that once account is taken of statutory requirements, together with the exemptions and disqualifications that apply to potential jurors, the jury might not be as representative as first thought. This appears to be borne out by a recent study prepared for the United Kingdom Home Office which found that jurors themselves complained that "the more affluent and powerful groups were less likely to serve on longer trials."⁴⁷ Not only was it felt that jurors were selected disproportionately from certain sections of the community, but in the process of selection for longer trials (which are becoming increasingly more common), better-off jurors are able to excuse themselves.

The finding of the study, that a significant proportion of its sample sought excuse from participation in jury service,⁴⁸ may well be the case in Australia, where work-related circumstances and the care of children and the elderly also feature highly in the reasons given for non-participation. The study also suggested an over-representation of women amongst jurors and an over-representation of the retired in longer trials. Further, the challenges the prosecution and sometimes defence are permitted to make against the selection of individual jurors may distort the representative nature of the jury. The result may be, as the study found, that juries are not representative of the wider population.⁴⁹

Nevertheless, the respondents to the study reported a strongly held belief that "bringing people together from different social and economic backgrounds" had real advantages. A broader spectrum of viewpoints was seen as necessary for "overcoming individual prejudices and bias."⁵⁰ It is of interest to observe that what is sought here to be achieved in juries is what judges would consider they are capable, individually, of doing.

It must be acknowledged that juries are able to reflect broader community views in their decision-making than a judge could. Reference was made in the abovementioned study to the value of jurors who are "streetwise".⁵¹ Importantly, juries do not have to give reasons. This has been suggested to permit them to bring "the conscience of the community to bear on issues".⁵² This may also suggest some non-legal, and even non-logical, thinking is applied.

There may be differences of views amongst judges and the legal profession on the issue whether juries are necessary. Nevertheless, confidence appears still to be placed in

⁴⁵ *Kingswell v The Queen* (1985) 159 CLR 264 at 301 per Deane J.

⁴⁶ Patrick Devlin, *Trial by Jury*, 3rd ed (1966) at 17.

⁴⁷ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office Online Report 05/04, (2004) at 27.

⁴⁸ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office Online Report 05/04, (2004) at 73.

⁴⁹ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office Online Report 05/04, (2004) at 73.

⁵⁰ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office Online Report 05/04, (2004) at 46-47.

⁵¹ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office Online Report 05/04, (2004) at 47.

⁵² Xavier Connor, "Trial by Jury — Can It Survive?" (1987) 61 *Law Institute Journal* 818.

them, as evidenced by their retention. That said, the fact is that in Australia the use of juries has significantly diminished over time. In civil cases their use is limited to defamation trials and then only in some States and Territories. Although they are still regularly used in criminal trials, the majority of offenders are dealt with summarily, before a Magistrate.⁵³ In New South Wales, less than four per cent of criminal trials are conducted with a jury.⁵⁴

A further reason for the reduction in the number of criminal trials conducted before a jury is the provision now in three States and one Territory for judge-alone trials at the request of the accused but at the discretion of the Court. Interestingly, a provision of the New South Wales *Criminal Procedure Act* 1986, gives the courts power to refuse to make an order for trial by judge alone if the court considers that "the trial will involve a factual issue that requires the application of objective community standards".⁵⁵ Some legislatures at least appear to believe that juries continue to have that role.

Examples of matters which have been held to require the application of community standards, and therefore a jury, in criminal trials are whether the requisite intention was formed⁵⁶; whether the accused acted under "an honest and reasonable, but mistaken, belief in the existence of" consent⁵⁷; reasonableness of an accused's action alleged to constitute an assault⁵⁸; whether an act was dangerous⁵⁹; whether the accused suffered from a substantial impairment at the time of the offence.⁶⁰

(Expert witnesses)

Expert witnesses are regularly used in courts in Australia. Some courts have the power to engage an expert of their own motion. But it is unlikely that the evidence of expert witnesses will be reflective of community or group views. Their evidence is usually in a field of science or learning. Evidence has on occasion been called of surveys of persons in the community. However, the practice has not developed to any extent. Questions have been raised as to whether this is an appropriate method by which a court may inform itself and also as to the usual problems concerning the reliability of surveys as evidence. As a consequence, they may not be regarded as having any real probative value.

(Amicus Curiae)

The views of sectional or public interest groups are more likely to be put before the court when a court grants an amicus curiae leave to appear to assist it. The number of occasions when this form of representation is sought is small and the number of grants even

⁵³ See for example Commonwealth Director of Public Prosecutions, *Annual Report 2012-2013* (30 October 2013) at 73.

⁵⁴ Peter McClellan, "Looking Inside the Jury Room", speech delivered to the Law Society of New South Wales Young Lawyers Annual Criminal Law Seminar, Sydney, 5 March 2011 at 2-3 available at <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mcclellan050311.pdf>.

⁵⁵ Section 132(5).

⁵⁶ *R v Stanley* [2013] NSWCCA 124 at [59], [61]; *R v King* [2013] NSWSC 438 at [48]-[53].

⁵⁷ *R v Fardon* [2010] QCA 317 at [41]-[42].

⁵⁸ *R v Trawin-Hadfield* [2014] NSWSC 591 at [18]-[22].

⁵⁹ *R v Trawin-Hadfield* [2014] NSWSC 591.

⁶⁰ *R v Robert Bretherton* [2013] NSWSC 1036.

more so. In 2010, one grant of leave to appear before the High Court as an amicus was made; in 2011, seven and in 2012, three.⁶¹ No rule of the High Court nor practice direction identifies the criteria for the grant by the court of leave. It will more likely be given where the Court considers that it may be assisted by hearing argument on aspects of the matter which are not fully dealt with by the parties, for one reason or another.⁶²

Regulatory authorities, such as the Australian Securities and Investments Commission ("ASIC"), are more likely to appear as amicus before the Court in cases involving the interpretation of statutes with which they are concerned. Indeed a role which ASIC sees for itself is addressing issues relevant to persons who are not before the court, but which class will be affected by its determination, for example creditors.⁶³

Amicus curiae have been given leave to appear in proceedings for community groups. A Consumer Credit Legal Centre, said to be representative of community interests, was granted leave to appear in a case involving the protection to be afforded a wife who consents to be co-guarantor with her spouse in circumstances where she is not fully informed.⁶⁴ Community legal centres, which provide free legal advice and information as well as legal education to organisations and community groups, were given leave in a case involving a statutory prohibition on the advertisement of legal services⁶⁵. By this procedure environmental groups have spoken.⁶⁶ Religious groups were represented in a case involving medical negligence in failing to diagnose a pregnancy in sufficient time to enable a woman to obtain an abortion. This led to a further grant of leave to the Abortion Providers' Federation.⁶⁷

(Tribunals)

There are a large number of tribunals in Australia, some of which are specialist tribunals, constituted by a lay or specialist professional person sitting with a judge. It is the judge who provides the determination of the Tribunal. The following are a few examples of these tribunals.

The largest is the Commonwealth Administrative Appeals Tribunal, which reviews administrative decisions "on the merits". The President of the Tribunal must be a judge of the Federal Court, but the Deputy President need not be a judge, while the non-presidential and senior members can be appointed on the basis that they have a relevant special knowledge or skill.⁶⁸ In practice most of the senior members are lawyers, but only some of the non-presidential members are. Common examples of non-legal specialist members include

⁶¹ See Mark Moshinsky and Kim Rubenstein, "Amicus Applications in the High Court—Observations on Contemporary Practice", paper delivered at the Gilbert+Tobin Constitutional Law Conference, 15 February 2013 at 2 available at

http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/moshinsky__and_rubenstein.pdf.

⁶² *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312 per French CJ.

⁶³ Australian Securities and Investments Commission, *ASIC's Approach to Involvement in Private Court Proceedings*, Information Sheet 180 (25 June 2013).

⁶⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

⁶⁵ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

⁶⁶ For example, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

⁶⁷ *Superclinics Australia Pty Ltd v CES & Ors S88/1996* [1996] HCATrans 357 (11 September 1996);

Superclinics Australia Pty Ltd v CES & Ors S88/1996 [1996] HCATrans 359 (12 September 1996).

⁶⁸ *Administrative Appeals Tribunal Act 1975* (Cth), s 7.

accountants for tax cases; actuaries for insurance cases; aviators for airline and pilot licence matters; persons with a background in defence services to deal with war veterans and medical practitioners to deal with injuries claims.⁶⁹ Thus the Tribunal has the benefit of the practical viewpoint of people with particular experience. They may not be considered to be representative of the community, but they introduce a considerable measure of lay participation into the tribunal system.

The members of the Fair Work Commission, which is the Commonwealth Tribunal dealing with industrial, or employment and related, matters, are not required to be legal practitioners. Criteria for appointment to various roles within the Commission include experience or knowledge in workplace relations, law, business, industry or commerce, or social policy.⁷⁰

The National Native Title Tribunal requires the President to have been enrolled as a legal practitioner, but the balance of its membership is not so restricted. A person who has special knowledge in relation to Aboriginal or Torres Strait Islander societies, land management or dispute resolution may be appointed.⁷¹ The Tribunal was established to deal with uncontested claims to native title over land and sea by indigenous persons and for associated compensation; to enquire into any issue in relation to native title which is referred to it by the relevant Commonwealth Minister, and to act in certain circumstances as an arbitral body to decide whether claims can proceed where negotiations have not been successful.⁷²

No legal qualification is required for membership of the Veterans' Review Board, the Migration Review Tribunal, the Refugee Review Tribunal or the Social Security Appeals Tribunal.

The States also have tribunals which deal with disputes that are generally of lesser value than those dealt with by Magistrates Courts, and they also deal with consumer complaints. Some have "super tribunals" which combine all of the specialist tribunals and have a strong administrative law function. One State has recently commenced a six month trial whereby two Justices of the Peace, only one of whom must be admitted as a lawyer, are able to constitute a tribunal in civil disputes up to a certain value.⁷³

The Magistrates Courts of the various States and Territories in Australia are the lowest in the hierarchy of the courts. Originally, Magistrates were not required to be lawyers. They then came to be drawn from the ranks of public servants and served an apprenticeship of a kind as clerks in the Petty Sessions or Police Courts.⁷⁴ In these times Magistrates may

⁶⁹ Gary Downes, "Structure, Power and Duties of the Administrative Appeals Tribunal of Australia", speech delivered to the Supreme Administrative Court of Thailand and Central Administrative Court of Thailand, Bangkok, 21 February 2006 at [35]-[36], available at <http://www.aat.gov.au/Publications/SpeechesandPapers/Downes/pdf/StructurePowerDutiesFebruary2006.pdf>.

⁷⁰ *Fair Work Act 2009* (Cth), s 627.

⁷¹ *Native Title Act 1993* (Cth), s 110.

⁷² Explanatory Memorandum, cl 130.

⁷³ *Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Act 2013* (Q), s 7.

⁷⁴ Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy*, (1991).

therefore have been regarded as representative of the community only to an extent. More recently, legal qualifications came to be required as a condition of the appointment of a magistrate and the grant of the status of a judicial officer followed.

The rise in specialist or diversionary courts in Australia has not necessarily resulted in a shift towards lay participation in the court system. The various Drug Courts, for example, do not allow lay participation in the operation or practice of the court.⁷⁵ The exceptions to this general rule are Aboriginal diversionary courts. In a report for the Australian Institute of Criminology, it was said of the Queensland Murri Court that it uses the existing principles of the Australian criminal justice system, rather than customary law, while allowing Indigenous Elders and respected persons to participate in the process. They "encourage a greater level of communication between Elders, the offender, their support persons and Magistrates, place greater importance on Indigenous knowledge and cultural practices, and attempt to impose more appropriate and effective sentences for Indigenous offenders."⁷⁶ Whilst the Magistrate remains the sentencing authority he or she is advised by Elders or other respected persons. The Circle Sentencing Model does not allow for direct lay participation in the sentencing process, in the sense in which it may be understood in other legal systems, but is regarded as contributing to at least the building of "trust" between Indigenous communities and the criminal justice system.⁷⁷

The Koori Court in Victoria was created to ensure greater participation of the Aboriginal community in the sentencing process of the Magistrates Court. When sentencing a defendant the Koori Court may consider any oral statement made by an Aboriginal Elder or respected person. Additionally it may inform itself in any way it thinks fit including by considering a report, statement or submission prepared by an officer of the court employed as an Aboriginal justice worker, a health service provider, a victim, a family member of the defendant or anyone else the Court considers appropriate.⁷⁸ It was expected that this process would enable offenders to comprehend that their conduct is not just contrary to mainstream law, but also to the values of the Aboriginal Community and thereby foster greater trust in the justice system. Moreover, sentences would, as a result, be more appropriate to the offender.⁷⁹

5. Conclusion – Representation?

In considering whether judges in Australia can or should be representative of the community, it is necessary to bear in mind that the role of the judge in the Australian federal system has some distinctive features, shaped by the constitutional and legal system as a whole. It requires that judges have a high level of expertise in a wide field of legal subjects and that they are seen to undertake their role completely independently of the other arms of government.

⁷⁵ See for example *Drug Court Act 1998 (NSW)*, s 23.

⁷⁶ Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report*, Australian Institute of Criminology Reports Technical and Background Paper No 39 (2010) at 10.

⁷⁷ Elena Marchetti and Kathleen Daly, "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model", (2007) 29 *Sydney Law Review* 414 at 443.

⁷⁸ *Magistrates' Court Act 1989 (Vic)*, s 4G, as amended by the *Magistrates' Court (Koori Court) Act 2002 (Vic)*.

⁷⁹ Legislative Council of Victoria, 29 May 2002, Book 7 of 2002, pp 1281-1285.

It may therefore be understood that lay representation has not been the norm for Australian courts and that this is unlikely to change. Lay participation is, however, effected through the continued use of juries in criminal trials and has been sought in connection with sentencing, particularly from the Aboriginal community. Another feature of the Australian legal system is the use, to a greater extent than elsewhere, of tribunals, many of which comprise non-lawyers.

The qualifications regarded as necessary for a judge in Australia, particularly at superior court level, have no doubt impeded the appointment of judges on a more representative basis. Nevertheless, there are signs of change in the approach to the appointment of judges which suggests that a level of accommodation is considered to be possible. Although appointments in the last 20 years cannot be said to reflect diversity in the population to any real extent, many more women judges have been appointed. Regardless of what is the political objective in doing so, it may be that the effect of these appointments is to achieve a level of legitimacy not only for women but for the courts. One would think that these appointments can but aid the perception that those appointing are attempting to draw more equally from the legal population and that the courts as a consequence more truly reflect the representation of women within that population group. As the appointments process becomes more consultative, it may be that wider representation in the descriptive sense occurs.

There are other benefits which are likely to result from the increasing number of women assuming the role of a judge. At a professional level, it is more likely that the high number of women law graduates will be encouraged to remain in the profession. Women who achieve senior status in the legal profession provide role models to those more junior and may themselves then aspire to judicial office. In a wider, societal sense these appointments facilitate the acceptance of women as persons having public authority. The importance of this acceptance should not be undervalued. It is sometimes commented that women exercising positions of authority exert a different, more sensitive and less self-centred influence upon proceedings. Whether this generalisation is plausible in the case of women judges is a question that awaits further empirical research over time.

Regardless of the gender or background of an Australian judge there are limits to how representative that person may be in discharging his or her office as a judge. Returning to the notion of representation which was discussed at the outset, in the Australian context a judge is a representative of justice. This is reflected in the oath taken or affirmation made upon appointment – to act "according to law". The terms of the oath of office in superior courts promises faithful service to people generally, in the discharge of judicial office and that the judge will "do right to all manner of people according to law without fear or favour, affection or ill-will".⁸⁰

⁸⁰ See for example *High Court of Australia Act 1979* (Cth), s 11. Similar formulations are used in the Federal, State and Territory courts.